No. 17-60191

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re: State of Texas,

State of Texas, Petitioner

On Petition for Declaratory and Injunctive Relief
and Writ of Mandamus

RESPONSE OF FEDERAL RESPONDENTS UNITED STATES DEPARTMENT OF ENERGY AND UNITED STATES DEPARMENT OF THE TREASURY, ET AL., IN OPPOSITION TO THE PETITION

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STATEMENT REGARDING ORAL ARGUMENT

The Department of Energy ("DOE") and the Department of the Treasury ("Treasury") are prepared to participate in oral argument if this Court decides that oral argument will assist it in reaching a decision. As set forth below, however, DOE and Treasury believe that the Petition should be summarily denied and is otherwise most efficiently resolved on the basis of the parties' written submissions.

INTRODUCTION

Texas' self-styled "Original Petition" seeks to initiate a "Court-supervised process" that effectively would take over an ongoing administrative proceeding in order to guarantee the licensing and eventual construction of a permanent repository for disposal of spent nuclear fuel ("SNF") at Yucca Mountain, Nevada. Pet. 25; Texas Reply on Mot. for Prelim. Inj. ("Reply") 3. While Texas' frustration with the lengthy and intermittent process for siting a permanent repository under the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* ("NWPA"), is apparent, the Petition is the wrong method to achieve that result. It also is fatally flawed. Texas lacks standing, the Petition fails to identify a reviewable agency final action and is untimely or moot in any event, and the Petition fails to meet the stringent standards for the extraordinary relief it seeks.

Moreover, the Petition's putative challenges to Department of Energy ("DOE") action (or inaction) stem from the prior Administration's policy of pursuing an alternative to Yucca Mountain. Texas' extraordinary request that this Court direct the respondents to resume the Yucca Mountain license proceeding before the Nuclear Regulatory Commission ("NRC")[1] fails to account for the new Administration's efforts regarding the Yucca Mountain licensing. In particular, the President's recent budget requests, for the first time since 2010, that Congress appropriate $120 million

[1] NRC has independent litigating authority in the courts of appeals and is represented by its own attorneys. *See* 28 U.S.C. §§ 2342, 2344, 2348.

for DOE for the coming fiscal year to conduct the Yucca Mountain license proceeding. *A New Foundation for American Greatness: Budget of the United States Government for Fiscal Year 2018,* May 23, 2017 (the "Proposed Budget"), available here.[2] Submitting the Proposed Budget to Congress, by itself, moots all aspects of the Petition seeking an order that the agencies request funding from Congress. Pet. 25-26, ¶¶ 3-4, 7-8.

The Petition's only express challenge to a DOE action concerns what the Petition refers to as "consent-based siting activities" allegedly undertaken in lieu of "pursuing Yucca's licensure." *See, e.g.,* Pet. 17. As explained below, any such "consent-based siting activities" were undertaken by the previous Administration and had no legal effect. Indeed, the DOE web-page that previously hosted the pertinent material, https://www.energy.gov/ne/consent-based-siting, was taken down by the new Administration and replaced with this message: "We are currently updating our website to reflect the Department's priorities under the leadership of President Trump and Secretary Perry." The new Administration also has stated that it does not intend to take further policy action on the consent-based siting activities in question. Fed.

[2] *See* Proposed Budget, Appendix - Department of Energy, at 394, available here. Even before Texas filed the Petition, the new Administration's so-called "skinny budget" for Fiscal Year 2018 had proposed $120 million for DOE to restart the Yucca Mountain licensing process. *America First: A Budget Blueprint to Make America Great Again*, March 13, 2017, at 19, available here.

Resp. Mot. for Abeyance 8. Texas' claims and prayers for relief (Pet. 25, ¶¶ 1, 2) based on such activities are likewise moot.

The Petition sets forth 24 prayers for mandamus, equitable, injunctive and declaratory relief, most of which are ripe only if the Federal Respondents fail to comply with some future mandamus order. Texas avers that "Respondents are violating the NWPA in two ways," (Pet. 17) and the Petition addresses just two issues: (1) whether DOE's consent-based siting activities violate the NWPA; and (2) whether the lack of an NRC decision on DOE's license application violates the NWPA. *Id.* at 5, 18-23; *see also* Texas Opp. to NEI Intervention 1 ("thrust" of Petition is "equitable relief prohibiting [DOE] from conducting…consent-based siting activity and ordering Respondents to finish the Yucca licensure proceedings."). While Texas' subsequent filings purport to expand this case, the Petition is *the* operative document in which Texas was required to raise and legally support *all* the issues it presents. Fed. R. App. P. 21(a)(2)(B) (mandamus petitions must include an issues presented and argument section). Any matters insufficiently developed in the Petition are not properly before the Court because they are waived. *See, e.g., Matter of Texas Mortg. Servs. Corp.*, 761 F.2d 1068, 1073 (5th Cir. 1985) (arguments not raised in the issues presented or meaningfully analyzed in the argument section are waived).

Furthermore, multiple prayers for relief – including for civil contempt against the agencies and officials, appointment of a special master to assume DOE's and NRC's responsibilities and complete construction of a repository, disgorgement of the

Nuclear Waste Fund ("Fund"), and restitution – are contingent, speculative, and unripe for consideration. Texas concedes as much. Pet. 24 (these "later" remedies sought only if respondents "fail to act" following a future order of this Court); Texas Opp. to NEI Intervention 2, 6-7. Additionally, while Texas baldly seeks to hold the Department of the Treasury ("Treasury") in civil contempt (Pet. 27), the Petition does not even allege that Treasury violated any legal duty, and the Argument section does not even mention Treasury. The Court should summarily dismiss all claims against Treasury.

Regarding the two issues that are concretely presented, and to the extent they are not moot, Texas offers insufficient legal justification for the extraordinary, unnecessary, and unorthodox relief it seeks. The Petition's requests for mandamus, declaratory, or injunctive relief suffer from multiple threshold flaws that render full briefing or consideration of the merits unnecessary. This Court therefore should summarily deny the Petition. We nonetheless address why Texas also fails to show its entitlement to the extraordinary mandamus and other relief that it seeks.

STATEMENT

I. Statutory Framework

The Petition relates to a pending license application proceeding before the NRC for construction authorization for a permanent repository for SNF at Yucca Mountain. The NRC proceeding is being conducted in accordance with the NWPA, which establishes a process for siting a permanent repository and delegates to DOE

"primary responsibility for developing and administering the [nuclear] waste disposal program," including selection and development of a repository. *National Ass'n of Regulatory Utility Comm'rs v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988) ("*NARUC*"). The NWPA specifies approvals DOE must obtain from NRC and others to construct and operate the Yucca Mountain repository. *See* 42 U.S.C. §§ 10134(a), 10145.

To address delays and other obstacles in the selection of a site to be characterized for a permanent repository under the original NWPA, Congress amended the NWPA in 1987 to designate Yucca Mountain as the only site to be characterized by DOE for development as a permanent repository. 42 U.S.C. § 10133(a). In 2002, Congress designated Yucca Mountain for the development of a permanent repository in a joint resolution. Pub. L. 107-200, 116 Stat. 735 (2002).

DOE was required to submit to NRC an application for construction authorization for a permanent repository. 42 U.S.C. § 10134(b). DOE cannot construct a repository at Yucca Mountain absent such authorization. *See id.* §§ 10133(c)(1), 10134(b), (d), (f)(5). Even with NRC construction approval, DOE cannot open a Yucca Mountain repository unless further actions outside DOE's control occur. *See infra* 14-15.

The NWPA assigns to NRC the responsibility to "consider an application for…a repository in accordance with the laws applicable to such applications [and]…issue a final decision *approving or disapproving* the issuance of a construction authorization" within three years of DOE's submission. 42 U.S.C. § 10134(d)

(emphasis added). The "laws applicable" to NRC's review of the DOE application include the NRC's substantive and procedural rules. *Id.* § 10134(d), (f)(5); *see also* 10 C.F.R. Part 2.

At points, the Petition addresses the funding of NWPA activities through the Fund, which Congress established to cover the costs of licensing and disposal activities related to commercial SNF. *See* 42 U.S.C. § 10222(c)-(d). Spending authority under the NWPA "shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts." *Id.* § 10105. Congress previously has funded Yucca Mountain activities for both NRC and DOE, including for licensing, with specific annual appropriations from the Fund. *See, e.g.*, Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65, 2877-7878 (2009).

Treasury's limited role under the NWPA relates to the Fund and is non-discretionary and ministerial in nature, and includes: holding the Fund, investing Fund proceeds in Treasury securities as directed by the Secretary of Energy, and purchasing obligations issued by the Secretary of Energy. *Id.* § 10222(d). Administration of the Fund is by the Secretary of Energy alone, including with respect to disbursements from the Fund pursuant to appropriations made by Congress, *e.g.*, for the Yucca licensing process. *Id.* § 10222(e).

II. Factual Background – The NRC Proceedings, No Funding From Congress, the *Aiken County* Mandamus Order, and Resumed License Proceeding

In June 2008, DOE submitted an approximately 8600-page license application to NRC for a repository at Yucca Mountain, which NRC later docketed. *See* 73 Fed. Reg. 53,284 (Sept. 15, 2008). The proceeding grew to include 12 parties and the submission of approximately 300 contentions challenging DOE's application before NRC's hearing tribunal, the Atomic Safety Licensing Board ("ASLB"). *See* 74 Fed. Reg. 4477 (Jan. 26, 2009).

In early 2009, following a change in Administrations, progress on the Yucca Mountain project stalled. For instance, in its budget request for Fiscal Year 2010, the Obama Administration declared its "decision to terminate the Yucca Mountain program while developing nuclear waste disposal alternatives." It also proposed eliminating all funding for developing Yucca Mountain and, instead, sought funding for a Blue Ribbon Commission to evaluate alternative approaches. DOE, FY 2010 Congressional Budget Request – Budget Highlights at 9, available here.

Following this policy change and corresponding budget requests and appropriations actions eschewing funding for the Yucca Mountain license proceeding, DOE on March 3, 2010 moved to withdraw its Yucca Mountain license application, which motion the ASLB denied. *U.S. Department of Energy*, LBP-10-11, 71 N.R.C. 609 (2010). Following briefing and review of the ASLB's order by the Commission, the Commission announced in September 2011 that it found "itself evenly divided" on

whether to uphold the ASLB's denial of DOE's motion to withdraw. *U.S. Department of Energy,* CLI-11-07, 74 N.R.C. 212 (2011). This decision left in place the ASLB's denial of DOE's motion to withdraw. The Commission directed the ASLB to address certain case management matters, and the ASLB subsequently suspended the entire licensing proceeding. *U.S. Department of Energy*, LBP-11-24, 74 N.R.C. 368 (2011).

This series of events led to the filing in the D.C. Circuit of multiple petitions for mandamus and petitions for review under the NWPA, resulting in two D.C. Circuit decisions. *In re Aiken Cty.*, 645 F.3d 428 (D.C. Cir. 2011) ("*Aiken I*"); *In re Aiken Cty.*, 725 F.3d 255 (D.C. Cir. 2013) ("*Aiken II*"). *Aiken I* dismissed four consolidated petitions filed in 2010 against DOE and NRC by two states (Washington and South Carolina) and related entities, most of whom were parties to NRC proceedings. The petitions alleged that DOE's motion to withdraw its license application and multiple aspects of "DOE's new policy regarding Yucca Mountain" violated the NWPA. *Aiken I*, 645 F.3d at 437. As the Commission had not yet ruled on DOE's motion to withdraw its application, the action was dismissed as unripe. *Id.* at 436. Furthermore, the D.C. Circuit found that the various complained-of DOE actions – such as establishing the Blue Ribbon Commission, policy statements in budget documents, and other actions alleged to constitute DOE's abandonment of Yucca Mountain – were not final agency action reviewable under the NWPA and Administrative Procedure Act ("APA"), were not prohibited by the NWPA, and were "simply not justiciable." *Id.* at 437.

In *Aiken II*, essentially the same petitioners filed new petitions against NRC only following the Commission's September 2011 decision and the ASLB's order suspending the licensing proceeding. The new petitions alleged that, by virtue of the suspension, NRC was unlawfully withholding consideration of DOE's Yucca Mountain license application. In a split decision, the D.C. Circuit rejected NRC's argument that Congress' failure to appropriate funds for the licensing proceeding and the minimal amount of carryover funds available to NRC rendered NRC's continuation of the licensing process unwarranted. *Aiken II*, 725 F.3d at 259-60. The court issued a writ of mandamus to NRC, ordering that "unless and until Congress authoritatively says otherwise or *there are no appropriated funds remaining*, the [NRC] must promptly *continue with the legally mandated licensing process*." *Id.* at 267 (emphasis added). Contrary the Petition (*see, e.g.,* 2, 5, 21), the *Aiken II* mandamus order does not specifically direct NRC's conduct of any aspect of the proceeding or order NRC to "complete" the adjudicatory hearings component of the licensing proceeding.

The licensing process recommenced promptly after the *Aiken II* order, and on November 18, 2013, NRC issued an order detailing how it would proceed in light of the remaining tasks and NRC's limited funds. *U.S. Department of Energy*, CLI-13-8, 2013 WL 7046350 (2013). The Commission directed the performance of multiple measures to move the overall licensing process forward, but held in abeyance the adjudicatory hearing component of the licensing process. *Id.* at *4-*7.

Since that time, the license proceeding has been conducted within the limitations of previously-appropriated carryover funds, as Congress has appropriated no further funds to DOE or NRC from the Fund for purposes of Yucca Mountain licensing since Fiscal Year 2012. No *Aiken II* petitioner has ever objected to NRC's conduct of the license proceeding or sought enforcement of the mandamus order.[3]

Soon after taking office in January 2017, and for the first time since 2010, the current Administration submitted the Proposed Budget seeking appropriations from Congress to conduct the Yucca Mountain licensing proceeding, including the adjudicatory hearing component.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction Over the Petition's Consent-Based Siting Claims Against DOE, and They are Otherwise Non-Justiciable

A. Texas Lacks Article III Standing

The Petition does not expressly address Texas' standing or state specifically how consent-based siting activities affect its interests; rather, Texas claims general "sovereign interests" in protecting its citizens and environment, ensuring compliance with the NWPA, regulating nuclear power production, monitoring storage of SNF,

[3] In two D.C. Circuit cases currently in abeyance concerning the radiation protection standards for the repository, the United States Environmental Protection Agency ("EPA"), NRC, and petitioner State of Nevada jointly moved in February 2016 to continue the abeyance and described for the court the post-*Aiken II* status of the licensing proceeding and NRC's funding limitations. *See Nevada v. EPA*, No. 08-1327, Joint Motion to Continue Abeyance 3-5, Doc. 1598678 (D.C. Cir. Feb. 12, 2016).

and ensuring reasonably-priced electricity. Pet. 16-17. Texas' reply in support of its Motion for Declaratory Judgment and a Preliminary Injunction ("Reply") belatedly addresses standing. While these arguments should have been raised in the Petition and are thus waived, we address them here for the Court's benefit.

To establish standing, Texas must demonstrate that it has suffered: (1) a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical;" that is (2) fairly traceable to the challenged action; and that is (3) likely to be redressed by the relief requested, if that relief is granted. *See Friends of the Earth v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 180-81 (2000); *Houston Chronicle Publ'g Co. v. City of League City*, 488 F.3d 613, 617 (5th Cir. 2007). Texas must "clearly and specifically set forth facts sufficient to satisfy these Article III standing requirements." *Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990).

1. Texas asserts that DOE's failure to accept SNF by 1998 and DOE's consent-based siting activities "injure[] Texas by requiring it to house SNF," Reply 6, and that SNF potentially can devastate public health and the environment. However, Texas fails to allege concrete or particularized injury because it offers no factual basis to support its assertion that the mere "existence" of SNF in Texas "poses danger." Reply 8. Texas offers no evidence that on-site storage of SNF at NRC-licensed and -regulated sites in Texas, in and of itself, constitutes injury-in-fact. Absent such evidence, the appropriate presumption is that such SNF is safely stored in accordance with NRC regulations. As the agency vested with both the responsibility and the

expertise to evaluate such issues, NRC has concluded that "spent fuel can be safely stored until a repository is available, or indefinitely should such storage become necessary." *In the Matter of DTE Electric Co.*, 2015 WL 3930333 at *13 (N.R.C. 2015); *see also New York v. NRC*, 824 F.3d 1012, 1019-22 (D.C. Cir. 2016).

Texas makes no showing comparable to those in the cases it cites. The environmental group petitioner found to have standing in *Nuclear Energy Institute v. EPA* had submitted affidavits addressing EPA studies projecting eventual future exposure to radionuclides through the petitioner's ground-water supply and highlighting the fact that petitioner's property was adjacent to the proposed Yucca Mountain repository site. 373 F.3d 1251, 1266 (D.C. Cir. 2004). Texas makes no such concrete, geographically-specific allegation of injury. *New Mexico v. Watkins* is also distinguishable, as there is no relevant comparison between the potential harm from the temporary, experimental storage of SNF in a proposed SNF repository where there existed the potential for collapse, 783 F.Supp. 628, 633 (D.D.C. 1991), and the present situation of routine, NRC-regulated storage of SNF at Texas sites. Furthermore, Texas fails to note that the D.C. Circuit in *Watkins* affirmed the district court's permanent injunction of the proposed experiment for legal reasons – because the Department of the Interior's extension of an administrative land withdrawal for the proposed repository was unlawful – not because of the contested issue of risk from irretrievability of SNF following the test. *New Mexico v. Watkins,* 969 F.2d 1122,

1124, 1129, 1134-38 (D.C. Cir. 1992) (irretrievability "did not enter the permanent injunction calculus.").

In asserting that the absence of a repository *presently* risks "widespread contamination" at active reactor sites around the country, Texas relies on its mischaracterization of DOE's 2002 Environmental Impact Statement ("2002 EIS") for Yucca Mountain. Reply 8. The selectively-quoted passage refers to an analytic scenario that "assumes no effective institutional control after 100 years, and that the storage facilities at 72 commercial and 5 DOE sites would begin to deteriorate after 100 years." 2002 EIS at S-30, available here. In other words, Texas refers to a situation where DOE addressed risks at the nation's commercial reactor sites 100 years hence and where there would be *no* "[m]onitoring and maintenance of storage facilities to ensure that radiological releases to the environment…and…the public remain within Federal limits." *Id.* Obviously, that is not the condition of NRC-regulated SNF storage in Texas today. Nor does citing the mere enactment of the NWPA and Congress' purposes in so doing establish that the storage of SNF, by itself, injures Texas. Reply 7-8.

2. Texas fares no better showing that the status quo (SNF remaining in Texas) is traceable to DOE's prior efforts toward a consent-based siting process. Texas offers no facts showing that these DOE efforts have tangibly prevented or even slowed the development of a repository at Yucca Mountain. Such an explanation is particularly necessary because Texas is not the object of, or even a party

to, the license proceeding allegedly impacted by DOE's actions. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (where complainant is not the object of the government action at issue, "much more is needed").

3. Nor can Texas show that its putative injury could be redressed through a favorable judgment here. Texas' claimed injury (*i.e.,* that consent-based siting activities keep SNF in Texas) presumes future transport of SNF to a Yucca Mountain repository. But an order from this Court halting DOE consent-based siting activities would not affect contingencies beyond DOE's control that will determine whether a Yucca Mountain repository begins to accept waste. For example, before any such transport out of Texas may occur, DOE must obtain NRC authorization to construct a repository and to "receive and possess" SNF there. *See* 42 U.S.C. §§ 10134, 10145. The NRC is expressly authorized to consider DOE's "application for a construction authorization" and to "issue a final decision approving or *disapproving*" it. *Id.* § 10134(d) (emphasis added). Thus, while the NWPA mandates that an administrative licensing process occur, it does not direct the outcome of that process. *Aiken I,* 645 F.3d at 435 (NRC denial of license means "consideration of Yucca Mountain as a location for a federal nuclear waste repository will come to an end").[4] Similarly, Texas fails to explain how an order halting DOE "consent-based siting

[4] This contingency also makes any injury based on future transport *vel non* too far removed at this juncture to satisfy Article III standing. *Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2341 (2014) (threatened injury must be "certainly impending" or there must be a "substantial risk that the harm will occur.").

activities" could affect aspects of the licensing process that are contingent on appropriations action by Congress that is beyond the control of both DOE and this Court. *Allen v. Wright*, 468 U.S. 737, 758 (1984) (standing absent where it is "entirely speculative" whether the requested relief would lead to the desired policy change).

4. Also unavailing is Texas' suggestion that, because it asserts violation of a procedural right, the redressability requirement is relaxed. Reply 12, 13. The Supreme Court has explained that alleging the deprivation of a procedural right without also alleging as Texas fails to do here the deprivation of some *concrete* interest affected by that right is insufficient to confer Article III standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009). Moreover, even if the imminence and redressability requirements could be relaxed for procedural rights, those requirements do not vanish altogether, nor is the injury-in-fact requirement relaxed. *See Center for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005). Here, Texas has failed to show imminence and redressability, and has identified no particularized injury-in-fact.

Texas makes an unsubstantiated and vague claim that it owns property adjacent to four commercial reactor sites in Texas, Reply 10, and thus has a "great deal" of potentially affected or "lost" territory. *Id.* at 13. This is wholly unlike *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007), where Massachusetts through affidavits presented facts averring a likelihood of losing "a significant fraction of coastal property" that it owned due to climate-change-induced sea-level rise, as well as related remedial costs. The Supreme Court concluded that the "risk [to Massachusetts] would be reduced to

some extent if petitioners received the relief they seek." *Id.* at 526. Here, Texas presents no facts showing that an order halting DOE's consent-based siting activities will promote moving SNF out of Texas.

Furthermore, to the extent courts relax the imminence and redressability requirements, they do so only with respect to procedural rights. *See Lujan*, 504 U.S. at 573 & n.7. Texas' claims are founded on the NWPA and based on an alleged *substantive* right to have SNF removed from Texas. Texas fails to explain what *procedural* right of Texas' has been injured by DOE's consent-based siting activities.

5. Finally, Texas may not credibly assert that its role as regulator and protector of ratepayers confers *parens patriae* standing. Reply 13-14. In this context, the United States, not the individual states, represents the public. *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990) (in an NWPA action, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government") (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982)).

B. The Petition Identifies No DOE Final Action on Consent-Based Siting, and Texas' Claims Are Moot

The Petition's only concrete challenge is that DOE is violating the NWPA by engaging in "consent-based siting activities in search of new locations for permanent repositories." Pet. 18, 19. The only conceivably applicable jurisdictional basis for this

claim is the NWPA's petition for review provision, 42 U.S.C. § 10139(a).[5] While the NWPA supplies court of appeals jurisdiction, it is not a waiver of sovereign immunity and does not give Texas an independent cause of action.[6] Rather, Texas' cause of action must be properly grounded in the APA. 5 U.S.C. §§ 703, 704; *Aiken I*, 645 F.3d at 436-37 (NWPA challenges reviewable under the APA); *Texas v. U.S. Dep't of Energy*, 764 F.2d 278, 285 (5th Cir. 1985) (applying APA "finality" and dismissing NWPA petition because the challenged DOE decisions "are not 'final actions' which are ripe for our review").[7]

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[5] Texas errs in trying to distinguish the NWPA from other petition for review provisions, such as under the Clean Air Act. Reply 3. The provisions are far more alike than dissimilar. For example, despite Texas' assertions (*id.*), the CAA does not limit judicial review to rulemakings or other "formal actions" nor does it vest exclusive venue in the D.C. Circuit. 42 U.S.C. § 7607(b)(1) (judicial review of, *inter alia*, "any other [EPA] final action" in the D.C. Circuit or, as specified, in the "Court of Appeals for the appropriate circuit").

[6] Notwithstanding the NWPA's finality, timing, and other jurisdictional requirements, Texas sees the Petition as a "civil action" that commences "an ongoing, Court-supervised process" to open a repository that unfolds like "district court litigation," complete with "discovery." Reply 3-4. There is no authority for this unprecedented conception of appellate litigation, and it is belied by the fact that this Court, unlike the Supreme Court, lacks rules for district court-like adjudication of "original actions." *See* U.S. Sup. Ct. R. 17.2 ("The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed.").

[7] The Petition also cites (at 6) the Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. § 1651, but neither provides jurisdiction here. The Declaratory Judgment Act authorizes a court to grant declaratory and injunctive relief where a federal agency has violated the law, but it does not waive sovereign immunity, create an independent basis for jurisdiction, or override generally applicable justiciability doctrines. *See, e.g.*, *Skelly Oil Co. v. Phillips Petroleum*, 339 U.S. 667, 671-74 (1950). The All Writs Act provides that "[t]he Supreme Court and all courts

Cont.

1. Texas must identify a DOE "final decision or action," 42 U.S.C. § 10139(a), on consent-based siting, *i.e.*, action that marks "the consummation of the agency's decision-making process" and which determines "rights or obligations" or "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Under the NWPA, Texas must "set forth…discrete action mandated by the NWPA that DOE failed to perform or performed inadequately." *Aiken I,* 645 F.3d at 437. Here, however, Texas merely has described (Pet. 2, 10-11) a collection of DOE activities that meet none of these criteria, including: establishing the Blue Ribbon Commission in 2010, the Blue Ribbon Commission's 2012 recommendations, and a 2013 *Strategy* document.[8] Taken together, these past DOE efforts merely contribute to developing a potential future siting process. They have no legal effect, and Texas makes no showing that they are final or reviewable under the APA and the NWPA. Just as *Aiken I* found the same types of prior DOE public announcements and policy proposals on SNF storage to be too "general," not final under the APA, and "simply

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established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). Texas does not demonstrate how review of DOE's non-final consent-based siting activities now is needed to prevent undermining this Court's jurisdiction to review a later final decision under the NWPA.

[8] Texas refers to a document released for public comment by the prior Administration to suggest that consent-based siting activities are ongoing. Reply 18 (citing DOE, *Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Active Waste*). But this document, too, is neither final nor reviewable. It is a mere draft with no legal effect that has been removed from DOE's web-page and as to which DOE has stated "it has no present intention of taking further policy action." Fed. Resp. Mot. for Abeyance 8.

not justiciable," 645 F.3d at 437, this Court should find Texas' challenge to these activities to be non-justiciable.

2. Texas' attempt to dress up its challenge to a collection of unreviewable non-final DOE actions as somehow being connected to an "ongoing" or "continuous" failure to begin accepting SNF in 1998 (Pet 5; Reply 15-18) also fails to satisfy the jurisdictional prerequisites. When alleging a failure to act under the NWPA, a petitioner must show that "'an agency failed to take a *discrete* agency action that it is *required to take*.'" *Aiken I*, 645 F.3d at 437 (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). This requirement rules out – under either the NWPA or for mandamus – Texas' claims premised on a failure to act. The claim against DOE effectively amounts to a nonjusticiable "broad programmatic attack," not a claim alleging failure to take a discrete agency action. *Norton*, 542 U.S. at 64.

3. In any event, the "consent-based siting activities" in question were initiatives of the prior Administration, and DOE took down its web-page on "Consent-Based Siting" in light of the new Administration's priorities. *Supra* 2. As a consequence, there is no live case or controversy about consent-based siting. Thus, not only are these claims non-justiciable for lack of finality, they also are moot. *See, e.g.*, *Fontenot v. McCraw*, 777 F.3d 741, 747-48 (5th Cir. 2015).

C. The Petition's NWPA Challenge to Consent-Based Siting Activities Is Untimely

1. A petition for review of "any final decision or action of the Secretary [of Energy]…[or] failure of the Secretary [of Energy]…to make any decision, or take any action, required under this part…may be brought not later than the 180th day after the date or the decision of the action or failure to act involved." 42 U.S.C. § 10139(a)(1)(A)-(B), (c). The only DOE actions concretely alleged in the Petition to violate the NWPA concern consent-based siting, which by Texas' own reckoning began with the creation of the Blue Ribbon Commission in 2010. Pet. 10. Any potential claim accrued then, or at the very latest in 2015 when DOE described its prior efforts and sought public comment on "how to design a consent-based siting process." 80 Fed. Reg. 79,872 (Dec. 23, 2015). Even assuming the Petition had identified a reviewable, final action on consent-based siting, it does not identify an action that occurred within the 180-day limitations period.[9]

2. Texas' lone attempt to explain how it meets the 180-day limitations period fails to actually mention *any* alleged consent-based siting activities. Rather, Texas refers to the "Respondents'" NWPA obligation to take nuclear materials by 1998 and a "breach" of that obligation that Texas claims is "ongoing," and thus

[9] Contrary to Texas' suggestion (Reply 1), DOE does not concede that its consent-based siting activities are inconsistent with the NWPA. Rather, we have identified insuperable threshold problems with Texas' vague and stale claims about years-old, non-final activities that DOE has taken down from its web-page.

within the limitations period. Pet. 4-5. Any such claim premised on this 1998 deadline is untimely, 42 U.S.C. § 10139(c), and Texas' near 20-year tardiness is not excused by a continuing violations theory (Reply 15-18).[10] Moreover, this alleged "breach" has no discernable connection to the consent-based siting activities at the core of the Petition, especially considering that consent-based siting activities began 12 years after the 1998 deadline. Nor is a claim regarding the 1998 deadline properly raised, as it does not appear in the Petition's Issues Presented or Argument sections. *See, e.g., Matter of Texas Mortg. Servs. Corp.*, 761 F.2d at 1073 (arguments not raised in the issues presented or meaningfully analyzed in the argument section waived); *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 688 (5th Cir. 2017).

3. Even if the issue were not waived or untimely, Texas' putative claim concerning the 1998 deadline should be denied because Texas lacks standing for essentially the same reasons stated in Section I.A. Texas can show neither injury-in-fact nor that a declaratory judgment would redress its alleged injury from DOE's failure to accept SNF by 1998.

[10] Texas cites no NWPA cases applying the continuing violations doctrine and no apposite Circuit law. The D.C. Circuit has declined to relax the NWPA's 180-day time limitation for an alleged "ongoing" failure to take action by a date certain. *Public Citizen v. NRC*, 845 F.2d 1105, 1108 (D.C. Cir. 1998) (doing so "would make a nullity of the statutory deadlines. Almost any objection to agency action can be dressed up as an agency's failure to act."). Furthermore, "the doctrine almost certainly does not apply to APA claims." *See, e.g., United States v. Estate of Hage,* 810 F.3d 712, 721 (9th Cir.) (citing cases).

4. The claim also fails on the merits. Texas makes several mistaken assumptions about the NWPA and available remedies for DOE's failure to accept SNF by 1998. Texas inaccurately paraphrases 42 U.S.C. § 10222(a)(5)(B) to suggest that it imposes on DOE a statutory mandate, enforceable by Texas, to perform beginning on January 31, 1998. Pet. 10. But that provision authorizes the Secretary of Energy to enter into standard contracts with entities that generate or own SNF. It further provides that "*contracts entered into under this section* shall provide that," in return for fees paid by generators and owners, "the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel." 42 U.S.C. § 10222(a)(5)(B) (emphasis added). As the Federal Circuit has explained, that provision required only that DOE include certain obligations in its contracts. *PSEG Nuclear, L.L.C. v. United States*, 465 F.3d 1343 (Fed. Cir. 2006). Thus, while a putative contract holder might complain under the NWPA that DOE failed to include this provision in a contract, the performance of and any damages for failure to meet *contractual* obligations were not addressed by the NWPA and, therefore, are not subject to this Court's NWPA jurisdiction. *Id.* at 1350; *see also Wis. Elec. Power Co. v. U.S. Dep't of Energy*, 211 F.3d 646, 648 (D.C. Cir. 2000) ("[A] contract [b]reach by the DOE does not violate a statutory duty.").

The many contract cases cited by Texas (Pet. 4-5) are inapposite, as they hold that the remedy for DOE's failure to dispose of SNF by 1998 lies in contract, not in a

petition for mandamus under 42 U.S.C. § 10139.[11] For example, the D.C. Circuit declined to issue a writ of mandamus to compel DOE to accept SNF because the "Standard Contract…provide[s] a scheme for dealing with delayed performance," and "petitioners *must pursue the remedies provided in the Standard Contract* in the event that DOE does not perform its duty to dispose of [SNF] by January 31, 1998." *N. States Power Co. v. Dept. of Energy*, 128 F.3d 754, 759 (D.C. Cir. 1997) (emphasis added). Further, Texas is not a contract holder and has paid no disposal fees. Texas cannot stand in a contract holder's shoes and, even if it could, this is the wrong court in which to obtain a contract remedy. Thus, Texas' putative claim based on the 1998 deadline is no more justiciable than its consent-based siting claims.

II. The Petition Fails to Meet the Standard for a Writ of Mandamus

"Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion." *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311-312 (1917). Mandamus is available only 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

[11] DOE does *not* dispute that it failed to begin accepting SNF in 1998 or contend that its obligation was conditioned on the existence of a repository. *See* Reply 4. Rather, DOE contends that claims relating to DOE's meeting that deadline are fundamentally contractual and that, as a non-contract-holder, Texas lacks standing and has no NWPA remedy available to it. The Government already has paid approximately $6.1 billion to contract holders as a result of its delay in accepting fuel. DOE, Agency Financial Report Fiscal Year 2016 at 38, available here.

remedy exists." *Wolcott v. Sebelius*, 635 F.3d 757, 768 (5th Cir. 2011). The Petition fails to satisfy any of these criteria, but even if it did there are sound and pragmatic reasons why this Court should deny the Petition in its discretion.

A. The Petition Identifies No Non-Discretionary Duty as to Consent-Based Siting

Mandamus generally will not issue unless the respondent is subject to a plainly-defined and nondiscretionary duty. *See Heckler v. Ringer*, 466 U.S. 602, 616 (1984). The Petition presents only one issue against DOE, namely consent-based siting discussed above. But even if the Petition were read more broadly to request a writ of mandamus directing DOE to do something more robust with regard to the license proceedings (*see* Pet. 20, suggesting DOE should "pursue the Yucca Mountain license application"), the Petition fails to identify a non-discretionary duty applicable to DOE that would give Texas a clear and indisputable right to mandamus relief. Texas cites three NWPA provisions that allegedly impose mandatory duties and that consent-based siting activities allegedly violate. Pet. 19. But Texas fails to demonstrate that these provisions establish any non-discretionary duty at all, let alone one that DOE breached.

The first provides that DOE "shall carry out…appropriate site characterization activities at the Yucca Mountain site." 42 U.S.C. § 10133(a). DOE indisputably has performed this duty, as site characterization preceded the license application that DOE submitted to NRC in 2008. The second provides: "The Secretary shall provide

for an orderly phase-out of site specific activities *at all candidate sites* other than the Yucca Mountain site." *Id.* § 10172(a)(1) (emphasis added). A "candidate site" under the NWPA is "an area…that is recommended by the Secretary…for site characterization, approved by the President…for site characterization, or undergoing site characterization." *Id.* § 10101(4); s*ee also id.* §10132. The universe of "candidate sites" that resulted from these statutory processes includes: Yucca Mountain, Nevada; Hanford, Washington; and Deaf Smith County, Texas. DOE, *Recommendation By The Secretary of Energy of Candidate Sites For Site Characterization For The First Radioactive-Waste Repository*, DOE/S-0048 at 9 (May 1986). Texas does not allege that DOE is taking any actions at the Hanford or Deaf Smith County sites. Third and finally, Texas suggests that DOE also is in breach of an alleged non-discretionary duty to "terminate all site specific activities…*at all candidate sites*, other than the Yucca Mountain site, within 90 days after December 22, 1987." 42 U.S.C. § 10172(a)(2) (emphasis added). But, as just explained, Texas offers no evidence that DOE is conducting *any* activities with respect to the referenced "candidate sites."[12]

B. The Petition Identifies No Non-Discretionary Duty Governing DOE's Participation in the License Proceeding

Texas' suggestion that it is entitled to a writ of mandamus against DOE to "pursue" or "participate in" the Yucca Mountain license proceeding (Pet. 20, 26) is

[12] Nor does the 1998 deadline provision, 42 U.S.C. § 10222(a)(5)(B), establish a statutory mandatory duty enforceable by Texas in this Court. *Supra* 22-23.

vitiated by the fact that Texas identifies no NWPA provision that constitutes a non-discretionary duty directing *how* DOE is to participate in that proceeding. The only non-discretionary duty applicable to DOE that conceivably could support a claim for mandamus relief with respect to the license proceeding is the requirement to submit an application for construction authorization for a geologic repository, 42 U.S.C. § 10134(b), which DOE satisfied in 2008. The NWPA does not explicitly direct further DOE actions in the licensing proceeding. Indeed, DOE has considerable discretion in carrying out its NWPA responsibilities. *See NARUC,* 851 F.2d at 1425. Furthermore, the license proceeding that Texas seeks to jumpstart has, in fact, been ongoing since the *Aiken II* order.[13] It simply is inaccurate to suggest that the proceeding has been totally inactive.

C. A Writ of Mandamus Is Not Appropriate Under the Circumstances

Even if the Petition satisfied the stringent criteria for mandamus relief, mandamus still would be unwarranted. Before issuing a writ of mandamus, the issuing court, in the exercise of its discretion, must be satisfied that the writ is

[13] To the extent Texas seeks a finding or any relief because DOE or Treasury "violated" *Aiken II* (Pet. 11, 25), that claim must fail. DOE and Treasury were not parties to *Aiken II,* the order is not directed to them, and they are not subject to it. *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985). Further, the Petition fails to explain *how* DOE or Treasury violated that order. In any event, "the court that issued the injunctive order alone possesses the power to enforce compliance with and punish contempt of that order." *Alderwoods Group, Inc., v. Garcia*, 682 F.3d 958, 970 (11th Cir. 2012). Finally, Texas was not a party in *Aiken II* and lacks standing to seek to enforce that order.

appropriate under the circumstances. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381 (2004). For many of the reasons explained above and reiterated below, a writ of mandamus is not appropriate.

First, the Petition is premature considering the change in Administrations and the fact that rapidly-moving events already have resolved or mooted Texas' claims. For instance, the Proposed Budget requested funding for the Yucca Mountain licensing process, just as Texas prays for, and DOE under the new Administration already has taken down its "consent-based siting" web-page and stated its intent not to pursue the objected-to activities. *See* Fed. Resp. Mot. for Abeyance at 8. These developments have mooted many of the Petition's claims and prayers for relief (Pet. 25-26, ¶¶ 1-4, 7-8). *Fontenot*, 777 F.3d at 747-48. It is unclear what more a writ of mandamus could accomplish.

Second, funding realities mean that a writ of mandamus could not achieve the result Texas seeks because, while the Administration has shown its support for the Yucca Mountain licensing process by requesting appropriations in the Proposed Budget, the prospects for the Yucca Mountain licensing process are interwoven with future actions by Congress. As explained in *Aiken II,* DOE and NRC carry out their respective licensing application process roles with specifically-appropriated funds, *see* 725 F.3d at 258, 267, and "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.'" *Id. at* 259 (citations

omitted). Aspects of the Yucca Mountain licensing process are contingent on Congress' exercise of its plenary appropriations authority, which is beyond the control of the respondents and this Court. *See Nevada v. DOE*, 133 F.3d 1201, 1203 (9th Cir. 1998) ("Each year, Congress appropriates money from the NWF for the Secretary's use in administering the NWPA. 42 U.S.C. § 10222."); *Aiken II,* 725 F.3d at 259 ("Of course, if Congress appropriates no money for a statutorily-mandated program, the Executive obviously cannot move forward.").

Third, mandamus relief is unnecessary because the NRC licensing process for Yucca Mountain is already under the *Aiken II* mandamus order. Subject to the availability of "appropriated funds," NRC has been ordered to "promptly continue with the legally mandated licensing process." *Id.* at 267. Significantly, the D.C. Circuit is well-apprised of the status of the NRC proceeding, and there has been no effort in nearly four years to claim a violation of the order. Granting the Petition would be duplicative or, worse, could result in conflict with the *Aiken II* order.

III. The Petition Fails To Meet the Standard for Injunctive Relief

DOE's June 12, 2017, opposition to Texas' motion for preliminary injunction (at 16-19) explains why Texas fails to meet the stringent standards for issuing injunctive relief, which explanation we incorporate by reference and do not repeat in the interest of brevity.

IV. The Claims Against Treasury, At Least, Should Be Summarily Dismissed as the Petition Does Not Allege that Treasury Breached Any Legal Duty

Texas purports to seek mandamus and bring NWPA claims against Treasury and the Secretary of the Treasury. Not only has Texas failed to satisfy the standards for jurisdiction, mandamus, or injunctive relief against Treasury that are discussed above, Texas also fails to allege that Treasury breached a legal duty, let alone one that would support such extraordinary relief. For these reasons, the claims against Treasury should be summarily dismissed.

The body of the Petition contains only two brief, expository references to Treasury (Pet. 1, 8) and no legal argument is directed at Treasury. Nonetheless, Treasury is named in seven of Texas' 24 prayers for relief. As Texas alleges no unlawful conduct by Treasury, it follows that Texas has not demonstrated as to Treasury: a breach of a non-discretionary duty supporting mandamus, final action or inaction reviewable under the APA and NWPA, or injury-in-fact to support Texas' standing.

Moreover, Treasury's involvement with the Yucca Mountain licensing process is limited to non-discretionary, ministerial functions executed at the direction of the Secretary of Energy. *Supra* 6. DOE, not Treasury, has the legal authority to determine how Fund monies are used, and only DOE may make disbursements from the Fund pursuant to Congressional appropriations. 42 U.S.C. § 10222(d), (e)(2). In sum, Treasury lacks the legal authority to provide much of the relief requested by

Texas. *See, e.g.,* Pet., 26, ¶¶ 11, 19. Furthermore, nothing Treasury does with regard to the Fund could expedite or slow the development of a repository. Were claims against Treasury permitted in such circumstances, Treasury could be entangled in nearly any lawsuit involving another agency's decisions about the investment and expenditure of funds held in the U.S. Treasury.

The prayers for relief involving Treasury are insufficiently supported in the Petition, not properly before the Court, and thus are waived. *See supra* 21. As most all deal with the Fund, they also are among those that Texas already has conceded are unripe and not presently properly before the Court in any event. *See supra* 3-4; Pet. 24; Tex. Opp. to NEI Intervention 2, 6-7, 8. The only prayers for relief involving Treasury that are not subject to a string of contingencies are Texas' demands for a Fund accounting. Pet. 26, ¶¶ 9, 10. However, the NWPA does not require Treasury to provide such an accounting, Texas cites no authority for its demand, and the "accounting" information that Texas seeks is publicly available. *See, e.g., Treasury Bulletin,* March 2017, at 103, available here. Had Texas reviewed this publicly-available information, it would have found that its prayer for civil contempt against the Secretary of the Treasury for failing to retain income and interest generated from the Fund, Pet. 17, is unsupported.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Response complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1) because it contains 7,788 words, except for the items excluded from the word count pursuant to F. R. App. P. 32(f), as determined by the word-count function of Microsoft Word 2013.

2. This Response complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 Garamond 14-point font.

Dated: June 30, 2017

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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 30, 2017

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