SCHEDULED FOR ORAL ARGUMENT ON SEPTEMBER 23, 2010

NO. 10-1050, 10-1052, 10-1069, 10-1082 *Consolidated*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

IN RE AIKEN COUNTY, Petitioner

No. 10-1052

ROBERT L. FERGUSON, *et al*., Petitioners,

v.

BARACK OBAMA, President of the United States, *et al.*, Respondents.

No. 10-1069

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al*., Respondents.

No. 10-1082

STATE OF WASHINGTON, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al*., Respondents.

On Petitions for Review and for Other Relief With Respect to Decisions of the President, the Secretary of Energy, the Deparment of Energy, and the Nuclear Regulatory Commission

---

Brief of Petitioners, Aiken County, Robert L. Ferguson, William Lampson, Gary Petersen, State of South Carolina, State of Washington, and Intervenor-Petitioner, National Association of Regulatory Utility Commissioners

THOMAS R. GOTTSHALL
ALEXANDER SHISSIAS
S. ROSS SHEALY*
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889
**not admitted*

Attorneys for Aiken County

BARRY M. HARTMAN
CHRISTOPHER R. NESTOR
CHRISTOPHER R. TATE*
JOHN ENGLERT*
K&L Gates LLP
1601 K Street, N.W.
Washington, DC 20005-1600
**not admitted*

Attorneys for Robert L. Ferguson, William Lampson, and Gary Petersen

HENRY DARGAN MCMASTER*
Attorney General for the State of South Carolina
JOHN W. MCINTOSH*
ROBERT D. COOK*
LEIGH CHILDS CANTEY*
Post Office Box 11549
Columbia, SC 29211
**not admitted*

WILLIAM HENRY DAVIDSON, II
KENNETH PAUL WOODINGTON
Davidson, Morrison & Lindemann
1611 Devonshire Dr., 2nd Floor
Post Office Box 8568
Columbia, SC 29202-8568

Attorneys for the State of South Carolina

JAMES BRADFORD RAMSAY
ROBIN J. LUNT
National Assoc. of Regulatory Utility Commissioners
1101 Vermont Ave. N.W., Suite 200
Washington, DC 20005

Attorneys for Intervenor-Petitioner NARUC

ROBERT M. MCKENNA*
Attorney General
ANDREW A. FITZ
TODD R. BOWERS
State of Washington
Office of the Attorney General
Post Office Box 40117
Olympia, WA 98504-0117
**not admitted*

Attorneys for State of Washington

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and *Amici Curiae*

The following is a list of all parties, intervenors and *amici* in this action.

1. Parties

The Petitioners in these consolidated actions are: Aiken County, South Carolina; Robert L. Ferguson, William Lampson and Gary Petersen (the "Ferguson Petitioners"); the State of South Carolina; and the State of Washington.

The Respondents are: Barack Obama, President of the United States; Secretary of Energy, Dr. Steven Chu; the United States Department of Energy (DOE); the United States Nuclear Regulatory Commission (NRC); the NRC's Atomic Safety and Licensing Board (ASLB); NRC Chairman, Gregory Jaczko; ASLB Panel Member, Thomas Moore; and ASLB Panel Member, Dr. Richard Wardwell.

2. Intervenors

The intervenors in these consolidated actions are: The National Association of Regulatory Utility Commissioners (NARUC) (for Petitioners) and the State of Nevada (for Respondents).

3. Amici Curiae

The *amicus curiae* in these consolidated actions is The Nuclear Energy Institute, Inc. (for Petitioners).

B. Ruling Under Review

The decisions under review are: (1) The determination made on or about January 29, 2010, by Respondents President Obama, Secretary Chu and DOE to withdraw with prejudice the application submitted by DOE to the NRC for a license to construct a permanent repository at Yucca Mountain, Nevada, for high level nuclear waste and spent nuclear fuel; and (2) The determination made on or about January 29, 2010, by Respondents President Obama, Secretary Chu and DOE to unilaterally and irrevocably terminate the Yucca Mountain repository process mandated by the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10270.

The State of Washington also requests a judgment declaring that the NRC is without authority to consider DOE's motion to withdraw its Yucca Mountain license application or to grant that motion. Aiken County requests a judgment declaring that the NRC lacks the authority to stay consideration of its licensing application pending review of the DOE motion to withdraw that application.

South Carolina requests that the Court order the NRC to comply with Nuclear Waste Policy Act (NWPA) by continuing the licensing process for DOE's application for construction authorization for the Yucca Mountain repository as prescribed in the NWPA.

C. Related Cases

These consolidated cases have not previously been before this Court and there are no related cases.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the National Association of Regulatory Utility Commissioners (NARUC) respectfully submits this disclosure statement. NARUC is a quasi-governmental non-profit association incorporated in the District of Columbia. NARUC has no parent corporation nor is there any publicly held corporation that owns stock or other interest in NARUC. NARUC is supported predominantly by dues paid by its State public utility commissioner members and through revenues generated by meetings of those members held three times each year.

Respectfully submitted,

s/ *James Bradford Ramsay*
JAMES BRADFORD RAMSAY
General Counsel
National Association of Regulatory
Utility Commissioners
1101 Vermont Avenue, N.W., Suite 200
Washington, DC 20005
(202) 898-2207

DATED: June 18, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

Legislative History

GLOSSARY OF ABBREVIATIONS

APA	Administrative Procedure Act
DOE	Department of Energy
EIS	Environmental Impact Statement
NARUC	National Association of Regulatory Utility Commissioners
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act
OCRWM	Office of Civilian Radioactive Waste Management
Secretary	Secretary of the United States Department of Energy
SRS	Savannah River Site
Respondents	Means the President, Secretary of Energy, and Department of Energy. The term "Respondents" does not include the NRC unless otherwise specifically indicated.

I. STATEMENT OF JURISDICTION

Pursuant to 42 U.S.C. § 10139(a), this Court has original and exclusive jurisdiction of Petitioners' challenge to Respondents' decision and action to withdraw with prejudice its application for a license to construct a permanent repository for high level nuclear waste at Yucca Mountain, Nevada, as well as to forever abandon the Yucca Mountain repository development process mandated by Congress and the NWPA. This consolidated action challenges final decisions and actions taken by Respondents in contravention of the NWPA beginning in January 2010. As discussed more fully below, the latest-filed case in this action was brought on April 13, 2010. Therefore, all original cases in this consolidated action were "brought not later than the 180th day after the date of the decision or action or failure to act involved," as required by 42 U.S.C. § 10139(c).

II. PERTINENT STATUTES AND REGULATIONS

Copies of the pertinent statutes and regulations are included in the separately bound addendum to this brief (Addendum).

III. STATEMENT OF ISSUES

1. Does the NWPA prohibit withdrawal of the Yucca Mountain license application, as well as other actions taken by Respondents to forever abandon and terminate the process to develop a repository at Yucca Mountain?

2. Did the decision to abandon the process to develop a repository at Yucca Mountain violate Nation Environmental Policy Act (NEPA)?

3. Was the decision to abandon the process to develop a repository at Yucca Mountain arbitrary and capricious because it was made without adequate support in the record?

4. Does Respondents' decision to abandon the license application and process mandated by the NWPA violate the separation of powers doctrine?

IV. STATEMENT OF THE CASE

The NWPA provides a detailed, stepwise process for the siting of a permanent repository for the nation's ever-increasing amounts of high level radioactive waste and spent nuclear fuel. 42 U.S.C. §§ 10101-10270. Congress designed the NWPA in this prescriptive manner in reaction to two prior failed siting attempts, which failed due to intense local political opposition. Congress sought to ensure a scientific, merits-based approach to siting and developing a repository.

Pursuant to the NWPA, DOE spent over 15 years and billions of dollars investigating the safety and feasibility of Yucca Mountain, Nevada, as the site for a permanent repository. In 2002, in response to DOE's recommendation of Yucca Mountain as a suitable repository site, Congress approved Yucca Mountain as the

nation's repository site. Consequently, as required by the NWPA, DOE in 2008 submitted to the NRC an application for a license to construct the repository.

In January 2010, however, Respondents announced their intent to withdraw that license application and forever terminate Yucca Mountain from consideration as a permanent repository site. In March 2010, Respondents formally moved to withdraw the application. Since that time, Respondents have taken numerous additional steps to immediately dismantle the infrastructure of the Yucca Mountain project.

On February 19, 2010, Petitioner Aiken County filed an action in this Court seeking declaratory and injunctive relief, and a writ of mandamus, challenging Respondents' decision to unilaterally and irrevocably withdraw the license application.

The other Petitioners filed similar challenges to Respondents' actions. Specifically, after giving notice of intent to sue on February 18, 2010, three individuals living near Hanford, Washington (the Ferguson Petitioners), filed a petition for review in this Court on February 25, 2010, seeking to reverse the Respondents' decision to irrevocably terminate the Yucca Mountain project. South Carolina filed its petition for review in the United States Court of Appeals for the Fourth Circuit, seeking the issuance of writs of mandamus and prohibition, for a stay and/or declaratory and injunctive relief. Washington filed its petition

for review in this Court on April 13, 2010, seeking declaratory and injunctive relief. All of these actions also include claims that the Respondents decision to forever terminate the Yucca Mountain repository development process, of which the license application is a part, violates the NWPA, and that Respondents' actions violate the NEPA and are arbitrary and capricious in violation of the Administrative Procedure Act (APA).

This Court consolidated Petitioners' actions and entered an order setting a briefing schedule for the various parties. Oral argument in this matter has now been scheduled for September 23, 2010.

V. STATEMENT OF FACTS

A. Background and Structure of the NWPA

Congress enacted the NWPA in 1982 to establish a "definite Federal policy" for the disposal of high-level radioactive waste and spent nuclear fuel. 42 U.S.C. § 10131(b)(2). The NWPA outlines a detailed, prescriptive, and stepwise process for the "siting, construction, and operation of repositories" to provide a "reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste . . . ." 42 U.S.C. § 10131(b)(1); *see also Nuclear Energy Inst., Inc. v. EPA,* 373 F.3d 1251, 1259 (D.C. Cir. 2004).

The NWPA's legislative history reflects Congress' concern with the "unmitigated" failure of the federal government to have provided for a permanent waste disposal facility, even by the early 1980s. H.R. Rep. No. 97-491(I), at 28 (1982), Addendum at 28; *see generally*, H.R. Rep. No. 97-491(I), at 26-30, Addendum at 26-30; *see also*, 42 U.S.C. § 10131(a)(3) ("Federal efforts during the past 30 years to devise a permanent solution to the problems . . . have not been adequate"). Congress sharply criticized prior agency confidence that a solution would simply work itself out:

> An opiate of confidence that the technical issues effecting [sic] nuclear waste disposal were easily resolvable for decades rendered Federal officials responsible for providing the facilities apathetic towards addressing those technical issues, and unprepared for the immense social and political problems which would obstruct implementation of a serious repository development program. *"Paper" analyses and future plans were accepted as adequate assurance that disposal facilities would be available when needed . . . .*

H.R. Rep. No. 97-491(I), at 26, Addendum at 26-27 (emphasis added).

Congress also noted that earlier efforts to develop a repository had fallen victim to political pressure:

> The Atomic Energy Commission, predecessor to the Department of Energy and the Nuclear Regulatory Commission, reacted with a rush to develop a pilot permanent high level waste disposal facility. *The rejection of a site for the facility in Lyons, Kansas in 1971 after an intense political attack on the program*, followed quickly by revelations of serious technical flaws in the site, are now widely recognized as the landmark event in nuclear waste management

> history which would color future repository siting activities through the present day.
>
> . . . .
>
> Increased pressure to resolve the problem sent the Federal nuclear establishment in 1976 . . . looking for a site in Michigan, *where political uproar quickly brought the program to defeat again*, this time even before enough drilling could be accomplished to determine whether technical flaws in the site existed.

H.R. Rep. No. 97-491(I), at 27, Addendum at 27 (emphasis added).

Congress concluded that although opening a repository was technically feasible, a prescriptive statutory process with Congressional control of certain critical decisions was necessary in order to actually realize that goal:

> The status of our technical ability to provide these permanent disposal facilities, or "repositories", is considered by the Committee to be technically advanced to a point which justifies implementation of the technology. . . . In practice, however, management of nuclear wastes has been inadequate to guarantee that the risks will be small in fact. *It is necessary, therefore, to provide close Congressional control* and public and state participation in the program *to assure that the political and programmatic errors of our past experience will not be repeated.*

H.R. Rep. No. 97-491(I), at 29-30, Addendum at 30 (emphasis added).

The NWPA's resulting "multi-stage process" for developing a repository, *Nuclear Energy Inst.*, 373 F.3d at 1259, was based on a series of special commission and task force recommendations that "laid a foundation for a comprehensive, step-by-step approach to repository development" and agreed on the need for legislation to "solidify a program *and keep it on track*." H.R. Rep.

No. 97-491(I), at 28-29, Addendum at 29 (emphasis added). This step-by-step approach, as outlined in the statute, is summarized as follows:

Site Nomination. DOE is initially required to promulgate guidelines for and recommend "candidate sites" to the President for further investigation. 42 U.S.C. § 10132(a), (b). Upon such recommendation, the President has a prescribed timeline in which to review the recommendations and either approve, disapprove, or request further information. 42 U.S.C. § 10132(c). If the President concurs, or if no action is taken, the recommended sites are deemed approved and they proceed to the second stage: site characterization.

Site Characterization. The site investigation, or characterization, stage involves DOE investigating candidate sites to support potential recommendation of a site for "approval" as a repository. Site characterization actions are "a preliminary decisionmaking activity" under the statute. 42 U.S.C. § 10133(d).

Congress has vested the Secretary of Energy (Secretary) with express termination authority while conducting these pre-decisional actions. 42 U.S.C. § 10133(c)(3). However, even during this pre-decisional phase of the process, the Secretary's termination discretion is limited. The statute requires a specific determination that a site is "unsuitable for development as a repository," and by its terms only allows the Secretary to terminate "site characterization activities." *Id.* The Secretary is required to notify Congress upon terminating such activities and,

within six months, is required to report to Congress again with "recommendations for further action," including "the need for new legislative authority." *Id.*

Site Approval. The third step in the NWPA's repository process is the "approval" stage in which a siting decision is made. As outlined below, and consistent with Congressional concerns reflected in the design of the NWPA's siting process, the ultimate authority to make a siting decision is not committed to the discretion of either the Secretary of Energy or the President, but instead rests with Congress.

If, upon the completion of site characterization activities, the Secretary decides that a site is suitable as a repository, the Secretary recommends site approval to the President. 42 U.S.C. § 10134(a). Such recommendation must be based on the technical merits of the site as demonstrated by "the record of information developed by the Secretary" during site characterization. Specifically, the recommendation must include: (1) a description of the proposed repository specifications and waste forms; (2) a discussion of the data "relating to the safety of such site"; (3) a final environmental impact statement for the site; and (4) preliminary comments from the NRC concerning the extent to which DOE's characterization and waste form analysis is sufficient to support a licensing application.

If the President concurs with the Secretary's recommendation, the NWPA directs that the President "shall submit a recommendation of such site to Congress." 42 U.S.C. § 10134(a)(2)(A). The state in which the proposed site lies has an equal opportunity to "disapprove" the recommended site. 42 U.S.C. § 10135(b). However, Congress reserves the authority to override that veto and, thus, reserves to itself the ultimate authority to select the site to be submitted to the NRC for licensing. Designation of a repository site under the NWPA is intended to end the site selection process. *Nuclear Energy Inst.*, 373 F.3d at 1302 ("Congress has settled the matter, and we, no less than the parties, are bound by its decision.").

Licensing: statutorily mandated duties. Repository site approval triggers the fourth and final stage under the NWPA's process: the licensing stage. Upon approval of a repository site, the Secretary "shall submit to the [NRC] an application for a construction authorization for a repository at such site . . . ." 42 U.S.C. § 10134(b). At the other end of the licensing process, the NRC "shall consider an application for a construction authorization for all or part of a repository" and "shall 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). Congress requires the NRC to provide status reports to Congress on its consideration of DOE's application, with the reports to be

provided annually "until the date on which such authorization is granted." 42 U.S.C. § 10134(c). Finally, the NWPA requires DOE to compile a project decision schedule "that portrays the optimum way to attain the operation of the repository, within the time periods specified in this part," with reporting requirements for any federal agency that cannot comply with the schedule. 42 U.S.C. § 10134(e)(1)-(2).

B. NWPA Implementation to Date

For almost 30 years and until Respondent's recent decision and actions, the process outlined in the NWPA has been followed. In 1986, DOE nominated five sites for characterization and recommended that three of them, including Yucca Mountain, be investigated further. *See Nevada v. Watkins*, 939 F.2d 710, 713 (9th Cir. 1991). The President approved this recommendation. *Id.*

That same year, DOE, using an "accepted, formal scientific method," ranked the appropriateness of the various sites it had investigated.[1] Yucca Mountain was the highest-ranked site.[2] In 1987, Congress amended the NWPA to focus DOE's study exclusively on the Yucca Mountain site. 42 U.S.C. § 10172.

---

[1] U.S. Dept. of Energy, *A Multiattribute Utility Analysis of Sites Nominated For Characterization For the First Radioactive Waste Repository – A Decision Aiding Methodology* 1-5–1-15 (1986), available at http://www.energy.gov/media/Multiattribute-Utility-Analysis_HQS-19880517-1167_pp1-250.pdf (last visited on June 18, 2010).

[2] *Id.*

DOE's subsequent analysis of the suitability of Yucca Mountain included completing numerous tunnels into the mountain to create "the world's largest underground laboratory."[3] In all, DOE spent over fifteen years and billions of dollars analyzing the suitability of the Yucca Mountain site as a geologic repository.[4]

DOE's investigation of Yucca Mountain led in February 2002 to the Secretary's recommendation to the President that Yucca Mountain be developed as a nuclear waste repository.[5] Specifically, the Secretary concluded that:

> [T]he amount and quality of research the [DOE] has invested into [determining Yucca Mountain's suitability as a repository] – done by top flight people . . . – is nothing short of staggering. After careful evaluation, I am convinced that the product of over 20 years, millions of hours, and four billion dollars of this research provides a sound scientific basis for concluding that the site can perform safely during both the pre- and post-closure periods, and that it is indeed scientifically and technically suitable for development as a repository.[6]

---

[3] *See* Yucca Mountain: The Most Studied Real Estate on the Planet, Report to the Chairman, U.S. Senate Committee on Environment and Public Works (Mar. 2006), available at http://epw.senate.gov/repwhitepapers/YuccaMountainEPWReport.pdf, at 6 (last visited June 18, 2010)

[4] Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982 at 1 (Feb. 2002), Addendum at 318-66.

[5] *Id.* at 6, Addendum at 326.

[6] *Id.* at 45, Addendum at 365.

The President then recommended the Yucca Mountain site to Congress.[7] Nevada filed a notice of disapproval, to which Congress responded with a joint resolution in July 2002 approving the development of a repository at Yucca Mountain. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135 note (2006)).

In June 2008, DOE submitted its license application to the NRC. *See* Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008). In September 2008, the NRC staff found that the application contained sufficient information to begin its detailed technical review, and accordingly, the application was docketed for review by the Atomic Safety & Licensing Board (Licensing Board).[8]

A number of proceedings occurred in the NRC after the application was docketed. Ten petitioners, including the states of Nevada and California, local governments in those states, tribal entities and Nuclear Energy Institute, sought and were granted intervention. The NRC's Licensing Board agreed to consider

---

[7] *See* John T. Woolley and Gerhard Peters, The American Presidency Project. Santa Barbara, CA, available at http://www.presidency.ucsb.edu/ws/?pid=72967 (last visited June 18, 2010) (Letter to Congressional Leaders Recommending the Yucca Mountain Site for the Disposal of Spent Nuclear Fuel and Nuclear Waste dated February 15, 2002).

[8] Department of Energy: Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, NV, 73 Fed. Reg. 53,284 (Sept. 15, 2008).

approximately 300 contentions submitted by those parties. *See U.S. Dep't of Energy (High-Level Waste Repository)*, LBP-09-6, 69 NRC 367, 377-78 (2009), aff'd in part, rev'd in part, CLI-09-14, 69 NRC 580 (2009). Discovery was on the verge of commencing when the Respondents' decision to abandon the Yucca Mountain process was announced.

C. Respondents' Termination Actions: Withdrawal of the License Application and the Decision to Irrevocably Abandon the Yucca Mountain Process and Terminate all Support Activities

On January 29, 2010, the Secretary, accompanied by several representatives of the President, held a press conference announcing that the President had determined to abandon the Yucca Mountain repository development process and to instead create a Blue Ribbon Commission to find another way of disposing of high level nuclear waste. *See* Addendum at 177. This announcement confirmed the Secretary's own announcement, just a few days earlier, that Yucca Mountain was "off the table." *Id.* The Respondents did not claim in either announcement that Yucca Mountain is scientifically unsuitable for use as a repository. When asked why this process was being terminated, his representative stated, "We work for the President, we take our direction from the President, the President has been clear that Yucca Mountain is not an option." *Id.*

On February 1, 2010, the Secretary announced that DOE would move to withdraw its Yucca Mountain licensing application and permanently terminate the

Yucca Mountain project.[9] That same day, DOE filed with the Licensing Board a motion to stay the proceedings based upon the President's order that DOE "'discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010 . . . .'" DOE Stay Motion, Addendum at 178. In neither the Secretary's announcement or DOE's motion did the Respondents claim that Yucca Mountain is scientifically unsuitable for use as a repository.

On March 3, 2010, DOE filed a motion to withdraw, with prejudice, its license application for a permanent geologic repository at Yucca Mountain. *See* DOE Motion to Withdraw, Addendum at 193-207. DOE's motion did not contain any claim that the Yucca Mountain site has been found to be unsafe or scientifically unsuitable for use as a repository. Indeed, in a filing before the NRC, DOE noted that "the Secretary's judgment here is *not* that Yucca Mountain is unsafe or that there are flaws in the LA [license application], but rather that it is not a workable option and that alternatives will better serve the public interest." DOE Reply Brief at 31 n.102, Addendum at 249 (emphasis added). Despite the lack of any scientific basis for its decision to terminate Yucca Mountain, DOE declared in its motion to withdraw that "it does not intend ever to refile its

[9] U.S. Dept. of Energy, FY 2011 Budget Request: Budget Highlights 5 (Feb. 2010), Deferred Joint Appendix (App.) at ___.

application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain." DOE Motion to Withdraw at 3 n.3, Addendum at 195.

DOE has taken further actions aimed at abandoning the Yucca Mountain repository, including closing the Yucca Mountain site and terminating contractors. For example, on February 8, 2010, representatives of Respondents sent a letter to the State of Nevada to withdraw over 100 water permit applications necessary for the project. Addendum at 192. On February 17, 2010, DOE advised Congress it intended to "reprogram" funding appropriated by Congress for Yucca Mountain in its latest budget and use the funding instead to immediately begin to "bring the Yucca Mountain Project to an orderly close." Deferred Joint Appendix (App.) at ____. The Respondents did not claim in either letter that Yucca Mountain is scientifically unsuitable for use as a repository.

Subsequently, on March 10, 2010, DOE distributed a Notice of Expected Separation to all employees of the Office of Civilian Radioactive Waste Management (OCRWM). Addendum at 264. The OCRWM and its personnel are responsible for supporting DOE's efforts to obtain a license from the NRC. *Id.* OCRWM, in turn, issued an "Activity Screening" on March 17, 2010, that noted, "Yucca is no longer an option . . . no program activities from this date forward can now possibly have any impact on [a] [NRC license application] that will no longer

be updated and is being withdrawn (from consideration by the regulator) by a Program that is being terminated." Addendum at 267.

On or about March 18, 2010, DOE and its contractors drafted plans for contract termination at Yucca. Addendum at 268-71. Those plans require the contractor to stop work on April 16, 2010. *Id.* On March 19, 2010, at least one contractor distributed instructions to site occupants to "begin cleaning up their work areas and eliminating/reducing any excess office supplies, materials, and personal items within their control." *See* Addendum at 272.

Finally, on March 26, 2010, Secretary Chu wrote a letter explaining that all of the actions above were taken because the Secretary "do[es] not believe that we should spend money on a licensing process that has been suspended, ... [W]e need to begin actions now to ensure that the shutdown occurs in an orderly fashion. . . ." Addendum at 275. According to the former Deputy Director of OCRWM, there is little doubt that DOE is in the process of completely disassembling the Yucca Mountain project. Addendum at 277-300.

VI. SUMMARY OF ARGUMENT

Congress designed the NWPA to ensure a repository siting process that focuses on the scientific merits and suitability of a site and avoids the political pitfalls that halted earlier siting attempts. Consequently, Congress has reserved to itself the ultimate authority to select the site that is to be submitted to the NRC for

licensing, provided that DOE's discretion to terminate the repository development process is limited to the period in which DOE is actively investigating the initial suitability of a site. Once DOE recommends a site as suitable and Congress approves that site, Congress commanded through the plain language of the NWPA that DOE submit a licensing application for construction of the repository and that the NRC issue a decision on the merits of that application.

The central issue in these consolidated actions is whether Respondents may ignore this plain language of the NWPA, and whether their actions violated NEPA and the APA. Specifically, Petitioners challenge two distinct actions taken by Respondents. First, for purposes of the mandamus writs sought by South Carolina and Aiken County, the action being challenged is Respondents' failure to comply with its nondiscretionary duty to pursue a license construction application for the Yucca Mountain repository. Second, Washington, the Ferguson petitioners, and South Carolina all challenge Respondents' decision and actions to unilaterally and irrevocably terminate the Yucca Mountain repository development process.

The Petitioners have standing to challenge these two decisions of Respondents as Petitioners all are located in, near or around facilities where high-level nuclear waste and spent nuclear fuel is being temporarily stored. In addition, the Respondents' decisions are reviewable under the plain language of the NWPA and constitute final reviewable decisions under the APA.

As explained in more detail below, the express language, structure and legislative history of the NWPA all demonstrate that Respondents may not irrevocably abandon the Yucca Mountain development process. The plain language of the NWPA—and Congress' unambiguous intent as embodied in that Act—demonstrates that where, as here, Congress has approved Yucca Mountain as the repository site, Respondents have no authority to unilaterally and forever abandon the Yucca Mountain development process. The statute requires that the process move forward as Congress intended, at least until the NRC issues a decision on the merits of the licensing application.

Respondents' decision to abandon the Yucca Mountain process also violates NEPA. Even if Respondents had authority to terminate the process, this decision is a major federal action that must be supported by environmental analysis pursuant to NEPA before such a decision may be made. Respondents have not conducted any such analysis.

Even if Respondents had the authority to abandon the process imposed by the NWPA, their decision to do so here is arbitrary and capricious in violation of the APA. Their decision is unsupported by any administrative record.

Finally, Respondents' attempt to abandon the process imposed by the NWPA also violates separation of powers principles, because it seeks, under the guise of a construction of the statute by the Respondents, to have the Executive

Branch revisit and reverse matters which have already been determined by Congress.

VII. ARGUMENT

A. Preliminary Issues

1. Standing: Each Petitioner has Standing to Challenge the Actions at Issue Here

The Petitioners have standing to challenge the actions of Respondents. To determine whether a Petitioner has alleged facts sufficient to support standing, the Court construes the complaint in favor of the Petitioner. *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 55 (D.C. Cir. 1991). The "irreducible constitutional minimum of standing" requires a party to show injury in fact caused by the defendants' conduct and redressable by judicial relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "'[W]here plaintiffs allege injury resulting from violation of a procedural right afforded to them by statute and designed to protect their threatened concrete interest, the courts relax—while not wholly eliminating—the issues of imminence and redressability . . . .'" *City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1187 n.1 (D.C. Cir. 2007) (citation omitted). Petitioners need not show that Yucca Mountain repository would ultimately ever be opened in order to have standing in this proceeding. *See Lujan*, 504 U.S. at 573 n.7.

The Petitioners each stand to suffer a direct injury caused by DOE's decision to forever abandon the Yucca Mountain development process, which would eliminate the only Congressionally-approved avenue for effectuating "the Federal Government['s] . . . responsibility to provide for the permanent disposal of high-level radioactive waste." 42 U.S.C. § 10131(a)(4). This Court can provide Petitioners relief for their injuries by requiring DOE to comply with its duties under the NWPA.

a. Aiken County

Aiken County is the location of the Savannah River Site (SRS), one of the DOE locations currently acting as a temporary storage facility for spent nuclear fuel and high-level radioactive waste. SRS covers over ten percent of the land in Aiken County,[10] and Aiken County owns substantial real property in close proximity to SRS. Affidavit of Clay Killian, County Administrator for Aiken County, Addendum at 58.

Yucca Mountain is the site selected for the long-term disposal of SRS's radioactive materials. DOE's own analysis demonstrates that failure to go forward with Yucca Mountain could result in "widespread contamination at the 72 commercial and 5 DOE sites across the United States, with resulting human health

[10] SRS Community Reuse Organization, The Future of SRS: The Community Perspective at 5, available online at www.srscro.org/downloads/SRRDI%20DOE%20Issues.doc

impacts."[11] The SRS site in Aiken County is one of the five referenced DOE sites. Aiken County therefore has a concrete interest that is impaired by the Respondents' actions to withdraw the license application and terminate the Yucca Mountain process. *City of Dania Beach*, 485 F.3d at 1185-86.

b. South Carolina

South Carolina is also home to SRS. It, therefore, has the same concrete injury as Aiken County as a result of Respondents' decision and actions to forever terminate Yucca Mountain.

In addition, South Carolina also houses seven commercial nuclear reactors that have been required to store onsite the spent nuclear fuel they generate. Continued delay in the siting of a permanent repository for this material only exacerbates the danger posed by the temporary storage of such toxic material.

The Court of Appeals for the Fourth Circuit has held that the Governor of South Carolina (and by extension the State itself) is essentially a neighboring landowner to the SRS, whose property is at risk of environmental damage from the DOE's activities at SRS. The State "therefore has a concrete interest that NEPA was designed to protect; as such, [the State] possesses the requisite

[11] *See* Department of Energy, Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, DOE/EIS-0250 Section S.12, App. ____.

standing to enforce [its] procedural rights under NEPA." *Hodges v. Abraham*, 300 F.3d 432, 445 (4th Cir. 2002). These conclusions apply with equal force to the NWPA.

c. Washington

Washington has an interest as a property owner, a regulator, and a sovereign in the management of approximately 53 million gallons of untreated high-level radioactive tank waste currently stored at DOE's Hanford Nuclear Reservation (Hanford) located in Washington. *See generally* Affidavit of Suzanne L. Dahl-Crumpler (Dahl Aff.), Addendum at 70-175. The clear and present danger posed by this waste to the citizens, environment and commerce of Washington is demonstrated by the fact that approximately one million gallons of the waste has already leaked from Hanford's tanks. *Id.* at 78.

The Hanford tank waste, as well as other waste in Washington, is presumptively slated for disposal at Yucca Mountain after treatment. *Id.* at 86. Therefore, Washington has compelling interests that have been, and will continue to be, adversely affected by Respondents' decision to forever abandon Yucca Mountain, a decision that will inevitably delay the siting of any alternative repository. *See, e.g., Lujan*, 504 U.S. at 573 nn.7-8.

d. Robert Ferguson, Gary Petersen, and William Lampson

Petitioners Robert L. Ferguson, Gary Petersen, and William Lampson are individuals who have lived and worked near the Hanford Site for decades, and who are presently, and will continue to be, harmed by the "temporary" storage of high level radioactive waste there. *See* Declarations of Robert Ferguson, William Lampson, and Gary Petersen, Addendum at 60-69. As with the other petitioners, each and every intervening day from Respondents' January 29, 2010, decision to take Yucca Mountain off the table causes a substantial additional delay in the opening of any permanent repository for high-level radioactive waste, and consequently causes Petitioners to suffer continued and extended exposure to the dangers of such waste stored temporarily at the Hanford Site. This extended exposure is not just a day-for-day calculation. It will take years to reconstruct the project that Respondents' are now dismantling should the Court rule in favor of the Petitioners on the merits. Addendum at 277-300. Petitioners' injuries are actual, concrete injuries that are caused by Respondents' violation of mandatory duties under the NWPA and are redressable by the relief sought. It is exactly this kind of additional, unlimited delay that the NWPA was intended to prevent.

e. NARUC

Intervenor NARUC has been consistently recognized by Congress and Courts as the proper party to represent the interests of State utility commissioners.

See, e.g., *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy*, 851 F.2d 1424 (D.C. Cir. 1988). NARUC's members have recognized statutory charges under the Atomic Energy Act and the NWPA to protect the health, safety, and economic interests of electric ratepayers. These interests are directly impacted by the Respondents' actions challenged in this proceeding.

In addition, regulated utilities pay for the waste disposal via the Nuclear Waste Fund, which is, in turn, passed through by State commissions to ratepayers. Since 1982, ratepayers, along with reactor owners, have paid more than $17 billion into the Nuclear Waste Fund, in part, to support the process of reviewing a permanent repository.[12] Withdrawing the application will undermine DOE's ability to fulfill its outstanding obligation to take possession of the waste on any kind of reasonable timetable. U.S. ratepayers continue to pay for a national storage "solution," enhanced litigation costs, and the clearly documented increased costs of interim storage.

Finally, State Commissions, many located within 10-40 miles of working reactors, also enforce rules designed to assure the safety of, reduce risk to, and promote reliability of service for both the Commission staff and the general public

[12] *See* Nuclear Energy Institute, *Nuclear Waste Fund Payment Information by State Through Q2 FY2010*, *available at* http://www.nei.org/resourcesandstats/documentlibrary/nuclearwastedisposal/graphicsandcharts/nuclearwastefundpaymentinformationbystate/.

vis-à-vis regulated utility operations. There is no question that the withdrawal motion, if permitted, leaves ratepayers vulnerable on several fronts, with tons of nuclear waste stored in densely compacted cooling ponds not meant for long term storage.

2. Respondents' Challenged Actions are Expressly Reviewable Under the NWPA and are Also Reviewable as "Final" Decisions Under the APA

By order dated May 3, 2010, the Court directed the parties to address:

> . . . whether final agency action is necessary to confer jurisdiction over a petition for review filed pursuant to the Nuclear Waste Policy Act, 42 U.S.C. § 10139(a)(1)(A), (B),(C), (D), and, if so, whether final agency action has been taken.

As explained below, this Court has jurisdiction over the challenged actions pursuant to the NWPA's judicial review provision, 42 U.S.C. § 10139(a)(1). Because the NWPA specifically provides for judicial review of the challenged actions, to the extent the Court's inquiry refers to "final agency action" within the meaning of the APA, 5 U.S.C. § 704, such finality is not necessary for the challenged actions to be judicially reviewable. The challenged actions are, nonetheless, reviewable under either standard.

a. This Court has Jurisdiction to Review the Respondents' Decisions Challenged by Petitioners Pursuant to the Plain Language of the NWPA

Section 119 of the NWPA provides in pertinent part:

(a) Jurisdiction of United States Courts of Appeals.

> (1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action—
>
> (A) for review of any final decision or action of the Secretary, the President, or the Commission under this subtitle [42 U.S.C. §§ 10131 *et seq*.];
>
> (B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this subtitle [42 U.S.C. § 10131 *et seq*.];
>
> (C) challenging the constitutionality of any decision made, or action taken, under any provision of this subtitle [42 U.S.C. § 10131 *et seq*.];
>
> (D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq*.) with respect to any action under this subtitle [42 U.S.C. §§ 10131 *et seq*.], or as required under section 135(c)(1) [42 U.S.C. § 10155(c)(1)], or alleging a failure to prepare such statement with respect to any such action.

42 U.S.C. § 10139(a)(1)(A)-(D).

Petitioners have challenged the Respondents' decision and actions to withdraw with prejudice the Yucca Mountain license application and unilaterally and irrevocably terminate the Yucca Mountain development process. This decision and associated actions are reviewable by this Court pursuant to the plain language of Section 119(a)(1)(A)-(D).

Specifically, the decision to irrevocably terminate the Yucca Mountain project is a final decision of the Respondents that is reviewable under Section 119(a)(1)(A). Similarly, the Secretary's failure to comply with his statutory duty

to maintain and prosecute the license application is reviewable under Section 119(a)(1)(B). Petitioners' claim that Respondents' violation of their statutory duties is a violation of the separation of powers is reviewable under Section 119(a)(1)(C). And, finally, review of Petitioners' NEPA challenge is expressly sanctioned by Section 119(a)(1)(D).

The express language of Section 119(a)(1) demonstrates that, unlike other judicial review provisions, Section 119 is not limited to review of "final agency actions." For example, Section 119 vests the Court of Appeals with "original and exclusive jurisdiction" over civil actions "alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part" or "challenging the constitutionality of any decision made, or action taken, under any provision of this part." 42 U.S.C. § 10139(a)(1)(B), (C) (emphasis added). *Compare* 42 U.S.C. § 10139(a)(1) *with* 5 U.S.C. § 704. (emphasis added); *see also Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357, 1365 (Fed. Cir. 2010) (noting "broad" nature of NWPA judicial review provision); *Gen. Elec. Uranium Mgmt. Corp. v. U.S. Dep't of Energy*, 764 F.2d 896, 901-02 (D.C. Cir. 1985) (noting Congress's intent that the judicial review provision cover "*all actions* concerning waste disposal. . . .") (emphasis added). Thus, certain actions taken under the NWPA that arguably might not be

considered "final agency action" for purposes of Section 704 the APA are nonetheless statutorily reviewable by operation of Section 119 of the NWPA.

b. The Challenged Actions of the Respondents Also Meet the "Final Agency Action" Requirement of the APA

Even if the NWPA did require "final agency action" for review thereunder, as is required under the APA, the challenged actions easily pass the arguably more restrictive and traditional APA test for nonstatutory review. A final agency action is one that marks the consummation of the agency's decision-making process and that establishes rights and obligations or creates binding legal consequences. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The particular label placed upon an action by an agency is not conclusive, "'for it is the *substance* of what the [agency] has purported to do and has done which is decisive.'" *Fund for Animals, Inc. v. United States Bureau of Land Mgmt.*, 460 F.3d 13, 26 (D.C. Cir. 2006) (Griffith, J., dissenting) (quoting *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416 (1942)) (emphasis added); *see also CropLife Am. v. EPA*, 329 F.3d 876, 881-83 (D.C. Cir. 2003) (EPA directive, embodied in a press release, forbidding the use of third-party human test data to evaluate pesticides' effects constituted final agency action subject to review); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (issuance of national guidance document final agency action because it marked the consummation of EPA's decision-making process and

determined the rights and obligations of both applicants and the agency); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (noting that "if an agency acts as if a document issued at headquarters is controlling in the field" that a court can find final agency action).

i. The decision to withdraw the licensing application is final for purposes of the mandamus action

The Mandamus Petitoners (Aiken County and South Carolina) seek to compel DOE to comply with its statutory duty to pursue the Yucca Mountain licensing application. DOE's decision to withdraw its license application and accompanying motion are exactly the type of "final decisions" and "actions" for which Congress vested this Court with original and exclusive jurisdiction under the NWPA. 42 U.S.C. § 10139(a)(1)(A).

DOE stated in its motion to withdraw that "it does not intend ever to refile an application" to construct a permanent geologic repository at Yucca Mountain. DOE Motion to Withdraw at 3 n.3, Addendum at 195. DOE's decision does not depend on further action by the NRC in order to be a final decision under the NWPA. To be sure, the NWPA assigns the President, Secretary, and NRC several sequential duties in the repository siting and licensing process, each duty triggered by the completion of the previous one. This interdependence, however, does not

insulate final decisions and actions by each actor from judicial review of its own decisions and actions.

Furthermore, DOE's action to withdraw its license application is tantamount to a failure of the Secretary to take a required action, *i.e.* failure to submit the license application in the first place, which failure *independently* serves as a basis for this Court's original and exclusive jurisdiction conferred by Congress in the NWPA. 42 U.S.C. § 10139(a)(1)(B). Finally, DOE's withdrawal actions are an attempt to usurp policy authority in an area where Congress has clearly spoken, a separation of powers issue which also vests this Court with jurisdiction under the "constitutional challenge" provision of the NWPA. 42 U.S.C. § 10139(a)(1)(C).

ii. The unilateral decision to terminate the Yucca Mountain development process is final for purposes of the petitions for review

The Secretary's 2002 recommendation of Yucca Mountain to the President, and the President's subsequent recommendation of the site to Congress, were "final" actions reviewable under Section 119(a)(1)(A). *See* 42 U.S.C. § 10134(a)(1), (2); *see also Texas v. U.S. Dep't of Energy*, 764 F.2d 278, 282 (5th Cir. 1985) (Secretary's concession that that judicial review of final siting recommendations is expressly provided for by the NWPA). These actions were relied upon by Congress when it passed a joint resolution affirmatively and finally

approving the development of a repository at Yucca Mountain, thus bringing the site-section process to a conclusion. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135 note (2006)); *Nuclear Energy Inst.,* 373 F.3d at 1309. Because the prior actions of the Secretary and President in recommending Yucca Mountain under Section 114 were "final" and reviewable under Section 119(a)(1)(A), the current action by Respondents nullifying those prior recommendations and terminating Yucca Mountain must also be "final" and reviewable.

Statutory "finality" aside, the unilateral decision of the President and Secretary to take Yucca Mountain "off the table," forever abandon the process required by the NWPA, and terminate the project constitutes "final agency action" under the traditional test. The decision marks the consummation of Respondents' decision-making process with respect to the project and legal consequences flow directly from that decision.

Since the decision was made, activity with respect to advancing the project has come to a halt, funding has been cut and diverted, and the project's contracts and teams are being dismantled. Addendum at 264-75. From the perspective of Respondents, there is no turning back, even if the NRC does not grant DOE's motion to withdraw the NRC license application for the project. Despite the NWPA's statutory mandate, Respondents assert that they will simply not proceed

with Yucca Mountain—period. *See*, *e.g.*, *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) ("[I]f an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review.").

The legal consequences flowing from the Respondents' decision to terminate the Yucca Mountain project cannot be denied. Pursuant to the NWPA, Yucca Mountain is the *only* site at which a permanent repository for storing high level radioactive waste can be developed. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135 note (2006)); *Nuclear Energy Inst.,* 373 F.3d at 1310-11. By trying to take Yucca Mountain "off the table," Respondents would effectively have no permanent repository site authorized by the NWPA. This ensures that high level radioactive waste will continue to be "temporarily" stored at sites such as Hanford and SRS for the indefinite and foreseeable future. Respondents' "Blue Ribbon Commission," is powerless to select a new site. Only Congress, by amending the NWPA, can do that.[13] The

[13] Respondents may not shirk their existing legal obligations under the NWPA by claiming that they might have a better idea than Congress and that they might be able to get the NWPA amended to implement that idea. If that were the case, the President could at any time abandon implementation of any law, hoping that he could convince Congress that he had a better idea. Such a position is inconsistent with the President's obligations to "faithfully execute the Office of the President." U.S. Const. art II., § 1, cl.8. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's

Respondents, moreover, are clearly following a course to deconstruct the long, detailed and carefully created structure that is necessary to proceed with the construction and operation of the permanent repository at Yucca Mountain. If Respondents are permitted to continue, this effort cannot be put back together quickly, if at all. Addendum at 279-80.

c. Respondents' Decision to Forever Terminate Yucca Mountain is Ripe for Review

For the same reasons, Respondents' decision to unilaterally and irrevocably terminate the Yucca Mountain project is also ripe for review. With respect to "fitness" for review, the substantive issues are undoubtedly "purely legal" in the relevant sense and delay will not further "crystallize" the merits issues in this case. *See Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333-34 (D.C. Cir. 1993) (petition for review that presents a "purely legal question" satisfies the "fitness" prong of the test for ripeness); *CropLife Am.*, 329 F.3d at 884 (press release announcing that EPA would not consider third party human studies in regulatory decision-making was a statement of a blanket agency policy that presented a purely legal question, ripe for review). With respect to "hardship," this Court has frequently suggested that hardship is not a *sine qua non* of ripeness. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2006) ("[W]here . . .

---

power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.")

'there are no significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the balance against judicial review.'") (quoting *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003)). Here, there are no significant agency or judicial interests militating in favor of delay.

B. Standard of Review

The central issue on these consolidated appeals is whether Respondents violated the NWPA, NEPA, and the APA. This is question of law subject to *de novo* review by this Court. *See Nat'l Rifle Ass'n of America v. Reno*, 216 F.3d 122, 126 (D.C. Cir. 2000); *see also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

In determining what the NWPA requires of Respondents and whether they have complied with their statutory duty, the Court should employ the "traditional tools of statutory construction," including consideration of the statute's text, structure and legislative history. *See Chevron*, 467 U.S. at 842-43 & n.9. When doing so, the Court must be cognizant of the Supreme Court's observation that "when Congress has made its intent known through explicit statutory language, the court's task is an easy one." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

This Court should begin with an analysis of the plain language of the statute. "The question, at bottom, is one of statutory intent, and we accordingly

'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expressly the legislative purpose.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp. v. Holiday*, 498 U.S. 52 (1990)). The courts "'must presume that a legislature says in a statute what it mean and means in a statute what it says . . . . When the words of a statute are unambiguous . . . this first canon is also the last: judicial inquiry is complete.'" *Teva Pharm. Indus. Ltd. v. Crawford*, 410 F.3d 51, 53 (D.C. Cir. 2005) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)); *see also Ratzlaf v. United States*, 510. U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) (where a statute's language is clear on its face, "that is the end of the matter. . . .").

C. Merits

1. The Plain Language and Legislative History of the NWPA Demonstrate That the Respondents' Actions Violate the NWPA

The NWPA expressly provides that upon Congress' approval of Yucca Mountain as a suitable repository site, DOE is statutorily obligated to submit a licensing application to the NRC and the NRC must reach a final decision approving or disapproving an authorization to construct the repository. This express language is consistent with Congress' intent that once it settles on a site,

the licensing application for that site must be submitted until a decision on the merits is reached. Respondents' actions in withdrawing the license application and nullifying the entire siting process violate the plain language and legislative intent of the NWPA.

a. Withdrawal of License Application Violates the NWPA

The plain language of the NWPA provides that upon Congressional approval of the Yucca Mountain site: (1) "the Secretary *shall submit* to the [Nuclear Regulatory] Commission an application for a construction authorization for a repository at such site"; (2) the Commission "*shall consider*" such application; and (3) the Commission "*shall issue* a *final decision approving or disapproving*" a construction authorization within a prescribed timeframe. 42 U.S.C. § 10134(b), (d) (emphasis added). *See Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1243 (D.C. Cir. 2009) ("'Shall' has long been understood as 'the language of command'" except for "rare exceptions . . . that apply only where it would make little sense to interpret 'shall' as 'must.'") (citations omitted).

These plain terms prohibit both DOE and the NRC from terminating the licensing phase short of a determination on the merits of DOE's application. Section 114(b)'s command on DOE to submit an application must be read in conjunction with the corresponding Section 114(d) commands on the NRC to "consider" the application and issue a final decision "approving or disapproving"

a construction authorization. *See Am. Fed'n of Gov't Employees, Local 2782 v. Fed. Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("It is a generally accepted precept of interpretation that statutes or regulations are to be read as a whole, with 'each part or section . . . construed in connection with every other part or section.'") (quoting 2A Sutherland, *Statutes and Statutory Construction* § 46.05, at 90 (C. Sands rev. 4th ed. 1984)). In light of these commands, the NWPA cannot be interpreted such that DOE can withdraw its license application after submission, preventing an NRC final decision of approval or disapproval on the merits, and unilaterally derailing the NWPA's statutory process for the "siting, construction, and operation of repositories." 42 U.S.C. § 10131(b)(1). "It is an elementary rule of construction that 'the act cannot be held to destroy itself.'" *Citizens Bank v. Strumpf*, 516 U.S. 16, 20 (1995) (quoting *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)); *Mullins v. Andrus*, 664 F.2d 297, 309 (D.C. Cir. 1980) ("We must reject a statutory interpretation . . . when it flouts a legislative edict."); *March v. United States*, 506 F.2d 1306, 1316 (D.C. Cir. 1974) ("'[J]udicial obeisance to administrative action cannot be pressed so far' as to justify adoption of an administrative construction that 'flies in the face of the purposes of the statute and the plain meaning of its words.'") (quoting *Haggar Co. v. Helvering*, 308 U.S. 389, 398 (1940)).

The broader context of the NWPA supports this plain language reading. First, the NWPA's other post-approval provisions confirm Congress' expectation that the NRC will issue a final decision on the merits of DOE's application, thus furthering Congress' goal of opening a repository. The NWPA requires DOE to prepare a project decision schedule "that portrays *the optimum way to attain the operation of the repository*," including identifying activities that, if delayed, will "*cause a delay in beginning repository operation*." 42 U.S.C. § 10134(e)(1) (emphasis added). Any federal agency that cannot comply with the project decision schedule must report to Congress and specify its "estimated time *for completion of the activity*," along with any actions it will take "to *mitigate the delay involved*." 42 U.S.C. § 10134(e)(2) (emphasis added). And, independent of the project decision schedule, the NWPA requires the NRC to provide Congress with status reports on its consideration of DOE's application "until the date *on which such authorization is granted*." 42 U.S.C. § 10134(c) (emphasis added). All of these provisions would be rendered nullities if the statute were construed to permit DOE's withdrawal. *See, e.g.*, *City of Portland, Or. v. EPA*, 507 F.3d 706, 711 (D.C. Cir. 2007) (statute should be construed to give every word meaning).

Second, Congress defined express termination authority for the Secretary during the NWPA's pre-decisional site characterization phase. *See* 42 U.S.C. § 10133(c)(3). Nothing in the NWPA's post-site-approval provisions, however,

offers any hint of such authority or discretion. Under a cardinal rule of statutory construction, this indicates that Congress did not intend to grant the Secretary authority to terminate the NWPA's process outside of the specific pre-approval context of site characterization. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418-19 (1998) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citations and quotations omitted).

Finally, the legislative history of the NWPA also precludes an interpretation of the Act that would allow withdrawal of a license application by DOE after submission for review by the NRC. The legislative history reflects that Congress deliberately crafted the NWPA's process to "solidify a program *and keep it on track*." H.R. Rep. No. 97-491(I), at 28-29, Addendum at 29 (emphasis added); *see also* H.R. Rep. No. 97-491(I), at 29-30 ("It is necessary … to provide close Congressional control . . . to assure that the political and programmatic errors of our past experience will not be repeated."), Addendum at 30. Congress took lessons from past failed attempts to site a repository, *see* H.R. Rep. No. 97-491(I), at 26-27, and stated that a "legislated schedule for Federal decisions and actions for repository development" is an "essential element" of the NWPA's program. *See* H.R. Rep. No. 97-491(I), at 30, Addendum at 37. There is no mention in the

final bill report of any DOE authority to terminate repository activities outside of the specific "pre-approval" site characterization provision under Section 113(c)(3) (42 U.S.C. § 10133(c)(3)). *See* H.R. Rep. No. 97-491(I), at 52, Addendum at 31C; *see generally* H.R. Rep. No. 97-491(I).

Legislative history accompanying Congress' 2002 joint resolution confirms the intent that during the NWPA's licensing phase, any "disapproval" authority under the Act is now vested solely in the NRC, based on the technical merits of DOE's application. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988)*; United States v. General Motors Corp.*, 518 F.2d 420, 436-37 (D.C. Cir. 1975). In 2002, when the site recommendation was submitted to Congress by the President, the Governor of Nevada protested, claiming among other things that the site was geologically unsuitable. However, after several days of Congressional hearings, the appropriate Senate committee concluded that:

> Whether the combination of natural and engineered barriers proposed by the Secretary will meet the licensing requirements of the NRC will *ultimately be for the Commission*, rather than this Committee, to decide.

S. Rep. 107-159 at 8 (2002) (Conf. Rep.), Addendum at 44 (emphasis added). To the same effect, the Committee additionally stated:

> The Governor raises serious questions about the geology of the Yucca Mountain site, the design of the repository, the credibility of DOE's performance assessments, and the safety of nuclear waste transportation. These questions must be more fully examined and

> resolved before the NRC can authorize construction of the repository. But they *should be resolved by the Commission*, rather than by the Committee or the Senate as a whole. We cannot find on the basis of the record before us that any of the objections raised by the Governor warrants termination of the repository program at this point.

Id. at 13 (emphasis added), Addendum at 49 (citations omitted).

In a section of the same Report entitled "The Case for Going Forward," the Senate Committee noted that:

> The Committee believes that the Secretary's recommendation to the President, combined with his testimony before the Committee, and the voluminous technical documents supporting the recommendation meet the burden of going forward imposed by the Act and are sufficient to justify allowing the Secretary to submit a license application for the repository *to the Nuclear Regulatory Commission for its review*.

Id. (emphasis added).[14]

This Court summarized the 2002 legislative history as follows:

> The Senate Committee Report . . . referred back to the NWPA findings and *reaffirmed the judgment that "[a] geologic repository is needed . . ."* The Report concluded that the Administration had adequately demonstrated that the Yucca site was likely to be suitable for development, subject to the outcome of future NRC licensing proceedings. *Approval of the site and continuation of the repository-development process therefore was determined to be in the national interest*.

Nuclear Energy Inst., 373 F.3d at 1304 (emphasis added).

---

[14] The House Report on the resolution also assumed the continuation of the NWPA's stepwise process through the licensing phase and the mandate for NRC review of the application. *See* H.R. Rep. No. 107-425, at 3 (2002), Addendum at 36A-36B.

Congress thus maintained the NWPA's "legislated schedule," all the while leaving unaffected the mandatory requirements that a license application be filed by DOE and that the Commission issue a decision on the merits of that application. Both the 2002 Joint Resolution and its legislative history, together with the plain meaning of the statute, make it clear that the Secretary's only role in the future is to have the NRC review the license application and to take any actions that are required by that review.[15] The site approval by Congress and its legislative history reaffirmed the NWPA's grant to the NRC, *not the Secretary*, the authority and responsibility to decide upon the Yucca Mountain license application once site approval has occurred.

b. Abandoning the Yucca Mountain Project Violates the NWPA

Respondents' actions to irrevocably abandon the Yucca Mountain process and terminate the entire Yucca Mountain project, including the license withdrawal, amount to a repudiation of Congress' approval of the Yucca Mountain repository site and Congress' direction that a process to develop that

[15] Accordingly, even if some cataclysm such as a major earthquake were to occur at Yucca Mountain, the Secretary still could not unilaterally withdraw the license application, or, as here, move to withdraw without providing evidence of the site's unsuitability. Instead, the Secretary would be required to present evidence of the changed circumstances to the Commission, and the Commission would ultimately decide whether a construction authorization should be disapproved on the merits.

site be followed. Respondents, however, are without authority or discretion under the NWPA to reverse Congress' decision and mandate.

The NWPA's structure is both a limitation and a command on any other authority the Secretary might employ to terminate consideration of a repository site. First, the NWPA vests DOE with express termination authority at only one juncture: during the pre-decisional site characterization stage. 42 U.S.C. § 10133(c)(3). Even this authority is limited: the termination must be based on a finding that a site is "unsuitable for development as a repository"; the scope of authority is restricted to terminating "characterization activities" (and does not extend to foreclosing future consideration of a site); and the Secretary must report back to Congress within six months on matters that include "the need for any new legislative authority." *Id.* There is no similar grant of authority in the post-decision licensing phase.

As noted above, this creates the presumption that Congress did not intend for such termination authority to exist after a repository site is approved. *Beach*, 523 U.S. at 418-19. Indeed, it would make no sense for Congress to allow the executive greater discretion to terminate a repository site *after* it had been approved by Congress than during the pre-decisional phase when presented with specific factors demonstrating technical unsuitability.

Second, the NWPA's approval process itself displaces any discretion the Secretary might have to make a siting decision. Under the NWPA, the ultimate authority to make a siting decision does not lie with either the Secretary or the President. The prospective host state has authority equal to the executive to "disapprove" a recommended site, 42 U.S.C. § 10135(b), and Congress retains ultimate authority to make a siting decision through a unique resolution process. *See* 42 U.S.C. § 10135(a), (c)-(g). Because Congress has displaced the Secretary's authority to *make* a siting decision, there is no basis to assume that Congress intended to allow the Secretary to *reverse* a siting decision Congress itself has made.

Additionally, the same statutory constraints that preclude DOE from withdrawing its license application also constrain Respondents from reversing Congress' selection of Yucca Mountain as a repository site. As argued above, the provisions in Sections 114(b) and 114(d) leave no room for Respondents or the NRC to terminate the licensing process short of a final determination on the merits of DOE's application.[16] *See supra*. In addition, the NWPA's other post-approval provisions demonstrate Congress' clear expectation that once a repository is

[16] Respondents' decision to terminate the Yucca Mountain project also encroaches on the province of the NRC, from whom the NWPA demands a decision on the merits as to the license application filed by DOE. *See* 42 U.S.C. § 10134(d).

approved, Respondents and the NRC will move forward to develop the repository. *See* 42 U.S.C. § 10134(e)(1) (requiring the Secretary to prepare a project decision schedule "that portrays the optimum way to attain the operation of the repository"); 42 U.S.C. § 10134(e)(2) (any federal agency that cannot comply with the project decision schedule must report to Congress, with a corresponding report from the Secretary); 42 U.S.C. § 10134(d) (based upon project decision schedule, the NRC may extend the three-year timeline imposed on it under the NWPA to reach its decision on DOE's construction authorization application). Each of these legislative mandates reflects Congress' decision to proceed at Yucca Mountain, and only at Yucca Mountain, and circumscribes the authority of the Respondents to proceed otherwise.

Finally, the NWPA's legislative history supports the plain-meaning interpretation that the NWPA prohibits DOE from abandoning the Yucca Mountain process. A Committee Report on the NWPA set forth a "proposed schedule for implementation of the program" ending "[a]round 1995" with "[o]peration of the first national high level nuclear waste repository." H.R. Rep. No. 97-491(I), at 30-31, Addendum at 30-31. In keeping with this expectation, the descriptions of the NWPA's specific provisions are framed in terms of Congress' intention that the NWPA's process will lead to a repository being opened. *See, e.g.*, H.R. Rep. No. 97-491(I), at 52-53 (section-by-section analysis

of Section 114), Addendum at 31C-31D. Nothing in the history of later amendments to the NWPA provides any different view. An amendment in 1987 focused the site characterization process solely on Yucca Mountain, without altering Congress' view on the need for a repository or the process for developing that repository. *See* H.R. Rep. No. 100-495 (1987) (Conf. Rep.), Addendum at 33-35. And the resolution passed in 2002 was for the stated purpose of approving the Yucca Mountain site "*for the development of a repository* for the disposal of high-level radioactive waste and spent nuclear fuel. . . ." H.R. Rep. No. 107-425, at 2 (2002), Addendum at 37 (emphasis added).

Under the NWPA, Congress—and not the Respondents—holds the authority to make a siting decision. Only Congress can reverse that decision. As this Court has previously stated: "Congress has settled the matter, and we, no less than the parties, are bound by its decision." *Nuclear Energy Inst.*, 373 F.3d at 1302.

2. The Decision to Abandon the Yucca Mountain Project Violates NEPA

Even if Respondents had authority to terminate development of the Yucca Mountain repository, Respondents' decision violates NEPA. Respondents have failed to undertake any NEPA evaluation to inform a decision that commits the

agency to abandon an established major federal project in favor of a completely unknown and undefined "different solution."

NEPA requires federal agencies to prepare an EIS with alternatives for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Until an EIS is completed, NEPA's implementing regulations prohibit taking actions that would "[h]ave an adverse environmental impact" or "*[l]imit the choice of reasonable alternatives*." 40 C.F.R. § 1506.1(a) (emphasis added). DOE's own NEPA regulations require it to "complete its NEPA review for each DOE proposal *before making a decision on the proposal*," 10 C.F.R. § 1021.210(b) (emphasis added), and before the agency has "reached the level of investment or commitment likely to determine subsequent development or restrict later alternatives. . . ." 10 C.F.R. § 1021.212(b).

A "major federal action" includes both "concerted actions to implement a specific policy or plan" and "systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.18(b)(3). The decision to terminate a major federal project constitutes a major federal action, *Andrus v. Sierra Club*, 442 U.S. 347, 363 (1979), as does the revision or expansion of an ongoing federal program that alters the operational status quo. *Id.*; *Upper Snake River Chapter of*

Trout Unlimited v. Hodel, 921 F.2d 232, 234-35 (9th Cir. 1990). Further, the decision not to implement an action through termination of a program is a major federal action if the effect of that decision is to alter the environmental status quo. *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1014-15 (9th Cir. 2009); *see also Comm. for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-03 (D.C. Cir. 1979) ("The duty to prepare an EIS normally is triggered when there is a proposal to change the status quo."); *cf. Fund for Animals, Inc. v. Thomas*, 127 F.3d 80, 84 (D.C. Cir. 1997) ("Because the new national policy *maintained* the substantive *status quo*, it cannot be characterized as a 'major federal action' under NEPA.") (emphasis added).

DOE's decision to abandon the Yucca Mountain process and forever terminate the project is a "major federal action" under this authority. DOE's decision has changed the direction of a specific and significant program aimed at resolving an entrenched environmental problem. DOE's decision has altered not just the operational status quo of the Yucca Mountain repository itself, but an entire national program keyed on Yucca Mountain as its centerpiece.

This is nowhere better illustrated than at Hanford. The mission of retrieving high-level radioactive waste from Hanford's aging and leak-prone underground storage tanks is directly tied to the construction of a $12.3 billion Waste Treatment Plant, which in turn is directly tied to the Yucca Mountain

project. Dahl Aff. ¶¶ 29-44, Addendum at 81-89. Terminating the Yucca Mountain project will cause significant regulatory, administrative, and technical issues to be revisited at Hanford, all of which could, among other effects, delay the time-critical mission to retrieve waste from Hanford's tanks. Dahl Aff. ¶ 44, Addendum at 88-89. At a minimum, terminating Yucca Mountain will prolong the surface storage of treated high-level waste at Hanford (with the need for additional facilities, with associated impacts), Dahl Aff. ¶ 45, Addendum at 89-90, and may result in this waste (as well as other waste, including waste from other sites) becoming indefinitely stored at Hanford. Dahl Aff. ¶ 47, Addendum at 90-91.

Based on these consequences, it is incontrovertible that Respondents' decision will "significantly affect[] the quality of the human environment." [17] And, just as at Hanford, the effects of terminating the Yucca Mountain project will be played out at waste storage sites across the country, including the SRS site.

[17] The threshold for whether an EIS must be prepared is relatively low, and it is judged on a reasonableness standard: "'it is enough for the plaintiff to raise substantial questions whether a project may have a significant effect on the environment.'" *California ex rel. Lockyer*, 575 F.3d at 1012 (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why a project's impacts are insignificant. *Blue Mountains*, 161 F.3d at 1212. This statement of reasons is "crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Id.*

Respondents' decision to irrevocably terminate the Yucca Mountain process thus requires evaluation under NEPA.

Furthermore, the decision to employ an alternative to Yucca Mountain is also a major federal action requiring NEPA review. Significant impacts may be presumed with any new alternative(s) implemented in lieu of Yucca Mountain. Indeed, DOE's own NEPA regulations provide that an EIS should be prepared for the "siting, construction, operation, and decommissioning of major treatment, storage, and disposal facilities for high-level waste and spent nuclear fuel, including geologic repositories." 10 C.F.R. § 1021, Appendix D to Subpart D. No less than with the Yucca Mountain repository itself, the siting and operation of an alternative geologic repository will create land, air, water, and transportation impacts that require examination in an EIS.

Respondents decision, however, commits them *today* to one or more of the unknown and unidentified alternatives to Yucca Mountain. Because NEPA requires an EIS to be prepared at the proposal stage, before an agency makes its decision, 42 U.S.C. § 4332(C), 10 C.F.R. § 1021.210(b), these alternatives require analysis under NEPA now, before Respondents have foreclosed Yucca Mountain as a reasonable alternative and committed itself to a different course.

Critically, Respondents have not published a Record of Decision adopting any NEPA analysis to inform its termination decision. Nor have Respondents

undertaken any NEPA analysis with respect to any of the unknown alternatives to Yucca Mountain to which it is now necessarily committed. Respondents have violated NEPA by moving forward with their decision to irrevocably terminate the Yucca Mountain project without first evaluating the impacts of that decision under NEPA.

3. The Decision to Abandon the Yucca Mountain Project is Arbitrary and Capricious as a Matter of Law

Respondents' decision to permanently terminate and abandon the Yucca Mountain project reverses decades of work, billions of dollars of investment, and settled expectations across the country. In addition, this decision was not made based on any identified technical or scientific evidence demonstrating the unsuitability of Yucca Mountain, but because the President ordered that Yucca Mountain is not an option. Addendum at 177. Therefore, Respondents' decision to irrevocably terminate Yucca Mountain is arbitrary and capricious in violation of the APA.

Under the APA, 5 U.S.C. § 706(2)(A), an agency action is arbitrary and capricious if the agency:

> [Hlas relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

"We require only that the agency 'examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'" *Nuclear Energy Inst.*, 373 F.3d at 1289 (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). Under this standard, even if Respondents had some discretion under the NWPA, their decision is arbitrary and capricious because Respondents have failed to articulate any explanation for the decision that rationally ties their choice to any specific facts.

The determination of whether Respondents' decision was arbitrary and capricious is "based on the administrative record." *BFI Waste Sys. of N. Am., Inc. v. FAA*, 293 F.3d 527, 532 (D.C. Cir. 2002). As demonstrated below, the record presented fails to support the challenged decision.

a. The "Record" of the Challenged Decision to Abandon Yucca Mountain Must Consist of Materials to Which the Public had Notice and Opportunity to Comment on Prior to the Decision Being Made, and Must Explain the Reasons for the Decision

Respondents have provided a voluminous index of documents that allegedly comprise the administrative record for their challenged decision to abandon Yucca Mountain. As a threshold matter, "at least the most critical factual material that is used to support the agency's position on review must have been made public in

the proceeding and exposed to refutation." *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984); *accord Chamber of Commerce of U.S. v. Sec. Exch. Comm'n*, 443 F.3d 890, 901 (D.C. Cir. 2006). While it is true that much of Respondents' "record" consists of public documents, none of these documents were referenced in pronouncements of the decision to abandon the statutory process under the NWPA, and Respondents never sought comments on any of the materials. Such a failure is itself evidence of capricious agency action.

b. The "Record" That Respondents Claim Supports its Decision is not the Record That was Developed, Considered, and Relied on by Them When They Decided to Abandon Yucca Mountain

None of the "record" materials were presented to the public as a part of Respondents' decision-making process. As a result, it is impossible to determine whether the "record" as provided fairly represents "the administrative record already in existence, not some new record made initially in the reviewing court." *Baptist Mem. Hosp.-Golden Triangle v. Sebelius*, 566 F.3d 226, 230 (D.C. Cir. 2009) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

A review of Respondents' statements upon making the decision to abandon the Yucca Mountain process indicates, in fact, that the decision had nothing to do with the materials purportedly comprising the "record." For example, on

January 29, 2010, in response to a direct question about the rationale and scientific basis for terminating this process, a government official stated flatly, "We work for the President, we take our direction from the President, the President has been clear that Yucca Mountain is not an option." Addendum at 177. No one at that meeting took the opportunity to elaborate on this stated rationale in any way, let alone point to any of the evidence now included in the "record" submitted by Respondents.

c. None of the Materials in the Record Explain the Basis for the Decision to Abandon the Yucca Mountain Process Under the NWPA

Even if the NWPA on its face does not foreclose the action taken by Respondents to irrevocably terminate the Yucca Mountain process, and even if Respondents actually considered only those documents contained in the "record," their decision would nevertheless be arbitrary and capricious. The "record" does not provide support for the decision based on factors that Congress intended for Respondents to consider. *See Motor Vehicle Mfrs. Ass'n*¸ 463 U.S. at 43; *Am. Radio Relay League, Inc. v. Fed. Commc'n Comm'n*, 524 F.3d 227, 233 (D.C. Cir. 2008).

An agency changing its course must supply a reasoned analysis. *See Nuclear Energy Inst.*, 373 F.3d at 1296. Where, moreover, an agency cites no information to support its own conclusions, such conclusions are arbitrary and

capricious. In *Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1305-06 (9th Cir. 1992), EPA had exempted construction sites of less than five acres from the stormwater discharge permit for rule for construction sites, based upon its unsupported conclusion that "larger sites will involve heavier equipment for removing vegetation and bedrock than smaller sites." *Id.* at 1305. The court held that the agency had cited no particular information to support its conclusion, and therefore EPA's rationale was "inadequate." *Id.* at 1306. The court ruled that the exemption was arbitrary and capricious. *Id.*; *see also Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1054-55 (D.C. Cir. 1999) (EPA's decision to regulate coarse particulate matter (PM) indirectly, using indicator of PM10, was arbitrary and capricious; administrative convenience of using PM10 cannot justify using an indicator poorly matched to the relevant pollution agent), *reh'g granted in part and denied in part*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part and rev'd in part on other grounds*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Tex Tin Corp. v. EPA*, 992 F.2d 353, 354-55 (D.C. Cir. 1993) (EPA's reliance upon generic studies in face of conflicting detailed and specific scientific evidence held arbitrary and capricious).

As noted *supra* at 8 (Section III.A.1.), the NWPA details specific factors for the Secretary and President to consider when making a recommendation for site approval under 42 U.S.C. § 10134(a). These factors include the repository's

physical characteristics, evidence of safety, and the final EIS. *Id.* The previous Secretary of Energy relied explicitly on these factors in his 2002 "Suitability Determination" recommending that Yucca Mountain be approved. *See supra* n.4. Petitioner's review of the "record" has revealed no evidence that Respondents considered the same factors used in approving Yucca Mountain when deciding to reverse that approval. Indeed, the 2002 determination is not even included in Respondents' "record," giving evidence it was not even considered by Respondents. As a result, Respondents' decision is arbitrary and capricious.

Because DOE has failed to articulate any explanation for its decision that rationally ties its choice to any specific facts, its decision is arbitrary and capricious. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 534 (2007) (EPA offers no reasoned explanation for refusal to decide whether greenhouse gases contribute to climate change); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48 ("an agency must cogently explain why it has exercised its discretion in a given manner"); *Natural Res. Def. Council*, 966 F.2d at 1306 (agency cited no particular information to support its conclusion); *cf. Nuclear Energy Inst.*, 373 F.3d at 1297 ("In light of NRC's detailed analysis supporting its decision . . . we believe that it adequately explained its change in course."). Respondents' cryptic conclusions that Yucca Mountain is not a "workable option" and that the nation needs a "different solution" pale in relation to the lengthy and detailed process under the

NWPA that led to Yucca Mountain's selection and Congressional approval. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42 (agency rescinding rule obligated to supply reasoned analysis in same manner as if promulgating rule). This makes it all the more striking that without any explanation, Respondents have rejected obvious and less extreme alternatives to irrevocably terminating the Yucca Mountain project. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 48 (logical less drastic alternative not addressed by agency).

4. Respondents' Decision to Abandon the License Application and Process Mandated by the NWPA Violates the Separation of Powers Doctrine

A withdrawal of the license application is not only directly contrary to the NWPA, it also seeks, under the guise of a construction of the statute by the Respondents, to have the Executive Branch revisit and reverse matters which have already been determined by Congress. Accordingly, Respondents' actions constitute an executive encroachment on legislative power. The Supreme Court has held that:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.
>
> * * *

> The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.

Youngstown Sheet & Tube Co.v. Sawyer, 343 U.S. 579, 587 (1952). The same case holds that the invalidated presidential order was beyond the power of the executive because it did "not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Id.* The Court then held that the presidential order in that case, like the executive actions in the present case, merely:

> sets out reasons why the President believes certain policies should be adopted, [and] proclaims these policies as rules of conduct to be followed. . . .

Id. Justice Jackson, concurring, noted that:

> The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.

Id. at 641.

The Court subsequently has reiterated these principles, holding, for instance, that "[w]e ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986). The present case is

precisely just such a case in which the Executive Branch has disobeyed the commands of Congress, and in which this Court should grant relief from such refusal to carry Congressional policy into execution.

D. Remedies/Relief

1. Declaratory Relief is Appropriate

Declaratory relief is appropriate where the challenged agency conduct is part of an ongoing policy or where the challenged conduct is capable of repetition, yet evading review. *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009). Such relief is appropriate where, as here, "'there is a substantial controversy, between parties having adverse legal interests, of *sufficient immediacy and reality to warrant the issuance of a declaratory judgment*.'" *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1018 (D.C. Cir. 1991) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975)).

Petitioners seek a declaration that Respondents may not unilaterally abandon the process mandated by Congress to establish a geologic repository; that the duty to apply for Yucca Mountain licensure is mandatory; that the duty to apply is not compatible with future withdrawal attempts by DOE; and that Respondents' have an affirmative duty under the NWPA to pursue Yucca Mountain's licensing in good faith. If the Court determines that Respondents do have authority to terminate the Yucca Mountain process, the Court should still

declare that Respondents may not decide to abandon Yucca Mountain without first complying with NEPA, and that the instant decision to abandon the Yucca Mountain process is not supported by the administrative record.

2. Mandamus to Compel the Secretary and DOE to Withdraw their Motion and Continue the License Application is Appropriate

Mandamus is an extraordinary remedy, the issuance of which is guided by equitable principles. Mandamus is available if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *Council of & for the Blind of Del. County Valley, Inc. v. Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983).

The Mandamus Petitioners have a clear right to relief from the Secretary's and DOE's decision to withdraw the license application. Under the NWPA, the abandonment of the Yucca Mountain application would result in SRS becoming a *de facto* permanent storage grounds for high-level nuclear waste, because Yucca Mountain is the only Congressionally approved repository for high-level nuclear waste. *See Nevada v. Dep't of Energy*, 400 F.3d 9, 11 (D.C. Cir. 2005) ("Congress directed the Secretary to consider building a repository *only at Yucca Mountain.*") (emphasis added). Despite Congressional assurance in 42 U.S.C. § 10131(a)(4) that "the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste," the Secretary's and

DOE's action, if allowed, would extinguish the only means Congress has enacted to effectuate this responsibility.

The Secretary and DOE have a clear duty to act. The present controversy is "the paradigm case for mandamus—a ministerial act that an agency has a clear duty to perform." *Weber v. United States*, 209 F.3d 756, 760 (D.C. Cir. 2000). The NWPA provides that "the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site . . . ." 42 U.S.C. § 10134(b). The use of the word "shall" is "a command that admits of no discretion on the part of the person instructed to carry out the directive." *Ass'n of Civilian Technicians Mont. Air Chapter No. 29 v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). Congress has spoken directly on the issue, establishing a carefully crafted statutory scheme that requires DOE to apply for a license and the NRC to reach a final decision on the technical merits of that application. Any interpretation of the NWPA that allows DOE to submit and subsequently withdraw its application prior to NRC's final approval or disapproval on the merits is not permitted. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co*., 512 U.S. 218, 229 (1994) ("An agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear").

Finally, the Mandamus Petitioners have no adequate remedy except to seek mandamus relief from this Court. Congress vested the Courts of Appeals with "original and exclusive jurisdiction" for actions stemming from final decisions of the Secretary, President, or Commission under the NWPA, including final decisions of the Secretary regarding DOE's duty to seek licensure for the Yucca Mountain repository. 42 U.S.C. § 10139(a)(1)(A); *Gen. Elec. Uranium Mgmt. Corp.*, 764 F.2d at 901 (by enacting 42 U.S.C. § 10139, "Congress intended that the court of appeals would have original and exclusive jurisdiction in cases of this sort [controversies over the Secretary's/DOE's duties under the NWPA]"). Congress therefore decided that the Court of Appeals was to provide the remedy in actions relating to DOE's submission of its application for the license with the NRC. Congress' grant of *original* jurisdiction, as opposed to appellate jurisdiction, is consistent with the purpose of the NWPA to provide for expedited review of the final decisions of the President, Secretary, and Commission for their respective decisions under the Act. H.R. Rep. No. 97-491(I), at 30, Addendum at 30 (stating purposes of NWPA include, "[e]xpedited judicial review of court challenges to the program as it is implemented.")

Because the Secretary's and DOE's decision to withdraw the license application is a final decision under the NWPA, this Court has original and exclusive jurisdiction, and only mandamus from the Court can adequately and

authoritatively assure their resumed compliance with their statutory duty to apply for construction authorization. The Mandamus Petitioners ask this Court to issue a writ compelling the Secretary and DOE to rescind the motion to withdraw the License Application, and to resubmit the License Application if already withdrawn at the time of this Court's decision, with such relief being deemed retroactive if necessary to prevent the effect of a withdrawal with prejudice.

3. Injunctive Relief is Appropriate

Petitioners seek to enjoin Respondents, including NRC, from taking actions which contravene their NWPA duties toward licensing and developing the Yucca Mountain repository. To determine whether injunctive relief is appropriate, this Court must "balance the equities and hardships" with "particular regard to whether such relief would further the public interest." *Cobell v. Kempthorne*, 455 F.3d 301, 315 (D.C. Cir. 2006) (citations omitted). Petitioners have demonstrated that Respondents effectively seek to eliminate the only Congressionally approved means to effectuate the federal government's responsibilities regarding high-level waste currently stored in Washington, South Carolina, and elsewhere. This hardship outweighs any hardship on the Respondents caused by complying with the NWPA. Furthermore, because the acts giving rise to this request contravene Congressional directives, the public interest factor weighs towards granting the injunction. *See Population Inst. v. McPherson*, 797 F.2d 1062, 1082 (D.C. Cir.

1986) ("[T]he public interest will be frustrated by the failure to distribute the funds as dictated by Congress."); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985) (noting that "the public interest should be gauged [by the decrees of] Congress, the elected representatives of the entire nation. . . ."); *see also Kennecott Corp. v. Smith*, 637 F.2d 181, 190 (3rd Cir. 1980), (analyzing the public interest factor: "We are obligated to observe the congressional policy choice."). Because a balance of the hardships and public policy favor the grant of injunctive relief to prevent the dismantling of the Yucca Mountain process, injunctive relief is appropriate.

4. Vacatur and Remand of the Decision to Abandon Yucca Mountain Project Pending Compliance With APA and NEPA is Appropriate

Petitioners seek to have this Court vacate the decision to abandon the Yucca Mountain process pending compliance with NEPA and development of a record to support the decision. Vacatur is appropriate where the challenged action is arbitrary and capricious in violation of the APA, *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001), or in violation of NEPA, *Am. Bird Conservancy, Inc. v. Fed. Commc'n Comm'n*, 516 F.3d 1027 (D.C. Cir. 2008). Because Petitioners have demonstrated that Respondents actions are not substantiated under APA or NEPA, vacatur is appropriate.

VIII. CONCLUSION AND PRAYER FOR RELIEF

Petitioners, for the foregoing reasons, pray that this Court issue its Order:

1. Declaring that the Respondents may not abandon the Yucca Mountain process as set forth in the NWPA.

2. Declaring that the Respondents may not withdraw the licensing application and must pursue that application consistent with the NWPA.

3. Declaring that Respondents' actions in ceasing to pursue the license application, including reducing and terminating contractor operations, withdrawing state permit applications, and firing employees, violate their obligations to file and pursue the licensing application under the NWPA.

4. Declaring that President and Secretary may not abandon the Yucca Mountain process and project without first complying with NEPA.

5. Declaring that Respondents' decision to abandon Yucca Mountain project was not supported by the record.

6. Granting mandamus relief directing that the Secretary and DOE must withdraw the motion to withdraw the license application and have a duty to pursue licensure of Yucca Mountain.

7. Vacating the unilateral decision of Respondents to abandon the Yucca Mountain process.

8. Granting injunctive relief to prevent Respondents, including NRC, from taking further actions to abandon the Yucca Mountain process in contravention of the NWPA.

RESPECTFULLY SUBMITTED this 18th day of June, 2010.

s/ *Thomas R. Gottshall*
THOMAS R. GOTTSHALL
ALEXANDER SHISSIAS
S. ROSS SHEALY*
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889
**not admitted*

Attorneys for Aiken County

s/ *Barry M. Hartman*
BARRY M. HARTMAN
CHRISTOPHER R. NESTOR
CHRISTOPHER R. TATE*
JOHN ENGLERT*
K&L Gates LLP
1601 K Street, N.W.
Washington, DC 20005-1600
**not admitted*

Attorneys for Robert L. Ferguson, William Lampson, and Gary Petersen

HENRY DARGAN MCMASTER*
Attorney General for the State of South Carolina
JOHN W. MCINTOSH*
ROBERT D. COOK*
LEIGH CHILDS CANTEY*
Post Office Box 11549
Columbia, SC 29211
**not admitted*

s/ *Kenneth P. Woodington*
WILLIAM HENRY DAVIDSON, II
KENNETH PAUL WOODINGTON
Davidson, Morrison & Lindemann
1611 Devonshire Dr., 2nd Floor
Post Office Box 8568
Columbia, SC 29202-8568

Attorneys for the State of South Carolina

ROBERT M. MCKENNA*
Attorney General

s/ *Andrew A. Fitz*
ANDREW A. FITZ
TODD R. BOWERS
State of Washington
Office of the Attorney General
Post Office Box 40117
Olympia, WA 98504-0117
**not admitted*

Attorneys for State of Washington

s/ *James B. Ramsay*
JAMES BRADFORD RAMSAY
ROBIN J. LUNT
National Assoc. of Regulatory Utility Commissioners
1101 Vermont Ave. N.W., Suite 200
Washington, DC 20005

Attorneys for Intervenor-Petitioner NARUC

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's order of May 13, 2010, setting a limit of 16,000 words on this opening brief of Petitioners, because this brief contains 14,215 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. and Times New Roman type style.

s/ *Thomas R. Gottshall*

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

CERTIFICATE OF SERVICE

I herby certify that on the 18th day of June 2010, a copy of the Brief of Petitioners and Intervenor-Petitioner was filed electronically using the CM/ECF system, which will provide service on the following parties:

Avila, Aaron Peter	aaron.avila@usdoj.gov efile_app.enrd@usdoj.gov aaronpavila@yahoo.com
Bauser, Michael Alan	mab@nei.org
Bowers, Todd R.	toddb@atg.wa.gov
Brabender, Allen Michael	allen.brabender@usdoj.gov efile_app.enrd@usdoj.gov
Cordes, John F., Jr.	John.Cordes@nrc.gov
Durkee, Ellen J.	ellen.durkee@usdoj.gov
Fitz, Andrew Arthur	andyf@atg.wa.gov dianam@atg.wa.gov ecyolyef@atg.wa.gov
Fitzpatrick, Charles J.	cfitzpatrick@nuclearlawyer.com smontesi@nuclearlawyer.com
Gottshall, Thomas Rush	tgottshall@hsblawfirm.com lgantt@hsblawfirm.com bvaldes@hsblawfirm.com
Hartman, Barry M.	barry.hartman@klgates.com klgateseservice@klgates.com
Jones, Lisa Elizabeth	lisa.jones@usdoj.gov efile_app.enrd@usdoj.gov
Lawrence, John W.	jlawrence@nuclearlawyer.com lborski@nuclearlawyer.com
Lunt, Robin Kimlin Jensen	rlunt@naruc.org
Malsch, Martin Guilbert	mmalsch@nuclearlawyer.com cfitzpatrick@nuclearlawyer.com
Ramsay, James Bradford	jramsay@naruc.org
Shissias, Alexander George	ashissias@hsblawfirm.com, efoster@hsblawfirm.com

Woodington, Kenneth Paul	kwoodington@dml-law.com sstafford@dml-law.com jangus@dml-law.com

I herby certify that service of the same was made on the following parties by first class United States mail:

Mr. Kilbourne, James Conwell
U.S. Department of Justice
Environment & Natural Resources Division
PO Box 23795, L'Enfant Plaza Station
Washington, DC 20026-3795

Davidson, William Henry, II
Davidson Morrison & Lindemann, PA
1611 Devonshire Drive, Second Floor
PO Box 8568
Columbia, SC 29202-8568

Ms. Cottingham, Anne Williams
Nuclear Energy Institute
1776 Eye Street, NW
Washington, DC 20006-3708

s/ *Thomas R. Gottshall*
THOMAS R. GOTTSHALL
ALEXANDER SHISSIAS
S. ROSS SHEALY
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889