

NO. 11-1271

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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In Re: AIKEN COUNTY, SOUTH CAROLINA; ROBERT L.  
FERGUSON; WILLIAM LAMPSON; GARY PETERSEN; STATE  
OF SOUTH CAROLINA; STATE OF WASHINGTON; NATIONAL  
ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS;  
NYE COUNTY, NEVADA, Petitioners.

UNITED STATES NUCLEAR REGULATORY COMMISSION,  
and GREGORY B. JACZKO, Chairman of the United States Nuclear  
Regulatory Commission, Respondents.

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**PETITION FOR WRIT OF MANDAMUS  
(AGENCY ACTION UNREASONABLY WITHHELD)**

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**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 this action are: Aiken County, South Carolina; Robert L. Ferguson, William Lampson, and Gary Petersen (the “Ferguson Petitioners”); the State of South Carolina; the State of Washington; the National Association of Regulatory Utility Commissioners (NARUC); and Nye County, Nevada.

The Respondents are the United States Nuclear Regulatory Commission (NRC) and NRC Chairman, Gregory Jaczko.

**2. Intervenors**

There are currently no intervenors in this action.

**3. *Amici Curiae***

There are currently no *Amici* participants in this action.

**B. Ruling Under Review**

This is an original action filed pursuant to 42 U.S.C. 10139(a)(1)(B).

**C. Related Cases**

*In re Aiken County*, No. 10-1050, consolidated with 10-1052, 10-1069, and 10-1082.

## **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,  
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DATED: July 29, 2011

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## **GLOSSARY OF ABBREVIATIONS**

ASLB	Atomic Safety and Licensing Board
AULG	Affected Unit of Local Government
DOE	United States Department of Energy
LSN	Licensing Support Network
NARUC	National Association of Regulatory Utility Commissioners
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act
OCAA	Office of Commission Appellate Adjudication
OIG	Office of Inspector General
SER	Safety Evaluation Report
SRS	Savannah River Site

## I. BACKGROUND

1. Petitioners bring this petition seeking a writ of mandamus (a) to compel the Nuclear Regulatory Commission (NRC) to meet its mandatory statutory obligation under the Nuclear Waste Policy Act (NWPA), 42 U.S.C. §§ 10101-10270, to “consider” the license application for authorization to construct the Yucca Mountain geologic repository for high-level nuclear waste, as specifically required by 42 U.S.C. § 10134(d); and (b) to require the NRC to meet its mandatory statutory obligation to approve or disapprove such license application within three years of its submission, an obligation that was required to be met by June 3, 2011.

2. The Yucca Mountain license application was submitted by the Department of Energy (DOE) on June 3, 2008, and the NRC began its consideration of the license application. This consideration involved two related activities: (a) technical review of the license application by NRC staff and (b) adjudication of contested issues by the NRC’s Atomic Safety and Licensing Board (ASLB). DOE, however, moved to withdraw the license application on March 3, 2010. On June 29, 2010, DOE’s motion to withdraw was denied by the ASLB. The next day, the NRC *sua sponte* ordered expedited briefing regarding review of the ASLB decision. However, the NRC has failed to issue its decision regarding review of the ASLB order. At the same time, the NRC has terminated its

own staff's technical review of the license application and the adjudication of contested issues in the licensing proceeding has come to an effective standstill.

3. Although the NWPA mandates that NRC "shall consider" the license application, NRC has unreasonably and unlawfully withheld its consideration by (a) withholding its decision regarding DOE's motion to withdraw and (b) terminating its staff's technical review of the license application and allowing effective suspension of the adjudication before the ASLB.

4. Although the NWPA mandates that NRC "shall issue a final decision approving or disapproving" the construction authorization within three years of submission, the NRC has failed to issue a decision by June 3, 2011 or comply with the requirements to extend the deadline by one year.

## **II. ISSUES PRESENTED**

- Has the NRC unreasonably withheld its consideration of the Yucca Mountain license application by:
  - i. failing to issue its decision regarding review of the ASLB's order?
  - ii. terminating its staff review of the Yucca Mountain license application and allowing effective suspension of the ASLB adjudication?

- Has the NRC unreasonably delayed its decision to approve or disapprove issuance of a construction authorization for the Yucca Mountain repository by failing to render a decision within the three years provided by statute?

### **III. JURISDICTION AND VENUE**

5. This Court has jurisdiction over the subject matter of this action pursuant to NWPA Section 119(a)(2), 42 U.S.C. § 10139(a)(1)(B), which provides the United States courts of appeals shall have original and exclusive jurisdiction over any civil action: “alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part [42 U.S.C. §§ 10131-10145]. . . .”

6. This Court has jurisdiction to issue a writ of mandamus to compel an agency action that has been unreasonably withheld or delayed pursuant to 28 U.S.C. § 1651(a) and 5 U.S.C. § 706(1).

7. Venue is proper in this Court pursuant to the NWPA Section 119(a)(2), 42 U.S.C. § 10139(a)(2), which provides: “[t]he venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.”

#### IV. THE PARTIES

8. Aiken County is the location of a significant segment 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. Aiken County owns substantial real property in close proximity to SRS. *See* Ex. 1 (Affidavit of J. Clay Killian, Aiken County Administrator). Yucca Mountain is the site selected for the long-term disposal of SRS's radioactive materials. DOE's environmental 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 impacts."<sup>1</sup> The SRS site is one of the five referenced DOE sites. Aiken County therefore has a concrete interest that is impaired by the Respondent's withholding actions required by the NWPA regarding the license application.

9. Petitioners Robert L. Ferguson, Gary Petersen, and William Lampson are individuals who have lived and worked near the Hanford Site in Washington State for decades, and who are presently, and will continue to be, harmed by the "temporary" storage of high-level radioactive waste there. *See* Ex. 2 (Declarations

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<sup>1</sup> *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, p. S-82, available at: [http://nepa.energy.gov/nepa\\_documents/EIS/EIS0250/RGD\\_SUMM/RGSUM\\_sum\\_conclus12.pdf](http://nepa.energy.gov/nepa_documents/EIS/EIS0250/RGD_SUMM/RGSUM_sum_conclus12.pdf) (last visited July 28, 2011).

of Robert Ferguson, William Lampson, and Gary Petersen). As with the other petitioners, each and every intervening day that Respondents withhold actions required by the NWPA regarding the Yucca Mountain license application 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. Petitioners' injuries are actual, concrete injuries that are caused by Respondent's withholding 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.

10. South Carolina is also home to SRS. It is an owner of adjacent and nearby property, including at least one road within the site. *See* Ex. 3 (South Carolina Standing Affidavit). South Carolina therefore has the same concrete injury as Aiken County as a result of Respondents' withholding of actions required by the NWPA regarding the Yucca Mountain license application. 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 approval 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 DOE's activities at SRS. South Carolina "therefore has a concrete interest that NEPA was designed to protect; as such, [the State] possesses the requisite 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. South Carolina also has an interest as an environmental regulator. *See* Department of Energy, Savannah River Site High-Level Waste Tank Closure Final Environmental Impact Statement, DOE/EIS-0303 (2002) at 7-2, 7-8, available at [http://nepa.energy.gov/nepa\\_documents/EIS/eis0303/feis/CHAP\\_7.PDF](http://nepa.energy.gov/nepa_documents/EIS/eis0303/feis/CHAP_7.PDF) (last visited July 28, 2011) (collecting state statutes and regulations imposing regulatory oversight).

11. Washington has an interest as a property owner, a resource manager, a regulator, and a sovereign in the management and disposition of approximately 56 million gallons of untreated high-level radioactive tank waste currently stored at DOE's Hanford Nuclear Reservation (Hanford) located in Washington. *See generally* Ex. 4 (Affidavit of Suzanne L. Dahl-Crumpler). 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.* ¶¶ 22-23, 25. The Hanford tank waste, as well as other waste in Washington, is presumptively slated for

disposal at Yucca Mountain after treatment and the treatment process for tank waste has been designed to meet Yucca Mountain specific standards. *Id.* ¶¶ 41-48, 51. Therefore, Washington has compelling interests that have been, and will continue to be, adversely affected by Respondents' withholding of actions required by the NWPA regarding the Yucca Mountain license application.

12. The National Association of Regulatory Utility Commission (NARUC) has been consistently recognized by Congress and courts as the proper party to represent the interests of state utility commissioners. *See, e.g., NARUC v. U.S. Dep't of Energy*, 851 F.2d 1424 (D.C. Cir. 1988). NARUC members, many located within 10-40 miles of working reactors, have recognized statutory charges to protect the health, safety, and economic interests of electric ratepayers who have already paid, through rates, more than \$17 billion into the Nuclear Waste Fund, in part, to support the process of reviewing a permanent repository.<sup>2</sup> All these interests are directly impacted by the Respondents' failure to comply with the NWPA. *See generally* Ex. 5 (Affidavit of Phyllis Reha).

13. Nye County, Nevada, the host county for the proposed Yucca Mountain nuclear waste repository, is recognized by the NWPA as the "affected

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<sup>2</sup> *See* Nuclear Energy Institute, *Nuclear Waste Fund Payment Information by State Through Q1 FY2011*, available at <http://www.nei.org/resourcesandstats/documentlibrary/nuclearwastedisposal/graphicsandcharts/nuclearwastefundpaymentinformationbystate/> (last visited July 28, 2011).

unit of local government” with “jurisdiction over the site of a repository” (AULG). *See, e.g.*, 42 U.S.C. §§ 10101(31), 10136(c), 10137(d). Congress determined that the AULG must be allowed by DOE to participate in oversight of all activities and operations at the repository. 42 U.S.C. § 10137(d). The AULG also has standing as a matter of right in the licensing proceeding. 10 C.F.R. § 2.309(d)(2)(iii). Nye County exercised these rights under the NWPA and has conducted numerous scientific and technical reviews at the site, funded pursuant to Section 116 of the NWPA. 42 U.S.C. § 10137(d). *See generally* Ex. 6 (Affidavit of Lewis Darrell Lacy). County residents have worked at the site since the inception of the Yucca Mountain characterization. *Id.* On May 11, 2009, the NRC granted Nye County’s petition to intervene as a matter of right in the licensing proceeding and admitted all but one of Nye County’s contentions.<sup>3</sup> Nye County has been provided millions of dollars of funding under Sections 116 and 117 of the NWPA and has used that funding to assist in the characterization of the site and to conduct scientific and technical oversight of activities at the repository site. The County has already been injured by delays caused by NRC’s failure to act. Financial assistance under Sections 116 and 117 of the NWPA, jobs for Nye County citizens, and support for attendant infrastructure and other improvements in the County will be improperly

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<sup>3</sup> *See* Order of ASLB (Identifying Participants and Admitted Contentions), *In re U.S. Dep’t of Energy*, NRC No. 63-001, LBP No. 09-06 (May 11, 2009).

discontinued if the Yucca Mountain repository project is unjustifiably terminated. Nye County citizens would serve as first responders, and would be among the first to be harmed, should an accident occur at the site. The County wants the repository built and operated in a safe manner and only continuation of the NRC licensing proceeding can determine if that is possible. Nye County continues to rely upon NWPA grant and funding assistance to protect its citizens' safety and also has an interest in preventing the repository from being abandoned without adequate safety justification and in preserving the economic and other benefits from the safe operation of the repository that are provided by the NWPA for the AULG. Thus, Nye County's stake in the license adjudication exists regardless of NRC's decision on construction authorization.

14. Respondent NRC is the federal agency mandated by Congress under the NWPA to consider the license application for a nuclear repository and issue a final decision approving or disapproving the issuance of said license.

15. Respondent Gregory B. Jaczko is Chairman of the NRC and the agency's principal executive officer.

## **V. FACTS AND GOVERNING LAW**

16. 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).

17. Under Public Law 107-200, passed July 23, 2002, the Yucca Mountain site received official site designation as the site of the nation’s geologic repository. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135).

18. The official site designation required DOE to submit an application to construct a high-level waste geologic repository at Yucca Mountain pursuant to 42 U.S.C. § 10134(b) (“the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site”).

19. On June 3, 2008, DOE submitted to the NRC its license application for construction authorization for the Yucca Mountain geologic repository. 73 Fed. Reg. 34,348 (June 17, 2008) (corrected in 73 Fed. Reg. 40,883 (July 16, 2008)).

20. DOE’s application is a “17-volume, 8600-page construction authorization . . . over two decades in the making and undergirded by millions of pages of studies, reports, and related materials at a reported cost of over 10 billion dollars.” Order of ASLB, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 1-2 (June 29, 2010).

21. The NRC's review of DOE's application occurs through two concurrent processes. See "Fact Sheet on Licensing Yucca Mountain," available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-yucca-license-review.html> (last visited July 28, 2011). In the first process, the technical staff of the NRC reviews the entirety of DOE's application to determine whether the application complies with applicable NRC regulations. *Id.* More than 100 staff and contractors with expertise in disciplines including geochemistry, hydrology, climatology, structural geology, volcanology, seismology, health physics, and engineering are involved in this review, which includes testing DOE's scientific and engineering analyses. *Id.*; see also "Acceptance and Safety Review of the Yucca Mountain Geologic Repository," available at <http://www.nrc.gov/waste/hlw-disposal/licensing/acceptance-safety.html> (last visited July 28, 2011). The product of the staff's review is a safety evaluation report (SER), issued by the NRC staff in volumes. The SER contains the staff's findings on the repository design, determines whether the proposed facility will meet NRC regulations to protect public health and safety, and determines whether construction of the facility may be authorized. *See id.*

22. The second process involves an adjudicatory hearing before the ASLB in which parties with standing may challenge technical and legal aspects of DOE's application. See "Fact Sheet on Licensing Yucca Mountain,"

available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-yucca-license-review.html> (last visited on July 28, 2011). The adjudicatory process involves only admitted contentions (i.e., issues related to the license application) put forth by those petitioners accepted as parties. *See id.* The NRC staff participates in the adjudication, with its position based on the SER. *Id.*

23. After the NRC staff reviews DOE's application and the ASLB completes its hearing and issues a decision, the NRC (Commission itself) will decide whether to authorize DOE to construct a high-level waste repository at Yucca Mountain. *See* "Licensing Process for the Yucca Mountain Geologic Repository," available at <http://www.nrc.gov/waste/hlw-disposal/licensing/licensing-process.html> (last visited July 28, 2011); *see also* "NRC's Process for Deciding Whether or Not to Authorize Construction of a Repository at Yucca Mountain, Nevada," available at <http://www.nrc.gov/waste/hlw-disposal/licensing/acceptance-safety/timeline.html> (last visited July 28, 2011).

24. In order to accomplish its staff review, formal adjudication, and final Commission decision within the timeline of 42 U.S.C. § 10134(d), the NRC has promulgated a Schedule for the Proceeding on Consideration of Construction Authorization for a High-Level Waste Geologic Repository. *See* 10 C.F.R. Part 2, Appendix D.

25. In September 2008, the NRC staff found that the application contained sufficient information to begin its detailed technical review. Accordingly, the application was docketed for staff review and a notice of hearing was issued for the ASLB adjudication. 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).

26. By early 2010, the ASLB had begun its review and adjudication of the Yucca Mountain application, having admitted approximately 300 contentions for hearing and initiating a discovery phase. *See* Order of ASLB (Identifying Participants and Admitted Contentions), *In re U.S. Dep't of Energy*, NRC No. 63-001, LBP No. 09-06 (May 11, 2009). However, on March 3, 2010, at the direction of the President, DOE filed a motion to withdraw its application with prejudice. *See* Department of Energy Motion to Withdraw, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (Mar. 3, 2010).

27. Petitioners Aiken County, NARUC, South Carolina, and Washington intervened in the licensing proceeding expressly for the purpose of opposing DOE's withdrawal motion as contrary to the NWPA. Petitioner Nye County, an original party to the license proceeding, also opposed DOE's motion on the same grounds.

28. On April 23, 2010, the NRC directed the ASLB to resolve DOE's motion expeditiously, stating that "the prudent course of action is to resolve the matters pending before our agency as expeditiously and responsibly as possible." The NRC directed the ASLB to resolve the motion within 45 days. Memorandum and Order, *In re U.S. Dep't of Energy*, NRC No. 63-001 (Apr. 23, 2010).

29. On June 29, 2010, following expedited briefing and oral argument by the participants in the licensing proceeding, the ASLB denied DOE's motion to withdraw the Yucca Mountain license application. Order of ASLB, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (June 29, 2010).

30. The following day, the NRC *sua sponte* issued an order requesting that the parties file concurrent opening and responsive briefing in consecutive weeks on whether the NRC should review the ASLB's decision, and if so, whether to reverse or affirm it. Order, *In re U.S. Dep't of Energy*, NRC No. 63-001 (June 30, 2010).

31. On July 2, 2010, the NRC asked this Court to suspend a related proceeding challenging the President's and DOE's decision to abandon Yucca Mountain, stating that the NRC had established an "expedited briefing schedule" for review of the ASLB order and asserting that "[h]olding the cases in abeyance until the Commission renders a final decision in response to that briefing would likely crystallize, narrow, or even wholly eliminate the issues . . . conserving both judicial

and the parties' resources." See Federal Respondents' Motion to Vacate Briefing and Oral Argument Schedule and Hold Cases in Abeyance, *In re Aiken County*, Case No. 10-1050 (July 2, 2010).

32. Briefing to the NRC regarding review of the ASLB's denial of DOE's motion to withdraw was completed by participants in the licensing proceeding on July 19, 2010. 2010 Annual Report on Commission Adjudication, SECY-11-0008 ("OCAA Report") at Attachment: "Commission Adjudicatory Decisions, January–December 2010" p. 9 (Jan. 13, 2011).<sup>4</sup>

33. Twenty-two days later, on or about August 10, 2010, the NRC's Office of Commission Appellate Adjudication (OCAA) had "prepared alternative draft decisions addressing appeals of the [ASLB's] decision on the issue of the Department of Energy's (DOE's) motion to withdraw its application to construct a geologic repository at Yucca Mountain, Nevada." *Id.* at 3.

34. All four NRC Commissioners voting on the license withdrawal issue<sup>5</sup> voted shortly thereafter. NRC Commissioner Svinicki voted on August 25, 2010. Ex. 7 (Office of Inspector General, Nuclear Regulatory Commission, "NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca

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<sup>4</sup>Available at <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2011/2011-0008scy.pdf> (last visited July 28, 2011).

<sup>5</sup> NRC Commissioner Apostolakis has recused himself from voting in this proceeding. See Notice of Recusal (July 15, 2010).

Mountain Repository License Application,” OIG Case No. 11-05) at 33. NRC Commissioner Ostendorff voted on August 26, 2010. *Id.* NRC Commissioner Magwood voted on September 15, 2010. *Id.* NRC Chairman Jaczko initially voted on August 25, 2010, withdrew his vote, and then re-voted on October 29, 2010. *Id.*

35. Two days after NRC Chairman Jaczko voted for the second time, the OCAA provided the Commission with a draft affirmation order detailing the status of the NRC commissioners’ vote. Ex. 7 at 33.

36. Since November 1, 2010, the draft affirmation order of NRC’s decision has sat in abeyance and could remain in limbo until the NRC is presented with a forcing function such as litigation, according to NRC’s general counsel. Ex. 7 at 35.

37. As of December 31, 2010, the OCAA’s draft decision on the Yucca Mountain license application was the only draft decision pending before the NRC. OCAA Report at 5.

38. The NRC has failed to follow its own internal policies and procedures regarding the scheduling of an affirmation session and formal decision. Ex. 7 at 31-37.

39. At a May 4, 2011, Congressional hearing, NRC Commissioners Svinicki, Magwood, and Ostendorff indicated that their votes have not changed, and that the Commissioners view their votes as final. House Committee on Science,

Space, and Technology Majority Staff, *Yucca Mountain: The Administration's Impact on U.S. Nuclear Waste Management Policy* ("SST Committee Report"), June 2011, at 36-37.<sup>6</sup>

40. The NRC Chairman has continued to block consideration of ASLB's decision to deny DOE's Motion to Withdraw the License Application. SST Committee Report at 37. During an investigation by the NRC's Office of Inspector General, one Commissioner informed the investigator that NRC Chairman Jaczko stated "that he would not take action until a majority of the Commission agreed to suspend the ASLB's adjudicatory proceedings." Ex. 7 at 36.

41. Under the NRC's internal procedures, the effect of a 2-2 Commission vote is to deny a request for Commission action. *See* Internal Commission Procedures, Chapter III ("Voting"), available at <http://www.nrc.gov/about-nrc/policy-making/internal.html#Meetings> (last visited July 28, 2011).

42. The NRC has still has not issued a formal final decision regarding the ASLB's order denying DOE's motion to withdraw.

43. Comments from NRC Chairman Jaczko indicate that any efforts by the NRC to issue a decision on the motion to withdraw have been abandoned, rather than merely delayed. In May 2011, Chairman Jaczko testified before Congress that

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<sup>6</sup> Available at <http://science.house.gov/letter/staff-report-yucca-mountain-safety> (last visited July 28, 2011).

“[w]e will be done with closeout by the end of this fiscal year. At that time, if those legal questions are unresolved, they are unresolved.” Ex. 8 (Congressional Hearing Transcript, May 4, 2011).

44. The lack of a decision from the NRC regarding DOE’s withdrawal motion has resulted in an effective standstill of the Yucca Mountain license adjudication in the 13 months since the ASLB’s order denying DOE’s motion to withdraw, including a cessation of deposition discovery during that period. See Ex. 9 (Order of ASLB, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (June 10, 2011)) (“if and when the adjudicatory process actively resumes”).

45. At the same time the NRC’s decision on the ASLB’s decision has been pending, and notwithstanding the denial of DOE’s motion to withdraw, the NRC Chairman unilaterally directed termination of the NRC Staff’s review of the Yucca Mountain license application. Ex. 7 at 44. The Chairman “strategically provided three of the four other Commissioners with varying amounts of information about his intention to proceed to closure,” and has terminated the NRC’s review of the license application although “a majority of the Commissioners did not think the conditions to proceed to closure (i.e. withdrawal or suspension) had been met.” Ex. 7 at 44-45.

46. As part of the NRC Chairman's unilateral decision to cease consideration of the Yucca Mountain license application, the Chairman prevented the release of the NRC staff's Safety Evaluation Report Volume 3, "Review of Repository Safety After Permanent Closure" ("SER-3"), although a majority of NRC Commissioners disagreed with the Chairman's direction to stop work on SER-3. Ex. 7 at 44-45. The publication of SER-3 is essential to consideration of the license application and thus fulfillment of the NRC's statutory obligation to issue a final decision approving or disapproving issuance of a construction authorization. *See* Ex. 7 at 45 (stating that decision to stop work on SER is a factor preventing the agency from meeting its statutory obligation); Order of ASLB, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (July 21, 2009), at 2 ("Few non-NEPA contentions can be adjudicated before relevant portions of the SER are issued."); Order of ASLB, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (Feb. 25, 2011), at 3 ("when the Staff's SER becomes available, the Board intends to move this proceeding forward as expeditiously as circumstances permit").

47. The ASLB adjudication is supported by a web-based Licensing Support Network (LSN) that is a database for all documentation regarding the application, including discovery and the hearing process. *See* 69 Fed. Reg. 32,836-37 (June 14, 2004). The LSN is central to the adjudicatory proceeding

before the ASLB, and is also critical to the NRC staff's review of the application's technical merits. This importance is underscored by 10 C.F.R. § 2.1007(a)(2), which states that access to the LSN "shall be provided" by the NRC through its website. Despite this requirement, the LSN will be shutdown on August 5, 2011, as part of the NRC's termination of license review. The ASLB has prepared for this shutdown. See Ex. 10 (Order of the ASLB, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (July 18, 2011)), Ex. 11 (Memorandum from Daniel J. Graser, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (July 26, 2011)), Ex. 12 (Order of the ASLB, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (July 28, 2011)).

48. An illustrative depiction of the process and timeline for the NRC's consideration of DOE's application, together with a representation of the NRC's current status in that regard, is attached as Exhibit 13 to this Petition.

## **VI. REASONS WHY THE WRIT SHOULD ISSUE**

### **A. Standard**

Mandamus is an extraordinary remedy, but it is appropriately imposed where an agency has refused to perform a statutory duty or has unreasonably delayed in doing so. *In re Aiken County*, \_\_\_ F.3d \_\_\_, 2011 WL 2600685 at \*5 (D.C. Cir. 2011); *Sierra Club v. Thomas*, 828 F.2d 783, 793-94 (D.C. Cir. 1987). As this

Court has explained: “When agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates. And even when agency delay or recalcitrance does not rise to a level that justifies either of the above courses, [the] APA empowers the court to evaluate the pace of the agency decisional process and to order expedition if the pace lags unreasonably.” *Pub. Citizen Health Research Group v. FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) (citing 5 U.S.C. §§ 555(b), 706(1)) (case citations omitted).

In assessing whether to issue the writ, the Court must determine whether the agency has a duty to act and, if so, whether it has unreasonably delayed in complying with that duty. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004). Whether a delay is reasonable is judged by application of the factors laid out in *Telecommunications Research and Action Center v. Federal Communications Center*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*). *In re Aiken County*, 2011 WL 2600685 at \*5. These can be summarized as: (1) the time agencies take to make decisions, which is subject to a ‘rule of reason’ and any timetables imposed by Congress; (2) the nature and extent of the interests prejudiced by the delay, with any delays impacting human health and welfare considered less tolerable; and (3) the impact, if any, of issuing the writ on the

agency's other duties or competing priorities. Finally, although "there is 'no per se rule on how long is too long' to wait for agency action . . . a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers*, 372 F.3d at 419 (quoting *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992)).

**B. NRC's Duty to Consider the Yucca Mountain License Application**

The NRC has a clear and specific statutory duty to *consider* the Yucca Mountain license application. "[W]e note that the NWPA requires the Commission to review the application, *see* 42 U.S.C. sec. 10134(d) ('The Commission shall consider an application for a construction authorization for all or part of a repository . . . .') . . . ." *In re Aiken County*, 2011 WL 2600685 at \*5. As discussed above at paragraphs 21-23, consideration of the license application includes detailed technical review by the NRC staff and an adjudication of contested issues by the ASLB, followed by a final decision by the Commission itself. The NRC is unreasonably withholding its consideration of the license application by (a) unreasonably delaying or withholding its decision on review the ASLB's order denying DOE's motion to withdraw, and (b) terminating its staff's review of the Yucca Mountain license application and permitting effective suspension of the ASLB adjudication.

## 1. Withholding Review of ASLB Order

The NRC's failure to issue a decision on whether it will review, and if so, reverse or uphold the June 29, 2010, ASLB order denying DOE's motion to withdraw is unreasonable. Briefing to the NRC by participants in the licensing proceeding has been completed for over a year, and all Commissioners voted on the issue by October 29, 2010. Although "there is 'no per se rule on how long is too long' to wait for agency action . . . a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers*, 372 F.3d at 419 (quoting *In re Int'l Chem. Workers Union*, 958 F.2d at 1149). The NRC required the ASLB to resolve the very same issue in the first instance within 45 days. Ultimately, the ASLB was able to conduct briefing, hold oral argument, and decide the motion in approximately 75 days.

The day after the ASLB's denial of DOE's motion to withdraw, the NRC itself solicited expedited briefing on the issue of whether it should review, and if so whether it should reverse or affirm the ASLB order. After ordering this briefing, the NRC has unreasonably delayed its decision. *See* ¶¶ 32-43 above. Despite representations to this Court nearly a year ago that the NRC's decision was forthcoming, *see* paragraph 31 above, no decision has been issued. Indeed, the NRC's own general counsel has indicated that litigation such as the instant petition would be necessary in order for the NRC to release its decision. *See* ¶ 36 above.

Furthermore, the NRC's delay is unjustifiable and unreasonable in light of the speed with which Congress directed the NRC to proceed with the underlying licensing proceeding pursuant to the NWPA. The NWPA mandates that the NRC will consider the application and issue a final decision approving or disapproving the license within three, or at most four, years. 42 U.S.C. § 10134(d). The NRC has promulgated a schedule for accomplishing this task that, based on the sheer scope of task, already consumes the entire period allowed even without the current inexplicable 13-month hiatus. *See* 10 C.F.R. Part 2, Appendix D. Resolution of DOE's motion to withdraw the license application is a necessary step in the critical path towards the NRC's final decision on the merits of the underlying license application, and this internal decision had itself already consumed over a year. Such delay is manifestly unreasonable. *See TRAC*, 750 F.2d at 80 (statutory timetable or other indication of the speed with which Congress expects the agency to proceed in the enabling statute is relevant to reasonableness of delay).

The NRC's unreasonable delay affects the public interest in the orderly and timely consideration of the Yucca Mountain licensing application, as dictated by Congress. *Cuomo v. United States NRC*, 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 . . ."). The NRC's unreasonable delay also affects the strong interests of Petitioners who intervened in the Yucca

Mountain licensing proceeding to litigate the very issue being unreasonably delayed, and to protect themselves from the harms caused by delay in construction of a permanent repository as provided for by law. *TRAC*, 750 F.2d at 80 (“the court should also take into account the nature and extent of the interests prejudiced by delay”).

## **2. Terminating Review of Yucca Mountain License Application**

The NRC’s termination of consideration of the license application by the technical staff of the agency is per se unreasonable in light of the NRC’s duty under the NWPA to consider the license application, and in light of the denial of DOE’s motion to withdraw. This “agency recalcitrance . . . in the face of a clear statutory duty” requires that the Court use its “power to order the agency to act to carry out its substantive statutory mandate[.]” *Pub. Citizen*, 740 F.2d at 32; *see also In re Bluewater Network*, 234 F.3d 1305 (D.C. Cir. 2000).

DOE’s license application, which the NWPA requires the NRC to consider, is a “17-volume, 8600-page construction authorization . . . over two decades in the making and undergirded by millions of pages of studies, reports, and related materials at a reported cost of over 10 billion dollars” Order of ASLB, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04, at 1-2 (June 29, 2010). The NRC has previously recognized the magnitude of its duty to consider the license application. *See* Order of Commission, *In re U.S. Dep’t of*

*Energy*, NRC No. PAPO-00, at 1-2 (Nov. 10, 2004) (“Review of an application likely will prove an immense undertaking. DOE has generated millions of Yucca Mountain-related documents since Congress charged it with responsibility for the repository. What’s more, Congress has imposed a three-year deadline for the licensing proceeding.”); Order of Commission, *In re U.S. Dep’t of Energy*, NRC No. 63-001 (June 30, 2009), at 2 (“the most extensive proceeding in the agency’s history”).

Notwithstanding the NRC’s admission that review of the license application—especially in light of the NWPA’s statutory timeline—would be a challenge, the NRC has nonetheless completely terminated its own staff’s review of the license application while refusing to rule on the DOE motion, even though its own adjudicatory body determined that the DOE motion should be rejected. The NRC did so without a vote of the Commissioners, and a majority of the Commissioners have indicated that the conditions to terminate review have not been met. *See* ¶¶ 45-46 above. The NRC has further allowed the ASLB adjudication to come to an effective standstill, with the adjudication’s central LSN now preparing for shutdown. *See* ¶¶ 44, 46-47 above. Because the NRC’s unreasonable withholding of its mandatory review affects human health and welfare, *see* paragraph 16 above, the NRC’s inaction is less tolerable than delay that affects mere economic regulation. *TRAC*, 750 F.2d at 80.

**C. The NRC’s Duty to Issue a Final Decision Approving or Disapproving the Yucca Mountain License Application**

The NWPA provides “that the Commission *shall* issue a *final decision* approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the *submission* of such application . . . .” 42 U.S.C. § 10134(d) (emphasis added). The Court acknowledges that DOE “submitted” its Yucca Mountain application in June 2008, and that, thus, “the three year statutory deadline . . . has potentially already come and gone.” *In re Aiken County*, 2011 WL 2600685 at \*5.

DOE has “suggested that the . . . deadline should toll from September 15, 2008, the date when the application was *docketed*, rather than from when the application was *submitted*.” *Id.* at 5 n.1. However, the starting point for statutory interpretation—the statute’s plain language—establishes that the statutory deadline began to run in June 2008, when DOE submitted its application.<sup>7</sup> Indeed, the NRC itself has previously recognized that the statutory deadline is tied to the submission of the license application. *See* Order of Commission, *In re U.S. Dep’t of Energy*,

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<sup>7</sup> Alternatively, even if the “submission” date is taken to be September 8 or 15, 2008, the NRC will have still failed to comply with the three-year deadline, which will end in September 2011. It is physically impossible for the NRC to conclude its consideration by that date, given the current status of the agency’s progress and the scope of tasks that would need to be completed. *See* ¶¶ 20-24, 44-48 above. The same holds true even if the NRC were to comply with the reporting requirements in 42 U.S.C. § 10134(d) and (e) to extend the agency’s deadline by one calendar year.

NRC No. PAPO-00, at 2-3 (Feb. 2, 2004) (“The purpose of the regulations is to enable the Commission to meet its statutory obligation to complete its examination of the application within three years of its filing.”); Order of ASLB, *In re U.S. Dep’t of Energy*, NRC No. PAPO-00, at 4 (Aug. 31, 2004) (stating that “the three-year deadline does not begin until after DOE submits its license application”).

The NRC has an express statutory obligation to issue a decision on the merits within a defined timeframe, which this Court has recognized. *In re Aiken County*, 2011 WL 2600685 at \*5. The Commission should have issued its final decision on the merits on June 3, 2011. It has not. Instead, it has taken numerous steps demonstrating that it *never* intends to issue a decision on the merits of DOE’s application. See ¶¶ 36-48 above. The Court should therefore issue a writ of mandamus compelling the NRC to issue a final merits-based decision approving or disapproving DOE’s application for a construction authorization.

## **VII. RELIEF SOUGHT**

WHEREFORE, Petitioners pray that this Court issue its Order:

- a. Determining that the NRC has unreasonably delayed consideration of the license application;
- b. Compelling the NRC to immediately resume consideration of the license application by reinstating the technical staff review;

- c. Compelling the NRC to issue its final decision regarding review of the June 29, 2010, ASLB order denying DOE's motion to withdraw the Yucca Mountain license application within 30 days;
- d. Determining that the NRC has unreasonably delayed approving or disapproving of the license application;
- e. Compelling the NRC to provide this Court with a proposed schedule containing appropriate milestones and a date certain on which a decision approving or disapproving the Yucca Mountain license application will be issued;
- f. Directing the NRC to update the Court on the status of the matter every 60 days;
- g. Awarding Petitioners reasonable costs, litigation expenses, and attorney fees associated with this litigation as provided by the Equal Access to Justice Act, 28 U.S.C. § 2412 or other applicable law; and
- h. Granting such other and further relief as this Court deems just and proper.

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RESPECTFULLY SUBMITTED this 29th day of July 2011.

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

This brief complies with the page limitations of Fed. R. App. P. 21(d), because this petition consists of 30 pages, excluding the parts of the petition exempted.

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.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July 2011, a copy of the Petition for Writ of Mandamus (Agency Action Unreasonably Withheld) was served by email and United States Mail upon the following:

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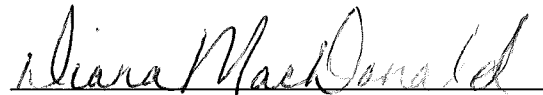
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DIANA MacDONALD  
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## CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July 2011, a copy of the Petition for Writ of Mandamus (Agency Action Unreasonably Withheld) was served by hand delivery upon the following:

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