

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

IN RE: AIKEN COUNTY,)	No. 10-1050
)	
Petitioner.)	
)	
)	
ROBERT L. FERGUSON, et al.,)	
)	
Petitioners)	
v.)	
)	No. 10-1052
UNITED STATES DEPARTMENT)	
OF ENERGY, et al.,)	
)	
Respondents.)	
)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Petitioner)	
v.)	
)	No. 10-1069
UNITED STATES DEPARTMENT)	
OF ENERGY, et al.,)	
)	(CONSOLIDATED)
Respondents.)	
)	
)	

**AIKEN COUNTY’S REPLY
TO MOTIONS FOR EXPEDITED CONSIDERATION**

Aiken County concurs with Petitioners State of South Carolina (“South Carolina”) and Robert L. Ferguson, *et. al.*, (“Ferguson”) that expedited consideration is called for in proceedings before this Court concerning the Yucca Mountain high-level waste geologic repository. However, Aiken County did not make such a motion and submits that its Petition regarding the license application is ready for a ruling by this Court without further briefing. The merits of the parties' positions as to this straightforward issue of statutory construction in the Aiken County case are so clear as to justify action by the Court at this time. No further briefing is needed from any party, nor is it allowed without an order from this Court. Rule 21, FRAP. Nothing in the responses of the Department of Energy (“DOE”) or the State of Nevada changes the status of Aiken County’s petition, *i.e.* ready for disposition by this Court.

On February 19th, Aiken County filed a Petition for Mandamus naming various parties including DOE, in this Court. On February 24th this Court issued a scheduling order, ordering DOE and no others to respond to Aiken County’s petition by March 24th. *See* Order of February 24th citing D.C. Cir. Rule 21(a).¹ DOE responded to Aiken County’s petition on March 24th, asserting various

¹ NRC was not directed to respond to Aiken County’s petition; therefore, any response is improper. D.C. Circuit Rule 21(a) (“No responsive pleading to a petition for an extraordinary writ to the district court or an administrative agency ... is permitted unless requested by the court. No such petition will be granted in the absence of such a request.”).

dispositive and merits-based arguments and briefing issues such as standing, exhaustion of administrative remedies, and finality. Aiken County filed its reply on April 2nd, addressing DOE's dispositive arguments and asserting Aiken County's merits-based argument for relief based on the construction of a single provision of the Nuclear Waste Policy Act, ("NWPA"), 42 U.S.C.A. § 10134(b) ("the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site. . . ."). At that time, Aiken County contends briefing in its case was complete.

Aiken County has demonstrated before this Court that DOE cannot withdraw its license application under the clear terms of the NWPA, and that mandamus in this Court is appropriate as the only adequate remedy for DOE's violation of the edicts of the NWPA. DOE's required action is nondiscretionary. The facts and legal contentions are adequately presented in the materials before the Court and further argument would not aid the decisional process on this limited issue.

DOE's response to the motion for expedited consideration attempts to create another level of complexity to this proceeding, based on a new filing DOE has made with the Nuclear Regulatory Commission, ("NRC"). However, the final agency action at issue in Aiken County's petition is the decision of DOE to withdraw its license application. The Atomic Safety and Licensing Board decision (forwarded to this Court on April 6th as supplemental authority, FRAP 28(j))

asking that this Court resolve the issue of the DOE license application withdrawal had not been issued when Aiken County filed its Reply. Therefore, the arguments set forth by Aiken County still remain intact: the NWPA vests original jurisdiction with the United States Courts of Appeals for civil actions related to DOE's statutory requirement that it seek licensure for Yucca Mountain. Congress has provided this specific remedy. The issue of whether DOE can lawfully decide to withdraw the license application is squarely before this Court.²

Aiken County supports the motions of South Carolina and Ferguson to expedite briefing, but as discussed above, Aiken County's argument that the license application cannot be withdrawn is sufficiently briefed for decision by this Court at this time. Due to Aiken County's unique procedural posture among Petitioners, the proposed schedules are not expedited with respect to Aiken County.³

² DOE's motion to hold this action in abeyance for 30 days simply ignores the fact that Congress has vested this Court with original jurisdiction over this controversy.

³ On April 8th, this Court consolidated the South Carolina and Ferguson petitions, for which briefing has not yet begun, with Aiken County's petition in which briefing was completed on April 2nd. South Carolina and Ferguson had previously filed motions for expedited briefing, which proposed identical briefing schedules for their respective proceedings. This Court set April 13th as a deadline for any reply to the Petitioners' motions for expedited briefing, as applied to this now-consolidated proceeding.

The issue before the Court in the Aiken County case is narrower than those of Ferguson and South Carolina.⁴ To the extent the expedited schedules proposed by South Carolina and Ferguson accelerate resolution of other important issues not reached in Aiken County's case, Aiken County supports the motions to expedite briefing those issues. However, on the issue of whether mandamus is proper under the NWPA to compel DOE to comply with its mandate to seek licensure of Yucca Mountain, no further briefing is required and the Court should not delay a ruling.

⁴ The South Carolina and Ferguson petitions seek relief related to the dismantling of the Yucca Mountain project as a result of various ongoing actions, while Aiken County at this point seeks mandamus relief related only to DOE's withdrawal of the Yucca Mountain license application. Further, Aiken County does not name the President of the United States as a respondent as did South Carolina and Ferguson.

Respectfully submitted,

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April 13, 2010

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)	

CERTIFICATE OF SERVICE

I certify that on April 13 2010, I electronically filed the foregoing AIKEN COUNTY’S REPLY TO MOTIONS FOR EXPEDITED CONSIDERATION with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered users:

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I further certify that on April 13, 2010 I have mailed the foregoing document AIKEN COUNTY'S REPLY TO MOTIONS FOR EXPEDITED CONSIDERATION by First-Class Mail, postage prepaid, to the following non-CM/ECF participants, addressed as follows:

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