

**SCHEDULED FOR ORAL ARGUMENT ON MARCH 22, 2011**

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

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

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No. 10-1050

IN RE AIKEN COUNTY, Petitioner

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No. 10-1052

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

v.

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

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No. 10-1069

STATE OF SOUTH CAROLINA, Petitioner,

v.

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

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No. 10-1082

STATE OF WASHINGTON, Petitioner,

v.

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

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

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**Petitioners' Unopposed Motion for Leave to File Supplemental Joint  
Appendix and Revised Addenda**

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Petitioners Aiken County, Robert Ferguson, William Lampson, Gary Petersen, the State of South Carolina, and the State of Washington, and Intervening Petitioner NARUC (collectively, "Petitioners") hereby file this Motion for Leave to File a Supplemental Joint Appendix ("SJA") in the above-captioned matter, as well a revised addenda to Petitioners' briefs. As grounds for the Motion, Petitioners state as follows:

1. Petitioners' cases challenge actions taken by Respondents under the Nuclear Waste Policy Act and other laws, with respect to the planned repository for high-level radioactive waste at Yucca Mountain, Nevada.
2. This Court consolidated Petitioners' cases by two orders dated April 8, 2010 and May 3, 2010.
3. On May 13, 2010, this Court entered an Order scheduling briefing in this matter. That Order included, *inter alia*, that Petitioners and Respondents utilize a deferred joint appendix in accordance with FRAP 30(c).
4. On May 17, 2010, Respondents filed with this Court a Certified Index to what Respondents claim constitutes the Administrative Record. *See* JA001.
5. On June 18, 2010, Petitioners timely filed their opening brief. Petitioners attached an addendum to that brief which included certain materials not included

in Respondents' administrative record. Those materials were comprised of (a) legal authority (such as legislative and regulatory authority) provided for the convenience of the parties and the Court given the accelerated nature of briefing; and (b) evidence of Respondents' final decisions for which review is sought, and to demonstrate the ripeness of such decisions. All but one of these documents had been presented to the Court as exhibits to prior motions. *See, e.g.*, Petitioners' Mot. for Expedited Briefing and Consideration, Exh. A-H.<sup>1</sup>

6. On July 2, 2010, Respondents moved to set aside the briefing schedule and hold the cases in abeyance. This Court granted Respondents' Motion on July 28, 2010.

7. On September 28, 2010, Petitioners moved this Court to lift the stay and set a new expedited briefing schedule. The Court granted Petitioners' Motion on December 10, 2010. It accepted Petitioners' earlier filed brief, and ordered that Respondents' Brief would be due January 3, 2011, Petitioners' Reply Brief would

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<sup>1</sup> The last entry in the SJA, Real Property Inventory Reports from the South Carolina Budget and Control Board, found at SJA 216, was introduced for the first time as an Exhibit to Petitioners' Reply Brief, in the section addressing questions of standing. Petitioner South Carolina introduced the inventory reports to respond to an argument by Respondents that South Carolina had not alleged property interests near the Savannah River Site. *See* Resp. Br. at 30, Reply Br. n. 4. This is an appropriate use of evidence establishing the claim of standing. *See* L.R. 28(a)(7); *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

be due January 18, 2011, a deferred joint appendix would be due February 1, 2011, and final briefs would be due February 8, 2011.

8. Respondents timely filed their brief on January 3, 2011.

9. Petitioners timely filed their brief on January 18, 2011, and again included the same two categories of materials in their addenda for the convenience of the parties and this Court.

10. In conjunction with the deferred joint appendix filed in this Court today, Petitioners now seek to file a supplemental joint appendix (“SJA”) that includes the material previously provided in the addenda to Petitioners’ initial briefing. This material, set forth in the SJA which is attached hereto as Exhibit 1, includes the following:

(a) Pages 1 through 157 of the SJA are copies of legislative and regulatory history cited in Petitioners’ briefing and provided purely for this Court’s convenience;

(b) Pages 158 through 216 of the SJA are evidence of the final decision to abandon the Yucca Mountain repository, included to demonstrate the finality of that action and the harm to Petitioners that resulted, for which Petitioners believe no motion to supplement the record is necessary or appropriate.

11. Petitioners also seek to remove certain pages from the addenda filed with the initial briefs, and file a revised addenda containing only statutes, regulations, and affidavits regarding standing. The revised addenda are attached hereto as Exhibits 2 (for Petitioners' Opening Brief) and 3 (for Petitioners' Reply Brief).

12. Respondents do not oppose the submission of Petitioners' revised addenda or the Petitioners' submission to the Court in the Supplemental Joint Appendix of the legislative and regulatory history materials for the convenience of the Court. Respondents contend that the remaining materials in the Supplemental Joint Appendix are not properly included in a joint appendix under the Federal Rules of Appellate Procedure nor properly considered by the Court because they are not part of the Administrative Record and Plaintiffs did not seek leave to have these materials considered under an exception to record review. Respondents do not, however, oppose Petitioners' request that this Court allow the filing of the Supplemental Joint Appendix for the Court's review as it deems appropriate. Respondents' nonopposition to the filing of the revised addenda and Supplemental Joint Appendix does not signify agreement with Petitioners' interpretation of any the materials or Petitioners' arguments as to their relevance and significance.

13. Petitioners and Respondents intend to timely file final briefs next week that will cite to the SJA and conform citations to the revised addenda. Therefore, the relief sought herein will assist the Court in its review of the evidence.

WHEREFORE, Petitioners respectfully request that this Court accept the SJA and revised addenda for filing.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of February 2011.

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**CERTIFICATE OF SERVICE**

I herby certify that on the 1st day of February 2011, a copy of the foregoing Petitioners' Motion to Calendar Oral Argument was filed electronically using the CM/ECF system, which will provide service on the following parties:

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I hereby certify that service of the same was made on the following parties by

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