

IN THE
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 11-1271

IN RE AIKEN COUNTY, *ET AL.*

On Petition for Writ of Mandamus

**RESPONSE BY U.S. NUCLEAR REGULATORY COMMISSION
TO PETITIONERS' STATUS REPORT DATED SEPTEMBER 28, 2012**

On August 3, 2012, this Court issued an order holding this case in abeyance and directing “that the parties file, no later than December 14, 2012, updates on the status of Fiscal Year 2013 appropriations with respect to the issues presented.” *See* Order of August 3, 2012, at 1. On September 28, 2012, petitioners filed a status report stating that Congress has enacted a Continuing Resolution (CR) that funds the federal government until March 27, 2013 “barring other subsequent legislative action.” *See* Petitioners’ Status Report at 2. Petitioners correctly state that the CR contains no language addressing the issues in this case. *Id.* at 2-3. Petitioners also ask this Court to take this case out of abeyance and issue the requested Writ of Mandamus immediately. *Id.* at 3-4.

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But, to use petitioners' own phrase, "subsequent legislative action" addressing the issues in this case is indeed possible. Congress has not formally adjourned; instead, it is scheduled to resume deliberations on Tuesday, November 13, 2012. See <http://www.majorityleader.gov/Calendar> (House). And Congress' last legislative day is currently scheduled for December 14, 2012, which is the date chosen by this Court for submissions in this case. *Id.* We trust that this Court did not pick that date at random; instead, we presume that this Court deliberately chose that date with the prospect of legislative action in a late or "lame duck" session of Congress in mind.¹

This Court should continue to hold this case in abeyance for several reasons. First and foremost, the CR adopted by Congress is not a final 2013 appropriations act. Instead, a CR is – at best – an "interim" measure that can be superseded by a formal appropriations act at any time. See, e.g., *Env'tl. Defense Center v. Babbitt*, 73 F.3d 867, 870 (9th Cir. 1995) (explaining that continuing resolutions remain in effect until either the expiration date or "until an appropriation is determined for

¹ Obviously, if this Court were interested only in the wording of a CR, it could have ordered the parties to file status reports on October 1, 2012, because Congress would have needed to enact budgetary legislation by this date to keep the federal government operating.

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the specific project or activity identified in the continuing resolution.”). To illustrate that fact, the House Appropriations Committee itself issued a press release emphasizing the limited and interim nature of the recently-enacted CR: “The CR being introduced today is a good-faith effort to provide limited, yet fair and adequate funding for government programs and services until March 27, *or until final Appropriations legislation can be approved.*”

<http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=307883>

(emphasis added). Thus, the CR fails to provide the “clarity” that Judge Kavanaugh spoke of in concurring in the abeyance order. *See* Kavanaugh, J., concurring in the Order of August 3, 2012, at 1.

But Congress may well express such clarity during a lame duck session. For example, Congress will be faced with the proposed “sequestration” cuts, which are scheduled to take effect on January 1, 2013, and may chose to address them as part of an overall budget review. It is certainly possible that Congress could enact formal appropriations legislation as part of any budget agreement. And because these cuts relate in large part to agency spending (affecting both the NRC and DOE), any resolution of the sequestration issues and adoption of a final budget could address funding for the Yucca Mountain proceeding.

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Furthermore, as we noted in an earlier filing, the House and the Senate considered separate versions of a 2013 appropriations bill. *See* Respondents' Response to Brief of the United States *Amicus Curiae* at 6-8. But these two bills contained conflicting language regarding Yucca Mountain. *Id.* The CR does not resolve this conflict, but a final appropriations act presumably would.

Second, Congress has before it legislation that specifically addresses high-level waste. In response to the Blue Ribbon Commission's Final Report, Senator Bingaman (NM) introduced a bill that would establish a new regulatory process and ensure adequate funding for managing nuclear waste. *See* S. 3469 112th Cong. (2012). On September 12, 2012, the Senate held a hearing on S.3469, which is still pending before Congress and could be considered during any lame duck session.²

Finally, Congress has demonstrated a significant interest in the Yucca Mountain proceeding. The NRC Commissioners have testified (as a group) at

² Other proposed legislation addressing high-level waste disposal issues currently pending in the 112th Congress includes: H.R. 1710, "Nuclear Used Fuel Prize Act of 2011," introduced by Representative Burgess (TX); S.1320, "Nuclear Fuel Storage Improvement Act of 2011," introduced by Senators Murkowski (AK) and Landrieu (LA); S.2167, "Nuclear Waste Fund Relief and Rebate Act," introduced by Senator Graham (SC); and H.R. 4625 introduced by Representative Wilson (SC).

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three Congressional oversight hearings this summer and fall – once before the House Energy and Commerce Committee (July 24, 2012) and twice before the Senate Environment and Public Works Committee (June 13 and September 12, 2012). On each occasion, the Commissioners were questioned, *inter alia*, about high-level waste issues and the Yucca Mountain proceeding. In addition, the Commission has responded to a number of written questions following each hearing. A significant number of these questions dealt with high-level waste in general and the Yucca Mountain proceeding in particular. This fact alone indicates serious Congressional interest in legislation addressing this issue and that it remains on Congress' radar.

In sum, although the recently-enacted CR funds the government through March 2013, it is merely a stopgap “temporary funding Band-Aid” (in the words of the House Appropriations Committee). But Congress could remove the Band-Aid during the lame duck session and enact a full-fledged appropriations act with specific funding and directions for the NRC (and DOE). In that event, Congress may speak to the Yucca Mountain funding issues pending before this Court and clarify its intentions regarding the Yucca Mountain proceeding.

Accordingly, absent a request from this Court, the NRC defers filing any status report until the passage of legislation addressing the issues in this case or

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December 14, 2012, whichever occurs first. At that time the NRC will file a status report addressing the CR, any legislation adopted in the lame duck session of Congress, and any developments at the NRC related to this case. In the meantime, we respectfully suggest that the Court continue to hold this case in abeyance.

Respectfully submitted,

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Dated: October 9, 2012

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CERTIFICATE OF SERVICE

I certify that on October 9, 2012, I caused the *Response by the U.S. Nuclear Regulatory Commission to Petitioners' Status Report Dated September 28, 2012* to be served on all parties or their counsel of record by filing the same with the Court's CM/ECF system.

 s/Charles E. Mullins
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