

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

No. 10-1050

IN RE: AIKEN COUNTY,
Petitioner

AIKEN COUNTY,
Petitioner

v.

STEVEN CHU, SECRETARY OF THE DEPARTMENT ENERGY, in his Official Capacity;
UNITED STATES DEPARTMENT OF ENERGY;
GREGORY B. JACZKO, Chairman of the Nuclear Regulatory Commission, in his Official
Capacity; UNITED STATES NUCLEAR REGULATORY COMMISSION; THOMAS
MOORE, PAUL RYERSON and RICHARD WARDWELL, UNITED STATES NUCLEAR
REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD JUDGES, in
their Official Capacity; and the NRC ATOMIC SAFETY AND LICENSING BOARD,
Respondents

ON PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF
AND WRIT OF MANDAMUS

RESPONDENTS' RESPONSE IN OPPOSITION
TO THE PETITION

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Pursuant to Federal Rule of Appellate Procedure 21 and this Court's February 24, 2010, order, the Department of Energy ("DOE") and Nuclear Regulatory Commission ("NRC") oppose Aiken County's "Petition for Declaratory and Injunctive Relief and Writ of Mandamus."^{1/} This Court should summarily deny the petition.

INTRODUCTION

Aiken County asks this Court to interfere with an ongoing administrative licensing proceeding before the NRC's hearing tribunal on DOE's application for construction authorization for a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nevada. Specifically,

^{1/} The Court's order requested that DOE respond to the petition. But because the petition seeks relief against both DOE and NRC, this response is filed on behalf of both agencies. NRC, however, joins in the jurisdictional and justiciability arguments only. NRC has not reviewed, and neither supports nor opposes, the merits-based arguments set out *infra* at pages 25-29. NRC is currently considering similar or related arguments as part of the agency's ongoing Yucca Mountain adjudicatory hearing process and thus NRC cannot speak to the merits now. Moreover, Aiken County improperly names as respondents NRC's Atomic Safety and Licensing Board, and its member-judges, even though the sole cited basis for this Court's jurisdiction, the Nuclear Waste Policy Act (Pet. 5-6), does not authorize suit against the Licensing Board. *See* 42 U.S.C. § 10139(a)(1). In any event, the government's "litigating position at this stage does not necessarily reflect a deliberative adjudication." *Career Education v. Department of Education*, 6 F.3d 817, 820 (D.C. Cir. 1993). Thus, as an independent hearing tribunal, the Board takes no view on any of the matters discussed in this response and remains free to decide all issues according to its best judgment, notwithstanding the government's litigating positions. *See id.*

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Aiken County asks this Court: (1) to order DOE to withdraw a February 1, 2010, motion seeking a stay of the licensing proceeding until the NRC's Atomic Safety and Licensing Board ("NRC Licensing Board") rules on an expected DOE motion to withdraw the license; and (2) to order the NRC Licensing Board to strike its February 16, 2010, order granting DOE's stay motion. Petition ("Pet.") at 18.

These interim administrative case management activities do not warrant this Court's attention. More importantly, principles of justiciability and the standard for mandamus relief do not allow the Court to grant the relief Aiken County seeks.

Aiken County also asks this Court to enjoin DOE from withdrawing the license application. Pet. at 18. In this regard, Aiken County's petition seeks premature judicial review of a non-final issue that the NRC is actively considering in the pending administrative proceeding. After Aiken County filed its petition in this Court, DOE moved, on March 3, 2010, in the NRC proceeding to withdraw its license application. The NRC has not yet rendered a decision on DOE's motion to withdraw. However, on March 5, 2010, the NRC Licensing Board issued a case management order setting forth an orderly process for deciding the DOE motion to withdraw and other pending motions. Aiken County has itself sought intervention in the NRC proceeding to oppose DOE's motion to withdraw the Yucca Mountain license application, along with various states and organizations.

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In short, there is no final reviewable decision that provides a jurisdictional basis for judicial review of the question whether the license application may be withdrawn. Aiken County's attempt to circumvent the administrative process and simultaneously litigate the same issue before the NRC and this Court must be rejected.

Aiken County's petition contains no developed legal arguments on the merits. However, Aiken County's petition and requests for mandamus, declaratory, or injunctive relief suffer from multiple and obvious threshold flaws that render full briefing or consideration of the merits unnecessary. These flaws include: (1) lack of jurisdiction in the absence of a final reviewable action, (2) absence of any need for mandamus to protect the Court's prospective jurisdiction, (3) lack of ripeness, (4) failure to exhaust administrative remedies, and (5) failure to demonstrate standing. Furthermore, this Court should have the benefit of DOE's and NRC's considered views as developed in the ongoing administrative proceedings and a complete administrative record before addressing the merits. This Court therefore can, and should, summarily deny the petition without addressing the merits.^{2/}

^{2/} If the Court does not find these grounds sufficient to deny the petition, we request that the Court direct traditional briefing by the parties on the merits of petitioner's claims.

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Furthermore, Aiken County's mandamus request must be denied because the fundamental requirement for such extraordinary relief – that there be no adequate remedy in the absence of mandamus – is not satisfied. Here there is a self-evident adequate remedy: the filing of a petition for review when and if there is a final action that adversely affects Aiken County, the standard means of seeking redress from an agency's erroneous action. Assuming Aiken County is dissatisfied with the final NRC decision and demonstrates standing and other jurisdictional prerequisites, judicial review after NRC has considered fully the arguments of DOE and other litigants, including Aiken County itself, and after NRC's final decision on DOE's withdrawal motion, would provide Aiken County with an adequate remedy. Aiken County cannot show that it would suffer any irreparable harm if it must wait for a final reviewable decision before seeking judicial review.

STATEMENT

A. Background – This petition relates to an ongoing proceeding before the NRC, *In the Matter of U.S. Dep't of Energy*, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04. That proceeding involves a license application, docketed by NRC in September 2008, for construction authorization for a permanent spent nuclear fuel and high-level radioactive waste geologic repository at Yucca Mountain.

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On January 29, 2010, at the direction of the President, the Secretary of Energy established the Blue Ribbon Commission on America's Nuclear Future, which will conduct a comprehensive review of, and consider alternatives for, disposition of spent nuclear fuel and high-level radioactive waste.^{3/} Congress has already appropriated \$5 million for the Blue Ribbon Commission to evaluate and recommend such "alternatives." Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009). On February 1, 2010, the Administration's Fiscal Year 2011 Budget was announced and stated that "[i]n 2010, the Department [of Energy] will discontinue its applications to the Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geological repository at Yucca Mountain, Nevada." Budget of the U.S. Government, Fiscal Year 2011: Terminations, Reductions, and Savings, at 62 (Feb. 1, 2010). Attach. A. The budget further states that "all funding for development of the Yucca Mountain facility will be eliminated" for fiscal year 2011. *Id.*

Also on February 1, 2010, DOE filed with the NRC Licensing Board a motion to stay the licensing proceeding (with one exception not relevant here),

^{3/} See Presidential Memorandum – Blue Ribbon Commission on America's Nuclear Future (Jan. 29, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-blue-ribbon-commission-americas-nuclear-future>).

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pending “the disposition by the Board of any DOE motion under Section 2.107 filed within the next 30 days.” Attach. B at 2. The motion explained that DOE intended to move to withdraw the pending licensing application pursuant to 10 C.F.R. § 2.107 within 30 days and that a stay would avoid unnecessary expenditure of resources by the Board, NRC, and other parties to the proceeding. Attach. B at 1-2. No party opposed the stay motion. On February 16, 2010, the NRC Licensing Board granted the stay motion pending resolution of DOE’s then-expected motion to withdraw the license application. Attach. C.

B. Aiken County’s Petition – Three days later, Aiken County filed the instant petition, styled as “Petition for Declaratory and Injunctive Relief and Writ of Mandamus,” seeking relief against DOE, NRC, and agency officials. The petition alleges that DOE’s filing of the stay motion violated the Nuclear Waste Policy Act, 42 U.S.C.A. § 10101 *et seq.*, the National Environmental Policy Act, 42 U.S.C. § 2331 *et seq.*, the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2), and the United States Constitution. The petition also alleges that the NRC Licensing Board acted unlawfully by granting the stay motion. Pet. at 12-17. For relief, the petition seeks a declaration that DOE and NRC have violated the law by staying the licensing proceedings and deciding to withdraw the license application. Pet. at 17. It also seeks a writ of mandamus or injunctive relief (1) requiring DOE to withdraw its February 1, 2010, stay motion; (2) requiring NRC

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to strike the stay order entered February 16, 2010; (3) prohibiting respondents from withdrawing the license application; and (4) requiring respondents to continue the licensing process. Pet. at 18.

Aiken County made no effort to obtain a stay from DOE or NRC before seeking relief in this Court. At the time it filed its petition in this Court Aiken County had not yet sought to become a party to the NRC proceeding (although it did so subsequently, as explained below).

C. Motions And Orders Subsequent To The Filing Of Aiken County's Petition – Subsequent to the filing of Aiken County's petition in this Court, the State of Washington, the State of South Carolina, and Aiken County filed petitions to intervene in the NRC license proceeding on February 25, February 26, and March 4, 2010, respectively, to enable them to oppose DOE's motion to withdraw the Yucca Mountain license application. Attach. D (Aiken County petition).

On March 3, 2010, DOE filed in the NRC proceeding a motion to withdraw the license application. Attach E. On March 5, 2010, the NRC Licensing Board issued a scheduling order indicating that the February 16, 2010, stay order does not prevent briefing of several matters before the Board. The Board's March 5 order also provides a due date for answers to the motions to intervene and states

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that “[t]he Board will set a time for responses to DOE’s motion to withdraw after” resolving the motions to intervene. Attach. F.⁴

Two other parties have since filed motions to intervene in the NRC proceeding. On March 16, 2010, the NRC Licensing Board issued an order providing that 10 C.F.R. § 2.309(h) controls the time for filing answers and responses in these and any future intervention petitions. Attach. G.

REASONS FOR DENYING THE PETITION

Aiken County’s petition expressly challenges DOE’s stay-of-proceedings motion and NRC’s February 16, 2010, order granting that motion. Aiken County’s petition was filed before DOE moved in the NRC proceeding to withdraw the license application. Aiken County’s petition, therefore, could not, and does not, expressly challenge DOE’s subsequent filing of the motion to

⁴ Subsequent to the filing of Aiken County’s petition in this Court, on February 25, 2010, a petition for review, docketed as *Ferguson v. Obama*, D.C. Cir. No. 10-1052, was filed in this Court purporting to seek review of the “final action of the President and Secretary of Energy to abandon and not to proceed with plans to apply for and pursue a license for, and to construct, a repository for high level radioactive waste at Yucca Mountain.” The Court has issued a scheduling order providing for the filing of dispositive motions and a certified index to the administrative record on April 19, 2010. On February 26, 2010, South Carolina filed in the Fourth Circuit a “Petition for Review and Petition for Writ of Mandamus, Writ of Prohibition, Stay, and/or Declaratory and Injunctive Relief,” docketed as *South Carolina v. U.S. Dep’t of Energy*, 4th Cir. No. 10-1229. The Fourth Circuit suspended proceedings in that case pending its disposition of a motion to transfer the case to this Court, filed by federal respondents on March 4, 2010.

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withdraw. Even if the petition is read to encompass a challenge to DOE's subsequently-filed motion to withdraw, the outcome is the same: Aiken County's petition must be denied. The challenged stay-of-proceeding motion and order granting that motion, as well as DOE's subsequently-filed motion to withdraw the license application, are all interim steps preceding NRC's resolution of the motion to withdraw. As such, the motions and order are not final actions.

Aiken County seeks a writ of mandamus under 28 U.S.C. § 1361, and in addition, or in the alternative, declaratory and injunctive relief of the same nature. Pet. at 17-18. None of this relief can be granted because the Court lacks jurisdiction to review non-final actions and the petition is non-justiciable under the related doctrines of ripeness, exhaustion, and standing. In addition, the prerequisites for mandamus or injunctive relief are not met.

I. This Court Lacks Jurisdiction Over Aiken County's Petition

A. There Is No Final Action

Finality is a jurisdictional prerequisite to filing an action in the courts of appeals pursuant to Section 10139(a)(1)(A) of the Nuclear Waste Policy Act, 42 U.S.C. § 10139(a)(1)(A). Finality is also a prerequisite to obtaining relief under Section 706(2) of the APA, 5 U.S.C. § 706(2) and is an aspect of justiciability, as discussed in Section II below. *See generally Public Citizen v. Office of U.S. Trade Representatives*, 970 F.2d 916, 921 (D.C. Cir. 1992).

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Two conditions must be satisfied for agency action to be considered final: (1) the action must mark the consummation of the agency's decision-making process and not be merely tentative or interlocutory in nature; and (2) the action must be one by which rights or obligations have been determined or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The actions challenged by Aiken County satisfy neither condition.

First, DOE's motion to stay an ongoing administrative proceeding and the NRC Licensing Board's grant of this request does not fix any legal relationship, deny any right, or impose any hardship on Aiken County. DOE's now-pending motion to withdraw its license application also has no immediate legal consequence upon Aiken County. Whether DOE's motion to withdraw ever has any such consequence is contingent on future administrative action. The NRC may deny DOE's motion or grant it only in part, meaning it will continue processing DOE's licensing application. Unless and until the NRC grants the withdrawal motion, DOE's motions and the NRC Licensing Board's order granting a stay of the proceeding are only interim steps towards a final decision, not the final decisions themselves. *See DRG Funding Corp. v. HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (“[C]ourts have defined a nonfinal agency order as one ... that ‘does not itself adversely affect [the] complainant but only affects his

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rights adversely on the contingency of future administrative action”) (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939)).

In determining whether agency conduct is “final agency action,” the “core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.” *Franklin v. Mass.*, 505 U.S. 788, 797 (1992). Here, there is no action that completes the relevant decisionmaking process for DOE or NRC, or that directly affects Aiken County. Hence there is no action or decision that is sufficiently final to permit this Court’s review. *See Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 894 (1990) (“[courts] intervene in the administration of the laws only when, and to the extent that, a specific ‘final agency action’ has an actual or immediately threatened effect”).

B. No Statutes Cited By Aiken County Provide Any Basis For Immediate Review Of The Non-Final Agency Actions Or For Granting Declaratory Or Injunctive Relief.

Aiken County’s petition improperly presupposes some basis for the Court’s jurisdiction and authority to review non-final agency actions and grant the requested relief. There is none. This Court’s jurisdiction to review non-final actions cannot be premised on Section 10139(a)(1)(A) of the Nuclear Waste Policy Act, 42 U.S.C. § 10139(a)(1)(A). While this Section provides for exclusive review in the courts of appeals, it does not provide an independent basis for

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judicial review or waiver of the government's sovereign immunity. Moreover, it provides for review only of a "final decision or action" of the Secretary of Energy, the President, or NRC "under this part." *Id.* There exists here no such final decision or action and therefore the Nuclear Waste Policy Act does not provide jurisdiction to grant Aiken County's requests for declaratory or injunctive relief. *See Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 184 (D.C. Cir. 2006) (final decision requirements can be jurisdictional in statutes other than the APA).

The petition invokes Section 706(2) of the APA, 5 U.S.C. § 706(2), as granting authority for the Court to set aside unlawful final agency action. Pet. at 6, 12. However, because there is no final agency action here, there is no cause of action under the APA. *See Trudeau*, 456 F.3d at 183-185, 188. The APA provides that "final agency action for which there is no other adequate remedy in a court" is subject to judicial review. 5 U.S.C. § 704. It further provides that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." *Id.*

Aiken County's petition points to a subsection of the Nuclear Waste Policy Act providing that the court of appeals shall have original and exclusive jurisdiction over a civil action alleging the "failure" of the Secretary of Energy, the President, or NRC "to make any decision, or take any action, required under this part," 42 U.S.C. § 10139(a)(1)(B), and a similar section of the APA authorizing a

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court to compel agency action unlawfully withheld, 5 U.S.C. § 706(1). *See* Pet. at 5, 17. Those provisions do not apply here because there has been no “genuine failure to act.” *See Ecology Center, Inc. v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999) (limited exception to the finality doctrine applies only when there has been a genuine failure to act). Rather, DOE has acted and the NRC Licensing Board has acted. Aiken County simply objects to those actions. Courts have repeatedly refused to allow plaintiffs to evade a finality requirement by dressing up complaints about the sufficiency or substance of an agency action as an agency’s supposed “failure” to act. *See e.g., Public Citizen v. Nuclear Regulatory Comm’n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988); *Nevada v. Watkins*, 939 F.2d 710, 714 n. 11 (9th Cir. 1991). Even if Aiken County’s claims were properly characterized as “failure to act” claims, they would fail because such claims, like mandamus, are available only to compel discrete, ministerial, or nondiscretionary actions. *See infra* at 25-29; *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-65 (2004).

Finally, the petition suggests that the Declaratory Judgment Act, 28 U.S.C. § 2201, authorizes a court to grant declaratory and injunctive relief where a federal agency has violated the law. Pet. at 6. But that Act does not waive sovereign immunity, create an independent basis for jurisdiction, or override generally-applicable justiciability doctrines. *See e.g., Skelly Oil Co. v. Phillips Petroleum*,

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339 U.S. 667, 671-74 (1950); *Schilling v. Rogers*, 363 U.S. 666, 677 (1960); *Continental Bank & Trust Co. v. Martin*, 303 F.2d 214, 215 (D.C. Cir. 1962) (“if the agency’s action is not final so as to be reviewable under the Administrative Procedure Act appellant is not helped on the question of jurisdiction by the Declaratory Judgment Act”).

C. Mandamus Cannot Be Used To Challenge The Subject Non-Final Agency Actions

The All Writs Act provides that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions” 28 U.S.C. § 1651(a). *Telecommunications Research and Action Center v. F.C.C.*, 750 F.2d 70, 76 (D.C. Cir.1984).

“[S]ection 1651(a) empowers a federal court to issue writs of mandamus necessary to protect its prospective jurisdiction.” *Id.* Under the circumstances here, mandamus cannot properly be invoked to review the challenged non-final actions. Aiken County does not, and cannot on the facts of this case, demonstrate that mandamus is necessary to protect this Court’s jurisdiction to review a final decision.⁵¹ There is no rationale under which this Court could conclude that its

⁵¹ “Because the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction.” *Id.* Aiken County does not allege unreasonable delay in NRC’s resolution of pending motions. In any event, there would be no basis for such a claim in light of the

(continued...)

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power to review a final decision by the NRC would be impaired by failure to review now the interlocutory filings in the NRC proceeding. *See infra* at 23-24.

In sum, Aiken County's petition is premature because it challenges non-final interlocutory actions in an ongoing administrative proceeding. This Court lacks jurisdiction to review these nonfinal actions. And a writ of mandamus is not necessary to protect this Court's prospective jurisdiction to review a final action.

II. Aiken County's Petition Is Non-Justiciable

A. Aiken County's Petition Is Not Ripe

Even if there were jurisdiction to review the challenged non-final actions, this Court should deny Aiken County's petition on ripeness grounds. *See Public Citizen*, 970 F.2d at 921 (finality and ripeness are distinct requirements and both must be met). "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)); accord *Ohio Forestry*

^{5/}(...continued)

NRC Licensing Board's prompt issuance of case management orders setting an orderly approach to deciding pending motions. Attachs. C, F, G.

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Ass'n v. Sierra Club, 523 U.S. 726, 732-33 (1998). “Determining whether administrative action is ripe for judicial review requires [courts] to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.” *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808.

A critical question concerning fitness for review is whether the claim involves uncertain or contingent events that may not occur as anticipated or may not occur at all. *Texas v. United States*, 523 U.S. 296, 300 (1998). If the claim is contingent upon future events, it is not ripe for adjudication. *Id.* Here, Aiken County's request for relief asking the Court to mandate the withdrawal of DOE's stay motion and reversal of the NRC's stay is contingent upon a speculative chain of events that assumes the termination of the license application process. Pet. at 14 ¶¶ 37-38. These events are uncertain to occur, however, because the NRC may deny the withdrawal motion. In fact, after filing the instant petition Aiken County petitioned to intervene in NRC's proceeding, presumably to ask the NRC to take that specific action. If Aiken County persuades the NRC to continue to review DOE's license application, there will be no controversy for this Court to resolve. *See Toca Producers v. FERC*, 411 F.3d 262, 266-67 (D.C. Cir. 2005) (withholding review where further administrative action could cause controversy to disappear). Thus, because Aiken County's claim is contingent upon the NRC granting a

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motion that is still pending before the administrative agency, this controversy is unripe.

Nor is there any reason to entertain this petition before the contingencies play out. Delaying review until the NRC completes its internal processes will cause no undue hardship to Aiken County. *See Sheet Metal Workers Intern. Ass'n, Local 270, AFL-CIO v. NLRB*, 561 F.3d 497, 502, 385 (D.C. Cir. 2009) (lack of hardship supports withholding judicial review). The challenged actions have no effect on Aiken County's "day-to-day business," and do not require Aiken County "to engage in, or to refrain from, any conduct." *Texas*, 523 U.S. at 301. Aiken County is in no different position now than it was before DOE filed the motions to stay and to withdraw the license application. The NRC would not have resolved DOE's license application by now. A license application carries with it uncertainty whether it will be granted. The possibility always existed that the NRC would deny DOE's application to construct Yucca Mountain, an action that would have the same impact upon Aiken County as the relief DOE requests in the pending motion to withdraw. And even assuming that DOE's license application is ultimately approved, there would be numerous other steps required to occur before it would even be possible to open a repository, including, for example, the enactment of land withdrawal legislation. *See, e.g.*, Nuclear Fuel Management and Disposal Act, S. 2589, 109th Cong., 2d Sess. § 3 (2006) (proposed legislation

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authorizing withdrawal of lands necessary for Yucca Mountain repository). Those acts were not guaranteed before DOE filed its motions, just as they are not required today.

This Court also would benefit from the record assembled by the NRC, and NRC's views on DOE's discretion to withdraw the petition and under what terms DOE may do so. There is no reason to invest judicial resources in deciding this dispute. "Federal courts cannot – and should not – spend their scarce resources on what amounts to shadow boxing." *Devia v. Nuclear Regulatory Comm'n*, 492 F.3d 421, 425-26 (D.C. Cir. 2007) (quoting *McInnis-Misenor v. Maine Medical Ctr.*, 319 F.3d 63, 72 (1st Cir. 2003)). Because withholding this Court's review could avoid unnecessary judicial intervention and the expenditure of limited judicial resources if the NRC denies the motion withdraw, and because Aiken County cannot show it would suffer hardship by allowing NRC proceedings to take their course, this Court should dismiss the instant petition as unripe.

B. Aiken County Failed To Exhaust Its Administrative Remedies

Aiken County's petition – which improperly seeks to by-pass the NRC's ongoing administrative hearing and proceed directly to this Court – also fails because Aiken County has failed to exhaust its administrative remedies. As a general matter, "[a] party must first raise an issue with an agency before seeking judicial review." *See Tesoro Refining and Marketing Co. v. FERC*, 552 F.3d 868,

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872 (D.C. Cir. 2009) (quoting *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007); *Hettinga v. United States*, 560 F.3d 498, 503 (D.C. Cir. 2009).

Relatedly, Fed. R. App. P. 18(a)(1) states that “[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.” These complementary exhaustion requirements give an administrative agency “an opportunity to consider the matter, make its ruling, and state the reasons for its action” before a federal court sets aside its determination. *See Unemployment Compensation Comm’n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946).

Exhaustion requirements promote administrative efficiency, respect executive autonomy by allowing an agency the opportunity to correct its own errors, provide courts with the benefit of an agency’s expertise, and serve judicial economy by avoiding the necessity for judicial involvement in some instances and by having the administrative agency compile the factual record. *See Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

Exhaustion’s purposes are served by withholding review of Aiken County’s petition. *See Ass’n of Flight Attendants-CWA v. Chao*, 493 F.3d 155, 158-59 (D.C. Cir. 2007) (“Typically, exhaustion ensures that imminent or ongoing administrative proceedings are seen through to completion.”). As noted above, Aiken County only recently petitioned to intervene in the NRC’s licensing proceeding and attached to its NRC intervention petition a copy of the instant

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petition. Attach. D. If the NRC allows Aiken County to intervene, accepts its arguments, denies the motion to withdraw, and continues to review the license application, this Court's intervention will be unnecessary. If the NRC grants the motion to withdraw but does so "without prejudice," judicial intervention in at least part of the dispute also will be avoided. Allowing the NRC to decide these issues in the first instance thus may cause this entire controversy, or significant parts of it, to disappear. And withholding judicial review enables the NRC to address Aiken County's arguments in the first instance, allows all NRC litigants to make their positions known to NRC, and when the time for judicial review comes, gives this Court a full record and reasoned NRC decision to review.

C. Aiken County Fails To Establish Its Standing

Aiken County – which files this petition in its proprietary capacity as the owner of real property near the Savannah River Site (a DOE waste facility) – also fails to establish its standing to seek the requested relief. Pet. at 7 ¶ 13. To demonstrate standing, Aiken County must establish that it has suffered (1) injury-in-fact, that is (2) fairly traceable to the challenged action, and that is (3) likely to be redressed by the relief requested, if that relief is granted. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); accord *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). The claimed injury, moreover, must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*,

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504 U.S. at 560 (internal quotation marks omitted); *see also Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180 (2000).

Aiken County never explains how it is injured by DOE's filing of motions in the NRC proceeding or by the NRC Licensing Board's order granting DOE's stay-of-proceeding motion. *See Sierra Club*, 292 F.3d at 900. Its standing affidavit merely recites the locations and assessed value of its real properties near the Savannah River Site. *See Pet. at Attach. C.* That Aiken County owns real estate of measurable value near the Savannah River Site, however, does not mean that it is injured by the filing of motions or a stay of proceeding. *See City of Olmsted Falls v. FAA*, 292 F.3d 261, 267 (D.C. Cir. 2002) ("geographic proximity does not, in and of itself, confer standing"); *Burton v. Central Interstate Low-Level Radioactive Waste Compact Comm'n*, 23 F.3d 208, 209 (8th Cir. 1994) (vague claims of economic injury are insufficient to confer standing). The filing and grant of a procedural motion in an administrative proceeding typically do not injure property interests, and in fact here they do not require or authorize anything that either will directly or indirectly diminish the value of Aiken County's properties. Stays of proceedings typically maintain the status quo. At this interlocutory stage in the Yucca Mountain licensing proceeding – where discovery is not yet complete and no hearing is imminent – Aiken County fails to articulate its injury or set forth a plausible chain of causation between the challenged actions

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and its property interests. An alleged injury from withdrawal of the license application does not establish standing because any such injury is contingent on future administrative action that may not occur as anticipated or indeed may not occur at all. *See Lujan*, 504 U.S. at 560 (injury must be actual or imminent).

Aiken County cannot assert *parens patriae* standing on behalf of its citizens, *see* Pet. at 7 ¶ 13. As a non-sovereign political subdivision of the State of South Carolina, Aiken County lacks *parens patriae* standing as a matter of law. *See Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 53-54 (1982) (sovereign authority does not reside in cities or counties); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004) (city is not a sovereign and thus may not sue as *parens patriae*). Moreover, even if it were sovereign, Aiken County would lack standing as *parens patriae* here because the mandamus action is against an agency of the United States. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). In actions involving the United States, it is the United States, not Aiken County or even the State of South Carolina, that represents the citizens as *parens patriae*. *Id.*; *see also City of Olmsted Falls*, 292 F.3d at 267-68 (because states may not sue federal government as *parens patriae*, presumably a city cannot sue under this doctrine); *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990) (State of Nevada lacks *parens patriae* standing to challenge rights-of-ways to Yucca Mountain).

III. Aiken County Fails To Demonstrate It Meets the Prerequisites For The Extraordinary Remedy Of Mandamus

“Mandamus is a drastic remedy, to be invoked only in extraordinary circumstances.” *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) (internal quotations omitted). “Mandamus is available only 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 plaintiff.” *Id.* (internal quotations omitted). None of these circumstances is present here.

A. Adequate Remedies Are Available To Aiken County

First and foremost, mandamus is inappropriate because Aiken County has perfectly adequate, non-mandamus remedies available to it. As noted above, Aiken County has moved to intervene in the NRC proceeding and potentially may obtain full relief through that administrative proceeding. If the NRC renders a final decision adverse to its interests, Aiken County may initiate an action in the court of appeals through the jurisdiction conferred by the Nuclear Waste Policy Act, 42 U.S.C. § 10139, or the Hobbs Act, 28 U.S.C. § 2342, assuming, of course, that it can satisfy the other prerequisites for judicial review.

Although Aiken County may prefer immediate interlocutory relief through mandamus, to obtain such extraordinary and drastic relief it must demonstrate that proceeding through the ordinary channels for judicial review will cause it

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irreparable harm. *See In re: Sealed Case No. 98-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (requiring plaintiffs to show irreparable harm before mandamus relief can be granted); *In re: Thornburgh*, 869 F.2d 1503, 1517 (D.C. Cir. 1989) (same). Nowhere in its mandamus petition, however, does Aiken County explain how its interests will be irreparably harmed by awaiting a final decision from the NRC, or why the ordinary processes for obtaining judicial review of final decisions through the Nuclear Waste Policy Act, the APA, or the Hobbs Act cannot be followed here. Rather, by Aiken County's own account, it will not suffer its alleged harms unless and until the NRC makes a final decision on the withdrawal motion. Pet. at 14-14 ¶¶ 37-39. For this reason alone, this Court should deny the petition.

The mere filing of motions and the NRC's consideration of those motions impose no real-world or on-the-ground harm, particularly no irreparable harm. All the NRC Licensing Board has done is enter a case-management order, in the interest of conserving party and agency resources, that halts further discovery until the Board resolves the underlying legal questions presented in DOE's motion to withdraw the license application. DOE remains committed to fulfilling its obligation to take possession and dispose of the nation's spent nuclear fuel and high-level nuclear waste, and it has established the Blue Ribbon Commission to review alternatives for such disposition. Aiken County suffers no harm, irreparable or otherwise, from awaiting the NRC's final decision.

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B. Aiken County Does Not Have A Clear Right To Relief

Aiken County also “has the burden of showing that ‘its right to issuance of the writ is clear and indisputable.’” *Northern States Power Co. v. U.S. Dep’t of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997) (quoting *Gulfstream Aerospace Corp. v. Maycamas Corp.*, 485 U.S. 271, 289 (1988)). Mandamus generally will not issue unless there is a plainly defined and nondiscretionary duty on the part of the defendant. *See Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (mandamus is only appropriate if “the defendant owes [the plaintiff] a clear nondiscretionary duty”); *Ganem v. Heckle*, 746 F.2d 844, 852, 241 (D.C. Cir. 1984) (“As an extraordinary remedy, mandamus generally will not issue unless there is a clear right in the plaintiff to the relief sought, a plainly defined and nondiscretionary duty on the part of the defendant to honor that right, and no other adequate remedy, either judicial or administrative, available”).⁶⁷ Stated differently, where an agency may exercise some discretion, it cannot be said that the petitioner’s right to relief is “clear and indisputable.”

Aiken County has not demonstrated the existence of a nondiscretionary duty on the part of DOE that would give it a clear and indisputable right to the mandamus relief it requests. Aiken County alleges that DOE breached mandatory

⁶⁷ *See also Norton*, 542 U.S. at 63; *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 457 (1999).

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obligations under the Nuclear Waste Policy Act, 42 U.S.C. § 10134(b), by filing the stay-of-proceeding motion. Pet. at 4, 12. The cited statutory provision, however, provides that “the Secretary [of DOE] shall submit to the [Nuclear Regulatory] [C]ommission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the recommendation of the site designation is effective under [42 U.S.C. § 10135].” 42 U.S.C. § 10134(b). DOE submitted the application for construction authorization in 2008, and the statutory language does not address DOE’s discretion to make procedural filings in any ensuing NRC licensing proceeding. This language certainly cannot support finding that DOE had a nondiscretionary duty to refrain from filing a motion asking for a temporary stay or pause in the administrative proceedings until the NRC rules on a different motion.

The Nuclear Waste Policy Act, moreover, provides that NRC is to consider the “application for construction authorization for all or part of a repository *in accordance with the laws applicable to such applications.*” 42 U.S.C. § 10134(d) (emphasis added).⁷ NRC regulations accord the Licensing Board ample discretion to issue case management directives. *See* 10 C.F.R. § 2.100 (incorporating NRC’s

⁷ This section of the Nuclear Waste Policy Act also provides that the NRC shall issue a final decision approving or disapproving the issuance of a construction authorization not later than 3 years (or four years if it complies with reporting requirements) after the date of submission of the application. *See* 42 U.S.C. § 1034(d). The initial three-year period does not expire until Fall 2011.

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generally-applicable procedural rules); 10 C.F.R. § 2.319 (specifying case management powers of a presiding officer at NRC hearings); *see also* 5 U.S.C. § 556(c).⁸⁷ Aiken County’s request that DOE be ordered to withdraw the stay request and that the NRC Licensing Board be ordered to strike the grant of that request is at odds with a “very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.” *Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 544 (1978). “Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.” *Id.* at 542-43 (internal quotation marks and citations omitted). Because Aiken County has demonstrated no clear and indisputable right to the requested writ of mandamus or injunction, this Court should deny the petition.

Aiken County also does not have a clear and indisputable right to a writ of mandamus enjoining DOE from moving to withdraw the license application and

⁸⁷ *Cf. Landis v. North Am. Co.*, 299 U.S. 248, 254-255 (1936) (“the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants”); *Gould v. Control Laser Corp.*, 705 F.2d 1340, 1341 (Fed. Cir. 1983) (district court has broad discretion in managing its docket and a stay will not be interfered with unless it is of immoderate or an indefinite nature).

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requiring DOE to continue the licensing process. Pet. at 3, 12. For this relief, Aiken County again cites 42 U.S.C. § 10134(b) as the source for the requisite duty, arguing that this statutory subsection “does not provide that the application can be withdrawn.” *Id.* However, the mere absence within that particular subsection of express authorization to withdraw a license application does not provide the requisite nondiscretionary duty on the part of federal respondents. Nor does it provide Aiken County with a clear and indisputable right for mandamus relief. Moreover, as noted above, the Nuclear Waste Policy Act specifies that the application would be decided under the “laws applicable to such applications,” 42 U.S.C. § 1034(d) which include 10 C.F.R. § 2.107, the rule governing withdrawal of license applications under which DOE filed its motion.

C. A Writ of Mandamus Is Not Appropriate Under the Circumstances

Finally, even if no other adequate relief were available to it and Aiken County could establish a clear and indisputable right to relief, mandamus would still be unwarranted here. Before issuing a writ of mandamus, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381 (2004). For the many reasons explained above, a writ of mandamus is not appropriate. Foremost among these is that the petition is premature and there

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is no reason for this Court to interject itself into a case that is still being litigated before the NRC. This Court should not involve itself in issues within the case-management discretion of the NRC or under active consideration in the ongoing licensing proceeding.

IV. Aiken County Fails To Satisfy The Standard For Injunctive Relief

For reasons set forth above in Sections I and II, there are myriad independent bases for denying Aiken County's petition. Aiken County is not entitled to injunctive relief for the further reason that it fails to carry its burden of demonstrating that the balance of equities favors injunctive relief. As discussed in Sections I.A and II, Aiken County fails to demonstrate that it suffers any harm at all, much less a likelihood of irreparable harm, from the interlocutory filings in the NRC proceeding. *See eBay Inc. v. MercExchange LLC*, 547 U.S. 388, 391 (2006) (injunctive relief requires showing of irreparable harm). Nor does Aiken County suffer harm, much less any likelihood of irreparable harm, from withholding judicial review until NRC issues a final reviewable order. *Id.* Aiken County also does not establish that the balance of hardships supports injunctive relief, or that an injunction would be in the public interest. *Id.* (injunctive relief requires court to consider the balance of hardships and the public interest).

In sum, this Court must deny Aiken County's request for a writ of mandamus, declaratory, and injunctive relief. Aiken County's attempt to

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circumvent the administrative process and obtain premature judicial review is at odds with the core purposes of justiciability doctrines and fundamental principles of administrative law.

CONCLUSION

For the reasons set forth above, the petition should be summarily denied.

Respectfully Submitted,

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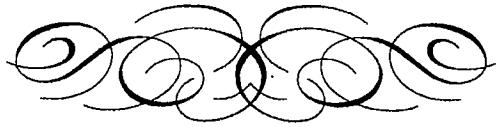
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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's Administrative Order of May 15, 2009, I hereby certify that on this date, March 24, 2010, I caused the foregoing Respondents' Response in Opposition to Petition to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service by e-mail is consistent with the preferences articulated by all counsel of record in the Service Preference Report.

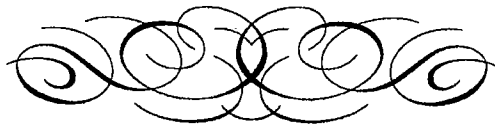
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ATTACHMENT A



Appendix

Budget of the U. S. Government



Fiscal Year 2011



Office of Management and Budget
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THE BUDGET DOCUMENTS

Budget of the United States Government, Fiscal Year 2011 contains the Budget Message of the President, information on the President's priorities, budget overviews organized by agency, and summary tables.

Analytical Perspectives, Budget of the United States Government, Fiscal Year 2011 contains analyses that are designed to highlight specified subject areas or provide other significant presentations of budget data that place the budget in perspective. This volume includes economic and accounting analyses; information on Federal receipts and collections; analyses of Federal spending; information on Federal borrowing and debt; baseline or current services estimates; and other technical presentations.

The *Analytical Perspectives* volume also contains supplemental material with several detailed tables, including tables showing the budget by agency and account and by function, subfunction, and program, that is available on the Internet and as a CD-ROM in the printed document.

Historical Tables, Budget of the United States Government, Fiscal Year 2011 provides data on budget receipts, outlays, surpluses or deficits, Federal debt, and Federal employment over an extended time period, generally from 1940 or earlier to 2011 or 2015.

To the extent feasible, the data have been adjusted to provide consistency with the 2011 Budget and to provide comparability over time.

Appendix, Budget of the United States Government, Fiscal Year 2011 contains detailed information on the various appropriations and funds that constitute the budget and is designed primarily for the use of the Appropriations Committees. The *Appendix* contains more detailed financial information on individual

programs and appropriation accounts than any of the other budget documents. It includes for each agency: the proposed text of appropriations language; budget schedules for each account; legislative proposals; explanations of the work to be performed and the funds needed; and proposed general provisions applicable to the appropriations of entire agencies or group of agencies. Information is also provided on certain activities whose transactions are not part of the budget totals.

AUTOMATED SOURCES OF BUDGET INFORMATION

The information contained in these documents is available in electronic format from the following sources:

Internet. All budget documents, including documents that are released at a future date, spreadsheets of many of the budget tables, and a public use budget database are available for downloading in several formats from the Internet at www.budget.gov/budget. Links to documents and materials from budgets of prior years are also provided.

Budget CD-ROM. The CD-ROM contains all of the budget documents in fully indexed PDF format along with the software required for viewing the documents. The CD-ROM has many of the budget tables in spreadsheet format and also contains the materials that are included on the separate *Analytical Perspectives* CD-ROM.

For more information on access to electronic versions of the budget documents (except CD-ROMs), call (202) 512-1530 in the D.C. area or toll-free (888) 293-6498. To purchase the budget CD-ROM or printed documents call (202) 512-1800.

GENERAL NOTES

1. All years referenced to are fiscal years, unless otherwise noted.
2. Detail in this document may not add to the totals due to rounding.

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PAYMENTS TO STATES UNDER FEDERAL POWER ACT—Continued
Program and Financing—Continued

Identification code 89-5105-0-2-806	2009 actual	2010 est.	2011 est.
23.95 Total new obligations	-3	-3	-3
New budget authority (gross), detail:			
Mandatory:			
60.20 Appropriation (special fund)	3	3	3
Change in obligated balances:			
73.10 Total new obligations	3	3	3
73.20 Total outlays (gross)	-3	-3	-3
Outlays (gross), detail:			
85.97 Outlays from new mandatory authority	3	3	3
Net budget authority and outlays:			
89.00 Budget authority	3	3	3
90.00 Outlays	3	3	3

The States are paid 37.5 percent of the receipts from licenses for occupancy and use of national forests and public lands within their boundaries issued by the Federal Energy Regulatory Commission (16 U.S.C. 810).

NORTHEAST HOME HEATING OIL RESERVE

For necessary expenses for Northeast Home Heating Oil Reserve storage, operation, and management activities pursuant to the Energy Policy and Conservation Act, \$11,300,000, to remain available until expended. (Energy and Water Development and Related Agencies Appropriations Act, 2010.)

Program and Financing (in millions of dollars)

Identification code 89-5369-0-2-274	2009 actual	2010 est.	2011 est.
Obligations by program activity:			
00.01 NEHOR	10	11	11
10.00 Total new obligations (object class 25.2)	10	11	11
Budgetary resources available for obligation:			
21.40 Unobligated balance carried forward, start of year	1	1	1
22.00 New budget authority (gross)	10	11	11
23.90 Total budgetary resources available for obligation	11	12	12
23.95 Total new obligations	-10	-11	-11
24.40 Unobligated balance carried forward, end of year	1	1	1
New budget authority (gross), detail:			
Discretionary:			
40.00 Appropriation	10	11	11
Change in obligated balances:			
72.40 Obligated balance, start of year	9	10	10
73.10 Total new obligations	10	11	11
73.20 Total outlays (gross)	-9	-11	-12
74.40 Obligated balance, end of year	10	10	9
Outlays (gross), detail:			
85.90 Outlays from new discretionary authority		9	9
85.93 Outlays from discretionary balances	9	2	3
87.00 Total outlays (gross)	9	11	12
Net budget authority and outlays:			
89.00 Budget authority	10	11	11
90.00 Outlays	9	11	12

The Northeast Home Heating Oil Reserve provides an emergency supply of home heating oil supply for the Northeast States during times of inventory shortages and significant threats to

immediate further supply. Two million barrels of heating oil will provide supplemental emergency supply over a 10-day delivery period, the time required for ships to carry heating oil from the Gulf Coast to New York Harbor.

Four-year contracts for the storage, operation and maintenance of the reserve were awarded in August 2007 to Hess Corp (for 1,000,000 barrels in New York harbor) to Morgan Stanley (for 750,000 barrels in New Haven, CT), and to Hess Corp (for 250,000 barrels in Groton, CT). A sale of 35,000 barrels was conducted at the time to offset storage costs. The Department repurchased 19,253 barrels of the oil in 2008. Purchase of the remainder, 15,427 barrels of oil, is scheduled for 2010. New storage contracts are planned for award in late 2011.

[NUCLEAR WASTE DISPOSAL]

[For nuclear waste disposal activities to carry out the purposes of the Nuclear Waste Policy Act of 1982, Public Law 97-425, as amended (the "NWPAA"), \$98,400,000, to remain available until expended, and to be derived from the Nuclear Waste Fund: *Provided*, That of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities, 2.54 percent shall be provided to the Office of the Attorney General of the State of Nevada solely for expenditures, other than salaries and expenses of State employees, to conduct scientific oversight responsibilities and participate in licensing activities pursuant to the NWPAA: *Provided further*, That notwithstanding the lack of a written agreement with the State of Nevada under section 117(c) of the NWPAA, 0.51 percent shall be provided to Nye County, Nevada, for on-site oversight activities under section 117(d) of the NWPAA: *Provided further*, That of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities, 4.57 percent shall be provided to affected units of local government, as defined in the NWPAA, to conduct appropriate activities and participate in licensing activities under Section 116(c) of the NWPAA: *Provided further*, That of the amounts provided to affected units of local government, 7.5 percent of the funds provided for the affected units of local government shall be made available to affected units of local government in California with the balance made available to affected units of local government in Nevada for distribution as determined by the Nevada affected units of local government: *Provided further*, That of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities, 0.25 percent shall be provided to the affected federally-recognized Indian tribes, as defined in the NWPAA, solely for expenditures, other than salaries and expenses of tribal employees, to conduct appropriate activities and participate in licensing activities under section 118(b) of the NWPAA: *Provided further*, That notwithstanding the provisions of chapters 65 and 75 of title 31, United States Code, the Department shall have no monitoring, auditing or other oversight rights or responsibilities over amounts provided to affected units of local government: *Provided further*, That the funds for the State of Nevada shall be made available solely to the Office of the Attorney General by direct payment and to units of local government by direct payment: *Provided further*, That 4.57 percent of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities shall be provided to Nye County, Nevada, as payment equal to taxes under section 116(c)(3) of the NWPAA: *Provided further*, That within 90 days of the completion of each Federal fiscal year, the Office of the Attorney General of the State of Nevada, each affected federally-recognized Indian tribe, and each of the affected units of local government shall provide certification to the Department of Energy that all funds expended from such payments have been expended for activities authorized by the NWPAA and this Act: *Provided further*, That failure to provide such certification shall cause such entity to be prohibited from any further funding provided for similar activities: *Provided further*, That none of the funds herein appropriated may be: (1) used directly or indirectly to influence legislative action, except for normal and recognized executive-legislative communications, on any matter pending before Congress or a State legislature or for lobbying activity as provided in 18 U.S.C. 1913; (2) used for litigation expenses; or (3) used to support multi-State efforts or other coalition building activities inconsistent with the restrictions contained in this Act: *Provided further*, That all proceeds and recoveries

DEPARTMENT OF ENERGY

Energy Programs—Continued
Federal Funds—Continued

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realized by the Secretary in carrying out activities authorized by the NWPA, including but not limited to, any proceeds from the sale of assets, shall be available without further appropriation and shall remain available until expended: *Provided further*, That of the funds made available in this Act for Nuclear Waste Disposal, \$5,000,000 shall be provided to create a Blue Ribbon Commission to consider all alternatives for nuclear waste disposal: *Provided further*, That no funds provided in this Act or any previous Act may be used to pursue repayment or collection of funds provided in any fiscal year to affected units of local government for oversight activities that had been previously approved by the Department of Energy, or to withhold payment of any such funds.] (*Energy and Water Development and Related Agencies Appropriations Act, 2010.*)

Special and Trust Fund Receipts (in millions of dollars)

Identification code 89-5227-0-2-271	2009 actual	2010 est.	2011 est.
01.00 Balance, start of year	20,494	22,162	24,028
01.99 Balance, start of year	20,494	22,162	24,028
Receipts:			
02.20 Nuclear Waste Disposal Fund	770	773	779
02.40 Earnings on Investments, Nuclear Waste Disposal Fund	1,096	1,224	1,323
02.99 Total receipts and collections	1,866	1,997	2,102
04.00 Total: Balances and collections	22,360	24,159	26,130
Appropriations:			
05.00 Nuclear Waste Disposal	-145	-98	
05.01 Salaries and Expenses	-49	-29	-10
05.02 Salaries and Expenses	-4	-4	-2
05.99 Total appropriations	-198	-131	-12
07.99 Balance, end of year	22,162	24,028	26,118

Program and Financing (in millions of dollars)

Identification code 89-5227-0-2-271	2009 actual	2010 est.	2011 est.
Obligations by program activity:			
00.01 Repository	76	44	
00.02 Program Direction	63	70	
10.00 Total new obligations	139	114	
Budgetary resources available for obligation:			
21.40 Unobligated balance carried forward, start of year	10	16	
22.00 New budget authority (gross)	145	98	
23.90 Total budgetary resources available for obligation	155	114	
23.95 Total new obligations	-139	-114	
24.40 Unobligated balance carried forward, end of year	16		

New budget authority (gross), detail:

Discretionary:			
40.20 Appropriation (special fund)	145	98	

Change in obligated balances:

72.40 Obligated balance, start of year	87	62	33
73.10 Total new obligations	139	114	
73.20 Total outlays (gross)	-164	-143	
74.40 Obligated balance, end of year	62	33	33

Outlays (gross), detail:

86.90 Outlays from new discretionary authority	93	98	
86.93 Outlays from discretionary balances	71	45	
87.00 Total outlays (gross)	164	143	

Net budget authority and outlays:

89.00 Budget authority	145	98	
90.00 Outlays	164	143	

Memorandum (non-add) entries:

Total investments, start of year: Federal securities: Par value			
92.01	42,570	44,643	46,529
Total investments, end of year: Federal securities: Par value			
92.02	44,643	46,529	48,631

The Nuclear Waste Disposal Account was established as part of the Nuclear Waste Policy Act of 1982 (P.L. 97-425), as

amended, to provide funding to implement Federal policy for disposal of commercial spent nuclear fuel and high-level radioactive waste. The Administration has determined that developing a repository at Yucca Mountain, Nevada, is not a workable option and that the Nation needs a different solution for nuclear waste disposal. As a result, the Department will 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 and establish a Blue Ribbon Commission to develop a new strategy for nuclear waste management and disposal. All funding for development of the Yucca Mountain facility will be eliminated, such as further land acquisition, transportation access, and additional engineering. Ongoing responsibilities under the Act, including administration of the Nuclear Waste Fund and the Standard Contract, will continue under the Office of Nuclear Energy, which will lead future waste management activities. Residual responsibilities for site remediation will be assumed by NNSA and the Office of Environmental Management.

Object Classification (in millions of dollars)

Identification code 89-5227-0-2-271	2009 actual	2010 est.	2011 est.
Direct obligations:			
Personnel compensation:			
11.1 Full-time permanent	26	25	
11.3 Other than full-time permanent	1	1	
11.5 Other personnel compensation	1	1	
11.9 Total personnel compensation	28	27	
12.1 Civilian personnel benefits	6	5	
21.0 Travel and transportation of persons	1	1	
23.2 Rental payments to others	3	3	
25.1 Advisory and assistance services	31	6	
25.2 Other services	32	16	
25.3 Other purchases of goods and services from Government accounts	3	5	
25.4 Operation and maintenance of facilities	9	25	
41.0 Grants, subsidies, and contributions	26	26	
99.9 Total new obligations	139	114	

Employment Summary

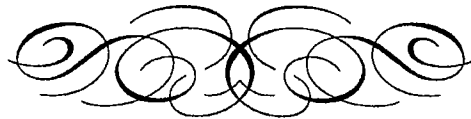
Identification code 89-5227-0-2-271	2009 actual	2010 est.	2011 est.
Direct:			
1001 Civilian full-time equivalent employment	243	243	

URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND

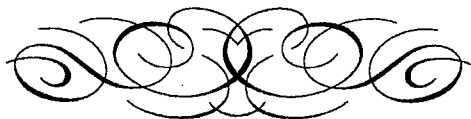
For necessary expenses in carrying out uranium enrichment facility decontamination and decommissioning, remedial actions, and other activities of title II of the Atomic Energy Act of 1954, and title X, subtitle A, of the Energy Policy Act of 1992, [\$573,850,000] \$708,498,000, to be derived from the Uranium Enrichment Decontamination and Decommissioning Fund, to remain available until expended. (*Energy and Water Development and Related Agencies Appropriations Act, 2010.*)

Special and Trust Fund Receipts (in millions of dollars)

Identification code 89-5231-0-2-271	2009 actual	2010 est.	2011 est.
01.00 Balance, start of year	4,453	4,536	4,649
01.99 Balance, start of year	4,453	4,536	4,649
Receipts:			
02.20 Domestic Utility Fees, Decontamination and Decommissioning Fund			200
02.40 Earnings on Investments, Decontamination and Decommissioning Fund	156	224	228
02.41 General Fund Payment - Defense, Decontamination and Decommissioning Fund	463	463	497
02.99 Total receipts and collections	619	687	925
04.00 Total: Balances and collections	5,072	5,223	5,574



Terminations, Reductions, and Savings



Budget of the U.S. Government Fiscal Year 2011



Office of Management and Budget
www.budget.gov

GENERAL NOTES

1. All years referenced for budget data are fiscal years unless otherwise noted. All years referenced for economic data are calendar years unless otherwise noted.
2. Detail in this document may not add to the totals due to rounding.
3. Web address: *http://www.budget.gov*.

TERMINATION: YUCCA MOUNTAIN NUCLEAR WASTE REPOSITORY
Department of Energy

The Administration has determined that Yucca Mountain, Nevada, is not a workable option for a nuclear waste repository and will discontinue the Department of Energy's program to construct a repository at the mountain in 2010. The Department will carry out its responsibilities under the Nuclear Waste Policy Act within the Office of Nuclear Energy as the Administration develops a new nuclear waste management strategy.

Funding Summary
(In millions of dollars)

	2010 Enacted	2011 Request	2011 Change from 2010
Budget Authority.....	197	0	-197

Justification

The Nuclear Waste Disposal Account was established as part of the Nuclear Waste Policy Act of 1982 (Public Law 97-425), as amended, to provide funding to implement Federal policy for disposal of commercial spent nuclear fuel and high-level radioactive waste. The Administration has determined that developing a repository at Yucca Mountain is not a workable option and that the Nation needs a better solution for nuclear waste disposal. The President has made clear that the Nation needs a better solution than the proposed Yucca Mountain repository, saying that such a solution must be based on sound science and capable of securing broad support, including support from those who live in areas that might be affected by the solution.

In 2010 the Department will discontinue its application to the Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geologic repository at Yucca Mountain, Nevada. Secretary of Energy Chu has announced that he will establish a Blue Ribbon Commission to help inform the Administration as it develops a new strategy for nuclear waste management and disposal.

In the interim, all funding for development of the facility will be eliminated, such as further land acquisition, transportation access, and additional engineering. While a new strategy is developed, ongoing responsibilities under the Act, including administration of the Nuclear Waste Fund and the Standard Contract, will continue within the Office of Nuclear Energy, which will lead all future waste management activities, including research on alternative waste management and disposal pathways, such as deep borehole disposal, salt disposal, and geologic disposal sites. Residual responsibilities for site remediation will be assumed by the Office of Environmental Management and responsibilities for security at the site will be assumed by the National Nuclear Security Administration.

ATTACHMENT B

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

**Before Administrative Judges:
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell**

In the Matter of)	Docket No. 63-001
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 09-892-HLW-CAB04
(High-Level Waste Repository))	February 1, 2010

**U.S. DEPARTMENT OF ENERGY’S MOTION TO
STAY THE PROCEEDING**

Today, the President announced the Administration’s budget for fiscal year 2011. In that budget, the President directed that the Department of Energy “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” *Budget of the U.S. Government, Fiscal Year 2011*, Appendix at 437 (available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/doe.pdf>); *see id., Terminations, Reductions, and Savings* at 62 (available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/trs.pdf>) (Attached). Moreover, the budget specifies that “all funding for development of the Yucca Mountain facility will be eliminated” for fiscal year 2011. *Id.*

In accord with these determinations, DOE has advised the undersigned counsel that DOE intends to withdraw the pending application with prejudice and to submit a separate Motion, pursuant to 10 C.F.R. § 2.107(a), within the next 30 days, to determine the terms and conditions,

if any, of that withdrawal. To avoid the unnecessary expenditure of resources by the Board, the NRC Staff, and all other parties to this proceeding, DOE hereby requests that the Board stay proceedings (with one exception discussed below) in this matter through the disposition by the Board of any DOE motion under Section 2.107 filed within the next 30-days. *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), unpublished Commission Order (Jan. 30, 2004) and *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), 1966 WL 627, 640 (N.R.C.) (Oct. 2, 1996) (Commission granting “housekeeping” stay to accommodate time for future Staff filings and parties’ responsive filings); *see generally Nat’l Audubon Soc’y, Inc. v. Watt*, 678 F.2d 299, 307 (D.C. Cir. 1982) (discussing parties’ agreement “to a stay of the proceedings ‘to conserve judicial resources’ . . . [T]he need for a stay was premised, in large part, on a new policy toward federal water projects adopted by an incoming Administration”).

The one exception that DOE proposes to this stay of proceedings would apply to DOE’s submission addressing the Board’s questions at the January 27, 2010 Case Management Conference, as well as the other parties’ written responses to that filing. DOE intends to adhere to its commitment to make that filing. That document, and other parties’ responses, may provide information relevant to the winding up of this proceeding.¹

Finally, DOE notes that Answers to this Motion are due in 10 days, but depositions are scheduled to begin approximately two weeks from today, and the electronic indexes associated with derivative discovery for those depositions under 10 C.F.R. § 2.1019 are due next week. In order to preserve the resources of the parties, DOE requests that the Board issue as soon as possible an interim Order suspending discovery pending its resolution of this Motion.

¹ In accordance with this Board’s Order of December 22, 2009, that parties “not [] take any actions at this time that would prevent or hinder their ability to archive LSN documentary material in a readily accessible format,” DOE will preserve and maintain its LSN collection pending further instruction.

DOE counsel has made a sincere attempt to confer with counsel for the other parties prior to filing this Motion, per 10 C.F.R. § 2.323(b), including holding a telephone conference to which counsel for each party was invited. As a result of that consultation, the following parties concur with this Motion: State of Nevada, State of California, Nuclear Energy Institute, Clark County, Nye County, Inyo County, and Eureka County.

The following parties take no position as of the time of this filing: the NRC Staff, JTS, NCAC, and the “Four Counties” (*i.e.*, Nevada Counties of Mineral, Lander, Churchill, and Esmeralda).

White Pine County opposes the Motion.

Respectfully submitted,

Signed (electronically) by Donald J. Silverman

Donald J. Silverman
Alex S. Polonsky
Counsel for the U.S. Department of Energy
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004

Scott Blake Harris
Sean Lev
James Bennett McRae

U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue, SW
Washington, DC 20585

Dated in Washington, DC
this 1st day of February

ATTACHMENT C

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

February 16, 2010

ORDER
(Granting Stay of Proceeding)

On February 1, 2010, the Department of Energy (DOE) moved for an interim suspension of discovery as well as a stay of most aspects of this construction authorization proceeding through the disposition of a further motion (which DOE stated that it will file within the next 30 days) seeking to withdraw its license application. DOE clarified that it was not requesting to stay "DOE's submission addressing the Board's questions at the January 27, 2010 Case Management Conference, as well as the other parties' written responses to that filing."¹ On February 2, 2010, the Board granted DOE's unopposed request for an interim suspension of discovery, pending disposition of DOE's motion to stay.²

DOE's motion to stay is supported by nearly all parties.³ No party or interested governmental participant has filed a timely opposition. Therefore, to avoid potentially unnecessary expenditure of resources, but with the exception noted below, the Board grants

¹ U.S. Department of Energy's Motion to Stay the Proceeding (Feb. 1, 2010) at 2 [hereinafter DOE Motion].

² CAB Order (Granting Interim Suspension of Discovery) (Feb. 2, 2010) (unpublished).

³ DOE Motion at 3; White Pine County Notice of Non Opposition to DOE's Motion to Stay (Feb. 1, 2010); NRC Staff Response to U.S. Department of Energy Motion to Stay the Proceeding (Feb. 2, 2010).

- 2 -

DOE's motion to stay the proceeding until the Board resolves DOE's expected motion to withdraw its license application. The grant of this stay shall not in any way affect the Board's future actions regarding the preservation and archiving of the Licensing Support Network document collections of the parties and interested governmental participants. The Board expects to set a schedule for further filings in that regard after DOE submits a status report on its archiving plan, as promised no later than February 19, 2010.⁴

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 16, 2010

⁴ The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010) at 4.

ATTACHMENT D

March 4th, 2010

United States Nuclear Regulatory Commission
Atomic Safety and Licensing Board
11555 Rockville Pike
Rockville, MD 20852

63-001-HLW

Enclosed are Aiken County's Petition to Intervene, Certificate of Service, and Exhibits 1-3. Exhibit 1 is Aiken County's petition before the United States Court of Appeals for the District of Columbia Circuit. Exhibit 2 is the scheduling order of the United States Court of Appeals for the District of Columbia Circuit. Exhibit 3 is a letter of February 19th 2010 from Thomas R. Gottshall.

Questions concerning this submittal may be directed to:

Thomas R. Gottshall, D.S.C. # 2406
tgottshall@hsblawfirm.com
P. O. Box 11889
Columbia, SC 29211-1889
(803) 779-3080
Attorneys for Petitioner Aiken County

Sincerely,



Thomas R. Gottshall

Document Components:
001 Aiken Transmittal Letter
002 Petition of Aiken County to Intervene
003 Exhibit 1
004 Exhibit 2
005 Exhibit 3

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

Before Administrative Judges:
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of)	Docket No. 63-001-HLW
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 09-892-HLW-CAB04
)	
(License Application for Geologic Repository at Yucca Mountain))	March 4, 2010
)	
)	
)	

PETITION OF AIKEN COUNTY, SOUTH CAROLINA, TO INTERVENE

Pursuant to the provisions of 10 C.F.R. § 2.309 pertaining to intervention and/or the provisions of 10 C.F.R. § 2.315 pertaining to participation by a non-party, Aiken County, South Carolina hereby petitions to intervene in this proceeding in opposition to the Department of Energy’s motion to withdraw, with prejudice, its application in this case. In the alternative, Aiken County seeks to stay this matter as contemplated by Rule 18, Federal Rules of Appellate Procedure, pending resolution of the petition Aiken County has filed with the United States Court of Appeals for the District of Columbia Circuit concerning the lawfulness of a Motion to Withdraw the license application. (Petition attached as Exhibit 1). The Court of Appeals has directed the Department of Energy to respond to the Petition by March 24 and has given Aiken County until April 5 to file its reply, if any. (Order attached as Exhibit 2). Aiken County earlier

requested by letter served with the court petition that the application not be withdrawn until the court proceeding has been resolved. (Letter attached as Exhibit 3).

BACKGROUND

Aiken County is a county within the State of South Carolina, as provided for under Article VII of the South Carolina Constitution. It is an independent governmental entity authorized to levy taxes, incur debt, and exercise eminent domain powers under Title 4 of the South Carolina Code of Laws. Aiken County has the responsibility to exercise its police powers for the health, safety and welfare of its citizens, and the procedural right to ensure, with regard to activities undertaken by the Federal Government within Aiken County, that the Federal Government observes procedures mandated by the law, the purpose of which is to protect the health, safety and welfare of the people of Aiken County. *See City of Dania Beach v. FAA*, 485 F.3d 1181, 1186-87 (D.C. Cir. 2007).

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. SRS Community Reuse Organization, *The Future of SRS: The Community Perspective* at 5, available online at www.srscro.org/downloads/SRRDI%20DOE%20Issues.doc. Further, Aiken County owns substantial real property in close proximity to SRS, as is set out in the Affidavit of Clay Killian, County Administrator for Aiken County, attached to Exhibit 1. Most of SRS is located in Aiken County, South Carolina.

Yucca Mountain is the site selected for the long-term disposal of these radioactive materials. DOE’s own analysis is 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.” See FEIS/DOE-250. The SRS site in Aiken County is one of the five referenced DOE sites.

RELIEF SOUGHT

Aiken County files this motion in response to the Department of Energy’s Motion to Withdraw of March 3rd, 2010. Aiken County hereby moves to intervene in these proceedings in the same manner as set forth in the Petition to Intervene of the State of South Carolina dated February 26, 2010, which this petition incorporates by reference. Aiken County does not, however, base its petition to intervene now on the Department of Energy’s *decision* to withdraw the application, but rather this petition is based on the actual *motion* to withdraw the application.¹ Additionally or alternatively, Aiken County seeks to appear in these proceedings pursuant to 10 C.F.R. §2.315(c) as an interested government body, with the below-signed as its designated representative.

Aiken County seeks denial of the Department of Energy’s motion to withdraw the permit application in this case, dissolution of the stay of the underlying licensing proceedings, and resumption of consideration of the Yucca Mountain license application.

In the alternative, Aiken County seeks a stay of consideration of the Department of Energy’s motion to withdraw the application until the resolution of Aiken County’s petition now before the Court of Appeals. Whether the Atomic Safety and Licensing Board has the legal authority to stay or terminate the license application itself are the very issues now before the court.

¹. Aiken County therefore does not incorporate by reference timeliness arguments made by the South Carolina Attorney General in its Petition to Intervene which are not required for this Petition.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



By: _____
Thomas R. Gottshall, D.S.C. # 2406

tgottshall@hsblawfirm.com

P. O. Box 11889

Columbia, SC 29211-1889

(803) 779-3080

Attorneys for Petitioner Aiken County

March 4, 2010

ATTACHMENT E

March 3, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

Before Administrative Judges:
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of)	Docket No. 63-001
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 09-892-HLW-CAB04
(High-Level Waste Repository))	

U.S. DEPARTMENT OF ENERGY'S MOTION TO WITHDRAW

The United States Department of Energy ("DOE") hereby moves, pursuant to 10 C.F.R. § 2.107, to withdraw its pending license application for a permanent geologic repository at Yucca Mountain, Nevada. DOE asks the Board to dismiss its application with prejudice and to impose no additional terms of withdrawal.

While DOE reaffirms its obligation to take possession and dispose of the nation's spent nuclear fuel and high-level nuclear waste, the Secretary of Energy has decided that a geologic repository at Yucca Mountain is not a workable option for long-term disposition of these materials. Additionally, at the direction of the President, the Secretary has established the Blue Ribbon Commission on America's Nuclear Future, which will conduct a comprehensive review

and consider alternatives for such disposition.¹ And Congress has already appropriated \$5 million for the Blue Ribbon Commission to evaluate and recommend such “alternatives.” Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009). In accord with those decisions, and to avoid further expenditure of funds on a licensing proceeding for a project that is being terminated, DOE has decided to discontinue the pending application in this docket,² and hereby moves to withdraw that application with prejudice.

Under the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 *et seq.* (“NWPA”), this licensing proceeding must be conducted “in accordance with the laws applicable to such applications” NWPA § 114(d), 42 U.S.C. § 10134(d). Those laws necessarily include the NRC’s regulations governing license applications, including, as this Board has already recognized, 10 C.F.R. § 2.107(a). *See* CAB Order (Concerning LSNA Memorandum), ASLBP No. 09-892-HLW-CAB04, at 2 (Dec. 22, 2009) (stating that “the parties are reminded that, pursuant to 10 C.F.R. § 2.107, withdrawal shall be on such terms as the Board may prescribe.”). That section provides in relevant part that “[w]ithdrawal of an application after the

¹ *See* Presidential Memorandum -- Blue Ribbon Commission on America’s Nuclear Future (Jan. 29, 2010) (“Presidential Memorandum”), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-blue-ribbon-commission-americas-nuclear-future>; Department of Energy Press Release, Secretary Chu Announces Blue Ribbon Commission on America’s Nuclear Future (January 29, 2010), available at <http://www.energy.gov/news/8584.htm>; Charter, Blue Ribbon Commission on America’s Nuclear Future (filed March 1, 2010), available at http://www.energy.gov/news/documents/BRC_Charter.pdf. The Commission will conduct a comprehensive review of policies for managing the back end of the nuclear fuel cycle, including all alternatives for the storage, processing, and disposal of civilian and defense used nuclear fuel and materials derived from nuclear activities. *See id.*

² This decision was announced in the Administration’s Fiscal Year 2011 Budget, which states that “[i]n 2010, the Department will discontinue its application to the Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geologic repository at Yucca Mountain, Nevada.” Budget of the U.S. Government, Fiscal Year 2011: Terminations, Reductions, and Savings, at 62 (Feb. 1, 2010). The Department of Energy’s Fiscal Year 2011 Congressional Budget Request similarly states that “in 2010, Department will discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain.” Department of Energy, FY 2011 Congressional Budget Request, Vol. 7, at 163 (Feb. 2010).

issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.” 10 C.F.R. § 2.107(a).

Thus, applicable Commission regulations empower this Board to regulate the terms and conditions of withdrawal. *Philadelphia Electric Company* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 N.R.C. 967, 974 (1981). Any terms imposed for withdrawal must bear a rational relationship to the conduct and legal harm at issue. *Id.* And the record must support any findings concerning the conduct and harm in question to impose a term. *Id.*, citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604-05 (5th Cir. 1976); 5 Moore's Federal Practice ¶ 41.05[1] at 41-58.

A. The Board Should Grant Dismissal With Prejudice

In this instance, the Board should prescribe only one term of withdrawal—that the pending application for a permanent geologic repository at the Yucca Mountain site shall be dismissed with prejudice.³

That action will provide finality in ending the Yucca Mountain project for a permanent geologic repository and will enable the Blue Ribbon Commission, as established by the Department and funded by Congress, to focus on alternative methods of meeting the federal government's obligation to take high-level waste and spent nuclear fuel. It is the Secretary of Energy's judgment that scientific and engineering knowledge on issues relevant to disposition of high-level waste and spent nuclear fuel has advanced dramatically over the twenty years since the Yucca Mountain project was initiated. *See also* Presidential Memorandum at 1. Future proposals for the disposition of such materials should thus be based on a comprehensive and

³ DOE seeks this form of dismissal because it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain.

careful evaluation of options supported by that knowledge, as well as other relevant factors, including the ability to secure broad public support, not on an approach that “has not proven effective” over several decades. *Id.*

The Board should defer to the Secretary’s judgment that dismissal of the pending application with prejudice is appropriate here. Settled law in this area directs the NRC to defer to the judgment of policymakers within the Executive Branch.⁴ And whether the public interest would be served by dismissing this application with prejudice is a matter within the purview of the Secretary.⁵ From public statements already made, we of course understand that some will nevertheless argue that dismissing this application is contrary to the NWPA. Although it is impossible to anticipate exactly what parties will argue at this point, at least one litigant seeking to raise these issues in federal court has said the NWPA obligation to file the pending application is inconsistent with the decision to withdraw the application. This is simply wrong.

Nothing in the text of the NWPA strips the Secretary of an applicant’s ordinary right to seek dismissal. In fact, the text of the statute cuts sharply in favor of the Secretary’s right to seek

⁴ *U.S. Department Of Energy* (Plutonium Export License), CLI-04-17, 59 N.R.C. 357, 374 (2004) (deferring, upon “balanc[ing] our statutory role in export licensing with the conduct of United States foreign relations, which is the responsibility of the Executive Branch,” to Executive Branch determination on an export license application). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-30, 58 N.R.C. 454, 472 (2003) (expressing “considerable doubt” about the NRC’s authority to “second-guess” the Bureau of Land Management on an issue relating to recommendations as to the wilderness status of land, and declining an invitation to do so); *see also Environmental Radiation Protection Standards for Nuclear Power Operations*, 40 CFR 190, CLI-81-4, 13 N.R.C. 298, 301 (1981) (deferring to EPA standards for radiation protection: “This agency does not sit as a reviewing court for a sister agency’s regulations....”). *See generally Pacific Gas & Electric Company* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 N.R.C. 45, 52 (1983) (“The law on withdrawal does not require a determination of whether [the applicant’s] decision [to withdraw] is sound.”).

⁵ The Atomic Energy Act (“AEA” or “Act”) gives the Secretary broad authority to carry out the Act’s purposes, including the authority to direct the Government’s “control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare.” AEA § 3(c), 42 U.S.C. § 2013(c). Indeed, as the D.C. Circuit has recognized, the AEA established “a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.” *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). While *Siegel* concerned directly the branch of the then-Atomic Energy Commission that later became the NRC, its recognition that broad discretion is to be given to the governmental agencies charged with administering the AEA’s objectives applies equally to the Department of Energy, the other lineal descendant of the AEC.

dismissal. The statute simply requires that the Secretary “shall submit . . . an application for a construction authorization.” NWPA § 114(b), 42 U.S.C. § 10134(b). It neither directs nor circumscribes the Secretary’s actions on the application after that submission.⁶

Indeed, far from imposing special limitations on DOE after the submission, the NWPA expressly requires that the application be considered “in accordance with the laws applicable to such applications.” NWPA § 114(d), 42 U.S.C. § 10134(d). Those laws include 10 C.F.R. § 2.107, which, as this Board has recognized, authorizes withdrawals on terms the Board prescribes. Congress, when it enacted the NWPA in 1982, could have dictated that special rules applied to this proceeding to prevent withdrawal motions, or could have prescribed duties by DOE with respect to prosecution of the application after filing, but it chose not to do so.

Nor does the structure of the NWPA somehow override the plain textual indication in the statute that ordinary NRC rules govern here or dictate that the Secretary must continue with an application he has decided is contrary to the public interest. The NWPA does not prescribe a step-by-step process that leads inexorably to the opening of a repository at Yucca Mountain. Indeed, even if the NRC granted the pending application today, the Secretary would not have the authority to create an operational repository. That would require further action by DOE, other agencies, and Congress itself, yet none of those actions is either mandated or even mentioned by the NWPA. The NWPA does not require the Secretary to undertake the actions necessary to obtain the license to receive and possess materials that would be necessary to open a repository. 10 C.F.R. §§ 63.3, 63.32(d). Rather, the NWPA refers only to the need for a “construction

⁶ After filing the application, the only NWPA mandate imposed on the Secretary is a *reporting* requirement to Congress to note the “project decision schedule that portrays the optimum way to attain the operation of the repository, within the time periods specified in this part.” NWPA § 114(e)(1), 42 U.S.C. § 10134(e)(1).

authorization,” NWPA § 114(b), 42 U.S.C. § 10134(b) – and even there, as discussed, it mandates only the submission of an application. To open a facility, moreover, the Department would be required to obtain water rights, rights of way from the Bureau of Land Management for utilities and access roads, and Clean Water Act § 404 permits for repository construction, as well as all the state and federal approvals necessary for an approximately 300-mile rail line, among many other things. None of those actions is mandated by the NWPA. At least as important, as the prior Administration stressed, *Congress* would need to take further action not contained in the NWPA before any such repository could be opened.⁷ In short, there are many acts between the filing of the application and the actual use of the repository that the NWPA does not require.

Where, even if the NRC granted the pending application, Congress has not authorized the Secretary to make the Yucca Mountain site operational, or even mandated that he take the many required steps to make it operational, it would be bizarre to read the statute to impose a non-discretionary duty to continue with any particular intermediate step (here, prosecuting the application), absent clear statutory language mandating that result. More generally, it has not been the NRC’s practice to require any litigant to maintain a license application that the litigant does not wish to pursue. That deference to an applicant’s decisions should apply more strongly where a government official has decided not to pursue a license application because he believes that other courses would better serve the public interest.

Finally, the fact that Congress has approved Yucca Mountain as the site of a repository, *see* Pub. L. No. 107-200, 116 Stat. 735 (2002) (“there hereby is approved the site at Yucca Mountain, Nevada, for a repository, with respect to which a notice of disapproval was submitted

⁷ *See* January 2009 Project Decision Schedule at 1 (“This schedule is predicated upon the enactment of legislation ... [regarding] land withdrawal.”). *See also, e.g.*, Nuclear Fuel Management and Disposal Act, S.2589, 109th Congress, 2d Sess. § 3 (2006) (proposed legislation authorizing the withdrawal of lands necessary for the Yucca Mountain repository).

by the Governor of the State of Nevada on April 8, 2002”), means, in the D.C. Circuit’s words, simply that the Secretary is “permitted” to seek authority to open such a site and that challenges to the prior process to select that site are moot. *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1309-10 (D.C. Cir. 2004). It does *not* require the Secretary to continue with an application proceeding if the Secretary decides that action is contrary to the public interest. *See, e.g.*, S. Rep. No. 107-159, at 13 (2002) (“It bears repeating that enactment of the joint resolution will not authorize construction of the repository or allow DOE to put any radioactive waste or spent nuclear fuel in it or even allow DOE to begin transporting waste to it. Enactment of the joint resolution will only allow DOE to take the next step in the process laid out by the Nuclear Waste Policy Act and apply to the NRC for authorization to construct the repository at Yucca Mountain.”); H.R. Rep. No. 107-425, at 7 (2002) (“In accordance with the Nuclear Waste Policy Act (NWPA), such approval would allow the Department of Energy (DOE) to apply for a license with the Nuclear Regulatory Commission to construct a nuclear waste storage facility on the approved site.”).⁸ That conclusion is even more strongly compelled now, in light of Congress’s recent decision to provide funding to a Blue Ribbon Commission, whose explicit purpose is to propose “alternatives” for the disposal of high-level waste and spent nuclear fuel.

Even if there were any ambiguity on these points, the Secretary’s interpretation of the NWPA would be entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Gen. Elec. Uranium Mgmt. Corp. v. DOE*, 764 F.2d 896, 907 (D.C. Cir. 1985) (applying *Chevron* deference to uphold DOE’s interpretation of the NWPA); *see also Skidmore v Swift Co.*, 323 U.S. 65 (1944); *Auer v. Robbins*, 519 U.S. 452 (1977); *Coeur*

⁸ *See also* 148 Cong. Rec. 7155 (2002) (Rep. Dingell) (stating that Yucca Mountain Site Approval Act “is just about a step in a process”); *id.* at 7166 (Rep. Norwood) (“The vote today does not lock us in forever and we are not committed forever to Yucca Mountain.”); *id.* at 12340 (Sen. Crapo) (“[T]his debate is not about whether to open the Yucca Mountain facility so much as it is about allowing the process of permitting to begin to take place.”).

Alaska, Inc. v. Southeastern Alaska Conservation Council, 129 S. Ct. 2458 (2009). Simply put, the text of the NWPA does not specify actions the Secretary can or must take once the application is filed. Accordingly, while some may disagree with the wisdom of the Secretary's underlying policy decision, the Secretary may fill this statutory "gap." The Secretary's interpretation is a reasonable one that should be given great weight and sustained. *See, e.g., Tennessee v. Herrington*, 806 F.2d 642, 653 (6th Cir. 1986) ("[W]e are mindful of the Supreme Court's statement in *Chevron, supra*, that: 'When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.'").

B. No Conditions Are Necessary As to the Licensing Support Network

Finally, there is no reason to impose conditions relating to the Licensing Support Network ("LSN") as a term of withdrawal. As DOE's prior filings with this Board explain, DOE will, at a minimum, maintain the LSN throughout this proceeding, including any appeals, and then archive the LSN materials in accordance with the Federal Records Act and other relevant law. *See* Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (filed Feb. 4, 2010); Department of Energy's Status Report on Its Archiving Plan (filed Feb. 19, 2010). Thus, DOE will retain the full LSN functionality throughout this proceeding, including appeal, and then follow well established legal requirements that already govern DOE's obligations regarding these documents. DOE is also considering whether sound public and fiscal policy, and the goal of preserving the knowledge gained both inside and outside of this proceeding, suggest going even further than those legal

requirements. There is thus no need for this Board to impose additional conditions concerning the preservation of records.

* * *

DOE counsel has communicated with counsel for the other parties commencing on February 24, 2010, in an effort to resolve any issues raised by them prior to filing this Motion, per 10 C.F.R. § 2.323(b). The State of Nevada and the State of California have stated that they agree with the relief requested here. The Nuclear Regulatory Commission Staff has stated that it takes no position at this time. The Nuclear Energy Institute has stated that it does not consent to the relief requested and will file its position in a response. All other parties that have responded have stated that they reserve their positions until they see the final text of the motion.⁹

⁹ These parties include: Clark County, Eureka County, Four Counties (Esmeralda, Lavender, Churchill, Mineral), Inyo County, Lincoln County, Native Community Action Council, Nye County, Timbisha Shoshone Tribal Group, White Pine County.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY
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ATTACHMENT F

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

March 5, 2010

ORDER
(Concerning Scheduling)

Before the Board are several related matters. First, the Department of Energy (DOE) has moved to withdraw its application.¹ Second, the State of South Carolina (South Carolina), the State of Washington (Washington), and Aiken County, South Carolina (Aiken County) have each petitioned to intervene, challenging whether DOE's motion should be granted and, if so, on what terms.² Third, the parties have not yet been afforded an opportunity to comment on DOE's filings regarding the preservation and archiving of its Licensing Support Network (LSN) document collection.³

The stay imposed by our February 16, 2010 Order does not prevent briefing of these matters, which shall proceed as follows:

¹ U.S. Department of Energy's Motion to Withdraw (Mar. 3, 2010).

² Petition of the State of South Carolina to Intervene (Feb. 26, 2010); State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010); Petition of Aiken County, South Carolina, to Intervene (Mar. 4, 2010).

³ The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010); The Department of Energy's Status Report on Its Archiving Plan (Feb. 19, 2010); see CAB Order (Granting Stay of Proceeding) (Feb. 16, 2010) at 2 (unpublished) (stating that a schedule for further filings regarding the preservation and archiving of the LSN documentation collection will be set in a subsequent order).

- 2 -

1. In accordance with CAB Case Management Order #1⁴ and Commission regulations,⁵ answers to the South Carolina, Washington and Aiken County petitions would ordinarily be due 25 days after service, and replies due seven days thereafter. For convenience, there shall be common filing dates: that is, answers to the three petitions shall be due Monday, March 29, 2010, and the replies of South Carolina, Washington and Aiken County shall be due Monday, April 5, 2010. To the extent practicable, the parties are encouraged to file answers jointly with other parties asserting similar positions.

2. The ten-day deadline for answers to DOE's motion to withdraw is waived.⁶ The Board will set a time for responses to DOE's motion to withdraw after it has determined whether South Carolina, Washington and Aiken County shall be permitted to intervene.

3. The Board expects shortly to seek written responses from DOE to additional questions concerning DOE's LSN collection. After the Board's questions have been answered, we will establish a schedule for comments by the parties on DOE's preservation and archiving plans.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 5, 2010

⁴ CAB Case Management Order #1 (Jan. 29, 2009) at 3 (unpublished).

⁵ See 10 C.F.R. § 2.309(h)(1)-(2).

⁶ See *id.* at § 2.323(c).

ATTACHMENT G

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
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In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

March 16, 2010

ORDER

(Filing Times for Answers and Replies)

The provisions of 10 C.F.R. § 2.309(h) shall control the time for filing answers to the newly filed intervention petitions of the National Association of Regulatory Utility Commissioners and the Prairie Island Indian Community and the time for filing any replies. In the event any additional intervention petitions are filed, those same provisions shall control the time period for filing answers and replies.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 16, 2010