

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

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

**PETITIONERS' (FERGUSON, PETERSEN AND LAMPSON) REPLY TO
RESPONDENTS' OPPOSITION TO PETITIONERS'
MOTION TO EXPEDITE**

I. INTRODUCTION

Respondents' Opposition does not seriously contest that Petitioners have raised a matter of significant public interest and a substantial question of law. Respondents, likewise, do not contest that they will continue to dismantle the Yucca Mountain project during the Court's consideration of this matter. They, moreover, do not seriously contest that Petitioners are likely to be exposed for longer periods of time to the potential dangers of high level radioactive waste ("HLW") at the Hanford site because Respondents have abandoned the Yucca Mountain project. Instead, Respondents argue that an expedited brief schedule is not necessary because: (a) exposing petitioners to continued harm for a few more years is of no concern because it will be years before the project is completed, it is possible it may never open, and the shutdown activities "should" protect the integrity of the project if it is revived; (b) there are threshold issues of jurisdiction and finality that must first be considered; and (c) even though Respondents have the resources to continue to dismantle the project, the proposed briefing schedule is too burdensome for them to follow. All of these reasons must be rejected.

There is no reason to delay rulings on the motions to expedite pending in the *Ferguson* and *South Carolina* matters, or on the mandamus motion pending in the *Aiken County* matter. The *Ferguson* Petitioners agree with counsel for Aiken County that no further briefing is required on the issue of whether mandamus is proper under the NWPA to compel DOE to comply with the mandate to seek licensing of Yucca Mountain. Stopping DOE from withdrawing its license application is an essential step in ensuring that Respondents do not violate the

NWPA. At the same time, Respondents have taken, and continue to take, other actions to carry out their January 2010 decision to permanently shut down the Yucca Mountain project even before they sought to withdraw the application. If the Respondents agree to stop dismantling the Yucca Mountain project while the Court considers their authority to do so, then a schedule as suggested by the Respondents would be appropriate. If they will not agree, then the expedited schedule is necessary.¹

II. ARGUMENT

A. Respondents' Activities Are Causing, And Will Continue To Cause, Irreparable Harm To Petitioners Without Expedited Briefing.

Respondents' claims of no irreparable harm must be rejected. First, Respondents assert that because Yucca Mountain is expected to take quite some time to open, any efforts to shut it down cannot constitute "imminent" harm.

Respondents' Opposition ("Opp.") at 14.² They do not contest the evidence of "significant and tangible actions that are accelerating the shut down process" at

Yucca Mountain, *see* Petitioners' Motion ("Mot.") at 8-9, or the evidence that the

¹ If the Court grants the motion for preliminary injunction sought today by the State of Washington, No. 10-1082, a slower briefing schedule would also be appropriate.

² Respondents misstate the standard for expedited review, which, as noted in this Court's Handbook of Practice and Internal Operating Procedures Part VIII.B at 33-34, examines not whether injury is "imminent," but whether it is "irreparable." As Petitioners' Motion explains, expedited review is appropriate not only because Respondents are proceeding with haste to shut down the Yucca Mountain project, but also because their actions are calculated to prejudice the ability to restart that project once this Court so orders.

“human capital that will be lost” as a result of Respondents’ actions and “is almost impossible to replace.” *Id.* at 11 (quoting Declaration of Lake Barrett, former Acting Director of the Office of Civilian Radioactive Waste Management (“OCRWM”), Exhibit I to Motion, at ¶ 6). Instead Respondents make vague assertions that their actions “should” permit retrieval of data in the future and, further, that it is “likely” that the key human resources “could” be available “if” contracts were reestablished. *Opp.* at. 10-11, n.6. If expedited review is granted this speculation will be eliminated.

Second, Respondents argue that any delays caused by their actions “must be put in context” of the complexity of the Yucca Mountain project, and that estimates put the project years, if not decades, from completion. *Opp.* at 11. This response begs the question of what exactly has happened to that timeline as a result of DOE’s dismantling of the Yucca Mountain project. Today’s actions will cause tomorrow’s delays, and it is tomorrow’s delays that expose Petitioners to more risk than would otherwise exist. The delays resulting from Respondents’ current actions will unquestionably extend the timeline for opening a workable repository at Yucca Mountain even further. The fact that the NRC or Congress may need to take action in the future that will impact whether Yucca Mountain action opens,

see Opp. at 12, is irrelevant to whether the Respondents have an obligation to take action now.³

Third, Respondents note that their new Blue Ribbon Commission, which is apparently not allowed to consider Yucca Mountain as an alternative,⁴ “may” develop a solution to the problems posed by Petitioners’ proximity to Hanford. They contend, therefore, this Court should not grant expedited review. Opp. at 15. Respondents might establish all the special commissions they want, using every color of the rainbow. They may not, however, shirk their existing legal obligations under the NWPA by claiming that they might have a better idea than Congress and that they might be able to get the NWPA amended to implement that idea.

³ This point goes directly to the heart of Petitioners’ argument on the merits: Respondents’ obligations at this point in the process are fixed irrespective of the obligations of other entities.

⁴ *See* Mot. Exhibit A at 3, 7. Respondents’ argument in this regard is made in part in the form of a new “motion” to hold this matter in abeyance pending action by the NRC. Apart from the fact that the Court did not authorize the filing of a new motion, and that under the Rules petitioners have ten days to respond, *see* FRAP 27(a)(3)(B), Cir. R. 27(d), this motion is nothing more than an effort to avoid responding to what the Court directed the parties to address. The *Ferguson* Petitioners are neither parties to the NRC proceedings, nor did they name the NRC as a respondent. DOE’s motion to withdraw its license application with prejudice is one of dozens of actions that have been taken to implement Respondents’ challenged final decision to take Yucca Mountain “off the table” and shut it down. As the evidence indicates, DOE already started to and plans to continue to shut down the project regardless of the disposition of its application. *See* Mot. at 7-13, Exhibits A-I, Barrett Decl. *See also, State of Washington v. DOE*, No. 10-1082, Motion for Preliminary Injunction (D.C. Cir. Apr. 13, 2010), pp. 5-7. To the extent that Respondents’ motion to hold this matter in abeyance impacts consideration of the issues raised by the *Ferguson* Petitioners, which it does not, the *Ferguson* Petitioners join in the arguments against Respondents’ motion made today by South Carolina and Aiken County.

Respondents are shuttering the Yucca Mountain project *now* in clear violation of the NWPA. Mot. Exhibit G (“[w]e need to begin actions now to ensure that the shutdown occurs in an orderly fashion”).

B. The Motion To Expedite Should Not Be Denied Merely Because Respondents’ Claim They Have Not Taken Final Agency Action.

Respondents’ assertion that the challenged action is not sufficiently final to merit review is demonstrably unfounded. As noted in Petitioners’ motion, however, this assertion may be addressed as part of the expedited briefing schedule. Mot. at 19.

A final action is one that marks the consummation of the agency’s decisionmaking process and that establishes rights and obligations or creates binding legal consequences. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The particular label placed upon an action by an agency is not conclusive, “‘for it is the substance of what the [agency] has purported to do and has done which is decisive.’” *Fund for Animals, Inc. v. United States BLM*, 460 F.3d 13, 26 (D.C. Cir. 2006) (Griffith, J., dissenting) (quoting *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416 (1942) (emphasis added); *see also Croplife Am. v. EPA*, 329 F.3d 876, 881-83 (D.C. Cir. 2003) (EPA directive, embodied in a press release, forbidding the use of certain data to evaluate pesticides’ effects constituted final agency action subject to review); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (issuance of national guidance document is final agency action because it marked the consummation of EPA’s decisionmaking process and determined the rights and obligations of both applicants and the agency); *Appalachian Power v.*

EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (noting that “if an agency acts as if a document issued at headquarters is controlling in the field” that a court can find final agency action).

Respondents do not dispute that on January 29, 2010, the Secretary announced publicly that the President had determined, and had directed him, “not proceed with the Yucca Mountain nuclear waste repository...” *See* Mot. at 7, Mot. Exhibit A. They do not dispute that this announcement confirmed the Secretary’s own announcement, just a few days earlier, that Yucca Mountain was “off the table.” *Id.* at 1.⁵ Instead, Respondents contend that this (and other) now undisputed “evidence of the decision” constitutes nothing more than evidence of an unreviewable DOE “general policy” towards the Yucca Mountain facility. Respondents’ Opposition (“Opp”) at 7. Respondents’ argument must fail.

Respondents’ action here is not just a budget request made by a federal agency to Congress. Opp. at 8 (citing *Fund for Animals v. BLM*, 460 F.3d 13, 19-20 (D.C. Cir. 2006)), and Petitioners’ challenge is far more than a “generalized complaint[] about agency behavior.” *Id.* (citing *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006)). To the contrary, Respondents’ decision to take Yucca Mountain “off the table” and shut it down marks the consummation of their decisionmaking process with respect to the project – a decision from which legal

⁵ To the extent Respondents dispute what the Respondents’ representatives said on January 29 and February 1, 2010, *see* Opp. at 7 n. 5, a copy of the tape recording of the announcement, transcribed in Exhibit A to the Petition, is provided to the Court in DVD format as Exhibit A hereto. It is time stamped to track the transcript.

consequences flow directly. Respondents' decision to shut down Yucca Mountain is as "final" as a decision under the NWPA could possibly be. Their failure to move forward with the project is an affirmative decision not to act, a failure to act despite an unequivocal statutory duty to do so, and a violation of the separation of powers, all of which is reviewable by this Court pursuant to both the NWPA and APA. *See* 42 U.S.C. § 10139(a)(1)(a)-(c); 5 U.S.C. § 706; *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1287-88 (D.C. Cir. 2004).

Legal consequences flow directly from this decision. Respondents do not dispute that their decision to end Yucca Mountain is actively and rapidly being implemented the Secretary and DOE. Mot. at 7-12, Mot. Exhibit A-I, Decl. of Lake Barrett. Since the decision was made, the project has come to a screeching halt, funding has been cut and diverted, and the project's contracts and teams are being dismantled. Mot. at 7-9, Exhibit A-G. Clearly this order is controlling in the field. The long and arduous effort to build it cannot be put back together quickly, if at all. *See* Mot. at Exhibit I ¶ 6. Respondents have decided not proceed with Yucca Mountain – period – despite the NWPA's statutory mandate that they proceed optimally.⁶ *See, e.g., Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (“[I]f an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers ‘final agency action’

⁶ Petitioners are not seeking an order the Respondents unconditionally construct and operate the Yucca Mountain project. They must, however, proceed “optimally” down a very specific path that Congress mandated to determine if this project will be built, and they may not divert from that path. *See* 42 U.S.C. §§ 10134(b)-(e)(1), 10172a.

review.”). Moreover, under the NWPA, Yucca Mountain is the only site on which a permanent repository for storing high level radioactive waste (“HLW”) can be developed. *See* Pub. L. 102-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135 note (2006)); *Nuclear Energy Inst., Inc.*, 373 F.3d at 1310-11.

For the foregoing reasons, the Court should reject Respondents’ extensive pleas of “let’s wait to see what the NRC does.” Respondents’ final decision to abandon the project apparently remains *irrespective* of whatever further action the NRC takes on the license application. Moreover, any remote possibility that Respondents may change course following future action by the NRC is irrelevant. *See Gen. Elec. Co.*, 290 F.3d at 380 (“if the possibility ... of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule ... would ever be final as a matter of law.”). Respondents’ decision at issue here represents a fully crystallized determination that Yucca Mountain is off the table, and Respondents have and will continue to rapidly implement that decision. Because the decision represents the “consummation of the agency’s decisionmaking process” and is a determination from which “legal consequences will flow,” it is final for purposes of judicial review. *Bennett*, 520 U.S. at 177-78.⁷

⁷ Respondents’ decision to take Yucca Mountain “off the table” is also ripe for review. With respect to “fitness” for review, the substantive issues are undoubtedly “purely legal” and delay will not, despite Respondents’ contention, further “crystallize” the merits issues in this case. *See Edison Elec. Institute v. EPA*, 996 F.2d 326, 333-34 (D.C. Cir. 1993) (petition for review that presents a “purely legal question” satisfies the “fitness” prong of the test for ripeness; *CropLife Am. v. EPA*, 329 F.3d 876, 884 (D.C. Cir. 2003) (press release

D. Absent Agreement By The Respondents To Stop Dismantling The Project Pending The Court's Review, The Proposed Expedited Schedule Is Necessary.

The schedule proposed gives all parties sufficient time to brief the issues in this case. Under Petitioners' proposal, and assuming the Court grants the motion to expedite this week, Respondents will have two weeks to brief the jurisdictional issues they claim exist, many of which it already spent fifteen pages briefing. *See* Respondents' Response in Opposition to the Petition, *In re Aiken County*, No. 10-1050 (D.C. Cir. March 24, 2010). Respondents will then have over two weeks to respond to Petitioners' merits brief, which will raise straightforward legal issues.⁸ The government will then have an additional two weeks to file a reply to Petitioners' merits brief and file its reply with respect to any jurisdictional issues.

announcing that EPA would not consider certain data in regulatory decision-making was a statement of a blanket agency policy that presented a purely legal question, ripe for review). With respect to "hardship," this Court has frequently suggested that hardship is not a *sine qua non* of ripeness. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 465 (D.C. Cir. 2006) ("[W]here . . . there are no significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the balance against judicial review."). Here, there are no significant agency or judicial interests militating in favor of delay. The final decision to close Yucca Mountain has been made by Respondents and is rapidly and aggressively being implemented. Petitioners have, and will continue to face will irreparable harm if expeditious review of their challenge is denied. *See* II.A., *supra*.

⁸ Respondents attempt to complicate matters by arguing that, because Petitioners have claimed that their actions are arbitrary and capricious in addition to unlawful, some sort of administrative record must be filed. Petitioners doubt that Respondents had any substantive basis at all for the decision to terminate the Yucca Mountain project (given that one official responded to questions about scientific reviews by noting simply that DOE "take[s] its orders from the President."). *Mot.*, Exhibit A at 7-8. Nevertheless, should Respondents have an administrative record for their final action, it is likely thin, and Petitioners submit that it should not be overly burdensome to file it expeditiously.

Petitioners recognize this is an aggressive schedule, and would be more than willing to extend it if Respondents agree to stop dismantling the Yucca Mountain project. They have thus far declined to do so, and the evidence indicates that the Respondents are determined to take accelerated and multiple actions in the very near future to completely end this project. Mot. at 7-12, Mot. Exhibit A-I, Decl. of Lake Barrett.

III. CONCLUSION

For the foregoing reasons, the *Ferguson* Petitioners respectfully request that their motion to expedite be granted.

April 13, 2010

/s/ Barry M Hartman

Barry M. Hartman
Bar No. 291617
barry.hartman@klgates.com
K&L GATES LLP
1601 K Street, N.W.
Washington, DC 20005-1600
(202) 778-9338

Christopher R. Nestor
christopher.nestor@klgates.com
K&L GATES LLP
17 North Second Street, 18th Floor
Harrisburg, PA 17101
(717) 231-4500

OF COUNSEL:

John Englert
K&L GATES LLP
210 Sixth Avenue
Pittsburgh, PA 15222-2613

Christopher R. Tate
K&L GATES LLP
1601 K Street, N.W.
Washington, DC 20006-1600

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 2010, a copy of the foregoing was served by use of the Court's Electronic Filing System, upon the following persons:

Ms. Ellen J. Durkee
Mr. Aaron Peter Avila
Lisa Elizabeth Jones
United States Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530
aaron.avila@usdoj.gov, ellen.durkee@usdoj.gov,
lisa.jones@usdoj.gov, efile_app.enrd@usdoj.gov
*Attorneys for Respondents President Barack Obama,
Department of Energy, Secretary Steven Chu*

John W. Lawrence
Charles J. Fitzpatrick
Martin G. Malsch
Egan, Fitzpatrick, Malsch & Lawrence PLLC
12500 San Pedro Ave., Suite 555
San Antonio TX 78216
Attorneys for Intervenor State of Nevada

Thomas R. Gottshall
Alexander Shissias
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29211-1889
tgottshall@hsblawfirm.com, ashissias@hsblawfirm.com
Attorneys for Petitioner Aiken County

William Henry Davidson II
Kenneth Paul Woodington
Davidson, Morrison & Lindemann
1611 Devonshire Dr., 2nd Floor
P.O. Box 8568
Columbia, SC 29202-8568
wdavidson@dml-law.com, kwoodington@dml-law.com
Attorneys for Petitioner State of South Carolina

Todd R. Bowers
Andrew A. Fitz
State of Washington, Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
AndyF@ATG.WA.GOV, ToddB@ATG.WA.GOV
Attorneys for Petitioner State of Washington

John F. Cordes, Jr.
Office of the General Counsel
Nuclear Regulatory Commission
Washington, DC 20555
John.cordes@NRC.gov
Attorney for NRC Respondents

James Bradford Ramsay
Robin J. Lunt
National Assoc. of Regulatory Utility Commissioners
1101 Vermont Ave., N.W., Suite 200
Washington, DC 20005
jramsay@naruc.org, rlunt@naruc.org
Attorneys for Intervenor NARUC



Barry M. Hartman

EXHIBIT A

NOTICE

**CD CONTAINING AUDIO RECORDING
FILED WITH THE COURT**