

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

No. 10-1050

Consolidated With Nos. 10-1052, 10-1069, 10-1082, 10-1084

IN RE AIKEN COUNTY,
PETITIONER

ON PETITIONS FOR MANDAMUS AND PETITIONS FOR REVIEW
AND INJUNCTIVE RELIEF

RESPONDENTS' RESPONSE TO PETITIONERS'
SUPPLEMENTAL FILING REGARDING MOTION
TO LIFT STAY AND SET EXPEDITED
BRIEFING SCHEDULE

On September 28, 2010, Petitioners filed a “Motion to Lift Stay and Set Expedited Briefing Schedule.” The government responded to that motion and opposed it (October 12, 2010). Recently, in their Reply to the government’s opposition (October 15, 2010), and also in a so-called “Supplemental Filing” (October 25, 2010),¹ Petitioners protest what they call a “decision” by the Nuclear Regulatory Commission (NRC) to “terminat[e] its review of the Yucca Mountain

¹ Petitioners’ “Supplemental Filing” is not authorized by the Federal Rules of Appellate Procedure or by the Rules of this Court, and Petitioners have not sought leave of the Court to file it. Nonetheless, we are compelled to respond, so that the Court has a full perspective on the matters Petitioners raise.

license application without an official Commission vote.” (Supplemental Filing at 1).

Petitioners’ characterization of events at NRC is not correct. The NRC statements and actions cited by Petitioners have nothing to do with whether the Department of Energy (DOE) may lawfully withdraw its application. Instead, the NRC actions relate to interim budgeting guidance covering only the period when the agency is funded under a Continuing Resolution. During that period NRC would begin “orderly closure” of its Yucca Mountain review, but would preserve knowledge in case the Commission (or, ultimately, this Court) concludes that DOE’s withdrawal is unlawful and Congress appropriates sufficient funds for full-scale review of the application. Furthermore, as explained below, Petitioners cannot challenge the interim budget guidance in these consolidated cases. Thus, Petitioners’ suggestion that the NRC has rendered a “decision” that would warrant reactivating these cases is meritless.

The NRC “decision” that Petitioners point to consists of an internal budget-guidance memorandum² signed by the NRC’s Chief Financial Officer, James E.

² The pertinent portion of the memorandum (p. 2) states in full: “With respect to the High-Level Waste Program, the CR legislation does not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission’s decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR.” The full memorandum is reproduced as Exhibit D to Petitioners’ Reply (Oct. 15, 2010).

Dyer, and the NRC's Executive Director of Operations, Richard W. Borchardt, as well as various statements by NRC's Chairman, by NRC Commissioners, and by NRC's Office of Public Affairs. (Petitioners have provided these documents to this Court as attachments to their pleadings.) But the Dyer-Borchardt memorandum and related Commission statements relate to NRC's temporary execution of its budget under a Continuing Resolution,³ and do not reflect a final Commission adjudicatory determination under the Nuclear Waste Policy Act on whether DOE may lawfully withdraw its license application. As noted in the government's status report (filed today), that adjudicatory matter, after full briefing, remains under active Commission deliberation.

The agency's budget-related guidance and statements do not provide grounds for reactivating the present (and now held in abeyance) lawsuits – which challenge the lawfulness of DOE's withdrawal. On its face, the Dyer-Borchardt budget-guidance memorandum relates to the prudent expenditure of funds under the Continuing Resolution. It resolved no question of DOE's (or NRC's) authority under the Nuclear Waste Policy Act to discontinue the Yucca Mountain license application.

Petitioners are correct, though, in pointing out that the Dyer-Borchardt memorandum had the effect of instructing the NRC Staff to begin orderly closure

³ Pub. L. No. 111-242, 124 Stat. 2607 (Sept. 30, 2010).

of NRC's Yucca Mountain program. But this budget instruction – which was opposed by two Commissioners (Commissioners Ostendorff and Svinicki⁴) but not by a Commission majority – was intended to give NRC Staff short-term spending guidance, in light of uncertainty surrounding NRC's 2011 budget. In Fiscal Year 2010, Congress appropriated \$29 million to NRC for Yucca Mountain activities. By contrast, NRC's Fiscal Year 2011 budget request – in expectation of DOE's then-anticipated motion to withdraw the application – included only \$10 million for orderly closure of the Yucca Mountain program. And, so far, the Senate Appropriations Committee has approved that sum for FY 2011.⁵

During the period of the Continuing Resolution (which expires on December 3), NRC has chosen to proceed with caution to ensure that funds available for Yucca Mountain work are not unreasonably consumed at the beginning of Fiscal Year 2011, thus precluding necessary expenditures later. This is consistent with NRC's obligation to conserve resources while operating under a Continuing Resolution. *See* OMB Circular No. A-11, Preparation, Submission, and Execution

⁴ The two Commissioners argued that the NRC Staff should not commence orderly closure activities, but should instead continue “conducting technical license application review activities.” *See* Ostendorff Memorandum (Oct. 8, 2010), p. 2 (reproduced as Exhibit G to Petitioners' Reply (Oct. 15, 2010)).

⁵ S. 3635, 111th Cong. Title IV (as reported by S. Comm. on Appropriations, July 22, 2010); *see also* S. REP. NO. 111-228 at 146 (July 22, 2010).

of the Federal Budget, § 123.1 (2010) (“Because of the nature of CRs, you should operate at a minimal level until after your regular appropriation is enacted.”)

NRC Staff’s “orderly closure” activities “would involve archiving material, completion of some technical work, knowledge capture and management, and maintenance of certain electronic systems to support these efforts.” *See* NUREG-1100, Volume 26, *Congressional Budget Justification for FY 2011* (Feb. 2011)⁶ at 95. By documenting its technical review and preserving it as appropriate for publication and public use, the NRC Staff will be in a position to resume review of the Yucca Mountain application if the Commission (or, ultimately, this Court) finds DOE’s withdrawal unlawful and if Congress appropriates sufficient funds to resume a full-scale review.

Finally, we must point out that Petitioners’ current consolidated lawsuits are not an appropriate vehicle for litigating Petitioners’ budget-execution grievance against NRC. To the extent that NRC budgetary decisions under the Continuing Resolution are justiciable in this Court (which is doubtful), *see Fund for Animals v. BLM*, 460 F.3d 13, 19-20 (D.C. Cir. 2006), a fresh petition for judicial review – filed *after* the disputed agency action – would be necessary. The current consolidated lawsuits were filed earlier this year, seven to eight months *before* the

⁶ This document is available on NRC’s website: <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1100/v26/sr1100v26.pdf>. Pertinent excerpts are reproduced in Exhibit E to Petitioners’ Reply (Oct. 15, 2010).

Dyer-Borchardt budget guidance. Such suits do not confer jurisdiction over later agency action. Whether brought under the Nuclear Waste Policy Act, the Hobbs Act, or any other similar direct-review statute, such suits must be considered “incurably premature” with respect to later agency action. *See Public Citizen v. NRC*, 845 F.2d 1105, 1109-1110 (D.C. Cir. 1988); *cf. Council Tree Communications, Inc. v. FCC*, 503 F.3d 284, 287 (2007) (“We have no jurisdiction to consider an incurably premature petition for review.”). Petitioners, in short, cannot use their current lawsuits to seek judicial relief against temporary NRC budget guidance.

In addition, Petitioners’ budget grievance in this Court also comes *too soon*. On October 7, 2010, Petitioners filed a motion before the Commission seeking to restart the Staff’s technical review of DOE’s application.⁷ Petitioners’ October 7th pleading advances virtually identical arguments to those raised in their Reply and Supplemental Filing. Petitioners, therefore, are jumping the gun by seeking immediate redress in this Court, without awaiting a Commission response to their

⁷ *See* Motion for a Commission Order Reinstating the Technical Review of the Yucca Mountain License Application, October 7, 2010 (on file at NRC).

own motion. In addition, the State of Nevada has filed before the Commission a mirror-image petition to halt any further NRC Staff review.⁸

Those matters, along with the fundamental legal question whether DOE may lawfully withdraw its Yucca Mountain application, remain under active Commission deliberation. As explained in the government's response in opposition to Petitioners' "Motion to Lift Stay and Set Expedited Briefing Schedule," Petitioners have presented no good reason why this Court should not continue to hold this case in abeyance until the Commission completes its work on the various Yucca Mountain-related briefs, motions, and petitions pending before it.

⁸ See State of Nevada Petition for Relief with Respect to Possible Issuance of a Partial Safety Evaluation Report for Yucca Mountain, June 14, 2010 (on file at NRC).

CONCLUSION

For the foregoing reasons, and for the reasons stated in “Respondents’ Response in Opposition to Petitioners’ Motion to Lift Stay and Set Expedited Briefing Schedule,” Petitioners’ motion should be denied.

Respectfully submitted,

/s/JOHN F. CORDES, JR.

Solicitor

(Mail Stop 15 D21)

Nuclear Regulatory Commission

11555 Rockville Pike

Rockville, MD 20852-2738

(301) 415-1956

JEREMY M. SUTTENBERG

Office of General Counsel

Nuclear Regulatory Commission

Washington, D.C. 20555

(202) 415-2842

For NRC Respondents

IGNACIA S. MORENO

Assistant Attorney General

Environment & Natural Resources Division

LISA E. JONES

AARON P. AVILA

ALLEN BRABENDER

/s/ELLEN J. DURKEE

Appellate Section, Environment &

Natural Resources Division

Department of Justice

P.O. Box 23795, L’Enfant Plaza Sta.

Washington, D.C. 20026

(202) 514-5316

For Respondents President Obama & DOE

October 27, 2010

DJ# 90-13-5-13056

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, October 27, 2010, I caused the foregoing status report to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served on counsel of record. The resulting service is consistent with the preferences articulated by counsel of record in the Service Preference Report. I have also served a copy by U.S. Mail to the following addresses:

Mr. William Henry Davidson III
Davidson, Morrison & Lindemann
1611 Devonshire Drive, Second Floor
P.O. Box 8568
Columbia, SC 29202-8568

Ms. Anne Williams Cottingham
Nuclear Energy Institute
1776 Eye Street N.W.
Washington, DC 20006-3708

/s/ Ellen J. Durkee
U.S. Dep't of Justice
Env't & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026-3795
(202) 514-4426
ellen.durkee@usdoj.gov