

SCHEDULED FOR ORAL ARGUMENT ON MAY 2, 2011

No. 11-1271

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In re Aiken County, et al., Petitioners

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On Petition for Writ of Mandamus (Agency Action Unreasonably Withheld)

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**FINAL BRIEF  
FOR THE RESPONDENTS**

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February 13, 2012

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **(A) Parties and Amici:**

Respondents agree with Petitioners' statement of the parties, intervenors and amici in this proceeding.

### **(B) Ruling Under Review:**

Respondents agree that this is an original action. Petitioners do not challenge a specific NRC action or ruling.

### **(C) Related Cases:**

Respondents do not agree with Petitioners' designation of *In re Aiken County*, No. 10-1050, *consolidated with* Nos. 10-1052, 10-1069, and 10-1082 as a "related case." While that consolidated lawsuit involved the proposed Yucca Mountain High-Level Waste Repository, the legal issues raised in that case were completely different from the legal issues in this case. That case was primarily a petition for review of specific actions by the U.S. Department of Energy. This case is a claim that the U.S. Nuclear Regulatory Commission has failed to act.

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## ABBREVIATIONS AND ACRONYMS

JA	Joint Appendix
NRC	U.S. Nuclear Regulatory Commission
DOE	U.S. Department of Energy
EPA	Environmental Protection Agency
OB	Petitioners' Opening Brief
NWPA	Nuclear Waste Policy Act
SER	Safety Evaluation Report
TER	Technical Evaluation Report
EIS	Environmental Impact Statement
IG	Inspector General
FY	Fiscal Year
CR	Continuing Resolution
OMB	Office of Management and Budget
GAO	General Accounting Office
NEPA	National Environmental Policy Act

## **JURISDICTION**

Petitioners invoke the Nuclear Waste Policy Act (“NWPA”), 42 U.S.C. § 10131 *et seq.*, and seek a writ of mandamus to compel action alleged to be unlawfully withheld or unreasonably delayed by the U.S. Nuclear Regulatory Commission (“NRC”). Under the NWPA this Court has ultimate jurisdiction over final NRC actions or failures to act. *See* 42 U.S.C. § 10139(a)(1)(B). Thus, this Court also has jurisdiction over ancillary claims related to agency inaction or delay. *See Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 74-79 (D.C. Cir. 1984) (“*TRAC*”). *See also* 28 U.S.C. § 1651(a).

While we therefore agree with petitioners that this Court has subject-matter jurisdiction, we do not agree that petitioners have standing to pursue their inaction and delay claims. We detail our objections to petitioners’ standing in Argument I of this brief.

## **ISSUES PRESENTED**

1. Whether petitioners lack standing because of their failure to allege an actual or imminent injury that is (a) fairly traceable to allegedly unreasonable NRC inaction or delay and (b) likely to be redressed by a court-ordered resumption of the proceeding to review the Yucca Mountain application.

2. Whether, in light of Congress’s decision not to continue funding for the Yucca Mountain proceeding, NRC reasonably suspended the adjudicatory hearing and preserved vital knowledge and records from the Staff review, pending a Congressional decision to resume adequate funding.

## **STATEMENT OF THE CASE<sup>1</sup>**

### **A. Nature of the Case.**

Petitioners seek a writ of mandamus from this Court against the Nuclear Regulatory Commission (“NRC” or “Commission”)<sup>2</sup> for “agency action unlawfully withheld or unreasonably delayed.” The petition challenges NRC’s inability to consider and resolve, within a statutorily-mandated three-year period, the license application filed by the U.S. Department of Energy (“DOE”) for authorization to construct a geologic repository at Yucca Mountain, Nevada, to hold radioactive high-level waste from defense facilities and from civilian nuclear power reactors.

As more fully described below, DOE submitted the application in 2008. The NRC technical staff started its review of the application to determine whether it met the applicable regulatory criteria, and NRC’s Atomic Safety and Licensing

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<sup>1</sup> This brief will use “OB” to cite Petitioners’ Opening Brief and “JA” to cite the Joint Appendix.

<sup>2</sup> “NRC” refers to the agency at large and “Commission” refers to the collegial body of five Presidential appointees who head the agency.

Board (“Licensing Board”) began an adjudicatory hearing process to decide approximately 300 separate challenges to the application filed by the State of Nevada, other governmental entities, and members of the public. For more than a year the NRC Staff and the Licensing Board made considerable progress. But following a period of declining appropriations, Congress ceased to appropriate the funds necessary to complete the proceeding from the Nuclear Waste Fund (“Waste Fund”). Furthermore, DOE announced that it would seek to withdraw the application.

The Licensing Board rejected DOE’s attempted withdrawal, and the Commission divided 2-2 on whether to uphold or reverse the Board decision, effectively leaving that decision intact. Meanwhile, the NRC Staff began an orderly closure of its review of the application. That process preserved the technical work the Staff had completed, leaving the Staff in a position to resume the review if Congress resumed funding for the proceeding. Additionally, the Board suspended the adjudicatory hearing but took action to preserve a massive collection of electronically-stored documents relevant to the hearing.

Petitioners’ opening brief seeks an order directing NRC to “resume consideration of the license application within 30 days” and “to approve or disapprove the application within 14 months.” OB54.



## **B. Statutory and Regulatory Framework.<sup>3</sup>**

### **1. The Nuclear Waste Policy Act.**

The Nuclear Waste Policy Act of 1982 (“NWPA”) established the federal government’s policy to dispose of high-level radioactive waste in a deep geologic repository. 42 U.S.C. § 10101 *et. seq.* The NWPA designated DOE as the agency responsible for designing, constructing, operating and decommissioning a repository, § 10134(b); the Environmental Protection Agency (“EPA”) as the agency responsible for developing environmental standards for the repository, § 10141(a); and NRC as the agency responsible for developing regulations to implement EPA's standards and for licensing and overseeing construction, operation and closure of the repository, §§ 10134(c) and (d); 10141(b). *See generally Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1258-62 (D.C. Cir. 2004).<sup>4</sup> The NWPA directs NRC to issue a decision approving or disapproving an application within 3 years from the date the application is submitted, but allows the agency a one-year extension. 42 U.S.C. § 10134(d).

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<sup>3</sup> Most applicable statutes and regulations are contained in the Addendum to Petitioners’ Opening Brief. Our own addendum adds additional materials.

<sup>4</sup> The latest EPA and NRC standards are before this Court for judicial review, but this Court has held those petitions for review in abeyance. *See Nevada v. NRC*, No. 09-1133; *Nevada v. EPA*, Nos. 08-1237 & 08-1345.

In 1987, Congress designated Yucca Mountain as the single site for further study. 42 U.S.C. § 10172. Subsequently, Congress designated Yucca Mountain for the development of a geological repository in a joint resolution passed over the State of Nevada's disapproval. 42 U.S.C. § 10135 note.

## **2. Review of a Repository Application before the NRC.**

The NWPA directs NRC to “consider an 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). Thus, NRC must consider an application in a normal licensing process under its applicable regulations, including its hearing-process regulations.

In the licensing process, the NRC Staff reviews a submitted application to determine whether it contains sufficient information for docketing and further review. 10 C.F.R. § 2.101. After docketing the application, NRC issues a Notice of Hearing, which allows members of the public to petition for leave to intervene in the licensing proceeding and seek a hearing before the Licensing Board. 10 C.F.R. § 2.104. Those members of the public who can demonstrate an “interest,” *i.e.*, that they have “standing,” and who submit a valid “contention” (*i.e.*, a legal or factual claim challenging a specific portion of the application) will be admitted as parties to the proceeding. 10 C.F.R. § 2.309(a).

NRC regulations establish hearing procedures tailored to the specific type of application being considered, including an application to construct a high-level waste repository. *See* 10 C.F.R. Part 2, Subpart J; 10 C.F.R. § 2.1000 *et seq.* Subpart J also applies portions of Subpart C (“Rules of General Applicability,” 10 C.F.R. § 2.300 *et seq.*) and Subpart G (“Rules for Formal Adjudications,” 10 C.F.R. § 2.700 *et seq.*) to any adjudicatory hearing.

Taken together, this regulatory framework establishes a formal, trial-type procedure to review a waste repository application. This process includes, *inter alia*, (1) a “Licensing Support Network” (an electronic system accessing DOE’s, NRC Staff’s, and all other potential parties’ relevant documentary material); (2) availability of subpoenas, 10 C.F.R. § 2.702; (3) examination and cross-examination of experts or other witnesses, 10 C.F.R. § 2.703; (4) formal discovery – including depositions – against all parties, including DOE and the NRC Staff, 10 C.F.R. §§ 2.1018 and 2.1019; (5) an Electronic Hearing Docket, 10 C.F.R. § 2.1013; and (6) appeals to the Commission from certain specified Licensing Board rulings, 10 C.F.R. § 2.1015.

### **3. Congressional Funding of Nuclear Waste Disposal Activities.**

The NWPA specifically states that the federal government’s authority under the Act to obligate funds is “only to such extent or in such amounts as are provided in advance by appropriation Acts.” 42 U.S.C. § 10105. When funding NRC and

DOE activities associated with the Yucca Mountain proceeding, Congress has specified both the source of those funds and the uses for which they are to be expended. Funds for NRC activities related to reviewing the Yucca Mountain application are appropriated from the Waste Fund, which was created by the NWPA specifically to fund nuclear waste-disposal activities. *See* 42 U.S.C. §§ 10222(c) and (d). Funds for DOE activities in support of the application come either from the Waste Fund or are designated for “activities to carry out the purposes” of the NWPA.

Having these specific appropriations, neither NRC nor DOE may use funds from any other source for Yucca Mountain-related activities; *i.e.*, neither NRC nor DOE may resort to general appropriation funds for the Yucca Mountain project if the specific Waste Fund appropriations are exhausted. *See* GOV’T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. I, 2-21—2-23, GAO-04-261SP (3d ed. 2004). (“*GAO Principles of Appropriations Law*”) (JA1300-02). Thus, both NRC and DOE may only conduct activities associated with the Yucca Mountain proceeding with those funds specifically designated by Congress.

### **C. Statement of Facts.**

#### **1. The DOE Application and Initial Proceedings.**

On June 3, 2008, DOE submitted the application, seeking authorization to construct a permanent high-level waste repository at Yucca Mountain. *See* 73 Fed.

Reg. 34,348 (June 17, 2008) (JA312); corrected 73 Fed. Reg. 40,883 (July 16, 2008). (JA314). On September 8, 2008, the NRC Staff found the application contained sufficient information to be docketed. *See* 73 Fed. Reg. 53,284 (Sept. 15, 2008). (JA316). The Staff then initiated an in-depth review of the application with the goal of determining whether the application complies with applicable NRC requirements. *Id.*

Subsequently, NRC issued a Notice of Hearing, allowing persons with an interest in the proceeding to seek intervention. 73 Fed. Reg. 63,029 (Oct. 22, 2008). In January 2009, the Chief Administrative Judge of the Licensing Board established three separate Boards (each comprised of three administrative judges) to review the requests to intervene in the proceeding and the numerous proposed contentions (more than 300) primarily challenging specific portions of the application. 74 Fed. Reg. 4477 (Jan. 26, 2009). (JA1047). In May 2009, the Boards issued a consolidated decision that admitted 8 “persons” (including Nye County) as parties to the proceeding, admitted two governmental units as “interested governmental bodies” (*see* 10 C.F.R. 2.315(c)), and admitted for adjudicatory hearing approximately 300 contentions. *Department of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC 367 (2009).<sup>5</sup> (JA1053).

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<sup>5</sup> The contentions admitted for hearing covered a wide range of issues, (continued. . .)

While several rulings were challenged on appeal, the Commission affirmed most of them. *Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580 (2009). (JA480).

In June 2009, the Chief Administrative Judge established a new (fourth) three-judge Board (replacing the initial panels) to review discovery disputes, late-filed contentions, and other case-management matters during the next phase of the hearing. 74 Fed. Reg. 30,644 (June 26, 2009). (JA1049). That panel (which has continued to manage the case) subsequently admitted additional parties and both admitted and dismissed additional contentions. *See, e.g., Department of Energy* (High-Level Waste Repository), LBP-09-29, 70 NRC 1028 (2009) (addressing late-filed contentions). (JA1209).

Meanwhile, the NRC Staff continued its review of the application. Partly to allow litigation at the Licensing Board to proceed in stages, the Staff planned to issue a five-volume safety evaluation report (“SER”) evaluating different areas of the application serially. *Department of Energy* (High-Level Waste Repository)

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(. . .continued)

including environmental, safety, technical, and regulatory-compliance matters. Among the areas to be considered were issues related to climate, earthquakes, volcanoes, sabotage, waste container corrosion, and numerous others. *See id.* at 485-98 (JA1198-1207) (listing contentions admitted for hearing).

Unpublished Case Management Order (July 21, 2009) at 1.<sup>6</sup> (JA521). Phase 1 deposition discovery, covering the issues to be addressed in SER Volumes 1 and 3, was scheduled to begin in February 2010. *Department of Energy* (High-Level Waste Repository) Unpublished Case Management Order (Sept. 30, 2009) at 2. (JA1282). In August 2010, the Staff issued SER Volume 1, which addressed general information. *See* Staff Board Notification (Aug. 23, 2010). (JA1280).

DOE submitted an Environmental Impact Statement (“EIS”) and supplements with the application. Pursuant to 42 U.S.C. § 10134(f) and 10 C.F.R. § 51.109, NRC Staff reviewed the EIS and its supplements to determine whether NRC could adopt the DOE EIS and concluded that it was practicable to adopt the DOE EIS with limited supplementation.<sup>7</sup> DOE notified NRC of its intent to supplement the EIS, *see* Letter dated October 3, 2008 (JA1292), but later decided not to prepare a supplement. *See* Letter dated July 31, 2009. (JA1295). To date, NRC Staff has not prepared a supplement to DOE’s EIS.

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<sup>6</sup> The five volumes would address: General Information, Pre-Closure Issues, Post-Closure Issues, Administrative and Programmatic Issues, and License Conditions. *Id.*

<sup>7</sup> <http://www.nrc.gov/waste/hlw-disposal/yucca-lic-app/nrc-eis-adr.pdf>

## **2. The DOE Motion to Withdraw.**

In early 2010, DOE announced that it would seek to withdraw the application. In addition, the President directed the Secretary of Energy to appoint a “Blue Ribbon Commission” to review alternatives for managing nuclear waste. *See* 75 Fed. Reg. 5485 (Feb. 3, 2010). (JA1051). On March 3, 2010, DOE filed a motion to withdraw, seeking to withdraw the application “with prejudice.” (JA525). Five groups, including four petitioners here, sought intervention in the proceeding to oppose the motion.<sup>8</sup> After expedited proceedings, the Licensing Board issued an order: (1) granting all five intervention petitions; (2) admitting one contention submitted by each new intervenor, *i.e.*, that DOE lacked authority to withdraw the application; and (3) denying DOE’s motion to withdraw. *Department of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC 609 (2010). (JA540).

The Secretary of the Commission immediately issued an order inviting all participants to file simultaneous briefs and responses addressing (1) whether the Commission should take review of LBP-10-11 and (2), if so, should the Commission affirm the decision or reverse it. *Department of Energy* (High-Level

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<sup>8</sup> Those seeking intervention included Aiken County, the States of South Carolina and Washington, and the National Association of Regulatory Utility Commissioners (“NARUC”).



Waste Repository) Unpublished Order of the Secretary (June 30, 2010). (JA593).

Briefing was completed on July 19, 2010. On September 9, 2011, the Commission issued a decision announcing that it found “itself evenly divided on whether to take the affirmative action of overturning or upholding the Board’s decision.”

*Department of Energy* (High-Level Waste Repository), CLI-11-07, 74 NRC \_\_\_\_ (Sep. 9, 2011) (“CLI-11-07”), Slip op. at 1. (JA635).<sup>9</sup> The Commission’s decision left the Licensing Board’s decision intact as the law of the case. The Commission’s September 9th decision also directed the Board to

by the close of the current fiscal year, complete all necessary and appropriate case management activities, including disposal of all matters currently pending before it and comprehensively documenting the full history of the adjudicatory proceeding.

*Id.* at 1-2. (JA635-36).

Previously, the Board had stayed the proceedings for a brief period during its consideration of the DOE motion to withdraw, but that stay expired with the issuance of the Board decision denying the DOE motion. *Department of Energy* (High-Level Waste Repository), Unpublished Order (Feb. 16, 2010). (JA1283). Thus, activities before the Board continued during the Commission’s 15-month

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<sup>9</sup> Commissioner Apostolakis recused himself from the proceeding. *See* Notice of Recusal (July 15, 2010). JA594. Thus, only four Commissioners have participated in this case.

appellate deliberations over whether to reverse or uphold the Board decision on the withdrawal question. For example, in December 2010, the Board issued a decision resolving ten legal issues from Phase I (addressing contentions related to SER Volumes 1 or 3) and denying requests for waivers of specific NRC regulations. *Department of Energy* (High-Level Waste Repository), LBP-10-22, 72 NRC \_\_\_\_ (Dec. 14, 2010) (slip op.). (JA1224).

In early 2011, DOE moved to suspend the proceeding, pointing to budgetary uncertainties. *See* Motion to Renew Temporary Suspension of the Proceeding (Jan. 21, 2011). (JA1261).<sup>10</sup> Although recognizing that “continuation of the Yucca Mountain project remains subject to Congressional funding,” the Board denied the motion. *Department of Energy* (High-Level Waste Repository), Unpublished Order (Feb. 25, 2011). (JA602). Some months later, when Phase I discovery depositions were noticed, DOE sought a protective order, noting that Congress had “appropriated zero funds to DOE for this proceeding and \$10 million to NRC.” *See* Motion for Protective Order (May 5, 2011) at 1. (JA1272). This time the Board granted DOE’s requested relief. *Department of Energy* (High-Level Waste

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<sup>10</sup> DOE’s motion stated that its “Office of Civilian Radioactive Waste Management,” which had responsibility for the Yucca Mountain project, ceased operations in September 2010, and that “[a]n active licensing proceeding would thus require DOE to, among other things, re-hire employees, enter into new contracts, and re-create capabilities . . .” *Id.* at 5. (JA1265).

Repository), Unpublished Order (May 20, 2011). (JA1285). The Board stated that “in light of the uncertain course of this unique proceeding,” it was granting the motion “to avoid undue and potentially unnecessary expense.” *Id* at 3. (JA1287).

### **3. The Orderly Closure of the NRC Staff’s Review of the Application.**

The orderly closure of the NRC Staff’s technical review of the application was the subject of an extensive report by NRC’s Office of Inspector General, *see* Report, Office of the NRC Inspector General, Case # 11-05 (June 6, 2011) (“IG Report”) (JA751), on which petitioners’ brief relies extensively and is the source of our discussion in this portion of our brief.

As will be more fully discussed below, the federal government started Fiscal Year (“FY”) 2011, *i.e.*, on October 1, 2010, funded by a Continuing Resolution (“CR”), *i.e.*, without the usual year-long appropriation. The President’s FY 2011 budget had sought only \$10 million for NRC from the Waste Fund. *See* IG Report at 6. (JA756). On October 4, 2010, the NRC Executive Director for Operations (the senior Staff manager at the NRC) and the Chief Financial Officer jointly issued a guidance memorandum addressing the Staff’s Waste Fund expenditures under the CR. IG Report at 7. (JA757).<sup>11</sup> Based on the guidance in the

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<sup>11</sup> A copy of this memorandum is at JA722.

memorandum, the Chairman directed the Staff to begin an orderly closure of its technical review. *Id.* at 7. (JA757).

Commissioner Ostendorff disagreed with the “orderly-closure” guidance and asked for a Commission vote on whether the review should be closed. IG Report at 10. (JA760). But a majority of the Commission did not vote to overturn the Chairman’s directive. IG Report at 45. (JA795). Accordingly, the Staff began an orderly-closure process.

The orderly-closure process documented the review and other knowledge concerning the program so that the Staff would be in a position to move forward if Congress resumes funding for the project. As part of that process, the Staff produced three Technical Evaluation Reports (“TERs”) to preserve the Staff’s technical assessment of information presented in the application. In August 2011, the Staff issued its first TER, NUREG-2107, “Postclosure Volume: Repository Safety After Permanent Closure,” which covers material that would have been evaluated in SER Volume 3. (JA1351).<sup>12</sup> In September 2011, the Staff issued NUREG-2108, “Preclosure Volume: Repository Safety Before Permanent Closure” (JA1354), and NUREG-2109, “Administrative and Programmatic

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<sup>12</sup> The Joint Appendix contains the internal title page, Abstract, and first page of the Executive Summary of each TER.

Volume.” (JA1357). These TERs cover the subject matter that would have been covered by SER Volumes 2 and 4, respectively.

Each TER captures the Staff’s technical assessment of information relating to a specific area of the LA, but does not include conclusions as to whether the application satisfies NRC regulations in that area. However, a TER would be used (along with other material) to prepare the corresponding SER should Congress appropriate sufficient funds to re-start the proceeding.

#### **4. Suspension of the Adjudicatory Hearing.**

When the Commission announced that it was evenly split on whether to take review of the Board’s decision denying the DOE motion to withdraw, it observed that “[c]onsistent with budgetary limitations, the Board has taken action to preserve information associated with this adjudication.” CLI-11-07, Slip op. at 1. (JA635). Then the Commission (unanimously) directed the Board to wind up its pending matters. *Id.*, Slip op. at 1-2. (JA635-36).

The Board subsequently issued a decision complying with the Commission’s directions. *U.S. Department of Energy* (High-Level Waste Repository), LBP-11-24, 74 NRC \_\_\_\_ (Sept. 30, 2011) (“LBP-11-24). (JA637). First, the Board presented a short history of the hearing, supplemented by an Appendix. LBP-11-24, Slip op. at 2. (JA638). Second, the Board observed that 288 unresolved contentions were still pending, which would be ripe for hearing after discovery,

issuance of the applicable SERs, and any necessary supplementation of the DOE EIS. LBP-11-24, Slip op. at 3. (JA639). Finally, the Board noted that while the agency still had some funds available, the President's FY 2012 Budget did not request any federal employee positions for the proceeding. *Id.* Accordingly, the Board suspended the proceeding. *Id.*

The Commission later issued a decision concerning two earlier Board decisions directing, *inter alia*, the parties to preserve documents in their Licensing Support Network document collections. *U.S. Department of Energy* (High-Level Waste Repository), CLI-11-13, 74 NRC \_\_\_\_ (Nov. 29, 2011) (slip op.) ("CLI-11-13"). (JA1316). The Commission declined to take review of the Board's actions. *Id.* In dicta, the Commission found the Board's handling of the matter reasonable, noting the lack of funding for continued proceedings. CLI-11-13, Slip op. at 6. (JA1321). The NRC Staff's documents currently reside in the agency's public document system (known as ADAMS), *id.*, and the other parties' documents were submitted to the Office of the Secretary. CLI-11-13, Slip op. at 5. (JA1320).

## **5. Nuclear Waste Fund Appropriations.<sup>13</sup>**

Funding for the Yucca Mountain project, both for DOE and for NRC, has declined consistently over the past several years, ultimately reaching zero funding in the current year – FY 2012 (which began on October 1, 2011).

a. For FY 2008 (October 1, 2007 through September 30, 2008), Congress appropriated \$29.025 million to NRC from the Waste Fund. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Tit. IV, 121 Stat. 1844, 1970 (Dec. 26, 2007). For FY 2009, Congress increased NRC’s Waste Fund appropriation to \$49 million. Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, Tit. IV, 123 Stat. 524, 629 (Mar. 11, 2009).

But for FY 2010, Congress and the Administration reversed the funding direction. In that year the Commission requested from the Office of Management and Budget (“OMB”) \$99.1 million for Yucca Mountain-related activities. IG Report at 8. (JA758).<sup>14</sup> But the President’s Budget (prepared by OMB) requested just \$56 million. *Id.* (JA758). Congress ultimately appropriated only \$29 million

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<sup>13</sup> The appropriate pages of the relevant Appropriations statutes are included in Respondents’ Addendum.

<sup>14</sup> OMB policy is that initial agency budget requests are confidential. *See* OMB Circular A-11, Section 2.2. (JA1325). But NRC requests for FY 2010, FY 2011, and FY 2012 are provided in the IG Report, which has now been made public.

to NRC, significantly less than in the previous year. Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2877 (Oct. 28, 2009).

The same trend is true for DOE appropriations. For FY 2008, Congress appropriated \$189 million from the Waste Fund for DOE, designated for “Nuclear Waste Disposal.” Pub. L. No. 110-161, 121 Stat. at 1960. That legislation also appropriated \$201 million designated for “Defense Nuclear Waste Disposal” and specified “for nuclear waste disposal activities to carry out the purposes of Public Law 97-425” [*i.e.*, the NWPA][,] 121 Stat. at 1964. Thus, the total appropriation for DOE activities related to Yucca Mountain for FY 2008 was \$390 million, the sum of the two specific appropriations. The reason for the separate appropriation is that Congress funded DOE activities related to Yucca Mountain to cover the disposal of both civilian-generated nuclear waste (from the Waste Fund) and defense-related nuclear waste.

The DOE appropriation for FY 2009 decreased significantly. In that year Congress appropriated \$145.39 million from the Waste Fund, Pub. L. No. 111-8, 123 Stat. at 618, and \$143 million designated as the “Defense” component, 123 Stat. at 623, for a total of \$288.39 million. In FY 2010, Congress appropriated \$98.4 million from the Waste Fund, Pub. L. No. 111-85, 123 Stat. at 2864, and



\$98.4 million designated as the “Defense” component, 123 Stat. at 2868, for a total of \$196.8 million.

b. For FY 2011, NRC requested OMB to budget \$39.5 million for Yucca Mountain-related activities. IG Report at 8. (JA758). In early 2010, the President proposed a FY 2011 Budget that requested \$0 be appropriated for DOE nuclear waste disposal activities and \$10 million appropriated from the Waste Fund for NRC. *Id.* But Congress did not pass specific appropriations bills during the summer of 2010; instead, on October 1, 2010, the federal government in general and NRC in particular began FY 2011 operating on a Continuing Resolution (“CR”). *See* Continuing Appropriations Act, 2011, Pub. L. 111-242, 124 Stat. 2607 (Sept. 30, 2010). As is typical with CRs, the Act appropriated to the NRC “[s]uch amounts as may be necessary” for continuing projects or activities at a “rate of operations” consistent with the previous fiscal year’s (*i.e.*, FY 2010) Appropriations Act. *Id.* at § 101, 124 Stat. at 2607.

Congress enacted additional temporary CRs for FY 2011 before finally enacting the Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10, 125 Stat. 38 (Apr. 15, 2011), which funded both NRC and DOE. This Act appropriated \$10 million to NRC from the Waste Fund. *Id.* at § 1423, 125 Stat. at 126. And Congress appropriated \$0 to the DOE from the Waste

Fund and \$0 for the “Defense” component. *Id.* at § 1446, 125 Stat. at 129; § 1456, 125 Stat at 130.

c. For the current fiscal year, FY 2012, NRC requested OMB to budget approximately \$4 million to terminate all programs related to the Yucca Mountain application. OIG Report at 9. (JA759). But the President’s Budget for FY 2012 requested \$0 from the Waste Fund for NRC. *Id.* During the summer of 2011, the U.S. House of Representatives passed an appropriations bill that would have provided \$45 million combined for DOE and NRC activities related to Yucca Mountain. H.R. 2354, 112th Cong. (as passed by House, July 15, 2011). Specifically, the House bill sought to appropriate \$25 million from the Waste Fund for DOE activities related to Yucca Mountain, *id.* at Tit. III, and \$20 million from the Waste Fund for NRC activities “to continue the Yucca Mountain proceeding.” *Id.* at Tit. IV. Furthermore, the House bill sought to prohibit NRC from taking further actions to close the Yucca Mountain proceeding.

None of the funds made available in this Act may be used to conduct closure of adjudicatory functions, technical review, or support activities associated with the Yucca Mountain geologic repository license application until the Nuclear Regulatory Commission reverses ASLB decision LBP–10–11, or for actions that irrevocably remove the possibility that Yucca Mountain may be a repository option in the future.

*Id.* at § 604.

But the final appropriations legislation for FY 2012, passed by the full Congress, contained no appropriation for Yucca Mountain-related activities by either DOE or NRC. *See Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786.* The legislation itself contains no mention of any Waste Fund appropriation. But the legislation does contain a specific and explicit prohibition against NRC use of funds appropriated by the Act for another activity for which funds were denied by Congress.

None of the funds provided in this title for “Nuclear Regulatory Commission - Salaries and Expenses” shall be available for obligation or expenditure through a reprogramming of funds that (1) increases funds or personnel for any program, project, or activity for which funds are denied or restricted by this Act ....

*Id.* at § 401.

Furthermore, the Joint Conference Committee Report explicitly states that the final bill rejected the House’s language. *See generally* H.R. Rep. 112-331 (2011) (Conf. Rep.) (“Conference Report”). Regarding DOE, the Report states that “[th]e conference agreement provides \$0 for nuclear waste disposal, as proposed by the Senate, instead of \$25,000,000 as proposed by the House.” Conference Report at 855. Regarding NRC, the Report notes that

The conference agreement does not include \$20,000,000 to be made available from the Nuclear Waste Fund to support the geological repository for nuclear fuel and waste, as proposed by the House. The Senate proposed no similar provision.

*Id.* at 880-81. Finally, the Report observed that

[t]he conference agreement does not include a provision proposed by the House prohibiting funds in this bill being used to close the Yucca Mountain license application process until a specific condition is met or for actions that would remove the possibility that Yucca Mountain might be an option in the future. The Senate proposed no similar provision.

*Id.* at 884.

## **6. Previous Litigation Involving Current Petitioners.**

Petitioners previously filed four actions, which were consolidated, seeking extraordinary relief, including mandamus. The consolidated petition challenged (1) DOE's decision to withdraw the application and (2) DOE's decision not to develop the Yucca Mountain repository. A panel of this Court held those claims were not ripe. *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011). During the case, State of Washington (petitioner here) sought a preliminary injunction to prevent DOE from any further action to dismantle the infrastructure supporting the application. *See* Motion for Preliminary Injunction (Apr. 13, 2010). (JA1328). This Court denied the motion, holding that petitioners failed to demonstrate they "have not satisfied the stringent standard required for an injunction or stay pending court review." Unpublished Order (May 3, 2010) at 1. (JA1289).

## STANDARD OF REVIEW

Our brief challenges petitioners’ standing to seek mandamus relief in this Court (Argument I) and argues on the merits that such relief is inappropriate (Argument II).

As questions of law, standing issues are subject to *de novo* review in this Court. *See Amer. Soc. for the Prevention of Cruelty to Animals v. Feld*, 659 F.3d 13, 19 (D.C. Cir. 2011). Petitioners have the burden to demonstrate each element required to show standing. *See, e.g., Chamber of Commerce v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011).

Mandamus relief, while within the discretion of this Court, is rarely granted. “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). As the party seeking mandamus, each petitioner 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. Mayacamas Corp.*, 485 U.S. 271, 289 (1988)).

## **SUMMARY OF ARGUMENT**

1. To justify standing to pursue their mandamus petition, petitioners must show an actual or imminent injury traceable to NRC inaction or delay and redressable by a judicial remedy. They fail to do so.

The South Carolina and Washington petitioners say they are concerned with the radioactive hazards of storing high-level waste in their states. But that waste is stored under regulatory controls. Petitioners have made no tangible showing that they are suffering imminent harm from continued storage of high-level waste in their states.

Moreover, the only way to remove whatever hazard may exist would be to remove the material. But no judicial remedy in this lawsuit would yield that result. Third-party obstacles, not within NRC's control, stand in the way. DOE, for instance, has announced it will not pursue the Yucca site as a national high-level waste repository. Moreover, DOE is under no legal obligation actually to build the Yucca facility even if NRC granted a license. And furthermore, even if DOE has a change of heart about Yucca's feasibility, it is far from guaranteed that Congress would enact necessary land-use legislation to accommodate the Yucca facility, provide funding to complete the NRC proceeding to review the application, or ultimately to fund construction of the facility. For these reasons, a mandamus order from this Court forcing resumption of NRC's licensing proceeding, including

both the staff technical review and the adjudicatory hearing, would not redress the South Carolina and Washington petitioners' claimed injury.

As for the remaining petitioners – Nye County and NARUC – their claims of injury have nothing to do with NRC inaction or delay. Nye County complains of a cut-off of funds to participate in the Yucca licensing process. But those funds come from Congressional appropriations under the NWPA to DOE, not from NRC, and resumption of the proceeding will not provide a resumption of funds to Nye County. And NARUC complains of fees its members have paid into the Nuclear Waste Fund. But those fees are statutory, entirely outside NRC's control, and resumption of the proceeding will not impact those fees. In short, neither of these petitioners has shown that NRC "inaction or delay" has caused them harm.

2. Even if this Court were to hold that petitioners satisfy the test for standing, it should reject their request for mandamus relief. Petitioners' opening brief (OB54) asks this Court to order NRC to re-activate its proceeding to review the DOE application for the Yucca repository, to establish milestones for completing that review, and to issue a decision approving or disapproving the application within 14 months. But the mandamus remedy is reserved for "extraordinary cases" where an agency has a "clear duty to act" and a petitioner has a "clear right to relief." *Fornaro*, 416 F.3d at 69. That is decidedly not the case here, where Congress has eliminated all funding for the Yucca licensing

proceeding. The mandamus relief that petitioners seek is simply unworkable, from both a pragmatic and legal perspective.

Initially, petitioners' brief overlooks the 288 unresolved contentions, many of which raise cutting-edge safety and environmental questions, currently awaiting discovery and hearing in NRC's suspended adjudicatory proceeding. Petitioners do not explain how a de-funded DOE, which under NRC rules has the burden of proof to support its application, can litigate those contentions to conclusion.

Moreover, petitioners' brief blithely assumes that NRC has in hand sufficient appropriated funds (and the authority to expend them) to finish its safety and environmental reviews, to adjudicate the 288 pending contentions, and to issue an ultimate decision on the application. That assumption is inconsistent with Congress's appropriation for last year (which gave NRC very little money and DOE no money) and certainly cannot be squared with this year's appropriation, which gives both NRC and DOE zero money from the Waste Fund for activities related to the Yucca proceeding. Federal appropriations law prohibits NRC's use of general appropriations – *i.e.*, non-Waste Fund money – to complete the proceeding.

Finally, insofar as petitioners are understood to be demanding that NRC use its “carry-over” (unspent and unobligated) funds from prior years' Waste Fund appropriations to restart the licensing proceeding, with no indication that the funds



necessary to complete the proceeding will be forthcoming, such a remedy would place the Court in the position of second-guessing NRC's internal budget decisions. This is not an appropriate judicial role. Courts should not micromanage agency budget-execution decisions.

In sum, by preserving prior work product and pertinent documents, and suspending (but not terminating) the adjudicatory hearing, NRC adopted a reasonable approach in response to Congress's current de-funding of NRC and DOE activities related to the proceeding and in response to uncertainty over future Congressional appropriations. While reasonable people could – and some did – disagree over the timing of NRC's "orderly-closure" approach, that approach was not unreasonable, given budget realities on the ground. There never were, and still are not, sufficient appropriated funds to complete the NRC licensing proceeding. Accordingly, the petition for writ of mandamus should be denied.

## **ARGUMENT**

### **I. PETITIONERS LACK ARTICLE III STANDING.**

Petitioners in this proceeding fall into three categories:

- (1) State and local governments that have DOE waste sites, as well as individuals who live or work near these sites;
- (2) The local government where Yucca Mountain is located;
- (3) An organization of state utility commission.

To establish standing, all petitioners must show: (1) an actual or imminent injury; that is (2) fairly traceable to the challenged action; and that is (3) likely to be

redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see *Chamber of Commerce*, 642 F.3d at 200. No petitioner satisfies this test.<sup>15</sup>

**A. Aiken County, South Carolina, Washington, Robert L. Ferguson, William Lampson, and Gary Petersen all lack standing.**

The first subset of petitioners relies on geographic proximity to existing nuclear waste sites as the basis for their standing. OB30-33. Washington cites the “clear and present danger posed by this [radioactive] waste to the citizens, environment, and commerce of Washington” to support its standing. OB32. The other petitioners make similar claims. OB30-33. But these “waste-storage petitioners” fail to demonstrate an actual or imminent injury. They have provided no plausible reason to believe that continued storage at secure locations, subject to regulatory oversight, harms them.

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<sup>15</sup> It is true that NRC’s Licensing Board found that some petitioners have standing to intervene in the NRC licensing proceeding. But administrative standing to challenge DOE’s withdrawal motion is not coterminous with judicial standing to challenge NRC delay. “Standing” in an NRC adjudication rests, at bottom, on the “interest-may-be-affected-by-the-proceeding” clause of section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a), while standing in a judicial review proceeding in this Court rests on the Constitution – namely, Article III’s Case or Controversy Clause. See *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74, 76-77 (D.C. Cir. 1999).

Because of NRC's regulatory scheme and robust methods of storage, NRC recently concluded that civilian nuclear waste could safely remain on-site for approximately the next hundred years.<sup>16</sup> So any radiation-caused injury from NRC-regulated facilities is inherently speculative. It is not self-evident and ought not simply be assumed that such injury is actual or imminent.

As for harm from DOE-regulated defense waste, petitioners say that there have been leaks in the past at facilities such as Hanford (in the State of Washington) and that "[f]urther leaks could occur in the future." *See* Dahl-Crumpler Affidavit, pp. 9-12. (JA143-46). But leaks occurring in the past bear no relationship to alleged delays in NRC's decision whether to license construction of the Yucca facility. And "any petitioner alleging only future injuries confronts a significantly more rigorous burden to establish standing." *Chamber of Commerce*, 642 F.3d at 200. "To shift injury from conjectural to imminent, the petitioners must show that there is a substantial probability of injury." *Id.* Despite past issues at DOE-regulated facilities that have led to litigation and settlements, *see* Dahl-Crumpler Affidavit at pp. 12-13 (JA146-47), this Court ought not assume, or find a

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<sup>16</sup> This conclusion was the result of a multiyear, in-depth study, culminating in NRC's updated "Waste Confidence Rule." *See* 75 Fed. Reg. 81,037, 81,067-74 (Dec. 23, 2010) (finding that high-level waste can be safely stored on-site for at least a hundred years). That rule is currently being challenged in this Court. *See New York v. NRC*, Nos. 11-1051, 11-1056 & 11-1057.

“substantial probability,” that in the future DOE will prove unable to protect the public health and safety.

Even assuming that continued waste storage creates some form of imminent or actual harm, however, the waste-storage petitioners also fail to establish redressability. The type of injury that these petitioners allege (radioactive contamination) can be redressed only through taking the waste away from its current location. But even if the Court grants the mandamus petition and NRC ultimately approves DOE’s application, a number of significant hurdles still would remain before nuclear waste could leave Washington and South Carolina. Ultimately, third parties (DOE and Congress) that are not under NRC’s control or within this Court’s jurisdiction in this lawsuit are the ones situated to provide the necessary redress.

As this Court has explained, “standing to challenge a government policy cannot be founded merely on speculation as to what third parties will do in response to a favorable ruling.” *Renal Physicians Ass’n v. U.S. Dept. of Health and Human Services*, 489 F.3d 1267, 1274 (D.C. Cir. 2007). Instead, a favorable ruling must “generate a significant increase in the likelihood” that the absentee third party will redress petitioner’s harm. *Town of Barnstable v. FAA*, 659 F.3d 28, 32 (D.C. Cir. 2011). Here, regardless of when or if NRC completes the proceeding and reaches a decision on the DOE application, it is speculative at best

to assume that third parties will take the actions necessary for actual construction and operation of a repository.

DOE has repeatedly said on the public record that Yucca Mountain is not a workable option.<sup>17</sup> So even if the NRC approves DOE's license application, it is not "substantially probable" that DOE would go forward and construct – let alone operate – the Yucca repository. NRC cannot force DOE to build Yucca.<sup>18</sup> Nor does the NWPA force construction. When Congress approved the Yucca site in 2002, it explained that DOE's filing of a license application did not create a statutory authorization actually to build a repository at Yucca Mountain.<sup>19</sup> Thus, it is highly speculative to assume that DOE would respond to a decision in this case in petitioners' favor by redressing petitioners' injuries.<sup>20</sup>

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<sup>17</sup> See, e.g., <http://energy.gov/articles/statement-department-energy-press-secretary-stephanie-mueller-about-yucca-mountain>.

<sup>18</sup> Petitioners' theory of redress seems to rely on the faulty assumption that they can turn "a license to operate into a sentence to do so." *Shoreham-Wading River Cent. Sch. Dist. v. NRC*, 931 F.2d 102, 107 (D.C. Cir. 1991).

<sup>19</sup> The Senate Report accompanying the adoption of the 2002 joint resolution states: "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." S. Rep. No. 107-159, at 13 (2002R) (Conf. Report) (emphasis added).

<sup>20</sup> *Town of Barnstable* provides an instructive contrast to the present case. In that case, local towns sought to challenge a series of FAA decisions that determined offshore wind farms would not interfere with air navigation. 659 F.3d at 30-31. (continued. . .)

Even assuming *arguendo* that petitioners prevail in this lawsuit – and then somehow convince DOE to change course – an additional third-party obstacle stands in the way of removing this waste. As we explain further in our merits argument (Argument II), DOE cannot prosecute its application, and NRC cannot adjudicate it, unless Congress appropriates sufficient funds to resume the licensing proceeding, *i.e.*, both the Staff technical review and the adjudicatory hearing. And even if Congress eventually re-funds the proceeding, DOE cannot build or operate the repository until Congress enacts yet another statute involving land use.<sup>21</sup> This grafts Congress as an additional (and mercurial) actor into the equation, and renders redressability far too speculative to satisfy standing. In practical reality, this Court cannot issue any order that would redress petitioners’ claims of injury

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(. . .continued)

These “hazard determinations” had no enforceable legal effect – the Interior Department ultimately had the final say regarding the offshore wind farms. *Id.* at 31. In framing the redressability question, this Court assumed that the towns would prevail, and then asked whether a favorable decision “would generate a significant increase in the likelihood that Interior would exercise its authority to revoke the lease or to modify it in a way that would in whole or in part redress petitioners’ threatened injuries.” *Id.* at 32. Because there were strong indications that Interior would indeed take into account a negative FAA decision, the Court found standing. *Id.* at 32-35. Here, by contrast, there is *no* indication that DOE would construct and operate Yucca even if NRC approves the application.

<sup>21</sup> Various bills to this effect were introduced in Congress during 2006 and 2007, but none were enacted. *See, e.g.*, Nuclear Fuel Management & Disposal Act, S. 2589, 109th Cong., 2d Sess. (Apr. 6, 2006).

arising out of continued high-level waste storage at current locations. “[O]nly Congress can do that, and nothing that we could order . . . can make Congress do anything.” *Guerrero v. Clinton*, 157 F.3d 1190, 1194 (9th Cir. 1998).

**B. Nye County lacks standing.**

Nye County argues that financial assistance received under the NWPA will be “discontinued by virtue of actions by the NRC in suspending the proceedings indefinitely.” OB29. But the financial assistance that Nye County receives under the NWPA is not at all tied to the NRC administrative proceeding. Instead, it comes from Section 116(c) of the NWPA, 42 U.S.C. § 10136(c).<sup>22</sup> It is true that *Congress* – in fiscal years 2011 and 2012 – zeroed out Nye County’s assistance (along with DOE’s high-level waste program). But that Congressional decision is completely unrelated to any NRC action. So Nye County errs by focusing its aim on NRC. Congress, rather than NRC, is the cause of Nye County’s financial injury. And a favorable court decision will not ensure future financial assistance – whether Nye County receives money under the NWPA is entirely dependent on Congressional appropriations. Nye County, therefore, fails to show either causation *or* redressability.

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<sup>22</sup> See, e.g., Consolidated Appropriations Act, 2008; 121 Stat. at 1960.

**C. NARUC lacks standing.**

NARUC represents the interests of State utility commissioners. OB34. Acting on their behalf, NARUC claims that electric ratepayers have paid more than \$17 billion into the Waste Fund to support the Yucca project. *Id.* Yet any injury to NARUC itself is neither explained nor self-evident. To the extent NARUC is aggrieved by prior Waste Fund fee assessments, such claims are beyond the scope of this mandamus petition. NARUC previously filed separate suits in this Court regarding fee assessments. *See* D.C. Circuit Nos. 10-1074, 10-1076. On December 13, 2010, this Court dismissed those suits as moot due to DOE's issuance in November 2010 of a new assessment of fee adequacy. NARUC and other parties then filed a fresh lawsuit challenging DOE's 2010 fee assessment rule. *See* D.C. Circuit Nos. 11-1066 and 11-1068. That case is still ongoing. And that case, not this one, is the proper forum for NARUC to challenge the disposition of Waste Fund fees.

**D. None of the Petitioners can invoke procedural harm as their basis for standing.**

As an additional basis for standing, all petitioners allege "procedural" injury. OB26-27. Because petitioners claim substantive harm (*i.e.*, radioactive hazards that can be alleviated only by removal of radioactive waste), it is unclear how their



grievance relates to the procedural-harm line of cases.<sup>23</sup> In any event, naked procedural violations alone are not enough to show standing. *See Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009) (“deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create standing”). *See also Nat’l Assoc. of Homebuilders v. EPA*, 2011 WL 6118589 at \*6 (D.C. Cir. Dec. 9, 2011) (noting that plaintiffs do not have standing to litigate “a [procedural] right in a void.”).

This Court has held that to establish procedural injury as a basis for standing, a plaintiff must show that it is “substantially probable that the procedural breach will cause [an] essential injury to the plaintiff’s own interest.” *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996) (*en banc*). And any “essential injury” must be “fairly traceable” to the agency. *Id.* at 666. If not, then the procedural injury is “too general for court action, and suited instead for political redress.” *Center for Biological Diversity v. DOI*, 563 F.3d 466, 479 (D.C. Cir. 2009) (quotations omitted).

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<sup>23</sup> By way of contrast, consider the axiomatic procedural-rights situation: claims of NEPA violations. Unlike a citizen interested in influencing agency decision-making through participation in the NEPA process, petitioners here (except Nye County) are not participating in the NRC hearing on the merits of DOE’s application. And while Nye County is a party to the merits hearing, its claimed injury here (lost money, *see* OB29) is completely unrelated to any NRC delay.

For the reasons stated above, however, petitioners do not demonstrate a particularized injury attributable to NRC and curable by this Court. Although standing's fundamental redressability and imminence requirements are said to be "relaxed" in procedural injury cases, *see Lujan v. Defenders of Wildlife*, 504 U.S. at 572 n.7, the requirements are not "wholly eliminate[d]." *Center for Law & Educ. v. Dept. of Education*, 396 F.3d 1152, 1157 (D.C. Cir. 2005). To show standing here, then, petitioners must show a plausible nexus between a judicial remedy requiring further NRC licensing proceedings and an "essential injury" to their "own interest." *See Florida Audubon*, 94 F.3d at 665. Otherwise, petitioners would be excused from showing any kind of link between their interests and the judicial remedy they seek. *Cf. County of Del., Pa. v. Dep't of Transp.*, 554 F.3d 143, 147-49 (D.C. Cir. 2009) (explaining that plaintiffs still need to show causation even when alleging procedural harm).

Here, the "essential injury to the [petitioners'] own interest" is attributable to alleged hazards from ongoing waste storage. But that injury does not flow from suspending NRC's proceeding to review the application. Rather, it flows from DOE's independent decision not to pursue the Yucca repository. So any potential injury resulting from nuclear waste is traceable to DOE and Congress, not NRC.

Ultimately, petitioners just disagree with the current policy decisions of DOE and the Congress on the Yucca Mountain issue. But this Court is not the appropriate forum for petitioners to air these grievances.

## **II. NRC TOOK REASONABLE ACTIONS WHEN CONGRESS FAILED TO FUND THE PROCEEDING ADEQUATELY.**

Even if this Court were to hold that petitioners have standing to seek mandamus relief, this Court should not grant the writ. Mandamus is a forward-looking remedy – that is, it is a remedy that directs the agency to take a specific action in the here and now; it does not simply “review” and pass judgment on a past action, as does an ordinary petition for review. Of necessity, to carry out any action “mandated” by this Court, an agency must have sufficient appropriated funds available to perform the required task. Here, Congress has expressly declined to provide the necessary funds.

Petitioners seek an order directing NRC to resume the adjudicatory hearing and the Staff review of the DOE license application and to reach a final decision within 14 months. Performing that task would require NRC – in its role as the body designated to review the application and license the repository – to expend substantial funds. But Congress’s most recent funding decisions demonstrate a legislative intent not only that DOE should not pursue the repository application at this time, but also that NRC should not continue to conduct its proceeding to review the application either.

We do not maintain that Congress has repealed the NWPA – or its requirement that NRC complete the Yucca licensing proceeding in three (or, with an extension, four) years – but we do maintain that by de-funding the proceeding Congress must be understood to have, in effect, “tolled” the 3-year statutory deadline by rendering it impossible to meet. Not only has Congress not provided any Waste Fund resources in the current-year appropriation, but it also expressly prohibited NRC from using other funds for any proceeding for which funds were denied – a prohibition also found in general appropriations law.

The long and short of the matter is that NRC is in no position to resume and complete the Yucca proceeding in the short term. In these circumstances, it was reasonable for NRC to suspend the proceeding, pending further funding from Congress, while taking steps to conserve the agency’s knowledge base, as well as its (and party-litigants’) documents. Given NRC’s (and DOE’s) current lack of funding, and given that mandamus requires an agency violation of a “clear duty” to act, mandamus does not lie in this case.

**A. Lack of DOE Funding Prevents Completion of The Proceeding.**

As petitioners’ brief stresses (OB37-38), the NWPA directs that NRC “shall consider an application for construction authorization for all or part of a repository . . .” 42 U.S.C. § 10134(d). But petitioners fail to quote the remainder of the “shall consider” clause, which states that NRC’s “consideration” of the DOE

application must proceed “in accordance with the laws applicable to such applications.” *Id.* Thus, the NWPA requires NRC to process the application under regulations and other laws governing the agency’s normal licensing process. Under NRC’s hearing process, the license applicant – here, DOE – has the burden of proof to demonstrate that the application meets NRC’s regulatory requirements. *See* 10 C.F.R. § 2.325. Contentions (claims) are made against the application and are defended by the applicant – DOE. Thus, DOE is an indispensable party to the NRC adjudication. *See generally* 10 C.F.R. § 2.1001 (defining DOE as a party).

Here, 288 contentions – claims against the application – are pending before the Licensing Board.<sup>24</sup> DOE must defend those claims, many of which involve complex questions of engineering, hydrology, seismology, and other extremely difficult technical subjects on which experts have expressed significant disagreement. *See* LBP-09-06, 69 NRC at 485-98 (listing contentions admitted for hearing). (JA1198-1207). DOE must prepare scientific and technical responses to the claims, identify and prepare witnesses, and present evidence and testimony before the Licensing Board. DOE’s evidence and testimony will be contested by experts and other witnesses for parties opposing the Yucca facility. Thus, the

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<sup>24</sup> And it is always possible that the parties will submit additional “late-filed” contentions as the litigation progresses. *See* 10 C.F.R. § 2.309(f).

“trial” of this case is expected to be extremely complex. Moreover, pre-hearing discovery – the full range of civil-discovery mechanisms is available under NRC rules (10 C.F.R. §§ 2.1018, 2.1019) – undoubtedly would be extensive.<sup>25</sup>

But Congress did not provide DOE with any Waste Fund money in the last two appropriations cycles. DOE made this point to the Licensing Board when seeking a protective order last spring:

Congress has not appropriated sufficient funding for this proceeding to be completed. Any funds DOE and NRC retain are insufficient to take this proceeding to completion. To the extent parties contend that this proceeding should continue as long as DOE has any remaining balance from prior year appropriations, the answer is that such action would be “imprudent” and “futile,” as there is no significant likelihood at this time that DOE or NRC would have the funds to complete the proceeding.

DOE Motion for Protective Order (May 5, 2011) at 6 (citation omitted). (JA1277).

The Board took DOE’s representation of insufficient funding at face value, a reasonable course given Congressional appropriation decisions.<sup>26</sup>

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<sup>25</sup> The prospect of an initial round of depositions last spring is what prompted DOE, pointing to a lack of funds, to seek a protective order preventing the start of discovery – relief that the Licensing Board granted. *Department of Energy* (High-Level Waste Repository), Unpublished Order (May 20, 2011) (JA1285).

<sup>26</sup> In FY 2011 Congress not only appropriated \$0 to DOE, but actually rescinded \$2.8 million in prior-year DOE appropriations for the high-level waste program. *See* Department of Defense and Full-year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1469, 125 Stat. at 130.

Providing zero funds for Yucca Mountain activities in the two most recent appropriations cycles presumably reflects a Congressional intent that DOE not continue to pursue a license at this time. And as we will discuss below, neither DOE nor NRC may lawfully re-program ordinary appropriated funds to conduct activities that fall under the purview of the Waste Fund. Thus, currently DOE is severely restricted in the actions it can take regarding the proceeding.

The bottom line is that DOE has received zero Waste Fund appropriations in recent years and the NRC hearing process cannot go forward in a meaningful way without full participation by DOE, the license applicant and an indispensable party. While DOE has some “carryover” funds, *i.e.*, funds appropriated for this project in previous years and not obligated or rescinded by Congress, DOE’s motion for a protective order stated that any funds it “retain[s] are insufficient to take this proceeding to completion.” Motion for Protective Order at 6. (JA1277). In these circumstances, NRC’s ultimate decision to suspend the proceeding rather than forcing it forward toward an inevitable dead end was reasonable.<sup>27</sup>

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<sup>27</sup> Had the proceeding continued, and DOE announced that it was out of money and could no longer prosecute the case, the Licensing Board – or the Commission – might well have had little choice but to dismiss the entire proceeding and reject the license application for lack of prosecution. Suspending the proceeding “in place” not only conserves Waste Fund resources, but also preserves Congress’s ability to revive the proceeding in the future.

## **B. Lack of NRC Funding Prevents Completion of the Proceeding.**

1. In addition to DOE, the NRC Staff is also a mandatory party to the adjudicatory hearing, *see* 10 C.F.R. § 2.1001, and would require additional funding to continue participation in the hearing. If the adjudicatory hearing portion of the proceeding resumes, the Staff will have issued the requisite SERs – and if necessary, any required supplements to the DOE EIS – determining whether (in the Staff’s view) the application meets the agency’s regulatory requirements to authorize construction of the repository. The Board would consider the respective positions of the Staff and other parties to decide whether the regulations have been satisfied. If those challenging that aspect of the application dispute the findings in the SERs or EIS supplement, the Staff would participate on that contention by submitting testimony or information regarding its findings on the application.

In addition to the resources necessary for the NRC Staff to complete the proceeding, *i.e.*, finish its review and participate in the licensing hearing, NRC also must fund the activities of the Licensing Board. Due to the complexity of the proceeding, and the statutory deadline, the Chief Administrative Judge created three separate Boards to review the proposed contentions and intervention requests, and a fourth Board to manage the case through discovery. Litigating the admitted contentions would likely require at least that many Boards to hear the claims (in parallel), with each panel conducting extensive evidentiary hearings on the



contentions before it. Not only would the proceeding require a number of Licensing Board judges, but it would also require a significant support system of technical advisors, law clerks, and other support personnel (like the members of a Court Clerk's office) to assist the judges in processing the case. Appeals from the decisions of each panel would be heard by the Commission itself, which would of course involve a separate support system to help adjudicate the appellate phase of the litigation. Finally, the agency will need to re-establish a courtroom with facilities capable of conducting an all-electronic proceeding; the previous facility (in Las Vegas) is no longer under lease.

It takes little imagination to see that finishing the entire review proceeding would be extremely costly and resource-intensive. The adjudicatory hearing is akin to extraordinarily complex civil litigation involving (essentially) a "complaint" with 288 different claims – or "counts" to use a more common term – currently requiring hearing and decision. Although summary disposition or other pre-trial motions may reduce the number of issues heard in the evidentiary phase of the hearing, resolution of those claims – and potentially others that may arise later, as well as appeals to the Commission – would require significant NRC personnel, with a sufficient corresponding Waste Fund appropriation, to litigate the case.

As discussed earlier in this brief, NRC's budget proposal for the most recent year the agency still expected the Yucca proceeding to move forward (FY 2010)

was \$99.1 million. *See* Statement of Facts, *supra* at 18. And this year the House – which passed an appropriations bill seeking to restart the Yucca proceeding – would have given NRC \$20 million. *See id.* at 21. But NRC’s carryover funds are limited, and do not nearly match what NRC itself or the House has estimated as the cost of moving forward toward completing the proceeding.<sup>28</sup>

2. The NWPA explicitly states that the federal government cannot expend or “obligate” money “under this Act” that has not been appropriated “in advance” by Congress. *See* 42 U.S.C. § 10105. As noted in our “Statement of Facts” (pp. 21-23, *supra*), the House passed an appropriation bill (H.R. 2354, Titles III and IV) for the current fiscal year that would have funded the Yucca licensing proceeding with \$25 million for DOE and \$20 million for NRC. Moreover, the House bill specifically would have prohibited NRC from closing the proceeding.

But the FY 2012 appropriations legislation as finally enacted by the full Congress removed all funding for both agencies for the Yucca Mountain

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<sup>28</sup> NRC currently has unobligated carryover funds of \$9.995 million. An informal agreement with the House Appropriations Committee requires NRC to request approval of both the House and Senate Appropriations Committees on any effort to use Nuclear Waste Fund unobligated carryover funds. The Joint Appendix includes a 2002 letter amending the original 1979 agreement (JA1306) and a 2011 letter denying an NRC request to use some of the current carryover funds to preserve the LSN document collection. (JA1313).

proceeding and removed the prohibition against NRC's closing the proceeding as well. *See* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat.786. Thus, Congress rejected not only the chance to provide NRC (and DOE) with funding for the proceeding, but the chance to ensure that NRC resumed active consideration of the application.

Moreover, the FY 2012 appropriations legislation specifically prohibited NRC from any use of the funds in the current appropriation that "increases funds or personnel for any program, project, or activity for which funds are denied or restricted by this Act." *See id.* at § 401. That prohibition appears to prevent NRC from using these general appropriation funds for the DOE proceeding. Petitioners correctly argue that none of the recent appropriation laws rescinded the NWPA's three-year deadline or repealed any other provision of substantive law. OB47-48. But Congress's deliberate decision not to appropriate funds here shows that it does not intend for NRC (or DOE) to continue the Yucca proceeding at this time.

"Courts often scrutinize the rejection of amendments and the choice of particular language over other proposed language to derive the legislative purpose behind the statute ultimately adopted." *Walton v. Hamonds*, 192 F.3d 590, 600 n.10 (6th Cir. 1999) (inferring Congressional intent from rejection of language in amendment to proposed legislation). *See, e.g., Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 726-27 (1989); *United States v. Yermian*, 468 U.S. 63, 72-73 (1984);

*Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 36, (1981).

Here, as we explained above, the full Congress rejected the provision that had passed the House and would have provided funds for both NRC and DOE. Further, Congress also rejected language that would have prevented the NRC from closing the proceeding to review the application. Finally, Congress adopted language that prohibits any attempt by NRC to use general appropriations funds for any purpose – such as the Yucca proceeding – for which funds were denied. Taken together, those actions allow this Court to infer a Congressional intent that NRC not continue the Yucca Mountain proceeding at this time.<sup>29</sup>

3. Even if Congress had not prohibited NRC from using general appropriation funds to conduct the proceeding, established principles of federal appropriations law would prohibit that use. Congress has funded the proceeding with specific appropriations – *i.e.*, appropriations from a specific fund and/or addressed to a specific purpose. Here, both NRC and DOE received appropriations from the Waste Fund, established by the NWPA explicitly to fund construction of

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<sup>29</sup> The Conference Report notes the House bill, but says expressly that the appropriations legislation “provides \$0 for nuclear waste disposal” for DOE and “does not include \$20,000,000” for NRC “to support the geological repository, as proposed by the House.” *See* H.R. Rep. 112-331 at p. 880-81.

a repository. DOE received additional appropriations for “activities to carry out the purposes” of the NWPA, *i.e.*, to support activities authorized by the Fund. Federal appropriations law requires both NRC and DOE to fund their activities related to the review proceeding solely from these “specific” appropriations. *See GAO Principles of Federal Appropriations Law*, at 2-21-- 2-23. (JA1300-02).

This basic principle of federal appropriations law recognizes Congress’s exclusive authority to decide the amount of funds available for a program or activity, and prevents NRC (and DOE) from usurping Congress’s “power of the purse” by improperly augmenting the Waste Fund appropriation with other funds. Thus, neither NRC nor DOE can transfer other funds from general appropriations to use for that purpose, even if Congress had not expressly prohibited the use of generally-appropriated funds for “other purposes,” as it appears to have done in the current appropriations legislation.

Consistent with this principle, the so-called “Necessary Expense Doctrine” also precludes the obligation of NRC’s general appropriation for purposes covered by the Waste Fund appropriation. While agencies must obligate funds only for the purposes for which Congress appropriated the funds, it is neither desirable nor feasible for Congress to specify every item of expenditure in an appropriations act. Therefore, expenditures from NRC’s general appropriation are permissible if they

are deemed a “necessary expense” of the appropriation by meeting GAO’s three-part test:

1. The expenditure must bear a logical relationship to the appropriation sought to be charged.
2. The expenditure must not be prohibited by law; and
3. The expenditure must not be otherwise provided for, *i.e.*, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

*GAO Principles of Federal Appropriations Law*, at 4-21--4-22. (JA1305A-05B).

*See, e.g., Department of Homeland Security—Use of Management Directorate Appropriations to Pay Costs of Component Agencies*, B-307382, 2006 U.S. Comp. Gen. LEXIS 138 (Sept. 5, 2006).

Because NRC’s consideration of the application has been funded by a Waste Fund appropriation, any proposed expenditure from general appropriation funds for those purposes fails the third prong of the test and could not be deemed a “necessary expense” of the general appropriation for either NRC or DOE. Thus, the “necessary expense” test also precludes NRC from using general appropriation funds for the purposes covered by special appropriations from the Waste Fund.

**C. Courts Cannot Order Federal Agencies To Continue Projects Without Congressional Appropriations.**

This Court should not issue a writ of mandamus requiring NRC to move forward on a licensing proceeding that the agency has insufficient funds to complete. In that respect, this case resembles *County of Vernon v. United States*,

933 F.2d 532 (7th Cir. 1991), where a locality sued the Army Corps of Engineers for abandoning a partially completed dam project authorized under the Flood Control Act of 1962. Congress subsequently ratified the Corps's decision to abandon the project by discontinuing appropriations. The Corps did not dispute that it had some funds available; instead, it argued that its available funds were insufficient to complete the project. The Seventh Circuit agreed.

Legislation authorizing a Project does not constitute an appropriation of public monies, but rather contemplates future action by Congress to provide funding. 37 Comp.Gen. 306 (1955). Therefore, the Corps could not continue with construction on the Project absent continuing appropriations from Congress. Regardless of the amount specified in the program authorization, Congress has not appropriated sufficient funds to complete the Project. Thus, we agree that the lack of funding precluded the Corps from completing the Project.

933 F.2d at 534-35 (footnote omitted).

The *County of Vernon* Court concluded that “the decision of Congress not to appropriate funds for a particular Project normally is not reviewable by the judiciary,” *id.* at 535 (citation omitted) and sustained the Corps's abandonment of the project. *See also Alabama v. North Carolina*, 130 S.Ct. 2295, 2310 (2010) (characterizing governmental expenditures on a project as “imprudent” and “futile” when the governmental body is not expected to have sufficient funds to complete the project).

Here, Congress has not appropriated sufficient funds to complete the proceeding. To the extent petitioners contend that NRC (and DOE) should

continue the proceeding as long as any funds are available, that action would be “imprudent” or “futile,” to use the Supreme Court’s words in *Alabama v. North Carolina*, because it is highly unlikely at this point that sufficient funds are – or will be – available to complete the proceeding. *Id.* at 2310.

In sum, a statutory authorization or directive without sufficient appropriations does not justify or enable continued spending. Petitioners’ demand for a mandamus remedy is therefore inapt given the circumstances of this case.

**D. This Court Should Not Reorder Agency Priorities.**

Insofar as petitioners may be seeking “lesser-included remedies” short of finishing the licensing proceeding, such as completing the multi-volume SER, this Court still should deny the mandamus petition. Such remedies would involve this Court in re-ordering budgetary priorities adopted by NRC in light of declining Congressional appropriations. This Court should not second-guess NRC budget decisions best left to informed agency discretion.

1. By 2010, the proceeding to review the DOE application was well under way. The Staff was well-along in its technical review of the application and the adjudicatory hearing had commenced. But a significant amount was still yet to be completed. To use a football analogy, by the fall of 2010, the process had moved “the ball” a significant distance down the field. But given the limited funding available to both NRC and DOE, it eventually became clear that the entire



proceeding could not be completed, *i.e.*, “reach the goal line,” as currently budgeted by Congress.

Although NRC had originally requested \$39.5 million for the proceeding in FY 2011 (IG Report at 8, JA758), the President’s Budget, anticipating a shut-down of the Yucca proceeding, requested only \$10 million for NRC (and \$0 for DOE). While both NRC (and DOE) retained limited carryover funds from prior Waste Fund appropriations, those funds did not appear sufficient to complete the entire proceeding. And as we discuss *supra*, a significant problem was the complete defunding of the DOE effort to support the application. It was not clear that DOE was in a financial position to advocate for its application in the adjudicatory hearing, which was still in its pre-hearing phase.

NRC faced a decision: either continue the proceeding until money simply ran out, or suspend the proceeding to conserve the resources of the Waste Fund until Congress again appropriated sufficient funds to complete the proceeding. NRC chose to close down review of the DOE application and conserve Waste Fund resources until such time as the proceeding becomes viable again. Given DOE’s announced intent not to support the application in the adjudicatory hearing, as well as Congress’s decision not to appropriate sufficient funds to complete the entire project, continuing to spend scarce funds might unnecessarily waste them.

Accordingly, although there was disagreement and debate among the Commissioners, *see* IG Report at 15-24 (JA765-74), NRC suspended the hearing and closed the technical review, directing the Staff to preserve its work so that it could resume the review if Congress provided adequate funding. The Staff prepared and issued three TERs (summaries of the Staff's technical work) that could form the basis of future SERs should the proceeding resume. *See* Statement of Facts, *supra*, at pp. 15-16. Likewise, the Licensing Board – after the Commission directed it to decide all pending matters by the close of FY 2011 (that is, by September 30, 2011) – suspended the hearing before it went to full discovery and evidentiary hearing, before the parties unnecessarily expended scarce remaining funds. *See* LBP-11-24, *supra*. (JA637). Previously, the Board had taken action to preserve the millions of documents potentially relevant to the adjudicatory hearing. *See* CLI-11-13, *supra* (discussing Board record-preservation orders). (JA1316).

Notably, neither the Board nor the Commission terminated the proceeding. To the contrary, the various NRC actions have left the agency in a position to resume the proceeding should Congressional funding resume.

2. This Court has warned against crafting remedies that could “interfere with the agency’s internal processes.” *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 553 (D.C. Cir. 1999). If NRC lacks sufficient funds to

complete review of the Yucca application, then directing the NRC to spend limited carryover funds on actions that fall well short of a final decision, such as publishing reports or conducting partial discovery or partial hearings, involves the very “interference” or micro-managing that *In re United Mine Workers* cautioned against.

Agencies, rather than courts, should decide whether to preserve limited funding for future use or go “all-in” and try to partially advance the program. To return to our football analogy, a court should not use its equitable powers to order agencies to advance a few yards when the statute the court is enforcing requires a touchdown.<sup>30</sup> Otherwise, courts will become entangled in overseeing budgetary and personnel decisions ill-suited for judicial review. *Cf. Nat. Res. Defense Council v. Sec. & Exchange Comm’n*, 606 F.2d 1031, 1046 (D.C. Cir. 1979) (“internal management considerations as to budget and personnel” are not “inherently susceptible to judicial resolution”).

This Court has held that it would not “re-order” agency budget priorities even in the face of an agency failure to meet a statutory deadline. In *In re Barr Laboratories*, 930 F.2d 72 (D.C. Cir. 1991), the applicable statute required the

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<sup>30</sup> This is particularly apt when, as here, the agency lacks sufficient funding to get to the end zone.

Food and Drug Administration (“FDA”) to reach a decision either approving or disapproving generic drug applications within 180 days. *Id.* at 73. The FDA failed to act on Barr’s applications within the required period and the company sought a writ of mandamus to compel the agency to act on its application. This Court balanced the relevant factors under the Court’s “agency-delay” jurisprudence and concluded that the balance did not weigh in Barr’s favor. *Id.* at 74-76.<sup>31</sup>

This Court was particularly concerned that granting the writ would intrude on the agency’s ability to set priorities:

In short, we have no basis for reordering agency priorities. The agency is in a unique and authoritative position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.

*Id.* at 76. In line with *Barr*, this Court should not use its mandamus authority to review NRC’s decision to save for the future whatever Waste Fund resources remained rather than consume them on a seemingly futile enterprise.

Given the decline in current funding, the uncertainty of future funding, and the lack of an active applicant, NRC adjusted the priorities for the agency’s Waste

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<sup>31</sup> In *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192 (10th Cir. 1999), the Tenth Circuit held that courts have no discretion whether to issue a writ of mandamus if an agency does not meet a deadline. But *Forest Guardians* expressly disagreed with *Barr*’s more nuanced view of judicial discretion.

Fund operations. Those priorities were: (1) preservation of the knowledge gained by issuing TERs; (2) a systematic “orderly closure” of the program that allowed the agency to reassign its personnel in an organized fashion; and (3) conservation of Waste Fund resources – *i.e.*, orderly closure of the Staff review and suspension of the adjudicatory hearing. NRC would not have achieved those priorities had it simply continued the proceeding until the money ran out, as petitioners apparently advocate. Reasonable officials could, and some did, disagree on this choice, but the agency’s ultimate decision was not unreasonable.

**E. Petitioners’ Cited Authorities Do Not Justify Mandamus Relief.**

Petitioners’ brief points to several cases to buttress their arguments. But viewed in context, those cases do not support petitioners’ claims.

Petitioners rely extensively on this Court’s leading “agency-delay” precedent, *TRAC*, 750 F.2d 70 (D.C. Cir. 1984), and discuss its factors at some length. OB36-52. But *TRAC* does not purport to address the situation where an agency does not have sufficient funds appropriated to complete the tasks required. Instead, *TRAC* assumes that the agency has sufficient appropriated funds but for reasons ranging from lethargy to inefficiency simply has not completed its responsibilities in timely fashion.

Here, NRC has not suspended the Yucca proceeding while possessing adequate funds to complete it. Instead, NRC was faced with a situation where

Congress ceased providing funds to complete – or even continue – the proceeding. Uncertain that it could complete the proceeding, and recognizing that the applicant, DOE, was not able to support the application fully, NRC reasonably determined that continuation of the Staff review and the Licensing Board proceeding might waste the resources of the Waste Fund. *TRAC* does not address this situation.

Likewise, the other cases cited by petitioners are inapposite. Petitioners cite *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), and *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000), for the unexceptional proposition that appropriations for a specific project do not constitute an “implicit” repeal of an otherwise applicable statute. OB47-48. But NRC does not claim that the NWPA’s requirement to complete review of the application in three years or any other NWPA requirement has been repealed.

Instead, it is our view that Congress implicitly waived or tolled the three-year requirement by failing to appropriate sufficient funds from the Waste Fund to complete the entire proceeding. As we have stressed, the NWPA prohibits NRC from obligating funds for activities related to Yucca Mountain unless Congress first appropriates funds for those activities and NRC cannot legally fund review of the DOE application from general appropriation funds. Thus, compliance with the 3-year deadline is, in both pragmatic and legal terms, impossible. It is axiomatic, of course, that this Court cannot order Congress to appropriate funds. *See*

generally *City of Houston v. HUD*, 24 F.3d 1421 (D.C. Cir. 1991). See also *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990).

Petitioners cite *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), for the proposition that an agency cannot avoid an obligation simply by expending “unrestricted funds” for other matters and then claiming a lack of funds. OB48-49. But the key word in that case is “unrestricted.” In *Cherokee Nation*, the government had expended available, unrestricted funds for other purposes instead expending them for contractually-obligated purposes. That the government had made discretionary choices with available unrestricted funds did not allow it to ignore a contractual obligation. 543 U.S. at 641-42.

Here, NRC does not have unfettered, unrestricted funds available with which to conduct its review of the application. Instead, NRC is limited to conducting its review of the application with funds appropriated from the Waste Fund – the fund established by the NWPA for this explicit purpose. And as we have shown above, given that “specific” appropriation NRC cannot conduct activities to support the purposes of the NWPA from any other “unrestricted” funds that it may have. Moreover, even if federal appropriations law allowed NRC to use general appropriations funds, Congress appears to have explicitly prohibited NRC from doing so with funds from the current appropriation.

Finally, petitioners argue that NRC “had plenty of money in 2010” to continue considering the application. OB48. But that statement assumes that NRC was required to act on the basis of the FY 2011 Continuing Resolution (“CR”) that – for the period of October 1, 2010 through April 15, 2011 – had the effect of continuing NRC’s FY 2010 appropriation of \$29 million. However, adopting that approach would have been ill-advised and irresponsible.

A CR is an interim appropriation that provides budget authority for agencies to continue current operations in the absence of a formal appropriations act. But given the nature of CRs, agencies have been cautioned to manage funds prudently until a formal appropriations act is enacted. OMB advises agencies to “operate at a minimum level until after your regular appropriation is enacted,” and to avoid “obligating funds under the CR that would impinge on final funding prerogatives of Congress.” OMB Circular A-11, §§ 123.1, 123.2. (JA1326-27). Furthermore, here the CR itself directed agencies to adopt spending policies “so that only the most limited funding action of that permitted in the Act shall be taken to provide for continuation of projects and activities.” *See* § 110, 124 Stat. at 2609.

In sum, during the CR period in FY 2011, NRC was operating in the face of: (1) the President’s proposed budget of \$10 million for FY 2011; (2) strong cautionary advice contained in OMB Circular A-11; (3) strong cautionary advice explicitly stated in the CR itself; and (4) the announcement by DOE that it would



not support the application. Given those factors, NRC reasonably proceeded on the expectation that its final appropriation would not be more than \$10 million – an expectation that was realized in the final FY 2011 appropriation legislation. Had NRC followed petitioners’ preferred course of profligate spending, the agency would have found itself in the position of having already expended far more money than it received in the final appropriation – a position in which no government agency wishes to find itself.

### CONCLUSION<sup>32</sup>

For the foregoing reasons, this Court should deny the petition for writ of mandamus.

---

<sup>32</sup> The Nuclear Energy Institute (“NEI”), the *amicus curiae* allied with petitioners, argues that the Licensing Board decision denying the DOE motion to withdraw – whose validity divided the Commission 2-2 – is both “final” and correct. But petitioners did not raise any argument about the validity of the Board decision in their opening brief – which is not unusual, to say the least, because petitioners *prevailed* before the Board. This Court “will not consider” issues raised in *amicus* briefs but not raised “by the parties to th[e] appeal.” *Baptist Memorial Hospital – Golden Triangle v. Sebelius*, 566 F.3d 226, 230 (D.C. Cir. 2009). See also *Entergy Systems v. FERC*, 319 F.3d 536, 545 (D.C. Cir. 2003); *Eldred v. Reno*, 239 F.3d 272, 378 (D.C. Cir. 2001). Accordingly, NRC has not addressed NEI’s argument.

Respectfully submitted,

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February 13, 2012.

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) inasmuch as it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. Times New Roman font.

This brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) inasmuch as it contains 13,504 words, as counted by Microsoft Office Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

\_\_\_\_s/Charles E. Mullins\_\_\_\_  
CHARLES E. MULLINS

February 13, 2012.

## CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2012, I filed a copy of the foregoing brief using the CM/ECF system which will serve the same on all parties of record as follows:

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February 13, 2012.

## STATUTORY AND LEGISLATIVE ADDENDUM

## STATUTORY AND LEGISLATIVE ADDENDUM

### Selected Provisions of the Nuclear Waste Policy Act of 1982

42 U.S.C. § 10105

42 U.S.C. § 10222

### Relevant Portions of Selected Appropriations Acts and Related Legislative Materials

Consolidated Appropriations Act, 2008

Pub. L. No. 110-161, 121 Stat. 1844 (Dec. 26, 2007).

Omnibus Appropriations Act, 2009

Pub. L. No. 111-8, 123 Stat. 524 (Mar. 11, 2009).

Energy and Water Development and Related Agencies Appropriations Act, 2010

Pub. L. No. 111-85, 123 Stat. 2845 (Oct. 28, 2009).

Continuing Appropriations Act, 2011

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

Department of Defense and Full-year Continuing Appropriations Act,

Pub. L. No. 112-10, 125 Stat. 38 (Apr. 15, 2011).

H.R. 2354, 112th Cong. (as passed by House, July 15, 2011)

Consolidated Appropriations Act, 2012

Pub. L. No. 112-74, 125 Stat. 786 (Dec. 23, 2011)

H.R. Rep. 112-331 (2011) (Conf. Rep.)

S. Rep. No. 107-159 (2002) (Conf. Rep.)

Westlaw

42 U.S.C.A. § 10105

Page 1

**C****Effective:[See Text Amendments]**

United States Code Annotated Currentness

Title 42. The Public Health and Welfare

Chapter 108. Nuclear Waste Policy (Refs &amp; Annos)

**→ → § 10105. Limitation on spending authority**

The authority under this chapter to incur indebtedness, or enter into contracts, obligating amounts to be expended by the Federal Government shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts.

CREDIT(S)

(Pub.L. 97-425, § 6, Jan. 7, 1983, 96 Stat. 2205.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1983 Acts. House Report No. 97-491, see 1982 U.S. Code Cong. and Adm. News, p. 3792.

LIBRARY REFERENCES

American Digest System

United States  82(1), 85.

Key Number System Topic No. 393.

42 U.S.C.A. § 10105, 42 USCA § 10105

Current through P.L. 112-54 (excluding P.L. 112-40) approved 11-12-11

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42 U.S.C.A. § 10222

Page 1

**Effective:[See Text Amendments]**

United States Code Annotated Currentness

Title 42. The Public Health and Welfare

Chapter 108. Nuclear Waste Policy (Refs &amp; Annos)

Subchapter III. Other Provisions Relating to Radioactive Waste

**→ → § 10222. Nuclear Waste Fund****(a) Contracts**

(1) In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d) of this section.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) of this section. In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose



an adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 6421 of this title.

(5) Contracts entered into under this section shall provide that--

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) Advance contracting requirement

(1)(A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless--

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of Title 5) may be disposed of by the Secretary in any repository constructed under this chapter unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than--

(A) June 30, 1983; or

(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of Title 5 may be disposed of by the Secretary in any repository constructed under this chapter unless such department transfers to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

#### (c) Establishment of Nuclear Waste Fund

There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of--

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e) of this section, which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on January 7, 1983, for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

#### (d) Use of Waste Fund

The Secretary may make expenditures from the Waste Fund, subject to subsection (e) of this section, only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter, including--

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored, [FN1] retrievable storage facility [FN2] or test and evaluation facility constructed under this chapter;

(2) the conducting of nongeneric research, development, and demonstration activities under this chapter;

- (3) the administrative cost of the radioactive waste disposal program;
- (4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, [FN1] retrievable storage site [FN2] or to be used in a test and evaluation facility;
- (5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored, [FN1] retrievable storage site [FN2] or a test and evaluation facility site and necessary or incident to such repository, monitored, [FN1] retrievable storage facility [FN2] or test and evaluation facility; and
- (6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

(e) Administration of Waste Fund

- (1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Waste Fund during the preceding fiscal year.
- (2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of Title 31. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.
- (3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States--

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with re-

maining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of Title 31.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subchapter, the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under such Act are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) of this section shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

#### CREDIT(S)

(Pub.L. 97-425, Title III, § 302, Jan. 7, 1983, 96 Stat. 2257.)

[FN1] So in original. The comma probably should not appear.

[FN2] So in original. Probably should be followed by a comma.

#### HISTORICAL AND STATUTORY NOTES



PUBLIC LAW 110-161—DEC. 26, 2007

## CONSOLIDATED APPROPRIATIONS ACT, 2008

Public Law 110–161  
110th Congress

An Act

Dec. 26, 2007  
[H.R. 2764]

Consolidated  
Appropriations  
Act, 2007.

Making appropriations for the Department of State, foreign operations, and related programs for the fiscal year ending September 30, 2008, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Consolidated Appropriations Act, 2008”.

**SEC. 2. TABLE OF CONTENTS.**

The table of contents of this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.
- Sec. 3. References.
- Sec. 4. Explanatory statement.
- Sec. 5. Emergency designations.
- Sec. 6. Statement of appropriations.

**DIVISION A—AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG  
ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2008**

- Title I—Agricultural Programs
- Title II—Conservation Programs
- Title III—Rural Development Programs
- Title IV—Domestic Food Programs
- Title V—Foreign Assistance and Related Programs
- Title VI—Related Agencies and Food and Drug Administration
- Title VII—General Provisions

**DIVISION B—COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES  
APPROPRIATIONS ACT, 2008**

- Title I—Department of Commerce
- Title II—Department of Justice
- Title III—Science
- Title IV—Related Agencies
- Title V—General Provisions
- Title VI—Rescissions

**DIVISION C—ENERGY AND WATER DEVELOPMENT AND RELATED  
AGENCIES APPROPRIATIONS ACT, 2008**

- Title I—Department of Defense—Civil: Department of the Army
- Title II—Department of the Interior
- Title III—Department of Energy
- Title IV—Independent Agencies
- Title V—General Provisions

**DIVISION D—FINANCIAL SERVICES AND GENERAL GOVERNMENT  
APPROPRIATIONS ACT, 2008**

- Title I—Department of the Treasury
- Title II—Executive Office of the President and Funds Appropriated to the President
- Title III—The Judiciary

## DELTA REGIONAL AUTHORITY

## SALARIES AND EXPENSES

For necessary expenses of the Delta Regional Authority and to carry out its activities, as authorized by the Delta Regional Authority Act of 2000, as amended, notwithstanding sections 382C(b)(2), 382F(d), 382M, and 382N of said Act, \$11,685,000, to remain available until expended.

## DENALI COMMISSION

For expenses of the Denali Commission including the purchase, construction, and acquisition of plant and capital equipment as necessary and other expenses, \$21,800,000, to remain available until expended, notwithstanding the limitations contained in section 306(g) of the Denali Commission Act of 1998.

## NUCLEAR REGULATORY COMMISSION

## SALARIES AND EXPENSES

For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974 and the Atomic Energy Act of 1954, including official representation expenses (not to exceed \$25,000), \$917,334,000, to remain available until expended: *Provided*, That of the amount appropriated herein, \$29,025,000 shall be derived from the Nuclear Waste Fund: *Provided further*, That revenues from licensing fees, inspection services, and other services and collections estimated at \$771,220,000 in fiscal year 2008 shall be retained and used for necessary salaries and expenses in this account, notwithstanding 31 U.S.C. 3302, and shall remain available until expended: *Provided further*, That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2008 so as to result in a final fiscal year 2008 appropriation estimated at not more than \$146,114,000: *Provided further*, That such funds as are made available for necessary expenses of the Commission by this Act or any other Act may be used for lease payments for additional office space provided by the General Services Administration for personnel of the U.S. Nuclear Regulatory Commission as close as reasonably possible to the Commission's headquarters location in Rockville, Maryland, and of such square footage and for such lease term, as are determined by the Commission to be necessary to maintain the agency's regulatory effectiveness, efficiency, and emergency response capability: *Provided further*, That notwithstanding any other provision of law or any prevailing practice, the rental square foot rate paid for the lease of space for such purpose shall, to the extent necessary to obtain the space, be based on the prevailing lease rates in the immediate vicinity of the Commission's headquarters.

## OFFICE OF INSPECTOR GENERAL

For necessary expenses of the Office of Inspector General in carrying out the provisions of the Inspector General Act of 1978, as amended, \$8,744,000, to remain available until expended: *Provided*, That revenues from licensing fees, inspection services, and other services and collections estimated at \$7,870,000 in fiscal

as amended, and title X, subtitle A, of the Energy Policy Act of 1992, \$627,876,000, to be derived from the Fund, to remain available until expended, of which \$20,000,000 shall be available in accordance with title X, subtitle A, of the Energy Policy Act of 1992.

#### SCIENCE

##### (INCLUDING RESCISSION OF FUNDS)

For Department of Energy expenses including the purchase, construction and acquisition of plant and capital equipment, and other expenses necessary for science activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or facility or for plant or facility acquisition, construction, or expansion, and purchase of not to exceed 30 passenger motor vehicles for replacement only, \$4,055,483,000, to remain available until expended: *Provided*, That of the funds made available in section 130 of division H (Miscellaneous Appropriations and Offsets) of the Consolidated Appropriations Act, 2004, Public Law 108-199, as amended by section 315 of Public Law 109-103, for the Coralville, Iowa, project, \$44,569,000 is rescinded.

#### 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 "Act"), including the acquisition of real property or facility construction or expansion, \$189,000,000, 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, \$5,000,000 shall be provided to 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 Act: *Provided further*, That notwithstanding the lack of a written agreement with the State of Nevada under section 117(c) of the Nuclear Waste Policy Act of 1982, Public Law 97-425, as amended, not less than \$1,000,000 shall be provided to Nye County, Nevada, for on-site oversight activities under section 117(d) of that Act: *Provided further*, That \$9,000,000 shall be provided to affected units of local government, as defined in the Act, to conduct appropriate activities and participate in licensing activities: *Provided further*, That of the \$9,000,000 provided, 7.5 percent of the funds provided 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 units of local government. This funding shall be provided to affected units of local government, as defined in the Act, to conduct appropriate activities and participate in licensing activities. The Committee requires the entities to certify that within 90 days of the completion of each Federal fiscal year, the Nevada Division of Emergency Management and the Governor of the State of Nevada 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 the activities authorized by the Act and this Act: *Provided*, That notwithstanding

California.  
Nevada.

Certification.  
Deadline.  
Nevada.



## ENVIRONMENTAL AND OTHER DEFENSE ACTIVITIES

## DEFENSE ENVIRONMENTAL CLEANUP

(INCLUDING TRANSFER OF FUNDS)

For Department of Energy expenses, including the purchase, construction, and acquisition of plant and capital equipment and other expenses necessary for atomic energy defense environmental cleanup activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, and the purchase of not to exceed three passenger motor vehicles for replacement only, \$5,398,573,000, to remain available until expended, of which \$463,000,000 shall be transferred to and deposited in the "Uranium Enrichment Decontamination and Decommissioning Fund".

## OTHER DEFENSE ACTIVITIES

(INCLUDING TRANSFER OF FUNDS)

For Department of Energy expenses, including the purchase, construction, and acquisition of plant and capital equipment and other expenses, necessary for atomic energy defense, other defense activities, and classified activities, in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, and the purchase of not to exceed twelve passenger motor vehicles for replacement only, \$761,290,000, to remain available until expended: *Provided*, That of the funds provided under this heading in Public Law 109-103, \$4,900,000 are transferred to "Weapons Activities" for special nuclear material consolidation activities associated with safeguards and security.

## DEFENSE NUCLEAR WASTE DISPOSAL

For nuclear waste disposal activities to carry out the purposes of Public Law 97-425, as amended, including the acquisition of real property or facility construction or expansion, \$201,000,000, to remain available until expended.

## POWER MARKETING ADMINISTRATIONS

## BONNEVILLE POWER ADMINISTRATION FUND

Expenditures from the Bonneville Power Administration Fund, established pursuant to Public Law 93-454, are approved for the Lower Granite Dam fish trap, the Kootenai River White Sturgeon Hatchery, the Nez Perce Tribal Hatchery, Redfish Lake Sockeye Captive Brood expansion, hatchery production facilities to supplement Chinook salmon below Chief Joseph Dam in Washington, Hood River Production Facility, Klickitat production expansion, Mid-Columbia Coho restoration, and Yakama Coho restoration, and in addition, for official reception and representation expenses in an amount not to exceed \$1,500. During fiscal year 2008, no new direct loan obligations may be made.

PUBLIC LAW 111-8—MAR. 11, 2009

OMNIBUS APPROPRIATIONS ACT, 2009

Public Law 111–8  
111th Congress

An Act

Mar. 11, 2009  
[H.R. 1105]

Making omnibus appropriations for the fiscal year ending September 30, 2009,  
and for other purposes.

Omnibus  
Appropriations  
Act, 2009.

*Be it enacted by the Senate and House of Representatives of  
the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Omnibus Appropriations Act,  
2009”.

**SEC. 2. TABLE OF CONTENTS.**

The table of contents of this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.
- Sec. 3. References.
- Sec. 4. Explanatory statement.
- Sec. 5. Statement of appropriations.

**DIVISION A—AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG  
ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2009**

Title I—Agricultural Programs  
Title II—Conservation Programs  
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**DIVISION B—COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES  
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Title I—Department of Commerce  
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**DIVISION C—ENERGY AND WATER DEVELOPMENT AND RELATED  
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Title I—Department of Defense—Civil: Department of the Army  
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**DIVISION D—FINANCIAL SERVICES AND GENERAL GOVERNMENT  
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Title I—Department of the Treasury  
Title II—Executive Office of the President and Funds Appropriated to the President  
Title III—The Judiciary  
Title IV—District of Columbia  
Title V—Independent Agencies

## NUCLEAR REGULATORY COMMISSION

## SALARIES AND EXPENSES

For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974, as amended, and the Atomic Energy Act of 1954, as amended, including official representation expenses (not to exceed \$25,000), \$1,034,656,000, to remain available until expended: *Provided*, That of the amount appropriated herein, \$49,000,000 shall be derived from the Nuclear Waste Fund: *Provided further*, That revenues from licensing fees, inspection services, and other services and collections estimated at \$860,857,000 in fiscal year 2009 shall be retained and used for necessary salaries and expenses in this account, notwithstanding 31 U.S.C. 3302, and shall remain available until expended: *Provided further*, That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2009 so as to result in a final fiscal year 2009 appropriation estimated at not more than \$173,799,000: *Provided further*, That such funds as are made available for necessary expenses of the Commission by this Act or any other Act may be used for the acquisition and lease of additional office space provided by the General Services Administration for personnel of the U.S. Nuclear Regulatory Commission as close as reasonably possible to the Commission's headquarters location in Rockville, Maryland, and of such square footage and for such lease term, as are determined by the Commission to be necessary to maintain the agency's regulatory effectiveness, efficiency, and emergency response capability: *Provided further*, That notwithstanding any other provision of law or any prevailing practice, the acquisition and lease of space for such purpose shall, to the extent necessary to obtain the space, be based on the prevailing rates in the immediate vicinity of the Commission's headquarters.

## OFFICE OF INSPECTOR GENERAL

For necessary expenses of the Office of Inspector General in carrying out the provisions of the Inspector General Act of 1978, \$10,860,000, to remain available until expended: *Provided*, That revenues from licensing fees, inspection services, and other services and collections estimated at \$9,774,000 in fiscal year 2009 shall be retained and be available until expended, for necessary salaries and expenses in this account, notwithstanding 31 U.S.C. 3302: *Provided further*, That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2009 so as to result in a final fiscal year 2009 appropriation estimated at not more than \$1,086,000.

## NUCLEAR WASTE TECHNICAL REVIEW BOARD

## SALARIES AND EXPENSES

For necessary expenses of the Nuclear Waste Technical Review Board, as authorized by Public Law 100-203, section 5051, \$3,811,000, to be derived from the Nuclear Waste Fund, and to remain available until expended.

on the north side of Highway 160: *Provided further*, That, of the amount appropriated in this paragraph, \$4,757,500 shall be used for projects specified in the table that appears under the heading “Congressionally Directed Non-Defense Environmental Cleanup Projects” in the text and table under this heading in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act).

#### 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, \$535,503,000, to be derived from the Uranium Enrichment Decontamination and Decommissioning Fund, to remain available until expended, of which \$10,000,000 shall be available in accordance with title X, subtitle A, of the Energy Policy Act of 1992.

#### SCIENCE

For Department of Energy expenses including the purchase, construction and acquisition of plant and capital equipment, and other expenses necessary for science activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or facility or for plant or facility acquisition, construction, or expansion, and purchase of not to exceed 49 passenger motor vehicles for replacement only, including one law enforcement vehicle, one ambulance, and three buses, \$4,772,636,000, to remain available until expended: *Provided*, That, of the amount appropriated in this paragraph, \$93,686,593 shall be used for projects specified in the table that appears under the heading “Congressionally Directed Science Projects” in the text and table under this heading in the explanatory statement described in section 4 (in the matter preceding division A of this consolidated Act).

Nevada.

#### 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 “NWP”), including the acquisition of real property or facility construction or expansion, \$145,390,000, 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, \$5,000,000 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 Act: *Provided further*, That notwithstanding the lack of a written agreement with the State of Nevada under section 117(c) of the NWP, \$1,000,000 shall be provided to Nye County, Nevada, for on-site oversight activities under section 117(d) of that Act: *Provided further*, That \$9,000,000 shall be provided to affected units of local government, as defined in the NWP, to conduct appropriate activities and participate in licensing activities: *Provided further*, That of the \$9,000,000

California.

Public Law 111-85  
111th Congress

An Act

Making appropriations for energy and water development and related agencies  
for the fiscal year ending September 30, 2010, and for other purposes.

Oct. 28, 2009  
[H.R. 3183]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for energy and water development and related agencies for the fiscal year ending September 30, 2010, and for other purposes, namely:

Energy and  
Water  
Development and  
Related Agencies  
Appropriations  
Act, 2010.

TITLE I

CORPS OF ENGINEERS—CIVIL

DEPARTMENT OF THE ARMY

CORPS OF ENGINEERS—CIVIL

The following appropriations shall be expended under the direction of the Secretary of the Army and the supervision of the Chief of Engineers for authorized civil functions of the Department of the Army pertaining to rivers and harbors, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related efforts.

INVESTIGATIONS

For expenses necessary where authorized by law for the collection and study of basic information pertaining to river and harbor, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related needs; for surveys and detailed studies, and plans and specifications of proposed river and harbor, flood and storm damage reduction, shore protection, and aquatic ecosystem restoration projects and related efforts prior to construction; for restudy of authorized projects; and for miscellaneous investigations and, when authorized by law, surveys and detailed studies, and plans and specifications of projects prior to construction, \$160,000,000, to remain available until expended.

CONSTRUCTION

(INCLUDING TRANSFER OF FUNDS)

For expenses necessary for the construction of river and harbor, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related projects authorized by law; for

that appears under the heading “Congressionally Directed Science Projects” in the joint explanatory statement accompanying the conference report on this Act.

#### 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 “NWP”), \$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 NWP: *Provided further*, That notwithstanding the lack of a written agreement with the State of Nevada under section 117(c) of the NWP, 0.51 percent shall be provided to Nye County, Nevada, for on-site oversight activities under section 117(d) of the NWP: *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 NWP, to conduct appropriate activities and participate in licensing activities under Section 116(c) of the NWP: *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 NWP, 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 NWP: *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 NWP: *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 NWP and this Act: *Provided further*, That failure to provide such

Nevada.

Nevada.

California.  
Nevada.

Native  
Americans.

Nevada.

Nevada.

Deadline.  
Nevada.  
Certification.

Penalty.

table that appears under the heading “Congressionally Directed Defense Environmental Cleanup Projects” in the joint explanatory statement accompanying the conference report on this Act.

#### OTHER DEFENSE ACTIVITIES

For Department of Energy expenses, including the purchase, construction, and acquisition of plant and capital equipment and other expenses, necessary for atomic energy defense, other defense activities, and classified activities, in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the acquisition or condemnation of any real property or any facility or for plant or facility acquisition, construction, or expansion, and the purchase of not to exceed 12 passenger motor vehicles for replacement only, \$847,468,000, to remain available until expended: *Provided*, That of the amount appropriated in this paragraph, \$3,000,000 shall be used for projects specified in the table that appears under the heading “Congressionally Directed Other Defense Activities Projects” in the joint explanatory statement accompanying the conference report on this Act.

#### DEFENSE NUCLEAR WASTE DISPOSAL

For nuclear waste disposal activities to carry out the purposes of Public Law 97-425, as amended, including the acquisition of real property or facility construction or expansion, \$98,400,000, to remain available until expended.

#### POWER MARKETING ADMINISTRATIONS

##### BONNEVILLE POWER ADMINISTRATION FUND

Expenditures from the Bonneville Power Administration Fund, established pursuant to Public Law 93-454, are approved for the Leaburg Fish Sorter, the Okanogan Basin Locally Adapted Steelhead Supplementation Program, and the Crystal Springs Hatchery Facilities, and, in addition, for official reception and representation expenses in an amount not to exceed \$1,500. During fiscal year 2010, no new direct loan obligations may be made.

Loans.

##### OPERATION AND MAINTENANCE, SOUTHEASTERN POWER ADMINISTRATION

For necessary expenses of operation and maintenance of power transmission facilities and of marketing electric power and energy, including transmission wheeling and ancillary services pursuant to section 5 of the Flood Control Act of 1944 (16 U.S.C. 825s), as applied to the southeastern power area, \$7,638,000, to remain available until expended: *Provided*, That notwithstanding 31 U.S.C. 3302 and section 5 of the Flood Control Act of 1944, up to \$7,638,000 collected by the Southeastern Power Administration from the sale of power and related services shall be credited to this account as discretionary offsetting collections, to remain available until expended for the sole purpose of funding the annual expenses of the Southeastern Power Administration: *Provided further*, That the sum herein appropriated for annual expenses shall be reduced as collections are received during the fiscal year so as to result in a final fiscal year 2010 appropriation estimated at not more



passenger motor vehicles, \$76,000,000, to remain available until expended.

#### DEFENSE NUCLEAR FACILITIES SAFETY BOARD

##### SALARIES AND EXPENSES

For necessary expenses of the Defense Nuclear Facilities Safety Board in carrying out activities authorized by the Atomic Energy Act of 1954, as amended by Public Law 100-456, section 1441, \$26,086,000, to remain available until expended.

#### DELTA REGIONAL AUTHORITY

##### SALARIES AND EXPENSES

For necessary expenses of the Delta Regional Authority and to carry out its activities, as authorized by the Delta Regional Authority Act of 2000, as amended, notwithstanding sections 382C(b)(2), 382F(d), 382M, and 382N of said Act, \$13,000,000, to remain available until expended: *Provided*, That no funds in this Act shall be expended for the relocation of the Delta Regional Commission headquarters.

#### DENALI COMMISSION

For expenses of the Denali Commission including the purchase, construction, and acquisition of plant and capital equipment as necessary and other expenses, \$11,965,000, to remain available until expended, notwithstanding the limitations contained in section 306(g) of the Denali Commission Act of 1998.

#### NORTHERN BORDER REGIONAL COMMISSION

For necessary expenses of the Northern Border Regional Commission in carrying out activities authorized by subtitle V of title 40, United States Code, \$1,500,000, to remain available until expended.

#### SOUTHEAST CRESCENT REGIONAL COMMISSION

For necessary expenses of the Southeast Crescent Regional Commission in carrying out activities authorized by subtitle V of title 40, United States Code, \$250,000, to remain available until expended.

#### NUCLEAR REGULATORY COMMISSION

##### SALARIES AND EXPENSES

For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974, as amended, and the Atomic Energy Act of 1954, as amended, including official representation expenses (not to exceed \$25,000), \$1,056,000,000, to remain available until expended: *Provided*, That of the amount appropriated herein, \$29,000,000 shall be derived from the Nuclear Waste Fund: *Provided further*, That revenues from licensing fees, inspection services, and other services and collections estimated at \$902,402,000 in fiscal year 2010 shall be retained and used

Public Law 111-242  
111th Congress

An Act

Making continuing appropriations for fiscal year 2011, and for other purposes.

Sept. 30, 2010  
[H.R. 3081]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2011, and for other purposes, namely:

Continuing  
Appropriations  
Act, 2011.

SEC. 101. Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2010 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this Act, that were conducted in fiscal year 2010, and for which appropriations, funds, or other authority were made available in the following appropriations Acts:

(1) The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010 (Public Law 111-80).

(2) Division A of the Department of Defense Appropriations Act, 2010 (division A of Public Law 111-118).

(3) The Energy and Water Development and Related Agencies Appropriations Act, 2010 (Public Law 111-85).

(4) The Department of Homeland Security Appropriations Act, 2010 (Public Law 111-83) and section 601 of the Supplemental Appropriations Act, 2010 (Public Law 111-212).

(5) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010 (division A of Public Law 111-88).

(6) The Legislative Branch Appropriations Act, 2010 (division A of Public Law 111-68).

(7) The Consolidated Appropriations Act, 2010 (Public Law 111-117).

(8) Chapter 3 of title I of the Supplemental Appropriations Act, 2010 (Public Law 111-212), except for appropriations under the heading "Operation and Maintenance" relating to Haiti following the earthquake of January 12, 2010, or the Port of Guam: *Provided*, That the amount provided for the Department of Defense pursuant to this paragraph shall not exceed a rate for operations of \$29,387,401,000: *Provided further*, That the Secretary of Defense shall allocate such amount to each appropriation account, budget activity, activity group, and sub-activity group, and to each program, project, and activity within

each appropriation account, in the same proportions as such appropriations for fiscal year 2010.

(9) Section 102(c) of chapter 1 of title I of the Supplemental Appropriations Act, 2010 (Public Law 111-212) that addresses guaranteed loans in the rural housing insurance fund.

(10) The appropriation under the heading “Department of Commerce—United States Patent and Trademark Office” in the United States Patent and Trademark Office Supplemental Appropriations Act, 2010 (Public Law 111-224).

SEC. 102. (a) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for (1) the new production of items not funded for production in fiscal year 2010 or prior years; (2) the increase in production rates above those sustained with fiscal year 2010 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization (defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element, and for any investment items defined as a P-1 line item in a budget activity within an appropriation account and an R-1 line item that includes a program element and subprogram element within an appropriation account) for which appropriations, funds, or other authority were not available during fiscal year 2010.

Contracts.

(b) No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.

SEC. 103. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

SEC. 104. Except as otherwise provided in section 102, no appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2010.

SEC. 105. Appropriations made and authority granted pursuant to this Act shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this Act.

Expiration date.

SEC. 106. Unless otherwise provided for in this Act or in the applicable appropriations Act for fiscal year 2011, appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation for any project or activity provided for in this Act; (2) the enactment into law of the applicable appropriations Act for fiscal year 2011 without any provision for such project or activity; or (3) December 3, 2010.

SEC. 107. Expenditures made pursuant to this Act shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law.

SEC. 108. Appropriations made and funds made available by or authority granted pursuant to this Act may be used without regard to the time limitations for submission and approval of appropriations set forth in section 1513 of title 31, United States Code,

but nothing in this Act may be construed to waive any other provision of law governing the apportionment of funds.

SEC. 109. Notwithstanding any other provision of this Act, except section 106, for those programs that would otherwise have high initial rates of operation or complete distribution of appropriations at the beginning of fiscal year 2011 because of distributions of funding to States, foreign countries, grantees, or others, such high initial rates of operation or complete distribution shall not be made, and no grants shall be awarded for such programs funded by this Act that would impinge on final funding prerogatives.

SEC. 110. This Act shall be implemented so that only the most limited funding action of that permitted in the Act shall be taken in order to provide for continuation of projects and activities.

SEC. 111. (a) For entitlements and other mandatory payments whose budget authority was provided in appropriations Acts for fiscal year 2010, and for activities under the Food and Nutrition Act of 2008, activities shall be continued at the rate to maintain program levels under current law, under the authority and conditions provided in the applicable appropriations Act for fiscal year 2010, to be continued through the date specified in section 106(3).

(b) Notwithstanding section 106, obligations for mandatory payments due on or about the first day of any month that begins after October 2010 but not later than 30 days after the date specified in section 106(3) may continue to be made, and funds shall be available for such payments.

Deadline.

SEC. 112. Amounts made available under section 101 for civilian personnel compensation and benefits in each department and agency may be apportioned up to the rate for operations necessary to avoid furloughs within such department or agency, consistent with the applicable appropriations Act for fiscal year 2010, except that such authority provided under this section shall not be used until after the department or agency has taken all necessary actions to reduce or defer non-personnel-related administrative expenses.

SEC. 113. Funds appropriated by this Act may be obligated and expended notwithstanding section 10 of Public Law 91-672 (22 U.S.C. 2412), section 15 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2680), section 313 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (22 U.S.C. 6212), and section 504(a)(1) of the National Security Act of 1947 (50 U.S.C. 414(a)(1)).

SEC. 114. The following amounts are designated as an emergency requirement and necessary to meet emergency needs pursuant to sections 403(a) and 423(b) of S. Con. Res. 13 (111th Congress), the concurrent resolution on the budget for fiscal year 2010:

(1) Amounts incorporated by reference in this Act that were previously designated as available for overseas deployments and other activities pursuant to such concurrent resolution.

(2) Amounts made available pursuant to paragraph (8) of section 101 of this Act.

SEC. 115. Notwithstanding any other provision of this Act, funds appropriated under the heading "Food for Peace Title II Grants" in chapter 1 of title I of the Supplemental Appropriations Act, 2010 (Public Law 111-212) may be used to reimburse obligations incurred for the purposes provided therein prior to the enactment of such Act.

PUBLIC LAW 112–10—APR. 15, 2011

DEPARTMENT OF DEFENSE AND FULL-YEAR  
CONTINUING APPROPRIATIONS ACT, 2011

Public Law 112–10  
112th Congress

An Act

Apr. 15, 2011  
[H.R. 1473]

Department of  
Defense and Full-  
Year Continuing  
Appropriations  
Act, 2011.

Making appropriations for the Department of Defense and the other departments and agencies of the Government for the fiscal year ending September 30, 2011, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Department of Defense and Full-Year Continuing Appropriations Act, 2011”.

**SEC. 2. TABLE OF CONTENTS.**

The table of contents for this Act is as follows:

Division A—Department of Defense Appropriations, 2011  
Division B—Full-Year Continuing Appropriations, 2011  
Division C—Scholarships for Opportunity and Results Act

**DIVISION A—DEPARTMENT OF DEFENSE  
APPROPRIATIONS, 2011**

The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2011, for military functions administered by the Department of Defense and for other purposes, namely:

**TITLE I**

**MILITARY PERSONNEL**

**MILITARY PERSONNEL, ARMY**

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty, (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers’ Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, \$41,403,653,000.

**MILITARY PERSONNEL, NAVY**

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel

and Related Agencies Appropriations Act, 2010 (Public Law 111-85) shall not apply to funds appropriated by this division.

SEC. 1416. Sections 105, 106, 107, 110 through 125, 205 through 211, 502, and 506 of the Energy and Water Development and Related Agencies Appropriations Act, 2010 (Public Law 111-85), to the extent the sections direct funds, shall not apply to funds appropriated by this division.

SEC. 1417. In addition to amounts otherwise made available by this division, \$180,000,000 is appropriated for “Department of Energy, Energy Programs, Advanced Research Projects Agency—Energy”.

Approval.

SEC. 1418. No appropriation, funds, or authority made available pursuant to section 1101 for the Department of Energy or Corps of Engineers, Civil shall be used to initiate or resume any program, project or activity or to initiate Requests For Proposals or similar arrangements (including Requests for Quotations, Requests for Information, and Funding Opportunity Announcements) for a program, project or activity if the program, project or activity has not been funded by Congress, unless prior approval is received from the Committees on Appropriations of the House of Representatives and the Senate.

SEC. 1419. Notwithstanding section 1101, the level for “Independent Agencies, Appalachian Regional Commission” shall be \$68,400,000.

SEC. 1420. Notwithstanding section 1101, the level for “Independent Agencies, Delta Regional Authority” shall be \$11,700,000.

SEC. 1421. Notwithstanding section 1101, the level for “Independent Agencies, Denali Commission” shall be \$10,700,000.

SEC. 1422. Notwithstanding section 1101, the level for “Defense Nuclear Facilities Safety Board” shall be \$23,250,000.

SEC. 1423. Notwithstanding section 1101, for the “Nuclear Regulatory Commission, Salaries and Expenses”, for necessary expenses in carrying out the purposes of the Energy Reorganization Act of 1974, as amended, and the Atomic Energy Act of 1954, as amended, including official representation expenses (not to exceed \$25,000), \$1,043,483,000, to remain available until expended: *Provided*, That of the amount appropriated herein, \$10,000,000 shall be derived from the Nuclear Waste Fund: *Provided further*, That revenues from licensing fees, inspection services, and other services and collections estimated at \$906,220,000 in fiscal year 2011 shall be retained and used for necessary salaries and expenses in this account, notwithstanding 31 U.S.C. 3302, and shall remain available until expended: *Provided further*, That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2011 so as to result in a final fiscal year 2011 appropriation estimated at not more than \$137,263,000: *Provided further*, That the last proviso under such heading in title IV of Public Law 111-85 shall not apply to funds appropriated by this division.

SEC. 1424. Section 15751(b) of title 40, United States Code, shall not apply to funds appropriated by this division.

Loans.

SEC. 1425. Notwithstanding section 1101, and subject to section 502 of the Congressional Budget Act of 1974, commitments to guarantee loans for renewable energy or efficient end-use energy technologies under title XVII of the Energy Policy Act of 2005 shall not exceed a total principal amount of \$1,183,000,000, to remain available until committed: *Provided*, That, in addition to

\$31,507,000 is rescinded: *Provided further*, That of the funds appropriated in Public Law 111-85 under this heading, \$25,000,000 is rescinded.

SEC. 1441. Notwithstanding section 1101, the level for “Department of Energy, Energy Programs, Northeast Home Heating Oil Reserve” shall be \$11,000,000.

SEC. 1442. Notwithstanding section 1101, the level for “Department of Energy, Energy Programs, Energy Information Administration” shall be \$95,600,000.

SEC. 1443. Notwithstanding section 1101, the level for “Department of Energy, Energy Programs, Non-Defense Environmental Cleanup” shall be \$225,200,000.

SEC. 1444. Notwithstanding section 1101, the level for “Department of Energy, Energy Programs, Uranium Enrichment Decontamination and Decommissioning Fund” shall be \$509,000,000.

SEC. 1445. Notwithstanding section 1101, the level for “Department of Energy, Energy Programs, Science” shall be \$4,884,000,000.

SEC. 1446. Notwithstanding section 1101, the level for “Department of Energy, Energy Programs, Nuclear Waste Disposal” shall be \$0.

SEC. 1447. Notwithstanding section 1101, the level for “Department of Energy, Energy Programs, Departmental Administration” shall be \$268,640,000: *Provided*, That miscellaneous revenues under this appropriation may be \$119,740,000 so as to result in a final fiscal year 2011 appropriation from the general fund estimated at no more than \$148,900,000.

SEC. 1448. Notwithstanding section 1101, the level for “Department of Energy, Energy Programs, Advanced Technology Vehicles Manufacturing Loan Program” shall be \$9,998,000.

SEC. 1449. Notwithstanding section 1101, the level for “Department of Energy, Energy Programs, Office of the Inspector General” shall be \$42,850,000.

SEC. 1450. Notwithstanding section 1101, the level for “Department of Energy, Atomic Energy Defense Activities, National Nuclear Security Administration, Weapons Activities” shall be \$6,993,419,000.

SEC. 1451. Notwithstanding section 1101, the level for “Department of Energy, Atomic Energy Defense Activities, National Nuclear Security Administration, Defense Nuclear Nonproliferation” shall be \$2,326,000,000.

SEC. 1452. Notwithstanding section 1101, the level for “Department of Energy, Atomic Energy Defense Activities, National Nuclear Security Administration, Naval Reactors” shall be \$967,000,000.

SEC. 1453. Notwithstanding section 1101, the level for “Department of Energy, Atomic Energy Defense Activities, National Nuclear Security Administration, Office of the Administrator” shall be \$399,793,000.

SEC. 1454. Notwithstanding section 1101, the level for “Department of Energy, Environmental and Other Defense Activities, Defense Environmental Cleanup” shall be \$5,016,041,000, of which \$33,700,000 shall be transferred to the “Uranium Enrichment Decontamination and Decommissioning Fund”.

SEC. 1455. Notwithstanding section 1101, the level for “Department of Energy, Environmental and Other Defense Activities, Other Defense Activities” shall be \$790,000,000.



- SEC. 1456. Notwithstanding section 1101, the level for “Department of Energy, Environmental and Other Defense Activities, Defense Nuclear Waste Disposal” shall be \$0.
- Rescissions. SEC. 1457. Of the unobligated balances from prior year appropriations available for “Corps of Engineers—Civil, Department of the Army, Construction”, \$100,000,000 is rescinded, to be derived from the Continuing Authorities Program: *Provided*, That of the unobligated balances made available for accounts under the heading “Corps of Engineers—Civil, Department of the Army” in Public Law 110-161 or any appropriation Act prior to such Act, \$76,000,000 is rescinded (in addition to funds rescinded in the previous proviso).
- Rescissions. SEC. 1458. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Energy Efficiency and Renewable Energy”, \$30,000,000 is rescinded.
- Rescissions. SEC. 1459. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Electricity Delivery and Energy Reliability”, \$3,700,000 is rescinded.
- Rescissions. SEC. 1460. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Nuclear Energy”, \$6,300,000 is rescinded.
- Rescissions. SEC. 1461. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Fossil Energy Research and Development”, \$140,000,000 is rescinded.
- Rescissions. SEC. 1462. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Naval Petroleum and Oil Shale Reserves”, \$2,100,000 is rescinded.
- Rescissions. SEC. 1463. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Clean Coal Technology”, \$16,500,000 is rescinded.
- Rescissions. SEC. 1464. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Strategic Petroleum Reserve”, \$15,300,000 is rescinded in addition to funds rescinded elsewhere in this division.
- Rescissions. SEC. 1465. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Energy Information Administration”, \$400,000 is rescinded.
- Rescissions. SEC. 1466. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Non-Defense Environmental Cleanup”, \$900,000 is rescinded.
- Rescissions. SEC. 1467. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Uranium Enrichment Decontamination and Decommissioning Fund”, \$9,900,000 is rescinded.
- Rescissions. SEC. 1468. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Science”, \$15,000,000 is rescinded.
- Rescissions. SEC. 1469. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Nuclear Waste Disposal”, \$2,800,000 is rescinded.
- Rescissions. SEC. 1470. Of the unobligated balances from prior year appropriations available for “Department of Energy, Energy Programs, Departmental Administration”, \$81,900,000 is rescinded.
- Rescissions. SEC. 1471. Of the unobligated balances from prior year appropriations available for “Department of Energy, Atomic Energy

112TH CONGRESS  
1ST SESSION

# H. R. 2354

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## AN ACT

Making appropriations for energy and water development  
and related agencies for the fiscal year ending September  
30, 2012, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 prepared by the Department of the Interior, Bureau of  
2 Reclamation. Any future obligations of funds by the  
3 United States relating to, or providing for, drainage serv-  
4 ice or drainage studies for the San Luis Unit shall be fully  
5 reimbursable by San Luis Unit beneficiaries of such serv-  
6 ice or studies pursuant to Federal reclamation law.

7       SEC. 203. Of the funds deposited in the San Joaquin  
8 River Restoration Fund in accordance with subparagraphs  
9 (A), (B), and (C) of section 10009(c)(1) of Public Law  
10 111–11, all unobligated balances remaining from prior fis-  
11 cal years are hereby permanently rescinded.

## 12           TITLE III—DEPARTMENT OF ENERGY

### 13                   ENERGY PROGRAMS

#### 14           ENERGY EFFICIENCY AND RENEWABLE ENERGY

15       For Department of Energy expenses including the  
16 purchase, construction, and acquisition of plant and cap-  
17 ital equipment, and other expenses necessary for energy  
18 efficiency and renewable energy activities in carrying out  
19 the purposes of the Department of Energy Organization  
20 Act (42 U.S.C. 7101 et seq.), including the acquisition or  
21 condemnation of any real property or any facility or for  
22 plant or facility acquisition, construction, or expansion,  
23 \$1,304,636,000 (reduced by \$6,000,000) (reduced by  
24 \$200,000), to remain available until expended: *Provided*,  
25 That for the purposes of allocating weatherization assist-

1 \$213,121,000 (increased by \$41,000,000), to remain  
2 available until expended.

3 URANIUM ENRICHMENT DECONTAMINATION AND  
4 DECOMMISSIONING FUND

5 For necessary expenses in carrying out uranium en-  
6 richment facility decontamination and decommissioning,  
7 remedial actions, and other activities of title II of the  
8 Atomic Energy Act of 1954, and title X, subtitle A, of  
9 the Energy Policy Act of 1992, \$449,000,000, to be de-  
10 rived from the Uranium Enrichment Decontamination and  
11 Decommissioning Fund, and not more than \$150,000,000,  
12 to be derived from the barter, transfer, or sale of uranium  
13 authorized under section 3112 of the USEC Privatization  
14 Act (42 U.S.C. 2297h–10) or section 314 of the Energy  
15 and Water Development Appropriations Act, 2006 (Public  
16 Law 109–103), to remain available until expended: *Pro-*  
17 *vided*, That proceeds from such barter, transfer, or sale  
18 of uranium in excess of such amount shall not be available  
19 until appropriated.

20 SCIENCE

21 For Department of Energy expenses including the  
22 purchase, construction, and acquisition of plant and cap-  
23 ital equipment, and other expenses necessary for science  
24 activities in carrying out the purposes of the Department  
25 of Energy Organization Act (42 U.S.C. 7101 et seq.), in-

cluding the acquisition or condemnation of any real property or facility or for plant or facility acquisition, construction, or expansion, and purchase of not more than 49 passenger motor vehicles for replacement only, including one ambulance and one bus, \$4,800,000,000, to remain available until expended.

#### 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), \$25,000,000, to remain available until expended, and to be derived from the Nuclear Waste Fund.

#### ADVANCED RESEARCH PROJECTS AGENCY—ENERGY

For necessary expenses in carrying out the activities authorized by section 5012 of the America COMPETES Act (42 U.S.C. 16538), \$100,000,000 (increased by \$79,640,000), to remain available until expended.

#### TITLE 17 INNOVATIVE TECHNOLOGY LOAN GUARANTEE PROGRAM

Subject to section 502 of the Congressional Budget Act of 1974, for the cost of loan guarantees for renewable energy or efficient end-use energy technologies under section 1703 of the Energy Policy Act of 2005, \$160,000,000, to remain available until expended: *Provided*, That the amounts provided in this section are in addition to those provided in any other Act: *Provided fur-*

## 1       SOUTHEAST CRESCENT REGIONAL COMMISSION

2       For necessary expenses of the Southeast Crescent Re-  
3 gional Commission in carrying out activities authorized by  
4 subtitle V of title 40, United States Code, \$250,000, to  
5 remain available until expended.

## 6               NUCLEAR REGULATORY COMMISSION

## 7                       SALARIES AND EXPENSES

8       For necessary expenses of the Nuclear Regulatory  
9 Commission in carrying out the purposes of the Energy  
10 Reorganization Act of 1974 and the Atomic Energy Act  
11 of 1954, including official representation expenses (not to  
12 exceed \$25,000), \$1,027,240,000 (increased by  
13 \$10,000,000), to remain available until expended: *Pro-*  
14 *vided*, That of the amount appropriated herein, not more  
15 than \$7,500,000 may be made available for salaries and  
16 other support costs for the Office of the Commission: *Pro-*  
17 *vided*, That of the amount appropriated herein,  
18 \$10,000,000 (increased by \$10,000,000) shall be used to  
19 continue the Yucca Mountain license application, to be de-  
20 rived from the Nuclear Waste Fund: *Provided further*,  
21 That revenues from licensing fees, inspection services, and  
22 other services and collections estimated at \$890,713,000  
23 in fiscal year 2012 shall be retained and used for nec-  
24 essary salaries and expenses in this account, notwith-  
25 standing 31 U.S.C. 3302, and shall remain available until

1 pursuant to a transfer made by, or transfer authority pro-  
2 vided, in this Act or any other appropriation Act.

3 SEC. 603. None of the funds appropriated or other-  
4 wise made available by this Act may be obligated by any  
5 covered executive agency in contravention of the certifi-  
6 cation requirement of section 6(b) of the Iran Sanctions  
7 Act of 1996, as included in the revisions to the Federal  
8 Acquisition Regulation pursuant to such section.

9 SEC. 604. None of the funds made available in this  
10 Act may be used to conduct closure of adjudicatory func-  
11 tions, technical review, or support activities associated  
12 with the Yucca Mountain geologic repository license appli-  
13 cation until the Nuclear Regulatory Commission reverses  
14 ASLB decision LBP-10-11, or for actions that irrev-  
15 ocably remove the possibility that Yucca Mountain may  
16 be a repository option in the future.

17 SEC. 605. None of the funds made available under  
18 this Act may be expended for any new hire by any Federal  
19 agency funded in this Act that is not verified through the  
20 E-Verify Program established under section 403(a) of the  
21 Illegal Immigration Reform and Immigrant Responsibility  
22 Act of 1996 (8 U.S.C. 1324a note).

23 SEC. 606. None of the funds made available by this  
24 Act may be used to enter into a contract, memorandum  
25 of understanding, or cooperative agreement with, make a

1       This Act may be cited as the “Energy aand Water  
2 Development and Related Agencies Appropriations Act,  
3 2012”.

Passed the House of Representatives July 15, 2011.

Attest:

*Clerk.*



H. R. 2055

# One Hundred Twelfth Congress of the United States of America

## AT THE FIRST SESSION

*Begun and held at the City of Washington on Wednesday,  
the fifth day of January, two thousand and eleven*

## An Act

Making appropriations for military construction, the Department of Veterans Affairs, and related agencies for the fiscal year ending September 30, 2012, and for other purposes.

*Be it enacted by the Senate and House of Representatives of  
the United States of America in Congress assembled,*

### SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2012".

### SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.
- Sec. 3. References.
- Sec. 4. Statement of appropriations.
- Sec. 5. Availability of funds.

#### DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2012

- Title I—Military Personnel
- Title II—Operation and Maintenance
- Title III—Procurement
- Title IV—Research, Development, Test and Evaluation
- Title V—Revolving and Management Funds
- Title VI—Other Department of Defense Programs
- Title VII—Related agencies
- Title VIII—General provisions
- Title IX—Overseas contingency operations

#### DIVISION B—ENERGY AND WATER DEVELOPMENT APPROPRIATIONS ACT, 2012

- Title I—Corps of Engineers—Civil
- Title II—Department of the Interior
- Title III—Department of Energy
- Title IV—Independent agencies
- Title V—General provisions

#### DIVISION C—FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS ACT, 2012

- Title I—Department of the Treasury
- Title II—Executive Office of the President and Funds Appropriated to the President
- Title III—The Judiciary
- Title IV—District of Columbia
- Title V—Independent agencies
- Title VI—General provisions—This Act
- Title VII—General provisions—Government-wide
- Title VIII—General provisions—District of Columbia

#### DIVISION D—DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS ACT, 2012

- Title I—Departmental management and operations

NORTHERN BORDER REGIONAL COMMISSION

For necessary expenses of the Northern Border Regional Commission in carrying out activities authorized by subtitle V of title 40, United States Code, \$1,497,000, to remain available until expended: *Provided*, That such amounts shall be available for administrative expenses, notwithstanding section 15751(b) of title 40, United States Code.

SOUTHEAST CRESCENT REGIONAL COMMISSION

For necessary expenses of the Southeast Crescent Regional Commission in carrying out activities authorized by subtitle V of title 40, United States Code, \$250,000, to remain available until expended.

NUCLEAR REGULATORY COMMISSION

SALARIES AND EXPENSES

For necessary expenses of the Commission in carrying out the purposes of the Energy Reorganization Act of 1974, as amended, and the Atomic Energy Act of 1954, as amended, including official representation expenses (not to exceed \$25,000), \$1,027,240,000, to remain available until expended: *Provided*, That of the amount appropriated herein, not more than \$9,000,000 may be made available for salaries and other support costs for the Office of the Commission: *Provided further*, That revenues from licensing fees, inspection services, and other services and collections estimated at \$899,726,000 in fiscal year 2012 shall be retained and used for necessary salaries and expenses in this account, notwithstanding 31 U.S.C. 3302, and shall remain available until expended: *Provided further*, That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2012 so as to result in a final fiscal year 2012 appropriation estimated at not more than \$127,514,000: *Provided further*, That of the amounts appropriated under this heading, \$10,000,000 shall be for university research and development in areas relevant to their respective organization's mission, and \$5,000,000 shall be for a Nuclear Science and Engineering Grant Program that will support multiyear projects that do not align with programmatic missions but are critical to maintaining the discipline of nuclear science and engineering.

OFFICE OF INSPECTOR GENERAL

For necessary expenses of the Office of Inspector General in carrying out the provisions of the Inspector General Act of 1978, \$10,860,000, to remain available until September 30, 2013: *Provided*, That revenues from licensing fees, inspection services, and other services and collections estimated at \$9,774,000 in fiscal year 2012 shall be retained and be available until expended, for necessary salaries and expenses in this account, notwithstanding section 3302 of title 31, United States Code: *Provided further*, That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2012 so as to result in a final fiscal year 2012 appropriation estimated at not more than \$1,086,000.

NUCLEAR WASTE TECHNICAL REVIEW BOARD

SALARIES AND EXPENSES

For necessary expenses of the Nuclear Waste Technical Review Board, as authorized by Public Law 100-203, section 5051, \$3,400,000 to be derived from the Nuclear Waste Fund, and to remain available until expended.

OFFICE OF THE FEDERAL COORDINATOR FOR ALASKA NATURAL GAS  
TRANSPORTATION PROJECTS

For necessary expenses for the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects pursuant to the Alaska Natural Gas Pipeline Act of 2004, \$1,000,000.

GENERAL PROVISIONS—INDEPENDENT AGENCIES

SEC. 401. (a) None of the funds provided in this title for "Nuclear Regulatory Commission—Salaries and Expenses" shall be available for obligation or expenditure through a reprogramming of funds that—

(1) increases funds or personnel for any program, project, or activity for which funds are denied or restricted by this Act; or

(2) reduces funds that are directed to be used for a specific program, project, or activity by this Act.

(b) The Chairman of the Nuclear Regulatory Commission may not terminate any program, project, or activity without the approval of a majority vote of the Commissioners of the Nuclear Regulatory Commission approving such action.

(c) The Nuclear Regulatory Commission may waive the restriction on reprogramming under subsection (a) on a case-by-case basis by certifying to the Committees on Appropriations of the House of Representatives and the Senate that such action is required to address national security or imminent risks to public safety. Each such waiver certification shall include a letter from the Chairman of the Commission that a majority of Commissioners of the Nuclear Regulatory Commission have voted and approved the reprogramming waiver certification.

SEC. 402. The Nuclear Regulatory Commission shall require reactor licensees to re-evaluate the seismic, tsunami, flooding, and other external hazards at their sites against current applicable Commission requirements and guidance for such licenses as expeditiously as possible, and thereafter when appropriate, as determined by the Commission, and require each licensee to respond to the Commission that the design basis for each reactor meets the requirements of its license, current applicable Commission requirements and guidance for such license. Based upon the evaluations conducted pursuant to this section and other information it deems relevant, the Commission shall require licensees to update the design basis for each reactor, if necessary.

MILITARY CONSTRUCTION AND VETERANS AFFAIRS AND  
RELATED AGENCIES APPROPRIATIONS ACT, 2012

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DECEMBER 15, 2011.—Ordered to be printed

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Mr. ROGERS of Kentucky, from the committee of conference,  
submitted the following

CONFERENCE REPORT

[To accompany H.R. 2055]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2055), making appropriations for military construction, the Department of Veterans Affairs, and related agencies for the fiscal year ending September 30, 2012, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

**SECTION 1. SHORT TITLE.**

*This Act may be cited as the “Consolidated Appropriations Act, 2012”.*

**SEC. 2. TABLE OF CONTENTS.**

*The table of contents of this Act is as follows:*

- Sec. 1. Short title.*
- Sec. 2. Table of contents.*
- Sec. 3. References.*
- Sec. 4. Statement of appropriations.*
- Sec. 5. Availability of funds.*

**DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2012**

- Title I—Military Personnel*
- Title II—Operation and Maintenance*
- Title III—Procurement*
- Title IV—Research, Development, Test and Evaluation*
- Title V—Revolving and Management Funds*
- Title VI—Other Department of Defense Programs*

*Title VII—Related agencies*  
*Title VIII—General provisions*  
*Title IX—Overseas contingency operations*

**DIVISION B—ENERGY AND WATER DEVELOPMENT APPROPRIATIONS ACT, 2012**

*Title I—Corps of Engineers—Civil*  
*Title II—Department of the Interior*  
*Title III—Department of Energy*  
*Title IV—Independent agencies*  
*Title V—General provisions*

**DIVISION C—FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS ACT, 2012**

*Title I—Department of the Treasury*  
*Title II—Executive Office of the President and Funds Appropriated to the President*  
*Title III—The Judiciary*  
*Title IV—District of Columbia*  
*Title V—Independent agencies*  
*Title VI—General provisions—This Act*  
*Title VII—General provisions—Government-wide*  
*Title VIII—General provisions—District of Columbia*

**DIVISION D—DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS ACT, 2012**

*Title I—Departmental management and operations*  
*Title II—Security, enforcement, and investigations*  
*Title III—Protection, preparedness, response, and recovery*  
*Title IV—Research and development, training, and services*  
*Title V—General provisions*

**DIVISION E—DEPARTMENT OF THE INTERIOR, ENVIRONMENT, AND RELATED AGENCIES APPROPRIATIONS ACT, 2012**

*Title I—Department of the Interior*  
*Title II—Environmental Protection Agency*  
*Title III—Related agencies*  
*Title IV—General provisions*

**DIVISION F—DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2012**

*Title I—Department of Labor*  
*Title II—Department of Health and Human Services*  
*Title III—Department of Education*  
*Title IV—Related agencies*  
*Title V—General provisions*

**DIVISION G—LEGISLATIVE BRANCH APPROPRIATIONS ACT, 2012**

*Title I—Legislative branch*  
*Title II—General provisions*

**DIVISION H—MILITARY CONSTRUCTION AND VETERANS AFFAIRS AND RELATED AGENCIES APPROPRIATIONS ACT, 2012**

*Title I—Department of Defense*  
*Title II—Department of Veterans Affairs*  
*Title III—Related agencies*  
*Title IV—Overseas contingency operations*  
*Title V—General provisions*

**DIVISION I—DEPARTMENT OF STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS APPROPRIATIONS ACT, 2012**

*Title I—Department of State and related agency*  
*Title II—United States Agency for International Development*  
*Title III—Bilateral economic assistance*  
*Title IV—International security assistance*  
*Title V—Multilateral assistance*  
*Title VI—Export and investment assistance*  
*Title VII—General provisions*

*Fusion Energy Sciences.*—The conference agreement provides \$402,177,000 for Fusion Energy Sciences, of which not more than \$105,000,000 is for U.S. Contributions to ITER. The conference agreement includes \$24,741,000 for the High Energy Density Laboratory Plasma program, of which \$12,000,000 is to be evenly distributed among heavy-ion fusion, laser-driven fusion, and magnetoinertial fusion. The conference agreement includes direction for the submission of a 10-year fusion plan as provided by both the House and Senate.

*High Energy Physics.*—The conference agreement provides \$791,700,000 for High Energy Physics research.

The conferees understand that the United States has unique capabilities to develop a world-leading neutrino science program. To begin the transition to the intensity frontier, the conferees provide \$21,000,000 for the Long Baseline Neutrino Experiment, which includes \$17,000,000 for research and development and \$4,000,000 for project engineering and design. The conferees provide no funding for long-lead procurements or construction activities. The conferees are concerned that this project is not mature enough for construction because a location and technology for the underground detectors has not been selected. Before consideration of congressional approval of construction, the Department is directed to provide to the House and Senate Committees on Appropriations a detailed project plan and refined total cost estimate for construction, not later than April 1, 2012.

Within available funds, the conferees provide \$15,000,000 as requested, \$10,000,000 within High Energy Physics and \$5,000,000 within Nuclear Physics, to support minimal, sustaining operations at the Homestake Mine in South Dakota.

*Nuclear Physics.*—The conference agreement provides \$550,000,000 for Nuclear Physics. Within available funds, the conference agreement includes \$22,000,000 for the Facility for Rare Isotope Beams, and \$50,000,000 for the 12 GeV upgrade of the Continuous Electron Beam Accelerator Facility.

*Workforce Development for Teachers and Scientists.*—The conference agreement provides \$18,500,000 for Science Workforce Development. Within available funds, up to \$5,000,000 is for the graduate fellowship program to fund the existing cohort established in fiscal year 2010.

*Science Laboratories Infrastructure.*—The conference agreement provides \$111,800,000 for Science Laboratories Infrastructure.

*Safeguards and Security.*—The conference agreement provides \$82,000,000 for Safeguards and Security.

*Science Program Direction.*—The conference agreement provides \$185,000,000 for Science Program Direction. No funds shall be used to hire new site office personnel, except for field staff at the Integrated Support Centers in Chicago and Oak Ridge.

#### NUCLEAR WASTE DISPOSAL

The conference agreement provides \$0 for nuclear waste disposal, as proposed by the Senate, instead of \$25,000,000 as proposed by the House.

## TITLE IV

## INDEPENDENT AGENCIES

## APPALACHIAN REGIONAL COMMISSION

The conference agreement provides \$68,263,000 for the Appalachian Regional Commission, instead of \$68,400,000 as proposed by the House and \$58,024,000 as proposed by the Senate.

## DEFENSE NUCLEAR FACILITIES SAFETY BOARD

## SALARIES AND EXPENSES

The conference agreement provides \$29,130,000 for the Defense Nuclear Facilities Safety Board, as proposed by the House and Senate. The conferees direct the Board to enter into an agreement for fiscal years 2012 and 2013 with the Office of Inspector General for the Nuclear Regulatory Commission. The conferees direct the Board to enter into an enduring procurement with a provider of inspector general services thereafter.

## DELTA REGIONAL AUTHORITY

## SALARIES AND EXPENSES

The conference agreement provides \$11,677,000 for the Delta Regional Authority, instead of \$11,700,000 as proposed by the House and \$9,925,000 as proposed by the Senate.

## DENALI COMMISSION

The conference agreement provides \$10,679,000 for the Denali Commission, instead of \$10,700,000 as proposed by the House and \$9,077,000 as proposed by the Senate.

## NORTHERN BORDER REGIONAL COMMISSION

The conference agreement provides \$1,497,000 for the Northern Border Regional Commission, instead of \$1,350,000 as proposed by the House and \$1,275,000 as proposed by the Senate.

## SOUTHEAST CRESCENT REGIONAL COMMISSION

The conference agreement provides \$250,000 for the Southeast Crescent Regional Commission, as proposed by the House, instead of \$213,000 as proposed by the Senate.

## NUCLEAR REGULATORY COMMISSION

## SALARIES AND EXPENSES

The conference agreement provides \$1,027,240,000 for the Nuclear Regulatory Commission (NRC) salaries and expenses, as proposed by the Senate, instead of \$1,037,240,000 as proposed by the House. This amount is offset by estimated revenues of \$899,726,000, resulting in a net appropriation of \$127,514,000. The fee recovery is consistent with that authorized by section 637 of the Energy Policy Act of 2005. The conference agreement does not include \$20,000,000 to be made available from the Nuclear Waste

Fund to support the geological repository for nuclear fuel and waste, as proposed by the House. The Senate proposed no similar provision.

The conference agreement includes a National Academy of Sciences study of the lessons learned from the events at the Fukushima nuclear plant, as proposed by the Senate. The Commission is directed to transfer \$2,000,000 to the National Academy of Sciences for this study within 30 days of enactment of this Act.

The conference agreement includes \$15,000,000; as proposed by the House, to support university education programs relevant to the NRC mission, of which not less than \$5,000,000 is for grants to support research projects that do not align with programmatic missions but are critical to maintaining the discipline of nuclear science and engineering.

The conferees recognize the progress that the Nuclear Regulatory Commission has made on the recommendations of the Near Term Task Force. Commission staff has proposed a prioritized list of the Task Force recommendations that reflects the order regulatory actions are to be taken. The conferees direct the Commission to implement these recommendations consistent with, or more expeditiously than, the "schedules and milestones" proposed by NRC staff on October 3, 2011. The conferees direct the Commission to maintain an implementation schedule such that the remaining recommendations (not identified as Tier 1 priorities) will be evaluated and acted upon as expeditiously as practicable. The conferees request that the Commission provide a written status report to the House and Senate Committees on Appropriations on its implementation of the Task Force recommendations on the one year anniversary of the Fukushima disaster.

#### OFFICE OF INSPECTOR GENERAL

The conference agreement includes \$10,860,000 for the Office of the Inspector General in the Nuclear Regulatory Commission, as proposed by the House and Senate. This amount is offset by revenues of \$9,774,000, for a net appropriation of \$1,086,000.

#### NUCLEAR WASTE TECHNICAL REVIEW BOARD

##### SALARIES AND EXPENSES

The conference agreement provides \$3,400,000 for the Nuclear Waste Technical Review Board, as proposed by the House and Senate.

#### OFFICE OF THE FEDERAL COORDINATOR FOR ALASKA NATURAL GAS TRANSPORTATION PROJECTS

The conference agreement provides \$1,000,000 for the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects, as proposed by the Senate, instead of \$4,032,000 as proposed by the House. The conference agreement does not include a House provision addressing excess fees.



dential appointees who fall under certain exemptions to Senate confirmation. The Senate proposed no similar provision.

The conference agreement does not include a provision proposed by the House prohibiting funds for International activities of the Office of Energy Efficiency and Renewable Energy at the Department of Energy, except for the U.S.-Israel program. The Senate proposed no similar provision.

The conference agreement does not include a provision proposed by the House prohibiting funds in this bill from being used to close the Yucca Mountain license application process until a specific condition is met or for actions that would remove the possibility that Yucca Mountain might be an option in the future. The Senate proposed no similar provision.

The conference agreement does not include a provision proposed by the House prohibiting funds to implement any new requirement regarding the disclosure of political contributions. The Senate proposed no similar provision.

#### TITLE V/VI

#### EMERGENCY SUPPLEMENTAL FUNDING FOR DISASTER RELIEF

The conference agreement does not include funding for the Corps of Engineers for disaster-related work as proposed in Title V of the House bill and Title VI of the Senate bill. Additional funding to address these needs will be considered separately.

## Calendar No. 412

107TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
107-159 }

### APPROVAL OF YUCCA MOUNTAIN SITE

JUNE 10, 2002.—Ordered to be printed

Mr. BINGAMAN, from the Committee on Energy and Natural Resources, submitted the following

### R E P O R T

[To accompany S.J. Res. 34]

The Committee on Energy and Natural Resources, to which was referred the joint resolution (S.J. Res. 34) approving the site at Yucca Mountain, Nevada, for the development of a repository for the disposal of high-level radioactive waste and spent nuclear fuel, pursuant to the Nuclear Waste Policy Act of 1982, having considered the same, reports favorably thereon without amendment and recommends that the joint resolution do pass.

#### PURPOSE OF THE MEASURE

The purpose of S.J. Res. 34 is to approve the site at Yucca Mountain, Nevada for the development of a repository for the disposal of high-level radioactive waste and spent nuclear fuel pursuant to the Nuclear Waste Policy Act of 1982. Timely enactment of S.J. Res. 34 will allow the Secretary of Energy to apply to the Nuclear Regulatory Commission for a license to build a repository at Yucca Mountain. Failure to enact the resolution within the 90-day period prescribed by the Act, on the other hand, will terminate the repository program established by the Act.

#### BACKGROUND AND NEED

Congress passed the Nuclear Waste Policy Act of 1982 to provide for the timely siting, construction, and operation of an underground repository for the permanent disposal of the nation's high-level radioactive waste and spent nuclear fuel. As used in the Act, the term "high-level radioactive waste" refers to the mixture of caustic chemicals and highly radioactive waste products that remain after uranium and plutonium have been chemically removed from spent nuclear fuel. Spent nuclear fuel refers to irradiated nuclear fuel

whole and that all of the barriers should work synergistically with each other, and that we should see the integrated picture rather than looking at each barriers in isolation."

The Committee is satisfied that the NRC will required DOE to demonstrate that the "natural features of the geologic setting," working in combination with the engineered barrier system, will isolate radionuclides in the repository in accordance with the Commission's licensing rule.

#### *The Committee Findings on the Governors's Objections*

The Governor raises serious questions about the geology of the Yucca Mountain site, the design of the repository, the credibility of DOE's performance assessments, and the safety of nuclear waste transportation. These questions must be more fully examined and resolved before the NRC can authorize construction of the repository. But they should be resolved by the Commission, rather than by the Committee or the Senate as a whole. We cannot find on the basis of the record before us that any of the objections raised by the Governor warrants termination of the repository program at this point.

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. As Senator Henry M. Jackson noted during the debate on the Act in 1982, "the licensing process of the Nuclear Regulatory Commission provides a further insurance to the State that is legitimate concerns for the public health and safety will be met. Beyond the Nuclear Regulatory Commission, there is, of course, the full recourse to the judicial process to insure that the Nuclear Regulatory Commission exercises its proper role in protecting the public health and safety. These considerations in themselves constitute a considerable protection for the State and its citizenry beyond the point in the process at which a construction permit application is filed."

#### *B. The Case for Going Forward*

The Committee believes that the Secretary's recommendation to the President, combined with his testimony before the Committee, and the voluminous technical documents supporting the recommendation meet the burden of going forward imposed by the Act and are sufficient to justify allowing the Secretary to submit a license application for the repository to the Nuclear Regulatory Commission for its review.

The Committee finds support for its view in the testimony of the agencies charged with overseeing and regulating the repository program. The Chairman of the Nuclear Waste Technical Review Board, which Congress established in 1987 to evaluate the technical and scientific validity of DOE's site characterization and transportation activities, testified that "no individual technical or scientific factor has been identified that would automatically eliminate Yucca Mountain from consideration at this point. \* \* \*" The Assistant Administrator for Air and Radiation of the Environ-