

ARGUED MAY 2, 2012

NO. 11-1271

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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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RESPONDENTS' RESPONSE TO  
BRIEF OF THE UNITED STATES AMICUS CURIAE

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June 29, 2012

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On May 2, 2012, this Court issued an Order inviting the Department of Justice to file a brief “expressing the views of the United States on whether this Court should issue a writ of mandamus” in this case. As provided in the Court’s May 2nd Order, we hereby respond to the United States’ brief on behalf of the Nuclear Regulatory Commission. We agree with the arguments presented by the United States, both on standing and on the merits. The United States’ position is persuasive.

**I. *Petitioners Lack Article III Standing.***

Petitioners claim standing to demand resumption of NRC’s Yucca Mountain licensing proceeding based on the presence of nuclear waste either within their borders (Aiken County and the states of South Carolina and Washington) or near their homes (individual petitioners). But, as we noted in our main brief, even if NRC approves the Yucca Mountain application and issues a license to construct the facility, numerous additional independent actions must take place before that waste would be moved to Yucca Mountain. *See* NRC Br. 29-34. The Federal Respondents made the same point in the previous *Aiken County* case. *See* Final Brief for the Respondents, filed Feb. 8, 2011, *In re Aiken County*, No. 10-1050, *et al.*, at 65-70.

As the United States' brief notes, standing's "redressability" requirement is not satisfied by "the hope that ordering NRC to resume the licensing proceeding until the carryover funds are exhausted would make it more likely that Congress would enact appropriations needed to complete the proceeding." US Br. 2, citing *Wilderness Society v. Norton*, 434 F.3d 584, 593-94 (D.C. Cir. 2006). "We have serious doubts as to whether, for standing purposes, it is ever 'likely' that Congress will enact legislation at all. ... It's not easy to become a law." *Coalition for Responsible Regulation, Inc., et al. v. EPA*, No. 09-1322 (& consolidated cases), slip op. at 78-79 (D.C. Cir. June 26, 2012) (internal quotation omitted).<sup>1</sup>

## **II. *Mandamus Relief Is Inappropriate.***

The United States correctly notes that mandamus is an equitable remedy, giving this Court flexibility to act in light of the circumstances of each case. US Br. 3-4. "[M]andamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion." *Whitehouse v. Illinois Cent. R.*

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<sup>1</sup> As noted in both our main brief and the federal respondents' brief in the prior *Aiken County* case, many of the independent intervening actions that must occur before petitioners' harm is redressed require separate Congressional actions. Basing standing on these actions actually taking place is highly problematic.

*Co.*, 349 U.S. 366, 373 (1955); *13th Regional Corp. v. U.S. Department of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980) (“Thus, the case must be found by a court to be clear and compelling on both legal and equitable grounds for a writ to issue.”).

There are several cogent reasons why this Court should exercise its discretion and deny mandamus relief here. The bottom line is that Congress has chosen not to provide funding to either the Department of Energy (DOE) or NRC to move the case forward. *See generally* US Br. 4-9; NRC Br. 20-23, 39-49.

First, Congress has appropriated \$0 to DOE from the Nuclear Waste Fund in the last two appropriations cycles. That fact alone reflects a Congressional intent that the proceeding not go forward because DOE, as the applicant, has the duty to prosecute the application before NRC. *See* 10 C.F.R. § 2.325. As the United States points out, *see* US Br. 6, while DOE has approximately \$17 million in unobligated carryover funds appropriated in prior years from the Waste Fund, that amount is not nearly enough to prosecute the application, which required approximately \$14 million *per month* when the case was active. *Id.*<sup>2</sup>

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<sup>2</sup> The United States’ brief also states that DOE has approximately \$8 million in obligated carryover funds that it could use for the Yucca Mountain licensing proceeding, if the proceeding were ordered resumed. *Id.*

Second, Congress appropriated \$0 from the Nuclear Waste Fund for NRC in Fiscal Year (FY) 2012. NRC currently has approximately \$10.4 million available in unobligated carryover funds appropriated in prior years from the Waste Fund. *See* Transcript of Oral Argument (Tr.) 30.<sup>3</sup> But petitioners themselves agreed at oral argument that this amount is insufficient for NRC to complete the proceeding. Tr. 70. In short, with so little money in hand NRC has no chance to move the proceeding to any point remotely close to a final licensing decision.

Third, neither DOE nor NRC has access to additional funds from general appropriations. *See* US Br. 12-14; NRC Br. 47-49. Instead, both agencies must finance their participation in the Yucca Mountain proceeding solely with funds paid by nuclear utilities into the Nuclear Waste Fund. 42 U.S.C. 10131(b)(4); *Nevada v. Department of Energy*, 400 F.3d 9, 15-16 (D.C. Cir. 2005). And Congress has stopped appropriating such funds.

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<sup>3</sup> NRC began FY 2012 with approximately \$10 million in unobligated carryover funds appropriated from the Waste Fund and has not obligated any of those funds. NRC Br. 45, n.28. NRC also began FY 2012 with approximately \$5.1 million in obligated, unexpended funds derived from the Waste Fund. During FY 2012, NRC resolved several outstanding obligations and recouped approximately \$0.4 million which has been added to the prior carryover amount, giving a total of approximately \$10.4 million. NRC still has approximately \$3.2 million in obligated, unexpended funds appropriated from the Waste Fund.



Finally, at oral argument the Court expressed a concern that not requiring NRC to expend all available funds would give the Executive Branch (in the form of NRC) the ability to disregard a mandate from Congress, altering the Constitutional balance of power. Tr. 58 (Judge Kavanaugh). But the special facts of this case do not justify that concern. Here, NRC has not of its own will refused to proceed in the face of a meaningful possibility of reaching the statutory goal of issuing a merits ruling on the DOE application. Instead, it was only when funding virtually dried up that NRC closed the staff review and suspended the adjudicatory hearing. Moreover, NRC did not dismiss the proceeding; instead, the agency simply suspended the proceeding “in place” so that it could resume if and when Congress appropriates adequate funds for both agencies from the Waste Fund.

In sum, an order directing NRC to restart the proceeding would accomplish little more than requiring the agency to expend the bulk of its remaining carryover funds from the Nuclear Waste Fund, with a corresponding expenditure by DOE. That action would not achieve any significant progress toward resolving the ultimate question: *i.e.*, whether NRC should approve the DOE application to construct the Yucca Mountain repository.

As Judge Garland observed at oral argument:

[T]he Court has to make a discretionary decision as to whether to issue mandamus, and there the normal equitable considerations come into play, including the question of whether any value is served, or whether we're taking the \$10 million and lighting it on fire.

Tr. 38 (Judge Garland). Rather than taking a wasteful “lighting it on fire” approach, NRC prudently halted spending and preserved its limited remaining Waste Fund money for future use as directed by Congress.

### **III. *Congress Has Provided No New Funding.***

Congress is again in the process of preparing the federal budget for the upcoming fiscal year, FY 2013, which begins on October 1, 2012. The House recently passed a Bill funding both DOE and NRC for FY 2013. *See* H.R. 5325, 112th Cong. (as passed by the House June 6, 2012). But while H.R. 5325 would provide \$25 million to DOE from the Nuclear Waste Fund (*id.* at 27), it would not allocate any funds to the NRC from the Waste Fund. *Id.* 50-52. (The addendum contains relevant pages of H.R. 5325.)

During the debate on H.R. 5325, Representative Shimkus offered an amendment proposing to move \$10 million from DOE funds to NRC funds to provide additional funding for the Yucca Mountain proceeding. *See* 158 Cong. Rec. H3416-18 (daily ed. June 5, 2012) (statements by Rep. Shimkus, *et al.*). The

House adopted the amendment, *see* 158 Cong. Rec. H3496-97 (daily ed. June 6, 2012), but as noted above the House Bill did not appropriate any funds to the NRC from the Waste Fund or, alternatively, state that general appropriation funds could be used for the Yucca Mountain proceeding “notwithstanding” the language of the Nuclear Waste Policy Act.<sup>4</sup>

Meanwhile, the Senate Appropriations Committee reported a proposed appropriations bill for FY 2013 to the floor of the Senate. *See* S. 2465, 112th Cong. (as reported out of Committee April 26, 2012). *See also* S. Rep. 112-164 (Apr. 26, 2012). The proposed bill does not provide any funds from the Nuclear Waste Fund for either DOE or NRC. *See, e.g.*, S. 2465 at 66-67 (relevant pages in the Addendum). The Senate as a body has not yet acted on either S. 2465 or H.R. 5325, so the FY 2013 appropriations process is far from complete. But given the budget dynamics in the past session of this same Congress,<sup>5</sup> it is far from clear that

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<sup>4</sup> This is in contrast to the language in the FY 2012 House appropriations legislation, which explicitly appropriated funds from the Waste Fund for NRC but which was later rejected by the Senate. *See* NRC Br. 21-23; 45-46.

<sup>5</sup> As our main brief recounts (21-23, 45-46), last year the House passed a measure that would have resumed the Yucca funding, the Senate did not, and the ultimate appropriations bill, as enacted, provided no funds.

Congress will appropriate further funds for the Yucca project for FY 2013. As the United States points out, should Congress enact a Continuing Resolution for FY 2013, that legislation would likely continue the “\$0” funding Congress enacted for FY 2012. US Br. 15, n5. Accordingly, as the United States’ brief suggests, while this Court has ample grounds to exercise its discretion and deny the request for mandamus, this Court may also hold the case in abeyance pending further action in the FY 2013 appropriation process. *Id.*

When Congress creates a program but provides insufficient funds to pay for it, “the dilemma’s resolution is the responsibility of Congress.” *Salazar v. Ramah Navajo Chapter*, 2012 WL 2196799 at \*11 (U.S. June 18, 2012).<sup>6</sup> It is our view that Congress, not this Court, is the body that needs to act before NRC can or should resume the Yucca Mountain proceeding.

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<sup>6</sup> *Ramah Navajo Chapter* is a contracts case where the Court directed the government to pay on the contracts from the Judgment Fund, notwithstanding insufficient specific appropriations for the contracts. Contract suits for money payments, like grants cases, are not the same as a case like this one seeking resumption of an inadequately-funded and closed-down program. *See* Tr. 5-6 (Judge Garland). Obviously, NRC cannot conduct the Yucca Mountain proceeding with funds from the Judgment Fund; NRC can only conduct the proceeding with funds appropriated from the Nuclear Waste Fund.

## CONCLUSION

For the forgoing reasons, as well as the reasons stated by the United States and by Respondents' main brief, this Court should deny the petition for writ of mandamus.

Respectfully submitted,

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June 29, 2012

**CERTIFICATE OF SERVICE**

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's Order dated May 2, 2012, I hereby certify that on this date I filed a copy of the foregoing brief using the D.C. Circuit's EC/CMF electronic filing system, and thus served all counsel of record.

As required by the rules, I have also caused an original and eight (8) paper copies of this brief to be filed with the Court.

s/Charles E. Mullins  
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June 29, 2012

## **LEGISLATIVE ADDENDUM**

112TH CONGRESS  
2D SESSION

# H. R. 5325

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## AN ACT

Making appropriations for energy and water development  
and related agencies for the fiscal year ending September  
30, 2013, 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 Act (Public Law 110–69), as amended, \$200,000,000, to  
2 remain available until expended: *Provided*, That of such  
3 amount, \$20,000,000 shall be available until September  
4 30, 2014, for program direction.

5 NUCLEAR WASTE DISPOSAL

6 For nuclear waste disposal activities to carry out the  
7 purposes of the Nuclear Waste Policy Act of 1982, Public  
8 Law 97–425, as amended (the “NWPA”), \$25,000,000,  
9 to remain available until expended, and to be derived from  
10 the Nuclear Waste Fund established in section 302(c) of  
11 such Act (42 U.S.C. 10222(c)), to be made available only  
12 to support the Yucca Mountain license application: *Pro-*  
13 *vided*, That not less than \$5,000,000 of funds made avail-  
14 able under this heading shall be made available only for  
15 assistance to affected units of local government which have  
16 given formal consent to the Secretary of Energy to host  
17 a high-level waste repository as authorized by the NWPA.

18 TITLE 17 INNOVATIVE TECHNOLOGY LOAN GUARANTEE  
19 PROGRAM

20 Such sums as are derived from amounts received  
21 from borrowers pursuant to section 1702(b)(2) of the En-  
22 ergy Policy Act of 2005 under this heading in prior Acts,  
23 shall be collected in accordance with section 502(7) of the  
24 Congressional Budget Act of 1974: *Provided*, That, for  
25 necessary administrative expenses to carry out this Loan

1 Guarantee program, \$38,000,000 is appropriated, to re-  
2 main available until September 30, 2014: *Provided further,*  
3 That \$38,000,000 of the fees collected pursuant to section  
4 1702(h) of the Energy Policy Act of 2005 shall be credited  
5 as offsetting collections to this account to cover adminis-  
6 trative expenses and shall remain available until expended,  
7 so as to result in a final fiscal year 2013 appropriation  
8 from the general fund estimated at not more than \$0: *Pro-*  
9 *vided further,* That fees collected under section 1702(h)  
10 in excess of the amount appropriated for administrative  
11 expenses shall not be available until appropriated.

12    ADVANCED TECHNOLOGY VEHICLES MANUFACTURING  
13                      LOAN PROGRAM

14 For administrative expenses in carrying out the Ad-  
15 vanced Technology Vehicles Manufacturing Loan Pro-  
16 gram, \$6,000,000, to remain available until September 30,  
17 2014.

## 18 DEPARTMENTAL ADMINISTRATION

19 For salaries and expenses of the Department of En-  
20 ergy necessary for departmental administration in car-  
21 rying out the purposes of the Department of Energy Orga-  
22 nization Act (42 U.S.C. 7101 et seq.), including the hire  
23 of passenger motor vehicles and official reception and rep-  
24 resentation expenses not to exceed \$30,000, \$230,783,000  
25 (reduced by \$10,000,000) (reduced by \$10,000,000) (re-

1 notwithstanding section 15751(b) of title 40, United  
2 States Code.

3 SOUTHEAST CRESCENT REGIONAL COMMISSION

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

8 NUCLEAR REGULATORY COMMISSION

9 SALARIES AND EXPENSES

10 For necessary expenses of the Commission in ear-  
11 rying out the purposes of the Energy Reorganization Act  
12 of 1974, as amended, and the Atomic Energy Act of 1954,  
13 as amended, including official representation expenses  
14 (not to exceed \$25,000), \$1,038,800,000 (increased by  
15 \$10,000,000), to remain available until expended: *Pro-*  
16 *vided*, That of the amount appropriated herein, not more  
17 than \$9,500,000 may be made available for salaries, trav-  
18 el, and other support costs for the Office of the Commis-  
19 sion, of which, notwithstanding section 201(a)(2)(c) of the  
20 Energy Reorganization Act of 1974 (42 U.S.C.  
21 5841(a)(2)(c)), the use and expenditure shall only be ap-  
22 proved by a majority vote of the Commission: *Provided*  
23 *further*, That revenues from licensing fees, inspection serv-  
24 ices, and other services and collections estimated at  
25 \$911,772,000 in fiscal year 2013 shall be retained and

1 used for necessary salaries and expenses in this account,  
2 notwithstanding 31 U.S.C. 3302, and shall remain avail-  
3 able until expended: *Provided further*, That the sum herein  
4 appropriated shall be reduced by the amount of revenues  
5 received during fiscal year 2013 so as to result in a final  
6 fiscal year 2013 appropriation estimated at not more than  
7 \$127,028,000: *Provided further*, That of the amounts ap-  
8 propriated under this heading, \$10,000,000 shall be for  
9 university research and development in areas relevant to  
10 their respective organization's mission, and \$5,000,000  
11 shall be for a Nuclear Science and Engineering Grant Pro-  
12 gram that will support multiyear projects that do not align  
13 with programmatic missions but are critical to maintain-  
14 ing the discipline of nuclear science and engineering.

15 OFFICE OF INSPECTOR GENERAL

16 For necessary expenses of the Office of Inspector  
17 General in carrying out the provisions of the Inspector  
18 General Act of 1978, \$11,020,000, to remain available  
19 until September 30, 2014: *Provided*, That revenues from  
20 licensing fees, inspection services, and other services and  
21 collections estimated at \$9,918,000 in fiscal year 2013  
22 shall be retained and be available until September 30,  
23 2014, for necessary salaries and expenses in this account,  
24 notwithstanding section 3302 of title 31, United States  
25 Code: *Provided further*, That the sum herein appropriated

1 section 1702 of the Energy Policy Act of 2005 (42 U.S.C.  
2 16512) or to subordinate any Guaranteed Obligation to  
3 any loan or other debt obligations in violation of section  
4 609.10 of title 10 of the Code of Federal Regulations.

5 SEC. 530. None of the funds made available by this  
6 Act may be used to conduct a survey in which money is  
7 included or provided for the benefit of the responder.

8 SEC. 531. None the funds made available by this Act  
9 may be used for the study of the Missouri River Projects  
10 authorized in section 108 of the Energy and Water Devel-  
11 opment and Related Agencies Appropriations Act, 2009  
12 (division C of Public Law 111–8).

13 This Act may be cited as the “Energy and Water De-  
14 velopment and Related Agencies Appropriations Act,  
15 2013”.

Passed the House of Representatives June 6, 2012.

Attest:

*Clerk.*

II

## Calendar No. 383

112TH CONGRESS  
2D SESSION

# S. 2465

[Report No. 112-164]

Making appropriations for energy and water development and related agencies  
for the fiscal year ending September 30, 2013, and for other purposes.

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### IN THE SENATE OF THE UNITED STATES

APRIL 26, 2012

Mrs. FEINSTEIN, from the Committee on Appropriations, reported the  
following original bill; which was read twice and placed on the calendar

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## A BILL

Making appropriations for energy and water development  
and related agencies for the fiscal year ending September  
30, 2013, 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,*  
3       That the following sums are appropriated, out of any  
4       money in the Treasury not otherwise appropriated, for en-  
5       ergy and water development and related agencies for the  
6       fiscal year ending September 30, 2013, and for other pur-  
7       poses, namely:

1           NORTHERN BORDER REGIONAL COMMISSION

2           For necessary expenses of the Northern Border Re-  
3 gional Commission in carrying out activities authorized by  
4 subtitle V of title 40, United States Code, \$1,425,000, to  
5 remain available until expended: *Provided*, That such  
6 amounts shall be available for administrative expenses,  
7 notwithstanding section 15751(b) of title 40, United  
8 States Code.

9           NUCLEAR REGULATORY COMMISSION

10                           SALARIES AND EXPENSES

11          For necessary expenses of the Commission in car-  
12 rying out the purposes of the Energy Reorganization Act  
13 of 1974, as amended, and the Atomic Energy Act of 1954,  
14 as amended, including official representation expenses  
15 (not to exceed \$25,000), \$1,042,200,000, to remain avail-  
16 able until expended: *Provided*, That revenues from licens-  
17 ing fees, inspection services, and other services and collec-  
18 tions estimated at \$914,832,000 in fiscal year 2013 shall  
19 be retained and used for necessary salaries and expenses  
20 in this account, notwithstanding 31 U.S.C. 3302, and  
21 shall remain available until expended: *Provided further*,  
22 That the sum herein appropriated shall be reduced by the  
23 amount of revenues received during fiscal year 2013 so  
24 as to result in a final fiscal year 2013 appropriation esti-  
25 mated at not more than \$127,368,000.

1 conventional Natural Gas and Other Petroleum Research  
2 Fund.

3 SEC. 311. The individuals described in paragraph (4)  
4 of section 815 of the Native American Programs Act of  
5 1974 (42 U.S.C. 2992c) shall be eligible for the programs  
6 under title XXVI of the Energy Policy Act of 1992 (25  
7 U.S.C. 3501 et seq.) in the same manner as an Indian  
8 tribe (as that term is defined in section 2601 of the En-  
9 ergy Policy Act of 1992 (25 U.S.C. 3501).

10 SEC. 312. (a) DEFINITIONS.—In this section:

11 (1) AFFECTED INDIAN TRIBE.—The term “af-  
12 fected Indian tribe” has the meaning given the term  
13 in section 2 of the Nuclear Waste Policy Act of 1982  
14 (42 U.S.C. 10101).

15 (2) HIGH-LEVEL RADIOACTIVE WASTE.—The  
16 term “high-level radioactive waste” has the meaning  
17 given the term in section 2 of the Nuclear Waste  
18 Policy Act of 1982 (42 U.S.C. 10101).

19 (3) NUCLEAR WASTE FUND.—The term “Nu-  
20 clear Waste Fund” means the Nuclear Waste Fund  
21 established under section 302(c) of the Nuclear  
22 Waste Policy Act of 1982 (42 U.S.C. 10222(c)).

23 (4) SECRETARY.—The term “Secretary” means  
24 the Secretary of Energy.



1           (5) SPENT NUCLEAR FUEL.—The term “spent  
2       nuclear fuel” has the meaning given the term in sec-  
3       tion 2 of the Nuclear Waste Policy Act of 1982 (42  
4       U.S.C. 10101).

5       (b) PILOT PROGRAM.—Notwithstanding any provi-  
6       sion of the Nuclear Waste Policy Act of 1982 (42 U.S.C.  
7       10101 et seq.), the Secretary is authorized, in the current  
8       fiscal year and subsequent fiscal years, to conduct a pilot  
9       program, through 1 or more private sector partners, to  
10      license, construct, and operate 1 or more government or  
11      privately owned consolidated storage facilities to provide  
12      interim storage as needed for spent nuclear fuel and high-  
13      level radioactive waste, with priority for storage given to  
14      spent nuclear fuel located on sites without an operating  
15      nuclear reactor.

16      (c) REQUESTS FOR PROPOSALS.—Not later than 120  
17      days after the date of enactment of this Act, the Secretary  
18      shall issue a request for proposals for cooperative agree-  
19      ments—

20           (1) to obtain any license necessary from the  
21      Nuclear Regulatory Commission for the construction  
22      of 1 or more consolidated storage facilities;

23           (2) to demonstrate the safe transportation of  
24      spent nuclear fuel and high-level radioactive waste,  
25      as applicable; and

1 (3) to demonstrate the safe storage of spent nu-  
2 clear fuel and high-level radioactive waste, as appli-  
3 cable, at the 1 or more consolidated storage facilities  
4 pending the construction and operation of deep geo-  
5 logic disposal capacity for the permanent disposal of  
6 the spent nuclear fuel.

7 (d) CONSENT-BASED APPROVAL.—Prior to siting a  
8 consolidated storage facility pursuant to this section—

9 (1) the Secretary shall enter into an agreement  
10 to host the facility with—

11 (A) the Governor of the State;

12 (B) each unit of local government within  
13 the jurisdiction of which the facility is proposed  
14 to be located; and

15 (C) each affected Indian tribe; and

16 (2) Congress shall approve the terms of the  
17 agreement and authorize the appropriation of funds  
18 from the Nuclear Waste Fund to implement the  
19 terms of the agreement.

20 (e) APPLICABILITY.—In executing this section, the  
21 Secretary shall comply with—

22 (1) all licensing requirements and regulations of  
23 the Nuclear Regulatory Commission; and

24 (2) all other applicable laws (including regula-  
25 tions).

1 (f) PILOT PROGRAM PLAN.—Not later than 120 days  
2 after the date on which the Secretary issues the request  
3 for proposals under subsection (c), the Secretary shall sub-  
4 mit to Congress a plan to carry out this section that in-  
5 cludes—

6 (1) an estimate of the cost of licensing, con-  
7 structing, and operating a consolidated storage facil-  
8 ity, including the transportation costs, on an annual  
9 basis, over the expected lifetime of the facility;

10 (2) a schedule for—

11 (A) obtaining any license necessary to con-  
12 struct and operate a consolidated storage facil-  
13 ity from the Nuclear Regulatory Commission;

14 (B) constructing the facility;

15 (C) transporting spent fuel to the facility;

16 and

17 (D) removing the spent fuel and decom-  
18 missioning the facility; and

19 (3) an estimate of the cost of any financial as-  
20 sistance, compensation, or incentives proposed to be  
21 paid to the host State, Indian tribe, or local govern-  
22 ment;

23 (4) an estimate of any future reductions in the  
24 damages expected to be paid by the United States  
25 for the delay of the Department of Energy in accept-

1 ing spent fuel expected to result from the pilot pro-  
2 gram;

3 (5) recommendations for any additional legisla-  
4 tion needed to authorize and implement the pilot  
5 program; and

6 (6) recommendations for a mechanism to en-  
7 sure that any spent nuclear fuel or high-level radio-  
8 active waste stored at a consolidated storage facility  
9 pursuant to this section shall move to deep geologic  
10 disposal capacity, following a consent-based approval  
11 process for that deep geologic disposal capacity con-  
12 sistent with subsection (d), within a reasonable time  
13 after the issuance of a license to construct and oper-  
14 ate the consolidated storage facility.

15 (g) PUBLIC PARTICIPATION.—Prior to choosing a  
16 site for the construction of a consolidated storage facility  
17 under this section, the Secretary shall conduct 1 or more  
18 public hearings in the vicinity of each potential site and  
19 in at least 1 other location within the State in which the  
20 site is located to solicit public comments and recommenda-  
21 tions.

22 (h) USE OF NUCLEAR WASTE FUND.—The Secretary  
23 may make expenditures from the Nuclear Waste Fund to  
24 carry out this section, subject to appropriations.

## 1 OFFICE OF INSPECTOR GENERAL

2 For necessary expenses of the Office of Inspector  
3 General in carrying out the provisions of the Inspector  
4 General Act of 1978, as amended, \$11,870,000, to remain  
5 available until expended: *Provided*, That revenues from li-  
6 censing fees, inspection services, and other services and  
7 collections estimated at \$9,918,000 in fiscal year 2013  
8 shall be retained and be available until expended, for nec-  
9 essary salaries and expenses in this account, notwith-  
10 standing section 3302 of title 31, United States Code: *Pro-*  
11 *vided further*, That the sum herein appropriated shall be  
12 reduced by the amount of revenues received during fiscal  
13 year 2013 so as to result in a final fiscal year 2013 appro-  
14 priation estimated at not more than \$1,952,000: *Provided*  
15 *further*, That for fiscal year 2013 and hereafter an indi-  
16 vidual appointed to the position of Inspector General of  
17 the Nuclear Regulatory Commission (NRC) shall, by vir-  
18 tue of such appointment, also hold the position of Inspec-  
19 tor General of the Defense Nuclear Facilities Safety  
20 Board: *Provided further*, That the Inspector General at the  
21 Defense Nuclear Facilities Safety Board shall have the du-  
22 ties, responsibilities, and authorities specified in the In-  
23 specter General Act of 1978, as amended: *Provided fur-*  
24 *ther*, That the Inspector General of the Defense Nuclear  
25 Facilities Safety Board shall utilize personnel of the Office

**Calendar No. 383**

112<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

**S. 2465**

**[Report No. 112-164]**

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**A BILL**

Making appropriations for energy and water development and related agencies for the fiscal year ending September 30, 2013, and for other purposes.

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APRIL 26, 2012

Read twice and placed on the calendar

Calendar No. 383

112TH CONGRESS } 2d Session }	SENATE	{ REPORT 112-164
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ENERGY AND WATER DEVELOPMENT APPROPRIATIONS  
BILL, 2013

APRIL 26, 2012.—Ordered to be printed

Mrs. FEINSTEIN, from the Committee on Appropriations,  
submitted the following

REPORT

[To accompany S. 2465]

The Committee on Appropriations reports the bill (S. 2465) making appropriations for energy and water development and related agencies for the fiscal year ending September 30, 2013, and for other purposes, favorably thereon and recommends that the bill do pass.

*New obligatory authority*

Total of bill as reported to the Senate .....	\$33,432,482,000
Amount of 2012 appropriations .....	33,805,000,000
Amount of 2013 budget estimate .....	33,684,037,000
Bill as recommended to Senate compared to—	
2012 appropriations .....	– 372,518,000
2013 budget estimate .....	– 251,555,000

that could significantly enhance the safety of present and future generations of Light Water Reactors.

Section 312 in the bill establishes a pilot program under which the Department may site, construct, and operate at least one consolidated storage facility for spent nuclear fuel and high-level radioactive waste subject to future authorization and appropriation. The Committee provides a \$2,000,000 increase in program direction from within available funds to implement this authority. The Committee directs the Department to use \$17,700,000 in unobligated, prior year funds appropriated from the Nuclear Waste Fund. The Committee directs the Department to solicit proposals for consolidated storage facilities within 120 days of enactment of this act. In evaluating proposals, the Department should give priority to novel concepts, including consolidated storage facilities proposed to be co-located with potential permanent repositories, given that current volumes of spent nuclear fuel now exceed the statutory limits established in section 114(d) of the Nuclear Waste Policy Act for the first repository. The Committee expects that the Department will consider only proposals it receives for the nuclear waste pilot program, and encourages consideration of proposals developed in a cooperative manner with an applying entity and States, local jurisdictions, or affected Indian tribes. The Department should at every step consider the views of the States, local jurisdictions and affected Indian tribes, and should not expend resources to consider sites that are unlikely to achieve support of the host State, local jurisdictions, and affected Indian tribes. The Committee directs the Department to exercise this authority consistent with the recommendations in the Blue Ribbon Commission's final report to the Secretary of Energy. The Committee notes that the Blue Ribbon Commission found that one or more consolidated storage facilities is required regardless of the ultimate location of a permanent repository. The Department currently lacks authority to conduct these activities.

*International Nuclear Energy Cooperation.*—The Committee provides \$3,000,000 for International Nuclear Energy Cooperation, the same as the budget request.

#### RADIOLOGICAL FACILITIES MANAGEMENT

*Radiological Facilities Management.*—The Committee provides \$66,000,000 for Radiological Facilities Management. Within available funds, the Committee provides \$15,000,000 for hot cells at Oak Ridge National Laboratory. In future budget requests, the Committee directs the Department to request sufficient funding for radiological infrastructure to maintain capabilities and regulatory compliance.

#### IDAHO FACILITIES MANAGEMENT

*Idaho Facilities Management.*—The Committee provides \$152,000,000 for Idaho Facilities Management, the same as the budget request. Funding provided will support moving forward with both the Advanced Post Irradiation Examination Facility and the restart of the Transient Reactor Experiment and Test Facility.



## 131

## DENALI COMMISSION

Appropriations, 2012 .....	\$10,679,000
Budget estimate, 2013 .....	10,165,000
Committee recommendation .....	10,165,000

The Denali Commission is a Federal-State partnership responsible for promoting infrastructure development, job training, and other economic development services in rural areas throughout Alaska. For fiscal year 2013, the Committee recommends \$10,165,000.

## NORTHERN BORDER REGIONAL COMMISSION

Appropriations, 2012 .....	\$1,497,000
Budget estimate, 2013 .....	1,425,000
Committee recommendation .....	1,425,000

The Committee recommends \$1,425,000 for the Northern Border Regional Commission.

## SOUTHEAST CRESCENT REGIONAL COMMISSION

Appropriations, 2012 .....	\$250,000
Budget estimate, 2013 .....	
Committee recommendation .....	

The Committee recommends no funding for the Southeast Crescent Regional Commission consistent with the budget request.

## NUCLEAR REGULATORY COMMISSION

## SALARIES AND EXPENSES

Appropriations, 2012 .....	\$1,027,240,000
Budget estimate, 2013 .....	1,042,200,000
Committee recommendation .....	1,042,200,000

## REVENUES

Appropriations, 2012 .....	-\$899,726,000
Budget estimate, 2013 .....	-914,832,000
Committee recommendation .....	-914,832,000

## NET APPROPRIATION

Appropriations, 2012 .....	\$127,514,000
Budget estimate, 2013 .....	127,368,000
Committee recommendation .....	127,368,000

The Committee recommendation for the Nuclear Regulatory Commission for fiscal year 2013 is \$1,042,200,000. This amount is offset by estimated revenues of \$914,832,000 resulting in a net appropriation of \$127,368,000.

## OFFICE OF INSPECTOR GENERAL

## GROSS APPROPRIATION

Appropriations, 2012 .....	\$10,860,000
Budget estimate, 2013 .....	11,020,000
Committee recommendation .....	11,870,000

## 132

## REVENUES

Appropriations, 2012 .....	-\$9,774,000
Budget estimate, 2013 .....	-9,918,000
Committee recommendation .....	-9,918,000

## NET APPROPRIATION

Appropriations, 2012 .....	\$1,086,000
Budget estimate, 2013 .....	1,102,000
Committee recommendation .....	1,952,000

The Committee recommends a net appropriation of \$1,952,000. The increase of \$850,000 is provided for the Inspector General to serve as the inspector general for the Defense Nuclear Facilities Safety Board [Board]. The funding for the inspector general services for the Board is not offset by receipts.

## NUCLEAR WASTE TECHNICAL REVIEW BOARD

Appropriations, 2012 .....	\$3,400,000
Budget estimate, 2013 .....	3,400,000
Committee recommendation .....	3,400,000

The Nuclear Waste Technical Review Board was established to evaluate the scientific and technical validity of the Department of Energy's nuclear waste disposal program. The Board reports its findings no fewer than two times a year to Congress and to the Secretary of Energy. For fiscal year 2013, the Committee recommends \$3,400,000.

OFFICE OF THE FEDERAL COORDINATOR FOR ALASKA NATURAL GAS  
TRANSPORTATION PROJECTS

Appropriation, 2012 .....	\$1,000,000
Budget estimate, 2013 .....	3,084,000
Committee recommendation .....	1,000,000

The Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects was established as an independent agency in the executive branch on December 13, 2006. The Committee recommends \$1,000,000. The Committee notes that only one joint venture is still pursuing the design and construction of a natural gas pipeline from Alaska to the Lower 48. This joint venture continues with extensive financial support from the State of Alaska. The Committee further notes that the Office of the Federal Coordinator is legally allowed to receive funding from the companies for its work. The Committee urges the agency to take advantage of this potential funding source as the work of the agency directly benefits the companies.

## GENERAL PROVISION

Section 401. The Committee has included a provision that clarifies that the Denali Commission has authority to receive conditional gifts and authority to receive transfers from other Federal agencies. The provision also requires the Commission to submit an annual report on conditional gifts and transfers.