UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 09-892-HLW-CAB04
(High-Level Waste Repository)	)	April 12, 2010

U.S. DEPARTMENT OF ENERGY'S PETITION FOR INTERLOCUTORY REVIEW

I. Preliminary Statement

The U.S. Department of Energy ("DOE") respectfully requests the Commission to take immediate interlocutory review of the Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) ("M&O"), issued on April 6, 2010, without notice or opportunity for parties to comment by the Atomic Safety and Licensing Board ("Board") in the Yucca Mountain repository licensing docket. DOE further respectfully requests the Commission to review the M&O on an expedited basis and, upon review, reverse it.

In the M&O, the Board abdicates its obligation to rule on critical motions properly pending before it -- namely, DOE's motion to withdraw its license application and five petitions by putative intervenors that oppose DOE's motion. Equally important, the M&O, unless reversed, *will preclude the Commission from reviewing, and applying its expertise to, the important issues raised by DOE's motion.* Instead of allowing the Commission that opportunity, the Board encourages resolution of those issues *outside the Commission* in separate, independent litigation that two of the putative intervenors and others have brought in the U.S. Court of Appeals to challenge DOE's motion to withdraw. The M&O indicates that the Board intends to

take no further action pending receipt of "guidance" from the Court of Appeals in those other proceedings. The Board is, apparently, not interested in guidance from the Commission.

The M&O directly contradicts the position that the Commission has taken in the proceedings before the Court of Appeals. The federal government brief, filed on behalf of the Commission and DOE just two weeks before the M&O, explains in detail why the Court of Appeals should not undertake review (indeed, that it lacks authority to do so) until the Commission completes its review of DOE's motion to withdraw. As that brief states, because "the NRC has not yet rendered a decision on the motion to withdraw," review in the Court of Appeals at this time constitutes an impermissible "attempt to circumvent the administrative process."[1] The federal government accordingly urged the Court of Appeals to "allow[] the NRC to decide these issues in the first instance."[2]

The M&O runs head-on into the well-established principles discussed in the Government Response. Even more to the point, the M&O, unless promptly reversed, will deprive the Commission of the opportunity to provide, and the Court of Appeals the benefit of receiving, the Commission's considered judgment on important matters within its jurisdiction and expertise.

DOE urges the Commission to grant this petition as expeditiously as possible, lest the Court of Appeals believe that the Commission has no interest in considering the issues raised by DOE's motion to withdraw and thus act in a way that deprives the Commission of ever having an

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[1] Respondents' Response in Opposition to the Petition at 2-3, *In re Aiken County*, No. 10-1050 (D.C. Circuit Court of Appeals) (filed March 24, 2010) ("Government Response"). A copy of the Government Response, without its exhibits, is attached. The Commission noted in the Government Response that it did not speak for the Board and that the litigating position of the Commission did not necessarily represent a deliberative adjudication. *Id.* at 1, n.1.

[2] *Id.* at 20.

opportunity to do so. Given the fast-developing proceedings in the Court of Appeals,[3] the Commission should act promptly to protect its jurisdiction and interest here. If the Commission grants review, DOE further requests an expedited schedule for resolution of the issues presented by its petition. DOE likewise suggests that the Commission adopt an expedited schedule for review of its underlying motion to withdraw, either by the Board or, if the Commission so chooses, by the Commission in the first instance.

II. Background

On March 3, 2010, DOE filed a motion with the Board pursuant to 10 C.F.R. § 2.107 requesting to withdraw its license application with prejudice.[4] Five entities, consisting of two States, a county, a federally recognized Indian tribe, and an association, have filed petitions to intervene to oppose that motion.[5] The petitions advance what the Board characterized as purely legal contentions in opposition to DOE's motion.[6]

Two of the putative intervenors (South Carolina and Aiken County) have also filed petitions for judicial review and other forms of relief in federal court; both petitions are now pending in the U.S. Court of Appeals for the D.C. Circuit.[7] Several individuals who have not

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[3] On April 8, 2010, the Court of Appeals entered an Order consolidating the judicial petitions challenging DOE's motion to withdraw and directed expedited briefing, to be completed by April 13, 2010, on the motions for expedited consideration of those petitions.

[4] DOE Motion to Withdraw (Mar. 3, 2010).

[5] Petition of the State of South Carolina to Intervene (Feb. 26, 2010); Petition to Intervene of Prairie Island Indian Community (Feb. 26, 2010); State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010); Petition of Aiken County, South Carolina to Intervene (Mar. 4, 2010); National Association of Regulatory Utility Commissioners, Petition to Intervene (Mar. 15, 2010).

[6] M&O at 6.

[7] *In re Aiken County*, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); *South Carolina v. U.S. Dep't of Energy*, No. 10-1069 (4th Cir. filed Feb. 26, 2010). The latter action was transferred to the D.C. Circuit on March 25, 2010.

sought to intervene in this proceeding have filed a third petition for judicial review in that same court.[8]

The Board issued scheduling orders for briefing on the petitions to intervene.[9] The parties completed briefing on the first three petitions on April 5, 2010. The Board issued the M&O the next day. The Board did so without notice and opportunity for the parties to be heard, and before the completion of briefing on the remaining two petitions.

In the M&O, the Board observed that the petitions for judicial review are based on "many of the same grounds asserted in the petitions before this Board"[10] and then opined, without benefit of briefing or argument by the parties or reference to the Government Response, that: (1) the claims "appear to be properly before the Court";[11] (2) the Court of Appeals "would not likely benefit from the development of an administrative record";[12] (3) "the pending actions in the Court of Appeals do not seem to the Board to be premature";[13] (4) the Board might not be permitted "to overrule DOE's own judgment on whether DOE has discretion to withdraw the Application";[14] and (5) any decision by the Board and then the Commission on DOE's motion to withdraw is likely to be appealed to the Court of Appeals.[15]

For these reasons, the Board held that it would "withhold decision on the five new petitions and DOE's motion to withdraw pending further developments in the related actions in

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[8] *Ferguson v. Obama*, No. 10-1052 (D.C. Cir. filed Feb. 25, 2010).

[9] Order (Concerning Scheduling) (March 5, 2010); Order (March 15, 2010).

[10] M&O at 9.

[11] *Id.*

[12] *Id.* at 10.

[13] *Id.*

[14] *Id.* at 12.

[15] *Id.*

the" Court of Appeals.[16] The Board additionally "encouraged" the parties "to seek expedited resolution of their claims in that Court."[17]

III. Discussion

The Commission has inherent "supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself." *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 N.R.C. 79, 85 (1992); *see also Pa'ina Hawaii, LLC* (Materials License Application), CLI-09-17, __ N.R.C. __, Docket No. 30-36974-ML, 2009 WL 2486185 *1 (N.R.C.) (Aug. 13, 2009) (slip op. at 2); *U.S. Dept. of Energy* (High Level Waste Repository), CLI-08-11, 67 N.R.C. 379, 383 (2008); *U.S. Energy Research & Develop. Admin.* (Clinch River Reactor Plant), CLI-76-13, 4 N.R.C. 67, 75-76 (1976). Indeed, the Commission has exercised this authority on its own initiative. *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-01, __ N.R.C. __, 2007 WL 96998 (N.R.C.) (Jan. 11, 2007) (Commission took *sua sponte* review of otherwise unreviewable decision, despite rejecting petitioner's request for certification, in view of the "significant" and "novel" issues raised" by licensing board orders).

This case presents an extraordinarily compelling circumstance for the Commission's exercise of its supervisory authority. The M&O is a direct threat to the Commission's authority to act in this significant proceeding. If allowed to stand, the M&O will deprive the Commission of its rightful opportunity to apply its expertise and perspective on important questions involving the interpretation of statutes and regulations within its jurisdiction. Instead of providing the Commission that opportunity, the Board has arrogated to itself the unprecedented authority to certify those issues to a federal court, and, in so doing, has cut the Commission out of the

[16] *Id.* at 12-13.

[17] *Id.* at 13.

adjudicatory process.

The Board's decision is misguided -- turning on their heads core principles of administrative procedure. The recent Government Response filed on behalf of the Commission and DOE in the Court of Appeals relied on those very principles to urge it not to act until the Commission ruled on the motion to withdraw. The relevant principles include lack of ripeness,[18] failure to exhaust administrative remedies,[19] and lack of final agency action.[20] Those principles require the Court of Appeals to defer action until the Commission has issued a final, reviewable decision. The M&O would prevent that from ever occurring and may lead to the courts resolving this case without any decision by the Commission as to the motion to withdraw.

Nor does the Board's rationale for reaching a contrary conclusion survive scrutiny. Most basically, the Board is fundamentally incorrect in ascribing little benefit to the Commission's consideration of DOE's motion to withdraw. DOE's motion is brought under one of the Commission's regulations, 10 C.F.R. § 2.107, which § 114 of the NWPA makes directly applicable to this proceeding.[21] The Commission's construction of its own regulation as it applies in this context is thus central to this case and should be of significant assistance to the Court of Appeals. Indeed, *as the Board itself acknowledged*, the Commission has expertise in the interpretation of the NWPA (and NEPA).[22] Accordingly, far from what the Board imagined, this is indisputably an occasion in which the Court of Appeals would benefit from agency

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[18] Government Response at 15-18.

[19] *Id.* at 18-20.

[20] *Id.* at 9-11.

[21] *See* NWPA § 114(d), 42 U.S.C. § 10134(d) ("The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications . . . .").

[22] M&O at 10.

review. The Court of Appeals may be required to defer to the Commission's reasonable interpretations made in ruling on DOE's motion to withdraw and thus would unquestionably benefit from final agency action.[23]

The Board likewise erred in suggesting that DOE's expertise under the NWPA might "neutralize" the Commission's expertise "in areas of disagreement."[24] The issue is wholly speculative, and, in any event, any potential for conflict in no way diminishes the importance of agency review and the development of a record for the Court of Appeals. If anything, the potential for *agreement* between DOE and the Commission strongly favors allowing the administrative process to proceed to completion before the Court of Appeals acts because that agreement would present an especially compelling occasion for deference.

Also infirm is the Board's concern about deferring to DOE's judgment in deciding to withdraw its license application. The Board has jurisdiction to decide DOE's motion,[25] and it did not conclude otherwise. That the Board may have to defer to DOE on some issues when exercising that jurisdiction provides no reason in law or logic for the Board to forgo deciding matters before it. Any deference incumbent on the Board is a consequence of the statutory scheme Congress enacted and is no cause for inaction. Indeed, the Board's action can be read as an attempt to avoid legally binding principles it would prefer did not apply.

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[23] *E.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' . . . This broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program' . . . .") (citations omitted).

[24] M&O at 10.

[25] Licensing boards are conferred "all the powers necessary" to execute their duties. 10 C.F.R. § 2.319 (g), (q) & (r).

Further, the Board's statement that judicial consideration is not "premature" suffers the same problem as its statement that claims are properly before the Court of Appeals -- it ignores settled law regarding, among other things, ripeness, exhaustion of administrative remedies, and finality, as reflected in the Government Response on these same issues recently filed in the Court of Appeals. By contrast, what is premature is the Board's suggestion that an agency record will not assist the Court of Appeals *before* the parties have had a full opportunity to make such a record. If the Board concluded that the issues posed by DOE's motion to withdraw deserve immediate attention at a higher level, the appropriate course of action would have been to follow NRC regulations and certify the issues to the Commission where the administrative record could have been completed.[26] Under no circumstances was it proper for a Board to resolve such issues by withholding action on them and bypassing the Commission by essentially "certifying" them to a federal court because the Board believes the issues are ready for decision there.

The Board's conclusion -- reached without briefing or argument -- that the petitioners' claims "appear to be properly before the Court" also grossly misreads § 119(a)(1)(B) of the NWPA. As an initial matter, the jurisdiction of the Court of Appeals is an issue for it to decide, not the Board, and even if one were to assume (incorrectly) that the Court of Appeals has statutory jurisdiction here, that would not excuse the Board from deciding the issues before it.

Beyond that, § 119 does not apply here. That provision vests in the Courts of Appeals "original and exclusive jurisdiction" over actions "alleging the failure of the Secretary [of Energy], the President, or the Commission to make any decision, or take any action, required under this part."[27] The Board claims that the withdrawal of the application would constitute a

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[26] 10 C.F.R. §§ 2.319(*l*), 2.1015(d).

[27] 42 U.S.C. § 10139(a)(1)(B).

failure to act, but that conclusion is contrary to precedent.[28] Separate and apart from that, § 119 parallels the general judicial review provisions of the Administrative Procedures Act, 5 U.S.C § 706, dealing with review of agency actions, § 706(2), and failures to act, § 706(1), respectively. The well-developed law under the APA imposes requirements of ripeness, exhaustion, and finality to claims under either provision, and those requirements likewise apply to the parallel provisions of the NWPA.[29] There is nothing in § 119 or any other provision of the NWPA that establishes that Congress intended to depart from these settled administrative principles to favor pre-emptive judicial review when it included the language from the APA into § 119.[30]

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[28] The Board's suggestion that the withdrawal of the application is a failure to act is incorrect. DOE has acted. The potential intervenors may or may not agree with DOE's action, but courts have held that challengers to agency actions cannot dress up their challenges about the sufficiency of such action as a supposed failure to act. *See, e.g., Public Citizen v. NRC*, 845 F.2d 1105, 1108 (D.C. Cir. 1988); *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991); *see also Ecology Center, Inc. v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999) ("complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act'" is not a failure to act). *Ecology Center* quoted *Watkins*, 939 F.2d at 714 n.11 (9th Cir. 1991), a case that arose under § 119(a)(1)(B).

[29] Regarding exhaustion, the Ninth Circuit held in *General Atomics v. NRC*, 75 F.3d 536, 541 (9th Cir. 1996), that it "is well established in administrative law that before a federal court considers the question of an agency's jurisdiction, sound judicial policy dictates that there be an exhaustion of administrative remedies" and it "requires that 'an agency be accorded an opportunity to determine initially whether it has jurisdiction.'" *Id.* (citation omitted); *see also Darby v. Cisneros*, 509 U.S. 137, 137-38 (1993) (exhaustion applies to actions under the APA "to the extent that it is required by statute or by agency rule as a prerequisite to judicial review."). Concerning finality, an agency action must be final to be judicially reviewable. *E.g., National Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005) ("First, the action under review must mark the consummation of the agency's decisionmaking process - it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which rights or obligations have been determined, or for which legal consequences flow.") (citation omitted). Regarding ripeness, the D.C. Circuit dismissed Nevada's petition from review in an earlier challenge because it was not "ripe." *Nevada v. DOE*, 457 F.3d 78, 85 (D.C. Cir. 2005) (a "'claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'") (citation omitted).

[30] *E.g., Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (there is a "well-settled presumption that Congress understands the state of existing law when it legislates.") (citation omitted); *Louisiana Pub. Serv. Com'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007) ("Congress

Finally, the Board's surmise that the Commission's decision on DOE's motion to withdraw will be appealed to the Court of Appeals provides no justification for the Board's abdication. The prospect of ultimate judicial review is routine in agency adjudicatory proceedings. That prospect has never justified short-circuiting the completion of the administrative process in favor of a preemptive judicial ruling.

IV. Conclusion

The M&O is the type of decision that the Commission's supervisory power is intended to correct. DOE respectfully urges the Commission to accept the M&O for interlocutory review and to reverse it as promptly as possible. If the Commission grants review, DOE is willing to accept any expedited schedule for resolution of the issues presented by its petition. DOE is likewise willing to agree to an expedited schedule for review of the underlying motion to withdraw, either by the Board or, if the Commission so chooses, by the Commission in the first instance.

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is presumed to know how the courts have interpreted extant law when it enacts new law.") (citation omitted).

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY
By Electronically Signed by Donald P. Irwin

Donald P. Irwin
Michael R. Shebelskie
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

Scott Blake Harris
Sean A. Lev
James Bennett McRae
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Counsel for the U.S. Department of Energy

April 12, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the **U.S. DEPARTMENT OF ENERGY'S PETITION FOR INTERLOCUTORY REVIEW** have been served on the following persons on this 12th day of April 2010 through the Nuclear Regulatory Commission's Electronic Information Exchange.

CAB 04
Atomic Safety and Licensing Board Panel
Thomas S. Moore, Chair
E-mail: tsm2@nrc.gov
Paul S. Ryerson
E-mail: psr1@nrc.gov
Richard E. Wardwell
E-mail: rew@nrc.gov

Parties Served	**E-mail Addresses**
Adams, Marta	madams@ag.nv.gov
Andersen, Robert M.	robert.andersen@akerman.com
Bailey, Annie	baileys@lcturbonet.com
Barlow, Gregory	lcda@lcturbonet.com
Baughman, Mike	bigboff@aol.com
Bauser, Michael A.	mab@nei.org
Belete, Elene	ebelete@jsslaw.com
Bell, Kevin W.	kwbell@energy.state.ca.us
Berkey, Curtis	curtis.berkey@abwwlaw.com

Beutel, Theodore	tbeutel@eurekanv.org
Bollwerk III, G. Paul	gpb@nrc.gov
Borski, Laurie	lborski@nuclearlawyer.com
Brooks, Felicia M.	fbrooks@ndnlaw.com
Bupp, Margaret	mjb5@nrc.gov
Carter, Lorraine	lcarter@captionreporters.com
Cereghino, Stephen	stephen_cereghino@ymp.gov
Choate, Zoie	zchoate@co.nye.nv.us
Colburn, Ross	rcolburn@ndnlaw.com
Cottingham, Anne	awc@nei.org
Crosland, Martha S.	Martha.Crosland@hq.doe.gov
Curran, Diane	dcurran@harmoncurran.com
Damele, Ronald	rdamele@eurekanv.org
Dinunzio, Nicholas	Nicholas.Dinunzio@hq.doe.gov
Dobie, Julie	jdobie@gklaw.com
Dreher, Michael	michael.dreher@nrc.gov
Dudley, Sherry	sdudley@co.nye.nv.us
Dunning, Michael	MichaelD@atg.wa.gov
Durbin, Susan	susan.durbin@doj.ca.gov
Elk, Shane	sthinelk@ndnlaw.com
Eredia, Sally	seredia@ndnlaw.com
Fitz, Andrew	AndyF@atg.wa.gov
Fitzpatrick, Charles J.	cfitzpatrick@nuclearlawyer.com
Francis, Karin	kxf4@nrc.gov
Fraser, Matthew	mfraser@harmoncurran.com
Frishman, Steve	steve.frishman@gmail.com
Giitter, Rebecca	rll@nrc.gov
Gilman, Joseph	jsg1@nrc.gov
Ginsberg, Ellen C.	ecg@nei.org
Golshan, K. G.	kg.golshan@nrc.gov
Gores, Jennifer A.	jgores@armstrongteasdale.com
Gottshall, Thomas	tgottshall@hsblawfirm.com
Graser, Daniel J.	djg2@nrc.gov

Gutierrez, Jocelyn	Jocelyn.Gutierrez@ymp.gov
Hanna, Robert S.	rshanna@bsglaw.net
Harrington, Arthur J.	aharring@gklaw.com
Harris, Scott Blake	Scott.Harris@hq.doe.gov
Hawkens, E. Roy	erh@nrc.gov
Hearing Docket	hearingdocket@nrc.gov
Heinzen, Steven A.	sheinzen@gklaw.com
Hembacher, Brian	brian.hembacher@doj.ca.gov
Horin, William	whorin@winston.com
Houck, Darcie L.	dhouck@ndnlaw.com
James, Gregory L. Esq.	gljames@earthlink.net
Johnson, Abigail	eurekanrc@gmail.com
Kahn, Zachary	zxk1@nrc.gov
Keskey, Don	donkeskey@publiclawresoucenter.com
Klevorick, Phil	klevorick@co.clark.nv.us
Larimore, Patricia	plarimore@talisman-intl.com
Lawrence, John W.	jlawrence@nuclearlawyer.com
Leigh, Rovianne	rleigh@abbwlaw.com
Lembke, Alisa	alembke@inyocounty.us
Lenehan, Daniel	daniel.lenehan@nrc.gov
Lev, Sean	sean.lev@hq.doe.gov
Lewis, Linda	linda.lewis@nrc.gov
List, Robert F.	rlist@armstrongteasdale.com
Loveland, Bryce	bloveland@jsslaw.com
Lynch, Susan	slynch1761@gmail.com
Maerten, Daniel	Daniel.Maerten@caci.com
Mahowald, Phillip	pmahowald@piic.org
Malsch, Martin G.	mmalsch@nuclearlawyer.com
Martin, Circe	ogcmailcenter@nrc.gov
Martinez, Melanie	wpnucwst2@mwpower.net

Mathias, Linda	yuccainfo@mineralcountynv.org
McRae, Ben	Ben.McRae@hq.doe.gov
Mercado, Michele	michele.mercado@doj.ca.gov
Miras-Wilson, Rachel	rwilson@winston.com
Montesi, Susan	smontesi@nuclearlawyer.com
Moore, Thomas S.	tsm2@nrc.gov
Mueller, Edwin	muellered@msn.com
Murphy, Malachy	mrmurphy@chamberscable.com
Nezhad, Cyrus	Cyrus.Nezhad@hq.doe.gov
Niegemann, Brian	bniegemann@ndnlaw.com
OCAA Mail Center	OCAAMAIL@nrc.gov
Overton, H. Lee	LeeO1@atg.wa.gov
Pak, Christina	Christina.Pak@hq.doe.gov
Peebles, John M.	jpeebles@ndnlaw.com
Peterson, William	paengineer@juno.com
Pitchford, Loreen, LSN Coordinator	lpitchford@comcast.net
Pitts, Jason	jayson@idtservices.com
Poland, Douglas M.	dpoland@gklaw.com
Putzu, Frank	frank.putzu@navy.mil
Renfro, Hanna	hrenfro@gklaw.com
Repka, David A.	drepka@winston.com
Rhoan, Robert	rrhoan@ndnlaw.com
Robbins, Alan	arobbins@jsslaw.com
Roby, Debra	droby@jsslaw.com
Rosenthal, Alan S.	rsnthl@nrc.gov; axr@nrc.gov
Rotman, Matthew	matthew.rotman@nrc.gov
Ryan, Tom	Tom.Ryan@nrc.gov
Ryerson, Paul S.	psr1@nrc.gov
Schwartz, Jacqueline	jschwartz@gklaw.com
Sears, Richard	rwsears@wpcda.org
Silberg, Jay E.	jay.silberg@pillsburylaw.com
Silvia, Andrea L.	alc1@nrc.gov
Simkins, Connie	jcciac@co.lincoln.nv.us
Simon, Mike	wpnucast1@mwpower.net

Sisco, Carlos L.	csisco@winston.com
Sommer, Josephine	Josephine.Sommer@ymp.gov
Sullivan, Timothy E.	timothy.sullivan@doj.ca.gov
Thompson, Johnathan	JonaT@atg.wa.gov
Tucker, Katherine	Katie.Tucker@nrc.gov
VanNiel, Jeffrey D.	nbrjdvn@gmail.com
Vazquez, Tameka	purpose_driven@yahoo.com
Vibert, Elizabeth A.	VibertE@co.clark.nv.us
Walsh, Timothy J.	timothy.walsh@pillsburylaw.com
Wardwell, Richard E.	rew@nrc.gov
Webb, Maria	maria.webb@pillsburylaw.com
Whipple, Bret	bretwhipple@lcturbonet.com
Williams, Scott	swilliams@abbwlaw.com
Woodington, Kenneth	kwoodington@dml-law.com
Young, Mitzi A.	may@nrc.gov
Zabarte, Ian	mrizabarte@gmail.com
Zobler, Marian L.	mlz@nrc.gov

U.S. DEPARTMENT OF ENERGY

By Electronically Signed by Stephanie E. Meharg

Donald P. Irwin
Michael R. Shebelskie
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

Scott Blake Harris
Sean A. Lev
James Bennett McRae
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Counsel for the U.S. Department of Energy

U.S. DEPARTMENT OF ENERGY'S PETITION FOR INTERLOCUTORY REVIEW

ATTACHMENT 1

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

No. 10-1050

IN RE: AIKEN COUNTY,
Petitioner

AIKEN COUNTY,
Petitioner

v.

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

ON PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF
AND WRIT OF MANDAMUS

RESPONDENTS' RESPONSE IN OPPOSITION TO THE PETITION

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

JOHN F. CORDES
Solicitor
JEREMY M. SUTTENBERG
Office of the General Counsel
U.S. Nuclear Regulatory Comm'n
Washington, D.C. 20555
(301) 455-1600

AARON P. AVILA
ALLEN M. BRABENDER
ELLEN J. DURKEE
Appellate Section, Environment & Natural Resources Division, U.S. Dep't of Justice
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026
(202) 514-4426

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RULES and REGULATIONS:

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

INTRODUCTION

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

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

Aiken County asks this Court: (1) to order DOE to withdraw a February 1, 2010, motion seeking a stay of the licensing proceeding until the NRC's Atomic Safety and Licensing Board ("NRC Licensing Board") rules on an expected DOE motion to withdraw the license; and (2) to order the NRC Licensing Board to strike its February 16, 2010, order granting DOE's stay motion. Petition ("Pet.") at 18. These interim administrative case management activities do not warrant this Court's attention. More importantly, principles of justiciability and the standard for mandamus relief do not allow the Court to grant the relief Aiken County seeks.

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

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

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

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

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

STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

REASONS FOR DENYING THE PETITION

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

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

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

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

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

A. There Is No Final Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions ...." 28 U.S.C. § 1651(a). *Telecommunications Research and Action Center v. F.C.C.* , 750 F.2d 70, 76 (D.C. Cir.1984). "[S]ection 1651(a) empowers a federal court to issue writs of mandamus necessary to protect its prospective jurisdiction." *Id.* Under the circumstances here, mandamus cannot properly be invoked to review the challenged non-final actions. Aiken County does not, and cannot on the facts of this case, demonstrate that mandamus is necessary to protect this Court's jurisdiction to review a final decision.[5/] There is no rationale under which this Court could conclude that its

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

(continued...)

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

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

II. Aiken County's Petition Is Non-Justiciable

A. Aiken County's Petition Is Not Ripe

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

[5/](...continued)
NRC Licensing Board's prompt issuance of case management orders setting an orderly approach to deciding pending motions. Attachs. C, F, G.

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

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

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

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

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

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

B. Aiken County Failed To Exhaust Its Administrative Remedies

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

872 (D.C. Cir. 2009) (quoting *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007); *Hettinga v. United States*, 560 F.3d 498, 503 (D.C. Cir. 2009). Relatedly, Fed. R. App. P. 18(a)(1) states that "[a] petitioner must ordinarily move first before the agency for a stay pending review of its decision or order." These complementary exhaustion requirements give an administrative agency "an opportunity to consider the matter, make its ruling, and state the reasons for its action" before a federal court sets aside its determination. *See Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946). Exhaustion requirements promote administrative efficiency, respect executive autonomy by allowing an agency the opportunity to correct its own errors, provide courts with the benefit of an agency's expertise, and serve judicial economy by avoiding the necessity for judicial involvement in some instances and by having the administrative agency compile the factual record. *See Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

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

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

C. Aiken County Fails To Establish Its Standing

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

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

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

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

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

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

"Mandamus is a drastic remedy, to be invoked only in extraordinary circumstances." *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) (internal quotations omitted). "Mandamus is available only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Id.* (internal quotations omitted). None of these circumstances is present here.

A. Adequate Remedies Are Available To Aiken County

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

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

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

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

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

Aiken County also "has the burden of showing that 'its right to issuance of the writ is clear and indisputable.'" *Northern States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 758 (D.C. Cir. 1997) (quoting *Gulfstream Aerospace Corp. v. Maycamas Corp.*, 485 U.S. 271, 289 (1988)). Mandamus generally will not issue unless there is a plainly defined and nondiscretionary duty on the part of the defendant. *See Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (mandamus is only appropriate if "the defendant owes [the plaintiff] a clear nondiscretionary duty"); *Ganem v. Heckle,* 746 F.2d 844, 852, 241 (D.C. Cir. 1984) ("As an extraordinary remedy, mandamus generally will not issue unless there is a clear right in the plaintiff to the relief sought, a plainly defined and nondiscretionary duty on the part of the defendant to honor that right, and no other adequate remedy, either judicial or administrative, available").[6] Stated differently, where an agency may exercise some discretion, it cannot be said that the petitioner's right to relief is "clear and indisputable."

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

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

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

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

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

generally-applicable procedural rules); 10 C.F.R. § 2.319 (specifying case management powers of a presiding officer at NRC hearings); *see also* 5 U.S.C. § 556(c).[8] Aiken County's request that DOE be ordered to withdraw the stay request and that the NRC Licensing Board be ordered to strike the grant of that request is at odds with a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 544 (1978). "Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Id.* at 542-43 (internal quotation marks and citations omitted). Because Aiken County has demonstrated no clear and indisputable right to the requested writ of mandamus or injunction, this Court should deny the petition.

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully Submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

JOHN F. CORDES
Solicitor
JEREMY M. SUTTENBERG
Office of the General Counsel
U.S. Nuclear Regulatory Comm'n
Washington, D.C. 20555
(301) 455-1600

Counsel for Nuclear Regulatory Commission

AARON P. AVILA
ALLEN M. BRABENDER
ELLEN J. DURKEE
Appellate Section, Environment & Natural Resources Division, U.S. Dep't of Justice
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20026
(202) 514-4426

Counsel for Department of Energy

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CERTIFICATE OF SERVICE

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

s/

Ellen J. Durkee
Attorney, Appellate Section
Environment & Natural Resources Division
P.O. Box 23795, L'Enfant Plaza Station
Washington, D.C. 20530
(202) 514-4426