No. _____

In the United States Court of Appeals for the Fifth Circuit

TEXAS, *Petitioner*,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF ENERGY; JAMES RICHARD "RICK" PERRY, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF ENERGY; UNITED STATES NUCLEAR REGULATORY COMMISSION; KRISTINE L. SVINICKI, IN HER OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION; UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD; THOMAS MOORE, PAUL RYERSON, AND RICHARD WARDWELL, IN THEIR OFFICIAL CAPACITIES AS UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD JUDGES; UNITED STATES DEPARTMENT OF THE TREASURY; AND STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF THE TREASURY, *Respondents.*

Original Action under the Nuclear Waste Policy Act

ORIGINAL PETITION

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument. This original petition requesting a writ of mandamus, injunction, declaratory judgment, and other equitable relief under the Nuclear Waste Policy Act concerns the decisions of several federal officials and agencies that violate federal law by failing to execute their obligations to complete the licensing process for a nuclear waste storage repository at Yucca Mountain, Nevada. Petitioner submits that oral argument could aid the Court in resolving the legal and factual issues surrounding this case.

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INTRODUCTION

"My hope of this committee and administration is that we, finally after 35 years of kicking the can for whatever reason, we can start . . . moving to temporary or permanent siting of this nuclear waste." *Confirmation Hearing of Secretary of Energy Rick Perry: Hearing Before the Sen. Energy & Nat. Res. Comm.*, 115th Cong. (Jan. 19, 2017) (statement of Rick Perry). Secretary Perry is correct that nuclear waste storage is a priority. This presidential administration has the opportunity to overcome the failures of previous administrations and build a permanent repository for nuclear waste.

Over thirty years ago, in the Nuclear Waste Policy Act ("Act"), 42 U.S.C. § 10101 et seq., Congress declared that the federal government will take responsibility for America's growing stockpiles of nuclear waste and build a permanent repository. To pay for it, Congress required nuclear power generators to pay the federal government fees set by the Department of Energy ("DOE") based on the amount of energy produced. The Department of the Treasury collected the funds and now holds them in what is known as the Nuclear Waste Fund ("NWF" or "Fund"). Nuclear plants met their end of the bargain by paying these fees, which were subsequently passed to ratepayers.

The federal government, however, failed to comply with the statutory scheme. In dereliction of the Act, the federal Executive Branch collected over $40 billion for nuclear waste storage, but has yet to complete or even license a repository. To be clear, this case is not about the process taking longer than expected. It's about the Executive dragging its feet through every stage of the process, and halting the project despite a congressional mandate to move forward.

Nuclear power has many champions—and for good reason. Nuclear power plants generate around a fifth of America's electricity and nearly 60% of the nation's carbon-free power.[1] Nuclear power stabilizes the electric grid and supports high-paying jobs at facilities. But like other forms of energy, nuclear power produces waste. Experts agree, however, that high-level nuclear waste ("HLW") and spent nuclear fuel ("SNF") can be safely stored deep inside the earth in a geologic repository.

Since the early 1980s, the Executive Branch's ability to identify a suitable repository site suffered delay after delay. Congress tried to speed things along by mandating that DOE pursue Yucca Mountain, Nevada as the sole site for permanent storage. And DOE complied by submitting a license application to the Nuclear Regulatory Commission ("NRC"). When President Obama later moved to scuttle the project by withdrawing the application, the NRC's Atomic Safety and Licensing Board ("ASLB") denied DOE's request to withdraw, and was ordered to complete its licensure proceedings. *In re Aiken Cty.*, 725 F.3d 255 (D.C. Cir. 2013). DOE was also prohibited from collecting any more money for the Fund. *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy* (*NARUC II*), 736 F.3d 517, 517 (D.C. Cir. 2013). In violation of *Aiken County*, NRC and ASLB continue to hold the Yucca adjudicatory hearings in abeyance.

Instead of pursuing Yucca, the DOE formed a Blue Ribbon Commission on America's Nuclear Future and began a completely different "consent-based siting"

[1] Nuclear Energy Inst., *Environment: Emissions Prevented, Carbon Dioxide Emissions Avoided*, *available at* http://www.nei.org/Knowledge-Center/Nuclear-Statistics/Environment-Emissions-Prevented.

approach to building a repository. This approach is designed to establish repositories at various sites, other than Yucca Mountain, throughout the country—if a particular area consents. But the Act requires DOE to pursue a repository solely at Yucca Mountain. DOE is therefore violating the Act by neglecting to pursue the Yucca repository and engaging in consent-based siting activities.

While Congress's clear mandate is ignored, nuclear waste continues to pile up in aging, above-ground temporary storage casks at reactor sites (some operational, others decommissioned) throughout the country. At the same time, the federal Executive retains the billions of dollars that the ratepayers of nuclear power paid for nuclear waste disposal, plus the enormous amount of interest and income that these exacted fees generate each year.

In light of the Executive Branch's disregard of a congressional mandate to build storage at Yucca Mountain, and the NRC and ASLB ignoring the D.C. Circuit's order requiring completion of the Yucca licensing determination, Petitioner respectfully requests equitable relief prohibiting DOE from conducting any other consent-based siting activity and ordering Respondents to finish the Yucca licensure proceedings. Ultimately, if Respondents are unable (or unwilling) to complete their obligations under the Act, or fail to approve the license for Yucca Mountain, the Court should exercise its equitable powers to correct the problem and help bring an appropriate end to a growingly unacceptable circumstance.

STATEMENT OF JURISDICTION

The Act confers "original and exclusive jurisdiction" on the courts of appeals for Petitioner's civil action "alleging the failure of the Secretary [of Energy], the

President, or the [Nuclear Regulatory] Commission to make any decision, or take any action, required under" the Act. 42 U.S.C. § 10139(a)(1). The Court may issue injunctive relief pursuant to Fed. R. App. P. 21, a writ of mandamus pursuant to 28 U.S.C. § 1651 and Fed. R. App. P. 21, and a declaratory judgment pursuant to 28 U.S.C. § 2201. The Court has broad power to issue the other forms of equitable relief requested in this Petition. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1035 (2015).

Venue lies in this Court because Petitioner is within this Circuit. 42 U.S.C. § 10139(a)(2) ("The venue of any proceeding under [the Act] shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia."). Moreover, this Circuit previously adjudicated an original petition brought by Texas under the Act which challenged the Secretary of Energy's designation of two sites in Texas as potentially acceptable for development as nuclear waste repositories. *Texas v. U.S. Dep't of Energy*, 764 F.2d 278, 280 (5th Cir. 1985). Those bringing suits under the Act often bring them in their home circuit. *See, e.g.*, *Ala. Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300 (11th Cir. 2002); *Nevada v. U.S. Dep't of Energy*, 133 F.3d 1201 (9th Cir. 1998); *Nat. Res. Def. Council, Inc. v. EPA*, 824 F.2d 1258 (1st Cir. 1987); *Tennessee v. Herrington*, 806 F.2d 642 (6th Cir. 1986). Thus, venue properly lies in this Circuit.

Respondents have "an unconditional obligation to take the nuclear materials," but have failed to do so. *N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 757 (D.C. Cir. 1997); *Ind. Mich. Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996) (holding Congress directed the Secretary of Energy to accept nuclear

waste by January 31, 1998 "without qualification or condition). This "massive breach" of obligation by Respondents, *Ala. Power*, 307 F.3d at 1302, is "ongoing," *Boston Edison Co. v. United States*, 658 F.3d 1361, 1366 (Fed. Cir. 2011); *see also New York v. U.S. Nuclear Regulatory Comm'n* (*New York II*), 824 F.3d 1012, 1015 (D.C. Cir. 2016) (finding that "[a]t this time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one"). Thus, Petitioner is within 180-day deadline for commencing this action. 42 U.S.C. § 10139(c).

Issues Presented

Decades ago, Congress gave the federal Executive Branch Respondents a mandate to identify and build repositories for America's growing nuclear waste problem. Congress even specified a repository site: Yucca Mountain, Nevada. While DOE initially pursued the Yucca site, it eventually tried to withdraw its licensure application from the NRC. In *Aiken County*, 725 F.3d at 255, the D.C. Circuit ordered the NRC to complete adjudication of the Yucca application, and yet, three years later, the NRC continues to hold that process in abeyance. At the same time, DOE began a new, unauthorized alternative consent-based siting process for a permanent repository other than Yucca. Thus, this Petition presents two primary issues:

1. Are Respondents violating the Act by engaging in consent-based repository siting activities at locations other than Yucca Mountain, when Congress identified Yucca Mountain as the sole repository?

2. Are Respondents violating the Act by failing to make a final decision to approve or disapprove the Yucca Mountain license application?

STATEMENT OF THE CASE

I. Nature of the Case.

Petitioner brings this action against Respondents the United States of America; the Department of Energy; the Secretary of Energy, in his official capacity; the Nuclear Regulatory Commission; the NRC Chairman, in her official capacity; the Atomic Safety and Licensing Board; ASLB Judges Moore, Ryerson, and Wardwell, in their official capacities; the Department of the Treasury; and the Secretary of the Treasury, in his official capacity.

This is an original petition for declaratory judgment, injunction, and writ of mandamus filed under the Act, 42 U.S.C. § 10139(a), the Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. § 1651.

As stated in the Prayer for Relief, Petitioner seeks multiple forms of equitable relief and Court-supervised activity, including, among other things, declaratory judgments, injunctions, writs of mandamus, an accounting, and civil contempt.

II. Factual Background.

A. Commercial Nuclear Energy Production and Waste.

Commercial nuclear energy generates nuclear waste through a process known as the "nuclear fuel cycle." After mining, enriching, and using the fuel for power generation, eventually the fuel is exhausted and becomes waste. Appendix ("App.") 53–55 (BLUE RIBBON COMM'N ON AM.'S NUCLEAR FUTURE, Report to the Secretary of Energy 9–11 (2012)). SNF is highly radioactive and remains dangerous to humans, sometimes for thousands of years. SNF is so hot that it must be stored in deep pools before it can be transferred to dry cask containers for transportation and storage

(short-term and long-term). App. 53–55. Currently, spent nuclear fuel is stored in pools or dry casks designed for temporary storage, all above ground, at the reactor sites. App. 58. And according to the Government Accountability Office, some reactor sites are running out of space. App. 356.

B. The Nuclear Waste Policy Act of 1982.

Since the 1950s, the federal government has sought to identify a permanent storage site for SNF and HLW. App. 64. In 1982, Congress enacted the Nuclear Waste Policy Act to protect the public and the environment from the risks associated with radioactive waste, and to identify a solution for long-term storage of SNF and HLW. 42 U.S.C. §§ 10101–10270 (1983); *see also* H.R. Rep. No. 97-491, pt. 1, at 26–27 (1982). The Act assigned DOE responsibility to construct repositories and transport the waste to those locations. 42 U.S.C. § 10131(a); App. 66. It required DOE to issue guidelines for the recommendation of repository sites within 180 days of January 7, 1983. 42 U.S.C. § 10132(a); *see, e.g.*, *Texas*, 764 F.2d at 280. The Act required DOE to use the guidelines to nominate at least five sites suitable for a repository, and then recommend three of those sites to the President by January 1, 1985, 42 U.S.C. § 10132(b)(1)(A). Once the President selected a site, after consultation with the affected sovereigns, the Act directed him to recommend that site to Congress for approval. *Id.* § 10134(a)(2)(A); *Texas*, 764 F.2d at 280–81.

The Act assigned the NRC responsibility to regulate the construction of the repositories, the transportation of HLW, and the supervision of the repositories once the waste is stored. *See, e.g.*, 42 U.S.C. §§ 10133(b) & 10134(b–c); App. 66.

To pay for the development, construction, and operation of the repositories, the Act established the NWF. 42 U.S.C. § 10222(d). Generators and owners of SNF and HLW have the primary responsibility to pay for the costs of storage. *Id.* § 10131(a)(5). But "state and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal . . . ." *Id.* § 10131(a)(6). When nuclear utilities enter into contracts with DOE to provide energy, they agree to pay fees into the NWF, and DOE agrees to take title to and dispose of the waste. *Id.* § 10222(a)(5). "[O]wners and operators of nuclear power generation facilities paid an initial fee to cover the disposal costs of the pre-1983 waste and an annual fee of 1.0 mil (one-tenth of a cent) per kilowatt-hour of nuclear-generated electricity to cover ongoing waste generation." *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy* (*NARUC I*), 680 F.3d 819, 821 (D.C. Cir. 2012). This money is deposited into the Fund, which is administered by the Department of the Treasury, and from which DOE may make expenditures in pursuit of the Act's obligations. 42 U.S.C. § 10222(c).

Currently, the NWF has an estimated market value between $39.8 billion and $42.7 billion.[2] At its current value, the Fund earns about $1.5 billion in investment

[2] *Compare* App. 211 (U.S. DEP'T OF ENERGY, AUDIT REPORT, DEPARTMENT OF ENERGY'S NUCLEAR WASTE FUND'S FISCAL YEAR 2014 FINANCIAL STATEMENT AUDIT 2 (Nov. 12, 2014), *available at* http://energy.gov/sites/prod/files/2014/12/f19/OAS-FS-15-03.pdf) *with* App. 237–238 (Nuclear Energy Inst., *Nuclear Waste Fund Payment Information by State* (last updated Oct. 2016), *available at* http://www.nei.org/Knowledge-Center/Nuclear-Statistics/Costs-Fuel,-Operation,-Waste-Disposal-Life-Cycle/Nuclear-Waste-Fund-Payment-Information-by-State).

income and interest per year.[3] As of 2016, Texas's ratepayers (through their two nuclear power plants) have contributed $815 million to the Fund. Those contributions have earned $709 million in interest.[4] Thus, in total, the contributions of Texas's ratepayers have netted over $1.5 billion to the Fund.

Utilities producing or using nuclear power have passed billions of dollars of these NWF costs onto Petitioner and other individual ratepayers. In 2013, Respondents were prohibited from collecting new fees for the NWF as a result of their repeated failures to license or build a repository and thus comply with the Act. *NARUC II*, 736 F.3d at 517. Currently, Respondents are not using the Fund to finish the licensure of Yucca Mountain. *Id.* at 520.

C. DOE's Initial Consideration of Sites, Congress's Selection of the Yucca Mountain Site, and DOE's Subsequent Abandonment of the Yucca Mountain Site.

After passage of the Act, DOE began exploring possible storage sites. By 1986, political opposition began to mount against several locations and characterizing separate sites was becoming both "costly and time-consuming." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1260 (D.C. Cir. 2004). As a result, Congress was forced to select a suitable repository site and amended the Act in 1987 to direct DOE and the NRC to "focus exclusively on Yucca Mountain, Nevada" as the sole site to be considered. *Id.*; *see also* App. 66; 42 U.S.C. § 10132; Nuclear Waste Policy Amendments Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987). Congress even went

[3] App. 225.

[4] App. 237–238.

so far as to exempt Yucca Mountain from some of the EPA's generally applicable environmental regulations. *Nuclear Energy Inst.*, 373 F.3d at 1260.

The Act required DOE to begin accepting SNF from reactor sites no later than January 31, 1998. 42 U.S.C. § 10222(a)(5)(B). In 1996, however, DOE announced it would be unable to comply with the deadline. *N. States Power*, 128 F.3d at 757. Eventually, in 2008, DOE submitted to the NRC a license application to construct a nuclear waste repository at Yucca Mountain. App. 67. Two years later, the President ordered DOE to withdraw the license application. App. 68; *New York II*, 824 F.3d at 1015. According to the Government Accountability Office, this decision was made for policy reasons, not technical or safety reasons. App. 337.

ASLB denied DOE's request to withdraw the application, concluding DOE lacked authority to do so because the Act requires it to pursue licensing at Yucca. *In re U.S. Dep't of Energy*, 71 N.R.C. 609, 629, 2010 WL 9105479 (June 29, 2010). An evenly divided NRC upheld ASLB's decision in 2011. *In re U.S. Dep't of Energy*, No. 63-001-HLW, 74 N.R.C. 212, 2011 WL 100005062, at *1 (Sept. 9, 2011). Nevertheless, ASLB suspended further activity on the Yucca application until it was ordered to resume those activities in August 2013. *Aiken Cty.*, 725 F.3d at 266–67. Despite that order, the NRC directed ASLB to hold the Yucca Mountain adjudicatory proceedings in abeyance. Thus, it has not rendered a final decision on the application. *In re U.S. Dep't of Energy*, No. 63-001, 2013 WL 7046350, at *6–7 (N.R.C. Nov. 18, 2013).

Instead of pursuing the Yucca Mountain application, in 2010, the President established a Blue Ribbon Commission to identify alternative methods of nuclear waste

storage and facility siting. App. 26. After two years of research, the Blue Ribbon Commission recommended "consent-based siting" as the preferred method of repository siting—that is, seeking alternative location for repositories if those areas consented. App. 29. Thus, DOE is pursuing consent-based siting, App. 253–57 (U.S. DEP'T OF ENERGY, STRATEGY FOR THE MANAGEMENT AND DISPOSAL OF USED NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE 10–14 (Jan. 2013)), a form of repository siting prohibited under the Act and the order in *Aiken County*, 725 F.3d at 266–67.

On January 11, 2017, Nevada Senators Dean and Cortez Masto, and Nevada Representatives Titus, Kihuen, and Rosen, introduced the Nuclear Waste Informed Consent Act, which would allow DOE and Secretary Perry to pursue consent based siting, a form of siting currently prohibited by the Act. S. 95, 115th Cong. (2017); H.R. 456, 115th Cong. (2017). The same day, South Carolina Representatives Wilson and Duncan, North Dakota Representative Cramer, and Minnesota Representative Lewis introduced the Sensible Nuclear Waste Disposition Act, which would prohibit DOE and Secretary Perry from conducting any consent based siting until the NRC issues a final decision on the Yucca Mountain license application. H.R. 433, 115th Cong. (2017).

D. Respondents' Dereliction Regarding Nuclear Waste.

DOE and the NRC's inaction on the Yucca Mountain license has left Texans without a solution to the nuclear waste problem. Nearly 2,610 metric tons of nuclear waste sit, not as intended deep inside the earth within permanent repositories, but

on Texas soil and just outside the very nuclear reactors where the fuel was used.[5] App. 404. Some nuclear waste even sits at decommissioned nuclear reactors. App. 58. Utilities perpetually bear the costs of storage, and until recently paid both Fund fees and nuclear storage costs. *NARUC II*, 736 F.3d at 517. Many nuclear utilities have recovered damages from DOE for temporary storage costs. *See*, *e.g.*, *System Fuels, Inc. v. United States*, 818 F.3d 1302 (Fed. Cir. 2016) (holding utility is entitled to damages for nuclear waste storage); *Sac. Mun. Util. Dist. v. United States*, 120 Fed. Cl. 270, 282 (2015) (awarding $22 million for DOE's failure to take nuclear waste); *Carolina Power & Light Co. v. United States*, 115 Fed. Cl. 57, 65 (2014) (awarding $103 million in damages for storage of nuclear waste). In fact, to date, the federal government has paid $5.3 billion in taxpayer funds to utilities to pay for temporary storage at reactor sites, and estimates suggest that DOE's remaining liabilities will total $23.7 billion.[6] DOE pays these judgments not out of the NWF, but out of the federal government's Judgment Fund, *Ala. Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300, 1314–15 (11th Cir. 2002), which is separately funded by taxpayers. Thus, taxpayers are paying twice for the federal government's failure to create a long-term solution to nuclear waste storage, all while the Executive retains billions in the Fund.

Forty billion dollars sit idle in the Fund while tons of nuclear waste remains in temporary storage, above ground at the power plants themselves. And yet "[a]t this

[5] Nationwide, over 78,000 metric tons sits above ground. App. 404.

[6] App. 261 (*The Federal Government's Responsibilities and Liabilities Under the Nuclear Waste Policy Act: Before the S. Comm. on Env't & Econ.*, 114th Cong. (Dec. 3, 2015) (testimony of Kim Cawley, Chief, Nat. & Physical Res. Cost Estimates Unit, Congressional Budget Office)).

time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one." *New York II*, 824 F.3d at 1015 (quoting *New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 474 (D.C. Cir. 2012)). Since that ruling, Respondents have not taken meaningful steps toward satisfying their statutory obligations.

E. Texas Produces Nuclear Energy and Waste Within its Borders.

Texas has four functioning nuclear reactors at two different sites—the South Texas Project and Comanche Peak—with two more reactors approved for construction.[7] Texas is the nation's fifth largest nuclear energy producer and one of the top ten United States sovereigns with the greatest nuclear power generation capacity.[8]

[7] Jordan Blum, *Regulators approve new nuclear reactors near Houston*, HOUS. CHRON. (Feb. 9, 2016), *available at* http://www.houstonchronicle.com/business/energy/article/Regulators-approve-new-nuclear-reactors-near-6819187.php.

[8] U.S. Dep't of Energy, Energy Information Admin., *State Nuclear Profiles* (last updated Apr. 26, 2012), *available at* http://www.eia.gov/nuclear/state/.

In fact, nuclear-generated electricity is delivered to approximately 90% of Texas residents.[9] Texas's nuclear reactors support 9,000 jobs and generate $4.4 billion in economic output.[10] Luminant Power owns the Comanche Peak reactors[11] and STP Nuclear operates the South Texas reactors.[12] These sites store approximately 2,610 metric tons of SNF and HLW in temporary, aging, above-ground casks. App. 404. Texas owns and manages property adjacent to these sites, including roads and infrastructure that service the sites.

Texas is not alone among those within the Fifth Circuit regarding its involvement with nuclear power and nuclear waste. Louisiana and Mississippi are also home to nuclear power plants. App. 8, 10, 12, 17–18, and 20–21. Louisiana has approximately 1,470 metric tons of SNF at these plants and Mississippi has approximately 1,010 metric tons. App. 404.

Texas also has direct authority with respect to nuclear waste within its sovereign boundaries, including HLW. Laws and regulatory bodies in Texas govern whether additional nuclear plants may be built and whether HLW may be stored within Texas's borders. *See Pacific Gas & Elec. Co. v. Cal. Energy Res. Conservation & Dev.*

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[9] Electric Reliability Council of Texas, *About ERCOT*, *available at* http://www.ercot.com/about.

[10] App. 14–15; NUCLEAR ENERGY INST., THE ECONOMIC BENEFITS OF TEXAS' NUCLEAR POWER PLANTS 7–9 (Dec. 2015), *available at* http://www.nei.org/CorporateSite/media/filefolder/Policy/Papers/EconomicBenefitsStudyTexasNuclearPlants.pdf?ext=.pdf.

[11] Luminant, *Comanche Peak Nuclear Power Plant*, https://www.luminant.com/wp-content/uploads/2015/02/ComanchePeak_Facts.pdf (last visited Mar. 13, 2017).

[12] The South Texas Project nuclear power plant is owned by Austin Energy (16%), CPS Energy (40%), and NRG Energy (44%). STP Nuclear Operating Co., *Our Owners*, http://www.stpegs.com/#/about-us/our-owners (last visited Mar. 13, 2017).

Comm'n, 461 U.S. 190, 208 (1983) (noting that, under 42 U.S.C. § 2018, Congress clearly intended for Petitioner "to continue to make judgments" about electrical generation and building new nuclear plants); TEX. UTIL. CODE § 39.205 (providing for collection, management, and expenditure of decommissioning money and that unspent funds are returned to ratepayers); *id.* § 39.206 (regulating decommissioning costs related to new nuclear reactors); TEX. HEALTH & SAFETY CODE § 401.205 (regulating waste disposal license holders and implementing the Act); *id.* § 401.302 (establishing fee for operators of nuclear reactors). Texas regulates the safe handling and disposal of naturally-occurring nuclear materials, low-level radioactive waste, and other byproduct materials. *See id.* § 401.0005.

Texas is party to the Low-Level Radioactive Waste Disposal Compact with Vermont, which provides for the safe transfer and storage of such waste. *Id.* § 403.006. And companies doing business in Texas want to store high-level nuclear waste securely. Waste Control Specialists, which operates two low-level waste disposal facilities in Andrews County, Texas, applied to the NRC for a high-level storage license in April 2016. The local community supports the application.[13]

Texas also possesses authority to ensure reasonable prices in the electricity market. In addition to the power generated by Texas's four nuclear reactors, two Texas utilities draw power from nuclear plants outside of Texas. Entergy Texas utilizes power from a nuclear plant in Louisiana, while El Paso Electric Company takes

[13] Resolution of Andrews Cty., Texas, Comm'rs Ct. (Jan. 20, 2015), *available at* http://www.co.andrews.tx.us/docs/WCS_Resolution.pdf.

power from a nuclear plant in Arizona. The Public Utility Commission of Texas ("PUC") oversees the Electric Reliability Council of Texas's ("ERCOT") retail market by ensuring that customers receive "safe, reliable, and reasonably priced electricity." TEX. UTIL. CODE § 39.101(a)(1); *see also TXU Generation Co., L.P. v. Pub. Util. Comm'n of Texas*, 165 S.W.3d 821, 833 (Tex. App.—Austin 2005, pet. denied) (describing consumer protection as a "vital objective" of Texas's public utilities law). The PUC also oversees the ERCOT wholesale electricity market. *See* TEX. UTIL. CODE § 39.151(d) (giving the PUC authority to adopt and enforce rules related to the reliability of the power grid); *id.* § 39.151(j) (requiring nuclear power plants to observe all policies and procedures of ERCOT and vesting the PUC with enforcement power); *id.* § 39.157 (requiring the PUC to monitor market power associated with electricity generation); *id.* § 39.351 (requiring registration with the PUC to generate electricity). For utilities that have partial ownership of or delivery of power from out-of-state nuclear plants, the PUC has general authority to ensure rates are just and reasonable. *Id.* § 36.001 (providing general authority to regulate rates); *id.* § 36.003 (requiring the PUC to ensure rates are just and reasonable).

Texas endeavors to ensure that nuclear energy production and waste is safe and that ratepayers receive fairly priced electricity generated by nuclear power. These efforts, however, are undercut by the continued existence of HLW and SNF at the two nuclear power plants within its borders. Thus, Respondents' actions, and inaction, implicate Texas's sovereign interests in protecting its citizens and environment from radioactive waste, ensuring compliance with the Act, regulating the production

of nuclear power, monitoring the storage of high and low-level nuclear waste, and ensuring reasonably priced electrical rates.

SUMMARY OF THE ARGUMENT

The federal government spent the last 60 years developing a plan to deal with America's nuclear waste, but after significant movement toward the development of a long-term storage facility at Yucca Mountain, Nevada, Respondents scuttled the project—in contravention of congressional directives and court judgments. *NARUC II*, 736 F.3d at 517; *Aiken Cty.*, 725 F.3d at 266–67; *NARUC I*, 680 F.3d at 821. Now, DOE estimates that a long-term solution for the safe storage of SNF and HLW will not be operational until mid-century, App. 250, nearly 100 years after Congress identified the solution to the problem and enacted legislation directing the President and DOE to build a repository for this nuclear waste. Respondents' balk is contrary to Congress's clear statutory mandate to build a repository at Yucca Mountain. Most importantly, Respondents' dereliction jeopardizes the health and safety of Texans, and Americans.

Currently, Respondents are violating the Act in two ways. First, the Executive is violating the Act by conducting consent-based siting activities instead of pursuing Yucca's licensure. The Act does not permit consent-based siting as an alternative to Yucca. It requires Respondents to pursue Yucca Mountain as the only repository. The Secretary has no policy discretion when congressional intent is clear. As such, Respondents' dereliction violates the Act.

Second, by holding the Yucca Mountain adjudicatory hearing in abeyance, the NRC and ASLB are violating the Act's requirement that they complete an up or

down vote on Yucca's licensure four years after the date of application. That deadline expired in 2012, and despite a previous order through a writ of mandamus directing the NRC to continue the licensure process, the adjudicatory proceedings at the NRC are still stayed.

The Court should declare Respondents in violation of the Act, and enjoin DOE from conducting consent-based siting activities. It should also issue a writ of mandamus directing the NRC and ASLB to perform the adjudicatory hearings for the Yucca Mountain license. The Court should additionally retain jurisdiction over this matter and order ASLB and the NRC to complete the Yucca hearings within the next six to twelve months. And, finally, if Respondents fail to comply with this Court's orders, or the NRC fails to approve the license, the Court should issue any one or more other appropriate remedies pleaded herein.

ARGUMENT

I. DOE's Consent-Based Siting Violates the Act.

DOE and the Secretary of Energy are violating the Act by engaging in consent-based siting activities in search of new locations for permanent repositories.

When congressional intent is clear as to a mandatory duty imposed on the Executive, as it is here, then the Executive lacks discretion to act otherwise. *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977) ("Use of the word 'shall' generally indicates a mandatory intent unless a convincing argument to the contrary is made.").

And, "absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions." *Aiken Cty.*, 725 F.3d at 259.

The Act clearly requires the Secretary of Energy to stop all site-specific activities other than those at Yucca Mountain. *See* 42 U.S.C. § 10133(a) ("The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization activities at the Yucca Mountain site."); *id.* § 10172(a)(1) ("The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site."); *id.* § 10172(a)(2) ("The Secretary shall terminate all site specific activities . . . at all candidate sites, other than the Yucca Mountain site, within 90 days after December 22, 1987."); *see NARUC II*, 736 F.3d at 519 ("The [Act] is obviously designed to prevent the Department [of Energy] from delaying the construction of Yucca Mountain as the permanent facility while using temporary facilities.").

The Secretary of Energy and DOE have no authority to act in contravention of clear congressional mandates. Just as the NRC must continue with the "legally mandated licensing process" for Yucca Mountain, the Secretary of Energy and DOE may not conduct consent-based siting activity. *Aiken Cty.*, 725 F.3d at 267; *see Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) ("[N]othing in the Constitution commits to the President the ultimate authority to construe federal statutes.").

As found in a similar case, a Petition like this one does not implicate the Executive Branch's prosecutorial or enforcement discretion. "[P]rosecutorial discretion

encompasses the discretion not to *enforce* a law against private parties; it does not encompass the discretion not to *follow* a law imposing a mandate or prohibition on the Executive Branch." *Aiken Cty.*, 725 F.3d at 266 (emphasis in original). This is a case about the Executive Branch's choice to pursue nuclear waste disposal activities everywhere except the Yucca site, and thereby spend taxpayer money, on activity that Congress prohibited. The Executive Branch "may not decline to follow a statutory mandate or prohibition simply because of policy objections." *Id.* at 259.

Based on clear violations of the Act, the Court should enjoin DOE and the Secretary of Energy from conducting consent-based siting activities, and the Court should order them to pursue the Yucca Mountain license application pending before the NRC and ASLB.

II. The NRC and ASLB Continue to Violate Their Duties to Issue a Final Decision on the Yucca Mountain License Application.

The NRC and ASLB continue to hold the Yucca Mountain licensure process in abeyance, despite the Act's requirement, and judicial mandates, that they complete the licensure process by either approving or rejecting the application.

The Act provides that the "Secretary [of Energy] shall carry out . . . appropriate site characterization activities at the Yucca Mountain site." 42 U.S.C. § 10133(a). "If the President recommends to the Congress the Yucca Mountain site . . . the Secretary [of Energy] shall submit to the [NRC] 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." *Id.* § 10134(b). The Secretary of Energy and DOE submitted its Yucca Mountain license application in June 2008. *Aiken Cty.*, 725 F.3d at 258.

Upon submittal of the application, the Act provides that the NRC "shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the [NRC] may extend such deadline by not more than 12 months." 42 U.S.C. § 10134(d) (emphasis added). ASLB is responsible for adjudicating the application. 10 C.F.R. § 1.15. Since DOE submitted the application in June 2008, the NRC's deadline "has long since passed" and the NRC still has not made a final decision. *Aiken Cty.*, 725 F.3d at 258. Despite the fact that the NRC was ordered to complete the licensure process in 2013, *id.* at 266–67, the NRC boldly declined and continues to hold the adjudicatory hearings in abeyance, *U.S. Dep't of Energy*, 2013 WL 7046350, at *6 ("we decline to resume the contested adjudication at this time"). The NRC's actions show it has no intention to ever issue a final decision.

To be sure, in 2010, Washington and South Carolina, among other parties, sought a writ of mandamus requiring the NRC to resume the licensing process. *Aiken Cty.*, 725 F.3d at 257. The court held that the NRC violated the Act by failing to complete the Yucca licensure proceedings. It also found that "bedrock principles of constitutional law" dictate that "the President must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute." *Id.* at 259. Policy objections do not amount to constitutional

objections. *Id.* Accordingly, the court rejected the NRC's attempts to justify its inaction. The court found it irrelevant that Congress had not allocated the full amount of funding for the licensure proceedings and that Congress might alter the funding in the future or reduce it to zero. *Id.* at 259–60. The court also rejected the NRC's argument that it may not want to pursue Yucca as a policy matter because the Act reserved those decisions to Congress. *Id.* at 260. The court had "repeatedly gone out of [its] way over the last several years to defer a mandamus order against [the NRC] and thereby give Congress time to pass new legislation that would clarify this matter if it so wished." *Id.* at 266. Ultimately, however, since Congress took no action, the NRC was "simply defying a law enacted by Congress . . . without any legal basis." *Id.* Thus, the court issued a writ of mandamus ordering the NRC to complete the Yucca licensure process with a final approval or disapproval. *Id.* at 267. And yet, the NRC continues to hold the licensure proceedings in abeyance.

"It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by the Nuclear Regulatory Commission." *Aiken Cty.*, 725 F.3d at 267. Nothing has changed since that pronouncement four years ago. The Act's statutory deadline is clear and unambiguous, and the NRC voluntarily missed it. The ruling in *Aiken County* was clear and unambiguous, but the NRC continues to hold the Yucca Mountain license in abeyance.

The Court should therefore (1) issue an injunction or writ of mandamus compelling the NRC and ASLB to complete the adjudicatory hearings and issue a final decision on the application within six to twelve months; and (2) retain jurisdiction to ensure compliance. It should further compel DOE and the Secretary of Energy to participate in those proceedings. *See id.* at 267 (issuing writ of mandamus compelling the NRC to finish the Yucca Mountain licensure).

* * *

The history of the federal Executive's role in building a nuclear waste repository is marked by delay after delay. DOE took 20 years to issue a formal finding on the suitability of Yucca Mountain, and it did so only after Congress amended the Act in 1987 to identify Yucca Mountain as the sole repository. App. 64–66. And now DOE is engaged in unauthorized consent-based siting.

The NRC's delays are similar. While DOE did not submit the Yucca Mountain application to the NRC until June 2008—six years after its tardy suitability finding, *Aiken Cty.*, 725 F.3d at 258—the NRC had until 2012, at the latest, to complete the Yucca licensure process, but has "no current intention of complying with the law," *id.*, and is holding the application in abeyance.

This Court possesses many remedial tools to correct decades of federal Executive inaction on a highly important topic. Although the Act does not articulate specific remedies, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S.

60, 70–71 (1992). Declaratory, injunctive, and mandamus relief will stop DOE's current unauthorized activity and restart the NRC's licensure process for Yucca Mountain. Ultimately, if Respondents fail to act, the Court should consider other remedies, such as civil contempt,[14] a special master,[15] disgorgement,[16] or restitution.[17]

But before the Court reaches these later remedies, Petitioner asks the Court to declare Respondents in violation of the Act, enjoin DOE from consent-based siting, issue a writ of mandamus directing the NRC to finish the Yucca licensure process, retain jurisdiction over this matter,[18] order Respondents to finish the Yucca licensure

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[14] *See Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 442–43 (1986) (federal courts may impose civil contempt fines to compel compliance with court orders); *In re Bradley*, 588 F.3d 254, 265 (5th Cir. 2009) (federal courts possess inherent powers to punish violations of court orders).

[15] *See In re Peterson (State Report Title: Ex Parte Peterson)*, 253 U.S. 300, 312–13 (1920) ("From the commencement of our government it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners, and commissioners."); *In re Deepwater Horizon*, 824 F.3d 571, 580 (5th Cir. 2016) (noting appointment and duties of special master); *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir.), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982) ("The power of a federal court to appoint an agent to supervise the implementation of its decrees has long been established."); *Gary W. v. Louisiana*, 601 F.2d 240, 244–45 (5th Cir. 1979) (affirming appointment of special master when one party failed to comply with an injunction).

[16] *See United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1058 (10th Cir. 2006) ("Disgorgement is a traditional equitable remedy."); *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) ("Disgorgement is remedial and not punitive. The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing.").

[17] *See Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 560–63 (5th Cir. 1987) (discussing court's equitable power of restitution).

[18] *See N. States Power*, 128 F.3d at 760 (issuing writ of mandamus because of "DOE's repeated attempts to excuse its delay on the ground that it lacks an operational repository or interim storage facility" and retaining jurisdiction to monitor compliance with the mandate); *accord Cobell v. Norton*, 240 F.3d 1081, 1109 (D.C. Cir. 2001) ("federal courts regularly retain jurisdiction until a federal agency has complied with its legal obligations, and have the authority to compel regular progress reports in the meantime").

within the next six to twelve months, and require monthly progress reports from Respondents. If the NRC disapproves of the license, or fails to meet the court-imposed deadlines, then the Court should consider all other available remedies.

Conclusion and Prayer for Relief

Petitioner prays for the following relief:

1. A declaratory judgment that DOE and the Secretary of Energy violated the Nuclear Waste Policy Act by pursuing consent-based nuclear waste repository siting activities at locations other than Yucca Mountain, Nevada;

2. A preliminary and permanent injunction prohibiting DOE and the Secretary of Energy from conducting further consent-based siting activities until such time as Congress amends the Nuclear Waste Policy Act allowing for such activities;

3. A declaratory judgment that DOE and the Secretary of Energy violated the Nuclear Waste Policy Act and the ruling in *In re Aiken County*, 725 F.3d 255, 266–67 (D.C. Cir. 2013), by failing to request appropriations from Congress to complete the Yucca Mountain license application process, and by failing to move forward with that application;

4. A declaratory judgment that the NRC, the NRC Chairman, ASLB, and the ASLB Judges violated the Nuclear Waste Policy Act, and the ruling in *In re Aiken County*, 725 F.3d 255, 266–67 (D.C. Cir. 2013), by failing to request appropriations from Congress to complete the Yucca Mountain license application adjudicatory hearings, and by suspending those hearings;

5. A writ of mandamus directing the NRC and ASLB to resume the adjudicatory process for the Yucca Mountain license application, and ordering DOE to participate in the proceedings;

6. A writ of mandamus directing the NRC, the NRC Chairman, DOE, and the Secretary of Energy to use money from the Nuclear Waste Fund to complete the adjudicatory process for Yucca Mountain;

7. A writ of mandamus directing the NRC and NRC Chairman, within 60 days of the order, to request additional necessary funding from Congress to complete the Yucca Mountain adjudicatory process;

8. A writ of mandamus directing DOE and the Secretary of Energy, within 60 days of the order, to request funding from Congress to complete the Yucca Mountain licensure process;

9. An order requiring the Department of the Treasury and the Secretary of the Treasury to provide an accounting of the whereabouts of the corpus of the Nuclear Waste Fund;

10. An order requiring the Department of the Treasury and the Secretary of the Treasury to provide an accounting of current principal contained in the Nuclear Waste Fund, an accounting of the interest and income derived from that principal from the date of the Nuclear Waste Fund's inception, and an accounting of the total value of the principal, interest, and income of the Nuclear Waste Fund;

11. An order directing the Department of the Treasury and the Secretary of the Treasury to release all necessary Nuclear Waste Fund money to DOE and the NRC to complete the Yucca Mountain licensure and adjudicatory process;

12. An order retaining jurisdiction over this matter and establishing a deadline within the next six to twelve months for the NRC, the NRC Chairman, ASLB, and the ASLB Judges to complete the Yucca Mountain adjudicatory hearings, with mandatory progress reports to be submitted to this Court every month;

13. An order holding the Secretary of Energy in civil contempt for failure to comply with the NWPA and court directives;

14. An order holding the NRC Chairman in civil contempt for failure to comply with the NWPA and court directives;

15. An order holding the ASLB Judges in civil contempt for failure to comply with the NWPA and court directives;

16. An order holding the Secretary of the Treasury in civil contempt for failure to comply with the NWPA and court directives;

17. An order holding the Secretary of the Treasury in civil contempt for failure to retain as part of the corpus of the Nuclear Waste Fund any and all interests or income generated from the Fund;

18. An order appointing a special master to assume the statutory authority and duties of DOE, the Secretary of Energy, and the NRC with respect to completion of Yucca Mountain as a permanent repository;

19. A preliminary and permanent injunction prohibiting the Department of the Treasury and the Secretary of the Treasury from using any accrued interest and income from the Nuclear Waste Fund principal on anything other than permanent storage of nuclear waste;

20. An order directing the Department of Treasury and Secretary of Treasury to place the accrued interest and income from the Nuclear Waste Fund principle in a trust fund reserved solely for building a permanent nuclear waste repository;

21. An order providing Petitioner with restitution from the Nuclear Waste Fund;

22. An order disgorging the Nuclear Waste Fund;

23. Attorneys' fees and the costs of this litigation; and

24. All further relief that the Court deems just and proper.

Respectfully submitted this 14th day of March, 2017.

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CERTIFICATE OF SERVICE

On March 14, 2017, this petition was filed with the Clerk of Court via CM/ECF. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses. Counsel further certifies that pursuant to Fed. R. App. P. 25(c) a copy of this Petition will be personally served on:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 7,331 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the type-face requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word.

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