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August 8, 2012

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**Re: *In Re Aiken County, et al.*  
U.S. Court of Appeals, DC Circuit 11-1271**

Dear Counsel:

As you know, on August 3, 2012, the United States Court of Appeals for the District of Columbia Circuit directed that the referenced matter “be held in abeyance and the parties file, by no later than December 14, 2012, updates on the status of Fiscal Year 2013 appropriations with respect to the issues presented.” The Order and the accompanying opinions were written in the context of addressing the question of whether mandamus should lie to require the Nuclear Regulatory Commission (“NRC”) to proceed with the Yucca Mountain licensing process as required by the Nuclear Waste Policy Act in light of uncontroverted evidence that millions of dollars in appropriated funds remain available to continue the process.

Two opinions accompanied the Order. Judge Randolph dissented, indicating that mandamus should issue immediately. Judge Kavanaugh concurred in the Order, noting that “Congress may enact statutory text that makes clear that the Nuclear Regulatory Commission may not use any appropriated money (including previously appropriated funds) for the Yucca Mountain licensing process” and further stating that absent such clarification from Congress, “mandamus likely would have to be issued.” Concurring Slip Op. at 1.

Given these statements from the Court, we are concerned that the status quo be preserved while the case is held in abeyance. Accordingly, within seven days of this letter, please provide us with written assurance that NRC and the Department of Energy (“DOE”) will not, prior to

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Counsel for NRC and United States

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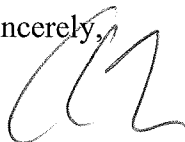
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December 14, 2012: (1) use the appropriated funds either identified by them to the Court,<sup>1</sup> or any other available funds, to further shut down the Yucca Mountain licensing process, nor (2) use such funds for any purpose that will increase the costs of restarting that process, nor (3) otherwise use the appropriated funds identified to the Court for any purpose other than directly advancing the NRC's duties to consider and reach a final decision on DOE's construction authorization application as described in 42 U.S.C. § 10134(d). We believe it is incumbent on NRC and DOE to preserve the status quo in this regard, at a minimum, and not to spend such funds on actions that the Court has clearly determined are illegal in order to manufacture new potential defenses to mandamus. Should adequate assurances not be forthcoming from the NRC and DOE in this regard, we will seek an appropriate order from the Court.

We also expect that any report to the Court regarding the status of appropriations will be submitted jointly.

We look forward to hearing from you.

Sincerely,



ANDREW A. FITZ

Senior Counsel

(360) 586-6752

*On behalf of all Petitioners*

AAF:dmm

cc: All Counsel of Record

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<sup>1</sup> "The most recent filings demonstrate that at least \$10 million is available to NRC and \$17 million available to [DOE], for a total of \$27 million. Amicus Br. at 6; NRC Resp. Br. at 4. NRC now informs the Court that it has an additional \$3.2 million in obligated but unexpended Nuclear Waste Fund money (in addition to the \$9.995 million asserted in its previous brief and \$10.4 million asserted at oral argument). *See* NRC Resp. Br. at n.3. This is not to mention tens of millions of dollars reported this year by DOE to Congress (*see* May 9, 2012, 28(j) Letter (ECF No. 1373032)), and funds from other sources." Petitioners' Response to Brief of the United States as Amicus Curiae at n.2 (ECF No. 1382426).