
Court's Denial of Rehearing in Yucca Mountain Case Signals Significant Shift in NRC Repository Licensing Process

By Christopher B. Clare, Kenneth von Schaumburg / Oct 29, 2013

Yesterday, October 28, 2013, the U.S. Court of Appeals for the District of Columbia denied a request from the State of Nevada for an en banc review of a three-judge panel's August 13, 2013 order^[1] requiring the Nuclear Regulatory Commission ("NRC") to move forward with the licensing process and approve or disapprove the Department of Energy's ("DOE") licensing application for the Yucca Mountain nuclear repository. The decision is a major victory for proponents of the high level nuclear waste repository.

In the Court's August 13 order, the Court found that the NRC violated the Nuclear Waste Policy Act ("NWPA"), which governs the Yucca Mountain licensing process, and that the Court had "no choice" but to grant the petitions of Nye County, Nevada, which is represented by Rob Andersen of Clark Hill, the States of Washington and South Carolina, Aiken County, South Carolina, as well other petitioners who had asked the Court to order the NRC to move forward with the licensing process. In yesterday's one sentence per curiam order denying en banc review, the full Court left its original order intact.

Nye County believes the Court's denial of Nevada's request for rehearing shifts the center of gravity in the Yucca Mountain dispute back to where it belongs, with the NWPA treated as the law of the land, and not just a suggestion. Senator Harry Reid, longtime opponent of Yucca Mountain, can no longer simply claim the Court's action was the erroneous decision of two federal judges. \$27 Million in funds are available to NRC and DOE to resume the licensing process. At the NRC level, the Safety Evaluation Reports ("SERs") for the project, improperly redacted by the previous NRC Chairman, should be issued immediately. Nye County's recent filings with NRC on behalf of the Court petitioners make the case for immediate low cost action by NRC. Nye County has laid out the costs of both issuing the SERs and the costs of restarting discovery, which would be borne almost entirely the parties, not the NRC. Barring the remote possibility of NRC or Nevada seeking review by the Supreme Court, and the even more remote possibility that the Supreme Court would agree to hear the case in any event, the NWPA mandates that NRC continue to adjudicate the license expeditiously. Rob Andersen noted in an interview that "Should NRC or DOE continue to drag their feet on the restart, the Court can be asked to enforce its writ of mandamus with additional orders." Also still pending before the D.C. Circuit Court is a petition from Nye County and others seeking the recusal of the current Chairwoman of the NRC, Allison Macfarlane, due to her longstanding opposition to Yucca Mountain.

The en banc decision does not come as a surprise to those familiar with the case. The NWPA requires the NRC to consider the DOE's application for the storage of nuclear waste at Yucca Mountain and issue a final decision on the site within three years of the application's submission. DOE submitted its application in 2008, but the NRC has still failed to act. Instead, it had admittedly stopped its review of the application, despite an existing \$11.1 million in Congressional funding (coupled with additional funding from DOE that brings the total funds to approximately \$27 million) meant to go towards the review process. As Judge Brett Kavanaugh explained in the August 13 order, the NRC could not continue "flouting the law." The Court also noted that Congress did not need to appropriate the full amount necessary for the complete licensing proceeding for there to be substantial progress.

For more information concerning the Yucca Mountain case or any nuclear waste issues, please contact Robert Andersen (202.772.0924 or randersen@rclarkhill.com).

[1] In re Aiken County, et al., Case No. 11-1271 (Aug. 13, 2013).