
D.C. Court Rules Yucca Mountain Must Move Forward

By Robert M. Andersen, Christopher B. Clare / Aug 13, 2013

In a landmark decision today, the U.S. Court of Appeals for the District of Columbia ruled that the Nuclear Regulatory Commission ("NRC") "has continued to violate the law governing the Yucca Mountain licensing process," and the Court believed it 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. [1] In doing so, the Court ordered the 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.

Under the Nuclear Waste Policy Act, the Nuclear Regulatory Commission was required 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. The Nuclear Waste Policy Act also provided the NRC with the option for an additional year of review time if it could provide a written explanation as to why it needed more time. DOE submitted its application in 2008, but the NRC has still failed to act. Instead, it has 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.

Writing for the majority, Judge Brett Kavanaugh explained that the Court could not continue to wait for Congress to resolve the issue, and, regardless of any underlying policy debate, the NRC could not continue "flouting the law." Of course, the NRC's actions (or failure to act) have largely been the product of the Obama administration, but the Court noted that "the President may not decline to follow a statutory mandate or prohibition simply because of policy objections." Going further, the Court explained 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 [NRC.]"

The NRC argued several justifications for its failure to act, but the Court found none to be persuasive. With respect to funding, the Court noted that Congress did not need to appropriate the full amount necessary for the complete licensing proceeding, but could instead appropriate funds on a step-by-step basis. Additionally, the Court found that any speculation as to what funding Congress might provide in the future is irrelevant and that allowing agencies to ignore Congressional statutes based on such speculation "would gravely upset the balance of powers between the Branches [of government] and represent a major and unwarranted expansion of the Executive's power at the expense of Congress." Similarly, any argument as to the low amount of recent funding appropriated is also irrelevant because the NRC has sufficient funding to move forward for the time being. Finally, the NRC does not have the option of simply not pursuing Yucca Mountain as a policy matter because "Congress sets the policy, not the [NRC.]"

In a dissenting opinion, Judge Merrick Garland argued the majority was ordering the NRC to do "a useless thing" because there will be insufficient funding to complete the application review process. Judge Garland would therefore have denied the petitions and allowed the NRC to continue ignoring the application proceeding until Congress appropriated more funding for the process. Rob Andersen, however, noted that the Petitioners informed the Court that no major multi-year project is funded upfront by Congress, and several critical licensing steps halted by NRC's illegal actions could be completed or continued with the remaining funds. These include the issuance of the already completed Safety Evaluation Reports and continuation of already scheduled discovery.

For more information concerning the Yucca Mountain case or any nuclear waste issues, please contact Robert Andersen (202.772.0924 or randersen@clarkhill.com) or your Environmental, Energy and Natural Resources attorney at Clark Hill.

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