Agency Discretion and Statutory Mandates in a Time of Inadequate Funding: An Alternative to in Re Aiken County Note

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Note

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BRET KUPFER

When an agency fails to abide by a statutory mandate, aggrieved parties may petition the courts for an order compelling the agency to act. In the interest of Congress’s constitutional power, courts will grant the petition and force agencies to comply. However, it is unclear whether an agency violates a statutory mandate when Congress intentionally withholds adequate funds to comply with the mandate.

On August 13, 2013, the United States Court of Appeals for the District of Columbia Circuit ordered the Nuclear Regulatory Commission to spend $11.1 million in carryover appropriations to review an application for a nuclear waste repository in Yucca Mountain. Congress has not provided additional funding in the last three years, and the $11.1 million is grossly inadequate to complete the statutory mandate. The order will produce no measurable benefit to the petitioners or the public, and the waste of funding is an absurd result that Congress never intended. A review of decisions across other circuits shows a split on whether a writ of mandamus is always appropriate when an agency fails to meet a statutory mandate. Conjoining the factors considered in those opinions, this Note lays out an alternative to forcing agencies to act when there is near certainty the action will not expedite relief for the claimant due to a lack of future appropriations.
AGENCY DISCRETION AND STATUTORY MANDATES IN A TIME OF INADEQUATE FUNDING: AN ALTERNATIVE TO \textit{IN RE AIKEN COUNTY}

BRET KUPFER

I. INTRODUCTION

Congress’s failure to pass appropriation bills in a timely manner undermines the effectiveness and efficiency of government. It has been more than a decade since Congress passed all twelve of the regular appropriation bills before the start of the fiscal year (FY).\textsuperscript{1} With increasing frequency, the House and Senate pass lump-sum omnibus bills that limit debate and the opportunity for members to make amendments.\textsuperscript{2} Funding

\textsuperscript{1} The fiscal year begins October 1 before the corresponding calendar year and ends September 30.

\textsuperscript{2} For example, for FY 2013 the full Senate failed to consider separately several bills reported from committee. S. 3301, 112th Cong. (as passed by S. Comm. on Appropriations, June 14, 2012); S. 3216, 112th Cong. (as passed by S. Comm. on Appropriations, May 22, 2012); S. 2465, 112th Cong. (as passed S. Comm. on Appropriations, Apr. 26, 2012); S. 2375, 112th Cong. (as passed by S. Comm. on Appropriations, Apr. 26, 2012); S. 2323, 112th Cong. (as passed by S. Comm. on Appropriations,
levels for authorized programs are not receiving the consideration they deserve, and federal agencies are increasingly tasked with implementing our federal laws without knowing what resources they may rely upon to perform a sufficient job. Nonetheless, Congress will continue to pass authorizations that span multiple years while failing to provide funding in each subsequent year. Agencies are without guidance as to whether they can cut or ignore underfunded statutory mandates.

Congress’s failure to consider funding levels of specific programs not only creates problems for an agency that does not know how to proceed, but also for the courts that provide judicial review of the agency’s action. Federal rulemaking, adjudications, and informal decision making is plagued with delays that are created in part by Congress’s failure to provide funding. These delays impact individuals in countless ways. Veterans are not receiving their benefits on time, innovators are deterred from investing in patents, and drug manufacturers are stalled when trying to bring potentially life-saving medication to market.3

We have a problem posed by agencies that delay congressional mandates for years or miss deadlines, but the courts have not crafted a clear doctrine on how delays should be remedied. The Supreme Court has never addressed the issue, the circuit courts have been split for ten years, and the lower courts are in need of guidance. The Administrative Procedure Act (APA)4 states that a court “shall compel agency action unlawfully withheld or unreasonably delayed,”5 and some courts and scholars interpret this to mean that a court must issue a writ of mandamus when an agency misses a statutory deadline. Of the scholarly pieces offering suggestions on the matter, only a few comment on whether an agency with inadequate funding must always abide by a statutory deadline.

This Note examines how an agency’s obligation to perform an underfunded mandate and its discretion to allocate its own resources were weighed against each other in an August 13, 2013, decision by the United States Court of Appeals for the District of Columbia Circuit—In re Aiken County.6 Petitioners sought a writ of mandamus to force the Nuclear Regulatory Commission (NRC) to review the Department of Energy’s

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3 See, e.g., James D. Ridgway, Equitable Power in the Time of Budget Austerity: The Problem of Judicial Remedies for Unconstitutional Delays in Claims Processing by Federal Agencies, 64 ADMIN. L. REV. 57, 66, 70 (2012) (noting that the average processing of an appeal to the Social Security Administration increased from 274 days in 2000 to 481 days by 2006, the length of time to process a patent was 35 months in 2010, and the average time for a veteran to dispute a decision by the Board of Veterans’ Appeals was 3.9 years).


5 Id. § 706(1).

6 725 F.3d 255 (D.C. Cir. 2013).
(DOE’s) application for a nuclear waste repository at Yucca Mountain in Nevada. Although the NRC failed to act within the statutory deadline established by the Nuclear Waste Policy Act (NWPA), the agency argued that its delay was lawful because the remaining $11.1 million appropriated to review the application for Yucca is inadequate to finish the review and Congress will not provide additional funds in the foreseeable future. Petitioners argued that the NRC is statutorily required to use all available funds until the mandate is achieved. The court ordered the agency to spend the $11.1 million, despite the likelihood that doing so would not provide any relief for the petitioner. This Note takes the position that even when an agency misses a congressionally imposed deadline, the agency action is not unreasonably delayed when it is near certain a court order requiring the agency to act will not expedite relief for the claimant due to a lack of future appropriations.

Part II of this Note provides the factual story of nuclear waste in America, and provides context for the financial, political, and legal issues that led the NRC to toll its review of the application for a repository in Yucca Mountain. Part III introduces the reader to judicial review of agency decisions, and considers cases where deadlines, inadequate appropriations, and absurd effects of a statute factored into the court’s decision on whether the agency had discretion to not implement a law. In Part IV, I propose a new rule and a set of factors to guide courts in deciding whether to order an agency to act upon a statutory mandate when the agency does not have the adequate funds to comply.

II. BACKGROUND ON YUCCA AND THE LITIGATION

A. History of Nuclear Waste

The NRC’s duty to review the DOE’s application for a permanent nuclear waste repository at Yucca Mountain is the most recent legal fight arising from the decision of policy makers to utilize nuclear energy. The history of nuclear energy is in large part a creation of government policy. Government decisions have been responsible for the Manhattan Project, the nuclear navy, and the fact that one-fifth of our electricity is generated by nuclear energy. Today, government support includes billions of dollars in government loan guarantees for investors in new nuclear plants.

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7 Id. at 258.
9 Final Brief for the Respondents at 44–45, In re Aiken Cnty., 725 F.3d 255 (No. 11-1271).
10 Reply Brief of Petitioner at 21, In re Aiken Cnty., 725 F.3d 255 (No. 11-1271).
11 In re Aiken Cnty., 725 F.3d at 259.
as well as the continued promise made in the Price-Anderson Act of 1957\textsuperscript{13} to limit the liability of any nuclear operator for an accident committed by a private or public actor.\textsuperscript{14}

Currently, sixty-two operating nuclear plants\textsuperscript{15} and eleven decommissioned nuclear plants\textsuperscript{16} store spent nuclear fuel (SNF), which is a byproduct from electricity generation.\textsuperscript{17} The DOE maintains a handful of sites that store SNF and high-level radioactive waste that are the byproduct of research, nuclear weapon reactors, and navy ship reactors.\textsuperscript{18} Both proponents of nuclear energy and their environmental critics agree that the nation needs a permanent solution to dispose of SNF and high-level radioactive waste.\textsuperscript{19} The question of where to put nuclear waste has been discussed since World War II.\textsuperscript{20} The majority of the nation’s SNF is kept in cooling pools on-site at the reactors, where it awaits an answer to the problem.\textsuperscript{21} The alternative to keeping fuel rods in the cooling pools is placing them in dry casks. All decommissioned nuclear plants that no longer produce electricity have been forced to seal their fuel rods in these casks made of metal and cement that stand up to twenty feet tall.\textsuperscript{22}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{16} \textit{BLUE RIBBON COMM’N ON AM.’S NUCLEAR FUTURE, REPORT TO THE SECRETARY OF ENERGY 36} (2012).
\item\textsuperscript{17} When electricity is produced from nuclear energy, unstable uranium rods are used to boil water in a reactor that creates the steam that turns the electric turbine. Scott R. Helton, Comment, \textit{The Legal Problems of Spent Nuclear Fuel Disposal}, 23 ENERGY L.J. 179, 180 (2002). When the rods lose too much energy and can no longer be used to generate electricity they are placed in cooling pools because they still maintain enough radioactivity to cause a meltdown if not properly managed. \textit{Id.} The terms “spent nuclear fuel,” “SNF,” “spent fuel rods,” “high-level radioactive waste,” and “nuclear waste” pose the same threats and challenges and may be used interchangeably in this Note.
\item\textsuperscript{18} \textit{BLUE RIBBON COMM’N ON AM.’S NUCLEAR FUTURE, supra note 16, at 17–18.}
\item\textsuperscript{20} Tom Kenny, Note, \textit{Where to Put It All? Opening the Judicial Road for a Long-Term Solution to the Nation’s Nuclear Waste Problem}, 86 NOTRE DAME L. REV. 1319, 1320 (2011).
\item\textsuperscript{21} \textit{BLUE RIBBON COMM’N ON AM.’S NUCLEAR FUTURE, supra note 16, at 14.}
\item\textsuperscript{22} See \textit{id.} at 16, 34 (discussing dry storage practices and noting that casks have walls up to three feet thick and weigh up to 360,000 pounds); Cate Lecuyer, \textit{Yankee Gets OK for Dry Cask Storage, REFORMER.COM (Apr. 27, 2006), http://www.reformer.com/headlines/cl_3756755 (reporting licensing approval of twenty foot tall dry casks at the Vermont Yankee nuclear power plant);} \textit{Dry Cask Storage Project Underway at Fermi 2, DTE ENERGY, http://www.dteenergy.com/nuclear/dryCaskStorageProje}
plants in operation today have placed some of their spent fuel rods into dry casks, but due to the additional cost, lack of guidance, and unknown future regulations of waste management, they have chosen to keep the majority of spent fuel rods in the cooling pools.\textsuperscript{23}

Both methods of temporary storage require licensing approval by the NRC, the agency tasked with ensuring safe operating standards of all civilian nuclear plants.\textsuperscript{24} If a permanent repository existed today, the NRC could demand that plant operators take such action necessary to minimize temporary storage in favor of the permanent solution. Absent a long-term storage solution, extension after extension has been granted to licensees of dry casks and cooling pools; these temporary storage solutions are now holding SNF far beyond the expected timeframe of twenty to thirty years.\textsuperscript{25}

As is true with all things nuclear related, the partial core meltdown at Three Mile Island in 1979 initiated changes for how nuclear waste is regulated. Less than two months after the Three Mile Island meltdown, the D.C. Circuit held that the NRC could not extend the operating license of a nuclear plant without a plan for handling radioactive waste.\textsuperscript{26} The NRC responded to the decision by amending its draft rule on the disposal of nuclear waste that had been in the works for the previous seven years.\textsuperscript{27} Still, Congress did not pass meaningful legislation until 1983 when it passed the NWPA, which directed the DOE to develop a plan, choose a location, and construct a permanent waste repository for all of the nation’s high-level radioactive waste by 1998.\textsuperscript{28}

\textsuperscript{23} See Spent Fuel Storage in Pools and Dry Casks Key Points and Questions & Answers, U.S. NUCLEAR REG. COMM’N, http://www.nrc.gov/waste/spent-fuel-storage/faqs.html#4 (last updated Mar. 25, 2013) (reporting that as of 2009, 78% of spent nuclear waste was in spent fuel pools and 22% was in dry casks). In the United States there are 50,000 metric tons of SNF in cooling pools, and 15,000 metric tons in dry casks. BLUE RIBBON COMM’N ON AM’S NUCLEAR FUTURE, supra note 16, at 10–11.


\textsuperscript{25} See, e.g., Waste Confidence Decision Review, 54 Fed. Reg. 39,767, 39,790 (Sept. 28, 1989) (codified as amended at 10 C.F.R. § 51 (2013)) (finding that a delay of repository until 2025 will not pose a significant risk to public safety or the environment); BD. ON RADIOACTIVE WASTE MGMT., NAT’L RESEARCH COUNCIL, RETHINKING HIGH-LEVEL RADIOACTIVE WASTE DISPOSAL 8–9 (1990) (determining that nuclear waste can be safely stored at the reactor sites for at least one hundred years); BLUE RIBBON COMM’N ON AM’S NUCLEAR FUTURE, supra note 16, at 34 (explaining how the NRC amended its Waste Confidence Decision in 2010 to permit extensions of SNF in temporary storage for up to sixty years).

\textsuperscript{26} Minnesota v. U.S. Nuclear Regulatory Comm’n., 602 F.2d 412, 416, 418 (D.C. Cir. 1979).


B. The Nuclear Waste Policy Act: Congress’s Long-Term Plan for Spent Nuclear Fuel

The NWPA divided the responsibility of establishing the repository among three separate agencies. The DOE would generate a list of potential sites for “site characterization”—the process of conducting intensive geological examination that tests the physical suitability of a site.\(^{29}\) The EPA would set radiological release standards by determining a safe level of radioactivity, if any, that might escape from a nuclear repository.\(^{30}\) The NRC would use the EPA’s standards to determine whether the DOE characterized sites met public health and safety regulations and whether a license should be issued.\(^{31}\) If approved, the DOE would be in charge of construction and maintenance.\(^{32}\)

To pay for the development and construction of the repository, the NWPA authorized the Secretary of Energy to enter contracts with plant operators and charge a fee on all electricity generated by nuclear reactors.\(^{33}\) Although plant operators are contractually obligated to pay one-tenth of one cent per kilowatt-hour generated into the Nuclear Waste Fund,\(^{34}\) the fee is passed on to the consumers. Over nearly thirty years, electricity customers have contributed $16 billion to the Nuclear Waste Fund,\(^{35}\) which, when accounting for interest, totals $28 billion currently available to finance a permanent repository.\(^{36}\) In consideration for the fee payments, the federal government promised plant operators that it would begin accepting SNF for storage by January 31, 1998.\(^{37}\)

The NWPA required the Secretary of Energy to nominate five sites for a permanent repository, and to take into consideration hydrology, geophysics, seismic activity, nuclear activity of the military, valuable natural resources, proximity to water supplies, and the proximity to populations.\(^{38}\) The Act further requires a full environmental assessment, and public hearings of each candidate site.\(^{39}\) By 1984, the DOE had nominated nine candidate sites and produced draft environmental

\(^{30}\) Id. § 10141(a).
\(^{31}\) Id. §§ 10134(d), 10141(b).
\(^{32}\) Id. § 10107(b)(2).
\(^{33}\) Id. § 10156(a)(1)–(3).
\(^{34}\) Id. § 10222(a)(1)–(2).
\(^{35}\) BLUE RIBBON COMM’N ON AML’S NUCLEAR FUTURE, supra note 16, at 70–71.
\(^{38}\) Id. § 10132(a), (b)(1)(A).
\(^{39}\) Id. § 10132(b)(1)(D), (b)(2).
assessments for each. More than a year behind the statutory deadline, the DOE narrowed its list for characterization to sites in Texas, Washington, and Yucca Mountain in Nevada.

In 1987, Congress intervened in the site selection process and passed the Nuclear Waste Policy Amendments Act that prohibited characterization of any site other than Yucca Mountain. The process was driven more by politics and NIMBY’ism than science. Congressional members from the eastern states supported passage on the condition that the Act was amended to scratch the plan for a second repository that would likely be cited on the opposite side of the country from Yucca. Those from South Carolina and Tennessee had objections because their states were expected to host short-term storage facilities, and they feared that their states would become the de facto permanent repositories if Yucca had serious delays. These votes were picked up by amending the legislation to prohibit the operation of any short-term storage until the permanent repository was licensed—a move that proved costly because now the government has no ability to remove waste from nuclear plants. In the end, the Act had something for everyone except the people of Nevada.

C. Nominating Yucca and the Litigation Fallout

Congress’s move to limit consideration of repository sites to Yucca Mountain did not repeal the procedural provisions of the NWPA. The selection process still required the DOE to perform environmental testing and solicit concerns from the local community before it could nominate a site to the President.

The people of Nevada launched every legislative and legal grenade

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43 “NIMBY” stands for “not in my back yard,” and is commonly used to summarize the attitude of opponents to power plants, garbage dumps, prisons, wind farms, and other utilities that improve the public welfare but are opposed solely for the proposed location.
44 For example, Congressman Al Swift (D-WA) was upset that Congress would undermine a process grounded in scientific facts, but was still inclined to vote for the legislation out of fear that the collective action from other members would limit the location of a repository to Washington if he too did not act for his own parochial interest. Nevada: Nuclear Waste Site, 1987–1988 Legislative Chronology, 7 CONGRESS & NATION 483, 487 (1989). The bill’s leading advocate, Chairman J. Bennett Johnston (D-LA) of the Senate Energy Committee, highlighted the cost benefits of a plan that tested only one site, and committed the nation pending positive test results because the cost to test the geological suitability of a site was $1 to $2 billion. Id. at 483.
45 Id. at 484.
46 Id.
they could to block Congress’s plan to build a permanent repository within their state. They elected officials first passed legislation prohibiting the designation of Yucca as the repository, which was struck down by the Ninth Circuit. They then argued the DOE environmental impact study failed to consider the threats of transporting nuclear waste to Yucca. Again, the courts refused to allow the state from blocking further progress. Opponents then successfully litigated against the EPA standards used to conduct an environmental impact study. The EPA and the NRC were forced to adopt standards that could safely store nuclear waste for one million years instead of the original standard requiring ten thousand years. But this victory for Nevada only delayed the process.

Fifteen years after Congress declared Yucca as the only site for characterization, the DOE nominated the site to President George W. Bush in 2002. President Bush approved the site within a day, and the congressional approval required by the NWPA was achieved within five months. Six years later, on June 3, 2008, after a $12 billion characterization, the DOE submitted its license application for Yucca to the NRC. The NWPA provides that the NRC has three years to review the application, which gave it until June 3, 2011, to issue a decision.

Up until 2008, the plan for a nuclear waste repository in Nevada never suffered from a lack of support in Washington, but Nevada was not going to give up. Five months after the DOE delivered the application to the NRC, Barack Obama was elected President. He, along with every Democratic candidate for President, had promised Senate Majority Leader Harry Reid (D-NV) and the people of Nevada that he would oppose a permanent nuclear waste repository at Yucca Mountain. As discussed

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47 Easley, supra note 14, at 668–69.
48 Nevada ex rel. Loux v. Herrington, 777 F.2d 529, 536 (9th Cir. 1985).
49 Nevada v. Dep’t of Energy, 457 F.3d 78, 81 (D.C. Cir. 2006).
50 Id. at 93–94.
51 See Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1315 (D.C. Cir. 2004) (holding, inter alia, that the EPA violated the Energy Policy Act when it determined 10,000 years was a long enough safety standard for the integrity of a nuclear waste repository).
56 Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed Reg. 34,348 (June 17, 2008). The application is available at www.nrc.gov/waste/hlw-disposal/yucca-lic-app.html.
57 42 U.S.C. § 10134(d).
below in Part II.E, the President has fully honored his campaign promise.

D. Breaching the Duty to Act by the NWPA Deadline

As the DOE was fighting delays to the site selection process, it was simultaneously failing to meet its contractual obligations to accept SNF by the 1998 statutory deadline set by the NWPA. In 1994, the DOE issued a Notice of Inquiry that it would not accept waste at a repository until 2010 at the earliest, twelve years after the deadline.59 Twenty states and fourteen plant operators sued the DOE that year in an effort to get the government on a faster path to a permanent repository.60 Parties filing lawsuits wanted to get rid of the nuclear waste as soon as possible, and they had a strong argument that the DOE had a legal obligation to take it away.

In 1995, the D.C. Circuit held that the DOE had an unconditional statutory obligation to meet the 1998 deadline.61 The DOE responded by essentially ignoring the court’s opinion, arguing that although it had breached the contracts, it was permitted to do so given factors out of its control.62 The matter found its way back before the D.C. Circuit, which held the government is obligated to pay for damages arising out of breached contracts.63 When the deadline passed a few months later, the DOE officially breached all of its contracts made under the NWPA. As of November 2012, the DOE had paid $2.6 billion resulting from final judgments and settlements, and it expects to pay an additional $19.7 billion to resolve the remaining cases—many parties have already won on the merits and the outstanding issue to be litigated is the amount of damages.64

As the federal government was failing to uphold its side of the contracts, operators of nuclear plants were approaching the end of their original permits to hold SNF in the cooling pools. Operators had the option of applying to the NRC for extensions, which permitted them to...
store increasing amounts of spent fuel rods in the cooling pools, or for permission to transfer the fuel rods to steel-lined cement dry casks.65

Even if the NRC had extended licenses to store SNF at nuclear plants indefinitely, the plant operators would still be in position to sue the DOE for breaching the contractual deadline given the costs of indefinitely holding SNF. Extended licenses have costs associated with expanding on-site dry cask storage, fitting more spent fuel rods into cooling pools, relicensing these activities, and the liabilities that come with holding spent fuel.66 As these costs add up, the financial fallout from the DOE’s breach will cost taxpayers billions of dollars. The DOE has entered seventy-two contracts to accept SNF and high-level radioactive waste, and the damages and liabilities are estimated to cost taxpayers $500 million each year in settlement and damages until a permanent solution is available.67 Through 2011, seventy-eight claims had been filed against the DOE.68 If planning and construction of the repository were to move forward immediately without further delays, total damages at the time of expected completion in 2020 would be $20.8 billion.69 But that is an unrealistic expectation given the political environment, and that the DOE has most recently established a goal of opening interim storage facilities that could accept the waste by 2025.70

E. Funding for Nuclear Waste Management

The Obama Administration has taken many steps to block the NRC from approving the DOE application for Yucca. The President appointed Senator Reid’s former staffer to head the NRC;71 had the DOE withdraw the application, only to have such action held to be in violation of the NWPA;72 and established a Blue Ribbon Commission to review alternative solutions to the nation’s nuclear waste problem.73 As discussed below, the President did one more thing to block Yucca: he coordinated with Congress to stop funding the review of the DOE application.

65 See Kenny, supra note 20, at 1321–22.
66 See, e.g., S. Cal. Edison Co. v. United States, 655 F.3d 1319, 1320–21 (Fed. Cir. 2011) (holding that a nuclear plant operator was entitled to such indirect overhead costs as “plant security, emergency response systems, lease payments, regulatory fees . . . [and] salaries” in addition to the direct costs associated with building dry cask storage).
68 Id.
69 Id.
Projects spanning multiple appropriation cycles often fall victim to changing congressional priorities and the inability of participants to know what financing will be provided from year to year. Government agencies suffer from the inability to retain specialists, schedule projects in the most efficient order, or sign longer-term contracts with vendors that would provide more service for the same amount of taxpayer dollars. Proponents of the NWPA hoped to overcome these obstacles by creating the self-sustaining Nuclear Waste Fund. Although the fund holds over $28 billion,74 the NWPA requires Congress to first appropriate money from the fund to agencies before they may make expenditures.75 Thus, today Congress could provide the NRC and the DOE with all the necessary funding to complete a repository without increasing taxes, increasing the national debt, or shifting funds away from other programs.

It is hard to know exactly how much the NRC will need to complete its review of the DOE application for Yucca. The best cost estimate for a program can usually be found in the latest budget request by the NRC to the Office of Management and Budget.76 However, since 2010 the annual budget requests have reflected the political objective of the Administration to stop Yucca.77 In 2009, before political influences prevented the NRC from preparing a full faith review of the DOE application, the agency estimated it would need $99.1 million for the coming year.78 Congress appropriated $29 million for FY 2010 and $10 million for FY 2011.79 NRC’s funding request was reduced to zero dollars for FYs 2012 and 2013, as reflected by White House policy.80 With no surprise, Congress appropriated zero dollars in each year.81 Today the NRC has only $11.1 million in carryover funds to conduct its review of the DOE application.82 Not surprisingly, the nuclear industry is outraged that the Waste Fund’s collection of fees continues while the process of building a repository has

74 HASS, supra note 36, at 8.
76 Before the President delivers his budget to Congress, government agencies report their requests for the next fiscal year to the Office of Management and Budget (OMB). 31 U.S.C. § 1108 (2006). It is OMB policy not to publicize the initial budget requests submitted by agencies. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-11, § 22 (2013). However, the NRC’s requests for FY 2010, FY 2011, and FY 2012 were discussed in the Inspector General’s report made public by earlier litigation. See Final Brief for the Respondents, supra note 9, at 18 n.14.
77 See Final Brief for the Respondents, supra note 9, at 44–45 (noting that available funding for the NRC’s review process is far below the estimated $99.1 million annual appropriation necessary for an adequate review of the DOE application).
78 Id.
79 Id. at 18–20.
80 See supra note 58 and text accompanying notes 71–73.
81 See Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198 (funding all programs not mentioned in the bill at FY 2012 levels); see also Final Brief for the Respondents, supra note 9, at 21 (noting funds for FY 2012 were zero).
82 In re Aiken Cnty., 725 F.3d 255, 258 (D.C. Cir. 2013).
completely broken down.83

The DOE, which the government argues is a necessary participant in NRC’s review of the application, has also seen its funding for Yucca zeroed out in appropriations. There are 288 outstanding contentions that the DOE must answer and defend as part of its responsibility to litigate its application.84 As the applicant, the DOE bears the burden of appearing before the Atomic Safety and Licensing Board (ASLB), an independent trial-level adjudicatory body within the NRC, and responding to any contention from a party with standing.85 Congress appropriated $390 million total to the DOE for FY 2008,86 which has steadily declined to $288 million for FY 2009, $197 million for FY 2010,87 $10 million for FY2011, $0 for FY 2012,88 and $0 for FY 2013.89

Although the final appropriation bills coming out of Congress in recent years have prevented further action on the application, many congressional members still support Yucca. The House passed an appropriation bill in the summer of 2011 that provided $25 million to the NRC to review Yucca.90 The bill explicitly forbade the use of any appropriated funds “to conduct closure of adjudicatory functions, technical review, or support activities associated with the Yucca Mountain geologic repository license application . . . or for actions that irrevocably remove the possibility that Yucca Mountain may be a repository option in the future.”91 The funding and language in the House version of the bill did not survive the conference committee.92

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84 Final Brief for the Respondents, supra note 9, at 27.
88 Final Brief for the Respondents, supra note 9, at 20–22.
89 See Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 198 (funding all programs not mentioned in the bill at FY 2012 levels).
90 H.R. 2354, 112th Cong., tit. 3 (as passed by House, July 15, 2011). The Energy and Water Development and Related Agencies Appropriations Act is one of twelve annual appropriation bills, and encompasses funding for hundreds of programs. SANDY STREETER, CONG. RESEARCH SERV., 7-5700, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION 2 (2007). Passage of the bill in the House does not suggest that a majority of House members support the quoted language on Yucca; it suggests that there is enough influence in the majority to support such language. Whether a majority of House members support a permanent repository at Yucca cannot be ascertained by up-or-down votes on appropriation packages.
91 H.R. 2354, 112th Cong., § 604.
F. The NRC’s Refusal to Act on the DOE Application

NRC has missed its statutory three-year deadline of June 3, 2011, and does not plan to review the DOE application unless adequate funding is provided. It is undisputed that $11.1 million is inadequate to complete an assessment of the DOE application, but there are other political considerations at play as well. In 2010, the Obama Administration had the DOE withdraw its 2008 application.93 The ASLB held that the withdrawal violated the NWPA.94 The five commissioners of the NRC can reverse the ASLB, but they never made a ruling after the ASLB decision.95 In unorthodox fashion, Gregory Jaczko—Chairman at the time and a former staffer of Senator Reid96—held the five commissioner’s review of the ASLB decision open indefinitely because he did not have the votes to reverse its decision.97 Instead, Jaczko ordered a closure of the review process, and the petitioners alleged it was an illegal action that shut down the licensing process before Congress was able to eliminate funding to the DOE and the NRC.98 The Office of the Inspector General issued a report finding that Jaczko misled the other Commissioners of his intentions and delayed the Commissions action, but that he did not violate any laws.99

In response to the Administration’s continuous obstruction of Yucca Mountain, a coalition of industry stakeholders and municipalities initiated more litigation to force the government to abide by its statutory mandate. On July 29, 2011, Aiken County, South Carolina, along with other municipalities, states, individuals, and energy trade groups filed suit against the NRC seeking a writ of mandamus ordering the NRC to resume its review of Yucca Mountain using the funds it has left.100 The $11.1 million remaining funds makes for an interesting set of facts—if the NRC had already expended all its appropriated dollars, the petitioners in In re Aiken County would not be asking for a writ of mandamus compelling NRC to act, although many would still be in position to seek damages. If the NRC had more remaining funds, say perhaps an amount closer to the $99.1 million number it requested for FY 2010, the NRC could not have argued that it should be permitted to disregard a statutory mandate due to inadequate funds.

On August 3, 2012, the D.C. Circuit ordered the case to be held in

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95 Strassel, supra note 93.
96 Id.
97 Id.
98 Reply Brief of Petitioners, supra note 10, at 11–12.
100 Petition for Writ of Mandamus at 28, In re Aiken Cnty., 725 F.3d 255 (D.C. Cir. 2013).
abeyance to give Congress time to resolve the inconsistency between the mandate and appropriations law. After Congress failed to address the issue, the court had to answer whether the NRC was wrong to violate a statutory mandate when the available funds were inadequate to complete the mandate.

III. JUDICIAL REVIEW OF AGENCY DECISIONS

A. Issuing a Writ of Mandamus

Courts have historically issued writs of mandamus and injunctions to compel agencies to act when they unreasonably delay or disregard statutory mandates. Congress confirmed this authority of the courts and used it as a basis for constructing judicial review of agency actions when it passed the APA. The APA directs courts to “compel agency action unlawfully withheld or unreasonably delayed.” A writ of mandamus is not without its limitations; a court has no authority to demand that Congress provide an agency with additional funds to meet a statutory mandate or that agencies use resources in a more efficient manner. A writ of mandamus is also not a substitute for the tools that courts may use to force unwilling government institutions to resolve infringements of constitutional rights, such as school desegregation or prison conditions.

A court will not issue a writ of mandamus for every act that violates a

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104 5 U.S.C. § 706(1) (2012). The legislative history shows that § 706(1) was based on the writ of mandamus and the All Writs Act. Miaskoff, supra note 103, at 640.
105 In re Barr Labs., Inc., 930 F.2d 72, 76 (D.C. Cir. 1991).
106 The authority of federal courts to force the hand of unwilling state and local governments expanded with Brown v. Board of Education of Topeka (Brown II), 349 U.S. 294, 300 (1955), but remains weak and dependent on the willingness of a government institution to obey a court order. When government inaction demands court intervention, the courts take a quasi-executive enforcement role. They may hold officials in contempt, order third parties to sequester funds, appoint a receiver to administer school boards, or dissolve institutions. Ridgway, supra note 3, at 101–02. The necessary actions by states to address desegregation or prison overcrowding are costly endeavors, but cost and resource limitations are never an excuse. Id. at 97. The Supreme Court even held that a court might prohibit a municipality’s tax and spending measures. Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 235 (1964). Such options available to force government action that stop the infringement of constitutional rights are not available for agency delay of a statutory mandate.
statute. The writ is preserved for “extraordinary circumstances,” when the agency has a “clear duty to act” and the petitioner has a “clear right to relief.” Because a mandamus is an equitable remedy, courts consider practical considerations such as “timing, resources, and efficacy.”

B. Agency Delay in the Face of a Statutory Mandate

Courts extend considerable deference to agency decisions. Unless otherwise stipulated in the authorizing statute, an agency decision is reviewable under sections 701 to 706 of the APA. Section 701(a)(2) exempts agency actions from judicial review that are “committed to agency discretion by law.” The Supreme Court held in *Lincoln v. Vigil* that there is no judicial review of how an agency spends its appropriated dollars when such action is committed to agency discretion by law. The Indian Health Service, an agency within the Department of Health and Human Services, had been operating a pilot health care program for children in the Southwest under legislation authorizing a nation wide program. Congress funded the program with the intention that such funds would be used to serve populations only in the Southwest pilot, but it never re-addressed the authorizing legislation that had a national scope. Recipients of health care in the Southwest who lost services when the Indian Health Service began stretching the funds on a nationwide program brought suit. The Court held that such action was not subject to judicial review because such action was “committed to agency discretion by law.”

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108 Id. (quoting Power v. Barnhart, 292 F.3d 781, 784 (D.C. Cir. 2002)).
110 Agency discretion can be viewed as being extended by courts, or it can be viewed as an extension of legislative authority provided by Congress—the two viewpoints do not conflict. For example, when Congress passed the Clean Air Act, it directed the EPA to determine air standards that “allow[] an adequate margin of safety . . . to protect the public health.” 42 U.S.C. § 7409(b)(1) (2006). This open standard gave the EPA considerable discretion to determine what volume of a particular pollutant in the air crosses the threshold of harming the public health; and the EPA need not consider the economic implications of the standards it decides. When challenged, the Supreme Court held that Congress can delegate its authority to agencies. Whitman v. Am. Trucking Ass’ns, Inc., 531 U.S. 457, 474–75 (2001). Agencies have unreviewable enforcement discretion unless the statute tailors the agency’s discretion. A statutory deadline, such as the one that required an NRC decision within three years, is one way to tailor the discretion of an agency.
112 Id. § 701(a)(2).
114 Id. at 193.
115 Id. at 185–87.
116 Id. at 186–88.
117 Id. at 189.
The seminal case on agency discretion is *Heckler v. Chaney*, which addressed whether an agency’s decision not to take enforcement action is committed to agency discretion by law. The Supreme Court reasoned that deference to agency decisions is appropriate because: (1) agencies are experts in their fields and judges are not in a position to balance the competing demands for the limited resources at an agency’s disposal; (2) when an agency fails to act, its decision generally does not threaten the right of an individual deserving the protection of the courts; and (3) the doctrine of separation of powers left the executive branch with responsibility to “take Care that the Laws be faithfully executed.” In *Chaney*, the Court held that an agency decision whether to enforce a violation of a law is unreviewable by the courts under section 701(a)(2) of the APA. Courts simply do not have the expertise to second-guess the thousands of decisions made each day by government agencies.

The Supreme Court has not addressed when an agency’s delay demands a writ of mandamus by the courts. The issue remains marked by inconsistencies in the courts, and scholars have noted that academia has also failed to provide helpful guidance. The factors considered by the Court in *Chaney* regarding agency inaction parallel factors considered by courts looking at agency delay. Whereas *Chaney* is well-established Supreme Court doctrine uniformly followed by lower courts, the principle of agency deference should guide courts when considering charges of agency delay.

Professor Richard Pierce argues that the judiciary has responsibility to take an active role in crafting remedies that address agency delay in the face of inadequate resources. He predicted in 1997 that agencies would forever have constantly diminishing resources to comply with statutory mandates because Congress faces myriad political demands that call for spending cuts and the exercise of Congress’s power to set mandates.

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118 *Id.* at 193 (quoting 5 U.S.C. § 701(a)(2) (1988)).
120 *Id.* at 826.
121 *Id.* at 831–32 (quoting U.S. CONST. art. II, § 3).
122 *Id.* at 837.
123 See Eric Biber, The Importance of Resource Allocation in Administrative Law, 60 ADMIN L. REV. 1, 4, 11 (2008) (arguing that judicial review of agency inaction and delay is “incoherent” because the courts wrongly treat agency action and inaction differently); Ridgway, supra note 3, at 94 (“Concrete guidance for judicial intervention is rare.”); Michael D. Sant’Ambrogio, Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging, 79 GEO. WASH. L. REV. 1381, 1388 (2011) (“The approach developed in the lower courts is ad hoc, incoherent, and difficult to apply consistently.”).
125 *Id.* at 64–66.
Applying the principals from *Chaney*, Pierce favors more discretion for agencies because courts are ill equipped to strike the balance among the many statutory demands on agencies with their limited resources.\textsuperscript{126} Using the 14,000 decisions with statutory deadlines made annually by the Immigration and Naturalization Service as his example, Pierce points out the reality that a good majority of agency decisions do not come before federal courts when a deadline is missed.\textsuperscript{127} Pierce would give agencies the discretion to delay, except in circumstances where Congress specifies a statutory deadline.\textsuperscript{128} He believes statutory deadlines demonstrate Congress’s intent and its rejection of the idea that a lack of agency resources is a reasonable excuse to delay.\textsuperscript{129}

Professor Michael D. Sant’Ambrogio contends that agency delay is an unavoidable cost of the administrative state, and that Congress and the Executive are better equipped than the courts to address the issue.\textsuperscript{130} Nonetheless, Sant’Ambrogio concludes that all three branches of the government have a responsibility to address agency delay, and that courts should make a contribution by using a cost-benefit analysis.\textsuperscript{131} Anchoring his conclusions in the Supreme Court’s 2007 decision in *Massachusetts v. EPA*,\textsuperscript{132} he argues that any delay in agency rulemaking must be grounded in the substantive law and not other policy considerations, no matter how practical the policy may be.\textsuperscript{133} So long as the delay to the rulemaking is supportive of the underlying objectives of the law, deference should be given to the agency.

In *Massachusetts v. EPA*, the EPA argued that it should be permitted to delay its determination whether the Clean Air Act requires regulation of greenhouse gasses because the executive branch initiated voluntary programs to address global warming and further action under the Act would impair international negotiations to reduce emissions.\textsuperscript{134} The Court refused to consider these policy considerations unaddressed by the Act and held that the EPA had a duty under the Act to determine whether greenhouse gas emissions harmed the public health and welfare.\textsuperscript{135}

Looking at *Massachusetts v. EPA* as well, Andrew Schwentker argues that an agency has unfettered discretion to delay rulemaking indefinitely if

\textsuperscript{126} *Id.* at 92–93.

\textsuperscript{127} *Id.* at 85.

\textsuperscript{128} *Id.* at 93.

\textsuperscript{129} *Id.*

\textsuperscript{130} Sant’Ambrogio, supra note 123, at 1430–32.

\textsuperscript{131} *Id.* at 1435–36.

\textsuperscript{132} 549 U.S. 497 (2007).

\textsuperscript{133} Sant’Ambrogio, supra note 123, at 1436.

\textsuperscript{134} 549 U.S. at 533.

\textsuperscript{135} *Id.* at 534–35.
it determines it has inadequate resources. 136 In essence, such an argument could have given the EPA a way to avoid the Court’s order to comply. Schwentker’s argument is another option for agencies with pre-textual motives, political or otherwise, that wish to delay statutory mandates. He did not suggest such deference applies to statutory deadlines in an adjudicatory process as is the case in In re Aiken County, but there are similar factors in both scenarios.

To better appreciate the factors courts apply when considering whether an agency’s action is unlawfully delayed, this Note looks beyond the scholarly articles to federal cases. In 1976, the plaintiffs in Open America v. Watergate Special Prosecution Force 137 sued the FBI when the agency response rate to document requests was months behind the thirty-day deadline established by the Freedom of Information Act (FOIA). 138 The FBI argued that it was doing the best it could with a backlog of 5,000 requests and no additional funding from Congress to manage the new obligation imposed by the Act. 139 When Congress passed FOIA it had estimated that each agency would bear an additional $100,000 in workload costs to meet the public demand for government documents. 140 Instead of appropriating additional funds for each agency, Congress intended that agencies would use their general funding to respond to requests. 141 The demand on the FBI greatly exceeded those predictions, and the level of requests cost $2,675,000 in the first year of FOIA’s implementation. 142 The court’s decision was relatively lenient: given the FBI’s limited resources, it was permitted to ignore its statutory deadline to the extent it made a good faith effort to respond to FOIA requests in the order they were received. 143

In 1984, the D.C. Circuit articulated the “TRAC factors” in Telecommunications Research & Action Center (TRAC) v. FCC. 144 These factors offer guidance on whether an agency’s delay is so egregious that a court must issue a writ of mandamus. The plaintiffs in TRAC filed suit against the FCC after the agency failed to rule on the validity of overcharge fees assessed on AT&T customers more than four years after the bills were paid. 145 The Court formulated six factors that previous

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137 547 F.2d 605 (D.C. Cir. 1976).
138 Id. at 608.
139 Id. at 613.
140 Id. at 612.
141 Id.
142 Id.
143 Id. at 616. But see Pierce, supra note 124, at 93 (favoring considerable deference to agency decisions, but not when Congress sets a statutory deadline).
144 750 F.2d 70 (D.C. Cir. 1984).
145 Id. at 72.
courts had applied and that are appropriate for review of an agency delay:

(1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.146

After laying out the comprehensive TRAC factors, the court reasoned that the factors did not have to be applied to the case at hand because the FCC assured the court that it would take proper remedial steps in the near future.147 The court avoided what appeared to be a ripe opportunity to provide a clear standard for later courts to determine when a writ of mandamus is appropriate to address agency delays. However, had the court applied the factors and found a writ of mandamus appropriate, a judgment ordering the agency to act would not have been much harsher than the remedy chosen by the court—continued oversight by the court and mandatory updates by the FCC.148 This example shows that there can be little to no difference between an agency’s response to a decision finding it unlawfully delayed and a decision finding it acted within its authority.

In 1991, the D.C. Circuit applied the TRAC factors in In re Barr Laboratories, Inc.149 when the Food and Drug Administration (FDA) failed to review a new drug application within a statutory deadline.150 The court held that mandamus was not appropriate because compelling the agency to act would “impose offsetting burdens on equally worthy generic drug producers, equally wronged by the agency’s delay.”151 The court, utilizing TRAC’s fourth factor, held that unreasonable delay alone does not justify judicial intervention, and that requiring the FDA to act on the plaintiff’s application ahead of others would simply compromise the agency’s other

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146 Id. at 80 (citations and internal quotation marks omitted).
147 Id.
148 Id. at 81.
149 930 F.2d 72 (D.C. Cir. 1991).
150 Id. at 74.
151 Id. at 73.
priorities.152 Any benefit derived from expediting one application would delay other equally worthy applications, and the court determined it had no remedy available that would “advance either fairness or Congress’s policy objective.”153 Had the court ordered the FDA to act immediately on the plaintiff’s application, it would have been doing no more than prioritizing the agency’s resources—and if every applicant with a legitimate claim against the FDA’s failure to meet its statutory deadline had filed suit, the court would have no remedy to provide.

In Forest Guardians v. Babbitt (Forest Guardians II),154 however, the United States Court of Appeals for the Tenth Circuit declined to follow In re Barr Laboratories and did not apply the TRAC factors when the Department of the Interior missed a clear statutory deadline.155 The APA stated that a “reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed.”156 The Tenth Circuit understood “unreasonably delayed” to mean that a court generally has discretion to determine when agency delay is unreasonable.157 Ultimately, however, the court held that when an agency fails to meet a congressionally imposed deadline, a court-ordered writ of mandamus is always appropriate and necessary because agency action was “unlawfully withheld” under the APA.158 Thus, in Forest Guardians, the Tenth Circuit held that mandamus was appropriate to compel the Secretary of the Interior to designate the critical habitat boundaries of the silvery minnow when the Secretary had exceeded the allotted time.159 Both In re Barr Laboratories and Forest Guardians were decided over ten years ago, and the Supreme Court has not addressed the split between the D.C. and Tenth Circuit.

While the Tenth Circuit has adopted a black-line rule for determining when mandamus is necessary, the application of the rule in Forest Guardians led the parties to a result similar to the more lenient rule adopted by the D.C. Circuit in In re Barr Laboratories. After remanding the case and directing the lower court to “consider what work is necessary to complete the [habitat] designation,”160 the Tenth Circuit acknowledged its powers were insufficient.161 Although the deadline had passed two

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152 Id. at 75.
153 Id. at 76.
154 174 F.3d 1178 (10th Cir. 1999).
155 Id. at 1191.
157 Forest Guardians II, 174 F.3d at 1190.
158 Id. at 1191.
159 Id. at 1193.
160 Forest Guardians v. Babbitt (Forest Guardians I), 164 F.3d 1261, 1274 (10th Cir. 1998), amended by 174 F.3d 1178 (10th Cir. 1999).
161 See Forest Guardians II, 174 F.3d at 1180 (amending its original decision and holding that “any order now to impose a new deadline for compliance must consider what work is necessary to publish the final rule and how quickly that can be accomplished”).
years prior, and mandamus was ruled appropriate, the court was at a loss for what it could realistically expect to demand from the agency. When agency inaction is the result of inadequate resources, courts acknowledge that they lack the expertise to balance the competing demands of the agency,\textsuperscript{162} and risk reorganizing the agency’s priorities to the detriment of another party.\textsuperscript{163}

C. Agency Inaction in the Face of Limited Resources

Agency delay may be caused by various impediments such as congressional politics, presidential priorities, agency capture, incompetency, unforeseen circumstances, or simply limited resources. It is this last cause of delay that the NRC argued prevents it from reviewing the DOE application.\textsuperscript{164} The NRC contended that TRAC cannot be applied to determine whether mandamus is appropriate because the agency cannot be faulted for inaction for something that is “impossible” to accomplish given the absence of congressional appropriations.\textsuperscript{165} It argued that the three-year statutory deadline to make a determination on the DOE application for a permanent repository was “tolled” by Congress, which chose not to appropriate adequate resources to complete the review.\textsuperscript{166}

Further, the NRC argued it cannot conduct an adequate review without the DOE actively litigating and defending its application before the ASLB.\textsuperscript{167} As the applicant, the DOE must defend the more than 288 outstanding contentions by interveners, and Congress has refused to appropriate funding to the DOE for such purposes just as it has withheld funding from the NRC.\textsuperscript{168}

With more than $28 billion sitting in the Waste Fund, one might think the NRC does not have a shortage of resources. If a writ of mandamus is an equitable solution, then perhaps a court should order the NRC to use the Waste Fund or use general appropriations. Unfortunately for the petitioners, these solutions run afoul of the Constitution and the NWPA.

The NWPA states the repository should not be built with taxpayer dollars, but with fees levied on the entities whose nuclear waste will be

\textsuperscript{162} See, e.g., Heckler v. Chaney, 470 U.S. 821, 831 (1985) (“[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”).

\textsuperscript{163} See, e.g., Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (describing TRAC’s fifth factor).

\textsuperscript{164} Final Brief for the Respondents, supra note 9, at 39.

\textsuperscript{165} Id. at 56–57.

\textsuperscript{166} Id. at 57. As used in this Note, to toll something means “to stop the running of [it],” and is used to reference the suspension of a statute’s time requirements. BLACK’S LAW DICTIONARY 1625 (9th ed. 2009).

\textsuperscript{167} Final Brief for the Respondents, supra note 9, at 27.

\textsuperscript{168} See supra text accompanying notes 84–89.
stored. The Waste Fund, established by section 302(c) of the NWPA, is paid into by producers of nuclear waste and may only be used to dispose nuclear waste, or matters associated with a permanent solution. To date, the NRC has used the Waste Fund only when Congress has appropriated funds from it. Restricting itself from using general funds is consistent with appropriations law established by Congress and clarified by the Government Accountability Office (GAO) in the Principles of Federal Appropriations. This highly respected guidance states that an agency may not use a general appropriation where Congress has made a specific appropriation for a program, unless the specific appropriation has been exhausted and the legislation stipulates that the general appropriation may be used at such time. Article I of the Constitution entrusts Congress to appropriate money from the Treasury, which administers the Waste Fund. Simply put, the judicial authority to issue a writ of mandamus is not extensive enough to order the NRC, Treasury, or Congress to use the Waste Fund for the sole purpose for which it was created.

Even if the NRC could use general appropriations, it is not possible to know what ramifications it would have on the NRC’s other priorities. Courts have been reluctant to decide how an agency should spend its resources on a given mandate. Using general appropriations to review the DOE application would sacrifice other statutory priorities of the NRC,

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170 Id. § 10222(c), (d); see also 128 CONG. REC. 32,554, 32,556–67 (1982) (floor comments by Senator James McClure, Chairman of the Senate Committee on Energy and Natural Resources); 128 CONG. REC. 26,306, 26,308 (1982) (summary of the Act entered into the record by Congressman Morris Udall, Chairman of the House Committee on Interior and Insular Affairs).
171 See 1 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-2615P, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-21 to 2-23 (3d ed. 2004) (“The Red Book”). Congress has tasked the GAO with guiding federal agencies on matters of appropriations law. See 31 U.S.C. §§ 3528–3529 (authorizing the GAO to relieve from liability a government official authorized to spend money of the United States if the official wrongfully spent funds but did so in good faith, and instructing the GAO to respond to certified officials when they pose questions regarding how the agency’s funds may be spent). To fulfill this responsibility the GAO publishes the Red Book, a comprehensive three-volume guide on appropriations law that federal agencies consult on a daily basis when they have questions regarding how much appropriations money they can spend and for what purposes. If an agency seeks more assurance, it may petition the GAO for a decision on the matter. Id. § 3529. The Red Book and GAO decisions provide guidance and a healthy precedent for most inquiries, but they do not provide guidance for all possible scenarios, e.g., whether the remaining $11.1 million at the NRC’s disposal must be spent down.
173 U.S. CONST. art. I, § 9, cl. 7.
174 42 U.S.C. § 10222(c).
175 For other examples when courts are limited in their ability to force the hand of government, see supra, notes 105 and accompanying text.
176 In using TRAC factors, the court avoided making decisions for agencies that were better positioned to prioritize their responsibilities with available resources. See Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (outlining the fourth factor).
and would not remedy the DOE’s inability to be an active participant.

Some courts and scholars have taken the position that a statutory deadline represents the clear intent of Congress, and that section 706(1) of the APA demands that courts compel agencies to comply regardless of resource constraints. The Tenth Circuit took this position in *Forest Guardians*, as discussed above.177 Professor Eric Biber highlights resource allocation as a consistent and principal factor in opinions by courts reviewing agency decisions.178 Biber believes an agency without adequate resources should be permitted to delay a statutory mandate indefinitely if resources are not provided—but he makes a similar exception as the Tenth Circuit, and would compel an agency to act if it is in violation of a statutory deadline.179 He joins the general consensus that courts must compel agencies with statutory deadlines to act regardless of inadequate resources.180

Despite the reasoned arguments that courts must compel agencies to act when they miss their statutory deadlines, should the deadline stand without question when Congress has intentionally underfunded the program? Is there no basis in law that a deadline set by Congress is not absolute in the face of inadequate funding? When courts are tasked with reconciling conflicting legislation, such as the NWPA against recent appropriations bills, they question Congress’s rationale. However, the precarious situation of underfunding a repository in Nevada does not stem from a single, rational, comprehensive plan. It is the product of competing interests within Congresses from the past and present. There are competing goals scattered amongst the 535 elected representatives, and courts have the task of deciphering what Congress as an institution intended.181 It becomes trickier when the competing goals of individual members result in legislation that is non-representative of any one member but the married outcome of many.

The remainder of Part III.C will review federal cases that address whether an agency must follow the strict reading of a statute when underfunding, impossibility, absurd results, and congressional intent does not favor a strict application of the law. In 1931, the Supreme Court reasoned that “[a] literal application of a statute which would lead to *absurd* consequences is to be avoided whenever a reasonable application

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177 *Forest Guardians II*, 174 F.3d 1178, 1191 (10th Cir. 1999).
179 *Id.* at 49.
180 *But see in re* Barr Labs., Inc., 930 F.2d 72, 73 (D.C. Cir. 1991) (holding that delay beyond a statutory mandate is not unreasonable where compelling an agency to process a plaintiff’s application would be detrimental to others with applications pending before the agency).
can be given which is consistent with the legislative purpose." 182 The Court held that although a provision in the National Prohibition Act permitted the government to seize all items found in a building used to manufacture intoxicating liquor, the government could only seize those items used or belonging to the defendant charged with violating the Act. 183 To permit the government to seize items belonging to third parties would create the “absurd consequence[]” of a “penalt[y] having no relation to the offense.” 184

There are times when a court should permit an agency to ignore a strict adherence of the law resulting in an absurd result due to a lack of agency resources. The D.C. Circuit applied this rationale in *Open America* when it held that an agency without adequate resources has discretion to miss a statutory deadline if the agency is making a good faith effort to comply. 185

In some circumstances, it is clear that an “absurd” result created by a statute must be followed. In a decision limiting the power of courts to dismiss a statute, the Supreme Court held in *Tennessee Valley Authority (TVA) v. Hill* 186 that the government could not close the gates on a completed $100 million dam because it would destroy the habitat of an endangered minnow. 187 Destruction of the habitat was prohibited under the Endangered Species Act, 188 which preceded appropriations to build the dam. The trial court held that the government could close the dam, noting Congress was fully aware of the habitat’s imminent destruction when it appropriated the funds, and that “[a]t some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result.” 189

The Supreme Court reversed the trial court and upheld the “cardinal rule” that authorizing legislation can only be repealed by subsequent legislation that directly repeals the prior law, and this is only more true for an implied repeal found in an appropriation bill. 190 Further, the Court avoided making any judgment on the reasonableness of the Act that forced

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183 *Id.* at 175–76.
184 *Id.* at 175.
185 *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976) (vacating an order that would have required the FBI to respond to a FOIA request within thirty days when the agency had no new resources to manage a case load demanding $2.7 million in resources and the agency was making a good faith effort to respond in the most fair, practical manner).
187 437 U.S. at 174.
189 *TVA v. Hill*, 437 U.S. at 189.
190 *TVA v. Hill*, 437 U.S. at 189.
abandonment of $100 million spent on a dam, since the underlying law was “abundantly clear that the balance ha[d] been struck in favor of affording endangered species the highest of priorities.”

The United States Court of Appeals for the Seventh Circuit also heard a case about a partially completed dam in *County of Vernon v. United States.* The court held that the Army Corps of Engineers did not violate the statute when it stopped construction of a dam with funds remaining because Congress had gone fourteen years without appropriating the requisite funds to complete the job. The Army Corps had acquired several thousand acres and undertaken construction from 1971 to 1975, at which time the Governor and the state’s congressional representatives had withdrawn their support. Congress ceased all funding by 1977 and the court was not asked to rule until 1991.

The facts are analogous to *In re Aiken County,* although the Seventh Circuit could say with more certainty that after fourteen years of no appropriations for the dam, Washington would continue to not provide additional funds. It is easy to agree that a writ of mandamus ordering the Army Corps to spend down all of its remaining funds would have been absurd. It is somewhat harder to argue that the writ of mandamus ordering the NRC to do the same is absurd given that the Yucca project is only on its third year of zero funding, nuclear waste is a problem that will not go away, and proponents of Yucca remain in Congress.

Not only does Congress appropriate inadequate funds, but at times it proactively prohibits the use of any funds for a statutory mandate. Just months after the Secretary of Interior exceeded the Endangered Species Act deadline for declaring the habitat boundaries of the red-legged frog, Congress precluded expenditure of FY 1995 funds for such activities. The United States Court of Appeals for the Ninth Circuit held in *Environmental Defense Center v. Babbitt* that if an appropriation bill

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191. Id. at 194. In direct response to the Court’s decision, Congress passed section 5 of the Endangered Species Act Amendments of 1978, which inserted an exemption into the Act allowing the Tellico Dam to close and flood the endangered minnow’s habitat. So while *TVA v. Hill* was technically superseded, it is still cited as good law for its principles: requiring courts to uphold troublesome aspects of legislation when the intent of Congress was clear, see *INS v. Chadha,* 462 U.S. 919, 944 (1983) (“Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.” (citing *TVA v. Hill,* 437 U.S. at 194–95)), and that an authorizing statute cannot be modified or amended by an appropriations statute, Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 670 (2007) (citing *TVA v. Hill,* 437 U.S. at 189 n.35).
192. 933 F.2d 532 (7th Cir. 1991).
193. Id. at 535.
194. Id. at 533.
195. Id.
197. Id.
prohibits use of the funds from carrying out a particular mandate, then a writ of mandamus is not appropriate because it is impossible for the agency to comply with the statute. 198 The Ninth Circuit dictated that the statutory mandate was not repealed, but there was no duty to act until funds were made available.199

IV. ADOPTING A NEW RULE

A. Challenge for the Courts

After waiting a year to see if Congress would address the inconsistency between what the law mandated and the reality of appropriated funds, the D.C. Circuit ordered the NRC to spend the remaining $11.1 million to review the DOE application for Yucca.200 Essentially, the court held that after a reasonable amount of patience, it is always appropriate to order an agency to use remaining funds to move forward with a statutory mandate.201 Although the court acknowledged that the $11.1 million would be wasted if Congress did not take action to fund the review process, the court reasoned that it had “no good choice but to grant the petition for a writ of mandamus.”202 But there was a better choice.

The court’s main argument was that continual defiance of a statutory mandate violated Congress’s constitutional authority to pass laws that the Executive must obey.203 The court simplified the facts to fit them within the constitutional principle requiring the Executive to “follow statutory mandates so long as there is appropriated money available.”204 It is not a fair analysis of the facts to assert that appropriated money is available to review the license for a repository at Yucca Mountain when spending it would not increase the speed or likelihood of achieving the policy objectives of the NWPA. While an agency cannot ignore a mandate simply because Congress provided inadequate funding,205 the court should permit the mandate to be tolled until funds are appropriated.206

But what is adequate funding, and should the agency make that determination? The court in In re Aiken County only addressed the latter

198 Id. at 869.
199 Id.
200 In re Aiken Cnty., 725 F.3d 255, 259 (D.C. Cir. 2013).
201 Id.
202 Id. at 266.
203 Id. at 259.
204 Id.
205 See id. at 259 (holding that three consecutive years of near zero appropriations for a statutory mandate does not repeal the mandate).
206 See id. at 268 (Garland, C.J., dissenting) (recognizing that the NRC has not refused to proceed with the mandate receiving zero appropriations for three consecutive years, only that the agency has suspended the process until there are sufficient funds to make meaningful progress).
question and rejected more discretion at the helm of agencies, under the concern it would shift power from Congress to the Executive.207 Further, if mandates can be tolled due to inadequate appropriations, how can courts be assured that an agency is not abusing that discretion to toll laws it disfavors?

B. The Proposed Rule

This Note proposes that a writ of mandamus ordering an agency to act is not appropriate when there is near certainty the action will not expedite relief for the claimant due to a lack of future appropriations. As was the court’s conclusion in TRAC, the decision whether to allow an agency to violate a statute is not an easy one.208 But drawing on the discussion in Part III, courts would be wise to consider the following factors:

1. Whether general appropriated funds may be used to fulfill the statutory duty;
2. Whether Congress is unlikely to appropriate sufficient funds in the future that would render spending the remaining funds beneficial to fulfilling the statutory mandate;
3. Whether starting and stopping actions to address the statutory mandate creates added costs; and
4. Whether mandamus would negatively implicate the agency’s other statutory duties.

Each of these factors should be applied with the flexibility necessary to successfully exercise the equitable authority of courts.209

Factor 1: Whether general appropriated funds may be used to fulfill the statutory duty.

If general appropriated funds may be used to fulfill a duty by a statutory mandate, then an agency should be ordered to draw on such funds in a manner that does not have negative implications—such as those discussed below in Factor 4. If an agency has full discretion to use its general appropriations to fulfill the mandate then courts must appropriately balance this ability with the other factors. The agencies in In re Barr Laboratories, Environmental Defense Center, and Forest Guardians all had limitations on some set of funding. In a comparable manner, the NRC

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207Id. at 259 (majority opinion).
208See Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (“Although the standard is hardly ironclad, and sometimes suffers from vagueness, it nevertheless provides useful guidance in assessing claims of agency delay.”).
209See, e.g., Miaskoff, supra note 103, at 652 (“The TRAC test is necessarily flexible because the issue of reasonableness is a question of fact.”).
was prohibited from using its general appropriations.

Factor 2: Whether Congress is unlikely to appropriate sufficient funds in the future that would render spending the remaining funds beneficial to fulfilling the statutory mandate.

Politics is unpredictable and given the sheer difficulty of passing legislation that a majority of Congress supports, courts should not rely on what Congress might do next. But at times, it is appropriate to predict what Congress will not do. The Seventh Circuit correctly held that after fourteen years of no additional funding, the Army Corps of Engineers cannot be ordered to continue construction of a dam when “Congress has not appropriated sufficient funds to complete the Project.”\(^{210}\) The proposed rule states that if there is near certainty that Congress will not appropriate additional funds for a mandated project that a court should weigh such facts in its decision whether to compel agency action.

The possibility of future funding is necessary for the writ of mandamus to have any chance at providing relief to the claimant. The petitioners in In re Aiken County ultimately sought not just NRC’s review of the Yucca application, or a repository in Nevada, but also the carting away of nuclear waste from their respective locales. Absent the possibility of future funding, a writ of mandamus ordering the NRC to act will not expedite the remedy sought by the petitioners, and it would not be within the court’s jurisdiction to issue such a writ.

Therefore, can the D.C. Circuit be near certain that Congress will not appropriate adequate funding for the review of the DOE application after making zero appropriations in the three previous years? This Note does not imagine that predicting Congress’s inaction in the future will be easy. Reliance on three years of congressional action to make a prediction is materially different than reliance on fourteen years of no funding, as considered by the Seventh Circuit in County of Vernon. However, it would be foolish to think that the NRC will receive the necessary funding to make measurable progress within the next four years when considering the following relevant factors: the nuclear disaster at Fukushima Daiichi motivated a new sense of congressional urgency to address nuclear waste;\(^ {211}\) the most recent Presidential budgets have all requested zero or

\(^{210}\) Cnty. of Vernon v. United States, 933 F.2d 532, 535 (7th Cir. 1991).

\(^{211}\) The 2011 tsunami that hit the Fukushima Daiichi plant in Japan flooded the generators that powered the water pumps replenishing the cooling pools. Fukushima Accident, WORLD NUCLEAR ASS’N, http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Fukushima-Accident/#.UlHQcCTFbXN (last updated Oct. 10, 2013). The loss of power resulted in exposure of spent fuel rods and a significant release of radioactive material. Mitsuru Obe & George Nishiyama, Japan Works to Avoid New Blast: Nuclear-Plant Operators Begin Injecting Nitrogen into Reactor, as U.S. Assessment Flags Range of Risks, WALL ST. J., Apr. 7, 2011, at A10. The accident sparked a wave of calls to move more SNF from the cooling pools to dry casks at a faster
inadequate funding for the Yucca licensing process; the Majority Leader in the Senate has blocked all attempts to provide even marginal funding for the licensing process; and the expectation that Obama and Reid will maintain the same policy prerogative during their time in office through January 2017.

There is near certainty that Congress will not act before the NRC uses the entire $11.1 million before making any permanent progress on the review. Even if Senate Republicans win a majority in the 2014 election and pass an appropriation bill that fully funds the licensing process and there is a legislative vehicle that avoids a presidential veto, funding for the application review would arrive at the NRC in the last months of 2015. Even under these most promising conditions for Yucca supporters, the review process of Yucca Mountain will not receive another dollar for more than two years.

**Factor 3: Whether starting and stopping actions to address the statutory mandate creates added costs.**

Mandamus is an equitable remedy that considers “timing, resources, and efficacy.” It cannot be assumed that spending money today will move a process closer to completion, especially a federal agency that must put projects on pause as it waits for additional funds. The Supreme Court in *Chaney* recognized greater agency discretion because, inter alia, agencies are the experts in the field and judges are inferior at balancing competing priorities with limited resources. If a court finds an agency is likely to spend all of a program’s funding before Congress appropriates additional funds, then the court must ask whether ordering the agency to act will result in a squandering of those funds. The substantive law might be better addressed, and in quicker fashion, if those limited resources are combined with future appropriations by Congress. The NRC argued that starting and stopping a review process sacrifices the ability to retain specialists, assemble the ASLB judges to hear contentions, furnish a courtroom facility in Nevada, and pick up the litigation on contentions left unresolved. An equitable solution with these circumstances does not demand a writ of mandamus.


212 The newly elected Congress will begin January 3, 2015, U.S. CONST. amend. XX, § 1, and be responsible for the coming FY 2016 appropriations, beginning October 1, 2015, 2 U.S.C. § 631 (2012).


215 Final Brief for the Respondents, supra note 9, at 44.
Factor 4: Whether mandamus would negatively implicate the agency’s other statutory duties.

Courts should not order agency action that grants relief for a party before the court at the expense of other individuals with adjudicatory matters before the agency. As was addressed in In re Barr Laboratories, the D.C. Circuit held that a writ of mandamus ordering an agency to review a claimant’s application was not appropriate when doing so would delay the applications of other parties filed with the FDA.216 Congress set a time limit on the review of generic drug applications, and had the court ordered the agency to act on the plaintiff’s application, the order would have frustrated the statute by further delaying other applications also entitled to protection by the statute’s deadlines.217 In Open America, the D.C. Circuit was correct not to interfere with the FBI’s management of its FOIA response protocol even though it had a backlog of 5,000 requests exceeding the statutory deadline.218 Factor 4 was not relevant to In re Aiken County, where the NWPA required all appropriations from the Waste Fund to be used for a nuclear repository and Yucca Mountain is the only possible site.

One factor omitted from the proposed rule, but included in TRAC, is whether missing a statutory deadline or agency delay is found to mask impropriety by an agency.219 Such improper actions were not lost on Judge Rudolph, who joined the opinion in In re Aiken County.220 If impropriety were a factor, then surely the Administration’s and former Chairman Jaczko’s actions do not favor more discretion for the Executive to determine when inadequate funding permits tolling of a statutory mandate. But the proposed rule is indifferent to whether the agency delayed unfaithfully, focusing instead on preventing waste and avoiding absurd results.

Even if former Chairman Jaczko had illegally undermined the NRC’s ability to review the Yucca application, once Congress cut appropriations, the Chairman’s policy agenda became representative of current appropriations law. It is not a coincidence that opposition to Yucca at the oversight agency occurred around the same time Congress undermined the agency. When Congress is expected to defund an authorized project, even an impartial head of an agency would have practical reasons to prepare for the budget cuts if doing so preserves the integrity of the project. Although

216 In re Barr Labs., Inc., 930 F.2d 72, 75 (D.C. Cir. 1991).
217 Id.
219 See Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) (outlining the sixth TRAC factor: “the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed” (internal quotation marks omitted)).
Chairman Jaczko did everything to shut down the license review process before Congress took legislative action, a Chairman favoring the review process would take the same action if Congress was underfunding the program. For these reasons, it is appropriate for the proposed rule to be indifferent to impropriety when congressional appropriations preclude progress towards the statutory mandate.

The proposed rule also does not account for the possibility that partial review of the DOE application would provide relief to the claimant seeking a writ of mandamus. Although this question was not before the court, it is worthy to explain why not—given that the plaintiffs argued that partial completion of the review process has utility. Along with members of Congress, they argue that the NRC should respond to the court decision by moving forward immediately with the Safety Evaluation Report (SER), a NRC report that makes technical conclusions regarding whether the DOE application is compliant with safety and security regulations.

Their argument can feature one of two propositions. First, that completion of the SER will prove Yucca meets all safety regulations—undermining the argument of opponents and reigniting the political support necessary to fund the project. This argument has no merit because courts do not issue a writ of mandamus that provides relief in the form of political victories that may or may not result in benefits outside the control of the court.

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221 See, e.g., Petitioners’ Response to Brief of the United States as Amicus Curiae at 9, In re Aiken Cnty., 725 F.3d 255 (No. 11-1271) (“The SERs and the full licensing record, paid for by billions of dollars of public funds, will inform all future repository efforts, regardless of whether Yucca Mountain is ever built.”).


223 Implementing the Nuclear Waste Policy Act—Next Steps: Hearing Before the Subcomm. on Env’t and the Econ. of the H. Comm. on Energy & Commerce, 113th Cong. 3 (2013) (statement of Allison M. MacFarlane, Chairman, U.S. Nuclear Regulatory Comm’n). The SER was planned to be reported in five volumes, and volume one was released in 2010 before the review process was put on hold. Id.; see also 1 SAFETY EVALUATION REPORT RELATED TO DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN A GEOLOGIC REPOSITORY AT YUCCA MOUNTAIN, NEVADA, U.S. NUCLEAR REGULATORY COMM’N 1 (2009) (noting that the NRC documents the review process of a license application in a SER).

224 See Petitioners’ Response to Brief of the United States as Amicus Curiae, supra note 221, at 9 (recognizing that the SERs “will inform all future repository efforts”).

225 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 (1992) (holding that the complaint, requesting that an Egyptian construction project receiving U.S. funds comply with the Endangered Species Act, lacked redressability because the construction project could still be implemented, and the habitat of an endangered species destroyed, when U.S. aid only accounted for 10% of the project’s funding); Weber v. United States, 209 F.3d 756, 760 (D.C. Cir. 2000) (holding that a writ of mandamus is not appropriate to order an agency investigation that leads to a recommendation not binding on
Second, proponents of Yucca may argue that the review process is a step-by-step process, and every step completed reduces the amount of time remaining to complete the entire review. However, it has not been shown that $11.1 million is enough to complete the SER, and the premise that it can be completed contradicts the finding by the court that no meaningful progress could be conducted with just $11.1 million.226 Even if the SER can be completed with the funds, it was never shown that doing so would expedite the additional pieces of the NRC review necessary to approve the application.227

C. What Should Be Made of Congressional Intent?

The Supreme Court has long held that courts need not apply a strict reading of the law if such a reading yields an absurd result.228 At the same time, the Court’s decision in TVA v. Hill holds that courts should not apply the absurdity doctrine where Congress was aware of the law’s impact.229 So, if spending $11.1 million would prove completely wasteful, is it possible Congress was not aware of the impact the NWPA and subsequent appropriations would have on the overall plan? Through public pledges, committee reports, and letters to agency officials, congressional leaders have staked out their positions on Yucca; however, the recent appropriation bills and corresponding conference reports offer no explanation of what Congress intended when it provided zero funding for FYs 2012 and 2013 for the NRC’s review of the application.230 The latest appropriation bills reflect congressional intent to prevent any meaningful review of the DOE application during the most recent fiscal years231—but does it show that Congress was aware that $11.1 million of taxpayer dollars would be squandered on a review process that is impossible to

226 See In re Aiken Cnty., 725 F.3d at 267 (“[If] Congress determines in the wake of our decision that it will never fund the Commission’s licensing process to completion, we would certainly hope that Congress would step in before the current $11.1 million is expended, so as to avoid wasting that taxpayer money.” (emphasis added)); id. at 269–70 (Garland, C.J., dissenting) (“The Commission has concluded that it cannot [make any meaningful progress with the remaining $11.1 million]. And we are not in a position—nor do we have any basis—to second-guess that conclusion.” (citations omitted)).

227 Most notably, the review process includes a lengthy litigation before the ASLB, where interested parties may challenge the DOE application. See Fact Sheet on Licensing Yucca Mountain, U.S. NUCLEAR REGULATORY COMM’N, http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-yucca-license-review.html (last updated March 29, 2012).

228 See supra note 182.


231 See supra Part II.E.
It is possible that Congress expected some waste and inefficiency in the review process when it zeroed out appropriations for Yucca. But that action does not show intent; it shows a preference to waste an unknown amount in favor of delaying Yucca. More importantly, a look at any authorizing legislation, in this case the NWPA, would never show intent to waste $11.1 million. By ordering the spending of $11.1 million, the D.C. Circuit avoided an opportunity to apply the absurdity doctrine.

While there is no clear congressional intent that the NRC should spend down the $11.1 million, it is also true that there is no clear intent that the NRC should hold the funds and delay its review of the application. The government erroneously argued that “Congress’s most recent funding decisions demonstrate a legislative intent . . . that NRC should not conduct its proceeding to review the application [at this time].”

This reads too much into congressional inaction and wrongfully suggests that if the NRC moved forward with reviewing the Yucca application it would be in violation of the appropriation bills when the agency is fully authorized to move forward. *TVA v. Hill* still supports the cardinal rule that repealing an authorizing legislation by mere implication is not favored, especially when the implication is in an appropriations bill. There could be no judicial review of a decision by the NRC to spend the $11.1 million, even if it was found to be completely wasteful.

On the other hand, a writ of mandamus ordering an agency to spend down funds that produce no measurable benefit to the public can be considered an absurd result that Congress never intended. Had the D.C. Circuit held mandamus was not appropriate, the decision would have been consistent with the absurdity doctrine and the holding in *TVA v. Hill*.

D. Responding to the D.C. Circuit

In its decision, the D.C. Circuit was concerned with a shift in constitutional authority that would occur if agencies were given discretion to toll statutory mandates due to inadequate resources. By ordering the NRC to continue its review of the application for Yucca Mountain, the court believed it was protecting Congress’s constitutional authority. It is ironic that the leading cause of the shift was Congress itself. When the

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232 Final Brief for the Respondents, *supra* note 9, at 38.

233 See 437 U.S. at 174 (holding it is unlawful to close the gates on a $100 million completed dam and flood the river basin of an endangered minnow).

234 See Lincoln v. Vigil, 508 U.S. 182, 193 (1993) (holding that spending dollars from a lump sum appropriation on an authorized program is not a reviewable action by the courts because it is an act “committed to agency discretion by law” (quoting the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1988)) (internal quotation marks omitted)).

Waste Fund has over $28 billion that can be used solely for a repository at Yucca Mountain and Congress appropriates zero dollars, it is clear that Congress’s intent was to block the completion of the repository. Refusing to order the NRC to act would have provided relatively no disruption to the NWPA as compared with the intentional defunding of the NWPA by the same legislative body whose authority the D.C. Circuit asserts to be protecting.

The D.C. Circuit also emphasized that an appropriation cannot amend an authorization act, and it rightfully cited TVA v. Hill for that proposition. But In re Aiken County can be distinguished from TVA v. Hill for two reasons. First, in TVA v. Hill, the Act upheld by the court was not dependent on the appropriation in conflict with it. In In re Aiken County, the NWPA was threatened by a lack of appropriations and unlike TVA v. Hill, the D.C. Circuit was not forced to pick one over the other. Rather, the challenge to the D.C. Circuit was how to salvage the NWPA despite the lack of appropriations. Its decision did nothing to further the policy objectives of the NWPA because the $11.1 million is near certain to be squandered due to a lack of future appropriations. Second, congressional intent is not as clear. The NWPA addresses what is expected of the NRC when it has inadequate funds, as compared with the Endangered Species Act, which is understood to protect the habitats of endangered species at all costs.

E. Benefits of the Proposed Rule

In addition to providing a more equitable remedy for agencies caught between statutory deadlines and inadequate appropriations, the proposed rule will have societal benefits. Unfunded and underfunded authorizations create inefficiencies that waste taxpayers’ dollars. The Congresses that underfund projects in the name of fiscal responsibility ironically create these situations. When an agency misses a deadline, it is accused of inefficiency and incompetency by critics and elected officials, when in truth Congress deserves to share in the blame for giving the agency a mandate that is impossible to complete without available funds.

Instead of forcing agencies to rush projects and underperform, a court decision confirming the impossibility of a statutory mandate will appropriately cast responsibility back on Congress. A member of

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236 Id. at 261 (citing TVA v. Hill, 437 U.S. at 189).
237 See supra text accompanying notes 186–91.
238 See Pierce, supra note 124, at 77 (comparing a split between courts as to whether an agency’s resource constraints can serve as a defense to a claim under the Federal Torts Claims Act when an agency’s delay or inadequate performance damaged the plaintiff).
239 See Susan Rose-Ackerman, Judicial Review and the Power of the Purse, 12 INT’L REV. L. & ECON. 191, 192 (1992) (arguing that courts should find low spending levels as a presumptive repeal of
Congress wishing to implement a new education program, fix bridges, establish historic landmarks, or any other project within their constituents’ list of priorities has an easier path to get the program authorized than they do to get it funded.\textsuperscript{240} For one, elected officials are inclined to vote for their colleagues’ projects that do not impact the budget. Second, the public often fails to appreciate that an authorization is an empty gesture until it receives funding. It is insincere for politicians to highlight the passage of new initiatives, and then fail to secure the necessary funding to see the projects through. Elected officials need to be held accountable for supporting authorization bills, and campaigning on the passage of new policy, but then failing to provide adequate funding.

V. CONCLUSION

The appropriations process is undermining the ability of federal agencies to meet the mandates set by Congress. This can be especially true of projects spanning multiple years or those with statutory deadlines. A writ of mandamus is not appropriate if it would force an agency to spend taxpayer dollars in a manner that would not increase the likelihood of fulfilling the statute’s policy objective. Past court decisions confirm that mandamus is not necessary in every case where a statutory mandate has been violated or ignored by an agency. A review of circuit court decisions shows that agencies should be given discretion to toll a statutory mandate when they have inadequate resources.

There is a near certainty that the NRC’s review of the Yucca licensing application will not be funded in the near future. It is also questionable whether in the long-term Congress will fund, and the NRC will approve, a repository at Yucca Mountain. Spending $11.1 million to review the Yucca application will prove to be a useless, unintended consequence of legislation that provides no relief for the claimants in In re Aiken County. Future courts should recognize that neither the Constitution nor any jurisprudence on judicial review of an agency action requires a similar decision.

\textsuperscript{240} See Biber, supra note 123, at 46 (arguing that elected officials score easy political points by passing authorizing legislation that addresses an issue, but that little attention is given to whether Congress follows up with an adequate appropriation).