

## The Yucca Mountain Court Cases

After the shutdown of the U.S. Department of Energy's Yucca Mountain repository program at the start of the Obama administration in 2009, the states of South Carolina and Washington, plus several other petitioners, filed suit against the DOE, seeking to overturn its shutdown of the repository project and the proposed withdrawal, "with prejudice," of the license application. Last July, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit ruled that the request by the petitioners was premature, as the U.S. Nuclear Regulatory Commission had yet to decide whether the DOE could withdraw its application for the repository.

Eventually, the NRC commissioners upheld (on a 2-2 vote, with one commissioner abstaining) a previous Atomic Safety and Licensing Board ruling that the DOE could not summarily cancel the program, because it was mandated under the Nuclear Waste Policy Act of 1982 (NWPA) and the Amendments Act of 1987. Because there was no funding to support the project, however, the NRC said that it was discontinuing the review of the license application, effectively placing the program in limbo.

Once the NRC had determined that the DOE could not cancel the project, however, the lawsuit was able to move forward. On May 2, oral arguments were scheduled to be heard on the suit, now aiming to force the NRC to resume its review of the license application to the point of approval or rejection. Industry experts have stated that a ruling could come as early as this June.

A second lawsuit, filed by the National Association of Regulatory Utility Commissioners (NARUC) and the Nuclear Energy Institute (NEI), seeks a temporary suspension of the collection of the Nuclear Waste Fund fee until the nuclear waste program is restarted and the DOE can therefore meet its obligations under

the NWPA to perform an annual fee adequacy assessment. Right now, the Nuclear Waste Fee brings in around \$750 million annually. The temporary suspension would last only until the federal government restarted a nuclear waste program. The brief emphasizes that under the full-cost recovery provisions of the DOE contracts with utilities, the full costs for waste management could still be recovered in the future.

So, lawsuits may determine some aspects of the future of the nation's high-level waste repository project. Another factor in the project's future, however, is the Blue Ribbon Commission on America's Nuclear Future, which released its final report in January. This report contains eight recommendations for moving forward on a repository program, and Energy Secretary Steven Chu is setting up a task force within the DOE to prepare an administration strategy on nuclear waste. (For more information on the BRC's final report, see the "Executive Summary," published in this issue on page 45.)

The future of Yucca Mountain and the repository program were major topics addressed at this year's Waste Management conference, held at the end of February in Phoenix. (This issue contains three separate reports on the conference, on pages 23, 55, and 66.) During the conference, Pete Lyons, the DOE's assistant secretary for Nuclear Energy, said that should the court mandate that the NRC continue its review of the Yucca Mountain license application, the DOE "would support the NRC in every way." Also at the conference, Amy Roma, an attorney with Hogan Lovells in Washington, stated that if the court ruled that the NRC must continue its review of the license application, it will also have to address funding, because the NRC has stated that it doesn't have the funds to continue the review.

Off the record, most industry ex-



### *Yucca Mountain: The Next Step Is up to the Courts*

perts seem to feel that the court will rule in favor of the plaintiffs and that the NRC will be directed to complete its review of the license application. We will then be faced with two reluctant agencies working on a project the administration doesn't support—projects for which staff no longer exists and funding is nonexistent. And a cynical person might observe that this situation presents another opportunity for a deadlocked Congress to demonstrate its inability to meet its legislative responsibilities. Is anyone taking any bets on how successful a reinstated repository program might be under these circumstances?—*Nancy J. Zacha, Editor* ■