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John E. Baldacci, Governor Brenda M. Harvey, Commissioner

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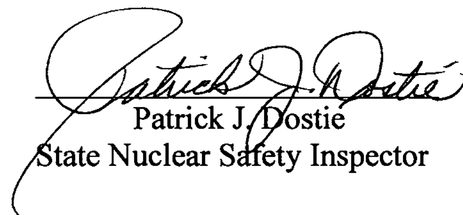
May 21, 2010

To: Honorable Ms. Elizabeth Mitchell, President of the Senate
Honorable Ms. Hannah Pingree, Speaker of the House

Subject: State Nuclear Safety Inspector Office's April 2010 Monthly Report to the Maine Legislature

Legislation was enacted in the second regular session of the 123rd and signed by Governor John Baldacci requiring that the State Nuclear Safety Inspector prepare a monthly report on the oversight activities performed at the Maine Yankee Independent Spent Fuel Storage Installation facility located in Wiscasset, Maine.

Enclosed please find the Inspector's April 2010 monthly activities report. This year the reports will not feature the glossary and the historical addendum. However, both the glossary and the addendum will be available on the Radiation Control Program's website at http://www.maineradiationcontrol.org under the nuclear safety link. For facilitating the connectivity and impact of some of the newsworthy items an editorial section is being contemplated. Should you have questions about its content, please feel free to contact me at 207-287-6721, or e-mail me at pat.dostie@maine.gov.



Patrick J. Dostie
State Nuclear Safety Inspector

Enclosure
cc:
Ms. Vonna Ordaz, U.S. Nuclear Regulatory Commission
Ms. Nancy McNamara, U.S. Nuclear Regulatory Commission, Region I
Mr. James Connell, Site Vice President, Maine Yankee
Ms. Brenda Harvey, Commissioner, Department of Health and Human Services
Mr. Geoff Green, Deputy Commissioner, Department of Health and Human Services
Ms. Lucky Hollander, Director of Legislative Relations, Department of Health and Human Services
Dr. Dora Mills, Director, Maine Center for Disease Control and Prevention
Mr. Patrick Ende, Senior Policy Advisor, Governor's Office
Mr. David Littell, Commissioner, Department of Environmental Protection
Mr. Richard Davies, Maine Public Advocate
Lt. Christopher Grotton, Special Services Unit, Maine State Police
Ms. Nancy Beardsley, Director, Division of Environmental Health
Mr. Jay Hyland, PE, Manager, Radiation Control Program

State Nuclear Safety Inspector Office

April 2010 Monthly Report to the Legislature

Introduction

As part of the Department of Health and Human Services' responsibility under Title 22, Maine Revised Statutes Annotated (MRSA) §666 (2), as enacted under Public Law, Chapter 539 in the second regular session of the 123rd Legislature, the foregoing is the monthly report from the State Nuclear Safety Inspector.

The State Inspector's individual activities for the past month are highlighted under certain broad categories, as illustrated below. Since some activities are periodic and on-going, there may be some months when very little will be reported under that category. It is recommended for reviewers to examine previous reports to ensure connectivity with the information presented as it would be cumbersome to continuously repeat prior information in every report. Past reports are available from the Radiation Control Program's web site at the following link: www.maineradiationcontrol.org and by clicking on the nuclear safety link in the left hand margin.

Commencing with the January 2010 report the glossary and the historical perspective addendum will no longer be included in the report. Instead, this information will be available at the Radiation Control Program's website noted above. In some situations the footnotes may include some basic information and will redirect the reviewer to the website.

Independent Spent Fuel Storage Installation (ISFSI)

During April the general status of the ISFSI was normal. There were no instances of spurious alarms and no fire-related or security impairments. There were nine security events logged. All nine SELs logged were associated with transient camera issues due to temporary environmental conditions.

There were two condition reports (CRs) for the month of April. The first CR was written on April 22nd and documented the apparent damage to an underground conduit which was discovered while pulling a new fiber optic cable. The second CR was written on April 29th and involved the use of an outdated form by a medical provider.

Other ISFSI Related Activities

On April 24th there was a suspicious incident of a couple walking their dog along the East Access Road by the ISFSI berm. The couple had seen the "No Trespassing" signs, but ignored them and continued on the unpaved road. Security immediately contacted the Wiscasset Police and dispatched security personnel to intercept the couple. The couple was escorted off-site by the Local Law Enforcement Agency. The suspicious event was reported to the Nuclear Regulatory Commission's Operations Center and the Federal Bureau of Investigation Office in Augusta.

Environmental

On April 1st the State Nuclear Safety Inspector performed his quarterly field replacement of the thermoluminescent dosimeters (TLDs)[1] monitoring the ISFSI and Bailey Cove. On April 21st the State received the results from the

[1] Thermoluminescent Dosimeters (TLD) are very small, passive radiation monitors requiring laboratory analysis. For a further explanation, refer to the glossary on the Radiation Program's website.

first quarter TLDs' field replacement of the ISFSI and Bailey Cove. The results from the quarterly change out continued to illustrate, but not as pronounced as it was during the previous quarters, the three distinct exposure groups: elevated, slightly elevated and normal. The two consistently high stations, G and K, averaged 29.3 milliRoentgens[2] (mR) due to their proximity to the storage casks. The moderately high group stations E, F, J, and L, averaged 26.1 mR. However, this past quarter the station F results were more comparable to the elevated group with an average of 28 mR versus those of stations E, J, and L, which averaged 25.4. The remaining stations, A, B, C, D, H, I, and M, averaged 22.9 mR. The control TLDs that are stored at the State's Radiation Control Program in Augusta averaged about 26 mR. In comparison the normal expected quarterly background radiation levels on the coast of Maine would range from 13 to 25 mR.

The Bailey Cove TLDs averaged 24 mR and ranged from 20 to 30 mR, which is comparable to the normally expected background radiation levels. As observed with the ISFSI TLDs, the Bailey Cove TLDs also had some higher values with the lower values due to their proximity to the water's edge.

The reason for the decreased radiation values for all the TLDs was due to the frozen ground and snow cover conditions. It is normal for the values to decrease during the winter months when the ground is frozen and covered with snow as it impedes the out gassing of the Radon gas from the soils. However, the TLD results were not as low as past winter seasons. The snow cover did not last as long and the temperatures were milder, which could explain why the results are closer to the fall 2009 quarter's results.

For statistical purposes each area radiation monitoring location has two TLDs. Each TLD has three elements to gauge the ambient environmental radiation level. Of the 14 TLD locations in Bailey Cove, two of the 84 TLD elements had unusually high responses, 80 and 92, compared to the range of 20 to 30 normally seen, were rejected. When these abnormal fluctuations occasionally occur, their data points are statistically tested by the TLD processing company against the remaining two elements in the same TLD to see if the data point is an outlier. If it is, the data point is rejected and not reported in the TLD summary report from the vendor.

For informational purposes Figure 1 at the end of the report illustrates the locations of the State's 13 TLD locations in the vicinity of the ISFSI. The State's locations are identified by letters with the two highest locations being stations G and K. Since station F had a higher value this quarter, its location and proximity to the ISFSI is noted.

On April 2nd, as part of its quarterly environmental radiological surveillance, the State obtained samples of freshwater, seawater and seaweed in the vicinity of the Maine Yankee environs. The samples were delivered to the State's Health and Environmental Testing Laboratory for analysis. When the results are received, they will be reported in the subsequent monthly report.

Maine Yankee Decommissioning

At present, there are eleven confirmatory reports that are essentially complete. Due to the extensive delays in on-going commitments and emerging issues, the confirmatory summary report is expected to be partially drafted in May.

Groundwater Monitoring Program

On April 7th, as part of the Department of Environmental Protection's (DEP) follow-up to Maine Yankee's March 22nd correspondence, the DEP notified Maine Yankee of its understanding of the four remaining topics for the

[2] A milliRoentgen (mR) is a measurement of radiation. For a further explanation, refer to the glossary on the Radiation Program's website.

groundwater monitoring program. The topics included well abandonment, status of well numbers MW-306 and MW-318A, the remaining items from the March 18th memorandum, and legal obligations.

On April 12th Maine Yankee provided responses to DEP's April 7th correspondence. Maine Yankee stated it would follow their standard operating procedure 20 from their Quality Assurance Project Plan for well abandonment, requested further consideration on the status of which wells would be dropped from the monitoring program, noted no further issue with the March 18th memorandum, and was committed to the successful completion of the Rad Groundwater Monitoring Program, but took issue with the DEP's current positions as being in conflict with the Agreement and the Work Plan.

On April 13th the DEP, Maine Yankee and the State Nuclear Safety Inspector (SNSI) met to discuss further the issues with well numbers MW-306, MW-318A, and MW-318B. It was agreed that the SNSI would provide a determination on which wells would be retained in the monitoring program and which wells would be dropped from the program.

On April 26th Maine Yankee requested the final determination of the three wells. The SNSI provided the determination, which was to retain MW-306, and to drop MW-318A. Although there was some reluctance by Maine Yankee on discontinuing MW-318B due to their understanding of the Agreement, the SNSI also offered to drop MW-318B. Maine Yankee accepted the determination of keeping MW-306 and dropping MW-318A & B.

Other Newsworthy Items

1. On April 2nd the National Association of Regulatory Utility Commissioners (NARUC) filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit over the Department of Energy's decision last October to continue charging fees with the moving and disposing of spent nuclear fuel when the Administration's position has been to close down the geologic disposal repository at Yucca Mountain. NARUC's contention is that with over $20 billion in the Nuclear Waste Fund there is no pressing need to assess fees, especially when there is no idea what solutions the newly appointed Blue Ribbon Commission on America's Nuclear Future will recommend and whether any of those recommendations will be implemented. A copy of the petition without the exhibits is attached to the end of the report.

2. On April 5th the Nuclear Energy Institute and 16 nuclear utilities filed a joint petition for review with the U.S. Court of Appeals for the District of Columbia Circuit for the Department of Energy's (DOE) failure to suspend collection of the fee payments to the Nuclear Waste Fund. A copy of the petition without the exhibits is attached to the end of the report.

3. On April 6th the Nuclear Regulatory Commission's (NRC) Atomic Safety and Licensing Board suspended briefings on the proposed Department of Energy's (DOE) motion to withdraw its Yucca Mountain license application pending before the NRC until a federal court rules on the legal challenges to DOE's authority to withdraw its application. A copy of the order is attached to the end of the report.

4. On April 7th Energy Secretary Chu insisted as the keynote speaker to the Energy Information Administration and the John Hopkins School of Advanced International Studies Conference that the Blue Ribbon Commission on America's Future not linger over the Yucca decision and pledged to proceed with the termination of the Yucca Mountain Project, despite mounting resistance in Congress.

5. On April 8th the Department of Justice notified the U.S. Court of Appeals for the District of Columbia Circuit of the Aiken County's citation of Nuclear Regulatory Commission's (NRC) Atomic Safety and Licensing Board's stay on the Department of Energy's motion to withdraw its Yucca Mountain license application. A copy of the letter without the NRC's order is attached to the end of the report.

6. On April 8th the U.S. Circuit Court off Appeals for the District of Columbia Circuit ordered that the three lawsuits against the Department of Energy from Aiken County, South Carolina, the three business leaders from Tri-City in Washington, and the State of South Carolina be consolidated. A copy of the court order is attached to the end of the report.

7. On April 12th six congressional Representatives from California, Connecticut, Maine, Massachusetts and Wisconsin sent a letter to the Co-Chairs of the newly formed Blue Ribbon Commission (BRC) on America's Nuclear Future requesting the BRC to "reach out to those in our representative states that are currently responsible for these decommissioned (single unit) sites to assist with your review and ensure the unique challenges faced by decommissioned plants can be addressed in your final recommendations." Both of Maine's Representatives, Mr. Mike Michaud and Ms. Chellie Pingree, signed the letter. A copy of the letter is attached to the end of the report.

8. On April 12th the Department of Energy (DOE) filed a petition for interlocutory review by the Nuclear Regulatory Commission on the NRC's Atomic Safety and Licensing Board's (ASLB) Memorandum and Order suspending the briefing and consideration of DOE's motion to withdraw its Yucca Mountain license application pending before the NRC. The petition would force the ASLB judges to resume its deliberations on the DOE's motion to withdraw its license application or the NRC Commissioners would take over the review. A copy of the petition without attachment 1 is attached to the end of the report.

9. On April 12th Chief Deputy Attorney General for Nevada published a paper in the Idaho Law Review, entitled "Yucca Mountain – Nevada's Perspective". The document provides some insight to Nevada's viewpoint on being chosen for a federal geologic repository, the pending legal challenges to the Environmental Protection Agency and Nuclear Regulatory Commission (NRC) rules for Yucca Mountain, and the NRC's licensing proceeding.

10. On April 13th the State of Washington filed a petition for review and a motion in the U.S. Court of Appeals for the District of Columbia Circuit seeking a declaratory and injunctive relief against the Department of Energy's termination of Yucca Mountain.

11. On April 14th the Department of Energy (DOE) submitted its response to the State of Washington's petition for injunctive relief. The DOE requested until April 23rd to respond to the Washington request for injunction and agreed to a 21 day stay in the DOE's actions to terminate the Yucca Mountain program. A copy of the response is attached to the end of the report.

12. On April 14th the U.S. Court of Appeals for the District of Columbia issued an Order "to extend the time to file a response to the motion for preliminary injunction."

13. On April 14th the Nuclear Waste Strategy Coalition (NWSC) held its bi-monthly conference call to apprise its members of the status of the Fiscal Year 2010 and 2011 Congressional Appropriations, the Department of Energy's (DOE) withdrawal of its Yucca mountain license application, the U.S. Court of Appeals for the District of Columbia consolidating the two lawsuits filed opposing the DOE's motion to withdraw its license application, and the filing of the National Association of Regulatory Utility Commissioners and the Nuclear Energy Institute petitions for review of DOE's continued assessment of fees despite the Administration's position to terminate Yucca Mountain.

14. On April 16th the Department of Energy (DOE) filed a notice of deferral with the Nuclear Regulatory Commission's Atomic Safety and Licensing Board relative to its plans for archiving its Yucca Mountain document collection with the National Archives. A copy of the notice is attached to the end of the report.

15. On April 22nd the Senate Budget Committee took an initial step to end funding for the Yucca Mountain Project when it approved a plan supporting the Administration's position to close Yucca Mountain. The budget resolution (S. Con. Res. 13) is a broad blueprint on how the Senate might prioritize its spending for the upcoming fiscal year and serves as a guideline for appropriations subcommittees to write spending bills over the summer.

16. On April 23rd the Nuclear Regulatory Commission (NRC) issued a "Memorandum and Order" vacating the NRC's Atomic Safety and Licensing Board's (ASLB) decision on April 6th "suspending briefing, suspending its consideration of the five new intervention petitions and DOE's (Department of Energy) motion to withdraw, and extending the stay of the proceeding it had entered previously." The Commissioners remanded the matter to the ASLB "for prompt resolution of DOE's motion to withdraw." The Commission based their decision on their belief that a judicial review may benefit from their consideration of the DOE motion. A copy of the Commission order is attached to the end of the report.

17. On April 23rd the State of Washington filed their reply in support of their motion for preliminary injunction against the Department of Energy's continued termination and dismantling of the Yucca Mountain Project. A copy of their reply is attached to the end of the report.

18. On April 23rd the Department of Energy (DOE) filed its response opposing the State of Washington's motion for preliminary Injunction.

19. On April 23rd the Department of Justice notified the U.S. Court of Appeals for the District of Columbia Circuit of the Nuclear Regulatory Commission's (NRC) ruling vacating their Atomic Safety and Licensing Board's stay on the Department of Energy's motion to withdraw its Yucca Mountain license application. A copy of the letter without the NRC's order is attached to the end of the report.

20. On April 26th Senator Sue Collins sent a letter to the Co-Chairs of the Blue Ribbon Commission (BRC) on America's Nuclear Future requesting on behalf of the Maine Yankee Community Advisory Panel to hold a meeting in Wiscasset. A copy of the Senator's letter is attached to the end of the report. A copy of the Maine Yankee Community Advisory Panel invitation is attached to the end of the report as indicated below in number 1 under "Other Noteworthy Items".

21. On April 26th the Sustainable Fuel Cycle Task Force Science Panel sent a letter to the Co-Chairs of the Blue Ribbon Commission (BRC) on America's Future expressing their several hundreds years worth of collective scientific and managerial experience in geologic disposal of high level waste. The Panel members also expressed that the Nuclear Regulatory Commission's scientific conclusions on the Yucca Mountain license application would be of significant value to the entire geologic disposal issue and further recommended that should an alternative disposal site be more workable than Yucca Mountain, the defense high level waste should receive first priority. A copy of the letter is attached to the end of the report.

22. On April 27th the Nuclear Regulatory Commission's (NRC) Atomic Safety and Licensing Board (ASLB) extended the June 1st deadline imposed on April 23rd by the NRC Commissioners to June 30th. The ASLB stated the June 1st deadline was infeasible due to the complexity of the issue, its desire to hold a legal hearing, and how to preserve the project's documents. A copy of the order is attached to the end of the report.

23. On April 28th the State of Washington filed a 10 page reply in the U.S. Court of Appeals for the District of Columbia Circuit in support of their motion for preliminary injunctive relief from the Department of Energy's on-going dismantlement of the Yucca Mountain project. The filing claims it will suffer irreparable harm before the Court reaches the merits of Washington's petition for review.

24. On April 28th Governor Baldacci received a letter from the .Department of Energy (DOE) thanking the Governor as Chair of the New England Governor's Conference for his December 16, 2009, letter. The DOE letter was non-committal on the specific requests outlined in the Governor's original December 16th letter. A copy of both letters is attached at the end of the report.

25. On April 28th three dozen leaders from South Carolina and Georgia, members of the Savannah River Site Community Reuse Organization (SRSCRO), held a press conference on Capitol Hill to protest the planned shutdown of the Yucca Mountain program and said that, if the Blue Ribbon Commission's deliberations do not include Yucca Mountain, then their report would lack credibility. The community leaders delivered 19 Pro-Yucca Mountain Resolutions to the Secretary of Energy and the Congressional delegations from South Carolina and Georgia. The SRSCRO is a non-profit regional group supporting job creation near the Department of Energy's Savannah River Site. A copy of the list of communities adopting resolutions is attached to the end of the report.

26. On April 28th the Nuclear Waste Strategy Coalition (NWSC) held a second conference call to discuss the status of the FY 2010 and 2011 Appropriations, the Department of Energy's (DOE) response to the State of Washington's motion for preliminary injunction in the U.S. Court of Appeals for the District of Columbia, and the Nuclear Regulatory Commission's order vacating the Atomic Safety and Licensing Board's (ASLB) ruling to stay DOE's motion to withdraw its license application and forcing the ASLB to rule on DOE's motion to withdraw with prejudice. The NWSC is an ad hoc group of state utility regulators, state attorneys general, electric utilities and associate members representing 47 member organizations in 30 states.

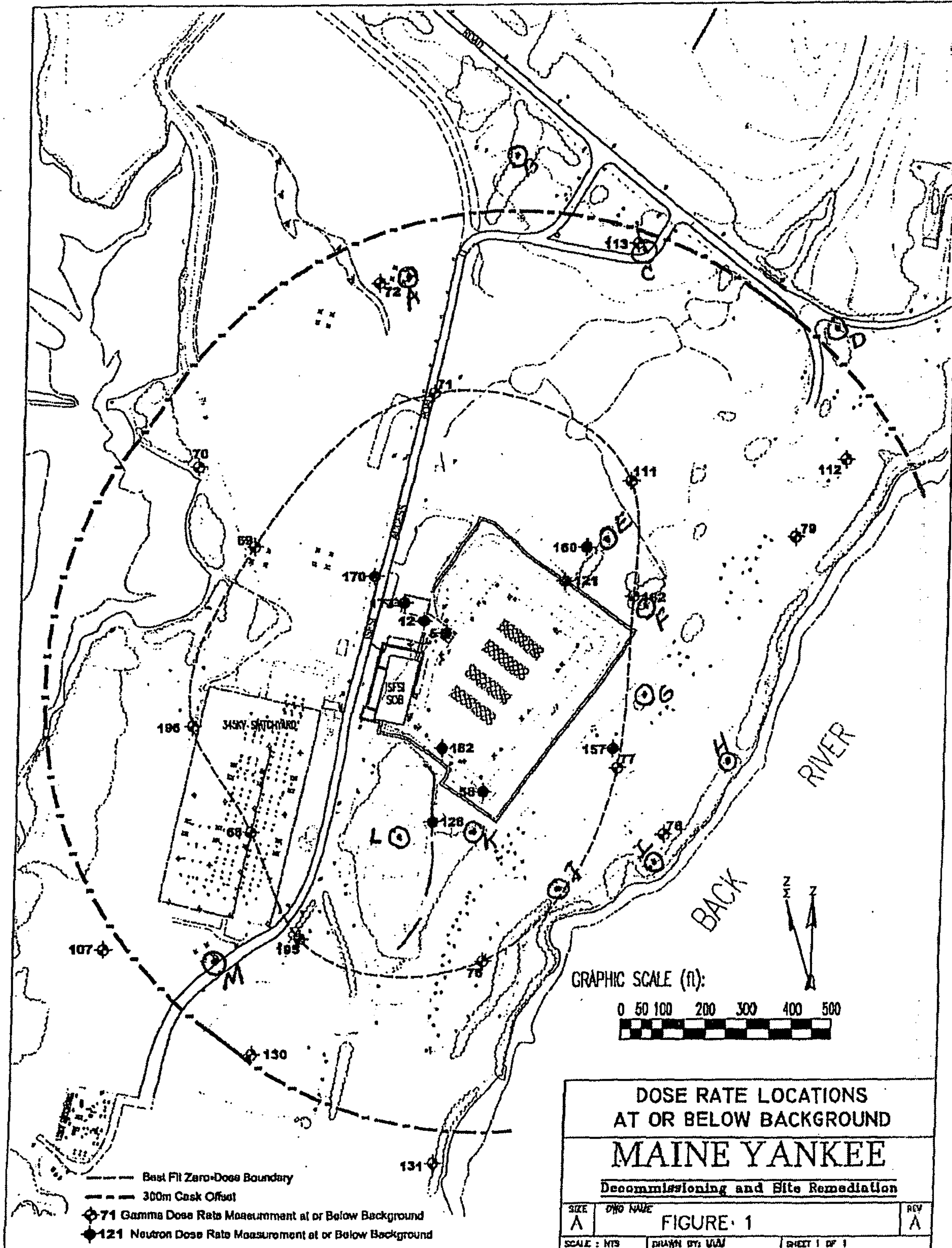
Other Noteworthy Items

1. On March 10th Marge Kilkelley, Chair of the Maine Yankee Community Advisory Panel, sent an invitation letter to the Co-Chairs of the recently formed Blue Ribbon Commission (BRC) on America's Nuclear Future inviting them to hold a meeting at the Chewonki Foundation in Wiscasset to discuss the unique issues related to single unit decommissioned sites. A copy of her letter is attached to the end of the report.

2. On or about March 19th Wayne Norton, Chairman of the Decommissioning Plant Coalition (DPC), and President and CEO of Connecticut Yankee and Yankee Rowe and Chief Nuclear Officer of Maine Yankee, submitted for the record his testimony to the House Appropriations Energy and Water Development Subcommittee, which held a hearing on March 24th on the Department of Energy's FY 2011budget. In his remarks Mr. Norton requested that the "appropriation bill contain direction to the Secretary of Energy and the recently established Blue Ribbon Commission on America's Nuclear Future for the development of specific recommendations that will facilitate the prompt removal of legacy spent fuel and waste material stored at permanently shut-down, single unit civilian nuclear plant sites throughout the United States." The DPC is a consortium of owners of single unit decommissioned nuclear plants that includes Big Rock Point in Michigan, Connecticut Yankee, LaCrosse in Wisconsin, Maine Yankee, Rancho Seco in California, and Yankee Rowe in Massachusetts. A copy of his testimony is attached to the end of the report.

3. On March 24th the Sustainable Fuel Cycle Task Force Science Panel posted an informational paper explaining some of the controversial issues raised on Yucca Mountain water infiltration, fractures, and the role of drip shields. A copy of their paper is attached to the end of the report.

4. On March 25th Lake Barrett, who previously ran the Department of Energy's Office of Civilian Radioactive Waste Management overseeing the Yucca Mountain project, advocated in his remarks to the Blue Ribbon Commission for "one or more regional interim storage facilities to bridge between the present undesirable onsite storage situation and a new geologic disposal facility." A copy of his remarks is attached to the end of the report.


DOSE RATE LOCATIONS
AT OR BELOW BACKGROUND
MAINE YANKEE
Decommissioning and Site Remediation
FIGURE 1
Best Fit Zero-Dose Boundary
300m Cask Offset
71 Gamma Dose Rate Measurement at or Below Background
121 Neutron Dose Rate Measurement at or Below Background
GRAPHIC SCALE (ft):
0 50 100 200 300 400 500
BACK RIVER
ISFSI SOB
345KV SWITCHYARD
SCALE : NTS
SHEET 1 OF 1

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF ENERGY AND THE UNITED STATES OF AMERICA,

Respondents,

Case No. 10-1074

PETITION FOR REVIEW

The National Association of Regulatory Utility Commissioners (NARUC) petitions this Court pursuant to Section 119 of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10139, as amended, Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702, and Rule 15(a) of the Federal Rules of Appellate Procedure, to review, remand, or vacate the final decision and action of or failure to act by the Department of Energy (DOE) as set forth in two separate letters. Both letters are dated October 8, 2009.

One is addressed to NARUC and the other is addressed to the Nuclear Energy Institute (NEI). Both DOE letters, and the NARUC and NEI requests they respond to are attached in Exhibit A.

Both DOE final decisions, which are identical except for references to the entity requesting relief, deny requests to (1) suspend the fee paid by ratepayers into the Nuclear Waste Fund (NWF) until there is a clearly defined program for disposal of spent nuclear fuel and high-level radioactive waste, and (2) promptly perform the annual review of the nuclear waste fees as required by NWPA Section 302(a)(4), 42 U.S.C. § 10222(a)(4) to determine whether the fees exceed or fall short of the needs of the long term waste repository program costs given the Administration's express intent to terminate the Yucca Mountain high-level waste repository.[1]

These DOE decisions respond to letter requests sent by NARUC and NEI to Energy Secretary Chu on July 8, 2009.

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1 See, e.g. U.S. Dep't. of Energy, FY 2010 Congressional Budget Request: Budget Highlights, May 2009 at 46-47: "All funding for development of the Yucca Mountain facility has been eliminated.... The budget request includes the minimal funding needed to explore alternatives for nuclear waste disposal...and to continue participation in the Nuclear Regulatory Commission license application" available at http://www.cfo.doe.gov/budget/10budget/Content/Highlights/FY2010Highlights.pdf.

NARUC represents the interests of State public utility commissions that oversee nuclear utility rates including the pass-through cost of the nuclear waste fee. The association has been recognized both by Congress in several statutes[2] and consistently by Article III courts[3] as the proper entity to represent the collective interests of the State utility commissions.

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2 See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. NARUC, et al. v. ICC, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.).

3 See, e.g., United States v. Southern Motor Carrier Rate Conference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) (The Supreme Court noted: "[t]he District Court permitted . . . (NARUC), an organization composed of State agencies, to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. See also NARUC v. DOE, 851 F.2d 1424 (D.C. Cir. 1988), where, although standing was not specifically addressed, NARUC was the lead petitioner in a successful appeal involving DOE and the nuclear waste program; Indianapolis Power and Light Co. v. ICC, 587 F.2d 1098 (7th Cir. 1982); Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976); Compare, NARUC v. Federal Energy Regulatory Commission, 475 F.3d 1277 (D.C. Cir. 2007); NARUC v. Federal Communications Commission, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

This Court has jurisdiction pursuant to NWPA Sec. 119(a)(1), 42 U.S.C. § 10139(a)(1).[4]

Venue is proper in the court pursuant to 42 U.S.C. § 10139(a)(2). Id. NARUC has its principal office of business in this circuit, and in any case, the statute allows an appeal to be lodged before this Court.

The appeal is timely filed within the 180 days specified in NWPA Sec. 119(c), 42 U.S.C. § 10139(c), based upon the October 8, 2009 date of DOE's letters. Id.

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[4] 49 U.S.C. § 10139. "Judicial review of agency actions: (a) Jurisdiction of United States courts of appeals (1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action-- (A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part; (C) challenging the constitutionality of any decision made, or action taken . . . (2) The venue of any proceeding . . . shall be in the judicial circuit in which the petitioner . . . has its principal office, or in the United States Court of Appeals for the District of Columbia. (c) Deadline for commencing action: A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved . ." Downloaded March 31, 2010 from the Government Printing Office site at: http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=058563466570+0+1+0&WAISaction=retrieve.

DOE is a proper respondent under Rule 15(a) of the Federal Rules of Appellate Procedure.

NARUC seeks an order and judgment that portions of these two DOE orders are arbitrary and capricious, 5 U.S.C. §706(2)(A), beyond DOE's jurisdiction, authority or power, 5 U.S.C. §706(2)(C), and/or otherwise not in accordance with law, 5 U.S.C. §706(2)(A). NARUC contends, *inter alia*, the letter orders are facially deficient and lack any record support. This Court should declare the DOE decision, action or failure to act to refuse (a) to reflect the termination of the Yucca Mountain program (as well as the accrued current NWF balance of $22 billion) in the annual review of the NWF fee,[5] (b) to timely conduct a 2009 fee assessment proceeding, and (c) to suspend collection of the fee, are arbitrary, capricious, and contrary to applicable law.

[5] The NWF fee was established to recoup the government's costs for the radioactive waste disposal. NWPA § 302(d); 42 U.S.C. § 10222(d). The NWPA set the fee for nuclear electricity generators at 1.0 mil per kilowatt-hour. NWPA § 302(a)(2), 42 U.S.C. § 10222(a)(2). The NWPA directs the Secretary to annually review whether the collection of the fee will provide sufficient revues to offset the programs costs and to propose a fee adjustment if excess or insufficient revenues are being collected. NWPA § 302(a)(4); 42 U.S.C. § 10222(a)(4).

At a minimum, DOE should be directed to suspend collection of the fee to the NWF pending DOE's compliance with the annual review provision of Section 302 of the NWPA. We also ask the Court to grant such other relief has it deems just and proper.

Respectfully submitted,

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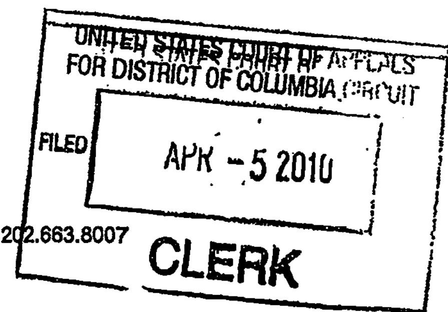
(FAX) 202-384-1554

Dated: April 2, 2010



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UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

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April 5, 2010

BY HAND DELIVERY

10-1076

Mr. Mark J. Langer
Clerk, United States Court of Appeals
For the District of Columbia Circuit
333 Constitution Ave., NW
Rm. 5523
Washington, DC 20001

Re: Joint Petition for Review

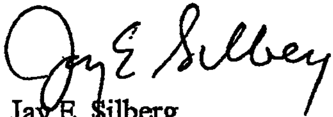
Dear Mr. Langer:

Enclosed for filing please find an original and five copies of the Joint Petition for Review and of the Joint Corporate Disclosure Statement seeking review of a final decision and action of, and/or failure to act by the U.S. Department of Energy ("DOE"). Please stamp one of the copies of each of the Joint Petition for Review and Joint Corporate Disclosure Statement and return them to the courier delivering the copies for filing. Two of the remaining copies of each document are to be served on the DOE and the Attorney General of the United States.

Courtesy copies of the Joint Petition for Review and the Joint Corporate Disclosure Statement were served on DOE, the Attorney General, and the National Association of Regulatory Utility Commissioners.

Also enclosed is a check for $450.00 to cover the docketing fee for this Joint Petition for Review.

Sincerely,



Jay E. Silberg
Counsel for Joint Petitioners

cc: Eric H. Holder, Jr., Esq., U.S. Attorney General
Scott Blake Harris, Esq., DOE
James Bradford Ramsay, Esq., National Association of Regulatory Utility Commissioners

Enclosures: As stated

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

APR - 5 2010

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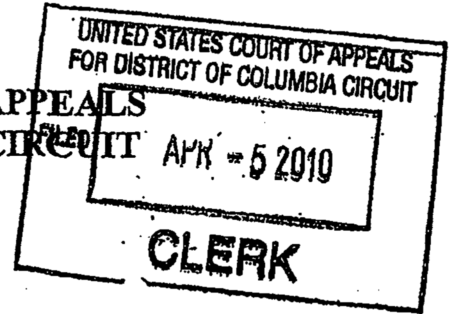


IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NUCLEAR ENERGY INSTITUTE,	)	
FLORIDA POWER & LIGHT COMPANY,	)	
NEXTERA ENERGY SEABROOK, LLC,	)	
NEXTERA ENERGY DUANE ARNOLD, LLC,	)	
NEXTERA ENERGY POINT BEACH, LLC,	)	
OMAHA PUBLIC POWER DISTRICT,	)	
PSEG NUCLEAR LLC,	)	
INDIANA MICHIGAN POWER COMPANY,	)	
ENERGY NORTHWEST,	)	Case No. 10-1076
PPL SUSQUEHANNA, LLC,	)	
NORTHERN STATES POWER COMPANY D/B/A XCEL ENERGY,	)	
THE DETROIT EDISON COMPANY,	)	
WOLF CREEK NUCLEAR OPERATING CORPORATION,	)	
KANSAS GAS AND ELECTRIC COMPANY D/B/A WESTAR ENERGY,	)	
KANSAS CITY POWER & LIGHT COMPANY,	)	
KANSAS ELECTRIC POWER COOPERATIVE, INC.,	)	
NEBRASKA PUBLIC POWER DISTRICT,	)	

Petitioners,

v.

THE UNITED STATES DEPARTMENT OF ENERGY

and

THE UNITED STATES OF AMERICA,

Respondents.

JOINT PETITION FOR REVIEW

Pursuant to 42 U.S.C. § 10139, 5 U.S.C. § 702, and Fed. R. App. P. 15(a), the Nuclear Energy Institute ("NEI"), Florida Power & Light Company ("FPL"), NextEra Energy Seabrook, LLC ("NextEra Seabrook"), NextEra Energy Duane Arnold, LLC ("NextEra DAEC"), NextEra Energy Point Beach, LLC ("NextEra Point Beach"), Omaha Public Power District ("OPPD"), PSEG Nuclear LLC ("PSEG"), Indiana Michigan Power Company ("I&M"), Energy Northwest ("EN"), PPL Susquehanna, LLC ("PPL Susquehanna"), Northern States Power Company d/b/a Xcel Energy ("Xcel Energy"), The Detroit Edison Company ("Detroit Edison"), Wolf Creek Nuclear Operating Corporation ("WCNOC"), Kansas Gas and Electric Company d/b/a Westar Energy ("KGE"), Kansas City Power & Light Company ("KCPL"), Kansas Electric Power Cooperative, Inc.

401770958v3

("KEPCo"), and Nebraska Public Power District ("NPPD") petition this Court for review of the final decision and action of, and/or failure to act by, the United States Department of Energy ("DOE") as set forth in the DOE letter dated October 8, 2009 (attached hereto as Exhibit 1), which rejected NEI's request on its own behalf and on behalf of its members (including the other Joint Petitioners) that DOE (1) promptly perform the annual review of the Nuclear Waste Fund fee required by Section 302(a)(4) of the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10222(a)(4), to account for the present status and cost of the nuclear waste program; and (2) immediately suspend collection of fee payments to the Nuclear Waste Fund.

FP&L, NextEra Seabrook, NextEra DAEC, NextEra Point Beach, OPPD, PSEG, I&M, EN, PPL Susquehanna, Xcel Energy, Detroit Edison, WCNOC, KGE, KCPL, KEPCo, NPPD, and all other NEI members who own civilian nuclear power reactors pay the Nuclear Waste Fund fee, which is the subject of NEI's request to DOE and DOE's October 8, 2009 letter.

This Court has jurisdiction over this matter pursuant to NWPA Section 119(a)(1), 42 U.S.C. § 10139(a)(1). Venue properly lies in this Court pursuant to NWPA Section 119(a)(2), 42 U.S.C. § 10139(a)(2). This Joint Petition is brought

within the 180 day period set forth in NWPA Section 119(c), 42 U.S.C. § 10139(c), based upon the October 8, 2009 date of the DOE letter.

Petitioners request that the Court grant the following relief:

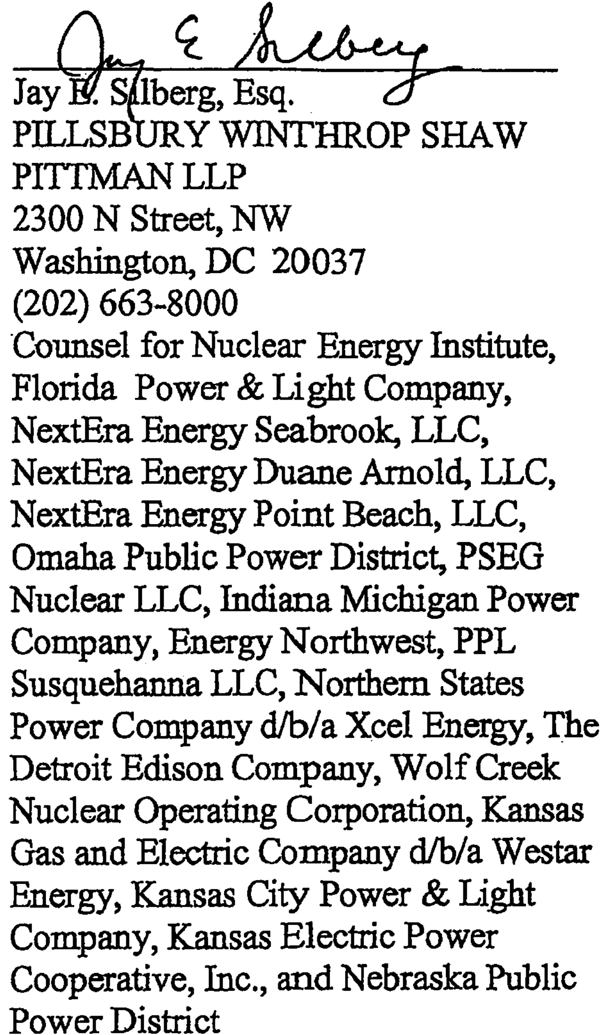
1. Declare that the DOE decision and action, or failure to act, to not account for the termination of the Yucca Mountain repository program in the annual review of the Nuclear Waste Fund fee is arbitrary and capricious and contrary to applicable law;

2. Declare that the DOE decision and action, or failure to act, to refuse to suspend collection of the Nuclear Waste Fund fee is arbitrary and capricious and contrary to applicable law;

3. Direct DOE to immediately suspend collection of the Nuclear Waste Fund fee pending DOE's compliance with the annual review provisions of Section 302 of the NWPA, 42 U.S.C. § 10222; and

4. Grant such other relief as the Court deems just and proper.

Respectfully submitted,



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Vice President, General Counsel, and Secretary
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202-739-8000

Dated: April 5, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	ASLBP No. 09-892-HLW-CAB04
(High Level Waste Repository)	April 6, 2010

MEMORANDUM AND ORDER
(Suspending Briefing and Consideration of Withdrawal Motion)

In June 2008, the Department of Energy (DOE) filed with the NRC an application (Application) for authorization to construct a national high-level nuclear waste repository at Yucca Mountain, Nevada. The seventeen volume, 8,600 page Application—underlain by millions of pages of supporting documentation and related materials—followed a decades-long process that was initiated under the Nuclear Waste Policy Act of 1982, as amended (NWPA). The Commission contemplated that the NRC's adjudicatory proceedings on DOE's Application alone (as distinct from the NRC Staff's extensive technical review) had "the potential to be one of the most expansive proceedings in agency history."[1]

Initially, twelve potential parties petitioned to intervene, collectively presenting for adjudication some 318 contentions that alleged various problems with the Application. DOE opposed every intervention petition and each of the 318 contentions. Eventually, NRC

[1] U.S. Dep't of Energy (High Level Waste Repository), CLI-08-14, 67 NRC 402, 405 (2008).

Construction Authorization Boards admitted all but one of the petitioners as parties, and accepted most of their contentions for further adjudicatory proceedings.[2]

Quite recently, some of the parties have changed their positions. DOE has now decided that "a geologic repository at Yucca Mountain is not a workable option" for long-term disposition of the nation's spent nuclear fuel and high-level nuclear waste.[3] DOE therefore moves, pursuant to 10 C.F.R. § 2.107, to withdraw its Application.

Five new petitioners seek to intervene to oppose DOE's motion to withdraw.[4] Rather than challenging the Application, as the original petitioners did, they challenge its withdrawal as being unlawful. Several other parties (former petitioners themselves) now oppose the intervention of all the new petitioners.[5]

The principal issues raised by the new petitioners, as well as by DOE's motion itself, are presently before the United States Court of Appeals for the District of Columbia Circuit in at least three pending actions.[6] That Court's rulings have the potential to resolve or moot most if

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[2] See generally U.S. Dep't of Energy (High Level Waste Repository), LBP-09-6, 69 NRC 367 (2009), aff'd in part, rev'd in part, CLI-09-14, 69 NRC 580 (2009).

[3] U.S. Department of Energy's Motion to Withdraw (Mar. 3, 2010) at 1.

[4] Petition of the State of South Carolina to Intervene (Feb. 26, 2010) [hereinafter South Carolina Petition]; State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010) [hereinafter Washington Petition]; Petition of Aiken County, South Carolina, to Intervene (Mar. 4, 2010) [hereinafter Aiken County Petition]; Petition to Intervene of the Prairie Island Indian Community (Mar. 15, 2010) [hereinafter PIIC Petition]; National Association of Regulatory Utility Commissioners Petition to Intervene (Mar. 15, 2010) [hereinafter NARUC Petition].

[5] Answer of the State of Nevada to the State of South Carolina's Petition to Intervene (Mar. 29, 2010) at 1; Answer of the State of Nevada to the State of Washington's Petition to Intervene (Mar. 29, 2010) at 1; Answer of the State of Nevada to Aiken County's Petition to Intervene (Mar. 29, 2010) at 1; Answer of Clark County, Nevada to Petitions to Intervene of the State of South Carolina, Aiken County, South Carolina and the State of Washington (Mar. 29, 2010) at 1; Joint Timbisha Shoshone Tribal Group Response to Petitions to Intervene by the States of South Carolina and Washington, and Aiken County, South Carolina (Mar. 29, 2010) at 1.

[6] In re Aiken County, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); Ferguson v. Obama, No. 10-1052 (D.C. Cir. filed Feb. 25, 2010); South Carolina v. U.S. Dep't of Energy, No. 10-1069 (D.C. Cir. transferred Mar. 25, 2010). The latter action was initiated in the Fourth Circuit on February 26, 2010, but was subsequently transferred to the District of Columbia Circuit.

not all issues raised by the new petitions and by DOE's motion before this Construction Authorization Board. In the interest of judicial efficiency, therefore, the Board will suspend further briefing of the new petitions to intervene and consideration of DOE's motion, pending guidance from the Court of Appeals on the relevant legal issues. The parties are encouraged to seek expedited resolution of their claims in that Court.

I. Procedural Status

On February 16, 2010, this Board granted (with certain exceptions) DOE's motion to stay discovery and other aspects of this adjudicatory proceeding until the Board resolves DOE's motion to withdraw the Application.[7] The Board is not generally empowered to direct the NRC Staff in the performance of the Staff's independent responsibilities.[8] Hence, the Staff's independent technical review of the Application is not affected by the Board's stay order. The Staff has informed the Board that it expects to complete two of the five volumes of the Safety Evaluation Report (SER) on the Application by November 2010.[9] Even if the Board had not stayed discovery, hearings on contested factual issues would ordinarily not take place until after the NRC Staff issues relevant portions of the SER.

II. New Petitions to Intervene

The five new petitioners allege their respective interests in this proceeding to be as follows:

A. Washington

Washington hosts DOE's Hanford Nuclear Reservation (Hanford), which stores radioactive, mixed radioactive and hazardous wastes.[10] The wastes are stored in underground

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[7] CAB Order (Granting Stay of Proceeding) (Feb. 16, 2010) (unpublished).

[8] See, e.g., Shaw Areva Mox Servs., LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 (2009).

[9] See CAB Case Management Order #3 (Feb. 1, 2010) at 1 (unpublished).

[10] Washington Petition at 2.

tanks, of which more than one third are leaking and have discharged approximately one million gallons of waste into the soil at the Hanford site. The released wastes have migrated into the Hanford groundwater, which flows into the Columbia River, negatively impacting Washington's environment and economy.[11]

DOE has proposed to process the released wastes in a waste treatment plant (WTP), thereby eliminating the need to store waste in leaking tanks.[12] Pursuant to the NWPA, the design is predicated on the assumption that the WTP's high-level waste output will be disposed of at the national repository. Accordingly, the WTP was designed and partially constructed to satisfy Yucca Mountain facility performance standards. To date more than half of the design and construction has been completed for the four components of this complex plant. Termination of the Yucca Mountain project at this time might require the WTP facility to be demolished and re-constructed in accordance with another repository's waste acceptance criteria.[13] This delay would require the waste to remain in leaking storage tanks indefinitely. Additionally, Hanford is storing four other types of waste, and in the absence of a national repository, Washington fears that it will be forced to store high-level wastes indefinitely, with no designated final disposal path.[14]

B. South Carolina

The Savannah River Site (SRS) and seven commercial reactors with onsite storage of spent nuclear fuel are located in South Carolina.[15] Thus, South Carolina is uniquely situated as a potential candidate state for a waste disposal or storage facility, should the Yucca Mountain

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[11] Id. at 3.

[12] Id. at 4.

[13] Id. at 5-6.

[14] Id. at 6.

[15] South Carolina Petition at 3-4.

facility be abandoned. Further, abandonment of the Yucca Mountain project would prolong the inherent risks associated with onsite storage of high-level waste at the SRS and statewide commercial reactors. This action would require South Carolina to develop emergency preparedness and transportation plans.[16]

C. Aiken County, South Carolina

The SRS is located in Aiken County, South Carolina.[17] Aiken County also owns real property close to the SRS. Failure to go forward with the Yucca Mountain project could result in widespread contamination of spent nuclear fuel at the SRS, negatively impacting human health.[18]

D. National Association of Regulatory Utility Commissioners

The National Association of Regulatory Utility Commissioners (NARUC) is a national organization comprised of state public utility commissioners responsible for regulating the rates and conditions of interstate electricity.[19] NARUC's members have a statutory duty to protect the health, safety and economic interest of ratepayers. Pursuant to the NWPA, ratepayers have paid more than $17 billion dollars into the Nuclear Waste Fund to support the development of a geologic repository for high-level waste. Abandoning Yucca Mountain would undercut the federal government's ability to dispose of high-level waste and spent nuclear fuel and waste the billions of dollars that ratepayers have already spent on Yucca Mountain.[20]

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[16] Id.

[17] Aiken County Petition at 2.

[18] Id.

[19] NARUC Petition at 3.

[20] Id. at 4.

E. Prairie Island Indian Community

The Prairie Island Indian Community (PIIC) is a Federally-recognized Indian Tribe, located adjacent to an Independent Spent Fuel Storage Installation and the Prairie Island Nuclear Generating Plant, both of which store spent nuclear fuel.[21] Pursuant to the NWPA, this spent nuclear fuel must be permanently disposed of at the national repository, where it will no longer subject PIIC members to health and safety risks. PIIC also represents the interests of ratepayers in the Community, who are among the nation's ratepayers that have paid billions of dollars under the Standard Contract for the disposal of spent nuclear fuel.[22]

III. New Contentions

Collectively, the five new petitions proffer sixteen contentions that are based upon the NWPA and the Standard Contract;[23] the National Environmental Policy Act (NEPA); the Administrative Procedure Act (APA); the United States Constitution; and the NRC's own precedents. All sixteen contentions are legal issue contentions, which do not involve disputed facts. Moreover, all sixteen address the same basic question: whether DOE acts beyond its authority or otherwise unlawfully in seeking to withdraw the Application.

Answers to two of the new petitions—PIIC's and NARUC's—are not due until April 9, 2010. The answers to Aiken County's, South Carolina's and Washington's petitions, however, reveal three basic positions.

Ironically—because it is, after all, DOE's motion that the new petitions challenge—DOE adopts the most generous stance. DOE would allow all the new petitioners to intervene in

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[21] PIIC Petition at 2-3.

[22] Id. at 2.

[23] The Court of Appeals previously addressed the NWPA and the Standard Contract in Ind. Mich. Power Co. v. Dep't of Energy, 88 F.3d 1272 (D.C. Cir. 1996) and Northern States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754 (D.C. Cir. 1997).

opposition to its motion to withdraw.[24] "DOE believes that States and State subdivisions, affected tribes, and NARUC should be able to present their differing view of the law on this issue in this unique proceeding."[25] DOE is nonetheless "confident that its Motion to Withdraw is consistent with all governing law."[26]

The NRC Staff is more cautious. Because it concludes that neither Washington, South Carolina nor Aiken County has proffered an admissible contention, the Staff asserts that none can be admitted as a party.[27] The Staff would, however, allow Aiken County to participate as an interested governmental body under 10 C.F.R. § 2.315(c).[28] The Staff would also allow such participation by Washington and South Carolina, if requested.[29]

Among other things, the Staff asserts that the issues that may be contested in this adjudicatory proceeding are limited by the Commission's initial hearing notice—that is, to whether the Application "satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met."[30] Because all new contentions pertain to DOE's motion to withdraw, and not to the issues identified in the Commission's hearing notice, the Staff asserts that none: (1) is properly within

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[24] U.S. Department of Energy's Response to Petitions to Intervene of the State of Washington, the State of South Carolina, Aiken County, the National Association of Regulatory Utility Commissioners, and the Prairie Island Indian Community (Mar. 29, 2010) at 3.

[25] Id. at 2.

[26] Id.

[27] See 10 C.F.R. § 2.309(a).

[28] See Aiken County Petition at 3 (seeking alternative relief as an interested government body).

[29] In their replies, Washington and South Carolina have requested such participation in the alternative. State of Washington's Reply to Answers of the State of Nevada, NRC Staff, U.S. Department of Energy, and Clark County, Nevada (Apr. 5, 2010) at 13 n.16; Reply Brief of the State of South Carolina on Its Petition to Intervene (Apr. 5, 2010) at 18.

[30] NRC Staff Answer to State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 29, 2010) at 12.

the scope of the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii);[31] (2) is "material to the findings the NRC must make to support the action that is involved in the proceeding," as required by 10 C.F.R. § 2.309(f)(1)(iv);[32] or (3) controverts a specific portion of the Application, as required by 10 C.F.R. § 2.309(f)(1)(vi).[33]

The State of Nevada is least generous. Nevada—joined by Clark County, Nevada, the Joint Timbisha Shoshone Tribal Group, and the Native Community Action Council—says that Aiken County, South Carolina and Washington should not be allowed to participate at all. Specifically, Nevada asserts that none has demonstrated standing, that their petitions are untimely, and that all have failed to demonstrate substantial and timely compliance with licensing support network (LSN) requirements.[34] Nevada also argues that Aiken County has failed to demonstrate entitlement to participate as an interested governmental entity.[35]

As set forth above, the new petitioners demonstrate substantial interests in this proceeding. Although not deciding their status or the admissibility of their contentions at this time, it appears to the Board that, at a minimum, Aiken County, South Carolina and Washington would all likely qualify for participation as interested governments under 10 C.F.R. § 2.315(c), if they satisfy LSN requirements. On the same conditions, PIIC would appear, at a minimum, to qualify under 10 C.F.R. § 2.315(c) as an affected, Federally-recognized Indian Tribe if it desires such status.

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[31] See id. at 12-13.

[32] Id. at 14-15.

[33] Id. at 15.

[34] See 10 C.F.R. § 2.1012(b)(1).

[35] Nevada is silent on the potential status of South Carolina and Washington as interested governments—presumably because, unlike that of Aiken County, their original petitions did not expressly request such status in the alternative.

IV. Pending Actions in the Court of Appeals

Two of the five petitioners—Aiken County and South Carolina—have filed in the United States Courts of Appeals actions under Section 119 of the NWPA that challenge withdrawal of the Application on many of the same grounds asserted in the petitions before this Board. Both actions are now pending in the District of Columbia Circuit, where briefing is underway in the Aiken County action (which was filed there) and briefing has been scheduled in the South Carolina action (which was transferred there).[36]

Section 119 of the NWPA authorizes original actions in the federal courts of appeals that are unusual and perhaps unique. It provides that "the United States courts of appeals shall have original and exclusive jurisdiction over any civil action" alleging specified violations of the NWPA and certain related violations of the Constitution or NEPA. **Unlike more typical jurisdictional statutes, Section 119 is not just limited to review of "final" agency actions.**

V. Reasons for the Board to Defer to the Court of Appeal's Rulings on Legal Issues

For several reasons, the Board concludes that the pending actions in the Court of Appeals will likely yield quicker and more authoritative resolution of most if not all relevant legal issues than if the Board were to address them without waiting for the Court's guidance.

First, while the Board expresses no view on the merits of the claims before the Court of Appeals, such claims appear to be properly before the Court. Although Section 119(a)(1)(A) of the NWPA authorizes the federal courts of appeals to review pertinent "final" agency actions, in addition Section **119(a)(1)(B) vests in such courts "original and exclusive jurisdiction" over any**

[36] The South Carolina action, originally filed in the Fourth Circuit, was transferred to the District of Columbia Circuit on March 25, 2010. Also pending in the District of Columbia Circuit is a third action on behalf of certain individuals from the State of Washington. Although styled as a petition for review of the "final action of the President and Secretary of Energy to abandon and not to proceed with plans to apply for and pursue a license for, and to construct a repository for high level radioactive waste at Yucca Mountain"—and not as an original action under Section 119—that matter also raises many of the same issues. Ferguson v. Obama, No. 10-1052 (D.C. Cir. filed Feb. 26, 2010).

civil action "alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part."

Assuming arguendo that the Secretary of Energy was obligated to file the Application in the first place, it would elevate form over substance not to construe allegations of unlawful withdrawal of the Application as tantamount to alleging the Secretary's "failure" regarding that obligation. Likewise, given the interactive nature of both the adjudicatory process before the Board and the NRC Staff's ongoing technical review of the Application, withdrawal would also appear tantamount to a "failure" to prosecute. In the circumstances of this Application, a motion to withdraw and failure to prosecute are two sides of the same coin.

Second, unlike in most administrative proceedings, the Court of Appeals would not likely benefit from the development of an administrative record in this case. The relevant issues are all legal issues, which require no factual development. With respect to certain issues, such as those arising under the APA and the Constitution, the NRC can claim no specialized expertise to which the Court of Appeals might wish to defer. With respect to other issues, such as those arising under the NWPA and NEPA, the NRC and DOE might each claim expertise—effectively neutralizing this factor in areas of disagreement.

Third, the pending actions in the Court of Appeals do not seem to the Board to be premature. The key issue is clear and well-defined: that is, whether DOE has lawful authority to withdraw the Application. From the standpoint of efficient judicial administration, there appears little practical advantage for the Court of Appeals to defer consideration of the matter. Given the lengthy, contested nature of the Yucca Mountain proceeding (which has spawned at least two earlier decisions of the D.C. Circuit),[37] it is unrealistic to expect that no party would appeal a final NRC decision, regardless of what it might be. If not addressed now, the same issues will almost certainly return to the Court of Appeals in the future.

[37] See Nevada v. Dep't of Energy, 457 F.3d 78 (D.C. Cir. 2006); Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency, 373 F.3d 1251 (D.C. Cir. 2004).

Fourth, this Construction Authorization Board's own authority to adjudicate the relevant issues has been challenged. As noted, the NRC Staff contends that all the new petitioners' claims are beyond the scope of the proceeding that the Commission has asked the Board to conduct concerning the safety, security and environmental impact of the proposed Yucca Mountain facility.[38] Petitioner Washington has itself questioned the Board's jurisdiction to adjudicate certain of its claims under NEPA and the APA.[39]

Unlike the Court of Appeals, the Board has no power to issue injunctions or hold parties in contempt. Pursuant to 10 C.F.R. § 2.107, other Boards and the Commission have addressed the terms and conditions upon which an application might be withdrawn,[40] but to our knowledge no Board has ever ruled that an application cannot lawfully be withdrawn at all. Obviously, however, no agency adjudicatory tribunal has addressed this issue in the context of the unique NWPA.

The Board's authority over DOE may be especially problematic. As the Commission has instructed, absent "strong and concrete evidence otherwise," the Board must extend some degree of comity to DOE and presume "that government agencies and their employees will do their jobs honestly and properly."[41] This does not mean, of course, that it is not the Board's responsibility to "scrutinize DOE's construction authorization application with care, or that the NRC would hesitate to reject that application if it is fatally flawed."[42] But just as that

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[38] See 10 C.F.R. § 63.31.

[39] Washington Petition at 21, 24.

[40] See, e.g., Sequoyah Fuels Corp. (Source Material License No. SUB-1010), CLI-95-2, 41 NRC 179, 192-93 (1995); P.R. Elec. Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 50-55 (1999); Pac. Gas & Elec. Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 53 (1983); Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1140-41 (1982).

[41] Dep't of Energy, CLI-09-14, 69 NRC at 606.

[42] Id.

responsibility does not authorize the Board to "go beyond the application itself and inquire broadly into DOE's institutional honesty and capability,"[43] arguably it might not permit the Board to overrule DOE's own judgment on whether DOE has discretion to withdraw the Application.

Finally, a fundamental objective of the NWPA—that a decision be made promptly on whether construction of the Yucca Mountain facility shall proceed—would be advanced by receiving guidance from the Court of Appeals now, rather than at the end of the process. The NWPA directs the NRC to make a prompt decision on the Application within a specified time period.[44] The implementing NRC regulations, which apply both to the NRC Staff's technical review and this Construction Authorization Board's resolution of adjudicatory challenges, do likewise.[45]

The Congressional mandate for a reasonably prompt, final decision on whether the Yucca Mountain facility will go forward is best served by adjudication of DOE's right to withdraw the Application through the Section 119 actions now pending in the Court of Appeals, where briefing has already begun. If the Board were to address the new petitions, and then turn to DOE's motion to withdraw, our rulings might first be appealed to the Commission and only thereafter to the Court of Appeals. It makes little sense to initiate such a parallel route to the Court—which in the best of circumstances could take many months—when the relevant issues are already before the Court.

VI. Conclusion

Accordingly, the Board will withhold decision on the five new petitions and DOE's motion to withdraw, pending further developments in the related actions in the United States Court of

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[43] Id. at 607.

[44] See 42 U.S.C. § 10134(d).

[45] See 10 C.F.R. Part 2, App. D.

Appeals for the District of Columbia Circuit. The parties are encouraged to seek expedited resolution of their claims in that Court.

Answers and replies regarding PIIC's and NARUC's petitions need not be filed until the Board so orders. The stay of this proceeding entered on February 16, 2010 remains in effect.[46]

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Paul S. Ryerson
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 6, 2010

[46] If they have not already done so, however, all new petitioners are encouraged to complete all steps to meet the agency's LSN regulations, including certifying that their LSN document collections are available. See 10 C.F.R. § 2.1009(b); Dep't of Energy, LBP-09-6, 69 NRC at 383. Additionally, once each petitioner certifies its LSN document collection, it must continue to meet the supplementation requirements. See PAPO Board Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 6, 2007) at 21 (unpublished); CAB Case Management Order #1 (Jan. 29, 2009) at 2 (unpublished).

U.S. Department of Justice

Environment and Natural Resources Division

E.Durkee
90-13-5-13056

Appellate Section
P.O. Box 23795
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April 8, 2010

Mr. Mark J. Langer
Clerk of Court
US Court of Appeals for the DC Circuit
333 Constitution Ave., N.W.
Washington, DC 20001

Re: *In re: Aiken County*, No. 10-1050

Dear Mr. Langer:

Pursuant to Fed. R. App. P. 28(j) and D.C. Cir. R. 28(f), the federal respondents hereby respond to the Petitioner Aiken County's letter and citation of supplemental authorities dated April 6, 2010. In that letter, Aiken County points this Court to a memorandum and order from the Atomic Safety Commission & Licensing Board, and suggests "that this order has implications on Petitioner's petition for relief before this court, including arguments by the parties related to exhaustion and ripeness." That order, however, is an interlocutory order of an administrative hearing tribunal within the Nuclear Regulatory Commission[1] and does not necessarily reflect the views of the Commission itself. On Monday, April 12, 2010, the Department of Energy intends to request review of the Boards's interlocutory order by the Commission, the body with the final authority over NRC adjudications.

Sincerely,
/s/ John F. Cordes
Counsel for Nuclear Regulatory Commission

/s/ Ellen J. Durkee
Counsel for Department of Energy

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[1] As indicated at p. 1, n. 1 of "Respondents' Response in Opposition to the Petition," the Licensing Board is not a proper respondent in this lawsuit, and takes no position on any issue before this Court.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050 **September Term 2009**

DOE-Yucca Mtn
NRC-63-001

Filed On: April 8, 2010

In re: Aiken County,
Petitioner

No. 10-1052

Robert L. Ferguson, et al.,
Petitioners

v.

United States Department of Energy, et al.,
Respondents

No. 10-1069

State of South Carolina,
Petitioner

v.

United States Department of Energy, et al.,
Respondents

State of Nevada,
Intervenor

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the petitions for review filed in No. 10-1052 and No. 10-1069; the petitions for a writ of mandamus filed in No. 10-1050 and No. 10-1069; the motions for expedited consideration filed in No. 10-1052 and No. 10-1069; and the motion for leave to file a consolidated response in No. 10-1069, it is

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050 **September Term 2009**

ORDERED, on the court's own motion, that these cases be consolidated. It is

FURTHER ORDERED, on the court's own motion, that the respondents and intervenor respond to the motions for expedited consideration by 4:00 p.m. on Monday, April 12, 2010. Any reply is due by 4:00 p.m. on Tuesday, April 13, 2010. The parties are directed to file the paper copies of their pleadings by hand. It is

FURTHER ORDERED that consideration of the motions for a stay and injunctive relief in No. 10-1069 be deferred pending further order of the court, and any response deadlines as to those motions are hereby suspended.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
/s/ Tara Glover
Deputy Clerk

Congress of the United States
Washington, DC 20515

April 12, 2010

Lee Hamilton
Co-Chair, Blue Ribbon Commission on
America's Nuclear Future
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

Brent Scowcroft
Co-Chair, Blue Ribbon Commission on
America's Nuclear Future
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

Dear Chairman Hamilton and Chairman Scowcroft,

Congratulations on your appointment as Co-Chairmen of the Blue Ribbon Commission on America's Nuclear Future. As the Blue Ribbon Commission on America's Nuclear Future begins its two year review to determine the best storage, processing, and disposal methods of nuclear fuel, high-level waste, and materials derived from nuclear activities, we write to ask that you also give appropriate and long-overdue attention to the deactivated nuclear facilities with large quantities of nuclear waste.

Each of us has in our respective states a stand alone, permanently shut down nuclear reactor site that has either completed, or is in the process of completing, decommissioning and decontaminating the reactor and related infrastructure. Beyond such work, there is little or no activity other than safeguarding the spent fuel remaining on the decommissioned site and associated high level nuclear waste generated during the operating life of the reactor.

Nuclear energy producers and ratepayers have met their responsibilities of ensuring the safe storage of nuclear waste in temporary canisters which remain waiting for removal to a permanent depository. As prescribed by law, ratepayers continue to pay millions of dollars annually for proper storage and handling of nuclear waste at both decommissioned sites and operating nuclear power plants. However, by eliminating Yucca as a possible depository site and the current 40 year maximum licensing approval for a canister containing spent nuclear waste, there is increased concern and uncertainty about the future of these decommissioned sites.

Your panel's charter specifically tasks you and your members to evaluate and make recommendations on a permanent solution of used nuclear fuel, as well as the appropriate safe storage of used nuclear fuel while final disposition solutions are selected and deployed. However, we were disappointed that the committee was established without a representative of a decommissioned nuclear facility that could add valuable insight on this important issue. **As you move forward in your work, we respectfully request that you will reach out to those in our representative states that are currently responsible for these decommissioned sites to assist with your review and ensure the unique challenges faced by decommissioned plants can be addressed in your final recommendations.**

The need for a permanent solution to spent nuclear fuel becomes more urgent every day. Your review and recommendations will have direct consequences on the future energy security of our nation, and it is critical that the report be a well rounded, comprehensive document that properly accounts for the need to address the issue of spent fuel from decommissioned sites.

We look forward to continuing to work with you and your panel on this important issue. Please do not hesitate to let us know if we can be of further assistance.

Sincerely,

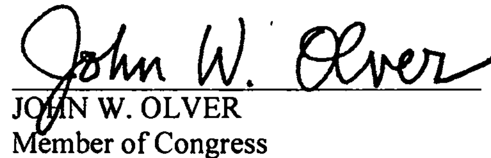
JOE COURTNEY
Member of Congress

MICHAEL H. MICHAUD
Member of Congress

RON KIND
Member of Congress

CHELLIE PINGREE
Member of Congress

DANIEL E. LUNGREN
Member of Congress



JOHN W. OLVER
Member of Congress

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 09-892-HLW-CAB04
(High-Level Waste Repository)	)	April 12, 2010

U.S. DEPARTMENT OF ENERGY'S PETITION FOR INTERLOCUTORY REVIEW

I. Preliminary Statement

The U.S. Department of Energy ("DOE") respectfully requests the Commission to take immediate interlocutory review of the Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) ("M&O"), issued on April 6, 2010, without notice or opportunity for parties to comment by the Atomic Safety and Licensing Board ("Board") in the Yucca Mountain repository licensing docket. DOE further respectfully requests the Commission to review the M&O on an expedited basis and, upon review, reverse it.

In the M&O, the Board abdicates its obligation to rule on critical motions properly pending before it -- namely, DOE's motion to withdraw its license application and five petitions by putative intervenors that oppose DOE's motion. Equally important, the M&O, unless reversed, *will preclude the Commission from reviewing, and applying its expertise to, the important issues raised by DOE's motion.* Instead of allowing the Commission that opportunity, the Board encourages resolution of those issues *outside the Commission* in separate, independent litigation that two of the putative intervenors and others have brought in the U.S. Court of Appeals to challenge DOE's motion to withdraw. The M&O indicates that the Board intends to

take no further action pending receipt of "guidance" from the Court of Appeals in those other proceedings. The Board is, apparently, not interested in guidance from the Commission.

The M&O directly contradicts the position that the Commission has taken in the proceedings before the Court of Appeals. The federal government brief, filed on behalf of the Commission and DOE just two weeks before the M&O, explains in detail why the Court of Appeals should not undertake review (indeed, that it lacks authority to do so) until the Commission completes its review of DOE's motion to withdraw. As that brief states, because "the NRC has not yet rendered a decision on the motion to withdraw," review in the Court of Appeals at this time constitutes an impermissible "attempt to circumvent the administrative process."[1] The federal government accordingly urged the Court of Appeals to "allow[] the NRC to decide these issues in the first instance."[2]

The M&O runs head-on into the well-established principles discussed in the Government Response. Even more to the point, the M&O, unless promptly reversed, will deprive the Commission of the opportunity to provide, and the Court of Appeals the benefit of receiving, the Commission's considered judgment on important matters within its jurisdiction and expertise.

DOE urges the Commission to grant this petition as expeditiously as possible, lest the Court of Appeals believe that the Commission has no interest in considering the issues raised by DOE's motion to withdraw and thus act in a way that deprives the Commission of ever having an

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[1] Respondents' Response in Opposition to the Petition at 2-3, *In re Aiken County*, No. 10-1050 (D.C. Circuit Court of Appeals) (filed March 24, 2010) ("Government Response"). A copy of the Government Response, without its exhibits, is attached. The Commission noted in the Government Response that it did not speak for the Board and that the litigating position of the Commission did not necessarily represent a deliberative adjudication. *Id.* at 1, n.1.

[2] *Id.* at 20.

opportunity to do so. Given the fast-developing proceedings in the Court of Appeals,[3] the Commission should act promptly to protect its jurisdiction and interest here. If the Commission grants review, DOE further requests an expedited schedule for resolution of the issues presented by its petition. DOE likewise suggests that the Commission adopt an expedited schedule for review of its underlying motion to withdraw, either by the Board or, if the Commission so chooses, by the Commission in the first instance.

II. Background

On March 3, 2010, DOE filed a motion with the Board pursuant to 10 C.F.R. § 2.107 requesting to withdraw its license application with prejudice.[4] Five entities, consisting of two States, a county, a federally recognized Indian tribe, and an association, have filed petitions to intervene to oppose that motion.[5] The petitions advance what the Board characterized as purely legal contentions in opposition to DOE's motion.[6]

Two of the putative intervenors (South Carolina and Aiken County) have also filed petitions for judicial review and other forms of relief in federal court; both petitions are now pending in the U.S. Court of Appeals for the D.C. Circuit.[7] Several individuals who have not

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[3] On April 8, 2010, the Court of Appeals entered an Order consolidating the judicial petitions challenging DOE's motion to withdraw and directed expedited briefing, to be completed by April 13, 2010, on the motions for expedited consideration of those petitions.

[4] DOE Motion to Withdraw (Mar. 3, 2010).

[5] Petition of the State of South Carolina to Intervene (Feb. 26, 2010); Petition to Intervene of Prairie Island Indian Community (Feb. 26, 2010); State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010); Petition of Aiken County, South Carolina to Intervene (Mar. 4, 2010); National Association of Regulatory Utility Commissioners, Petition to Intervene (Mar. 15, 2010).

[6] M&O at 6.

[7] *In re Aiken County*, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); *South Carolina v. U.S. Dep't of Energy*, No. 10-1069 (4th Cir. filed Feb. 26, 2010). The latter action was transferred to the D.C. Circuit on March 25, 2010.

sought to intervene in this proceeding have filed a third petition for judicial review in that same court.[8]

The Board issued scheduling orders for briefing on the petitions to intervene.[9] The parties completed briefing on the first three petitions on April 5, 2010. The Board issued the M&O the next day. The Board did so without notice and opportunity for the parties to be heard, and before the completion of briefing on the remaining two petitions.

In the M&O, the Board observed that the petitions for judicial review are based on "many of the same grounds asserted in the petitions before this Board"[10] and then opined, without benefit of briefing or argument by the parties or reference to the Government Response, that: (1) the claims "appear to be properly before the Court";[11] (2) the Court of Appeals "would not likely benefit from the development of an administrative record";[12] (3) "the pending actions in the Court of Appeals do not seem to the Board to be premature";[13] (4) the Board might not be permitted "to overrule DOE's own judgment on whether DOE has discretion to withdraw the Application";[14] and (5) any decision by the Board and then the Commission on DOE's motion to withdraw is likely to be appealed to the Court of Appeals.[15]

For these reasons, the Board held that it would "withhold decision on the five new petitions and DOE's motion to withdraw pending further developments in the related actions in

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[8] *Ferguson v. Obama*, No. 10-1052 (D.C. Cir. filed Feb. 25, 2010).

[9] Order (Concerning Scheduling) (March 5, 2010); Order (March 15, 2010).

[10] M&O at 9.

[11] *Id.*

[12] *Id.* at 10.

[13] *Id.*

[14] *Id.* at 12.

[15] *Id.*

the" Court of Appeals.[16] The Board additionally "encouraged" the parties "to seek expedited resolution of their claims in that Court."[17]

III. Discussion

The Commission has inherent "supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself." *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 N.R.C. 79, 85 (1992); *see also Pa'ina Hawaii, LLC* (Materials License Application), CLI-09-17, __ N.R.C. __, Docket No. 30-36974-ML, 2009 WL 2486185 *1 (N.R.C.) (Aug. 13, 2009) (slip op. at 2); *U.S. Dept. of Energy* (High Level Waste Repository), CLI-08-11, 67 N.R.C. 379, 383 (2008); *U.S. Energy Research & Develop. Admin.* (Clinch River Reactor Plant), CLI-76-13, 4 N.R.C. 67, 75-76 (1976). Indeed, the Commission has exercised this authority on its own initiative. *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-01, __ N.R.C. __, 2007 WL 96998 (N.R.C.) (Jan. 11, 2007) (Commission took *sua sponte* review of otherwise unreviewable decision, despite rejecting petitioner's request for certification, in view of the "significant" and "novel" issues raised" by licensing board orders).

This case presents an extraordinarily compelling circumstance for the Commission's exercise of its supervisory authority. The M&O is a direct threat to the Commission's authority to act in this significant proceeding. If allowed to stand, the M&O will deprive the Commission of its rightful opportunity to apply its expertise and perspective on important questions involving the interpretation of statutes and regulations within its jurisdiction. Instead of providing the Commission that opportunity, the Board has arrogated to itself the unprecedented authority to certify those issues to a federal court, and, in so doing, has cut the Commission out of the

[16] *Id.* at 12-13.

[17] *Id.* at 13.

adjudicatory process.

The Board's decision is misguided -- turning on their heads core principles of administrative procedure. The recent Government Response filed on behalf of the Commission and DOE in the Court of Appeals relied on those very principles to urge it not to act until the Commission ruled on the motion to withdraw. The relevant principles include lack of ripeness,[18] failure to exhaust administrative remedies,[19] and lack of final agency action.[20] Those principles require the Court of Appeals to defer action until the Commission has issued a final, reviewable decision. The M&O would prevent that from ever occurring and may lead to the courts resolving this case without any decision by the Commission as to the motion to withdraw.

Nor does the Board's rationale for reaching a contrary conclusion survive scrutiny. Most basically, the Board is fundamentally incorrect in ascribing little benefit to the Commission's consideration of DOE's motion to withdraw. DOE's motion is brought under one of the Commission's regulations, 10 C.F.R. § 2.107, which § 114 of the NWPA makes directly applicable to this proceeding.[21] The Commission's construction of its own regulation as it applies in this context is thus central to this case and should be of significant assistance to the Court of Appeals. Indeed, *as the Board itself acknowledged*, the Commission has expertise in the interpretation of the NWPA (and NEPA).[22] Accordingly, far from what the Board imagined, this is indisputably an occasion in which the Court of Appeals would benefit from agency

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[18] Government Response at 15-18.

[19] *Id.* at 18-20.

[20] *Id.* at 9-11.

[21] *See* NWPA § 114(d), 42 U.S.C. § 10134(d) ("The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications . . . .").

[22] M&O at 10.

review. The Court of Appeals may be required to defer to the Commission's reasonable interpretations made in ruling on DOE's motion to withdraw and thus would unquestionably benefit from final agency action.[23]

The Board likewise erred in suggesting that DOE's expertise under the NWPA might "neutralize" the Commission's expertise "in areas of disagreement."[24] The issue is wholly speculative, and, in any event, any potential for conflict in no way diminishes the importance of agency review and the development of a record for the Court of Appeals. If anything, the potential for *agreement* between DOE and the Commission strongly favors allowing the administrative process to proceed to completion before the Court of Appeals acts because that agreement would present an especially compelling occasion for deference.

Also infirm is the Board's concern about deferring to DOE's judgment in deciding to withdraw its license application. The Board has jurisdiction to decide DOE's motion,[25] and it did not conclude otherwise. That the Board may have to defer to DOE on some issues when exercising that jurisdiction provides no reason in law or logic for the Board to forgo deciding matters before it. Any deference incumbent on the Board is a consequence of the statutory scheme Congress enacted and is no cause for inaction. Indeed, the Board's action can be read as an attempt to avoid legally binding principles it would prefer did not apply.

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[23] *E.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' . . . This broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program' . . . .") (citations omitted).

[24] M&O at 10.

[25] Licensing boards are conferred "all the powers necessary" to execute their duties. 10 C.F.R. § 2.319 (g), (q) & (r).

Further, the Board's statement that judicial consideration is not "premature" suffers the same problem as its statement that claims are properly before the Court of Appeals -- it ignores settled law regarding, among other things, ripeness, exhaustion of administrative remedies, and finality, as reflected in the Government Response on these same issues recently filed in the Court of Appeals. By contrast, what is premature is the Board's suggestion that an agency record will not assist the Court of Appeals *before* the parties have had a full opportunity to make such a record. If the Board concluded that the issues posed by DOE's motion to withdraw deserve immediate attention at a higher level, the appropriate course of action would have been to follow NRC regulations and certify the issues to the Commission where the administrative record could have been completed.[26] Under no circumstances was it proper for a Board to resolve such issues by withholding action on them and bypassing the Commission by essentially "certifying" them to a federal court because the Board believes the issues are ready for decision there.

The Board's conclusion -- reached without briefing or argument -- that the petitioners' claims "appear to be properly before the Court" also grossly misreads § 119(a)(1)(B) of the NWPA. As an initial matter, the jurisdiction of the Court of Appeals is an issue for it to decide, not the Board, and even if one were to assume (incorrectly) that the Court of Appeals has statutory jurisdiction here, that would not excuse the Board from deciding the issues before it.

Beyond that, § 119 does not apply here. That provision vests in the Courts of Appeals "original and exclusive jurisdiction" over actions "alleging the failure of the Secretary [of Energy], the President, or the Commission to make any decision, or take any action, required under this part."[27] The Board claims that the withdrawal of the application would constitute a

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[26] 10 C.F.R. §§ 2.319(*l*), 2.1015(d).

[27] 42 U.S.C. § 10139(a)(1)(B).

failure to act, but that conclusion is contrary to precedent.[28] Separate and apart from that, § 119 parallels the general judicial review provisions of the Administrative Procedures Act, 5 U.S.C § 706, dealing with review of agency actions, § 706(2), and failures to act, § 706(1), respectively. The well-developed law under the APA imposes requirements of ripeness, exhaustion, and finality to claims under either provision, and those requirements likewise apply to the parallel provisions of the NWPA.[29] There is nothing in § 119 or any other provision of the NWPA that establishes that Congress intended to depart from these settled administrative principles to favor pre-emptive judicial review when it included the language from the APA into § 119.[30]

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[28] The Board's suggestion that the withdrawal of the application is a failure to act is incorrect. DOE has acted. The potential intervenors may or may not agree with DOE's action, but courts have held that challengers to agency actions cannot dress up their challenges about the sufficiency of such action as a supposed failure to act. *See, e.g., Public Citizen v. NRC*, 845 F.2d 1105, 1108 (D.C. Cir. 1988); *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991); *see also Ecology Center, Inc. v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999) ("complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act'" is not a failure to act). *Ecology Center* quoted *Watkins*, 939 F.2d at 714 n.11 (9th Cir. 1991), a case that arose under § 119(a)(1)(B).

[29] Regarding exhaustion, the Ninth Circuit held in *General Atomics v. NRC*, 75 F.3d 536, 541 (9th Cir. 1996), that it "is well established in administrative law that before a federal court considers the question of an agency's jurisdiction, sound judicial policy dictates that there be an exhaustion of administrative remedies" and it "requires that 'an agency be accorded an opportunity to determine initially whether it has jurisdiction.'" *Id.* (citation omitted)*; see also Darby v. Cisneros,* 509 U.S. 137, 137-38 (1993) (exhaustion applies to actions under the APA "to the extent that it is required by statute or by agency rule as a prerequisite to judicial review."). Concerning finality, an agency action must be final to be judicially reviewable. *E.g., National Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005) ("First, the action under review must mark the consummation of the agency's decisionmaking process - it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which rights or obligations have been determined, or for which legal consequences flow.") (citation omitted). Regarding ripeness, the D.C. Circuit dismissed Nevada's petition from review in an earlier challenge because it was not "ripe." *Nevada v. DOE*, 457 F.3d 78, 85 (D.C. Cir. 2005) (a "'claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'") (citation omitted).

[30] *E.g., Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (there is a "well-settled presumption that Congress understands the state of existing law when it legislates.") (citation omitted); *Louisiana Pub. Serv. Com'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007) ("Congress

Finally, the Board's surmise that the Commission's decision on DOE's motion to withdraw will be appealed to the Court of Appeals provides no justification for the Board's abdication. The prospect of ultimate judicial review is routine in agency adjudicatory proceedings. That prospect has never justified short-circuiting the completion of the administrative process in favor of a preemptive judicial ruling.

IV. Conclusion

The M&O is the type of decision that the Commission's supervisory power is intended to correct. DOE respectfully urges the Commission to accept the M&O for interlocutory review and to reverse it as promptly as possible. If the Commission grants review, DOE is willing to accept any expedited schedule for resolution of the issues presented by its petition. DOE is likewise willing to agree to an expedited schedule for review of the underlying motion to withdraw, either by the Board or, if the Commission so chooses, by the Commission in the first instance.

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is presumed to know how the courts have interpreted extant law when it enacts new law.") (citation omitted).

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY
By Electronically Signed by Donald P. Irwin

Donald P. Irwin
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Counsel for the U.S. Department of Energy

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1082

STATE OF WASHINGTON,
Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,
Respondents

RESPONDENTS' MOTION FOR EXTENSION OF TIME TO RESPOND TO THE PETITIONER STATE OF WASHINGTON'S MOTION FOR PRELIMINARY INJUNCTION

Respondents U.S. Department of Energy ("DOE") and Dr. Steven Chu, Secretary of Energy, hereby move for an extension of time to file a response to the State of Washington's motion for preliminary injunction until Friday, April 23, 2010. As specified below, the DOE has agreed to stay for 21 days further action to effectuate a shutdown of the Yucca Mountain program in order to provide additional time for response and consideration of the motion for preliminary injunction.

On April 13, 2010, the State of Washington filed a Petition for Review and For Declaratory and Injunctive Relief seeking review of decisions by DOE and the Secretary of Energy to terminate development of a permanent depository for high-

level radioactive waste and spent nuclear fuel at Yucca Mountain, Nevada. At the same time, the State filed a motion for preliminary injunction seeking to enjoin the Department and the Secretary "from taking any further actions to terminate or dismantle operations" relating to the Yucca Mountain site. On April 13, 2010, this Court entered an order directing the Respondents to file a response to the State's motion by 9:00 a.m., Thursday, April 15, 2010.

In its motion for preliminary injunction, the State of Washington asserts that the respondents' actions violate the Nuclear Waste Policy Act, the National Environmental Policy Act, and the Administrative Procedure Act. The merits of many of these claims have not been briefed before an administrative tribunal and none briefed in federal court. Consequently, it will require more than the currently allotted response time for the undersigned to consult with their client, DOE, and to adequately analyze and brief the arguments asserted by the State. Furthermore, staff from the Appellate Section, Environment and Natural Resources Division, U.S. Department of Justice, who have been working on the responses in the related petitions filed in *In Re Aiken County*, No. 10-1052, and consolidated cases, are currently unavailable to work on this response for a variety of reasons, but we are recalling staff who are on business-related travel to return to Washington to work on this motion.

The State argues that a preliminary injunction is necessary to preserve the status quo as Energy, it asserts, is "aggressively terminating" the Yucca Mountain project. P.I. Motion, at 19. The undersigned have consulted with Scott Blake Harris, the General Counsel of the Department of Energy, and he has authorized us to represent that the DOE agrees not to undertake further actions to effectuate a shutdown of the Yucca Mountain Program, including terminating employees, terminating contracts, or instructing its contractors to end ongoing work for a period of 21 days from this filing through May 5, 2010, in order for the attorneys in the Department of Justice to have adequate time to prepare a response to the State's motion and for the Court to have adequate time to consider the motion and response.[1/]

[1/] This would not affect DOE's pre-existing commitment to assist employees who of their own accord wish to move to other DOE programs. The fact that employees remain with DOE will in fact facilitate the Department's ability to re-start licensing activities if the current suspension of those activities is lifted. Furthermore, this course of action is taken in the interest of minimizing potential harm to employees.

Also, as indicated in respondents' motion and response filed in *In re Aiken County, et al.*, No. 10-1050, on April 12, 2010, DOE has sought interlocutory review by the Nuclear Regulatory Commission of the NRC Licensing Board's order suspending consideration of petitions to intervene and DOE's motion to withdraw its license application. The Commission now has DOE's request under advisement. If further response from DOE in connection with that request is necessary during the 21-day period, DOE would intend to respond. However, as specified above, DOE will take no further steps to effectuate a shutdown of the Yucca Mountain Program.

Consequently, for the foregoing reasons, the DOE and Secretary Chu move for an extension of time for all Respondents to file a response to the State's motion for preliminary injunction to April 23, 2010.

Respectfully submitted,

JAMES C. KILBOURNE
Chief, Appellate Section
Environment & Natural
Resources Division

ELLEN J. DURKEE
Appellate Section, Environment & Natural
Resources Division, U.S. Dep't of Justice
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Counsel for Department of Energy, Secretary Chu

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

Before Administrative Judges:
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of	)	Docket No. 63-001
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 09-892-HLW-CAB04
(High-Level Waste Repository)	)	April 16, 2010

DEPARTMENT OF ENERGY'S NOTICE OF DEFERRAL OF FILING OF REQUEST FOR RECORDS DISPOSITION AUTHORITY

On February 19, 2010, the U.S. Department of Energy ("DOE") filed with this Board a status report on its plans for archiving its LSN collection ("Status Report").[1] In the Status Report DOE stated its intention to file with the National Archives and Records Administration ("NARA") a "Request for Records Disposition Authority" (Standard Form 115 or SF-115) for its LSN collection, and to do so within 60 days, barring unforeseen circumstances. Status Report at 2-3. That 60-day period ends next Monday, April 19, 2010.

On April 14, 2010, in litigation pending in the U.S. Court of Appeals for the D.C. Circuit stemming from DOE's request to withdraw its license application, DOE committed to refrain from "undertak[ing] further actions to effectuate a shutdown of the Yucca Mountain Program . . .

[1] The Department of Energy's Status Report on Its Archiving Plan (Feb. 19, 2010).

for a period of 21 days from this filing through May 5, 2010."[2] On April 14, 2010, the Court of Appeals, citing "reliance on the government's representation" quoted immediately above, issued a *per curiam* Order denying petitioner's motion for a preliminary injunction.[3] The Order also required a series of further filings, the latest of which is scheduled for April 28, 2010.

Given DOE's representation to the Court of Appeals and the Court's April 14, 2010 *per curiam* Order, and out of an abundance of caution, DOE will refrain from filing the SF-115 form anticipated in the Status Report until at least May 5, 2010.

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[2] Respondents' Motion for Extension of Time to Respond to the Petitioner State of Washington's Motion for Preliminary Injunction, *State of Washington, Petitioner v. U. S. Department of Energy, et al., Respondents* (D.C. Cir. No. 10-1082) (April 14, 2010) at 3.

[3] *Per Curiam* Order (D.C. Cir. No. 10-1082) (April 14, 2010). A copy of the Order is attached hereto.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY
By Electronically Signed by Donald P. Irwin

Donald P. Irwin
Michael R. Shebelskie
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
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Richmond, Virginia 23219-4074

Scott Blake Harris
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Counsel for the U.S. Department of Energy

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
William D. Magwood, IV
William C. Ostendorff

In the Matter of U.S. DEPARTMENT OF ENERGY (High Level Waste Repository)	Docket No. 63-001-HLW

CLI-10-13

MEMORANDUM AND ORDER

The Department of Energy (DOE) has filed a motion to withdraw[1] its request for authorization to construct a permanent geologic spent fuel and high-level nuclear waste repository at Yucca Mountain, Nevada. Five new petitioners have sought to intervene in the proceeding, submitting proposed contentions that challenge the legality of DOE's proposed withdrawal.[2] After first scheduling briefing, the Construction Authorization Board issued a decision suspending briefing, suspending its consideration of the five

[1] *U.S. Department of Energy's Motion to Withdraw* (Mar. 3, 2010) (Motion to Withdraw).

[2] *See Petition of the State of South Carolina to Intervene* (Feb. 26, 2010), *Supplement/Amendment to Petition of the State of South Carolina to Intervene* (Mar. 26, 2010); *State of Washington's Petition for Leave to Intervene and Request for Hearing* (Mar. 3, 2010); *Petition of Aiken County, South Carolina, to Intervene* (Mar. 4, 2010); *National Association of Regulatory Utility Commissioners, Petition to Intervene* (Mar. 15, 2010); *Petition to Intervene of the Prairie Island Indian Community* (Mar. 15, 2010).

new intervention petitions and DOE's motion to withdraw, and extending the stay of the proceeding it had entered previously.[3] The Board based its suspension decision on its view that it was prudent and efficient to await guidance on the "motion to withdraw" issue from the U.S. Court of Appeals for the District of Columbia Circuit, which has before it several lawsuits challenging DOE's effort to halt the Yucca Mountain project.[4] DOE has petitioned for interlocutory review of the Board's decision.[5]

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[3] Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010), at 12-13 (unpublished) (Suspension Order). *See also* Order (Granting Stay of Proceeding) (Feb. 16, 2010) (unpublished).

[4] Suspension Order at 2-3 & 2 n.6. Four cases are pending in the U.S. Court of Appeals for the District of Columbia Circuit: *In re Aiken County*, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); *Ferguson v. U.S. Dep't of Energy*, No. 10-1052 (D.C. Cir. filed Feb. 25, 2010); *South Carolina v. U.S. Dep't of Energy*, No. 10-1069 (D.C. Cir. transferred Mar. 25, 2010). These cases were consolidated on April 8. The State of Washington also has filed a lawsuit, *Washington v. Dep't of Energy*, No. 10-1082 (D.C. Cir. filed Apr. 13, 2010), and asked that it be consolidated with the other three cases. All these lawsuits, except for *Ferguson*, include NRC and NRC officials among the respondents. Three of the petitioners in the court cases, South Carolina, Washington, and Aiken County (SC), also have sought intervention in the NRC proceeding.

[5] *U.S. Department of Energy's Petition for Interlocutory Review* (Apr. 12, 2010). The State of Nevada filed an answer in support of DOE's petition. *State of Nevada Answer in Support of the Department of Energy's Petition for Interlocutory Review* (Apr. 14, 2010). Nye County, Nevada, an admitted party in the proceeding, joined DOE's petition. *Nye County Nevada's Petition for Interlocutory Review of CAB04 April 6, 2010 Order* (Apr. 15, 2010). Aiken County, the NRC Staff, the State of Washington, the State of South Carolina, and Clark County, Nevada (also an admitted party in the proceeding), responded to DOE's and Nye County's petitions. *See Aiken County's Response to Two Petitions for Interlocutory Review* (Apr. 16, 2010); *NRC Staff Answer to U.S. Department of Energy Petition for Interlocutory Review* (Apr. 20, 2010); *NRC Staff Answer to Nye County Nevada's Petition for Interlocutory Review of CAB04 April 6, 2010 Order* (Apr. 20, 2010); *State of Washington's Response to Petitions for Interlocutory Review* (Apr. 21, 2010); *Answer of the State of South Carolina to Petitions for Interlocutory Review* (Apr. 22, 2010); *Answer of Clark County, Nevada in Support of the Department of Energy's Petition for Interlocutory Review* (Apr. 22, 2010).

Given the unique circumstances of this case, we review and vacate the Board's decision as an exercise of our inherent supervisory authority over adjudications.[6] DOE's motion to withdraw invokes § 2.107 of our rules[7] and statutes central to our mission — the Nuclear Waste Policy Act (NWPA) (particularly NWPA § 114(b), (d)) and the Atomic Energy Act of 1954, as amended (AEA).[8] Courts generally accord considerable weight to an agency's construction of the statutes it administers,[9] and defer to an agency's interpretation of its own regulations.[10] Fundamental questions have been raised, both

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[6] The special NRC rules governing this high-level waste proceeding do not provide for the kind of interlocutory review that DOE seeks. *See* 10 C.F.R. § 2.1015. DOE asks that we invoke our inherent supervisory authority over adjudications, but we generally do not entertain such requests. *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009). Even so, were this an ordinary case, DOE's petition surely would qualify for interlocutory review because it challenges a Board decision that "[a]ffects the basic structure of the proceeding in a pervasive [and] unusual manner." *See* 10 C.F.R. § 2.341(f)(2); *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 62-63 (2009). Therefore, in these unique circumstances, we believe it appropriate to exercise our *sua sponte* review authority.

[7] *See* Motion to Withdraw at 1-3. Among other things, section 2.107(a) provides that "[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe."

[8] NWPA, 42 U.S.C. §§ 10101 et seq. (*see* Motion to Withdraw at 2, 4-8); NWPA § 114(b), (d), 42 U.S.C. § 10134(b), (d) (*see* Motion to Withdraw at 2, 5-6); AEA, 42 U.S.C. §§ 2011 et seq. (*see* Motion to Withdraw at 4 n.5).

[9] *See, e.g., United States v. Eurodif S.A.*, 129 S.Ct. 878, 886-87 (2009); *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). *See also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.").

[10] *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (an agency's interpretation of its own regulation is controlling provided it is not "plainly erroneous or inconsistent with the regulation." (citing *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945)). *Accord Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *see also Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978).

before us and before the D.C. Circuit, regarding the terms of DOE's requested withdrawal, as well as DOE's authority to withdraw the application in the first instance. Interpretation of the statutes at issue and the regulations governing their implementation falls within our province. If judicial review is pursued after our final decision, the application of our expertise in the interpretation of the AEA, the NWPA, and our own regulations will, at a minimum, inform the court in its consideration of the issues raised by DOE's motion to withdraw.

The Board understandably has sought to manage this case with an eye toward the efficient use of NRC resources and in anticipation of an authoritative legal ruling from the D.C. Circuit on DOE's effort to withdraw its Yucca Mountain application. But we respectfully do not agree with the Board that freezing our consideration of DOE's motion to withdraw promotes respect for the courts or efficiency. As noted above, judicial review may well benefit from NRC's consideration of the issues surrounding DOE's motion. And, in any event, it is not clear when or if the D.C. Circuit will provide the guidance the Board expects on those issues. In the D.C. Circuit litigation, the government has raised substantial justiciability arguments that, if accepted, would block a judicial merits determination until after the NRC acts.[11]

Thus, rather than await a judicial decision, the timing and result of which is uncertain, and absent a contrary instruction from the court, we think the prudent course of action is to resolve the matters pending before our agency as expeditiously and responsibly as possible.

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[11] *See Respondents' Response in Opposition to the Petition, In re: Aiken County,* No. 10-1050 (D.C. Cir.) (filed Mar. 24, 2010).

For these reasons, we vacate the Board's Suspension Order and remand the matter to the Board for prompt resolution of DOE's motion to withdraw. We direct the Board to establish a briefing schedule on DOE's motion to withdraw and issue a decision on that motion no later than June 1, 2010. The Board should continue case management and resolve all remaining issues promptly.

IT IS SO ORDERED[12].

For the Commission

(NRC SEAL)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of April, 2010.

---

[12] Commissioner Apostolakis did not participate in this order because he had not yet taken the oath of office.

U.S. Department of Justice

Environment and Natural Resources Division

A.Brabender
90-13-5-13056; 90-13-5-13057; 90-13-5-13058

Appellate Section
P.O. Box 23795
L'Enfant Plaza Station
Washington, DC 20026-3795

Telephone (202) 514-5316
Facsimile (202) 353-1873

April 23, 2010

Mr. Mark J. Langer
Clerk of Court
U.S. Court of Appeals for the D.C. Circuit
333 Constitution Ave., N.W.
Washington, DC 20001

Re: *In re: Aiken County, Ferguson v. DOE, South Carolina v. DOE*
Consolidated Case Nos. 10-1050, 10-1052, 10-1069

Dear Mr. Langer:

On April 6, 2010, Petitioner Aiken County filed a letter pursuant to Fed. R. App. P. 28(j) and D.C. Cir. R. 28(f), alerting this Court to the Atomic Safety & Licensing Board's ("Board") order suspending briefing and consideration of DOE's motion to withdraw its license application. The federal respondents now hereby alert this Court to the Nuclear Regulatory Commission's ("NRC") order dated April 23, 2010, vacating the Board's April 6 suspension order and remanding the matter to the Board for prompt resolution of DOE's motion to withdraw (Attached). The NRC directed "the Board to establish a briefing schedule on DOE's motion to withdraw and issue a decision on that motion no later than June 1, 2010." The NRC also ordered that "[t]he Board should continue case management and resolve all remaining issues promptly." This NRC order is relevant to various filings pending before this Court, including the petition for writ of mandamus in No. 10-1050 and the motion to the hold all petitions in abeyance.

Sincerely,

/s/ John F. Cordes
Counsel for the Nuclear Regulatory Commission

/s/ Allen M. Brabender
Counsel for Department of Energy

SUSAN M. COLLINS
MAINE

413 DIRKSEN SENATE OFFICE BUILDING
WASHINGTON, DC 20510 1904
(202) 224-2523
(202) 224-2693 (FAX)

COMMITTEES:
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, RANKING MEMBER
APPROPRIATIONS
ARMED SERVICES
SPECIAL COMMITTEE ON AGING

United States Senate
WASHINGTON, DC 20510-1904

April 26, 2010

The Honorable Lee Hamilton
The Honorable Brent Scowcroft
Co-Chairs
Blue Ribbon Commission on American's Nuclear Future
U.S. Department of Energy
Forrestal Building 7A-257
1000 Independence Ave., SW
Washington, DC 20585

Dear Chairmen Hamilton and Scowcroft:

I am writing on behalf of the Maine Yankee Community Advisory Panel to forward their invitation to you to hold a meeting in Wiscasset, Maine at the location of the decommissioned Maine Yankee power plant.

As you consider alternatives for storage of spent nuclear fuel and associated waste, I urge you to give priority to the issue of waste at shut-down reactors. At many of these sites, there is no activity other than safeguarding the spent fuel and associated high-level nuclear waste generated during the operating life of the reactor. Federal law imposed a duty on the Department of Energy to begin accepting this spent fuel and associated waste for disposal in 1998. That did not happen, and each facility owner is now in some stage of litigation against the government to determine damages from the government's breach of contract.

That law also imposed a duty on owners of these facilities, and the consumers of the electricity they generated, to pay for costs of the government's disposal activities. Despite these payments that total in the billions thus far, electricity consumers in my state and others continue to bear the burden of providing funds to secure and safeguard these shut-down reactor sites. And, while the sites are under strict environmental, safety and security controls, as required by state and federal law, they cannot be reused in ways that will benefit the host communities until the protected material is removed.

The Maine Yankee Community Advisory Panel believes that a meeting in Wiscasset, Maine would provide the Commission members an excellent opportunity to learn about these issues and understand why waste at shut-down reactors should be a priority. Thank you for consideration of this request.

Sincerely,

Susan M. Collins
United States Senator

SMC:ac
enclosures

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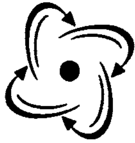


Sustainable Fuel Cycle
TASK FORCE
www.sustainablefuelcycle.com

Sustainable Fuel Cycle Task Force Science Panel

April 26, 2010

The Honorable Lee H. Hamilton
Co-Chairman
Blue Ribbon Commission on America's Nuclear Future
U.S. Department of Energy
C/O Mr. Timothy A. Frazier
1000 Independence Ave., SW
Washington, DC 20585-1290

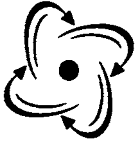
The Honorable Brent Scowcroft
Co-Chairman
Blue Ribbon Commission on America's Nuclear Future
U.S. Department of Energy
C/O Mr. Timothy A. Frazier
1000 Independence Ave., SW
Washington, DC 20585-1290

Re: Letter to BRC Hamilton & Scowcroft

Dear Co-Chairman Hamilton and Co-Chairman Scowcroft:

Congratulations on your appointment as Co-Chairmen to the President's Blue Ribbon Commission on America's Nuclear Future. We recognize the difficult challenges of the task assigned to the Commission, and offer our assistance to you in any way we possibly can. Experience of the members of the Sustainable Fuel Cycle Task Force Science Panel comprises several hundreds of years of collective scientific and managerial effort in addressing the issues of geologic disposal of high level waste. Information about our group is available on our website: www.sustainablefuelcycle.com.

The issues of dealing with the wastes of the nuclear fuel cycle have been examined many times and by many International bodies. Many of our panel members have served on numerous National and International scientific expert panels, which have all concluded that there is no known permanent workable disposal alternative other than geologic disposal. Furthermore, there is an international consensus that disposal is an ethically responsible solution. The United States has existing inventories of high level nuclear wastes and used nuclear fuel that will require eventual geologic disposal. This generation has a societal responsibility to develop a realistic, safe, secure, environmentally protective, and politically workable solution, and not pass responsibilities to future generations. Just leaving used nuclear fuel and highly radioactive wastes in existing and past production locations that were never intended for that purpose, for very long periods of time, is undesirable, especially in these post 911 times.



Sustainable Fuel Cycle Task Force Science Panel

The extensive scientific evidence that has been presented to the Nuclear Regulatory Commission (NRC) in the Yucca Mountain license application indicates that the Yucca Mountain repository is a potentially promising scientific disposal solution. The NRC should be allowed to complete its independent regulatory review to provide their scientific conclusions. Only then, with a sound scientific basis, should the nation make decisions about whether or not a repository at Yucca Mountain is workable, or if another repository site is necessary. Regardless of the continuation of Yucca Mountain or not, this independent NRC information is of significant value.

Alternative disposal solutions should have not only a sound technical basis, but also timely, realistic social and political considerations in the siting approaches so that an alternative disposal site can be technically and socially compared. If the nation concludes that a different geologic disposal site is more workable, than Yucca Mountain, then we recommend prompt implementation of the alterative disposal program, preferable starting with existing defense high level waste, suitably packaged for geologic disposal, such as borosilicate glass logs.

Our membership is available to brief and assist Commission members and staff as desired. Please feel free to contact us via email at sciencepanel@sustainablefuelcycle.com or via telephone at 202-262-6236.

Yours sincerely,

Charles Fairhurst, Ph.D. D. Warner North Ph.D. Ruth Weiner, Ph.D.

Isaac Winograd, Ph.D. Wendell Weart, Ph.D. Eugene H. Roseboom Jr., Ph.D.

For the
Sustainable Fuel Cycle Task Force Science Panel

Copy to Blue Ribbon Commission Members:

- Mark Ayers, President, Building and Construction Trades Department, AFL-CIO
- Vicky Bailey, Former Commissioner, Federal Energy Regulatory Commission; Former IN PUC Commissioner; Former Department of Energy Assistant Secretary for Policy and International Affairs
- Albert Carnesale, Chancellor Emeritus and Professor, UCLA
- Pete V. Domenici, Senior Fellow, Bipartisan Policy Center; former U.S. Senator (R-NM)
- Susan Eisenhower, President, Eisenhower Group, Inc.
- Chuck Hagel, Former U.S. Senator (R-NE)
- Jonathan Lash, President, World Resources Institute
- Allison Macfarlane, Associate Professor of Environmental Science and Policy, George Mason University
- Richard A. Meserve, President, Carnegie Institution for Science, and former Chairman, U.S. Nuclear Regulatory Commission
- Ernie Moniz, Professor of Physics and Cecil & Ida Green Distinguished Professor, Massachusetts Institute of Technology
- Per Peterson, Professor and Chair, Department of Nuclear Engineering, University of California - Berkeley
- John Rowe, Chairman and Chief Executive Officer, Exelon Corporation
- Phil Sharp, President, Resources for the Future

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	ASLBP No. 09-892-HLW-CAB04
(High Level Waste Repository)	April 27, 2010

ORDER
(Setting Briefing Schedule)

On April 23, 2010, the Commission vacated the Board's April 6, 2010 order suspending briefing of DOE's motion to withdraw. The Commission directed the Board to establish a briefing schedule on DOE's motion and to issue a decision on that motion no later than June 1, 2010.[1]

The Board is, of course, obliged to comply with the Commission's direction insofar as possible. Respectfully, however, the complexity of the issues, the desirability of holding oral argument, and a previously-established filing date[2] concerning a related issue render a decision by June 1, 2010 infeasible. Instead, in accordance with the Commission's direction to resolve all pending matters expeditiously and responsibly, the Board will decide DOE's motion to withdraw as soon as possible after June 1 and, in no event, later than June 30.

[1] U.S. Dep't of Energy (High Level Waste Repository), CLI-10-13, 71 NRC __, __ (slip op. at 5) (Apr. 23, 2010).

[2] CAB Order (Questions for Several Parties and LSNA) (Apr. 21, 2010) at 3 (unpublished).

All outstanding matters shall be briefed as follows:

1. Answer's to the petitions to intervene of the Prairie Island Indian Community (PIIC) and the National Association of Regulatory Utility Commissioners (NARUC) shall be filed by May 4, 2010. In particular, the Board wishes to learn whether the NRC Staff continues to assert that the issue of DOE's authority to withdraw its Application is beyond the scope of this proceeding in light of the Commission's April 23, 2010 order stating that the NRC's position should be available to the Court of Appeals if judicial review is pursued. PIIC's and NARUC's replies shall be filed by May 11, 2010.

2. Responses to DOE's motion to withdraw shall be filed by May 17, 2010. Consistent with the Commission's direction to proceed as expeditiously as possible, the five new petitioners shall be allowed to participate in briefing and argument of DOE's motion to withdraw as though they were admitted as parties, pending the Board's determination of their status. DOE may submit a reply, which shall be filed no later that May 27, 2010. Among other things, the parties and potential parties may wish to give particular attention to the statutory scheme, history, and legislative intent of the Nuclear Waste Policy Act.

3. Responses to the questions set forth in the Board's April 21, 2010 order remain due May 24, 2010. As promised in our March 5, 2010 order, thereafter the parties will be afforded an opportunity to comment on DOE's plans for preserving its LSN collection. Any such comments shall be filed no later than June 1, 2010.

/

4. The Board will shortly schedule a date for argument of these matters, to be held at the earliest practicable date after June 1.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD [3]

/RA/

Paul S. Ryerson
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 27, 2010

[3] To facilitate its prompt issuance, this order has not been reviewed by Judge Thomas S. Moore.

Department of Energy
Washington, DC 20585

April 28, 2010

The Honorable John E. Baldacci
Governor of Maine
Chair, New England Governors'
Conference, Inc.
76 Summer Street
Boston, Massachusetts 02110-1226

Dear Governor Baldacci:

Thank you for your December 16, 2009, letter regarding spent nuclear fuel at decommissioned nuclear facilities in New England and the appointment of the Blue Ribbon Commission. As Acting Principal Deputy Director of the Office of Civilian Radioactive Waste Management, I am responding on behalf of the Secretary Chu. I apologize for our delay in responding.

On January 29, 2010, Secretary Chu announced the formation of the Blue Ribbon Commission on America's Nuclear Future. The Commission will conduct a comprehensive review of policies for managing the back end of the nuclear fuel cycle and will provide advice and make recommendations on issues including alternatives for the storage, processing, and disposal of civilian and defense spent nuclear fuel and nuclear waste, including the fuel stored at decommissioned facilities. I am enclosing a copy of the Blue Ribbon Commission charter for your information.

The Commission is being co-chaired by former Congressman Lee Hamilton and former National Security Advisor Brent Scowcroft. It is made up of 15 members who have a range of expertise and experience in nuclear issues, including scientists, industry representatives, and respected former elected officials. The Commission held its first meeting in March and intends to produce an interim report within 18 months and a final report within 24 months.

If you have any questions, please contact me or Ms. Sky Gallegos, Deputy Assistant Secretary for Intergovernmental Affairs, at (202) 586-5450.

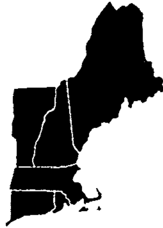
Sincerely,

David K. Zabransky
Acting Principal Deputy Director
Office of Civilian Radioactive
Waste Management

Enclosure

Printed with soy ink on recycled paper

NEW ENGLAND GOVERNORS' CONFERENCE, INC.



76 Summer Street
Boston, Massachusetts 02110-1226
617-423-6900 • FAX 617-423-7327
e-mail: negc@tiac.net
Internet: http://www.negc.org

December 16, 2009

The Honorable Steven Chu
Secretary
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585

Dear Secretary Chu:

We are writing regarding your announced intention to appoint a Blue Ribbon Commission to examine alternatives to the current federal program for managing and disposing of spent nuclear fuel and high-level radioactive waste. We hope this initiative will lead to the development of a sustainable, long-term policy that appropriately recognizes and balances national, regional, and state interests.

As you know, New England is home to three permanently shut down single unit reactor sites. At each of these sites, all decommissioning and site restoration activities have been completed in areas removed from the Nuclear Regulatory Commission license for each site. Spent nuclear fuel storage areas and activities remain licensed by the Nuclear Regulatory Commission. Accordingly, all three sites could be fully returned to the benefit of the local communities, but for the fact that the used nuclear fuel and high level radioactive waste has not been removed by the federal government as required by law and contract. In addition, the ratepayers of New England continue to pay tens of millions of dollars annually for the continued storage of such material at both decommissioned and operating nuclear reactor sites. We would further note that all of the nuclear waste material at these sites is stored in dual-purpose canisters that have been licensed by the Nuclear Regulatory Commission for transportation.

There is growing consensus that the expedited removal and consolidation of spent nuclear fuel and high-level waste from decommissioned reactor sites is sound public policy. The Department of Energy has heard this message from, among others: members of New England's Congressional delegation; the New England Council; the Maine Public Utilities Commission; the National Association of Regulatory Utility Commissioners; the National Conference of State Legislatures; the National Commission on Energy Policy; the American Physical Society; the National Research Council; and the Nuclear Waste Strategy Coalition.

We also request that you direct the Blue Ribbon Commission to develop policy alternatives and recommendations that will lead to the removal of the spent nuclear fuel and high level waste stored at decommissioned and operating reactor sites at the earliest possible date. As you know, the Nuclear Regulatory Commission generally licenses canisters for spent nuclear fuel storage for only 20 years. After this time the Nuclear Regulatory Commission must review the storage system and may only relicense canisters for additional 20 year periods. This uncertainty in the

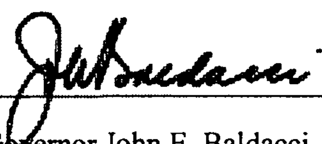
Governor JOHN E. BALDACCI *Maine* CHAIRMAN
Governor DEVAL L. PATRICK *Massachusetts* VICE CHAIRMAN
Governor M. JODI RELL *Connecticut*
Governor JOHN LYNCH *New Hampshire*
Governor DONALD L. CARCIERI *Rhode Island*
Governor JAMES H. DOUGLAS *Vermont*

storage time for the canisters presents the potential for significant safety and environmental issues if a system fails to receive relicensing for decommissioned reactor sites that no longer have the ability to move spent nuclear fuel and high level waste between canisters.

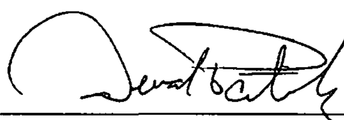
We are pleased to learn that you recently stated your intention to appoint a Commission member with experience managing spent nuclear fuel at decommissioned reactor sites. It is crucial that this type of expertise be represented on the Commission.

Thank you for considering our views as you approach this most important task.

Sincerely,

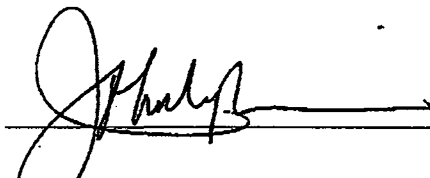


Governor John E. Baldacci, Chair
Maine



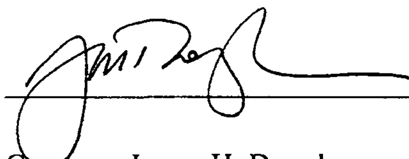
Governor Deval L. Patrick, Vice Chair
Massachusetts

Governor M. Jodi Rell
Connecticut



Governor John Lynch
New Hampshire

Governor Donald L. Carcieri
Rhode Island



Governor James H. Douglas
Vermont

South Carolina/Georgia Groups Adopting Pro-Yucca Mountain Resolutions

- South Carolina House Of Representatives
- Aiken County, SC
- Allendale County
- Barnwell County, SC
- Augusta/Richmond County, GA
- Columbia County, GA
- Columbia County, GA, Development Authority
- Greater Aiken, SC, Chamber Of Commerce
- Augusta, GA, Metro Chamber Of Commerce
- North Augusta, SC, Chamber Of Commerce
- Columbia County, GA, Chamber of Commerce
- Aiken Edgefield Economic Development Partnership
- Southern Carolina Regional Development Authority
- SRS Community Reuse Organization
- Augusta Tomorrow
- CSRA Fort Gordon Alliance
- City Of Aiken, SC
- City Of Barnwell, SC
- Town Of Fairfax, SC

Maine Yankee Community Advisory Panel on
Spent Nuclear Fuel Storage and Removal

Marge Kilkelly, Chair
5 McCobb Road
Dresden, ME 04342

March 10, 2010

The Honorable Lee Hamilton
The Honorable Brent Scowcroft
Co-Chairmen
Blue Ribbon Commission on America's Nuclear Future
U.S. Department of Energy
Forrestal Building 7A-257
1000 Independence Avenue, S.W
Washington, D.C. 20585

Dear Chairmen:

I am writing on behalf of the Maine Yankee Community Advisory Panel (CAP) to invite the Blue Ribbon Commission on America's future to hold a meeting in Wiscasset, Maine to learn first hand about the unique circumstances of single-unit permanently shutdown reactor sites. The Maine Yankee CAP would be pleased to host the Blue Ribbon Commission at the Chewonki Foundation, a neighbor to Maine Yankee and the site of our meetings. The Chewonki Foundation's President Dr. W. Donald Hudson, Jr. is vice-chair of the Maine Yankee CAP.

The 12 member Maine Yankee Community Advisory Panel was established in 1997 to enhance open communication, public involvement and education on the decommissioning of the Maine Yankee nuclear power plant. With Maine Yankee now a stand-alone Independent Spent Fuel Storage Installation, the CAP continues to be a primary link between Maine Yankee and the public providing information about spent nuclear fuel storage and its removal from the Wiscasset site.

Maine Yankee's ISFSI exists only because the federal government has failed to fulfill its commitment to remove the spent nuclear fuel and greater than Class C waste from the site as required by the Nuclear Waste Policy Act and Contract. The annual cost of ISFSI operations to Maine Yankee's ratepayers is approximately $6 - $8 million per year. The land where the ISFSI is located is unavailable for other useful purposes. Additionally, we are unlike sites that will continue to have operating nuclear reactors since it is the only remaining nuclear activity on the site.

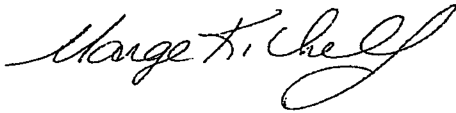
We are heartened by the many voices urging that priority be given to the removal of spent nuclear fuel from permanently shutdown reactor sites. They include the Maine congressional delegation, all current New England Governors, the Government Accountability Office, the National Association of Regulatory Utility Commissioners, the New England Council, the Nuclear Waste Strategy Coalition, the Nuclear Energy Institute, and - as it stated in late 2008 should the Yucca Mountain program falter - the Department of Energy itself.

We were given the expectation by Secretary Chu that issues of permanent shutdown reactor sites will be addressed by the panel and we look forward to hearing that the Commission or a Subcommittee dedicated to this issue will hold a meeting in Wiscasset in the near future.

My colleagues and I are grateful that such a talented and experienced group have taken on the assignment given by the Secretary and wish the Commission success in its endeavors.

Should you have questions or wish to discuss this meeting, please contact me at 207-737-8737 or our Maine Yankee CAP staff person Eric Howes at 207-631-1362. Thank you for your consideration, and I look forward to hearing from you.

Sincerely,



Marge Kilkelly, Chair
Maine Yankee Community Advisory Panel

C: Governor John Baldacci
United States Senator Olympia Snowe
Unites States Senator Susan Collins
Congressman Michael Michaud
Congresswoman Chellie Pingree
Department of Energy Secretary Dr. Steven Chu
Assistant Secretary for Nuclear Energy Dr. Warren F. "Pete" Miller, Jr.
Deputy Assistant Secretary for Nuclear Energy Dr. Peter Lyons

Testimony for the Public Record
Wayne A. Norton
President and CEO of Connecticut Yankee and Yankee Rowe and CNO of Maine Yankee Nuclear Power Plants (decommissioned) on behalf of
The Decommissioning Plant Coalition

Summary

Mr. Chairman and Members of the Subcommittee:

As Chairman of the Decommissioning Plant Coalition[1] (DPC), I am submitting this testimony for the record. In it, the DPC respectfully requests that the FY 2011 Energy & Water Development appropriation bill contain direction to the Secretary of Energy and the recently established Blue Ribbon Commission on America's Nuclear Future (the Commission) for the development of specific recommendations that will facilitate the prompt removal of legacy spent fuel and waste material stored at permanently shut-down, single unit civilian nuclear plant sites throughout the United States. We also ask that report language accompanying the appropriation clearly state the importance of this specific tasking. Finally, we urge the Subcommittee and Committee to reject, as you did last year, the Administration's request for a reinstitution of the tax levied against utilities (pursuant to the Energy Policy Act of 1992) to pay for the clean up of certain DOE facilities.

Background

Since enactment of the Nuclear Waste Policy Act of 1982 and the 1987 amendments to that Act, the members and participants of the DPC have both complied with its requirements to pay into the Nuclear Waste Fund (NWF) and supported the valiant efforts of this Committee to ensure that the Department of Energy (DOE) expeditiously conclude its investigation of the proposed Yucca Mountain repository site in Nevada. For your continued interest and support, we thank you.

In total, we have contributed over $700 million (through fees paid or obligated and interest earned thereon) to the NWF. Not unlike other utility/contract holders, we have now been forced to sue the DOE for its failure to meet statutory and contractual obligations to begin the acceptance of spent nuclear fuel and other waste material at our sites. This litigation has been complex, time consuming, and resource intensive; and it doesn't promise to get much easier if

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[1] The Decommissioning Plant Coalition was established in 2001 to highlight issues unique to nuclear power plants that have undergone or are undergoing decommissioning. The DPC is focused on addressing the needs of reactors at single-unit sites that are undergoing or have completed decommissioning activities. Since its inception, members and participants of the Decommissioning Plant Coalition have included the owners of the Big Rock (MI), Connecticut Yankee (CT), LaCrosse (WI), Maine Yankee (ME), Rancho Seco (CA), and Yankee Rowe (MA) facilities.

the Congress grants the Administration's request to effectively double the number of attorneys assigned to this litigation at the Department of Justice. The irony of the fact that the Executive Branch is proposing to spend more money defending itself from lawsuits (none of which it has yet to win) than prosecuting a program that will allow it to fulfill its statutory and contractual obligations is not lost on us. And, as the members of this panel well know, there is now no question about the government's liability and we are well advanced in multiple lawsuits that will determine the extent of the damages we have incurred. Initial judgments, now on appeal, tell us that those damages will run into the hundreds of millions of dollars over the next few years just for DPC members and participants, judgments that will likely be paid out of the permanent appropriations account known as the Judgment Fund.

We are very disappointed that the President and Secretary have decided to propose the termination of the Yucca Mountain licensing proceeding at this time. Many billions of dollars were spent in the development of the license application for that facility, we are not aware of any scientific or engineering defect that has been identified that justifies its abandonment, and it strikes us that much could be learned by expending relatively modest amounts of the money that is continuing to be collected by the NWF to defend that application in proceedings before the Nuclear Regulatory Commission (NRC). Notwithstanding the commitment expressed by the Secretary to the development of alternative approaches to managing the so-called "back-end" of the nuclear fuel cycle, there have been none suggested to date that would obviate the need for the United States to develop a deep geologic repository at some point in time and it is for this reason that we are strongly opposed to the request of the Department to withdraw the Yucca Mountain application, and in particular, to withdrawal "with prejudice."

While we have no option but to seek compensation for our damages, and notwithstanding our disappointment regarding the apparent fate of the Yucca Mountain program, we are far more interested in focusing our efforts on the development of a sustainable policy that will lead to the government's fulfillment, rather than breach, of its obligations to us and our ratepayers.

Support for the BRC

In that light, we are very supportive of the establishment of the Blue Ribbon Commission on America's Nuclear Future (BRC). We agree with others that the 15 Members selected to serve on the panel are distinguished Americans who bring a necessary variety of backgrounds to the tasks set forth in the President's memorandum and initial charter. We have every confidence that these Members will be able to develop consensus on a sustainable future course that will guide the development of a nuclear "back-end" fuel cycle policy and provide the regulatory stability necessary to assure the deployment of new reactors as the Nation continues to develop a new energy policy that considers constraints on carbon emissions.

What we hope is not lost in this forward looking thinking is the dilemma caused for our localities by the additional delay in government performance of its current obligations that is an inevitable result of the new policy process that has been initiated.

A Growing Consensus Regarding Shutdown Reactor Priority

The DPC is appreciative of the longstanding support of the Subcommittee and Committee in our efforts to call attention to the need to treat the removal of legacy spent fuel from our sites on a priority basis. In various reports filed by the Committee, you have made the following observations:

- For FY 2002 -- "The Committee remains concerned that the Department will not be ready to fulfill its waste acceptance responsibilities consistent with the repository schedule, particularly for spent fuel from reactors presently undergoing decommissioning. The Committee recommendation includes $1,800,000 within available funds to initiate the procurement of one transportation cask for each of the six reactor sites presently undergoing dismantlement and decommissioning. Such procurement does not constitute a settlement or fulfillment of the Secretary's obligation to take acceptance of spent nuclear fuel."
- For FY 2003 -- "The Department should also reinitiate its activities to obtain proposals from the private sector for the procurement of transportation casks for reactor sites presently undergoing dismantlement and decommissioning."
- For FY 2004 -- "...the Committee believes the Department should be working more actively with the contract holders and the DOE sites that will be shipping spent nuclear fuel and high-level waste to the repository to develop a detailed and comprehensive acceptance and transportation plan for the years 2010-2020...In addition, the Department should either ensure that the detailed acceptance criteria that will be part of the license application will include appropriate criteria and specifications for greater-than-class-C waste, or present Congress with a separate plan proposing an alternative disposal path for greater-than-class-C waste. The comprehensive acceptance and transportation plan shall ensure that spent nuclear fuel and high-level waste from those reactor sites that are undergoing decommissioning, including the Dairyland Power Cooperative La Crosse Boiling Water Reactor, shall be accepted and transported as soon as practicable to facilitate the closure of these sites. Finally, the Committee expects the Department to commence the institutional coordination and procurement actions necessary to support a national transportation campaign to begin shipping spent nuclear fuel and high-level waste to the repository beginning in 2010."
- For FY 2008 -- "The Committee directs the Department to develop a plan to take custody of spent fuel currently stored at decommissioned reactor sites to both reduce costs that are ultimately borne by the taxpayer and demonstrate that DOE can move forward in the near-term with at least some element of nuclear waste policy. The Department should consider consolidation of the spent fuel from decommissioned reactors either at an existing DOE site, at one or more existing operating reactor sites, or at a competitively-selected interim storage site. The Department should engage the 11 sites that volunteered to host GNEP facilities as part of this competitive process."
- For FY 2010 -- "Therefore, the Committee makes the $5,000,000 available for the Blue Ribbon Commission only for an analysis of alternatives that includes all options for nuclear waste disposal based on scientific merit, as previously discussed in the Management of Nuclear Spent Fuel and Radioactive Waste section of this report . . . . Additionally, the Committee directs that the proposed Blue Ribbon Commission shall

include an appropriate level of representation of decommissioned reactor sites to ensure their interests are considered in the formulation of a national nuclear waste policy."

The Subcommittee and Committee have not been alone in calling for attention to the removal of material from DPC sites. From 2007 to present, no fewer than 11 responsible organizations have endorsed the prompt need to plan the removal of spent fuel and other legacy waste material from decommissioned sites, including: the American Physical Society, the National Commission on Energy Policy, The Keystone Center, The New England Council, the National Association of Regulatory Utility Commissioners, The Nuclear Waste Strategy Coalition, the National Conference of State Legislatures, the National Research Council, the GAO and the New England Governors Conference.

In the past 15 months, many Members of Congress have called upon the Administration to ensure that it and the BRC recognize the priority need to specifically plan for the prompt removal of material from otherwise decommissioned sites, including your colleagues: Representatives Courtney (CT), Kind (WI), Lundgren (CA) Michaud (ME), Olver (MA), Pingree (ME), and Stupak (MI). Indeed, Secretary Chu seemed to recognize the need for an examination of the unique circumstances affecting decommissioned sites in response to a letter he received last year from Senator Kerry (MA) and the late Senator Kennedy.

We believe these organizations and individuals understand, as you do, that the used fuel and other material at our sites has been, and will continue to be, safely and securely stored under NRC regulation for as long as it remains on-site. We believe they also understand, as we do, that a prompt removal of this material will, in addition to ending the complexity of securing and overseeing the material on sites that have no other purpose and produce no revenue, will:

- ensure that the sites can be considered for a wider range of reuse;
- demonstrate the ability of the Department to fulfill its commitments regarding spent fuel and other civilian wastes that are Greater-Than-Class-C;
- relieve these non-revenue producing facilities of continuing liabilities and eliminate remaining nuclear safety, security and environmental risk concerns at these sites; and
- bring to an end the currently endless contributions of ratepayers to secure and manage the sites and those of taxpayers who incur increasing and currently unending damages for the government's failure to execute its obligations.

For these reasons, we earnestly ask the Committee to ensure that the Commission be tasked to provide specific and separate recommendations that will facilitate the prompt removal of legacy spent fuel and waste material stored at permanently shut-down, single unit civilian nuclear plant sites throughout the United States.

Oppose Additional Taxes for DOE Facility D&D

We would also ask the Committee to once again reject the Administration's request to tax anew those companies that have utilized civilian nuclear technologies for the production of electricity. The Administration's request is intended to raise additional funds for the decontamination and

decommissioning (D&D) of certain DOE facilities that produced enriched uranium for first, defense, and subsequently civilian, programs.

While we certainly support the cleanup of these facilities, we would note that we already paid our proportionate share of such costs, pursuant to contracts for purchase of the material that by their terms included all program costs, including eventual D&D. We also paid a second time, when Congress decided to impose, as part of the legislation that led to the privatization of the government's uranium enrichment enterprise, a special assessment to support the cleanup of three uranium enrichment plants. This tax raised, industry-wide, $150 million a year, adjusted for inflation, and expired under the terms of the legislation at the end of 2007 after 15 years.

This second utility tax, which has raised over $2.6 billion, was supposed to be matched with even larger government contributions. Utilities, including DPC members and participants, have fully met their obligation; the federal government has not. The fund to which utility payments were made, has a current balance in excess of $5 billion, notwithstanding the fact that the government has yet to pay all of the sums called for in the 1992 implementing legislation. Clearly, the imposition of yet a third obligation to pay will have an inordinate impact on our customers, as it would be assessed against a non-revenue producing facility. The cost of this new tax would be passed along to electric utility customers at a time when they can least afford it. We would ask the Subcommittee and Committee to again reject the Administration's proposal.

In Conclusion

In conclusion, we again express our gratitude to the Members of the panel who have long recognized the special circumstances confronting permanently shut down nuclear plants. We look forward to working with you as the Congress continues its efforts to address the Nation's used nuclear fuel and high-level nuclear waste issues.

March 24, 2010

Sustainable Fuel Cycle Task Force Science Panel

Yucca Mountain Water Infiltration, Fractures, and the Role of Drip Shields

Questions have been raised whether the ubiquitous fractures in the rocks comprising Yucca Mountain will allow water intrusion into the proposed repository, thereby negating its suitability for isolation of spent nuclear fuel and other high level radioactive wastes. In point of fact, the few fractures that are both open and interconnected comprise a major attribute of the proposed site, as explained below.

Yucca Mountain (hereafter YM) is located in the most arid part of Nevada where the water table is 2000 feet below the surface. The area receives on the average 7 inches of precipitation per year, much of which either runs off or evaporates before infiltrating into the ground. Less than half an inch of the precipitation is estimated to reach the depth of the proposed repository which is located approximately 1000 feet below the surface and approximately 1000 feet above the water table. The exceptionally deep water table reflects both the paucity of infiltration and the high permeability (i.e., hydraulic continuity) of the open and interconnected fractures. Over 7 miles of tunnels have been drilled into YM during the past 15 years and no water has been observed flowing from open fractures in any potential waste emplacement areas, excluding water that has been intentionally forced out of the strata during heating experiments. Based on analyses of water transport at depth into tunnels in arid environments, capillary action should result in water adhering to the rocks and not contacting the emplaced radioactive wastes. Should water -- the chief mechanism for transport of radioactivity to the biosphere -- periodically drip or flow into the tunnels, several engineered barriers (discussed below) will prevent or retard contact of the water with the radioactive wastes.

Valid questions also have been asked regarding water infiltration into the repository during future wetter climates, similar to those that occurred during the Pleistocene epoch when ice sheets covered the northernmost States. Geologic studies of the minerals (opal and calcite) lining open fractures in the tunnels indicate that water flow at depth during the past 300,000 years was not noticeably different than today, presumably owing to the buffering action of the 1000 feet of strata overlying the proposed repository horizon. Other geologic studies indicate that the water table has been close to its present great depth for even longer periods of time, attesting to the unlikelihood of the proposed repository horizon having being flooded during the recent geologic past.

Three independent engineered barriers comprise a “defense-in-depth” approach to preclude or minimize contact of water with the spent nuclear fuel and high level waste borosilicate glass. The first barrier is the heat generated by the waste. Thermodynamic modeling of the system indicates that the waste will remain dry for several thousand years because the rock surrounding the waste will be above the boiling point of water. The metals encapsulating the waste (i.e., the waste package) comprise the second barrier. The packages are made of two outer layers of strong and corrosion resistant nickel alloy

(Alloy 22) and stainless steel. The waste inside the outer waste package boundaries are encased in strong and corrosion-resistant zirconium cladding on the used nuclear fuel, or stainless steel canisters which contain the borosilicate glass. The actual radioactive wastes inside these final inner metallic barriers are in ceramic-like solid form and their low solubility should retain most of the radioactive content even if water somehow penetrated the encapsulating barriers. Titanium drip shields comprise the third barrier. Highly corrosion resistant and strong titanium shields are to be placed over the waste packages to divert any water dripping or flowing into the tunnels from contacting the waste.

Statements have been made that the decision (made in the 1990's) to add titanium drip shields over the waste canisters was prompted by doubts about the ability of YM to isolate radioactivity from the biosphere. This is not correct. The drip shields were added to provide an additional "defense in depth" barrier to provide regulatory conservatism. It was not indicative of an undesirable site, but an example of conservatism erring on the side of extra protection.

The entire YM repository, which includes the hydrologic system, has been extensively evaluated utilizing internationally peer reviewed long term performance assessment models. The results indicate performance well within USNRC and USEPA standards for isolation of high level radioactive wastes from the environment. Working together, the natural environment -- i.e. the paucity of free water coupled with well-drained rocks — and the three engineered barriers are believed to provide isolation of the waste packages from flowing water for millennia to tens of millennia. Most important, the placement of the proposed YM repository above the water table in solidified rocks permits ease of monitoring of the contact (if any) of water and the waste packages over a period of several decades between the start of waste emplacement and sealing of the repository. During this time the waste packages can be retrieved for examination, if deemed necessary. The data obtained during these decades would be invaluable for testing the long term performance assessment models.

That the arid and well-drained environment at YM is exceptionally well suited for isolation of spent fuel from the biosphere, even in the absence of engineered barriers, is perhaps best appreciated by consideration of the excellent preservation (for millennia to tens of millennia) of delicate plant and animal fossils in arid cave environments of the Southwest. These caves, commonly formed in well-drained rocks tens to hundreds of feet above the local water table, provide natural analogues for the likely preservation, over similar time frames, of metallic/ceramic waste packages emplaced in Yucca Mountain.

For the Science Panel: Dr. Isaac Winograd, sciencepanel@sustainablefuelcycle.com
Dr. Eugene Roseboom, sciencepanel@sustainablefuelcycle.com

Blue Ribbon Commission Brief Remarks

Lake Barrett

March 25, 2010

Good morning Chairman Hamilton, Chairman Scowcroft and members of the Commission. My name is Lake Barrett and I am speaking as a public citizen before you today. My real job is being the volunteer president for my church preschool with 150 2 to 4 year olds. However I am also a nuclear engineer and at the end of my main working career I basically ran the DOE OCRWM Yucca Mountain office for 10 years during the entire Clinton Administration and Bush Administration until the 2002 Nuclear Waste Policy Act Yucca Mountain decision was lawfully made and when I retired.

In the beginning, as a young engineer, I worked on a nuclear refueling of the USN Nautilus, and I firmly believe that that nuclear waste, which still sits in Idaho, needs to be safely disposed of in my life time and not just left there for my grandchildren to figure out how to dispose of it. Our generation made it and we should safely dispose of it. It is immoral for our country to just put spent nuclear fuel and High Level Waste in temporary engineered storage and give the disposal problem to our grandchildren just because it is politically hard for us to do. We ethically should not just kick the trash down the road for them to have to do. It is just plain wrong for so many reasons.

I remind the Commission that 50 years ago, AEC officials said that Hanford tank storage was fine and safe for 50 years or more. Technologies would take care of it and there was no need for disposal preparation. Little did they know. But those words are no different than some that you hear today from very important people who talk about just storing spent fuel and nuclear wastes at existing nuclear sites for hundrerds of years or more into the future.

In my limited time I recommend that you focus on developing an alternative nuclear waste Plan B that the nation can rationally compare against the Plan A Yucca Mountain. Yucca Mountain, like it or not and as imperfect as it may be, is the lawfully designated repository after 30 years and 10 Billion dollars of hard scientific and political work. Yucca licensing should be allowed to continue to help inform you if the current regulatory process works or not. That information is important for any repository site of the future. Valuable geologic disposal expertise should not be thrown away just for short term political expediency.

Within what little time I have, I recommend you develop an integrated three element Plan B program where the most important element is the creation of a durable process that delivers a real geologic disposal facility within an ethical time period. My view of an ethical time period for operation is within the next 25 years which is nearly 100 years after the first HLW was created, which still sits un-disposed at Hanford. Do not lose sight that disposal is the critical central issue and key goal for you.

The second and least important element is advanced nuclear technologies. As the Secretary said they can reduce wastes and do many wonderful things, but they do not dispose of all the wastes. Some may try to trick you into thinking that nuclear waste can be completely recycled.

It cannot. Advanced nuclear concepts should proceed only on their net merits. One with good long term promise is advanced reactors that can burn LWR fuel without chemical separations. But even these promising future concepts do not eliminate the need for disposal and do nothing for existing and future HLW.

If Yucca is not to be used, then a new repository is many decades away from operation. As mentioned yesterday there are 10 permanently shutdown reactor sites that have stranded spent fuel on our lakes, rivers and seacoasts, where all agree it should not indefinitely be stored. Therefore I believe the second most important element is the creation of one or more regional interim storage facilities to bridge between the present undesireable onsite storage situation and a new geologic disposal facility. These volunteer regional interim storage facilities would initially, in a stepwise learning fashion, consolidate all shutdown reactor fuel and eliminate all nuclear risks at these sites which were never meant to be long term waste storage sites.

The federal government should provide incentive performance contracts to private industry to site, license, build and operate these "bridging" interim storage facilities. Such facilities would likely be coupled with future advanced nuclear facilities to make them desirable from a state perspective. State partnerships are key to facility siting. Traditional federal government siting is a proven failure, and should be avoided.

On the subject of states, yesterday people mentioned how the Nordic countries have done well on siting their repositories. I remind the Commission that Sweden and Finland do not have states, only local governments. If we had only local and central governments, we would already have operating facilities here, but we are the United STATES of America. Trips to Sweden are fun (in summer), but don't be misled.

There are many good existing reports with lessons learned on how to do these things and I would be happy to brief and help any Commission member or staff with these in the future. I live here in the area and Tim and John have my contact information.

I thank you all for agreeing to serve on this important Commission and I will do anything possible to help toward your success. I do not want to leave this earth without having a safe environmentally protective permanent disposal capability available to my grandchildren for wastes that you and me helped create. Since you are now federal employees on this Commission, I hope you will feel the same way.

Thank you,

Lake