

MAINE STATE LEGISLATURE

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March 31, 2011

To: Honorable Mr. Kevin L. Raye, President of the Senate
Honorable Mr. Robert W. Nutting, Speaker of the House

Subject: State Nuclear Safety Inspector Office's October through December 2010 Monthly Reports to the Maine Legislature

As part of the State's long standing oversight of Maine Yankee's nuclear activities, 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.

Considering the numerous changes in the Legislature and its leadership and to afford a better understanding of the national situation with used nuclear fuel, I have provided below a brief historical summary of events that have transpired previous to these reports to help bridge the gap and segue into what is happening now.

Background:

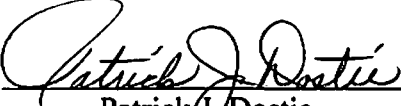
1. In 1982 the Nuclear Waste Policy Act (NWPA) set a date certain of January 1998 for the federal government to take possession of and dispose of spent nuclear fuel and established a fee for the Nuclear Waste Fund to dispose of the spent nuclear waste.
2. In 1987 the NWPA was amended to designate Yucca Mountain in Nevada as the federal repository for spent nuclear fuel and high level waste.
3. In January 1998 the Department of Energy was unable to take possession of the nuclear waste as the Yucca Mountain Project was far from being completed. The failure resulted in a breach of contract nationwide with utilities that have nuclear generating facilities. Numerous lawsuits were filed.
4. In 2002 the Department of Energy recommended Yucca Mountain as a suitable site for the nation's first geologic repository. President Bush approved the recommendation. Nevada's Governor vetoed the Yucca Mountain Project. Congress overrode Nevada's opposition and President Bush signed the Joint Resolution into law.
5. In June 2008 the Department of Energy submitted to the Nuclear Regulatory Commission its license application to build a repository at Yucca Mountain in Nevada.
6. In September 2008 the Nuclear Regulatory Commission accepted the application and commences its three year review.
7. In November 2008 Candidate Obama won the national elections and vowed to stop the Yucca Mountain Project.
8. In February 2009 the proposed FY2010 federal budget reduced funding for the Yucca Mountain Project to maintain only the licensing review process underway at the Nuclear Regulatory Commission.
9. In May 2009 twelve intervenors filed 318 contentions in the Yucca Mountain licensing proceedings. The Nuclear Regulatory Commission's Atomic Safety and Licensing Board accepted 299 contentions for review.

10. In January 2010 President Obama established the Blue Ribbon Commission on America's Nuclear Future to develop a plan on how the nation's nuclear stockpile should be managed.
11. In February 2010 the President's FY 2011 Budget did not include any funding for the Yucca Mountain Project for the Department of Energy and \$10 million for the Nuclear Regulatory Commission to commence the orderly closure of the Project.
12. In March 2010 the Department of Energy filed a motion with the Nuclear Regulatory Commission's Atomic Safety and Licensing Board to withdraw its license application before the Board and started the process of dismantling the Yucca Program.
13. In May 2010 the U.S. Court of Appeals for the District of Columbia Circuit imposed a stay on its review of the Yucca Mountain Project pending the outcome of the Nuclear Regulatory Commission's Atomic Safety and Licensing Board's ruling on the withdrawal of the license application and subsequent review by the Commission.
14. In June 2010 the Nuclear Regulatory Commission's Atomic Safety and Licensing Board denied the Department of Energy's motion to withdraw its license application saying that only Congress has the authority to do so.
15. In July 2010 the Nuclear Regulatory Commission tried to rule on the Atomic Safety and Licensing Board's decision but found itself deadlock.
16. In September 2010 the U.S. Court of Federal Claims raised Maine Yankee's initial award of \$75.8 million decreed in October of 2006 to \$81.7 million for its lawsuit against the federal government's failure to take the spent fuel.

Enclosed please find the Inspector's October through December 2010 monthly activities reports. The submission of these reports was temporarily delayed due to other competing work. The major highlights for the reports locally are: Maine Yankee held its annual emergency plan exercise, the Five-Year Post Decommissioning Radiological Groundwater Monitoring Program Agreement between the State and Maine Yankee is nearing the end, and the preliminary draft of the Confirmatory Summary Report detailing the State's decommissioning findings is 50% complete.

The major highlights nationally for the fourth quarter include the Nuclear Regulatory Commission's Chairman, Dr. Jaczko, using the language in the President's FY 2011 budget request instead of Congress's FY 2011 Appropriations Continuing Resolution at FY 2010 levels to unilaterally halt the Nuclear Regulatory Commission's active review of the Yucca Mountain license application. His actions precipitate a wave of letters from Congress and previous Nuclear Regulatory Commissioners. Another highlight is the balance sheet on the Nuclear Waste Fund listing the individual states and their contributions into the Fund since its inception. The Table does draw attention to an outstanding balance of \$116.9 million for Maine ratepayers. A further highlight is Energy Secretary Chu's issuance of his long awaited fee adequacy assessment for disposing of the nation's used nuclear fuel and high-level waste. His assessment maintains the current fee of over \$750 million annually. One other highlight involves the Nuclear Regulatory Commission publishing its final revision to its Waste Confidence Rule, which stipulates that spent nuclear fuel can be safely stored on-site at existing reactor facilities for up to 120 years. Earlier the Commission directed the Staff to evaluate extended storage at reactor sites up to 300 years. On the heels of the Commission's Rule two reports from two separate organizations, the U.S. Nuclear Waste Technical Review Board and the Massachusetts Institute of Technology, were published to weigh in on the extended storage of spent fuel at current and former reactor sites. One report focused on the lack of technical knowledge while the other evaluated the key factors that would impact future decisions on interim storage facilities. Both reports make recommendations on research and development going forward. In this backdrop the Blue Ribbon Commission and its Subcommittees continue to hold meetings. Some of those meetings included international visits to Finland and Sweden to get first hand experience on how the Scandinavians were successful in siting a repository with their local communities.

Please note that the reports will not feature the glossary and the historical addendum as in previous years. However, both the glossary and the addendum are available on the Radiation Control Program's website at <http://www.maineradiationcontrol.org> under the nuclear safety link. Should you have questions about the reports' contents, 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

Enclosures

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. Mary Mayhew, Commissioner, Department of Health and Human Services
Ms. Jennifer Duddy, Senior Director of Legislative and Public Relations, Depart. of Health and Human Services
Dr. Stephen Sears, Acting Director, Maine Center for Disease Control and Prevention
Senior Policy Advisor, Governor's Office
Mr. Darryl Brown, 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

November 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 were no longer included in the report. Instead, this information was available at the Radiation Control Program's website noted above. In some situations the footnotes may include some basic information and may redirect the reviewer to the website.

Independent Spent Fuel Storage Installation (ISFSI)

During November the general status of the ISFSI was normal with the fence project continuing. There were no spurious alarms due to environmental conditions.

There was no fire-related impairment but there was one security-related impairment in November. The impairment was due to the re-construction of the security fence near the east side of the Security and Operations Building. The impairment that started last month continued through the month and into the early part of December. The project was reviewed by the Nuclear Regulatory Commission but it did not require their prior approval. The re-aligning of the fence was to minimize the number of spurious and environmental alarms the ISFSI was experiencing.

There were 32 security events logged for the month. Twenty-four of the events documented transient environmental conditions which cleared shortly after their initiation. Seven of the events documented computer problems, six of which were due to operator error and one required the computer to be rebooted. The last event documented a planned and expected breach of the fence as part of the fence project. Security is required to log the event even though it was a planned activity.

There were 17 condition reports¹ (CR) for the month of November. The CRs are listed below.

1st CR: Documented an error found on one of the electrical prints. The error was corrected.

2nd CR: Involved a wrong revision number for an attachment to a program document. Upon further review it was determined that the program document was not needed and it was terminated.

3rd & 4th CRs: Were for security sensitive issues and are not available for public disclosure.

¹ A condition report is a report that promptly alerts management to potential conditions that may be adverse to quality or safety. For more information, refer to the glossary on the Radiation Program's website.

- 5th & 6th CRs: Were for tracking performance enhancement items from the practice drill and the annual emergency plan exercise.
- 7th CR: Documented the excavation without a Soil Scientist present. The excavation was halted until the Soil Scientist returned the next day.
- 8th CR: Involved missing pages from a procedure book. The pages were used during the drill and not replaced immediately after the drill.
- 9th CR: Documented an assumed error in the daily alarm testing. The alarms were retested. Upon further investigation it was determined that the initial testing was properly performed.
- 10th CR: As part of their rounds, Security identified a key in the control panel of the diesel generator. The key was left in the switch after changing the clock to Eastern Standard Time. The key was removed.
- 11th CR: Involved one part of the fence upgrade not being properly backfilled to specifications. The post hole was filled with asphalt instead of gravel.
- 12th CR: Documented a deficiency in testing when computers are replaced. The procedure was updated and clarified to ensure proper testing in the future.
- 13th CR: Addressed the footings of the fence posts not meeting backfill specifications. Some remediation was performed, but most of it was used as is with fill and some asphalt.
- 14th CR: Documented the first aid treatment to a security guard for a cut finger. Apparently, the security guard was not wearing protective gloves.
- 15th & 16th CR: Documented the new computer experiencing a new error code. In the first instance the computer automatically rebooted itself. In the second instance the computer had to be manually rebooted. Both issues were resolved by the vendor applying a software patch to fix the problem.
- 17th CR: Involved the radiation instruments in the emergency kits. The surveillance found in service beyond their calibration due date. New radiation instruments that were freshly calibrated were available but had not been swapped yet for the older radiation detectors in the emergency kits.

Other ISFSI Related Activities

On November 10th Maine Yankee submitted to the Nuclear Regulatory Commission revision 33 of their Spent Fuel Storage Installation Quality Assurance Program. The changes do not diminish the commitments in the program as they are editorial in nature, such as correcting punctuation, updating the revision number, changing bullets to lettered subparagraphs, and deleting a reference to Containment.

On November 21st a former contractor was observed taking pictures from Ferry Road. The local law enforcement agency was notified. They intercepted and counseled the individual. Since the contractor was not on Maine Yankee property, no notifications to the Nuclear Regulatory Commission's Operations Center were made.

On November 29th Maine Yankee submitted a letter to the Nuclear Regulatory Commission (NRC) requesting an exemption from the new NRC security regulations pertaining to operating reactors. Maine Yankee's intent is to maintain the current regulatory requirements until the new rulemaking revising the security requirements for ISFSIs is implemented. The exemption request contains security-related sensitive information that is being withheld from public disclosure.

Environmental

On November 2nd the State received the third quarter results from the field replacement of the thermoluminescent dosimeters² (TLDs) around the ISFSI and Bailey Cove. The results from the quarterly TLD 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 high stations identified were G, K, and F and averaged 33.7 milliRoentgens³ (mR) due to their proximity to the storage casks. The moderately high group stations E, J, L, and M averaged 29.4 mR. The remaining stations, A, B, D, H, and I, averaged 27.0 mR. The TLDs at station C were missing, as noted in last month's report, as part of a security measure to enhance visibility. The tree limb that the TLDs were on was cut and disposed of. New TLDs were placed on the tree trunk for the fourth quarter.

In comparison the normal expected quarterly background radiation levels on the coast of Maine range from 15 to 30 mR. The background levels are highly dependent upon seasonal fluctuations in Radon, tidal effects, and local geology. The control TLDs that are stored at the State's Radiation Control Program in Augusta averaged about 29.9 mR.

The Bailey Cove TLDs averaged 27.9 mR and ranged from 25 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.

For informational purposes Figure 1 on page 4 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 three highest locations being stations F, G, and K.

Maine Yankee Decommissioning

The preliminary draft of the Confirmatory Summary Report detailing the State's involvement and independent findings is about 25% completed.

Groundwater Monitoring Program

On November 4th Maine Yankee provided the State with a list of quality control issues raised by their independent contractor's validation of the June groundwater data and explanations for the results obtained. Subsequent internal reviews were performed by the Department of Environmental Protection and the Health and Environmental Testing Laboratory on the list provided. Maine Yankee had notified the State in July that Maine Yankee's laboratory vendor, AREVA, was closing and dismantling its radioactive laboratory operations in Westborough, Massachusetts. AREVA, however, assured Maine Yankee that they would complete the analyses as per their contract. Nonetheless, the hastiness of the closing compromised the data quality.

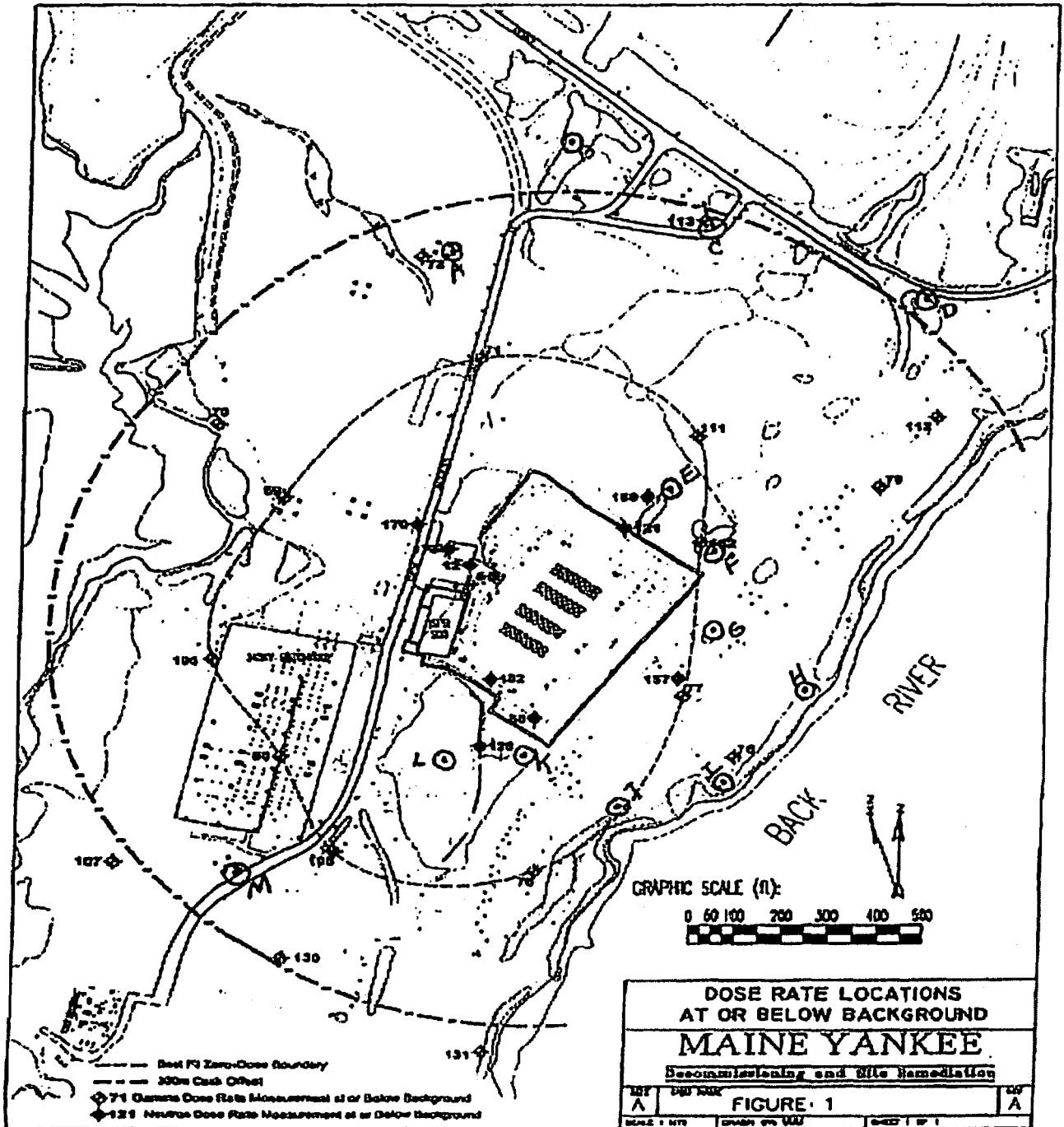
On November 16th Maine Yankee hosted a conference call with the State to discuss the issues raised by the laboratory vendor's inadequate performance. Maine Yankee committed to properly completing the groundwater sampling and analysis with another laboratory contractor. The State's Radiation Control Program,

² Thermoluminescent Dosimeters (TLD) are very small, passive radiation monitors requiring laboratory analysis. For more information, refer to the glossary on the Radiation Program's website.

³ A milliRoentgen (mR) is a measurement of radiation. For a further explanation, refer to the glossary on the Radiation Program's website.

the Department of Environmental Protection and the Health and Environmental Testing Laboratory participated in the conference call along with Maine Yankee and their supporting contractors, Ransom Environmental Consultants Inc. and Black Diamond Consultants.

Figure 1



Other Newsworthy Items

1. On November 1st Secretary of Energy Chu issued his determination on the adequacy of the Nuclear Waste Fund fee as per the Nuclear Waste Policy Act. Secretary Chu concluded that there was no reasonable justification to increase or decrease the fee. Therefore, there will be no proposal to Congress to adjust the fee and the fee will remain the same. Secretary Chu endorsed the determination provided by the Department of Energy's (DOE) Office of Standard Contract Management. Copies of the Secretary's adequacy statement and DOE's determination are attached.
2. On November 1st Nuclear Regulatory Commissioner Svinicki responded to the Nuclear Regulatory Commission Chairman's October 27th response to the House of Representative Sensenbrenner's October 13th letter. Commissioner Svinicki disagrees with the Chairman's position that based on the FY 2011 budget request the Chairman commenced the orderly closure of the Yucca Mountain Project. Commissioner Svinicki points to the FY 2011 budget request language stipulating that closure would commence "upon the withdrawal or suspension of the licensing review", which has not occurred. A copy of her letter is attached.
3. On November 1st the Nuclear Regulatory Commission (NRC) staff filed with the NRC Atomic Safety and Licensing Board stating that it had not identified any additional witnesses.
4. On November 1st White Pine County, Nevada filed with the Nuclear Regulatory Commission's (NRC) Atomic and Safety Licensing Board (ASLB) that it had no additional party or other witnesses to the NRC's review of the Yucca Mountain license application.
5. On November 1st Senator Inhofe from Oklahoma sent a letter to all five Nuclear Regulatory Commissioners requesting they respond to questions relative to the Commissioners voting on the Atomic Safety and Licensing Board's ruling to deny the Department of Energy's motion to withdraw their license application on Yucca Mountain. Since all the letters are virtually the same, a copy of the letter to Commissioner Magwood is attached.
6. On November 2nd the Transportation and Storage Subcommittee of the Blue Ribbon Commission on America's Nuclear Future held a meeting in Chicago. The meeting was segregated into three panels. The first panel reviewed the National Academies' report on spent fuel transportation, its findings, status of its recommendations, and what the future holds for shutdown plants. The second panel dealt with specific facility siting aspects and other process issues relative to one or more interim storage facilities. The third panel discussed what steps and timelines would be necessary to plan and implement a large scale spent fuel transportation campaign in the next three to five years.
7. On November 4th Nuclear Regulatory Commissioners Ostendorff and Svinicki separately responded to Senator Inhofe's November 1st letter on when they voted on the Yucca Mountain ruling. A copy of Commissioner Svinicki's response is attached.
8. On November 4th the Disposal Subcommittee of the Blue Ribbon Commission on America's Future held a meeting to discuss the lessons learned from past site evaluation processes. Topics included the scope of scientific work and costs associated with the Waste Isolation Pilot Plant in Carlsbad, New Mexico, and the Yucca Mountain Project in Nevada.
9. On November 5th Chairman Jaczko of the Nuclear Regulatory Commission (NRC) responded to Senator Inhofe's November 1st letter stating that he did vote twice on the NRC's Atomic Safety and Licensing Board's ruling denying the Department of Energy's motion to withdraw its Yucca Mountain license application. However, he did not inform the Senator how he voted. Commissioner

Magwood also responded on the 5th as to when he voted. A copy of the Chairman's letter is attached.

10. On November 10th the Nuclear Waste Strategy Coalition held a conference call to update its members on the status of the withdrawal of the Yucca Mountain license application pending before the Nuclear Regulatory Commission and the U.S. Court of Appeals for the District of Columbia Circuit, the status of the litigation of the Nuclear Waste Fund fees with oral arguments set for December 6th, an update on the hearing activities of the Blue Ribbon Commission Committee and Subcommittees, and pending discussions on FY 2011 Appropriations and Continuing Resolution until December 3rd. The NWSC is an ad hoc group of state utility regulators, state attorneys general, electric utilities and associate members representing 47 stakeholders in 31 states, committed to reforming and adequately funding the U.S. civilian high-level nuclear waste transportation, storage, and disposal program.
11. On November 15-16th the Blue Ribbon Commission on America's Nuclear Future held a two day meeting. The first day focused on overviews from Japan's, France's, Canada's and Russia's waste disposal policies as well as an overview managing spent nuclear fuel from the RAND Corporation, American Nuclear Society, and Professor Stewart from New York's University School of Law. The second day was devoted to the Green Ribbon Commission, Dr. Jenkins-Smith from the University of Oklahoma and lessons learned from U.S. and international repository programs.
12. On November 15th Representative Mike Simpson from Idaho introduced a House Resolution condemning the Nuclear Regulatory Commission's (NRC) Chairman for unilaterally ceasing the NRC's review of the Yucca Mountain license application and calling on the NRC to resume their licensing activities on the geologic repository. A copy of the House resolution is attached.
13. On November 16th three members of the U.S. House of Representatives sent a letter to the White House's Acting Director of the Office of Management and Budget requesting an explanation of the legal budget authority that the Chairman of the Nuclear Regulatory Commission has to cease the review of the Yucca Mountain Project. In addition, the Representatives requested a list of other federal agencies operating under similar guidance from their FY 2011 budget requests. A copy of their letter is attached.
14. On November 17th the State Inspector participated in a national webinar on the Department of Energy's real time tracking system demonstration of high visibility radioactive shipments through radio frequency identification and satellite monitoring.
15. On November 18th the Attorneys representing Nevada sent a letter to the Chair of the Nuclear Regulatory Commission's Atomic Safety and Licensing Board inquiring on the status of Nevada's eleven legal issues pending before the Board. On behalf of Nevada, the letter requested the Board to issue a schedule for deciding these legal issues. A copy of their letter is attached.
16. On November 19th three Representatives from Washington, California and New Jersey, sent a letter to the Nuclear Regulatory Commission Chairman requesting to release the Commission's decision on the Department of Energy's motion to withdraw its Yucca Mountain license application. A copy of their letter is attached.
17. On November 22nd the two Co-Chairs for the Blue Ribbon Commission on America's Nuclear Future sent a letter to the Department of Energy requesting specific cost and financing information on the nation's High-Level Waste Program. A copy of their request is attached.

18. On November 23rd the Nuclear Regulatory Commission's Atomic safety and Licensing Board ordered that Nevada's November 18th letter will be accepted as a motion before the Board and notified the other parties that they have ten days to respond to Nevada's motion.
19. On November 24th Aiken County, South Carolina, filed with the U.S. Court of Appeals for the District of Columbia Circuit their status report as mandated by the Court's July 28th Order directing the parties to file status reports every 30 days.
20. On November 29th the Nuclear Regulatory Commission (NRC) staff notified the NRC's Atomic Safety and Licensing Board that it will not be issuing its Safety Evaluation Report Volume 3 on the Yucca Mountain Project this month and that a revised schedule for its publication is uncertain at this time.
21. On November 29th Aiken County, South Carolina, the states of Washington and South Carolina, and the three business leaders near the Hanford Reservation in Washington filed a status report with the U.S. Court of Appeals for the District of Columbia Circuit requesting the Court to grant their motion to lift the Court ordered stay that was issued on the pending Nuclear Regulatory Commission's decision on the Atomic Safety and Licensing Board's ruling to deny the Department of Energy's motion to withdraw its license application on Yucca Mountain. The petitioners base their contention on the Commission's inactivity on this issue since July and that the Court's stay was predicated on the Commission's imminent resolution, which is still outstanding.



The Secretary of Energy
Washington, D.C. 20585

**Secretarial Determination of the
Adequacy of the Nuclear Waste Fund Fee**

The Nuclear Waste Policy Act (NWPA) establishes a Nuclear Waste Fund to be used to pay for the disposition of commercial spent nuclear fuel and high-level radioactive waste. Section 302(a)(2) of the NWPA establishes a fee of 1 mill (1/10-cent) per kilowatt-hour of electricity generated and sold that must be paid by nuclear utilities and deposited in the Fund. The NWPA also requires the Secretary to review the adequacy of this fee annually and, upon a determination that either insufficient or excess funds are being collected, to propose an adjustment to the fee to ensure that the full costs of the Federal Government's disposal program will be fully recovered from generators and owners of high-level radioactive waste or spent nuclear fuel. The Secretary must transmit any proposed fee adjustment to Congress for a review period of 90 days of continuous session, after which time the adjustment becomes effective unless contrary legislation is enacted into law.

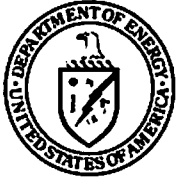
I adopt and approve the attached annual determination of the Director, Office of Standard Contract Management, that there is no reasonable basis at this time to conclude that either excess or insufficient funds are being collected and thus will not propose an adjustment to the fee to Congress; the fee will, therefore, remain at the amount specified in the Nuclear Waste Policy Act pending the next annual review.

Steven Chu

8-11-10

Date

Attachment



Department of Energy
Washington, DC 20585

October 18, 2010

MEMORANDUM FOR SCOTT BLAKE HARRIS
GENERAL COUNSEL

FROM: DAVID K. ZABRANSKY,  DIRECTOR
OFFICE OF STANDARD CONTRACT MANAGEMENT

SUBJECT: Annual Determination of the Adequacy of the Nuclear Waste Fund Fee

The Nuclear Waste Policy Act (NWPA) establishes a Nuclear Waste Fund to be used to pay for the disposition of commercial spent nuclear fuel (SNF) and high-level radioactive waste (HLW). Section 302(a)(2) of the NWPA establishes a fee of 1 mill (1/10-cent) per kilowatt-hour of electricity generated and sold. That fee must be paid by nuclear utilities and deposited in the Fund. The NWPA also requires the Secretary to review the adequacy of this fee annually and, upon a determination that either insufficient or excess funds are being collected, to propose an adjustment to the fee to ensure that the full costs of the Federal Government's disposal program will be fully recovered from generators and owners of HLW or SNF. The Secretary must transmit any proposed fee adjustment to Congress for a review period of 90 days of continuous session, after which time the adjustment becomes effective unless contrary legislation is enacted into law. Since the enactment of the NWPA in January 1983, the Secretary has never proposed a fee adjustment. The most recent assessment of the adequacy of the fee, completed in 2009, concluded that the fee was adequate based on the most recent life cycle cost estimate of the Yucca Mountain repository of \$97 billion in constant 2007 dollars.

The Office of Standard Contract Management has conducted an annual review of the adequacy of the Nuclear Waste Fund fee. A copy of this "Annual Review of the Adequacy of the Nuclear Waste Fund Fee" is attached. This annual review concludes that there is no reasonable evidentiary basis to conclude that the current fee is generating either insufficient or excess funds to cover the costs of DOE's obligation to manage and dispose of SNF and HLW. Accordingly, I have determined that there is no basis to propose an adjustment to the fee to Congress and, therefore, the fee should remain at the amount specified in the NWPA.

Attachment



Annual Review of the Adequacy of the Nuclear Waste Fund Fee

INTRODUCTION: The Nuclear Waste Policy Act (NWPA) establishes a Nuclear Waste Fund to be used to pay for the disposition of commercial spent nuclear fuel (SNF) and high-level radioactive waste (HLW). Section 302(a)(2) of the NWPA establishes a fee of 1 mill (1/10-cent) per kilowatt-hour of electricity generated and sold that must be paid by nuclear utilities and deposited in the Fund. The NWPA also requires the Secretary to review the adequacy of this fee annually and, upon a determination that either insufficient or excess funds are being collected, to propose an adjustment to the fee to ensure that the full costs of the Federal Government's disposal program will be fully recovered from generators and owners of HLW or SNF. The Secretary must transmit any proposed fee adjustment to Congress for a review period of 90 days of continuous session, after which time the adjustment becomes effective unless contrary legislation is enacted into law. Since the enactment of the NWPA in January 1983, the Secretary has never proposed a fee adjustment. The most recent assessment of the adequacy of the fee, completed in 2009, concluded that the fee was adequate based on the most recent life cycle cost estimate of the Yucca Mountain repository of \$97 billion in constant 2007 dollars.

This review concludes that there is no reasonable evidentiary basis to conclude that the current fee is generating either insufficient or excess funds. In such circumstances, the statutory framework and legislative intent support maintenance of the fee at the amount specified in the NWPA.

BACKGROUND: Section 111(b)(4) of the NWPA states that one of the purposes of the NWPA is "to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of [high-level radioactive] waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel." The legislative history of the NWPA confirms that Congress intended those who benefit from electricity supplied through nuclear power to pay for the disposal of nuclear waste and spent fuel created during the generation of that electricity.¹

Section 302(a)(1) of the NWPA authorizes the Secretary of Energy to enter into contracts with generators or owners of HLW or SNF. Section 302(a)(5) requires that these contracts contain a provision under which the Secretary agrees to dispose of SNF and HLW in return for payment of the fees established by section 302. Thus, payment of the fee is the consideration for the Secretary's contractual obligations related to the disposal of HLW and SNF. Section 302(a)(2) sets the fee at 1.0 mill per kilowatt-hour of electricity generated by a civilian nuclear power

¹ *Commonwealth Edison Co. v. U.S. Dept. of Energy*, 877 F.2d 1042, 1047 (D.C. Cir. 1989) ("Congress, in passing the Nuclear Waste Policy Act, expressed its intention that 'the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel.'" (citing NWPA, sec. 111(a)(4)); Congressional Record – Senate at S 15655 (December 20, 1982) ("The bill includes several new or modified concepts from the bill passed by the Senate in the last Congress. One of the most noteworthy of those is the proposal for an assured full-cost recovery by the Federal Government from nuclear power-supplied ratepayers for the nuclear waste programs included in the bill. By establishing a 1 mill-per-kilowatt-hour users fee on nuclear generated electricity, this bill for the first time would provide a direct financial linkage between the beneficiaries of nuclear power and the cost for interim management and ultimate disposal for nuclear wastes.").

reactor and sold on or after the date 90 days after January 7, 1983. This fee results in the deposit of approximately \$750 million of receipts annually into the Waste Fund. The Waste Fund's balance accrues annual interest of approximately \$1 billion, producing total annual income into the Waste Fund of approximately \$1.750 billion. The current value of the Waste Fund is approximately \$24 billion.

Section 302(a)(4) of the NWPA provides for the Secretary annually to review the amount of the fee to "evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d)" of Section 302. Subsection (d) defines such costs in terms of expenditures from the Waste Fund "for purposes of radioactive waste disposal activities under Titles I and II" of the NWPA. Section 302(a)(4) further provides that, if the Secretary "determines that either insufficient or excess revenues are being collected," the Secretary "shall propose an adjustment to the fee to insure full cost recovery." The NWPA provides Congress with 90 days in which to act before the adjustment can take effect.²

The Secretary of Energy has determined that a Yucca Mountain Repository is not a workable option for permanent disposal of SNF and HLW. Consistent with that determination, on March 11, 2009, Secretary Chu announced that "the [Fiscal Year (FY) 2010] Budget begins to eliminate funding for Yucca Mountain as a repository for our nation's nuclear waste."³ The Secretary stated that DOE "will begin a thoughtful dialogue on a better solution for our nuclear waste storage needs."⁴ In its May 2009 budget request for FY 2010, DOE requested no funding for development of a Yucca Mountain repository.⁵ Congress approved DOE's budget request in October 2009.⁶

In its February 2010 budget request for FY 2011, DOE stated that it "has been evaluating a range of options for bringing the [Yucca Mountain] project to an orderly close. In FY 2010, the Department of Energy will withdraw from consideration by the Nuclear Regulatory Commission the license application for construction of a geologic repository at Yucca Mountain, Nevada, in accordance with applicable regulatory requirements."⁷ The Administration's FY 2011 Budget similarly stated that "[i]n 2010 the Department [of Energy] will discontinue its application to the

² The Eleventh Circuit in *Alabama Power* struck the "unless" clause from the fee adjustment statutory provision as violative of the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983). *Alabama Power Co. v. U.S. Dept. of Energy*, 307 F.3d 1300, 1308 (2002). As a result, the statute that remains reads "[t]he adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal [to Congress]," while the clause "unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment . . ." was invalidated.

³ Statement of Steven Chu, Secretary of Energy, Before the Comm. on the Budget, United States Senate, at 3, available at [http://congressional.energy.gov/documents/3-11-09_Final_Testimony_\(Chu\).pdf](http://congressional.energy.gov/documents/3-11-09_Final_Testimony_(Chu).pdf).

⁴ *Id.*

⁵ DOE, FY 2010 Cong. Budget Request, Budget Highlights, at 9, available at <http://www.cfo.doe.gov/budget/10budget/Content/Highlights/FY2010Highlights.pdf>. In addition, the request included minimal funding to continue participation in the NRC license application process for Yucca Mountain. *Id.*

⁶ Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009); Energy and Water Development and Related Agencies Appropriations Act, 2010, Conference Report, H.R. Rep. No. 111-278 at 20-21 (2009), reprinted in 2009 U.S.C.A.N. 1003.

⁷ DOE, FY 2011 Cong. Budget Request, Budget Highlights, at 44, available at <http://www.mbe.doe.gov/budget/11budget/Content/FY2011Highlights.pdf>.

Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geologic repository at Yucca Mountain, Nevada.”⁸ It further stated that “all funding for development of the [Yucca Mountain] facility will be eliminated” for FY 2011.⁹ Consistent with those determinations, on March 3, 2010, the Department filed a motion with the NRC to withdraw the license application for Yucca Mountain.¹⁰ An NRC Board denied that motion on June 29, 2010, but the next day the NRC itself invited briefing as to whether it should review and reverse or affirm that determination.¹¹ As of this writing, the matter remains pending before the NRC.¹²

Although, as noted above, the Secretary has determined that a geologic repository at Yucca Mountain is not a workable option, the Secretary has repeatedly affirmed the Department’s commitment to meeting its obligation to manage and dispose of the nation’s SNF and HLW.¹³ To explore options to meet this commitment, the Secretary, acting at the direction of the President, has established the Blue Ribbon Commission on America’s Nuclear Future (BRC).¹⁴ The BRC is directed by its charter to consider, among other things, (1) “[o]ptions for safe storage of used nuclear fuel while final disposition pathways are selected and deployed,” (2) “fuel cycle technologies and R&D programs,” and (3) “[o]ptions for permanent disposal of used fuel and/or high-level nuclear waste, including deep geological disposal.”¹⁵ Congress has provided \$5 million to fund the BRC so that it may consider “alternatives” for disposal of SNF and HLW.¹⁶ The BRC is required to issue a draft report by mid-2011 and a final report by early 2012.¹⁷ The BRC’s forthcoming recommendations will inform the Department’s policies toward management and disposal of SNF and HLW.

DISCUSSION:

The Framework Established by the NWPAA and the Standard Contracts

As explained above, Section 302(a)(1) of the NWPAA provides that DOE’s disposal contracts with generators or owners of HLW or SNF must contain a provision that requires the payment of a fee. Section 302(a)(5) provides that payment of the fee is the consideration for the Secretary’s

⁸ Office of Management and Budget, Terminations, Reductions, and Savings, Budget of the U.S. Government, FY 2011, at 62, available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/trs.pdf>.

⁹ *Id.*

¹⁰ DOE’s Motion to Withdraw, In the Matter of U.S. Dep’t of Energy, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04.

¹¹ In the Matter of U.S. Dep’t of Energy, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW.

¹² *Id.*

¹³ See, e.g., DOE, Secretary Chu Announces Blue Ribbon Commission on America’s Nuclear Future (Jan. 29, 2010), available at <http://www.energy.gov/news/8584.htm> (“The Administration is committed to promoting nuclear power in the United States and developing a safe, long-term solution for the management of used nuclear fuel and nuclear waste.”); DOE’s Motion to Withdraw at 1, In the Matter of U.S. Dep’t of Energy, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04 (“DOE reaffirms its obligation to take possession and dispose of the nation’s spent nuclear fuel and high-level nuclear waste . . .”).

¹⁴ DOE, Secretary Chu Announces Blue Ribbon Commission on America’s Nuclear Future (Jan. 29, 2010), available at <http://www.energy.gov/news/8584.htm>.

¹⁵ Charter, Blue Ribbon Commission on America’s Nuclear Future (filed March 1, 2010), available at http://www.brc.gov/pdfFiles/BRC_Charter.pdf (“BRC Charter”).

¹⁶ Energy and Water Development and Related Agencies Appropriations Act, 2010 Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (Oct. 2009).

¹⁷ BRC Charter, ¶ 4.

obligation under the contract to take and dispose of HLW and SNF. Nothing in the NWPA, or in the contracts entered into pursuant to Section 302 (standard contracts),¹⁸ ties either of these obligations to progress on the Yucca Mountain repository or the use of the Yucca Mountain repository for the disposal of HLW or SNF. On the contrary, consistent with the statute, the standard contracts provide that “DOE shall accept title to all SNF and/or HLW, of domestic origin, generated by the civilian nuclear power reactor(s) specified in appendix A, provide subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract” without specifying a particular disposal site or method.¹⁹ Thus, the statutory and contractual language is clear that the obligations to collect and to pay the waste fee are ongoing and tied to DOE’s obligation to take and dispose of SNF and HLW, but not to the Yucca Mountain project. Those statutory and contractual obligations remain in place today.

Under the statutory and contractual scheme, payment of the fees continues to provide the consideration for DOE’s performance of its obligations to dispose of these materials.²⁰ DOE, moreover, has clearly stated that termination of the Yucca Mountain project does not affect its commitment to fulfill its contractual obligations to take and dispose of HLW and SNF.²¹ Accordingly, the fact that DOE will not pursue the Yucca Mountain repository does not provide a basis to stop the collection and payment of the consideration for acceptance and disposal of HLW and SNF.

DOE’s conclusion that its obligation to dispose of these materials – and thus the need to collect a fee to recover the costs of such disposal – is independent of the status of the Yucca Mountain repository, or any other repository, has been supported by the courts. As explained by the D.C. Circuit in *Indiana Michigan*:

DOE’s duty ... to dispose of the SNF is conditioned on the payment of fees by the owner ... *Nowhere, however, does the statute indicate that the obligation ... is somehow tied to the commencement of repository operations ...* The only limitation placed on the Secretary’s duties ... is that that duty is “in return for the payment of fees established by this section.”²²

Similarly, courts have made clear that the waste fee is intended to defray the costs of a wide set of activities relating to permanent disposal. In *State of Nev. ex rel. Loux*, the court concluded that the NWPA requires the Waste Fund to cover the costs of a broad array of activities that relate to the ultimate disposal of waste, including pre-site characterization activities conducted

¹⁸ 10 C.F.R. § 961.11 (text of the standard contract).

¹⁹ *Id.*, Art. IV.B.1.

²⁰ NWPA, sec. 302(a)(5)(“Contracts entered into under this section shall provide that ... (B) in return for the payment of fees ... the Secretary ... will dispose of the [HLW] or [SNF] ...”).

²¹ See *supra* note 13.

²² *Indiana Michigan Power Co. v. Dept. of Energy*, 88 F.3d 1272, 1276 (D. C. Cir. 1996) (quoting NWPA, sec. 302(a)(5)(B)) (emphasis added).

by a state in which a repository may potentially be sited.²³ Significantly, moreover, in *Alabama Power*, which was decided after the Joint Resolution of Congress approving the Yucca Mountain site (i.e., the Yucca Mountain Development Act) became law, the court did not limit Section 302(d) to activities associated with Yucca Mountain; instead, the court noted that Section 302(d) permits expenditures for activities that “entail some sort of advancement or step toward permanent disposal, or else an incidental cost of maintaining a repository.”²⁴ These cases are consistent with Congress’s intent that the Waste Fund be used to pay the costs of DOE’s entire disposal program, rather than only the costs of a particular repository.²⁵

Basis for Any Adjustment to the Fee

The remaining question for decision is whether there is, at this time, a basis for the Secretary to propose to Congress an adjustment of the fee. As stated above, the NWPA prescribes that the fee “shall be equal to 1.0 mil” per kilowatt-hour of electricity generated and sold by nuclear utilities. The fee can be altered under the NWPA only through the adjustment provision of Section 302(a)(4), which requires the Secretary to propose an adjustment to the fee “[i]n the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d)” and further provides Congress an opportunity to either allow the proposal to become law or enact contrary legislation. In other words, the NWPA requires the fee to remain at the statutorily-prescribed rate of 1.0 mill unless and until the Secretary determines an adjustment is necessary because excess or insufficient revenues are being collected. If the Secretary makes such a determination, the Secretary must report that determination to Congress, and wait 90 days to see whether Congress acts to disturb that judgment.²⁶

The NWPA does not prescribe a methodology for how the Secretary must carry out the fee adequacy review provision of Section 302(a)(4). Rather, the NWPA gives the Secretary discretion in how he administers that provision each year.²⁷ Over the years, the Secretary has

²³ *State of Nev. ex rel. Loux v. Herrington*, 777 F.2d 529, 532 (9th Cir. 1985). The issue in that case was whether Nevada was entitled to access the Waste Fund to pay for its pre-site characterization monitoring and testing activities at Yucca Mountain. Despite the fact that the NWPA – in sections 116(c)(1)(A) and 117(c)(8) – expressly authorizes funding of only *post*-site characterization monitoring and testing activities, the court liberally construed other NWPA provisions as also authorizing funding of *pre*-site characterization monitoring and testing activities. *Id.* at 532-35. The court indicated that a liberal construction of the NWPA’s funding provisions is necessary to effectuate the statutory purpose of ensuring that generators and owners of HLW and SNF bear the full costs of the disposal of their HLW and SNF. *Id.* at 532. *See also Indiana Michigan*, 88 F.3d at 1275 (indicating that Congress intended Section 302(d) of the NWPA, which governs Waste Fund expenditures, to be interpreted more liberally than other sections of the NWPA).

²⁴ *Alabama Power*, 307 F.3d at 1313.

²⁵ *See* S. Rep. No. 100-517 at 1-2 (1988) (“The Nuclear Waste Policy Act of 1982 (NWPA) establishes a national policy and program for safely storing, transporting, and disposing of spent nuclear fuel and high-level radioactive waste. ... The NWPA also establishes a nuclear waste fund, to be composed of payments made by generators of spent fuel and high-level waste, from which the costs of the program are paid.”) (emphases added).

²⁶ NWPA, sec. 302(a)(4); *Alabama Power*, 307 F.3d at 1308.

²⁷ *Alabama Power*, 307 F.3d at 1308. That court further observed that any challenge to DOE’s decision would face an “insurmountable burden of proof” and that “[g]iven the nebulous calculations that must be made in order to assess the costs of waste storage that will be incurred in the distant future, it is not surprising that the statutory fee has never been challenged by the utilities.” *Id.* at 1309.

used this flexibility to implement varying approaches to evaluate the adequacy of the waste fee.²⁸ These approaches reflected the evolving nature of the disposal program, including changes in the direction of the program and changes in expectations concerning what activities would be undertaken in the future, what costs would be incurred, and what future market conditions would be. None of these annual evaluations has ever led to a conclusion that the fee of 1.0 mill per kilowatt-hour of electricity was either insufficient or excessive such that an adjustment was necessary to ensure full cost recovery. It has, thus, remained unchanged since it was first established.

In this instance, we are aware of no evidence that would provide a reasoned and sound basis for determining that excess or insufficient revenues are being collected for the costs for which DOE is responsible under the NWPA's statutory scheme (and under its contractual obligations entered into pursuant to that scheme). At the direction of the President and with funding provided by Congress, the Secretary has established the Blue Ribbon Commission to analyze alternatives and to provide recommendations for disposal of these materials. Future decisions as to these matters will be informed by the recommendations of the BRC. At this time, however, the BRC has not reported, and thus no action has been or could be taken in light of its recommendations. Accordingly, there is no basis to say that the Department's means of meeting its statutory and regulatory obligations will require more or less money than would be collected through continued assessment of the fee at the level it has been set at for several decades. In such a situation, the relevant language of the NWPA requires (or, at the least, permits) the amount of the waste fee to remain at the amount set by the NWPA itself. In particular, because the Secretary cannot make an affirmative "determin[ation]" that "insufficient or excess revenues are being collected," the Secretary may decide not to propose a change to the fee. Such an approach is consistent with DOE's past annual reviews, which have stated that DOE's policy is to propose a change to the fee only "when there is a compelling case for the change."²⁹

Additionally, to the extent that there is information bearing on the total cost of alternative means of disposing of the materials at issue, that information supports retaining the fee at its current level. Over more than two decades, both before and after Yucca Mountain was designated as the site for which an application should be filed, the Secretary's fee reviews have uniformly determined that the fee should remain at the present rate. Before Yucca Mountain was

²⁸ For example, in the 1987 assessment, the number of cases (involving different host rock and locations among two repositories) was reduced from 10 to 5, as a result of the President's decision in May 1986 to approve only 3 candidate sites for characterization. In 1989, the number of cases was reduced to 1, as a result of the Nuclear Waste Policy Amendments Act's designation of Yucca Mountain as the only site to be characterized for the first repository. Program changes in other years were similarly reflected in fee adequacy assessments for those years. Notably, all fee adequacy assessments since 1995 have assumed that the NWPA's 70,000 MTHM emplacement limit would be repealed by Congress so that only one repository would be constructed to receive all the SNF produced by existing reactors. See Bechtel SAIC Company, LLC, History of Total System Life Cycle Cost and Fee Adequacy Assessments for the Civilian Radioactive Waste Management System, MIS-CRW-SE-000007 REV 00, at 10, 12, and 14-33 (Sep. 2008).

²⁹ DOE, Nuclear Waste Fund Fee Adequacy: An Assessment, DOE/RW-0291P, at 5 (November 1990); see also DOE, Fiscal Year 2007 Civilian Radioactive Waste Management Fee Adequacy Assessment Report, DOE/RW-0593, at 12 (July 2008) ("It is understood that any adjustment to the fee would require compelling evidence that such an adjustment is necessary to ensure future full cost recovery."); DOE, Memorandum for the Secretary, "INFORMATION: The 2008 Determination of the Adequacy of the Nuclear Waste Fund Fee." EXEC-2009-012439, Attachment, at 10 (September 29, 2009) (same).

designated as the sole site for characterization by the 1987 amendments, the Secretary consistently decided against proposing a fee adjustment, in part because DOE's disposal program had not yet matured to the point where program costs could be defined with sufficient certainty to justify an adjustment. For example, according to the Secretarial memo accompanying the 1984 annual review, "[s]ince substantial uncertainty surrounds both program cost and revenue projections at this time, it is prudent to delay a decision to adjust the fee structure until the program is more clearly defined."³⁰ Similarly, in both the 1986 and 1987 annual reviews, DOE concluded that "[f]ee revisions may be recommended within a few years, when more accurate program cost estimates will be developed as the program matures from its present conceptual design phase to the engineering design phase."³¹

Even more to the point, as recently as 2009, the analysis done by DOE determined that the fee amount was appropriate to meet the anticipated costs of the proposed Yucca Mountain repository. One cannot determine with any confidence at this time precisely how much the yet-to-be-selected disposal alternative will cost, but the closest proxy – albeit an imperfect one – is the costs of the proposed Yucca facility. Thus, the fact that the Department recently concluded that the fee should not be varied in order to meet the costs of the Yucca repository provides additional support for the conclusion that the fee should not be altered at this time (and, in particular, should not be lowered).

At the same time, it is important to note that the Department is committed to continuing to review the fee annually. If the Department, informed by the recommendations of the BRC, moves toward a means of disposal that will require a different level of fee than has been charged over the past several decades, and there is compelling evidence that the current revenues are inadequate or excessive, the Department will promptly propose an adjustment of the fee.

In sum, absent a basis for concluding that disposition will not require fees at the current level, the statute does not contemplate – and certainly does not mandate – that the Secretary raise, lower, or suspend the fee. Indeed, if the Secretary were to stop collecting the fee (i.e., by adjusting the fee to zero), that action would contravene the principle of generator responsibility embodied in Section 111(b)(4) and would be inequitable to future ratepayers. Such an adjustment would allow utilities that generate SNF during the time the fee is zero to avoid paying the costs of their SNF disposal, and would effectively shift those costs onto future ratepayers after a disposal solution is identified and the fee is adjusted back to a positive amount.³² This type of cost-shifting was not what Congress intended when it set up the Nuclear Waste Fund.³³ It is clear

³⁰ DOE, Memorandum to the Secretary, "Submittal of Annual Fee Adequacy Evaluation Report for the Office of Civilian Radioactive Waste Management Program." HQZ.870307.8942, at 2 (July 16, 1984).

³¹ DOE, Nuclear Waste Fund Fee Adequacy: An Assessment, DOE/RW-0020, at 1-2 (March 1986); DOE, Nuclear Waste Fund Fee Adequacy: An Assessment, HQS.880517.227, at 2 (June 1987).

³² In such a scenario, attempting to collect the fee from the original generators of SNF would not be an option because neither the NWPA nor the standard contract permits retroactive adjustment of the fee. See 10 C.F.R. 961.11, Article VIII.A.4 ("Any adjustment to the ... fee ... shall be prospective.").

³³ See, e.g. *Consolidated Edison Co. of New York, Inc. v. U.S. Dept. of Energy*, 870 F.2d 694, 698 (D.C. Cir. 1989) (recognizing that Congress intended to avoid "unfairly burdening future ratepayers.").

from the plain language of the NWPA that Congress intended utilities to pay the full costs of disposing of the SNF they generate.³⁴

CONCLUSION: The NWPA provides that the standard contract requires generators or owners of HLW or SNF to pay fees in return for DOE's obligation to accept HLW and SNF and be responsible for its final disposition. DOE has clearly stated that termination of the Yucca Mountain project will not affect its commitment to fulfill its obligations under the NWPA and the standard contracts. DOE must continue to collect the fees to have sufficient revenues to carry out its obligations to accept and dispose of HLW and SNF. Presently, there is no reasonable basis, and certainly no compelling evidence, that justifies any proposed adjustment of the fee, either upwards or downwards, to achieve full cost recovery. Moreover, the best available proxy (though imperfect) indicates that the fee should be retained at the current level. Additionally, adjustment of the fee to zero would be inequitable to past and future ratepayers who pay utility bills for electricity that reflect payment of the fees. In such circumstances, the NWPA requires the fee to remain at its current amount of 1 mill per kilowatt-hour that was established in the NWPA.

³⁴ NWPA, sec. 111 ("Findings and Purposes ... (a) FINDINGS—THE Congress finds that ... (4) ... the costs of [HLW and SNF] disposal should be the responsibility of the generators and owners of such waste and spent fuel ... (b) PURPOSES—The purposes of this subtitle are ... (4) to establish a Nuclear Waste Fund ... that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.").



COMMISSIONER

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

November 1, 2010

The Honorable Jim Sensenbrenner
Ranking Member, Select Committee on
Energy Independence and Global Warming
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Sensenbrenner:

I write to supplement the October 27, 2010 response of NRC Chairman Gregory Jaczko to your letter of October 13, 2010, regarding the NRC's review of the U.S. Department of Energy's license application for a deep, geologic repository. In his reply to you, Chairman Jaczko states that the NRC staff "is following established Commission policy to begin to close out the [High Level Waste] HLW program." I disagree and write to provide my individual view as a member of the Nuclear Regulatory Commission who was serving during the Commission's review and approval of the NRC's Fiscal Year 2011 budget request to the Congress.

When the Commission voted to approve budget justification language related to NRC's proposed HLW activities for FY 2011, a majority of the Commission's members supported language stipulating that orderly closure of the program activities would occur "[u]pon the withdrawal or suspension of the licensing review." The budget justification submitted to the Congress, and pending there now, was modified to include this language. These precursors have not occurred and an adjudicatory appeal related to DOE's request to withdraw its application lies unresolved before the Commission, making the orderly closure of NRC's program, in my view, grossly premature.

As noted by Chairman Jaczko in his response to you, the Commission opined to revisit this budgetary matter in response to a proposal of Commissioner Ostendorff in October of this year. Consequently, deliberation of the agency's budget request in January of 2010 constitutes the sole time the full Commission affirmatively took up and decided the policy of what would comprise the NRC's HLW activities for FY 2011. As a member of the Commission, now and at that time, I differ in my interpretation of the "established Commission policy" in this case and appreciate the opportunity to communicate this view to you and other interested members of the Committee.

Respectfully

A handwritten signature in black ink, appearing to read "Kristine L. Svirnicki".

Kristine L. Svirnicki

BARBARA BOXER, CALIFORNIA, CHAIRMAN

MAX BAUCUS, MONTANA
THOMAS R. CARPER, DELAWARE
FRANK R. LAUTENBERG, NEW JERSEY
BENJAMIN L. CARDIN, MARYLAND
BERNARD SANDERS, VERMONT
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LAMAR ALEXANDER, TENNESSEE

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POHNER, STAFF DIRECTOR
RUTH VAN MARK, MINORITY STAFF DIRECTOR

November 1, 2010

The Honorable William D. Magwood, IV
Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Commissioner Magwood:

Chairman Jaczko has stated previously that an effective regulator acts openly and transparently, describing openness as access to information and transparency as a clear explanation of the decision-making process. Over the past several months, the Nuclear Regulatory Commission's actions on the license application to build a repository at Yucca Mountain have fallen far short of those ideals--including withholding important licensing documents from the public and failure to conclude the adjudicatory review of DOE's motion to withdraw the license application in a timely fashion. As such, it is no surprise that the public and the agency's own employees are increasingly questioning the agency's credibility.

A crucial first step to rebuild the public's trust is simply to conclude the adjudicatory proceeding and answering the simple question of whether DOE can lawfully withdraw the license application. Answering this question would also eliminate any opportunity for tortured interpretations of budgetary authority under Continuing Resolutions regarding whether the staff should continue their review of the license application. Please respond in writing to the following questions:

1. Have you voted in the adjudicatory proceeding regarding the Atomic Safety and Licensing Board's ruling that DOE cannot lawfully withdraw the Yucca Mountain license application? If so, when?
2. If not, when do you anticipate voting on the matter?

These questions are simple, straightforward, and of great interest to many stakeholders. I respectfully request that each of you respond by November 5, 2010.

Sincerely,



James M. Inhofe
Ranking Member
Senate Committee on Environment and Public Works



CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

November 5, 2010

The Honorable James M. Inhofe
Ranking Member, Committee on Environmental and Public Works
United States Senate
Washington, DC 20510

Dear Senator Inhofe:

This is in response to your November 1, 2010 letter about the adjudicatory proceeding regarding the withdrawal of the Yucca Mountain license application. This is an unusual request. Under the Commission's voting process, initial votes on adjudicatory matters are essentially an exchange of preliminary views for discussion and deliberation among the Commissioners. Not until deliberations are complete does the Commission vote on a final Order. The decision of the Commission as a collegial body is captured in this final Order, which is publicly affirmed, and is the public record of the Commission's decision. Therefore, my response to your request must be limited in nature.

Regarding my vote, I first voted on August 25, 2010. I subsequently withdrew my vote and continued active consultation with my colleagues before re-voting on October 29, 2010.

Thank you for your interest in an ongoing adjudication currently before the Commission, and for respecting the importance of maintaining the integrity of the internal deliberative process.

Sincerely,

A handwritten signature in black ink, appearing to read "G. B. Jaczko", with a long horizontal flourish extending to the right.

Gregory B. Jaczko



COMMISSIONER

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

November 4, 2010

The Honorable James M. Inhofe
Ranking Member, Committee on
Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Senator Inhofe:

I write in response to your November 1, 2010 letter regarding the U.S. Department of Energy's request to withdraw its license application for development of a deep, geologic repository at Yucca Mountain.

I filed my vote on this matter with the Secretary of the Commission on August 25, 2010.

Respectfully,

A handwritten signature in black ink, appearing to read "Kristine L. Svinicki".

Kristine L. Svinicki

.....
(Original Signature of Member)

111TH CONGRESS
2D SESSION

H. RES.

Condemning the unilateral decision of the Chairman of the Nuclear Regulatory Commission to begin the closure of the Yucca Mountain license application and calling on the Nuclear Regulatory Commission to resume license activities immediately pending further direction from Congress.

IN THE HOUSE OF REPRESENTATIVES

Mr. SIMPSON submitted the following resolution; which was referred to the Committee on _____

RESOLUTION

Condemning the unilateral decision of the Chairman of the Nuclear Regulatory Commission to begin the closure of the Yucca Mountain license application and calling on the Nuclear Regulatory Commission to resume license activities immediately pending further direction from Congress.

Whereas in 1987 Congress amended the Nuclear Waste Policy Act of 1982 by designating Yucca Mountain as the only option for a long-term storage site by a vote of 237-181 in the House of Representatives and 61-28 in the Senate;

Whereas Congress reaffirmed Yucca Mountain's designation as the only option for a long-term storage site in 2002 by a vote of 306–117 in the House of Representatives and 60-39 in the Senate;

Whereas in 2007 the House of Representatives overwhelmingly rejected by a vote of 80-351 an attempt to eliminate funding for the Yucca Mountain nuclear waste disposal program;

Whereas the Department of Energy has already collected \$24,000,000,000 in fees from nuclear utilities and their ratepayers;

Whereas the Federal taxpayer has already spent over \$8,500,000,000 studying Yucca Mountain as the permanent site for nuclear waste storage;

Whereas the Department of Energy total liability for breach of contracts requiring disposal of spent nuclear fuel and high-level waste from civilian nuclear reactors could reach as much as \$50,000,000,000;

Whereas the Nuclear Regulatory Commission Atomic Safety and Licensing Board found that the Yucca Mountain license application cannot be legally withdrawn;

Whereas the Fiscal Year 2010 Energy and Water Development and Related Agencies Appropriations Act provided funding to continue the Yucca Mountain license application;

Whereas Congress has provided no funding for activities related to the closure of the Yucca Mountain license application;

Whereas the Fiscal Year 2011 Continuing Resolution provided no funding to undertake new initiatives;

Whereas the House Republican members of the Energy and Water Appropriations Subcommittee stated in a letter dated October 20, 2010, that they expect the Nuclear Regulatory Commission to continue its fiscal year 2010 licensing activities until Congress provides additional direction and funding;

Whereas 2 Commissioners disagreed with the decision to shut down such activities and noted that shutdown is inconsistent with the Continuing Resolution; and

Whereas the Nuclear Regulatory Commission Inspector General has launched an investigation of the Chairman's unilateral decision to terminate the review of the Yucca Mountain application: Now, therefore, be it

1 *Resolved*, That the House of Representatives—

2 (1) condemns the unilateral decision of the
3 Chairman of the Nuclear Regulatory Commission to
4 begin the closure of the Yucca Mountain license ap-
5 plication; and

6 (2) calls on the Nuclear Regulatory Commission
7 to resume license activities immediately pending fur-
8 ther direction from Congress.

Congress of the United States
Washington, DC 20515

November 16, 2010

Mr. Jeffrey Zients
Acting Director, Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Mr. Zients:

I write today regarding recent actions by the Chairman of the Nuclear Regulatory Commission, Gregory Jaczko, to shut down the review of the Department of Energy's application for Yucca Mountain.

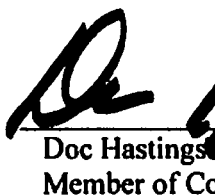
While it is widely known that the Obama Administration opposes Yucca Mountain, it remains our nation's repository for spent nuclear fuel and high level defense waste under the law. In fact, the Atomic Safety Licensing Board has rejected the Department of Energy's motion to withdraw the Yucca Mountain license application. To date, the Nuclear Regulatory Commission has taken no action to overturn this ruling. And, litigation is pending in federal court.

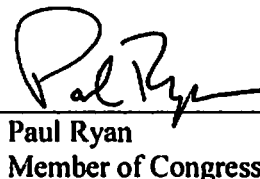
Despite the fact that the federal government is operating under a continuing resolution based on the Fiscal Year 2010 appropriations levels that are law, Chairman Jaczko is using President Obama's Fiscal Year 2011 budget proposal as the justification for his decision to halt the license review. As you know, the Fiscal Year 2011 budget proposal was simply a request – it was never approved by Congress and does not have the force of law.

I write to request a detailed explanation from the Office of Management and Budget outlining the legal budgetary authority of Chairman Jaczko to shut down the Yucca Mountain review and terminate the project. I also request a list of other federal agencies that are operating under the President Obama's Fiscal Year 2011 budget request as opposed to the congressionally approved continuing resolution and existing law.

Thank you for your prompt attention to this request.

Sincerely,


Doc Hastings
Member of Congress


Paul Ryan
Member of Congress


Mike Simpson
Member of Congress

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November 18, 2010

ASLBP 09-892-HLW-CAB04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

Re: Docket No. 63-001-HLW
In the Matter of U.S. Department of Energy (High Level Waste Repository)
Nevada Status Inquiry

Dear Judges Moore, Ryerson and Wardwell:

The State of Nevada writes seeking clarification of the status of an important matter still pending before the Construction Authorization Board (CAB) – rulings on the eleven Phase 1 legal issues.

In its June 30, 2009 Memorandum and Order on the admission of contentions, CLI-09-14 at page 14, the Commission indicated that, “in the interest of moving forward expeditiously where possible in this proceeding,” the CAB should “provide a thorough and meaningful discussion of the legal issues and the bases for resolving them.” The CAB moved promptly to set the appropriate schedules for defining, briefing and arguing eleven Phase 1 legal issues. All of these legal issues were fully briefed and argued on January 26-27, 2010. They are still pending.

On February 16, 2010, the CAB issued an unopposed stay of the proceeding pending its disposition of the Department of Energy’s (DOE’s) (then) expected motion to withdraw its license application. That motion was filed on March 3, 2010. On April 23, 2010, in CLI-10-13, the Commission vacated the CAB’s further suspension order of April 6, 2010, and directed the Board to establish a briefing schedule and issue a decision on DOE’s motion to withdraw its license application. The Commission also (at page 5) said the Board should “continue case management and resolve all remaining issues promptly.” On June 29, 2010, in LBP-10-11, the Board denied DOE’s motion to withdraw and granted the pending intervention petitions of the states of Washington and South Carolina, the county of Aiken in South Carolina, the Prairie Island Indian Community, and the National Association of Regulatory Utility Commissioners, as

EGAN, FITZPATRICK, MALSCH & LAWRENCE, PLLC

November 18, 2010

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well as the amicus curiae filing by the Florida Public Service Commission. One contention of each new party was admitted (whether DOE lacks authority under the Nuclear Waste Policy Act to withdraw its application). See LBP-10-11 at page 47.

With the issuance of LBP-10-11, deciding DOE's motion to withdraw, the Board's February 16, 2010 stay of the proceeding expired according to its terms. No other stay is in effect. Accordingly, the parties have been filing the required LSN and updated witness reports with the CAB. However the eleven Phase 1 legal issues are still pending. It seems to Nevada that a decision on these issues is overdue.

The CAB may be waiting for a decision by the Commission regarding DOE's motion to withdraw its application. However, the Commission's instruction in CLI-10-13 that the Board should "continue case management and resolve all remaining issues promptly" would seem to include the eleven legal issues, especially now that the CAB has addressed what was obviously its first priority – deciding DOE's motion to withdraw. Accordingly, Nevada would appreciate the CAB advising it and the other parties of its schedule for deciding these eleven issues.

A table of significant filings and events related to the eleven legal issues is attached for your information.

Sincerely,

(electronically signed)

Martin G. Malsch
mmalsch@nuclearlawyer.com

MGM:lb
Enclosure

Table of Significant Filings and Events Related to Legal Issues

DATE OF FILING	NATURE OF FILING
December 19, 2008	Nevada petitions to intervene, identifying 19 legal contentions
January 16, 2009	DOE answers Nevada's petition, challenging all legal contentions
February 9, 2009	NRC Staff answers Nevada's petition, challenging all legal contentions
February 24, 2009	Nevada separately replies to answers filed by DOE and NRC Staff
May 11, 2009	Board issues LBP-09-06, admitting 28 legal contentions from Nevada (designating some contentions as legal notwithstanding how they were pled)
May 21, 2009	NRC Staff appeals admissibility of legal contentions to Commission
May 29, 2009	Nevada opposes NRC Staff's appeal of LBP-09-06
June 30, 2009	Commission issues CLI-09-14, affirming admissibility of legal contentions
July 21, 2009	Board issues Serial Case Management Order seeking information on relationship of legal contentions to NRC Staff SER Volumes
August 17, 2009	DOE responds to Board Order of July 21 st
August 21, 2009	Nevada responds to Board Order of July 21 st
September 30, 2009	Board issues Case Management Order #2, requiring parties to identify a legal question for each of the 11 legal contentions to be addressed in Phase I
October 6, 2009	Nevada (10 legal contentions), NEI (1 legal contention) and DOE jointly respond to CMO#2; Nevada and DOE also separately respond on 1 issue
October 13, 2009	NRC Staff comments on October 6 th separate responses by DOE and Nevada
October 23, 2009	Board issues Order scheduling 11 Phase I legal issues for briefing
December 7, 2009	Nevada, NEI, DOE and NRC Staff file opening briefs on Phase I legal issues
December 9, 2009	Board issues LBP-09-29, admitting another Nevada legal contention
December 22, 2009	NRC Staff responds to Board questions from LBP-09-29
December 30, 2009	Nevada replies to NRC Staff response to Board questions from LBP-09-29
January 6, 2010	Nevada, NEI, DOE and NRC Staff file reply briefs on Phase I legal issues
January 26-27, 2010	Board conducts oral argument of briefs on Phase I legal issues
February 16, 2010	Board stays proceeding until it resolves DOE's expected withdrawal motion
March 3, 2010	DOE files motion to withdraw its Yucca Mountain license application
May 17, 2010	Nevada answers DOE's motion to withdraw
June 3, 2010	Board conducts oral argument on DOE's motion to withdraw
June 29, 2010	Board issues LBP-10-11 denying DOE's motion to withdraw
June 30, 2010	Commission Secretary schedules briefs on LBP-10-11
July 9, 2010	Nevada (and other parties) file briefs with Commission on LBP-10-11
July 19, 2010	Nevada (and other parties) file reply briefs with Commission on LBP-10-11

Congress of the United States
Washington, DC 20515

November 19, 2010

Gregory Jaczko
Chairman
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

Dear Chairman Jaczko:

We write to you today to request the release of the Nuclear Regulatory Commission's decision regarding the Department of Energy's authority to withdraw the application for the Yucca Mountain nuclear waste repository.

As Chairman, you have stressed the importance of "conduct[ing] the public's work in an open and transparent manner." Unfortunately, the continued delay in finalizing the adjudicatory review of the Department of Energy's motion to withdraw the license application for Yucca Mountain fails to live up to this pledge.

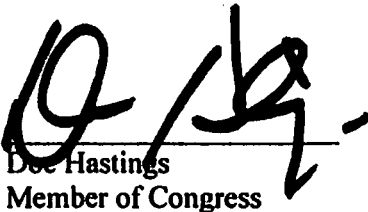
It has come to our attention that Commissioners William Ostendorff, Christine Svinicki, and William Magwood filed their votes with the Secretary of the Commission nearly two months ago. In fact, it is clear you delayed the resolution of this matter by withdrawing your vote of August 25, 2010, before submitting the only outstanding vote on October 29, 2010 – six weeks after the third Commissioner cast his vote.

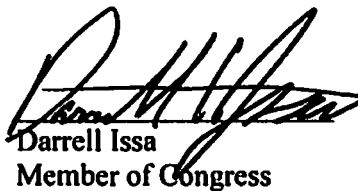
The NRC has had this issue pending since July 16, 2010. During that time, the D.C. Circuit Court has postponed proceedings while they await the NRC's response to the Atomic Safety and Licensing Board's decision. With all of the votes submitted, it is time to fulfill your commitment to openness and provide the public with the answers they deserve. Therefore, we ask that you conclude your deliberations and affirm a final Order.

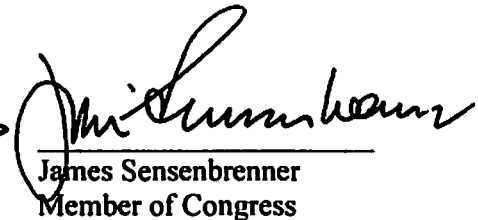
Please respond regarding your plans, including specific dates, for issuing a final order on this matter by December 2, 2010.

Thank you for your timely attention to this matter.

Sincerely,


Doc Hastings
Member of Congress


Darrell Issa
Member of Congress


James Sensenbrenner
Member of Congress

BLUE RIBBON COMMISSION ON AMERICA'S NUCLEAR FUTURE

November 12 2010

Mr. Tim Frazier
Designated Federal Official, Blue Ribbon
Commission on America's Nuclear Future
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

Dear Mr. Frazier:

At our request, the Commission staff is in the process of assembling information on the costs and financing of the US program to manage used fuel and high-level nuclear wastes. To assist in the completion of this effort, it would be most helpful if the Department could provide the information listed in the attachment.

Please contact John Kotek, the Commission's Staff Director, if you have any questions regarding this request.

Sincerely,



Lee Hamilton
Co-Chairman



Brent Scowcroft
Co-Chairman

Attachment

**DOE Inputs Needed for
High-Level Waste Program Cost and Financing Overview**

- 1. Nuclear waste fund status and prospects:**
 - The current balance of the Nuclear Waste Fund
 - The current annual receipts of the nuclear waste fund and projections of future fee receipts.
 - Annual earnings of the fund at its current level
 - Past annual fee payments into the Nuclear Waste Fund
 - Annual defense-related appropriations for the high level waste program (historical)
 - One-time nuclear waste fees currently payable, with interest
 - Annual appropriations from the Nuclear Waste Fund since its inception

- 2. Civilian waste standard contract settlements and litigation**
 - The most recent annual liabilities report based on data from past settlements.
 - Any available information on costs to government of litigation to date, including attorney costs, expert costs and litigation support).

- 3. Repository cost projections**
 - The annual disposal cost numbers that supported the 2008 fee adequacy analysis, i.e. the 2008 equivalent of Table C-1, Annual Cost Profile, in the 2001 Total System Lifecycle Cost report, showing the annual breakdown in projected disposal costs between MGR, WAST, and PI & I.

- 4. DOE defense waste and R&D costs**
 - Estimates of DOE-EM spent fuel management costs:
 - Current and projected costs of DOE-owned spent fuel management
 - Current and projected costs of DOE-owned HLW waste management
 - Current and projected costs of 'returned fuel' management (foreign research reactors etc)

 - Costs of DOE and National lab research and development into nuclear waste management and fuel cycle technology - past, current, and projected budgets.