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From: Jeff Skov [jmskov@earthlink.net]
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To: WCO outreach Resource
Subject: Comment on 200-Year Onsite Storage of Spent Nuclear Fuel
Attachments: Comment to NRC, 2-17-12, final.pdf

February 17, 2012

Ms. Christine Pineda, Project Manager
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C.

Dear Ms. Pineda:

The U.S. Nuclear Regulatory Commission's (NRC's) press release dated January 3, 2012, requested public comment on a report updating preliminary assumptions for an Environmental Impact Statement (EIS) the agency intends to develop to analyze the effects of storing spent nuclear fuel from the nation's commercial power reactors for as much as 200 years. I have attached my comment for the record.

I would appreciate an email back confirming that you received the attached.

Thank you for the opportunity to comment.

Jeffrey M. Skov
Dallas, Texas

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Comment by Jeffrey M. Skov
As Requested by the U.S. Nuclear Regulatory Commission (NRC)
Relative to NRC's Intent to Advance Extended (200-Year) On-Site Storage of
Commercial Power Reactor Spent Nuclear Fuel
February 17, 2012

The U.S. Nuclear Regulatory Commission's (NRC's) press release dated January 3, 2012, requested public comment on a report updating preliminary assumptions for an Environmental Impact Statement (EIS) the agency intends to develop to analyze the effects of storing spent nuclear fuel from the nation's commercial power reactors for as much as 200 years. This submittal provides my comment for the record.

Rather than expend limited resources on efforts to extend the time that increasing quantities of spent nuclear fuel may be stored at the nation's reactor plant sites, for the following reasons, the NRC should simply proceed to comply with Section 114(d)¹ of the Nuclear Waste Policy Act of 1982, as amended (NWSA). That provision of the act, which is introduced by the words "COMMISSION ACTION" in bold font, requires that the NRC "shall consider" the application of the U.S. Department of Energy (DOE) for authorization to construct a national high-level nuclear waste repository at Yucca Mountain, Nevada, and "issue a final decision approving or disapproving the issuance of a construction authorization" within three years, with provision for an additional one-year extension.

The reasons are as follows:

I. Independent from the law, advancing the public health and safety is the right thing to do.

Regardless of the explicit requirements of the NWSA, NRC should seek always to advance public health and safety within the scope of its regulatory purview. Because very long term on-site storage of spent nuclear fuel—where it sits in casks that are on the surface, in the weather, in conspicuous view to malevolent agents, and often near both important bodies of fresh water and significant population centers—is less protective of the public health and safety than placement deep underground in a dry, desert environment, far removed from population centers, on an expansive, guarded federal government reservation, the good and right course for the NRC is to advance the latter over the former. Such a course may require courage in the face of powerful political forces,² unscrupulous tactics,³ and "continued outbursts of abusive

¹ Codified at Title 42, *The Public Health and Welfare*, of the U.S. Code, Section 10134(d).

² See, e.g., *In Deal, Aide to Reid To Be Named to NRC*, Washington Post, November 23, 2004 ("In a deal to let 175 of President Bush's nominees take office, an adviser to new Democratic leader Harry M. Reid, the Senate's staunchest opponent of a nuclear waste dump in his home state of Nevada, will be named to the Nuclear Regulatory Commission.").

³ See, e.g., Statement for the Record by the Inspector General, U.S. Nuclear Regulatory Commission, to the Subcommittee on Environment and the Economy, Committee on Energy and Commerce, U.S. House of Representatives, June 14, 2011 ("OIG [NRC's Office of Inspector General] also found that although the [NRC] Chairman had the authority to direct staff to follow the FY 2011 budget guidance, he was not forthcoming with the other Commissioners about his intent to stop work on the SER [Safety Evaluation Report for the Yucca Mountain repository project] as part of implementing close-out activities. This included stopping work on SER Volume 3 ("Review of Repository Safety After Permanent Closure"), which NRC staff believed to be near completion by the end of FY 2010. OIG learned that the Chairman anticipated that proceeding to close-out in this manner could be controversial and viewed as a policy

rage" (COARs).⁴ However, the unwavering pole star for the NRC should ever be to take actions that serve to advance the public health and safety. As Abraham Lincoln said, "Let us have faith that right makes might; and in that faith let us, to the end, dare to do our duty as we understand it."

II. Advancing the repository at Yucca Mountain is the law.

The proposition that advancing the repository at Yucca Mountain is the law was explicitly examined by the NRC's assigned Atomic Safety and Licensing Board (ASLB) when the DOE sought in 2010 to withdraw its construction authorization application for the repository. The ASLB concluded:

[W]e deny DOE's motion to withdraw the Application. We do so because the Nuclear Waste Policy Act of 1982, as amended (NWPAA), does not permit the Secretary to withdraw the Application that the NWPAA mandates the Secretary file. Specifically, the NWPAA does not give the Secretary the discretion to substitute his policy for the one established by Congress in the NWPAA that, at this point, *mandates progress toward a merits decision by the Nuclear Regulatory Commission on the construction permit.*⁵

The Commissioners of the NRC examined this ruling, in detail,⁶ and ultimately sustained the ASLB ruling.⁷

decision for full Commission consideration. Therefore, prior to directing issuance of the CR [Continuing Resolution] budget guidance memorandum, he strategically provided three of the four other Commissioners with varying amounts of information about his intention to proceed to closure and not complete SER Volume 3. He did not provide Commissioner Svinicki with any information about his intentions. Although two of the three Commissioners he spoke with did not fully understand the implications of the CR budget guidance memorandum, the Chairman told the EDO [NRC Executive Director for Operations] prior to his signing the memorandum that all the Commissioners were informed and supported issuance of the CR budget guidance memorandum, and the Chairman's Chief of Staff told the CFO [NRC Chief Financial Officer] that he had clearance from the Commission offices to issue the memorandum. In fact, subsequent to the issuance of the CR budget guidance memorandum, a majority of Commissioners disagreed with the outcome of the memorandum, which was the Chairman's direction to stop work on SER Volume 3.").

⁴ See Statement of Kristine L. Svinicki, Commissioner, U.S. Nuclear Regulatory Commission, before the Committee on Oversight and Government Reform, U.S. House of Representatives, Hearing on "The Leadership of the Nuclear Regulatory Commission," December 14, 2011 ("Another circumstance that I believe caused the Commission to bring these issues [concerning the NRC Chairman's conduct] forward is the Chairman's *continued outbursts of abusive rage* directed at subordinates within the agency's staff. All members of the Commission, including me, have been on the receiving end of this conduct, which was also acknowledged by the NRC Inspector General in his testimony before the House Energy & Commerce Committee (Subcommittee on Environment and the Economy) earlier this year. These incidents appear to have grown more frequent, however, and I am now aware of this conduct being directed against staff at various levels in the agency. Some of these employees have spoken to me privately of the embarrassment and humiliation of being made to lose their composure in front of their colleagues, or to be seen exiting the Chairman's office in a state of obvious upset." Emphasis added.).

⁵ See NRC ASLB Memorandum and Order LBP-10-11 (Docket No. 63-001-HLW; ASLB No. 09-892-HLW-CAB04), dated June 29, 2010, at p. 3 (footnote omitted; emphasis added).

⁶ That the NRC Commissioners examined the ASLB ruling in detail is evident from the amount of time they took. The DOE filed its motion to withdraw its construction authorization application for the Yucca Mountain repository on March 3, 2010. Less than four months later, the ASLB issued its Memorandum and Order LBP-10-11 (dated June 29, 2010) denying the DOE's motion. The next day, with some bluster, the NRC Commissioners directed that participants submit briefs as to whether the Commission should review, and reverse or uphold, the ASLB's decision. Briefing was completed on July 19, 2010. Over 13

The august U.S. Court of Appeals for the District of Columbia (D.C.) Circuit has also recognized a legal obligation for NRC to both consider the DOE's construction authorization application for the Yucca Mountain repository and render a decision. That Court based (in part) its July 1, 2011, "not-ripe-yet" ruling in an action brought against DOE—contesting DOE's attempted withdrawal of the application and apparent decision to abandon development of the repository—on an assumption that NRC would complete its review of the application, in accordance with what the Court saw as a "statutory mandate," and take actions to "complete the process mandated in the NWPA":

Although Petitioners point to evidence that the Commission has suspended the Licensing Board's [*i.e.*, the ASLB's] review, *we note that the NWPA requires the Commission to review the application, see 42 U.S.C. § 10134(d)* ("The Commission shall consider an application for a construction authorization for all or part of a repository . . ."), and therefore *we must assume that the Commission will comply with its statutory mandate*. If the Licensing Board denies the application, consideration of Yucca Mountain as a location for the federal nuclear waste repository will come to an end. . . . [I]f the [ASLB] approves the application, the Commission will issue a construction license for Yucca Mountain, which would *complete the process mandated in the NWPA* . . .

* * *

The NWPA set forth a process and schedule for the siting, construction, and operation of a federal repository for the disposal of spent nuclear fuel and high-level radioactive waste. At this point in that process, the DOE has submitted a construction license application for the Yucca Mountain repository and *the Commission maintains a statutory duty to review that application*.⁸

III. NRC acknowledges that advancing the repository at Yucca Mountain is the law.

Although the NRC Commissioners sustained their ASLB's ruling denying DOE's motion to withdraw the construction authorization application, their Order⁹ to that effect was ambiguous as to whether they fully understood what the law was that was the subject of the ASLB ruling. The

months after that, on September 9, 2011, the NRC Commissioners issued Memorandum and Order CLI-11-07, which sustained the ASLB ruling. This delay was doubtless due to thorough examination of every conceivable aspect—every jot and tittle—of the ASLB pronouncement. To presume otherwise would be to suggest that the delay in considering their ASLB's interpretation of important federal legislation, the distilled will of the American people, enacted to promote public health and safety, was due to political gamesmanship and stalling rather than to diligent, *bona fide* prosecution of the agency's mission. Such a suggestion would cast the Commissioners in a most foul, high unconscionable light.

⁷ See NRC Commission Memorandum and Order CLI-11-07, dated September 9, 2011.

⁸ *In re: Aiken County*, 645 F.3d 428 (D.C. Cir. 2011), emphasis added. Note that it is unclear why counsel for NRC was not candid with the Court in that counsel was undoubtedly aware that the NRC had indeed suspended the review of the DOE's construction authorization application. The NRC Inspector General (IG) report that was the basis for the IG's Congressional testimony quoted in Footnote 3 above was dated June 6, 2011, and describes direction that the NRC Chairman gave *in early October 2010* to NRC staff to "proceed to orderly closure of the technical review" (see on p. 7 of the June 6, 2010, NRC IG report). Thus NRC counsel was arguably aware that an assumption that the U.S. Court of Appeals for the D.C. Circuit relied on (among other things) to form the basis of its much later, July 1, 2011, *In re Aiken County* ruling was not true. Counsel should perhaps be reminded that, whatever their political stripe, they are still officers of the court and have an obligation of candor to the court.

⁹ NRC Commission Memorandum and Order CLI-11-07, dated September 9, 2011.

Order both (1) announced the vote—a two-to-two tie,¹⁰ which served to preserve the ASLB ruling¹¹—and (2) directed the ASLB to close out the proceeding within three weeks, in apparent contravention of the results of the vote.

However, in a recent filing with the U.S. Court of Appeals for the D.C. Circuit—arguing that a writ of mandamus should not issue relative to NRC's NWPA Section 114(d) implementation decisions—NRC clarified that:

The NWPA directs NRC to issue a decision approving or disapproving an application within 3 years from the date the application is submitted, but allows the agency a one-year extension. 42 U.S.C. § 10134(d).¹²

Further:

We do *not* maintain that Congress has repealed the NWPA – or its requirement that NRC complete the Yucca licensing proceeding in three (or, with an extension, four) years . . .¹³

Thus, in the wake of the ambiguity apparent in the NRC Commissioners' Memorandum and Order CLI-11-07, dated September 9, 2011, and perhaps to clarify that ambiguity, the Commissioners, through counsel, have now indubitably acknowledged that NWPA Section 114(d), codified at Title 42 of the U.S. Code, Section 10134(d), is the law of the United States.

IV. Flouting the law diminishes NRC's integrity and erodes public confidence.

The public trusts that the various organs of government will comply with the law. Apart from being wrongful *per se*, lawlessness within any agency—especially, as here, with regard to implementation of a federal statute enacted with a view to advancing the health and safety of the public, and the protection of their environment—serves rapidly to diminish the perceived integrity of that agency and erode the public's confidence in it.

Such has already happened with NRC. The public reads NRC's recent (January 11, 2012) filing with the U.S. Court of Appeals for the D.C. Circuit, discussed above, to say, in essence, (1) that NRC understands the law and its willful failure to comply with the law, but argues that the privilege of objecting to such lawlessness, and of seeking law abidance instead, is owed only to

¹⁰ The fifth NRC Commissioner (of five total) had previously recused himself from matters relating to the Yucca Mountain repository.

¹¹ That the tie vote sustained the ASLB's ruling was confirmed by NRC in its January 11, 2012, filing with the U.S. Court of Appeals for the D.C. Circuit (see Footnote 12, *infra*) at p. 15: "The Licensing Board [*i.e.*, the ASLB] rejected DOE's attempted withdrawal, and the Commission divided 2-2 on whether to uphold or reverse the Board decision, effectively *leaving that decision intact*." (Emphasis added.)

¹² Preliminary Brief of the Respondents, filed January 11, 2012, in the U.S. Court of Appeals for the D.C. Circuit, Case No. 11-1271, *In re Aiken County, et al., Petitioners, On Petition for Writ of Mandamus (Agency Action Unreasonably Withheld)* (scheduled for oral argument on May 2, 2012), at p. 4.

¹³ *Id.* at p. 39. Emphasis added. Also, some argumentation—to the effect that because Congress failed to give NRC funding, Congress "must be understood to have, in effect, 'toll[ed]' the 3-year statutory deadline"—was omitted. In this regard, a better understanding of the will of the Congress is to be had from the explicit language in the NWPA rather than from inferences suggested by subsequent appropriations bills. That the Congress established an express, definite deadline for action in the NWPA should be understood to reflect not only an expectation that NRC should abide by the law, but also that a certain urgency should attach to such abidance. See Footnote 15, *infra*.

those who can satisfy an elaborate, multi-prong qualification test;¹⁴ (2) that NRC believes its lawlessness is "reasonable" because, it says, it lacks the money needed to comply; and (3) that it need not be heard to complain¹⁵ to its budgetary masters that lack of funding has reduced it to lawlessness and left important legislation—which it bears emphasizing again was enacted to advance public health and safety, and protection of the environment—unimplemented.

It is easy to see why the public's perception of the integrity of the NRC is diminished.

The regulated community is similarly aghast. They too are tasked to uphold health-and-safety-promoting statutes and regulations that require money to implement. So they ask, why may NRC willfully and wantonly refuse to comply with its important legal obligations because of (it says) a lack of money when those in the regulated community would doubtless be excoriated, probably in a criminal court, were they to do the same?

V. Waste owners and generators—and not U.S. taxpayers—pay for advancing Yucca Mountain.

In its recent filing with the U.S. Court of Appeals for the D.C. Circuit, discussed above, NRC argues that "**Lack of NRC Funding Prevents Completion of the Proceeding.**"¹⁶ However, in the same brief, NRC notes that, "[f]or the current fiscal year, FY 2012, NRC requested OMB to budget approximately \$4 million to terminate all programs related to the Yucca Mountain application."¹⁷ NRC should not be heard to justify its lawless behavior on a lack of Congressional appropriation that it did not request.

Further, NRC's stated understanding, in the same filing, that "the most recent year the agency still expected the Yucca proceeding to move forward" was "FY 2010"¹⁸ just does not square with the fact that that very issue—that the law requires the Yucca proceeding to move forward—was formally adjudicated and resolved by NRC's own ASLB on June 29, 2010; remained the law at the beginning of FY 2011, i.e., October 1, 2010, when NRC's "expectation" about the future of the Yucca Mountain proceeding expired (because by that time there had been no action by the NRC Commissioners to overturn the ASLB ruling); remained the law on July 1, 2011, when the U.S. Court of Appeals for the D.C. Circuit dismissed Case No. 10-1050 because of, *inter alia*, its confidence that "the Commission will comply with its statutory mandate" in NWPA Section 114(d); remained the law on September 9, 2011, when the NRC Commissioners (finally) issued Memorandum and Order CLI-11-07 that reported the results of the Commissioners' vote that

¹⁴ *Id.* at pp. 28–29 ("To establish standing [seeking NRC to abide by the law, which NRC acknowledges is the law], all petitioners must show: (1) an actual or imminent injury; that is (2) fairly traceable to the challenged action; and that is (3) likely to be redressed by the requested relief.").

¹⁵ On the contrary, NRC specifically requested only enough funds for the current fiscal year, beginning October 1, 2011, to "terminate all programs related to the Yucca Mountain application." See *Id.* at p. 21 ("For the current fiscal year, FY 2012, NRC requested OMB [Office of Management and Budget] to budget approximately \$4 million to terminate all programs related to the Yucca Mountain application." Emphasis added.). NRC's *FY 2013 Congressional Budget Justification*, NUREG-1100, Volume 28, dated February 2012, similarly reflects a request of \$0 to support NRC's implementation of the NWPA's requirement to advance the repository at Yucca Mountain.

¹⁶ Preliminary Brief of the Respondents, filed January 11, 2012, in the U.S. Court of Appeals for the D.C. Circuit, Case No. 11-1271, *In re Aiken County, et al., Petitioners, On Petition for Writ of Mandamus (Agency Action Unreasonably Withheld)* (scheduled for oral argument on May 2, 2012), at pp. 43–49. Emphasis in original.

¹⁷ *Id.* at p. 21.

¹⁸ *Id.* at p. 44.

sustained the ASLB ruling; remained the law on January 11, 2012, when NRC counsel acknowledged that "[t]he NWPA directs NRC to issue a decision approving or disapproving an application within 3 years from the date the application is submitted, but allows the agency a one-year extension" (as discussed above); and remains the law today. Look for it in Title 42 of the U.S. Code—the volumes devoted to and entitled *The Public Health and Welfare*.

The more important point, however, is that the NWPA provides a separate, non-taxpayer-supplied funding source, the Nuclear Waste Fund,¹⁹ for advancing the repository at Yucca Mountain, including NRC's compliance with NWPA Section 114(d).²⁰ This approach resolves a specific concern of the Congress that, "while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel."²¹ Thus any implication—apparent in the NRC's recent filing—that NRC's lawless path forward is somehow attributable to concern for the taxpayer or mindfulness of the public fisc is incorrect and misleading.

VI. Not advancing Yucca Mountain does cost the taxpayer.

The NWPA provides that waste owner/generator payments into the Nuclear Waste Fund serve a purpose. In return for the payments, the adequacy of which is required to be reevaluated annually, the federal government, of which the NRC is part, is required to take certain actions prescribed in the NWPA. That the federal government is in breach of its obligation to take those actions has been decided in court. Consequently, the federal government owes damages for its breach. The longer the breach obtains, the more the damages that will be owed. As a matter of fairness and as a matter of law, the federal government is precluded from paying these damages from the Nuclear Waste Fund; instead, the damages are paid from the U.S. Treasury's taxpayer-supplied Judgment Fund. Therefore, to the extent that NRC's disobedience further hampers and delays the federal government's fulfillment of its obligations, the NRC is costing the taxpayer money. The government's current estimated liability for judgments and settlements—based on the seventy-plus lawsuits that have been filed to date—stands at approximately \$2 billion, of which approximately \$750 million has been paid to date. The total liability is potentially unlimited; however, the U.S. Congressional Budget Office projects (based on DOE estimates) that taxpayers will be liable for no more than approximately \$13.1 billion through 2056 if the federal government can cure the breach by 2021.²²

Note that these monetary costs are in addition to the toll of the emotional distress caused by protracted worry over the large amounts of spent nuclear fuel in close proximity to population centers, fresh water, etc.—and conspicuous to terrorist planners—compounded by worry over

¹⁹ See NWPA Section 302 (codified at 42 U.S.C. 10222), Nuclear Waste Fund ("There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. . . .").

²⁰ *Id.* ("The Secretary [of Energy] may make expenditures from the Waste Fund . . . only for purposes of radioactive waste disposal activities . . . including . . . the . . . licensing . . . of any repository . . . constructed under this Act.").

²¹ See NWPA Section 111(a)(4) (codified at 42 U.S.C. 10131).

²² See *generally, Federal Commitments Regarding Used Fuel and High-Level Wastes*, prepared by Van Ness Feldman, P.C., for the Blue Ribbon Commission on America's Nuclear Future, dated August 31, 2010 (revised November 12, 2010), Executive Summary and Section I.

why the NRC is both callous to the concerns and deliberately disobeying the federal law that was enacted to resolve the concerns.²³

Conclusion

Rather than expending limited resources on efforts to extend the time that spent nuclear fuel may be stored at the reactor plant sites, NRC should instead comply with NWPA Sec. 114(d) (requiring NRC to make a decision on the merits of DOE's Yucca Mountain construction authorization application within three or four years) because:

- (1) It's the right thing to do in terms of protecting public health and safety;
- (2) It's the law;
- (3) NRC acknowledges it's the law;
- (4) Flouting the law diminishes the integrity of and erodes the public's confidence in NRC;
- (5) Complying with the NWPA does not cost the taxpayer (funding source is the Nuclear Waste Fund, which is supplied by waste owners and generators); and
- (6) Defying the NWPA *does* cost the taxpayer, both in terms of money, because the damages for the federal government's continuing breach of its obligation to comply with the NWPA are paid from the U.S. Treasury's (taxpayer-supplied) Judgment Fund and not from the Nuclear Waste Fund, and in terms of emotional distress, because of the worry of all that spent nuclear fuel sitting out on pads in the rain by the river (notionally) where the terrorists can see it rather than deep underground in a dry, desert environment on an expansive, guarded federal government reservation far from population centers.

Finally, please consider that while any one of the above reasons is compelling by itself, taken together they overwhelmingly point to only one conclusion.

Thank you for the opportunity to provide this comment.

Jeffrey M. Skov
Dallas, Texas

February 17, 2012

cc: The Honorable Senator John Cornyn
The Honorable Senator Kay Bailey Hutchison
The Honorable Congressman Michael C. Burgess, M.D.

²³ This worry is not to be taken lightly; for example, see "Little to fear but fear itself—Chernobyl's legacy," *The Economist*, September 8, 2005 ("Perhaps the true tragedy of Chernobyl is that the biggest observable health impact so far has been on the mental health of the millions who have been told they are at risk.")