

Enclosure

**NRC STAFF RESPONSE TO
NEVADA REQUEST FOR FINANCIAL ASSISTANCE**

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INTRODUCTION

By letter dated May 10, 2004, the State of Nevada (Nevada or State) requests, pursuant to section 274i. of the Atomic Energy Act (AEA), 42 U.S.C. § 2021(i), and 10 C.F.R. § 63.63, that the U.S. Nuclear Regulatory Commission (NRC staff) consider its funding request of \$13.75 million for the licensing review of Yucca Mountain. Petition by the State of Nevada Under Atomic Energy Act Section 274i. and 10 C.F.R. § 63.63 for Financial Assistance in the Licensing Review of the Yucca Mountain Nuclear Waste Repository, at 1-2, 7-34 (May 10, 2004) (hereinafter Request). As grounds for its request, Nevada claims: (1) that AEA section 274i. allows the NRC to enter into assistance agreements with any State impacted by nuclear activities as the Commission deems appropriate; (2) that it has “rights of participation and consultation” in the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101–10270 (NWPA); and (3) that the legislative history of the NWPA as well as the provisions of 10 C.F.R. § 63.63 entitle Nevada to the “broadest possible rights and opportunities.” Request at 1-3. Based on a consideration of applicable statutes, regulations, Commission precedent, and the agency’s available funds, Nevada’s request for \$13.75 million is denied.

NEVADA’S PROPOSAL

As mentioned above, Nevada asks (Request at 7-33) that the NRC staff provide Nevada \$13.75 million in FY 2005 in order that Nevada might carry out activities generally described below:

- Licensing Support Network (LSN) participation, additional staff \$.5 million
- Examine climatology and Department of Energy (DOE) \$.4 million
characterization efforts

● Study geology, volcanism, seismicity	\$.5 million
● Review criticality, design, engineering, pre-closure performance	\$.5 million
● Evaluate engineered barrier system and perturbed Near Field	\$ 1.8 million
● Hydrology, Hydrogeology, Hydrochemistry	\$.8 million
● Focus on Radionuclide Transport from Waste to Biosphere	\$.5 million
● Review site description and biosphere modeling	\$.4 million
● Examine overall performance assessment issues and	\$ 2.0 million
Total System Performance Assessment (TSPA)	
● Use expert elicitation	\$.25 million
● Review quality assurance	\$.25 million
● Perform Aircraft Crash Analyses	\$.25 million
● Analyze DOE Final Environmental Impact Statement (FEIS)	\$.25 million
● Analyze NEPA and transportation	\$.6 million
● Legal counsel	\$ 4.75 million
TOTAL:	\$13.75 million

Nevada asserts that the requested funding is necessary for its effective participation, that for “practical and public policy reasons” the NRC should approve Nevada’s request¹ and that

¹ Nevada states that DOE has spent billions of dollars to develop a license application and retain outside legal counsel and that inequity could arise if the NRC staff favors repository licensing, and that Nevada is the “only credible advocate for public health, safety and environment.” Request at 5-6. Claims of inequity and questions about the NRC staff’s objectivity were rejected when the Commission declined Nevada’s suggestion that the staff not participate as a party in the repository licensing proceeding. See Letter from Acting Chairman, Edward McGaffigan, to Brian Sandoval, Nevada Attorney General (July 8, 2003) (enclosing a Commission Response to a Nevada petition on hearing procedures). The Commission (quoting from Chairman Richard Meserve’s February 20, 2001 response to a letter from Director Robert Loux, dated January 17, 2001) stated:

As envisioned in [the] procedures [in 10 C.F.R. Part 2, Subparts J and G] and in the Commission’s regulations for the licensing of a repository, the NRC staff, with the assistance of the Center for Nuclear Waste Regulatory Analyses

Nevada's computer model experts and legal team will ensure the right questions are probed.

Id. at 5-8.

In accordance with the regulations, the Director of the Office of Nuclear Materials Safety and Safeguards arranged a meeting between representatives of the State and the NRC staff. The meeting was held on July 22, 2004. The purpose of the meeting was to discuss the proposal and, as required by 10 C.F.R. § 63.63(c), to identify any modifications that may contribute to effective participation by the State. Transcript of Meeting, at 5-7 (July 22, 2004) (hereinafter Meeting Transcript). The Director specifically encouraged the State to propose particular NRC services or activities that would help the State participate in the NRC staff safety review of a potential license application for a geologic repository at Yucca Mountain. Meeting Transcript at 5-6. Nevada, while arguing that the NRC could provide "funds" and not just "services" and that the services would be of lesser importance, stated that: (1) the NRC staff could engage in a one-on-one dialogue with Nevada technical experts on key components of the DOE's Total System Performance Assessment and the NRC staff's Total Performance Assessment model; (2) the NRC staff could enter into a dialogue regarding assistance,

(CNWRA), will conduct an independent technical review of DOE's license application and Safety Analysis Report if and when they are received and will prepare a Safety Evaluation Report (SER) documenting the review and conclusions. Then, the NRC staff, as a party in the hearing, will independently present and support its technical analyses and SER insofar as it bears on the issues placed in controversy in a potential hearing and will take and support a position on those issues based on the staff's and CNWRA's expert analyses. The staff's analyses, positions, and regulatory conclusions will be wholly independent of those of DOE. The Commission believes that the staff's participation as a party is useful to the Atomic Safety and Licensing Board, the other parties, and the public as it will provide an independent regulatory perspective for the record. Both the Commission and the NRC staff are fully aware of and committed to maintaining objectivity in regulating the activities of DOE or any other regulated entity. That objectivity will not be undercut -- indeed, it will be enhanced -- by the presentation by the staff of its independent views as a party in a potential hearing.

Id. enclosure at 4.

including having the NRC staff hire personnel, to help the State with its Licensing Support Network activities; and (3) the NRC staff could perform studies suggested by Nevada and Nevada could participate. See Meeting Transcript at 17-21. These suggested services modify Nevada's original proposal and are also addressed in this decision.

Finally, Nevada commits to reimburse the NRC if Nevada wins its March 17, 2004 lawsuit that seeks monies above Congressionally appropriated amounts from the Department of Energy (DOE),² and commits to be subject to NRC audit of any funds received from the NRC. See Request at 7-8.³

EVALUATION

A. Requirements for Proposals Made Pursuant to 10 C.F.R. § 63.63

Under 10 C.F.R. § 63.63, Nevada may participate in license reviews in the context of a hearing on the license application and also may submit, at any time, a proposal to the Director of the Office of Nuclear Materials Safety and Safeguards to facilitate its participation in the review of the license application. See 10 C.F.R. § 63.63(a)–(b). The submittal must contain a description and schedule of (1) how the State wishes to participate in the review or what services or activities the State wishes the NRC staff to carry out, and (2) how the services or activities proposed to be carried out by the NRC staff would contribute to this participation.

² Attachment 4 of the Request is a copy of a filing from Nevada's lawsuit. Counsel for Nevada indicated during the July 22, 2004 meeting that Nevada's brief was due July 29, DOE's brief is due September 13, and final briefs of all parties are due October 26, 2004. See Meeting Transcript at 9-10 (statement of Joseph R. Egan).

³ It should be noted that Nevada's commitment to reimburse the NRC is limited to the \$4 million that Nevada seeks to recover from the DOE. See Petitioner's Motion to Expedite Consideration of the Petition for Review at 1, *Nevada v. Abraham*, No. 04-1082 (D.C. Cir. filed Mar. 23, 2004). Therefore, even if the Court of Appeals directs the DOE to fund Nevada's activities to the level sought by Nevada, Nevada would receive an amount that is insufficient to reimburse the NRC for the entire requested amount of \$13.75 million.

10 C.F.R. § 63.63(b). “The proposal may include educational or information services (seminars, public meetings) or other actions on the part of the NRC, such as establishing additional public document rooms or employment or exchanges of State personnel under the Intergovernmental Personnel Act.” *Id.* In addition, as discussed above, the regulations require that the Director arrange a meeting with state representatives to discuss the proposal.

10 C.F.R. § 63.63(c). In essence, an appropriate proposal under 10 C.F.R. § 63.63 should primarily focus on activities or services the NRC staff may perform or provide to enhance State participation.

A determination of whether to grant the State’s proposal is governed by 10 C.F.R.

§ 63.63(d), which provides:

(d) Subject to the availability of funds, the Director shall approve all or any part of a proposal, as it may be modified through the meeting described above, if it is determined that:

(1) The proposed activities are suitable in light of the type and magnitude of impacts which the State or affected Indian Tribe may bear;

(2) The proposed activities:

(i) Will enhance communications between NRC and the State or affected Indian Tribe;

(ii) Will make a productive and timely contribution to the review; and

(iii) Are authorized by law.

The Director of NMSS must also advise the State as to whether its proposal has been accepted or denied, state the reasons for any denial (whether in whole or in part), and place all proposals, as well as responses to them, in the Publicly Available Records System (PARS) Library which is available via the NRC public website. 10 C.F.R. § 63.63(e)–(f).

B. Federal Appropriations Law

Regardless of the arguments raised by Nevada in support of its request, that portion of the request asking for financial assistance must be denied based on the principles of Federal appropriations law.

Nevada contends that Congress intended that the State participate in the Yucca Mountain licensing proceeding in the broadest possible sense.⁴ Request at 2 (citing *Nevada v. Herrington*, 777 F.2d 529 (9th Cir. 1985) (quoting S. Rep. No. 97-282, at 28 (1981))). Nevada's reliance on section 274i. of the AEA and 10 C.F.R. § 63.63 as authorizing the NRC to expend funds without enactment of appropriations legislation is not well founded.

The NRC is not authorized to grant Nevada's request for financial assistance regardless of whether Nevada is an "intervenor" subject to the statutory prohibition regarding funding parties intervening in regulatory or adjudicatory proceedings.⁵ Because appropriated funds are not available for that purpose, granting Nevada's request would constitute an improper augmentation of funds, violate the Antideficiency Act, and would eviscerate the control that Congress constitutionally maintains over agency budgets. Although Nevada claims that the AEA enables the NRC to provide financial assistance to Nevada, the NRC believes that neither

⁴ Nevada cites *Nevada v. Herrington*, 777 F.2d 529, 533 (9th Cir. 1985), for the proposition that the NWPA provides that States should have the broadest possible rights and opportunities to participate in the development of the repository. Request at 2. However, *Herrington* is a case where Nevada was challenging the DOE's guidelines for categorically restricting funding for entire types of oversight activities. *Nevada v. Department of Energy*, 133 F.3d 1201 (9th Cir. 1998), is more analogous to Nevada's current petition for financial assistance, as it involves Nevada's challenge to an agency's decision not to grant Nevada its requested funds. The Court adopted the view that Congress had not appropriated funds for Nevada because it did not intend for Nevada to receive any funding for that year, and accepted DOE's argument that Nevada already had sufficient funds at its disposal. *Id.* at 1204, 1206. The Court held that the DOE's decision not to grant funds under the NWPA was acceptable as the statute "does not indicate that the DOE is required to provide Nevada with annual grants or with a specified amount of money; nor does it suggest that the DOE is obligated to accede to the terms of Nevada's requests for financial assistance." *Id.* at 1205. Moreover, Nevada's petition to the NRC fails to address why Nevada itself cannot provide sufficient funds from existing State resources to adequately participate in the licensing proceeding. The State of Nevada's posted fiscal year 2004 State Executive Budget Appropriations and Authorization totals \$6.534 billion. See State of Nevada, Executive Budget, at Intro-13, at http://budget.state.nv.us/BB_Intro.pdf (last visited Aug. 4, 2004).

⁵ 5 U.S.C. § 504 note (enacted by Pub. L. No. 102-377, § 502, 106 Stat. 1315, 1342 (1992)) ("None of the funds in this Act or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts.").

AEA section 274i. nor 10 C.F.R. § 63.63 authorizes the Agency to obligate such funds to Nevada. In any event, even if such an expenditure were authorized under those provisions of law, there are appropriation law restrictions that preclude the NRC from granting the millions of dollars that Nevada seeks.

1. Appropriated NRC Funds Are Not Available

All federal agencies can function only to the extent authorized by Congress. See *Atl. City Elec. Co. v. Fed. Energy Regulatory Comm'n*, 295 F.3d 1, 8 (D.C. Cir. 2002) (citing *Michigan v. Env'tl. Prot. Agency*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). The Supreme Court has articulated a fundamental axiom of governmental appropriations law: any expenditure made by a governmental agency is proper only when that money has been appropriated by Congress for that purpose. See *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990); *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (citing *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851)). Congress has not enacted an appropriation that specifically enables the NRC to give Nevada the requested financial assistance.

Even assuming *arguendo* that funding Nevada's request was contemplated by section 274i. of the AEA or 10 C.F.R. § 63.63, the NRC is not authorized to provide financial assistance to Nevada, due to several appropriations law restrictions.

2. Improper Augmentation of Funding

Congress has not appropriated funds to the NRC for assisting Nevada in its activities for the Yucca Mountain licensing proceeding. Under section 116 of the NWPA, 42 U.S.C. § 10136, Congress designated the DOE as the Federal agency that would provide funding for Nevada activities under that statute. Moreover, Congress appropriated a total of one million dollars for DOE to provide to Nevada for expenditures to conduct scientific oversight responsibilities and to participate in Yucca Mountain licensing activities. See Energy and Water Development Appropriations Act, 2004, Pub. L. No. 108-137, § 316, 117 Stat. 1827, 1865

(2003) (directing the DOE to make one million dollars available to Nevada for such purposes). Thus, Congress clearly expressed and intended Nevada to receive a total of one million dollars from the federal government to assist in the State's participation for the Yucca Mountain licensing proceeding and that this one million dollars was intended to come from the funds appropriated to the DOE, not the NRC. *See id.* As a general rule, an agency may not augment its appropriations from outside sources without specific authority. 36 Comp. Gen. 268, 269 (1956); Comp. Gen. B-255474, 1995 WL 153630, at *1 (Apr. 3, 1995) (unpublished). Nevada's financial assistance request, if granted, would have the practical effect of improperly augmenting Congress' appropriations to DOE for Nevada participation activities in the amount of 13.75 million dollars from NRC funds.

A purpose of any specific Congressional appropriation is to establish the maximum authorized federal expenditure for that program or activity. *See, e.g.,* 72 Comp. Gen. 164, 165 (1993) ("When Congress makes an appropriation, it is establishing an authorized program level beyond which an agency cannot operate. Allowing an agency to exceed this level with funds derived from some other source would usurp congressional prerogative and undercut the congressional power of the purse"); *see also* Comp. Gen. B-300248, 2004 WL 77861, at *3 (Jan. 15, 2004) (unpublished). By authorizing the DOE to provide one million dollars to Nevada in 2004, Congress set a financial limitation on the funds that Nevada was to receive from the federal government for the State's participation in the Yucca Mountain licensing review. In the face of this specific appropriation, granting Nevada's request would essentially result in the NRC providing additional funding above limits set by Congress and thus would constitute an improper augmentation of DOE funds.

As stated above, a purpose of any specific Congressional appropriation is to establish the maximum authorized federal expenditure for that program or activity. *See, e.g.,* 72 Comp. Gen. at 165. The use of any other appropriation (including a general appropriation) to

supplement a specific appropriation is an improper use of the other or general appropriations. (“Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law”); see *also* 4 Comp. Gen. 476, 478 (1924) (“The ordinary rule is that an appropriation for a specific purpose is exclusive of other appropriations in general terms which might be also available in the absence of the specific appropriation”). The fact that the more specific appropriation may be exhausted is immaterial. 63 Comp. Gen. 422, 428 (1984).

Given that Congress specifically appropriated one million dollars under DOE’s appropriations to Nevada for the State’s participation in the licensing proceeding,⁶ applying NRC’s appropriations would result in using the NRC’s general or other funds to supplement the funds specifically appropriated by Congress for the specific object of Nevada’s participation activities. As noted by the General Accounting Office, an appropriation for a specific object is available for that object to the exclusion of more general appropriations, which might otherwise be considered for the same object.⁷ See 31 Comp. Gen. 491, 492 (1952). Congress appropriated funds to the NRC for its necessary expenses in carrying out NRC’s purposes and objectives. See Energy and Water Development Appropriations Act, 2004, Pub. L. No. 108-137, tit. IV, 117 Stat. 1827, 1866–67 (2003). Therefore, NRC funds cannot be charged as a back up to the one million dollars specifically appropriated for Nevada’s participation activities.

The NRC is also not able to provide such funds to Nevada because the making of an appropriation must be expressly stated; it cannot be inferred or made by implication. 31 U.S.C.

⁶ The Energy and Water Development Appropriations Act for fiscal year 2004 states that the \$1 million dollars shall be provided to Nevada “solely for expenditures, other than salaries and expenses of State employees, to conduct scientific oversight responsibilities and participate in licensing activities[.]” See Energy and Water Development Appropriations Act, 2004, Pub. L. No. 108-137, § 316, 117 Stat. 1827, 1865 (2003).

⁷ See 1 U.S. Gen. Accounting Office, *Principles of Federal Appropriations Law* 2-21 (3d ed. 2004) (citing Comp. Gen. B-272191, 1997 WL 702260 (Nov. 4, 1997) (unpublished)).

§ 1301(d); see also 50 Comp. Gen. 863, 864 (1971) (holding that a statute was not specific enough to allow the appropriation of funds). Section 274i. of the AEA does not provide the appropriations authority for the NRC to grant financial assistance to Nevada. Nevada also cites to statutes which demonstrate a general intent shown by Congress that Nevada participate in the review. See, e.g., Request at 1, 2. Nevada cites to a Congressional report, NRC documents and regulations, and lists “practical and public policy reasons” for its conclusion that the NRC has legal grounds to obligate \$13.75 million dollars to Nevada for anticipated participation in the Yucca Mountain license application review. See Request at 1-5. However, despite Nevada’s argument that Congress intended to have the State involved in the review, Nevada has been unable to identify any statute appropriating funds for the purpose of NRC providing financial assistance to Nevada to participate as requested. Inferences that Congress wishes Nevada to be involved in the licensing review are not specific enough to provide the necessary legal basis for the NRC to obligate millions of dollars of funding to Nevada. See, e.g., 13 Comp. Gen. 77, 80 (1933) (holding that although a section of a statute included a direction to pay, no funds were provided, and therefore no payment could be executed); Comp. Gen. B-114808, 1979 WL 12213, at *3 (Aug. 7, 1979) (unpublished) (holding that although Congress made it clear in a statute that payment from the Treasury would be necessary, Congress did not satisfy 31 U.S.C. § 1301(d)’s specificity requirement and therefore no appropriation could be made).

Under appropriations law, the NRC must abide by its budget authority.⁸ In the Agency's 2004 Congressionally-approved budget, the NRC did not allocate any funds for Nevada's requested financial assistance. See NUREG-1100, Vol. 19, *Budget Estimates and Performance Plan, Fiscal Year 2004* (Feb. 2003). If the NRC were to provide the requested financial assistance to Nevada out of funds appropriated for fiscal year 2004, the NRC would be significantly altering its planned budget, which would not only lead to a deficiency in funds dedicated to other legally-authorized programs, but it would also contravene what Congress necessarily approved and appropriated. See 10 Comp. Gen. 382, 383 (1931) ("The Congress in the enactment of [appropriation laws] has clearly indicated an intention to confine the use of funds by officers or agents of the United States . . . to the funds advanced . . . pursuant to the various appropriation acts. The requirement of these statutes is nothing more than in furtherance of the provisions of the United States Constitution, Article I, Section 9, Paragraph 7, that 'No money shall be drawn from the Treasury but in consequence of appropriations made by law'."); see also *Scheduled Airlines Traffic Offices v. Dept. of Def.*, 87 F.3d 1356, 1361 (D.C. Cir. 1996). Nevada seeks a substantial amount of funds from the NRC's Congressionally-approved appropriations. The NRC does not have the authority to unilaterally change its budget authority.

3. Necessary Expense Rule

Nevada's request also fails to pass the necessary expense rule. In the absence of any statutory authorization for an expenditure of funds, an agency may consider whether that

⁸ Budgetary authority is defined by the Office of Management and Budget as, "the authority provided by law to incur financial obligations that will result in outlays. This definition is the same as the one contained in section 3(2) of the Congressional Budget and Impoundment Control Act of 1974, which Congress uses in the congressional budget process. The law is violated if a federal agency enters into contracts, issues purchase orders, hires employees, or otherwise obligates the Government to make a payment before a law has provided budget authority for that purpose." Office of Mgmt. & Budget, Circular No. A-11, *Preparation and Submission of Budgetary Estimates* § 20.4 (1999).

expenditure is a necessary expense. See, e.g., 70 Comp. Gen. 248, 250 (1991) (citing 31 U.S.C. § 1301(a) for the proposition that appropriated funds may be used only for authorized purposes, but noting the accepted doctrine that “an appropriation made for a particular object, by implication, confers authority to incur expenses which are reasonably necessary or incident to the proper execution of the object”). Consequently, although section 274i. of the AEA does not provide sufficient legal basis for the NRC to provide the requested funds, the NRC would need to determine whether such an expenditure qualified as a “necessary expense.” When applying the necessary expense rule, an expenditure can be justified only after meeting a three part rule:

(1) The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available;

(2) The expenditure must not be prohibited by law; and

(3) The expenditure must not be otherwise provided for, that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme. See 63 Comp. Gen. 422, 427-28, 432 (1984).

As is the case here, the failure to meet any part of the necessary expenses rule makes the rule inapplicable and the expenditure unauthorized. There is nothing in the NRC’s Appropriation’s Act for fiscal year 2004⁹ that could be interpreted as an authorization for the NRC to provide \$13.75 million dollars to Nevada, nor has Nevada adequately demonstrated a logical relationship between a Congressionally-approved appropriation to the NRC and the

⁹ See Energy and Water Development Appropriations Act, 2004, Pub. L. No. 108-137, tit. IV, 117 Stat. 1827, 1866–67 (2003).

necessity of NRC funding Nevada. Consequently, it is at best unclear whether Nevada has satisfied the first part of the necessary expense rule.

More importantly, Nevada's request for financial assistance fails to satisfy the third part of the necessary expense rule. An expenditure that may be reasonably related to a general appropriation may not be paid out of that appropriation if the expenditure falls specifically within the scope of another appropriation. See, e.g., 63 Comp. Gen. at 432-33. As stated above, Congress provided funds, through DOE, specifically for Nevada to participate in licensing activities for fiscal year 2004, in the Energy and Water Development Appropriations Act. As also stated, if the NRC were to give Nevada some of the Agency's appropriations, the NRC would be improperly circumventing this Congressional limitation of \$1 million dollars of federal funds to Nevada. Therefore, Nevada's request fails the third part of the necessary expense rule in that Nevada's participation funding falls within the scope of another appropriation or statutory funding scheme.

Nevada's proposal also fails the second part of the necessary expense rule which requires that the expenditure not be prohibited by law. As explained below, such an expenditure would violate the Antideficiency Act (31 U.S.C. § 1341 *et seq.*) and the Miscellaneous Receipts Act (31 U.S.C. § 3302).

4. Antideficiency Act and Miscellaneous Receipts Act

The Antideficiency Act prohibits any officer or employee of the government from making expenditures or incurring obligations *in advance* of appropriations. See 31 U.S.C. § 1341(a). Neither the NRC's Congressionally-approved 2004 fiscal year budget, nor the NRC's appropriation specifically appropriates \$13.75 million dollars of funds for Nevada's preparations for the Yucca Mountain licensing proceeding. See NUREG-1100, Vol. 19, *Budget Estimates and Performance Plan, Fiscal Year 2004* (Feb. 2003); see also Energy and Water Development Appropriations Act, 2004, Pub. L. No. 108-137, tit. IV, 117 Stat. 1827, 1866-67 (2003). As a

preliminary matter, if the NRC were to obligate \$13.75 million dollars of appropriated funds to Nevada an expenditure in excess of appropriations made available to the NRC by Congress, this would constitute a violation of the Antideficiency Act. 31 U.S.C. § 1341(a)(1)(A).

Nevada's request claims that the State needs the funds now in order to participate in the upcoming Yucca Mountain licensing proceeding. Request at 3. The proceedings are anticipated to commence in fiscal year 2005. Considering that Nevada's proposal reflects participation related activities in fiscal year 2005, Nevada is essentially requesting that the NRC obligate funds from the Agency's fiscal year 2004 appropriations in advance of the Agency receiving its fiscal year 2005 appropriations. See Request at 10-33 (listing Nevada's technical, scientific, and legal cost categories as "Participation"); see also Request at 33 ("The level of detail of the foregoing Proposal, while far from comprehensive, is sufficient to illustrate the enormous quantity of work that lies ahead for Nevada in FY2005 in order for it to meaningfully participate in and contribute significant insights to the anticipated Yucca Mountain licensing proceeding."); see also Petitioner's Motion to Expedite Consideration of the Petition for Review at 10, *Nevada v. Abraham*, No. 04-1082 (D.C. Cir. filed Mar. 23, 2004) (Nevada using Nye County's recommendation that the DOE dedicate funds from its fiscal year 2005 budget to argue that the State deserves further funding). However, agencies are precluded under the Antideficiency Act from advancing funds before they are made available by Congress.

The Antideficiency Act, provides that an agency may not involve the government in a contract or obligation for the payment of money before an appropriation is made. See 31 U.S.C. § 1341 (a)(1)(B); see also *Wilder's Case*, 16 Ct. Cl. 528, 543 (1880) (concluding that the Antideficiency Act and related statutes show that Congress "restricted in every possible way the expenditures and expenses and liabilities of the government . . . to the specific appropriations for each fiscal year"). Therefore, the NRC is precluded from obligating funds to Nevada in advance of any future appropriation. Consequently, an NRC decision to grant

Nevada's request to be funded in advance of the fiscal year 2005 activities would result in a violation of the Antideficiency Act.

The Miscellaneous Receipts Act also precludes the NRC from retaining any "reimbursement" of financial assistance to Nevada. Nevada is seeking financial assistance from the NRC, which it commits to partially repay if the DOE is ordered to fund Nevada's activities. See Request at 8. Nevada would have the NRC loan Nevada millions of dollars with the only commitment being that *if* Nevada eventually receives funds from DOE, the NRC will receive a partial refund from Nevada. However, if the NRC were to provide the financial assistance to Nevada, it would statutorily be prevented from retaining any reimbursement from Nevada by 31 U.S.C. § 3302, the Miscellaneous Receipts Act. This statute provides that unless authorized by law, an agency may not keep money received from sources other than congressional appropriations. 31 U.S.C. § 3302(b). In other words, any payment received by the NRC must be deposited in the United States Treasury, rather than in an NRC account that would be available for use by the agency. See *id.*; see also 10 Comp. Gen. 382, 383-84 (1931) ("all the public moneys shall go into the treasury; appropriations then follow . . . It is difficult to see how a legislative prohibition could be more clearly expressed"). In summary, the NRC would not have legal authority to retain the proposed reimbursement from Nevada.

C. Section 274i. of the AEA and Financial Assistance

Nevada claims that its request for financial assistance from the NRC is authorized under AEA section 274i. See Request at 3-4. As Nevada notes, section 274i. states that the Commission may "enter into agreements with any State . . . to provide training . . . and such other assistance . . . as the Commission deems appropriate." 42 U.S.C. 2021(i). This provision, Nevada claims, authorizes the NRC "to enter into assistance agreements with any State impacted by nuclear activities[.]" See Request at 3.

Nevada relies on NUREG-0539, *Means for Improving State Participation in the Siting, Licensing, and Development of Federal Nuclear Waste Facilities: A Report to the Congress* (Mar. 1979) (hereinafter NUREG-0539), contending that it represents a Commission endorsement of NRC financial assistance for “host States in repository licensing” as “appropriate.” See Request at 3. Nevada states that the NRC has consistently “recognized that any viable licensing proceeding will require the well-funded participation by the host State” and that, in NUREG-0539, the NRC “encouraged and approved of federal funding for host States[.]” See Request at 5. In addition, Nevada points to NRC statements that “the informed participation of the [host] States is likely to assist the Federal licensing process by providing valuable insights, particularly as to environmental concerns, and by bringing factual and policy issues into sharper focus,” NUREG-0539 at 20, and that “Federal grants may be particularly appropriate in view of the uncertainties and technological complexities associated with geologic disposal which may be beyond the existing review capability of most (if not all) States,” *id.* at 21. Nevada concludes that the NRC approved the idea of funding a repository host State, such as Nevada, as appropriate assistance for such State for the repository licensing process, which funding is authorized under AEA section 274i. See Request at 3, 5.

Contrary to Nevada’s claims, AEA section 274i. does not authorize the financial assistance it seeks from the NRC. Section 274 was added to the AEA by An Act to Amend the Atomic Energy Act of 1954, as amended, With Respect to Cooperation With States, Pub. L. No. 86-373, 73 Stat. 688 (1959) (hereinafter Federal-State Amendment). The Federal-State Amendment’s stated purpose was to recognize the interests of the States in the peaceful uses of atomic energy, clarify the respective responsibilities of the States and the Commission in regulating radioactive materials, establish cooperative programs between the States and the Commission for the control of radiation hazards, promote an orderly regulatory pattern between the Commission and the States with respect to the use of such materials, coordinate the development of standards for protection from radiation hazards, and establish a framework for the Commission to relinquish defined areas of its

regulatory jurisdiction that States could assume as they became ready to do so. See 42 U.S.C. § 2021(a). In furtherance of these purposes, section 274b. authorizes the Commission “to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission” with respect to byproduct materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. 42 U.S.C. § 2021(b). The amendment provides that the Commission may enter into such agreements if the Commission finds that the State has a radiation protection program adequate to protect the public health and safety and that the State program is compatible with the Commission’s regulations. 42 U.S.C. § 2021(d). Where section 274b. agreements are entered into, the Commission retains certain regulatory responsibilities within its unique competence. 42 U.S.C. § 2021(c). The statute also directs the Commission and the States to cooperate in formulating radiation protection standards. 42 U.S.C. § 2021(g).

Section 274i. of the amendment further supports this Federal-State framework. That subsection provides:

The Commission in carrying out its licensing and regulatory responsibilities under this Act is authorized to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate. The Commission is also authorized to provide training, with or without charge, to employees of, and such other assistance to, any such State or political subdivision thereof or group of States as the Commission deems appropriate. Any such provision or assistance by the Commission shall take into account the additional expenses that may be incurred by a State as a consequence of the State’s entering into an agreement with the Commission pursuant to subsection b.

42 U.S.C. § 2021(i).

Under the plain meaning of AEA section 274i., the NRC cannot provide the financial assistance sought by Nevada. In construing a statute, where a law has an unambiguous and plain meaning, it must be enforced according to its terms. See, e.g., *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The plainness or ambiguity of statutory text is determined by considering both

the law's language and context. *Id.* at 341. Construction of a statute should thus “look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.” *Crandon v. United States*, 494 U.S. 152, 158 (1990). Statutory interpretation is therefore a “holistic endeavor” that “must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy[,]” and “at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.” *U.S. Nat'l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993).

Examining the text of section 274i., the first sentence grants the Commission the authority to enter into agreements with any State or States, on a cooperative basis. The purpose of these agreements must be “to perform inspections or other functions.” Finally, this authorization must serve the purpose of “carrying out [the Commission's] licensing and regulatory responsibilities.” The second sentence, on which Nevada focuses, authorizes the Commission to provide “training” and “such other assistance” to States, with or without charge. The third sentence qualifies the previous one, informing that any such assistance that the Commission provides “must take into account the additional expenses” that a State incurs as a result of becoming an Agreement State under section 274b.

Nevada's interpretation of section 274i., by focusing on the words “agreements with any State . . . to provide training . . . and such other assistance . . . as the Commission deems appropriate,” see Request at 3, ignores the overall context and purpose of section 274i., and fails to account for the whole text and policy of the Federal-State Amendment. Nevada makes the broad claim that via the words “such other assistance” the NRC is authorized to provide the State with substantial cash grants. Yet a plain reading of section 274, taken as a whole, indicates that the “assistance” contemplated by subsection i. must further the overarching purposes of section 274, e.g., it must further a State's efforts to cooperate with the NRC by performing inspections or other functions as a surrogate of the agency, or have a nexus with the efforts of a State to assume,

or prepare itself to assume, on an independent basis, the Commission's jurisdiction over public health and safety in the regulation of certain byproduct, source, and special nuclear materials, via a section 274b. agreement. See 42 U.S.C. § 2021(a)–(b).

The activities described in Nevada's request bear no relation to the agreement Nevada has with the Commission pursuant to 274b. A review of Nevada's request, therefore, must look to whether the request is consistent with the other purpose of section 274, the entry into cooperative arrangements for a state to perform a Commission function.

Although section 274i. would authorize some types of cooperative agreements between the NRC and a State, the staff finds that Nevada's proposal, would not be consistent with the purposes of such cooperation. Given that Congress has already vested the NRC with the exclusive responsibility to review a repository license application, an agreement whereby Nevada would receive funds to duplicate activities which will be performed by the staff in its review of the license application would not further the aim of having a State perform NRC functions as a surrogate, and would thus be wasteful. Furthermore, while Nevada has previously entered into a section 274b. agreement with the NRC,¹⁰ the State's request for funding has no nexus with that agreement. The assistance Nevada requests would instead be used to finance Nevada's activities in matters outside the scope of section 274.

Moreover, Nevada's interpretation of section 274i. ignores the principle of statutory construction of *ejusdem generis*, which dictates that "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific

¹⁰ Pursuant to Nevada's agreement with the Commission, the Commission ceded to its jurisdiction to Nevada over byproduct materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. See Agreement Between the U.S. AEC and the State of Nevada for Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State Pursuant to Sec. 274 of the Atomic Energy Act of 1954, as Amended, at 2-3 (1972), available at <http://www.hsr.d.ornl.gov/nrc/special/regs/NVagreements.pdf>.

enumeration.” *Brogan v. United States*, 522 U.S. 398, 403 n.2 (1998). Under this canon of construction, because the specific term “training” is followed by the more general “such other assistance,” the meaning of “such other assistance” that the Commission is authorized to provide must be understood as meaning other assistance related or similar to “training.”¹¹ Nevada has not asked for training or other related assistance, but instead requests a type of assistance that the NRC is not authorized to provide. Nevada’s interpretation of section 274i., by focusing on the words “agreements with any State . . . to provide training . . . and such other assistance . . . as the Commission deems appropriate,” see Request at 3, ignores the overall context and purpose of section 274i., and fails to account for the whole text and policy of the Federal-State Amendment. Nevada makes the broad claim that via the words “such other assistance” the NRC is authorized to provide the State with substantial cash grants. Yet section 274, when taken as a whole, indicates that the “assistance” contemplated by the statute must have a nexus with the efforts of a State to assume, or prepare itself to assume, inspections or other functions associated with the regulation of byproduct, certain source and special nuclear material normally exercised by the Commission to ensure adequate protection of the public health and safety.

Even if one assumed that Nevada’s claim that section 274i. authorizes the NRC to grant Nevada’s request for funding was consistent with the plain meaning of the statute, Nevada’s interpretation would be incorrect in light of the legislative history of the Federal-State Amendment. The Supreme Court has held that even the plain text of a statute is not controlling where there is “indication that doing so would frustrate Congress’ clear intention or yield patent absurdity[.]” see *Hubbard v. United States*, 514 U.S. 695, 702 (1995), or where “the literal application of a statute

¹¹ Proper examples of “such other assistance” that the NRC is authorized to provide include the NRC’s payment of States’ tuition costs for State personnel at NRC-sponsored training on a space-available basis, and provision of related assistance, such as reimbursement for invitational travel and per diem expenses. See STP Procedure Approval, Training Criteria for Agreement State Personnel, SA-600, at 3 (Jan. 22, 2001); STP Procedure Approval, Invitational Travel Authorization and Vouchers, AD-500, at 1-2 (Dec. 2, 2002).

will produce a result demonstrably at odds with the intentions of its drafters[.]” see *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (internal citations omitted). Resort to the legislative history here is particularly appropriate, as on numerous occasions the Federal courts have looked to the legislative history of the AEA and the comments of the Joint Committee on Atomic Energy [JCAE] to determine the purpose and meaning of AEA provisions, including section 274. See, e.g., *Pac. Legal Found. v. Pac. Gas & Elec. Co.*, 659 F.2d 903, 920-22 (9th Cir. 1981), *aff’d sub nom. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 209-11 (1983).

The Senate report on the bill contained the comments of the JCAE, which summarized the main objective of the bill as providing a mechanism for the Commission to “turn over” areas of regulatory jurisdiction to States, as they became ready to do so. See Sen. Rep. No. 86-870, at 3 (1959). In pursuit of this objective, “[t]o assist the States to prepare themselves for assuming independent regulatory jurisdiction, the new bill . . . specifically authorizes the Commission to provide training and other services to State officials and employees and to enter into agreements with the States under which the latter may perform inspections and other functions cooperatively with the Commission.” *Id.* The JCAE also explained that “the bill authorizes the Commission to provide training and other services to State officials and employees[.]” *Id.* at 9. The provision of training and assistance to States was explained as

enhanc[ing] the protection of the public health and safety, because most citizens look to their local health officers for advice and protection against hazardous materials used in the community. The capacity of such officials to control hazards from byproduct, source, and special nuclear materials would be increased by the training and programs of assistance authorized under this bill.

Id. at 8-9. “By these means,” the JCAE commented, “it is intended to assist the States to prepare themselves for assuming independent regulatory jurisdiction.” *Id.* at 9. The JCAE also emphasized the following: “It is not intended that a cash grant shall be provided to pay for the administration of State regulatory programs. It is anticipated that training, consulting, and similar arrangements may

be made by the Commission to reimburse State or State employees for expenses, or pay salaries of such employees while associated with the AEC.” *Id.* at 12.

It was further explained in the floor debate in the Senate that subsection i. of Pub. L. No. 86-373 clarifies the Commission’s authority under AEA section 161(f), which provides that the Commission may “utilize or employ the services or personnel of any Government agency or any State or local government . . . to perform [its] functions on its behalf as may appear desirable[,]” and AEA section 31b., which authorizes the Commission to provide educational and training assistance for research and development in atomic energy. See 42 U.S.C. §§ 2201(f), 2051(b). See 105 Cong. Rec. 7524–25 (May 19, 1959). The training and assistance contemplated by subsection i. “would be intended to assist the States to prepare for, and carry out, independent State radiation protection programs.” *Id.* at 7525.

A reading of the legislative history confirms that section 274i. was designed to allow the Commission to undertake cooperative efforts with States, and to provide States with training and other forms of similar assistance, to enable the States to perform functions ordinarily performed by the Commission, and to perform them on the Commission’s behalf. Most importantly, it was not intended that the Commission should be able to provide financial assistance to States to perform these functions. Nevada thus turns the plain meaning of the statute on its head, interpreting the statute at odds with a plain analysis of the text, and yielding a result “demonstrably at odds” with the intent of section 274 as recounted in the legislative history.

Furthermore, Nevada is incorrect in its interpretation of NUREG-0539. That document was drafted in furtherance of the requirements of the 1979 NRC Authorization Act, Pub. L. No. 95-601, § 14, 92 Stat. 2947, 2953 (1978), which directed the Commission “to prepare a report on means for improving the opportunities for State participation in the process for siting, licensing, and developing nuclear waste storage or disposal facilities[,]” including “consideration of a program to provide grants through the Commission to any State . . . for the purpose of conducting an

independent State review of any proposal to develop a nuclear waste storage or disposal facility[.]” NUREG-0539 at 1. In response to this direction, the Commission reported to the Congress that it believed that “*the Federal Government* should consider providing financial assistance to the affected States to perform an independent review.” *Id.* at 20 (emphasis added). The Commission opined that Federal grants would be advisable to make it more equitable for a State to bear the burden of a HLW repository or disposal facility, and to enable affected States to provide valuable contributions in the licensing process for such a facility. *Id.* at 20-21. Thus, although Nevada is correct in stating that the Commission endorsed the idea of providing Federal grants to affected States, it nevertheless selectively reads NUREG-0539 in its analysis, ignoring and taking out of context statements of NUREG-0539 just as Nevada ignored the broader text and purpose of AEA section 274i. After stating that a program to provide Federal grants to affected States would be advisable for Congress to consider, the Commission went on to note that “[e]ither the Commission or the Department of Energy might be assigned the responsibility for making grants to support independent State reviews.” *Id.* at 22. While the Commission acknowledged that there apparently was “no compelling reason to specify that the grants should come exclusively from DOE or NRC[.]” the Commission also concluded that “the Department as the agency directly interested in construction [might] be the logical source of funds.” *Id.* The Commission’s report took no firm position either way, leaving the ultimate policy choice up to Congress.

Congress, in turn, did make such a choice, in favor of a grant program administered by DOE. It enacted section 116(c)(1)(A) of the NWPA, which provides: “The Secretary [of Energy] shall make grants to the State of Nevada . . . for the purpose of participating in activities required by this section[.]” 42 U.S.C. § 10136(c)(1)(A). Further, NWPA section 170(a)(1) authorizes the Secretary of Energy to “enter into a benefits agreement with the State of Nevada concerning a repository . . . for the acceptance of high-level radioactive waste or spent nuclear fuel in that State . . . , as appropriate.” 42 U.S.C. § 10173(a)(1). Thus, Congress provided a means for Nevada,

the affected State, to receive the financial assistance it seeks to aid its independent review of the repository program, and to address the equity of locating the facility within the State, from Federal grants to be administered by the Secretary of Energy. Accordingly, Nevada must press its claim for financial assistance with DOE and DOE only. This conclusion is also consistent with Federal appropriations law, as discussed in section B., above.

D. NWPA and 10 C.F.R. Part 63

Nevada claims that the NWPA affords it rights of meaningful participation and consultation that are necessary to promote public confidence in the repository, that the NWPA as well as the provisions of 10 C.F.R. § 63.63 entitle it to the “broadest possible” rights and opportunities, that Nevada has a special right to participate as a party in an NRC licensing proceeding that is not premised upon satisfying NRC requirements for intervention (therefore funding of Nevada does not constitute prohibited intervenor funding), and that 10 C.F.R. § 63.63 has provisions that entitle Nevada to participate in the license application review and provide for the requested financial assistance. See Request at 1-5. Nevada, however, relies on decades old NRC statements made prior to passage of the NWPA to support its mistaken belief that the NWPA and NRC regulations confer entitlement to the requested financial assistance. Nevada also ignores the unique statutory role of the NRC and practical and public policy reasons for not providing the requested financial assistance, including unnecessary duplication of the NRC staff’s review.

1. Regulatory and Legislative History

While the NRC does not dispute that Nevada has certain participatory rights under the NWPA or that the origin of 10 C.F.R. Part 63, Subpart C, stems in part from NRC recommendations for improving opportunities for State participation in NRC activities,¹² Nevada

¹² As detailed above, in response to the 1979 NRC Authorization Act (Pub. L. No. 95-601, § 14, 92 Stat. 2947, 2953 (1978)), the NRC prepared a report on ways to improve State participation and give detailed consideration to the advisability of a program which would provide NRC grants to any State to enable an independent State review of any proposal to

fails to look past statements made prior to passage of the NWPA's scheme for the funding of Nevada's repository related activities.

Apart from participation in rulemaking, the Commission's early focus on State participation was to keep the State informed about the repository through (1) the prelicensing consultative process and (2) the participation of the State in formal adjudicatory proceedings on a geologic repository. See NUREG-0539 at 18. The Commission viewed these activities as "appropriate channels" for keeping States informed and providing for "participation to the extent authorized by law." *Id.* at 19. Informational or participatory activities could include: educational or informational services, exchange of personnel under the Intergovernmental Personnel Act, technical services needed by the Commission (subject to contract conflict provisions of section 170A. of the AEA) in connection with its review of the license application, a direct liaison between individual interested States and NRC program offices and contractors, and continued workshops for State officials and inclusion of States on technical advisory review panels.¹³ NUREG-0539 at 18-19. The report also discussed possible grant programs (from the NRC or DOE, or both) which could equip a State with the technical capability to evaluate a proposed facility and participate in NRC licensing proceedings,

develop a nuclear waste storage or disposal facility. The report, see NUREG-0539 at 3, indicated that State participation would be a means:

- (1) To improve the Federal waste management programs by bringing to bear the perspective and expertise of the States;
- (2) To involve those directly affected by the impacts of waste facilities in the planning and implementation processes for those facilities;
- (3) To recognize the legitimate interests of the States in repository planning and development; and
- (4) To create a setting where States can fulfill their responsibilities in cooperation with the Federal Government for providing effective waste disposal.

¹³ The report also indicated that if the State has extensive knowledge, the NRC would consider requesting State assistance in performing the safety review and environmental analysis. See NUREG-0539 at 20.

id. at 21-22, and recommended that the NRC be authorized to establish a grant program to allow States to participate more fully in the Federal waste management program, *id.* at 28.

In publishing proposed 10 C.F.R. Part 60, 44 Fed. Reg. 70,406, 70,412 (Dec. 6, 1979), which included provisions for State participation in the review of the Site Characterization Report and any subsequent license application, the NRC made similar statements.

States may request to participate in several ways. States could assist the Commission in the review of specific portions of license applications. States could perform other technical assistance work for the Commission, particularly in the area of environmental studies and the like. States might perform environmental and radiation monitoring for the Commission throughout the operational period and perhaps after closure as well. States could also participate through employment or exchange of State and Federal personnel under the Intergovernmental Personnel Act. In addition, States could participate in hearing on a license application under the applicable provisions of the rules of practice. The Commission intends to develop further guidance to assist the States in planning for such participation.

Besides review of site characterization reports, license applications, and ongoing work in support of the license application, States might also be involved by the Department (in response to the regulation for implementation of NEPA or otherwise) in the site selection process itself. . . . In any case, these procedures have been designed to allow affected States to participate to the fullest extent possible within the limits of the Commission's authority and the State's own desires and capabilities.

The Commission recently submitted to the Congress a report on "Means for Improving State Participation in the Siting and Development of Federal Nuclear Waste Facilities," NUREG-0539, March 1979. The extent of State participation may be affected by legislative action on the matters discussed in the report.

44 Fed. Reg. at 70,412.

When the NRC issued the final rule, it declined to include a more formal "consultation and concurrence" role for States and emphasized the importance of public meetings in enabling State and public participation.¹⁴ 46 Fed. Reg. 13,971, 13,973 (Feb. 25, 1981). The NRC stated:

¹⁴ The final rule issued in 1981 provided that proposals for participation in the "review of the site characterization report and/or license application" had to meet the following requirements in § 60.62 (46 Fed. Reg. at 13,986):

(c) Proposals for participation in the review shall be signed by the Governor of the State submitting the proposal and shall at a minimum contain the following information:

(1) A general description of how the State wishes to participate in the

The concerns of commenters on broad policy issues such as “consultation and concurrence” would require actions by parties other than the Commission. Within the context of NRC’s existing authority, appropriate opportunities for meaningful State and public participation have been developed. No serious deficiencies in these opportunities have been pointed out to the NRC. In addition, the provisions of the NRC’s open meeting policy set forth at 43 FR 28058 (June 26, 1978) will also be applied to the licensing of a geologic repository to the extent practicable. . . . The Commission strongly encourages the Director to conduct open meetings prior to a license application to the extent reasonable for matter such as periodic status reports and similar proceedings.

Id. The NRC, however, specifically rejected proposals for intervenor funding, indicating that the NRC lacked the authority to provide such funding and that the matter might be addressed in separate rulemaking applicable to various adjudicatory proceedings. 46 Fed. Reg. at 13,974.

Significantly, though, when Congress enacted the NWPA in 1982, it did not adopt the grant scheme suggested in NUREG-0539. The NWPA requires State participation in repository siting decisions (sections 115, 116) and that the NRC and DOE consult with the host State and affected Indian Tribes, but provides for grant funding only from the DOE. NWPA section 116(c)(1)(A) requires the Secretary of Energy to “make grants to the State of Nevada and any affected unit of

review, specifically identifying those issues which it wishes to review.

(2) A description of material and information which the State plans to submit to the NRC staff for consideration in the review. A tentative schedule referencing steps in the review and calendar dates for planned submittals should be included.

(3) A description including funding estimates of any work that the State proposes to perform for the Commission, under contract, in support of the review.

(4) A description of State plans to facilitate local government and citizen participation.

(5) A preliminary estimate of the types and extent of impacts which the State expects should a geologic repository be located at the site in question.

(d) If the State desires educational or information services (seminars, public meetings) or other actions on the part of NRC, such as establishing additional public document rooms or employment or exchange of State personnel under the Intergovernmental Personnel Act, these shall be included with the proposal.

local government for the purposes of participating in activities required by this section and section 117 or authorized by written agreement entered into pursuant to section 117(c).”¹⁵

The NWPA does not include any provision for grants by the NRC. Rather, the NWPA requires that the NRC give the Governor, and the legislature of the host State (as well as the governing body of any affected Indian Tribe), “timely and complete information regarding determination or plans made with respect to site characterization, siting, development, design, licensing, construction, operation, regulation, or decommissioning of [the] repository.”¹⁶ NWPA § 117.

After passage of the NWPA, the NRC proposed to revise its regulations to reflect statutory provisions regarding site characterization and the participation of States and Indian tribes in the process of siting, licensing, and developing disposal facilities. See Disposal of High-Level Radioactive Waste in Geologic Repositories; Amendments to Licensing Procedures, 50 Fed. Reg. 2,579 (proposed Jan. 17, 1985). Notably, the NRC acknowledged that the NWPA vested in DOE the “authority to fund a broad variety of State activities, including grants to enable a State ‘to review activities . . . for purposes of determining any potential economic, social, public health and safety,

¹⁵ Grants must be for the purposes of enabling the State (or affected unit of local government) to: (i) review activities under subtitle A [sections 111 - 125] of the NWPA regarding the Yucca Mountain site for purposes of determining any potential economic, social, public health and safety and environmental impacts of a repository on the State (or AULG) and its residents; (ii) develop a request for impact assistance under section 116(c)(2); (iii) engage in monitoring, testing or evaluation activities with respect to site characterization programs with regard to the site; (iv) provide information to Nevada residents regarding any activities of the State, the Secretary, or the Commission with respect to such site; and (v) request information from, and make comments and recommendations to, the Secretary regarding any activities under subtitle A of the NWPA with respect to the site. NWPA § 116(c)(1)(B), 42 U.S.C. § 10136(c)(1)(B).

¹⁶ 10 C.F.R. Part 63 codifies this provision and requires the Director of NMSS to provide timely and complete information regarding Commission plans with respect to “the siting, development, design, licensing, construction, operation, regulation, *permanent closure, or decontamination or dismantlement of surface facilities of the geologic repository operations area at the site.*” 10 C.F.R. § 63.61(a) (emphasis added).

and environmental impacts' of a repository." 50 Fed. Reg. at 2,584 (citing NWSA § 116(c)(1)(B)(i), 42 U.S.C. § 10136). The Commission noted that it "would consider providing certain educational or information services and funding work that the State proposes to perform for the Commission, under contract, in support of the review" and further opined that the scope of NRC assistance may be limited by Congress. *Id.* Any contract with State governments would be based on a State providing a service necessary for the NRC to discharge its "statutory duty," would be "carried out under established procurement procedures and would be subject to applicable limitations with respect to competitive bidding and avoidance of conflicts of interest. See 41 C.F.R. Chapter I (Federal Procurement Regulations)."¹⁷ *Id.* at 2,587. Moreover, the NRC viewed any Federal funding of work to improve a State's capacity to review a license application as solely DOE's responsibility, paid for from the Nuclear Waste Fund instead of NRC appropriations. As the Commission stated:

The regulation retains a provision for a State or affected Indian tribe to submit a proposal to facilitate its participation in the review of a site characterization plan and/or license application. . . . The types of services or activities that the NRC might consider providing would *include those educational or information services and related actions that are set out in existing § 60.62(d)*.

The Commission has *omitted those portions of existing §60.62(c) that contemplate Commission funding of State work in support of the license review*. In light of the Waste Policy Act, *funding of such work to improve the State's capacity to review a license application is a responsibility of DOE and it is to be financed out of the Nuclear Waste fund*. . . .

. . . The information required to be included in the proposal has also been modified to conform to the limitation of scope. The Waste Policy Act may have further limited the opportunities for states to receive funding from the NRC[.] The Commission is of the view that Congress intended that DOE should assume the Federal responsibility for activities of the types described in Sections 116 and 118 and that such activities should be financed out of the Nuclear Waste Fund rather than out of NRC appropriations.

¹⁷ The NRC stated that "[a] further reason for handling such contracts under the general procurement regulations rather than Part 60 is that the criteria for approval of proposals (existing § 60.63, proposed § 60.63(d) would be inappropriate when the Commission's purpose is to acquire services which it needs in discharging its own reviewing functions." 50 Fed. Reg. at 2,587.

50 Fed. Reg. at 2,587-88 (emphasis added).

As the foregoing passage illustrates, since 1985 the Commission has indicated that the permissible types of services or activities to be provided by the NRC under repository regulations are primarily educational or informational in nature and would not include funds to improve a State's capability to review a license application. The reduced scope of the NRC's role in aiding state participation in the license application review was reflected by removal of provisions, without further comment in the statement of considerations accompanying the final rule, requiring a proposal to: (1) specifically identify "issues [a State] wants to review" (formerly in § 60.62(c)(1)); (2) describe with funding estimates "any work that the State proposes to perform for the Commission, under contract, in support of the review" (formerly § 60.62(c)(3)); and (3) provide an estimate of expected impacts associated with locating the repository (formerly § 60.62(c)(5)). See 50 Fed. Reg. at 2,590; 51 Fed. Reg. 27,158 (July 30, 1986).¹⁸ See also note 16, *supra*.

¹⁸ The provisions of 10 C.F.R. § 63.63 are basically the same as § 60.63, as promulgated in 1986 (51 Fed. Reg. 27,164) (emphasis added):

§ 60.63 Participation in license reviews.

(a) State and local governments and affected Indian Tribes may participate in license reviews as provided in Subpart G of Part 2 of this chapter. A State in which a repository for high-level radioactive waste is proposed to be located and any affected Indian Tribe shall have an unquestionable right to participate as a party in such proceedings.

(b) In addition, whenever an area has been approved by the President for site characterization, a State or an affected Indian Tribe may submit to the Director a proposal to facilitate its participation in the review of a site characterization plan and/or license application. *The proposal may be submitted at any time and shall contain a description and schedule of how the State or affected Indian Tribe wishes to participate in the review, or what services or activities the State or affected Indian Tribe wishes the NRC to carry out, and how the services or activities proposed to be carried out by NRC would contribute to each participation.* The proposal may include educational or information services (seminars, public meetings) or other actions on the part of NRC, such as establishing additional public document rooms or employment or exchange of State personnel under the Intergovernmental Personnel Act.

(c) The Director shall arrange for a meeting between the representatives of the State or affected Indian Tribe and the NRC staff to discuss any proposal submitted under paragraph (b) of this section, with a view to identifying any

In sum, an examination of the regulatory and legislative history reveals that 10 C.F.R. § 63.63 and its predecessor, 10 C.F.R. § 60.63, provide for proposals for NRC services or activities (e.g., of an informational or educational nature) to assist State participation. Proposals for financial assistance for review activities are not permissible under the regulation. Any funding of Nevada's review activities would be the responsibility of DOE. See *Herrington*, 777 F.2d at 533-34. Therefore, Nevada's request for financial assistance is not authorized or appropriate under 10 C.F.R. Part 63, Subpart C.

2. Participatory "Rights" and Prohibited Intervenor Funding

Nevada claims that it has special rights of participation and consultation under the NWPA as well as broad participatory rights. See Request at 1-2 (citing *Herrington*, 777 F.2d 529). *Nevada v. Herrington*, however, did not hold that the State has an unqualified right to participate in repository activities, or more specifically, even address the State's possible role in NRC licensing activities. The dispute before the Court was whether DOE was required by the NWPA to fund Nevada hydrologic and geologic studies undertaken prior to site characterization. 777 F.2d at 529-31. Although the Court relied on legislative history acknowledging Nevada's participatory

modifications that may contribute to the effective participation by such State or Tribe.

(d) Subject to the availability of funds, the Director shall approve all or any part of a proposal, as it may be modified through the meeting described above, if it is determined that:

(1) The proposed activities are suitable in light of the type and magnitude of impacts which the State or affected Indian Tribe may bear;

(2) The proposed activities:

(i) Will enhance communications between NRC and the State or affected Indian Tribe;

(ii) Will make a productive and timely contribution to the review; and

(iii) Are authorized by law.

(e) The Director will advise the State or affected Indian Tribe whether its proposal has been accepted or denied, and if all or any part of proposal is denied, the Director shall state the reason for denial.

(f) Proposals submitted under this section, and response thereto, shall be made available to the Public Document Room.

rights in the “development of the facilities,” it held that Nevada was entitled to DOE funding of Nevada’s pre-site characterization activities (even though Yucca Mountain was one of three sites being considered by DOE) subject to certain limitations. *Id.* at 533-34. Specifically, Nevada was entitled only to seek DOE funding that was “essential” to an informed statement of reasons for disapproving a site under NWPA section 116(b) and funding for “reasonable” or scientifically justifiable activities performed by demonstrably competent contractors and which cannot unreasonably interfere or delay DOE’s activities. *Id.* at 534. Thus, the cited decision identifies limits on Nevada’s participation rights in the development of the repository (an activity that the NRC, as the regulator, does not perform).

In addition, Commission decisions and statements raise serious doubts about the ability to provide the requested funding. The Commission has long recognized limitations in providing financial assistance to stakeholders. In *Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings)*, CLI-76-23, 4 NRC 494, 495, 498 (1976), the Commission noted that it had decided against providing funding for participants in its licensing, enforcement, antitrust and rulemaking proceedings (except for its intent to ask Congress for a specific appropriation to fund the participants in the GESMO proceeding), because it could not satisfy the Comptroller General’s tests that: (1) the Commission could not make necessary licensing or rulemaking determinations unless financial assistance is extended; and (2) that the funded participation is essential to Commission disposition of issues. *Id.* at 498. The Commission also indicated that narrow statutory enactments authorizing the payment of attorney’s fees to the prevailing party in civil rights cases and for attorney’s fees and other expenses in some rulemaking and litigation under the “Toxic Substance Control Act” were exceptions to the normal rule that each party to litigation bears its own expenses. *Id.* (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975)); see also *Duke Power Co. (Perkins Nuclear Station, Units, 1, 2 & 3)*, LBP-82-81, 16 NRC 1128, 1139 (1982) (a claim for litigation costs under the “private attorney

general” theory must have a statutory basis) (citing *Alyeska*, 421 U.S. at 269; *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975)).

Nevada’s reliance on statements in NUREG-0539, issued in 1979, ignores more recent NRC statements questioning the availability of funding for activities related to litigation concerning Yucca Mountain. For example, in issuing the final Licensing Support Network Rule, the Commission specifically addressed concerns about funding of participation in electronic discovery activities and stated that the NRC is prohibited from paying the expenses of participants in licensing proceedings by a provision of the Energy and Water Development Appropriations Act, 1993, which was codified at 5 U.S.C. § 504 note (enacted by Pub. L. No. 102-377, § 502, 106 Stat. 1315, 1342 (1992)).¹⁹ Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository, 63 Fed. Reg. 71,729, 71,732 (Dec. 30, 1998). The Commission further noted that a Comptroller General opinion, Comp. Gen. B-200585, 1980 WL 14543, at *2 (Dec. 3, 1980) (unpublished), interpreting identical language in the Energy and Water Development Appropriations Act, 1981 (Pub. L. No. 96-367, § 502, 94 Stat. 1331, 1345 (1980)), concluded that the NRC could not provide to intervenors free copies of transcripts or free copying and service of intervenor documents.²⁰ *Id.* The Commission thus abandoned its previous

¹⁹ Years earlier, when the Commission proposed to establish a negotiating committee to develop regulations for a repository adjudicatory proceeding, the Commission indicated it could not provide direct funding to individual participants on the negotiating committee based on a prohibition in its authorization act and the legislative history of the provision. 52 Fed. Reg. 29,024, 20,926 (Aug. 8, 1987).

²⁰ Recent 10 C.F.R. Part 2 revisions, 69 Fed. Reg. 2,182, 2,218, 2,237-38 (Jan. 14, 2004), removed all mention of a provision that formerly appeared in § 2.712 that the Commission would provide, in any adjudicatory proceeding (except in an antitrust proceeding) on a license or license amendment, upon request of a party other than the applicant, free copies and service of a party’s testimony (including attachments), proposed findings of fact and conclusions of law, and responses to discovery requests. See 10 C.F.R. § 2.712(g) (2003). These provisions were initially suspended as a result of the 1980 Comptroller General opinion that viewed the use of funds for such purposes as unlawful intervenor funding. See 46 Fed. Reg. 13,681 (Feb. 24, 1981).

suggestion in the supplementary information of the proposed rule that participants could provide their documentary materials to the NRC or DOE to allow the NRC or DOE to maintain electronic availability of the participants' documents. See *id.* Mindful of the costs associated with document conversion, loading, and maintaining and operating a web server, the Commission suggested that affected units of local government (AULG) and others could utilize a portion of DOE grant funds. 63 Fed. Reg. at 71,733. Accordingly, the Commission recognized even prior to the promulgation of 10 C.F.R. Part 63, that any assistance provided in support of State activities would be circumscribed by prohibitions on intervenor funding.

An NRC denial of fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 was upheld in *Business & Professional People v. NRC*, 793 F.2d 1366, 1367 (D.C. Cir. 1986), which also cited a Comptroller General decision that funds restricted by section 502 of the 1982 NRC Appropriations Act may not be used to satisfy an award in an adversary adjudication. *Id.* (citing 62 Comp. Gen. 692, 695 (1983)). Therein the Comptroller General held that “[t]he plain terms of section 502 . . . unambiguously prohibit the use of appropriated funds for payments of any kind to intervenors.” 62 Comp. Gen. at 695.

Nevada claims that because 10 C.F.R. § 63.63 allows Nevada to participate in license reviews, “Nevada will be a party to license reviews” and hence not an intervenor. Request at 2. Nevada confuses a “participant” in an NRC licensing review with a “party” in an NRC adjudicatory proceeding. Participation in the license review includes a broad spectrum of means for participation ranging from attending public meetings between the NRC staff and DOE where there are limited opportunities for public comment or questions regarding the matters discussed,²¹ to full, formal participation as a party in an adjudication.

²¹ See “Enhancing Public Participation in NRC Meetings: Policy Statement,” 67 Fed. Reg. 36,920 (May 28, 2002).

Nevada may participate as a “party” to the Yucca Mountain licensing proceeding only if it successfully demonstrates “intervenor” status by submitting an intervention petition that proffers at least one admissible contention. See 10 C.F.R. §§ 2.309(d)(2), 2.1001. Nevada could also “participate” in the licensing proceeding without proffering an admissible contention for litigation if granted permission to participate as an “interested governmental participant” in the licensing proceeding under 10 C.F.R. § 2.315(c). An interested governmental participant may “introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without requiring the representative to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under § 2.341 with respect to the admitted contentions.” As an interested governmental participant, however, Nevada could only address contentions raised by admitted intervenors or, in an uncontested proceeding (*i.e.*, where intervention is not granted) file papers related to any environmental issues that must be resolved by the presiding officer under 10 C.F.R. § 51.109(e).

Consistent with 10 C.F.R. §§ 60.63, and 63.63, for over 15 years, the NRC staff has engaged in activities to keep Nevada and interested members of the public timely informed about Yucca Mountain through numerous technical exchanges and management meetings conducted under an NRC/DOE agreement first executed in 1983 and last revised in 1999. See Procedural Agreement Between the U.S. Nuclear Regulatory Commission and the U.S. Department of Energy Identifying Guiding Principles for Interface During Site Investigation and Site Characterization, 48 Fed. Reg. 38,701 (Aug. 25, 1983); see also Agreement Between DOE/OCRWM and NRC/NMSS Regarding Prelicensing Interactions (Mar. 1999) (ADAMS Accession No. ML031690574). The NRC staff also conducted numerous public meetings regarding rulemaking for Yucca Mountain, the Yucca Mountain Review Plan, and the NRC licensing process. Nevada has participated in these activities. Participation in prelicense application activities, or in the

licensing review as mentioned in the regulations, does not, however, confer on Nevada any special status. Depending on whether it files an admissible contention in the adjudicatory proceeding, Nevada would participate in the licensing process either an interested governmental participant or an intervenor.

Arguably, the issue of intervenor funding is not yet ripe for consideration because the NRC has not yet published a notice of hearing relating to Yucca Mountain and providing an opportunity to intervene, and, as a consequence, Nevada has not filed an intervention petition in response to an NRC notice of hearing. Nevada's financial aid request, however, appears to be based solely on its oft stated desire to achieve, with NRC financial assistance, meaningful participation through funding technical and legal advice aimed at developing admissible contentions in the Yucca Mountain licensing proceeding. See, e.g., Request at 3, 5-7. Nevada contends that "Nevada may participate effectively only by submitting formal and technically competent contentions" and that "substantial resources are needed" for Nevada to submit its "health, safety and environmental contentions" in FY 2005. See Request at 3, 10-22. Nevada also states that its "goal is to thoroughly and independently evaluate the work of DOE and NRC staff so as to make a vital contribution to the proceeding," *id.* at 6-7. Given Nevada's stated determination to intervene, a decision as to whether the requested financial assistance is precluded by the prohibition against intervenor funding should, as a policy matter, consider Nevada's stated intention. Inasmuch as intervenor funding is prohibited, policy considerations thus weigh against granting the requested funding.

In short, Nevada's request for funds to cover its discovery obligations (a litigation expense traditionally born by litigants in American jurisprudence) and to finance its independent (and undoubtedly duplicative) review of a license application for a high-level waste repository (a matter Congress placed within the exclusive jurisdiction of the NRC) in order to challenge the adequacy

of DOE and NRC activities is in essence, a request to fund intervention even though Nevada is not yet an intervenor. Nevada must sustain the costs of its own litigative strategy.

Even if the requested payment does not constitute prohibited intervenor funding, sound policy and practical reasons mandate that the NRC not finance Nevada activities which are not necessary for the NRC to accomplish its statutory duties with respect to public health and safety and regulation of the repository. To the extent that Nevada seeks financial assistance and not NRC services or activities, its request is not authorized under 10 C.F.R. § 63.63. Money requests will not be entertained. The NWPA requires that Nevada obtain funding only from the DOE.

E. Other 10 C.F.R. § 63.63(d) Factors (Suitability, Enhancement of Communications, Timely Review)

Under 10 C.F.R. § 63.63(d), the Director must determine, *inter alia*, whether the proposed activities “are suitable in light of the type and magnitude of impacts that the State might bear,” whether the proposed activities “will enhance communications between the NRC and the State,” and whether the proposed activities “will make a productive and timely contribution to the review.”

During the public meeting held on July 22, 2004, Nevada identified services the NRC could provide, namely: (1) a dialogue between the NRC staff and Nevada experts regarding the DOE TSPA code and the NRC staff’s TPA code; (2) a dialogue about ways to assist the State in meeting its LSN obligations (including NRC funding of a Nevada LSN position); and (3) NRC staff performance of studies suggested by Nevada and with Nevada’s participation. See Meeting Transcript at 17-21.

The request by Nevada for assistance with meeting its LSN obligations is not appropriate for NRC consideration. Through its long ongoing participation on the LSN/LSS Advisory Review Panel, Nevada has already been afforded an opportunity to become fully conversant with the requirements for satisfying its LSN obligations, and has and will continue to be able to communicate with the LSN Administrator if procedural implementation issues arise. Beyond that,

as discussed previously, the Commission has already concluded that Nevada, as well as other potential participants, should bear the costs of LSN participation or seek funding from DOE. See 63 Fed. Reg. at 71,732. To do otherwise would place the NRC in the precarious position of enabling Nevada to cite NRC “funding” or “under funding” as an excuse for its failure to satisfy the requirements of 10 C.F.R. Part 2, Subpart J.

Nevada’s Petition, as modified during the July 22, 2004, public meeting, suggests a wide ranging set of activities related to the NRC staff’s review of a potential license application from DOE. The activities suggested by Nevada appear suitable in light of the impacts that Nevada may bear due to the licensing of a repository at Yucca Mountain. The staff does not, however, believe that the identified activities will make a productive and timely contribution to the NRC staff’s review of the license application. As discussed below, the areas identified for further inquiry by Nevada are not necessary for the staff to complete its review of a license application.

Nevada’s Petition includes technical activities such as reviewing specific aspects of DOE’s license application performance assessment (e.g., climatology, release of radionuclides from the waste form, transport of radionuclides in the geosphere, biosphere assumptions), using computer analyses in support of performance assessment (e.g., hydrologic flow and transport, infiltration, and seepage), performing independent evaluations (e.g., probability of igneous disruption of the repository, consequences of igneous activity, tectonic models, effects of seismic activity, degradation of the engineered barrier system), and understanding performance assessment methodologies and results developed by DOE and the NRC staff. Nevada has described the proposed activities in broad, general terms (e.g., saturated flow, seismic hazard studies, migration of radionuclides, etc.) and somewhat more specific terms (e.g., effects of volcanic ash on short term and long term climate, aircraft crashes). Nevada’s characterization of these activities seems to imply that very little information is currently available. This is not the case.

The NRC staff has spent considerable resources over the past two decades preparing to review a potential DOE license application, which includes development of an independent understanding of the technical issues, as well as the approach and information DOE intends on using in a potential license application. The substance of the staff's independent technical understanding can be found in publicly available documents, which include both NUREG Reports and reports from the NRC staff's contractor, the Center for Nuclear Waste Regulatory Analyses (CNWRA). The NRC staff's understanding of the DOE's repository program has also been available to the public through staff-issued Issue Resolution Status Reports and numerous public technical exchanges between the NRC staff and DOE, which Nevada has frequently, if not always, attended. Over this now decades old process, the staff has developed the capability to perform a review of a potential license application. Given the staff's developed expertise to conduct its independent safety review, simply stated, the activities suggested by Nevada are neither productive nor timely in terms of contributing to the staff's capability.

For example, Nevada has suggested activities to (1) evaluate the significance of buried volcanic centers to probability calculations, (2) consider the effects of volcanic ash on short term and long term climate, (3) investigate corrosion of the engineered barriers, and (4) model saturated zone flow processes. With respect to the first activity, the NRC staff has publicly, both in technical exchanges and in technical documents, discussed the importance of buried volcanic centers. Thus, the NRC staff is knowledgeable of the issue and is prepared to review a potential license application without the further activities identified by Nevada. With respect to the second activity, the staff has developed considerable knowledge about volcanic eruptions postulated to occur in the Yucca Mountain area and the ash associated with such eruptions, as well as an understanding of the size and type of past eruptions world-wide that have been associated with climatic changes. Based on this knowledge, there is no need for the staff to divert additional resources from other review activities to investigate this area. With respect to the third activity, the staff is aware of

Nevada's concerns in the area of the evolution of the engineered system and the perturbed near field and Nevada's suggestions for corrosion studies. The staff has the expertise and capabilities necessary to assess realistic conditions for corrosion studies in any potential license application. Alternative studies by Nevada are not necessary. Finally, with respect to the fourth activity, Nevada has suggested undertaking modeling studies of saturated zone flow processes at Yucca Mountain. The staff is well aware of issues associated with saturated flow processes at Yucca Mountain based upon years of following DOE activities in this area (as well as the activities of the United States Geological Survey and the Nye County Early Warning Drilling Program) and conducting independent modeling analysis, including analyses performed by the CNWRA (e.g., Section 3 in NUREG-1538, "Preliminary Performance-Based Analyses Relevant to Dose-Based Performance Measures for a Proposed Geologic Repository at Yucca Mountain," dated October 2001) that provide information on saturated flow processes for Yucca Mountain. The staff is prepared to review a potential license application without the further activities identified by Nevada.

In addition, Nevada suggests other activities that, as a practical matter, would simply duplicate past or future NRC staff review activities. Nevada has suggested it will review each of DOE's expert elicitation. The staff has long recognized the importance of expert elicitation and published a technical position "Branch Technical Position on the Use of Expert Elicitation in the High-Level Radioactive Waste Program" (NUREG-1563, November 1996). The staff is fully prepared to review DOE's use of expert elicitation and it would not be productive or timely for Nevada to duplicate this review. Nevada has suggested it would analyze DOE's quality assurance program. The staff has carefully reviewed and monitored DOE's quality assurance program for many years. Most recently, the staff performed an evaluation of DOE's process controls and corrective actions, and held a public meeting with DOE to discuss the results of this evaluation (Technical Exchange on May 5, 2004 held in Las Vegas). The staff is fully prepared to review

DOE's quality assurance program and Nevada hasn't shown how its analysis of that program would contribute to a productive and timely NRC staff review.

Nevada has also suggested further analysis of DOE's Final Environmental Impact Statement (FEIS) including transportation decisions. Nevada's suggested activities would have the staff re-visit work already completed or duplicate staff activities to be conducted. The staff has previously commented on the DOE FEIS and concluded that, based on the NRC's knowledge of the proposed action described in the FEIS, the FEIS appears to bound the range of impacts, including transportation impacts.²² In its letter of February 4, 2002, the Commission also noted that fulfillment of DOE's commitment to refine the repository design and to define transportation modes and routes would allow for more precise estimates of impacts and could result in revisions to the NEPA analyses. The NRC staff will base any FEIS adoption determination on a review of the license application as well as any additional DOE environmental analyses, including information from the DOE's rail alignment environmental review process. Therefore, the NRC staff does not find that the areas identified for further inquiry in Nevada's request are necessary for the staff to complete its review of a license application or would contribute to a productive and timely review.

Finally, Nevada has not suggested any activities that would enhance communications between the Nevada and the NRC staff. Nevada and the staff currently follow each other's activities through attendance at public meetings, reviews of published reports, and formal and informal correspondence (i.e., letters and phone calls). Nevada has, for example, requested further information regarding the NRC staff's Total-System Performance Assessment (TPA) code that would include one-on-one discussions between the NRC technical staff and Nevada's technical experts. Although these discussions might allow Nevada's experts to "come up to speed" with

²² February 4, 2002 letter from Richard Meserve, Chairman, NRC to Spencer Abraham, Secretary, DOE.

respect to the TPA code, Nevada has not shown that such discussions would be mutually beneficial or meaningful, or would otherwise enhance communications.

In summary, the staff is prepared to review a potential license application without the further activities identified by Nevada. The staff does not believe that any of the activities suggested by Nevada either would contribute to a productive and timely review or enhance communications between the NRC staff and Nevada. Therefore, the activities listed in the petition do not satisfy the criteria of 10 C.F.R. § 63.63(d).

In any event, the NRC staff will continue to follow Nevada's activities and provide Nevada with NRC public documents using a distribution list, which includes both Nevada representatives and Nevada's counsel, for documents related to the repository program.

Availability of Funds

Under 10 C.F.R. § 63.63(d), any approval of a State proposal is subject to the availability of funds. The \$13.75 million dollars requested by Nevada was not requested in time for inclusion either in the FY 2004 or FY 2005 budgets, FY 2004 funds have been nearly expended, and, as discussed above, the staff is unable to obligate funds which it does not yet have. There are, therefore, no funds available to provide the financial assistance requested by Nevada, even if the NRC were permitted by law to do so.

CONCLUSION

For the foregoing reasons, to the extent that Nevada requests financial assistance, the request must be denied as a matter of law. With respect to Nevada's request for assistance in making documents available on the LSN, this request must be denied, since the Commission has already determined that each participant must bear the costs of making their documents electronically available. Even if the financial assistance requested by Nevada were legally permissible, the activities proposed by Nevada do not satisfy the criteria of 10 C.F.R. § 63.63.

Finally, the NRC staff is unable to provide any of the services requested by Nevada due to unavailability of funds. In all respects, the Nevada proposal is denied.

Based on a consideration of applicable statutes, regulations, Commission precedent, and sound public and fiscal policy, the request for \$13.75 million is denied. The NRC does not have funds available, or appropriated, for the purposes requested, and the request, which in large measure seeks to provide Nevada with the capability to duplicate the independent NRC staff review, does not otherwise satisfy the criteria in 10 C.F.R. § 63.63(d).