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**PRAIRIE ISLAND INDIAN COMMUNITY'S RESPONSE  
IN OPPOSITION TO THE  
U.S. DEPARTMENT OF ENERGY'S MOTION TO WITHDRAW**

The Prairie Island Indian Community (hereafter referred to as PIIC) files this Response in Opposition ("Response") to the United States Department of Energy's ("DOE") March 3, 2010 Motion to Withdraw in this proceeding, in accordance with the schedule established by the Board.

**INTRODUCTION**

On March 3, 2010, the DOE filed its Motion to Withdraw its pending license application for a permanent geologic repository at Yucca Mountain, Nevada, "with prejudice." The DOE's Motion (p 1) states: "DOE asks the Board to dismiss its application with prejudice and to impose no additional terms of withdrawal." DOE's Motion (p 1-2) states in pertinent part:

While DOE reaffirms its obligation to take possession and dispose of the nation's spent nuclear fuel and high-level nuclear waste, the Secretary of Energy has decided that a geologic repository at Yucca Mountain is not a workable option for long-term disposition of these materials. Additionally, at the direction of the President, the Secretary has established the Blue Ribbon Commission on America's Nuclear Future, which will conduct a comprehensive review and consider alternatives for such disposition. [fn omitted] And Congress has already appropriated \$5 million for the Blue Ribbon Commission to evaluate and recommend such "alternatives." Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009). In accord with those decisions, and to avoid further expenditure of funds on a licensing proceeding for a project that is being terminated, DOE has decided to discontinue the pending application in this docket, [fn omitted] and hereby moves to withdraw that application with prejudice.

The PIIC in this Response opposes DOE's Motion in its entirety. The PIIC further asserts that the relief requested by DOE is unlawful, and should thereby be rejected by the Board and the

Nuclear Regulatory Commission (Commission). The PIIC herein also offers suggestions on terms and conditions to be incorporated in Board and Commission rulings.

PIIC is a Federally recognized Indian Tribe organized under the Indian Reorganization Act, 25 U.S.C. § 476, and is governed under the terms of a Constitution and Bylaws adopted by tribal members on May 23, 1936, and approved by the Secretary of the Interior on June 20, 1936, as amended (“Constitution and Bylaws”). Article IV, Section 1 of the Constitution provides that the Community Council (sometimes referred to as the Tribal Council) shall be the governing body for the PIIC with the authority to act or speak on behalf of the PIIC. On March 10, 2010, the Tribal Council authorized its General Counsel to file a petition to intervene in these proceedings on behalf of the PIIC.

All five members of the Tribal Council reside within approximately five (5) miles of the Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation (“PINGP ISFSI”). The Prairie Island Indian Reservation is located immediately adjacent to the PINGP property, with the nearest Community residences approximately 600 yards from the PINGP ISFSI. The Prairie Island Reservation is approximately 40 miles southeast of the Twin Cities of Minneapolis - St. Paul and near the cities of Red Wing and Hastings, Minnesota. Approximately 250 Community Members reside on or near the Reservation in the vicinity of the PINGP ISFSI. The PIIC also owns and operates Treasure Island Resort & Casino, the largest employer in Goodhue County, which employs approximately 1,500 people. The Resort and Casino includes a 480-room hotel and convention center, a 95-space RV park, and a 137-slip marina. On any given day during the year, there may be more than 8,000 visitors to the reservation.

The PIIC has a direct and compelling interest in opposing DOE's motion. As noted, the PIIC is adjacent to an ISFSI one of the many such sites now located throughout the United

States. These SNF sites were originally intended to be temporary storage sites, pending completion of a repository to timely receive and dispose of said waste as provided by the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. § 10101, *et seq.*, and the Standard Contract entered into by nuclear utilities and the U.S. Department of Energy (Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11 *et seq.*). The PIIC is concerned that the long-term storage of spent nuclear fuel at the PINGP ISFSI may result in a detrimental effect to the health and safety of PIIC members and pose a risk to visitors to the reservation and may have a detrimental effect on the environment in which the PIIC is situated.<sup>1</sup>

The PIIC owns facilities that utilize electric energy, and also represents energy users in their community. The PIIC is located in the State of Minnesota, which is part of a Midwestern region that utilizes nuclear energy, both directly and indirectly, through a large interconnected electrical grid. The PIIC is thus among the nation's ratepayers that have paid billions of dollars in fees under the NWPA and the Standard Contract for the purpose of ensuring disposal of SNF on a prompt basis. The amount of said rate payments on a national basis is now approximately \$33 billion (with interest), including on a combined basis, payments sent to the Nuclear Waste Fund (NWF), and fee collections included in electric rates but still held by utilities relating to SNF generated and sold before April 7, 1983 (see attached Affidavit and Attachments of Ronald C. Callen). As the Court held in *Indiana Michigan Power Co v. United States Department of Energy*, 88 F.3d 1272, 1277 (1996), there exists a reciprocal obligation between the payment of

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<sup>1</sup> The PIIC is also involved in another proceeding before this Commission; see *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 N.R.C. 905 (2008)(finding that the PIIC had met the requirements of Section 2.309(d) and had standing to intervene in the PINGP license renewal application).

SNF fees under the NWPA and Standard Contract, and DOE's performance of its SNF disposal duties:

"... we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998."

The PIIC has described earlier its interests in this proceeding given its close proximity to the PINGP plant and ISFSI, and as the representative of its citizens having long-term enduring interests in the protection of public safety, the environment and natural resources, and to protect their long-term financial interests. DOE's motion directly affects the PIIC's interests to act on behalf of its citizens. *Massachusetts v Environmental Protection Agency*, 549 US 497, 518-19 (2007). The PIIC has asserted in its March 15, 2010 Petition to Intervene that the effects resulting from DOE's proposed motion, if granted, provides Petitioner PIIC all of the elements of judicial standing, including "concrete and particularized interests" as set forth by the U.S. Supreme Court (e.g. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), and that PIIC interests fall within the "zone of interests" to be protected by the NWPA, 42 U.S.C. § 10101, *et seq.*, by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321; the Atomic Energy Act, 42 U.S.C. § 42 U.S.C. 2011, *et seq.*, and also the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

## ARGUMENT

### I. THE DOE SECRETARY'S ACTION IN FILING THE MOTION TO WITHDRAW IS UNLAWFUL UNDER THE NWPA AND THE STANDARD CONTRACT.

The DOE Secretary's action in filing the March 3, 2010 Motion to Withdraw the license application is unlawful, as being unauthorized and inconsistent with the NWPA and the Standard

Contract. Similarly, the relief sought in the March 3, 2010 Motion to Withdraw is unlawful because it is contrary to the Secretary's mandated duties under the NWPA and Standard Contract.

The NWPA and Standard Contract assigned the DOE the mandated duty to develop a repository for SNF, pursuant to a timely designated schedule. *Indiana Michigan*, 88 F.3d at 1277; *Tennessee v. Herrington*, 806 F.2d 642, 648 (1986). The ISFSI site located near PIIC's community, as with ISFSIs around the nation, have not been studied or approved as long-term or permanent SNF storage or disposal sites. The nation needs one or more SNF repositories for both commercial and military waste, irrespective of any other alternatives that may arise in future decades, or which may be studied by the recently appointed Blue Ribbon Committee. DOE's sudden, unexpected, and major change of direction, as reflected in its March 3, 2010 Motion to Withdraw, creates major questions and unknowns, including the prospect that SNF will become stranded in the respective states in such a fashion as to create significant long-term environmental and safety risks, in addition to substantial financial risks and costs.

The Secretary's action is contrary to the purposes and objectives of Congress as clearly stated in Section 111 of the NWPA, 42 U.S.C. § 10131. The Secretary's action ignores the mandated steps to establish a repository as set forth in the original 1982 NWPA, as revisited in the 1987 Amendments. The Secretary's action obstructs, rather than upholds, DOE's duties under its Standard Contract, a result that may incur additional monetary damages to the detriment of the nation's taxpayers.

DOE's Motion to Withdraw, even if it had sought withdrawal of the license application without prejudice, would be contrary to its mandated duties assigned by Congress in the NWPA. However, its Motion to Withdraw the license application with prejudice is particularly unnecessary and reckless, given both the requirements and obligations established by the NWPA

and Standard Contract, but also given the long history of steps undertaken thus far since the adoption of the NWPA. The Secretary wholly ignores the long-term history and context that defines his duties, as made clear by the NWPA, the Standard Contract, 1987 Amendments to the NWPA, the DOE Secretary's recommendation to select Yucca Mountain in 2002, the President's adoption of this recommendation, and Congress' ratification in 2002 of this selection (approval of Yucca Mountain site, Pub L No. 107-200, 116 Stat 735). The Secretary ignores the declaratory ruling of the Courts in *Indiana Michigan Power, supra*, and the partial mandamus granted by the Court in *Northern States Power v. DOE*, 120 F.3d 753 (1997), and also the many damage suit award decisions rendered in recent years by the U.S. Court of Claims arising from DOE's breach in the Standard Contract. This history also includes billions of dollars expended by the federal government to study the Yucca Mountain site, DOE's effort to formulate the license application filed in 2008, and the follow-up process to respond to information inquiries by the NRC Staff up until or through 2009. The sudden and unexplained DOE Motion to Withdraw with prejudice, if granted, would result in extreme prejudice to PIIC's interests, as it may forever foreclose siting a geological repository at Yucca Mountain, in contravention of the above history, including the unequivocal objectives, purposes, and policies established by Congress over a period of decades.

The NWPA, as augmented by this history and context, mandates the licensing procedure that both the DOE and the NRC must uphold. Under Section 114(b) of the NWPA, Congress has mandated that the Secretary "*shall submit* to the Commission an application for a construction authorization for a repository at [Yucca Mountain]. . . ." 42 U.S.C. § 10134(b) (emphasis added). Section 114(d) further provides that "[t]he Commission *shall consider* an application for a construction authorization for all or part of a repository in accordance with the laws applicable

to such applications" and "*shall issue a final decision approving or disapproving the issuance of a construction authorization*" within a prescribed timeframe. 42 U.S.C. § 10134(d) (emphasis added).

Contrary to the above, DOE's March 3, 2010 motion inexplicably proclaims that the Secretary has discretion to announce a withdrawal of the filed license application, and to *sua sponte* terminate the decades-long Yucca Mountain program, for which billions of dollars have been spent. The Secretary presumes this authority and discretion without pointing to any applicable statutory and judicial authority, and without any semblance of a process or procedure to formulate a basis for this change in policy or interpretation, or to support this change with rational reasoning or facts, or to submit same to a formal notice proceeding to provide interested parties an opportunity to comment on the proposed action.<sup>2</sup> Inexplicably, the Secretary's March 3 Motion provides no explanation and no reason to justify the action or the relief requested.

DOE's Motion attempts a reversal of law and roles, and suggests that DOE's proposed withdrawal is not to be based upon the NWPA, or prior Court decisions clarifying same, but, *de novo*, "on such terms as the Board may prescribe." DOE's Motion (pp 2-3) states:

That section provides in relevant part that "[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe." 10 C.F.R. 2.107(a).

And then, in a true polyglot fashion, DOE states that:

Thus, applicable Commission regulations empower this Board to regulate the terms and conditions of withdrawal. *Philadelphia Electric Company* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 N.R.C. 967, 974 (1981). Any

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<sup>2</sup> In contrast, the DOE Secretary utilized a formal process prior to issuing the *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995), absolving DOE of any duty to dispose of SNF until it had access to a federal repository. DOE's Final Interpretation was reversed by the Court in *Indiana Michigan*, 88 F.3d at 1272.

terms imposed for withdrawal must bear a rational relationship to the conduct and legal harm in question to impose a term. *Id.*, citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604-05 (5th Cir. 1976); 5 Moore's Federal Practice ¶ 41.05[1] at 41-58.

The serious and insidious problem with these DOE statements is the suggestion that agency rulings in other contexts should somehow govern over this overarching issue presented here -- namely, how to properly carry out the nation's policy as stated in the NWPA and the Standard Contracts signed pursuant to the NWPA, improperly relying on general procedural rules to overrule a specific statutory mandate. DOE does not explain how a term or condition imposed by the Board or this Commission can specifically apply here to overturn the plain language and the objectives and purposes of Congress, as set forth in the NWPA, and in the Standard Contracts entered into between the DOE and nuclear utilities.

The violation of the NWPA by the DOE, as reflected in its Motion, cannot be underestimated. Exasperatingly, the DOE now ignores all the Court decisions rendered against it years ago, in cases where DOE made arguments similar to that asserted in its May 3, 2010 Motion. DOE provides no rationale or explanation for seeking to withdraw its license application, and for acting contrary to its duties under the NWPA, mandates that were made unequivocally clear by the Courts in *Indiana Michigan Power v. DOE*, 88 F.3d 1272 (DC Cir 1996) and in *Northern States Power Company et al v DOE*, 120 F.3d 753 (1997).

DOE's Motion erroneously states:

The Board should defer to the Secretary's judgment that dismissal of the pending application with prejudice is appropriate here. Settled law in this area directs the NRC to defer to the judgment of policymakers within the Executive Branch. [fn omitted] And whether the public interest would be served by dismissing this application with prejudice is a matter within the purview of the Secretary. [fn omitted].

DOE then cites further steps necessary before a repository could be opened (points which are irrelevant as discussed later), and then states:

Even if there were any ambiguity on these points, the Secretary's interpretation of the NWPA would be entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Gen. Elec. Uranium Mgmt. Corp. v. DOE*, 764 F.2d 896, 906 (D.C. Cir. 1985)(applying *Chevron* deference to uphold DOE's interpretation of the NWPA)....

DOE asserts that the decision to withdraw the license application involves "the Secretary's underlying policy decisions" and that "the Secretary may fill this statutory 'gap.'" Severe problems exist with respect to DOE's assertions.

DOE's assertion that the present DOE Secretary has a policy decision to make here is also wholly unmeritorious. The License Application (including obtaining a decision on the LA on the merits) is a step required by the NWPA. Previous administrations have already completed the prior NWPA steps leading up to the filing of the LA, and have progressed the repository program mandated by the NWPA to the present situation wherein an LA is filed, with most or all technical questions by the NRC Staff having been answered. The LA is now ripe for the discovery and hearing process to be followed by a Commission decision on the LA. The present DOE Secretary is really faced with no policy decision that is ripe or necessary at this time -- except to carryout DOE's statutorily mandated or NWPA-mandated participation in the present case leading up to an NRC decision on the LA already filed pursuant to the NWPA. The present DOE Secretary should instead cease interfering with and sabotaging the current NWPA-mandated step of obtaining a Commission decision on the merits of the LA. Moreover, unlike the process used by DOE to issue its *Final Interpretation*, the Secretary here has unlawfully decided to withdraw the LA without any explanation, rationale, or prior formal process to gather

input and views from all major national stakeholders impacted by the Secretary's precipitous "decision".<sup>3</sup>

DOE's assertion that there exists a "statutory gap" to fill (to thereby provide the Secretary the discretion to fill the gap by withdrawing the LA) is extremely unmeritorious. No such statutory gap or discretion exists, as made clear by the Court decisions reversing DOE's similar "policy decisions" in the Final Interpretation,<sup>4</sup> reversed by the Courts in *Indiana Michigan Power* and *Northern States Power*.

All parties recognize that this LA decision process would take years, and that it was only one of several steps that would have to be completed before a repository at Yucca could be constructed and made operational. These pre-existing factors have been in place for many years and simply do not justify a withdrawal of the LA, however.

DOE's motion referencing a "statutory gap" does not explain what the statutory gap is. Certainly, the need for other efforts to secure water rights, transportation routes, or to consider a rail line, does not present a statutory gap under the NWPA, and comprised matters upon which DOE was making progress up to this point. None of these matters relate to the specific task involving the LA, as mandated by the NWPA. Quite simply, there exists no statutory gap that affects the LA or that justifies DOE's withdrawal motion.

DOE erroneously asserts the Secretary's interpretation of the NWPA is entitled to "deference" under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) which deference suggests that Congress implicitly delegated the agency to fill in the

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<sup>3</sup> The Final Interpretation was issued following a process by which DOE issued a Notice of Inquiry on Waste Acceptance Issues requesting comments and input from the nation's stakeholders on these issues, 59 FR 27007, May 25, 1994.

<sup>4</sup> Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21793, *et seq* (1995).

“gaps.” Simply put, however, Congress did not delegate to the DOE any authority to “fill in the gaps” and, further, such “gaps” do not exist. Congress did not say either the DOE or the NRC have authority to say the DOE may at its discretion unilaterally declare without a substantial evidentiary basis, that the Yucca Mountain repository is not an alternative, notwithstanding the future findings of a presidential Blue Ribbon Commission.

DOE’s Motion fails the classic *Chevron* two-part test which begins with whether Congress’s intent is “clear” and “unambiguously expressed” and then whether the agency’s interpretation is “permissible,” or reasonable in light of the law. First, as noted above, the NWPA clearly and unambiguously prescribes that the DOE is to complete construction of a SNF repository and that DOE should enter into a Standard Contract with nuclear facilities such that the long-term and safe storage of SNF is ensured. The DOE’s Motion similarly ignores the clear declaratory judgments, writs of mandamus and damage awards granted by the courts, such judgments each providing clear and unambiguous judicial interpretations of the relevant portions of Congress’ intent in the NWPA.

DOE’s proposed elimination of the Yucca Mountain repository for SNF is clearly inconsistent with the NWPA’s statutory scheme and equally at odds with DOE’s own position for many years that the Yucca Mountain Repository is a desired SNF location. Now the DOE asserts jurisdiction to say as a matter of policy and without evidence that it can unilaterally reject Yucca Mountain. Its only alternative to this rejection is to offer a presidential Blue Ribbon Commission’s study of so-called alternatives, an “interpretation” neither reasonably nor remotely connected to Congress’s intent in the NWPA or to the massive scope of national the SNF situation. It is highly unlikely that Congress would leave the determination of such a major question to such a Blue Ribbon Commission without requiring that Yucca Mountain be one of

the most significant alternatives considered and evaluated. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Congress has repeatedly considered and reaffirmed its commitment to the Yucca Mountain repository so that DOE's remedy of withdrawal, with prejudice, flies directly in the face of Congress's clear and unambiguous intent to support the Yucca Mountain alternative.

DOE's motion (p 7-8) rehashes the same *Chevron* argument that has been rejected by the Courts -- that the new DOE Secretary's "interpretation of the NWPA would be entitled to deference". The DOE Secretary claims he therefore has legal authority and discretion to withdraw the license application (and with prejudice) due to a "gap" in statutory policy that may be filled in by the agency, citing *Chevron*. The DOE's motion (p 8) suggests that the DOE's motion, filed by counsel, without any process or rationale, somehow fills "this statutory 'gap'." This argument was soundly rejected by the Court in *Indiana Michigan* when the DOE raised the same *Chevron* argument in trying to defend its failure to commence disposal of SNF by January 31, 1998. The Court in *Indiana Michigan*, stated:

In reviewing an agency's construction of a statute entrusted to its administration, we follow the two-step statutory analysis established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

First, we ask whether Congress has spoken unambiguously to the question at hand. If it has, then our duty is clear: "We must follow that language and give it effect." *Wisconsin Elec. Power Co. v. DOE*, 250 U.S. App. D.C. 128, 778 F.2d 1, 4 (D.C. Cir. 1985). If not, we consider the agency's action under the second step of *Chevron*, deferring to the agency's interpretation if it is "reasonable and consistent with the statute's purpose." (cites omitted).

The Court wholly rejected DOE's argument that the language of Section 302(a)(5)(B) of the NWPA, 42 USC10222 (a)(5)(B), ("in return for the payment of fees. . . [DOE], beginning not later than January 31, 1998, will dispose of the [SNF]...") did not require DOE to "begin to

dispose of SNF by January 31, 1998" or "that this obligation is further conditioned on the availability of a repository or other facility authorized, constructed, and licensed in accordance with the NWPA." The Court (pp 1276-1277) rejected DOE's *Chevron* assertion, stating:

The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress. It does not survive the first step of the *Chevron* analysis. 467 U.S. at 842-43.

\* \* \*

Rather, these prerequisites evince a strong congressional intent that DOE's various obligations be performed in a timely manner. See, e.g., *Tennessee v. Herrington*, 806 F.2d 642, 648 (6th Cir. 1986) ("The overall structure of the Act does reveal a consistent concern for timely implementation of the disposal provisions."), *cert. denied*, 480 U.S. 946, 94 L. Ed. 2d 790, 107 S. Ct. 1604 (1987).

The Court's holding reemphasized that DOE's *Chevron* assertion simply does not comply with the NWPA:

In conclusion, we hold that the petitioners' reading of the statute comports with the plain language of the measure. In contrast, the agency's interpretation renders the phrase "not later than January 31, 1998" superfluous. Thus, we hold that section 392(1)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998. The decision of the Secretary is vacated, and the case is remanded for further proceedings consistent with this opinion.

A basic overriding question exists -- since the Court in *Indiana Michigan* rejected DOE's *Chevron* claim or defense in ruling against its anticipatory breach of not meeting the NWPA's January 31, 1998 deadline for disposing of SNF, how could such a *Chevron* defense exist in the more extreme circumstances here -- DOE's outright claim that it may simply withdraw its license application with prejudice and permanently terminate the disposal facility despite the NWPA's unambiguously expressed mandate to submit the LA for the repository at Yucca Mountain.

In *Northern States Power Co, et al. v DOE*, 128 F.3d 754 (1997), the Court granted a partial mandamus to enforce its holding in *Indiana Michigan*. The Court (p 756) noted Congress' intent in the NWSA "whereby the federal government would have the responsibility to provide for the permanent disposal of the SNF." The Court noted the 1998 deadline for commencement of SNF disposal under both the NWSA and the Standard Contract:

In the language of the statute, the "contracts entered into under this section shall provide that. . . in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter." 42 U.S.C. § 10222(a)(5)(B).

The Court in *Northern States Power* (pp 756-757) reiterated its reversal of DOE's Final Interpretation and DOE's *Chevron* analysis in *Indiana Michigan*:

Reviewing DOE's construction of the NWSA under the two-step analysis of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), we concluded that DOE's interpretation was contrary to the unambiguously expressed intent of Congress. We reached this conclusion after analyzing the plain language of the statute, which mandates that DOE assume a contractual obligation to start disposing of the SNF by January 31, 1998. We took special care to emphasize the reciprocal nature of the obligations. DOE's duty to dispose of the SNF in a timely manner is "in return for" the payment of fees into the Nuclear Waste Fund. 42 U.S.C. § 10222(a)(5)(B). We held that DOE's obligation to meet the 1998 deadline is "without qualification or condition," and identified DOE's duty to "perform its part of the contractual bargain." 88 F.3d at 1273. We therefore remanded the matter to DOE for "further proceedings consistent with" our opinion. *Id.* at 1277. DOE neither sought rehearing of that decision nor petitioned the Supreme Court for further review.

The Court in *Northern States* held that the petitioners qualified for mandamus relief against the DOE. Citing its holding in *Indiana Michigan*, the Court stated (p 758):

We held that DOE's interpretation was inconsistent with the text of the NWSA, which clearly demonstrates a congressional intent that the Department assume a contractual obligation to perform by the 1998 deadline, "without qualification or

condition." 88 F.3d at 1276. DOE's duty to take the materials by the 1998 deadline is also an integral part of the Standard Contract, which provides that the Department "shall begin" disposing of the SNF by January 31, 1998. 10 C.F.R. § 961.11, Art. II.

The Court in *Northern States Power* (p 760) again rejected DOE's interpretation of both the NWPA and Standard Contract:

We held in *Indiana Michigan* that the NWPA imposes an unconditional duty on DOE to take the materials by 1998. Congress, in other words, directed DOE to assume an unqualified obligation to take the materials by the statutory deadline. Under the Department's interpretation of the governing contractual provisions, however, the government can always absolve itself from bearing the costs of its delay if the delay is caused by the government's own acts. This cannot be a valid interpretation, as it would allow the Executive Branch to void an unequivocal obligation imposed by Congress. DOE has no authority to adopt a contract that violates the directives of Congress, just as it cannot implement interpretations of the contract that contravene this court's prior ruling. We hold that this provision in the Standard Contract, insofar as it is applied to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation to assume an unconditional duty.

The clear and unequivocal holdings of the court in *Indiana Michigan* and *Northern States Power* arose because of DOE's failure to meet its unconditional obligation to begin disposal of SNF by 1998. Given these holdings, how can DOE's decision and action in this proceeding to permanently withdraw its license application and to terminate the repository for SNF disposal comport with the plain language and intent of Congress in the NWPA, the Standard Contract, or the judicial holdings in *Indiana Michigan* and *Northern States Power*?

The Petitioner PIIC asserts that the Secretary's actions as reflected in DOE's March 3, 2010 motion are unlawful under the NWPA and Standard Contract, and constitutes an unauthorized action concerning a matter where the Secretary has no discretion. The discretion of the DOE Secretary was exercised in 2002 as noted above, and by the previous Secretary in completing and filing the license application. The duty of the present Secretary is to now

conscientiously carry out the processing of the license application in the 3-4 year time frame provided by the NWPA.

**II. THE NRC (IN ADDITION TO THE DOE) DOES NOT HAVE THE DISCRETION TO TERMINATE THE LICENSE PROCEEDING, OR TO TERMINATE THE LICENSING PROCESS WITH PREJUDICE.**

Petitioner asserts that this Commission (in addition to the DOE) does not have the lawful authority or discretion to terminate this licensing proceeding without a substantive decision on the merits, and certainly lack such authority or discretion to terminate this licensing process at this stage, in the manner proposed, with prejudice, so as to terminate the entire Yucca Mountain project.

Congress set forth its findings and purposes, and goals, and objectives, in Section 111 (a) and (b) of the NWPA, 42 U.S.C. § 10131 (a) and (b), including the determination of the national policy that a deep geological repository is necessary and appropriate to dispose of high level radioactive waste and spent nuclear fuel. This decision by Congress was buttressed by the 1987 amendments, the 2002 recommendations of Yucca Mountain as a repository site selection by the then DOE Secretary, by President Bush's adoption of the Secretary's recommendation, and by Congress' 2002 determination to designate Yucca Mountain as the nation's first repository site (Pub. L. No. 107-200, 116 Stat. 735).

The Yucca Mountain site selection has thus already been made by the DOE, the President, and Congress, pursuant to the process established by the NWPA [Sections 112, 113, and 114, 42 U.S.C. §§ 10132, 10133, and. 10134]; See *Nuclear Energy Institute v Environmental Protection Agency*, 373 F3d 1251, 1302 (D.C. Cir, 2004). Under NWPA's mandated process, DOE was then to file its license application (Section 114(b), 42 U.S.C. § 10134(b)), which DOE

accomplished in 2008. Under NWPA Section 114(d), 42 U.S.C. § 10134(d), this Commission then has a specific timeline for processing and ruling upon the license application on the merits. Quite simply, the Commission does not possess the authority or discretion to grant DOE's Motion, since the NWPA places a mandatory duty upon the Commission to rule on the merits of the License Application. Section 114(d) of the NWPA, 42 U.S.C. §10134(d), states in plain language that:

The Commission shall consider an application for a construction authorization for all or part of a repository [and] shall issue a final decision approving or disapproving the issuance of such application ....

And as the Court reiterated in *Indiana Michigan and Northern States Power*, Congress intended a definite and timely process.

DOE's motion suggesting that, while the NWPA requires the filing of the license application, but not the furtherance thereof by the DOE and NRC to a decision on the merits, constitutes an absurd interpretation of the plain language of the NWPA and the Standard Contract, and violates the intent and purposes of Congress as stated in the NWPA. DOE's suggestion that this decades-long process, costing billions of dollars, and relied on so many by the nation's citizens, states, localities, and the industry, was only for the purpose of accomplishing a filing of the license application, but nothing more, is exasperatingly illogical and situational.

DOE's Motion is not simply a pedestrian procedural motion that may arise in a routine NRC case. DOE's motion is a tactical step having immense national importance. DOE seeks by its motion to withdraw from and stop 30 years of efforts, after billions of dollars of expenditures, as required by the NWPA and Standard Contracts, and as funded by the nation's ratepayers, to address the proper disposal of toxic SNF. DOE seeks to violate its statutory and contractual

mandate and duties, and to have this Commission participate in the same undertaking, despite the nation's long-term reliance on achieving the objectives of the NWPA and Standard Contract.

The bottom line is that the present DOE Secretary has no lawful authority or discretion to retroactively reverse all of the existing law and past milestones achieved thus far, and to *sua sponte* impose a unilateral decision, without any rationale or explanation, to withdraw and foreclose the required license processing, for the Yucca Mountain project. Moreover, this Commission has the lawful duty under the NWPA to process the license application.

### **III. DOE'S MOTION SEEKING TO IRREVOCABLY TERMINATE THE YUCCA MOUNTAIN REPOSITORY PROGRAM CONSTITUTES A VIOLATION OF NEPA**

The DOE's Motion to Withdraw the construction license application in this proceeding, with prejudice, constitutes DOE's decision to irrevocably terminate the Yucca Mountain repository program. This motion and decision fail to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321.

The PIIC asserts that the DOE may not lawfully withdraw its license application with prejudice and thereby *sua sponte* terminate the Yucca Mountain repository project. DOE's decision and motion is unlawful because DOE has not first undertaken the prerequisite steps of complying with the NEPA.

DOE's decision and motion seeking to terminate the Yucca Mountain repository leaves the nation bereft of any facility to dispose of high level radioactive waste or spent nuclear fuel on any foreseeable basis. The result is a default option -- to simply leave SNF and other HLW where it is -- adjacent to the PIIC and at scores of sites around the nation that were never studied or even intended to be long-term storage sites or disposal sites (see attached affidavit of Ronald

C. Callen). The PIIC is unaware of appropriate environmental studies or other NEPA analysis undertaken by DOE prior to reaching its decision to terminate the Yucca Mountain repository project and to file the motion to withdraw its license application with prejudice. Yet, DOE's decision and motion will have a significant effect upon the environment in numerous locations throughout the nation, including PIIC's reservation.

DOE's decision is unquestionably a major federal action that has a significant effect on environment within the meaning of NEPA, 42 U.S.C. § 4332(C); 40 C.F.R. §§1508.8, 1508.18, 1508.27; *Idaho Sporting Congress v Thomas*, 137 F3d 1146, 1149-50 (9<sup>th</sup> Cir, 1998), *overruled on other grounds* by 537 F3d 1146 (9<sup>th</sup> Cir, 2008); *Greenpeace Action v Franklin*, 14 F3d 1324, 1332 (9<sup>th</sup> Cir, 1992). DOE is therefore required to first evaluate its proposed decision under NEPA as a prerequisite to implementing the decision. 42 U.S.C. § 4332(C); 40 C.F.R. § 1501.2, 1501.3, 1501.4, 1502.3, 1506.1, 1507.1; 10 C.F.R. §§ 1021.210(b), 1021.211; *California, Exhibit rel. Lockyer v U.S. Dept of Agriculture*, 575 F3d 999, 1012 (9<sup>th</sup> Cir, 2009).

The PIIC also asserts that the studies that DOE has undertaken thus far relative to Yucca Mountain, and in preparation for a DOE decision and license application of that site (including the general "no action" alternative discussed in the 2002 FEIS (*Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*) and in the 2008 SEIS (*Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*) cannot be retroactively applied on a post-hoc basis to support DOE's highly unforeseen and situational decision made here to now withdraw the subject license application.

The discussion of the "No Action Alternative" in the FEIS and the SEIS also provides cold comfort to communities around the nation which are hosting or are located adjacent to nuclear plants and ISFSI's. First, the discussion includes relatively few pages compared to the many hundreds of pages focusing upon just one site -- the Yucca Mountain repository site. The SEIS discussion of the No Action Alternative includes Chapters 2 and 7. The general approach of this alternative may be capsulized by language on page 7-4 of the SEIS:

In light of these types of uncertainties and DOE's conclusion that no action would not result in predictable actions by others, the Yucca Mountain FEIS considered the range of possibilities by focusing the analysis of the No-Action Alternative on the potential impacts of two scenarios.

In No-Action Scenario 1, DOE would continue to manage its spent nuclear fuel and high-level radioactive waste in above- or below-ground dry-storage facilities at DOE sites around the country. Commercial utilities would continue to manage their spent nuclear fuel at current locations. The commercial and DOE sites would remain under *institutional control*; that is, they would be maintained to ensure the protection of workers and the public in accordance with current federal regulations. The storage facilities would be replaced every 100 years. They would undergo one major repair during the first 100 years because this scenario assumes that the design of the first storage facilities at a site would include a facility life of less than 100 years. The facility replacement period of 100 years represents the assumed useful lifetime of the structures. Replacement facilities would be on land adjacent to the existing facilities.

In No-Action Scenario 2, spent nuclear fuel and high-level radioactive waste would remain in *dry storage* at commercial and DOE sites and would be under institutional control for approximately 100 years (the same as Scenario 1). Beyond that time, the scenario assumed no institutional control. Therefore, after about 100 years and up to 10,000 years, the analysis assumed that the spent nuclear fuel and high-level radioactive waste storage facilities at commercial and DOE sites would begin to deteriorate and would eventually release radioactive materials to the environment.

The "No Action Alternative" appears to constitute a non-plan that provides for the permanent stranding of HLW and SNF at current locations, by default. Yet, it was obviously beyond the scope of the FEIS or SEIS to prepare an environmental impact statement specific to any one default location, such as PIIC's location. DOE's "no action alternative" in its EIS is not

adequate or even applicable on a post-hoc basis here to support the stranding of SNF or HLW at any location by default.

DOE's Motion in this case seeks to precipitously withdraw the Yucca Mountain repository LA and to end the project after decades of effort, and the undisputed need for a repository for both HLW and SNF. The clear and direct result of DOE's proposed course is to strand such waste indefinitely or permanently at present sites that are not suitable for such waste retention or disposal purposes, and which have never been studied for said purpose. This result directly impacts PIIC, and the public health, safety, and environment where PIIC is located, and also destroys the objectives and purposes of the NWPA and its enforcement vehicle, the Standard Contracts between the DOE and the nation's nuclear utilities, and the nation's reliance thereon.

DOE's Motion attempts to moot out and make irrelevant the FEIS to support the Yucca Mountain license, and to abandon the LA for the project in derogation of its duties under the NWPA. At the same time, DOE has no other plan for SNF or other HLW disposal, and no apparent environmental studies upon which to support its default option -- to leave SNF and HLW stranded indefinitely or forever at current locations that were never intended, studied, or designed for SNF and HLW "disposal."

The DOE's Motion also fails to provide any explanation of how its abandonment of the Yucca Mountain repository would comply with this Commission's Nuclear Waste Confidence (NWC) decision (Waste Confidence Decision, as amended, 10 C.F.R. Parts 50 and 51). Instead, DOE's Motion appears to presume that said NWC decision can or will be modified to accommodate DOE's everlasting delays and failures, or alternatively, that the NWC is meaningless.

In summary, PIIC asserts that DOE's Motion seeks to undertake action, and to effect a result, that violates NEPA.

**IV. DOE's DECISION AND MOTION TO WITHDRAW THE LICENSE APPLICATION, AND ITS DECISION AND MOTION TO WITHDRAW THE LICENSE APPLICATION WITH PREJUDICE SO AS TO TERMINATE THE YUCCA MOUNTAIN PROJECT (AND BOARD OR NRC APPROVAL OF SAID DECISIONS AND MOTION) IS (OR WOULD BE) ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT.**

The PIIC asserts that DOE's decision and motion (to both withdraw and withdraw with prejudice) its license application, and to terminate the Yucca Mountain project (and also Board or NRC grant of said motion) is (or would be) arbitrary and capricious in violation of the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A).

DOE's decision and motion (and any grant thereof) is (or would be) arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A), for several reasons. First, such decision and action violates the NWPA, the Standard Contracts, NEPA, and thus also violates the APA on this basis. Second, DOE's decision and motion represents a sudden and complete 180 degree reversal of agency effort that has included decades of work, billions of dollars, and has been the subject of massive reliance by states, localities, the military, and the nation's citizens and energy users. DOE's reversal is wholly unexplained. Not even a feigned attempt is made in DOE's motion to provide facts, reasons, rationale, or supporting evidence to justify such a decision or action. Given the statutory requirements, the goals, purposes, and objectives of Congress, and the decades-long odyssey of studies, documentation, filings, and achieved milestones, the DOE should be found to be estopped to even make such a decision, and to file such a motion, in the circumstances presented.

DOE's decision and motion is a "final agency action" within the meaning of the APA, 5 U.S.C. § 704. Yet, DOE undertook no process whatsoever to consider the views and interests of the nation's stakeholders before deciding to undertake the action and to file the Motion. DOE did not issue any Notice of Inquiry to set forth rational reasons and alternative proposals prior to its decision, or to request comments from interested or affected parties, or to then render a decision based upon any process, let alone a deliberative process (in contrast to the Final Interpretation process, discussed *infra*). Instead, the DOE here has reversed course, in violation of law, without any stated rationale or reason, except for a hollow claim of limitless unbridled "discretion."

The DOE (and the NRC) would violate their duties under the NWPA if DOE's Motion is granted. The whole process by which DOE has suddenly and unexpectedly reversed course after 30 years of effort is "arbitrary and capricious," as would be NRC action facilitating such a result. DOE's new found "strategy" to defy the NWPA, and to withdraw the LA, has not been explained. DOE's action here is also inconsistent with the Notices commencing this case. No process has been provided for major affected interests in the nation to be informed of DOE's rationale, to input thereupon, and to seek appropriate remedies to ensure compliance with the NWPA, the Standard Contract, NEPA, and the APA. The NRC has similarly not re-noticed this as a new case, or a case transformed to consider the reverse of the matters and issues presented in the original LA application.

DOE's decision and motion is thus arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A).

**V. THE BOARD AND NRC SHOULD REJECT DOE'S MOTION, AND PLACE CONDITIONS ON ANY FUTURE CONSIDERATION OF DOE'S MOTION, TO ENSURE COMPLIANCE WITH APPLICABLE LAW.**

The PIIC asserts that the Board and Commission should reject DOE's motion, and attach conditions in its ruling to ensure DOE's compliance with the NWPA, the Standard Contract, NEPA, and the APA.

DOE's motion requests extraordinary and abusive relief -- the sudden and complete termination of the license application process and of the entire decades-long Yucca Mountain project. Yet DOE has provided no process to formulate any rationale for this decision, to provide a fair process to gather input nationally on the implications or impacts of its "secret" decision, and has undertaken no environmental studies under NEPA on the impacts of this major decision.

DOE's Motion (p 1-2) refers to the establishment of the "Blue Ribbon Commission on America's Nuclear Future - which will conduct a comprehensive review and consider alternatives for such disposition" and that "Congress has already appropriated \$5 million for the Blue Ribbon Commission to evaluate and recommend such 'alternatives'" citing Energy and Water Development' and Related Agencies Appropriation Act, 2010, Pub L. No. 111-85, 123 Stat. 2845, 2864-65 (2009). With exasperating simplicity, DOE's Motion suggests that the Blue Ribbon Commission, with \$5 million dollars, will reach a miraculous and brilliant resolution to the indeterminable nuclear waste problem -- a problem that the nation has not resolved since the Manhattan project in World War II, the adoption of the NWPA in 1982, and to the present, after up to \$10 billion in program expenditures, environmental studies and endless effort. It is difficult to envision how the mere appointment of the Blue Ribbon Commission, with only a \$5

million appropriation, and 18-24 months, can provide a nuclear waste resolution when federal promises, nearly \$10 billion of expenditures, and nearly 30 years of effort, has not yet done so.<sup>5</sup>

Contrary to DOE's motion, the mere appointment of a "Blue Ribbon Commission," with a \$5 million appropriation, simply does not justify DOE's decision "to discontinue the pending application" and "to withdraw that application with prejudice" . . . "and to avoid future expenditure of funds on a licensing proceeding for a project that is being terminated." These statements in DOE's motion are illogical and counterintuitive. First, the statements implying DOE's intent or interest "to avoid further expenditure of funds on a licensing proceeding" is outright silly given the billion of dollars and efforts to get to the point of filing the license application, and the indeterminable billions more that federal taxpayers will likely have to pay out in additional damages as a result of DOE's sudden "policy" reversal. In contrast, the continuation of the license application to a decision on the merits would justify these past efforts and expenditures, particularly if the license application is granted (given that a repository is still needed, under any conceivable alternative that may be outlined by the Blue Ribbon Commission).

Second, DOE's motion confirms that a "secret decision" has been made that the "project...is being terminated." After 60 or more years of federal promises, and the plain language and intent of Congress in the NWPA and the Standard Contract (as clearly outlined in *Indiana Michigan and Northern States Power*), and the reliance thereon, how did we as a nation suddenly receive the unexplained edict that the repository "project is being terminated?" Quite simply, how can the DOE violate the NWPA and ignore the Court holdings in *Indiana Michigan*

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<sup>5</sup> This time and effort has led to the selection of Yucca Mountain as a potential repository site and has resulted in the License Application.

*Power or Northern States Power*, and the many U.S. Court of Claims decisions since, by simply announcing that the DOE has decided to now "terminate the project?"

DOE's Motion (p 2-3) also erroneously suggests that the NWPAs somehow authorize the withdrawal of the license application "on such terms as the Board may prescribe" or "on such terms as the presiding officer may prescribe." The gist of this incredible argument is that the DOE can unilaterally and whimsically reverse its position, ignore its lawful duties, and file the subject Motion; and secondly, that the entire nation's lawmaking and judicial process and decisions (discussed *supra*) can be made subservient to only the presiding officer or Board in this singular agency, based simply upon an expedient and unexplainable motion of DOE's counsel.

DOE's motion (p 3) asserts that the board should "prescribe only one term of withdrawal -- that the pending application for a permanent geologic repository at the Yucca Mountain site shall be dismissed with prejudice." DOE's motion (p 3) then states:

"That action will provide finality in ending the Yucca Mountain project for a permanent geologic repository and will enable the Blue Ribbon Commission, as established by the Department and funded by Congress, to focus on alternative methods of meeting the federal government's obligation to take high-level waste and spent nuclear fuel."

DOE's statements are illogical. Quite simply, the mandated processing of the mandated license application does not and would not affect or complicate in any way the role or function of the new found "Blue Ribbon Commission." In other words, the continued processing of the pending license application and the carrying out of the functions of the Blue Ribbon Commission are separate yet consistent functions. The processing of the license application cannot conceivably disrupt, distract, or affect in any way the work of the Blue Ribbon Commission. There exists no inconsistency whatsoever if the license process continues while the Blue Ribbon Commission

undertakes its studies (as all sources indicate that a repository is needed under any known scenario -- see attached affidavit of Ronald C. Callen).

The Board and the NRC should reject DOE's motion outright. At minimum, the Board and Commission should hold the motion in abeyance and require DOE to first conduct the required NEPA studies, and to issue an Inquiry to initiate a process, with notice in the Federal Register and provision for comments, to enable DOE to formulate a proper decision in compliance with the APA, NEPA and the NWPA (and Standard Contracts) and as a prerequisite to any consideration of its motion by this Board or the Commission.

DOE's motion (p 8-9) asserts that "no conditions are necessary as to the licensing support network." DOE's motion on this point is revealing in what it does not say! This statement is contradicted by reports of information being communicated to interested parties. The DOE has already acted precipitously, contrary to its contractual and statutory authority, to unilaterally withdraw water and other permit applications necessary for a repository. The DOE also has not articulated a published policy to ensure the long-term preservation of all records, studies, samples, and support for a possible repository, all compiled at great public expense.

DOE's motion (pp 8-9) asserts that no terms or conditions should be placed upon the DOE relative to any decision rendered by the Board or Commission. Instead, the DOE Motion (p 3) states that "the Board should prescribe only one term of withdrawal -- that the pending application for a permanent geologic repository at the Yucca Mountain site shall be dismissed with prejudice.<sup>3</sup>" noting in fn3 that: "DOE seeks this form of dismissal because it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain."

PIIC asserts that DOE's Motion should be denied outright, and that the Board should restart the discovery and hearing schedule in this case, and that the Board and Commission should then "follow through" to render decisions on the merits of the LA. However, if the Board or Commission were to grant DOE any relief whatsoever, and as a deficient secondary option, PIIC would recommend that the Board and Commission assure compliance with the NWPA as much as possible, so that the process on the LA can be quickly restarted in the future. One possible approach would be to temporarily suspend the discovery and hearing process, pending resolution of DOE's motion and any Court appeals therefrom. During such a suspension period, the report by the Blue Ribbon Commission will have been received, and Congress will be provided an opportunity to reconfirm its policy as stated in the NWPA, or to adjust the policy if it so determines.

Under any scenario, the Board and Commission should reject DOE's request to withdraw the LA "with prejudice." Such an extreme relief request is totally at odds with the NWPA and Congress' selection of Yucca Mountain in its 2002 statute (Pub. L. No. 107-200, 42 U.S.C. § 10135). Also, such a draconian relief request is wholly unnecessary and is only designed to attempt to permanently bar any future consideration of Yucca Mountain as a repository, a result which is directly contrary to the NWPA.

PIIC emphasizes that the back-up "suspension" option described above is far worse than outright rejection of DOE's Motion in its entirety. The rejection of DOE's Motion will permit the Commission to continue to fulfill its statutory role, duties, and functions under the NWPA to consider and rule upon the LA. However, the suspension option is superior to DOE's unexplained, arbitrary, and unlawful action to withdraw the LA with prejudice. PIIC prefers outright rejection of DOE's Motion as being compliant with the NWPA, and justified by DOE's

failure to provide a process or rationale to support the withdrawal of the LA. However, the suspension option provides some opportunity to save the goals, objectives, and purposes of the NWPA, and to provide the nation the opportunity to input on this momentous decision.

The Board and Commission should issue orders as necessary to preserve studies, records and scientific studies or samples of any kind, and adopt mandates to make all DOE and NRC personnel responsible for ensuring the carrying out of this function. Of course, such an order would also be consistent with an NRC order denying DOE's motion to withdraw (or to withdraw with prejudice) its application for a license pending in this proceeding, or alternatively, to suspend the proceedings for a time pending a restart of the proceedings.

### **CONCLUSION AND RELIEF**

For the reasons stated in its March 15, 2010 Petition to Intervene, and in its Reply to Answers thereto, and this Response to DOE's March 3, 2010 Motion to Withdraw, the PIIC respectfully requests that DOE's Motion to Withdraw be denied in its entirety.

#### **PRAIRIE ISLAND INDIAN COMMUNITY**

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Dated this 17<sup>th</sup> day of May, 2010



The Detroit Edison Company's Enrico Fermi 1 project. I also served for twenty-five years as a member of the staff of the Electric Division of the Michigan Public Service Commission (MPSC), heavily involved with the regulation of Michigan's electric utilities, including nuclear utilities. I served for two years as founding director of the Nuclear Waste Office of the National Association of Regulatory Utility Commissioners in Washington, D.C. For 10 years I have served as a consultant and expert witness in many cases before the MPSC on nuclear plant, decommissioning, and SNF issues. My resume is attached to this Affidavit as Attachment 1.

3. The action proposed by the U.S. Department of Energy (DOE) before the Nuclear Regulatory Commission (NRC) Atomic Safety and Licensing Board to withdraw the Yucca Mountain license application is severely damaging to the public interest, a matter not evaluated, discussed or defended in the DOE's formal request. The absence of any rationale is an unfortunate part of that damage and --"clouded the path forward in a number of significant ways." (NRC Commissioner Klein, Attachment 2).

4. The Petitioner (like many states and localities) has a direct interest in the continuation of the Yucca license application project, and toward the success of a repository program on a timely basis. Tons of spent nuclear fuel (SNF), are being stored in Petitioner's Community, and tens of thousands of tons of spent nuclear fuel (SNF) are being temporarily stored in nuclear plant facilities, or in Independent Spent Fuel Storage Installations, at or adjacent to Petitioner's Community, and in numerous states, including Michigan, as shown on Attachment 3 (NEI, DOE). Petitioner's ratepayers, and those of the various states, have paid over \$17 billion to cover fees under the Standard Contract for a repository program pursuant to the mandates of the Nuclear Waste Policy Act (NWPA). The Nuclear Waste Fund has recorded

over \$33 billion in said contract fees, including credited interest. Attachment 3 shows the accumulation of these fees by state.

5. The various states have authorized the inclusion of the fees in rates under the Standard Contract in reliance on the provisions of the NWPA and the Standard Contract, which was to provide for the timely development of a repository to dispose SNF.

6. The proposed action request by the DOE would strand SNF at the many sites over an indeterminate period of time. Present SNF storage sites were never designed or structured to be long-term storage sites. The impact of the decision to withdraw the license application would result in increased risks to the environment, to public health, safety, and security, and greatly increase financial and other risks to states and host communities where the SNF is located.

7. The risks to states and host localities where SNF is stored are increased because the generators and owners of the SNF are corporate entities that can restructure themselves over time away from SNF costs so as to leave all costs and risks with the states and communities where the SNF resides. SNF and high level nuclear waste (HLNW) is a liability and not an asset. Once generating plants are closed, the financial incentive for private entities is to attempt to evade the costs and risks associated with SNF and HLNW.

8. To withdraw the Yucca Mountain license application would return the nation's nuclear waste disposal program to an era predating the NWPA. Essentially, the Motion, if granted, would deny three decades of efforts and federal promises, and would leaves the nation without a nuclear waste disposal program.

9. The impact of this regression and destruction of the program is highlighted in a review of efforts to solve nuclear waste disposal. The need for a disposal program for high level

radioactive waste began with the Manhattan Project during WW II with the first generation of HLNW. Disposal of commercial and defense wastes by internment in a deep geologic medium was recommended in 1957. The first commercial generation of SNF was in 1959. Federal initiatives to develop a facility continued without success until more focused efforts resulted in announcements or promises made by the federal government during the 1970s of availability of a repository in the 1980s. None of these federal disposal promises came to fruition. The repeated failures became the impetus for the passage of the Nuclear Waste Policy Act (NWPA), which was aimed at assuring a disposal program. The NWPA embodies the funding and purposes of Congress to require an approved program plan, a defined schedule, a reliable source of funding, a Presidential appointed program director and a DOE contract signed with each nuclear utility, among other provisions.

10. Despite the Act's careful construction, the DOE denied having a clear obligation to accept SNF and by 1996 stated that it would not begin disposal by 1998. DOE's allegation was reversed by the Courts. Although long delayed, significant actual progress has been demonstrated in the DOE's license application to the NRC. Progress was being made toward license approval until the abrupt Presidential decision to withdraw the license application.

11. Nuclear electric plants were designed to hold SNF in their spent fuel pools for five years, after which the waste was to be moved to a disposal facility. By 1980, more than 50 nuclear electric plants had been licensed for operation. Yet no repository had become available. Since disposal could not begin, the only viable option available was at-reactor storage. The first such facility, an independent spent fuel storage facility, was licensed in 1986. Since then, continuing SNF generation has resulted in the NRC licensing such facilities at about 60 nuclear units and more are expected. Spent fuel exists at least nine plants already shut down, being part

of a total of more than twenty shutdown plants (Attachment 4). Among operating plants, more than 2000 MTU of spent fuel is being generated each year. As of 2010, more than 60,000 MTU of SNF has accumulated (NEI Table, Attachment 3). Defense high level waste, destined for a repository, continues to be stored at the facilities where the waste was generated. In addition, the federal government continues to accept SNF from research reactors in 41 countries.

12. Granting the Administration's request would constitute a return to federal research investigations only, returning the nation to only a study program, to where it was in the 1950's and 1960s. The Blue Ribbon Commission is an important entity, but it cannot be considered a development program. In addition, its results will be a set of recommendations only.

13. If the current license proceeding were continued, and a license were approved, a repository would perhaps be open for use perhaps by about 2030. However, were the licensing effort to be abandoned as the DOE now intends, no repository facility could reasonably be imagined until 2050, or perhaps decades later. SNF will continue to accumulate and SNF dry storage must then last up to 80 years or more presuming a replacement disposal program. The NRC will consider storage for long periods of time, will "work to see what that time frame is really like – 100 years, 200 years, 400" (NRC Chairman Jaczko, Attachment 5). SNF will remain at the existing sites, on major bodies of water and/or near population centers some of which can be expected to grow. In any event, none was evaluated for very long term storage.

14. License abandonment would also appear to complicate the Administration proposal to encourage a new round of nuclear plant construction. It raises a question as to the wisdom of the Administration proposal to provide \$54 billion for federal nuclear plant construction loan guarantees. Already, the NRC is considering 13 applications covering 22 units

and expects more to come. Disposal irresolution also threatens public acceptance of nuclear power at a time when such acceptance appears on the rise.

15. The proposed action to terminate the license application and the repository project is of great importance to Petitioner who represents the citizenry near the nuclear sites. In addition, rate regulatory agencies have well noted the public payments to the federal treasury of over \$30 billion (including assigned interest). The Administration has stated its intention to continue collecting such payments without any disposal program. The abandonment decision by the Administration may make nearly useless the more than \$8 billion expended for the Yucca investigation. Meanwhile, ratepayers are paying for interim storage facility construction and operation.

16. The more disposal is delayed the more it increases the risk that a complete federal failure will burden Petitioner's ratepayers and citizens with the waste. Also a risk is that, in many cases, SNF ownership is by limited liability corporations who are lightly capitalized.

17. The NRC's Waste Confidence Decision - that a facility for disposal will reasonably be expected in the first quarter of the current century - must be reconsidered. It would become a challenge if the license application is withdrawn. The situation represents a "real challenge" to the NRC because "the Commission must go beyond technical judgment" (Comm. Dale Klein, Attachment 2). The NRC Chairman characterized this issue as an "elephant in the room" (NRC Chairman Jaczko, Attachment 5).

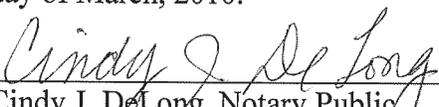
18. Damage payments for the failure of the federal government to meet the mandated date of 1988 will continue to mount. If the current program is abandoned, it raises the specter that a federal administration could also abandon a future disposal program.

19. In summary, storage is but a temporary expedient; whatever fuel cycle may be developed, a repository is unavoidable. Just as the development of a repository is a major federal action requiring an environmental impact assessment, the license decision to instigate long-term storage by abandoning the Yucca program is a major federal action necessitating impact evaluation.

20. The ASLB must consider all these impacts as fundamental to their decision.

  
\_\_\_\_\_  
Ronald C. Callen

Subscribed and sworn to before me this 15th day of March, 2010.

  
\_\_\_\_\_  
Cindy J. DeLong, Notary Public  
State of Michigan, County of Ingham  
My Commission Expires: August 11, 2016

# **ATTACHMENT 1**

## RONALD C. CALLEN

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### *Current Activity*

Consultant and Expert Witness on nuclear waste disposal, under contract with Clark Hill P.L.C., under a grant from the Michigan Utility Participation Board.

*Assistant Director of Electric Division  
Michigan Public Service Commission  
Lansing, MI (Retired)  
1986-1990, 1997-1998*

Served Michigan Attorney General as legal team technical expert; team represented 35 states in two cases before U.S. Court of Appeals and appeal to U.S. Supreme Court to redress federal inaction on nuclear waste disposal and misuse of ratepayer funds.

Chief advisor and federal representative for Michigan Public Service Commission (MPSC) on nuclear waste disposal. Maintained advocacy as ratepayer representative in four-year effort to encourage and direct Congressional passage of corrective legislation. Investigated national spent nuclear fuel discharge, inventory, transportation and federal storage capability in pursuit of national federal policy. Tracked ratepayer funding of federal program and served as national advocate for redirection of funds for legally mandated purposes. Founding member, state representative and Congressional contact in 22-state Nuclear Waste Strategy Coalition. Principal investigator of problems with management of nuclear waste disposal by U.S. Department of Energy; co-author of definitive recommendation for redress. Investigator and advocate for adequate decommissioning fund reserve for nuclear power plants including impact of delay in nuclear waste disposal.

Upon retirement, 1998, received commendations from Governor, Attorney General, Michigan Public Service Commission, National Association of Regulatory Utility Commissioners (NARUC) and Nuclear Waste Strategy Coalition.

Managed staff activities on nuclear licensing procedures and federal review including waste disposal and decommissioning; entered contested casework on behalf of Michigan ratepayers. Developed and enhanced state-federal regulatory interaction and advanced NARUC-NRC program of issues pursuit. Investigated nuclear plant operation and licensing, financially impactful events, changes and anomalies; consulted with Commission and placed issues into regulatory procedures seeking resolution by Commission. Instituted interaction between Commission and U.S. Nuclear Regulatory

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Commission (NRC) leading to plant assessments and sharing activity on licensee performance. Acted as State expert with U.S. Nuclear Regulatory Commission on interactive issues of regulation.

Led NARUC review of the national nuclear waste disposal program, organized its critical review, assisted in establishment of the NARUC Nuclear Waste Disposal Subcommittee, organized the Staff Subcommittee acting as its Chairman for five years, and as expert advisor to NARUC Subcommittee on Nuclear Waste Disposal and Committee on Electricity. Organized NARUC reviews, Congressional appearances and those with U.S. Department of Energy (DOE) and NRC and acted as liaison with NRC Staff on nuclear waste disposal and nuclear power plant economic and nuclear safety regulation. Created and issued for ten years analysis of state-by-state payments to Nuclear Waste Fund, developed Congressional testimony, prepared and delivered reports in federal progress and problems at all Subcommittee meetings.

Participant, Wyc River Dialogue on Nuclear Waste, Aspen Institute and Advisory Board on formation of the Dialogue.

Developed procedures, rationale and legislation to require state approval of power plant siting. Developed procedures for integrated resource planning (IRP), assessed processes of other states and brought recommendations to Commission for approval. Helped institute first Michigan IRP procedures and led the environmental review portion and contributed to overall review and decisions on Staff response.

Acted as Commission expert on air pollution control including interaction with Michigan Air Pollution Control Commission and staff. Directed and developed MPSC position on federal legislation and conveyed it to the U.S. Congress. Advocated for a state-wide global warming economic impact study with U.S. Environmental Protection Agency (EPA); led establishment of its data-gathering, initial goals and state-wide review process by state government, major utilities and U.S. automobile manufacturers.

Led development of formal procedures for state-wide gas and oil pipeline environmental review, published those results, managed over 200 cases, acted as expert witness in contested cases before the Commission, represented Commission and Department with state environmental review board and led its Inter-Governmental Environmental Review Board.

*Director Nuclear Waste Program Assessment Office  
National Association of Regulatory Utility Commissioners  
Washington, D. C.  
1990-1992*

Conceived, established and directed NARUC's first single purpose office to interact with the U.S. Department of Energy, the Congress of the United States, the federal program review agencies and the utility and nuclear industry on progress of the national nuclear waste disposal program. Represented the Subcommittee and NARUC on boards and review groups, assessed Congressional impact opportunities, acted as expert investigator of state and federal actions that use ratepayer funds for federal nuclear waste disposal. Monitored contact with all significant agencies and most state commissions. Brought to the NARUC Subcommittee and the Committee on Electricity options and

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recommendations for pursuit of redress and improvement of national program. Acted as agent, assessor and developer of federal policy recommendations for pursuit with the U.S. Congress through appearance and legislative initiative.

Performed all administrative functions including office setup, operation and handling of funds. Wrote periodic newsletter and produced a periodic record of state-by-state payments to the federal expenditures from the Nuclear Waste Fund. Appeared on behalf of the NARUC at workshops, waste program review boards of the Department of Energy and formally, before the Nuclear Waste Technical Review Board on behalf of the NARUC. Represented NARUC at staff meetings with DOE, NRC, U.S. Technical Review Board, U.S. Office of Technology Assessment and U.S. General Accounting Office. Acted as expert at workshops and as invited speaker at industry and utility conferences.

*Director, Scientific Research and Development  
Director, Scientific & Environmental Studies  
Operational Development Division  
Michigan Public Service Commission  
Lansing, Michigan  
1973-1986*

Organized and directed unit to resolve major issues for Commission involving scientific and technical investigations and inter-agency coordination. Issues included nuclear power use, regulation and waste disposal, public acceptance, decommissioning and electric power plant certification. Special focus on federal nuclear power plant operations high level nuclear waste program and state response, and energy-economic balancing of final decisions. Managed electric utility air and water pollution control requirements, cost, and energy impact analysis, and natural gas and oil pipeline certification.

*Project Director  
Enrico Fermi I Fast Breeder Reactor  
Atomic Power Development Associates  
Detroit, Michigan  
1965-1973*

Program and Licensing Director for oxide core power demonstration project; senior scientific investigator of fuel-melting incident; and developer of means to prevent and detect any recurrence; reactor power test physicist; license coordinator for early phase of plant decommissioning.

*Senior Physicist  
Connecticut Advanced Nuclear Engine Laboratory  
Pratt & Whitney Aircraft Company  
Middletown, Connecticut  
1957-1963*

Experiments Director and Analytical Physicist for space nuclear power reactor experimental physics studies; licensed nuclear critical experiments operator, director of power and flux radioactivation physics tests.

*Activities and Memberships*

State of Michigan Representative and original member of the Nuclear Waste Strategy Coalition; NARUC Nuclear Waste Subcommittee Staff; liaison to Michigan Department of Natural Resources on Environmental Risk; Group Leader for MITRE Workshop on Nuclear Power, NARUC Representative to DOE Workshops on Strategic Issues, Mission Plan Revision and Contingency Planning; Group Leader, workshop on nuclear waste disposal, U.S. Nuclear Regulatory Commission. Liaison with all state commissions on nuclear waste disposal, informal advisor to Chair, Minnesota Department of Public Service.

Author: *Congress' Nuclear Waste Contract with America - Where Do We Go From Here?*. The Electricity Journal, June 1995.

Co-author: *Redesigning the U.S. High Level Nuclear Waste Disposal Program for Effective Management*, Nuclear Waste Strategy Coalition, August, 1994.

Papers: Co-author, 1992 International Conference on Nuclear Waste Disposal; frequent testimony for the U.S. Congress; U.S. Nuclear Regulatory Commission Introductory Conference on Nuclear Waste Disposal: Introductory Speaker for the Michigan Public Service Commission forum on Nuclear Waste Disposal: author, *Summary of the Forum*, 1993.

Lecturer, NARUC Regulatory Studies Institute.

Appearances: U.S. DOE; U.S. Nuclear Waste Technical Review Board; Independent Panel for Review of DOE Nuclear Waste Program Management; Office of the U.S. Nuclear Waste Negotiator, Radioactive Waste Review Board, National Academy of Sciences; Western Interstate Energy Board; National Conference on Nuclear Waste Transportation and the Public Role; American Nuclear Society Conference on Decommissioning and Disposal; National Conference of State Legislatures; Vermont Governor's Nuclear Advisory Board; NRC State Liaison Program; Workshop to Review the DOE Program by Affected Units of Nevada Government; and Decision Maker's Summit on Radioactive Waste Disposal, the Radioactive Exchange.

Co-founder, Michigan Representative, Member of Executive Committee, State Working Group on High Level Nuclear Waste, National Governors Association.

Member, Governor's Advisory Committee on High Level Nuclear Waste Disposal and Governor's Task Forces on High Level and Low Level Nuclear Waste.

Liaison for MPSC to the Michigan Air Pollution Control Commission and Department of Commerce; Representative to the Michigan Environmental Review Board.

Task Force Chairman, Governor's Special Commission on Energy.

Chairman, Michigan Intergovernmental Environmental Review Committee.

Member, Michigan Utilities Reform Task Force.

Consultant, on loan on state utility regulation, U.S. Nuclear Regulatory Commission, 1978.

Board Member, Nuclear Emergency Planning Hearing, Michigan Public Service Commission, 1975.

Adjunct Associate Professor, Michigan State University, 1980.

Workshop Leader, Advisory Conference for State Officials on Nuclear Waste, U.S. Nuclear Regulatory Commission. Advisory Commission, Citizens for Science Program, National Science Foundation; Energy Technology Committee, Michigan Energy Resources and Research Association. Originator, Michigan Acid Rain Forum; Member, Michigan Coastal Zone Energy Impact Advisory Committee; Member, American Association for Advancement of Science; Michigan Association of Environmental Professions.

#### *Education*

Graduate, Regulatory Studies Program, Michigan State University, 1979.

Courses in personnel management, interpersonal relations, computer programming.

M.A. Physics. Thesis - Inelastic Neutron Scattering in P-31, Wesleyan University, Middletown, Connecticut.

B.A. cum laude, major in mathematics, Wabash College, Crawfordsville, Indiana.

#### *Personal*

Commissioner and Chairman, Lansing Municipal Board of Water and Light; Chairperson, Lansing West Side Air Quality Committee; Chairman, City of Lansing Tree Preservation Committee; Mayor's Committee on Energy Conservation; Lansing Mayor's Transition Committee; Chairman, Education Committee, Lansing Coalition for Community Concerns; Board of Directors, World War II Veterans Memorial Hospital, Meriden, Connecticut; Board of Trustees, Emmanuel Lutheran Church, Meriden, Connecticut and Grace Lutheran Church, Lansing, Michigan; Mid-Michigan Unity Coalition.

Special interest in public science interface on issues of energy, nuclear waste and environment; quality and equal education, racial relations and minority opportunities.

Married, three adult children.

## **ATTACHMENT 2**



# NRC NEWS

U.S. NUCLEAR REGULATORY COMMISSION

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No. S-10-008

**“The Challenges Ahead”  
Prepared Remarks for  
Dale E. Klein, Commissioner  
U.S. Nuclear Regulatory Commission  
at the  
NRC Regulatory Information Conference  
Rockville, MD  
March 9, 2010**

Last year, I delivered my third RIC speech as Chairman of the NRC. Now I am delivering my first, and last, RIC speech as an NRC Commissioner. Being a Chairman first, and then a Commissioner, is an interesting experience and it gives me a unique perspective. So I want to share a bit of that perspective with you today because I think there are lessons to be learned from the past for how the agency can move forward into the future.

My main goal when I became Chairman was to leave the NRC a better place than when I came. The improvements and upgrades we pushed for—including modernizing our communications and technology infrastructure, aggressively confronting our space needs, and strengthening our international programs to promote global nuclear safety—have, in my opinion, made the agency a better regulator and a better employer.

To be an outstanding regulator we need good people and a strong safety culture, but we also need the right technology. When I arrived here in 2006, the NRC had plenty of good people and a strong safety culture, but it was far behind the times in the technology department. As Chairman Jaczko noted, I have been an advocate of getting the staff BlackBerries. And many will tell you, when I arrived in 2006, I was stunned to learn we did not have any. There were some senior staff who questioned why we needed them. But I know today that they cannot live without them and probably some are using them at this very moment while I am giving my speech!

Though not essential for us to meet our statutory mission, adequate technology greatly enhances our ability to fulfill our responsibilities to our licensees and to the public. Better technology is also necessary for us to attract and retain talent. From my experience as a college professor, I can tell you that younger people today do not know what it's like to live without laptops and cell phones and text messaging. And they simply will not come to work at a place that is technologically out of date. The NRC still has work to do in this area, but we have made good progress in recent years.

Now let me look back, briefly, at a few issues and try to share a few things I have learned during my time here.

In my first month as Chairman, one of the major issues we had to deal with was the tritium leakage at the Braidwood plant. In fact, as Chairman designate, I met with a new senator from Illinois named Barack Obama who was considering legislation that he thought would address this issue. I assured him that I understood this was an important issue needing attention and that the NRC would work with him to address his concerns and the concerns of the public. However, I cautioned that a legislative proposal under consideration might actually undermine the nation's risk-based approach to regulating nuclear safety. One of the first things I did as Chairman was to have the NRC work with industry to set up a voluntary leakage notification program that, for the most part, has proven to be pretty good. But despite the success of that program, I will say that on the whole, the nuclear industry—and to some degree the NRC—have not, in my view, fully absorbed and appreciated the need to have comprehensive and organized communications plans that reach out to the public to explain what is, and what is not, a significant risk to public health. Recent events have indeed demonstrated that we have much work to do in educating the public and stakeholders. If nuclear energy is to expand as part of this nation's energy strategy, public outreach and education is absolutely essential.

Another issue that came up early in my Chairmanship was the question of the NRC's role and responsibilities within the international community of regulators. I repeated, quite often, that we could no longer regard nuclear power in the United States as a strictly domestic enterprise and that industry and the NRC needed to engage more with our international partners. As is so often said, but cannot be overemphasized, "a nuclear accident anywhere is a nuclear accident everywhere" because the public perceives "things nuclear" differently. Aside from maintaining a worldwide standard of nuclear safety, it also seems beyond doubt that the NRC, our licensees, and our stakeholders have all benefitted substantially from our expanded cooperation with other countries.

I don't know if Chuck Whitney from Oglethorpe Power is here today, but a few weeks ago he told me about how their company sends people all over the world to do component inspections. And then he said, "Wherever we go, the NRC is already there. And we are glad to see that." I truly hope that the NRC and the U.S. industry continue to be engaged internationally and use our experience and talented people to promote nuclear safety in emerging or expanding nuclear nations. I know Jim Ellis from INPO spoke this morning. I was quite proud when he joined me two years ago in jointly presenting the U.S. report to the IAEA's Convention on Nuclear Safety. Being proactive and demonstrating to the world that industry and regulators can, and must, share responsibility for safety is one of the most important things we can do to increase public confidence in nuclear safety.

Another challenge that will certainly confront the NRC and the nation for some time is the matter of long-term storage of spent fuel—especially now that a potential repository at Yucca Mountain appears to be off the table. Of course, in my role as Commissioner, I cannot comment on the merits of any of the matters currently before the NRC. But I will say, in my personal view, that I have found the handling of this matter from a national policy perspective... unfortunate. The administration's handling of the matter has already led to the filing of a number of lawsuits and clouded the path forward in a number of significant ways for years to come. Frankly, I would have

preferred the White House to plainly say that it was implementing a policy change. The President has the right and the responsibility to set policy, and clearly an issue of national importance and complexity such as this needs to be periodically revisited. However, in my opinion, the administration's stated rationale for changing course does not seem to rest on factual findings and thus does not bolster the credibility of our government to handle this matter competently.

Those who would distort the science of Yucca Mountain for political purposes should be reminded that it was a year ago today that the President issued his memorandum on scientific integrity, in which he stated that "The public must be able to trust the science and scientific process informing public policy decisions." I honestly cannot say if Yucca Mountain could ever meet the stringent tests that would allow it to be licensed. But I do know that, under the law, that licensing determination... and the technical evaluation of the science... is the NRC's responsibility.

Now that one can ask whether the nation is back to square one with regard to the back end of the fuel cycle, the NRC naturally faces the issue of waste confidence. Many of you have spent the last year or two urging the Commission to pass a new waste confidence rule, readdressing several of the basic findings supporting the rule. But I think the current situation demonstrates that those of us who resisted a rush to update the waste confidence findings were correct to proceed with caution. I continue to question whether the Commission would have maintained its public credibility if it had finalized the proposed update without taking the time to consider more fully the reality of the current situation. What many people—even many people in this room—fail to understand is that the waste confidence rule is a real challenge for us because it is not simply based on the technical judgment of the NRC. Part of the Commission's "confidence" underlying the rule must be based on events that are beyond the NRC's control, and when those events are in flux, the Commission has to be very careful in deciding whether it can credibly say that we have "confidence" that a repository will be open on a given date or period of time.

Since this is the last time I will have an opportunity like this, I want to take some time to express my appreciation to a number of people who helped make my time at the NRC both productive and enjoyable.

First, let me thank Luis Reyes, who was the EDO at the time of my appointment and for the first two years of my term. I don't mean to take anything away from Bill Borchardt, but Luis was the one who took me around and showed me how the agency works. His professionalism, his friendly demeanor, and his sound advice were invaluable to me as I was getting my NRC "sea legs." I also want to thank Senators Tom Carper and George Voinovich both of whom have chaired the Clean Air and Nuclear Safety Subcommittee of the Senate Environment and Public Works Committee. No chairman of a federal agency could ask for fairer, more scrupulous, and more supportive leadership in their oversight committee than these two Senators.

I would also like to thank all the members of the staff who served in my office, and in particular, Paul Dickman, whom I rescued from the Department of Energy to come serve as my Chief of Staff. Some have been with me during my entire tenure here at the NRC, many others on brief rotations. All have been excellent, dedicated professionals. I came to the NRC with the theory that the staff are highly competent and can be trusted. And I have enough trust in my own

judgment that I did not feel the need to be surrounded by “my” people—who would simply tell me what I wanted to hear. Fortunately, my theory was confirmed by my experience, and I thank all my staff for their service.

There are two more people I want to thank by name. First, and above all, is my wife Becky—who not only indulged, but encouraged, this long detour from my academic career so that I could engage in public service: first at the Defense Department and then here at the NRC.

This subject of public service is the last thought I would like to leave you with... which brings me to the second name: Ed McGaffigan. Of all the people I met here at the NRC, he was the one who inspired me the most. I refer to him a lot when I talk about public service... as I did just recently at the Federal Engineer of the Year awards. Ed embodied the qualities of the ideal public servant: intellectual rigor, hard work, and a fearless devotion to the truth. We often disagreed on the issues, but we remained friends and colleagues... because we both thought that collegiality in the Commission was important for helping the agency fulfill its mission.

One of my proudest accomplishments here was to help establish the McGaffigan Award, to honor an employee “who demonstrates an extraordinary commitment to public service and exemplifies the integrity, professional dedication, and moral courage that Commissioner McGaffigan exhibited.” I won’t be participating in selecting future award-winners, since I will be leaving the agency soon, but I do know for certain that there is no shortage of people to choose from.

Nearly everyone in this room—licensees, vendors, construction engineers, stakeholders—help contribute to nuclear safety in some way. But I think those of us who have chosen public service... whether as an appointee for several years as I did, or for a career as many of you are doing... are fulfilling that incredibly important goal in a special way. And I can certainly say that I have felt very honored to have worked alongside so many fine men and women—the thousands of outstanding public servants who make up what I believe is the most outstanding regulatory body in the world.

My final comments are simple:

- To the staff of the NRC, do not become complacent; keep working to make this the best place to work in government,
- To the industry, keep working to exceed requirements and achieve excellence, and
- To our international partners, keep working with us to achieve consistent high standards that make the world a better and safer place.

Thank you very much.

**ATTACHMENT 3**

# U.S. State by State Commercial Nuclear Used Fuel and Payments to the Nuclear Waste Fund



Payments Associated by Each State Are Based on Its Nuclear Plant Generation

State	Metric Tons of Uranium	Nuclear Waste Fund Contributions (\$ M)
Alabama	2,880	774.2
Arizona	1,800	551.4
Arkansas	1,220	306.0
California	2,720	842.7
Colorado	30	0.2
Connecticut	1,920	376.3
Florida	2,830	787.6
Georgia	2,410	701.7
Idaho	90	NA
Illinois	7,670	1,846.5
Iowa	450	115.6
Kansas	610	193.2
Louisiana	1,150	334.2
Maine	550	65.5
Maryland	1,260	364.5
Massachusetts	640	164.7
Michigan	2,410	539.6
Minnesota	1,130	394.8
Mississippi	730	208.6
Missouri	610	200.9
Nebraska	840	266.5
New Hampshire	520	160.8
New Jersey	2,360	622.7
New York	3,370	824.2
North Carolina	3,330	858.3
Ohio	1,030	311.1
Oregon	350	75.5
Pennsylvania	5,650	1,615.2
South Carolina	3,780	1,272.3
Tennessee	1,460	478.6
Texas	1,890	639.9
Vermont	580	97.0
Virginia	2,320	712.7
Washington	620	163.6
Wisconsin	1,280	362.5
Other	NA	7.6
<b>Total</b>	<b>62,490</b>	<b>17,236.7</b>

Idaho is holding used fuel from Three Mile Island 2

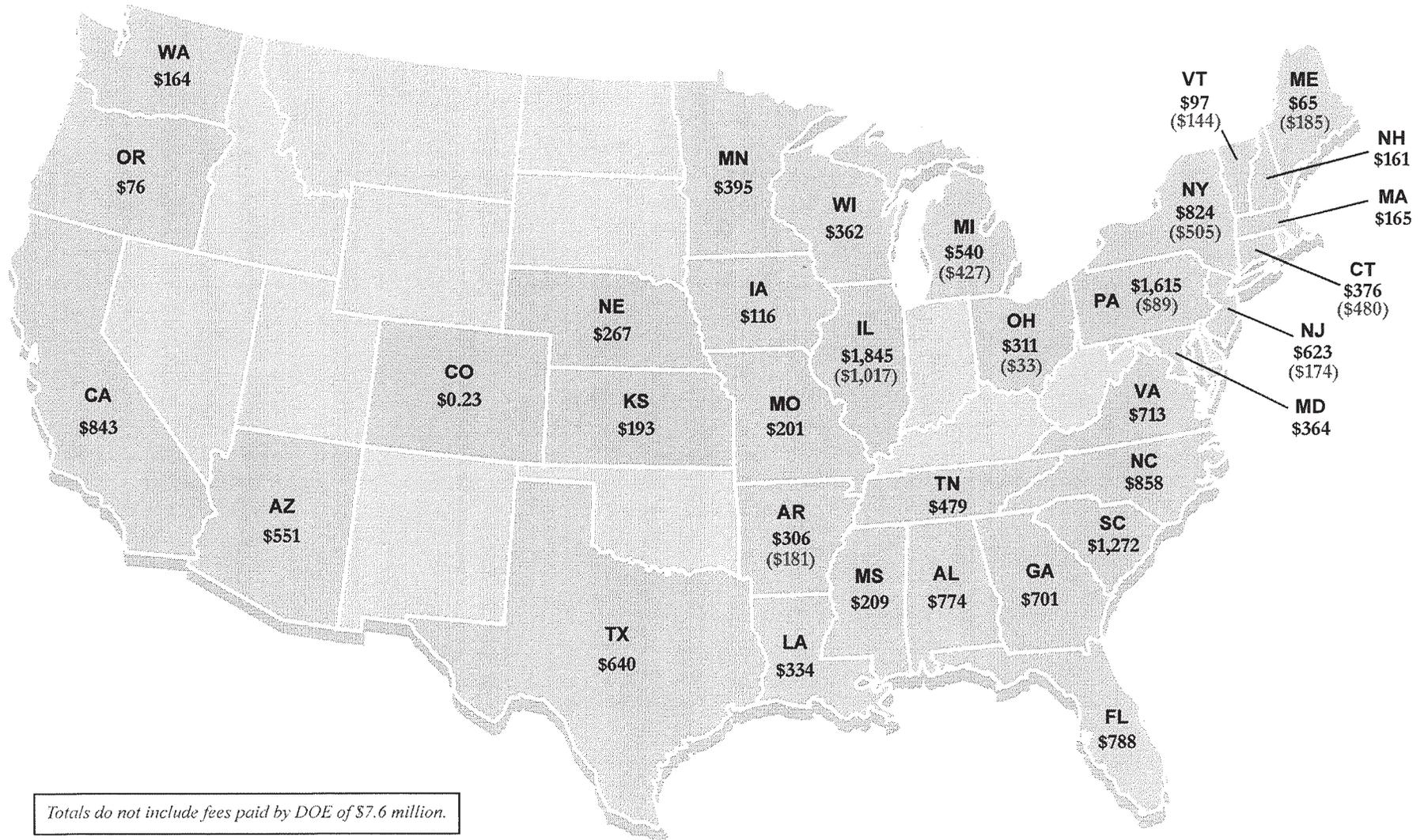
Used Fuel Data is rounded up to the nearest ten and is as of February 2010, Nuclear Waste Fund Contributions as of December 31, 2009.

Source: ACI Nuclear Energy Solutions and Department of Energy

Updated: 02/10

# Purchaser Fee Payments to the Nuclear Waste Fund as of December 31, 2009

Dollars in millions. Figures represent cumulative one-mill and one-time fee payments.  
(One-time fees owed shown in red total \$3.2 billion).



**ATTACHMENT 4**

**APPENDIX B**  
**U.S. Commercial Nuclear Power Reactors Formerly**  
**Licensed To Operate (Permanently Shut Down)**

Unit Location	Reactor Type MWT	NSSS Vendor	OL Issued Shut Down	Decommissioning Alternative Selected Current Status
Big Rock Point Charlevoix, MI	BWR 240	GE	05/01/1964 08/29/1997	DECON DECON Completed
GE Bonus* Punta Higuera, PR	BWR 50	CE	04/02/1964 06/01/1968	ENTOMB ENTOMB
CVTR** Parr, SC	PTHW 65	WEST	11/27/1962 01/01/1967	SAFSTOR SAFSTOR
Dresden 1 Morris, IL	BWR 700	GE	09/28/1959 10/31/1978	SAFSTOR SAFSTOR
Elk River* Elk River, MN	BWR 58	AC/S&L	11/06/1962 02/01/1968	DECON DECON Completed
Fermi 1 Newport, MI	SCF 200	CE	05/10/1963 09/22/1972	SAFSTOR in Progress DECON
Fort St. Vrain Platteville, CO	HTG 842	GA	12/21/1973 08/18/1989	DECON DECON Completed
GE VBWR Sunol, CA	BWR 50	GE	08/31/1957 12/09/1963	SAFSTOR SAFSTOR
Haddam Neck Meriden, CT	PWR 1,825	WEST	12/27/1974 12/05/1996	DECON DECON Completed
Hallam* Hallam, NE	SCGM 256	BLH	01/02/1962 09/01/1964	ENTOMB ENTOMB
NS Savannah Baltimore, MD	PWR 74	B&W	08/1965 11/1970	SAFSTOR SAFSTOR
Humboldt Bay 3 Eureka, CA	BWR 200	GE	08/28/1962 07/02/1976	SAFSTOR DECON In Progress
Indian Point 1 Buchanan, NY	PWR 615	B&W	03/26/1962 10/31/1974	SAFSTOR SAFSTOR
La Crosse Genoa, WI	BWR 165	AC	07/03/1967 04/30/1987	SAFSTOR SAFSTOR
Maine Yankee Wiscasset, ME	PWR 2,700	CE	06/29/1973 12/06/1996	DECON DECON Completed
Millstone 1 Waterford, CT	BWR 2,011	GE	10/31/1986 07/21/1998	SAFSTOR SAFSTOR
Pathfinder Sioux Falls, SD	BWR 190	AC	03/12/1964 09/16/1967	DECON DECON Completed
Peach Bottom 1 Delta, PA	HTG 115	GA	01/24/1966 10/31/1974	SAFSTOR SAFSTOR

U.S. NUCLEAR REGULATORY COMMISSION

APPENDIX B  
**U.S. Commercial Nuclear Power Reactors Formerly  
 Licensed To Operate (Permanently Shut Down) (continued)**

Unit Location	Reactor Type Wwt	NSSS Vendor	OL Issued Shut Down	Decommissioning Alternative Selected Current Status
General Electric Company Sunol, CA	EVESR 17	GE	11/12/63 02/01/67	SAFSTOR SAFSTOR
Piqua* Piqua, OH	OCM 46	AI	08/23/1962 01/01/1966	ENTOMB ENTOMB
Rancho Seco Herald, CA	PWR 2,772	B&W	08/16/1974 06/07/1989	DECON DECON In Progress
San Onofre 1 San Clemente, CA	PWR 1,347	WEST	03/27/1967 11/30/1992	SAFSTOR DECON In Progress
Saxton Saxton, PA	PWR 23.5	WEST	11/15/1961 05/01/1972	DECON DECON Completed
Shippingport* Shippingport, PA	PWR 236	WEST	N/A 1982	DECON DECON Completed
Shoreham Wading River, NY	BWR 2,436	GE	04/21/1989 06/28/1989	DECON DECON Completed
Three Mile Island 2 Middletown, PA	PWR 2,770	B&W	02/08/1978 03/28/1979	(1)
Trojan Rainier, OR	PWR 3,411	WEST	11/21/1975 11/09/1992	DECON DECON Completed
Yankee-Rowe Rowe, MA	PWR 600	WEST	12/24/1963 10/01/1991	DECON DECON Completed
Zion 1 Zion, IL	PWR 3,250	WEST	10/19/1973 02/21/1997	SAFSTOR SAFSTOR
Zion 2 Zion, IL	PWR 3,250	WEST	11/14/1973 09/19/1996	SAFSTOR SAFSTOR

\* AEC/DOE owned; not regulated by the U.S. Nuclear Regulatory Commission.

\*\* Holds byproduct license from the State of South Carolina.

Notes: See Glossary for definitions of decommissioning alternatives.

(1) Three Mile Island 2 has been placed in a postdefueling monitored storage mode until Unit 1 permanently ceases operation, at which time both units are planned to be decommissioned.

Source: DOE Integrated Database for 1990: U.S. Spent Fuel and Radioactive Waste, Inventories, Projections, and Characteristics (DOE/RW-0006, Rev. 6), and U.S. Nuclear Regulatory Commission, Nuclear Power Plants in the World, Edition #6

**ATTACHMENT 5**



# NRC NEWS

U.S. NUCLEAR REGULATORY COMMISSION

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No. 10-046

March 9, 2010

## NRC CHAIRMAN SAYS SUBSTANTIAL WORK AHEAD FOR COMMISSION IN THE COMING YEAR

Nuclear Regulatory Commission Chairman Gregory B. Jaczko said Tuesday the agency must “provide a steady hand” in managing existing programs and “also must keep our eyes fixed on the horizon” to deal with the challenges the agency is certain to face.

Speaking at the 22<sup>nd</sup> Annual Regulatory Information Conference in Rockville, Md., Jaczko took a look at “where we stand today as an agency and my vision for the NRC over the coming year ... using the lens of our key regulatory tools – rulemaking, licensing and oversight.”

“Our mission is comprehensive, but the way in which we meet our mandate is not static. For all the changes to our regulatory landscape over the last few years – the increased focus on security after 9/11, the safety changes after Davis Besse, the wave of license renewal and new reactor applications – our work likely will only become more varied and vital in the coming years,” said Jaczko,

“We must provide a steady hand – to continue doing what we’ve always done well, and to prepare for new and emerging challenges. And we also must keep our eyes fixed on the horizon – to appreciate where we are going, to recognize the issues that will take on added importance in the coming years, and to know what we need to do now in order to prepare for those challenges,” he added.

Jaczko praised Dr. Dale Klein, a commissioner and chairman of the NRC from 2006-2009, for his service to the NRC and nation. Klein will leave the commission upon the swearing in of a successor. Three new commission nominees are now before the full Senate. And he thanked Commissioner Kristine Svinicki for her work on, among other things, the cyber security rule.

Jaczko said he wanted to “address an ‘elephant in the room’ – the update to the Waste Confidence Rule.” It is important, he said, “that we stay focused on our regulatory responsibility – to ensure that spent fuel is safely and securely managed.” The NRC staff has told the commission that spent fuel in any reactor can be safely stored without environmental impact for 50 to 60 years beyond a reactor’s life of operation. Jaczko said he is looking forward to working

with his colleagues. “We need a rule that will stand the test of time... We should leave the ultimate strategy of disposal to organizations like the Blue Ribbon Commission whose job it is to examine the alternatives and make the recommendations on permanent disposal.

Looking at licensing reviews, Jaczko said that a necessary component for success “is for applicants to get designs completed as early as possible and to provide high quality information in their applications.” He noted the agency has a strong track record of conducting efficient, predictable licensing reviews while always staying focused on its public safety mission.

Jaczko also touched on the issues of sump clogging, a matter that has “been around for way too long with existing reactors, and has now even cropped up as a potential problem in certain new reactor designs.” And he mentioned reactor license amendment requests for adopting NFPA 805 – a risk-based method for calculating fire threats. This is an area, he said, “where we have had difficulty making clear, tangible progress.” He said the first amendment should be approved this year and once a pilot program is complete and the process has been proven, “I would encourage licensees not to wait to submit their amendment applications. I challenge all licensees to adopt NFPA 805,” he said.

“NFPA is the lighthouse to guide us forward in this area. We have grappled with this matter for 35 years since the Browns Ferry Fire... We need to continue pressing ahead on this issue. And for one simple reason that we have long recognized – fire poses a significant threat to plant safety,” he added.

The Chairman also said that however important good rules are, “what ultimately defines a regulator is its ability to ensure that its requirements are being followed. We stand watch, but the NRC can’t be everywhere and can’t inspect everything. That is why we must always maintain an effective oversight program. He said the Reactor Oversight Program has served the agency well, but the agency is looking at potential improvements.

Touching on the issue of buried piping and tritium leaks, Jaczko said that “we have seen ... the public concern that this issue can raise. The leaks to this point have been below regulatory limits and have been of low significance to public health and safety.” He said the agency is working with domestic and international standards organizations to see if more can be done.

“Just as our mission calls for us to clearly communicate to the public about the relatively low significance of these events,” he said about tritium leaks and buried piping, “it is also imperative that we clearly communicate to the licensees that we are not going to attempt to explain away performance that is less than stellar. Licensees have a responsibility to communicate for themselves and to make their own efforts to earn and keep the trust of the public in the communities where they are located.”

In a closing comment, Jaczko noted the agency’s participation in the President’s Open Government Directive. The NRC, he said, has a historic organizational commitment to openness and transparency.

“Consistent with that approach, I hope over the next few months the Commission will begin to meet more frequently in public to deliberate on matters under consideration. I believe that this kind of openness and transparency will build public confidence in the agency by highlighting our strengths: the hard work and dedication of the staff, and the diligence of the Commission,” he said.

###

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## Agency needs new plan after Yucca decision

### Long-term storage of nuclear waste still an issue

By STEVE TETREALT  
STEPHENS WASHINGTON BUREAU

WASHINGTON -- With the Yucca Mountain repository apparently off the table, safety regulators will need to retool to determine whether nuclear waste can remain stored at reactor sites for periods of a hundred years or longer, officials said Wednesday.

The Nuclear Regulatory Commission is preparing to pivot from its focus on evaluating the proposed Nevada waste storage site in light of the Obama administration declaring it no longer was interested in the repository plan.

The agency will need to determine what environmental and safety issues might come into play if thousands of tons of radioactive spent fuel needs to be kept in steel and concrete containers at reactor sites across the country for extended periods, NRC official Jack Davis said at an agency conference.

Speaking with reporters earlier this week, NRC Chairman Gregory Jaczko said nuclear fuel can be stored safely for long periods, and the NRC will "work to see what that time frame is really like -- 100 years, 200 years, 400," according to the New York Times.

NRC staff has indicated that waste-containing canisters can remain robust for another 50-60 years. On Wednesday, Davis, who heads a high-level waste technical review team, said the prospect of keeping highly radioactive material contained for longer periods raises a new set of issues the agency will need to tackle.

NRC safety regulations "are not really optimized for long-term storage," he said. Also, "if you are starting to store for a very long time at individual sites, you are going to have to reconsider the environmental impacts and the assessments that went into that."

Davis' comments echoed those of NRC nominee William Magwood, made at a Senate confirmation hearing last month.

Magwood said nobody had planned for radioactive used fuel to remain at reactor sites that long. "I think we have to go back and take a look at what we have in place now and assure ourselves it is able to stay in place another 50 years if necessary."

Michael Weber, the director of the NRC's Office of Nuclear Material Safety and Safeguards, said Wednesday with Yucca Mountain no longer in consideration, the nation is where it was years ago, before policymakers determined that waste should be buried in Nevada.

"For now the repository at Yucca Mountain is on the off-ramp, and we are staring out in front of our windshield looking at an unmarked road before us," Weber said.

**Find this article at:**

<http://www.lvrj.com/news/agency-needs-new-plan-after-yucca-decision-87321152.html>

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**NUCLEAR REGULATORY COMMISSION**  
**ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:	)	
	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	
	)	ASLBP No. 09-892-HLW-CAB04
(License Application for Geologic	)	
Repository at Yucca Mountain)	)	
_____	)	

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Prairie Island Indian Community's Response in Opposition to the U.S. Department of Energy's Motion to Withdraw, dated May 17, 2010, have been served upon the following persons by Electronic Information Exchange.

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