

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

Docket No. 63-001-HLW

July 9, 2010

**STATE OF WASHINGTON, STATE OF SOUTH CAROLINA,
AIKEN COUNTY, SOUTH CAROLINA, AND WHITE PINE COUNTY, NEVADA'S
MOTION FOR RECUSAL/DISQUALIFICATION**

On June 30, 2010, the Commission invited participants to this proceeding to file briefs with the Commission “as to whether the Commission should review, and reverse or uphold, the [Atomic Safety and Licensing] Board’s decision” denying a motion by the Department of Energy (DOE) to withdraw with prejudice its application for an authorization to construct a geologic repository for high-level radioactive waste and spent nuclear fuel at Yucca Mountain, Nevada. Through this motion, the State of Washington, the State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada (collectively “Movants”) respectfully request that Commissioners Magwood, Apostolakis, and Ostendorff recuse themselves and be disqualified from any consideration of the decision of the Atomic Safety and Licensing Board (ASLB or Board) denying DOE’s withdrawal motion, and further that they make a determination regarding this motion before considering any other matters, including whether the Commission should review the ASLB decision or the merits of that decision. This motion is based upon the responses of Commissioners Magwood, Apostolakis, and Ostendorff to questioning during a February 9, 2010, confirmation hearing before the United States Senate’s Committee on Environment and Public Works. During

that hearing, each Commissioner responded that he would not “second guess” DOE’s decision to withdraw the license application for Yucca Mountain from the Commission’s review.

I. FACTS

On February 1, 2010, DOE filed a motion before the ASLB to stay the licensing proceeding before that Board. U.S. Department of Energy’s Motion to Stay the Proceeding (Feb. 1, 2010). DOE indicated it intended to “withdraw its pending application with prejudice and to submit a separate motion, pursuant to 10 C.F.R. § 2.107(a), within the next 30 days, to determine the terms and conditions, if any, of that withdrawal.” *Id.* at 1-2. DOE requested that the stay be maintained through the Board’s disposition of the anticipated withdrawal motion. *Id.* at 2. DOE indicated its motion was based upon the President’s direction in the proposed Fiscal Year 2011 budget that DOE “discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010. . .” *Id.* at 1.¹

Just over a week later, on February 9, 2010, Commission nominees William D. Magwood, IV, George Apostolakis, and William C. Ostendorff appeared before the Senate Committee on Environment and Public Works for a confirmation hearing. During that hearing, the following exchange occurred:

Senator Boxer. Now, I have a question here for all three of you from Senator Reid. You can just answer it yes or no. If confirmed, *would you second guess the Department of Energy’s decision to withdraw the license application for Yucca Mountain from NRC’s review?*

Mr. Magwood. No.

Senator Boxer. Okay. Anybody else?

Mr. Apostolakis. No.

¹ DOE’s motion for stay was granted by the ASLB on February 16, 2010.

Mr. Ostendorff. No.

Senator Boxer. Thank you. I think he will be very pleased

Affidavit of Andrew A. Fitz (Fitz Aff.), Ex. 1 at 51-52 (emphasis added). Nominees Magwood, Apostolakis, and Ostendorff have all been subsequently confirmed as members of the Nuclear Regulatory Commission. Fitz Aff., Ex. 2.

On March 3, 2010, DOE filed with the ASLB its motion to withdraw with prejudice the Yucca Mountain construction authorization application. During briefing on this motion, DOE argued in part that the NRC should defer to the policy determination of the Secretary of Energy that DOE's application should be withdrawn. *See e.g.*, U.S. Department of Energy's Reply to the Responses to the Motion to Withdraw (May 27, 2010) at 23-25.

On June 29, 2010, the ASLB denied DOE's motion to withdraw, with or without prejudice, as contrary to the terms of the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10270. On June 30, 2010, the NRC issued the above-referenced order inviting briefing on the ASLB's June 29 decision.

II. ARGUMENT

When acting in an adjudicatory role, NRC Commissioners are, like other agency adjudicators, subject to the same objective standard for recusal as federal judges. *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246-67 (D.C. Cir. 1972) ("With regard to judicial decisionmaking, whether by court or agency, the appearance of bias or pressure may be no less objectionable."); *In re Houston Lighting & Power Co. (South Texas Project, Units 1 & 2)*, CLI-82-9, 15 NRC 1363, 1366 (1982). This objective standard provides that a judge "shall" recuse him or herself in any proceeding in which "his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The Supreme Court has explained that under this standard, "what matters is not the

reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal [is] required whenever ‘impartiality might reasonably be questioned.’” *Liteky v. United States*, 510 U.S. 540, 548 (1994) (quoting 28 U.S.C. § 455(a)).

This standard has been applied in NRC decisions. *See, e.g., In re Hydro Res., Inc.* (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), CLI-98-9, 47 NRC 326, 330 (1998) (NRC regulations are “meant to ensure both the integrity and the appearance of integrity of the Commission’s formal hearing process.”); *In re Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, ALAB-907, 28 NRC 620, 623 (1989) (“The parties in an adjudicatory proceeding have a right to an impartial adjudicator, both in reality *and in appearance* to a reasonable observer.” (citing *In re Metro. Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-85-5, 21 NRC 566, 568-69 (1985) (emphasis added)). “[T]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge has learned from his participation in the case.”” *In re Joseph J. Macktal*, CLI-89-14, 30 NRC 85, 91 (1989) (quoting *In re Houston Lighting & Power Co.*, 15 NRC at 1365). A Commissioner should disqualify himself or herself if “the reasonable man, were he to know all the circumstances, would harbor doubts about the judge’s impartiality.” *In re Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, CLI-84-20, 20 NRC 1061, 1078 n.46 (1984) (quoting *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101 (5th Cir. 1980).

In addition, when a motion to recuse or disqualify is made by a party, the judge or adjudicator must address that motion before ruling on any other matters in the case. This rule logically flows from the nature of a recusal/disqualification motion, which questions the propriety of the judge’s continued involvement in the matter. If, after a motion to recuse/disqualify is made, the judge rules on another matter in the case but later recuses him or herself, the ruling on the other

matter would be irreparably tainted.² *See generally*, 46 Am. Jur. 2d *Judges* § 193 (2010) (“When a recusal motion is presented to a court, the court is required to promptly act on the motion before resolving any other matters.”).

The standard for recusal or disqualification is met in this case. The extra-judicial testimony of Commissioners Magwood, Apostolakis, and Ostendorff, made in advance and as a matter of confirmation that they would not “second guess” any DOE decision to withdraw the Yucca Mountain license application, can be reasonably interpreted to demonstrate that each have, in fact, prejudged this matter should the Commission choose to review the ASLB’s decision. At a minimum, this testimony has created at least the appearance that Commissioners Magwood, Apostolakis, and Ostendorff are not impartial, as reflected in the popular press. *See Fitz Aff.*, Ex. 3. Moreover, taken at face value, the testimony definitively establishes that the three Commissioners have in fact prejudged the issues in this matter. There is no other logical meaning that can be ascribed to the statements not to “second guess” DOE on the issue of withdrawal. Senator Boxer’s comment that Senator Reid “will be very pleased” provides a further indication that the questioning was intended to establish that the new Commissioners would not stand in the way of DOE’s motion to withdraw. No other meaning was intended or understood, nor can any other meaning be inferred. Since the new Commissioners had not yet taken office when they made the statements, their opinions were obviously formed on “some basis other than what the judge has learned from his participation in the case.” *In re Joseph J. Macktal*, 30 NRC at 91 (quoting *In re Houston Lighting & Power Co.*, 15 NRC at 1365). .

² In this matter, therefore, the Commissioners should, consistent with this rule, make a decision on Movants’ motion to recuse/disqualify before determining any other issue pending, including the determination of whether review of the Board’s order is appropriate or whether the Board’s order should be upheld or reversed.

While courts have acknowledged the importance of Congressional committees on oversight and investigation, and that it may be appropriate for Congressional representatives to vigorously represent the interests of their constituents before administrative agencies, *see Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C.Cir.1981), it is nevertheless clear that Congressional interest cannot extend to influencing the judicial functions of a federal Commission. *Pillsbury Co. v. Fed. Trade Comm'n*, 354 F.2d 952, 963-64 (5th Cir. 1966). Congressional inquiries that intrude into matters under adjudication by the Commission, such as in this case, compromise the reasonable appearance of impartiality. *Id.* Furthermore, although administrative adjudicators are generally presumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances, *United States v. Morgan*, 313 U.S. 409, 421 (1941), an adjudicator cannot “shrug off such a procedural due process claim merely because the officials involved should be able to discount what is said and to disregard the force of the intrusion into the adjudicatory process.” *Pillsbury*, 354 F.2d at 964.

The confirmation hearing testimony of Commissioners Magwood, Apostolakis, and Ostendorff has, at a minimum, already compromised the appearance of impartiality in any NRC review of the ASLB’s decision, and in fact indicated that they will not be impartial. Recusal or disqualification is appropriate under the circumstances.³ The result, however, is that at least in appearance, a quorum of the five-member Commission lacks the impartiality necessary under relevant legal standards to review the Order. *See, e.g., Liteky*, 510 U.S. at 548; *Nuclear Info. & Res. Serv. v. Nuclear Reg. Comm’n*, 509 F.3d 562, 571 (D.C. Cir. 2007); *U-Haul Co. of Nev., Inc. v. Nat’l Labor Relations Bd.*, 490 F.3d 957, 965 (D.C. Cir. 2007); *In re Hydro Res., Inc.*, 47 NRC

³ Indeed, in 2005, NRC Chairman Jaczko recused himself from all NRC matters involving Yucca Mountain for a one-year period based on his former position as a senior policy advisor to Majority Leader Reid, noting during Congressional testimony: “I agreed to recuse myself for 1 year, because I thought it was appropriate given, I believe, the perceptions about my ability to be objective and fair.” Fitz Aff., Ex. 4.

at 331; *In re Long Island Lighting Co.*, 20 NRC at 1078 n.46. The Commissioners should thus not constitute “members present” for the purposes of a quorum. *See* 42 USC 5841(a)(1). They should take no part in the decision of whether to review the ASLB’s decision, and if review is taken, no part in considering the merits of that review.

III. CONCLUSION

For the reasons above, Movants respectfully request that Commissioners Magwood, Apostolakis, and Ostendorff address this motion before reaching any other issue in this case and, when they do so, that each recuse himself or be disqualified from this matter.

DATED this 9th day of July, 2010.

ROBERT M. MCKENNA
Attorney General

Signed (electronically) by Andrew A. Fitz
ANDREW A. FITZ
TODD R. BOWERS
Senior Counsel
MICHAEL L. DUNNING
H. LEE OVERTON
JONATHAN C. THOMPSON
Assistant Attorneys General
(360) 586-6770
*Attorneys for Intervenor
State of Washington*

Signed (electronically) by Kenneth P. Woodington
DAVIDSON & LINDEMANN, P.A.
WILLIAM H. DAVIDSON, II
KENNETH P. WOODINGTON
(803) 806-8222

HENRY DARGAN McMASTER
Attorney General
JOHN W. McINTOSH
Chief Deputy Attorney General
ROBERT D. COOK
Assistant Deputy Attorney General
LEIGH CHILDS CANTEY
Assistant Attorney General
(803) 734-3970
*Attorneys for Intervenor
State of South Carolina*

Signed (electronically) by Thomas R. Gottshall
THOMAS R. GOTTSBALL
Executed in accordance with 10 C.F.R. 2.304(d) by
S. ROSS SHEALY, ESQ.
HAYNSWORTH SINKLER BOYD, P.A.
(803) 779-3080
*Attorneys for Intervenor
Aiken County, South Carolina*

Signed (electronically) by Richard W. Sears
RICHARD W. SEARS
District Attorney
White Pine County District Attorney’s Office
(775) 289-8828
*Attorneys for Intervenor
White Pine County, Nevada*

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

Docket No. 63-001-HLW

July 9, 2010

**AFFIDAVIT OF ANDREW A. FITZ IN SUPPORT OF
MOTION FOR RECUSAL/DISQUALIFICATION**

I, Andrew A. Fitz, swear and affirm under penalty of perjury under the laws of the state of Washington and federal laws that the following is true and correct.

1. I am now, and at all times mentioned have been a citizen of the United States, and am a resident of the State of Washington, over the age of eighteen years, competent to make this affidavit, and make this affidavit from my own personal knowledge, judgment, and professional experience.

2. I am one of the attorneys of record for Intervenor, State of Washington, in the above-referenced matter.

3. Attached hereto as Exhibit 1 is a true and accurate excerpt of *Hearing on Nomination of NRC Commissioners*, U.S. Senate Committee on Environment and Public Works, 111th Cong. (Feb. 9, 2010).

4. Attached hereto as Exhibit 2 are true and accurate copies of Presidential Nominations, 111th Congress (2009-2010), for William Charles Ostendorff (PN1269-111), William D. Magwood, IV (PN1072-111 and PN1071-111), and George Apostolakis (PN1070-111) confirming each appointment to the Nuclear Regulatory Commission on March 19, 2010.

5. Attached hereto as Exhibit 3 are a true and accurate copies of three newspaper articles: (1) Steve Tetreault, *Ruling keeps Yucca Mountain alive*, Las Vegas Review-Journal, June 30, 2010; (2) Editorial, *Nuclear Regulatory Commission must do right thing on Yucca Mountain*, The Seattle Times, July 1, 2010; and (3) Editorial, *Hoping for a fair hearing on Yucca Mountain*, The Seattle Times, June 2, 2010.

6. Attached hereto as Exhibit 4 is a true and accurate copy of *Hearing on Pending Nominations of Gregory B. Jaczko and Peter B. Lyons*, U.S. Senate Committee on Environment and Public Works, 109th Cong. (Apr. 20, 2005).

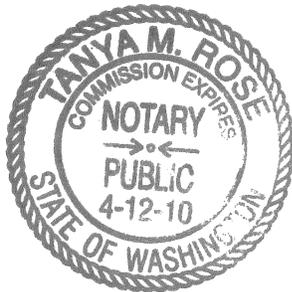
DATED this 8th day of July, 2010, in Olympia, Washington.



ANDREW A. FITZ
(360) 586-6770

Subscribed and sworn to before me on July 8, 2010, by

Andrew A. Fitz.



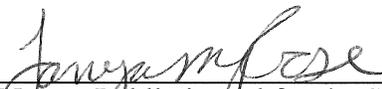

Notary Public in and for the State of
Washington, residing at Olympia, WA.
My appointment expires 4-12-10.

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HEARING ON NOMINATION OF NRC COMMISSIONERS

Tuesday, February 9, 2010

United States Senate

Committee on Environment and Public Works

Washington, D.C.

The committee met, pursuant to notice, at 10:00 a.m. in room 406, Dirksen Senate Office Building, the Honorable Barbara Boxer [chairman of the committee] presiding.

Present: Senators Boxer, Inhofe, Voinovich, Alexander, Carper, Cardin, Klobuchar, Merkley

Also Present: Senator Webb

Senator Boxer. Thank you very much.

Dr. Apostolakis, you mentioned your work with the NRC's Advisory Committee on Reactor Safeguards, and you appreciated conducting all the committee's meetings in public. Do you believe the NRC would benefit from conducting its meetings, deliberations and votes in public?

Mr. Apostolakis. Senator, I am aware of the fact that Chairman Jaczko is promoting this idea. I am very pleased with the way the ACRS has conducted its business. I think we write letters to the Commission in public, we argue about individual words and commas and periods. I think that has been very, very beneficial both to us and the stakeholders. Now, with respect to the Commission itself, in principle, I think it is a good idea. I would like to understand a little better what the downside might be, because I haven't really studied the matter. But in principle, I am for it.

Senator Boxer. How about you, Mr. Magwood? Open and transparent meetings?

Mr. Magwood. I agree with my colleague. In principle, I agree with that direction. The one concern I would have is how it affects the quality of decisions that are made. The current process at NRC involves an iteration of documents between the

various parts of the Commission staffs. That is an opportunity to really delve into issues in a great deal of detail. I would hate to lose that in the process of having open meetings.

But if there is a way of getting both benefits, I would certainly be in favor of it.

Senator Boxer. So let me understand that. You are saying that you think it might not be as productive, if you were looking at an analysis and it was in public? Why would that be?

Mr. Magwood. No, my point is that I think it is important to do the analysis, even if it takes a long time, on a textual basis. And if there is a way of actually arriving at decisions in public, I am all in favor of that. I think that is a good thing to do. I want to make sure that we don't lose the detail.

Senator Boxer. Let me just make sure that everyone understands my question. I am not talking about doing the analysis in public. I am talking about the meetings in public and your deliberations and your votes in public, once you have gotten the analysis.

Mr. Magwood. In principle, I don't have a problem with that.

Senator Boxer. Mr. Ostendorff?

Mr. Ostendorff. Chairman Boxer, I support the NRC's

openness and transparency. I am aware that there are some discussions currently underway with existing Commissioners to look at some changes in the voting procedures specifically. In principle, I support openness and those activities. I would like to have an opportunity, once I am confirmed to more fully discuss that and better understand the exact issues.

Senator Boxer. I appreciate that, all of you using the word, in principle. But to me, either it is open or it is shut. So I am going to say to you, just from you to me and me to you, I don't speak for anybody else, I am going to be watching this. Because I think that, yes, analysis and all the hard work has to go on between the folks who you rely on and you should be able to probe that. But once it gets to the meetings, and all the information is out there, I believe this needs to be shared with the public. I think it is important, not jus to agree with it in principle but in practice. So I will be following that myself.

Now, I have a question here for all three of you from Senator Reid. You can just answer it yes or no. If confirmed, would you second guess the Department of Energy's decision to withdraw the license application for Yucca Mountain from NRC's review?

Mr. Magwood. No.

Senator Boxer. Okay. Anybody else?

Mr. Apostolakis. No.

Mr. Ostendorff. No.

Senator Boxer. Thank you. I think he will be very pleased with that.

And the last question I have is on re-processing. I went to France, La Hague, I don't know how many of you have been to La Hauge at all. When I went there, I was very open to seeing how this new technology could work. When I left there, I realized that it is far more controversial than it might appear, because, and I am sure, Mr. Magwood, you saw that, this material is so hot, so hot that even though it is contained in a small container, it needs this huge burial site. In La Hague, they are going to have to ship back this waste to the countries that sent it in the first place, after 20 years.

So I guess my question is, to all of you, you can do it in writing, I don't want to take a lot of time, but do you think there needs to be more work on perfecting this type of a technology? Or do you think it is just ready to roll?

Mr. Apostolakis. Senator, I really don't know much about the recycling, so I cannot give you an answer.

Senator Boxer. That is fair. Mr. Magwood?

infrastructure. It is counter-intuitive, and it turns out it is absolutely wrong to say that. They are looking at over 10,000 projects that were completed, they are looking at who the people are that got the jobs. I have this study here if you want to get your hands on it.

I think that concludes everything. Remember, we are not going to have our hearings that we originally were going to have on Thursday and Wednesday. So we are going to do everything today and put off the others until we get back. Does anybody else have any questions, comments? If not, thank you so much. We stand adjourned. And to our friends at the table, thank you very much.

[Whereupon, at 11:50 a.m., the committee was recessed, to reconvene later the same day.]

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Nomination: PN1269-111

Date Received: December 11, 2009 (111th Congress)

Nominee: William Charles Ostendorff, of Virginia, to be a Member of the Nuclear Regulatory **Commission** for the remainder of the term expiring June 30, 2011, vice Dale Klein, resigned.

Referred to: Senate Environment and Public Works

Reported by: Senate Environment and Public Works

Legislative Actions

Floor Action: December 11, 2009 - Received in the Senate and referred to the Committee on Environment and Public Works.

Committee Action: February 09, 2010 - Committee on Environment and Public Works. Hearings held.

Committee Action: March 04, 2010 - Committee on Environment and Public Works. Ordered to be reported favorably.

Floor Action: March 04, 2010 - Reported by Senator Boxer, Committee on Environment and Public Works, without printed report.

Floor Action: March 04, 2010 - Placed on Senate Executive Calendar. Calendar No. 736. Subject to nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.

Floor Action: March 19, 2010 - Confirmed by the Senate by Voice Vote.

Organization: Nuclear Regulatory **Commission**

Control Number: 111PN0126900

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Nomination: PN1072-111

Date Received: October 13, 2009 (111th Congress)

Nominee: William D. Magwood, IV, of Maryland, to be a Member of the Nuclear Regulatory **Commission** for the term of five years expiring June 30, 2015.
(Reappointment)

Referred to: Senate Environment and Public Works

Reported by: Senate Environment and Public Works

Legislative Actions

Floor Action: October 13, 2009 - Received in the Senate and referred to the Committee on Environment and Public Works.

Committee Action: February 09, 2010 - Committee on Environment and Public Works. Hearings held.

Committee Action: March 04, 2010 - Committee on Environment and Public Works. Ordered to be reported favorably.

Floor Action: March 04, 2010 - Reported by Senator Boxer, Committee on Environment and Public Works, without printed report.

Floor Action: March 04, 2010 - Placed on Senate Executive Calendar. Calendar No. 737. Subject to nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.

Floor Action: March 19, 2010 - Confirmed by the Senate by Voice Vote.

Organization: Nuclear Regulatory **Commission**

Control Number: 111PN0107200

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Nomination: PN1071-111

Date Received: October 13, 2009 (111th Congress)

Nominee: William D. Magwood, IV, of Maryland, to be a Member of the Nuclear Regulatory **Commission** for the remainder of the term expiring June 30, 2010, vice Edward McGaffigan, Jr.

Referred to: Senate Environment and Public Works

Reported by: Senate Environment and Public Works

Legislative Actions

Floor Action: October 13, 2009 - Received in the Senate and referred to the Committee on Environment and Public Works.

Floor Action: March 04, 2010 - Reported by Senator Boxer, Committee on Environment and Public Works, without printed report.

Floor Action: March 04, 2010 - Placed on Senate Executive Calendar. Calendar No. 738. Subject to nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.

Floor Action: March 19, 2010 - Confirmed by the Senate by Voice Vote.

Organization: Nuclear Regulatory **Commission**

Control Number: 111PN0107100

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Nomination: PN1070-111

Date Received: October 13, 2009 (111th Congress)

Nominee: George Apostolakis, of Massachusetts, to be a Member of the Nuclear Regulatory **Commission** for the term of five years expiring June 30, 2014, vice Peter B. Lyons, term expired.

Referred to: Senate Environment and Public Works

Reported by: Senate Environment and Public Works

Legislative Actions

Floor Action: October 13, 2009 - Received in the Senate and referred to the Committee on Environment and Public Works.

Committee Action: February 09, 2010 - Committee on Environment and Public Works. Hearings held.

Committee Action: March 04, 2010 - Committee on Environment and Public Works. Ordered to be reported favorably.

Floor Action: March 04, 2010 - Reported by Senator Boxer, Committee on Environment and Public Works, without printed report.

Floor Action: March 04, 2010 - Placed on Senate Executive Calendar. Calendar No. 739. Subject to nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate.

Floor Action: March 19, 2010 - Confirmed by the Senate by Voice Vote.

Organization: Nuclear Regulatory **Commission**

Control Number: 111PN0107000

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Jun. 30, 2010
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Ruling keeps Yucca Mountain alive

NRC panel says licensing process must continue

By [STEVE TETREULT](#)
STEPHENS WASHINGTON BUREAU

WASHINGTON -- The Yucca Mountain nuclear waste plan was kept alive Tuesday when a panel of judges ruled the Obama administration does not have the authority to withdraw the project without permission from Congress.

Federal law requires the Department of Energy to apply for a waste repository license and for the Nuclear Regulatory Commission to evaluate the application and rule on its merits unless lawmakers decide otherwise, according to a three-judge board that hears commission licensing matters.

"We deny DOE's motion to withdraw the application," the judges said at the outset of a 53-page ruling. The Nuclear Waste Policy Act, which was passed in 1982, "does not give the secretary (of energy) the discretion to substitute his policy for the one established by Congress."

The decision is a setback for the Obama administration, which has been moving to shut down the Nevada project in fulfillment of a campaign pledge to Sen. Harry Reid, D-Nev., a longtime Yucca foe.

The program has been zeroed out of President Barack Obama's 2011 budget, and the hundred or so people remaining at work in Las Vegas and Washington, D.C., are retiring, transferring or preparing to be laid off.

Reid's Republican opponent in their Senate race, Sharron Angle, wants to develop Yucca as a site for reprocessing spent nuclear fuel for use as energy.

Angle opposes using the site as a "dumping ground" for nuclear waste -- something Southern Nevadans have fought for years -- but argues hundreds of jobs can be created at Yucca if it becomes a center for nuclear energy generation.

Tuesday's ruling by the Atomic Safety and Licensing Board promises months more of legal maneuvering over the repository that seems certain to extend beyond the November elections, said Lake Barrett, a retired DOE manager who was a director of the Yucca program from 1993 to 2002.

"This is a long way from being over," Barrett said. "This was round two of a 15-rounder."

At least for the time being, the decision keeps the Yucca project alive, if only on paper.

The Department of Energy said it plans to appeal the ruling to the full five-member regulatory commission board, whose members are presidential appointees confirmed by the Senate.

"We believe the administrative board's decision is wrong and believe that the Nuclear Regulatory Commission will reverse that decision," DOE spokeswoman Stephanie Mueller said.

Bruce Breslow, executive director of the Nevada Agency for Nuclear Projects, said the state "respects but disagrees with" the licensing panel's decision, and will join the appeal.

Reid said he was disappointed but that Tuesday's ruling was hardly the last word.

"The full commission will likely take another look at the motion to withdraw the license application and make the final decision on behalf of the NRC in the coming months," Reid said.

"I will continue to ensure that this dangerous project never comes back to life."

Added fellow Nevada Democrat Rep. Shelley Berkley: "Nevadans have been told before that it's time to end the fight against Yucca Mountain, and we aren't going to surrender now just because of this one ruling."

The ruling was applauded by rural Nevada interests that view the repository plan, which could cost close to \$100 billion if approved, as a economic lifeline.

Robert List, the former Nevada governor who is counsel for Churchill, Lander, Esmerelda and Mineral counties, said the administration's bid to withdraw the license application "was an attempt to circumvent the law."

"This ruling is a reminder that we are a nation of laws, not of men and no single individual. Neither the president, the secretary of energy or the Senate majority leader can ignore the law in order to achieve a personal objective," List said.

The ruling was just the latest twist in the long and tortured history of the proposed Yucca Mountain repository.

On top of any decisions from the regulatory commission, a federal appeals court in Washington, D.C., has scheduled hearings in September on a lawsuit filed by states that include Washington and South Carolina that seeks to revive the Yucca project.

For more than 20 years, the site 100 miles northwest of Las Vegas was the government's sole focus in trying to dispose of more than 77,000 tons of highly radioactive materials.

But until Obama was elected president, the project drew opposition only from the state's top elected leaders and a majority of residents who challenged its safety.

The next action might happen before the five-member regulatory commission board.

The commissioners could wait to receive an appeal, or they could decide to take up the matter.

NRC spokesman David McIntyre said the commission "has the order and is reading it."

The NRC chairman is Gregory Jaczko, a former science adviser to Reid. The Nevada senator fought to have Jaczko placed on the board in 2003. He was nominated to a second term in 2008.

Jaczko has advocated keeping radioactive waste stored at the nation's 104 nuclear power plant

sites for now.

The material would be kept in steel and concrete canisters that scientists believe would be safe for 100 years or longer.

"I would not be surprised if the NRC reverses the ruling," said Tom Clements, southeastern nuclear campaign coordinator for Friends of the Earth.

Clements noted that three NRC commissioners -- William Magwood, George Apostolakis and William Ostendorff -- were asked directly at their Senate confirmation hearings in February whether they would "second guess" DOE on Yucca Mountain. Each said no.

But Barrett said it was "highly irregular" for nominees to be asked flat out during confirmation how they might rule on an issue. The commissioners might be challenged on those grounds.

"The three new commissioners will have to decide whether they can actually vote on the matter since many people think they were compromised during the confirmation process," Barrett said.

The judges rejected a DOE motion to withdraw a 17-volume, 8,600-page application to build an underground repository and above-ground industrial site to handle spent nuclear fuel that would arrive by rail car.

Energy Secretary Steven Chu had noted the Obama administration had changed its nuclear waste policy and concluded Yucca Mountain "is not a workable option."

The judges said it would take more than that to pull the plug.

"We conclude that Congress directed both that DOE file the application, and that the NRC consider the application and issue a final merits-based decision," the judges said. "Unless Congress directs otherwise, DOE may not single-handedly derail the legislated decision-making process by withdrawing the application."

Review-Journal writer Keith Rogers contributed to this report. Contact Stephens Washington Bureau chief Steve Tetreault at stetreault@stephensmedia.com or 202-783-1760.

Find this article at:

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The Seattle Times

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Nuclear Regulatory Commission must do right thing on Yucca Mountain

WASHINGTON state ought to be encouraged by a federal legal panel's decision rejecting the Obama administration's effort to unilaterally scuttle the billions of dollars and years put into the long-term repository for the nation's nuclear waste. After all, that is where much of the nuclear defense waste stored at Hanford is bound.

Encouraged, yes, except for the fact that the Nuclear Regulatory Commission, rather than waiting for the U.S. Department of Energy to appeal the decision, apparently seems raring to second-guess its own Atomic Safety and Licensing Board. The commission quickly asserted jurisdiction and asked for filings by next Friday.

Candidate Barack Obama promised to end the Yucca Mountain project, which flouts the intent of Congress and leaves spent nuclear fuel and defense waste stacking up around the country.

But the NRC's panel noted the Obama administration did not offer any scientific proof that Yucca was not a sound place for the waste but only said it was "unworkable."

Unworkable *politically*, that is. Senate Majority Leader Harry Reid, D-Nev., has long opposed the Yucca site in his home state. Washington's own Sen. Patty Murray, an *unfailing* champion of the Yucca site, nailed Energy Secretary Steven Chu when he could not produce any scientific reason for the decision.

Three of the five NRC members promised not to get in the way of Obama's Yucca decision at their confirmation hearings. The fourth, whom Obama appointed as chair, was Reid's former science adviser and, when he joined the commission in 2005, voluntarily recused himself from Yucca Mountain decisions but only for a year.

The deck certainly seems stacked here. The commissioners should do their duty and uphold their board's correct decision.

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Hoping for a fair hearing on Yucca Mountain

WE hope the Nuclear Regulatory Commission's board hearing Thursday on whether the Obama administration can unilaterally withdraw its permit application for the nation's nuclear-waste repository is a fair one.

There is not much that does not stink about President Obama's decision to squander 30 years and \$10 billion of study of Nevada's Yucca Mountain site and flout an act of Congress. The 1997 law designated Yucca Mountain as the longterm site to hold the nation's commercial nuclear waste now stacking up around the country and the nation's high-level nuclear-defense waste. Hanford in Southeastern Washington has two-thirds of the nation's defense waste.

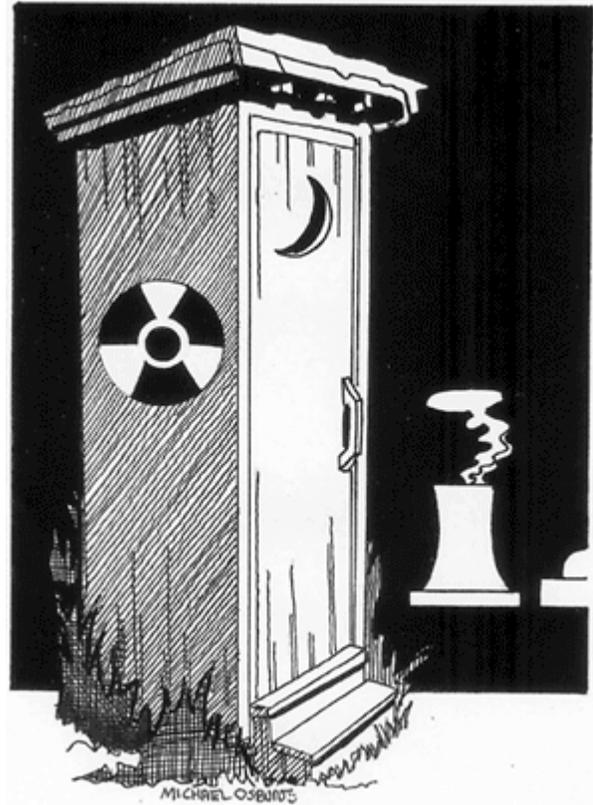
Washington and South Carolina are seeking to intervene in the administration's action, both before the NRC and in federal lawsuits.

The Department of Energy applied for the Yucca permit in 2008. Two years later, Senate Majority Leader Harry Reid, a Democrat, struggles for re-election. Obama comes to the rescue, zeroing out Yucca Mountain's budget and creating a blue-ribbon commission to consider where the waste should go instead — but the data-rich Yucca option is off the table. The Obama administration's request to withdraw the permit "with prejudice" would preclude any further consideration.

But why not keep Yucca as a possible alternative while others are studied?

Energy Secretary Steven Chu, a Nobel laureate scientist, could not answer the scientific question posed at a hearing by Sen. Patty Murray, D-Wash, who opposes the federal action. That is because the answer is political. Washington U.S. Reps. Norm Dicks, Jay Inslee and Doc Hastings also oppose the move.

The NRC board that will decide whether the administration could withdraw its application previously delayed its proceeding, deferring to the federal courts. But, in April, the four sitting commission members, including three Obama appointees and a fourth whom Obama designated as chair, voted unanimously to overrule the board's decision and made it take up the issue.



Interestingly, the three newest members of the commission, William Magwood, George Apostolakis and William Ostendorff, at their February confirmation hearings all agreed they would not challenge Obama's Yucca decision.

Meanwhile, the administration's scheme proceeds. Last month, the Energy Department ordered the project's main contractors to terminate most work and prepare for laying off more workers.

These moves are clearly premature, certainly wasteful and obviously disingenuous. Sure, go ahead and study alternatives. But if this was an earnest effort to find the best solution, Yucca Mountain would remain among the possibilities.

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**PENDING NOMINATIONS OF GREGORY B. JACZKO
AND PETER B. LYONS**

HEARING

BEFORE THE

**COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
ONE HUNDRED NINTH CONGRESS**

FIRST SESSION

ON

**THE NOMINATIONS OF GREGORY B. JACZKO AND PETER B. LYONS
TO BE MEMBERS OF THE NUCLEAR REGULATORY COMMISSION**

APRIL 20, 2005

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ONE HUNDRED NINTH CONGRESS
FIRST SESSION

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**PENDING NOMINATIONS OF GREGORY B.
JACZKO AND PETER B. LYONS**

WEDNESDAY, APRIL 20, 2005

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 406, Dirksen Senate Office Building, Hon. James Inhofe (chairman of the committee) presiding.

Present: Senators Inhofe, Warner, Voinovich, Carper, Lautenberg, and Obama.

Senator INHOFE. Our meeting will come to order. We always start punctually. Since this is a confirmation hearing, but you have already passed that point, it is still necessary to ask the two of you each the same questions. So I will ask the question, and if you would each respond for the record. Are you willing to appear at the request of any duly constituted Committee of Congress as a witness?

Mr. LYONS. Yes.

Mr. JACZKO. Yes, I am.

Senator INHOFE. Do you know of any matters which you may or may not have thus far disclosed, that might place you in any conflict of interest to this position?

Mr. LYONS. No.

Mr. JACZKO. No.

**OPENING STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. All right, good. I will go ahead and start with an opening statement. Today we are going to hear from the two Commissioners recently appointed to the Nuclear Regulatory Commission: Greg Jaczko and Pete Lyons.

Both Commissioners are Senate veterans. Commissioner Jaczko served on Senator Reid's staff, and prior to that, worked for this committee. So he certainly knows his way around here. Commissioner Lyons is a former staffer for Senator Domenici and the Senate Energy Committee. So we welcome both of you here, and we look forward to serving with you.

Both Commissioners were recess appointed by the President in January, and their appointments will not expire for 2 years. It is no secret that the process that led to the recess appointments was one in which I was highly critical. Over the last few years, two Admirals were nominated to the NRC, and both withdrew their names out of frustration with the process.

Numerous other nominees were perpetually held up on the Senate floor. This was the result of the controversy over the nomination of Commissioner Jaczko, and Senator Reid's strong desire to get him on the Commission.

There had been a number of concerns raised with regard to Commissioner Jaczko by those who want to see the success of nuclear power continue to grow in the future. His extensive work in opposition to licensing of Yucca Mountain is at the heart of much of that concern.

I understand that the Commissioner has recused himself from the NRC action on Yucca Mountain for 1 year. I look forward to discussing both the parameters and the timing of that recusal today.

I am not holding this hearing to rehash the history of the last 2 years. While Commissioner Jaczko's past work on nuclear matters has caused concern, I have been pleased to hear reports that in his tenure thus far as Commissioner, he has conducted himself in a manner that is very fair and very open. I am very glad to hear that, and I appreciate that very much. I know that will continue.

Today's hearing is important, because the Commissioners have not had the opportunity to share their views with this committee on nuclear power and what they see as the role of the NRC in regulating nuclear power. As they know, this committee has sole jurisdiction in the Senate over the Nuclear Regulatory Commission.

It is important that we fully understand what is guiding you, and it is equally important that you understand what we hope to see out of the NRC.

I have spent a good deal of time and energy over the past decade working hard to reform the way NRC does business. That effort has been very successful. I want to be certain that not only will that progress not be reversed, but that the NRC will continue to improve.

In 1998, as Chairman of the Nuclear Subcommittee, I began a series of oversight hearings of the NRC. The hearing I held in 1998 was the first such oversight hearing in many, many years. We traced it back as far as we can, and it has been quite some time. I do not think that any bureaucracy, any commission, can go without any oversight, and I think we have a lot of progress as a result of that.

When I began conducting oversight of the NRC, I did so with the goal of changing the bureaucratic atmosphere that had infected the NRC. By 1998, the NRC had become an Agency of process, not results. It was neither efficient nor effective. If the Agency was to improve, it has to employ a more results-oriented approach, one that was risk-based and science-based, and not one mired in unnecessary process and paperwork.

I am pleased that in the last 7 years, we have seen tremendous strides, and those who work for the NRC should be proud. This approach has made the NRC a lean and more effective regulatory Agency.

I have always been an advocate of nuclear energy, and nuclear power has proven to be a safe, reliable, and clean source of energy. Over the next 15 years, our energy demands will increase by nearly 30 percent. If we are to meet the energy demands of the future,

and we are serious about reducing utility emissions, then we should get serious about the zero emissions energy production that nuclear power provides.

Nuclear facilities are more efficient and safe today than ever before, and we are exploring new, even better technologies. We should be excited about the future of nuclear energy. I am pleased with the NRC's commitment to both license renewal and new reactor licensing, as they are key to the continued success of this clean, efficient energy.

The committee will be active this year on legislation pertaining to the NRC. Senator Voinovich and I will be introducing three bills today dealing with nuclear power: reauthorization of Price-Anderson; the nuclear security bill; and reauthorization of the fees bill that this committee passed by unanimous consent almost 5 years ago.

Staff is already in preliminary discussions with the Minority on these issues, and I anticipate an NRC oversight hearing in the future, as well as a classified hearing on the nuclear security. It is my hope to have these bills out of the committee in the very near future.

I want to thank the Commissioners for being here today, and I look forward to your testimony.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE
STATE OF OKLAHOMA

Good morning, today we are going hear from two Commissioners recently appointed to the Nuclear Regulatory Commission: Greg Jaczko (YATSKO) and Pete Lyons. Both Commissioners are Senate veterans. Commissioner Jaczko served on Senator Reid's staff and prior to that worked for this committee. Commissioner Lyons is a former staffer for Senator Domenici and the Senate Energy Committee. Welcome to both of you. Commissioner Jaczko, welcome back to EPW.

Both Commissioners were recess-appointed by the President in January and their appointments will not expire for 2 years. It's no secret that the process that led to the recess appointments was one in which I was highly critical. Over the last few years two Admirals were nominated to the NRC and both withdrew their names out of frustration with that process. Numerous other nominees were perpetually held up on the Senate floor. This was the result of the controversy over the nomination of Commissioner Jaczko and Senator Reid's strong desire to get him on the Commission. There had been a number of concerns raised with regard to Commissioner Jaczko by those who want to see the success of nuclear power continue to grow in the future. His extensive work in opposition to licensing of Yucca Mountain is at the heart of much of that concern.

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In 1998, as chairman of the Nuclear Subcommittee, I began a series of oversight hearings of the NRC. The hearing I held in 1998 was the first held by this committee in years. Fortunately, every year since that time we have had the Commission appear before us. Senator Voinovich has continued this rigorous oversight as the current chairman of that subcommittee.

When I began conducting oversight of the NRC, I did so with the goal of changing the bureaucratic atmosphere that had infected the NRC. By 1998, the NRC had become an Agency of process, not results. It was neither efficient nor effective. If the Agency was to improve it had to employ a more results-oriented approach—one that was risk-based and science-based, not one mired in unnecessary process and paperwork. I am pleased that in the last 7 years, we have seen tremendous strides and those who work for the NRC should be proud. This approach has made the NRC a lean and more effective regulatory Agency.

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The committee will be active this year on legislation pertaining to the NRC. Just this week three bills were introduced by Senator Voinovich and myself dealing with nuclear power: reauthorization of Price Anderson; a nuclear security bill; and reauthorization of a fees bill that this committee passed by unanimous consent almost 5 years ago. Staff is already in discussions with the Minority on these bills, and I anticipate an NRC oversight hearing in the near future as well a classified hearing on nuclear security. It is my hope to have these bills out of committee in the very near future.

I want to thank the Commissioners for being here today and I look forward to their testimony.

Senator INHOFE. Senator Voinovich, before you came in, we went through the required questions. Since they are already on the Commission it is not like the normal type of hearing that we have. So I recognize you at this time.

**OPENING STATEMENT OF HON. GEORGE V. VOINOVICH,
U.S. SENATOR FROM THE STATE OF OHIO**

Senator VOINOVICH. Thank you, Mr. Chairman.

I think it is wonderful that we are having this hearing, and I welcome our two Commissioners here this morning. Mr. Jaczko and Mr. Lyons, thank you for being here today.

Mr. Chairman, you and I both take oversight responsibilities of the NRC very seriously. You set the tone, and I am trying to follow in your footsteps. Together, we have held six oversight hearings of the NRC, starting in 1998, when you were Chairman of the Clean Air Climate Change and Nuclear Safety Committee, which I now chair.

An important part of this oversight involves close scrutiny of those individuals who are nominated by the President to lead the Commission. That is why I signed a letter, along with 14 of my colleagues, in November 2004, urging Leader Frist to not confirm the Republican or Democratic nominees to the Commission without a hearing.

Due to Senator Reid's insistence that many other nominees not be confirmed by the Senate until Mr. Jaczko be placed on the Commission, President Bush recess appointed both of you to the Commission. I strongly believe that circumventing this committee and

the Senate is the wrong way to do things, but that is the way it happened.

Mr. Chairman, I thank you for your strong leadership in holding this hearing today. Although the nominees are both already serving on the Commission, I welcome the opportunity to ask them some important questions on the record.

Mr. Jaczko, I signed the letter, not only because of process concerns, but also because of significant questions about your impartiality. We had a wonderful meeting in the office, and I appreciate the time that you spent with me. I am not going to go into all the details. We know what they are.

I would like to say that I am pleased, along with what the Chairman had to say, that the reports are that you have been fair and open as a Commissioner. However, I have been in this business long enough to understand that perception is not often reality.

I look forward to talking with you further about how some of these things, in terms of negative perceptions, can be worked out. I think the most important thing is that your actions speak louder than your words, and I have to say, good job.

You also have agreed to recuse yourself from NRC action on Yucca Mountain for 1 year. Like the Chairman, I would like to talk about some of the details and what that recusal means.

Mr. Lyons, your nomination and confirmation occurred very quickly after the other pending nominee withdrew his name. I am concerned that the speed at which you went through the process did not allow enough time to be fully vetted. I thank you for coming in to meet with me personally. I enjoyed meeting with you, also.

All that being said, I look forward to hearing your words this morning, and having you answer some of our questions. I know this is a special day for your respective families, because of the fact that they are here today. I just want to thank them for the sacrifice that they have made. Mr. Jaczko, you have been through a little bit more than Mr. Lyons.

I know it is really interesting in life. Those of us who are in the business get a lot of flak. And we can take it, because it is part of it. But for our families, it is very difficult. I know my mother, when I was Mayor of the city of Cleveland, chose not to subscribe to the Cleveland Plain Dealer. She just did not. She said, "I just do not want to read it any more, George."

So we thank you for what you have been through. It is harder on the families. So thank you, Mr. Chairman.

[The prepared statement of Senator Voinovich follows:]

STATEMENT OF HON. GEORGE V. VOINOVICH, U.S. SENATOR FROM THE
STATE OF OHIO

Good morning. Mr. Jaczko and Mr. Lyons, thank you for being here today.

Mr. Chairman, you and I both take our oversight responsibilities of the Nuclear Regulatory Commission very seriously. Together, we have held six oversight hearings of the NRC starting in 1998 when you were chairman of the Clean Air, Climate Change, and Nuclear Safety Subcommittee that I now chair.

An important part of this oversight involves close scrutiny of those individuals that are nominated by the President to lead the Commission.

That is why I signed a letter along with 14 of my colleagues in November 2004 urging Majority Leader Frist to not confirm the Republican or Democrat nominees to the Commission without a hearing.

Due to Senator Reid's insistence that many other nominees not be confirmed by the Senate until—you Mr. Jaczko—be placed on the Commission, President Bush

recess appointed both of you. I strongly believe that circumventing this committee and the Senate is the wrong way to do things.

Mr. Chairman, I thank you for your strong leadership in holding this hearing today. Although the nominees are both already serving on the Commission, I welcome the opportunity to ask them some important questions on the record.

Mr. Jaczko, I signed the letter not only because of process concerns but also because of significant questions about your impartiality. As a senior policy advisor to Senator Reid, you worked for several years against important issues that will be or are before the Commission—specifically the licensing of Yucca Mountain as the Nation's nuclear waste repository.

As the Chairman mentioned in his opening statement, I too am pleased with reports that you have been fair and open thus far as a Commissioner. However, I have been in this business long enough to understand that 'perception is often reality'. I look forward to talking with you further about how you will overcome these negative perceptions. Additionally, I understand that you have agreed to recuse yourself from NRC action on Yucca Mountain for 1 year, and I would like to talk to you about the details of that recusal today.

Mr. Lyons, your nomination and confirmation occurred very quickly after the other pending nominee withdrew his name. I am concerned that the speed at which you went through this process did not allow enough time for you to be fully vetted. I thank you for coming in to meet with me recently and look forward to asking you additional questions today.

With all of that being said, I want to look forward. I thank you both and your families for your willingness to serve. The NRC plays a critical role in the welfare of the American public and their number one concern must be safety.

The NRC currently has a very full plate, including:

- Considering license renewals, applications for new plants and power up-rates at existing plants, and the licensing of the Yucca Mountain nuclear waste repository;
- Ensuring public confidence in nuclear power and that nothing like the Davis-Besse incident ever occurs again; and
- Evaluating and strengthening security at the Nation's nuclear plants.

I want to make sure that the NRC has the budget and personnel to get the job done well in all of these areas. I recently met with Chairman Diaz who told me that increases are needed for fiscal year 2006, and I want to hear both of your thoughts on what the Commission needs as well.

While the NRC will be busy, this committee and my subcommittee will also be very busy over the next 2 months on nuclear issues. First, Chairman Inhofe and I introduced three pieces of legislation today on reauthorization of the Price Anderson nuclear insurance program, nuclear security, and reauthorization of the fees that make up a large part of NRC's budget. These bills have all been considered by the committee in the past, and I hope to get them reported out of the committee before June.

Second, I plan to hold the annual NRC oversight hearing when we return from the recess at the end of this month. Third, in May, I am working with Chairman Inhofe to hold a classified hearing on nuclear security.

Mr. Chairman, thank you again for your strong leadership and for holding this important hearing. I look forward to hearing from our witnesses today.

Thank you.

Senator INHOFE. Thank you, Senator Voinovich. I might add, my wife and I, we canceled our subscription to the Tulsa Daily World 25 years ago. So that is a policy.

I want to say this about Senator Voinovich. He is now chairman of the subcommittee that I chaired. There is no one in America more qualified to deal with the air issues and the nuclear issues than he is. He has an extensive background in that.

I will recognize Senator Lautenberg, for an opening statement.

**OPENING STATEMENT OF HON. FRANK R. LAUTENBERG,
U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator LAUTENBERG. Thank you very much, Mr. Chairman. Holding this hearing is very important to me. New Jersey has its problems, which I will talk about.

We have two people before us today, that we are pleased that you bring the capabilities that you each do. Senator Reid, particularly, Mr. Jaczko, appreciated your service; Senator Jack Reid and Senator Harry Reid.

Now that we have that straight, we can get on to the other things. I know that members of the committee and staff are familiar with these nominees. Mr. Jaczko formerly worked for Senator Harry Reid, and Mr. Lyons worked for Senator Domenici. The NRC is rarely in the public spotlight. But its mission is crucial, and will only become more important in the future.

Now my home State gets more than half of its electric power from three nuclear facilities. Nuclear power is vital to the economy of our region.

Mr. Chairman, I cannot help but think about what happened when we closed down two brand-new facilities, one in New Hampshire and one in Long Island. It cost billions of dollars. We were unwilling to accept the presence of these facilities and the locations they were at.

Now we find ourselves leaning far more to the dependence on nuclear facilities than ever before. The main thing that we are concerned about, as we have heard discussions in the Senate and the Congress for a long time, is the fact that nuclear power is vital to the economy of our region. I believe it has the potential for the future as a source of energy that does not produce air pollution, that is common from other power plants.

But public safety must always, always be the No. 1 concern with regard to nuclear power facilities. It is the NRC's job to make sure that public safety is the top priority.

In New Jersey, the public and the Department of Environmental Protection have some safety concerns about our nuclear plants. The Oyster Creek facility, for instance, is the oldest operating nuclear facility in the country. It will be 40 years old when its current license expires in 2009.

There is significant disagreement in my State about whether Oyster Creek should be relicensed. As the time for that decision grows closer, it is absolutely essential that we be able to turn to the NRC for factual, unbiased information.

There are also concerns about the safety issues with two other plants: the Salem and Hope Creek nuclear power plants. Once again, it is up to the NRC to insist that a culture of safety is in place at every nuclear facility.

Now, of course, we have to come up with a safe, feasible solution to the problem of nuclear waste. The newly released report by the National Academy of Sciences raises a red flag about the practice of storing spent fuel rods in pools of water.

Now we all know it is not an easy problem to solve. I am also concerned about the potential for a catastrophe during transport, should all of this stored nuclear waste be moved to one central location.

Dry cask storage may not be a perfect solution. But it might be the best solution that we can find at this time. The question is, can we implement a better solution? If we cannot, should we go forward using nuclear energy and relying on dry cask storage? Without alternatives, we are left in a dilemma that seems unsolvable. The an-

swers to these questions have tremendous implications for our national energy policy, as well as our national security.

So again, Mr. Chairman, I commend you for getting to this hearing. It is long overdue, I think, and I look forward to hearing the views of Mr. Jaczko and Mr. Lyons on these and other matters. Thank you.

Senator INHOFE. Thank you, Senator Lautenberg.

We have been joined by Senator Warner, who is the senior member of this committee. He has requested, Mr. Lyons, that he introduce you. So after his opening remarks and introduction, we will ask each of you to introduce any family that is here before we get started.

Senator Warner.

**OPENING STATEMENT OF HON. JOHN W. WARNER,
U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA**

Senator WARNER. Thank you, Mr. Chairman and colleagues of the committee.

This is indeed an individual who requires no introduction, but he very graciously asked me to do so, and I am privileged to do so. I shall be brief.

This individual is one of the President's nominees to be a Commissioner, as we all know, for the Nuclear Regulatory Commission, but his career is extraordinary. He has been in both public service and scientific world.

He spent almost three decades at Los Alamos National Laboratory. As you know, that is one of our premiere institutions for a wide range of complicated things integral to our security system. He served first as a scientist in the laboratories and nuclear programs, and later as a manager of energy, environment, and industrial partnerships.

In 1997, Dr. Lyons accepted an invitation from our good friend and close colleague, Senator Domenici, to come to Washington and work in his Senate Office. Dr. Lyons worked for Senator Domenici for almost 10 years on issues related to nuclear energy, global and non-proliferation, energy policy, and programs involving the Department of Energy. He may call on you to come back on a sabbatical to get his bill through. It is coming up pretty soon, I think. So maybe we had better move along pretty quickly.

I had the opportunity recently to visit with Dr. Lyons in connection with this new appointment. We discussed concerns we both share about the decline in the number of scientists and engineers who are graduating from colleges and universities in this country, and about the need for nuclear power. I feel very strongly about that.

I very much enjoyed our conversation and meeting. I understand that your lovely wife is here today. I will accede to the Chairman's desire to have you introduce her.

So I strongly recommend to the committee, and then I shall do so to the full Senate, the advice and consent be conferred upon this man, that he be allowed to accept the President's appointment.

Thank you very much.

Senator INHOFE. Thank you, Senator Warner.

If you would like, Mr. Jaczko and Dr. Lyons, to introduce any family who is here, this is the time to do it.

Mr. JACZKO. Actually, I am accompanied by my staff, which I think is my new family.

[Laughter.]

Mr. JACZKO. So I do not have any other family members here.

Mr. LYONS. The only family member who was able to be here today is one of my three sons, David.

Senator INHOFE. Good. David, we welcome you here.

Mr. LYONS. Also there are several members of my staff here. Thank you, sir.

Senator INHOFE. All right, good.

Mr. Jaczko, you may start off with your opening statement. If you want to limit your comments, your entire statement will be placed in the record.

**STATEMENT OF GREGORY B. JACZKO, NOMINATED BY THE
PRESIDENT TO BE A MEMBER OF THE NUCLEAR REGULATORY COMMISSION**

Mr. JACZKO. Thank you, Mr. Chairman. First, I would like to thank Chairman Inhofe and Senator Voinovich for the kind words that you had to say about me in your opening remarks. I do appreciate that very much. I appreciate Chairman Inhofe and other committee members for inviting us here and giving us this opportunity to testify before the Environment and Public Works Committee.

It has been a privilege for me to serve as a Commissioner on the U.S. Nuclear Regulatory Commission since January of this year. I have spent the last 3 months learning about the Agency's processes, programs, and structure. I have had an opportunity to travel to several of our regional offices to visit nuclear power plants, as well as nuclear fuel cycle facilities. I have had an opportunity to visit six different States, as I said, in three of our four regions.

I have made a point of reaching out to various stakeholders in the industry to hear firsthand their views about the impact that the NRC's policies have on licensees in the communities around the Nation. I look forward to continuing to serve the public in my new role. As I said, it is an honor for me to be here today.

As the Nation's regulator of commercial uses of nuclear materials, the NRC serves an important public policy role. Its efforts are defined clearly in its mission statement, which has been developed over several decades through guidance from the Congress and this committee, in particular.

As you know, the mission of the NRC is to license and regulate the Nation's civilian use of nuclear materials, to ensure the adequate protection of public health and safety, common defense and security, and the protection of the environment.

I believe this is a very concise and powerful statement. I see my challenge as a Commissioner is to interpret and put into practice this mission statement in an effective regulatory framework.

I appreciate the important oversight role that this committee has played in the work of the NRC, and I look forward to working closely with the committee to develop and foster that relationship.

I also look forward to building new relationships, and productive and collaborative relationships with the licensees and stakeholder groups to accomplish this goal.

I will pledge that I will work with licensees to ensure the NRC's programs and regulations continue to promote the safety and security of our Nation's nuclear facilities.

The role that Congress, State and local governments, and stakeholders play in this process is very important. The Congress represents the interests of the American people by ensuring the safe and secure use of nuclear materials. I look forward to hearing those views on the issues facing the NRC and ensuring that these concerns are appropriately addressed within the Commission.

I would also like to say that I have been very pleased to work with the NRC staff. Chairman Inhofe, you mentioned the bureaucracy, and I think the NRC is fairly small when it comes to bureaucracy. We have about 3,000 employees. But I have found that it is a very dedicated, very skilled, and very talented group of people, and I have been very fortunate to work with them.

As I said, I have had an opportunity to not only be in our headquarters offices, but also to visit our three regional offices, and see some of the people who are out in the field, which I think is, in some sense, really the face of our Agency.

I will also work to foster a sense of trust and openness between the NRC staff and the Commission. Because I believe that is crucial to our Agency conducting its mission and achieving its mission.

I believe that my background enables me to achieve these goals. I have a Bachelor's Degree and a Doctorate in particle physics. I also had an opportunity to serve as an adjunct professor at Georgetown University.

I have also had the opportunity to work both in the U.S. House of Representatives and here in the Senate, working both for this committee and members who serve on this committee.

My professional life has been devoted to science and its impact on public policy. I see my position as an NRC Commissioner as a logical extension of that path.

The challenges the Agency faces in the years to come are numerous and varied, from integrating safety and security into our nuclear power plant regulatory framework, to ensuring the safe use of nuclear material in medical and industrial applications, to maintaining transparency and openness in our post-September 11th environment.

Openness, specifically, has been a vital focus, at least as far back as the early 1990's, with Chairman Ivan Selin's belief that the Agency should increase its "efforts to reach out to the public at large, to recognize how important public credibility is to the achievement of its regulatory goals." I believe that is just as true today as it was then.

I look forward to delving into these important issues with all my fellow Commissioners, with Commissioner Lyons, the NRC staff, and all interested stakeholders.

I pledge to you to consider the complex policy issues that come before the Commission in a fair, objective, and open-minded manner, based on my scientific and public policy background, and an

awareness of the direct impact that the decisions I make have in our communities and on our licensees.

As I said, I look forward to working closely with this committee, as you provide guidance and direction. I welcome any questions you may have this morning, and I will be responsive to your concerns in the future. Again, I want to thank you for the opportunity to testify today.

Senator INHOFE. Thank you, Dr. Jaczko.

Dr. Lyons.

STATEMENT OF PETER B. LYONS, NOMINATED BY THE PRESIDENT TO BE A MEMBER OF THE NUCLEAR REGULATORY COMMISSION

Mr. LYONS. Thank you, Chairman Inhofe, Senator Carper, Senator Lautenberg, Senator Warner, Senator Voinovich. I thank you very much for the opportunity to testify before your committee. It is an honor and a privilege to appear before you today.

I was greatly honored by my recess appointment by the President to serve on the NRC. After being sworn in on January 25, I have been busy, along with my fellow Commissioners, in deliberations on a variety of issues.

During these few months of NRC service, I have valued the guidance from the three senior members of the Commission, and support from the outstanding and dedicated staff at the NRC.

Nuclear energy is a vital component of our Nation's energy portfolio, providing 20 percent of our Nation's electricity. Nuclear technologies are important to many other industries, and help to underpin our Nation's strong economy, quality of life, and standard of living. But nuclear energy and other nuclear technologies will be utilized only if safety, security, and environmental considerations are addressed to the satisfaction of the public.

The Commission has a vital role with respect to the safety and security of our civilian nuclear plants, fuel cycle facilities, and other civilian applications of nuclear technologies. The challenging and crucial nature of the Commission's decisions is absolutely important on all of these issues.

I want to assure the committee that I am committed to careful evaluation of the facts of each case on which I render a decision. I pledge to you that all decisions I make will be based on the existing laws and regulations and on the merits of each specific case.

I believe that my past experience will be useful in my service on the Commission. My academic training, particularly in nuclear physics at Cal Tech, my three decades at Los Alamos, and my 8 years on Senate staff have prepared me, I believe, for this new role.

I have always viewed national security as a very broad arena, to include our Nation's military, economic, safety, and environmental well-being. Within that broad definition of national security, I have contributed to a very wide range of national security interests, throughout my service at Los Alamos and in the Senate.

I view this service as a Commissioner as another opportunity to contribute to our Nation's security through the NRC's focus on safety, security, and environmental impacts of civilian uses of nuclear technologies.

My experience at Los Alamos provided many lessons relevant to this appointment. At the laboratory, I led and managed very large, complex national security projects with critical deadlines and complex safety issues, involving hundreds of scientists.

During my time on Senate staff, I supported policy deliberations on a wide range of civilian and military nuclear issues.

I will draw on this range of knowledge and experience as I discharge my responsibilities on the Commission.

I look forward to future interactions with this committee. I assure you that I stand ready to respond to any and all inquiries from this committee, and that I welcome guidance from your committee, now and throughout my tenure at the NRC, as I discharge my responsibilities at the Commission. I look forward to answering your questions, and I thank you for the opportunity to appear here today.

Senator INHOFE. Thank you, Dr. Lyons.

The Chair, at this point, would yield to Senator Warner for comments.

Senator WARNER. Just very quickly, Mr. Chairman and members of the committee, I think we are fortunate to have two eminently qualified individuals. Both of you have my strongest support.

Again, Dr. Lyons, I return to the discussions that we had in my office regarding the future of nuclear power. I do not want to go into a great dissertation on this, but I do believe our country has to look at that. You can see the rest of the world moving, in some way, toward greater accessing of nuclear power. Is that not correct? You see it in Europe. You see it in Asia.

Mr. LYONS. Very much so, sir.

Senator WARNER. We simply cannot ignore this opportunity. I want to assure the American public that I take a position of urging consideration of nuclear power, from the standpoint of one who has associated with the Navy basically my entire lifetime. The safety record there is extraordinary; no incidents of any danger to the individuals.

The safety records of nuclear power throughout the world, have there been any incidents recently of harm to individuals in the growing nuclear power industry elsewhere in the world?

Mr. LYONS. To my knowledge, there are no recent significant incidents.

Senator WARNER. To mine, either. So I do hope Americans keep an open mind, as we see our gasoline prices at the pump climb.

You have talked about this, Mr. Chairman, China drawing so much of the world's resources of energy now that we have to look at these alternatives. I thank the Chair and members of the committee.

Senator INHOFE. Well, thank you, Senator Warner, and I agree with all of your comments. We have been joined by Senator Carper.

Senator Carper.

Senator CARPER. Thanks, Mr. Chairman.

Senator Warner mentioned his experience with the Navy. Along with other services in the Armed Forces in our country, he served as the Secretary of the Navy for a number of years.

I think I have shared with him this story. But about 2 years ago, I took our son's Boy Scout troop to Norfolk Naval Station. I do this

about every other year. We visit ships and submarines and aircraft carriers. We sleep in the beds and eat in the galley. It is a lot of fun for them and, frankly, for me and the adults who go along, too.

A couple of years ago when we were there, about 3 years ago now, one of the ships that we visited was the Teddy Roosevelt. It is 1,000 feet long. It is about 30 stories high. When it goes to sea with the Air Wing aboard, there are about 5,000 sailors and 75 aircraft. The Teddy Roosevelt stops to refuel once every 25 years.

Senator WARNER. In other words, those sailors sleep on full reactors.

Senator CARPER. They sleep right on those reactors. You and I have known a number of people who live on reactors on the submarines and aircraft carriers and other ships.

We live in a day when today, close to 60 percent of our oil is imported. We have these huge trade deficits. Nuclear power, while not having a perfect record has, I think, a distinguished record, especially in the U.S. Navy.

Senator WARNER. We might add the pollution factor.

Senator CARPER. Absolutely.

Senator WARNER. We realize with our environment, how hard you are working on cleansing the air, yourself. You are a pioneer now on this committee on the question of clean air. If there is any question about that, nuclear power is a major contributor to our clean air.

Senator CARPER. As we wrestle with multi-pollutant legislation, we do not have to worry about sulphur dioxide emissions from these plants. We do not have to worry about nitrogen oxide, mercury, or CO₂ at all. For us to ignore that kind of potential, we do so at our own peril.

Having said all that, and as one who is an advocate of developing the next generation of nuclear power plants to create some of our electricity, your job, your role, is all the more important.

We have come to, I think, a point in our Nation's history where a lot of people who have been skeptical, dubious, of nuclear energy, because of the safety concerns, what do we do with the waste, and do we have to worry about a Chernobyl or Three Mile Island incident? We always have to be mindful and vigilant that that can happen.

But your jobs are more important than ever. Just at a time when people are willing to take a second look to consider how we might better utilize nuclear power to meet our energy needs, your role is all the more critical and you need to be all the more vigilant. We appreciate your service, and we are glad that you are here today. We look forward to asking you questions. Thank you.

Senator INHOFE. Thank you, Senator Carper.

Senator Obama, we have concluded with opening statements. But if you have one, we would recognize you at this time.

Senator OBAMA. Thank you, Mr. Chairman.

I am happy to wait and participate in the question and answer portion.

Senator INHOFE. All right, sir.

Well, I will go ahead and start. Dr. Jaczko, I could not believe it was you when I walked through that door, with your bright and

shiny smiling face. I could not see any horns. I just am delighted that you are not what I expected.

I think it would be unreasonable for this committee to ask any former staffers to recuse themselves from areas which they have dealt with before, because you have dealt with all areas, both of you have.

I do not think it is unusual, though, that if there is a particular area that you have been committed to, that has been such a topic of conversation, that we would request a recusal.

I understand that you did recuse yourself for a period of 1 year on issues dealing with Yucca Mountain. The only tough question you will get today is, will you continue to recuse yourself for the rest of your service on items dealing with Yucca Mountain?

Mr. JACZKO. Mr. Chairman, to answer that question, I think I want to say, first of all, that I do believe I can be fair and objective on all matters, including Yucca Mountain, that may come before me as a Commissioner. I agreed to recuse myself for 1 year, because I thought it was appropriate given, I believe, the perceptions about my ability to be objective and fair.

My hope is that within 1 year, I will have demonstrated that absolutely I can be fair and objective. My hope is that at the end of my recusal, that the answer to that question will be self-evident, whether or not I need to further recuse myself. But I will certainly continue to discuss with our Office of General Counsel, as well as other members of the Commission, what my appropriate action should be on any matters, including Yucca Mountain, after that recusal.

Senator INHOFE. Well, you know, there is some precedent for this. It was Commissioner Curtis, a few years ago, who had had a very similar association with Seabrook. He did recuse himself, by letter to us, in his tenure of service. So if that is the request I make of you, do I understand that you prefer not to do that?

Mr. JACZKO. I would certainly review that. I am not familiar with all the details of his circumstances, and I will certainly review that with the Office of General Counsel and seek their advice on the similarities with my circumstance.

Senator INHOFE. All right, and to both of you, I think what Senator Warner said certainly speaks for, I think, all of us on this committee. As we look at the energy crisis that we are faced with today, and you see how far we have come in nuclear energy. Yet, we know that, in my opinion, we are going to have to dramatically expand the use of nuclear energy over the coming years.

Now to do this, it is going to mean that you will have to continue the very aggressive record that the NRC has had in granting licenses and renewals and this type of thing. I would just ask each one of you, you have been on the job now, so you are pretty familiar with what resources you have. Do you have the resources to keep up that record, the record to which the Commission has been challenged, in terms of new facilities and expansions?

Mr. JACZKO. I could begin. I certainly think this is something that we are taking a very good look at, in making sure that we do have the resources to do that. I think, right now, we have some uncertainties because we do not have any definite new license applications. I think it makes it, of course, difficult for us to plan and

budget until we have some definite idea of what exactly we may be receiving in terms of new license applications.

So I think we certainly have resource challenges, from a human capital standpoint, which I know this committee has been very, very interested in, and has introduced legislation on those issues. Certainly, maintaining that expertise is an important part of what we need to do to make sure we have the resources and ensure that we are providing the new expertise as members of our staff retire.

Senator INHOFE. OK, very good.

Dr. Lyons, do you have any thoughts on that?

Mr. LYONS. Senator Inhofe, before Commissioner Jaczko and I arrived, the Commission had been demonstrating a very impressive record on license renewals. I believe they have processed about 30 license renewals to date. They have been doing it on a very time-effective, predictable basis. Certainly, I look forward toward continuing that record.

I think I have perhaps two specific comments. While the license renewals are important, I think it is also of substantial interest that in two recent cases, license renewals have been not denied, but returned to the licensee as being inadequate. As we look at license renewals, it is very important that we demand that they maintain the high standards of the ones to date.

On the subject of new reactors, if such applications are submitted, I have a very strong concern, which I have expressed in some Commission meetings, that we are not adequately budgeting for at least what industry is proposing in the way of new license applications. I am concerned about that.

Senator INHOFE. I see.

Senator Lautenberg.

Senator LAUTENBERG. Thank you very much, Mr. Chairman.

It is interesting to see now how the outreach, if I can call it that, for consideration of nuclear power is certainly there.

I would ask this. There have been a couple of notorious failures of plants that were built and never really operated. They were abandoned, finally. One was in New Hampshire. One was in Long Island, and another was in Washington. Each one was a loss of several billion dollars, and several billion dollars at a time when a billion was a lot of money.

The fact of the matter is that there ought to be something in the history of those that tells us about the things that prevented these plants from ever really operating. One, I think, was low power for while, and it eventually shut down.

So I do not know whether either of you are familiar with those situations, or if you are familiar enough to even talk about them at the moment. But if not, I would ask you each to take a look at the history, and see what it is that went wrong.

Dr. Lyons, you know, in my State, over 50 percent now of our energy is created from a nuclear facility. We worry a lot about the safety standards. It is a very crowded State. It is the most densely populated State in the Union. As I mentioned in my opening remarks, the oldest nuclear plant in the country is there at Oyster Creek.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

Docket No. 63-001-HLW

July 9, 2010

CERTIFICATE OF SERVICE

I hereby certify that copies of the State of Washington, State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada's Motion for Recusal/Disqualification and Affidavit of Andrew A. Fitz have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, D.C. 20555-0001

Construction Authorization Board 04

Thomas S. Moore, Chair
tsm2@nrc.gov
Paul S. Ryerson, Administrative Judge
psrl@nrc.gov
Richard E. Wardwell, Administrative Judge
rew@nrc.gov
E. Roy Hawkens
erh@nrc.gov
Paul G. Bollwerk III
gpb@nrc.gov
Anthony C. Eitreich, Esq., Chief Counsel
Anthony.Eitreich@nrc.gov
Daniel J. Graser, LSN Administrator
djg2@nrc.gov

Alan S. Rosenthal
Alan.Rosenthal@nrc.gov
Zachary Kahn, Law Clerk
zxkl@nrc.gov
Matthew Rotman, Law Clerk
matthew.rotman@nrc.gov
Katherine Tucker, Law Clerk
katie.tucker@nrc.gov
Joseph Deucher
joseph.deucher@nrc.gov
Andrew Welkie
axw5@nrc.gov
Jack Whetstone
jgw@nrc.gov
Patricia Harich
patricia.harich@nrc.gov
Sara Culler
sara.culler@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
Washington, D.C. 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, D.C. 20555-0001
Jessica A. Bielecki
Jessica.Bielecki@nrc.gov
Karin Francis, Paralegal
kxf4@nrc.gov
Adam Gendelman, Esq.
adam.gendelman@nrc.gov
Joseph S. Gilman, Paralegal
jsg1@nrc.gov
Daniel W. Lenehan, Esq.
daniel.lenehan@nrc.gov
Andrea L. Silvia, Esq.
alc1@nrc.gov
Mitzi A. Young, Esq.
may@nrc.gov
Marian L. Zabler, Esq.
mlz@nrc.gov
ogcmailcenter@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001
Rebecca Giiter
rll@nrc.gov
OCA Mail Center
ocaamail@nrc.gov

Office of General Counsel
1551 Hillshire Dr.
Las Vegas, NV 89134-6321
Jocelyn M. Gutierrez, Esq.
jocelyn.gutierrez@ymp.gov
Josephine L. Sommer, Paralegal
josephine.sommer@ymp.gov

U.S. Department of Energy
Office of General Counsel
1000 Independence Ave. S.W.
Washington, DC 20585
Sean A. Lev, Esq.
sean.lev@hq.doe.gov
Martha S. Crosland, Esq.
martha.crosland@hq.doe.gov
Nicholas P. DiNunzio, Esq.
nicholas.dinunzio@hq.doe.gov
James Bennett McRae
ben.mcrae@hq.doe.gov
Cyrus Nezhad, Esq.
cyrus.nezhad@hq.doe.gov
Christina C. Pak, Esq.
christina.pak@hq.doe.gov

Counsel for U.S. Department of Energy
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
Clifford W. Cooper, Paralegal
cwcooper@morganlewis.com
Lewis M. Csedrik, Esq.
lcsedrik@morganlewis.com
Jay M. Gutierrez, Esq.
jgutierrez@morganlewis.com
Raphael P. Kuyler, Esq.
rkuyler@morganlewis.com
Charles B. Moldenhauer, Esq.
cmoldenhauer@morganlewis.com
Thomas D. Poindexter, Esq.
tpoindexter@morganlewis.com
Alex S. Polonsky, Esq.
apolonsky@morganlewis.com
Thomas A. Schmutz, Esq.
tschmutz@morganlewis.com
Donald J. Silverman, Esq.
dsilverman@morganlewis.com
Shannon Staton, Legal Secretary
ssaton@morganlewis.com
Annette M. White, Esq.
annette.white@morganlewis.com
Paul J. Zaffuts, Esq.
pzaffuts@morganlewis.com
Hunton & Williams LLP
Riverfro Plaza, East Tower
951 East Byrd St.
Richmond, VA 23219
Kelly L. Faglioni, Esq.
kfaglioni@hunton.com
Donald P. Irwin, Esq.
dirwin@hunton.com
Stephanie Meharg, Paralegal
smeharg@hunton.com
Micahel R. Shebelskie, Esq.
mshebelskie@hunton.com
Belinda A. Wright, Sr. Professional Asst.
bwright@hunton.com

For U.S. Department of Energy
USA-Repository Services LLC
Yucca Mountain Project Licensing Group
1160 N. Town Center Dr., Suite 240
Las Vegas, NV 89144
Stephen J. Cereghino
stephen_cereghino@ymp.gov

For U.S. Department of Energy
Tailsman International, LLC
1000 Potomac St., NW, Suite 300
Washington, DC 20007
Patricia Larimore
plarimore@talisman-intl.com

Counsel for State of Nevada
Egan, Fitzpatrick, Malsch & Lawrence, PLLC
1750 K St. N.W., Suite 350
Washington, D.C. 20006
Martin G. Malsch, Esq.
mmalsch@nuclearlawyer.com
Susan Montesi
smontesi@nuclearlawyer.com

Egan, Fitzpatrick, Malsch & Lawrence PLLC
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
Charles J. Fitzpatrick, Esq.
cfitzpatrick@nuclearlawyer.com
John W. Lawrence, Esq.
jlawrence@nuclearlawyer.com
Laurie Borski, Paralegal
lborski@nuclearlawyer.com

Counsel for Lincoln County, Nevada
Whipple Law Firm
1100 S. Tenth St.
Las Vegas, NV 89017
Annie Bailey, Legal Assistant
baileys@lcturbonet.com
Adam L. Gill, Esq.
adam.whipplelaw@yahoo.com
Eric Hinckley, Law Clerk
erichinckley@yahoo.com
Bret Whipple, Esq.
bretwhipple@nomademail.com

Lincoln County Nuclear Oversight Program
P.O. Box 1068
Caliente, NV 89008
Connie Simkins, Coordinator
jcciac@co.lincoln.nv.us

Bureau of Government Affairs
Nevada Attorney General
100 N. Carson St.
Carson City, NV 89701
Marta Adams, Chief Deputy Attorney General
madams@ag.nv.gov

Nevada Agency for Nuclear Projects
Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706
Steve Frishman, Tech. Policy Coordinator
steve.frishman@gmail.com
Susan Lynch, Administrator of Technical Programs
slynch1761@gmail.com

Lincoln County District Attorney
P.O. Box 60
Pioche, NV 89403
Gregory Barlow, Esq.
lceda@lcturbonet.com

For Lincoln County, Nevada
Intertech Services Corporation
P.O. Box 2008
Carson City, NV 89702
Mike Baughman, Consultant
mikebaughman@charter.net

Counsel for Nye County Nevada
Jeffrey D. VanNiel, Esq.
530 Farrington Court
Las Vegas, NV 89123
nbrjdvn@gmail.com

Nye County Regulatory/Licensing Advisor
18160 Cottonwood Rd. #265
Sunriver, OR 97707
Malachy R. Murphy, Esq.
mrmurphy@chamerscable.com

Nye Co. Nuclear Waste Repository
Project Office
2101 E. Calvada Blvd., Suite 100
Pahrump, NV 89048
Zoie Choate, Secretary
zchoate@co.nye.nv.us
Sherry Dudley Admin. Technical Coordinator
sdudley@co.nye.nv.us

Counsel for Nye County, Nevada
Ackerman Senterfitt
801 Pennsylvania Ave. NW #600
Washington, DC 20004
Robert Andersen, Esq.
robert.andersen@akerman.com

Counsel for Eureka County, Nevada
Harmon, Curran, Speilberg & Eisenberg, LLP
1726 M. St. NW, Suite 600
Washington, DC 20036
Diane Curran, Esq.
dcurran@harmoncurran.com
Mathew Fraser, Law Clerk
mfraser@harmoncurran.com

Nuclear Waste Advisory for Eureka
County, Nevada
1983 Maison Way
Carson City, NV 89703
Abigail Johnson, Consultant
eurekanrc@gmail.com

Eureka County, Nevada
Office of the District Attorney
701 S. Main St., Box 190
Eureka, NV 89316-0190
Theodore Beutel, District Attorney
tbeutel.ecda@eurekanv.org

Eureka County Public Works
P.O. Box 714
Eureka, NV 89316
Ronald Damele, Director
rdamele@eurekanv.org

For Eureka County, Nevada
NWOP Consulting, Inc.
1705 Wildcat Lane
Ogden, UT 84403
Loreen Pitchford, Consultant
lpitchford@comcast.net

Clark County Nevada
500 S. Grand Central Parkway
Las Vegas, NV 98155
Phil Klevorick, Sr. Mgmt Analyst
klevorick@co.clar.nv.us
Elizabeth A. Vibert, Deputy District Attorney
elizabeth.vibert@ccdanv.com

Counsel for Clark County, Nevada
Jennings, Strauss & Salmon
8330 W. Sahara Ave., #290
Las Vegas, NV 89117
Bryce Loveland, Esq.
bloveland@jsslaw.com
1350 I St. NW, Suite 810
Washington, DC 20005-3305
Elene Belte, Legal Secretary
ebelete@jsslaw.com
Alan I. Robbins, Esq.
arobbins@jsslaw.com
Debra D. Roby, Esq.
drobby@jsslaw.com

Mineral County Nuclear Projects Office
P.O. Box 1600
Hawthorne, NV 89415
Linda Mathias, Director
yuccainfo@mineralcountynv.or

White Pine County, Nevada
Office of the District Attorney
801 Clark St., #3
Ely, NV 89301
Richard Sears, District Attorney
rwsears@wpcda.org

For White Pine County, Nevada
Intertech Services Corporation
P.O. Box 2008
Carson City, NV 89702
Mike Baughman, Consultant
bigboff@aol.com

Inyo County Yucca Mountain Repository
Assessment Office
P.O. 367
Independence, CA 93526-0367
Alisa M. Lembke, Project Analyst
alembke@inyocounty.us

Esmeralda County Repository Oversight Program
Yucca Mountain Project
P.O. Box 490
Goldfield, NV 89013
Edwin Mueller, Director
muellered@msn.com

Counsel for Churchill, Esmerald, Lander,
and Mineral Counties, Nevada
Armstrong Teasdale, LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237
Jennifer A. Gores, Esq.
jgores@armstrongteasdale.com
Robert F. List, Esq.
rlist@armstrongteasdale.com

For City of Caliente, Lincoln County,
and White Pine County, Nevada
P.O. Box 126
Caliente, NV 89008
Jason Pitts, LSN Administrator
jayson@idtservices.com

White Pine County Nuclear Waste Project Office
959 Campton St.
Ely, NV 89301
Mike Simon, Director
wpnucwst1@mwpower.net
Melaine Martinez, Sr. Management Assistant
wpnucwst2@mwpower.net

Counsel for Inyo County, California
Greg James, Attorney at Law
710 Autumn Leaves Circle
Bishop, CA 93514
gjames@earthlink.net
Law Office of Michael Berger
479 El Sueno Rd.
Santa Barbara, CA 93110
Michael Berger, Esq.
michael@lawofficeofmichaelberger.com
Robert Hanna, Esq.
robert@lawofficeofmichaelberger.com

Nuclear Energy Institute
Office of the General Counsel
1776 I St. NW, Suite 400
Washington, DC 20006-3708
Michael A. Bauser, Esq.
mab@nei.org
Anne W. Cottingham, Esq.
awc@nei.org
Ellen C. Ginsberg, Esq.
ecg@nei.org

Counsel for Nuclear Energy Institute
Pillsbury Winthrop Shaw Pittman LLP
2300 N St. N.W.
Washington, DC 20037-1122
Jay E. Silberg, Esq.
jay.silberg@pillsburylaw.com
Timothy J.V. Walsh, Esq.
timothy.walsh@pillsburylaw.com
Maria D. Webb, Senior Energy Legal Analyst
maria.webb@pillsburylaw.com
Winston & Strawn LLP
1700 K St. NW
Washington, DC 20006-3817
William A. Horin, Esq.
whorin@winston.com
Rachel Miras-Wilson, Esq.
rwilson@winston.com
David A. Repka, Esq.
drepka@winston.com
Carlos L. Sisco, Senior Paralegal
csisco@winston.com

California Energy Commission
1516 Ninth St.
Sacramento, CA 95814
Kevin W. Bell, Senior Staff Counsel
kwbell@energy.state.ca.us

C

California Department of Justice
Office of the Attorney General
1300 I St., P.O. Box 944255
Sacramento, CA 94244-2550
Susan Durbin, Deputy Attorney General
susan_durbin@doj.ca.gov
Michele Mercado, Analyst
michele.mercado@doj.ca.gov
1515 Clay St., 20th Floor
P. O. Box 70550
Oakland, CA 94612-0550
Timothy E. Sullivan, Deputy Attorney General
timothy.sullivan@doj.ca.gov
300 South Spring St., Suite 1702
Los Angeles, CA 90013
Brian W. Hembacher, Deputy Attorney General
brian.hembacher@doj.ca.gov

Native Community Action Council
P.O. Box 140
Baker, NV 89311
Ian Zabarte, Member of Board of Directors
mrizabarte@gmail.com

Counsel for Native Community Action Council
Alexander, Berkey, Williams & Weathers LLP
2030 Addison St., Suite 410
Berkeley, Ca 94704
Curtis G. Berkey, Esq.
cberkey@abwwlaw.com
Rovianne A. Leigh, Esq.
rleigh@abwwlaw.com
Scott W. Williams, Esq.
swilliams@abwwlaw.com

Counsel for Joint Timbisha Shoshone
Tribal Group
Fredericks, Peebles & Morgan LLP
1001 Second St.
Sacramento, CA 95814
Felicia M. Brooks, Data Administrator
fbrooks@ndnlaw.com
Ross D. Colburn, Law Clerk
rcolburn@ndnlaw.com
Sally Eredia, Legal Secretary
seredia@ndnlaw.com
Darcie L. Houck, Esq.
dhouck@ndnlaw.com
Brian Niegemann, Office Manager
bniegemann@ndnlaw.com
John M. Peebles, Esq.
jpeebles@ndnlaw.com
Robert Rhoan, Esq.
rrhoan@ndnlaw.com
3610 North 163rd Plaza
Omaha, NE 68116
Shane Thin Elk, Esq.
sthinelk@ndnlaw.com
Godfrey & Kahn, S.C.
One East Main St., Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Julie Dobie, Legal Secretary
jdobie@gklaw.com
Steven A. Heinzen, Esq.
sheinzen@gklaw.com
Douglas M. Poland, Esq.
dpoland@gklaw.com
Hanna L. Renfro, Esq.
hrenfro@gklaw.com
Jacqueline Schwartz, Paralegal
jschwartz@gklaw.com

Godfrey & Kahn, S.C.
780 N. Water St.
Milwaukee, WI 53202
Arthur J. Harrington, Esq.
aharrington@gklaw.com

For Joint Timbisha Shoshone Tribal Group
3560 Savoy Boulevard
Pahrump, NV 89601
Joe Kennedy, Executive Director
joekennedy08@live.com
Tameka Vazquez, Bookkeeper
purpose_driven12@yahoo.com

Counsel for State of South Carolina
Davidson & Lindemann, P.A.
1611 Devonshire Dr., 2nd Floor
P.O. Box 8568
Columbia, SC 29202
Kenneth P. Woodington
kwoodington@dml-law.com

Counsel for Aiken County, South Carolina
Haynesworth Sinkler Boyd, PA
1201 Main Street, Suite 2200
P.O. Box 11889
Columbia, SC 29211-1889
Thomas R. Gottshall
tgottshall@hsblawfirm.com
Ross Shealy
rshealy@hsblawfirm.com

Counsel for Prairie Island Indian Community
Public Law Resource Center PLLC
505 N. Capitol Avenue
Lansing, MI 48933
Don L. Keskey
donkeskey@publiclawresourcecenter.com

Counsel for National Association of Regulatory Utility
Commissioners (NARUC)
1101 Vermong Avenue, Suite 200
Washington, DC 20005
James Ramsay
jramsay@naruc.org
Robin Lunt
rlunt@naruc.org

ROBERT M. MCKENNA
Attorney General

Signed (electronically) by Andrew A. Fitz

ANDREW A. FITZ

TODD R. BOWERS

Senior Counsel

MICHAEL L. DUNNING

H. LEE OVERTON

JONATHAN C. THOMPSON

Assistant Attorneys General

State of Washington, Office of the Attorney General

PO Box 40117

Olympia, WA 98504-0117

(360) 586-6770

andyf@atg.wa.gov

toddb@atg.wa.gov

michaeld@atg.wa.gov

leeol@atg.wa.gov

jonat@atg.wa.gov