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

October 8, 2010

OFFICE OF THE
COMMISSIONER

MEMORANDUM TO: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood

FROM: Commissioner Ostendorff

SUBJECT: DISAGREEMENT WITH STAFF BUDGET GUIDANCE UNDER FISCAL YEAR 2011 CONTINUING RESOLUTION

The purpose of this memorandum is to record my disagreement with guidance given to the NRC Staff related to the fiscal year 2011 Continuing Resolution (CR). The contents of this memorandum are consistent with a memorandum to file I signed on October 6, 2010.

On October 4, 2010, the EDO and CFO issued a memorandum to the Staff providing direction on the fiscal year 2011 Continuing Resolution. This memorandum stated that "[w]ith respect to the High-Level Waste Program, the CR legislation does not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the fiscal year 2011 budget request using available Nuclear Waste Fund resources during the CR." On October 6, 2010, I issued COMWCO-10-0002 for the Commission's consideration to provide specific direction to the staff with respect to this guidance, but I wanted to write separately to express my strong personal disagreement with the direction given to the Staff by this guidance.

I believe it is inconsistent with the intent of the Continuing Resolution to direct the Staff to follow direction in the budget request for fiscal year 2011. My conclusion comes not only from a plain reading of the Continuing Resolution and applicable guidance, but also from my past experience as Principal Deputy Administrator at NNSA and as counsel for the House Armed Services Committee. With respect to the fiscal year 2011 Continuing Resolution, Section 101 expressly provides that the funds to be appropriated are those "as provided in the applicable appropriations Act <u>for fiscal year 2010</u> and under the authority and conditions provided in such Acts, for continuing projects or activities ... that are <u>not otherwise specifically provided for in this Act</u>...." (emphasis added). Absent any express exception in the Continuing Resolution, the NRC is obligated to follow its fiscal year 2010 budget ... including any Commission direction contained in that budget. The Continuing Resolution does not specifically provide for the NRC to follow its yet-to-be-approved fiscal year 2011 budget request, nor does it even specifically mention the NRC or the High-Level Waste repository review. Thus, under the express language of the Continuing Resolution, special treatment for this activity is "not otherwise specifically provided for." A basic canon of statutory construction is *expressio unius est exclusio alterius*: the express mention of one thing excludes all others. Congress expressly outlined all of the exceptions to the general rule in Section 101 that agencies should follow their fiscal year 2010 budgets, and the NRC's High-Level Waste Program is not one of those exceptions, therefore

making the fiscal year 2010 budget direction operable.

Further, Section 104 of the Continuing Resolution states that "except as otherwise provided in Section 102, no appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2010." This prohibition reinforces the view that the NRC is to stay the course with respect to how it was undertaking projects or activities during the Continuing Resolution. The Commission's fiscal year 2010 budget specifies that fiscal year 2010 funds will be used to "support the ongoing license review by funding the NRC staff conducting technical license application review activities...." I strongly object to using funds during the Continuing Resolution for a reason inconsistent with this stated purpose, such as "orderly closure" of the licensing review. Commencing orderly closure is not, in my opinion, "conducting technical license application review activities," and therefore is entirely inconsistent with the intent of the Continuing Resolution.

In addition to a plain reading of the Continuing Resolution, this view is also supported by guidance from the Office of Management and Budget (OMB). Section 123 of OMB Circular A-11, for example, states that normally, "the continuing resolution limit[s] the purposes for which funds may be obligated." Circular A-11 goes on to explain that "[a] CR makes amounts available subject to the same terms and conditions specified in the enacted appropriations acts from the prior fiscal year.... Normally, you are **not** permitted to start new projects or activities." (emphasis in original). Therefore, it is my opinion that under the Continuing Resolution the staff should continue to follow the Commission's direction in the fiscal year 2010 budget as authorized and appropriated by Congress, rather than change course as suggested in the Continuing Resolution guidance memorandum.

The relevance of the fiscal year 2011 budget request is limited to determining the rate at which the programs and activities are to be funded during the Continuing Resolution, not to determine that the programs and activities should be conducted in accordance with direction that is contained in the fiscal year 2011 budget request. To the extent that budget direction in the fiscal year 2011 budget request should be followed (a position I do not agree with), the conditions in that budget request that would authorize "orderly closure" have not been met. The fiscal year 2011 budget request clearly states that such closure would not begin until "withdrawal or suspension of the licensing review...." Since the issue of whether the application may be withdrawn is currently before the Commission and a final decision has not been rendered, that condition clearly has not been met.

cc: EDO
CFO
OGC
SECY
OCAA