

NO. 10-1050, 10-1052, 10-1069, 10-1082 *Consolidated*

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10-1050

IN RE AIKEN COUNTY, Petitioner

No. 10-1052

ROBERT L. FERGUSON, *et al.*, Petitioners,

v.

BARACK OBAMA, President of the United States, *et al.*, Respondents.

No. 10-1069

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

No. 10-1082

STATE OF WASHINGTON, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

**PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION
TO MOTION TO LIFT STAY AND SET EXPEDITED
BRIEFING SCHEDULE**

The consolidated Petitioners provide this reply to the Respondents' response filed October 12, 2010. For the reasons presented in Petitioners' September 28, 2010, Corrected Motion to Lift Stay and Set Expedited Briefing Schedule (Petitioners' Motion), as buttressed by events occurring over the past week, this Court should lift its July 28, 2010, stay and re-establish an expedited briefing schedule as outlined in Petitioners' Motion.

Petitioners respectfully request that the Court give this matter expedited consideration, as the Respondents, and in particular now the Nuclear Regulatory Commission (NRC), are following a course that does far more than administratively suspend the Yucca Mountain project. Respondents' actions flaunt this Court's authority and render hollow Congress' express direction that Petitioners are entitled to *judicial* review of Respondents' illegal conduct.

I. SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners provide the following supplement to their previously-submitted Statement of the Case. *See* Petitioners' Motion at 1-6. In short, the NRC has now terminated its technical review of the Department of Energy's (DOE) Yucca Mountain license application and begun an "orderly closure" of its programs to review and adjudicate DOE's application. This termination has occurred despite the fact that the Commission¹ still has pending before it, and has taken no action on, the June 29, 2010, decision of the NRC's Atomic Safety and Licensing Board (Board). That decision denies DOE's motion to withdraw its application based on

¹ For purposes of this Reply, "Commission" means the NRC Commissioners acting as an adjudicatory body.

the plain terms of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. §§ 10101-10270.

On October 6, 2010, media reports surfaced indicating that at the purported direction of Commission Chairman Gregory Jaczko,² the NRC staff had been directed to terminate its review of DOE's Yucca Mountain license application and close down its work. Steve Tetreault, *Yucca Project Review Halted—NRC Chief Tables Viability Study of Nuclear Waste Site*, Las Vegas Review-Journal, Oct. 6, 2010 (attached hereto as Exhibit A). Up to this point, the NRC staff has continued in its administrative review of DOE's application.³ In August 2010 NRC staff issued the first of five expected "Safety Evaluation Reports" on DOE's application.⁴ According to press accounts, another Safety Evaluation Report—this one relating to the key issue of post-closure safety of the proposed facility—is already in draft form and has been undergoing internal review. See Ex. A; Elaine Hiruo, *US NRC Chairman Killed Key Yucca Report Month Before Release Date*, platts.com, Oct. 7, 2010 (attached hereto as Exhibit C).

² The Chairman is the principal executive officer for the Commission. See, e.g., 42 U.S.C. § 5841(a)(2). Chairman Jaczko was formerly appropriations director and chief science advisor to United States Senate Majority Leader Senator Harry Reid of Nevada, who leads the opposition to Yucca Mountain. See <http://www.nrc.gov/about-nrc/organization/commission/jaczko.html>.

³ This technical review occurs in parallel with, but outside of, the adjudicatory hearing before the NRC's Atomic Safety and Licensing Board. See Nuclear Regulatory Commission, Congressional Budget Justification (Feb. 2010) at 94 (attached hereto as Exhibit E).

⁴ Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada, Vol. 1: General Information (Aug. 2010) (Abstract attached hereto as Exhibit B).

Petitioners have obtained an October 4, 2010, memorandum directing this termination. *See* Memorandum to Office Directors and Regional Administrators, Oct. 4, 2010 (attached hereto as Exhibit D). The memorandum discusses the NRC's current budget execution in light of the fact the agency is now operating under a Congressional Continuing Resolution.⁵ *See* Ex. D at 1.

Despite budget authority to continue with license review,⁶ the memorandum nevertheless dictates that NRC staff should proceed with activities on the Yucca Mountain license application "in accordance with the Commission's decisions on the FY 2011 budget." Ex. D at 2. The NRC's proposed FY 2011 budget reflects drastic cuts to its Yucca Mountain work based on the assumption of DOE's license withdrawal.⁷ For FY 2011, the NRC has requested only \$10 million (a decrease of \$13.7 million) and 32 full-time positions (a decrease of

⁵ Congress has not yet acted on the NRC's proposed budget for Fiscal Year (FY) 2011, which began on October 1, 2010.

⁶ Under the Continuing Resolution, "[f]unding availability is based on the previous fiscal year appropriated level augmented by unobligated carryover . . ." Ex. D at 1. With specific respect to the NRC's High-Level Waste program, the memorandum indicates that "the [Continuing Resolution] legislation *does not include specific restrictions on spending funds.*" Ex. D at 2 (emphasis added).

⁷ The plain language of the NRC's proposed budget links termination of license review to the actual withdrawal (or suspension) of DOE's license:

The Administration has indicated that it does not support developing a repository at Yucca Mountain, Nevada. Consistent with that position, DOE may submit to the NRC a motion to withdraw or suspend its Yucca Mountain license application during FY 2010. The NRC Budget reflects that possibility. *Upon the withdrawal or suspension of the licensing review, the NRC would begin an orderly closure of the technical review and adjudicatory activities and would document the work and insights gained from the review.*

Ex. E at 94 (emphasis added).

more than 55 positions), with these resource levels proposed to “support work related to the orderly closure of the agency’s Yucca Mountain licensing support activities.” Ex. E at 95.

At this point, of course, there *is* no withdrawal of DOE’s license. In fact, there is an outright denial of such withdrawal per the Board’s June 29, 2010, decision. While the Commission itself requested (and received) briefing in early July concerning “whether the Commission should review, and reverse or uphold, the Board’s decision,” the Commission has yet to even indicate whether it will take interlocutory review of that decision.

The October 4 memorandum was challenged by Commissioner William Ostendorff. On October 6, 2010, Commissioner Ostendorff circulated a memorandum to his fellow Commissioners requesting that they give further direction to NRC staff “to ensure that the Staff has clear guidance on how to operated under the Continuing Resolution.” Ostendorff Memorandum, Oct. 6, 2010 (attached hereto at Exhibit F). Commissioner Ostendorff argued that termination of the license review is “a significant policy matter” that “warrants the Commission’s attention.” Ex. F. He further argued that NRC staff should continue its efforts regarding the license application. *Id.*

In a second memorandum dated October 8, 2010, Commissioner Ostendorff reiterated that the NRC staff’s review of the license application should continue because “the issue of whether the application may be withdrawn is currently before the Commission . . .” Ostendorff Memorandum, Oct. 8, 2010 (attached hereto as Exhibit G). He further argued that under the language of both

the Continuing Resolution and the NRC's proposed FY 2011 budget, nothing justified termination of the NRC's Yucca Mountain work. *See* Ex. G.

On October 14, 2010, Commissioner Kristine Svinicki voted in favor of Commissioner Ostendorff's proposal to send a supplemental memorandum to NRC staff. Commissioner Svinicki's Comments on COMWCO-10-0002, Oct. 14, 2010 (attached hereto as Exhibit H). In attached comments, Commissioner Svinicki agreed that nothing in the Continuing Resolution or the NRC's proposed FY 2011 budget justified termination of the NRC's licensing activities. *See* Ex. H. She also declared that the termination of these activities is "a significant policy matter warranting Commission deliberation." Ex. H.

However, no such Commission deliberation occurred. On October 14, the NRC Secretary issued an order stating that Commissioner Ostendorff's proposal was "not approved" because "[a] majority of the Commission declined to participate in this matter." NRC Secretary Memorandum to Commissioner Ostendorff, Oct. 14, 2010 (attached hereto as Exhibit I). Thus, without a vote of the Commission, and with the matter of the Board's denial of license withdrawal still pending without action before the Commission, the NRC has terminated its review of the Yucca Mountain license application.

II. ARGUMENT

Petitioners' Motion sets forth the basis for lifting the current stay and re-setting an expedited case schedule. In short, the basis for stay (waiting on pending Commission action) has proven illusory. In the interim, Respondents continue to dismantle the very thing Petitioners are fighting to preserve. *See*

Petitioners' Motion at 6-9. In Petitioner's September 27, 2010, Status Report, Petitioners pointed out how DOE was continuing to dismantle the project in complete disregard of the Board order. The NRC's recent actions demonstrate that the NRC is in league with DOE, underscoring the justification for restoring expedited consideration.

Respondents' briefing suggests that the NRC Respondents "take no position in this Court on the merits of DOE's motion to withdraw or on related DOE activities." Respondents' Response in Opposition to Petitioners' Motion to Lift Stay and Set Expedited Briefing Schedule (Respondents' Resp.) at 3, n.4. The NRC, however, has displayed no such reserve in acting 180-degrees inapposite of the Board's decision. At the same time the Commission is purportedly "actively considering" the Board's decision, Respondents' Resp. at 6, the NRC is moving full steam ahead to terminate staff review of DOE's application.

These actions amount to a *de facto* reversal of the Board's decision at the same time this Court is waiting on the Commission to formally act on the Board's order. The termination of the NRC staff's license review in the face of the Board's unanimous order denying withdrawal necessarily repudiates the Board's decision, which is based not only on DOE's duties under the NWPAA, but the NRC's own duties to review the license application. *See, e.g.*, U.S. Department of Energy, ASLBP No. 09-892-HLW-CAB04 (June 29, 2010) (Memorandum and Order) at 5 ("we conclude that Congress directed both that DOE file the Application (as DOE concedes) *and that the NRC consider the Application and*

issue a final, merits-based decision approving or disapproving the construction authorization application”) (emphasis added).

Given these circumstances, it borders on the disingenuous for the Respondents to suggest that the Board’s decision “effectively grants Petitioners relief on its primary claim.” Respondents’ Resp. at 4.⁸ Having a favorable result on paper means nothing if there is no actual license review, and no Yucca Mountain project moving forward.

Further, it is also erroneous for Respondents to suggest that Petitioners will suffer no irreparable harm in waiting to see if the Commission will eventually act on the Board’s order. The practical reality, which is fully realized by both DOE and the NRC, is that once dismantled, it will be appreciably more difficult (if not impossible) to re-start the Yucca Mountain project than to continue with the current program. This is true even if the Petitioners prevail before this Court. Under Respondents’ logic, a preliminary injunction to stay the logging of an ancient forest would never issue based on the fact that it is theoretically possible for a new forest to eventually grow. There is no guarantee, however, that *any* forest will re-grow to replace the one demolished. Even if a new forest does grow, it will never be the *same* forest as the one erased by defendant’s actions. The existing forest will be irreparably lost.

Currently, the NRC has qualified staff already in place to review DOE’s application. Congress has appropriated funds for that review. The review is in

⁸ Alternatively, Respondents’ counsel are not being given complete information by their own client.

full progress. The staff has already issued one Safety Evaluation Report and is reportedly close to issuing a second.

Respondents represent that if a Commission or court decision requires the license application to continue, it is possible to “reassemble [a] workforce and resume activities, provided Congress appropriates funds.” Respondents’ Resp. at 11. However, just like the example of the ancient forest, this theoretical “possibility” cannot restore Petitioners to their current status. An existing license review process *today* will have been lost, replaced by the *possibility* of a license review process *if* the NRC can reassemble the human and budgetary resources that are already in place today.

All of the above reinforces the points made in Petitioners’ Motion. The NRC’s action to affirmatively terminate license review further underscores the Commission’s continued *inaction* with respect to the Board’s order, upon which this Court is waiting.

Furthermore, irrespective of whether the Commission upholds the Board’s decision, Petitioners still have a robust claim before this Court challenging what DOE has already done to terminate its broader project to develop the Yucca Mountain repository. DOE’s Yucca Mountain project has already been dismantled in a “concrete way,” independent of any action the Commission might take and beyond the scope of any effective relief the Commission can provide against its sister federal agency. And now, the NRC has terminated its own

staff's license review program in a concrete way, without regard to the adjudicative issue pending before it.⁹

Given this, it is impossible to fathom how further waiting on review by the Commission can “crystallize, narrow, or even wholly eliminate” issues before this Court. Given the NRC's actions, there is nothing left to crystallize. The decision of the Chairman, as implicitly or explicitly supported by a majority of the Commission on October 14, constitutes a final action determining that the NRC has no further obligation to continue with its license review. It is therefore reviewable under the NWPA. *See, e.g., Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701-02 (D.C. Cir. 1971) (substance of action means it is, in reality, the 'final' action of agency); *Am. Fed'n of Gov't Employees, AFL-CIO v. O'Connor*, 747 F.2d 748, 753 n.10, (D.C. Cir. 1984).

In order for the Court to preserve its authority to grant effective relief, the need for a swift judicial resolution remains intact and justifies expedited review. While Respondents assert that this Court has already determined that “no irreparable harm” justifies a preliminary injunction against DOE, Respondents wholly ignore the fact that this Court already ordered expedited consideration of

⁹ Respondents continue to wrongly insist that the scope of these consolidated cases is restricted to the narrow issue of whether or not DOE may withdraw its license application. While that narrow issue is indeed raised, the consolidated petitions go beyond this issue to raise the broader question of whether, based on Congress' approval of the Yucca Mountain repository site, both DOE and the NRC are compelled by the NWPA to move forward with the licensing process, and whether DOE is obliged to plan for and continue developing Yucca Mountain as a presumptive repository.

this case based on the pace of DOE's termination activities, as well as the national importance of the future of the Yucca Mountain project.

The NRC's recent actions only amplify this justification. A swift resolution by this Court will provide direction to DOE and the NRC, provide certainty to Congress in making decisions with respect to the pending budget requests of DOE and the NRC, and—if the Petitioners are successful—provide relief to the Petitioners while there is still some opportunity for the Yucca Mountain program to be reasonably reconstructed. It is one thing for Respondents to claim they can break an egg and put it back together, a proposition starkly at odds with reality. At this point, however they have not only broken the egg, but have cooked it and are in the process of eating it before this Court can review the legality of their actions. In this case, justice delayed is truly justice denied.

III. CONCLUSION

The basis advanced by Respondents in persuading the Court to vacate expedited consideration and instead indefinitely hold this case in abeyance is illusory, as demonstrated by the continued inaction of the Commission with respect to the Board's decision and the affirmative action by the Commission to terminate the NRC's review of Yucca Mountain application. The issues involved in this matter are of paramount national importance. The Petitioners again respectfully request that the Court lift its current stay of case and impose the expedited briefing schedule set forth in Petitioners' Motion.

RESPECTFULLY SUBMITTED this 15th day of October, 2010.

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Yucca project review halted

NRC chief tables viability study of nuclear waste site

By STEVE TETREAU
STEPHENS WASHINGTON BUREAU

WASHINGTON -- The chairman of the Nuclear Regulatory Commission tossed water on the embers of the Yucca Mountain project this week, directing agency scientists to halt a formal review of the nuclear waste site.

The guidance by NRC Chairman Gregory Jaczko could hasten a final chapter on the nuclear repository program, whose personnel have dispersed and whose offices in Las Vegas and Washington were shut down as of Oct. 1.

The move was applauded by Nevada federal and state officials eager to see the nuclear program ended. But it has raised hackles in other states and among industry groups, and attorneys said it could add fuel to the ongoing legal battles over the project's remains.

The commissioners who lead the nuclear safety body have not yet ruled on a Department of Energy request to withdraw a construction application for the site -- about 100 miles northwest of Las Vegas -- raising questions as to whether it might be premature for NRC analysts to stop their work, some attorneys said.

"As a general matter, when an administrative agency has an application before it, and in particular the NRC, there is an obligation to review the application," according to the Nuclear Energy Institute, the nuclear industry's lobbying arm. "That would be a general principle, that as long as an application is pending, which it is, the agency is under an obligation."

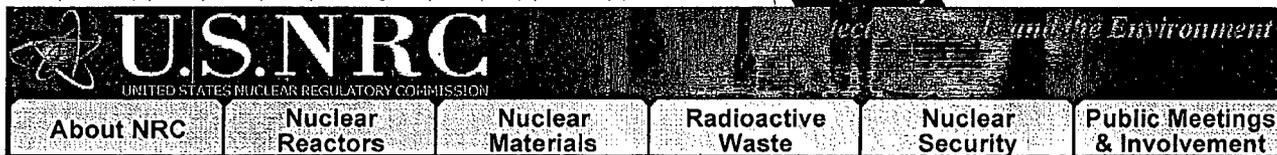
An attorney for the state of Washington, one of the parties suing the Department of Energy over the Yucca Mountain shutdown, asked the NRC and the Department of Justice on Wednesday for more information, a possible precursor to further legal action.

In Nevada, the head of the nuclear projects agency said the state earlier this year formally requested the NRC halt its Yucca Mountain review after the Obama administration indicated it wanted to shut down the project.

For the NRC to continue producing reports about Yucca Mountain "would be a waste of taxpayer money," said Bruce Breslow.

Meredith MacKenzie, a spokeswoman for leading Yucca critic Sen. Harry Reid, D-Nev., said the writing has been on the wall for Yucca Mountain's demise for some time.

"The president's FY11 budget clearly stated that the Yucca Mountain project was being closed out,"



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Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada; Volume 1: General Information (NUREG-1949, Volume 1)

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- Abstract

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- NUREG-1949, Volume 1 (PDF - 626 KB)

Publication Information

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Date Published: August 2010

Office of Nuclear Material Safety and Safeguards

Availability Notice

Abstract

This is the first volume of the U.S. Nuclear Regulatory Commission (NRC) staff's "Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada." It documents the NRC staff's review and evaluation of general information the U.S. Department of Energy (DOE) provided in its June 3, 2008, license application, as updated on February 19, 2009, that seeks an authorization to begin construction of a repository at Yucca Mountain. In subsequent volumes of the report, Volumes 2-5, the NRC staff plans to present its review and evaluation of the Safety Analysis Report included in DOE's license application.

Consistent with NRC's requirements for the general information, the NRC staff reviewed the following: (i) a general description of the proposed repository, (ii) proposed schedules for repository activities, (iii) a description of security measures, (iv) a description of the Material Control and Accounting Program, and (v) a description of work done to characterize the site.

On the basis of its review and specified DOE commitments, the NRC staff concludes in this volume that DOE has provided information that satisfies the requirements of 10 CFR 63.21(b)(1)-(5) of the NRC's regulations.

US NRC chairman killed key Yucca report month before release date

Washington (Platts)--7Oct2010/526 pm EDT/2126 GMT

A US Nuclear Regulatory Commission document addressing the central safety issue of the federal government's proposed nuclear waste repository in Nevada was a month away from being released when Chairman Gregory Jaczko pulled the plug on that and all over repository licensing activities at the agency. NRC spokesman David McIntyre confirmed Thursday that Volume 3 of the safety evaluation report on the US Department of Energy's repository license application had been written and was undergoing an internal review when Jaczko ordered the shutdown. Volume 3 addresses the issue of the post-closure safety of a nuclear waste repository at Yucca Mountain, an issue central to whether the site could safely dispose of utility spent fuel and highly radioactive defense waste. The document will not be issued, McIntyre said. Aby Mohseni, NRC deputy director of repository safety and licensing, would not comment during an interview Thursday on the report's findings, saying the document is predecisional. He said his staff was informed shortly before fiscal 2010 ended September 30 that it would be affected by guidance issued on the FY-11 stopgap funding measure Congress approved late last week. The \$10 million NRC requested for Yucca Mountain-related work in FY-11 was sought to carry out an orderly closure of Yucca licensing activities, McIntyre said. It also will fund continued work on so-called "knowledge capture" as agency staff assemble lessons learned, both technical and process, from work on the program, Mohseni said. DOE has made it clear this year that the Yucca project would be terminated September 30. DOE did not request any FY-11 funds for the program or for the office that managed it. According to NRC's budget justification document for FY-11, an orderly closure of its Yucca work could be triggered by a withdrawal of DOE's repository license application or a suspension of the licensing review. Neither has occurred, said Lake Barrett, a former acting director of the DOE repository program. In an interview Thursday, Barrett called Jaczko's action "unprecedented," noting that the question of whether DOE has the legal authority to unilaterally kill the program is still pending in a federal appeals court. "Our belief [is] that an administrative agency in receipt of a license application ought to adjudicate that application," Nuclear Energy Institute spokesman John Keeley said in an e-mail Thursday. --Elaine Hiruo, elaine_hiruo@platts.com Similar stories appear in Nucleonics Week. See more information at <http://www.platts.com/Products/nucleonicsweek/>



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

October 4, 2010

MEMORANDUM TO: Office Directors and Regional Administrators

FROM: J. E. Dyer *J. E. Dyer*
Chief Financial Officer

R. W. Borchardt *R. W. Borchardt*
Executive Director for Operations

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING
RESOLUTION

On September 30, 2010, a Continuing Resolution (CR) through December 3, 2010, was signed into law. The purpose of this memorandum is to review and augment the earlier guidance on budget execution. The amount of funding available under a CR is determined by the annual CR legislation enacted by Congress. Funding availability is based on the previous fiscal year appropriated level augmented by unobligated carryover, as in past years. The NRC's FY 2011 budget request sustains agency's programs at approximately the same level as FY 2010, with the exception of the High-Level Waste Program. Therefore, offices should proceed to commit, obligate, and expend funds for ongoing activities to effectively use available resources during the CR.

Although the staff made improvements, we continue to emphasize the importance of effectively executing the agency budget by incrementally funding activities, as well as, preparing and moving procurement packages through the acquisition process with "subject to availability of funds" language, when appropriate, to expedite the award process when sufficient funds become available. Additionally, to maintain maximum flexibility, priority for funds for existing contract support activities should be allocated only to those activities that do not have sufficient forward funding.

As highlighted in the earlier guidance provided by the Office of the Chief Financial Officer (OCFO), CR funding will be provided based on the offices' needs as identified in their Funds Utilization Plans (FUP) submitted on August 6, 2010. Based on the office's FUPs, agency funding needs exceeded the funds available in the first quarter. As a result, we plan to provide offices with 60 percent of the requested funding for the period of the CR. Offices should advise OCFO of any significant mission critical needs as a result of the constrained funding.

During the CR period, new work that was not authorized and funded in FY 2010 should not be started in FY 2011. Offices should contact the OCFO prior to funding any questionable

CONTACT: Reginald W. Mitchell, OCFO
(301) 415-7540

Office Directors and RAs

-2-

activities under the CR. In addition, contract awards for FY 2011 should be reflected in your Advance Procurement Plan (APP). It is important that offices processing contract documents consistent with their APPs/FUPs continue to focus on improved budget execution during the CR.

With 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 FY 2011 budget using available Nuclear Waste Fund resources during the CR.

As we move forward, the OCFO will refine the CR plan and issue allowances for every CR period thereafter, until such time the agency receives its full appropriation/apportionment. After the agency receives its full-year appropriation/apportionment, this guidance will be rescinded and all normal budget execution operations will be resumed.

cc: PMDA/DRMA Directors

MEMORANDUM TO THOSE ON THE ATTACHED LIST DATED: October 4, 2010

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION

Edwin M. Hackett, Executive Director, Advisory Committee on Reactor Safeguards	<u>E-Mail Mail Stops</u> RidsAcrsAcnw_MailCTR Resource
E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel	RidsAslbpManagement Resource
Stephen G. Burns, General Counsel	RidsOgcMailCenter Resource
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Hubert T. Bell, Inspector General	RidsOigMailCenter Resource
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Eliot B. Brenner, Director, Office of Public Affairs	RidsOpaMail Resource
Annette Vietti-Cook, Secretary of the Commission	RidsSecyMailCenter Resource RidsSecyCorrespondenceMCTR Resource
Michael F. Weber, Deputy Executive Director for Materials, Waste, Research, State, Tribal, and Compliance Programs, OEDO	RidsEdoMailCenter Resource
Darren B. Ash, Deputy Executive Director for Corporate Management, OEDO	RidsEdoMailCenter Resource
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Roy P. Zimmerman, Director, Office of Enforcement	RidsOeMailCenter Resource
Charles L. Miller, Director, Office of Federal and State Materials and Environmental Management Programs	RidsFsmeOd Resource
Cheryl L. McCrary, Director, Office of Investigations	RidsOiMailCenter Resource
Thomas M. Boyce, Director, Office of Information Services	RidsOis Resource
James F. McDermott, Director, Office of Human Resources	RidsHrMailCenter Resource
Michael R. Johnson, Director, Office of New Reactors	RidsNroOd Resource
Catherine Haney, Director, Office of Nuclear Material Safety and Safeguards	RidsNmssOd Resource
Eric J. Leeds, Director, Office of Nuclear Reactor Regulation	RidsNrrOd Resource
Brian W. Sheron, Director, Office of Nuclear Regulatory Research	RidsResOd Resource
Corenthis B. Kelley, Director, Office of Small Business and Civil Rights	RidsSbcrMailCenter Resource
James T. Wiggins, Director, Office of Nuclear Security and Incident Response	RidsNsirOd Resource
Marc L. Dapas, Acting Regional Administrator, Region I	RidsRgn1MailCenter Resource
Luis A. Reyes, Regional Administrator, Region II	RidsRgn2MailCenter Resource
Mark A. Satorius, Regional Administrator, Region III	RidsRgn3MailCenter Resource
Elmo E. Collins, Jr., Regional Administrator, Region IV	RidsRgn4MailCenter Resource

CC: TO THOSE ON THE ATTACHED LIST DATED: October 4 2010

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION

<u>Name/Office</u>	<u>Mail Stop</u>
B. Gusack, NRO	T6 - D2
B. Ficks, OIS	O13 - H16M
B. Holt, RGN III	RGN III
J. Horn, HR	GW5 - A6
J. Dambly, ADM	TWB5 - E19M
J. Golder, FSME	T8 - A23
J. Coleman, RGN II	RGN II
M. Givvines, NRR	O13 - H16M
M. Muessle, RES	CSB6 - D20M
M. Hays, RGN IV	RGN IV
P. Baker, RGN I	RGN I
S. Abraham, NSIR	T4 - A45
T. Pulliam, NMSS	EBB - C1 24

Congressional Budget Justification

for FY 2011

NUREG-1100, Volume 26



February 2010

Exhibit E

- ▶ Development of the Web-Based Licensing System and License Verification System.

SPENT FUEL STORAGE AND TRANSPORTATION

The Spent Fuel Storage and Transportation Business Line supports the licensing, oversight, rulemaking, research, and international activities associated with the safe and secure storage and transportation of spent nuclear fuel. The FY 2011 budget request for Spent Fuel Storage and Transportation is \$29.6 million, including salaries and benefits to support 119.8 FTE, travel, and contract support. This represents a decrease of \$6.5 million, including a decrease of 4.3 FTE, from the FY 2010 enacted. Resources decrease primarily in the area of research to reflect a shift in resources from the Spent Fuel Storage and Transportation Business Line to support high-priority emergent research work under the Nuclear Materials Users Business Line. Major activities the requested resources will support include the following:

- ▶ Licensing of interim storage of spent fuel from commercial nuclear reactors.
- ▶ Certification of domestic and international transportation of radioactive materials.
- ▶ Inspection of storage cask and transportation package vendors, fabricators, and designers to ensure safety.
- ▶ Review of license requests for site-specific independent spent fuel storage installations (ISFSIs), dual purpose (storage and transport) casks, transportation security plans, and route approvals.
- ▶ Technical review of approximately 80 transportation package designs and approximately 25 spent fuel storage casks and spent fuel storage facilities to support safe and secure domestic and international transportation, industry needs for full-core offload capability at operating reactor sites, and transfer of spent fuel to ISFSIs to support reactor decommissioning.
- ▶ Interaction with the International Atomic Energy Agency (IAEA) and other international regulators to inform the regulatory framework for radioactive material transportation and spent fuel storage.

DECOMMISSIONING AND LOW-LEVEL WASTE

The Decommissioning and Low-Level Waste Business Line supports the licensing, oversight, rulemaking, research, and international activities associated with the safe and secure removal of a nuclear facility from service and reduction of residual radioactivity to a level that permits release of the property and termination of the NRC license, and the disposition of low-level radioactive waste from all civilian sources. The FY 2011 budget request for Decommissioning and Low-Level Waste is \$36.4 million, including salaries and benefits to support 144.7 FTE, travel, and contract support. This represents a decrease of \$1.4 million, including a decrease of 3.5 FTE, from the FY 2010 enacted due to decrease in the oversight of DOE waste determination activities. Major activities the requested resources will support include the following:

- ▶ Technical, safety, and environmental review of uranium recovery facilities.
- ▶ Project management and technical reviews for decommissioning activities for 13 power reactors, 10 RTRs, 21 complex materials sites, and 18 inactive uranium recovery facilities, including license termination plans, decommissioning plans, and license amendments.
- ▶ Support of interfaces with licensees, applicants, Federal and State agencies, the public, other stakeholders, and Native American Tribal Governments.
- ▶ Five environmental reviews and eight safety reviews (hearings included) of uranium recovery facility applications.
- ▶ Oversight of certain DOE waste determination activities and plans consistent with the NRC's responsibilities in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.

HIGH-LEVEL WASTE REPOSITORY

The High-Level Waste Repository Business Line supports the licensing, oversight, rulemaking, and research activities associated with DOE's Yucca Mountain geologic repository application. The FY 2011 budget request for High-Level Waste Repository is \$10.0 million, including salaries and benefits to support 32.0 FTE, travel, and contract support. This

represents a decrease of \$19.0 million, including a decrease of 67.0 FTE, from the FY 2010 enacted. Major activities the requested resources will support include the following:

- ▶ Work related to an orderly closure of the agency's Yucca Mountain licensing support activities such as archiving material, knowledge capture and management, and maintenance of certain electronic systems. Resources will also support closing the adjudicatory aspects upon actual notice of suspension or withdrawal of the license application from Congress or DOE.

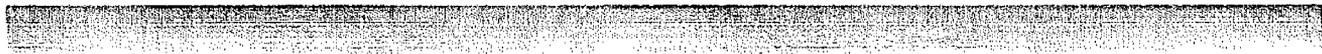
The Administration has indicated that it does not support developing a repository at Yucca Mountain, Nevada. Consistent with that position, the DOE may submit to the NRC a motion to withdraw or suspend its Yucca Mountain license application during 2010. The NRC budget request reflects that possibility. Upon the withdrawal or suspension of the licensing review, the NRC would begin an orderly closure of the technical review and adjudicatory activities, and would document the work and insights gained from the review.

INTEGRATED SPENT FUEL MANAGEMENT

Integrated Spent Fuel Management is a new business line in FY 2011. This business line was created to develop regulatory tools, analysis and data needed to evaluate and support future waste management strategies.

The Integrated Spent Fuel Management Business Line will develop the information necessary to inform the agency's regulatory perspectives on waste management options, undertake research, analysis, and modeling efforts to support regulatory development for potential future high-level waste disposal systems, and serve as the agency's point for coordinating and integrating key interdependent work on disposal, extended long-term storage, and other waste management strategies. Major activities the requested resources will support include the following:

- ▶ Activities for generic long-term future of waste management that will ensure the adequate protection of public health and safety and the environment. The focus is on the review, investigation, and development of an appropriate licensing regulatory framework that will accommodate alternative geologic disposal or other spent fuel disposal options.
- ▶ Development of a flexible performance assessment model for addressing disposal in alternative geological media with different engineered barrier systems and different waste forms.



High-Level Waste Repository
(Dollars in Millions)

Product Line	FY 2011							
	FY 2009 Enacted		FY 2010 Enacted		Request		Changes from FY 2010	
	\$M	FTE	\$M	FTE	\$M	FTE	\$M	FTE
Licensing	37.0	82.1	23.0	83.6	10.0	32.0	(13.0)	(51.6)
Oversight	1.3	4.2	0.7	3.9	0.0	0.0	(0.7)	(3.9)
Rulemaking	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Research	0.3	1.7	0.0	0.0	0.0	0.0	0.0	0.0
Subtotal	\$38.6	88.0	\$23.7	87.5	10.0	32.0	(\$13.7)	(55.5)
Corporate Support	10.6	23.6	5.2	10.9	0.0	0.0	(5.2)	(10.9)
Total	\$49.2	111.6	\$29.0	99.0	\$10.0	32.0	(\$19.0)	(67.0)

Numbers may not add due to rounding.

FY 2009 and FY 2010 enacted resources are respectively being executed according to the requirements in the FY 2009 and FY 2010 Appropriation Acts and as outlined in the FY 2009 and FY 2010 Congressional Budget Justifications. FY 2009 and FY 2010 resources are mapped in this table to the FY 2011 budget structure only for comparison.

HIGH-LEVEL WASTE REPOSITORY

The High-Level Waste Repository program is responsible for licensing activities related to the Yucca Mountain geologic repository. This program supports achievement of the NRC's strategic goal of safety and security through its regulatory activities associated with the licensing review of the DOE application for the permanent disposal of spent fuel at Yucca Mountain, Nevada. To conduct the license application review, the program implemented two concurrent processes: assess the technical merits of the repository design, and support the adjudicatory hearing before the NRC Atomic Safety and Licensing Boards convened to hear the technical and legal challenges posed by a number of parties to the DOE application.

The Administration has indicated that it does not support developing a repository at Yucca Mountain, Nevada. Consistent with that position, DOE may submit to the NRC a motion to withdraw or suspend its Yucca Mountain license application during FY 2010. The NRC Budget reflects that possibility. Upon the withdrawal or suspension of the licensing review, the NRC would begin an orderly closure

of the technical review and adjudicatory activities and would document the work and insights gained from the review.

The NRC has organized HLW Repository activities into product lines that best support safety and security strategies and impact strategic outcomes as they relate to HLW. The resources requested support all direct aspects of HLW Repository within the Licensing Product Line. This product line contributes to progress on the NRC safety and security performance measures and their contribution to achievement of the strategic outcomes.

*Resources for the
High-Level Waste
Repository business
Line will support
hearing-
related activities.*

LICENSING

Strategic Goal Strategies Supported

Safety – Develop, maintain, and implement licensing and regulatory programs for fuel facilities material, spent fuel management, waste management, uranium recovery, and decommissioning.

Workload

For FY 2011, the NRC requests \$10.0 million, including 32.0 FTE, to provide for Licensing activities. This represents a funding decrease of \$13.7 million, including 55.5 FTE, when compared with estimated FY 2010 funding levels. FY 2010 resources are being executed according to the requirements in the FY 2010 Appropriation Act and as outlined in the FY 2010 Congressional Budget Justification. In this discussion, the FY 2010 resources are mapped to the FY 2011 budget structure only for comparison.

Resources will support work related to the orderly closure of the agency's Yucca Mountain licensing support activities. This would involve archiving material, completion of some technical work, knowledge capture and management, and maintenance of certain electronic systems to support these efforts. Resources will also support closing the adjudicatory aspects upon actual notice from the Congress or DOE.

Changes from FY 2010 Enacted

Resources decrease to reflect the orderly closure of the agency's Yucca Mountain licensing support activities.

OVERSIGHT

Workload

None.

Changes from FY 2010 Enacted

Resources were reduced to zero.

RULEMAKING

Workload

None.

Changes from FY 2010 Enacted

Resources were reduced to zero.

RESEARCH

Workload

None.

Changes from FY 2010 Enacted

Resources were reduced to zero.

SIGNIFICANT ACCOMPLISHMENTS

In FY 2009, the NRC published a notice of hearing and leave to intervene in October 2008. Petitions for leave to intervene and contentions were filed. In May 2009, almost 300 contentions were admitted, and only three were rejected when the Commission ruled on the appeals in June 2009. Hearing activities are continuing. In March 2009, the NRC amended its regulations in 10 CFR Part 63, "Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada," to conform to a new EPA standard for the proposed repository.



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

COMWCO-10-0002

October 06, 2010

COMMISSIONER

MEMORANDUM TO: Chairman Jaczko
 Commissioner Svinicki
 Commissioner Apostolakis
 Commissioner Magwood

FROM: Commissioner Ostendorff *[Signature]*

SUBJECT: COMMISSION DIRECTION ON STAFF BUDGET GUIDANCE
 UNDER FISCAL YEAR (FY) 2011 CONTINUING RESOLUTION

On September 20, 2010, Congress passed a Continuing Resolution making appropriations to fund the federal government through December 3, 2010. The Continuing Resolution appropriates "[s]uch amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2010 and under the authority and conditions provided in such Acts, for continuing projects or activities ... that are not otherwise provided for in this Act, that were conducted in fiscal year 2010, and for which appropriations, funds, or other authority were made available...."

On October 4, 2010, the EDO and CFO issued a memo to the staff providing direction on the 2011 Continuing Resolution. This memo 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 FY 2011 budget using available Nuclear Waste Fund resources during the CR." This is a significant policy matter that I believe warrants the Commission's attention, and which requires that the Commission give direction to the staff to avoid confusion on the Commission's intent for operation under the Continuing Resolution.

[] the Staff informed the Commission of its schedule for issuance of the SER volumes. [] the Staff's statement to the Construction Authorization Board at a hearing in January 2010 that it would complete SER Volumes 1 and 3 no later than August and November 2010, respectively. [] it would continue to work on any remaining SER volumes until fiscal year 2010 funds were exhausted, absent further congressional direction to the contrary. []

[] It is my view that whatever the ultimate disposition of the High-

Level Waste Repository activity, complete SER documents are the best and most appropriate way in which to memorialize the Staff's work product.

During the pendency of the Continuing Resolution, the Staff should continue to follow this schedule and issue the remaining SER Volumes accordingly. The Staff should continue to work on the remaining SER volumes, [] at the rate for operations appropriate given the proposed fiscal year 2011 budget as augmented by reprogrammed funds remaining from fiscal year 2010 appropriations.

This is a time-sensitive matter, and I believe that the Commission should take action on this proposal no later than October 8th in order to ensure that the Staff has clear guidance on how to operate under the Continuing Resolution.

SECY, please track.

cc: EDO
CFO
OGC
SECY



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 *W. O. 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 for fiscal year 2010 and under the authority and conditions provided in such Acts, for continuing projects or activities ... that are not otherwise specifically provided for in this Act..." (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

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: COMWCO-10-0002 – COMMISSION DIRECTION ON
STAFF BUDGET GUIDANCE UNDER FISCAL YEAR
(FY) 2011 CONTINUING RESOLUTION

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached XX None _____



SIGNATURE

10/14/10

DATE

Entered on "STARS" Yes No _____

Commissioner Svinicki's Comments on COMWCO-10-0002
Commission Direction on Staff Budget Guidance Under
Fiscal Year 2011 Continuing Resolution

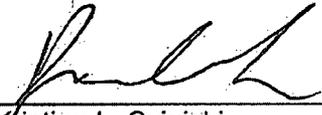
I approve Commissioner Ostendorff's proposal, contained in COMWCO-10-0002, that during the pendency of the Fiscal Year 2011 Continuing Resolution, the staff continue to follow its schedule for completing and issuing the Safety Evaluation Report (SER) volumes and further, that the staff continue to work on any remaining SER volumes until fiscal year 2010 funds are exhausted. I agree that, whatever the ultimate disposition of the Yucca Mountain license application and associated activities, complete SER documents should be a matter of public record and will be the best vehicle to memorialize the scientific knowledge and analysis gained during the technical review. Consequently, the staff should continue to work on and issue the remaining SER volumes according to its stated schedule, at the rate for operations appropriate given the proposed fiscal year 2011 budget, as augmented by prior year high-level waste (HLW) carryover funds and fiscal year 2010 reprogrammed HLW funds remaining from fiscal year 2010 appropriations.

I fundamentally disagree with the direction contained in the October 4, 2010 memorandum, issued by the Executive Director for Operations and Chief Financial Officer, instructing Staff to follow the Commission's fiscal year 2011 budget direction for carrying out HLW review activities during the continuing resolution. I find this directive inconsistent with the intent of the Continuing Resolution. Section 101 of the Fiscal Year 2011 Continuing Resolution provides that the funds to be appropriated are those "as provided in the applicable appropriations Act for fiscal year 2010 and under the authority and conditions provided in such Acts, for continuing projects or activities . . . that are not otherwise specifically provided for in this Act." Since the Continuing Resolution does not specifically provide for the NRC to follow its fiscal year 2011 budget request, nor does it provide specific limitations on the use of HLW funds, the NRC should continue to carry out the Yucca Mountain review activities in accordance with its fiscal year 2010 budget to "support the ongoing license review by funding the NRC staff conducting technical license application review activities."

In contrast, the fiscal year 2011 budget request – which is currently sitting before Congress – describes the "orderly closure" of technical review activities, including knowledge capture and management, and archiving of material. But this is not all that the fiscal year 2011 budget states with respect to the HLW program. It also explains that "orderly closure" activities are conditioned upon certain events taking place first: "Upon withdrawal or suspension of the licensing review, the NRC would begin an orderly closure..." Neither of these events has occurred, and commencing closure activities now is contrary to the Commission's express direction. Therefore, my view on the appropriate scope of activities under the continuing resolution is further fortified by the fact that the conditions for transitioning to orderly closure of the review have not been met.

Furthermore, at the time of the Commission's deliberations on the fiscal year 2011 budget proposal, the Administration was contemplating options for the Yucca Mountain license application and the Department of Energy (DOE) had not submitted its motion to withdraw. My approval of the fiscal year 2011 budget proposal was predicated on continuing the technical review of the application, while recognizing that the NRC's ability to do so was influenced by other imponderables, such as DOE's ability to support the review. The "fog of war" environment that clouded the future of the Yucca Mountain license application could not, and did not, anticipate with any precision the circumstances that the NRC faces today.

Ultimately, I agree that this is a significant policy matter warranting Commission deliberation and action. In my opinion, we would have been better served had the CR guidance memorandum, at the very least, requested Commission direction on the use of Nuclear Waste Fund resources during the continuing resolution. Absent that request, however, I support fully Commissioner Ostendorff's proposal.



Kristine L. Svinicki 10/19/10

October 14, 2010

MEMORANDUM TO: Commissioner Ostendorff

FROM: Annette Vietti-Cook, Secretary **/RA Andrew L. Bates for/**

SUBJECT: COMWCO-10-0002 – COMMISSION DIRECTION ON STAFF
BUDGET GUIDANCE UNDER FISCAL YEAR (FY) 2011
CONTINUING RESOLUTION

A majority of the Commission declined to participate on this matter. In the absence of a quorum, your proposal is not approved.

cc: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
EDO
CFO
OGC
OPA
OCA

CERTIFICATE OF SERVICE

I herby certify that on the 15th day of October 2010, a copy of the foregoing Petitioners' Reply on Motion to List Stay and Set Expedited Briefing Schedule was filed electronically using the CM/ECF system, which will provide service on the following parties:

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I herby certify that service of the same was made on the following parties

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