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

COMMISSIONER

October 27, 2010

The Honorable Doc Hastings
1203 Longworth House Office Building
Washington, DC 20515-4704

Dear Congressman Hastings:

Thank you for your letter dated October 21, 2010. I share your view that the Nuclear Regulatory Commission's (NRC) work on the Yucca Mountain license application has been performed at the direction of Congress as required under the Nuclear Waste Policy Act. I firmly believe that Congress and the American public deserve to have the benefit of the information. In fact, I believe that the NRC is obligated to provide it.

With respect to the decision to halt all work on the Yucca Mountain license application, I have made my views available for the record in documents I released to the public earlier this month (see enclosed documents). In sum, I disagree with Chairman Jaczko's decision to transition to close out of the NRC's High-Level Waste Repository program, and I have voiced this disagreement to the Chairman, my other colleagues on the Commission, and the NRC staff. I endorse your view that the actions taken contravene the intent of the President's directive on openness and transparency.

Regarding your request for the current status of Volume III of the Yucca Mountain Safety Evaluation Report, it is my understanding that on July 15, 2010, Volume III was transmitted to the Director of the NRC's Office of Nuclear Material Safety and Safeguards for concurrence and authorization to publish. In light of the recent guidance to the NRC staff for the fiscal year 2011 Continuing Resolution, it is now my understanding that the NRC staff is no longer working on Volume III. Instead, the NRC staff will be developing a separate report to document its technical review activities completed to date. It is also my understanding that this report will not contain any specific regulatory findings made by the NRC staff with respect to the Yucca Mountain license application.

Concerning your request for a copy of the latest draft of Volume III and the associated data to compile the report, I have forwarded your request to the NRC's Office of Congressional Affairs.

I am available to respond to any further inquiries you may have on this matter.

Sincerely,

William C. Ostendorff

Enclosures:
as stated

REQUEST REPLY BY: 10/8/10

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

COMMISSIONER

COMWCO-10-0002

October 06, 2010

MEMORANDUM TO: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood

FROM: Commissioner Ostendorff

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

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