

REVISED on March 1, 2011, to correct NRC Form 757, Section C, to reflect three staff members' non-concurrences and their requests that their non-concurrences be made public

February 4, 2011

MEMORANDUM TO: Chairman Jaczko  
Commissioner Svinicki  
Commissioner Apostolakis  
Commissioner Magwood  
Commissioner Ostendorff

FROM: Catherine Haney, Director /RA/  
Office of Nuclear Material Safety and Safeguards

SUBJECT: UPDATE ON THE YUCCA MOUNTAIN PROGRAM

The purpose of this memorandum is to describe the status of the Yucca Mountain Program. Since October 1, 2010, the U.S. Nuclear Regulatory Commission (NRC) staff's activities have focused on the orderly closure of the NRC staff's safety review of the license application submitted by the U.S. Department of Energy (DOE) for authorization to construct a geologic repository at Yucca Mountain (YM), NV. This memorandum also describes the staff's plans to capture the knowledge it acquired during more than 3 decades of pre-licensing preparation and more than 2 years of licensing review activities.

Program Status and Termination of Safety Review

Effective on October 1, 2010, the staff ceased its safety review of the YM license application. Consequently, the staff is converting the remaining volumes of its safety evaluation report (SER) ("Volume 3: Review of Repository Safety after Permanent Closure," "Volume 2: Review of Repository Safety before Permanent Closure," and "Volume 4: Review of Administrative and Programmatic Requirements") into technical evaluation reports, which will be published as NUREG reports in the knowledge management series. These reports will document the staff's technical review activities and technical conclusions but will contain no staff findings of regulatory compliance.

Knowledge Capture and Orderly Closure of Supporting Licensing Proceedings

The NRC staff is archiving the institutional, regulatory, and technical knowledge amassed over nearly 3 decades as it evaluated YM and other potential sites for deep geologic disposal of spent fuel and high-level waste. The staff is evaluating and documenting the lessons learned from (1) the development and implementation of site-specific regulations and guidance documents for geologic disposal, (2) the conduct of a licensing proceeding under Subpart J,

CONTACT: Lawrence E. Kokajko, NMSS  
301-492-3158

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"Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository," of Title 10 of the *Code of Federal Regulations* (10 CFR) Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," and (3) the establishment and the operation of the Licensing Support Network (LSN). The staff will preserve this knowledge as a resource for future use. Associated with this, on October 1, 2010, the staff directed the Center for Nuclear Waste Regulatory Analyses (CNWRA) to stop its license application review activities. The staff redirected CNWRA to focus its YM-related efforts on the preservation of knowledge and records management. As the High Level Waste (HLW) repository knowledge management tasks are completed, CNWRA will transition to non-HLW Repository work using fee-based resources to evaluate the safety and environmental impacts of longer term storage of spent nuclear fuel and to support the staff's development of a longer term waste confidence rulemaking plan.

The NRC staff established priorities for activities it will undertake commensurate with available resources and closure of the licensing review. As part of this effort, the staff will document its technical review of the license application in technical evaluation reports (NUREGs). These reports will capture the scientific findings, knowledge, and experience of the staff's technical review, the development of requests for additional information, and an evaluation of the license application without stating the conclusion that would be needed to support a licensing decision. The first of these, documenting postclosure review activities, is planned for completion in the second quarter of fiscal year (FY) 2011. Resources permitting, reports on the staff's preclosure (Volume 2) and administrative (Volume 4) reviews will follow later in the third and fourth quarters of FY 2011.

During the first quarter of FY 2011, the staff established its process for developing the technical evaluation reports and began preparation of those reports. The staff is responding to a Freedom of Information Act request for access to staff drafts of SER Volumes 2 and 3. Technical staff members continued to provide input to the Office of the General Counsel on adjudicatory hearing-related matters to assist in responding to orders from the Construction Authorization Board 4 (CAB4 or the Board), including directives on case management and identification of witnesses. Departing and other senior technical staff members were interviewed on videotape for knowledge capture and as a future training resource. Personnel from the Office of Administration and the Atomic Safety and Licensing Board Panel (ASLBP or the Panel) initiated discussions with the General Services Administration and other government agencies about preparatory activities to close and decommission the Las Vegas Hearing Facility (LVHF), including its computer systems, physical infrastructure, and physical security infrastructure. During this period, the high-level waste core group continued discussions about the budget for orderly closure of the YM program to ensure coordination with preparation for renewal of the CNWRA contract and other contractual matters.

#### Hearing Process and Activities

CAB4 has continued to preside over the YM proceeding after denying the Department of Energy license application withdrawal motion in June 2010. The NRC staff, as required, has kept the Board informed of the status of the staff's application review activities. Specifically, on

The Commissioners

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November 29, 2010, the staff informed CAB4 that it would not issue SER Volume 3 in November 2010 as previously planned, and that a revised schedule is indeterminate. On December 8, 2010, CAB4 ordered the staff to submit by December 22, 2010, a full explanation of its schedule change for the issuance of Volume 3 and directed the parties to confer and seek to reach agreement on a discovery status report by January 25, 2011. The staff replied on December 22, 2010, also indicating that the schedule for SER Volumes 4 and 2 was indeterminate. On December 14, 2010, CAB4 ruled on the Phase 1 legal issues and denied petitions for rule waivers. The Board also directed affected parties to submit a joint stipulation, or differing views, regarding the effects of the Board's Phase 1 legal issue rulings on admitted contentions by January 21, 2011. The major parties (including the NRC staff) timely responded and also filed differing views. In addition, DOE filed a January 21, 2011, motion seeking a suspension of the proceeding through May 20, 2011 and Nevada filed a January 20, 2011, motion seeking reconsideration of the rejection of a contention in its initial petition. CAB4 has not yet ruled on the suspension motion.

Absent contrary direction it is our understanding that the Panel plans to maintain the adjudicatory infrastructure for the repository licensing proceeding, including the Las Vegas Hearing Facility (LVHF), the Licensing Support Network (LSN), and the LVHF component of the Digital Data Management System (DDMS), until the end of FY 2011. At that time shut-down of the infrastructure would need to be accomplished to avoid the agency requiring Nuclear Waste Fund (NWF) money that has not been appropriated in order to complete the shut-down after FY 2011. We understand that ASLBP plans to send a memorandum in February that discusses this matter more fully and includes key action points for an orderly shutdown.

Resources

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The Commissioners

- 4 -

Coordination

The Office of the General Counsel has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections.

Three staff members in NMSS filed non-concurrences on this memorandum (Enclosures 2-4). These non-concurrences are included in the interest of providing the Commission with alternative views.

This paper contains pre-decisional procurement and budget information and should be withheld from public disclosure.

Enclosures:

1. [
- ]
2. Non-Concurrence dated January 18, 2011
3. Non-Concurrence dated February 1, 2011
4. Non-Concurrence dated February 2, 2011

cc: SECY  
EDO  
OGC  
OCA  
OPA  
CFO  
ASLBP

The Commissioners

- 4 -

Coordination

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OGC  
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CFO  
ASLBP

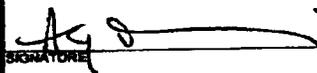
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Enclosure 1

NRC FORM 757 NRC 680 10-199 03-2008		U.S. NUCLEAR REGULATORY COMMISSION	
<b>NON-CONCURRENCE PROCESS</b>			
<b>SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL</b>			
TITLE OF DOCUMENT Update on the Yucca Mountain Program		ADAMS ACCESSION NO. ML103146391	
DOCUMENT SPONSOR Catherine Haney		SPONSOR PHONE NO. 301-492-3554	
NAME OF NON-CONCURRING INDIVIDUAL Aky Malacal		PHONE NO. 301-492-3182	
<input type="checkbox"/> DOCUMENT AUTHOR <input checked="" type="checkbox"/> DOCUMENT CONTRIBUTOR <input checked="" type="checkbox"/> DOCUMENT REVIEWER <input checked="" type="checkbox"/> ON CONCURRENCE			
TITLE Deputy Director		ORGANIZATION HLWRS/NMSS	
REASONS FOR NON-CONCURRENCE <p>           Although the Commission Memorandum describes the current status of the program, it also addresses a path forward that seems to me to contain policy issues that require Commission direction or guidance. For example, whereas the application of Nuclear Waste Funds in FY 2011 was only authorized for orderly shutdown activities under a CR guidance and as specifically directed by the Chairman, the ongoing ASLE hearings require that those funds also support legal activities in ongoing Yucca Mountain licensing proceedings. If there are no constraints in using FY2011 or carryover NWF monies to support licensing activities, then it would be a policy issue to direct the staff to apply resources to orderly shutdowns instead of completing and issuing the remaining SER volumes, especially since the Commission has not reversed the ASLEP's decision that denied DOE's motion to withdraw its application. The Memorandum also indicates that fee-based resources (rather than NWF) might be needed to shut down the Las Vegas Hearing Facility, which would be another policy issue, in my opinion.         </p> <p>           For the reasons above, I respectfully refuse to concur.         </p>			
SIGNATURE 		<input type="checkbox"/> CONTINUED IN SECTION D	
		DATE 1/18/2011	
AND COPY TO YOUR IMMEDIATE SUPERVISOR AND PROGRAM MANAGER			

NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT  
Update on the Yucca Mountain Program

ADAMS ACCESSION NO.  
ML103140391

SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR  
(THIS SECTION SHOULD ONLY BE COMPLETED IF SUPERVISOR IS DIFFERENT THAN DOCUMENT SPONSOR.)

NAME  
Larawan E. Kobayashi

TITLE  
Director, Division of High-Level Waste Reporting Safety

PHONE NO.  
801-492-3158

ORGANIZATION  
NMSS

COMMENTS FOR THE DOCUMENT SPONSOR TO CONSIDER

I HAVE NO COMMENTS

I HAVE THE FOLLOWING COMMENTS  
See attached sheet.

CONTINUED IN SECTION D

SIGNATURE  
*[Signature]*

DATE  
18 Feb 2011

Re: Memorandum to the Commission entitled, "Update on the Yucca Mountain Program"

Given the unique nature of the NRC's High-Level Waste Program, its associated review of the DOE Yucca Mountain license application, and its attendant internal and external issues, it seems reasonable to expect that professional staff can differ in what constitutes a policy question suitable for Commission deliberation. Mr. Aby Mohseni, Deputy Director for the Licensing and Inspection Directorate in the Division of High-Level Waste Repository Safety, suggests that there are embedded in this memorandum at least two policy matters appropriate for the Commission to consider: (1) application of Nuclear Waste Funds for orderly closure while the licensing proceeding is still ongoing; and (2) use of fee-based resources to close the Las Vegas Hearing Facility and its associated infrastructure (such as LSN). The Commission itself has not yet decided on the ASLBP CAB-4 ruling (LBP-10-11), and there is enough complexity and uncertainty to suggest that the staff seek Commission direction on these issues rather than have the staff provide, in essence, a status report. While the Commission could make this memorandum a voting matter on its own once it is received, it seems more appropriate for Agency senior leadership to acknowledge it at the outset. I believe this is Mr. Mohseni's view.

Therefore, while either way could lead to the same outcome (i.e., Commission deliberation on orderly closure and funding), I tend to agree with Mr. Mohseni that the embedded policy matters should be addressed at the outset.

  
Lawrence E. Kokajko, Director  
Division of High-Level Waste Repository Safety  
Office of Nuclear Material Safety and Safeguards

18 January 2011

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NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT  
Update on the Yucca Mountain Program

ADAMS ACCESSION NO.  
ML103148391

SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR

NAME  
Catherine Haney

TITLE  
Office Director

PHONE NO.  
301-492-3554

ORGANIZATION  
NMSS

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.)

- See Attached -

CONTINUED IN SECTION D

SIGNATURE - DOCUMENT SPONSOR  
*C Haney*

DATE  
2-4-11

SIGNATURE - DOCUMENT SIGNER  
*C Haney*

DATE  
2-4-11

NON-CONCURRING INDIVIDUAL (To be completed by document sponsor when process is complete, i.e., after document is signed):

- CONCURS
- NON-CONCURS
- WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)
- WANTS NCP FORM PUBLIC
- WANTS NCP FORM NON-PUBLIC

### NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT

Updated on the Yucca Mountain Program

ADAMS ACCESSION NO.

ML110540412

**SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR**

NAME

Catherine Haney

TITLE

Office Director

PHONE NO.

301-492-3554

ORGANIZATION

NMSS

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.)

Section C revised on March 01, 2011, to reflect that the non-concurring individual would like the NCP Form to be made public and that he/she non concurs on the document.

See Attached

CONTINUED IN SECTION D

SIGNATURE - DOCUMENT SPONSOR

*Catherine Haney*

DATE

3-1-11

SIGNATURE - DOCUMENT SIGNER

*Catherine Haney*

DATE

3-1-11

**NON-CONCURRING INDIVIDUAL** (To be completed by document sponsor when process is complete, i.e., after document is signed):

CONCURS

NON-CONCURS

WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)

WANTS NCP FORM PUBLIC

WANTS NCP FORM NON-PUBLIC

I carefully considered the concerns raised in Mr. Mohseni's non-concurrence on the memo titled, "Update on the Yucca Mountain Program." Prior to, and immediately after he filed the non-concurrence, Mr. Mohseni and I discussed his concerns with the memo. Since Mr. Mohseni filed his non-concurrence, the memorandum has been revised to reflect new resource information and recent discussion with the ASLBP regarding closure of the Las Vegas Hearing Facility (LVHF) and the associated infrastructure. Subsequent to this last revision, Mr. Mohseni was given the opportunity to revise his non-concurrence based on the revised memo. He chose not to revise his statement.

Mr. Mohseni believes there are at least two policy issues embedded in the memorandum:

1. Application of Nuclear Waste Funds for orderly closure instead of supporting hearing and licensing activities, including issuance of the remaining SER volumes.
2. Use of fee-based resources to close the Las Vegas Hearing Facility and its associated infrastructure (such as LSN).

The purpose of the memorandum to the Commission is to describe the status of the Yucca Mountain Program and staff's plans to capture the knowledge it acquired during pre-licensing preparation and licensing review activities. The memo was not intended to raise policy issues or topics that have previously been discussed and resolved at the Commission level.

The application of Nuclear Waste Funds (NWF) for orderly closure instead of completing and issuing the remaining SER volumes has been well vetted with the Commission. I am not aware of any new information that would warrant raising it as a policy matter in this memorandum. For example, in a October 6, 2010, memorandum to Chairman Jaczko and Commissioners Svinicki, Magwood, and Apostolakis (COMWCO-10-002), Commissioner Ostendorff stated that use of FY 2011 Continuing resolution funds "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." He went on to propose that ". . . Staff continue to follow the pre-established schedule for the SER and issue the remaining SER Volumes accordingly." This matter was subsequently closed by Annette Vietti-Cook's October 14, 2010, memorandum to Commissioner Ostendorff that stated, "A majority of the Commission declined to participate on this matter. In the absence of a quorum, your proposal is not approved."

Use of funds to support continued review of the Yucca Mountain application was the topic of several Congressional letters. In an October 27, 2010, letter to the Honorable Jim Sensenbrenner (ML102980673) Chairman Jaczko responded to Congressman Sensenbrenner's concerns about reports regarding the NRC's review of DOE's Yucca Mountain application. The response to Question 1 (quoted below) also indicates that the Commission has already considered Mr. Mohseni's first issue.

\*Question 1. On what legal authority are you grounding your decision to terminate review of the license application based on a budget request, rather than existing law?

O Answer - Neither the text of the Fiscal Year (FY) 2010 Energy and Water Development and Related Agencies Appropriations Act and its underlying committee reports, nor the Fiscal Year 2011 Continuing Resolution provide the Commission with express direction on how it is to expend its appropriations from the Nuclear Waste Fund for Yucca Mountain activities. In the absence of an express direction, the approach the NRC is following is consistent with the terms of the Continuing Resolution, the Commission's Fiscal Year 2011 budget request, the general principles of appropriations law, and past U.S. Nuclear Regulatory Commission (NRC) practice. The Commission declined to revisit this decision in voting earlier this month."

I am mindful that there are limited resources available to complete orderly closure activities during FY2011 while the NRC hearing activities and Federal court litigation is ongoing. As of December 28, 2010, 1.8 FTE has been expended by the ASLBP and OGC to support the ongoing ASLBP hearing and litigation in the U.S. Court of Appeals for the District of Columbia. (As a reference point, NMSS has expended 9.0 FTE.) Expenditure of FY2011 HLW funds, in this manner, has been supported by OEDO, OGC, ASLBP, and CFO, and has not been viewed to be a matter of policy although these offices and I recognize that use of the funds to support NRC hearings should be closely monitored because they could consume NWF resources that are currently needed for orderly closure in FY 2011. In addition, because there are no HLW funds in FY 2012, depletion of NWF money would bring the administrative hearing process to a halt in FY 2011.

In response to Mr. Mohseni's second concern that the memorandum contains an embedded policy issue regarding use of fee-based resources to close the Las Vegas Hearing Facility and its associated infrastructure, the memorandum has been revised to reflect several recent discussions with CFO, ASLBP, NMSS, and OGC. Originally, the memorandum stated that the Atomic Safety and Licensing Board "Panel plans to maintain the adjudicatory infrastructure for the repository licensing proceeding, including the LSN, the LVHF, and the LVHF component of the Digital Data Management System (DDMS), until the Panel receives direction from the Commission to implement the closure of that infrastructure." The memorandum previously notes that "since no Nuclear Waste Fund (NWF) resources are available in FY 2012, starting on October 1, 2011, fee-based funds will be needed to support the LVHF and its infrastructure." The revised memorandum no longer raises the issue of using fee based funds to close the Las Vegas Hearing Facility or other YM hearing infrastructure. This change was made to clearly inform the Commission that orderly closure would be accomplished this fiscal year with available NWF money. Therefore, Mr. Mohseni's second issue is no longer raised by the memorandum.

*Catherine Haney*  
2-3-11

NON-CONCURRENCE PROCESS

SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL

TITLE OF DOCUMENT Update on the Yucca Mountain Program	ADAMS ACCESSION NO. ML163146391
DOCUMENT SPONSOR Catherine Hasey	SPONSOR PHONE NO. 301-492-3554
NAME OF NON-CONCURRING INDIVIDUAL Janet P. Kotra	PHONE NO. 301-492-3190

DOCUMENT AUTHOR     DOCUMENT CONTRIBUTOR     DOCUMENT REVIEWER     ON CONCURRENCE

TITLE Senior Project Manager	ORGANIZATION NMSS/NMSS/PMSS
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REASONS FOR NON-CONCURRENCE

I have prepared and revised copious variations of this memorandum. When, on June 14, 2010, the Chairman ordered the Director of NMSS to postpone issuance of Safety Evaluation Report Volumes 1 and 3, HLWRS and NMSS managers became concerned the entire Commission may not be fully aware of the policy, legal and budgetary consequences of such redirection. Some believed that a diligent staff, struggling to honor conflicting obligations, needed programmatic and policy guidance from the entire Commission armed with a fair assessment of the facts. I was given to understand the memorandum was not to refer to any of the related policy issues, a decision with which I disagreed. Later, in September, it became clear that, rather than postpone issuance of individual SER volumes, the Chairman's intent was to terminate the staff's safety review altogether. Using the continuing resolution as justification, the Chairman, through OEDO and the CFO, told staff that all work on the SER must stop, including Volume 3 on post closure safety, which was already complete, and undergoing management review. Written guidance to this effect appeared later, in an October 4, 2010 memorandum. The Chairman later met with the Yucca Mountain Team on October 12, 2010. He explained that the decision to shut down the staff's review of the application was his alone and that staff should move to orderly closure of NRC's Yucca Mountain program. This, despite the fact that, then, as now, the Nuclear Waste Policy Act remains in effect, the hearing process continues, and the Commission has yet to issue a decision on whether DOE may legally withdraw the application. Over time, repeated rounds of comment (formal and otherwise) from OEDO, the CFO and the General Counsel were incorporated. Time and again these comments diluted or contradicted the direct language offered by NMSS and ASLEP staff. Both staff sought to outline policy, programmatic and budgetary difficulties faced by their offices as they tried to cover the costs of both shutting down a complex and valuable national program and infrastructure while still supporting an ongoing hearing process. This now long-suffering memorandum is characterized as a "status report." Throughout its tortured evolution, I continued to make countless changes during a most unorthodox process, despite growing reservations, so long as the description of the program's history and status remained reasonably accurate. At this juncture, I can no longer support this memorandum. I believe

CONTINUED IN SECTION D

SIGNATURE <i>Janet Phelan Kotra</i>	DATE 2/11/2011
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ENCLOSURE 3

**NON-CONCURRENCE PROCESS**

TITLE OF DOCUMENT

Update on the Yucca Mountain Program

ADAMS ACCESSION NO.  
ML193148391

SECTION D: CONTINUATION PAGE

CONTINUATION OF SECTION

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that, in its present form, this memorandum appears to imply that the NMSS staff voluntarily, or, worse still, on its own volition, sought to terminate NRC staff's independent review of the Yucca Mountain License application and end staff's support for a fair and impartial hearing process for that application. It has been my experience that members of the NMSS staff, who have conducted a fair, independent and technically sound safety review, and who worked earnestly to prepare the required Safety Evaluation Report, stood down from that duty only with enormous reluctance. As currently drafted, this memorandum makes no reference to the facts surrounding the Chairman's termination of the NRC staff's review of the Yucca Mountain license application. Absent this crucial context, a reader is left with the mistaken impression that this termination and the "orderly shutdown" of the NRC staff's licensing review and hearing process was staff's preferred and well-considered course of action, initiated by the NRC's technical staff. Nothing could be further from the truth. Furthermore, absent proper context, the reader would also conclude that NMSS staff prepared this memorandum to inform a passive Commission about "staff's" course of action, after the fact, to alert the heretofore uninvolved Commission about problems and difficulties to which "staff's" course have led. For these reasons, I must respectfully withdraw my concurrence of December 2, 2016.

NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT

Update on the Yucca Mountain Program

ADAMS ACCESSION NO.

ML103140391

SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR  
(THIS SECTION SHOULD ONLY BE COMPLETED IF SUPERVISOR IS DIFFERENT THAN DOCUMENT SPONSOR.)

NAME *King Stablein*

TITLE *Chief, Projects Branch B, Division of High-Level Repository Safety*

PHONE NO.

*301-492-3199*

ORGANIZATION  
*NMSS*

COMMENTS FOR THE DOCUMENT SPONSOR TO CONSIDER

- I HAVE NO COMMENTS
- I HAVE THE FOLLOWING COMMENTS

*I agree wholeheartedly with Dr. Kotra's comments and agree specifically that this status report lacks the necessary context and information to adequately characterize the confusion, chaos, and anguish occasioned by the Chairman's unilateral decision to disrupt the orderly process of SER development. My nonconcurrency comments will amplify some of the points made by Dr. Kotra.*

CONTINUED IN SECTION D

SIGNATURE *King Stablein*

DATE *2/2/11*

### NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT

Update on the Yucca Mountain Program

ADAMS ACCESSION NO.

ML103140391

**SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR**

NAME

Catherine Haney

TITLE

Office Director

PHONE NO.

301-492-3554

ORGANIZATION

NMSS

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.)

- see attached -

CONTINUED IN SECTION D

SIGNATURE - DOCUMENT SPONSOR

*Catherine Haney*

DATE

2-4-11

SIGNATURE - DOCUMENT SIGNER

*Catherine Haney*

DATE

2-4-11

**NON-CONCURRING INDIVIDUAL** (To be completed by document sponsor when process is complete, i.e., after document is signed):

CONCURS

NON-CONCURS

WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)

WANTS NCP FORM PUBLIC

WANTS NCP FORM NON-PUBLIC

### NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT

Updated on the Yucca Mountain Program

ADAMS ACCESSION NO.

ML110540412

**SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR**

NAME

Catherine Haney

TITLE

Office Director

PHONE NO.

301-492-3554

ORGANIZATION

NMSS

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.)

Section C revised on March 01, 2011, to reflect that the non-concurring individual would like the NCP Form to be made public and that he/she non concurs on the document.

See Attached

CONTINUED IN SECTION D

SIGNATURE - DOCUMENT SPONSOR

*Catherine Haney*

DATE

3-1-11

SIGNATURE - DOCUMENT SIGNER

*Catherine Haney*

DATE

3-1-11

NON-CONCURRING INDIVIDUAL (To be completed by document sponsor when process is complete, i.e., after document is signed):

CONCURS

NON-CONCURS

WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)

WANTS NCP FORM PUBLIC

WANTS NCP FORM NON-PUBLIC

**NON-CONCURRENCE PROCESS**

**SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL**

TITLE OF DOCUMENT <b>UPDATE ON THE YUCCA MOUNTAIN PROGRAM</b>	ADAMS ACCESSION NO. <b>ML103140391</b>
DOCUMENT SPONSOR <b>Catherine Hasey</b>	SPONSOR PHONE NO. <b>301-492-3554</b>
NAME OF NON-CONCURRING INDIVIDUAL <b>King Stabilein</b>	PHONE NO. <b>301-492-3199</b>
<input type="checkbox"/> DOCUMENT AUTHOR <input type="checkbox"/> DOCUMENT CONTRIBUTOR <input type="checkbox"/> DOCUMENT REVIEWER <input checked="" type="checkbox"/> ON CONCURRENCE	

TITLE <b>Branch Chief</b>	ORGANIZATION <b>NMSS/HLWRS</b>
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REASONS FOR NON-CONCURRENCE  
**Please see attached document.**

CONTINUED IN SECTION D

SIGNATURE <i>King Stabilein</i>	DATE <b>2/2/11</b>
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**Reasons for King Stablein's Nonconurrence on Memorandum to the Commission entitled  
"Update on the Yucca Mountain Project"**

As Dr. Kotra's direct supervisor, I have witnessed her efforts to prepare and revise this memorandum over the past few months, and we have engaged in continual discussions about whether or not we could support the contents as they twisted and turned to accommodate the many agendas that were influencing the direction of the memo. We grew more and more uncomfortable as we came to understand that neither the context for the current state of the Yucca Mountain program nor the policy issues affecting the program were intended to be part of the final product. I have come to conclude that the memo does not provide the Commission with important information regarding the program, but rather, appears to suggest that the staff has taken the initiative to go in the direction of closure of the program and has had no difficulty in carrying out certain steps to achieve closure by September 30, 2011. In her non-concurrence, Dr. Kotra has skillfully illuminated many fundamental issues with the memo, and I fully support what she has written. In addition, I want to add some thoughts of my own.

Until the Chairman unilaterally brought development of the SER to a halt as of September 30, 2010, the High-Level Waste Repository Safety (HLWRS) staff was on track to deliver all five volumes of the SER in the first part of FY 2011. Volume 3, the key postclosure volume, was virtually complete and could have been issued by the November 2010 date that staff had given to ASLB. When the Chairman met with the HLWRS staff on October 12, 2010, it was pointed out to him that allowing the staff to finish the SER volumes would be by far the most efficient and effective use of Nuclear Waste Fund resources and at the same time would give the Nation the benefit of an independent regulator's evaluation of the Yucca Mountain application. He made it clear during this meeting that, although he recognized that he could choose that path, his view was that it would look more political to publish the SER volumes with findings than to issue them as Technical Evaluation Reports (TERs). Despite his audience's incredulity regarding this position, the Chairman said that the decision was solely his and that he chose to derail the SER development process while directing the staff to begin orderly shutdown of the Yucca Mountain program.

This decision has had profound effects on the Yucca Mountain program, none of which are reflected in the subject status report. As a supervisor in this program, I am keenly aware of the agony experienced by the HLWRS staff as they dutifully followed the Chairman's direction. Many of the staff have worked on the Yucca Mountain program for two decades or longer. To not be allowed to finish the SER, the culmination of those years of precicensing and licensing activity, because of what appears to be the arbitrary decision of one person, was wrenching for the staff. The staff was not aware of any substantive discussion and airing of issues at the Commission level, as would be expected for a decision of this magnitude regarding a program that has existed for 30 years. It felt to the staff as if the Chairman had casually dismissed the staff's sacrifices and effort of those many years without even bothering to engage his fellow Commissioners in the manner that Commission decisions are usually handled. The staff would

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have greatly appreciated, given the importance of this decision, an opportunity to share its views with the entire Commission. There is no recognition in this status update of the staff's frustration over the direction of the program or of the staff's lack of opportunity to present its views, concerns, and insights to the Commission before a final decision was made.

There is also no recognition in this memorandum of the difficulties staff has had to endure because of the lack of a Commission decision regarding whether or not DOE can withdraw its license application. The staff has been caught in a bind which it felt itself incapable of escaping as it attempts to follow the Chairman's direction to carry out orderly closure of the program. Confronted with the reality that there is still an active application before ASLB, certain activities in the staff's Orderly Closure Plan were considered by staff to require that the Commission allow DOE to withdraw its application before staff could carry out those activities. One example is the disposition in the National Archives of the documents that have been needed during the licensing process. The staff, many of whom have been in this program for 20 years or more, are acutely aware of the NWPA and the argument that ASLB crafted in rejecting DOE's request to withdraw its application. Staff should not be put in a situation where the direction from the Chairman appears to be in direct conflict with the NWPA and the fact of an active license application. Absent policy decisions from the Commission, staff has struggled on a daily basis to figure out how to cope with this bizarre situation in a manner which would enable staff to maintain its integrity.

For these reasons, as well as those expressed so eloquently by Dr. Kotra in her nonconurrence, I respectfully decline to concur on this status update memo.

*King Stablein* 2/3/11

King Stablein, Chief  
Projects Management Branch B  
Division of High-Level Waste Repository Safety  
Office of Nuclear Material Safety and Safeguards

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I carefully considered the concerns raised in Dr. Kotra's non-concurrence on the memo titled, "Update on the Yucca Mountain Program." Over the last several months, I have met with Dr. Kotra to discuss her concerns on transitioning the Yucca Mountain Program towards closure. Most recently, I met with Dr. Kotra on January 31, 2011, to discuss the concerns she planned to raise with the most recent version of the memorandum. Based on these discussions and my review of her non concurrence, I do not believe that changes are needed to the memorandum.

Dr. Kotra notes in her opening statement that she has "prepared and revised copious variation of this memorandum". She also states that "over time, the memo has been revised to dilute or contradict "the direct language offered by NMSS and ASLBP staffs. Both staffs sought to outline policy, programmatic and budgetary difficulties faced by their offices as they tried to cover the costs of both shutting down and complex and valuable national program and infrastructure while still supporting an ongoing hearing process." Dr. Kotra states that "In its present form, this memorandum appears to imply that the NMSS staff voluntarily, or, worse still, on its own volition, sought to terminate NRC staff's independent review of the Yucca Mountain License application and end staff's support for a full and impartial hearing process for the application. . . . As currently drafted this memorandum makes no reference to the facts surrounding the chairman's termination of the NRC staff's review of the Yucca Mountain license application."

Dr. Kotra is correct in her statement that there have been many iterations of this memorandum. This was due to the evolving nature of the program and the information that I felt needed to be conveyed to the Commission. Dr. Kotra states that she "was given to understand the memorandum was not to refer to any of the related policy issues, a decision with which I disagreed." Over time, the purpose of the paper evolved. The purpose of the Commission memorandum is to describe the status of the Yucca Mountain Program and staff's plans to capture the knowledge it acquired during pre-licensing preparation and licensing review activities. Potential policy issues associated with the closure of the Yucca Mountain project had been decided at the Commission level (reference my response to Mr. Mohseni's non concurrence on this same memo). I am not aware of any new information regarding program closure that would warrant raising it as a policy matter in this memorandum nor did I believe it necessary to raise any facts surrounding the termination of staff's review in this status paper.

Lastly, I do not agree with Dr. Kotra's statement that the "memorandum appears to imply that the NMSS staff voluntarily, or worse still, on its own volition, sought to terminate NRC staff's independent review of the Yucca Mountain License application and end staff's support for a full and impartial hearing process for the application. The memorandum was not intended to document or revisit past decisions on the Project.

Catherine Dancy

2-3-11

**NON-CONCURRENCE PROCESS**

TITLE OF DOCUMENT

ADAMS ACCESSION NO.

**SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR  
(THIS SECTION SHOULD ONLY BE COMPLETED IF SUPERVISOR IS DIFFERENT THAN DOCUMENT SPONSOR.)**

NAME

Aby Mohseni

TITLE

Deputy Director

PHONE NO.

301-492-3181

ORGANIZATION

NRC/NMSS/DELWRS

COMMENTS FOR THE DOCUMENT SPONSOR TO CONSIDER

- I HAVE NO COMMENTS  
 I HAVE THE FOLLOWING COMMENTS

As Dr. King Stablein's supervisor, I agree with his characterization of the program and the shortcomings of the memorandum. I would furthermore point to the inconsistency of the NRC Solicitor's characterization of the status of the program as being suspended due to the Continuing Resolution, implying a temporary and reversible status. In an email to a staff inquiry, the Solicitor agreed with the following characterization:

"In December 2010, the U.S. Court of Appeals lifted a prior order that had held four lawsuits against DOE in abeyance. The Court's December order set the lawsuits for full briefing and for oral argument. All briefs now have been filed, and the Court is scheduled to hear oral argument on March 22, 2011. The lawsuits against DOE claim that DOE has no authority to withdraw the Yucca Mountain license application, and that Congress must specifically authorize such action. As the appeals court proceeding has moved forward, and in view of NRC's limited budget resources under the current Continuing Resolution, NRC has suspended review of the Yucca Mountain license application, and NRC has stated it has no schedule for completion of the review."

This statement is inconsistent with the orderly closure activities outlined in the memorandum, including the termination of the Las Vegas Hearing Facility in FY 2011.

CONTINUED IN SECTION D

SIGNATURE



DATE

2/3/2011

SEND THIS PAGE TO DOCUMENT SPONSOR

### NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT: **Update on the Yucca Mountain Program** ADAMS ACCESSION NO. **ML103140391**

**SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR**

NAME: **Catherine Haney**

TITLE: **Office Director** PHONE NO. **301-492-3554**

ORGANIZATION: **NMSS**

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.)  
**- see attached -**

CONTINUED IN SECTION D

SIGNATURE - DOCUMENT SPONSOR <i>Catherine Haney</i>	DATE <i>2-4-11</i>	SIGNATURE - DOCUMENT SIGNER <i>Catherine Haney</i>	DATE <i>2-4-11</i>
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NON-CONCURRING INDIVIDUAL (To be completed by document sponsor when process is complete, i.e., after document is signed):

- |   |   |
|---|---|
| <input type="checkbox"/> CONCURS  | <input type="checkbox"/> WANTS NCP FORM PUBLIC                |
| <input checked="" type="checkbox"/> NON-CONCURS                                 | <input checked="" type="checkbox"/> WANTS NCP FORM NON-PUBLIC |
| <input type="checkbox"/> WITHDRAWS NON-CONCURRENCE (i.e., discontinues process) |   |

### NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT

Updated on the Yucca Mountain Program

ADAMS ACCESSION NO.

ML110540412

**SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR**

NAME

Catherine Haney

TITLE

Office Director

PHONE NO.

301-492-3554

ORGANIZATION

NMSS

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.)

Section C revised on March 01, 2011, to reflect that the non-concurring individual would like the NCP Form to be made public and that he/she non concurs on the document.

See Attached

CONTINUED IN SECTION D

SIGNATURE - DOCUMENT SPONSOR

*Catherine Haney*

DATE

3-1-11

SIGNATURE - DOCUMENT SIGNER

*Catherine Haney*

DATE

3-1-11

**NON-CONCURRING INDIVIDUAL** (To be completed by document sponsor when process is complete, i.e., after document is signed):

CONCURS

NON-CONCURS

WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)

WANTS NCP FORM PUBLIC

WANTS NCP FORM NON-PUBLIC

I carefully considered the concerns raised in Dr. Stablein's non-concurrence on the memo titled, "Update on the Yucca Mountain Program." On February 2, 2011, prior to him filing the non-concurrence, I met with Dr. Stablein to discuss his concerns with the memorandum. Based on this discussion and my review of his non-concurrence, I do not believe that changes are needed to the memorandum.

Dr. Stablein notes several items that are omitted from or not recognized in the memorandum. They are as follows:

- Important information regarding the program
- The "profound effects" of the decision to transition the Yucca Mountain Program to closure are reflected in the subject status report.
- "...staff's frustration over the direction of the program or of the staff's lack of opportunity to present its views, concerns, and insights to the Commission before a final decision was made."
- "...difficulties staff has had to endure because of the lack of a Commission decision regarding whether or not DOE can withdraw its license application."

Dr. Stablein further states that the paper "appears to suggest that the staff has taken the initiative to go in the direction of closure of the program and has had no difficulty in carrying out certain steps to achieve closure by September 30, 2011."

Mr. Mohseni, Dr. Stablein's supervisor, in his comments on Dr. Stablein's non-concurrence states that he agrees with Dr. Stablein's characterization of the program and the shortcomings of the memorandum. In addition, Mr. Mohseni identifies perceived inconsistency with the orderly closure activities outlined in the memorandum, including the termination of the Las Vegas hearing Facility in FY 2011 and comments by the NRC Solicitor on a draft IAEA document that imply a temporary and reversible status (reference Mr. Mohseni's comments on Dr. Stablein's non-concurrence).

I have reviewed the list of items that Dr. Stablein believes were omitted from or not recognized in the memorandum and his statement that the paper "appears to suggest that the staff has taken the initiative to go in the direction of closure of the program and has had no difficulty in carrying out certain steps to achieve closure by September 30, 2011." I believe that they all fall outside of the scope of the memorandum or are not needed. The purpose of the Commission memorandum is to describe the status of the Yucca Mountain Program and staff's plans to capture the knowledge it acquired during pre-licensing preparation and licensing review activities.

I have also been informed by the NRC Solicitor that his comments on an interim draft of an IAEA document were not meant to suggest a temporary "suspension" of YM due to budget constraints. The term was drafted by others and his focus was on accurately characterizing the status of Federal court litigation. He understands that the staff is engaged in orderly closure activities. As directed, our FY 2011 activities are focused on the orderly closure of the Program and not on completion of the Safety Evaluation Reports. As stated by the Chairman in

an October 27, 2010, letter to the Honorable Jim Sensenbrenner (ML 102980673), "the approach the NRC is following is consistent with the terms and the Continuing Resolution, the Commission's Fiscal 2011 budget request, the general principles of appropriations law, and past U.S. Nuclear Regulatory Commission (NRC) practice." The approach described in the memorandum is endorsed by the OEDO, CFO, and OGC and the memorandum describes the resource limitations on completing activities in FY2011.

*Catherine Hawley*  
*2-3-11*