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ACTION OFFICE: OGCEC

AUTHOR: REP Darrell Issa
AFFILIATION: CONG
ADDRESSEE: Gregory Jaczko
SUBJECT: Release of Vol III ...Yucca Mountain Project

ACTION: Signature of Chairman
DISTRIBUTION: Chairman, Comrs, EDO, RF..OCA to Ack

LETTER DATE: 03/11/2011

ACKNOWLEDGED No
SPECIAL HANDLING: Commission Correspondence.... OGC should coordinate response with EDO

NOTES: Issa requests unredacted Vol III SER noon March
23...requests RESPONSE.. NLT 5:00 April 1

FILE LOCATION: ADAMS

DATE DUE: 03/23/2011 **DATE SIGNED:**

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Congress of the United States

House of Representatives

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March 11, 2011

The Honorable Gregory Jaczko
Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Chairman Jaczko:

The Committee on Oversight and Government Reform is conducting an investigation into the termination of the Yucca Mountain Project. In particular, the recent actions of the Nuclear Regulatory Commission (NRC) in connection with the Department of Energy's motion to withdraw the license application require further explanation.

The Nuclear Waste Policy Act of 1982 (NWPAct), established the authority of the federal government, specifically the U.S. Department of Energy (DOE), to site, construct and operate a permanent geologic repository for the nation's spent nuclear fuel (SNF) and high level waste (HLW). In 1987, Congress amended the NWPAct, designating Yucca Mountain in Nevada as the only site available for consideration.

In 2002, pursuant to the process defined by the NWPAct, Congress and the President approved the recommendation of the Secretary of Energy to construct a repository at Yucca Mountain. In June 2008, DOE submitted a license application to the NRC to construct and operate the proposed repository. Yet, your actions and those of current Energy Secretary Steven Chu appear to undermine congressional intent.

The U.S. Court of Appeals for the D.C. Circuit stated in a 2004 opinion that "Congress has settled the matter, and we, no less than the parties, are bound by its decision."¹ On March 3, 2010, however, the Department of Energy filed a motion to withdraw the license application with prejudice in an attempt to ensure the Yucca Mountain Project could never be resurrected.² Affected parties challenged the legality of this action, and in June 2010, the NRC's Atomic Safety and Licensing Board (ASLB) unanimously denied DOE's motion, citing a lack of authority.³

¹ See *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1302 (D.C. Cir. 2004).

² U.S. Department of Energy's Motion to Withdraw (Mar. 3, 2010), available at <http://www.energy.gov/news/8721.htm>.

³ ASLB Order (Granting Intervention to Petitioners and Denying Withdrawal Motion) (Jun. 29, 2010).

Eight months later, the Commission has still not decided whether to review the ASLB's decision. It has come to this Committee's attention that Commissioners William Ostendorff, Kristine Svinicki, and William Magwood filed their "preliminary" votes with the Secretary of the Commission last summer.⁴ Although you filed your vote last summer as well, you delayed the resolution of this matter by later withdrawing your vote.⁵ You proceeded to continue solitary deliberations until after the start of the new fiscal year and resubmitted your vote on October 29, 2010.⁶ Despite having all preliminary votes submitted more than four months ago, and the enormous significance of the Commission's decision in this matter, you have failed to schedule an affirmation session to ratify those votes. Nevertheless, until the affirmation session is held, the ASLB's determination that the application cannot be withdrawn continues to stand.

While delaying a final vote on the ASLB decision, you instructed staff to proceed with an "orderly closure" of the NRC's license application review.⁷ NRC staff are following your instruction "to continue [the staff's] activities on the Yucca Mountain license application" in accordance with the "Commission's decisions on the fiscal year 2011 budget request" during the Continuing Resolution, which, by your interpretation, dictates termination of the review.⁸ In response to congressional and your fellow commissioners' questions about your instruction to the NRC staff,⁹ you have stated that neither the FY 2010 Appropriations Act and associated committee reports nor the FY 2011 Continuing Resolution provided you with any express direction on how to expend taxpayer dollars on Yucca Mountain activities in FY 2011.¹⁰ Your fellow commissioners¹¹ and a former NRC Chairman¹² have expressed their strong disagreement with this position publicly.

If you insist the staff continue down this path, I would expect the "orderly closure" you requested to include a complete accounting of the staff's work to date. Part of this effort would logically be the public release of Volume III of the Safety Evaluation Report, which contains the conclusions of the NRC staff regarding the technical merits of

⁴ Letter from Comm'r Kristine Svinicki to Senator James Inhofe (Nov. 4, 2010); letter from Comm'r William Ostendorff to Senator James Inhofe (Nov. 4, 2010); letter from Comm'r William Magwood to Senator James Inhofe (Nov. 5, 2010).

⁵ Letter from Chairman Gregory Jaczko to Senator James Inhofe (Nov. 5, 2010).

⁶ *Id.*

⁷ See Memorandum from Comm'r Ostendorff to Chairman Jaczko *et al.*, "Disagreement with Staff Budget Guidance Under Fiscal Year 2011 Continuing Resolution" (Oct. 8, 2010) (hereinafter Ostendorff Memo).

⁸ *Id.*; Memo from J.E. Dyer, Chief Financial Officer, and R.W. Borchardt, Executive Director for Operations, "Guidance Under a Fiscal Year 2011 Continuing Resolution" (Oct. 4, 2010).

⁹ Letter from Rep. Jim Sensenbrenner to Chairman Gregory Jaczko (Oct. 13, 2010); letter from Comm'r Kristine Svinicki to Rep. Jim Sensenbrenner (Nov. 1, 2010); Ostendorff Memo, *supra* note 7.

¹⁰ Letter from Chairman Gregory Jaczko to Rep. Joe Barton (Oct. 27, 2010).

¹¹ Letter from Comm'r Kristine Svinicki to Rep. Joe Barton (Nov. 1, 2010); letter from Comm'r William Ostendorff to Rep. Doc Hastings (Oct. 27, 2010).

¹² Open Letter to Journalists from Dale E. Klein, former Chairman, Nuclear Regulatory Commission (Oct. 29, 2010), available at <http://www.nucleartownhall.com/blog/ex-nrc-chairman-klein-rebuffs-jaczko-yucca-shut-down-alibi/>.

the license application. Thus far, the NRC has only released a redacted, pre-decisional version of the document in response to a Freedom of Information Act (FOIA) request.¹³ The document's pre-decisional state directly contradicts Commissioner Ostendorff's October 27, 2010, letter informing Rep. Doc Hastings "on July 15, 2010, Volume III was transmitted to the Director... [f]or concurrence and authorization to publish."¹⁴ Furthermore, in the words of the ASLB, none of the evidence provided "comports with the Staff's characterization of SER Volume 3 being a preliminary draft."¹⁵

Shortly after taking office, President Obama pledged that "the public must be able to trust the science and scientific process informing public policy decisions."¹⁶ Likewise, as Chairman, you have stressed the importance of "conduct[ing] the public's work in an open and transparent manner."¹⁷ Unfortunately, your actions surrounding the termination of the Yucca Mountain Project fail to live up to this pledge.

In order to assist the Committee with its investigation, please provide the following information and documents:

1. A timeline of significant events related to the Commission's review of the ASLB's decision on DOE's motion to withdraw the license application, including but not limited to the following:
 - a. Filing of each Commissioner's vote.
 - b. Withdrawal of any Commissioner's vote.
 - c. Active deliberation or discussions between Commissioners or their staff.
2. Documents and communications, including e-mails, relating to the Commission's review of the ASLB's decision on DOE's motion to withdraw the license application.
3. Documents and communications, including e-mails, relating to reasons for the delay between the filing of the final Commissioner's vote and the scheduling of the affirmation session.
4. A timeline of all significant events related to the "orderly closure" of the High-Level Waste Program and the use of Nuclear Waste Fund resources

¹³ Response to Freedom of Information Act / Privacy Act Request, No. 2011-0015 (Feb. 14, 2011), available at <http://www.nrc.gov/reading-rm/adams-web-based.html> (Accession no. ML110480651).

¹⁴ Letter from Comm'r William Ostendorff to Rep. Doc Hastings (Oct. 27, 2010).

¹⁵ ASLB Order (Directing NRC Staff's Show Cause) (Feb. 25, 2011).

¹⁶ President Barack Obama, *Remarks on Signing of Stem Cell Executive Order and Scientific Integrity Presidential Memorandum* (Mar. 9, 2009), available at

http://www.whitehouse.gov/the_press_office/remarks-of-the-president-as-prepared-for-delivery-signing-of-stem-cell-executive-order-and-scientific-integrity-presidential-memorandum/.

¹⁷ Prepared Remarks, The Honorable Gregory Jaczko, Chairman, U.S. Nuclear Regulatory Commission, "A Firm Foundation, A Strong Regulatory Future," (Mar. 9, 2010) available at http://adamswebsearch2.nrc.gov/idmws/DocContent.dll?library=PU_ADAMS^pbmad04&LogoutID=3d46d1e295e9ff82d1bd118bda083450&id=100680285.

under the Continuing Resolution, including but not limited to the following:

- a. Communication to or among the Commissioners or their respective staffs.
 - b. Internal communication to NRC staff.
5. Documents and communications, including e-mails, relating to all significant dates concerning the "orderly closure" of the High-Level Waste Program and the use of Nuclear Waste Fund resources under the Continuing Resolution.
 6. Documents and communications, including e-mails, exchanged among or originated by the Commissioners, their respective staffs, and Commission staff relating to the funding of the High-Level Waste Program in FY2011. This request includes any reviews or recommendations provided by the Office of the General Counsel.
 7. Documents and communications, including e-mails, exchanged among or originated by the Commissioners, their respective staffs, and Commission staff relating to the release of Volume III of the SER
 8. A statement by each individual responsible for reviewing and signing Volume III of the SER specifying whether he/she received the document for final concurrence and whether and when he/she gave that concurrence.
 9. Documents and communications, including e-mails, related to the decision to develop a report separate from the SER to document the NRC staff's technical review activities completed to date.
 10. Volume III of the SER, in unredacted form.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X.

The Committee requests that the NRC produce Volume III of the SER in its unredacted, electronic form no later than noon on March 23, 2011. We ask that you provide the remaining requested information and documents as soon as possible, but no later than 5:00 p.m. on April 1, 2011. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment to this letter provides additional information about responding to the Committee's request.

The Honorable Gregory Jaczko
March 11, 2011
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If you have any questions about this request, please contact John Ohly of the Committee Staff at (202) 225-5074. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Darrell Issa", written over a horizontal line.

Darrell Issa
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

The Honorable William C. Ostendorff, Commissioner
U.S. Nuclear Regulatory Commission

The Honorable George Apostolakis, Commissioner
U.S. Nuclear Regulatory Commission

The Honorable Kristine Svinicki, Commissioner
U.S. Nuclear Regulatory Commission

The Honorable William D. Magwood, IV, Commissioner
U.S. Nuclear Regulatory Commission

ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
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WASHINGTON, DC 20515-6143

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Minority (202) 225-5091

Responding to Committee Document Requests

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.