

Non-Concurrence Process Record for NCP-2011-012

The U.S. Nuclear Regulatory Commission (NRC) strives to establish and maintain an environment that encourages all employees to promptly raise concerns and differing views without fear of reprisal and to promote methods for raising concerns that will enhance a strong safety culture and support the agency's mission.

Individuals are expected to discuss their views and concerns with their immediate supervisors on a regular, ongoing basis. If informal discussions do not resolve concerns, individuals have various mechanisms for expressing and having their concerns and differing views heard and considered by management.

Management Directive MD 10.158, "NRC Non-Concurrence Process," describes the Non-Concurrence Process (NCP). <http://pbadupws.nrc.gov/docs/ML0706/ML070660506.pdf>

The NCP allows employees to document their differing views and concerns early in the decision-making process, have them responded to, and attach them to proposed documents moving through the management approval chain.

NRC Form 757, Non-Concurrence Process is used to document the process.

Section A of the form includes the personal opinions, views, and concerns of an NRC employee.

Section B of the form includes the personal opinions and views of the NRC employee's immediate supervisor.

Section C of the form includes the agency's evaluation of the concerns and the agency's final position and outcome.

NOTE: Content in Sections A and B reflects personal opinions and views and does not represent official factual representation of the issues, nor official rationale for the agency decision. Section C includes the agency's official position on the facts, issues, and rationale for the final decision.

The agency's official position (i.e., the document that was the subject of the non-concurrence) is included in ADAMS Accession Number ML11180A265.

This record has been redacted prior to discretionary release to the public.

NON-CONCURRENCE PROCESS

SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL

TITLE OF DOCUMENT Update On The Yucca Mountain Program		ADAMS ACCESSION NO. ML11180A265
DOCUMENT SPONSOR Catherine Haney		SPONSOR PHONE NO. 301-492-3557
NAME OF NON-CONCURRING INDIVIDUAL Aby Mohseni		PHONE NO. 301-492-3181

☐ DOCUMENT AUTHOR ☐ DOCUMENT CONTRIBUTOR ☐ DOCUMENT REVIEWER ☒ ON CONCURRENCE

TITLE Acting Division Director	ORGANIZATION HLWRS/NMSS
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REASONS FOR NON-CONCURRENCE

See attachment

☐ CONTINUED IN SECTION D

SIGNATURE 

DATE
07/21/2011

**SUBMIT FORM TO DOCUMENT SPONSOR AND COPY TO YOUR IMMEDIATE SUPERVISOR AND
DIFFERING VIEWS PROGRAM MANAGER**

As acting Director of the Division of High Level Waste Repository Safety, I am not concurring on this Commission Memorandum because it fails to provide full and comprehensive information with respect to the developments that affect the Commission's responsibilities to act on important issues. The missing information relates to the responsibilities of the Commission with respect to the statutory time limits contained in the Nuclear Waste Policy Act (NWPA) as we approach the three-year limit. By my estimation, the Commission may request an additional one-year extension from Congress before August 7, 2011.

Whereas Sec. 114 of the Act states that:

" (d) COMMISSION ACTION.—The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection (e)(2);"

and whereas, the three-year statutory time limit expires September 7, 2011 (assuming submission date to be the NRC's docketing date of September 8, 2008.)

and whereas, NRC solicitor noted that the July 1, 2011 decision by the U.S. Court of Appeals of the District of Columbia Circuit *In re Aiken County*, at Slip Op. 12-13 appears to be an open invitation to petitioners to file for mandamus against the NRC on a claim of agency inaction or excessive delay in agency action;

and whereas the June 6, 2011 OIG report found that Commissioners are uncertain as to whether they are adequately informed of policy matters that should be brought to their attention;

I believe the staff memorandum should include the above information and perhaps include the staff's recommendations on path forward. In doing so, the full Commission would be alerted to the approaching time-limit and benefit from the staff's best thinking.

I discussed the above information, and the absolute necessity to include in the memorandum, with two OGC senior managers and my Office Director. I also briefed them on the inclusion of options that might be available to the Commission to correspond with the Congress as required in the Act prior to August 7, 2011. During this discussion, the OGC senior manager took a few minutes to seek the views of Steve Burns, the General Counsel. When he came back he informed us that Steve Burns would absolutely disagree with inclusion of any discussion on the NWPA time limit and associated Commission actions.

The direction from Steve Burns regarding a staff memorandum raises three issues. 1) There is a potential violation of separation of function with OGC structure, as it is well known that Steve Burns advises the Chairman. The staff remains either without the benefit of counsel, or inappropriately influenced by counsel that is linked to the Chairman's office. 2) Given the OIG report, there is potential for inappropriate influence by the Chairman's office through Steve Burns, to control information to the full Commission; and in my opinion, that is a potential violation of the statutory requirement to keep the full Commission fully and currently informed. 3) The OGC role is advisory and should not be directing staff on staff products. The NMSS Office Director has a statutory role under the Atomic Energy Act and needs counsel that advises with respect to the responsibilities contained in the Act. In this case, there is an obligation for OGC to advise the staff on the staff's obligations under the NWPA and the associated timeline encoded in 10CFR Part 2; I do not believe that OGC is adequately performing its advisory functions.

NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT

Update on the Yucca Mountain Program

ADAMS ACCESSION NO.

ML11180A265

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.)

I have reviewed Mr. Mohseni's non-concurrence. Based on the attached input from Mr. Burns, OGC,
I do not need : to modify the document.

☐ CONTINUED IN SECTION D

SIGNATURE - DOCUMENT SPONSOR

Catherine Haney

DATE

8-2-11

SIGNATURE - DOCUMENT SIGNER

Catherine Haney

DATE

8-2-11

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

Note to Cathy Haney
Director, NMSS

I have read Mr. Mohseni's non-concurrence in the status memo on the high level waste program. I thought you should have the benefit of my views on his position that the status memorandum should discuss and perhaps include staff recommendations on litigation strategy in light of the court's decision *In re Aiken County* and the notification provision in section 114(d) of the Nuclear Waste Policy Act. As indicated in his non-concurrence, I do not support including a discussion of these issues in the staff's status memorandum to the Commission. These views were essentially communicated orally by my staff to you and Mr. Mohseni during a phone call to discuss OGC comments on a draft of the memorandum.

First, although Mr. Mohseni suggests I have committed a "potential violation" of the separation of functions rules, my primary objection to discussing the matters he would prefer to address in the memo is in fact rooted in *avoiding* the introduction of a possible separation of functions problem. As discussed in the memorandum to the Commission on the *Aiken County* decision which Mr. Mohseni references, the Solicitor (who reports to me) noted the court's language that suggests possible future action by petitioners for delay or inaction by the Commission related primarily to matters pending before the Commission in its *adjudicatory capacity*. To the extent that Mr. Mohseni wants you to include suggestions for a "path forward" which would appear to address how the staff believes the Commission should position itself or otherwise act with respect to those adjudicatory matters, including such content in the memo is inappropriate under the separation of functions rule in 10 CFR 2.348 given the staff's status as a party to the proceeding. I have in fact been in discussions with the Solicitor and the Director of OCAA, who prepares adjudicatory decisions for the Commission, with respect to the impact of the court's decision on the Commission's current adjudicatory posture, discussions to which separated staff may not be privy.

Second, even apart from the separation of functions considerations, I do not view it appropriate for a *status* memorandum from the staff on the "Yucca Mountain Program" to include a discussion of litigation strategy and legal advice. This is hardly a matter of OGC "directing" or interfering with the content of staff products, but rather recognition of the proper allocation of roles and responsibilities between staff and OGC. As chief legal officer of the agency, I am ultimately responsible for litigation strategy, which is handled by the Solicitor on a day-to-day basis, and for the communication of legal advice to the Commission. Although Mr. Mohseni charges that I am somehow acting at the behest of the Chairman's office to keep information from the Commission, I would remind him that I report to the Commission and take that responsibility seriously. Moreover, it can be hardly said that OGC has hidden these issues from the Commission, when the Solicitor's memo to the Commissioners specifically identifies the issue raised by the court regarding the statutory "deadline." I would also note that I have been considering for some time the question of whether any notification to Congress at this time is necessary, appropriate or in the agency's best interest. I have communicated with the Commission on this very issue, but I am not prepared to include specific legal advice in the *staff's* status memorandum to the Commission and do not believe it appropriate to do so. Mr. Mohseni's suggestion to the

contrary, and while he may not always agree with OGC positions, OGC managers and staff continue to provide comprehensive, thorough advice to NMSS.

Stephen G. Burns
General Counsel