

| U.S. NUCLEAR REGULATORY COMMISSION | |
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| 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 Honey | SPONSOR PHONE NO. 301-492-3854 |
| NAME OF NON-CONCURRING INDIVIDUAL Aby Mahand | PHONE NO. 301-492-3452 |
| <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 NLR |
| 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 Yucca 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 ARLB hearings require that these funds also support legal activities to support 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 shutdown instead of supporting and funding the remaining SER volumes, especially since the Commission has not reversed the ARLB's decision that denies 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> | |
| <input type="checkbox"/> CONTINUED IN SECTION D | |
| DATE 1/18/2011 | |

FORM NRC-1000

Use ADAMS Template NRC-000


ENCLOSURE 2

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|--|--|--|---|
| <small>NSIC FORM 707 MAY 2003 EDITION GPO:2003-500-000</small> | | <small>U.S. NUCLEAR REGULATORY COMMISSION</small> | |
| NON-CONCURRENCE PROCESS | | | |
| <small>TITLE OF DOCUMENT</small> Update on the Yucca Mountain Program | | <small>ADAMS ACCESSION NO.</small> NDL183148391 | |
| <small>SECTION B - TO BE COMPLETED BY NON-CONCURRENCE INDIVIDUAL'S SUPERVISOR (THIS SECTION SHOULD ONLY BE COMPLETED IF SUPERVISOR IS DIFFERENT THAN DOCUMENT SPONSOR.)</small> | | | |
| <small>NAME</small> <i>Laura E. Kibyle</i> | | <small>PHONE NO.</small> 301-491-2159 | |
| <small>TITLE</small> <i>Director, Division of High-Level Waste Repository Safety</i> | | <small>ORGANIZATION</small> NRC | |
| <small>COMMENTS FOR THE DOCUMENT SPONSOR TO CONSIDER</small> | | | |
| <input type="checkbox"/> I HAVE NO COMMENTS | | | |
| <input checked="" type="checkbox"/> I HAVE THE FOLLOWING COMMENTS <i>See attached sheet.</i> | | | |
| <small>DATE</small> <i>1/24/04</i> | | | <input type="checkbox"/> CONTINUED IN SECTION D |
| <small>APPROVED BY</small> <i>[Signature]</i> | | | |
| <small>USE ADAMS Template NSIC-002</small> | | | |

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 Moheeni, 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 LBN). 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. Moheeni'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. Moheeni that the embedded policy matters should be addressed at the outset.


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

18 January 2011

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|--|--|---|--|---|---|
| <small>NRC FORM 750 MAY 1988 GPO</small> | | NON-CONCURRENCE PROCESS | | <small>U.S. NUCLEAR REGULATORY COMMISSION</small> | |
| <small>TITLE OF DOCUMENT</small> Update on the Yearly Meeting Program | | | <small>ADAMS ACCESSION NO.</small> ML163146391 | | |
| SECTION G - TO BE COMPLETED BY DOCUMENT SPONSOR | | | | | |
| <small>NAME</small> Catherine Haney | | | <small>PHONE NO.</small> 301-492-3554 | | |
| <small>TITLE</small> Office Director | | | <small>ORGANIZATION</small> NRC | | |
| <small>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.)</small> <p style="text-align: center;">- See Attached -</p> | | | | | |
| | | | | | <input type="checkbox"/> CONTINUED IN SECTION D |
| <small>SIGNATURE - DOCUMENT SPONSOR</small> <i>C Haney</i> | | <small>DATE</small> 2-4-11 | <small>SIGNATURE - DOCUMENT SIGNER</small> <i>C Haney</i> | | <small>DATE</small> 2-4-11 |
| <small>NON-CONCURRENCE INDICATOR (To be completed by document sponsor when process is complete, i.e., after document is signed):</small> | | | | | |
| <input checked="" type="checkbox"/> CONCLUDE | | <input type="checkbox"/> NON-CONCLUDE | | <input type="checkbox"/> WANTS NCP FORM PUBLIC | |
| <input type="checkbox"/> WITHDRAWNS NON-CONCURRENCE (i.e., withdrawal process) | | | | <input checked="" type="checkbox"/> WANTS NCP FORM NON-PUBLIC | |
| <small>REPORT TO BUREAU</small> | | <small>SEE ADAMS SYSTEM AWC-003</small> | | <small>FORM CHECKLIST REFER</small> | |

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 <i>Catherine Haney</i> | DATE 3-1-11 | SIGNATURE - DOCUMENT SIGNER <i>Catherine Haney</i> | DATE 3-1-11 |
|--|-----------------------|---|-----------------------|

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

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

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 Vletti-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