



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SCHEDULED FOR ORAL ARGUMENT MAY 2, 2012

OFFICE OF THE
GENERAL COUNSEL

April 17, 2012

Mark Langer, Clerk
United State Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Washington D.C. 20001

RE: *In re Aiken County, et al.*, No. 11-1271 (scheduled for Oral argument May 2, 2012).

Dear Sir:

Pursuant to FRAP 28(j), Respondent NRC replies to Petitioners' letter dated April 6, 2012.

Petitioners state that Secretary Chu testified before Congress that DOE will "abide by" any decision of this Court and will "pursue" the Yucca Mountain license if this Court so orders. Government agencies must, of course, comply with court orders. But this Court presumably will issue no such order to DOE in this case because DOE is not a party. In any event, as government counsel noted at oral argument during the previous *Aiken County* lawsuit, DOE's resuming pursuit of a Yucca Mountain license is, of necessity, "subject to funding[.]" JA101.

Petitioners imply that Chairman Jaczko's statement that there is "no formal contingency plan" to resume the licensing process undercuts the statement in our brief (p.53) that NRC is in a position to resume the proceeding if Congress resumes the necessary funding. But the absence of a formal plan would not prevent NRC from resuming the proceeding; instead, Chairman Jaczko merely offered the unremarkable observation that Congressional delay in resuming funding would delay NRC's resuming the proceeding.

Obviously, Congressional funding is a prerequisite to agency action. As we noted in our brief (pp.51-53), it was Congress' withdrawal of funding that forced NRC to close the proceeding. Indeed, as early as 2010, Chairman Jaczko informed Congress that given severely declining appropriations, terminating review of the license application was "consistent with NRC's obligation to spend funds prudently" See Letter to Representative Sensenbrenner (Oct. 27, 2010), Enclosure, p.1 (attached).

Petitioners also question the NRC staff's current review of "alternative disposal methods for HLW and SNF." But with the Yucca Mountain proceeding de-funded by Congress, NRC has no option but to turn its attention to "alternative disposal methods[.]"

In a recent decision discussing Congress' "power of the purse," this Court reinforced a fundamental point in our brief (pp.43-51) -- NRC cannot spend money for the Yucca Mountain proceeding unless Congress appropriates it. See *Department of the Navy v. FLRA*, 665 F.3d 1339, 1346-48 (D.C. Cir. 2012). "Congress's control over federal appropriations is absolute." *Id.* at 1347 (internal quotation omitted).

Sincerely,

A handwritten signature in black ink, appearing to read "Charles E. Mullins". The signature is written in a cursive style with a long horizontal stroke extending to the left.

Charles E. Mullins
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission

Enclosure: Letter from Gregory B. Jaczko (NRC) to Rep. Jim Sensenbrenner (Oct. 27, 2010)
with responses to questions..

Filed by EC/CMF



CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

October 27, 2010

The Honorable Jim Sensenbrenner
Ranking Member, Select Committee on
Energy Independence and Global Warming
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Sensenbrenner:

This letter is in response to your letter of October 13, 2010, in which you expressed concerns about reports regarding the U.S. Nuclear Regulatory Commission's (NRC's) review of the U.S. Department of Energy license application seeking to construct a geologic repository at Yucca Mountain, Nevada. You also requested answers to six questions. My responses to those questions are enclosed.

As detailed in my enclosed responses, I want to assure you that 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 NRC practice.

I appreciate your interest in our high-level waste program and will keep you informed of NRC activities in this regard, and would be happy to meet with you to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory B. Jaczko".

Gregory B. Jaczko

Enclosure:
Responses to Questions

Responses to Questions

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?

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.

As you know, in FY 2010, the NRC requested \$56 million for its High-Level Waste (HLW) program, but Congress only appropriated \$29 million. The NRC requested an appropriation of \$10 million for the HLW program in FY 2011, or about a third of the FY 2010 appropriation. Both the Senate Appropriations Committee and the Energy and Water Development subcommittee of the House Appropriations Committee approved that sum for FY 2011.

Under these circumstances, the path that the NRC is following is consistent with NRC's obligation to spend funds prudently under a Continuing Resolution pending final budget action by the Congress. See Section 110 of Pub. L. 111-242, 124 Stat. 2607 (Sept. 30, 2010); OMB Circular No. A-11. §123.2 (2010).

QUESTION 2. What specific actions have been taken or will be taken to terminate review of the license application, including all actions related to NRC staff review of the application?

ANSWER.

Pursuant to the guidance issued by the Executive Director of Operations and the Chief Financial Officer, staff is beginning an orderly closure of the program. No specific actions have yet been taken to terminate the program. Rather the first step of this process is to preserve the staff's work products, and complete and implement a detailed and comprehensive plan for this effort. The entire process is expected to take at least a year and include documenting the staff's review and other knowledge concerning the program by means such as comprehensive technical reports and videotaped interviews of technical staff.

QUESTION 3. How does halting NRC review of the license application influence the pending appeal of ASLB's ruling?

ANSWER.

The staff is following established Commission policy to begin to close out the HLW program. These actions are separate from our hearing process and any decision the Commission may make to review the Atomic Safety and Licensing Board's (ASLB's) ruling and decide whether to uphold or reverse their decision concerning the formal status of the U.S. Department of Energy's (DOE's) application.

Enclosure

QUESTION 4. How will your decision impact future legal challenges to DOE's motion to withdraw?

ANSWER.

Currently the United States Court of Appeals for the District of Columbia has held related proceedings in abeyance pending NRC action. *In re Aiken County*, No. 10-1050 (and consolidated cases)(D.C. Cir.). I am not in a position to speculate on how this court or any future court will respond to NRC's actions.

QUESTION 5. How are you ensuring that NRC is prepared to resume consideration of the license application if the commission and courts uphold ASLB's decision?

ANSWER.

The staff is beginning to transition to close out for the reasons outlined above. By thoroughly documenting the staff's technical review and preserving it as appropriate for publication and public use, the agency will be able to respond to direction from the Congress or the courts.

QUESTION 6. What communication specifically relating to this decision have you had with the offices of Secretary of Energy Chu, Senate Majority Leader Reid, or the White House.

ANSWER.

Consistent with my role as Chairman of an independent regulatory commission, members of my staff and I informed the White House and a select number of Members of the Congress, including NRC's authorizers and appropriators as well as Senator Reid, on a bipartisan basis, of the budgetary decision to begin to transition to close out of NRC's HLW activities. Neither I, nor anyone on my staff, had communication with the U.S. Department of Energy regarding this decision.

Congress of the United States
Washington, DC 20515

October 13, 2010

Chairman Gregory Jaczko
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

Dear Chairman Jaczko:

We are writing to express our concern regarding reports that you are unilaterally halting the Nuclear Regulatory Commission's (NRC) review of the Department of Energy's (DOE) license application for the nuclear waste repository at Yucca Mountain.

Recent media reports assert that you directed NRC staff to begin terminating review of DOE's license application, consistent with the language of the Fiscal Year 2011 (FY11) budget request, despite the fact that Congress has yet to approve the FY11 budget.¹ This action has been justified in a guidance memo which argues, "the [continuing resolution] legislation does not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget..."² However, basing funding and operational decisions on submitted budget requests, not appropriations bills signed into law, is suspect. Even the NRC spokesman, David McIntyre, noted that he was "not sure whether there was a precedent for [your] decision."³

Your directive is even more alarming given the current status of the license application. As you know, the Atomic Safety and Licensing Board (ASLB) rejected DOE's motion to withdraw the license application on June 29, 2010. According to the ASLB, DOE lacks the authority to overrule clear Congressional intent for NRC to review the license application of Yucca Mountain as a nuclear waste repository. As you know, Congress passed the Nuclear Waste Policy Act of 1982 (NWPA) to centralize the long-term management of nuclear waste, including construction of a safe and permanent nuclear waste repository. In 1987, Congress amended the NWPA by designating Yucca Mountain as the only option for a longer-term storage site by a vote of 237-181 in the House of Representatives and 61-28 in the Senate. Congress reaffirmed Yucca Mountain's designation as the only option for a long-term storage site in 2002 by a vote of 306-117 in the House of Representatives and 60-39 in the Senate. Again in 2007, the House of Representatives overwhelmingly rejected, by a vote of 80-351, an attempt to eliminate funding for the Yucca Mountain nuclear waste disposal program. Additionally, on July 6, 2010, 91 Members of Congress sent DOE a letter expressing concern with their decision to immediately close Yucca Mountain.

The commissioners have not yet issued a ruling on appeal; therefore, unless the commission overturns the ASLB decision, the NRC must consider the license application. Your unilateral

¹ <http://www.isrl.gov/newsroom/whomone-does-it-support-01-yucca-review-104488878.html>

² U.S. Nuclear Regulatory Commission, "Guidance Under a Fiscal Year 2011 Continuing Resolution." October 4, 2010.

³ <http://www.enr.com/resources/stories/2010/10/07/101007a1>

Chairman Jaczko
October 13, 2010
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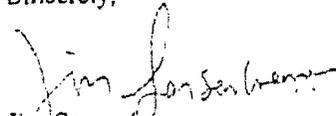
decision silences the opinions of the other commissioners on the pending appeal. Further, legal challenges in federal court are imminent, pending final action from the NRC. Your directive gives the appearance of coordinated action between you and DOE, which suggests an additional level of impropriety.

In light of the reports, we request answers to the following questions:

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?
2. What specific actions have been taken or will be taken to terminate review of the license application, including all actions related to NRC staff review of the application?
3. How does halting NRC review of the license application influence the pending appeal of ASLB's ruling?
4. How will your decision impact future legal challenges to DOE's motion to withdraw?
5. How are you ensuring that NRC is prepared to resume consideration of the license application if the commission and courts uphold ASLB's decision?
6. What communication specifically relating to this decision have you had with the offices of Secretary of Energy Chu, Senate Majority Leader Reid, or the White House?

Please respond by October 27, 2010. We appreciate your cooperation.

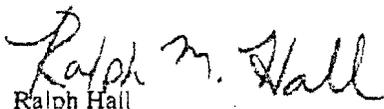
Sincerely,



Jim Sensenbrenner
Ranking Member
Select Committee on Energy Independence and
Global Warming



Joe Barton
Ranking Member
Energy and Commerce Committee



Ralph Hall
Ranking Member
Science and Technology Committee



Doc Hastings
Ranking Member
Natural Resources Committee