

**WRITTEN STATEMENT**  
**BY ALLISON M. MACFARLANE, CHAIRMAN**  
**UNITED STATES NUCLEAR REGULATORY COMMISSION**  
**TO THE**  
**HOUSE COMMITTEE ON ENERGY AND COMMERCE**  
**SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY**  
**SEPTEMBER 10, 2013**

Good morning, Chairman Shimkus, Ranking Member Tonko, and distinguished members of the Subcommittee. On behalf of the U.S. Nuclear Regulatory Commission (NRC)<sup>1</sup>, I appreciate the opportunity to appear before you today to talk about the recent court decision on Yucca Mountain and what it means for the NRC.

As you are aware, on August 13, 2013, a panel of the U.S. Court of Appeals for the District of Columbia Circuit issued its decision directing the NRC to resume its review of the Department of Energy's (DOE) application to construct a geologic repository for high-level waste at Yucca Mountain, Nevada. The NRC promptly began taking steps to comply with the court's direction following the issuance of the decision. While the full nature of the direction we will take remains under Commission review, I commit to provide additional information to you as our decision process continues.

**COMMISSION ACTIONS PURSUANT TO COURT DECISION**

On August 30, 2013, the Commission issued an Order requesting that all parties to the suspended adjudication provide the Commission with their views on how the NRC should

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<sup>1</sup> Commissioner George E. Apostolakis has recused himself from the adjudicatory proceeding and did not participate in the development or review of this testimony.

continue with the licensing process. The responses from the parties are due on September 30, 2013. The Commission has also directed the NRC offices to gather pertinent budget information during the 30 day comment period. Based on the input from the parties and the budget information provided by NRC offices, the Commission will determine the path forward in the licensing process. Because the Commission has not reached a decision on the path forward for the agency, it would be inappropriate for me to speculate about what the final direction will be.

## **ROLES AND RESPONSIBILITIES**

The NRC is an independent regulatory agency, whose mission is to license and regulate the Nation's civilian use of radioactive materials, to protect public health and safety, promote the common defense and security, and protect the environment. Under the Nuclear Waste Policy Act, the DOE is responsible for developing and submitting to the NRC a license application for the construction of a high-level waste repository at Yucca Mountain. The NRC is required by law to review the application and determine whether to issue a construction authorization to the DOE, based in part on standards set by the Environmental Protection Agency (EPA) and implemented in NRC regulations. The focus of the NRC's review is on whether the DOE has demonstrated that it can construct and operate a repository safely and in compliance with NRC regulations.

The DOE submitted its license application to the NRC in June 2008. In September the application was accepted for docketing, and in October, the Commission published a notice in the *Federal Register* inviting interested persons to request a hearing. Multiple interested parties petitioned for a hearing on the DOE license application, and a hearing was granted. From that point forward, as the NRC staff conducted its technical review of the application, the Atomic

Safety and Licensing Board (ASLB) presided over the adjudicatory proceeding. I will discuss the staff's actions first and then discuss the role of the ASLB and its extensive responsibilities.

## **NRC STAFF ACTIONS**

The NRC expert technical staff was tasked with conducting an independent, thorough review of the repository design and making an objective determination on whether the design met the safety, security, and safeguards requirements under NRC regulations. The staff was also responsible for examining the DOE's environmental documents to determine whether the NRC could adopt the DOE Environmental Impact Statement (EIS) on the proposed repository. In September 2008, the NRC staff adopted the EIS, subject to additional supplementation on groundwater analyses. In October 2008, the DOE had notified the NRC of its intent to supplement the EIS. Subsequently, in July 2009, the DOE notified the NRC that it had decided not to prepare a supplement. To satisfy National Environmental Policy Act (NEPA) obligations, the EIS would need to be supplemented.

Between 2008 and 2010, the NRC staff, along with the Federally-funded Center for Nuclear Waste and Regulatory Analyses, conducted a detailed regulatory review and began the preparation of its safety evaluation report (SER). In March 2010, the DOE filed a motion to withdraw its application. At the end of fiscal year 2011, the NRC formally suspended its review of the Yucca Mountain license application. At the time of the suspension, the first of a five-volume SER had been published and there were four remaining volumes in various stages of completion. The complete SER would represent the staff's technical determination as to whether the proposed repository meets NRC's safety and security regulations and whether construction should be authorized with appropriate license conditions.

In response to the suspension of the Yucca Mountain licensing program, the staff did not complete the SER, but instead documented the technical review completed to date in three technical evaluation reports (TER). The TERs do not make regulatory findings on the adequacy of the proposed facility or its compliance with regulations.

With the court's decision in hand directing that the NRC resume its review, I recognize that the completion of the five-volume SER will be of particular interest. This milestone represents one, albeit significant, element in the overall process required by law and/or regulations. Our staff is now gathering budget information to facilitate Commission decisions regarding the path forward.

As the Commission noted in its last appearance before this committee, the agency is confronted with challenges associated with reconstituting the multi-disciplinary team to resume the licensing process if the court so directed. The staff's information will also take these staffing considerations into account.

As part of the normal license review process, the NRC would need the DOE's participation as the applicant to address any issues identified by the review team. I defer to DOE officials to address the Department's ability to do so.

## **ATOMIC SAFETY AND LICENSING BOARD ACTIVITIES**

Additional considerations for the Commission in determining the path forward involve the adjudicatory proceeding and the related licensing support network (LSN). The Atomic Energy Act requires that an opportunity for a hearing must be provided for NRC licensing actions. This process is separate from the work the technical staff would be doing on the technical and environmental review. In the case of the licensing of a geologic repository for high-level waste,

the Commission's regulations require that, if a member of the public requests a hearing and meets certain procedural requirements, including the submission of issues they wish to raise in opposition to the license application, referred to as contentions, the request for a hearing will be granted. That hearing must be completed before a final decision on whether to issue the license can be made. In that case, an Atomic Safety and Licensing Board (ASLB) is assigned to preside over the hearing. The Board is an independent panel of three administrative judges.

Multiple parties filed petitions seeking a hearing in this licensing proceeding and the ASLB granted most of the hearing requests. It is important to note that the focus of these adjudicatory hearings is on whether the license applicant, in this case the DOE, has demonstrated that the regulations have been met and the license should be issued. Therefore, the applicant bears the burden of making this demonstration. The NRC technical staff is required to be a party to these hearings and is required to explain its position, described in the SER, on whether the license should be granted. To date, no evidentiary hearings have been held.

When the adjudicatory proceeding was suspended, as directed by the Commission, the ASLB closed out all activities associated with the hearing process on the DOE application. At that time, a total of 288 contentions had been pending resolution on the merits. In addition to the appointment of the multiple boards, a specialized multimedia hearing facility was established in Las Vegas principally to serve as the venue for related hearings and conferences. We have since closed that facility. In addition, as required by regulations, the NRC created a web-based LSN, as a discovery tool that captures documentary material and makes it available electronically to all participants. The NRC has preserved these records but the LSN is no longer active.

Before the Commission can reach a decision on the license application, a number of other adjudication-related activities must occur, including the appointment of a board to conduct this proceeding; the completion of discovery; the conduct of a full evidentiary hearing on the nearly 300 pending contested issues that were raised by multiple parties in opposition to the license; and, finally, the issues before the ASLB would need to be resolved. A completed, adjudicated EIS and supplement is also necessary for a license decision to satisfy NEPA requirements. In addition, the parties would have the right to appeal the licensing boards' final decisions resolving contentions to the Commission. All of these steps must be completed before a final agency decision on the construction authorization can be made.

Recognizing the significance of the adjudicatory process in an ultimate licensing decision, the Commission's August 30 Order sought views from the various participants.

## **FUNDING CONSIDERATIONS**

The NRC currently has approximately \$11.1 million in unobligated carryover money appropriated from the Nuclear Waste Fund. There is also an additional \$2.5 million of obligated, unexpended Nuclear Waste Fund money.

As this Committee is aware, the NRC does not have in reserve sufficient resources to complete all of the necessary steps in this licensing process. No additional funds for high-level waste were requested or appropriated to the NRC in fiscal year 2012 or fiscal year 2013. The matter of whether or not funds are appropriated for the fiscal year 2014 is before Congress and the fiscal year 2015 budget development process is well underway. As the court noted in its decision, the underlying policy debate related to the matter of future funding for the NRC license review of DOE's Yucca Mountain license application is for Congress and the President to address.

## **CONCLUSIONS**

Chairman Shimkus, Ranking Member Tonko, and members of the Subcommittee, the Commission remains committed to acting independently, collegially, transparently, and objectively in responding to the court's decision on Yucca Mountain. We will act expeditiously to direct the agency on how to proceed in the licensing process using the agency's limited remaining resources under the Nuclear Waste Fund. While the ultimate nature of that direction remains under Commission review, the Commission's recent Order will help ensure that our decision has the full benefit of views submitted by the various parties to the adjudicatory proceedings. Finally, per our commitment to the Committee during the February 28, 2013 hearing, the Commission will submit monthly progress reports relative to the expenditure of unobligated carryover money appropriated from the Nuclear Waste Fund. These will begin with the September report, which is to be provided by mid-October of this year. I would be pleased to respond to your questions.