

RulemakingComments Resource

From: Jeff Skov <jmskov@earthlink.net>
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Please accept the attached supplement to my comment for the record relative to the U.S. Nuclear Regulatory Commission's (NRC's) Proposed Rule, "Waste Confidence—Continued Storage of Spent Nuclear Fuel" (78 FR 56775), and Associated Draft Generic Environmental Impact Statement (DGEIS) (78 FR 56621), under Docket ID No. NRC-2012-0246.

The referenced Federal Register Notices, dated September 13, 2013, indicate that comments received late "will be considered if it is practical to do so." I believe you will agree that consideration of and action on this supplement is not only "practical" but also warranted.

I would appreciate an email back confirming that you received the attached.

Thank you for the opportunity to comment.

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**Supplemental Comment by Jeffrey M. Skov
As Requested by the U.S. Nuclear Regulatory Commission (NRC)
Relative to the NRC's Proposed Rule,
"Waste Confidence—Continued Storage of Spent Nuclear Fuel" (78 FR 56775), and
Associated Draft Generic Environmental Impact Statement (DGEIS) (78 FR 56621)
March 12, 2014**

This comment supplements my comment of December 20, 2013.¹ Please consider it "if it is practical to do so" in accordance with the NRC's Federal Register Notices of September 13, 2013 (78 FR 56775² and 78 FR 56621³).

I formerly served in the U.S. Navy's submarine force and stood watch as Officer of the Deck (OOD), both while surfaced and submerged. When on the surface, a submarine's low profile means that small changes in course are not readily apparent to other vessels. Submarine OODs will therefore make deliberately big turns—turns of at least sixty degrees—if needed to assuage any anxiety the OOD suspects other vessels may have regarding the submarine's course. This practice assures that otherwise hard-to-discern changes in the attitude of the ship's sail are readily apparent to other vessels.

Since the other, proximate vessels clearly have an important stake in the submarine's course, they may be fairly characterized as "stakeholders."

As an anxious stakeholder in NRC's "waste confidence" activities,⁴ I have been watching for a big course change by the agency following the August 13, 2013, ruling by the U.S. Court of Appeals for the District

¹ See at <http://pbadupws.nrc.gov/docs/ML1336/ML13360A288.pdf>.

² See at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-13/pdf/2013-21708.pdf>.

³ See at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-13/pdf/2013-21715.pdf>.

⁴ The term "anxious" is apt since the importance of reestablishing "waste confidence" is hard to overstate. Not only is the simple, fundamental principle of trust that our administrative agencies will abide by the law at stake—which is huge since waste confidence is established in law. But also there are the potentially direful consequences of NRC's Order CLI-12-16 (dated August 7, 2012) to contend with. That order prevents the agency from issuing or renewing power reactor licenses until waste confidence can be restored. As a result, agency leadership ineptness (as, for example, by not studying and correcting for documented failures) or continuing agency frowardness could lead the nation to a dismal future of increasing air pollution and carbon dioxide emissions as growing fossil fuel combustion takes the place of nuclear power to make electricity. The increasing air pollution would result in additional cases of heart and lung diseases, including cancers, with some fraction of those cases leading to premature deaths; see Footnotes 18 and 19 in my comment dated December 20, 2013. The consequences of increased carbon dioxide emissions have been well-documented and include global warming, receding glaciers, rising sea levels, increased incidence and severity of storms, increased pestilence, etc. (To be sure, increases in wind and solar power could offset some of the gain in fossil combustion emissions, but contributions from those sources carry the unfortunate consequences that countless, wonderful American viewscapes would be despoiled and—to the extent that energy backup and/or storage systems would be required for nighttime and unenergetic, or overly energetic, winds—electricity prices would rise.) Thus, NRC's actions to understand and correct what went wrong relative to its compliance with the NWPA, and thereby to assure waste confidence is firmly founded in probity, reason, and law abidance going forward, are very important to a clean, bright, vibrant, energized, economically secure future for America.

of Columbia Circuit ("D.C. Circuit Court") in *In re: Aiken County*.⁵ As you know, that ruling significantly undermined waste confidence by holding that the NRC had been "defying" and "flouting" the Nuclear Waste Policy Act of 1982, as amended (NWPA),⁶ *i.e.*, the federal law explicitly enacted to provide waste confidence.⁷

The D.C. Circuit Court's ruling was neither unclear nor ambiguous:

- "[T]he statutory deadline for the Commission to complete the licensing process and approve or disapprove the Department of Energy's application [for the Yucca Mountain repository] has long since passed. Yet the Commission still has not issued the decision required by statute. Indeed, *by its own admission, the Commission has no current intention of complying with the law*. Rather, the Commission has simply shut down its review and consideration of the Department of Energy's license application." (Emphasis added.)
- "As things stand, therefore, the Commission is simply *flouting* the law." (Emphasis added.)
- "[T]he Commission is simply *defying* a law enacted by Congress, and the Commission is doing so without any legal basis." (Emphasis added.)
- "It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to *disregard* federal law in the manner asserted in this case by the Nuclear Regulatory Commission." (Emphasis added.)
- "The petition for a writ of mandamus is granted."

Since the Court had previously ruled that NRC indubitably has "the ball" relative to NWPA implementation,⁸ the NRC's errant course was certainly less protective of the public's health and welfare,⁹ NRC's failure to implement the NWPA has been costing the U.S. taxpayer so dearly,¹⁰ the

⁵ 725 F.3d 255 (D.C. Cir. 2013); see at

[http://www.cadc.uscourts.gov/internet/opinions.nsf/BAE0CF34F762EBD985257BC6004DEB18/\\$file/11-1271-1451347.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/BAE0CF34F762EBD985257BC6004DEB18/$file/11-1271-1451347.pdf).

⁶ Codified at Title 42, The Public Health and Welfare, of the U.S. Code, Section 10101, *et seq.*

⁷ The stated purpose of the NWPA is to "establish a schedule for the siting, construction, and operation of repositories that *will provide a reasonable assurance that the public and the environment will be adequately protected* from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository" (emphasis added). See NWPA Sec. 111(b)(1); codified at 42 U.S.C. 10131(b)(1).

⁸ See 645 F.3d 428, 436 (D.C. Cir. 2011), including the concurring opinion by Judge Kavanaugh, at [http://www.cadc.uscourts.gov/internet/opinions.nsf/872039F019B626D7852578C00053956D/\\$file/10-1050-1316111.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/872039F019B626D7852578C00053956D/$file/10-1050-1316111.pdf).

⁹ The NWPA is codified in Title 42, "The Public Health and Welfare," of the U.S. Code because it is through complying with the law—and not through flouting and defying it—that the public health and welfare are advanced.

¹⁰ Through September 30, 2013, the Treasury Department's Judgment Fund had paid out \$3.691 billion, comprising \$2.7 billion in settlements and \$991 million in court-awarded damages, to nuclear utilities as a result of the federal government's breach of the NWPA-prescribed "standard contracts"—see DOE's Fiscal Year 2013 audit report for the Nuclear Waste Fund (NWF), Report [OAS-FS-14-02](#), dated December 2013, p. 18. That equates to approximately \$19.633 million per month, on average. NRC's share (during the time the agency has had "the ball" but not advanced it) had already exceeded \$800 million when *In re: Aiken County* was decided. Significantly, that money comes from the U.S. taxpayers and not from the utility-supplied Nuclear Waste Fund.

agency continues so unabashedly to tout its independence,¹¹ and the text of the Court's ruling was so clear and unambiguous (see above), I was expecting to see a readily apparent change in the attitude of the NRC; *i.e.*, a clear, unmistakable indication that the agency was on a new course.¹²

To my astonishment, the NRC has instead deemed NWPA implementation to be merely an "alternative strategy,"¹³ has twice (to my knowledge) responded to Congressional inquiries by declaring that the agency would not request additional funds needed fully to comply with the NWPA because "[n]othing in the D.C. Circuit Court of Appeals' mandamus order requires the Commission to do so,"¹⁴ and submitted a budget request for Fiscal Year 2015 that seems simply to ignore and wish away the NWPA.¹⁵

My comment of December 20, 2013, asserted that the NRC needs to grasp that "defying" and "flouting" federal law is wrong, and that nuclear professionals—and, indeed, *all* professionals—study things that

¹¹ See, e.g., "[Effective Regulation: The Cornerstone of Nuclear Power Development](#)," prepared remarks of Chairman Allison M. Macfarlane at the Nuclear Industry Congress Africa, February 25, 2014, Cape Town, South Africa ("My remarks today will focus on the essential role of an *independent*, effective nuclear regulator . . . every country with a nuclear power program must have an *independent*, effective regulator . . . To be truly *independent*, the regulatory body must be separate from . . . political and economic pressures . . . In the United States, the NRC is the *independent* nuclear safety and security regulator . . . A nuclear regulator must be *independent* . . . a regulator must have the ability to make truly *independent* safety decisions, with the confidence that those decisions won't be overturned for political reasons"; emphasis added); "[Investing in Safety: The Importance of Effective Regulation](#)," prepared remarks of Chairman Allison M. Macfarlane, Platts Nuclear Energy Conference, February 5, 2014, Washington, DC ("[C]onfidence in the quality and *independence* of the regulator is essential . . . An effective, *independent* regulator is essential . . . *independence* is a critical consideration . . . in having *independent* decision-making authority, a regulator must have confidence that its decisions won't be overturned for political reasons"; emphasis added); [Prepared Remarks of NRC Chairman Allison M. Macfarlane](#), American Nuclear Society Winter Meeting, November 11, 2013, Washington, DC ("The NRC has continued to hone its *independent* regulatory model in the 35-plus years since our agency was established . . . To be effective, a regulator must be *independent* of any political, economic, or other policy interest whose outside influence could coerce the regulatory body to make decisions that aren't in safety's best interest [N.B.] . . . we're certainly practicing the kind of competent, *independent* regulation that we advocate"; emphasis added).

¹² Such would be consistent also with the concurring opinion in *In re: Aiken County* that "[t]oday's judgment should ensure that the Commission's next chapter begins with adherence to the law."

¹³ See "Project Plan, Yucca Mountain Review Activities" dated December 11, 2013 (attachment to "Monthly Status Report to Congress, Activities Related to the Yucca Mountain Licensing Action, Report for December 2013," which was transmitted under cover letter from Chairman Allison M. Macfarlane dated January 24, 2014; see [here](#)) ("The primary organization within NRC that supports the completion of the [Yucca Mountain Safety Evaluation Report] is the Office of Nuclear Material Safety and Safeguards (NMSS), Division of Spent Fuel *Alternative Strategies*"; emphasis added).

¹⁴ See Response to Question 6 in Enclosure to letter from Chairman Allison M. Macfarlane to Representative Ed Whitfield, Chairman, Subcommittee on Energy and Power, Committee on Energy and Commerce, U.S. House of Representatives, dated December 9, 2013 (see [here](#)); and Response to Shimkus Question 3 ("Has the NRC contacted the Office of Management and Budget regarding the need to fund the Yucca Mountain license review? If not, why not?") in Attachment 1 of NRC Office of Congressional Affairs letter to Representative John Shimkus, Chairman, Subcommittee on Environment and the Economy, Committee on Energy and Commerce, U.S. House of Representatives, dated February 26, 2014.

¹⁵ See "[FY 2015 Congressional Budget Justification Summary](#)," U.S. Nuclear Regulatory Commission, March 2014; search for "Yucca" (no instances), "repository" (no instances), "Nuclear Waste Policy Act" (no instances), "Policy Act" (no instances), "NWPA" (no instances), "writ" (no instances), "mandamus" (no instances), "court order," (no instances), and "court" (no instances).

go wrong to learn lessons and thereby prevent recurrence. That NRC remains essentially on its same errant course indicates now that the agency has evidently failed to make that grasp.

The agency's continuing wantonness affects the waste confidence rulemaking because NRC's stakeholders worry that if the agency can flout and defy and disregard the NWPA, in the words of the D.C. Circuit Court, and continue to do so, then what confidence do stakeholders have that the agency has not, is not, and will not similarly flout and defy and disregard the Atomic Energy Act (AEA), the Administrative Procedures Act (APA), and the National Environmental Policy Act (NEPA)?

Is compliance with the AEA, APA, or NEPA considered an "alternative strategy" at the agency?

Are any of the activity line items in the agency's recent Fiscal Year 2015 budget submittal¹⁶ supported by court-issued writs of mandamus that explicitly direct the agency to request the funding? Why is that a requirement for the NWPA?

Why does the NWPA seemingly continue to have such a secure place on the NRC's Okay-to-Violate (OTV) List?

Obviously my comment of December 20, 2013, applies with even more force today. I urge the NRC to take the actions described in that comment.

However, what specifically prompts this supplement is Footnote 2 of the National Association of Regulatory Utility Commissioners' (NARUC's) February 10, 2014, filing¹⁷ with the D.C. Circuit Court in opposition to the U.S. Department of Energy's (DOE's) request for a rehearing *en banc* of the Court's November 19, 2013, ruling in *NARUC v. DOE*. The footnote supports a contention by NARUC that DOE's obstreperousness in meeting its own nuclear waste obligations, over the course of two decades, has been "galling." Sterner adjectives seem appropriate. Here is the text of the footnote:

See, e.g., Indiana Mich. Power Co. v. DOE, 88 F.3d 1272 (D.C. Cir. 1996) (establishing DOE's unconditional obligation to meet its nuclear waste obligations); *Northern States Power Co. v. DOE*, 128 F.3d 754 (D.C. Cir. 1997), *cert. denied*, 525 U.S. 1015 (1998) (barring DOE from asserting that its delay was "unavoidable" and therefore excusable); *Maine Yankee Atomic Power Co. v. U.S.*, 225 F.3d 1336 (Fed. Cir. 2000), *reh'g & reh'g en banc denied* (Dec. 12, 2000) (finding that DOE's failure to begin accepting utility spent fuel by 1998 was a breach of contract); *Ala. Power Co.*, 307 F.3d 1300 (prohibiting DOE from using Nuclear Waste Fund to pay damages to utilities for DOE's failure to perform); *Neb. Pub. Power Dist. v. U.S.* 590 F.3d 1357 (Fed. Cir. 2010) (*en banc*) (again rejecting DOE attempt to assert that its delay was unavoidable); *Entergy Nuclear Fitzpatrick, LLC v. U.S.*, 711 F.3d 1382 (Fed. Cir. 2013) (rejecting for a third time DOE's attempt to assert that its delay was unavoidable).

Including the two rehearing requests that were denied and the fruitless petition for *certiorari*, the footnote documents nine successive losses by counsel for DOE—an "oh-for-nine" record in sports parlance.

¹⁶ See "[FY 2015 Congressional Budget Justification Summary](#)," U.S. Nuclear Regulatory Commission, March 2014.

¹⁷ "Petitioners' Opposition to Respondents' Petition for Rehearing and Rehearing En Banc," in the matter of *NARUC, et al. v. DOE*, U.S. Court of Appeals for the District of Columbia Circuit, Case Nos. 11-1066 and 11-1068 (Consolidated), filed February 10, 2014.

The footnote suggests that counsel for DOE is at best ineffective and at worst scrofulous.

The D.C. Circuit Court's ruling in *In re: Aiken County*, and especially NRC's subsequent actions in response to that ruling, suggest that counsel for NRC may be similarly afflicted.

Therefore, I respectfully request that the scope of the root cause analysis and extent of condition evaluation, both of which are clearly warranted in response to *In re: Aiken County*, include the advice, decisions, and activities of NRC's Office of General Counsel. This review should be conducted by experts in legal ethics and legal malpractice, preferably from academia, and should focus on the following:

- Whether NRC counsel condoned and/or affirmatively advised the "flouting" and "defying" of federal law, as was the holding in *In re: Aiken County*, and whether it continues to do so.
- Whether NRC counsel appropriately advised on the ethics of disregarding the D.C. Circuit Court's two, clear, well-spaced warnings—on July 1, 2011,¹⁸ and on August 3, 2012¹⁹—that mandamus would likely issue if the agency failed to act on the DOE's license application.
- Whether, in the wake of *In re: Aiken County*, NRC counsel appropriately advised on the ethics of *not* requesting sufficient additional funds to comply fully with the agency's NWPA obligations and whether that omission could reasonably be construed as furthering the agency's pattern of "flouting" and "defying" the law (in the words of the D.C. Circuit Court), and/or as simple dereliction of duty.²⁰
- Whether NRC counsel appropriately advised both on the contours and on the animating principles behind the federal criminal statutes on obstruction of justice (18 U.S.C. 1505²¹) and conspiracy (18 U.S.C. 371²²).
- Whether NRC counsel has appropriately advised on the ethical tenability of a "do as I say, not as I do" stance relative to the need for a root cause analysis and extent of condition evaluation as a response to *In re: Aiken County*, in view of the agency's principles embodied in Criterion XVI

¹⁸ See at [http://www.cadc.uscourts.gov/internet/opinions.nsf/872039F019B626D7852578C00053956D/\\$file/10-1050-1316111.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/872039F019B626D7852578C00053956D/$file/10-1050-1316111.pdf); as characterized in *In re: Aiken County*: "In 2011, a prior panel of this Court indicated that, if the Commission failed to act on the Department of Energy's license application within the deadlines specified by the Nuclear Waste Policy Act, mandamus likely would be appropriate. See *In re Aiken County*, 645 F.3d 428, 436 (D.C. Cir. 2011)."

¹⁹ See [http://www.cadc.uscourts.gov/internet/opinions.nsf/0163D8DE4194448E85257A4F004FC9E8/\\$file/11-1271-1387350.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/0163D8DE4194448E85257A4F004FC9E8/$file/11-1271-1387350.pdf); as characterized in *In re: Aiken County*: "[W]e followed a cautious approach in our decision more than a year ago when we declined to issue mandamus against the Commission at that time. But the Court's majority clearly warned that mandamus would eventually have to be granted if the Commission did not act or if Congress did not change the law. Since then, despite the clear warning, the Commission has still not complied with the statutory mandate. On the contrary, the Commission has reaffirmed that it has no plans to comply with the statutory mandate. In the face of such deliberate and continued agency disregard of a statutory mandate, our precedents strongly support a writ of mandamus."

²⁰ Agency personnel and counsel should perhaps review "A Message to Garcia" by Elbert Hubbard, 1899

²¹ See at <http://www.gpo.gov/fdsys/pkg/USCODE-2012-title18/pdf/USCODE-2012-title18-partI-chap73-sec1505.pdf>.

²² See at <http://www.gpo.gov/fdsys/pkg/USCODE-2012-title18/pdf/USCODE-2012-title18-partI-chap19-sec371.pdf>.

("Corrective Action") of 10 CFR 50, Appendix B,²³ and Safety Culture Traits 1 ("Leadership Safety Values and Actions"), 2 ("Problem Identification and Resolution"), 5 ("Continuous Learning"), and 9 ("Questioning Attitude") in NRC's "Final Safety Culture Policy Statement," 76 FR 34773, 34777-34778,²⁴ dated June 14, 2011.

- Whether NRC counsel has appropriately exhibited and continues to exhibit candor to the D.C. Circuit Court, in all particulars, that is its duty.
- Whether NRC counsel has advised on the ethics of continually touting the agency's "independence,"²⁵ while at the same time stridently toeing a line—to the point of "flouting" and "defying" federal law (in the words of the D.C. Circuit Court)—established by the Administration and its partisan allies in the Senate.²⁶
- Finally, whether NRC counsel should have moved for recusal of Judge Pillard in *Nye County, et al., v. NRC and Allison M. Macfarlane* (Docket No. 13-1260 before the D.C. Circuit Court), which was recently dismissed, because of the controversy that her obvious apparent bias²⁷ was bound to create.

I would be happy to recommend some appropriately knowledgeable and keenly inquisitive attorneys, from academia, to perform this minor additional scope, if desired.

I appreciate the opportunity to submit this supplemental comment. I believe consideration of and action on this supplement is not only "practical" but unquestionably warranted.

Thank you.

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²³ See at <http://www.gpo.gov/fdsys/pkg/CFR-2013-title10-vol1/pdf/CFR-2013-title10-vol1-part50-appB.pdf>.

²⁴ See at <http://www.gpo.gov/fdsys/pkg/FR-2011-06-14/pdf/2011-14656.pdf>.

²⁵ See Footnote 11, *supra*.

²⁶ To avoid confusion, perhaps agency braggadocio concerning its independence should carry the explicit caveat that it is independence from political forces in the executive and legislative branches, and not independence from federal law, that the agency so highly prizes (and not the other way around). This would assure that the intent is clear to all. And, of course, future agency decisions, actions, and inactions would need to back up the caveat.

²⁷ Senator Harry Reid reportedly blocked 175 Presidential nominations to force the G.W. Bush Administration to seat his former staffer as a commissioner on the NRC. See "In Deal, Aide to Reid To Be Named to NRC," Washington Post, November 23, 2004 ("In a deal to let 175 of President Bush's nominees take office, an adviser to new Democratic leader Harry M. Reid, the Senate's staunchest opponent of a nuclear waste dump in his home state of Nevada, will be named to the Nuclear Regulatory Commission"). The view that that appointment contributed directly to the adverse ruling in *In re: Aiken County* is widely held. Similarly, Senator Reid initiated an historic change to the rules of the U.S. Senate in order to seat Judge Pillard (and two others) on the "underworked" D.C. Circuit Court. See "In Landmark Vote, Senate Limits Use of the Filibuster," New York Times, November 21, 2013. Her subsequent assignment to the matter of *Nye County, et al., v. NRC and Allison M. Macfarlane*, which sought to force the recusal of NRC Chairman Macfarlane, another Reid favorite, from the Yucca Mountain licensing proceeding, was bound to be viewed as improbably coincidental.