

From: [Jeff Skov](#)
To: [DeJesus, Anthony](#)
Cc: [Bladey, Cindy](#)
Subject: [External_Sender] RE: Re: PRM Process [PRM-2-15; NRC-2015-0264]
Date: Tuesday, March 01, 2016 9:03:03 PM

Anthony – I received the Secretary's letter dated February 10, 2016, that provided the text of the Federal Register Notice (FRN) announcing the docketing of PRM-2-15, and saw that the FRN was published on Wednesday, February 17, 2016. I read the FRN carefully and want to commend you and the rulemaking staff on its clarity, concision, and evenhandedness. Well done.

One passage did catch my eye: "The petitioner states that these amendments 'would be effective retroactively, beginning with the 08/13/13 *In re: Aiken County* ruling—because of the extraordinary significance of that ruling.'" The direct transcription of text from the PRM left me with a concern that the rulemaking staff may potentially view the PRM's characterization of the significance of the 8/13/13 ruling to be exaggeration or hyperbole, and may not agree that the ruling was "extraordinary." In this regard, please convey to staff the following:

(1) In the 8/13/13 *In re: Aiken County* ruling, the D.C. Circuit Court granted the requested petition for a writ of mandamus—see the ruling, [here](#), p. 22 ("[t]he petition for a writ of mandamus is granted"). A writ of mandamus is an "extraordinary writ" in accordance with both the *Federal Rules of Appellate Procedure* ("FRAP") and the *Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit*. The rules associated with the writ are contained in Title V, entitled "Extraordinary Writs," in both documents; see [here](#) and [here](#), respectively. Thus, when the Court grants a writ of mandamus, it is by definition granting an extraordinary writ.

(2) The Court's *In re: Aiken County* ruling itself notes that "[m]andamus is an extraordinary remedy"—see [here](#), p. 4.

(3) The U.S. Supreme Court goes even further. It characterizes a writ of mandamus as a "drastic and extraordinary remedy reserved for really extraordinary causes." This high court language is quoted in the *In re: Aiken County* ruling (dissenting opinion); see [here](#) (search for "drastic"). Note that both "drastic and extraordinary" and "really extraordinary" reasonably convey a higher degree of extraordinariness than simply "extraordinary."

(4) Part of the Court's basis for the 8/13/13 *In re: Aiken County* ruling was concern for the nation's constitutional structure. In its concluding paragraph, the Court states: "This case has serious implications for our constitutional structure. 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." It is fair to say that this constitutional dimension—the adjudged potential for the NRC to upset the nation's fundamental "constitutional structure"—alone provides ample validation that the Court's ruling was extraordinary.

(5) Finally, note that searches of the D.C. Circuit Court's opinions database (using the ["advanced search" feature](#)) for opinions that contain the term "mandamus" along with either the term

"nuclear" or the term "NRC" (not case sensitive) identified no opinions other than the 8/13/13 *In re: Aiken County* ruling where the D.C. Circuit Court issued a writ of mandamus to the NRC. The reasonable conclusion is that receipt of the writ is not an ordinary occurrence at NRC; and therefore is extraordinary.

I believe the above adequately validate that the 8/13/13 *In re: Aiken County* ruling was extraordinarily significant. To so characterize it is both objectively reasonable and well substantiated.

Still, please do not let this clarification undermine the commendation I feel is due—for you and the rulemaking staff—regarding the overall evenhandedness of the FRN.

On a separate subject, I noticed that NRC released its Fiscal Year (FY) 2017 budget justification, NUREG-1100, Volume 32 (see [here](#)). I searched the document and found no instances of "yucca," "repository," "NWP," "nuclear waste policy act," or "court order." This lack of discussion underscores I believe the importance of the second rule proposed in the PRM. If we believe (1) that the NWP was enacted for the purpose it says it was; i.e., to "provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and ... spent nuclear fuel" (see [here](#), pp. 417-418); (2) that the NRC has validated that these hazards are legitimate, and recently so through Information Notices [2012-20](#), [2013-07](#), and [2014-09](#), and NRC OIG Report [OIG-15-A-06](#); (3) that the NRC currently has "the ball" to implement the NWP, as determined by the 2011 *In re: Aiken County* ruling (see [here](#)) and confirmed by the 2013 *In re: Aiken County* ruling (see [here](#)); (4) that NRC has a patchy record at fulfilling its obligations under the NWP, as evidenced by the extraordinary writ of mandamus it received in 2013 (see discussion above); and (5) that the omission of any request for funding necessary to restart the Yucca Mountain licensing proceeding was not inadvertent; then one would reasonably expect some discussion in this regard in NRC's budget justification documentation.

I of course hold the Congress in the highest regard. But one of the purposes underlying the creation of the various federal administrative agencies is that they can accumulate considerable, focused expertise that is germane to their respective missions. Consequently, Congress need not be a technical expert in air traffic control, say, in the case of the Federal Aviation Administration, or new pharmaceutical testing, in the case of the Food and Drug Administration.

Conversely, the agencies acquire a responsibility to give voice to their expertise, to speak up whenever significant impediments emerge that adversely affect, for the cited examples, air traffic control or the safety of new drugs. That responsibility abides at NRC too. For example, when impediments emerge that affect the ability of the NRC to meet its statutory obligations under the NWP—which, again, was enacted to "provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and ... spent nuclear fuel"—then there is an expectation on the part of the Congress and the public that the NRC will speak up.

This onus to speak up is heightened by two factors. First is whether the Congress has established the agency as an *independent* agency, as is the case for the NRC. This designation reasonably signals

Congress's intent that the agency's voice is not to be stifled by party politics.

Second is the degree of technical complexity of the issue. The growing accumulations of spent nuclear fuel at the nation's reactor plant sites is not a simple warehousing problem. That would be a problem which members of Congress and their staffs could readily understand. Rather, the issue requires expertise in radioactive source term estimation, criticality safety, thermodynamics and fluid flow, pyrophoricity, radioactive decay heat generation rate calculation, radiation shielding, metallurgy and materials science, welding and nondestructive examination of weldments, operations research, corrosion in wet and/or marine environments, seismology, surface hydrology, extreme weather meteorology, radioactive leak detection technology, and security. The NRC is much better equipped than either the Congress or the public to understand and address these myriad technical facets that are presented by the growing accumulations of spent nuclear fuel at the nation's reactor plant sites.

It is important that the NRC speak up regarding the circumstances and consequences of the impediments to NWPA implementation. The Congress and the people need and deserve to hear the agency's independent, technical voice. They rely on it. The second proposed rule would make sure it is heard.

All of these considerations support the second proposed rule in the PRM.

Anthony, please pass these thoughts on to the rulemaking staff. And again, please express my thanks and appreciation for the quality of the docketing FRN for the PRM.

Regards,

Jeff.

Jeffrey M. Skov
jmskov@earthlink.net
972-953-8823 (cell)

-----Original Message-----

From: "DeJesus, Anthony"

Sent: Dec 8, 2015 3:39 AM

To: Jeff Skov

Cc: "Bladey, Cindy"

Subject: RE: Re: PRM Process [PRM-2-15; NRC-2015-0264]

Good morning Mr. Skov,

I will share this e-mail with the NRC staff that will be responsible for analyzing your petition.

I will also add this e-mail to the NRC's Agencywide Documents Access and Management System (ADAMS) and add it to the docket folder [[NRC-2015-0264](#)] on the Federal

rulemaking Web site at <http://www.regulations.gov>.

Sincerely,
Anthony



Anthony de Jesús, Sr. Regulations Specialist
Agency 2.802 Petition Coordinator
Rules, Announcements, and Directives Branch

U.S Nuclear Regulatory Commission
OWFN 12- G09
Washington, DC 20555-0001
301-415-1106
Anthony.deJesus@nrc.gov

From: Jeff Skov [mailto:jmskov@earthlink.net]
Sent: Monday, December 07, 2015 9:33 PM
To: DeJesus, Anthony <Anthony.DeJesus@nrc.gov>
Cc: Bladey, Cindy <Cindy.Bladey@nrc.gov>
Subject: [External_Sender] Re: PRM Process [PRM-2-15; NRC-2015-0264]

Anthony – Last week, the U.S. Department of Energy's Office of Inspector General released its Fiscal Year (FY) 2015 Financial Statement Audit of the Nuclear Waste Fund (NWF). It is designated as Audit Report OAI-FS-16-03; see it online here . . .

<http://www.energy.gov/sites/prod/files/2015/12/f27/OAI-FS-16-03.pdf>

The petition for rulemaking (PRM) I submitted (PRM-2-15) references last year's Financial Statement Audit of the NWF; *i.e.*, the report for FY 2014 (cited as Ref. 18 in the PRM).

The release of this FY 2015 report enhances the supporting rationale for the PRM because the report updates the amounts of the total expenditures from the U.S. Department of the Treasury's Judgment Fund that are attributable to the ongoing delay in Nuclear Waste Policy Act (NWPAct) implementation—from \$3.2b plus \$1.3b (in settlements and damages, respectively), as reported in the FY 2014 report, to \$3.9b plus \$1.4b (in settlements and damages, respectively), as reported in the new, FY 2015 report (see on p. 19 in the new report, under the heading "Spent Nuclear Fuel Litigation," second paragraph). Thus, the average rate of disbursement from the Judgment Fund that is attributable to NWPAct implementation delay has increased from \$739 thousand per calendar day to, now, \$821 thousand per calendar day.

This enhances the rationale discussed on pp. 5-6 of the PRM, under the heading "Reduce costs," because NRC's efforts to determine and correct the cause of the violation documented in *In re: Aiken County* (Ref. 1 in the PRM), as would be required under the first rule proposed in the PRM, now stand potentially to save the taxpayer even more money.

Recall that Ref. 11 in the PRM (reaffirmed by Ref. 1) documents the holding by the U.S. Court of Appeals for the District of Columbia Circuit that it is the NRC that currently has the ball to implement the NWPA.

I thought the rulemaking staff would be interested in this development.

I would be pleased to discuss if desired, at your convenience.

Thank you.

Jeff.

Jeffrey M. Skov
jmskov@earthlink.net
972-953-8823 (cell)

-----Original Message-----

From: "DeJesus, Anthony"
Sent: Dec 1, 2015 3:57 AM
To: Jeff Skov
Cc: "Bladey, Cindy"
Subject: PRM Process [PRM-2-15; NRC-2015-0264]

Good morning Mr. Skov,

I received your phone call regarding the PRM you filed with the NRC.

The next step is that staff will prepare a docketing notice for publication in the *Federal Register*. This will let the public know that the NRC has docketed your petition. Once the NRC publishes the *Federal Register* notice you will receive another letter letting you know that we have published a *Federal Register* notice.

After publication of the docketing notice, the NRC will review and make a determination regarding your PRM. The NRC will make one of the following determinations:

1. The NRC undertakes a rulemaking that considers the issues raised by a petition for rulemaking.
2. The NRC does not undertake a rulemaking to address the issue raised by the

petition for rulemaking.

In either case the NRC will inform you, in writing, of its decision and will publish a notice in the *Federal Register*. If the NRC denies your petition, we will inform you, in writing, of the grounds for denial.

The NRC's determination on the petition for rulemaking may be based upon, but is not limited to, the following considerations:

- The merits of the petition;
- The immediacy of the safety, environmental, or security concern raised;
- The availability of NRC resources and the priority of the issues raised in relation to other NRC rulemaking issues;
- Whether the problems or issues are already under consideration by the NRC in other NRC processes;
- The substance of any public comment received, if comment is requested; and
- The NRC's relevant past decisions and current policies.

I am unable to provide a precise timeline describing how long the determination process may take. The time required to review a PRM and make a determination is based on a number of factors, including staff resources and the complexity of the issues involved in your PRM. However, I can say that the NRC makes every attempt to make a determination on a PRM as expeditiously as possible. Furthermore, throughout the process the NRC will provide you with an update on your PRM (approximately every 6 months).

I hope this answers all of your questions.

Please let me know if you have any additional questions.

Sincerely,
Anthony



Anthony de Jesús, Sr. Regulations Specialist
Agency 2.802 Petition Coordinator
Rules, Announcements, and Directives Branch

U.S Nuclear Regulatory Commission
OWFN 12- G09
Washington, DC 20555-0001
301-415-1106
Anthony.deJesus@nrc.gov