Anthony:

The purpose of this note is to update you and the rulemaking staff on events that bear on petition for rulemaking PRM-2-15 (Docket ID NRC-2015-0264) (see here) which have occurred since my prior update in March 2016.

As you know, the PRM proposes two new rules. The first would require the NRC, upon identification of a violation by a court of competent jurisdiction, to determine the cause(s) of the violation, determine whether other statutes or regulations are similarly affected, and formulate and implement appropriate corrective actions to prevent recurrence. The second would require NRC annually to report both the circumstances and the consequences of instances where the agency has insufficient funds to fulfill its statutory mandates; e.g., insufficient funds to fulfill its obligations under the Nuclear Waste Policy Act (NWPA).

I. Issuance of NRC Generic Letter (GL) 2016-01, April 7, 2016

The PRM cites to three NRC Information Notices (identified as Ref. 13, Ref. 14, and Ref. 15 in the PRM) and one report by NRC's Office of the Inspector General (OIG) (Ref. 16 in the PRM) to emphasize the safety importance of timely NWPA implementation. GL 2016-01, "Monitoring of Neutron-Absorbing Materials in Spent Fuel Pools," dated April 7, 2016 (see here), provides significant additional information related specifically to the degradation of neutron-absorbing materials in reactor spent fuel pools (SFPs). Such degradation can invalidate the analyses that demonstrate that spent nuclear fuel (SNF) will remain subcritical in SFPs despite the dense SNF packing that NWPA implementation delays have made necessary.

In addition to its list of references, GL 2016-01 contains a table entitled "Related Generic Communications," which lists six previous Information Notices and two previous GLs that pertain to the issue of ensuring criticality safety in SFPs.

I urge the rulemaking staff to review the GL, along with its supporting references and the documents listed in the GL's "Related Generic Communications" table, in addition to the references in the PRM (Ref. 13, Ref. 14, Ref. 15 and Ref. 16). One additional recent document is also relevant—NRC Event Report Number 51924 (see here, search for "51924"), submitted May 12, 2016. The event report documents that, because "an assessment of the Spent Fuel Pool racks containing neutron absorbing material concluded that some degradation had occurred … we [the licensee] cannot assure we are maintaining Keff < 0.95 as required per design." (Keff is the physics parameter that represents margin to criticality.)

Combined, all these documents provide a fuller picture of the safety consequences of NWPA frustration.

The August 2013 *In re: Aiken County* ruling by the U.S. Court of Appeals for the District of Columbia Circuit (Ref. 1 of the PRM) documents that the NRC has contributed to the frustration of the NWPA:

> [T]he statutory deadline for the Commission to complete the licensing process and approve or disapprove the Department of Energy's application [for construction authorization at 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.

The safety consequences of NRC's role in delaying the implementation of the NWPA warrant the actions proposed in the first rule in PRM-2-15, including finding and understanding the cause of the NRC's violation documented in the Court's ruling, and establishing robust corrective actions to prevent recurrence.

The second rule proposed in the PRM would ensure (among other things) that the safety consequences of *ongoing* NWPA implementation delays are articulated to Congress and the public as part of the annual budgeting process. Without such clear articulation, the NRC is vulnerable to criticism that it is "hiding the ball" in its annual budget request documents (i.e., the annual editions of NUREG-1100). That is, the omission of any request for funding to continue the Yucca Mountain licensing proceeding—as reflected in PRM Ref. 20 for Fiscal Year (FY) 2015, PRM Ref. 21 for FY 2016, and Vol. 32 of NUREG-1100 (see here) for FY 2017—reasonably suggests that there are no safety consequences associated with that omission. That simply does not square with GL 2016-01, along with its supporting references and the documents listed in the GL's "Related Generic Communications" table, in addition to the other relevant references cited in the PRM (Ref. 13, Ref. 14, Ref. 15 and Ref. 16).

Note of course that the rules proposed in PRM-2-15 are broader in scope than simply addressing the NRC's NWPA violation. However, the safety consequences of that violation alone reasonably warrant adoption of the two proposed rules. Further, nothing prevents future similar NRC violations—whether in waste-related contexts or in other contexts—from having their own significant safety consequences.

II. Speech by NRC Chairman Burns at National Press Club, May 5, 2016

In his speech at the National Press Club on May 5, 2016 (see here), NRC Chairman Burns (now Commissioner Burns) emphasized "NRC's five principles of good regulation," which he noted "remain as important and relevant today as they were when they were first unveiled in 1991." Here is how he described the core NRC principles:

> Independence – It is vitally important that the regulator remain separated from the promotional organs of government, and be independent of the industry it regulates and other non-governmental organizations, and of any undue political influence.
>
> Openness – In a field as complicated and controversial as ours, it's important that regulators execute their craft in an open and transparent manner.
>
> Efficiency – In our case, the American taxpayer, the rate-paying consumer and the licensees are all entitled to the best possible management and administration of regulatory activities.
>
> Clarity: The regulatory regime should be coherent, logical and practical.
>
> And Reliability: Stakeholders must be confident in the prompt and fair administration of appropriate regulations.

The Chairman reemphasized the importance of these core principles in subsequent speeches on August 11, 2016 (see here; search for "Principles of Good Regulation"), October 11, 2016 (see here; search for "those principles are"), and November 1, 2016 (see here; search for "We must continue to strive to

uphold the Principles of Good Regulation"). That October speech was before the students in the nuclear engineering program at Texas A&M University. The Chairman—reinforcing the importance of the core principles—counseled that it would be wise for the students to "take some time to study" them.

The rules proposed in PRM-2-15 advance *each* of these core principles, as described in the following paragraphs.

II.a Independence

The proposed rules would promote NRC's *independence* in several ways:

- The rules would require that a cause analysis be performed for the NRC violation documented in the *In re: Aiken County* ruling. That analysis would reveal whether any compromise or co-opting of NRC's independence contributed to the violation.

  Prudence dictates that we not presuppose the results of the cause analysis. However, it is also not unrealistic to posit that some commandeering of the agency's independence contributed to the violation. Consider that (1) former NRC Chairman Gregory Jaczko had previously served as an aide to U.S. Senator Harry Reid (see here; search for "Reid"); (2) Senator Reid had been an unwavering and shrill critic of Yucca Mountain (see here, for example; search for "hell no"); (3) Senator Reid held up 175 of President G.W. Bush's executive nominations to get Jaczko seated on the Commission (see here; search for "175"), (4) Jaczko's potential for bias with respect to the Yucca Mountain proceeding was an issue at his Senate confirmation hearings (see here; search, for example, for "His extensive work in opposition to licensing of Yucca Mountain" or "only tough question"); and (5) the concurring opinion in *In re: Aiken County* itself called out Jaczko, by name, and noted that he had "orchestrated a systematic campaign of noncompliance" within NRC (see here; search for "orchestrated").

- The proposed rules would require that corrective actions to prevent recurrence ("CAPRs") be formulated and implemented to address the violation. These CAPRs would serve to safeguard NRC's independence from future, similar incursions.

- The proposed rules would act more broadly to safeguard and preserve NRC's independence going forward—in two respects. First, any future court-adjudged violations would be met with a new cause analysis, and new CAPRs tailored therefor, thereby guarding against both encroaching laxity relative to previously established CAPRs and clever new tactics or mechanisms whereby NRC's independence can be commandeered. Second, the very existence of the proposed new rules would serve as a deterrent. That is, would-be influencers—be they promotional organs of government, non-governmental organizations, individual Senators (say), etc.—would likely be less inclined to interfere rather than risk the spotlight that the new rules would bring to bear.

- The increased transparency brought to the budgeting process by the second proposed rule would also assuredly reinforce NRC's independence, since it too would exert a powerful deterrent effect.

Note also the degree of importance that the Chairman ascribed to the agency's independence. He used the words "vitally important." That reflects the Chairman's judgment that the NRC's independence is

part of the essential vitality, the *lifeblood*, of the agency. It's a view that makes the case for the proposed rulemaking especially compelling.

II.b Openness

The next core principle is *openness*. The two proposed rules clearly promote openness. Since the August 2013 *In re: Aiken County* ruling, the agency's pronouncements relative to NWPA compliance have ranged from defensive to furtive. For example, in former Chairman Macfarlane's December 9, 2013, letter to Representative Whitfield, she responds to the question (Question 6) of whether NRC has submitted a supplemental budget request to restart the Yucca Mountain licensing proceeding. She responds that "[n]othing in the D.C. Circuit Court of Appeals' mandamus order requires the Commission to do so." (See here for transmittal letter. See here for responses; search for "Nothing".)

A similar defensive—almost petulant—attitude is reflected in NRC's responses transmitted to Representative Shimkus on February 26, 2014: "The D.C. Circuit Court of Appeals mandamus order does not include a requirement for the Commission to request additional funds." (See here for transmittal letter. See here for the responses; search for "does not include".)

That defensive, unforthcoming attitude is unusual since it seems to overlook the Court's much clearer message in *In re: Aiken County*; i.e., "[t]he Commission is under a legal obligation to continue the licensing process." (See here; search for "the key point".)

More importantly, the attitude broadly overlooks the substantial safety consequences of ongoing NWPA frustration—see discussion in Section I above—and NRC's role in that frustration (see again the *In re: Aiken County* ruling, here; search for "defying" and "flouting").

I additionally re-reviewed the text of the NWPA. It nowhere requires that NRC must be under a court order before it can request funds for NWPA compliance.

The NRC has also been furtive relative to NWPA compliance. For example, the PRM cites to a report in *Radwaste Monitor*, Volume 8, Number 6, dated February 6, 2015, entitled "NRC Won't Say Why No Yucca Funding Was Requested." The article noted that NRC "did not include any funding to complete the Yucca licensing review in its Fiscal Year 2016 budget request released this week" and "declined to comment" on the reason why. A more open response would have been to describe both the circumstances and the consequences of the omission, as would be required under the second proposed rule.

In summary, the first proposed rule would enable the NRC to be completely open—rather than furtive or defensive—about court-adjudged instances of agency unlawfulness. The second proposed rule would serve to institutionalize openness in this and all future instances where the NRC does not receive sufficient funds to implement its statutory mandates.

This enhanced openness would also comport with the "transparent" component of NRC's vision (see PRM Ref. 5, p. 7); with the "openness in communications and decisionmaking" element in NRC's Organizational Values (also at p. 7 in PRM Ref. 5); and generally with the agency's published Traits of a Positive Safety Culture (see Ref. 6 in the PRM).

II.c Efficiency

The third principle, *efficiency*, is served in three ways:

- Adoption of the PRM would likely staunch the $1,000 per minute, on average, that is being disbursed from the Treasury Department's Judgment Fund as a result of continuing frustration of the NWPA. See discussion in the PRM under "Reduce Costs." For the revised disbursement rate estimate, see the discussion in Section III below.

  As you know, the NRC currently has the ball to act to implement the NWPA—see PRM Ref. 12 (search for "The Commission shall consider an application"); PRM Ref. 11 (search for "The Commission maintains a statutory duty" or "the ball"); and PRM Ref. 1 (search for "The Commission is under a legal obligation to continue the licensing process"). Combined, these references represent the determination of both the legislative and judicial branches of our government.

  Just to clarify the point, $1,000 per minute is being paid by taxpayers, on average, to manage SNF on utilities' sites that by law should not be on their sites. That is not efficient.

  Adoption of the PRM would additionally prevent similar collateral fiscal impacts that stem from future NRC violations.

- The CAPRs NRC will establish under the PRM, if adopted, will promote future violation-free implementation of NRC activities. Clearly, violation-free implementation of agency work is more efficient than performance of inadequate, violation-fraught work. This will be true on an ongoing basis: as new violations trigger new CAPRs, NRC's performance will continually improve.

  It is important to note that NRC violations, by their nature, can lead to extremely costly litigation/rulemaking/litigation sequences. For example, the PRM (on p. 10) notes that the lack of "waste confidence" precipitated by NRC's NWPA violation resulted in litigation (see PRM Ref. 36), a lengthy moratorium on reactor plant licensing and license renewals (PRM Ref. 37), and a rulemaking (PRM Ref. 38) that spawned significant additional litigation by multiple petitioners (see here; search for "Four sets of petitioners"). This expensive litigation/rulemaking/litigation train is not an efficient use of government funds and therefore warrants particular attention consistent with NRC's core principle of *efficiency*.

- Finally, the provision in the PRM for an "extent of condition" evaluation for court-adjudged NRC violations will determine whether NRC's implementation of other statutes and regulations—i.e., statutes and regulations beyond those identified by the court in its ruling—are similarly affected. Once identified, efficiency will be served by discontinuing any unlawfulness associated with the implementation of those other statutes and regulations. See additional discussion in Section IV below.

II.d Clarity

I am pleased Chairman Burns framed his perspective on the next core NRC principle, *clarity*, in terms of coherence (among other things). The *In re: Aiken County* ruling revealed a rich vein of incoherence. For example:

- Why did over a year go by between (1) the receipt of all briefs (on July 19, 2010) (see SECY-11-0008, here; search for "7/19/10") requested by the NRC Secretary's Order of June 30, 2010 (see here), which established an expedited, "simultaneous" briefing schedule relative to Commission consideration of Licensing Board Order LBP-10-11 (see here), AND (2) the Commission's subsequent Order sustaining the Licensing Board's ruling, CLI-11-07 (see here), on September 9, 2011, EVEN THOUGH the Commission was on record (CLI-10-13, dated April 23, 2010; see here), on this very matter, stating that "we think the prudent course of action is to resolve the matters pending before our agency *as expeditiously and responsibly as possible*" (emphasis added)?

  For clarity, the timeline looks like this:

  April 23, 2010: CLI-10-13 issues, providing the Commission's expectation for expeditiousness and responsibility

  June 29, 2010: LBP-10-11 issues

  June 30, 2010: NRC Secretary's Order issues, establishing an expedited briefing schedule

  July 19, 2010: Last brief filed

  Sept. 6, 2010: Labor Day 2010

  Sept. 5, 2011: Labor Day 2011

  Sept. 9, 2011: Commission issues CLI-11-07 sustaining LBP-10-11

  Two factors make this delay all the more incoherent. First, the NWPA allots only three years (with a provision for a one-year extension) for the NRC to complete its *entire* review of the Yucca Mountain application and render a decision. That well over one year of that time was spent simply determining whether the applicant can lawfully obstruct the proceeding—either "with prejudice" or not—does not reasonably cohere with the statutory timeline.

  Second, the *417 days* it took to decide the matter and issue CLI-11-07 (i.e., the duration between July 19, 2010, and September 9, 2011) does not cohere with the *136 days* the Commission normally took (on average) to decide other, contemporaneous matters, or the *201 days* the Commission took (on average) to decide contemporaneous matters deemed to be of a "High" complexity level—based on review of SECY-10-0003, dated 1/12/10 (for CY 2009), SECY-11-0008, dated 1/13/11 (for CY 2010), SECY-12-0016, dated 1/30/12 (for CY 2011), and SECY-13-0004, dated 1/9/13 (for CY 2012).

  That length of time seems neither expeditious nor—based on review of the documents discussed in Section I above—responsible.

- Why were two warnings by the D.C. Circuit Court of Appeals—one in 2011 and the second (described as a "clear warning") in 2012—ineffective? (See PRM Ref. 1; search for "prior panel" and "clear warning".) That does not cohere with simple management fundamentals, let alone NRC's vision of itself as "effective."

- Why was the Court disposed to use the word *flouting*, with its implication of contempt for the rule of law? (See PRM Ref. 1; search for "flouting".) That does not cohere with NRC's vision of itself as "trusted."

- Why does the NRC deem that a court order is required to enable the agency to request funding for NWPA implementation, but not for implementation of its other statutory mandates? (See discussion in Section II.b above.) A more coherent approach would be either to require a court order for requests for funding for each of NRC's statutory mandates, or never to require a court order for requests for funding. At the least, NRC could publish the criteria it uses to determine which funding requests require a court order and which do not.

- Why hasn't NRC already conducted its own cause analysis and "extent of condition" evaluation, and already implemented CAPRs? That seems commonsensical in view of:

  - the safety significance of the violation—see discussion in Section I above;

  - the extraordinary nature of the remedy—a writ of mandamus is by definition an extraordinary remedy (see general discussion here);

  - the eminence, intellectual power, and authority of the Court that issued the writ—the D.C. Circuit Court of Appeals is widely regarded to be the second highest court in the nation (see here, for example; search for "second highest");

  - the fact that NRC did not appeal the ruling (see PRM Ref. 29; search for "decision became final"), thereby signaling its acceptance of the violation;

  - the preponderance of instances in the NRC's own regulations where it requires its licensees to determine the cause of violations, and formulate and implement appropriate CAPRs therefor (see the PRM, here; search for "This principle animates NRC's regulations");

  - the NRC's published traits of a positive safety culture, which espouse a questioning attitude, openness, and a visible, top-level commitment to addressing significant unacceptable safety-significant conditions (see PRM Ref. 6; search for "Leaders demonstrate a commitment to safety in their decisions and behaviors"; "A safety conscious work environment is maintained"; "Trust and respect permeate the organization"; and "Individuals avoid complacency and continuously challenge existing conditions and activities in order to identify discrepancies that might result in error or inappropriate action"); and

  - the negligible cost impact, since the determination of cause, extent of condition, and CAPRs is something NRC should reasonably be doing anyway for significant unacceptable conditions—as an exercise of sound, fundamental management practice.

II.e Reliability

The final core NRC principle is *reliability*. The Chairman noted that this means that stakeholders "must be confident in the prompt and fair administration of appropriate regulations." It stands to reason that stakeholders must also be confident that NRC will promptly and responsibly implement governing *statutes*, such as the NWPA. I am sure all can appreciate the uncomfortable state of affairs that would ensue were administrative agencies free to determine which statues they accept to implement and which they do not.

In sum, the rules proposed under the PRM clearly comport with and advance each of NRC's "important and relevant" core principles.

III. FY 2016 Financial Statement Audit of Nuclear Waste Fund, December 14, 2016

The PRM references the FY 2014 Financial Statement Audit of the Nuclear Waste Fund (NWF), U.S. Department of Energy (DOE) Office of Inspector General (OIG) Report No. OAS-FS-15-03, dated November 2014 (cited as Ref. 18 in the PRM). My email of December 7, 2015, apprised you and the rulemaking staff that the DOE OIG had released the FY 2015 report, Report No. OAI-FS-16-03 (see here). The FY 2015 report updated the amounts of the total expenditures from the U.S. Department of the Treasury's Judgment Fund that were attributable to ongoing NWPA implementation delay—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 FY 2015 report (see on p. 19 in the FY 2015 report, under the heading "Spent Nuclear Fuel Litigation," second paragraph).

On December 14, 2016, the DOE OIG released the *FY 2016* Financial Statement Audit of the NWF, Report No. OAI-FS-17-04 (see here). This new report again updates the amounts of the total expenditures from the Judgment Fund attributable to NWPA implementation delay—to $4.4b plus $1.7b (in settlements and damages, respectively). See on p. 21 in the FY 2016 report, under the heading "Spent Nuclear Fuel Litigation," second paragraph.

In this regard, I also want to call your attention to an article, "How the Department of Energy Became a Major Taxpayer Liability," published online on July 6, 2016, by CNBC (see here). The article contains a graph that depicts cumulative disbursements from the Judgment Fund related to NWPA implementation delay. Note that the disbursements do not begin until about the start of 2005. Based on this, I believe it is more accurate to recast the rate at which this money has been paid out of the Judgment Fund to reflect that the disbursements started on January 1, 2005, rather than February 1, 1998. This treatment is both more representative of the actual current disbursement rate and more illustrative of the rate that corresponds to the NRC's role in NWPA implementation delay.

Note that the title of the article is a bit misleading. It is the NRC, rather than the DOE, that currently has the ball to act to implement the NWPA. See PRM Ref. 12 (search for "The Commission shall consider an application"); PRM Ref. 11 (search for "The Commission maintains a statutory duty" or "the ball"); and PRM Ref. 1 (search for "The Commission is under a legal obligation to continue the licensing process").

The PRM calculated the Judgment Fund payout rate based on the duration from February 1, 1998 (the breach start date) until the "as-of" date in the FY 2014 NWF audit report (a total of 200 months). Similarly, the update I submitted on December 7, 2015 (see here), calculated the rate based on the duration from the same breach start date (February 1, 1998) until the "as-of" date in the *FY 2015* NWF

audit report (a total of 212 months). Each calculation used the amount of total Judgment Fund disbursements that appeared in the respective audit report (i.e., $4.5 billion as reported in the FY 2014 report and $5.3 billion as reported in the FY 2015 report).

Recasting the calculation based on the more accurate disbursement start date of January 1, 2005, and the "as-of" date of September 30, 2016, in the latest, *FY 2016* NWF audit report (a total of 141 months), and on a total disbursement of $6.1 billion, as reported in the FY 2016 report, results in a payout rate of $1.42 million per calendar day, on average. That is, $6.1 billion divided by 141 months is $0.0433 billion per month, which is the same as $43.3 million per month, or $1.42 million per calendar day (based on a leap-year-recognizing 30.4375 days per month).

Interestingly, this is about the same as $1,000 per minute, around the clock, weekends and holidays included.

At $1000 per minute, the time between the Commission's pronouncement that it deals with matters "as expeditiously and responsibly as possible" and its final ruling on DOE's motion to withdraw ("with prejudice") the Yucca Mountain license application equates to $726 million. The time between the Court's first warning that NRC maintains a statutory mandate under the NWPA and the Court's extraordinary holding that NRC had been "defying" and "flouting" that mandate equates to $1.11 billion. And the time between the docketing of PRM-2-15 and today is $675 million.

All must agree that these amounts are both significant and unacceptable. When coupled with the safety consequences that stem from NRC's delay in implementing the NWPA, as discussed in the PRM and reinforced in the discussion in Section I above, the denial of the various other benefits to the nation that the U.S. Secretary of Energy described in his February 2002 Yucca Mountain Site Recommendation, Section 8, "The National Interest" (see here), and the fact that NRC still has not acted to determine the cause of the violation or its extent of condition, thereby precluding the formulation of CAPRs, they make the NRC's "course of action" seem not so much expeditious and responsible, nor even laggardly and irresponsible, but, well, systematically orchestrated and deliberately noncompliant. (This is consistent with the view expressed in the concurring opinion in *In re: Aiken County*: "Although the Commission had a duty to act on the application and the means to fulfill that duty, [the] former Chairman … orchestrated a systematic campaign of noncompliance.")

IV. *Winston & Strawn, LLP v. James P. McLean, Jr.*, December 9, 2016

Finally, I want to bring your attention to a ruling decided in December by the D.C. Circuit Court of Appeals in the matter of *Winston & Strawn, LLP v. James P. McLean, Jr.*, Docket No. 14-7197 (see here). As you know, the first proposed rule has an "extent of condition" provision that, when triggered by a court-adjudged violation of a particular statute, would require the NRC to determine whether the agency may be in violation of other statutes or regulations. At first blush, this may seem unnecessary. After all, the NRC is a well-established, respected organization. It is very knowledgeable of the law. It has its own Inspector General who is ever on the lookout for mischief. And, as a public, highly scrutinized, and (generally) transparent agency, any violations would surely not remain latent.

There are three responses to this. The first addresses the notion that because NRC operates "in a fishbowl," it may rely on external parties to identify agency violations of the law. This stance is ethically untenable, since it relieves the agency of the onus to comply with applicable statutes and regulations in the first instance. Moreover, external entities will only identify NRC violations that affect their own

interests—the interests of the nation as a whole are therefore left wanting. (That is essentially the situation we have now. The "antinuclear" contingent is happy that progress at Yucca Mountain is stalled and wasn't bothered that NRC was "defying" and "flouting" the law to make that happen. They are unconcerned that a "systematic campaign of noncompliance" was, or is, being "orchestrated" at NRC, as long as their interests are served. For their part, the nuclear utilities are happy that the corpus of their money in the NWF is being preserved (with interest) and that their SNF management costs are being paid from the Judgment Fund. It may be an unenlightened view, but they are happy with the status quo. The interests of the nation, whose safety is being threatened—see discussion in Section I above—and who is paying $1000 per minute because federal law is being frustrated, are not being represented [with the humble exception of this PRM].)

Another consideration in this same vein is the fact that not all observers of NRC activities are large and litigious organizations like the Sierra Club, the Natural Resources Defense Council, the State of New York, and the like. Asserting in federal court that the NRC is violating the law is no trivial undertaking. Many small and non-litigious players will likely simply ignore observed agency violations.

Second, regarding the NRC's Inspector General, is the fact of the *In re: Aiken County* ruling itself. As you know, the Court held that "the Commission is simply defying a law enacted by Congress" and, worse, that "the Commission is simply flouting the law" (see here; search for "defying" and "flouting"). Thus, a well-staffed and well-paid Inspector General is no guarantee that statutory violations are not occurring.

Finally is the *Winston & Strawn* ruling. The Court notes that "[t]he Federal Rules [of Civil Procedure] are 'as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the . . . mandate [of a Federal Rule] than they do to disregard constitutional or statutory provisions.'" The Court then holds that a local rule of the D.C. District Court is inconsistent with the corresponding Federal Rule of Civil Procedure, and has been since the Federal Rule was revised in 2010. Thus, the D.C. District Court—an organization at least as well-established and respected as the NRC, and one that is presumably more knowledgeable of the law—had essentially been violating a federal law for the better part of a decade. How can the NRC, a comparative tyro, believe it is immune from such protracted inadvertence?

Based on the above, it is clear that the "extent of condition" evaluation as proposed in the PRM is an important and worthwhile undertaking for the NRC in the wake of court-adjudged violations.

V. Summary

Section I above discusses NRC's recently issued GL 2016-01, the only GL issued by NRC in 2016 (or so far in 2017), which provides a fuller picture of the safety consequences associated with growing accumulations of SNF at nuclear plant sites. Review of the GL, along with its list of references and the documents cited in the GL's table entitled "Related Generic Communications," serves to emphasize the importance of the NRC's *In re: Aiken County* violation relative to the function of the agency as a nuclear safety regulator.

Section II describes how the proposed rules comport with and advance each of the NRC's core principles, as delineated by NRC Chairman Burns (now Commissioner Burns) in his speech at the National Press Club on May 5, 2016, and in later speeches. Chairman Burns described these core principles as "important and relevant." I agree.

Section III updates the average payout rate from the Treasury Department's Judgment Fund that is attributable to NWPA implementation delays. The start date of the disbursements is adjusted to reflect the actual start date (approximately January 1, 2005). The cumulative total disbursement is updated based on the latest (FY 2016) Financial Statement Audit of the NWF. The section additionally reiterates that the NRC currently has the ball to act to implement the NWPA, based on PRM Ref. 12 (search for "The Commission shall consider an application"); PRM Ref. 11 (search for "The Commission maintains a statutory duty" or "the ball"); and PRM Ref. 1 (search for "The Commission is under a legal obligation to continue the licensing process"). Significantly, the revised payout rate from the U.S. Treasury is on the order of $1,000 per minute, around the clock, including weekends and holidays.

Section IV addresses potential arguments that the NRC need not conduct an "extent of condition" evaluation either now in the aftermath of the *In re: Aiken County* ruling, or following any future determination by a court of competent jurisdiction that the NRC is violating the law. Among the reasons is a ruling, *Winston & Strawn, LLP v. James P. McLean, Jr.*, by the D.C. Circuit Court of Appeals in December. In this ruling, the D.C. Circuit Court of Appeals held that the U.S. District Court for the District of Columbia had essentially been in violation of U.S. law since 2010. This ruling addresses the proposition that the NRC, by virtue of its maturity and knowledge of the law, should not be expected to conduct the extent of condition evaluations proposed under PRM-2-15. However, if the U.S. District Court for the District of Columbia, which is significantly more mature (established in 1863) and versed in the law than the NRC, can unknowingly be in violation of applicable law for the better part of a decade, then NRC's own maturity and knowledge of the law are unpersuasive relative to the need for the proposed extent of condition evaluations.

This rationale is made doubly compelling by the fact that the only triggers for the extent of condition evaluations under the proposed rules are instances where the NRC has already been held to be in violation of the law by a court of competent jurisdiction.

VI. Conclusion

Anthony, Winston Churchill said, "If you have an important point to make, don't try to be subtle or clever. Use a pile driver. Hit the point once. Then come back and hit it again. Then hit it a third time—a tremendous whack." (See here.)

The point is this. The PRM essentially asks the NRC to cross four conceptual thresholds. The first is whether the agency's violation documented in the *In re: Aiken County* ruling is acceptable or not; i.e., did the NRC do anything wrong? Some would say that the fact of the ruling is enough. But you should also recall the eminence, intellectual power, and authority of the D.C. Circuit Court of Appeals, and that it is generally regarded to be the second highest court in the nation. You should recall the clear words the Court used: "the Commission is simply *defying* a law enacted by Congress" (emphasis added) and "the Commission is simply *flouting* the law" (emphasis added). You should recall that the Court provided two clear, well-spaced warnings in advance of its ruling. You should recall that the remedy the Court decreed, a writ of mandamus, is a "drastic and extraordinary remedy reserved for really extraordinary causes" (in the words of the U.S. Supreme Court, which is not wont to use the word "extraordinary" twice in one sentence). And finally you should recall that the agency cannot anyway now offer justifications or excuses, since any colorable claims should appropriately have been put forth in a petition for certiorari to the U.S. Supreme Court. The NRC currently has an empty quiver.

So this is an easy threshold to cross—*yes*, the violation documented in *In re: Aiken County* is unacceptable.

Second, the NRC must determine whether the violation is significant. Here you should recall the nuclear safety consequences associated with the violation, including the discussion in Section I above. Next you should recall the $1,000 per minute payout from the U.S. Treasury (on average) that attended the violation and that persists still, since the NRC still has the ball to implement the NWPA. You should recall the significant benefits that the U.S. Secretary of Energy presented in his February 2002 Yucca Mountain Site Recommendation, Section 8, "The National Interest"—including national security, energy security, environmental protection, and assisting anti-terrorism efforts at home—that are being denied to the nation. Finally, you should recall the damage to NRC's credibility and reputation as "[a] trusted, independent, transparent, and effective nuclear regulator" that results when the D.C. Circuit Court of Appeals holds that NRC defies and flouts the law.

Recall here too Chairman Burns' point that the NRC's independence is "*vitally* important" (emphasis added), and his more recent words that the NRC's independence must be "beyond reproach" (see here, from September 29, 2016; search for "independence must be beyond reproach ") (see also here, from November 7, 2016; search for "independence must be beyond reproach"). Recall that these words do not square with the reproach in *In re: Aiken County* that "a systematic campaign of noncompliance" was being "orchestrated" at NRC.

So, this too is thus an easy threshold to cross—*yes*, NRC's violation is significant.

Third, once you accept that the NRC's violation was both unacceptable and significant, then is any action warranted? Here you should recall the NRC's Principles of Good Regulation—Independence, Openness, Efficiency, Clarity, and Reliability (see discussion in Section II above). Recall that NRC leadership views these principles as "important and relevant." Does inaction reasonable comport with these core principles? You should recall NRC's traits of a positive safety culture, and NRC's vision of itself as "trusted, independent, transparent, and effective." You should recall how inaction has resulted in an NRC stance of defensiveness and furtiveness regarding Yucca Mountain. See Section II.b above. You should recall simple management fundamentals taught in MBA and MPA programs across the nation—that significant, unacceptable conditions should be studied, understood, and corrected, and that measures should be put in place to prevent their recurrence. You should recall that the actions proposed in the PRM—determining the cause and extent of significant, unacceptable conditions, and implementing corrective actions to prevent recurrence—are no different from what NRC would impose on its own licensees were they to violate, defy, or flout NRC's regulations. You should thus embrace the wisdom embodied in that ancient phrase, "Physician, heal thyself." Finally, you should understand that until the cause of the violation is studied, understood, and reported, the NRC does not know whether that cause is still manifest at the agency, or whether "a systematic campaign of noncompliance" is still being "orchestrated" there.

Thus, once you cross the conceptual threshold that NRC's *In re: Aiken County* violation was both unacceptable and significant, then crossing the third threshold, that appropriate actions are warranted, is unavoidable. The rules proposed in the PRM reasonably define what those actions should be.

(NRC's current, highly limited and half-fast response to the violation cannot be held up as the appropriate action to take, because it prolongs the nuclear safety risks that stem from NWPA implementation delays; does not represent good-faith implementation of the NWPA; does not honor

the timeliness concern in the NWPA; does not address the cause of the violation and therefore does not ensure that the cause has been eliminated and prevented from recurring; does not comport with NRC's stated intent, in this specific context, to deal with "matters pending before our agency as expeditiously and responsibly as possible"; does not comport with NRC's "important and relevant" core principles; does not comport with NRC's vision of itself as "trusted, independent, transparent, and effective"; does not comport with NRC's traits of a positive safety culture; does not comport with the gravity and extraordinariness of the Court's *In re: Aiken County* ruling; does not honor the esteem, patience, and authority of the Court; serves to deny the nation the benefits from NWPA implementation that the U.S. Secretary of Energy aptly delineated back in 2002; and continues to cost the U.S. taxpayer approximately $1,000 a minute.)

The fourth conceptual threshold is whether NRC should take the additional step of extending the rules proposed in the PRM to cover *all* instances—i.e., apart from Yucca Mountain or even waste-related matters—where a court of competent jurisdiction holds that NRC violated applicable law, and all instances where NRC does not receive sufficient funding to meet (in good faith) its statutory mandates. This final step seems altogether appropriate and warranted.

For all of the above reasons, the NRC should proceed to adopt the proposed rules.

Anthony, in closing, please let me reiterate the high esteem in which I hold the NRC. As I said in the PRM, the fact of the *In re: Aiken County* ruling, and NRC's response to that ruling, stand in such stark contrast to the agency's normal, prudent, principled pursuit of its mission that attention is warranted.

I am attaching a Word™ version of this update for you convenience.

I ask that you please ensure the hyperlinks contained herein connect in the version that is posted, for the convenience of readers.

Thank you.

Jeff.

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