

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of)

U.S. DEPARTMENT OF ENERGY)

(High-Level Waste Repository))

) Docket No. 63-001
)
)
)
)

CLI-14-01

MEMORANDUM AND ORDER

In response to the writ of mandamus issued by the U.S. Court of Appeals for the District of Columbia Circuit, we recently issued a decision and companion Staff Requirements Memorandum setting forth the course of action we selected to continue the licensing process for the Department of Energy's Yucca Mountain high-level radioactive waste repository.¹ The State of Nevada requests that we clarify certain aspects of the decision and the SRM; Nye County, Nevada, the States of South Carolina and Washington, Aiken County, South Carolina, and the National Association of Regulatory Utility Commissioners (together, the "Five Parties") seek

¹ See *generally* CLI-13-8, 78 NRC ___ (Nov. 18, 2013) (slip op.); Staff Requirements—SECY-13-0113—Memorandum and Order Concerning Resumption of Yucca Mountain Licensing Process (Nov. 18, 2013) (ADAMS accession no. ML13322A007) (SRM); *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013).

reconsideration of certain aspects of our decision.² As discussed below, we deny both requests.

I. DISCUSSION

We undertook CLI-13-8 and the companion SRM pursuant to our inherent authority to supervise the Staff's work and adjudicatory proceedings relating to license applications.³ Our authority to reconsider or clarify such a decision, if needed, is likewise inherent in our authority to render the decision in the first instance.⁴

As we stated in CLI-13-8, the course of action that we approved to resume the Yucca Mountain licensing process constitutes the next logical steps in that process. These actions, principally completion of the safety evaluation report (SER) and completion of a supplemental environmental impact statement, are intended to advance the process "in a manner that is constructive and consistent with the court's decision and the resources available."⁵ We have

² *State of Nevada Petition for Clarification of November 18, 2013 Restart Order and Related Staff Requirements Memorandum* (Nov. 27, 2013) (Nevada Petition); *Request for Leave to File Motion for Reconsideration of Memorandum and Order* (Nov. 27, 2013), and *Motion for Reconsideration of Memorandum and Order* (Nov. 27, 2013) (Five Parties Motion). We received three answers to the requests. *Five Parties' Answer to Nevada's Petition for Clarification of Restart Order and Staff Requirements Memorandum* (Dec. 9, 2013); *State of Nevada Consolidated Answers to (1) Five Parties' Request for Leave to File Motion for Reconsideration and (2) Five Parties' Motion for Reconsideration of Commission's November 18, 2013 Restart Order* (Dec. 9, 2013); *NRC Staff Answer to Petition for Clarification and Response to Motion for Reconsideration* (Dec. 9, 2013) (Staff Answer).

³ CLI-13-8, 78 NRC at ___ (slip op. at 6) (citing *Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-13-6, 78 NRC ___ (Aug. 5, 2013) (slip op.); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476 (2008); and *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002)).

⁴ *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 652 (1980) (citing *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980)).

⁵ CLI-13-8, 78 NRC at ___ (slip op. at 9).

considered Nevada's and the Five Parties' requests.⁶ As discussed below, we do not find that our decisions require revision or clarification.

A. Nevada's Petition for Clarification

Nevada seeks clarification that, should the adjudication be restarted and discovery resume, we will adjust the milestone for the proceeding calling for completion of discovery sixty days after the SER is issued.⁷ In CLI-13-8, we declined to consider various requests related to the adjudication in view of our decision to continue to hold the adjudication in abeyance. As we stated there, should the adjudication re-commence at a future time, "participants will have the opportunity to re-submit requests associated with the conduct of the proceeding at that time."⁸ Additional potential deviations from the schedule in 10 C.F.R. Part 2, Appendix D associated with the adjudication—including the one raised by Nevada here—would be appropriately addressed at that time. No participant will be unfairly prejudiced.

Nevada also seeks clarification of the SRM. In particular, Nevada requests that we clarify our direction that the NRC staff, in carrying out the directions in CLI-13-8, "adopt work previously completed as a first principle."⁹ Nevada states its concern that the phrase "work previously completed" can be interpreted to imply a judgment that all work relevant to the safety

⁶ The Staff objects to the Five Parties' request on procedural grounds, citing provisions relevant to adjudications in 10 C.F.R. Part 2, Subpart C. Staff Answer at 5-7. Our rules provide that a motion for reconsideration "must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid." 10 C.F.R. § 2.345. *Accord* 10 C.F.R. §§ 2.323(e), 2.341(d) (referencing the standard in section 2.323(e)). Assuming that this standard applies to the Five Parties' motion, we observe that the Five Parties neither demonstrate a clear and material error in our decision nor raise any issue that could not reasonably have been anticipated. Further, as discussed *infra*, the Five Parties have not shown that any of the requested relief is required. The Five Parties have not, therefore, demonstrated any error that renders our decision invalid.

⁷ Nevada Petition at 2-3.

⁸ CLI-13-8, 78 NRC at ___ (slip op. at 18).

⁹ Nevada Petition at 3.

evaluation performed to date may be adopted without further “investigation or inquiry,” or might include the Staff’s Technical Evaluation Reports.¹⁰ We decline to revisit the SRM. As the Staff correctly observes, neither Nevada nor any other external entity is entitled to seek revisions to a Commission direction to the NRC staff contained in an SRM.¹¹ In any event, however, no clarification of this direction is needed. The Staff represents—and we expect—that it will undertake completion of its review activities, including development of its findings on the Safety Evaluation Report, consistent with “existing agency requirements and guidance.”¹² Further, as always, we expect the Staff to complete a robust review addressing all applicable regulatory requirements, with its analysis and conclusions documented in the SER, and for those working on the project to exercise their independent professional judgment in the performance of their duties.

B. Five Parties’ Motion for Reconsideration

The Five Parties seek greater detail on the licensing activities than we set forth in CLI-13-8, as well as additional information that they believe will help them to assess the merits of the course of action we have selected. They request, for example, “an order outlining a schedule of deadlines for issuance of the remaining [safety evaluation report volumes]”; “a detailed listing of what work remains on each individual [safety evaluation report volume], and an explanation for estimating that an additional twelve months is required”; and an “explanation

¹⁰ *Id.* at 3-4.

¹¹ Staff Answer at 4 & nn. 9, 11 (citing Internal Commission Procedures (July 5, 2011) at II-9, III-11, *available at* <http://www.nrc.gov/about-nrc/policy-making/internal.html> (last visited Dec. 18, 2013)). The cited provisions describe the contents of an SRM and the process for reviewing draft SRMs, respectively.

¹² See Staff Answer at 3-5 (citing “Yucca Mountain Review Plan,” NUREG-1804 (Rev. 2 July 2003) (ML032030389) and NRC Management Directive 3.57, “Correspondence Management” (Oct. 18, 2005) (ML053070034) (describing concurrence processes)). Further, the Staff represents that it is preparing review guidance that will address our direction on its conduct of this review. *Id.* at 4-5.

for why prompt issuance of the SERs, followed by staged discovery and adjudication of Phase I post-closure issues, is not achievable with available funds.”¹³

As we stated in CLI-13-8, the court in *Aiken County* “afforded us broad discretion in choosing a pragmatic course of action to resume the licensing process.” The course of action we selected complies with the fundamental direction of the D.C. Circuit—to resume the licensing process. As fully explained in CLI-13-8, by taking an incremental approach, we have attempted to ensure, to the maximum extent possible, that the next logical steps in the process are completed.¹⁴ Although the petitioners in the *Aiken County* decision sought a broad mandamus order, nothing in the court’s decision required us to undertake a particular course of action, to conduct an accounting containing the level of detail sought by the Five Parties, or to subject the Staff’s estimates of the time required to perform its work to the scrutiny of third parties. We decline to order the Staff to do more than has been directed by the D.C. Circuit. Although we expect that the activities outlined in CLI-13-8 will expend “nearly all of the funds currently available to the NRC”¹⁵—leaving few, if any, funds for other licensing activities, including the resumption of the adjudication—we have committed to re-evaluate this conclusion “in the event that circumstances materially change.”¹⁶ And as we have stated, we are closely monitoring the cost and progress of the Staff’s activities, and we will give direction for reprioritization of time and funds should estimates prove inaccurate. That is to say, in the event the NRC appears

¹³ Five Parties Motion at 3, 4, 5.

¹⁴ CLI-13-8, 78 NRC at ___ (slip op. at 9-12).

¹⁵ *Id.* at ___ (slip op. at 21).

¹⁶ *Id.* at ___ (slip op. at 22) (footnote omitted).

likely to exhaust funds prior to completing the activities we have directed, we will provide direction to the Staff to maximize completion of these activities.¹⁷

In short, in CLI-13-8 we outlined a course of action, necessarily predictive in nature, to complete the next logical steps in this licensing process. Our chosen path forward is consistent with the court's direction in *Aiken County* and the limited available funds, and further relief is not warranted.

* * * * *

One other matter merits mention. In CLI-13-8, we observed that the agency had remaining \$2.5 million “in obligated, unexpended funds that would become available if contract audit activities are completed and these funds are eligible for subsequent [de-obligation].”¹⁸ In December 2013, \$2.2 million in obligated, unexpended Nuclear Waste Fund appropriations were de-obligated and are now available for agency use.¹⁹ Now that additional funds are available we are providing further direction to the Staff, consistent with CLI-13-8 and the companion SRM, on the use of those funds to make the Licensing Support Network document collection publicly available in the Agencywide Documents Access and Management System.²⁰

¹⁷ SRM at 2 (unnumbered) (instructing the Staff to provide monthly progress reports that will include “accomplishments, updated schedules for remaining activities, the cost of remaining activities, and stakeholder communications and interactions”). In addition, we are providing to Congress monthly reports on NRC activities and expenditure of unobligated carryover funds appropriated from the Nuclear Waste Fund. These reports are publicly available. See CLI-13-8, 78 NRC at ___ n.86 (slip op. at 22 n.86).

¹⁸ CLI-13-8, 78 NRC at ___ (slip op. at 10 n.35).

¹⁹ The remaining balance of approximately \$300,000 is reserved to cover any emergent costs identified during the ongoing contract closeout process.

²⁰ CLI-13-8, 78 NRC at ___ (slip op. at 13 n.47); SRM at 2 (unnumbered). We provide this direction separately. See Staff Requirements—SECY-13-0138/SECY-13-0138A—U.S. Department of Energy (High-Level Waste Repository): State of Nevada Petition for Clarification of November 18, 2013 Restart Order and Related Staff Requirements Memorandum (Nov. 27, 2013); “Five Parties” Motion for Reconsideration of Memorandum and Order (Nov. 27, 2013) (Jan. 24, 2014) (ML14024A265).

In light of the uncertainties inherent in cost projections, we reiterate that we continue to closely monitor all ongoing activities and Nuclear Waste Fund expenditures to ensure effective implementation of our direction and prudent use of funds.²¹

II. CONCLUSION

For the reasons set forth above, we *deny* Nevada's and the Five Parties' requests.

IT IS SO ORDERED.²²

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 24th day of January, 2014.

²¹ CLI-13-8, 78 NRC at ___ (slip op. at 22 & n.87); SRM at 2 (unnumbered).

²² Commissioner Apostolakis has recused himself from this adjudication and, therefore, did not participate in this matter. See Notice of Recusal (July 15, 2010).