



Closing Yucca Mountain: Litigation Associated with Attempts to Abandon the Planned Nuclear Waste Repository

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Summary

Passed in 1982, the Nuclear Waste Policy Act (NWPA) was an effort to establish an explicit statutory basis for the Department of Energy (DOE) to dispose of the nation's most highly radioactive nuclear waste. The NWPA requires DOE to remove spent nuclear fuel from commercial nuclear power plants, in exchange for a fee, and transport it to a permanent geologic repository or an interim storage facility before permanent disposal. Defense-related high-level waste is to go into the same repository. In order to achieve this goal, and in an effort to mitigate the political difficulties of imposing a federal nuclear waste facility on a single community, Congress attempted to establish an objective, scientifically based multi-stage statutory process for selecting the eventual site of the nation's new permanent geologic repository. Congress amended the NWPA's site selection process in 1987, however, and designated Yucca Mountain, Nevada, as the sole candidate site for the repository by terminating site specific activities at all other candidate sites.

The Obama Administration, in conjunction with DOE, has taken three important steps directed toward terminating the Yucca Mountain project. First, the Administration's FY2011 budget proposal eliminated all funding for the Yucca Mountain project. Second, the President and Secretary of Energy Steven Chu established a Blue Ribbon Commission to consider alternative solutions to the nation's nuclear waste challenge. Third, and most controversial, DOE has attempted to terminate the Nuclear Regulatory Commission's (NRC's) Yucca Mountain licensing proceeding by seeking to withdraw the license application for the Yucca Mountain facility.

DOE's withdrawal motion triggered strong opposition from a number of concerned parties. The states of Washington and South Carolina—each awaiting cleanup and removal of defense-related nuclear waste at the Hanford and Savannah River Sites, respectively—have led the legal challenge against the license withdrawal. Claims challenging the Secretary's authority to withdraw the Yucca Mountain license application are currently proceeding before the NRC and the U.S. Court of Appeals for the District of Columbia (D.C. Circuit).

Controversy over the Yucca Mountain license application intensified in October 2010, when NRC Chairman Gregory Jaczko directed NRC staff to use funds appropriated under the FY2011 continuing resolution to close down the agency's review of the Yucca Mountain license application.

While the result of the ongoing dispute over the legality of the attempted termination of the Yucca Mountain program remains uncertain, the change of control in the House of Representatives could have a significant impact on the fate of the Yucca Mountain facility. A number of leading House Republicans have voiced strong opposition to shutting down the Yucca Mountain facility. Consequently, the Yucca Mountain dispute may not only be played out before the NRC and the D.C. Circuit, but also in the House of Representatives, in the form of appropriations disputes and oversight hearings.

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Introduction

Almost 30 years ago, Congress addressed increasing concerns regarding the management of the nation's growing stockpile of nuclear waste by calling for the federal collection of spent nuclear fuel (SNF) and high-level nuclear waste (HLW) for safe, permanent disposal. Passed in 1982, the Nuclear Waste Policy Act (NWPA) was an effort to establish an explicit statutory basis for the Department of Energy (DOE) to dispose of the nation's most highly radioactive nuclear waste. The NWPA requires DOE to remove spent nuclear fuel from commercial nuclear power plants, in exchange for a fee, and transport it to a permanent geologic repository or an interim storage facility before permanent disposal. Defense-related high-level waste is to go into the same repository.¹ In order to achieve this goal, and in an effort to mitigate the political difficulties of imposing a federal nuclear waste facility on a single² community, Congress attempted to establish an objective, scientifically based multi-stage statutory process for selecting the eventual site of the nation's new permanent geologic repository.³ Although DOE would be responsible for developing the eventual repository and carrying out the disposal program, individual nuclear power providers would fund a large portion of the program through significant annual contributions, or fees, to the newly established Nuclear Waste Fund (NWF).⁴

Establishing a Permanent Geologic Repository for High-Level Nuclear Waste and Spent Nuclear Fuel

The NWPA created a multi-stage statutory framework—requiring the participation of the President, Congress, the Secretary of Energy, the Department of Energy, and the Nuclear Regulatory Commission—that governs the establishment of a permanent geologic nuclear waste repository. The various phases of the process include site recommendation, site characterization and study, site approval, and construction authorization. At the site recommendation stage, the Secretary of Energy (Secretary) was directed to nominate at least five potentially “suitable” sites for an eventual repository.⁵ After identifying and conducting an initial study of these sites, the Secretary was to recommend three sites to the President for characterization as “candidate sites.”⁶ Pursuant to these obligations, the Secretary recommended Deaf Smith County, Texas; Hanford, Washington, and Yucca Mountain, Nevada, to the President in 1986. The Secretary's recommendations were met with significant opposition from the affected states; however, and as a result, Congress amended the NWPA's site selection process in 1987 and designated Yucca Mountain as the sole candidate site for the repository by terminating “all site specific activities (other than reclamation activities) at all candidate sites, other than the Yucca Mountain site.”⁷ The 1987 amendments, did not, however, end the site characterization, approval, and construction authorization phases, which continued as outlined under the original terms of the NWPA.

¹ P.L. 97-425, Nuclear Waste Policy Act (hereinafter NWPA), *codified at* 42 U.S.C. §§ 10101 *et seq.*

² Although the NWPA originally envisioned the construction of a second repository to provide regional balance, the idea was abandoned under the NWPA amendments of 1987.

³ NWPA §§ 111-125.

⁴ *Id.* at § 302.

⁵ The Secretary nominated sites in Mississippi, Texas, Utah, Washington, and Nevada.

⁶ NWPA § 112(b).

⁷ NWPA § 160.

In accordance with the characterization stage of the NWPA framework, Yucca Mountain was extensively inspected and studied in an effort to determine if the site was in compliance with suitability guidelines established by DOE, and public health, safety, and environmental guidelines established by the Environmental Protection Agency.⁸ Following significant litigation over the proper safety standards to be applied to the Yucca Mountain facility, and notwithstanding charges by the state of Nevada that the site was unsafe,⁹ Secretary of Energy Spencer Abraham recommended that the President approve the Yucca Mountain site for the development of a repository in 2002.¹⁰ President George W. Bush approved the Yucca Mountain site the next day, and, pursuant to the terms of the NWPA, recommended the site to Congress.

The NWPA, however, provided the state in which the proposed repository would be located with the opportunity to object to the President's site recommendation by submitting a notice of disapproval to Congress.¹¹ If a notice of disapproval were submitted, the NWPA stated that the site would be "disapproved" unless both houses of Congress overrode the state's objection by passing a "resolution of siting approval."¹² Although Nevada opposed the selection of Yucca Mountain and quickly submitted its notice of disapproval, Congress passed, and the President signed, the necessary approval resolution to override Nevada's objection.¹³ Thus, the approval stage of the NWPA process ended.

The fourth stage of the NWPA process commenced in June 2008 when DOE submitted an application for authorization to construct the Yucca Mountain nuclear waste repository (license application) to the Nuclear Regulatory Commission. Under the NWPA, "if the President recommends to the Congress the Yucca Mountain site ... and the site designation is permitted to take effect ... the Secretary shall submit to the [NRC] an application for a construction authorization for a repository at such site."¹⁴ The statute further directed that following submission of the license application, the NRC "shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application."¹⁵ The NRC was considering the 8,600 page license application when the new Obama Administration ushered in a change in policy with respect to the suitability of Yucca Mountain as the future site of the nation's permanent nuclear waste repository.

⁸ There has been significant litigation over the environmental guidelines to be applied to Yucca Mountain. *See, e.g.*, *Nuclear Energy Institute v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004).

⁹ Two key arguments against Yucca Mountain pertain to the region's overall geologic instability and concerns over water infiltration. *See*, Marta Adams, *Yucca Mountain—Nevada's Perspective*, 46 Idaho L. Rev. 1, 1-6 (2010).

¹⁰ Matthew Wald, *Energy Department Recommends Yucca Mountain for Nuclear Waste Burial*, N.Y. Times, Feb. 15, 2002.

¹¹ NWPA § 115(b).

¹² NWPA § 115(c).

¹³ P.L. 107-200, 107th Cong. (2002).

¹⁴ NWPA § 114(b).

¹⁵ NWPA § 114(d).

Yucca Mountain and the Obama Administration

Both President Obama and Secretary of Energy Steven Chu have stated that Yucca Mountain does not represent a viable option for the permanent storage of nuclear waste.¹⁶ During the 2008 presidential campaign, then-Senator Obama supported Nevada's fight against the repository, asserting in an issue statement on energy policy that he did not believe Yucca Mountain was a "suitable site."¹⁷ In accordance with this view, during his first year in office President Obama and DOE requested, and Congress appropriated, only enough funds in FY2010 to continue the NRC license proceeding while halting any design or development progress on the actual repository.¹⁸

During his second year in office, the President, in conjunction with DOE, took three important steps directed toward terminating the Yucca Mountain facility. First, the Administration's FY2011 budget proposal eliminated all funding for the Yucca Mountain project.¹⁹ Second, the President and Secretary Chu established a Blue Ribbon Commission to consider alternative solutions to the nation's nuclear waste challenge. Third, and most controversially, DOE has attempted to terminate the NRC's Yucca Mountain licensing proceeding by seeking to withdraw the license application for the Yucca Mountain facility.

The Obama Administration Budget

Following years of decreases in program funding going back to the George W. Bush Administration, the Obama Administration and Secretary Chu have resolved to completely defund and terminate the Yucca Mountain program while developing nuclear waste disposal alternatives.²⁰ The Administration's FY2011 and FY2012 budget proposals eliminate all funding for the Yucca Mountain facility. The consecutive budget proposals follow years of steady decreases in funding for the repository: from \$572 million in FY2005, to \$288 million in FY2009, to only enough funds, approximately \$197 million, to finance the ongoing NRC licensing process in FY2010.²¹

The FY2011 DOE budget request was met with some resistance from both House and Senate appropriators. Senator Patty Murray offered an amendment during the Senate Committee on Appropriations' consideration of the Energy and Water Appropriations bill that would have restored funding to the repository.²² Similarly, the ranking Member of the House Appropriations Subcommittee on Energy and Water Development, Representative Rodney Frelinghuysen, offered

¹⁶ Statement of Steven Chu, Secretary, Department of Energy, Before the Senate Committee on the Budget, March 11, 2009 ("[B]oth the President and I have made clear that Yucca Mountain is not a workable option.").

¹⁷ Obama for America, "Barack Obama and Joe Biden: New Energy for America" (2008), available at http://www.barackobama.com/pdf/factsheet_energy_speech_080308.pdf.

¹⁸ P.L. 111-85, 111th Cong. (2009).

¹⁹ The President's FY2012 budget proposal also contained no funding for the Yucca Mountain facility. Available at <http://www.whitehouse.gov/omb/budget/Overview>.

²⁰ President's FY2011 Budget Proposal at 71, available at <http://www.gpoaccess.gov/usbudget/fy11/pdf/budget.pdf>.

²¹ Statement of Steven Chu, Secretary, Department of Energy, Before the Senate Committee on Appropriations Subcommittee on Energy and Water Development, and Related Agencies, May 19 2009. Secretary Chu had requested \$25 million in FY2011 to "wrap up" the Yucca Mountain project and preserve "critical knowledge and data." See, Stephen Power, *Chu, Orszag at Odds Over Yucca Funding*, Wall St. J., Jan. 14, 2010.

²² *Sen. Murray Fails to Revive Nevada Nuke Waste Site*, Seattle Times, July 23, 2010.

an amendment that would have restored \$100 million in funding for the Yucca Mountain facility.²³ Both proposals were rejected in committee.

In addition to defunding the Yucca Mountain project, the President's budget request recommended closing the Office of Civilian Radioactive Waste Management (OCRWM), which had previously been charged with administering the Yucca Mountain project and many of DOE's obligations under the NWPA. After steady reductions in staff the OCRWM officially closed on September 30, 2010.²⁴ Pursuant to the President's budget proposal, the administration of the NWF and responsibility for DOE's ongoing obligations under the Standard Contract²⁵ and NWPA have been shifted to the Office of Nuclear Energy.²⁶ At least two Members of Congress have expressed concern over the legality of the Administration's decision to eliminate the statutorily established OCRWM,²⁷ which was specifically created by the NWPA for the purpose of "carrying out the functions of the Secretary" under the act.²⁸

In response to these concerns, DOE has suggested that the 1977 Department of Energy Organization Act grants the Secretary of Energy "broad authority to create, eliminate, and merge organizations" within DOE.²⁹ Generally speaking, Congress has the authority to structure the administrative bureaucracy. Thus, absent specific statutory authority, agencies have no legal power to direct how statutorily defined functions and powers of agencies are to be utilized, allocated, or abandoned.³⁰ In this instance, the Secretary of Energy has been granted statutory authority to "establish, alter, consolidate or discontinue, such organizational units or components within the Department as he may deem to be necessary or appropriate."³¹ The Administration's proposal—which Congress, through its appropriation power, is free to either follow or disregard—is to "terminate" the OCRWM and transfer the office's responsibilities to the Office of Nuclear Energy.³² Given the Secretary's statutorily granted authority, it is likely that such a transfer would be a valid consolidation of DOE offices. However, any statutory duties or

²³ *House Appropriations Panel Rejects Yucca Mt. Amendment*, Platts, July 16, 2010.

²⁴ The OCRWM workforce at Yucca Mountain consisted of as many as 2,700 employees. DOE has stated that it will help employees "find new opportunities, including working to help employees find new positions in the department and throughout the federal government through career transition programs." Emily Yehle, *Yucca Project's Last 600 Employees Scramble for New Jobs*, N.Y. Times, Aug. 4, 2010.

²⁵ Under the NWPA, DOE was authorized to enter into contracts with private nuclear facilities to allow the federal government to take possession of nuclear waste and ensure its storage and disposal in a prospective permanent geologic repository. In an effort to streamline the collection and disposal process, DOE elected to create a single "Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste" for use with nuclear power providers. For additional information on the government's obligations under the Standard Contract, see CRS Report R40996, *Contract Liability Arising from the Nuclear Waste Policy Act (NWPA) of 1982*, by Todd Garvey.

²⁶ President's FY2011 Budget Proposal, at 71.

²⁷ See, Letter from Congressman Ralph Hall and Congressman Paul Broun, to Steven Chu, Secretary of Energy, February 3, 2010.

²⁸ 42 U.S.C. § 10224 ("There hereby is established within the Department of Energy an Office of Civilian Radioactive Waste Management.").

²⁹ P.L. 95-91, 95th Cong. (1977); Janice Valverde, *Two House Republicans Challenge Decision to End Yucca Mountain Funding, Close Office*, BNA Daily Report for Executives, Feb. 9, 2010.

³⁰ See, e.g., *Kendall v. U.S. ex. rel Stokes*, 37 U.S. (12 Pet.) 524 (1838)(holding that the President has no authority to direct the Post Master's performance of his statutory duty).

³¹ 42 U.S.C. § 7253.

³² Department of Energy FY2011 Congressional Budget Request at 176 (Feb. 2010) ("The Administration has ... decided to terminate the Office of Civilian Radioactive Waste Management.").

obligations that were placed in OCRWM must continue to be carried out by the Office of Nuclear Energy.³³

DOE Reprogramming

An additional budget-related controversy arose in March 2010 as a result of DOE's efforts to reprogram FY2010 funds for use in closing the Yucca Mountain facility. Reprogramming occurs where an agency seeks to redirect funds for an unforeseen purpose within an appropriations account.³⁴ This is to be distinguished from a transfer of funds, which involves moving funds from one appropriations account to another.³⁵ A transfer of funds generally requires congressional authorization, while a reprogramming generally falls within the discretionary authority of the agency.³⁶ Notwithstanding agencies' general authority to reprogram funds, appropriations bills (and their accompanying House and Senate reports) often contain language directing the agency to request approval from its appropriating committee before proceeding with a reprogramming. The conference report to the Energy and Water Development and Related Agencies Appropriations Act, for instance, contained specific language directing DOE to request approval by the House and Senate Committees on Appropriations before reprogramming funds.³⁷ These types of restrictions, which generally appear in legislative reports attached to the appropriations bill, are not considered binding law.³⁸ However, agencies have historically followed the procedures in order to maintain working relationships with their appropriating committees.

Although DOE submitted a request to reprogram FY2010 funds, the department has taken the position that it may reprogram the funds without committee approval.³⁹ While Secretary Chu initially seemed to accept the committee's controls over the proposed reprogramming during a hearing on March 24, 2010, he followed the hearing with a letter to the committee explaining his belief that he was free to reprogram funds to pay for the closure of the Yucca Mountain facility without approval from the committee.⁴⁰ In the letter, Secretary Chu advised the House Appropriations Subcommittee on Energy and Water Development that his department did not intend to accept committee controls over reprogramming, telling the subcommittee chair that DOE had "the authority within the law to take the reprogramming actions that we have planned."⁴¹ Despite opposition by Members of the subcommittee, as well as a number of other Members of Congress, DOE has successfully continued its shutdown of the Yucca Mountain facility.

³³ Such duties include annually preparing and submitting to Congress a "comprehensive report on the activities and expenditures of the office." 42 U.S.C. § 10224.

³⁴ U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, Vol. I: 2-30 (2004).

³⁵ *Id.*

³⁶ *Id.* (citing *Lincoln v. Vigil*, 508 U.S. 182 (1993)).

³⁷ H.Rept. 111-278, 111th Cong. (2009) at 102 ("Any reallocation of new or prior year budget authority or prior year de-obligations must be submitted to the House and Senate Committees on Appropriations in writing and may not be implemented prior to approval by the Committees.").

³⁸ *See, e.g.*, *American Hospital Assn. v. NLRB*, 499 U.S. 606, 616 (1991) ("Petitioner does not—and obviously could not—contend that this statement in the Committee Reports has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating.").

³⁹ Letter from Steven Chu, Secretary of Energy, to Peter J. Visclosky, Chairman, Subcommittee on Energy and Water Development, Committee on Appropriations, U.S. House of Representatives, March 26, 2010.

⁴⁰ *Id.*

⁴¹ *Id.*

Blue Ribbon Commission on America's Nuclear Future

Shortly before releasing the FY2011 budget proposal, the President asked DOE to establish the Blue Ribbon Commission on America's Nuclear Future (Commission) to explore, study, and evaluate alternatives to the Yucca Mountain facility for the permanent storage of SNF.⁴² The 15-member Commission, appointed by the Secretary of Energy, consists of distinguished scientists, academics, industry representatives, labor representatives, and former elected officials.⁴³ The Commission's goal is to "provide recommendations for developing a safe, long-term solution to managing the nation's used nuclear fuel and nuclear waste."⁴⁴ The Commission will not, however, be considering specific sites for a future repository.⁴⁵

Co-chaired by former Congressman Lee Hamilton and former National Security Advisor Brent Scowcroft, the Commission is charged with producing an interim report within 18 months of the Commission's establishment and a final report within 24 months.⁴⁶ Although not expressly prohibited from considering Yucca Mountain as a potential solution to the nation's nuclear waste problems,⁴⁷ Secretary Chu and the White House have conveyed that the Commission should focus only on "alternatives" to Yucca Mountain. Accordingly, the Commission co-chairs have stated that "Secretary Chu has made it quite clear that nuclear waste storage at Yucca Mountain is not an option."⁴⁸ In a February 11, 2011, letter to Co-chairs Hamilton and Scowcroft, Secretary Chu reaffirmed that the Commission should not be considering Yucca Mountain as a viable nuclear waste disposal solution. In the letter Secretary Chu reiterated that it was time to "turn the page and look for a better solution—one that is not only scientifically sound but that also can achieve a greater level of public acceptance than would have been possible at Yucca Mountain. It is time to move beyond the 25 year old stalemate over Yucca Mountain."⁴⁹

⁴² Memorandum from President Barack Obama, to Steven Chu, Secretary of Energy, *Blue Ribbon Commission on America's Nuclear Future*, Jan. 29, 2010.

⁴³ A list of Commission members is available at <http://brc.gov/members.html>.

⁴⁴ DOE Press Release, *Secretary Chu Announces Blue Ribbon Commission on America's Nuclear Future*, Jan. 29, 2010. Available at <http://www.doe.gov>. According to Secretary Chu, the Commission will be looking at "different types of disposal options." Janice Valverde, *Administration to Withdraw License Bid for Yucca Mountain, Eliminates Funding*, BNA Daily Report for Executives, Feb. 2, 2010.

⁴⁵ DOE itself is currently prohibited by statute from considering specific sites other than Yucca Mountain. 42 U.S.C. § 10172 ("The Secretary shall terminate all site specific activities ... at all candidate sites, other than the Yucca Mountain site, within 90 days after the enactment of the Nuclear Waste Policy Amendments Act of 1987.").

⁴⁶ The Commission held its first meeting on March 25 and 26, 2010. The Commission is divided into three sub-committees focusing on disposal, reactor fuel cycle technology, and transportation and storage. For updated information on the Commission's work see <http://brc.gov>.

⁴⁷ The initial House-passed bill approving the Administration's FY2010 proposed budget included language mandating that any review of nuclear waste disposal alternatives include Yucca Mountain as a potential option. However, the final DOE appropriations bill contained language mandating only that DOE "consider all alternatives for nuclear waste disposal." P.L. 111-85 (2009).

⁴⁸ Steve Tetreault, *Federal Panel to Examine Nuclear Waste Storage*, Las Vegas Review-Journal, Jan. 30, 2010. *But cf.*, Memorandum and Order, Atomic Safety and Licensing Board, Docket No. 63-001-HLW, June 29, 2010, at 19 n.69 ("There appears to be no express contradiction of the House Report language, which requires the Blue Ribbon Commission to consider Yucca Mountain, in either the Conference Report or the Senate Report and thus the language in the House Report appears to be the law.").

⁴⁹ Letter from Steven Chu, Secretary of Energy, to Lee Hamilton and Brent Scowcroft, Co-Chairs, Blue Ribbon Commission on America's Nuclear Future, Feb. 11, 2011, available at http://brc.gov/library/correspondence/BRC_Letter_from_Secretary_Chu_2-11-2011.pdf.

Withdrawal of the Yucca Mountain Construction Authorization License

The most controversial action taken by DOE has been the agency's attempted withdrawal of the license application in an effort to terminate the NRC's ongoing Yucca Mountain license proceeding. DOE has made clear that the decision to withdraw the license, initially submitted in June 2008,⁵⁰ was based on "policy" considerations.⁵¹ Specifically, DOE has asserted that scientific and technological advancements since the enactment of the NWPA, such as dry cask storage and advanced recycling, "provide an opportunity to develop better alternatives to Yucca Mountain."⁵²

DOE formally filed its motion asking the Atomic Safety and Licensing Board (Board) to dismiss the application "with prejudice" on March 3, 2010.⁵³ A common legal term, an application that is withdrawn "with prejudice" is generally barred from being re-filed in the future. However, whether or not an application, motion, or claim is dismissed with prejudice is a decision made by the Board and the NRC, and not by the requesting party.⁵⁴ DOE specifically asked the Board to dismiss the application with prejudice because the agency "does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain."⁵⁵ As construction on the Yucca Mountain facility cannot continue without a construction authorization from the NRC, many commentators consider a successful "with prejudice" withdrawal as marking the formal termination of any potential repository at Yucca Mountain.⁵⁶

DOE's withdrawal motion triggered strong opposition from a number of concerned parties. The states of Washington and South Carolina—each awaiting cleanup and removal of defense-related nuclear waste at the Hanford and Savannah River Sites, respectively—have led the legal challenge against the license withdrawal.⁵⁷ Similar legal claims⁵⁸ were immediately filed in two

⁵⁰ The NRC reportedly spent \$58 million in FY2009 to review the Yucca Mountain license. See, Janice Valverde, *Administration to Withdraw License Bid for Yucca Mountain, Eliminates Funding*, BNA Daily Report for Executives, Feb. 2, 2010.

⁵¹ See, Nuclear Regulatory Commission Atomic Safety and Licensing Board, Memorandum and Order, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04 (June 29, 2010) at 2 ("Conceding that the Application is not flawed nor the site unsafe, the Secretary of Energy seeks to withdraw the Application with prejudice as a 'matter of policy' because the Nevada site 'is not a workable option.'") See also, Nuclear Regulatory Commission Atomic Safety and Licensing Board, U.S. Department of Energy's Reply to the Responses to the Motion to Withdraw, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04 (May 27, 2010) at 1 (Characterizing the question presented as whether the Secretary has authority "to seek withdrawal of a license application for a repository when the Secretary has determined, as a matter of policy, not to proceed with that repository.").

⁵² See, Brief for Respondents, *In re Aiken County*, No. 10-1050 (D.C. Cir. Jan. 3, 2011). DOE has also cited consistent opposition from Nevada as a reason for the policy shift.

⁵³ U.S. Department of Energy's Motion to Withdraw, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04, March 3, 2010.

⁵⁴ 10 C.F.R. § 2.107 ("The Commission may ... on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice."). Under NRC procedures, decisions by the Board are appealable to the Commission as a whole.

⁵⁵ U.S. Department of Energy's Motion to Withdraw, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04, March 3, 2010.

⁵⁶ See, 42. U.S.C. § 10134; Shannon Dininny, *Wash. to Intervene in Yucca Mountain Case*, Seattle Times, March 1 2010. If the application were dismissed with prejudice, it is an open question as to whether the application could then be re-filed at a later date by a different agency.

⁵⁷ The nuclear waste located at the Hanford and the Savannah River sites was intended for disposal at Yucca Mountain.

different venues. Washington; South Carolina; Aiken County, South Carolina; the Prairie Island Indian Community; and the National Association of Regulatory and Utility Commissioners (NARUC) petitioned to intervene in the NRC licensing proceeding in order to stop the withdrawal. Washington, South Carolina, and Aiken County, along with a group of private plaintiffs from Washington State, have also filed statutory claims in the D.C. Circuit challenging DOE's authority⁵⁹ to withdraw the license application.⁶⁰

The legal battle over the Secretary's authority to withdraw the license application hinges on specific statutory language within the NWPA. Section 114 outlines the process for obtaining the necessary site approval and construction authorization and provides the statutory foundation for the ongoing litigation.⁶¹ The provision states that once the site approval procedures are completed and the site is designated, as was the case with Yucca Mountain, "the Secretary *shall* submit to the [NRC] an application for a construction authorization for a repository."⁶² Upon submission of the application, the NRC "*shall* consider" the application "in accordance with the laws applicable to such applications, except that the [NRC] *shall* issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application."⁶³

DOE has put forth three main arguments in support of the agency's motion to withdraw the license application. First, at a general level, DOE argues that the Secretary's decision to withdraw the license application, a decision the agency characterizes as a "discretionary" policy choice, should be granted significant deference by both the NRC and the federal courts.⁶⁴ The Secretary, and the President, clearly have broad discretion in carrying out the procedures outlined by the NWPA for establishing a permanent geologic repository.⁶⁵ For example, the Secretary exercises broad discretion under the NWPA both before and after the licensing process. Most starkly, § 113 states: "[i]f the Secretary at anytime determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall ... terminate all site characterization activities at such site."⁶⁶ This provision gives the Secretary broad authority to terminate the Yucca Mountain

(...continued)

⁵⁸ The arguments made before the NRC and the D.C. Circuit were essentially the same, with the core arguments focusing on the NWPA, the National Environmental Policy Act, and the Administrative Procedure Act.

⁵⁹ NARUC also filed a case with the D.C. Circuit to bar the Secretary from collecting Nuclear Waste Fund fees. *See*, National Association of Regulatory Utility Commissioners v. DOE, 2010 U.S. App. LEXIS 25579 (D.C. Cir. Dec. 13, 2010).

⁶⁰ It is important to recognize that the litigation associated with DOE's attempts to withdraw the license application is distinct from the contract litigation currently proceeding in the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit. The contract claims seek damages based on a partial breach of the Standard Contract entered into by DOE and individual nuclear power providers, whereas the claims before the NRC and the D.C. Circuit are asking those bodies to prohibit the Secretary of Energy from withdrawing the Yucca Mountain license application. The license withdrawal decision may have an impact on future liability in the contract cases in as far as it leads to further delays in DOE's ability to begin collecting and disposing of nuclear waste covered under the Standard Contract. For more information on the contract claims, see CRS Report R40996, *Contract Liability Arising from the Nuclear Waste Policy Act (NWPA) of 1982*, by Todd Garvey.

⁶¹ NWPA § 114.

⁶² NWPA § 114(b) (emphasis added).

⁶³ NWPA § 114(d) (emphasis added).

⁶⁴ U.S. Department of Energy's Motion to Withdraw, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04 (March 3, 2010).

⁶⁵ *See*, NWPA §§ 112-113.

⁶⁶ NWPA § 113.

program “at any time” as long as he finds the site “unsuitable.” However, the authority found in § 113, entitled “Site Characterization,”⁶⁷ presumably applies only during the site characterization phase—a phase terminated once the Secretary recommended Yucca Mountain to the President. Whether the Secretary retains discretion during the license application phase, as governed by the explicit language of § 114, is a key question to be resolved by the NRC and the D.C. Circuit.

Second, DOE has argued that the NWPA specifically incorporates NRC regulations that allow for the withdrawal of a license application by ensuring that that license application be considered in accordance “with the laws applicable to such applications.”⁶⁸ The laws applicable to NRC license applications would include general procedural regulations promulgated by the NRC.⁶⁹ These regulations clearly recognize the ability of an applicant to request the withdrawal of a license application from consideration before the NRC or the Board.⁷⁰ Thus, because the NWPA seems to incorporate “applicable” NRC regulations, DOE has asserted that the NWPA’s requirement that the Secretary submit the application must be read in conjunction with NRC regulations that allow withdrawal.⁷¹ Under such a reading, the NWPA could be interpreted to express Congress’s clear intent that, following the submission of the license application, any license proceeding must progress subject to existing NRC procedural regulations.

Finally, DOE has argued that even if § 114 required that the Secretary submit the license application, nothing in the statute restricts the Secretary’s actions after the application is submitted.⁷² Under DOE’s interpretation of the statute, the agency’s statutory obligations with regard to the license application were satisfied in June 2008 when the agency formally submitted the license application. What the Secretary chooses to do with the application after submission is viewed by DOE as outside the scope of § 114’s language.

Those who oppose DOE’s authority to withdraw the license application rely on the plain language of § 114. The challengers take the position that the Secretary’s interpretation of § 114 would essentially “render the [provision’s] plain language meaningless.”⁷³ Pursuant to this position, the challengers argue that the NWPA clearly expressed Congress’s intent that the license proceeding be carried through to its ultimate conclusion. Section 114 states that the Secretary “shall” submit the license application to the NRC and that the NRC “shall” not only consider the application, but also issue a final decision within a three-year time frame.⁷⁴ In conjunction with the requirement that the Secretary provide Congress with status reports on the progress of the license application,⁷⁵ the challengers interpret these provisions as Congress’s attempt to mandate that

⁶⁷ As noted previously the NWPA sets up what amounts to a four-phase program for establishing a permanent repository. These phases are entitled characterization, recommendation, approval, and authorization. *See*, NWPA §§ 112-115.

⁶⁸ U.S. Department of Energy’s Motion to Withdraw, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04 (March 3, 2010) at 5.

⁶⁹ *See*, 10 C.F.R. Part 2.

⁷⁰ 10 C.F.R. § 2.107. Although this provision authorizes a party to request withdrawal, it is unlikely that the provision establishes a right to withdrawal.

⁷¹ U.S. Department of Energy Motion to Withdraw, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04, (March 3, 2010).

⁷² *Id.* at 5-6.

⁷³ *See, e.g.*, Motion for Preliminary Injunction, *Washington v. DOE*, No-10-1050 (D.C. Cir. April 13, 2010) at 11.

⁷⁴ NWPA § 114(b); NWPA § 114(d).

⁷⁵ NWPA § 114(c).

DOE initiate the licensing proceeding by filing the application, at which point authority over the application transfers to the NRC to subsequently carry out its obligation to reach a final decision. Ultimately, the challengers view the NWPA as creating a step-by-step process, complete with reporting obligations, that necessarily leads to a final decision on the merits of the license application by the NRC.⁷⁶ Challengers argue that a DOE interpretation that would allow the Secretary to terminate the license proceeding prior to NRC's final determination would be contrary to Congress's clear intent.

NRC Administrative Proceedings

The Board, which has been reviewing the Yucca Mountain license application since the application was submitted in June of 2008, is an "independent trial-level adjudicatory body" that conducts all licensing hearings for the NRC.⁷⁷ The Board generally consists of three administrative judges, but unlike other administrative adjudicative bodies, not all Board judges are trained lawyers. A given panel generally consists of a mix of legal and technical judges.⁷⁸ Technical judges must be "persons of recognized caliber and stature in the nuclear field" and generally have substantial experience in nuclear engineering.⁷⁹

DOE filed its motion to withdraw the Yucca Mountain license application with the Board on March 3, 2010. On April 6, 2010, the Board issued an initial opinion questioning its own authority to adjudicate the dispute while noting that many of the significant legal questions involved with DOE's motion to withdraw were currently pending before the D.C. Circuit.⁸⁰ Given the circumstances, the Board decided to avoid reaching the merits of DOE's withdrawal motion and, "in the interest of judicial efficiency," suspended consideration of DOE's motion "pending guidance from the Court of Appeals on the relevant legal issues."⁸¹

The Board's decision was immediately appealed by DOE to the full NRC, where the Commission overturned the order.⁸² Asserting that the independent agency had a significant role to play in the ongoing legal dispute, the NRC reminded the Board that "the application of our expertise in the interpretation of the [Atomic Energy Act], the NWPA, and our own regulations will, at a minimum, inform the court in the consideration of the issues raised by DOE's motion to withdraw."⁸³ Additionally, the NRC noted that it was unclear when, or even if, the D.C. Circuit would provide the guidance sought by the Board given questions as to whether the D.C. Circuit had jurisdiction to reach the merits of the Yucca Mountain claims before it.⁸⁴ Therefore, rather

⁷⁶ See, e.g., Motion for Preliminary Injunction, *Washington v. DOE*, No-10-1050 (D.C. Cir. April 13, 2010).

⁷⁷ *Nuclear Regulatory Commission: ASLBP Responsibilities*, available at <http://www.nrc.gov/about-nrc/regulatory/adjudicatory/aslbp-respons.html>.

⁷⁸ *Id.*

⁷⁹ *Nuclear Regulatory Commission: Atomic Safety and Licensing Board Panel*, available at <http://www.nrc.gov/about-nrc/organization/aslbpfuncdesc.html>.

⁸⁰ As previously noted, claims opposing DOE's withdrawal were simultaneously filed with the NRC and the D.C. Circuit.

⁸¹ Memorandum and Order, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04 (April 6, 2010) at 3.

⁸² Memorandum and Order, *In the Matter of U.S. Department of Energy*, No. 63-001-HLW (April 23, 2010).

⁸³ *Id.* at 4.

⁸⁴ For example, judicial review is generally limited to "final agency action." However, the NWPA provides the D.C. Circuit with jurisdiction over any claim "alleging the failure of the Secretary, the President, or the Commission to make (continued...)"

than rely on a determination by the D.C. Circuit, the NRC remanded the case to the Board to “resolve the matter pending before our agency as expeditiously and responsibly as possible.”⁸⁵

The NRC’s rebuke of the Board’s order was not surprising given the traditional roles of administrative adjudicatory bodies and federal courts. Generally speaking, where similar claims are simultaneously filed before an agency and a federal court, the court, for reasons of judicial efficiency, will typically allow the administrative proceeding to reach an independent conclusion rather than simultaneously consider the same questions.⁸⁶ In this way the federal court allows the parties the opportunity to resolve their claims at the administrative level, and allows the agency to establish a factual record upon which, on a potential appeal, the federal court can base its own legal conclusions. Additionally, by allowing the agency to reach an initial decision, the federal court receives the benefit of the agency’s subject-matter expertise.⁸⁷ Consistent with this traditional allocation of duties, the D.C. Circuit, rather than taking up the claims as the Board had hoped, released an order delaying its consideration of the Yucca Mountain claims until the NRC’s evaluation of DOE’s motion was complete.⁸⁸

Ruling of the Atomic Safety and Licensing Board

Ordered by the NRC to reach a final decision on DOE’s motion, the Board responded with a sweeping opinion ruling that Secretary Chu did not have the authority to withdraw the Yucca Mountain license application.⁸⁹ The Board rejected the discretion that DOE had argued for, concluding instead that the statutory language of the NWSA “mandates progress towards a merits decision,” which DOE could not “single handedly derail” by withdrawing the license application.⁹⁰ Beginning with the plain language of §114, the Board held that Congress had established a “detailed, specific procedure” that removed control of the license application process from the Secretary by creating a mandatory statutory scheme.⁹¹ Under this scheme, the official site designation triggered DOE’s obligation to submit the license application, which once submitted, in turn triggered a “duty on NRC’s part to consider and to render a decision on the application.”⁹² In the Board’s view, to allow DOE to withdraw the application as a matter of policy at this stage would be contrary to Congress’s intent that the licensing process be “removed from the political process.”⁹³ Drawing a distinction between the clearly discretionary site characterization phase detailed in §113, and the mandatory language of §114, the Board noted that “[c]learly, when Congress wished to permit DOE to terminate activities, it knew how to do

(...continued)

any decision, or take any action, required under this subtitle ...” NWSA § 119(a).

⁸⁵ Memorandum and Order, *In the Matter of U.S. Department of Energy*, No. 63-001-HLW (April 23, 2010) at 4.

⁸⁶ This general practice is based on the APA’s requirement of “finality” and the general requirement that a party exhaust the available administrative process before bringing a claim to federal court. *See*, 5 U.S.C. § 704; *McGee v. United States*, 402 U.S. 479 (1971).

⁸⁷ *See, e.g.*, Memorandum and Order, *In the Matter of U.S. Department of Energy*, No. 63-001-HLW (April 23, 2010) at 4.

⁸⁸ Per Curiam Order, *In re Aiken County*, No. 10-1050 (D.C. Cir. July 28, 2010).

⁸⁹ Memorandum and Order, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04 (June 29, 2010) (hereinafter ASLB Order).

⁹⁰ *Id.* at 3.

⁹¹ *Id.* at 6.

⁹² *Id.* at 7.

⁹³ *Id.* at 9.

so.”⁹⁴ With no such inclusion of discretionary language in §114, the Board denied the Secretary’s authority to withdraw the license application.

The Board also rejected DOE’s argument that the NWSA reflected Congress’s intent to integrate NRC procedural regulations that allow for withdrawal. First, the Board characterized 10 C.F.R. § 2.107 as a clarification of the NRC’s authority to grant or deny a motion for withdrawal, rather than a “presumptive” grant of permission to an applicant to “unilaterally withdraw [an] application.”⁹⁵ Additionally, the Board concluded that Congress would not obliquely alter a “fundamental” aspect of the NWSA’s licensing scheme through “vague terms or ancillary provisions.”⁹⁶ “It would require a strained and tortured reading of the NWSA,” held the Board, “to conclude that Congress intended that its explicit mandate to the NRC ... might be nullified by a nonspecific reference to an obscure NRC procedural regulation.”⁹⁷

In reaching its conclusion, the Board also gave significant weight to Congress’s 2002 decision to override Nevada’s objection to establishing the future repository at Yucca Mountain. As previously noted, once President Bush designated Yucca Mountain as the candidate site for the nation’s permanent repository and recommended the site to Congress, under §115 and §116 of the NWSA Nevada was authorized to veto that designation by submitting to Congress a notice of disapproval.⁹⁸ However, the NWSA permits Congress to override the state’s objection by passing a resolution approving of the site. In accordance with these procedures, Nevada submitted a notice of disapproval, which Congress then overrode in P.L. 107-200. The Board interpreted this as reserving to Congress the ultimate decision “as to whether the Yucca Mountain project was to move forward.”⁹⁹ The Board reasoned that “by overruling Nevada’s disapproval of the Yucca Mountain site Congress was commanding, as a matter of policy, that Yucca Mountain was to move forward” with the license application to be decided on its “technical merits” by the NRC.¹⁰⁰

Although DOE’s motion was denied outright, the Board went on to state in dicta that, even were a withdrawal of the application permitted, the dismissal should not be granted “with prejudice.” The Board noted that NRC practice has traditionally reserved “with prejudice” dismissals for situations in which the Board has reached the merits of the application.¹⁰¹ With the Board having reached no merits-based decision on any aspect of the license application, any dismissal should, according to the Board, be without prejudice. Additionally, the Board determined that the “public interest” would not be served if the current Secretary’s judgment on Yucca Mountain could “tie the hands of future administrations for all time.”¹⁰²

⁹⁴ *Id.* at 8.

⁹⁵ *Id.* at 13.

⁹⁶ *Id.* at 14.

⁹⁷ *Id.*

⁹⁸ NWSA §§ 115-116.

⁹⁹ *ASLB Order*, at 10. Although the Board gave the congressional approval resolution great weight, it is important to note that had Nevada not objected to the designation of the Yucca Mountain site, no approval resolution would have been necessary for the Yucca Mountain project to move forward. The purpose of the resolution was simply to override Nevada’s objection.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 21-22

¹⁰² *Id.* at 21.

NRC Appeal

One day after the Board's decision, before DOE filed a formal appeal, the NRC released an order inviting the parties to file briefs on whether the Commission should review and overturn or uphold the Board's decision.¹⁰³ The parties have filed all briefs, all commissioners have cast their votes, and a final decision is expected imminently. However, controversy has arisen surrounding the NRC's ability to render a fair and objective decision on DOE's license withdrawal.¹⁰⁴ The NRC consists of five commissioners, three of whom—William Magwood, William Ostendorff, and George Apostolakis—were nominated by President Obama and confirmed by the Senate in February 2010. During the Senate confirmation hearing for the three nominees, Senator Barbara Boxer specifically asked each nominee whether, as commissioners, they would “second guess [DOE's] decision to withdraw the license application for Yucca Mountain from NRC's review.”¹⁰⁵ All three responded “No.”¹⁰⁶ As a result, Aiken County filed a motion with the NRC accusing the commissioners in question of having an improper predisposition for overturning the Board's decision and asking that all three commissioners recuse themselves from the NRC's review.¹⁰⁷ Although none of the commissioners recused themselves in response to the motion by Aiken County, Commissioner Apostolakis did recuse himself from the appeal because he had previously been involved with an independent assessment of the Yucca Mountain license.

With only four commissioners eligible to vote, the possibility exists that the NRC vote on the authority of DOE to withdraw the Yucca Mountain license application will result in a tie. Some media sources have speculated that a likely outcome will either be a tie vote or a 3-1 vote in favor of affirming the Board's decision.¹⁰⁸ If a tie were to occur, under NRC procedures the Board's decision would be affirmed.¹⁰⁹ Thus, for DOE to be granted the authority to withdraw the license application, at least three commissioners would need to vote in favor of overturning the Board's decision. In the meantime, DOE has essentially completed its shutdown of the Yucca Mountain facility and continues to assert that the Secretary has the authority to withdraw the license application.

¹⁰³ Order of the Nuclear Regulatory Commission, *In the Matter of U.S. Department of Energy*, No. 63-001-HLW (June 30, 2010).

¹⁰⁴ Additionally, NRC Chairman Gregory Jaczko has been accused of delaying the NRC's decision on the license withdrawal. In response to a November 1, 2010, request from Senator James Inhofe for an explanation of when the NRC would render its decision on the license withdrawal, Commissioners Ostendorff and Svinicki, replied that they had filed their votes in August 2010, while Commissioner Magwood replied that he had filed his in September 2010. Steve Tetreault, *Vote Timing Nettles Repository Backers*, Las Vegas Review Journal (Nov. 10, 2010).

¹⁰⁵ Hearing before the Senate Committee on Environment and Public Works, February 11, 2010.

¹⁰⁶ *Id.*

¹⁰⁷ *Aiken County Response in Opposition to Commission Review of ASLB Order*, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04, July 8, 2010.

¹⁰⁸ Steve Tetreault, *Vote Timing Nettles Repository Backers*, Las Vegas Review Journal, Nov. 10, 2010.

¹⁰⁹ See, NRC Internal Commission Procedures, App. 5 (“As a general matter requests for Commission action will be denied if the Commission vote is 2-2. Therefore, a 2-2 vote will result in: ... denial of review of Licensing Board decisions ...”). Available at <http://www.nrc.gov/about-nrc/policy-making/internal.html>.

D.C. Circuit Litigation

DOE's License Withdrawal

In conjunction with opposing DOE's motion for withdrawal at the administrative level, a number of parties have filed cases in federal court in an attempt to stop DOE and the Obama Administration from terminating the Yucca Mountain program.¹¹⁰ These statutory claims, filed by South Carolina, Washington, and others, have been consolidated in the D.C. Circuit.¹¹¹ The states of South Carolina and Washington have been at the forefront of much of the litigation surrounding the Yucca Mountain facility. DOE's Hanford Nuclear Reservation, located in southeast Washington, is currently home to approximately 53 million gallons of defense-related nuclear waste—a majority of which was to be disposed of, after solidification, in the future Yucca Mountain repository.¹¹² Similarly, DOE's Savannah River Site is home to large amounts of high-level waste. The parties have asked the court to block DOE from withdrawing the Yucca Mountain license.

The complaints filed in the case¹¹³ allege violations of the NWA, the National Environmental Policy Act and the Administrative Procedure Act—claims similar to those made before the NRC. The petitioners assert that the NWA creates a mandatory obligation on behalf of the Secretary to submit the application, as well as a mandatory obligation on behalf of the NRC to review the application.¹¹⁴ Any withdrawal, the complaints argue, would be in violation of the site selection provisions of the NWA. Petitioners also argue that DOE's decision to abandon the Yucca Mountain facility violates NEPA. NEPA mandates that any federal agency prepare an assessment of the potential environmental impact before proceeding with a "major federal action significantly affecting the quality of the human environment."¹¹⁵ Petitioners argue that any decision to close Yucca Mountain must be preceded by a NEPA assessment or an explanation of why the agency action will not have a significant impact on the environment. Finally, petitioners argue that the decision to terminate the Yucca Mountain project after decades of progress without articulating

¹¹⁰ In a related suit, New York, Connecticut, and Vermont challenged the NRC's "waste confidence" determination in a complaint filed with the D.C. Circuit on February 14, 2011. In September 2010, the NRC approved a revision to the agency's waste confidence rule, affirming NRC's confidence that "spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation ... of that reactor ..." 10 C.F.R. § 51.23 The previous rule only expressed confidence that nuclear waste could be stored for "30 years beyond the licensed life for operation" of any reactor. 10 C.F.R. § 51.23 (2009) Additionally, whereas the previous rule stated that "the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor...", the revised rule states only that "the Commission believes there is reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary." Compare 10 C.F.R. § 51.23 (2009) with 10 C.F.R. § 51.23 (2011).

¹¹¹ See, *In re Aiken County*, No. 10-1050 (D.C. Cir. 2011).

¹¹² State of Washington's Petition for Leave to Intervene and Request for Hearing, *In the Matter of U.S. Department of Energy*, ASLBP NO. 09-892-HLW-CAB04, March 3, 2010.

¹¹³ *Id.* at 4. The U.S. Courts of Appeals have original jurisdiction over challenges to agency action under the NWA. NWA § 119.

¹¹⁴ State of Washington's Petition for Leave to Intervene and Request for Hearing, *In the Matter of U.S. Department of Energy*, ASLBP NO. 09-892-HLW-CAB04 (March 3, 2010) at 10-11.

¹¹⁵ 42 U.S.C. § 4332.

“any explanation for its decision that rationally ties its choice to any specific facts” is arbitrary and capricious under the APA and therefore unlawful.¹¹⁶

The D.C. Circuit initially granted the petitioners’ request to expedite the proceedings, invited the parties to file briefs, and scheduled oral argument for September 23, 2010.¹¹⁷ The circuit court’s decision to hear the claims before the NRC had completed its proceedings was unusual, as previously noted, considering principles of judicial economy, finality, and exhaustion. Shortly thereafter, however, the D.C. Circuit, on a motion from the Department of Justice (DOJ), reversed course and ordered that the “cases be held in abeyance pending further proceedings before the [NRC].”¹¹⁸ Specifically, the circuit court directed the parties to await the NRC’s “final decision in its pending review of the Licensing Board’s June 29, 2010, decision.”¹¹⁹ However, after months of delays, additional controversy,¹²⁰ and no final decision from the NRC, the D.C. Circuit lifted the stay on December 10, 2010, and again agreed to expedite the cases.¹²¹ Under the order, briefing is scheduled to begin in early January with final briefs due on February 8 and oral argument scheduled for March 22, 2011.

Suspending the Nuclear Waste Fund Fee

Shortly after the D.C. Circuit lifted its stay on the license withdrawal claims, the court also dismissed a Yucca Mountain-related case brought by the National Association of Regulatory Commissioners (NARUC) and the Nuclear Energy Institute (NEI).¹²² NARUC and NEI had filed a claim asking the court to order Secretary Chu to conduct the required annual assessment of the Nuclear Waste Fund fee and suspend collection of the fee pending that assessment.¹²³ Nuclear power providers have collectively paid approximately \$750 million per year in fees to the fund, which currently has an approximate balance of \$24 billion.

Under the NWPA, DOE was authorized to enter into contracts with nuclear power providers to gather and dispose of nuclear waste in exchange for payments by the providers into the statutorily established Nuclear Waste Fund (NWF).¹²⁴ However, the Secretary is required to “annually review” the adequacy of the fee to ensure it provides “sufficient revenues to offset costs” incurred as a result of nuclear waste disposal activities.¹²⁵ If the Secretary finds that “insufficient or excess revenues are being collected . . . the Secretary shall propose an adjustment to the fee to insure(sic) full cost recovery.”¹²⁶ At the time the claim was filed, DOE had not conducted a fee assessment

¹¹⁶ See, e.g., Motion for Preliminary Injunction, *Washington v. DOE*, No-10-1050 (D.C. Cir. April 13, 2010).

¹¹⁷ Order, *In re Aiken County*, No. 10-1050 (D.C. Cir. May 3, 2010).

¹¹⁸ Order, *In re Aiken County*, No. 10-1050 (D.C. Cir. July 28, 2010).

¹¹⁹ *Id.*

¹²⁰ The D.C. Circuit’s order lifting the stay on the Yucca Mountain cases came shortly after the NRC announced it would be terminating its review of the Yucca Mountain license application.

¹²¹ Order, *In re Aiken County*, No. 10-1050 (D.C. Cir. Dec. 10, 2010).

¹²² *National Association of Regulatory Utility Commissioners v. DOE*, 2010 U.S. App. LEXIS 25579 (D.C. Cir. Dec. 13, 2010).

¹²³ *Id.*

¹²⁴ See, CRS Report R40996, *Contract Liability Arising from the Nuclear Waste Policy Act (NWPA) of 1982*, by Todd Garvey.

¹²⁵ NWPA § 302(a)(4).

¹²⁶ *Id.*

since FY2008. NARUC and NEI argued that given the Administration's attempts to terminate the Yucca Mountain facility, "there is no current basis to judge the adequacy of the fee to cover future costs because the method of disposal and its life-cycle costs are unknown."¹²⁷ Thus, Congress intended that "[i]f no fee can be justified based on record evidence, no fee can be charged."¹²⁸ However, DOE subsequently released its most recent assessment of the NWF fee and the court dismissed the claim as moot, but suggested that the parties could now challenge the new fee assessment.¹²⁹

NRC Halts Yucca Mountain License Review

Controversy over the Yucca Mountain license application intensified in October 2010, when NRC Chairman Gregory Jaczko directed NRC staff to use funds appropriated under the FY2011 Continuing Appropriations Act (CR) to close down the agency's review of the Yucca Mountain license application.¹³⁰ With no final action on a full FY2011 budget, Congress passed the CR to extend appropriations across the federal government "at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2010 and under the authority and conditions provided in such Acts."¹³¹ In an October 4, 2010, memorandum, NRC staff were instructed to continue their Yucca Mountain activities "in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR."¹³² Thus, NRC staff were directed to follow the agency's FY2011 budget request rather than enacted FY2010 appropriations. Noting that the Senate Appropriations Committee and the House Appropriations Energy and Water Development Subcommittee had approved the NRC's 2011 budget request, Chairman Jaczko justified the budget guidance as "consistent with NRC's obligation to spend funds prudently under a Continuing Resolution pending final budget by the Congress."¹³³ Although Chairman Jaczko has suggested that a closure of NRC license review activities would eventually include the Board's license review, the Board recently denied a DOE motion to stay the licensing proceedings and expressed a desire to "move this proceeding forward as expeditiously as circumstances permit."¹³⁴

The NRC's FY2011 budget request, which anticipated DOE's attempt to withdraw the license application, directed that "[u]pon the withdrawal or suspension of the licensing review, the NRC would begin an orderly closure of the technical review and adjudicatory activities and would

¹²⁷ Final Initial Brief of Petitioner, *National Association of Regulatory Commissioners v. DOE*, No. 10-1074 (D.C. Cir. Oct. 18, 2010) at 7.

¹²⁸ *Id.* at 15.

¹²⁹ *National Association of Regulatory Utility Commissioners v. DOE*, 2010 U.S. App. LEXIS 25579 (D.C. Cir. Dec. 13, 2010).

¹³⁰ Memorandum to Office Directors and Regional Administrators from J.E. Dyer, Chief Financial Officer, Nuclear Regulatory Commission, *Guidance Under A Fiscal Year 2011 Continuing Resolution* (Oct. 4 2010) (hereinafter "*NRC Budget Guidance*")

¹³¹ P.L. 111-242, 111th Cong. (2010) (extended by P.L. 111-322).

¹³² *NRC Budget Guidance*, at 2.

¹³³ Letter from Gregory B. Jaczko, Chairman, Nuclear Regulatory Commission, to Congressman Joe Barton (Oct. 27, 2010).

¹³⁴ Memorandum and Order, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04 (February 25, 2011).

document the work and insights gained from the review.”¹³⁵ Accordingly, the agency requested only \$10 million to “support work related to the orderly closure of the agency’s Yucca Mountain licensing support activities.”¹³⁶

Two fellow NRC commissioners formally opposed the chairman’s budget guidance as inconsistent with the CR.¹³⁷ Commissioner Ostendorff argued that the NRC “should continue to follow the Commission’s direction in the fiscal year 2010 budget as authorized and appropriated by Congress, rather than change course as suggested in the Continuing Resolution guidance memorandum.”¹³⁸ Commissioner Svinicki called the chairman’s guidance “grossly premature,” as the FY2011 budget request had made clear that the NRC would only begin its orderly closure of the Yucca Mountain review “upon the withdrawal or suspension of the licensing review.”¹³⁹ As the license had not yet been withdrawn, Svinicki argued that any decision to terminate the license proceeding would be inconsistent with the language of the budget justification.

Whether the NRC has the authority to utilize FY2011 CR funds in terminating its review of the Yucca Mountain license application remains unclear. Much of the ambiguity involved in the dispute arises from the fact that the NRC generally receives lump-sum, rather than specific, appropriations.¹⁴⁰ However, in determining whether the NRC may use FY2011 CR funds to terminate its review of the Yucca Mountain license, two questions must be answered. First, does the CR allow the NRC to follow its FY2011 budget request or is the Commission instead bound by FY2010 enacted appropriations? Second, if the NRC is bound by FY2010 enacted appropriations, may the Commission use FY2010 funds to close down the review of the Yucca Mountain license?

The CR clearly makes funds available pursuant to the rates and restrictions of enacted FY2010 appropriations, unless otherwise stated, through March 18, 2011.¹⁴¹ However, OMB Bulletin No. 10-03 on the apportionment of CR funds states that “[i]f either the House or Senate has reported or passed a bill that provides no funding for an account at the time the CR is enacted, this automatic apportionment does not apply to that account.”¹⁴² The Senate has reported a version of the Energy and Water appropriations bill that, though making no specific mention of the Yucca Mountain license review, could be interpreted as incorporating the NRC FY2011 budget request,

¹³⁵ Nuclear Regulatory Commission FY2011 Congressional Budget Justification, NUREG-1100 Vol. 26 (Feb. 2010) at 95. Available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1100/v26/sr1100v26.pdf>.

¹³⁶ *Id.*

¹³⁷ In addition to the two sitting Commissioners, former Nuclear Regulatory Commission Chairman Dale E. Klein, who was a sitting member of the Commission during the FY2011 budget discussions, also opposed the Chairman’s budget guidance. *NRC Chairman Klein Rebuffs Jaczko Yucca Shut-Down Alibi*, Nuclear Townhall (Oct. 29, 2010) available at <http://www.nucleartownhall.com/blog/ex-nrc-chairman-klein-rebuffs-jaczko-yucca-shut-down-alibi/>.

¹³⁸ Memorandum from Commissioner William C. Ostendorff, Disagreement With Staff Budget Guidance Under Fiscal Year 2011 Continuing Resolution (Oct. 8, 2010).

¹³⁹ Letter from Kristine L. Svinicki, Commissioner, Nuclear Regulatory Commission, to Congressman Joe Barton (Nov. 1, 2010).

¹⁴⁰ Specific, or line-item, appropriations detail the amount appropriated for each purpose whereas a lump-sum appropriation covers a “number of specific programs, projects, or items.” U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, Vol. II: 6-5 (2006).

¹⁴¹ Although the initial CR only authorized funds through December 3, 2010, it was extended to March 4, 2011, and has now been extended to March 18, 2011. P.L. 112-4, 112th Cong. (2011).

¹⁴² Office of Management and Budget, OMB Bulletin No. 10-03, Apportionment of the Continuing Resolution(s) for Fiscal Year 2011 (Sept. 30, 2010).

which only included funds for an orderly closure of the NRC's review of the license application.¹⁴³ Thus, under the implementation guidance provided by OMB, it could be argued that the CR may not provide continued funds for the Yucca Mountain license review, as the Senate has arguably expressed an intent not to fund the license review in the future.

However, considering Congress has yet to expressly defund the Yucca Mountain license review, it is also possible that the NRC is obligated to follow its FY2010 enacted appropriations. Even so, the "rate for operations" and the "authority and conditions" provided in the NRC's lump-sum FY2010 enacted appropriations remain unclear.¹⁴⁴ Both the NRC budget request and the House report associated with the FY2010 Energy and Water Development and Related Agencies Appropriations bill contained language specifically allocating funds to "support the NRC's review of the [DOE's] licensing application to construct and operate a permanent geologic repository at Yucca Mountain."¹⁴⁵ The Senate report and the Conference report, on the other hand, were silent on the NRC's license review.¹⁴⁶ However, the Joint Explanatory Statement accompanying the Conference report expressly provides that the language of the House and Senate reports "should be complied with unless specifically addressed to the contrary in the conference report."¹⁴⁷ Thus, it could be argued that the language in the House report that expressed Congress's intent to appropriate funds for the continued review of the Yucca Mountain license was incorporated by the conference report. In contrast, Chairman Jaczko has argued that "neither the text of the FY 2010 [NRC appropriation bill] and its underlying committee reports, nor the fiscal year 2011 [CR] provide the Commission with express direction on how it is to expend its appropriation ... for Yucca Mountain activities."¹⁴⁸ In any case, specific restrictions on lump-sum appropriations "contained in the agency's budget request or in legislative history are not legally binding on the department or agency unless they are" incorporated into the statutory language of the appropriation act.¹⁴⁹

If DOE is bound by enacted FY2010 appropriations, the additional question arises of whether general principles of appropriations law allow the NRC to use funds arguably made available to continue the licensing proceeding to instead terminate the license review. Generally speaking, agencies may use appropriated funds only for the purpose for which they were appropriated.¹⁵⁰ This principle has been codified in 31 U.S.C. § 1301(a), which states: "[a]ppropriations shall be

¹⁴³ S.Rept. 111-295. It is also unclear whether the Yucca Mountain license review constitutes an "account" under the OMB Apportionment Bulletin.

¹⁴⁴ P.L. 111-85, 123 Stat. 2877-2878. The bill appropriated \$1.56 billion "for necessary expenses of the Commission ..." and \$10.8 million for "necessary expenses of the Office of Inspector General."

¹⁴⁵ Nuclear Regulatory Commission Performance Budget Fiscal Year 2010, NUREG-1100, Vol. 25 (May 2009); H.Rept. 111-203.

¹⁴⁶ S.Rept. 111-45; H.Rept. 111-278.

¹⁴⁷ H.Rept. 111-278 ("Report language included by the House which is not contradicted by the report of the Senate or the conference ... is approved by the committee of conference.")

¹⁴⁸ Letter from Gregory B. Jaczko, Commissioner, Nuclear Regulatory Commission, to Congressman Joe Barton (Oct. 27, 2010).

¹⁴⁹ U.S. Government Accountability Office, *Principles of Federal Appropriations Law*, Vol. II: 6-6 (2006)(hereinafter *Red Book*). The Supreme Court has made clear that statements in committee reports associated with appropriations bills do not have the force of law. *See*, *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991); *Lincoln v. Vigil*, 508 U.S. 182 (1993). *See also*, *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975) ("when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on federal agencies.").

¹⁵⁰ *Red Book*, Vol. I: 4-6 (2004).

applied only to the objects for which the appropriations were made except as otherwise provided by law.”¹⁵¹ However, because of the nature of the lump-sum appropriation made available to the NRC, it is difficult to determine the specific purposes, if any, for which funds were appropriated. Indeed, allocating lump-sum appropriations generally lies within the discretion of the agency, as “the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.”¹⁵² Although legislative history and the 2010 NRC budget request may have suggested some understanding that a portion of the NRC appropriated funds would go toward funding the agency’s review of the Yucca Mountain license application, there was no specific appropriation for the license review in the NRC’s FY2010 appropriations.

Notwithstanding uncertainty over the specific nature of NRC appropriations, an agency generally may not use money appropriated for the implementation of a “mandatory” program to instead terminate that program.¹⁵³ In contrast, appropriated funds may be used to terminate a program if the program is not mandatory, and “the termination would not result in curtailment of the overall program to such an extent that it would no longer be consistent with the scheme of applicable program legislation.”¹⁵⁴ The recent decision by the Board could be read as interpreting the NRC’s review of the Yucca Mountain license as mandatory. For example, the Board specifically held that the NWA “mandates progress toward a merits decision by the Nuclear Regulatory Commission.”¹⁵⁵ Thus, the NRC’s final decision on DOE’s license withdrawal, and the nature of the statutory obligations created under the NWA, will likely have an impact on whether NRC’s use of funds is authorized.¹⁵⁶

Congressional Reaction to Proposed Termination of the Yucca Mountain Facility

Congress has been relatively active in response to the Obama Administration’s proposed termination of Yucca Mountain, DOE’s motion to withdraw the license application, and the

¹⁵¹ 31 U.S.C. § 1301(a).

¹⁵² *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

¹⁵³ *Red Book*, Vol. I: 4-17-18 (2004).

¹⁵⁴ *Id.*

¹⁵⁵ Memorandum and Order, *In the Matter of U.S. Department of Energy*, ASLBP No. 09-892-HLW-CAB04, June 29, 2010.

¹⁵⁶ A similar factual scenario from the late 1970s and early 1980s suggests that congressional intent plays an integral role in determining whether an agency can use appropriated funds to terminate a program. Congress authorized the design, construction, and operation of the Clinch River Breeder Reactor in 1970. Until FY1983, the program had been funded as part of a lump sum appropriation, although “amounts intended for the project [had] been indicated in committee reports accompanying the appropriation act.” On three instances during this period the Comptroller General denied requests from DOE’s predecessor, the Energy Research and Development Administration (ERDA), to use appropriated funds to terminate the program. Congress’s position on the project “changed substantially,” however, in FY1994. Legislative history reflected that no funds were designated for the project and a continuing resolution directed that DOE not “undertake any new activities relating” to the reactor. Following passage of the continuing resolution, DOE again requested authority to use previously appropriated funds to terminate the reactor project. Noting that “the funding situation was very different at the time we issued our earlier decision,” the Comptroller General determined that DOE was not “unreasonable in concluding that further funding for the project [was] not likely to be forthcoming. We think this provides the Department with a legal basis for terminating the project.” Government Accountability Office, *Decisions of the Comptroller General*, 63 Comp. Gen. 75 (1983). See also, *Red Book* Vol. I 4-18 (2004).

NRC's recent decision to cease review of the license application. Although much of the resistance to the shutdown has come from the South Carolina and Washington delegations, a growing number of Members have expressed their opposition to the Obama Administration's plans. In July 2010, 91 Members of Congress signed a letter to Secretary Chu asking that DOE "halt all actions to dismantle operations at Yucca Mountain" until the NRC and the D.C. Circuit resolve the license dispute.¹⁵⁷ The letter made clear the Members' position that DOE had "overstepped its bounds" and "ignored congressional intent" in attempting to terminate the Yucca Mountain facility.¹⁵⁸

The NRC's delay in coming to a final decision on DOE's motion to withdraw the Yucca Mountain license application as well as the agency's decision to halt the license review has also generated a significant congressional response. The then-ranking Members of the House Select Committee on Energy Independence and Global Warming, House Energy and Commerce Committee, House Science and Technology Committee, and House Natural Resources Committee expressed their concern over Chairman Jaczko's decision to "unilaterally" halt the NRC's review of the Yucca Mountain license in a public letter to the Commission.¹⁵⁹ The letter called Chairman Jaczko's decision to base budget guidance on the FY2011 budget request rather than enacted FY2010 appropriations "suspect."¹⁶⁰ Other Members of Congress have asked the Inspector General of the Nuclear Regulatory Commission to "convene a formal investigation into the chairman's recent actions to shut down the project."¹⁶¹ Finally, the then-ranking Member of the House Appropriations Committee as well as six members of the House Appropriations Subcommittee on Energy and Water Development—the Subcommittee that controls DOE and NRC appropriations—told Chairman Jaczko that his actions "may seriously erode the NRC's relationship with this subcommittee."¹⁶² In a strongly worded letter, the Members threatened increased oversight of the NRC, concluding with the warning: "If you continue to shut down the Yucca Mountain license application, which can only be seen as a partisan act, we will reconsider the flexibilities which the NRC has long enjoyed due to its reputation as an independent body."¹⁶³

¹⁵⁷ Letter from Senator Patty Murray *et al.* to Stephen Chu, Secretary of Energy (July 6, 2010).

¹⁵⁸ *Id.*

¹⁵⁹ Letter from Representative Jim Sensenbrenner *et al.* to Gregory Jaczko, Commissioner, Nuclear Regulatory Commission (Oct. 13, 2010).

¹⁶⁰ *Id.*

¹⁶¹ Letter from Representative Fred Upton and Congressman Ed Whitfield to Hubert T. Bell, Inspector General, Nuclear Regulatory Commission (Oct. 19, 2010). The investigation is reportedly "ongoing." Janice Valverde, *NRC Commissioners Challenge Chairman on Decision to Halt Yucca License Review*, BNA Daily Report for Executives (Nov. 4, 2010).

¹⁶² Letter from Representative Jerry Lewis to Gregory Jaczko, Commissioner, Nuclear Regulatory Commission (Oct. 20, 2010).

¹⁶³ *Id.*

The House has also sought to utilize appropriations restrictions to prevent the NRC from terminating its review of the Yucca Mountain license application. The Full-Year Continuing Appropriations Act, though not providing funding to the Yucca Mountain project, would expressly prohibit the NRC from using funds provided under the act “to conduct closure of adjudicatory functions, technical review, or support activities associated with the Yucca Mountain geologic repository license application” until the Commission reverses the Atomic Safety and Licensing Board’s decision denying the Secretary of Energy the authority to withdraw the license application.¹⁶⁴

Finally, three resolutions have been introduced in the House that would express support for Yucca Mountain as the “nation’s primary permanent nuclear waste storage site;”¹⁶⁵ express disapproval of the DOE motion to withdraw the Yucca Mountain license application;¹⁶⁶ and condemn the NRC’s decision to halt its review of the Yucca Mountain license application.¹⁶⁷ A Resolution of Inquiry has also been introduced that would ask the President and Secretary of Energy to provide the House of Representatives with documents relating to the proposed termination of the Yucca Mountain program.¹⁶⁸ Other bills have also been introduced that would limit DOE’s ability to collect NWF fees.¹⁶⁹

For a description of other legislative proposals pertaining to the Yucca Mountain project and the NWPA, see CRS Report RL33461, *Civilian Nuclear Waste Disposal*, by Mark Holt.

The Future of Yucca Mountain

While the result of the ongoing dispute over the attempted termination of the Yucca Mountain program remains uncertain, the change of control in the House of Representatives could have a significant impact on the ultimate fate of the program. A number of leading House Republicans have voiced strong opposition to abandoning the Yucca Mountain repository. For example, the chairmen of a number of important committees—including the House Budget Committee, House Committee on Appropriations, House Committee on Appropriations Subcommittee on Energy and Water, House Natural Resources Committee, and House Committee on Science, Space, and Technology—have all opposed the Administration’s attempts to terminate the Yucca Mountain project. Additionally, Representative Darrell Issa, chairman of the House Committee on Oversight and Government Reform, opposes the Administration’s position on Yucca Mountain.¹⁷⁰ Speaker of the House John Boehner has also indicated his interest in reviving the Yucca Mountain program, arguing that “[w]e’ve invested tens of billions of dollars in a storage facility that’s as safe as anything we’re going to find.”¹⁷¹ Consequently, the Yucca Mountain dispute may not only

¹⁶⁴ H.R. 1 § 1419 112th Cong. (2011).

¹⁶⁵ H.Res. 1123 111th Cong. (2010).

¹⁶⁶ H.Res. 1209 111th Cong. (2010).

¹⁶⁷ H.Res. 1732 111th Cong. (2010).

¹⁶⁸ H.Res. 1466 111th Cong. (2010).

¹⁶⁹ H.R. 2372 111th Cong. (2010); S. 861 111th Cong. (2010).

¹⁷⁰ See, Representative Darrell Issa, *Nuclear Power and Our Energy Future*, The San Diego Union-Tribune (April 18, 2010) (“Despite a commitment for increasing loan guarantees to ramp up the development of new nuclear plants, the administration’s determination to shutter the proposed nuclear waste repository at Yucca Mountain effectively jeopardizes this goal.”).

¹⁷¹ Statement by Representative John Boehner, to the City Club of Cleveland (Aug. 24, 2010).

play out legally before the NRC and in the D.C. Circuit, but also politically in the House of Representatives, potentially in the form of appropriations disputes and oversight hearings.

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