

THE NRC INSPECTOR GENERAL REPORT ON THE  
NRC CHAIRMAN'S UNILATERAL DECISION TO  
TERMINATE NRC'S REVIEW OF THE DOE YUCCA  
MOUNTAIN REPOSITORY LICENSE APPLICATION

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON ENVIRONMENT AND THE  
ECONOMY  
OF THE  
COMMITTEE ON ENERGY AND  
COMMERCE  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED TWELFTH CONGRESS  
FIRST SESSION

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TO TERMINATE NRC'S REVIEW OF  
THE DOE YUCCA MOUNTAIN REPOSITORY  
LICENSE APPLICATION**

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**TUESDAY, JUNE 14, 2011**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY,  
COMMITTEE ON ENERGY AND COMMERCE,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 10:10 a.m., in room 2123 of the Rayburn House Office Building, Hon. John Shimkus (chairman of the subcommittee) presiding.

Members present: Representatives Shimkus, Murphy, Whitfield, Pitts, Bass, Latta, McMorris Rodgers, Harper, Cassidy, Gardner, Barton, Upton (ex officio), Green, Barrow, DeGette, and Waxman (ex officio).

Member attending: Representative Markey.

Staff present: Carl Anderson, Counsel, Oversight; Gary Andres, Staff Director; Charlotte Baker, Press Secretary; Michael Beckerman; Deputy Staff Director; Sean Bonyun, Deputy Communications Director; Anita Bradley, Senior Policy Advisor to Chairman Emeritus; Andy Duberstein, Special Assistant to Chairman Upton; Todd Harrison, Chief Counsel, Oversight/Investigations; Heidi King, Chief Economist; Dave McCarthy, Chief Counsel, Environment/Economy; Carly McWilliams, Legislative Clerk; Andrew Powaleny, Press Assistant; Chris Sarley, Policy Coordinator, Environment and Economy; Peter Spencer, Professional Staff Member, Oversight; Phil Barnett, Minority Staff Director; Tiffany Benjamin, Minority Investigative Counsel; Alison Cassady, Minority Senior Professional Staff Member; Greg Dotson, Minority Energy and Environment Staff Director; and Caitlin Haberman, Minority Policy Analyst.

Mr. SHIMKUS. The hearing will come to order. The chair recognizes himself for 5 minutes.

**OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS**

Today, we take another step in understanding the management breakdown at the NRC. I welcome our witness, Mr. Bell, and I thank him for his professionalism. He started this review last October at the request of Chairman Upton and Mr. Whitfield. His work is both thorough and timely.

Having read the entire report, I am struck by three problems at the NRC. First is the inefficiency. It is unbelievable that 1 week after the Nuclear Waste Policy Act says that the NRC must either approve or deny the license application or formally notify Congress as to why it needs more time, the Commission cannot even reach the question of whether the application is even alive. One year ago, the Atomic Safety and Licensing Board ruled that DOE has no authority to withdraw the application, and the NRC must continue to review it. Less than 2 months later, the question was put to a vote of the full Commission. On August 10, Commissioner Apostolakis abstained; on August 25 and 26 Commissioners Sviniki, Jaczko, and Ostendorf voted. Then, August 30, Chairman Jaczko retracted his vote. Then, September 15, Commissioner Magwood voted. Then, October 29, Chairman Jaczko voted again. But somehow 10 months after all that, the vote is still not over. You don't need Internal Commission Procedures to see that it has been a horribly inefficient process, and according to Mr. Bell's report, we have no one to blame except Chairman Jaczko.

But there are Internal Commission Procedures. Commissioners are to vote within 10 business days; once a quorum has voted, permission to vote late may be granted by a majority of the Commission, and a delay in affirming the vote and promulgating the order may only be granted by a majority of the Commission. None of that has been followed. It is the Chairman's duty to make certain it is followed. Parties to the action rely on the Commission to follow its own rules and keep the trains running on time. The Chairman's neglect of this duty alone is shocking as it denies to the parties of interest a full, timely determination.

But once you read further in the report, it becomes clear that the problems are worse than just inefficiency and even worse than neglect of duty. There is outright malfeasance. The report is replete with instances of Chairman Jaczko deliberately misleading both his fellow Commissioners and senior staff at the NRC. And he knowingly withheld crucial information from his fellow Commissioners even though the federal statute requires that all Commissioners have access to all information. In some instances, Chairman Jaczko manipulated the process through outright false statements to prevent his full Commissioners from understanding the implications of his actions and omissions. When confronted by one Commissioner about this, Chairman Jaczko merely insulted his colleague by sarcastically retorting, "You should have asked."

I hope all members study Mr. Bell's June 6 report carefully and take time today to seek any clarifications. This situation warrants our attention and best judgment.

The gentleman then yields back his time. The chair recognizes the ranking member, Mr. Green, for 5 minutes.

[The prepared statement of Mr. Shimkus follows:]

**Subcommittee on Environment & the Economy  
Hearing on the June 6, 2011 Report of the Inspector General of  
The Nuclear Regulatory Commission  
June 14, 2011  
Opening of Chairman John Shimkus**

The Chair recognizes himself for 5 minutes. Today we take another step in understanding the management breakdown at the NRC. I welcome our witness, Mr. Bell, and I thank him for his professionalism. He started this review last October at the request of Chairman Upton and Mr. Whitfield. His work is both thorough and timely.

Having read the entire report, I'm struck by three problems at the NRC. First, is the *inefficiency*. It is unbelievable that the one week after the Nuclear Waste Policy Act says that NRC must either approve or deny the license application, or formally notify Congress as to why it needs more time, the Commission cannot even reach the question of whether the application is even alive. One year ago, the Atomic Safety and Licensing Board ruled that DOE has no authority to withdraw the application, and the NRC must continue to review it. Less than two months later the question was put to a vote of the full Commission. On August 10, Commissioner Apostolakis abstained, on August 25 and 26 Commissioners Sviniki, Jaczko and Ostendorf voted. Then, August 30, Jaczko retracted his vote. Then September 15 Commissioner Magwood voted, then October 29 Chairman Jaczko voted again. But somehow ten months after all that, the vote is still not over. You don't need Internal Commission Procedures to see that it's been a horribly inefficient process, and according to Mr. Bell's Report, we have no one to blame except Chairman Jaczko.

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I hope all Members study Mr. Bell's June 6 Report carefully and take time today to seek any clarifications. This situation warrants our attention and best judgment.

The Chair recognizes Mr. Green for five minutes.

**OPENING STATEMENT OF HON. GENE GREEN, A  
REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. GREEN. Thank you, Mr. Chairman, for holding this hearing today, and thank Mr. Bell for appearing before the committee to discuss your report entitled, "NRC Chairman's Unilateral Decision to Terminate NRC's Review of the DOE Yucca Mountain Repository License Application."

There has been a lot of discussion in this committee on the decision by the administration not to proceed with Yucca Mountain, and I have stated several times before the U.S. alone produced 806 billion kilowatt hours of nuclear power in 2008 making us the biggest producer of nuclear power in the world. Now, 25 years later, \$15 billion in rate-payers fees and income taxes, we are closing our only long-term solution for nuclear waste. The President has said he supports investments in alternative forms of energy, and Secretary Chu has testified before this committee that we would be unable to meet the President's goals if we do not continue to invest in nuclear power.

As we look forward and focus on investing more in nuclear power, we still have nuclear waste. Even if we have better short-term storage than we do now, we still need somewhere to put the waste 50 or 1,000 years from now.

Today, we will be discussing the NRC's Inspector General's Report on the NRC chair's decision to terminate the NRC's review of Yucca Mountain. Many allegations have been made on the legality of the NRC chair's decision to terminate the NRC's review. This report evaluated two allegations that one, the chairman unilaterally improperly closed the NRC review of Yucca Mountain application while the government was still operating under a continuing resolution in fiscal year 2011; and two, the chairman is preventing the Commission from ruling on NRC licensing board's decision to deny the DOE's motion to withdraw the Yucca application.

The Inspector General's report found that Chairman Jaczko had not been forthcoming with all the commissioners but that ultimately he acted within his authority as NRC chair and none of which suggests the NRC chair violated the law. The report does not review whether or not the actual decision to close Yucca was appropriate. The report does shed some light on the obvious internal issues within NRC that should be evaluated and addressed.

And just on a personal note, it is frustrating, our country being the largest emitter of nuclear waste in the world and we are seeing us literally eclipsed by countries who do not have as much nuclear power as we do. And it is frustrating after all these years.

With that, again, I want to thank Mr. Bell for appearing before the committee. I look forward to hearing your testimony. And again, thank you, Mr. Chairman. I yield back my time.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the chairman of the full committee, Mr. Upton, for 5 minutes.

**OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF MICHIGAN**

Mr. UPTON. Thank you, Mr. Chairman.



Developing a safe, permanent storage site for spent nuclear fuel is indeed essential to energy security as well as our national security, and that is not and should not be treated as a partisan issue. So I commend and thank our witnesses for their efforts to provide an objective look at the inner workings of this key agency. The more we learn about NRC's current leadership, the greater our concern about the apparent breakdown in the Agency's operations, departure from nonpartisan tradition, and disregard for the decades of technical expertise and billions of dollars invested.

Justice delayed is justice denied. And it has been a year since states and other affected parties went to court seeking a ruling on the license application for the repository at Yucca. The Atomic Safety and Licensing Board ruled that the NRC must consider and vote on DOE's application. Yet the Commission still has not yet taken final action. And after a year in limbo, it now appears that the NRC Chair Jaczko devised a complex, calculated strategy to kill the license application without consideration by the Commission.

Consumers have been paying into the Nuclear Waste Fund since 1983 with a promise of something in return: a permanent place to send the spent fuel away from the reactor sites. When the license application was finally filed 3 years ago, we grew more confident. The Act said that in 3 years the NRC would grant the license or explain to Congress why they needed more time. Instead, NRC won't even give a straight answer about whether the application is still alive.

And it is not just nuclear power consumers who are cheated. It is taxpayers in every State including Nevada who are paying out judgments to plant operators because the DOE is late accepting the waste. GAO reports that the taxpayers are on the hook for an additional \$15.4 billion—on top of the nearly \$15 billion already spent on the project—and that is the liability if DOE opens Yucca by 2020. If not, it rises another half-billion dollars every year.

The circumstances surrounding this administration's rush to pull the plug on Yucca are alarming as much as they are disappointing. We have an administration that apparently wants to erase the visionary effort launched by President Reagan, casting aside 3 decades of scientific research, bipartisan collaboration, and a fortune invested to start from scratch no matter what the cost or consequences to our national security.

Despite this moment of dysfunction at the top, the NRC's intrinsic value to the U.S. lies in the expertise and extraordinary dedication of its highly professional staff, including our witnesses today. To them we repeat: We will do what we can to rescue the Agency from the ditch that some have driven you into. And to consumers and taxpayers across America: We will get the NRC to focus once again on its statutory mission to serve all the people instead of, perhaps, the chairman's political patrons.

And I yield to Mr. Whitfield.

[The prepared statement of Mr. Upton follows:]

**Subcommittee on Environment and the Economy  
Hearing on the June 6, 2011 Report of the Inspector General  
of the Nuclear Regulatory Commission  
Opening Remarks, Energy and Commerce Committee Chairman Fred Upton  
June 14, 2011**

Let me begin by thanking the Subcommittee Chairman for holding this hearing to continue our examination of Nuclear Regulatory Commission management. Developing a safe, permanent storage site for spent nuclear fuel is essential to our energy security as well as our national security. This is not, and should not be treated as, a partisan issue. I commend and thank our witness for his efforts to provide an objective look at the inner-workings of this key agency. The more we learn about NRC's current leadership, the greater our concern about the apparent breakdown in agency operations, departure from non-partisan tradition, and disregard for the decades of technical expertise and billions of dollars invested.

Justice delayed is justice denied. It has been a year since states and other affected parties went to court seeking a ruling on the license application for the repository at Yucca Mountain. The Atomic Safety and Licensing Board ruled that the NRC must consider and vote on DOE's application. Yet the Commission still has not taken final action.

After a year in limbo, it now appears that NRC Chairman Jaczko devised a complex, calculated strategy to kill the license application without consideration by the Commission.

Consumers have been paying into the Nuclear Waste Fund since 1983 with a promise of something in return: a permanent place to send the spent fuel away from reactor sites. When the license application was finally filed three years ago, we grew more confident. The Act said that in three years the NRC would grant the license or explain to Congress why they needed more time. Instead, NRC won't even give a straight answer about whether the application is still alive.

And it's not just nuclear power consumers who are cheated. It's taxpayers in every state including Nevada who are paying out judgments to plant operators because the DOE is late accepting the waste. GAO reports that taxpayers are on the hook for an additional \$15.4 billion – on top of the nearly \$15 billion already spent on the project – and that's the liability if DOE opens Yucca by 2020. If not, it rises about \$500 million per year after that.

The circumstances surrounding the Obama administration's rush to pull the plug on the Yucca Mountain repository are alarming as much as they are disappointing. We now have an administration that wants to erase the visionary effort launched by President Reagan, casting aside three decades of scientific research, bipartisan collaboration and a fortune invested to start from scratch no matter what the cost or consequences to our national security. We cannot allow our nuclear safety to be compromised by politics.

Despite this moment of dysfunction at the top, the NRC's intrinsic value to the U.S. lies in the expertise and extraordinary dedication of its highly professional staff, including our witness today. To them we repeat: we will do what we can to rescue the Agency from the ditch that politicians have driven you into.

And to consumers and taxpayers across America: we will get NRC to focus once again on its statutory mission to serve all the people instead of just serving its Chairman's political patrons.

**OPENING STATEMENT OF HON. ED WHITFIELD, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF KENTUCKY**

Mr. WHITFIELD. Thank you very much.

In January 2009, President Obama made this statement: "Let me say as simply as I can, transparency and the rule of law will be the touchstone of this Presidency." And yet when you read the Inspector General's report of Chairman Jaczko's actions, you see words like "misleading," "withholding information," "false statements." That is not the type of transparency that we need in America today.

And I would like to reiterate what Chairman Upton said. This is more than just about Chairman Jaczko. This is about the American people and the American taxpayer who have already spent over \$10 billion preparing Yucca Mountain who now have been sued by utility companies and owe them an additional \$15 billion. And that is increasing every year because the government cannot meet its obligations, primarily because of one person at the Nuclear Regulatory Commission whose personal objective is to close this project at Yucca Mountain. And so I think it is an abuse of his authority and I look forward to the testimony of all the witnesses today.

I yield back.

Mr. SHIMKUS. The gentleman yields back his time. The chair recognizes the chairman emeritus, Mr. Waxman, for 5 minutes.

**OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Mr. WAXMAN. Well, thank you, Mr. Chairman. This is the third hearing this subcommittee has held on the closure of the Yucca Mountain Waste Repository. Today, we will hear from the Nuclear Regulatory Commission's Inspector General, who has recently issued a report on allegations that the NRC chairman's actions relating to the closure were improper.

The primary finding of the Inspector General's report was that Chairman Jaczko's ambitions have been consistent with established law, OMB guidance, and his authority as chairman. This finding is very different from what Chairman Shimkus has been saying for months. In the press and in this hearing room he has repeatedly stated that Chairman Jaczko has been acting illegally. This is, of course, the problem with prejudging and announcing the outcome of an investigation before it has started.

Despite the rhetoric we have heard over the past months, today we won't be presented with evidence of law-breaking. Instead, we will hear about internal procedures of the NRC. We will examine the consultation requirements and functions of the chairman of the NRC versus the functions of the other commissioners. The IG will tell us that some commissioners felt misled by Chairman Jaczko, did not like his interpersonal style, and expressed concern about the NRC chairman's unilateral actions.

Now, these are legitimate issues for our subcommittee to examine. We should be exercising our oversight to look at the Commission to ensure that it operates as smoothly, professionally, and fair-

ly as possible. The chairman of the Commission, like the chairman of a congressional subcommittee or committee has an obligation to conduct proceedings fairly and impartially.

Chairman Shimkus is concerned that Chairman Jaczko withheld information from his fellow Commissioners. That is a legitimate concern and one we should examine today. Ironically, however, we should look at this in the context of how our committee has operated. Over our objections, the staff of our subcommittee has been conducting interviews of fact witnesses without including Democratic members or our staff. The chairman says that the IG report "reveals a calculating and political NRC chairman who has abused his authority and withheld information from fellow Commissioners." Well, that is how some of us feel when we are being treated in this investigation by denying us access to witness interviews. Let us make sure that our committee operates as a model if we are going to criticize the Commission for not operating as we would hope they would.

I look forward to hearing from the IG today and want to reiterate that I support a thorough investigation into the Yucca Mountain and the actions of the NRC, but any such investigation should be fair and nonpartisan and I would hope our committee will meet this standard.

I yield back my time.

Mr. SHIMKUS. The gentleman yields back his time. The chair now calls for today's witness, the Honorable Hubert T. Bell, Inspector General of the Nuclear Regulatory Commission. He is accompanied by Mr. Joseph McMillan, Assistant Inspector General for Investigations at the NRC, and Ms. Rossana Raspa, Senior Level Assistant for Investigative Operations in the Office of Inspector General.

As you know, the testimony that you are about to give is subject to Title XVIII, Section 1001, of the United States Code. When holding an investigative hearing, this committee has a practice of taking testimony under oath. Do you have any objection to testifying under oath? And both shake their head "no."

The chair then advises you that under the rules of the House and the rules of the committee, you are entitled to be advised by counsel. Do you desire to be advised by counsel during your testimony today? And the chair recognizes that all shake their head, "no."

In that case, if you would please rise and raise your right hand and I will swear you in.

[Witnesses sworn.]

Mr. SHIMKUS. Thank you very much. And now you may give your 5-minute summary of your written statement. Welcome.

**TESTIMONY OF HUBERT T. BELL, INSPECTOR GENERAL, NUCLEAR REGULATORY COMMISSION, ACCOMPANIED BY JOSEPH MCMILLAN, ASSISTANT INSPECTOR GENERAL FOR INVESTIGATIONS, AND ROSSANA RASPA, SENIOR LEVEL ASSISTANT FOR INVESTIGATIVE OPERATIONS**

Mr. BELL. Good morning again. Mr. Chairman, members of the subcommittee, it is my pleasure to appear before you today. With me are Mr. Joseph McMillan, Assistant Inspector General for Investigations, and Ms. Rossana Raspa, Senior Level Assistant for Investigative Operations.

The mission of the Office of Inspector General at the Nuclear Regulatory Commission is to assist NRC by ensuring integrity, efficiency, and accountability in the Agency's programs. My office carries out this mission by independently and objectively conducting and supervising audits and investigations related to NRC's programs and operations; preventing and detecting fraud, waste, and abuse; and promoting economy, efficiency, and effectiveness in NRC programs and operations. Our operating budget is \$10.860 million with 58 full-time employees.

Last week, my office issued a report conveying the results of an investigation into an allegation that the NRC Chairman unilaterally and improperly closed out NRC's review of the Department of Energy's Yucca Mountain repository application while the government was operating under a continuing resolution during fiscal year 2011 and was purposely preventing the Commission from completing its ruling on the Atomic Safety Licensing Board's decision to deny DOE's motion to withdraw its Yucca Mountain repository license application from NRC.

OIG also looked into concerns raised about the chairman's management style and whether his control of information prevents the other commissioners from effectively fulfilling their statutory responsibility to address policy matters.

The Nuclear Waste Policy Act of 1982, as amended, names Yucca Mountain as the single-candidate site for geological high-level radioactive waste repository. Next, the Act states that NRC will consider an application for construction of a repository and issue a final decision within 3 years of application's submission.

NRC accepted DOE's Yucca Mountain license application in September 2008 and planned, at the end of the technical review, to issue a safety evaluation report (SER) containing its findings on the repository design. In February 2010, the Energy Secretary noted during a Senate hearing that the Administration would seek to suspend licensing for the Yucca Mountain repository because it was not a workable option. In March 2010, DOE submitted to the ASLB a motion to withdraw its Yucca Mountain License Application, which the ASLB denied. The Commission chose to review the ASLB decision and in August 2010 began consideration of this adjudicatory matter.

On September 30, Congress issued a continued resolution directing federal agencies generally to spend money at 2010 levels to continue 2010 projects and activities. On October 4, 2010, NRC senior officials issued a memorandum directing staff to continue its activities on Yucca Mountain license application during the CR period in accordance with the Commission's fiscal year 2011 congressional budget justification. That document directed "work related to the orderly closure of the Agency's Yucca Mountain licensing support activities." Soon after, the chairman directed staff to stop working on SER and proceed to orderly closure of the program.

OIG learned that the CR budget memorandum's language directing staff to follow fiscal year 2011 budget guidance for High-Level Waste Program activities was based on instruction from the chairman's office. OIG found that the chairman used the memorandum to initiate NRC's fiscal year 2011 plans to close out its Yucca Mountain license application review, although the budget had not

been passed. The chairman's decision was supported by the NRC General Counsel and consistent with the discretion within the chairman's budget execution authority under the Reorganization Plan Number 1 of 1980, OMB budget guidance for CR spending. The administration's decision to terminate the Yucca Mountain repository project and the chairman's interpretation of the Commission's fiscal year 2011 budget policy decisions.

OIG also found that while the chairman had the authority to direct staff to follow the fiscal year 2011 budget guidance, he was not forthcoming with the other commissioners about his intent to stop work on the SER as part of implementing close-out activities. Although he told executive director of operations that all commissioners were informed of the support issuance of the CR budget guidance memorandum, a majority disagreed with the outcome of the memorandum, which was the chairman's direction to stop work on the SER. Also, a majority of the commissioners did not think the conditions to proceed to closure had been met.

Although one commissioner wrote a commission action memorandum, or COM, to the other commissioners on October 6 proposing to direct staff to continue working on SER, two commissioners elected not to vote on the matter. Without a majority, the Commission could not move the matter to policy space within the Commission's purview.

OIG found that various factors are preventing NRC from fulfilling its statutory obligation to review DOE's Yucca Mountain Repository License Application and issue a final decision concerning issuance of a construction authorization. Factors include the administration's decision to terminate the Yucca Mountain repository project, decreasing appropriations to NRC for the High-Level Waste Program, and the chairman's direction to stop work on an SER.

OIG found that the Commission's adjudicatory voting procedures are not consistently enforced and they do not provide details on the process that occurred between completion of a notation vote on an adjudicatory matter and the conduct of an affirmation vote. The lack of enforcement of and specificity in the Commission's procedures—coupled with the Commission's practice not to move to affirmation until all commissioners agree to the affirmation notice and order—allows matters to sit in abeyance without final Commission action.

OIG also found that the chairman controls the information provided to the other commissioners based on his interpretation of his statutory authority as chairman versus the authority given to the Commission. Because the chairman manages and controls information available to the other commissioners, they are uncertain as to whether they are adequately informed of policy matters that should be brought to their attention. Ultimately, however, all commissioners have the ability to bring any issue they perceive as a policy matter before the Commission by writing a Commission action memorandum gaining a majority of the Commission's support.

Mr. Chairman and members of the subcommittee, we would be pleased now to answer questions.

[The prepared statement of Mr. Bell follows:]

**Summary of NRC Inspector General's 6/14/2011 Statement to the Subcommittee on  
Environment and the Economy, Committee on Energy and Commerce,  
U.S. House of Representatives**

The Office of the Inspector General (OIG), U.S. Nuclear Regulatory Commission (NRC) completed an investigation into an allegation that the NRC Chairman (1) unilaterally and improperly closed out NRC's review of the Department of Energy's (DOE's) Yucca Mountain repository application while the Government was operating under a continuing resolution (CR) during FY 2011, and (2) was purposely preventing the Commission from completing its ruling on the Atomic Safety Licensing Board's decision to deny DOE's motion to withdraw its Yucca Mountain repository license application from NRC. The investigation also reviewed concerns about the Chairman's management style and whether his control of information prevents the other Commissioners from effectively fulfilling their responsibility to address policy matters. The investigation found that:

The Chairman used a FY 2011 CR budget guidance memorandum to initiate NRC's FY 2011 plans to close out its Yucca Mountain license application review even though the FY 2011 budget had not yet been passed. His decision to direct the staff to follow the FY 2011 budget guidance was supported by the NRC General Counsel and consistent with (1) the discretion within his budget execution authority under the Reorganization Plan No. 1 of 1980, (2) OMB Circular A-11 guidance to spend prudently during a CR period, (3) the Administration's decision to terminate the Yucca Mountain repository project, and (4) the Chairman's interpretation of the Commission's FY 2011 budget policy decisions, which articulated close-out activities.

Although the Chairman had the authority to direct staff to follow the FY 2011 budget guidance, he was not forthcoming with the other Commissioners about his intent to stop work on the staff's safety evaluation report (SER) as part of implementing close-out activities. Although he told the Executive Director for Operations that all the Commissioners were informed and supported issuance of the CR budget guidance memorandum, a majority disagreed with the outcome of the memorandum, which was the Chairman's direction to stop work on the SER. Additionally, a majority of the Commissioners did not think the conditions to proceed to closure had been met.

Various factors are preventing NRC from fulfilling its statutory obligation to review DOE's Yucca Mountain repository license application and issue a final decision concerning issuance of a construction authorization. Factors include the Administration's decision to terminate the Yucca Mountain repository project, decreasing appropriations to NRC for the High-Level Waste Program, and the Chairman's direction to stop working on the SER.

The Commission's adjudicatory voting procedures are not consistently enforced and do not provide details on the process that occurs between the completion of an adjudicatory SECY paper vote and the conduct of an affirmation vote. The lack of enforcement of and specificity in the Commission's written procedures, coupled with the Commission's practice not to move to affirmation until all Commissioners agree to the affirmation notice and order, allows matters to sit in abeyance without final Commission action.

The Chairman controls information provided to the other Commissioners based on his interpretation of his statutory authority as Chairman versus the authority given to the Commission. Because he manages and controls information available to the other Commissioners, they are uncertain as to whether they are adequately informed of policy matters that should be brought to their attention. Ultimately, however, all Commissioners have the ability to bring what they perceive as policy matters before the Commission by writing a COM and gaining majority Commission support.



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STATEMENT FOR THE RECORD  
BY THE  
INSPECTOR GENERAL  
U.S. NUCLEAR REGULATORY COMMISSION

TO THE

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

THE NRC INSPECTOR GENERAL REPORT ON THE  
"NRC CHAIRMAN'S UNILATERAL DECISION TO TERMINATE NRC'S REVIEW OF  
DOE YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION"

JUNE 14, 2011

## STATEMENT FOR THE RECORD

**Introduction**

Mr. Chairman and members of the Subcommittee, it is my pleasure to appear before you today. I am accompanied today by Mr. Joseph McMillan, Assistant Inspector General for Investigations, and Ms. Rossana Raspa, Senior Level Assistant for Investigative Operations.

As you know, the mission of the Office of the Inspector General (OIG) at the Nuclear Regulatory Commission (NRC) is to assist NRC by ensuring integrity, efficiency, and accountability in the agency's programs that regulate the civilian use of byproduct, source, and special nuclear material in a manner that adequately protects public health and safety and the environment, while promoting the Nation's common defense and security. Specifically, OIG supports NRC by carrying out its mandate to (1) independently and objectively conduct and supervise audits and investigations related to NRC programs and operations; (2) prevent and detect fraud, waste, and abuse; and (3) promote economy, efficiency, and effectiveness in NRC programs and operations. OIG also keeps the NRC Chairman and members of Congress fully and currently informed about problems, recommends corrective actions, and monitors NRC's progress in implementing those actions. My fiscal year 2012 budget request is \$10.860 million and 58 full-time employees, which is consistent with my FY 2011 appropriation.

**Background**

To perform these activities, OIG employs auditors, analysts, criminal investigators, technical experts, legal counsel, and support personnel. OIG also uses private sector contractors to audit the NRC's financial statements as mandated by the Chief Financial Officers Act and for other audit, investigative, and information technology technical support services.

To fulfill our audit mission, OIG conducts performance, financial, and contract audits. Performance audits focus on NRC administrative and program operations and evaluate the effectiveness and efficiency with which managerial responsibilities are conducted and whether the programs achieve intended results. Financial audits attest to the reasonableness of NRC's financial statements. Contract audits evaluate the cost of goods and services that NRC procured from commercial enterprises. In addition, the audit staff prepare evaluation reports that present OIG perspectives or information on specific topics.

OIG's investigative program carries out its mission by performing investigations relating to the integrity of NRC programs and operations. Most OIG investigations focus on allegations of fraud, waste, and abuse and violations of law or misconduct by NRC employees and contractors. Additionally, OIG investigates allegations of irregularities or abuses in NRC programs and operations with special emphasis on those activities that could adversely impact public health and safety. Periodically, the investigative staff conducts event inquiries, which yield investigative reports documenting the examination of events or agency regulatory actions that do not specifically involve individual misconduct. Instead, these reports identify staff actions that contributed to the occurrence of an event.

#### **Allegation**

OIG recently issued a report conveying the results of an investigation into an allegation that the NRC Chairman:

(1) unilaterally and improperly closed out NRC's review of the Department of Energy's (DOE's) Yucca Mountain repository application while the Government was operating under a continuing resolution (CR) during FY 2011, and (2) was purposely preventing the Commission from

completing its ruling on the Atomic Safety Licensing Board's decision to deny DOE's motion to withdraw its Yucca Mountain repository license application from NRC.

The investigation also looked into concerns that were raised about the Chairman's management style toward staff and Commissioners and whether his control of information prevents the other Commissioners from effectively fulfilling their statutory responsibility to address policy matters.

### **Background and Chronology**

The Nuclear Waste Policy Act of 1982, as amended, and the Energy Policy Act of 1992 specify that spent nuclear fuel and high-level radioactive waste will be disposed of underground, in a deep geologic repository. The Nuclear Waste Policy Act names Yucca Mountain as the single candidate site for this potential repository. The act specifically states that NRC will "consider an application for a construction authorization for a repository" and "shall issue a final decision approving or disapproving the issuance of a construction authorization not later than 3 years after" the application is submitted.

DOE, which is charged with constructing and operating the repository, submitted its license application on June 3, 2008, and NRC formally accepted it for review in September 2008. This started the 3-year schedule set by Congress for NRC to reach a decision on whether to approve construction. NRC planned, at the end of its technical review, to issue a safety evaluation report (SER) containing its findings on the repository design. The SER would determine whether the proposed facility would meet NRC regulations to protect public health and safety. NRC staff decided to issue the SER in five volumes, and in March 2010 estimated that all volumes could be completed by March 2011.

In February 2010, the Energy Secretary noted during a Senate hearing that the Administration would seek to immediately suspend licensing for the Yucca Mountain repository because it was not a workable option. In March 2010, DOE submitted to the NRC Atomic Safety Licensing Board a motion to withdraw its Yucca Mountain License Application. On June 29, 2010, the Atomic Safety Licensing Board issued a decision that denied DOE's motion to withdraw, concluding that DOE lacked the authority to withdraw the application. The Commission decided to review the board's decision and, in accordance with NRC's process, on August 10, 2010, the Office of Commission Appellate Adjudication submitted adjudicatory SECY paper SECY-10-0102 on the Yucca Mountain matter to the Commission for its consideration.

On September 30, 2010, Congress issued the first in a series of CRs directing Federal agencies generally to spend money at FY 2010 levels, as necessary, to continue projects and activities that were conducted during FY 2010.

On October 4, 2010, the NRC Chief Financial Officer (CFO) and Executive Director for Operations (EDO) issued guidance to staff related to budget execution under the CR period. The memorandum stated that offices were to commit, obligate, and expend funds for ongoing activities at FY 2010 levels, with the exception of the High-Level Waste Program. With regard to the High-Level Waste Program, the memorandum directed staff to continue its activities on the Yucca Mountain license application during the CR period in accordance with the Commission's decisions on the FY 2011 budget. The Commission's decisions on the FY 2011 budget are reflected in the agency's Congressional Budget Justification for FY 2011, which allotted \$10 million for the Yucca Mountain repository to "support work related to the orderly closure of the agency's Yucca Mountain licensing support activities."

Shortly after the issuance of the CR budget guidance memorandum, Chairman Jaczko directed staff working on the Yucca Mountain license application review to stop working on the SER and proceed to orderly closure of the technical review.

#### **Investigation Results**

##### *CR Budget Guidance Memorandum*

OIG examined the circumstances surrounding the development of the EDO's and CFO's October 4, 2010, CR budget memorandum and learned that the language directing staff to follow FY 2011 budget guidance for High-Level Waste Program activities was based on instruction provided by the Chairman's office. The final language differed from earlier drafts of the memorandum prepared by the EDO's and CFO's offices. Earlier drafts of the memorandum either contained no mention of the Yucca Mountain license application review or directed that the agency would continue its review with any available FY 2010 carryover funds until exhausted.

OIG found that Chairman Jaczko used the FY 2011 CR budget guidance memorandum to initiate NRC's FY 2011 plans to close out its Yucca Mountain license application review even though the FY 2011 budget had not yet been passed. The Chairman's decision to direct the staff to follow the FY 2011 budget guidance was supported by the NRC General Counsel and consistent with the discretion within the Chairman's budget execution authority under the Reorganization Plan No. 1 of 1980 (Reorganization Plan). The Reorganization Plan states that the Chairman determines the use and expenditure of funds of the Commission in accordance with the distribution of appropriated funds according to major programs and purposes approved by the Commission. Chairman Jaczko's decision was also consistent with OMB Circular A-11 guidance to spend prudently during a CR period in a manner that does not impinge on final funding prerogatives of Congress, coupled with the Administration's decision to terminate the

Yucca Mountain repository project. The Chairman's decision was also consistent with his interpretation of the Commission's FY 2011 budget policy decisions, which articulated close-out activities for the High-Level Waste Program.

OIG also found that although the Chairman had the authority to direct staff to follow the FY 2011 budget guidance, he was not forthcoming with the other Commissioners about his intent to stop work on the SER as part of implementing close-out activities. This included stopping work on SER Volume 3 ("Review of Repository Safety After Permanent Closure"), which NRC staff believed to be near completion by the end of FY 2010. OIG learned that the Chairman anticipated that proceeding to close-out in this manner could be controversial and viewed as a policy decision for full Commission consideration. Therefore, prior to directing issuance of the CR budget guidance memorandum, he strategically provided three of the four other Commissioners with varying amounts of information about his intention to proceed to closure and not complete SER Volume 3. He did not provide Commissioner Svinicki with any information about his intentions. Although two of the three Commissioners he spoke with did not fully understand the implications of the CR budget guidance memorandum, the Chairman told the EDO prior to his signing the memorandum that all the Commissioners were informed and supported issuance of the CR budget guidance memorandum, and the Chairman's Chief of Staff told the CFO that he had clearance from the Commission offices to issue the memorandum. In fact, subsequent to the issuance of the CR budget guidance memorandum, a majority of Commissioners disagreed with the outcome of the memorandum, which was the Chairman's direction to stop work on SER Volume 3.

Additionally, a majority of the Commissioners did not think the conditions to proceed to closure had been met. These conditions were articulated in the FY 2011 Congressional Budget Justification as "upon the withdrawal or suspension of the licensing review," the NRC would

begin an orderly closure of the technical review and adjudicatory activities and would document the work and insights gained from the review.

OIG also learned that on October 6, 2010, Commissioner Ostendorff wrote a Commission action memorandum, or COM, to the other Commissioners seeking the Commission's involvement in the Chairman's direction to staff to stop working on the SER. Commissioner Ostendorff proposed that the Commission direct staff to continue to work on the remaining SER volumes at the rate for operations appropriate given the proposed FY 2011 budget as augmented by reprogrammed funds remaining from FY 2010 appropriations. In accordance with Commission procedures, Commissioner Ostendorff needed a majority of the Commission to support his proposal in order for it to become guidance for the staff. However, after the Commissioner issued his memorandum, Chairman Jaczko communicated to Commissioners Magwood and Apostolakis that he expected their continued support. He told both Commissioners that he would not have directed issuance of the CR budget guidance memorandum had they not committed to support him. Despite their view that they had not been fully informed about the Chairman's intent behind the CR budget guidance memorandum, Commissioners Magwood and Apostolakis elected not to participate in voting on Commissioner Ostendorff's COM. Therefore, without a majority, the Commission was unable to move the matter from budget space, within the Chairman's purview, to policy space, within the Commission's purview.

#### SER Issue

As part of this investigation, OIG reviewed circumstances related to development and issuance of the SER schedule and volumes. OIG learned that between April and May 2010, Office of Nuclear Material Safety and Safeguards staff informed the Chairman that they were ahead of schedule with their work on the SER volumes, and they asked whether they should attempt to issue the volumes at earlier dates than those that had been established in March 2010. The



Chairman responded in a June 2010 memorandum that they should not expedite issuance of the volumes, but should instead maintain the timeline that had been provided to the Commission in March 2010. According to that timeline, Volume 1 would be issued in August 2010, and Volume 3 in November 2010. Volume 1 of the SER was issued as scheduled; however, in October 2010, at the start of the new fiscal year, Chairman Jaczko directed staff to stop working on the remaining SER volumes. Subsequently, the Chairman gave direction to the staff to prepare a document for public release that captures the knowledge gained through the NRC's technical review of DOE's license application but would not contain any of the staff's findings or conclusions.

OIG found that the Chairman's decision to direct staff to stop working on the SER contributes to NRC's inability to meet its statutory obligation under the Nuclear Waste Policy Act to consider DOE's Yucca Mountain repository license application and issue a final decision approving or disapproving issuance of a construction authorization. Other factors preventing the agency from meeting its statutory obligation are the Administration's decision to terminate the Yucca Mountain repository project and decreasing appropriations to NRC for the High-Level Waste Program.

#### Adjudicatory Voting Process

Because the outcome of the Commission's vote SECY-10-0102 remains an open adjudicatory matter before the Commission, OIG could not assess the substantive reasons that are preventing this matter from finalization. However, OIG reviewed the Commission's adjudicatory SECY paper voting process and assessed the level to which the Commission adhered to its process with regard to SECY-10-0102 and with adjudicatory SECY papers in general.

OIG learned that the Commission has written internal procedures intended to facilitate Commission decisionmaking based on majority rule. For example, Commissioners are expected to vote on adjudicatory SECY papers within 10 business days of receiving the paper. Once a majority of the Commission has voted, those who have not voted are expected to submit a request for an extension, which must, in turn, be approved by a majority of the Commission. The written procedures do not provide details on the process that occurs between the completion of an adjudicatory SECY paper vote and the conduct of an affirmation vote. However, OIG learned that, in practice, an affirmation vote is not held until all of the Commissioners are satisfied with the affirmation notice and order describing the outcome of the adjudicatory vote.

OIG learned that the Office of the Secretary did not enforce adherence to the Commission's adjudicatory voting process with regard to SECY-10-0102 and generally does not enforce the voting process to facilitate completion of adjudicatory matters. With regard to SECY-10-0102, although all participating Commissioners had voted by September 15, 2010, the Chairman did not vote until October 29, 2010. He never requested an extension to vote, therefore, the other Commissioners were not polled to see if they agreed with the delay. OIG also learned that although the Commission was provided a draft affirmation order detailing the status of the Commission's votes 2 days after the Chairman voted, as of the date of OIG's report, the Commission had not held an affirmation vote on the matter, and the draft order continued to sit in deliberation before the Commission for affirmation.

OIG found that the lack of enforcement of and specificity in the Commission's written procedures, coupled with the Commission's practice not to move to affirmation until all Commissioners agree to the affirmation notice and order, allows matters to sit in abeyance

without final Commission action.

Information Flow/Work Environment

During the course of the investigation, a number of interviewees conveyed their perception that Chairman Jaczko controls and restricts the information available to his fellow Commissioners and noted concerns about his interpersonal style. Senior officials, managers, and staff provided examples that they believed illustrated the Chairman's failure to share with his fellow Commissioners information needed to support their fully informed decisionmaking. Examples included the CR budget guidance memorandum described earlier and the FY 2012 budget process, wherein the Chairman presented his FY 2012 budget proposal to the Commission without supporting documentation from the staff to allow Commissioners to assess how the Chairman's proposal aligns with the staff's budget requests. Previous Chairmen have provided this supporting documentation to the Commission along with their budget proposals to facilitate Commission decisionmaking related to the budget. Chairman Jaczko said his intent in FY 2012 was to help the staff shape a budget that would be more successful in getting through the Commission. Although he believes this is what occurred with the FY 2012 budget, he has since learned from the General Counsel that after his budget was developed and presented to the Commission, the Commissioners were entitled to some of the draft documents.

Other examples cited to illustrate the Chairman's control of information included the Commission agenda planning process and the Chairman's involvement in determining what constitutes a policy versus an administrative matter. In addition, a number of interviewees described instances of behavior by the Chairman that they viewed as unprofessional or manipulative.

Mr. SHIMKUS. Thank you very much, Mr. Bell. I ask unanimous consent that the contents of the document binder be introduced into the record and to authorize staff to make any appropriate redactions. Without objection, the document will be entered into the record with any redactions that staff determines are appropriate.

[The information appears at the conclusion of the hearing.]

Mr. SHIMKUS. I now recognize myself for the first 5 minutes.

Again, Mr. Bell, thank you. Mr. Bell, how many interviews did you conduct for this investigation?

Mr. BELL. Thirty-nine total, sir.

Mr. SHIMKUS. Thirty-nine total. And they were transcribed interviews under oath, is that correct?

Mr. BELL. The majority were. I think maybe one or two were not transcribed. They were all under oath.

Mr. SHIMKUS. They were all under oath?

Mr. BELL. Yes. But I think all but two were transcribed.

Mr. SHIMKUS. And did you review documents as well?

Mr. BELL. Yes, we did.

Mr. SHIMKUS. So your report is based on documentary evidence and sworn testimony both in its narrative and its findings, is that correct?

Mr. BELL. That is correct, sir.

Mr. SHIMKUS. And this evaluation was conducted independently without any direction or interference from outside of the Office of the Inspector General?

Mr. BELL. That is correct, sir.

Mr. SHIMKUS. Mr. Bell, you investigated the chairman's decision to close down the staff safety evaluation of the Yucca license during a continuing resolution last October, correct?

Mr. BELL. Yes, sir.

Mr. SHIMKUS. And you determined the senior NRC staff expressed concerns that the whole Commission needed to be onboard with guidance to this effect?

Mr. BELL. Yes, sir.

Mr. SHIMKUS. And the chairman told senior staff he would inform the Commission and later said the commissioners were in agreement with the direction and implications of the direction. Is that the case?

Mr. BELL. That is the case. Yes, sir.

Mr. SHIMKUS. But the chairman did not ensure the other commissioners understood the implications of this guidance, did he?

Mr. BELL. The inference that the chairman had told the Commission was that before he issued any memorandum that all the commissioners would be informed. And this was done to either be himself having conversations with the commissioners or his chief of staff talking to the Commission officers that he had not personally spoken with or discussed it with.

Mr. SHIMKUS. But on your report, let me ask this again, Chairman Jaczko did not ensure that each commissioner understood the implications of the guidance?

Mr. BELL. No.

Mr. SHIMKUS. In fact, according to your investigation, the chairman was not forthcoming with the commissioners. He did not even

talk to one of them and he did not explicitly explain his plans to direct the shutdown of the Yucca review. Is that what you found?

Mr. BELL. That is correct, sir.

Mr. SHIMKUS. Is the Reorganization Plan of 1980 as amended the statutory guidance under which the NRC operates?

Mr. BELL. Yes.

Mr. SHIMKUS. According to the NRC statutory requirements in this plan, the chairman "shall be responsible for ensuring that the Commission is fully and currently informed about matters within its functions." Isn't that correct?

Mr. BELL. That is what the Reorganization Plan states, yes, sir.

Mr. SHIMKUS. That is an essential responsibility of the chairman as laid out in the law, correct?

Mr. BELL. Correct.

Mr. SHIMKUS. According to your investigation, the chairman "strategically provided three of the four commissioners with varying amounts of information about his intention to not complete the safety evaluation report." That is what you determined, correct?

Mr. BELL. That is what the investigation showed, yes, sir.

Mr. SHIMKUS. And that is what you determined as the author. Now, is strategically withholding information from different commissioners consistent with "ensuring that the Commission is fully and currently informed?"

Mr. BELL. It doesn't appear to be. No, sir.

Mr. SHIMKUS. From your investigation, it became clear that many staff, including senior staff and the majority of the commissioners considered the Yucca-related guidance and directives imposed by the chairman to be a policy matter. Isn't that correct?

Mr. BELL. A policy matter is correct.

Mr. SHIMKUS. At page 42 you write that "the chairman himself knew the Commission did not support the budget guidance for the High-Level Waste Program and that he wanted to be prepared for battle." So even the chairman recognized this would be a policy fight, not an administrative matter, correct?

Mr. BELL. Correct.

Mr. SHIMKUS. Would you agree that the decisions surrounding the Yucca Mountain application review have profound national policy implications? Wouldn't you agree that it is a policy matter?

Mr. BELL. It is a policy matter, sir.

Mr. SHIMKUS. What we see here, in fact, was a matter of national policy which the chairman tried to manipulate into a mere administrative matter solely within his control. Is this consistent with the statutory obligations for how to formulate policy?

Mr. BELL. No, sir.

Mr. SHIMKUS. Thank you very much. And I would like to yield 5 minutes to the ranking member, Mr. Green, for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

Your investigation evaluated two allegations that Chairman Jaczko unilaterally and improperly closed out the NRC review of the Yucca Mountain application while the government was operating under a continuing resolution in fiscal year 2011, and two, that the chair was preventing the Commission from ruling on NRC Licensing Board decision to deny the DOE's motion to withdraw Yucca. You found that the chairman had not been forthcoming with

all commissioners but ultimately he acted within his authority. Did your office evaluate whether it was appropriate to close the Yucca Mountain facility generally?

Mr. BELL. No, sir.

Mr. GREEN. OK. Does your report say it was wrong to close the Yucca Mountain facility?

Mr. BELL. No, it does not. No, sir.

Mr. GREEN. And I didn't see it in your report but this is the second time I have noticed an administration taking leave under a continuing resolution. I would say did your investigation discuss anything about an administration using, I guess, very liberally interpreting a continuing resolution that may not have been successful in Congress?

Mr. BELL. No. No, sir.

Mr. GREEN. Some of my colleagues have charged the chair decided to close out the Yucca Mountain licensing review process for some nefarious purpose and some have alleged this was done directly at the behest of the President for political purposes. In your investigation, did you find any indication that the President reached out to the chairman and personally asked him or contacted him to stop reviewing the Yucca Mountain application?

Mr. BELL. No, sir.

Mr. GREEN. This report identified some serious communication issues within the Commission and I think we need to take those seriously. The report does not, however, find illegal conduct, nor does it make any assertions more generally about whether the administration's decision to close Yucca was proper. I do think, Mr. Chairman, our committee needs to look at what the NRC—and frankly, I think it is general government, not just our committee. There has been a case—and I watched what happened with NASA last year. Some decisions were made based on the President's budget that did not pass the House of Representatives or the Senate and yet they made these administrative decisions to change programs. I think that might be the problem we have. And I think whether it be NRC or even other agencies, I think they need to come back to Congress before they make these decisions, particularly after \$15 billion in ratepayers' and taxpayers' money has been put into it and after 25 years of work, all of a sudden a year ago say, well, we are not going to accept that. So that is our problem. I think Congress needs to take away that authority that they are using.

Mr. SHIMKUS. Will the gentleman yield for one second?

Mr. GREEN. I would be glad to.

Mr. SHIMKUS. Kind of follow up on that. In this case, if there is a policy decision that should be made, it should be made by the commissioners collectively. Wouldn't you say that is correct, Mr. Bell, a policy decision?

Mr. BELL. A policy decision should be the Commission.

Mr. SHIMKUS. And that is another way—this is a Commission, so the Commission should all have a say when there is a change in policy. And it is our contention, and I think the report defends it, that the policy decisions were made by the chairman.

Mr. GREEN. And I agree. It should be the Commission. But ultimately on something this major, I think we ought to have the op-

portunity as elected officials to make that decision because, again, Appropriations for \$15 billion for the last 25 years at least. And I yield back my time.

Mr. SHIMKUS. The gentleman yields back his time. The chair recognizes the chairman of the full committee, Mr. Upton, for 5 minutes.

Mr. UPTON. Well, thank you, Mr. Chairman. And I want to thank you, too, Mr. Bell for the report.

President Reagan, as we know, signed the Nuclear Waste Policy Act back in 1982, almost 30 years ago. And in reading again the Commercial Nuclear Waste GAO report from this last April, I want to read to you one long paragraph. "Prolonging onsite storage would add to the taxpayer burden by increasing the substantial liabilities that DOE has already incurred due to onsite storage at commercial nuclear reactors. For DOE to open Yucca in 2020 as it had planned, it began taking custody of spent nuclear fuel, it would still have taken decades to take custody of the entire inventory of spent nuclear fuel. Assuming that 2020 opening of Yucca, the DOE estimated that the total taxpayer liabilities for the backlog as of 2020 would be about \$15.4 billion. It would increase by half a billion for each year of delay thereafter. It is important to recognize that these liabilities are outside of the nearly 15 billion already spent on developing a repository and the estimated 41 to 67 billion still to be spent if Yucca Mountain repository were to be constructed and become operational, most of the cost of which is borne by the Nuclear Waste Fund." So nearly \$100 billion at the end of the day.

In reading the report this weekend, I want to read just a couple comments on three commissioners. The first is Commissioner Magwood, who, on page 17, you write, "Magwood also told the chairman that he would not support a precipitous termination of the High-Level Waste Program. According to Commissioner Magwood, the chairman assured him that this was not the expectation." "According to Commissioner Magwood, the chairman became very agitated and said that he would never have taken these actions had both Commissioners Apostolakis and Magwood not agreed to support the guidance. Commissioner Magwood said that he objected to this statement quite strongly and that the chairman never told him his plan had been to shut down the High-Level Waste Program and withhold publication of SER Volume III."

Then on Commissioner Ostendorff, you write on page 18, "Commissioner Ostendorff stated that on October 1, 2010, Chairman Jaczko told him that the CR budget guidance memo would have the staff commence orderly closure of Yucca license application review. Ostendorff told the chairman that he disagreed with his direction. The direction was wrong and you should not issue it."

As it relates to the third commissioner, Commissioner Svinicki, you write on page 19, "On October 5, her staff informed Chairman Jaczko's office that she objected to the CR guidance. She stated that she did not have any direct communication with Chairman Jaczko's review regarding the matter before the CR budget guidance memo was issued on October 4, 2010." So can one come to a different conclusion than there were at least three votes in opposition of where they ultimately were? And it is a pretty damning re-

port as it relates to his control of these three commissioners who in fact said on the record that they didn't agree. Can one come to a different conclusion?

Mr. BELL. I will let Mr. McMillan answer.

Mr. MCMILLAN. Clearly, each of those commissioners, sir, thought that the budget guidance memorandum that was being circulated would not stop the SER from progressing. While the Commission might very well be moving towards closure of the program itself, in each of those cases when the individuals were interviewed, it was their impression that the SER would, in fact, be continued.

Mr. UPTON. But was it not the fact that the staff review of the SER plan was going to be expedited and it was Chairman Jaczko who said slow down?

Mr. MCMILLAN. That is correct. There was a meeting in the June time frame of 2010 when the staff went to the chairman and indicated a desire to advance SER's related to numbers I and III, the issues related to Volumes I and III. The chairman did indicate to the staff that he wanted to maintain the published schedule that was in the record at that time. That was their understanding that they would maintain the public schedule of timing.

Mr. UPTON. What did the commissioners feel when they learned that the SER III decision had been withheld from them, their reaction?

Mr. MCMILLAN. And again, staying within the context of the report, through the interviews, clearly the commissioners that we spoke to that had no understanding of this SER being stopped, OK, were somewhat agitated by that fact and they did in fact raise the issues back with the chairman regarding their discussions that he had had and the indications that at no time did they understand that the SER and the findings in the SER would be stopped.

Mr. SHIMKUS. The chairman's time has expired. The chair now recognizes the chairman emeritus, Mr. Waxman, for 5 minutes.

Mr. WAXMAN. Thank you, Mr. Chairman.

Mr. Bell, over the last few months, the chairman of this subcommittee has told us that the NRC chairman acted illegally with regard to its handling of Yucca Mountain. Mr. Bell, you have conducted a 7-month investigation of this matter. Did you find that the chairman of the NRC acted illegally?

Mr. BELL. No, we didn't, sir.

Mr. WAXMAN. OK. Your report describes concerns raised by some Commission staff that Chairman Jaczko controls and restricts the information provided to his fellow commissioners. Some of this appears to be due to a change in management style. For example, Chairman Jaczko has taken a more hands-on role in the budget process. As your report describes, the chairman meets with division directors to provide direction on the Agency's priorities, and then each division formulates a budget document and submits it to the chairman and the chairman sees the budget as his responsibility and it says that he is entitled to develop the budget as he sees fit. Mr. Bell, although some staff and commissioners may not like this approach, does it mean it was illegal?

Mr. BELL. It is not illegal and it is the prerogative of the chairman to the direction of the budget. And this chairman has elected



to have the budget filter through him and his office and then he disseminates it back to the Commission.

Mr. WAXMAN. Now, Chairman Jaczko made a decision that there should be an orderly shutdown of Yucca Mountain because he did not think that the NRC was going to have enough funds to pursue the matter. Wasn't that decision vindicated by the continuing resolution passed overwhelmingly by the House and the Senate and signed by the President where \$10 million was provided to close out Yucca Mountain's consideration?

Mr. BELL. Well, obviously, yes, sir. And a decrease in the budget for the High-Level Waste Program was one of the contributing factors to moving toward a closeout because it eventually was a zero budget for High-Level Waste.

Mr. WAXMAN. So the chairman made a decision about the budget and others might not have agreed with it, but he made that decision and it looked like it was vindicated by the actions of the Congress.

Similarly, the chairman has taken a more active role in the planning of the Commission's agenda. At times he has directed staff to not develop an issue paper for the review of the whole Commission. At other times he has determined that an issue paper is an administrative matter, not a policy matter worthy of consideration by the Commission. The IG report states that the chairman wants to control the flow of policy issues to the Commission to allow them to be more efficient. Of course, some disagree and see this as a means to limit the information available to other commissioners. Mr. Bell, although some staff and commissioners may not like this chairman's approach, does that mean it is illegal?

Mr. BELL. It is not illegal because remember I said that any commissioner has an opportunity to write a COM and get a majority vote on the COM and then it moves from a policy space to Commission space. But you have to have majority Commission agree with the COM. So he has not done anything illegal, but each commissioner knows if they want to move an issue from the chairman's purview to the Commission's purview, then they have to get a majority vote by writing a COM and having the commissioners vote on it. To date that hasn't been done.

Mr. WAXMAN. What is a COM?

Mr. BELL. A communication memorandum of an issue that they want to bring forward.

Mr. WAXMAN. I see. So they could have acted to take this issue away from the chairman but they did not.

Mr. BELL. They can take any issue that they get a consensus on, a majority vote on and move it from the chairman's purview to the Commission agenda.

Mr. WAXMAN. OK. It seems to me that the chairman's interpretation of his role and responsibilities differs from how other commissioners see his role and responsibilities. And this seems to appear to be the root cause of the conflict. Your report, Mr. Bell, also notes that Chairman Jaczko has a "bad temper" and created what some employees describe as an "intimidating work environment." And that Chairman Jaczko admits in the report to having a short fuse, especially with his fellow commissioners. Mr. Bell, he obviously

should work on his interpersonal skills at the office, but does this mean his behavior is illegal?

Mr. BELL. No.

Mr. WAXMAN. And I could just say from my own experience, I serve on this committee, I know my colleagues in a professional way. I am surprised when I hear that some of them have a huge temper and they are rude to their staffs. I am shocked when I hear that some of the colleagues that I serve with on the committee might Twitter things to people. I just don't have any knowledge of it but I guess the members of this Commission and the staff noticed his poor interpersonal skills. Not admirable, is it? That is, I guess, a rhetorical question, Mr. Bell.

Mr. Green said that the report does not find illegal conduct, nor does it make any assertion more generally about whether the administration's decision to close Yucca Mountain repository was proper. Is that an accurate statement? Should I repeat it?

Mr. BELL. Yes, repeat it again, sir.

Mr. WAXMAN. He said that the report does not find illegal conduct, nor does it make any assertion more generally about whether the administration's decision to close Yucca Mountain was proper.

Mr. BELL. Yes, that is accurate.

Mr. WAXMAN. And then Mr. Green went on to say I do think Congress needs to address the issue. But Congress did address the issue in the continuing resolution.

Mr. SHIMKUS. The gentleman's time has expired.

Mr. WAXMAN. Is that a correct statement?

Mr. SHIMKUS. You can answer him, Mr. Bell.

Mr. BELL. Yes.

Mr. WAXMAN. Thank you, Mr. Chairman.

Mr. SHIMKUS. The gentleman's time has expired. The chair now recognizes the chairman emeritus of the full committee, Mr. Barton, for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman.

I don't know where these rumors come from that Members have tempers. That must be on the minority side. We are all peace and light and sunshine on the majority side, you know, so—

Mr. WAXMAN. I read a Twitter about it.

Mr. BARTON. You read a Twitter about it? Well, we will investigate those rumors, Chairman Waxman, get to the bottom of it.

I want to put into the record, Mr. Chairman, an article from the December 2010 periodical called "Waste Management." It is part of the Nuclear News magazine and it refers to former Chairman Dale Klein's comments. He wrote an open letter to the Commission and to several journalists about this issue that we are debating today or investigating today. And I will put the entire article in the record but part of his open letter states—this is former NRC chairman Dale Klein—that "there was no intention by the Commission"—by that he means the NRC—"to approve or even contemplate a preemptive termination of the High-Level Waste Program." I would ask that this be put into the record.

Mr. SHIMKUS. Is there objection? Hearing none, so ordered.

[The information follows:]

## Waste Management



YUCCA MOUNTAIN

### Former NRC chairman Klein at odds with Jaczko decision

**N**UCLEAR REGULATORY COMMISSION Chairman Gregory Jaczko had no response to an open letter to journalists released in late October by former NRC chairman Dale Klein, who strongly disagrees with Jaczko's decision to terminate the NRC's work on the Yucca Mountain repository license application.

Earlier in October, Jaczko had decided on an "orderly closure" to the licensing activities, based on, he said, the NRC's budget guidance for fiscal year 2011 (*NN*, Nov. 2010, p. 17). The agency's budget request for FY 2011 reflects the possibility that the Department of Energy, which filed the license application with the NRC, would withdraw the application or that the NRC would suspend its review of the application.

NRC spokesman David McIntyre told *Nuclear News* by e-mail on November 3 that neither Jaczko nor the NRC had responded to Klein's letter. He did note, however, that Jaczko had responded to some Republican congressmen who on October 13 had sent him a list of questions about his decision to order the NRC staff to stop its work on the Yucca Mountain license application.

Klein, who served as NRC chairman under two presidents, from July 2006 to May 2009, and was a member of the commission until March 30, 2010, said in his open letter that its purpose was to "address a particular point raised by the current chairman,



Klein

Gregory Jaczko, in the controversy surrounding his decision to terminate the ongoing NRC work on the Yucca Mountain license application."

Klein noted that Jaczko had repeatedly stated that the commission had approved this budgetary approach for FY 2011 to shut down work on the application. "I served as a member of the commission during the fiscal year 2011 budget deliber-

*Former NRC chairman Dale Klein has made it known that he disagrees with current chairman Gregory Jaczko's decision to terminate the NRC's review of the Yucca Mountain license application.*

ations and was intimately involved in establishing the budget policy referred to by Chairman Jaczko," Klein said. "I do not agree with the chairman's assertion that his actions are consistent with the commission's FY 2011 budget policy guidance."

During the development of the budget, Klein said, "there was no intention by the commission to approve, or even contemplate, a preemptive termination of the high-level waste program." He added that the NRC's approach and guidance to its staff was to sustain ongoing work while maintaining flexibility in the face of the federal Office of Management and Budget's directions concerning the HLW program.

The remainder of Klein's letter reads as follows:

In December 2009, the HLW program was in flux. It was not known if the Department of Energy would request a withdrawal or suspension of the Yucca Mountain license application, the Blue Ribbon Commission on America's Nuclear Future had not been formed, and the Congress had not engaged on how affected agencies would address their obligations under the Nuclear Waste Policy Act. While I may have anticipated some of the unfolding events, I could not have predicted all that has clouded this contentious issue. Clearly the conditions and assumptions that the commission relied upon in developing our FY 2011 budget approach changed over time, and a recalibration would have been appropriate.

Since the majority of current commissioners chose not to reconsider the budget guidance, the guidance which I

helped to create remains in force. It is not appropriate for Chairman Jaczko to continue to rationalize his actions as being consistent with the commission's FY 2011 budget guidance. Doing so implies that I and Commissioner [Kristin] Svinicki are complicit in authorizing his actions, and that is clearly not the case. Having served as NRC chairman during several budget cycles, I believe that the continuing resolution budget guidance for the HLW program should have been handled as a commission policy matter, with the full participation of the commission and, most certainly, in consultation with Congress.

Lastly, having served as chairman, I believe I have a reasonable understanding of the legal authority of the chairman's office to address administrative matters such as budget issues. I would not consider the closeout of the HLW application technical review to be a simple reassignment of personnel or routine reallocation of resources. Rather, the actions taken are the implementation of a major national policy decision that has not been acted on by the commission or authorized by Congress.

#### Jaczko responds to congressmen

In an October 27 letter, Jaczko responded to four Republican House members—Reps. Jim Sensenbrenner, Joe Barton, Ralph Hall, and Doc Hastings—who had questioned his decision to close down the application review. The congressmen had submitted six questions for Jaczko to answer.

To the first question, about the legal au-

December 2010

thority to terminate the review, Jaczko said that neither the text of the FY 2010 Energy and Water Development and Related Agencies Appropriations Act and its underlying committee reports, nor the FY 2011 continuing resolution provide the NRC with express direction on how it is to expend its appropriations from the Nuclear Waste Fund for Yucca Mountain activities. "In the absence of an express direction, the approach the NRC is following is consistent with the terms of the continuing resolution, the commission's fiscal year 2011 budget request, the general principles of appropriations law, and past U.S. Nuclear Regulatory Commission practice," he said.

Jaczko added that the NRC had declined to revisit this decision in voting earlier in October. In FY 2010, he noted, the NRC requested \$56 million for its HLW program, but Congress appropriated only \$29 million. In FY 2011, the NRC requested an appropriation of \$10 million for the HLW program, about a third of the FY 2010 appropriation. The request was approved by both the Senate Appropriations Committee and the Energy and Water Development Subcommittee of the House Appropriations Committee.

"Under these circumstances," he said, "the path that the NRC is following is consistent with NRC's obligation to spend funds prudently under a continuing resolu-

tion pending final budget action by the Congress."

In response to a question about the actions taken to terminate the review, Jaczko said that the NRC staff is beginning an orderly closure of the process. "No specific actions have yet been taken to terminate the program," he said. "Rather, the first step of this process is to preserve the staff's work products and complete and implement a detailed and comprehensive plan for this effort."

He said that the entire process is expected to take at least a year and will include documenting the staff's review and other knowledge concerning the program by means such as comprehensive technical reports and videotaped interviews of technical staff.

The congressmen had also asked whether Jaczko had communicated about the matter with Energy Secretary Steven Chu, Senate Majority Leader Harry Reid (D., Nev.), or the White House.

Jaczko answered that he and members of his staff had informed the White House and a select number of members of the Congress, including the NRC's authorizers and appropriators, as well as Senator Reid, of the decision to begin to close out the NRC's HLW activities. He added that neither he nor anyone on his staff had communicated with the DOE regarding his decision.

Jaczko's letter is available online at [www.nrc.gov/reading-rm/doc-collections/congress-docs/correspondence/2010/sensenbrenner-10-27-2010.pdf](http://www.nrc.gov/reading-rm/doc-collections/congress-docs/correspondence/2010/sensenbrenner-10-27-2010.pdf).

#### FUEL CYCLE

### EPRI issues report on advanced fuel cycles

The Electric Power Research Institute in October issued a report—*Advanced Nuclear Fuel Cycles: Main Challenges and Strategic Choices*—that addresses the various factors that countries must weigh when making decisions related to fuel cycle strategies. The report concludes that over the long term, the sustainability of commercial nuclear power hinges on four main challenges: natural resource supply, economic competitiveness, waste management, and nonproliferation.

According to the report, while numerous fuel cycle options could potentially address these challenges, many likely wouldn't lend themselves to industrial-scale deployment. "The complexities involved in simultaneously solving all of the real or perceived fuel cycle issues, therefore, favor an evolutionary rather than revolutionary approach," the report says.

*Continued*

Mr. BARTON. OK. I have read the executive summary, Mr. Bell, of your investigatory report and I listened as you answered some questions from Chairman Waxman. It is my understanding that one of your conclusions is that while Chairman Jaczko didn't act appropriately, it is your opinion that he did not violate any law. Is that correct?

Mr. BELL. That is correct, sir.

Mr. BARTON. Now, I have a different opinion and I am not an inspector general so my opinion is just that. I think it is an informed opinion. But I have read the statute that applies to the Nuclear Regulatory Commission and it has language that says the chairman "must fully inform other commissioners of all pending actions." You yourself in your report say that Chairman Jaczko I believe said misled but he certainly didn't fully inform all the other commissioners. If that is a true statement, how can he not have violated federal law?

Mr. McMILLAN. Sir, what we are attempting to convey in the report was the fact that if the commissioner on the Commission wanted to move his decision from budget space to policy space, there was a mechanism by which to do that. And clearly, Commissioner Ostendorff attempted to do that with his COM in October shortly after the CR memorandum guidance.

Mr. BARTON. How can you put the burden on a commissioner if the chairman has the information and the chairman doesn't fully inform the other commissioners? I mean how can you then put the burden of proof so to speak on an uninformed unaware commissioner?

Mr. McMILLAN. It was the responsibility to ensure all the commissioners understood the purpose of the budget guidance memorandum. That clearly was a responsibility of the chairman.

Mr. BARTON. If I understand your report correctly, he failed that responsibility. Is that not correct?

Mr. McMILLAN. The report reflects the fact that the commissioners that were involved in that process went to the chairman and indicated that had they known that the SER was going to be stopped that they would not have even given tacit approval towards moving that document—

Mr. BARTON. So that would appear to me to factually prove that he violated the law. I mean I don't know how you can have it any other way. He has got an obligation under law to fully inform the commissioners. Your own report indicates that he didn't fully inform. The commissioners said that had they known, they would have taken preemptive action to prevent what he did. He violated the law. He did not uphold his responsibility under the statute. That is clear layman common sense. My time has expired. I have two more things I want to state.

Before you issued this report about him not violating the law, did you check with outside legal counsel on that issue?

Mr. BELL. No, we didn't, sir.

Mr. BARTON. Did not. So this is an internal decision. What is your opinion, Mr. Inspector General, as of right now the licensing application for Yucca Mountain? Is it active? Has it been terminated? Should it still be acted upon? What is the legal standing

given that the Construction Authorization Board refused to allow the Department of Energy to withdraw that application?

Mr. BELL. Well, the ASLB denied the appeal. So the application is still before the Commission. And until——

Mr. BARTON. So it is active? It should be acted upon. The Commission should make a decision on it. Is that not correct?

Mr. BELL. Correct.

Mr. BARTON. Thank you, Mr. Chairman.

Mr. SHIMKUS. Thank you. The chair now recognizes the gentlelady from Colorado, Ms. DeGette, for 5 minutes.

Ms. DEGETTE. Thank you very much, Mr. Chairman.

Mr. Bell, in the beginning of your report, you provide some historical background for the structure of the NRC and more specifically for the chairman's authority. I think this is important based on the last questioning. I understand that when the Commission was established, much of the power was evenly distributed among the commissioners, is that correct?

Mr. BELL. Under the Reorganization Act?

Ms. DEGETTE. Under the original structure of the Commission, much of it was evenly distributed, right?

Mr. BELL. Yes.

Ms. DEGETTE. And then it was changed and it was changed because of Three-Mile Island, is that right?

Mr. BELL. Correct.

Ms. DEGETTE. And after Three-Mile Island, both the Presidential Commission and an NRC-commissioned review identified issues with that structure I described with the equal power, and so they completely overhauled the Commission's structure. Is that right?

Mr. BELL. Correct.

Ms. DEGETTE. Now, can you talk to me for a minute about some of the expanded duties and responsibilities of the chairman under that Reorganization Plan in 1980?

Mr. McMILLAN. Specifically, ma'am——

Ms. DEGETTE. Mr. McMillan?

Mr. McMILLAN [continuing]. Under Section 2 of the Reorganization Plan, it assigns the chairman responsibility for all functions, serving as the Commission's spokesman, serving as the Commission's principle executive officer responsible for developing policy planning and guidance for consideration by the Commission. It also assigns him the responsibility of the administrative functions of the Commission, distribution of business among the offices of the Commission and preparation of the budget estimates, and then proposed the distribution of appropriated funds. The Reorg. Plan states that the chairman determines the use in expenditure funds of the Commission in accordance with the distribution of appropriated funds. So clearly, he has got some unique responsibilities and duties——

Ms. DEGETTE. Right.

Mr. McMILLAN [continuing]. That are different than those of other commissioners.

Ms. DEGETTE. He has got additional responsibilities and duties?

Mr. McMILLAN. Yes, ma'am.

Ms. DEGETTE. Is that right?

Mr. McMILLAN. Yes, ma'am.

Ms. DEGETTE. And that plan was approved by Congress as I understand it.

Mr. BELL. 1980.

Ms. DEGETTE. And it was approved in 1980? Thank you.

Mr. BELL. Reorganization.

Ms. DEGETTE. And so really to say what may or may not have happened in this situation with Chairman Jaczko is illegal is probably inaccurate, and I think you have answered that about 10 times. Is that correct, Mr. Bell?

Mr. BELL. Yes.

Ms. DEGETTE. So, Mr. Chairman, I would like to make a suggestion. And Mr. Murphy will tell you we had a very, very informative trip last week where we looked at nuclear disposal, studies for permanent and also reprocessing and interim disposal. And I have been interested in this issue for many, many years ever since I went to Yucca Mountain with Chairman Emeritus Barton and I have been thinking, irrespective of what you think about the issue of nuclear energy for this country as a policy, the fact is that we have to grapple with this, and we have to grapple with it in a way that is science-based, not in a way that is based on politics.

And the concern I have is that in this country, much of what we have done—and you can argue on either side of the aisle who is more at fault—is we base our issues on how we should dispose of the current and future nuclear waste, politics and not on science where it will work.

And so I guess my suggestion would be, look, we are in a situation right now where we had looked at Yucca Mountain, they were undergoing their scientific studies. The last administration tried to expedite the certifications even though the studies weren't over, and now this administration has shut it down. And we can argue back and forth whether what the chairman did was illegal or just wrong or maybe not wrong at all or maybe just a miscommunication. We can argue about all of that, but the truth is we now don't have a permanent facility that is either certified or under certification process. And it seems to me that that would be a very fertile area for us to look at in this committee because at some point, irrespective of how we decide to take our nuclear energy policy in the future, we are going to have to grapple with this.

And so that would be my suggestion. We can waste a lot of time arguing about these details or we can move forward and say what are we going to do now coming from where we come?

Thank you and I yield back.

Mr. SHIMKUS. The gentlelady yields back her time. And I would just say that the delay of the SER report is a delay of science-based information for Yucca. That is part of this whole debate is the SER report, which has been delayed. And I yield 5 minutes to the vice chairman of the committee, Mr. Murphy, for 5 minutes.

Mr. MURPHY. Thank you, Mr. Chairman.

It certainly is important from my friend from Colorado that it is important to adhere to scientific information because the implication is not only what happens to Yucca Mountain, but this impacts the credibility of the NRC on many issues of licensing.

So Mr. Bell, last week, Chairman Jaczko issued a press release claiming your office has exonerated him of any wrongdoing. I am

not certain that the report really supports that interpretation so let me ask this: first of all, on the matter of the continuing resolution budget guidance issued unilaterally by the chairman, your report makes it clear that the senior career NRC managers and other commissioners and even the chairman himself believed it to be a policy matter. Is that correct?

Mr. BELL. Yes.

Mr. MURPHY. Now, in fact, on page 22 of your report you say that the chairman told the executive director of operations, "There may be commissioners who don't agree with this and will try to make it a policy issue." Your report states that the EDO had already advised the chairman that this was a policy matter—on page 15—and therefore, it should have been brought before the Commission, is that correct?

Mr. BELL. Yes.

Mr. MURPHY. I believe the quote on page 15 is that, "He believed that if the commissioners decide the matter was a policy issue, they could vote on it." He said, "he expressed his concerns"—the chairman—"that the Commission needed to see the memorandum." And your report also details the efforts of the chairman and his staff made to mislead the commissioners, deny them the information they needed to make an informed decision, and prevent other commissioner views on this matter being considered. Is that correct?

Mr. BELL. Yes.

Mr. MURPHY. Now, is it a crime to mislead?

Mr. BELL. It is not a crime but it certainly is not an up-front way to do business. And also the exoneration—the chairman's statement was the chairman's statement. We had no input or anything into the chairman's statements just for the record.

Mr. MURPHY. And is it against the law to overturn a statute that Congress has passed and signed into law?

Mr. BELL. No.

Mr. MURPHY. It is not a crime—not illegal to do that?

Mr. BELL. I mean if Congress overturns it?

Mr. MURPHY. No. If there was a statement that says that the chairman and executive director of operations to the chairman shall be responsible for ensuring that the Commission is fully and currently informed about matters within its functions. And that was signed into law and that is specifically, categorically an order. Is that illegal?

Mr. BELL. It is wrong.

Mr. MURPHY. OK. Is the chairman of the NRC statutorily required, then, under the Reorganization Plan of 1980, as amended, to keep its commissioners fully and currently informed?

Mr. BELL. Yes.

Mr. MURPHY. OK. So the chairman and executive director of the NRC are required under law, as you said, to keep the Commission fully and currently informed of Agency activities. Do you conclude from your investigation that this is currently happening that it is fully and currently informed? Is that your conclusion that it is fully happening or it is not happening?

Mr. BELL. It is not being fully informed, correct.

Mr. MURPHY. OK.



Mr. BELL. Now, I think the chairman has given them just enough information to proceed in the manner that he wanted to proceed with the——

Mr. MURPHY. But that isn't the matter that the chairman wanted to——

Mr. BELL. But that——

Mr. MURPHY. From what you have said so far on a couple of occasions now that that runs contrary to what the statute says was passed by Congress and signed into law by the President. So how does failure to follow statutory obligations exonerate the chairman's actions?

Ms. RASPA. I am sorry. What was the question?

Mr. MURPHY. My point is, given the statements made by Mr. Bell here in reference to this statute, my question then how does failure to follow statutory obligations exonerate the chairman's actions? You have to put the microphone up close, ma'am.

Ms. RASPA. The reorganization plan was premised on keeping the commissioners informed of matters within their purview. And so they were aware of the chairman's actions. They didn't fully understand the implications of that CR budget memorandum.

Mr. MURPHY. But I challenge that. As Commissioner Magwood stated, "The chairman never told him his plan had been to shut down the High-Level Waste Program and withhold publication of SER Volume III. The chairman responded to him, you should have asked." So is intent to mislead by withholding information to effect behavior an actual policy matter, isn't this a violation of the statute?

Mr. MCMILLAN. What we attempted, again, sir, to do was to lay out what transpired during the course of these sequence of events and leave the interpretations whether it be regarding legality, OK, to others.

Mr. MURPHY. I understand.

Mr. MCMILLAN. Clearly, when you have——

Mr. MURPHY. I am not asking whether this is criminal or not. I think this is a whole other legal issue. The question is is it a violation of the statute? Is it a violation of the statute in terms of what they actually did, what was actually going on?

Mr. MCMILLAN. One could draw that conclusion that it is opposite the intent of that statute, yes.

Mr. MURPHY. Thank you. I yield back.

Mr. SHIMKUS. The gentleman's time has expired. The chair now recognizes the gentleman from Kentucky, Mr. Whitfield, for 5 minutes.

Mr. WHITFIELD. Thank you very much. And, Mr. Bell, thanks for being with us today. We appreciate it.

I want to touch on, initially, the Department of Energy's motion to withdraw the application, which was denied by the Appeal Board. And then after that and the subject of a lot of this is the fact that there has not been a final vote by the Commission on whether or not to uphold the Appeal Board.

And Chairman Ostendorff said—and I want to know if your investigation affirmed this—but he said that he went to Chairman Jaczko on September the 9th, September the 14th, October the 5th,

October the 19th, October the 27th wanting to know when they were going to vote on this. Did your investigation affirm that?

Mr. BELL. Yes.

Mr. WHITFIELD. He did talk to him on those occasions? OK. And Chairman Jaczko told him that he was delaying it because he was concerned that a 2-2 vote would leave the Appeal Board decision in limbo, is that correct?

Mr. BELL. That is correct.

Mr. WHITFIELD. And some of the Commission members felt like a 2-2 vote would actually uphold the Appeal Board decision, is that correct?

Mr. BELL. In most instances, a 2-2 vote does uphold.

Mr. WHITFIELD. So what did your investigation find out that Jaczko was thinking about when he said it would leave the Board in limbo—the decision in limbo?

Ms. RASPA. Regarding the adjudicatory matter, we could only look into the process of their votes. We could not look at their thinking and what was behind their thinking in casting those votes.

Mr. WHITFIELD. OK. But a 2-2 vote upholds the Board and at least some people are saying that Jaczko is saying well, I didn't want to vote because I am afraid a 2-2 vote would leave this in confusion. OK.

In addition to that, I just read through some of this testimony and your report and it says that Chairman Jaczko controls and restricts information available to his fellow commissioners. Did you have people say that?

Mr. BELL. Yes, we had.

Mr. WHITFIELD. They view him as unprofessional and manipulative. Did you find that?

Mr. BELL. That was things that have been said also, yes.

Mr. WHITFIELD. They find that he suppresses papers and manipulates the agenda planning process because he wants to control the sequence of papers to be presented to the Commission.

Ms. RASPA. The chairman has also indicated that he is trying to prioritize those matters that—

Mr. WHITFIELD. I am not asking what he is trying to do. I am just asking was this told to you. It says here that you were told that the chairman withholds information to the Commission by either suppressing papers or manipulating the agenda.

Mr. BELL. Yes, we were told that.

Mr. WHITFIELD. You were told that? OK. You were also told that the distinction between policy issues and administrative actions is a subject of contention within the Commission, is that correct?

Mr. McMILLAN. Yes.

Mr. BELL. That is correct. Yes, sir.

Mr. WHITFIELD. And, of course, the chairman would like if he wants it to be administrative, then it is not a policy matter so he would have more control over that, is that correct?

Mr. BELL. That is correct. Anything that is not policy he would have.

Mr. WHITFIELD. OK. And it says that some people have said that he acts in an unprofessional way, that he uses intimidation, that there is a work environment of intimidation, he yells at people, his

tactics have a negative impact on the camaraderie in the office or in the Agency. He rules by intimidation. His behavior creates an environment in which it is difficult for people to work with him. He even said that himself. And the thing that disturbs me about this here you have a chairman of a Nuclear Regulatory Commission that has such a dramatic impact on this country that is now resulting in legal judgments against the Federal Government paid for by taxpayers, and the clear impression is that we have one chairman over there who is unprofessional, who intimidates, who manipulates, and this has all been testified to by people that you have interviewed. Is that correct?

Mr. BELL. That is correct.

Mr. WHITFIELD. And would you say that the tenure of that would be a violation of the Energy Reorganization Act of 1974 if you are trying to have a collegial atmosphere and provide transparency and information, what has been testified to by these people, his actions would be violating that Act, wouldn't it?

Mr. BELL. I don't think it violates the Act. I mean the judgment and the personality and everything that goes with his demeanor at times people consider it unprofessional.

Mr. WHITFIELD. All right. I see my time has expired.

Mr. SHIMKUS. The gentleman's time has expired. The chair recognizes the gentleman from Pennsylvania, Mr. Pitts, for 5 minutes.

Mr. PITTS. Thank you, Mr. Chairman.

Mr. Bell, in your report you asked the chairman to respond to your office on what, if any, action he intends to take in response to your investigation. To your knowledge, does the press release last week by Chairman Jaczko that he was exonerated represent the views of the Commission?

Mr. BELL. No, that is the chairman's press statement. That is his press release to the report.

Mr. PITTS. Do you consider his press release an adequate response to your report?

Mr. BELL. That is not a response to me at all. That is just a press release that he issues publicly. So we have not had any correspondence with the chairman about the report yet.

Mr. PITTS. What do you intend to do if the chairman fails to respond formally to your report?

Mr. BELL. I mean the report stands on its own and the report will stay open until we get some response. If we don't get a response, then the actual report itself will be closed until we get some notice from the chairman. Then it would be an open report.

Mr. PITTS. All right. Regarding the issuance of the CR guidance, the executive director for operations on page 15 said, "expressed his concerns to the chairman that the Commission needed to see the memorandum." And the chairman told him "the memorandum would not be issued until the other commissioners were on board with the memorandum language." The EDO went on to testify that "the Chairman told him that all four commissioners were in agreement with the language." Is that correct?

Mr. BELL. That is what we were told, yes.

Mr. PITTS. Now, you conclude that the chairman selectively mislead three commissioners and to one commissioner he revealed

nothing at all about the CR guidance to close out the Yucca review, is that correct?

Mr. BELL. That is correct.

Mr. PITTS. So someone's testimony appears to be false here. Either the EDO is misstating that he received this assurance from the chairman or the chairman did not tell the truth to the EDO about having the agreement of the other commissioners. How do you reconcile this testimony?

Ms. RASPA. The chairman did not recall when asked if he had communicated to the EDO and exactly what he had communicated in terms of giving him the green light to issue this CR memorandum. However, the EDO, as you have indicated, does say or did tell us that the chairman told him the memorandum could be issued, all were on board, he had spoken to all the commissioners. And therefore, based on that, he signed the CR memorandum.

Mr. PITTS. Well, I think a question raised by this report here is that somebody is not telling the truth in this process. Your report lays out what people say, but you do not connect the dots. What are the next steps?

Ms. RASPA. We cannot say that the chairman lied to us. He said he did not recall what he told the EDO quite frankly. That is in our report. There is a conflict and sometimes you can't resolve that conflict.

Mr. PITTS. Is this investigation continuing? Are there other facts and issues that you believe warrant investigation?

Mr. McMILLAN. At this juncture this is still an open investigation. If something were to be presented to us that necessitated us looking at a particular issue related to the allegations themselves, then clearly we would take it under that context, you know, to assess. But as Ms. Raspa said, occasionally in an investigation, as you are cognizant of, you can't always reconcile the testimonies between people. There was no anecdotal documentary evidence to line up specifically what the chairman recalled or did not recall in relationship to the EDO's testimony that it was, in fact, told to him. So this was a point that we just could not resolve regarding that communication.

Mr. PITTS. So it appears that Chairman Jaczko has let politics trump science here, that he has manipulated the process. He has misled some of the fellow commissioners about the consequences of the actions they were taking. And I think the credibility of the NRC has been damaged. Its reputation has been damaged. There are some real serious questions about the Agency's independence and scientific integrity, and I thank you for your testimony.

Mr. SHIMKUS. The gentleman's time has expired. The chair recognizes the gentleman, Mr. Bass, for 5 minutes.

Mr. BASS. Thank you, Mr. Chairman. I just want to follow up very quickly on a line of questioning that Mr. Pitts brought up at the beginning of his time.

It is my understanding that the chairman of the NRC sent out a press release after this report was published exonerating himself. Is that the only response that he is required to make to your report?

Mr. BELL. The press release is not a response to my report. His response to my report has to be directed to me.

Mr. BASS. And he hasn't done that, right?

Mr. BELL. No, he hasn't done that. I mean we normally——

Mr. BASS. He has no obligation to either, right?

Mr. BELL. Well, no, we give him an opportunity to respond, and normally we give 120 days.

Mr. BASS. So if nothing happens in 120 days, it is the end as far as you are concerned?

Mr. BELL. Well, it is the end of what we looked at.

Mr. BASS. Yes. All right. Fair enough. I have a couple of questions regarding control of Commission information.

Mr. Bell, is it your experience that under former chairmen's staff could bring policy matters directly to the full Commission?

Mr. BELL. Under previous chairmen?

Mr. BASS. Yes. Is it your experience that under previous chairmen it was the standard that staff could bring policy matters directly to the full Commission?

Mr. BELL. I don't know firsthand but it has never come to us in a manner that was disputed like this.

Mr. BASS. All right. Fair enough. Yet your report under Chairman Jaczko the staff was not able to bring policy matters directly to Commission, were they?

Mr. McMILLAN. I can help clarify that to some degree.

Mr. BASS. Yes, certainly.

Mr. McMILLAN. The staff has periodic meetings, OK, with all of the commissioners, including the chairman. And during the course of those meetings, a variety of issues are serviced which is coming from the staff in and of itself. It is just the manner by which the current chairman handles the agenda if you would is where there has been some disconnects from previous chairmen in the Commission itself.

Mr. BASS. Well, do you think it is fair to say that the staff were constrained from communicating policy matters to the full commission or on matters that the chairman may have had a disagreement with staff?

Ms. RASPA. I think that as Mr. McMillan indicated, the staff does communicate with each of the commissioners. They generally know what the staff may be working on. What becomes more difficult is when the staff is looking for guidance and wants to, for example, get a paper up to the commissioners that that process has to go through the EDO who in turn has to go through the chairman. And it is at that point where even though the commissioners know, they may not know always real time as items are coming up they have to be prioritized.

Mr. BASS. Let me reconstruct the sentence. Do you think that the staff was constrained from communicating policy matters to commissioners at any time?

Mr. BELL. I would say yes.

Mr. BASS. OK. Fair enough. According to your report on page 29, the executive director of operations, EDO, said the chairman did not want any differences between his budget and staff's budget and sought as his budget proposal. The chairman also wanted the opportunity to review and change any of the staff's responses to the

commissioners' questions. Do you believe unilaterally editing staff information supplied to the Commission is an appropriate way to manage Agency information sharing?

Mr. BELL. Well, again, this chairman has operated differently than previous chairmen. And previous chairmen it was a more open and collaborative discussion of the budget. This chairman has sought to take the budget as his responsibility and has taken full responsibility for it. I mean if commissioner officers seek any information from any office, then all this information has to be filtered back through the chairman's office for a response.

Mr. BASS. So in your opinion, unilaterally editing staff information supplied to the Commission is an appropriate way, then, to manage Agency information?

Mr. BELL. No.

Mr. BASS. OK. Fair enough. Your report on page 37 that the chairman's budget estimate was submitted to the Commission without fundamental supporting documents presented by the staff, is that correct?

Mr. BELL. Correct. But I think that has subsequently, though the general counsel, has advised the chairman's office that when he submits budget information to any of the offices that there has to be supporting documentation to support the budget or the appearance is everything is coming from the chairman himself. So I think the chairman has recognized that in the future any budget items that go forward has to have some supporting documentation from the office that provided the budget information.

Mr. BASS. Mr. Chairman, I am out of time. I yield back.

Mr. SHIMKUS. The gentleman yields back his time. The chair recognizes the gentleman from Ohio, Mr. Latta, for 5 minutes.

Mr. LATTI. Well, thank you very much, Mr. Chairman. And thanks very much for being here today. Sitting through these hearings I have come to the conclusion if I was teaching federal administrative law in law school, I would have the perfect case study to do. And also having been a county commissioner back in the State of Ohio where we actually had rules and regulations that we had to follow, this is amazing. And I know that Chairman Barton expressed that in the last hearing, and I am just astounded what I have been hearing today and also when I read the report because, you know, I make lots of tabs and everything else.

But if I could, you know, the questions, you know, you said it is the prerogative of the chair who gets the information, but, you know, first of all, doesn't this Board sit as a quasi-judicial board, Mr. Bell? Would it sit as a quasi-judicial board?

Mr. BELL. Quasi-judicial board?

Mr. LATTI. Right, when it is making its rulings. And it has to hear from all the parties and it has to have the information come before the Board?

Mr. BELL. I think the Commission as a whole has to make a decision—

Mr. LATTI. Right, but the Board makes the decision but is it quasi-judicial as it is doing this?

Mr. BELL. Yes.

Mr. LATTI. OK. And would you also say that the Commission needs to make timely actions on their actions when they have

something come before it? Because if you don't, justice delayed is justice denied in these cases. Would that be a fair statement?

Mr. BELL. Well, to think that within a certain time frame after anything has happened that you would have motions going forward to end whatever they are in the process of doing.

Mr. LATTA. Yes, and also following along, then, when the Commission's own internal procedures say the commissioners should vote within 10 business days and parties are waiting for the outcome, isn't holding a vote unfair in that situation?

Mr. BELL. Well, it seems unfair but there is no—I mean the voting processes are relaxed. It is not enforced the way it should be.

Mr. LATTA. And I did find your report very, very interesting because on page 36 when you were talking about the chairman told the OIG he did not recall the email from his chief of staff advising him not to request an extension to vote and that he did not realize an extension was required on adjudicatory matters if a vote was not cast within 10 days. He said that the Commission does not always act in accordance with procedures. For example, the procedures say that the Commission votes on matters within 10 days, but then he goes on. He said that the Commission procedures are a guideline and not absolute rules, which take us back to what was being said here earlier, going back to the Reorganization Plan within Section 1, Section 2, you know, it really lays out what the Commission is supposed to be doing. Did the Commission act the way it should have been acting under its own rules and regulations.

Mr. BELL. No. No.

Mr. LATTA. OK. Going on. On page 29, again, this report is just fascinating. Page 29 when you were interviewing Commissioner Ostendorff talking about what was going on July the 11th, 2010, it says the general counsel, again, the general counsel—the attorney—told Commissioner Ostendorff that it was his experience that there were certain issues that the chairman does not want to hear from him on. He goes on to say “the conversation left him with the impression that there was possibly not an open environment for OGC to provide unfiltered advice to the chairman without fear of retribution.” Is that the way that we have due process being carried out in one of our administrative boards or commissions here? You know, going back to the whole idea of due process and getting something done, did that occur under the policy of the Commission?

Mr. BELL. That is what we were told. I mean this is what Commissioner Ostendorff said that the general counsel told him. Again, I mean, you know—

Mr. LATTA. OK. And again, in your opening statement, again, you know, intriguing. Page 7, again, in your opening statement, you know, it is very interesting. The first full paragraph when you said in the second line “OIG also found that although the chairman had authority to direct staff to follow the FY 2011 budget guidance, he was not forthcoming with other commissioners about his intent to stop work on the SER as part of the implementing of his closeout activities.” So again, is that proper procedure under the law and under what they have as their rules and regulations at the NRC?

Mr. BELL. No.

Mr. LATTA. OK. And just real briefly, you know, when you are saying “not forthcoming,” and I think the term by one of my fellow

colleagues appears something about being misled, you know, are we talking about a word that we should be using is a lie, to mislead? Is it a lie to not be forthcoming or are we just talking about what some people like to talk about back home—they call it a lie back home but here we are talking about a white lie?

Mr. McMILLAN. That is for a characterization, is a white lie or an outright—it was clear that the commissioners that spoke with the agents conveyed the fact that they did not have all the information to believe that that SER was going to be stopped as a part of that budget guidance memorandum. That is factually what we were told by each of those commissioners that we interviewed. Now, the characterization as to his intentions behind it, his mens rea thoughts about it, we didn't get into that quite frankly with regard to—what we were trying to do was line up what occurred when and how did this document get out without their concurrence if you would. And that is what they told us is that they had no knowledge that the SER was going to be stopped.

Mr. LATTA. Thank you. Mr. Chairman, I see my time is expired and I yield back.

Mr. SHIMKUS. The gentleman yields back his time. The chair is going to ask unanimous consent that Mr. Markey be recognized for 5 minutes. Without objection, so ordered.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

I find it highly ironic that we are having a hearing to express the majority's apparent surprise that matters related to Yucca Mountain are sometimes political. This issue has been nothing but political from the very beginning. The Department of Energy was supposed to select two scientifically appropriate sites, one east of Mississippi and one west of Mississippi River. But the Speaker of the House then said he didn't want it in Texas. That was one of the sites. The second site was in Washington State. The majority leader came from Washington State. He said I don't want it in Washington State. It was out. The third state was the salt domes in Louisiana. The chairman of the Committee on Energy from the Senate said I don't want it in Louisiana. The fourth site was in North Carolina. The ranking Republican on this committee said I don't want it in North Carolina. Mississippi itself was a potential site, but they had a very powerful delegation at that time and they said we don't want it in Mississippi.

And John Sununu as the Governor of New Hampshire on behalf of George Bush running for president in '88 said we don't want it in the granite formations of New Hampshire. And so the nuclear queen of spades wound up—not on a scientific basis but a political basis—political, political, political—in Nevada. That is how it all happened. I was here. I was saying you make a political decision you are going to wind up with big scientific problems at the end of the day, big scientific problems. So Congress actual—this committee barred the Department of Energy from looking at any other site other than Yucca Mountain. We used political science, not real science to hand that nuclear queen of spades to Nevada. That is the legacy this committee left.

The problem is that Yucca Mountain has two fault lines running through it and is in an active earthquake zone. There have been more than 600 earthquakes within 50 miles of the site within the



past 20 years. We saw just how earthquakes can impact spent nuclear fuel in Japan just a few months ago. Moreover, in 1997 scientists found that plutonium from nuclear weapons tests that had been conducted just a few decades earlier had migrated a mile through water in the rock near Yucca Mountain, which contradicted earlier assertions that the repository site was geologically isolated from the water table.

So basically what we had was Congress writing a law that Yucca Mountain was a nuclear Alcatraz from which there could be no migration of this nuclear material. But scientists said it was more like a nuclear sieve. And we heard that from the National Academy of Sciences back then in 1987 and '86. We heard that from them here, but this committee and other committees ignored that warning.

The Obama Administration bravely recognized that moving forward with Yucca Mountain was not the scientifically appropriate direction to take. DOE withdrew its license application and Congress started to slash funding for the project. Chairman Greg Jaczko then did what any permitting office would do when a building plan is cancelled. He stopped spending money processing the permit. Although members of this committee have accused him of doing something illegal, the NRC Inspector General and general counsel have both found that it was legal and entirely within his authority to do so.

Mr. Bell, you said earlier that Chairman Jaczko's press release on your report was his alone and you had no input, but isn't it true that you and your deputy saw this statement before it went out from Chairman Jaczko and you told the chairman's chief of staff that you had no objections. Is that true?

Mr. BELL. No, that is not true. I read the statement but I said that was his statement. We made no changes, nothing to the statement. I just saw the statement because he said he was going to put it out.

Mr. MARKEY. Did you say you had an objection to him putting it out?

Mr. BELL. I said I didn't oppose him to releasing the statement.

Mr. MARKEY. You did not oppose him in putting out that statement?

Mr. BELL. No. I mean—

Mr. MARKEY. OK. Great. So in finding, number one, you said two of the commissioners didn't understand that when the chairman told him that he would be using the appropriations process to proceed with closure of the Yucca Mountain program, this meant the documents necessary for the Yucca Mountain license would cease being prepared. On page 23, your report notes that when Chairman Jaczko suspected that one of the commissioners didn't understand the discussion they had, he directed his staff to follow up with the commissioner's staff to be sure it was clear. Do you believe that Chairman Jaczko is responsible for a failure by other commissioners to understand their support for a document that said it would begin the closure of Yucca Mountain's technical review and adjudicatory activities when the license application was withdrawn even after he tried to explain it to him?

Mr. McMILLAN. Clearly, he said Chairman Jaczko is irresponsible.

Mr. MARKEY. Is it his fault they didn't understand it.

Mr. McMILLAN. He had a responsibility to ensure that they understood the content of the four squares of that piece of paper. And if they are saying—and what they related to us during the interviews was they never came to understand that the SER—and I think sometimes those are differences—

Mr. MARKEY. Can I tell you the truth? I have a hard time when two commissioners on the Nuclear Regulatory Commission can't understand something this prosaic, this simple, when they have to understand the most complex nature of nuclear materials. So to say that they didn't understand something so fundamental, OK, as to the way in which the regulatory process works, in my opinion they did not do their job. They had a responsibility after they were told that that was the route that they were going to go.

Mr. SHIMKUS. The gentleman's time is expired.

Mr. MARKEY. I thank the chairman.

Mr. SHIMKUS. The chair now recognizes Mr. Harper for 5 minutes.

Mr. HARPER. Thank you, Mr. Chairman.

Mr. Bell, when the staff reported in March of 2010 to the Commission about their plans for completing the Yucca Safety Evaluations and tight budget constraints, their plans were to complete Volume I and Volume III of the SER not later than, I believe, August and November of 2010 respectively. Is that correct?

Mr. BELL. That is correct, sir.

Mr. HARPER. Now, according to your report, the EDO and technical staff believed that even if DOE were to withdraw the application, it would benefit the country to have completed the technical review. Is that correct?

Mr. BELL. That is correct, sir.

Mr. HARPER. The most critical portion of the technical review, the SER Volume III was almost complete and on track to be completed well before November according to staff. Is that correct?

Mr. BELL. Yes.

Mr. HARPER. Completion by the end of August is consistent with a not-later-than-November schedule reported to the Commission in March, isn't it?

Mr. McMILLAN. Sir, just on that last question—

Mr. HARPER. Yes?

Mr. McMILLAN [continuing]. With regards to the completion, that was not necessary concurrence and approval. OK. While it might very well have been completed by the staff to be forwarded up, it still had to go through a concurrence process including OGC, so I just want to make sure we clarified that point.

Mr. HARPER. Certainly. Thank you.

Mr. McMILLAN. Thank you.

Mr. HARPER. But when the chairman learned that the report could be ready in August before the fiscal year, is it true that he inserted himself into the process in June and directed staff to slow down?

Mr. McMILLAN. He directed the staff to maintain the current published schedule with regards to the release of the various products.

Mr. HARPER. OK. But did he not in fact—did you have an addition to that?

Ms. RASPA. I would just note that the August time frame was for Volume I. It was not for Volume III. Volume III was anticipated in November. However, the majority of the work had been done and they believed they could get both volumes ahead of schedule.

Mr. HARPER. OK. But in fact—

Mr. SHIMKUS. Would the gentleman yield just for a second?

Mr. HARPER. Yes.

Mr. SHIMKUS. Which is amazing that a government agency would be good enough to move quickly instead of being way behind. So in that aspect I would applaud the NRC for being prompt.

Mr. HARPER. And I will go back, Mr. Bell, and ask this. In fact, though, the chairman did direct staff to issue the SER Volume III not earlier than November. Isn't that correct?

Ms. RASPA. His June 11 memorandum speaks to not issuing Volume I prior to schedule. It does also speak about other volumes but only Volume I is specifically identified as not being released prior to August.

Mr. HARPER. OK. But prior to November was Volume III.

Ms. RASPA. Volume III was due in November, correct.

Mr. HARPER. Now, was the impact of his actions in the SER Volume III would not be completed by what date? Did you say October 1?

Ms. RASPA. November.

Mr. McMILLAN. November.

Mr. HARPER. November, OK. Now, as your report on page 27, when senior staff discussed the chairman's actions to slow the completion of the SER, they indicated to the chairman that it would be contrary to the Agency's value of openness and transparency to slow down that work. Is that correct?

Ms. RASPA. Our report reflects that one manager told us that, correct.

Mr. HARPER. So at least one commissioner also warned the chairman that it was not a good idea to slow the process, is that correct?

Mr. McMILLAN. Yes.

Ms. RASPA. One commissioner, yes, also agreed that it shouldn't be slowed.

Mr. HARPER. Did the chairman listen to the senior staff or other commissioners and allow the staff review to continue at the same pace the staff themselves had set?

Ms. RASPA. No.

Mr. HARPER. The staff also informed the Commission in March 30, 2010, that it planned to continue to work on any remaining SER volumes until fiscal year 2010 funds were exhausted, is that correct?

Mr. McMILLAN. Correct.

Mr. BELL. Yes.

Mr. HARPER. Were those funds exhausted by November of 2010?

Ms. RASPA. No, they were not. By the end of the fiscal year 2010 there was approximately \$7 million remaining.

Mr. HARPER. OK. And, in fact, according to your report, the NRC staff including the EDO assumed as late as mid-September that the CR guidance would allow for continuing the license review with those available funds as you said. So the draft EDO CFO memos of mid-September bear this out. So despite the chairman's instructions to slow down, staff planned to continue work using those fiscal year 2010 funds. But the chairman changed that. That is where we are, right?

Ms. RASPA. The senior staff always anticipated that they would be able to complete certain volumes and they were relying on fiscal year 2010 funds to do that.

Mr. HARPER. So this was the chairman's strategy to slow-walk these critical reports to October, early November, and then use his budget authority to ensure the staff's findings would not be made public. Is that correct?

Mr. MCMILLAN. I think the report is reflective of the fact that once they got into budget space, you would have to use another mechanism by which to change the course. And since you did have the budget guidance memorandum that everyone was complying with, it would have taken a COM at that juncture then to move it over into policy space.

Mr. HARPER. My time is almost up. Let me ask this question. Did your investigation examine whether the chairman's actions were directed by or coordinated with the White House or Senator Harry Reid?

Mr. MCMILLAN. We had no indications or inferences by anyone that came to us that assured us or stated to us that that occurred.

Mr. HARPER. My question was did you examine that possibility? Did you look into that with any of the witnesses?

Mr. MCMILLAN. There was nothing that would lead us to that from the information of the interviews that we conducted where anyone stated that at all so we didn't go and probe any further in that regard. We stayed within regards to the allegation that was proffered to us. And no one said that there was any interference by the White House at all.

Mr. HARPER. Right. But did you ask?

Mr. MCMILLAN. I want to get back with you on that one particular point just to ensure in our notes, but I just want to assure you that it never came up.

Mr. HARPER. OK. But my question is did you ask it through any communications along the lines of what I just inquired?

Mr. MCMILLAN. I would have to get back with you with regard to that specific question.

Mr. HARPER. Thank you. With that, I yield back.

Mr. SHIMKUS. The gentleman's time has expired. The chair now recognizes the gentleman from Louisiana, Mr. Cassidy, for 5 minutes.

Mr. CASSIDY. Thank you. Now, I appreciate Mr. Markey's efforts to defend his former employee, but he alleged that maybe those other commissioners were derelict in their responsibility of learning as much as they could learn. Did you find any evidence of dereliction of duty in learning other issues by the other commissioners?

Mr. MCMILLAN. Again, I think it was clear that when the commissioners were interviewed by our office, they were very con-

cerned by the fact that they felt they did not have all the information.

Mr. CASSIDY. OK. Now earlier I think you, Mr. Bell, mentioned that the senior staff felt constrained in conveying information to the other commissioners. But just to be clear, would they have been constrained without instructions from the chairman as to what to communicate? Would they on their own have said oh, we shall be constrained because whatever or would it have been a directive from their chairman to not communicate certain issues?

Mr. BELL. Well, I think it was pretty common knowledge that any communications that went back to the chairman had to go through the chairman's office.

Mr. CASSIDY. So the constraint would have come from the chairman.

Mr. BELL. It was just the way this chairman has elected to do business, that if it is not a policy issue and his office can control whatever it was, whatever request commissioners made, whether it be the budget or otherwise. Before the commissioners got an answer, it had to be vetted through the chairman's office.

Mr. CASSIDY. So ultimately, just in a word, it was the chairman's responsibility. It was the chairman who was doing the restraining?

Mr. BELL. Correct.

Mr. CASSIDY. Correct. Now, you know, I have been here for 3 years and I look at taxpayers who just see \$15 billion frittered away and I have to ask, although you are clear that he may have been within the letter of the law—there is a question of fact and we can't resolve this question of fact—do you think he was within the spirit of the law in terms of the Reorganization Act and was he within the spirit of the law communicating to his fellow commissioners that which they needed to know?

Mr. BELL. Again, I think the chairman was given just enough information for them to understand what he wanted to do.

Mr. CASSIDY. Now, again, is that within the spirit of the law as originally—I mean, I can imagine somebody writing the law way back when. How do we account for a control freak who decides to only define as policy issues those things which are relatively unimportant, to define others as budget issues, and then to be selective in presentation. That would be very hard to write a statute to exclude what someone attempts to do. Was he within the spirit of the law in terms of communication with his fellow commissioners?

Mr. McMILLAN. That, in fact, could be called into question as to whether or not he was within the spirit of the law as designed for an open collaborative engagement with the other commissioners.

Mr. CASSIDY. Now, as regards this question of fact because earlier, ma'am, you had mentioned it is a question of fact. The EDO suggests that he was told by the chairman not to do something but the chairman does not recall. A little bit of a dodge, but let us give it to him. Now, I have been deposed before and I watch law programs on TV. There is a milieu in which people try to establish which side of the question of fact is most likely true. Is there a pattern on one side of duplicity, of hiding, of ignoring the spirit of the law, again, doing whatever you can to avoid certain outcomes. Does this person have a motivation to not recall or is there, on the other side, such motivation? Now, it does seem as if, as I look at this

question of fact, I am much more likely to believe the EDO and I am much more likely to think that if this were to go to some sort of judicial proceeding that the judge would be more likely to believe the EDO. Do you have any thoughts on that?

Mr. BELL. I don't have any thoughts.

Mr. CASSIDY. OK. Now, lastly, I see that in these confirmation hearings before the Senate in 2005, Mr. Jaczko said that he was going to recuse himself from all issues regarding Yucca Mountain for a year, and at that point he was hopeful to have demonstrated that he would absolutely be fair and objective and that there would not longer be a need to recuse himself. In your opinion, do the actions of the chairman indicate that he has been fair and objective regarding the Yucca Mountain issue?

Mr. BELL. Well, I think the time frame that he referred to was when he was a commissioner——

Mr. CASSIDY. Yes?

Mr. BELL. [continuing]. And during that time frame, anything with Yucca Mountain he did recuse himself from.

Mr. CASSIDY. But that is not my question. My question is he said he did not need to recuse himself from consideration of Yucca Mountain issues throughout his entire tenure on NRC because he had proven himself to be fair and objective. I think that is fair and objective kind of like Fox News. Has he proven himself to be fair and objective in your opinion regarding Yucca Mountain?

Mr. BELL. Well, not in terms of the information-sharing aspect of it anyway.

Mr. CASSIDY. OK.

Mr. McMILLAN. Also, sir, I wanted to clarify the questions you asked previously about direction from the White House. We did, in fact, ask that question and no one indicated that there was any direction from the President or the White House to close the program. That question was, in fact, asked.

Mr. CASSIDY. Thank you. I will yield back.

Mr. GREEN. I was just going to say, Mr. Chairman, one, I didn't know it was so easy to get a law license. I watch it on TV. But I would agree that this chairman might be as fair and objective as Fox News is.

Mr. SHIMKUS. We thank the ranking member for that interrogatory there.

We do want to thank you for coming. We do appreciate the effort that you did and the position that you hold within the NRC is a tough position because you are checking up on yourself. And so we know you have worked diligently and we do appreciate it. And I want to thank you for coming and for the members who have participated and their devotion to the hearing today.

The committee rules provide that members have 10 days to submit additional questions for the record to the witnesses. And then if you then receive those, if you would reply to us, we would appreciate that.

Again, thanking you for your attendance, the hearing stands adjourned.

[Whereupon, at 11:53 a.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]



**UNITED STATES**  
**NUCLEAR REGULATORY COMMISSION**  
WASHINGTON, D.C. 20555-0001

OFFICE OF THE  
INSPECTOR GENERAL

September 28, 2011

The Honorable John Shimkus  
Chairman

The Honorable Gene Green  
Ranking Member

U.S. House of Representatives Sub Committee  
On Environment and Economy Room  
2125 Rayburn House Office Building  
Washington, DC 20515-6115

Dear Representative Shimkus and Representative Green:

As requested, I have prepared the enclosed responses to questions posed by yourself and the Honorable Tim Murphy following my testimony from the June 14, 2011, hearing before the U.S. House of Representatives Committee on Energy and Commerce concerning my office's report, *NRC Chairman's Unilateral Decision To Terminate NRC's Review of the DOE Yucca Mountain Repository License Application*. Please contact me at 301-415-5933 if you have additional questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Hubert T. Bell".

Hubert T. Bell  
Inspector General

Enclosure: As stated

**The Honorable John Shimkus**

**1. Did you find additional situations, other than the Yucca Mountain proceedings, in which matters remained pending before the Commission for an extended period of time? If so, please explain.**

As part of its investigation into the Yucca Mountain matter, the Office of the Inspector General (OIG) reviewed 13 adjudicatory SECY paper files corresponding to SECY papers to assess whether SECY voting and polling procedures were followed in connection with these documents. These files corresponded with adjudicatory SECY papers issued between March 2008 and August 2010 and were considered by NRC's Office of the General Counsel (OGC) to be "closed" adjudicatory matters, which OGC provided to OIG for review. OGC used the term closed to indicate matters for which affirmation votes had been held and for which OGC anticipated no additional litigation.

On average, the Commission conducted an affirmation vote 65 days after the issuance of an adjudicatory SECY paper and 16 days after participating Commissioners had submitted their voting sheets. The longest time span between issuance of a SECY paper and an affirmation vote was 188 days and the shortest time span was 7 days. The longest time span between submission of all vote sheets and an affirmation vote was 52 days and the shortest was 1 day.

In comparison, the Commission conducted its affirmation vote on SECY-10-0102 (DOE request to withdraw Yucca Mountain license application) 395 days after the issuance of the SECY-10-0102. This was 315 days after all participating Commissioners had submitted their vote sheets on the matter.

Average # days from issuance of adjudicatory SECY to affirmation vote	Average # days from completion of vote on adjudicatory SECY to affirmation vote	Days between issuance of SECY-10-0102 and affirmation vote	Days between completion of SECY-01-0102 voting and affirmation vote
65	16	395	315

**2. What are the internal procedures referenced in the above finding?**

The *Internal Commission Procedures* describe the procedures governing the conduct of business at the Commission level of the NRC. NRC's General Counsel told OIG during the investigation that the *Internal Commission Procedures* should generally be followed, but that deviations are permitted as the procedures are not binding law.

At the time OIG issued its investigative report, the Commission procedures in effect at the time<sup>1</sup> stated the Commissioners were expected to vote on adjudicatory SECY papers no later than 10 business days after receipt of the paper. Once a majority of the Commission had voted, a request for an extension of time to vote beyond the 10-business day voting period, or a request to delay the affirmation of the vote, was to be granted only by a majority of the Commission.

<sup>1</sup> The procedures have been updated since completion of OIG's investigation. The *Internal Commission Procedures* currently available on NRC's Web site are dated July 2011.



Per the procedures, the Secretary of the Commission was responsible for scheduling a weekly affirmation session. It was also the Secretary's responsibility to, within 48 hours of the issuance of an adjudicatory SECY paper, notice the affirmation of the paper so that the affirmation would be held at the earliest available date unless a majority of the Commission had advised that the affirmation should be set for a later date. Although the Internal Commission Procedures stated that it was the Secretary's responsibility to schedule these sessions, they also stated that in order for Commissioners to vote orally at meetings, the Chairman must call for the vote.

As noted in the investigative report, however, Chairman Jaczko's practice was not to call an affirmation vote on a matter until there was unanimous agreement with the affirmation notice language. The General Counsel told OIG that if there is no consensus among the Commissioners, it is difficult for the Secretary to go forward with a draft affirmation notice or order to reflect a consensus position. The General Counsel said that this was the situation with the high-level waste matter and that as a theoretical matter, this could "rest in limbo" until NRC was posed with a forcing function, such as being party to litigation against the Government.

Since issuance of OIG's investigative report, the Commission has updated its procedures. OIG has not reviewed the updated procedures to determine whether there are significant changes relative to voting on adjudicatory SECY papers.

**3. Are there any enforcement mechanisms to the Commission procedures that would make for a more orderly and certain period for Commission action, if adhered to? What changes if any would you suggest?**

At the time OIG issued its investigative report, there was no enforcement mechanism relative to the *Internal Commission Procedures* on voting. The Secretary had responsibility for tracking votes, prompting Commissioners to vote after a majority of Commissioners had voted, polling Commissioners for extension requests if such a request were made, moving issues to closure after a majority of Commissioners had voted, and resolving different points of view if there was not a majority position on a vote. However, as noted in the investigative report, procedures on voting timeliness, extension requests, and polling were not routinely followed. Furthermore, as noted above, it has been Chairman Jaczko's practice not to move to affirmation until there is agreement on the affirmation notice language.

Although the topic of enforcement of Commission procedures was not specifically explored during the investigation, it is presumably difficult for the Secretary, who reports to the Commission, the highest level of authority within NRC, to ensure the Commission's adherence to its procedures.

As noted above, the Commission has updated its procedures since the issuance of the investigative report. OIG has not reviewed the new procedures to determine whether there are new enforcement mechanisms. However, based on our knowledge gained through the Yucca Mountain investigation, OIG suggests the following to improve the likelihood of the Commission adhering to its own procedures:

1. Clearly articulate, in the *Internal Commission Procedures* or an appropriate management directive, a delegation of responsibility to the Secretary, or another party, to document compliance with the *Internal Commission Procedures* on voting. To support the Secretary's (or another individual's) ability to document compliance with these procedures by those to whom this individual reports, it would be important to include some type of assessment and reporting requirement so that lack of adherence to procedures would be known to parties outside of the Commission. For example, there

could be a requirement for the Secretary to annually report on compliance with Commission procedures. This report would be provided to the Commission and upon request be made available to Congress.

Include in the *Internal Commission Procedures* a description of the process that occurs between completion of an adjudicatory vote and the conduct of an affirmation vote. This description would articulate what needs to be accomplished, what parties are involved, and timeframes and deadlines for steps in that process. Such a description would help make this portion of the process more transparent and make the Commission more accountable for this part of the process.

**The Honorable Tim Murphy**

**1. Last June 29, the ASLB ruled that DOE did not have the authority to withdraw its license application. Less than a day after the ALSB issued its decision concluding that DOE did not have the authority to withdraw the license application with prejudice, the NRC on its own reached out and asked the parties to quickly brief the question of whether it should review the order and if so, whether the ALSB order should be upheld. Those responses were filed last July, yet the NRC has not ruled. Is it unusual for the NRC on its own to reach out within a day of a Board decision and seek review of a Board decision before any party has asked for it?**

OIG did not examine the process by which NRC sought review of the ASLB's decision, and therefore cannot speak to it in this response.

**2. Are you aware of any cases where the NRC has ever reached out within a day of a Board decision and asked the parties to brief whether the NRC should consider the case, and file those briefs within 10 days?**

We are not aware of such a situation.

**3. Are you aware of any case where the NRC has reached out to ask parties to brief whether it should consider reviewing a Board order, then never acting on the issue?**

We are not aware of such a situation.

**4. Did you investigate why the NRC took this unprecedented action in this case?**

This was not within the scope of OIG's investigation; therefore, we do not know whether this action was unprecedented.

**5. Did you investigate whether the question of whether the NRC should consider the Board order originated with a particular commissioner? If so, which one?**

We did not investigate this issue.

Committee on Energy and Commerce  
Subcommittee on Environment and Economy

*The NRC Inspector General Report on the NRC Chairman's Unilateral Decision to Terminate NRC's Review of  
the DOE Yucca Mountain Repository License Application*

June 14, 2011

**Exhibits Index**

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3	Memorandum TO: R. William Borchardt FROM: Gregory B. Jaczko SUBJECT: Schedule for HLW SER	June 11, 2010
4	Draft Memorandum FROM: R.W. Borchardt, Executive Director for Operations SUBJECT: Early Guidance for the Continuing Resolution	August 31, 2010
5	Draft Memorandum FROM: J.E. Dyer, CFO and R.W. Borchardt, Executive Director of Operations SUBJECT: Guidance Under a Fiscal Year 2011 Continuing Resolution	September 13, 2010
6	Draft Memorandum TO: Office Directors and Regional Administrators FROM: J.E. Dyer, CFO and R.W. Borchardt, Executive Director of Operations SUBJECT: Guidance Under a Fiscal Year 2011 Continuing Resolution	September 14, 2010
7	Draft Memorandum TO: Office Directors and Regional Administrators FROM: J.E. Dyer, CFO and R.W. Borchardt, Executive Director of Operations SUBJECT: Guidance Under a Fiscal Year 2011 Continuing Resolution	September 27, 2010
8	Memorandum TO: Office Directors and Regional Administrators FROM: J.E. Dyer, CFO and R.W. Borchardt, Executive Director of Operations SUBJECT: Guidance Under a Fiscal Year 2011 Continuing Resolution	October 4, 2010
9	Memorandum TO: Chairman Jaczko, Commissioner Svinicki, Commissioner Apostolakis, Commissioner Magwood, Commissioner Ostendorff FROM: Catherine Haney, Director Office of Nuclear Material Safety and Safeguards SUBJECT: Update on the Yucca Mountain Program	February 4, 2011
10	Memorandum TO: Chairman Jaczko FROM: Hubert T. Bell, Inspector General SUBJECT: NRC Chairman's unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository License Application (OIG CASE NO. 11-05)	June 6, 2011
11	NRC News, Press Release No. 11-099, <i>Statement of NRC Chairman Gregory B. Jaczko</i>	June 8, 2011

### A. REORGANIZATION PLAN NO. 1 OF 1980

5 USC App. I

Prepared by the President and submitted to the Senate and the House of Representatives in Congress assembled March 27, 1980,<sup>1</sup> pursuant to the provisions of chapter 9 of title 5 of the United States Code.<sup>2</sup>

#### Nuclear Regulatory Commission

**Sec. 1.** (a) Those functions of the Nuclear Regulatory Commission, hereinafter referred to as the "Commission", concerned with:

(1) policy formulation;

(2) rulemaking, as defined in section 553 of title 5 of the United States Code, except that those matters set forth in 553(a)(2) and (b) which do not pertain to policy formulation orders or adjudications shall be reserved to the Chairman of the Commission;

(3) orders and adjudications, as defined in section 551 (6) and (7) of title 5 of the United States Code;

shall remain vested in the Commission. The Commission may determine by majority vote, in an area of doubt, whether any matter, action, question or area of inquiry pertains to one of these functions. The performance of any portion of these functions may be delegated by the Commission to a member of the Commission, including the Chairman of the Nuclear Regulatory Commission, hereinafter referred to as the "Chairman", and to the staff through the Chairman.

(b)(1) With respect to the following officers or successor officers duly established by statute or by the Commission, the Chairman shall initiate the appointment, subject to the approval of the Commission; and the Chairman or a member of the Commission may initiate an action for removal, subject to the approval of the Commission:

(i) Executive Director for Operations,

(ii) General Counsel,

(iii) Secretary of the Commission,

(iv) Director of the Office of Policy Evaluation,

(v) Director of the Office of Inspector and Auditor,

(vi) Chairman, Vice Chairman, Executive Secretary, and Members of the Atomic Safety and Licensing Board Panel,

(vii) Chairman, Vice Chairman and Members of the Atomic Safety and Licensing Appeal Panel.

(2) With respect to the following officers or successor officers duly established by statute or by the Commission, the Chairman, after consultation with the Executive Director for Operations, shall initiate the appointment, subject to the approval of the Commission, and the Chairman, or a member of the Commission may initiate an action for removal, subject to the approval of the Commission:

(i) Director of Nuclear Reactor Regulation,

(ii) Director of Nuclear Material Safety and Safeguards,

(iii) Director of Nuclear Regulatory Research,

(iv) Director of Inspection and Enforcement.

(v) Director of Standards Development.

<sup>1</sup>As amended May 5, 1980.

<sup>2</sup>This Reorganization Plan was originally approved under special Congressional procedures; the Supreme Court decision in *Immigration & Naturalization Service vs. Chadha* (462 US 919 (1983)) called into question the legality of this plan. Congress responded by enacting this Reorganization Plan in P.L. 98-614.

(3) The Chairman or a member of the Commission shall initiate the appointment of the Members of the Advisory Committee on Reactor Safeguards, subject to the approval of the Commission. The provisions for appointment of the Chairman of the Advisory Committee on Reactor Safeguards and the term of the members shall not be affected by the provisions of this Reorganization Plan.

(4) The Commission shall delegate the function of appointing, removing and supervising the staff of the following offices or successor offices to the respective heads of such offices: General Counsel, Secretary of the Commission, Office of Public Evaluation, Office of Inspector and Auditor. The Commission shall delegate the functions of appointing, removing and supervising the staff of the following panels and committee to the respective Chairman thereof: Atomic Safety and Licensing Board Panel, Atomic Safety and Licensing Appeal Panel and Advisory Committee on Reactor Safeguards.

(c) Each member of the Commission shall continue to appoint, remove and supervise the personnel employed in his or her immediate office.

(d) The Commission shall act as provided by subsection 201(a)(1) of the Energy Reorganization Act of 1974, as amended (42 USC 5841 (a)(1), as amended) in the performance of its functions as described in subsections (a) and (b) of this section.

**Sec. 2.** (a) All other functions of the Commission, not specified by section 1 of this Reorganization Plan, are hereby transferred to the Chairman. The Chairman shall be the official spokesman for the Commission, and shall appoint, supervise, and remove, without further action by the Commission, the Directors and staff of the Office of Public Affairs and the Office of Congressional Relations. The Chairman may consult with the Commission as he deems appropriate in exercising this appointment function.

(b) The Chairman shall also be the principal executive officer of the Commission, and shall be responsible to the Commission for developing policy planning and guidance for consideration by the Commission; shall be responsible for the Commission for assuring that the Executive Director for Operations and the staff of the Commission (other than the officers and staff referred to in sections (1)(b)(4), (1)(c) and (2)(a) of this Reorganization Plan) are responsive to the requirements of the Commission in the performance of its functions; shall determine the use and expenditure of funds of the Commission, in accordance with the distribution of appropriated funds according to major programs and purposes approved by the Commission; shall present to the Commission for its consideration the proposals and estimates set forth in subsection (3) of this paragraph; and shall be responsible for the following functions, which he shall delegate, subject to his direction and supervision, to the Executive Director for Operations unless otherwise provided by this Reorganization Plan:

(1) administrative functions of the Commission;

(2) distribution of business among such personnel and among administrative units and offices of the Commission;

(3) preparation of

(i) proposals for the reorganization of the major offices within the Commission;

(ii) the budget estimate for the Commission; and

(iii) the proposed distribution of appropriated funds according to major programs and purposes.

(4) appointing and removing without any further action by the Commission, all officers and employees under the Commission other than those whose appointment and removal are specifically provided for by subsections 1 (b), (c) and 2(a) of this Reorganization Plan.

(c) The Chairman as principal executive officer and the Executive Director for Operations shall be governed by the general policies of the Commission and by such regulatory decisions, findings, and determinations, including those for reorganization proposals, budget revisions and distribution of appropriated funds, as the Commission may by law, including this Plan, be authorized to make. The Chairman and the Executive Director for Operations, through the Chairman, shall be responsible for insuring that the Commission is fully and currently informed about matters within its functions.

**Sec. 3.** (a) Notwithstanding sections 1 and 2 of this Reorganization Plan, there are hereby transferred to the Chairman all the functions vested in the Commission pertaining to an emergency concerning a particular facility or materials licensed or regulated by the Commission, including the functions of declaring, responding, issuing orders, determining specific policies, advising the civil authorities, and the public, directing, and coordinating actions relative to such emergency incident.

(b) The Chairman may delegate the authority to perform such emergency functions, in whole or in part, to any of the other members of the Commission. Such authority may also be delegated or re-delegated, in whole or in part to the staff of the Commission.

(c) In acting under this section, the Chairman, or other member of the Commission delegated authority under subsection (b), shall conform to the policy guidelines of the Commission. To the maximum extent possible under the emergency conditions, the Chairman or other member of the Commission delegated authority under subsection (b), shall inform the Commission of actions taken relative to the emergency.

(d) Following the conclusion of the emergency, the Chairman, or the member of the Commission delegated the emergency functions under subsection (b), shall render a complete and timely report to the Commission on the actions taken during the emergency.

**Sec. 4.** (a) The Chairman may make such delegations and provide for such reporting as the Chairman deems necessary, subject to provisions of law and this Reorganization Plan. Any officer or employee under the Commission may communicate directly to the Commission, or to any member of the Commission, whenever in the view of such officer or employee a critical problem or public health and safety or common defense and security is not being properly addressed.

(b) The Executive Director for Operations shall report for all matters to the Chairman.

(c) The function of the Director of Nuclear Reactor Regulation, Nuclear Material Safety and Safeguards, and Nuclear Regulatory Research of reporting directly to the Commission is hereby transferred so that such officers report to the Executive Director for Operations. The function of receiving such reports is hereby transferred from the Commission to the Executive Director for Operations.

(d) The heads of the Commission level offices or successor offices, of General Counsel, Secretary to the Commission, Office of Policy Evaluation, Office of Inspector and Auditor, the Atomic Safety and Licensing Board Panel and Appeal Panel, and Advisory Committee on Reactor Safeguards shall continue to report directly to the Commission and the Commission shall continue to receive such reports.

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**272 Reorganization Plan No. 1 of 1980**

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**Sec. 5.** The provisions of this Reorganization Plan shall take effect October 1, 1980, or at such earlier time or times as the President shall specify, but no sooner than the earliest time allowable under section 906 of title 5 of the United States Code.<sup>3</sup>

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<sup>3</sup>45 FR 40561.

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March 30, 2010

MEMORANDUM TO: Chairman Jaczko  
Commissioner Klein  
Commissioner Svinicki

FROM: R. W. Borchardt */RA by Martin Virgilio for/*  
Executive Director for Operations

SUBJECT: PLANS FOR THE HIGH-LEVEL WASTE  
REPOSITORY PROGRAM

The purpose of this memorandum is to inform the Commission of the U.S. Nuclear Regulatory Commission (NRC) staff's plans for its repository licensing review and the status of the infrastructure for the associated adjudicatory proceeding, in light of recent developments, including the allocation of Fiscal Year (FY) 2010 funding. In announcing the Administration's budget for FY 2011, on February 1, 2010, the President directed the U.S. Department of Energy (DOE) to "discontinue its application to the NRC for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010...." On March 3, 2010, DOE filed a motion with Construction Authorization Board 4 (CAB4) to withdraw its license application for the proposed geologic repository.

Background

On June 3, 2008, DOE submitted the Yucca Mountain Repository License Application to the NRC seeking authorization to construct a geologic repository at Yucca Mountain, NV. On September 8, 2008, the staff accepted DOE's application for docketing and review. In response to a notice of hearing published in the *Federal Register* on October 22, 2008, intervention petitions were filed. In May 2009, two interested governments, eight parties, and nearly 300 contentions were admitted to the proceeding. In August 2009, two additional parties were admitted after satisfying Licensing Support Network (LSN) requirements. The allocation of FY 2010 funding is depicted in the pie chart in Enclosure 1. Enclosure 2 provides a revised schedule of tentative completion dates for Safety Evaluation Report Volumes.

Licensing Proceedings

On February 1, 2010, DOE moved for an interim suspension of discovery as well as a stay of most aspects of the construction authorization proceeding through the disposition of an additional motion (which DOE said it would file within 30 days) seeking to withdraw, with prejudice, its license application. On February 2, 2010, CAB4 granted DOE's unopposed request for an interim suspension of discovery, pending disposition of DOE's motion to stay.

Contact: Janet Kotra, HLWRS  
301-492-3190

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On February 16, 2010, CAB4 granted DOE's motion to stay the proceeding, pending resolution of DOE's expected motion to withdraw its license application. On March 3, 2010, DOE filed a motion seeking to withdraw its license application, with prejudice. By order dated March 5, 2010, CAB4 indicated it will not rule on that motion until after it rules on intervention petitions filed by the State of South Carolina, the State of Washington, and Aiken County, SC. Since that order, additional intervention petitions have been filed by the National Association of Regulatory Utility Commissioners and by the Prairie Island Indian Community.

Licensing Review

As the staff informed the Commission in a March 27, 2009, memorandum and the Commissioner's assistants in a June 5, 2009, note, the resources appropriated in FY 2008 through FY 2010 were not enough for the Agency to adhere to the schedule outlined in Appendix D, "Schedule for the Proceeding on Consideration of Construction Authorization for a High-Level Waste Geologic Repository," to Title 10 of the *Code of Federal Regulations* (10 CFR) Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders." Because of the reduced funding, the staff was obliged to slow its review of the license application and to develop its safety evaluation report (SER) in segments. On January 27, 2010, the staff informed CAB4 that it will complete SER Volumes 1 and 3 by no later than August and November 2010, respectively. The staff is continuing with its safety review and SER preparation at this time. However, in light of the President's FY 2011 budget, and assuming Congress provides no additional funding or direction to the contrary, staff will discontinue work on any remaining SER volumes once FY 2010 funds are exhausted and inform the Presiding officer in the proceeding of its actions. As of the end of February 2010, DOE had responded to all the staff's more than 600 requests for additional information. At this time, the staff has not identified a need for any additional information from DOE to complete the SER.

Knowledge Capture and Orderly Closure

For close to 30 years, as the United States has considered Yucca Mountain and other sites for deep geologic disposal of spent fuel and high-level waste (HLW), the NRC's HLW program has amassed a vast amount of information about, and experience with, the technical and regulatory issues associated with the potential licensing of a repository. The staff intends to preserve this knowledge as a resource for future use. In the event that the license review is terminated, the staff would document the current status of the license review in a NUREG document to capture much of the Yucca Mountain-specific technical and regulatory knowledge gained by the staff. Also, the staff will need to identify and retain other important technical and regulatory knowledge that could support future changes to the NRC's regulatory framework for HLW and spent fuel disposal. Much of this knowledge has been developed by the NRC staff and the Center for Nuclear Waste Regulatory Analyses (Center). The continued viability of the NRC's HLW Program, including the Center, is critical to maintain the core skills and range of expertise necessary for the NRC to implement future direction in the national program for HLW and spent nuclear fuel disposal. As much as possible, the staff will continue to retain this valuable source of skills and technical insight with fee-based funds and limited use of Nuclear Waste Fund monies.

Adjudicatory Hearing Infrastructure

The Atomic Safety and Licensing Board Panel (Panel) intends to maintain the infrastructure for the adjudicatory hearing associated with the HLW repository licensing proceeding, including the LSN, the Digital Data Management System (DDMS), and the Las Vegas Hearing Facility, until the Agency has completed the adjudicatory process regarding the DOE withdrawal request. If

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Commissioners

3

there is a final decision terminating the HLW repository licensing proceeding, and the Panel receives Commission direction that no further basis exists for maintaining any infrastructure related to the HLW repository licensing proceeding, the Panel anticipates that it will be able to remove DDMS components from the Las Vegas Hearing Facility and close the facility within 4 to 6 months. (Under the current lease, the Government must give the lessor at least 120 days notice of its intent to vacate.) Assuming adequate fee-based funding, the DDMS would remain functional within the Panel's Rockville, MD, hearing facility for use in the many combined license and other proceedings that the Panel will conduct over the next several years.

Whether the LSN should remain viable as a knowledge management tool once the HLW repository proceeding is terminated is one of the matters currently pending before CAB4. As noted by LSN Administrator Daniel Graser in his December 17, 2009, memorandum to CAB4, the LSN's principal function as the unified search index for the nearly four million documents in the HLW document collections for the various participants will be irrecoverably nullified if the DOE document collection (which constitutes 99 percent of the documentary material available via the LSN) is taken offline and archived. In the event of a non-appealable decision to permit DOE to remove its collection from the LSN and to discontinue the system, the Panel would require approximately 4 months from a final Commission determination to terminate the LSN to complete the decommissioning process.<sup>1</sup>

## Enclosures:

1. High-Level Waste Budget for Fiscal Year 2010 (Pie Chart)
2. Tentative Completion Dates for Safety Evaluation Report Volumes

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Date	MYoung by phone	JVhetstine by email	MWeber	RWBorchardt (MVirgilio for)	
Name	3/11/10	3/09/10	3/ 24/10	3/30/10	

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<sup>1</sup> Although recent events, including the filing of several additional intervention petitions, suggest an increased level of adjudicatory activity over the coming months relative to the DOE withdrawal motion, the Panel anticipates that the Panel's current FY 2010 HLW funding should be adequate to cover those hearing-related activities. (If, however, for any reason the DOE motion is not finally resolved before the Agency until late FY 2010 or the proceeding continues into FY 2011, the availability of sufficient FY 2011 resources for the Panel to complete these various infrastructure decommissioning activities will become increasingly problematic.)

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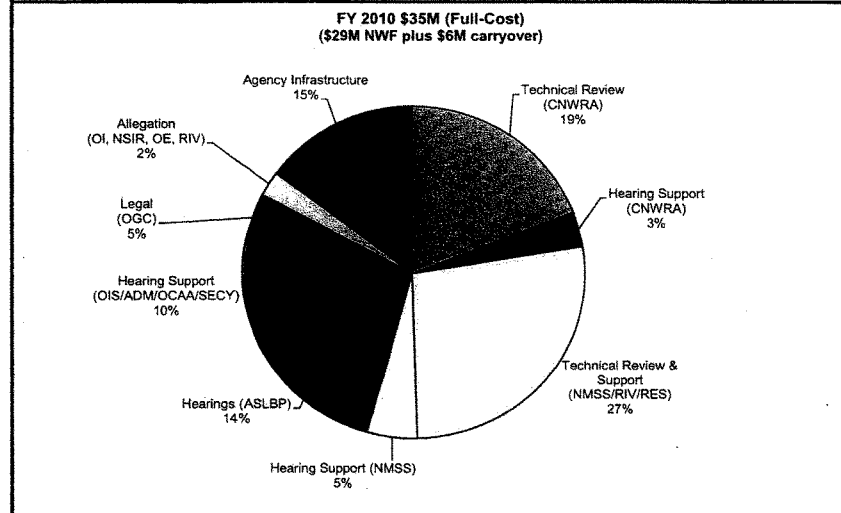
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Allocation of HLW Funding  
FY 2010 \$35M Full-Cost  
(\$29M NWF plus \$6M carryover)

HLW Offices	FY 2010 \$35M Full-Cost (\$29M NWF plus \$6M carryover)	
<i>Reserved Carryover</i>	945	3%
Technical Review (CNWRA)	6,676	19%
Hearing Support (CNWRA)	1,178	3%
Technical Review & Support (NMSS/RIV/RES)	9,506	27%
Hearing Support (NMSS)	1,677	5%
Hearings (ASLBP)	4,732	14%
Hearing Support (OIS/ADM/OCAA/SECY)	3,534	10%
Legal (OGC)	1,662	5%
Allegation (OI, NSIR, OE, RIV)	844	2%
Agency Infrastructure	5,200	15%
<b>Total Program (Full-Cost)</b>	<b>35,009</b>	<b>100%</b>



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ENCLOSURE 1

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TENTATIVE COMPLETION DATES FOR SAFETY EVALUATION REPORT VOLUMES  
(Milestones to be completed no later than dates shown)

SER Volume Number	Volume 1 General Information	Volume 2* Preclosure	Volume 3* Postclosure	Volume 4* Administrative/ Programmatic	Volume 5* License Specifications
HLWRS Staff completes text and Executive Summary	04/23/2010	09/21/2010	06/14/2010	08/5/2010	09/30/2010
HLWRS Management and OGC Volume Review Complete	06/7/2010	11/3/2010	07/27/2010	09/17/2010	11/15/2010
Resolve Comments and Complete Review by Technical Editor	07/6/2010	12/03/2010	08/24/2010	10/18/2010	12/14/2010
OGC Complete Legal Review	07/20/2010	12/17/2010	09/08/2010	11/01/2010	01/13/2011
NMSS Director Review and Concurrence	07/27/2010	01/04/2011	09/22/2010	11/16/2010	01/27/2011
Final OGC Review Complete with "No Legal Objection"	08/03/2010	01/18/2011	10/06/2010	12/01/2010	02/10/2011
Publication of Final SER Volume	08/31/2010	03/01/2011	11/19/2010	01/14/2011	03/24/2011

\*Work on these volumes will be discontinued once FY 2010 funds are exhausted

ENCLOSURE 2

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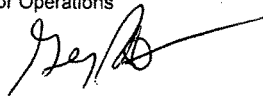
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June 11, 2010

MEMORANDUM TO: R. William Borchardt,  
Executive Director for Operations

FROM: Gregory B. Jaczko  
Chairman



SUBJECT: Schedule for HLW SER

I understand staff may be considering altering the schedule for publication of Volume 1 of the Yucca Mountain Safety Evaluation Report. I appreciate the work the staff has been doing on this project.

I believe it is in the best interests of the agency not to alter the schedule for the completion of SER volumes at this time, but instead to maintain the predictable schedule previously provided to the Commission in March, 2010 regarding plans for the High-Level Waste Repository Program. The agency's overall resources would be better utilized by maintaining the current schedule.

Therefore, the information in Volume 1 of the SER should be finalized and presented no earlier than August 2010, and subsequent volumes consistent with and not earlier than the schedule provided to the Commission in March, 2010.

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MEMORANDUM TO: Those on the Attached List

FROM: R. W. Borchardt  
Executive Director for Operations

SUBJECT: EARLY GUIDANCE FOR THE CONTINUING RESOLUTION

The agency is planning to operate under a Continuing Resolution (CR) for at least the first three months of the new fiscal year. During this operating period of time, certain guidelines for agency operations will be implemented. The Office of the Chief Financial Officer (OCFO) provided guidance for the Continuing Resolution process via a briefing in the Financial Manager's Council meeting in May 2010, and a memorandum to Office Directors and PMDA Directors dated July 13, 2010. Offices should have prepared their Funds Utilization Plans (FUPs), as requested, by the OCFO, and the FUPs will be used to determine early funding needs. The purpose of this memorandum is to provide guidance, specific to the near term budget execution, during this CR.

While this is a period during which heightened review of contract, training, and travel requests is appropriate, this should not be interpreted to mean that core activities should be curtailed, postponed, or eliminated. Offices should proceed to operate similar to the conduct of business during the CR in FY 2010. Existing contract support activities should be incrementally funded such that obligations do not exceed the offices' currently available funds. During the CR period, new projects or activities that were not authorized and funded in the FY 2010 appropriations should not be started in FY 2011. Awards for new projects of activities that have been approved in the FY 2011 budget should be coordinated with the OCFO to determine if these contracts should be funded under the CR. In general, awards for new work for FY 2011 should be reflected in your Advance Procurement Plan (APP). For those contract awards planned for Quarters 1 or 2, these should be reflected as zero dollars in the APP. The Requests for Procurement Action (RFPA-Form 400), should be submitted "pending availability of funds," to enable the pre-award process to continue. Please note that new contract awards for continuing work are not subject to the CR.

After the agency receives its full-year appropriation, this guidance will be rescinded and all normal budget execution operations will be resumed. If you have any questions regarding this guidance, please contact Nader Mamish at (301) 415-1703.

**Not For Public Disclosure**

**Not For Public Disclosure**

MEMORANDUM TO: Those on the Attached List

FROM: R. W. Borchardt  
Executive Director for Operations

SUBJECT: EARLY GUIDANCE FOR THE CONTINUING RESOLUTION

The agency is planning to operate under a Continuing Resolution (CR) for at least the first three months of the new fiscal year. During this operating period of time, certain guidelines for agency operations will be implemented. The Office of the Chief Financial Officer (OCFO) provided guidance for the Continuing Resolution process via a briefing in the Financial Manager's Council meeting in May 2010, and a memorandum to Office Directors and PMDA Directors dated July 13, 2010. Offices should have prepared their Funds Utilization Plans (FUPs), as requested, by the OCFO, and the FUPs will be used to determine early funding needs. The purpose of this memorandum is to provide guidance, specific to the near term budget execution, during this CR.

While this is a period during which heightened review of contract, training, and travel requests is appropriate, this should not be interpreted to mean that core activities should be curtailed, postponed, or eliminated. Offices should proceed to operate similar to the conduct of business during the CR in FY 2010. Existing contract support activities should be incrementally funded such that obligations do not exceed the offices' currently available funds. During the CR period, new projects or activities that were not authorized and funded in the FY 2010 appropriations should not be started in FY 2011. Awards for new projects or activities that have been approved in the FY 2011 budget should be coordinated with the OCFO to determine if these contracts should be funded under the CR. In general, awards for new work for FY 2011 should be reflected in your Advance Procurement Plan (APP). For those contract awards planned for Quarters 1 or 2, these should be reflected as zero dollars in the APP. The Requests for Procurement Action (RFPA-Form 400), should be submitted "pending availability of funds," to enable the pre-award process to continue. Please note that new contract awards for continuing work are not subject to the CR.

After the agency receives its full-year appropriation, this guidance will be rescinded and all normal budget execution operations will be resumed. If you have any questions regarding this guidance, please contact Nader Mamish at (301) 415-1703.

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NAME	EJacobs-Baynard	JAndersen	RWBorchardt
DATE	/ /10	/ /10	/ /10

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9/13/10

MEMORANDUM TO: Those on the Attached List

FROM: J. E. Dyer  
Chief Financial Officer

R. W. Borchardt  
Executive Director for Operations

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION

The agency anticipates operating under a Continuing Resolution (CR) for at least the first three months of the new fiscal year. The purpose of this memorandum is to review and augment the earlier guidance on budget execution. The amount of funding available under a CR is determined by the annual CR legislation enacted by Congress. In past years, the funding availability was based on the previous fiscal year appropriated level augmented by estimated unobligated carryover. The NRC's FY 2011 budget request sustains agency's programs at approximately the same level as FY 2010, with the exception of the High-Level Waste Program. Therefore, offices should proceed to commit, obligate and expend funds for ongoing activities, and plan for effective use of these available resources during the CR.

Although the NRC operated under a CR in FY 2010 for a much shorter period than in recent years (approximately one month), the agency was unable to meet the EDO's and CFO's goal of a linear obligation rate throughout the fiscal year. For FY 2011, offices should increase its focus on improved timely obligation rates which may require incremental funding, when necessary, during the anticipated longer CR period. Existing contract support activities should be incrementally funded such that obligations do not exceed the offices' currently available funds. Funds for existing contract support activities should be allocated only to those activities that do not have sufficient forward funding. Offices should not delay moving procurement packages through the agency acquisition process. Procurement packages/actions should advance through the acquisition process with "subject to availability of funds" language, when appropriate, and be ready for award when sufficient funds become available.

As highlighted in the earlier guidance provided by the OCFO, CR funding will be based upon the offices' needs as identified in their Funds Utilization Plans (FUP). If agency funding needs exceed the funding available, offices will be informed that an across the board reduction will be applied.

During the CR period, new projects or activities that were not authorized and funded in FY 2010 should not be started in FY 2011. The prohibition on starting new project obligating/expending generally does not apply when the program used appropriated funds during the last year.

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-2-

Any new projects not authorized last year should be coordinated with the OCFO to determine if these contracts can be funded under the CR. In addition, awards for new work for FY 2011 should be reflected in your APP. It is important that offices processing contract documents consistent with their APPs/FUPs continue to focus on improved budget execution during the CR.

With respect to the High-Level Waste Program, the underlying assumption is that the CR legislation will not include specific restrictions on spending funds. Therefore, the agency will continue to conduct the licensing review of the application using available Nuclear Waste Fund resources during the CR.

Based on the actual CR legislation, the OCFO will refine the CR plan and issue allowances at the beginning of FY 2011 and for every CR period thereafter, until such time the agency receives its full appropriation/apportionment. After the agency receives its full-year appropriation/apportionment, this guidance will be rescinded and all normal budget execution operations will be resumed. If you have any questions regarding this guidance, please contact Reggie Mitchell at (301) 415-7540 or Nader Mamish at (301) 415-1703.

CONTACTS: Patrice Williams-Johnson, OCFO  
(301) 415-5732

Elizabeth Jacobs-Baynard, OEDO  
(301) 415-8709

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-2-

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NAME	EJacobs-Baynard		CKasputys		JAndersen	
DATE	9/10/10 Via email		9/10/10 Via email		9/ /10	
OFFICE	OCFO/DPB/FARB	C	OCFO/DPB	C	CFO	C
NAME	PWilliams-Johnson		RMitchell		JEDyer	
DATE	9/ /10		9/ /10		9/ /10	
					RWBorchardt	c

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9/14/10

MEMORANDUM TO: Office Directors and Regional Administrators

FROM: J. E. Dyer  
Chief Financial Officer

R. W. Borchardt  
Executive Director for Operations

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION

The agency anticipates operating under a Continuing Resolution (CR) for at least the first three months of the new fiscal year. The purpose of this memorandum is to review and augment the earlier guidance on budget execution. The amount of funding available under a CR is determined by the annual CR legislation enacted by Congress. In past years, the funding availability was based on the previous fiscal year appropriated level augmented by estimated unobligated carryover. The NRC's FY 2011 budget request sustains agency's programs at approximately the same level as FY 2010, with the exception of the High-Level Waste Program. Therefore, offices should proceed to commit, obligate and expend funds for ongoing activities, and plan for effective use of these available resources during the CR.

Although the NRC operated under a CR in FY 2010 for a much shorter period than in recent years (approximately one month), the agency was unable to meet the EDO's and CFO's goal of a linear obligation rate throughout the fiscal year. For FY 2011, offices should increase its focus on improved timely obligation rates which may require incremental funding, when necessary, during the anticipated longer CR period. Existing contract support activities should be incrementally funded such that obligations do not exceed the offices' currently available funds. Funds for existing contract support activities should be allocated only to those activities that do not have sufficient forward funding. Offices should not delay moving procurement packages through the agency acquisition process. Procurement packages/actions should advance through the acquisition process with "subject to availability of funds" language, when appropriate, and be ready for award when sufficient funds become available.

As highlighted in the earlier guidance provided by the OCFO, CR funding will be based upon the offices' needs as identified in their Funds Utilization Plans (FUP). If agency funding needs exceed the funding available, office allocations will be adjusted to accommodate the constraints.

CONTACTS: Patrice Williams-Johnson, OCFO  
(301) 415-5732

Elizabeth Jacobs-Baynard, OEDO  
(301) 415-8709

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Office Directors and RAs'

-2-

During the CR period, new projects or activities that were not authorized and funded in FY 2010 should not be started in FY 2011. The prohibition on starting new project obligating/expending generally does not apply when the program used appropriated funds during the last year. Any new projects not authorized last year should be coordinated with the OCFO to determine if these contracts can be funded under the CR. In addition, awards for new work for FY 2011 should be reflected in your APP. It is important that offices processing contract documents consistent with their APPs/FUPs continue to focus on improved budget execution during the CR.

With respect to the High-Level Waste Program, the underlying assumption is that the CR legislation will not include specific restrictions on spending funds. Therefore, the agency will continue to conduct the review of the Yucca Mountain license application and associated activities using available Nuclear Waste Fund resources during the CR pending direction from the Commission.

Based on the actual CR legislation, the OCFO will refine the CR plan and issue allowances at the beginning of FY 2011 and for every CR period thereafter, until such time the agency receives its full appropriation/apportionment. After the agency receives its full-year appropriation/apportionment, this guidance will be rescinded and all normal budget execution operations will be resumed. If you have any questions regarding this guidance, please contact Reggie Mitchell at (301) 415-7540 or Nader Mamish at (301) 415-1703.

cc: PMDA Directors

**Not For Public Disclosure**

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Office Directors and RAs'

-2-

During the CR period, new projects or activities that were not authorized and funded in FY 2010 should not be started in FY 2011. The prohibition on starting new project obligating/expending generally does not apply when the program used appropriated funds during the last year. Any new projects not authorized last year should be coordinated with the OCFO to determine if these contracts can be funded under the CR. In addition, awards for new work for FY 2011 should be reflected in your APP. It is important that offices processing contract documents consistent with their APPs/FUPs continue to focus on improved budget execution during the CR.

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Based on the actual CR legislation, the OCFO will refine the CR plan and issue allowances at the beginning of FY 2011 and for every CR period thereafter, until such time the agency receives its full appropriation/apportionment. After the agency receives its full-year appropriation/apportionment, this guidance will be rescinded and all normal budget execution operations will be resumed. If you have any questions regarding this guidance, please contact Reggie Mitchell at (301) 415-7540 or Nader Mamish at (301) 415-1703.

cc: PMDA Directors

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NAME	EJacobs-Baynard /RA/		CKasputys /RA/		JAndersen	
DATE	9/10/10 Via email		9/10/10 Via email		9/ /10	
OFFICE	OCFO/DPB/FARB	C	OCFO/DPB	C	CFO	C
NAME	PWilliams-Johnson /RA/		RMitchell		JEDyer	
DATE	9/13/10		9/ /10		9/ /10	
					RWBorchardt	c

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9/27/10

MEMORANDUM TO: Office Directors and Regional Administrators

FROM: J. E. Dyer  
Chief Financial Officer

R. W. Borchardt  
Executive Director for Operations

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING  
RESOLUTION

The agency anticipates operating under a Continuing Resolution (CR) for at least the first three months of the new fiscal year. The purpose of this memorandum is to review and augment the earlier guidance on budget execution. The amount of funding available under a CR is determined by the annual CR legislation enacted by Congress. In past years, the funding availability was based on the previous fiscal year appropriated level augmented by unobligated carryover. The NRC's FY 2011 budget request sustains agency's programs at approximately the same level as FY 2010, with the exception of the High-Level Waste Program. Therefore, offices should proceed to commit, obligate and expend funds for ongoing activities to effectively use available resources during the CR.

Although the staff made improvements executing their funds despite operating under a CR in FY 2010 (approximately one month), the agency was unable to meet the Chief Financial Officer (CFO) and Executive Director for Operations' (EDO) goal of a linear obligation rate throughout the fiscal year. Therefore, we continue to emphasize the importance of effectively executing the agency budget by incrementally funding activities, as well as, preparing and moving procurement packages through the acquisition process with "subject to availability of funds" language, when appropriate, to expedite the award process when sufficient funds become available. Additionally, to maintain maximum flexibility, priority for funds for existing contract support activities should be allocated only to those activities that do not have sufficient forward funding.

As highlighted in the earlier guidance provided by the Office of the Chief Financial Officer (OCFO), CR funding will be provided based on the offices' needs as identified in their Funds Utilization Plans (FUP). If agency funding needs exceed the funding available, office allocations will be adjusted to accommodate the constraints.

CONTACTS: Patrice Williams-Johnson, OCFO  
(301) 415-5732

Elizabeth Jacobs-Baynard, OEDO  
(301) 415-8709

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Office Directors and RAs'

-2-

During the CR period, new work that was not authorized and funded in FY 2010 should not be started in FY 2011. Offices should contact the OCFO prior to funding any questionable activities under the CR. In addition, contract awards for FY 2011 should be reflected in your Advance Procurement Plan (APP). It is important that offices processing contract documents consistent with their APPs/FUPs continue to focus on improved budget execution during the CR.

With respect to the High-Level Waste Program, the underlying assumption is that the CR legislation will not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR.

Based on the actual CR legislation, the OCFO will refine the CR plan and issue allowances at the beginning of FY 2011 and for every CR period thereafter, until such time the agency receives its full appropriation/apportionment. After the agency receives its full-year appropriation/apportionment, this guidance will be rescinded and all normal budget execution operations will be resumed.

cc: PMDA Directors

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Office Directors and RAs'

-2-

During the CR period, new work that was not authorized and funded in FY 2010 should not be started in FY 2011. Offices should contact the OCFO prior to funding any questionable activities under the CR. In addition, contract awards for FY 2011 should be reflected in your Advance Procurement Plan (APP). It is important that offices processing contract documents consistent with their APPs/FUPs continue to focus on improved budget execution during the CR.

With respect to the High-Level Waste Program, the underlying assumption is that the CR legislation will not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR.

Based on the actual CR legislation, the OCFO will refine the CR plan and issue allowances at the beginning of FY 2011 and for every CR period thereafter, until such time the agency receives its full appropriation/apportionment. After the agency receives its full-year appropriation/apportionment, this guidance will be rescinded and all normal budget execution operations will be resumed.

cc: PMDA Directors

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NAME	PWilliams-Johnson /RA/		RMitchell		JEDyer	
DATE	9/13/10		9/ /10		9/ /10	
					EDO	c
					RWBorchardt	

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UNITED STATES  
 NUCLEAR REGULATORY COMMISSION  
 WASHINGTON, D.C. 20555-0001

October 4, 2010

MEMORANDUM TO: Office Directors and Regional Administrators

FROM: J. E. Dyer *J. E. Dyer*  
 Chief Financial Officer

R. W. Borchardt *R. W. Borchardt*  
 Executive Director for Operations

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING  
 RESOLUTION

On September 30, 2010, a Continuing Resolution (CR) through December 3, 2010, was signed into law. The purpose of this memorandum is to review and augment the earlier guidance on budget execution. The amount of funding available under a CR is determined by the annual CR legislation enacted by Congress. Funding availability is based on the previous fiscal year appropriated level augmented by unobligated carryover, as in past years. The NRC's FY 2011 budget request sustains agency's programs at approximately the same level as FY 2010, with the exception of the High-Level Waste Program. Therefore, offices should proceed to commit, obligate, and expend funds for ongoing activities to effectively use available resources during the CR.

Although the staff made improvements, we continue to emphasize the importance of effectively executing the agency budget by incrementally funding activities, as well as, preparing and moving procurement packages through the acquisition process with "subject to availability of funds" language, when appropriate, to expedite the award process when sufficient funds become available. Additionally, to maintain maximum flexibility, priority for funds for existing contract support activities should be allocated only to those activities that do not have sufficient forward funding.

As highlighted in the earlier guidance provided by the Office of the Chief Financial Officer (OCFO), CR funding will be provided based on the offices' needs as identified in their Funds Utilization Plans (FUP) submitted on August 6, 2010. Based on the office's FUPs, agency funding needs exceeded the funds available in the first quarter. As a result, we plan to provide offices with 60 percent of the requested funding for the period of the CR. Offices should advise OCFO of any significant mission critical needs as a result of the constrained funding.

During the CR period, new work that was not authorized and funded in FY 2010 should not be started in FY 2011. Offices should contact the OCFO prior to funding any questionable

CONTACT: Reginald W. Mitchell, OCFO  
 (301) 415-7540

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Office Directors and RAs

-2-

activities under the CR. In addition, contract awards for FY 2011 should be reflected in your Advance Procurement Plan (APP). It is important that offices processing contract documents consistent with their APPs/FUPs continue to focus on improved budget execution during the CR.

With respect to the High-Level Waste Program, the CR legislation does not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR.

As we move forward, the OCFO will refine the CR plan and issue allowances for every CR period thereafter, until such time the agency receives its full appropriation/apportionment. After the agency receives its full-year appropriation/apportionment, this guidance will be rescinded and all normal budget execution operations will be resumed.

cc: PMDA/DRMA Directors

**Not For Public Disclosure**

## Not For Public Disclosure

MEMORANDUM TO THOSE ON THE ATTACHED LIST DATED: October 4, 2010

SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION

Edwin M. Hackett, Executive Director, Advisory Committee  
on Reactor Safeguards  
E. Roy Hawkins, Chief Administrative Judge, Atomic Safety  
and Licensing Board Panel  
Stephen G. Burns, General Counsel  
Brooke D. Poole, Director, Office of Commission Appellate Adjudication  
Hubert T. Bell, Inspector General  
Margaret M. Doane, Director, Office of International Programs  
Rebecca L. Schmidt, Director, Office of Congressional Affairs  
Eliot B. Brenner, Director, Office of Public Affairs  
Annette Vietti-Cook, Secretary of the Commission

Michael F. Weber, Deputy Executive Director for Materials, Waste,  
Research, State, Tribal, and Compliance Programs, OEDO  
Darren B. Ash, Deputy Executive Director  
for Corporate Management, OEDO  
Martin J. Virgilio, Deputy Executive Director for Reactor  
and Preparedness Programs, OEDO  
Nader L. Mamish, Assistant for Operations, OEDO  
Kathryn O. Greene, Director, Office of Administration  
Patrick D. Howard, Director, Computer Security Office  
Roy P. Zimmerman, Director, Office of Enforcement  
Charles L. Miller, Director, Office of Federal and State Materials  
and Environmental Management Programs  
Cheryl L. McCrary, Director, Office of Investigations  
Thomas M. Boyce, Director, Office of Information Services  
James F. McDermott, Director, Office of Human Resources  
Michael R. Johnson, Director, Office of New Reactors  
Catherine Haney, Director, Office of Nuclear Material Safety  
and Safeguards  
Eric J. Leeds, Director, Office of Nuclear Reactor Regulation  
Brian W. Sheron, Director, Office of Nuclear Regulatory Research  
Corenthis B. Kelley, Director, Office of Small Business and Civil Rights  
James T. Wiggins, Director, Office of Nuclear Security  
and Incident Response  
Marc L. Dapas, Acting Regional Administrator, Region I  
Luis A. Reyes, Regional Administrator, Region II  
Mark A. Satorius, Regional Administrator, Region III  
Elmo E. Collins, Jr., Regional Administrator, Region IV

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RidsEdoMailCenter Resource  
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RidsAdmMailCenter Resource  
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CC: TO THOSE ON THE ATTACHED LIST DATED: October 4 2010

**SUBJECT: GUIDANCE UNDER A FISCAL YEAR 2011 CONTINUING RESOLUTION**

<u>Name/Office</u>	<u>Mail Stop</u>
B. Gusack, NRO	T6 – D2
B. Ficks, OIS	O13 – H16M
B. Holt, RGN III	RGN III
J. Horn, HR	GW5 – A6
J. Dambly, ADM	TWB5 – E19M
J. Golder, FSME	T8 – A23
J. Coleman, RGN II	RGN II
M. Givvines, NRR	O13 – H16M
M. Muessle, RES	CSB6 – D20M
M. Hays, RGN IV	RGN IV
P. Baker, RGN I	RGN I
S. Abraham, NSIR	T4 – A45
T. Pulliam, NMSS	EBB – C1 24

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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

February 4, 2011

MEMORANDUM TO: Chairman Jaczko  
Commissioner Svinicki  
Commissioner Apostolakis  
Commissioner Magwood  
Commissioner Ostendorff

FROM: Catherine Haney, Director  
Office of Nuclear Material Safety and Safeguards *Catherine Haney*

SUBJECT: UPDATE ON THE YUCCA MOUNTAIN PROGRAM

The purpose of this memorandum is to describe the status of the Yucca Mountain Program. Since October 1, 2010, the U.S. Nuclear Regulatory Commission (NRC) staff's activities have focused on the orderly closure of the NRC staff's safety review of the license application submitted by the U.S. Department of Energy (DOE) for authorization to construct a geologic repository at Yucca Mountain (YM), NV. This memorandum also describes the staff's plans to capture the knowledge it acquired during more than 3 decades of pre-licensing preparation and more than 2 years of licensing review activities.

Program Status and Termination of Safety Review

Effective on October 1, 2010, the staff ceased its safety review of the YM license application. Consequently, the staff is converting the remaining volumes of its safety evaluation report (SER) ("Volume 3: Review of Repository Safety after Permanent Closure," "Volume 2: Review of Repository Safety before Permanent Closure," and "Volume 4: Review of Administrative and Programmatic Requirements") into technical evaluation reports, which will be published as NUREG reports in the knowledge management series. These reports will document the staff's technical review activities and technical conclusions but will contain no staff findings of regulatory compliance.

Knowledge Capture and Orderly Closure of Supporting Licensing Proceedings

The NRC staff is archiving the institutional, regulatory, and technical knowledge amassed over nearly 3 decades as it evaluated YM and other potential sites for deep geologic disposal of spent fuel and high-level waste. The staff is evaluating and documenting the lessons learned from (1) the development and implementation of site-specific regulations and guidance documents for geologic disposal, (2) the conduct of a licensing proceeding under Subpart J,

CONTACT: Lawrence E. Kokajko, NMSS  
301-492-3158

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The Commissioners

- 2 -

"Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository," of Title 10 of the *Code of Federal Regulations* (10 CFR) Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," and (3) the establishment and the operation of the Licensing Support Network (LSN). The staff will preserve this knowledge as a resource for future use. Associated with this, on October 1, 2010, the staff directed the Center for Nuclear Waste Regulatory Analyses (CNWRA) to stop its license application review activities. The staff redirected CNWRA to focus its YM-related efforts on the preservation of knowledge and records management. As the High Level Waste (HLW) repository knowledge management tasks are completed, CNWRA will transition to non-HLW Repository work using fee-based resources to evaluate the safety and environmental impacts of longer term storage of spent nuclear fuel and to support the staff's development of a longer term waste confidence rulemaking plan.

The NRC staff established priorities for activities it will undertake commensurate with available resources and closure of the licensing review. As part of this effort, the staff will document its technical review of the license application in technical evaluation reports (NUREGs). These reports will capture the scientific findings, knowledge, and experience of the staff's technical review, the development of requests for additional information, and an evaluation of the license application without stating the conclusion that would be needed to support a licensing decision. The first of these, documenting postclosure review activities, is planned for completion in the second quarter of fiscal year (FY) 2011. Resources permitting, reports on the staff's preclosure (Volume 2) and administrative (Volume 4) reviews will follow later in the third and fourth quarters of FY 2011.

During the first quarter of FY 2011, the staff established its process for developing the technical evaluation reports and began preparation of those reports. The staff is responding to a Freedom of Information Act request for access to staff drafts of SER Volumes 2 and 3. Technical staff members continued to provide input to the Office of the General Counsel on adjudicatory hearing-related matters to assist in responding to orders from the Construction Authorization Board 4 (CAB4 or the Board), including directives on case management and identification of witnesses. Departing and other senior technical staff members were interviewed on videotape for knowledge capture and as a future training resource. Personnel from the Office of Administration and the Atomic Safety and Licensing Board Panel (ASLBP or the Panel) initiated discussions with the General Services Administration and other government agencies about preparatory activities to close and decommission the Las Vegas Hearing Facility (LVHF), including its computer systems, physical infrastructure, and physical security infrastructure. During this period, the high-level waste core group continued discussions about the budget for orderly closure of the YM program to ensure coordination with preparation for renewal of the CNWRA contract and other contractual matters.

Hearing Process and Activities

CAB4 has continued to preside over the YM proceeding after denying the Department of Energy license application withdrawal motion in June 2010. The NRC staff, as required, has kept the Board informed of the status of the staff's application review activities. Specifically, on

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November 29, 2010, the staff informed CAB4 that it would not issue SER Volume 3 in November 2010 as previously planned, and that a revised schedule is indeterminate. On December 8, 2010, CAB4 ordered the staff to submit by December 22, 2010, a full explanation of its schedule change for the issuance of Volume 3 and directed the parties to confer and seek to reach agreement on a discovery status report by January 25, 2011. The staff replied on December 22, 2010, also indicating that the schedule for SER Volumes 4 and 2 was indeterminate. On December 14, 2010, CAB4 ruled on the Phase 1 legal issues and denied petitions for rule waivers. The Board also directed affected parties to submit a joint stipulation, or differing views, regarding the effects of the Board's Phase 1 legal issue rulings on admitted contentions by January 21, 2011. The major parties (including the NRC staff) timely responded and also filed differing views. In addition, DOE filed a January 21, 2011, motion seeking a suspension of the proceeding through May 20, 2011 and Nevada filed a January 20, 2011, motion seeking reconsideration of the rejection of a contention in its initial petition. CAB4 has not yet ruled on the suspension motion.

Absent contrary direction it is our understanding that the Panel plans to maintain the adjudicatory infrastructure for the repository licensing proceeding, including the Las Vegas Hearing Facility (LVHF), the Licensing Support Network (LSN), and the LVHF component of the Digital Data Management System (DDMS), until the end of FY 2011. At that time shut-down of the infrastructure would need to be accomplished to avoid the agency requiring Nuclear Waste Fund (NWF) money that has not been appropriated in order to complete the shut-down after FY 2011. We understand that ASLBP plans to send a memorandum in February that discusses this matter more fully and includes key action points for an orderly shutdown.

Resources

There are potential programmatic implications because of the limited NWF resources available to support all of the activities in this program. Currently, the Panel estimates that it will need \$2.7 million to support CAB4 and the adjudicatory infrastructure through the end of FY 2011. The staff estimates that \$18.0 million is needed to complete all high- and some medium-priority knowledge management and documentation activities associated with orderly closure of the NRC YM licensing program (Enclosure 1).

Assuming there are no additional activities regarding orderly closure or adjudication, the staff will apply \$10 million of FY 2011 NWF resources to these tasks, and will seek to reprogram \$2.0 (out of a total of \$7.1) million in prior-year NWF resources for salaries and benefits. The staff will convert \$2.1 million of the FY 2011 NWF contract funds into salaries and benefits. In addition, CNWRA will continue to expend the \$8.7 million of FY 2010 unliquidated obligations. The reprogramming effort is particularly important since FY 2011 resources alone are not sufficient to both carry out staff's planned knowledge capture and management activities and maintain the LVHF for an appreciable portion of FY 2011 while still being able to achieve order facility shutdown by the end of the fiscal year. Without the reprogramming of the \$2.0 million prior-year NWF resources, the staff will be unable to complete most of the medium priority knowledge management activities.

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Coordination

The Office of the General Counsel has reviewed this paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections.

Three staff members in NMSS filed non-concurrences on this memorandum (Enclosures 2-4). These non-concurrences are included in the interest of providing the Commission with alternative views.

This paper contains pre-decisional procurement and budget information and should be withheld from public disclosure.

Enclosures:

1. Fiscal Year 2011 Resource Estimates  
for the Orderly Closure of NRC Yucca  
Mountain Licensing Activities
2. Non-Concurrence dated January 18, 2011
3. Non-Concurrence dated February 1, 2011
4. Non-Concurrence dated February 2, 2011

cc: SECY

EDO

OGC

OCA

OPA

CFO

ASLBP

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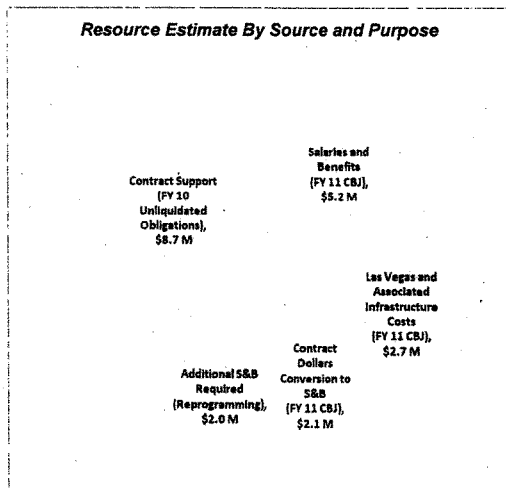
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**Fiscal Year 2011 Resource Estimate for the Orderly Closure of NRC Yucca Mountain Licensing Activities**

The \$20.7 million of Nuclear Waste Fund (NWF) monies in Fiscal Year (FY) 2011 is necessary for NRC's orderly closure of Yucca Mountain licensing activities. As the following table shows, \$2.7 million will be used to shut down the Las Vegas Hearing Facility along with its Digital Data Management system installation. \$18.0 million will be used for knowledge management and capture.

ACTIVITY	\$(K)
<b>INFRASTRUCTURE</b>	<b>\$2,700</b>
<ul style="list-style-type: none"> <li>Rent and maintenance of hearing facility in Las Vegas</li> <li>Closure of hearing facility and removal of electronic systems</li> </ul>	
<b>KNOWLEDGE MANAGEMENT AND DOCUMENTATION</b>	<b>\$18,000</b>
<ul style="list-style-type: none"> <li>Completion of technical evaluation reports</li> <li>Documents to be archived at National Archives; R&amp;D samples archived</li> <li>Knowledge Capture - videotaping interviews, workshop presentations, documents</li> <li>Regulatory lessons learned</li> <li>OGC and other office support for closure</li> </ul>	
<b>TOTAL</b>	<b>\$20,700</b>

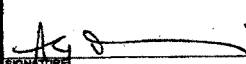
The staff will use resources available from FY 2010 unliquidated obligations (\$8.7 million), FY 2011 President's Budget (\$10.0 million), and reprogramming prior year carryover (\$2.0 million). The chart below identifies the source of funding for each purpose.



Enclosure 1

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NRC FORM 757 NRC-160 10-110 (3-2009)		U.S. NUCLEAR REGULATORY COMMISSION	
<b>NON-CONCURRENCE PROCESS</b>			
<b>SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL</b>			
TITLE OF DOCUMENT Update on the Yucca Mountain Program		ADAMS ACCESSION NO. ML103140391	
DOCUMENT SPONSOR Catherine Hanes		SPONSOR PHONE NO. 301-492-3554	
NAME OF NON-CONCURRING INDIVIDUAL Aby Mohamed		PHONE NO. 301-492-3182	
<input type="checkbox"/> DOCUMENT AUTHOR <input checked="" type="checkbox"/> DOCUMENT CONTRIBUTOR <input checked="" type="checkbox"/> DOCUMENT REVIEWER <input checked="" type="checkbox"/> ON CONCURRENCE			
TITLE Deputy Director		ORGANIZATION HLWRS/NMSS	
<b>REASONS FOR NON-CONCURRENCE</b> <p>Although the Commission Memorandum describes the current status of the program, it also addresses a path forward that seems to me to contain policy issues that require Commission direction or guidance. For example, whereas the application of Nuclear Waste Funds in FY 2011 was only authorized for orderly shutdown activities under a CR guidance and as specifically directed by the Chairman, the ongoing ASLE hearings require that these funds also support legal activities in ongoing Yucca Mountain licensing proceedings. If there are no constraints in using FY2011 or carryover NWF monies to support licensing activities, then it would be a policy issue to direct the staff to apply resources to orderly shutdown instead of completing and issuing the remaining SER volumes, especially since the Commission has not reversed the ASLEP's decision that denied DOE's motion to withdraw its application. The Memorandum also indicates that fee-based resources (rather than NWF) might be needed to shut down the Las Vegas Hearing Facility, which would be another policy issue, in my opinion.</p> <p>For the reasons above, I respectfully refuse to concur.</p>			
SIGNATURE 		<input type="checkbox"/> CONTINUED IN SECTION D DATE 1/18/2011	
NO COPY TO YOUR IMMEDIATE SUPERVISOR AND PROGRAM MANAGER			
NRC FORM 757 (3-2009)		Use ADAMS Template NRC-006 PRINTED ON RECYCLED PAPER ENCLOSURE 2	

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NRC FORM 757 NRC HQ 10.158 (2-2009)		U.S. NUCLEAR REGULATORY COMMISSION	
<b>NON-CONCURRENCE PROCESS</b>			
TITLE OF DOCUMENT Update on the Yucca Mountain Program		ADAMS ACCESSION NO. ML105146391	
SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR (THIS SECTION SHOULD ONLY BE COMPLETED IF SUPERVISOR IS DIFFERENT THAN DOCUMENT SPONSOR.)			
NAME <i>Larson E. K. Kyle</i>			
TITLE <i>Director, Division of High-Level Waste Repository Safety</i>		PHONE NO. <i>801-492-3158</i>	
ORGANIZATION <i>NMSS</i>			
COMMENTS FOR THE DOCUMENT SPONSOR TO CONSIDER <input type="checkbox"/> I HAVE NO COMMENTS <input checked="" type="checkbox"/> I HAVE THE FOLLOWING COMMENTS <i>See attached sheet.</i>			
SIGNATURE <i>[Signature]</i>		<input type="checkbox"/> CONTINUED IN SECTION D DATE <i>10/11/2011</i>	
NRC FORM 757 (2-2009)      Use ADAMS Template NRC-008      PRINTED ON RECYCLED PAPER			

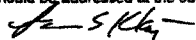
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Re: Memorandum to the Commission entitled, "Update on the Yucca Mountain Program"

Given the unique nature of the NRC's High-Level Waste Program, its associated review of the DOE Yucca Mountain license application, and its attendant internal and external issues, it seems reasonable to expect that professional staff can differ in what constitutes a policy question suitable for Commission deliberation. Mr. Aby Mohseni, Deputy Director for the Licensing and Inspection Directorate in the Division of High-Level Waste Repository Safety, suggests that there are embedded in this memorandum at least two policy matters appropriate for the Commission to consider: (1) application of Nuclear Waste Funds for orderly closure while the licensing proceeding is still ongoing; and (2) use of fee-based resources to close the Las Vegas Hearing Facility and its associated infrastructure (such as LSN). The Commission itself has not yet decided on the ASLBP CAB-4 ruling (LBP-10-11), and there is enough complexity and uncertainty to suggest that the staff seek Commission direction on these issues rather than have the staff provide, in essence, a status report. While the Commission could make this memorandum a voting matter on its own once it is received, it seems more appropriate for Agency senior leadership to acknowledge it at the outset. I believe this is Mr. Mohseni's view.

Therefore, while either way could lead to the same outcome (i.e., Commission deliberation on orderly closure and funding), I tend to agree with Mr. Mohseni that the embedded policy matters should be addressed at the outset.



Lawrence E. Kokajko, Director  
Division of High-Level Waste Repository Safety  
Office of Nuclear Material Safety and Safeguards

18 January 2011

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NRC FORM 757 NRC 602 10.158 (2-2009)		U.S. NUCLEAR REGULATORY COMMISSION	
<b>NON-CONCURRENCE PROCESS</b>			
TITLE OF DOCUMENT Update on the Yucca Mountain Program		ADAMS ACCESSION NO. ML163140391	
SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR			
NAME Catherine Haney			
TITLE Office Director		PHONE NO. 301-492-3554	
ORGANIZATION NMSS			
ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.)			
- See Attached -			
SIGNATURE - DOCUMENT SPONSOR <i>C Haney</i>		DATE 2-4-11	<input type="checkbox"/> CONTINUED IN SECTION D SIGNATURE - DOCUMENT SIGNER <i>C Haney</i>
		DATE 2-4-11	
NON-CONCURRING INDIVIDUAL (To be completed by document sponsor when process is complete, i.e., after document is signed):			
<input checked="" type="checkbox"/> CONCURS <input type="checkbox"/> NON-CONCURS <input type="checkbox"/> WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)		<input type="checkbox"/> WANTS NCP FORM PUBLIC <input checked="" type="checkbox"/> WANTS NCP FORM NON-PUBLIC	

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I carefully considered the concerns raised in Mr. Mohseni's non-concurrence on the memo titled, "Update on the Yucca Mountain Program." Prior to, and immediately after he filed the non-concurrence, Mr. Mohseni and I discussed his concerns with the memo. Since Mr. Mohseni filed his non-concurrence, the memorandum has been revised to reflect new resource information and recent discussion with the ASLBP regarding closure of the Las Vegas Hearing Facility (LVHF) and the associated infrastructure. Subsequent to this last revision, Mr. Mohseni was given the opportunity to revise his non-concurrence based on the revised memo. He chose not to revise his statement.

Mr. Mohseni believes there are at least two policy issues embedded in the memorandum:

1. Application of Nuclear Waste Funds for orderly closure instead of supporting hearing and licensing activities, including issuance of the remaining SER volumes.
2. Use of fee-based resources to close the Las Vegas Hearing Facility and its associated infrastructure (such as LSN).

The purpose of the memorandum to the Commission is to describe the status of the Yucca Mountain Program and staff's plans to capture the knowledge it acquired during pre-licensing preparation and licensing review activities. The memo was not intended to raise policy issues or topics that have previously been discussed and resolved at the Commission level.

The application of Nuclear Waste Funds (NWF) for orderly closure instead of completing and issuing the remaining SER volumes has been well vetted with the Commission. I am not aware of any new information that would warrant raising it as a policy matter in this memorandum. For example, in a October 6, 2010, memorandum to Chairman Jaczko and Commissioners Svinicki, Magwood, and Apostolakis (COMWCO-10-002), Commissioner Ostendorff stated that use of FY 2011 Continuing resolution funds "is a significant policy matter that I believe warrants the Commission's attention, and which requires that the Commission give direction to the staff to avoid confusion on the Commission's intent for operation under the Continuing Resolution." He went on to propose that "... Staff continue to follow the pre-established schedule for the SER and issue the remaining SER Volumes accordingly." This matter was subsequently closed by Annette Vietti-Cook's October 14, 2010, memorandum to Commissioner Ostendorff that stated, "A majority of the Commission declined to participate on this matter. In the absence of a quorum, your proposal is not approved."

Use of funds to support continued review of the Yucca Mountain application was the topic of several Congressional letters. In an October 27, 2010, letter to the Honorable Jim Sensenbrenner (ML102980673) Chairman Jaczko responded to Congressman Sensenbrenner's concerns about reports regarding the NRC's review of DOE's Yucca Mountain application. The response to Question 1 (quoted below) also indicates that the Commission has already considered Mr. Mohseni's first issue.

"Question 1. On what legal authority are you grounding your decision to terminate review of the license application based on a budget request, rather than existing law?

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O Answer - Neither the text of the Fiscal Year (FY) 2010 Energy and Water Development and Related Agencies Appropriations Act and its underlying committee reports, nor the Fiscal Year 2011 Continuing Resolution provide the Commission with express direction on how it is to expend its appropriations from the Nuclear Waste Fund for Yucca Mountain activities. In the absence of an express direction, the approach the NRC is following is consistent with the terms of the Continuing Resolution, the Commission's Fiscal Year 2011 budget request, the general principles of appropriations law, and past U.S. Nuclear Regulatory Commission (NRC) practice. The Commission declined to revisit this decision in voting earlier this month."

I am mindful that there are limited resources available to complete orderly closure activities during FY2011 while the NRC hearing activities and Federal court litigation is ongoing. As of December 28, 2010, 1.8 FTE has been expended by the ASLBP and OGC to support the ongoing ASLBP hearing and litigation in the U.S. Court of Appeals for the District of Columbia. (As a reference point, NMSS has expended 9.0 FTE.) Expenditure of FY2011 HLW funds, in this manner, has been supported by OEDO, OGC, ASLBP, and CFO, and has not been viewed to be a matter of policy although these offices and I recognize that use of the funds to support NRC hearings should be closely monitored because they could consume NWF resources that are currently needed for orderly closure in FY 2011. In addition, because there are no HLW funds in FY 2012, depletion of NWF money would bring the administrative hearing process to a halt in FY 2011.

In response to Mr. Mohseni's second concern that the memorandum contains an embedded policy issue regarding use of fee-based resources to close the Las Vegas Hearing Facility and its associated infrastructure, the memorandum has been revised to reflect several recent discussions with CFO, ASLBP, NMSS, and OGC. Originally, the memorandum stated that the Atomic Safety and Licensing Board "Panel plans to maintain the adjudicatory infrastructure for the repository licensing proceeding, including the LSN, the LVHF, and the LVHF component of the Digital Data Management System (DDMS), until the Panel receives direction from the Commission to implement the closure of that infrastructure." The memorandum previously notes that "since no Nuclear Waste Fund (NWF) resources are available in FY 2012, starting on October 1, 2011, fee-based funds will be needed to support the LVHF and its infrastructure." The revised memorandum no longer raises the issue of using fee based funds to close the Las Vegas Hearing Facility or other YM hearing infrastructure. This change was made to clearly inform the Commission that orderly closure would be accomplished this fiscal year with available NWF money. Therefore, Mr. Mohseni's second issue is no longer raised by the memorandum.

*Catherine Xaney*  
2-3-11

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NRC FORM 757 NRC 800 10-100 0-0000		U.S. NUCLEAR REGULATORY COMMISSION	
<b>NON-CONCURRENCE PROCESS</b>			
<b>SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL</b>			
TITLE OF DOCUMENT <b>Update on the Yucca Mountain Program</b>		ADAMS ACCESSION NO. <b>ML183140391</b>	
DOCUMENT SPONSOR <b>Catherine Hasey</b>		SPONSOR PHONE NO. <b>301-492-3554</b>	
NAME OF NON-CONCURRING INDIVIDUAL <b>Janet P. Kotra</b>		PHONE NO. <b>301-492-3190</b>	
<input checked="" type="checkbox"/> DOCUMENT AUTHOR <input type="checkbox"/> DOCUMENT CONTRIBUTOR <input type="checkbox"/> DOCUMENT REVIEWER <input checked="" type="checkbox"/> ON CONCURRENCE			
TITLE <b>Senior Project Manager</b>		ORGANIZATION <b>NMSS/NMSS/PMSS</b>	
<b>REASONS FOR NON-CONCURRENCE</b> <p>I have prepared and revised copious variations of this memorandum. When, on June 14, 2010, the Chairman ordered the Director of NMSS to postpone issuance of Safety Evaluation Report Volumes 1 and 3, HLWRS and NMSS managers became concerned the entire Commission may not be fully aware of the policy, legal and budgetary consequences of such redirection. Some believed that a diligent staff, struggling to honor conflicting obligations, needed programmatic and policy guidance from the entire Commission armed with a fair assessment of the facts. I was given to understand the memorandum was not to refer to any of the related policy issues, a decision with which I disagreed. Later, in September, it became clear that, rather than postpone issuance of individual SER volumes, the Chairman's intent was to terminate the staff's safety review altogether. Using the continuing resolution as justification, the Chairman, through OEDO and the CPO, told staff that all work on the SER must stop, including Volume 3 on post closure safety, which was already complete, and undergoing management review. Written guidance to this effect appeared later, in an October 4, 2010 memorandum. The Chairman later met with the Yucca Mountain Team on October 12, 2010. He explained that the decision to shut down the staff's review of the application was his alone and that staff should move to orderly closure of NRC's Yucca Mountain program. This, despite the fact that, then, as now, the Nuclear Waste Policy Act remains in effect, the hearing process continues, and the Commission has yet to issue a decision on whether DOE may legally withdraw the application. Over time, repeated rounds of comment (formal and otherwise) from OEDO, the CPO and the General Counsel were incorporated. Time and again these comments diluted or contradicted the direct language offered by NMSS and ASLMP staffs. Both staffs sought to outline policy, programmatic and budgetary difficulties faced by their offices as they tried to cover the costs of both shutting down a complex and valuable national program and infrastructure while still supporting an ongoing hearing process. This new long-suffering memorandum is characterized as a "status report." Throughout its tortured evolution, I continued to make countless changes during a most unorthodox process, despite growing reservations, so long as the description of the program's history and status remained reasonably accurate. At this juncture, I can no longer support this memorandum. I believe</p>			
<input checked="" type="checkbox"/> CONTINUED IN SECTION D			
SIGNATURE <i>Janet P. Kotra</i>		DATE <b>2/1/2011</b>	

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ENCLOSURE 3

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<b>NON-CONCURRENCE PROCESS</b>			
<small>TITLE OF DOCUMENT</small> <b>Update on the Yucca Mountain Program</b>		<small>ADAMS ACCESSION NO.</small> <b>ML103146391</b>	
<small>SECTION D: CONTINUATION PAGE</small>			
<small>CONTINUATION OF SECTION</small>		<input checked="" type="checkbox"/> A <input type="checkbox"/> B <input type="checkbox"/> C	
<p>that, in its present form, this memorandum appears to imply that the NMSS staff voluntarily, or, worse still, on its own volition, sought to terminate NRC staff's independent review of the Yucca Mountain License application and end staff's support for a full and impartial hearing process for that application. It has been my experience that members of the NMSS staff, who have conducted a fair, independent and technically sound safety review, and who worked earnestly to prepare the required Safety Evaluation Report, stood down from that duty only with enormous reluctance. As currently drafted, this memorandum makes no reference to the facts surrounding the Chairman's termination of the NRC staff's review of the Yucca Mountain License application. Absent this crucial context, a reader is left with the mistaken impression that this termination and the "orderly shutdown" of the NRC staff's licensing review and hearing process was staff's preferred and well-considered course of action, initiated by the NRC's technical staff. Nothing could be farther from the truth. Furthermore, absent proper context, the reader would also conclude that NMSS staff prepared this memorandum to inform a passive Commission about "staff's" course of action, after the fact, to alert the heretofore uninvolved Commission about problems and difficulties to which "staff's" course have led. For these reasons, I must respectfully withdraw my concurrence of December 2, 2010.</p>			

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NRC FORM 757 NRC 10-10-100 (3-2009)		U.S. NUCLEAR REGULATORY COMMISSION	
<b>NON-CONCURRENCE PROCESS</b>			
TITLE OF DOCUMENT Update on the Yucca Mountain Program		ADAMS ACCESSION NO. ML103140391	
SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR (THIS SECTION SHOULD ONLY BE COMPLETED IF SUPERVISOR IS DIFFERENT THAN DOCUMENT SPONSOR.)			
NAME <i>King Stablein</i>			
TITLE Chief, Projects Branch B, Division of High-Level Regulatory Safety		PHONE NO. 301-492-3199	
ORGANIZATION NMSS			
COMMENTS FOR THE DOCUMENT SPONSOR TO CONSIDER			
<input type="checkbox"/> I HAVE NO COMMENTS <input checked="" type="checkbox"/> I HAVE THE FOLLOWING COMMENTS			
<p><i>I agree wholeheartedly with Dr. Kotra's comments and agree specifically that this status report lacks the necessary context and information to adequately characterize the confusion, chaos, and anguish occasioned by the Chairman's unilateral decision to disrupt the orderly process of SER development. My nonconcurrence comments will amplify some of the points made by Dr. Kotra.</i></p>			
SIGNATURE <i>King Stablein</i>		<input type="checkbox"/> CONTINUED IN SECTION D DATE 2/2/11	
NRC FORM 757 (3-2009)		Use ADAMS Template NRC-008 PRINTED ON RECYCLED PAPER	

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NRC FORM 757 NRC MD 10.158 (3-2009)		U.S. NUCLEAR REGULATORY COMMISSION	
<b>NON-CONCURRENCE PROCESS</b>			
TITLE OF DOCUMENT <b>Update on the Yucca Mountain Program</b>		ADAMS ACCESSION NO. <b>ML103140391</b>	
<b>SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR</b>			
NAME <b>Catherine Haney</b>			
TITLE <b>Office Director</b>		PHONE NO. <b>301-492-3554</b>	
ORGANIZATION <b>NMSS</b>			
ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.)  - see attached -			
<input type="checkbox"/> CONTINUED IN SECTION D			
SIGNATURE - DOCUMENT SPONSOR <i>Catherine Haney</i>	DATE <i>2-4-11</i>	SIGNATURE - DOCUMENT SIGNER <i>Catherine Haney</i>	DATE <i>2-4-11</i>
NON-CONCURRING INDIVIDUAL (To be completed by document sponsor when process is complete, i.e., after document is signed):			
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I carefully considered the concerns raised in Dr. Kotra's non-concurrence on the memo titled, "Update on the Yucca Mountain Program." Over the last several months, I have met with Dr. Kotra to discuss her concerns on transitioning the Yucca Mountain Program towards closure. Most recently, I met with Dr. Kotra on January 31, 2011, to discuss the concerns she planned to raise with the most recent version of the memorandum. Based on these discussions and my review of her non concurrence, I do not believe that changes are needed to the memorandum.

Dr. Kotra notes in her opening statement that she has "prepared and revised copious variation of this memorandum". She also states that "over time, the memo has been revised to dilute or contradict "the direct language offered by NMSS and ASLBP staffs. Both staffs sought to outline policy, programmatic and budgetary difficulties faced by their offices as they tried to cover the costs of both shutting down and complex and valuable national program and infrastructure while still supporting an ongoing hearing process." Dr. Kotra states that "In its present form, this memorandum appears to imply that the NMSS staff voluntarily, or, worse still, on its own volition, sought to terminate NRC staff's independent review of the Yucca Mountain License application and end staff's support for a full and impartial hearing process for the application. . . . As currently drafted this memorandum makes no reference to the facts surrounding the chairman's termination of the NRC staff's review of the Yucca Mountain license application."

Dr. Kotra is correct in her statement that there have been many iterations of this memorandum. This was due to the evolving nature of the program and the information that I felt needed to be conveyed to the Commission. Dr. Kotra states that she "was given to understand the memorandum was not to refer to any of the related policy issues, a decision with which I disagreed." Over time, the purpose of the paper evolved. The purpose of the Commission memorandum is to describe the status of the Yucca Mountain Program and staff's plans to capture the knowledge it acquired during pre-licensing preparation and licensing review activities. Potential policy issues associated with the closure of the Yucca Mountain project had been decided at the Commission level (reference my response to Mr. Mohseni's non concurrence on this same memo). I am not aware of any new information regarding program closure that would warrant raising it as a policy matter in this memorandum nor did I believe it necessary to raise any facts surrounding the termination of staff's review in this status paper. I also disagree with her suggestion that the paper fails to outline programmatic and budgetary difficulties. The resources section of the memorandum informs the Commission of programmatic implications due to the limited NWF resources, noting that estimates are contingent upon "no additional activities regarding closure or adjudication" and that FY2011 resources are not sufficient for knowledge capture and LVHF maintenance activities. Lastly, I do not agree with Dr. Kotra's statement that the "memorandum appears to imply that the NMSS staff voluntarily, or worse still, on its own volition, sought to terminate NRC staff's independent review of the Yucca Mountain License application and end staff's support for a full and impartial hearing process for the application. The memorandum was not intended to document or revisit past decisions on the Project.

*Catherine Haney*  
2-3-11

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NRC FORM 757 NRC MD 15.159 (3-2009)		U.S. NUCLEAR REGULATORY COMMISSION	
<b>NON-CONCURRENCE PROCESS</b>			
<b>SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL</b>			
TITLE OF DOCUMENT		ADAMS ACCESSION NO.	
UPDATE ON THE YUCCA MOUNTAIN PROGRAM		ML103140391	
DOCUMENT SPONSOR		SPONSOR PHONE NO.	
Catherine Hasey		301-492-3554	
NAME OF NON-CONCURRING INDIVIDUAL		PHONE NO.	
King Stablein		301-492-3199	
<input type="checkbox"/> DOCUMENT AUTHOR <input type="checkbox"/> DOCUMENT CONTRIBUTOR <input type="checkbox"/> DOCUMENT REVIEWER <input checked="" type="checkbox"/> ON CONCURRENCE			
TITLE		ORGANIZATION	
Branch Chief		NMSS/HLWRS	
REASONS FOR NON-CONCURRENCE			
Please see attached document.			
<input type="checkbox"/> CONTINUED IN SECTION D			
SIGNATURE		DATE	
<i>King Stablein</i>		2/2/11	

**Not For Public Disclosure****Reasons for King Stablein's Nonconcurrence on Memorandum to the Commission entitled  
"Update on the Yucca Mountain Project"**

As Dr. Kotra's direct supervisor, I have witnessed her efforts to prepare and revise this memorandum over the past few months, and we have engaged in continual discussions about whether or not we could support the contents as they twisted and turned to accommodate the many agendas that were influencing the direction of the memo. We grew more and more uncomfortable as we came to understand that neither the context for the current state of the Yucca Mountain program nor the policy issues affecting the program were intended to be part of the final product. I have come to conclude that the memo does not provide the Commission with important information regarding the program, but rather, appears to suggest that the staff has taken the initiative to go in the direction of closure of the program and has had no difficulty in carrying out certain steps to achieve closure by September 30, 2011. In her non-concurrence, Dr. Kotra has skillfully illuminated many fundamental issues with the memo, and I fully support what she has written. In addition, I want to add some thoughts of my own.

Until the Chairman unilaterally brought development of the SER to a halt as of September 30, 2010, the High-Level Waste Repository Safety (HLWRS) staff was on track to deliver all five volumes of the SER in the first part of FY 2011. Volume 3, the key postclosure volume, was virtually complete and could have been issued by the November 2010 date that staff had given to ASLB. When the Chairman met with the HLWRS staff on October 12, 2010, it was pointed out to him that allowing the staff to finish the SER volumes would be by far the most efficient and effective use of Nuclear Waste Fund resources and at the same time would give the Nation the benefit of an independent regulator's evaluation of the Yucca Mountain application. He made it clear during this meeting that, although he recognized that he could choose that path, his view was that it would look more political to publish the SER volumes with findings than to issue them as Technical Evaluation Reports (TERs). Despite his audience's incredulity regarding this position, the Chairman said that the decision was solely his and that he chose to derail the SER development process while directing the staff to begin orderly shutdown of the Yucca Mountain program.

This decision has had profound effects on the Yucca Mountain program, none of which are reflected in the subject status report. As a supervisor in this program, I am keenly aware of the agony experienced by the HLWRS staff as they dutifully followed the Chairman's direction. Many of the staff have worked on the Yucca Mountain program for two decades or longer. To not be allowed to finish the SER, the culmination of those years of precicensing and licensing activity, because of what appears to be the arbitrary decision of one person, was wrenching for the staff. The staff was not aware of any substantive discussion and airing of issues at the Commission level, as would be expected for a decision of this magnitude regarding a program that has existed for 30 years. It felt to the staff as if the Chairman had casually dismissed the staff's sacrifices and effort of those many years without even bothering to engage his fellow Commissioners in the manner that Commission decisions are usually handled. The staff would

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have greatly appreciated, given the importance of this decision, an opportunity to share its views with the entire Commission. There is no recognition in this status update of the staff's frustration over the direction of the program or of the staff's lack of opportunity to present its views, concerns, and insights to the Commission before a final decision was made.


There is also no recognition in this memorandum of the difficulties staff has had to endure because of the lack of a Commission decision regarding whether or not DOE can withdraw its license application. The staff has been caught in a bind which it felt itself incapable of escaping as it attempts to follow the Chairman's direction to carry out orderly closure of the program. Confronted with the reality that there is still an active application before ASLB, certain activities in the staff's Orderly Closure Plan were considered by staff to require that the Commission allow DOE to withdraw its application before staff could carry out those activities. One example is the disposition in the National Archives of the documents that have been needed during the licensing process. The staff, many of whom have been in this program for 20 years or more, are acutely aware of the NWPA and the argument that ASLB crafted in rejecting DOE's request to withdraw its application. Staff should not be put in a situation where the direction from the Chairman appears to be in direct conflict with the NWPA and the fact of an active license application. Absent policy decisions from the Commission, staff has struggled on a daily basis to figure out how to cope with this bizarre situation in a manner which would enable staff to maintain its integrity.

For these reasons, as well as those expressed so eloquently by Dr. Kotra in her nonconcurrency, I respectfully decline to concur on this status update memo.

*King Stablein* 2/3/11

King Stablein, Chief  
Projects Management Branch B  
Division of High-Level Waste Repository Safety  
Office of Nuclear Material Safety and Safeguards

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NRC FORM 757 NRC 943 10-158 (3-2009)		U.S. NUCLEAR REGULATORY COMMISSION	
<b>NON-CONCURRENCE PROCESS</b>			
TITLE OF DOCUMENT		ADAMS ACCESSION NO.	
<b>SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR</b> (THIS SECTION SHOULD ONLY BE COMPLETED IF SUPERVISOR IS DIFFERENT THAN DOCUMENT SPONSOR.)			
NAME Aby Mohseni		PHONE NO. 301-492-3181	
TITLE Deputy Director			
ORGANIZATION NRC/NMSS/DHLWRS			
COMMENTS FOR THE DOCUMENT SPONSOR TO CONSIDER <input type="checkbox"/> I HAVE NO COMMENTS <input checked="" type="checkbox"/> I HAVE THE FOLLOWING COMMENTS			
<p>As Dr. King Stabilein's supervisor, I agree with his characterization of the program and the shortcomings of the memorandum. I would furthermore point to the inconsistency of the NRC Solicitor's characterization of the status of the program as being suspended due to the Continuing Resolution, implying a temporary and reversible status. In an email to a staff inquiry, the Solicitor agreed with the following characterization:</p> <p>"In December 2010, the U.S. Court of Appeals lifted a prior order that had held four lawsuits against DOE in abeyance. The Court's December order set the lawsuits for full briefing and for oral argument. All briefs now have been filed, and the Court is scheduled to hear oral argument on March 22, 2011. The lawsuits against DOE claim that DOE has no authority to withdraw the Yucca Mountain license application, and that Congress must specifically authorize such action. As the appeals court proceeding has moved forward, and in view of NRC's limited budget resources under the current Continuing Resolution, NRC has suspended review of the Yucca Mountain license application, and NRC has stated it has no schedule for completion of the review."</p> <p>This statement is inconsistent with the orderly closure activities outlined in the memorandum, including the termination of the Las Vegas Hearing Facility in FY 2011.</p>			
SIGNATURE 		<input type="checkbox"/> CONTINUED IN SECTION D DATE 2/3/2011	
SUBMIT THIS PAGE TO DOCUMENT SPONSOR			
NRC FORM 757 (3-2009)		Use ADAMS Template NRC-006	
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<b>NRC FORM 757</b> <small>NRC MD 10.158 (3-2009)</small>		<b>U.S. NUCLEAR REGULATORY COMMISSION</b>	
<b>NON-CONCURRENCE PROCESS</b>			
<b>TITLE OF DOCUMENT</b> Update on the Yucca Mountain Program		<b>ADAMS ACCESSION NO.</b> ML103140391	
<b>SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR</b>			
<b>NAME</b> Catherine Haney			
<b>TITLE</b> Office Director		<b>PHONE NO.</b> 301-492-3554	
<b>ORGANIZATION</b> NMSS			
<b>ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE</b> (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.) <div style="text-align: center;">- see attached -</div>			
<input type="checkbox"/> CONTINUED IN SECTION D			
<b>SIGNATURE - DOCUMENT SPONSOR</b> <i>Catherine Haney</i>	<b>DATE</b> 2-4-11	<b>SIGNATURE - DOCUMENT SIGNER</b> <i>Catherine Haney</i>	<b>DATE</b> 2-4-11
<b>NON-CONCURRING INDIVIDUAL</b> (To be completed by document sponsor when process is complete, i.e., after document is signed):			
<input type="checkbox"/> CONCURS		<input type="checkbox"/> WANTS NCP FORM PUBLIC	
<input checked="" type="checkbox"/> NON-CONCURS		<input checked="" type="checkbox"/> WANTS NCP FORM NON-PUBLIC	
<input type="checkbox"/> WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)			

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I carefully considered the concerns raised in Dr. Stablein's non-concurrence on the memo titled, "Update on the Yucca Mountain Program." On February 2, 2011, prior to him filing the non concurrence, I met with Dr. Stablein to discuss his concerns with the memorandum. Based on this discussion and my review of his non concurrence, I do not believe that changes are needed to the memorandum.

Dr. Stablein notes several items that are omitted from or not recognized in the memorandum. They are as follow:

- Important information regarding the program
- The "profound effects" of the decision to transition the Yucca Mountain Program to closure are reflected in the subject status report.
- ". . . staff's frustration over the direction of the program or of the staff's lack of opportunity to present its views, concerns, and insights to the Commission before a final decision was made."
- ". . . difficulties staff has had to endure because of the lack of a Commission decision regarding whether or not DOE can withdraw its license application."

Dr. Stablein further states that the paper "appears to suggest that the staff has taken the initiative to go in the direction of closure of the program and has had no difficulty in carrying out certain steps to achieve closure by September 30, 2011."

Mr. Mohseni, Dr. Stablein's supervisor, in his comments on Dr. Stablein's non concurrence states that he agrees with Dr. Stablein's characterization of the program and the shortcomings of the memorandum. In addition, Mr. Mohseni identifies perceived inconsistency with the orderly closure activities outlined in the memorandum, including the termination of the Las Vegas hearing Facility in FY 2011 and comments by the NRC Solicitor on a draft IAEA document that imply a temporary and reversible status (reference Mr. Mohseni's comments on Dr. Stablein's non concurrence).

I have reviewed the list of items that Dr. Stablein believes were omitted from or not recognized in the memorandum and his statement that the paper "appears to suggest that the staff has taken the initiative to go in the direction of closure of the program and has had no difficulty in carrying out certain steps to achieve closure by September 30, 2011." I believe that they all fall outside of the scope of the memorandum or are not needed. The purpose of the Commission memorandum is to describe the status of the Yucca Mountain Program and staff's plans to capture the knowledge it acquired during pre-licensing preparation and licensing review activities.

I have also been informed by the NRC Solicitor that his comments on an interim draft of an IAEA document were not meant to suggest a temporary "suspension" of YM due to budget constraints. The term was drafted by others and his focus was on accurately characterizing the status of Federal court litigation. He understands that the staff is engaged in orderly closure activities. As directed, our FY 2011 activities are focused on the orderly closure of the Program and not on completion of the Safety Evaluation Reports. As stated by the Chairman in

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an October 27, 2010, letter to the Honorable Jim Sensenbrenner (ML 102980673), "the approach the NRC is following is consistent with the terms and the Continuing Resolution, the Commission's Fiscal 2011 budget request, the general principles of appropriations law, and past U.S. Nuclear Regulatory Commission (NRC) practice." The approach described in the memorandum is endorsed by the OEDO, CFO, and OGC and the memorandum describes the resource limitations on completing activities in FY2011.

*Catherine Haney*  
2-3-11

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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

OFFICE OF THE  
INSPECTOR GENERAL

June 6, 2011

MEMORANDUM TO: Chairman Jaczko

FROM: *Hubert T. Bell*  
Hubert T. Bell  
Inspector General

SUBJECT: NRC CHAIRMAN'S UNILATERAL DECISION TO TERMINATE  
NRC'S REVIEW OF DOE YUCCA MOUNTAIN REPOSITORY  
LICENSE APPLICATION (OIG CASE NO. 11-05)

This report conveys the results of an Office of the Inspector General (OIG), U.S. Nuclear Regulatory Commission (NRC), investigation into an allegation that the NRC Chairman, Gregory Jaczko, unilaterally and improperly closed out the NRC's review of the Department of Energy's (DOE) Yucca Mountain repository license application while the Government was operating under a continuing resolution (CR) in fiscal year (FY) 2011. In addition, it was alleged that the Chairman was purposely preventing the Commission from completing its ruling on the Atomic Safety Licensing Board's (ASLB) decision to deny DOE's motion to withdraw its Yucca Mountain repository license application from NRC. During the course of this investigation, concerns were also raised about the Chairman's management style toward staff and Commissioners and whether his control of information prevents the other Commissioners from effectively fulfilling their statutory responsibility to address policy matters.

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OIG's investigation examined whether the Chairman exceeded his authority in directing the NRC staff to close out the Yucca Mountain license application review during the CR period, the Commission's adjudicatory voting process, and the impact the Chairman's management style has on the collegial functioning of the NRC Commission. The investigation findings appear in section III of this report.

### I. BACKGROUND

#### *NRC Mission and Commission Structure*

NRC was established in 1974 to ensure the safe use of civilian nuclear materials in the United States. NRC's regulatory mission covers nuclear reactors, nuclear materials, and nuclear waste. NRC is an independent regulatory agency headed by a five-member Commission. The Commissioners are appointed by the President and confirmed by the Senate for 5-year terms, and their terms are staggered so that one Commissioner's term expires on June 30 each year. One member is designated by the President to be the Chairman, and no more than three Commissioners may be from the same political party. This report uses the term Chairman to refer to the Commissioner appointed as Chairman, the term Commissioner to refer to the other members of the Commission, and the term Commission to refer to the entire body (Commissioners plus Chairman).

In 1979, 5 years after NRC's creation, the most serious nuclear accident in U.S. history occurred at Three Mile Island nuclear power plant in Pennsylvania. After the accident, President Jimmy Carter established the Kemeny Commission to examine and assess the events that led to the accident. In addition, NRC organized its own review, known as the Rogovin study. Both the Kemeny Commission and Rogovin study recommended that a single administrator should head NRC. However, President Carter decided to maintain a Commission structure, and he submitted Reorganization Plan No. 1 of 1980 (Reorganization Plan) to Congress with the intent to

... improve the effectiveness of the Nuclear Regulatory Commission by giving the Chairman the powers he needs to ensure efficient and coherent management in a manner that preserves, in fact enhances, the commission form of organization.<sup>1</sup>

President Carter's main goals were to strengthen the Chairman's role to clarify where agency responsibility resided while retaining the diversity that a commission form of organization offers.

On October 1, 1980, the Reorganization Plan, as amended, became effective. The Reorganization Plan is the statutory guidance by which the Commission operates. The plan articulates the role of the Chairman as it relates to executive powers and the Commissioners as

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<sup>1</sup> This statement was made by President Carter when he presented the Reorganization Plan to Congress on March 27, 1980.

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it relates to their policy role. Thus, the Commission's interpretation and implementation of the plan helps set the tone for how well the Commission members work together in a collegial fashion.

Section 1 of the Reorganization Plan establishes the Commission's functions and the Chairman's functions. It designates the Commission as responsible for (1) policy formulation, (2) rulemaking, and (3) orders and adjudications. It also provides that at any time, the Commission may "determine by majority vote, in an area of doubt, whether any matter, action, question or area of inquiry pertains to one of these functions."

Section 2 of the Reorganization Plan assigns the Chairman responsibility for all other functions, including (1) serving as official Commission spokesman, (2) serving as the Commission's principal executive officer responsible for developing policy planning and guidance for consideration by the Commission, (3) administrative functions of the Commission, (4) distribution of business among the offices of the Commission, (5) preparation of the Commission's budget estimate, and (6) the proposed distribution of appropriated funds according to major programs and purposes. The Reorganization Plan states that the Chairman determines the use and expenditure of funds of the Commission, "in accordance with the distribution of appropriated funds according to major programs and purposes approved by the Commission."

The plan also states that the Chairman and the Executive Director for Operations (EDO), who reports to the Chairman, are responsible for insuring the Commission is fully and currently informed about matters within its functions.

NRC's *Internal Commission Procedures* reiterate the Reorganization Plan provisions concerning the role of the Commission as a whole and the Chairman's individual role. The procedures state that each Commissioner, including the Chairman, has equal responsibility and authority in all Commission decisions and actions, has full and equal access to information pertaining to Commission responsibilities, and has one vote. The procedures note that one of the Commission's collegial functions is revision of budget estimates and determining the distribution of appropriated funds according to major programs and purposes.

The procedures also reiterate the Reorganization Plan's provision that the Commission may determine by majority vote, in any area of doubt, whether any matter, action, question, or area of inquiry pertains to policy formulation or any of the Commission's functions. OIG learned that Commissioners use a written form of communication, referred to as a Commission action memorandum (COM), to seek votes from the other Commissioners to determine whether a matter falls into the Commission's purview as opposed to that of the Chairman. A majority vote by the Commission is needed for them to address the matter as policy.

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In December 1999, OIG issued a report, *Special Evaluation of the Role and Structure of NRC's Commission* (OIG-99-E-09), which identified that Commission members, from time to time, have different interpretations of the Reorganization Plan, which can adversely affect the Commission's collegiality.<sup>2</sup>

Chairman Jaczko has been a Commissioner since January 2005 and Chairman since May 2009. His term runs through June 2013.

### *U.S. Nuclear Waste Policy*

The current U.S. policy governing permanent disposal of spent nuclear fuel and high-level radioactive waste is defined by the Nuclear Waste Policy Act of 1982, as amended (NWPA), and the Energy Policy Act of 1992. These acts specify that spent nuclear fuel and high-level radioactive waste will be disposed of underground, in a deep geologic repository. The NWPA names Yucca Mountain, a high ridge in the Nevada desert approximately 100 miles northwest of Las Vegas, as the single candidate site for this potential geologic repository. The NWPA specifically states that NRC "shall consider an application for a construction authorization for a repository" and "shall issue a final decision approving or disapproving the issuance of a construction authorization not later than 3 years after" the application is submitted.

DOE, which is charged with constructing and operating the repository, submitted its license application for a repository to hold no more than 70,000 metric tons of spent nuclear fuel and high-level radioactive waste to NRC on June 3, 2008, and NRC formally accepted it for review in September 2008. NRC published its Notice of Hearing in the *Federal Register* on October 22, 2008, starting the 3-year schedule set by Congress for NRC to reach a decision on whether to approve construction. If necessary, NRC may give notice to Congress of the need for an additional year to complete the review.

NRC's Atomic Safety and Licensing Board Panel<sup>3</sup> (ASLBP) is responsible for conducting hearings on a variety of legal and technical contentions regarding the Yucca Mountain license application.

<sup>2</sup> The special evaluation defined collegiality as the relationship between a group of associates or coworkers, where authority is vested in all of the members, as they work towards a common duty or role. The full report and NRC's response to the report may be accessed at <http://www.nrc.gov/reading-rm/doc-collections/insp-gen/2000/>.

<sup>3</sup> The panel conducts all licensing and other hearings as directed by the Commission, primarily through individual Atomic Safety and Licensing Boards (ASLBs) or single presiding officers appointed by either the Commission or the Chief Administrative Judge. The panel, which has no fixed number of positions, is composed of (1) administrative judges (full-time and part-time), who are lawyers, engineers, and scientists, and (2) administrative law judges (ALJs) who are lawyers. Administrative judges and ALJs serve as single presiding officers or on three-member boards, which generally are chaired by a lawyer, for a broad range of proceedings.

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### *Continuing Resolutions (CR)*

A CR is a law that provides funding for Federal agencies, specific activities, or both to continue in operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year. For the most part, CRs are temporary and intended by Congress to be stop-gap measures enacted to keep existing Federal programs functioning after the expiration of previous budget authority and until regular appropriation acts can be enacted. Unlike regular appropriation acts, CRs typically do not appropriate specified sums of money. Instead, they usually appropriate "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations." An agency may determine the pattern of its obligations under a CR provided it operates under a plan that will keep it within the rate for operations limit set by the resolution.

Office of Management and Budget (OMB) Circular A-11, *Preparation, Submission, and Execution of the Budget*, provides guidance on operating under a CR. According to OMB Circular A-11, agencies should carefully review each CR to determine the formula provided and should keep in mind that the amount available under a CR is the product of negotiations among the various factions in Congress and the Administration. OMB Circular A-11 notes that agencies may not obligate funds under a CR that would impinge on final funding prerogatives of Congress. It also states that CRs usually include provisions directing agencies to execute programs using the most limited funding actions permitted in order to provide for continuing projects and activities.

The Comptroller General, head of the Government Accountability Office, has the legal authority to issue decisions and opinions on appropriations law.

### *Chronology of Events*

In September 2008, NRC formally accepted DOE's license application to build a geologic repository at Yucca Mountain and embarked on its review process. According to the NWPA, NRC was to reach a decision concerning the viability of the site within 3 years of the license application acceptance date.<sup>4</sup>

NRC planned, at the end of its technical review, to issue a safety evaluation report (SER) containing its findings on the repository design.<sup>5</sup> The SER would determine whether the proposed facility would meet NRC regulations to protect public health and safety. NRC staff responsible for developing the SER decided to issue the SER in five volumes, and estimated<sup>6</sup> that Volume 1 (General Information) would be complete in August 2010, Volume 3 (Review of

<sup>4</sup> The NWPA additionally allows the NRC to extend the 3-year deadline by not more than 1 year.

<sup>5</sup> An SER summarizes the NRC staff's technical review and safety evaluation related to the anticipated effect of a proposed license application or licensing action on public health and safety.

<sup>6</sup> Dates reflect the NRC staff's last official estimate, announced in March 2010.



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Repository Safety After Permanent Closure) in November 2010, Volume 4 (Review of Administrative and Programmatic Requirements) in January 2011, and Volume 2 (Review of Repository Safety Before Permanent Closure) and Volume 5 (License Specifications and Conditions) in March 2011.

On February 2, 2010, Energy Secretary Steven Chu noted during a Senate hearing that President Barack Obama's Administration would seek to immediately suspend licensing for the Yucca Mountain repository because it was "not a workable option." DOE's budget proposed zero funding for the project in FY 2011, which conveyed the Administration's intent to terminate the Yucca Mountain project.

In February 2010, NRC published its FY 2011 Congressional Budget Justification, which also conveyed the Administration's intent concerning Yucca Mountain, stating:

The Administration has indicated that it does not support developing a repository at Yucca Mountain, Nevada. Consistent with that position, DOE may submit to the NRC a motion to withdraw or suspend its Yucca Mountain license application during FY 2010. The NRC Budget reflects that possibility. Upon the withdrawal or suspension of the licensing review, the NRC would begin an orderly closure of the technical review and adjudicatory activities and would document the work and insights gained from the review.

NRC's FY 2011 Congressional Budget Justification allotted \$10 million for the Yucca Mountain repository to "support work related to the orderly closure of the agency's Yucca Mountain licensing support activities." This amount was \$19 million less than the \$29 million appropriated for license application review activities in FY 2010.

On March 3, 2010, DOE submitted to the ASLB a motion to withdraw its Yucca Mountain license application. On June 29, 2010, the ASLB issued a decision that denied DOE's motion to withdraw, concluding that DOE lacks the authority to seek to withdraw the application. The ASLB grounded its decision in its interpretation of the NWPA, reasoning that Congress directed DOE to file the application and the NRC to consider the application and issue a final, merits-based decision approving or disapproving.

On June 30, 2010, the Commission issued an order inviting hearing participants to file briefs as to whether the Commission should review, and reverse or uphold, the ASLB's decision, thus signifying the Commission's decision to review the ASLB's decision.

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On August 10, 2010, in accordance with NRC's process, the Office of Commission Appellate Adjudication (OCAA)<sup>7</sup> submitted adjudicatory paper SECY-10-0102, "U.S. Department of Energy (High-Level Waste Repository), Review of LBP-10-11, Docket No. 63-001-HLW," to the Commission for its review and vote. Commissioners began casting their votes on SECY-10-0102 on August 25, 2010, and a majority of Commissioners had voted by September 15, 2010. Chairman Jaczko did not cast his final vote at that time.

On September 30, 2010, Congress issued the first in a series of CRs, directing Federal agencies generally to spend money at FY 2010 levels, as necessary, to continue projects and activities that were conducted during FY 2010.

On October 4, 2010, the NRC Chief Financial Officer (CFO) and the EDO issued guidance to NRC staff related to budget execution under the CR. The memorandum stated that offices were to commit, obligate, and expend funds for ongoing activities at FY 2010 levels, with the exception of the High-Level Waste Program. The memorandum stated that during the CR period, new work that was not authorized and funded in FY 2010 should not be started in FY 2011. With regard to the High-Level Waste Program, the memorandum directed staff to continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR period.

In early October 2010, Chairman Jaczko directed NRC staff working on the Yucca Mountain license application review to stop working on Volume 3 of the SER and proceed to orderly closure of the technical review.

On October 29, 2010, Chairman Jaczko voted on SECY-10-0102, completing the Commission's notational voting process on the Yucca Mountain matter; however, as of the date of this report, the Commission has not held an affirmation vote on the matter and the draft order continues to sit in deliberation before the Commission for affirmation.

## II. INVESTIGATIVE DETAILS

### A. OIG Review of CR Issue

OIG learned that the language in the EDO's and CFO's October 4, 2010, CR budget guidance memorandum directing staff to follow FY 2011 budget guidance for High-Level Waste Program activities was based on instruction provided by the Chairman's office and was used by the Chairman to stop work on the SER and NRC's Yucca Mountain license application review.

<sup>7</sup>OCAA assists the Commission in its adjudicatory functions including the resolution of appeals from decisions of ASLBs; assistance includes analysis of adjudicatory matters and preparation of adjudicatory decisions consistent with Commission policy and guidance.

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While the Chairman told NRC senior officials that the CR budget guidance memorandum language had been reviewed and agreed to by his fellow Commissioners, one Commissioner was not informed of the language, two were provided some information but did not recognize the impact the memorandum would have on the SER, and one Commissioner disagreed with the language because he recognized the impact it would have on the SER.

Furthermore, while all of the NRC Commissioners in February 2010 (Chairman Jaczko, Commissioner Kristine Svinicki, and former Chairman Dale Klein) agreed to the agency's FY 2011 Congressional Budget Justification, which specified criteria that needed to be met before the license application review process could be shut down, there is disagreement among current Commissioners and a former Chairman and agency officials as to (a) whether these criteria were met and (b) the Chairman's shutdown approach.

*NRC's Budgets for the High-Level Waste Repository Program*

NRC's budget documents reflect a significant funding reduction for the High-Level Waste Program between FY 2010 and FY 2011 and elimination of the program by FY 2012. OIG learned that each NRC budget proposal and subsequent passback appeal letter<sup>8</sup> to OMB for increased funding was voted on and approved by the Commission, although the Commission composition was different for each year.

The Commission's FY 2010 performance budget request – which was voted on and approved by former Chairman Klein, then Commissioners Jaczko and Peter Lyons, and Commissioner Svinicki – sought \$99.1 million for the program to support two concurrent processes associated with the "ongoing license review": (1) assess the technical merits of the repository design, and (2) support the adjudicatory hearing before the NRC ASLB convened to hear the technical and legal challenges posed by parties to the DOE license application. Subsequently, Congress appropriated \$29 million to NRC for the High-Level Waste Program.

For FY 2011, the Commission (Chairman Jaczko, Commissioner Svinicki, and then Commissioner Klein) requested \$39.5 million to support the High-Level Waste Program. OMB responded with \$10 million for the program. In December 2009, Chairman Jaczko sent NRC's FY 2011 passback letter of appeal to OMB. This letter, which had been approved by the Commission, stated that DOE:

... is expected to submit to the NRC a motion to withdraw or suspend its Yucca Mountain license application before the end of FY 2010. Assuming this scenario, the \$10 million provided in the FY 2011 pass-back would allow for us to start the process for an orderly disposition of the adjudicatory and technical review activities. Additional resources may be needed for an orderly disposition of activities beyond FY 2011, the amount dependent upon the timing of the motion.

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<sup>8</sup> The passback appeal letter is also referred to as the reclama letter.

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NRC's FY 2011 Congressional Budget Justification, published in February 2010 after Commission approval, also referenced the possibility that DOE would move to suspend or withdraw its license application and noted:

Upon the withdrawal or suspension of the licensing review, the NRC would begin an orderly closure of the technical review and adjudicatory activities and would document the work and insights gained from the review.

Although this document also stated that NRC had requested \$10 million, including 32 FTE, to provide for licensing activities, the only activities described were those related to the orderly closure of the agency's Yucca Mountain licensing support activities.

OIG noted differences between NRC's December 2009 passback letter of appeal and the February 2010 Congressional Budget Justification for FY 2011 with regard to (1) proposed activities and (2) prerequisites to trigger those activities. While the NRC passback appeal letter states that *orderly disposition of the adjudicatory and technical review activities* would be based upon a *motion to withdraw or suspend*, the Congressional Budget Justification states the *orderly closure of the technical review and adjudicatory activities* would be based on *withdrawal or suspension of the licensing review*.

For FY 2012, the Commission (Chairman Jaczko and Commissioners Svinicki, William Ostendorff, William Magwood, and George Apostolakis) requested \$4.0 million for the termination of all program activities. OMB, however, allocated no money to NRC for the High-Level Waste Program, which is reflected in NRC's FY 2012 Congressional Budget Justification.

#### *CR Budget Guidance Memorandum*

OIG reviewed the EDO's and CFO's October 4, 2010, CR budget guidance memorandum and four earlier versions that predated the final document. The final October 4, 2010 memorandum stated that NRC's FY 2011 budget request sustains agency programs at about the same level as FY 2010, with the exception of the High-Level Waste Program and that offices should therefore proceed to commit, obligate, and expend funds for ongoing activities to effectively use available resources during the CR. The memorandum specified that, "During the CR period, new work that was not authorized and funded in FY 2010 should not be started in FY 2011." It also provided:

With respect to the High-Level Waste Program, the CR legislation does not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR.

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The first version of this memorandum – dated August 31, 2010, contained no mention of the Yucca Mountain repository license application review. Two later versions (dated September 13 and September 14, 2010) directed that the agency would continue to conduct its Yucca Mountain license application review with any available FY 2010 carryover funds until exhausted, and made no reference to the FY 2011 budget. The first version reviewed by OIG that made mention of the FY 2011 budget was dated September 27, 2010. This version directed staff to continue its activities on Yucca Mountain in accordance with the FY 2011 budget.

*Commissioner Ostendorff's COM*

OIG reviewed a COM prepared by Commissioner Ostendorff, titled, "Commission Direction on Staff Budget Guidance Under Fiscal Year (FY) Continuing Resolution." This document was submitted by Commissioner Ostendorff to the other Commissioners on October 6, 2010, in response to the CR budget guidance memorandum sent from the EDO and CFO to the staff on October 4, 2010. The COM states that the direction given to staff in the October 4, 2010 memorandum to continue its Yucca Mountain activities in accordance with FY 2011 budget guidance "is a significant policy matter that I believe warrants the Commission's attention, and which requires that the Commission give direction to the staff to avoid confusion on the Commission's intent for operation under the Continuing Resolution." Commissioner Ostendorff referred to a March 30, 2010 memorandum titled, "Plans for the High-Level Waste Repository Program," from the EDO to the Commission that conveyed the staff's intent to complete SER Volumes 1 and 3 no later than August and November 2010, respectively, and the staff's plan to continue to work on any remaining SER volumes until FY 2010 funds were exhausted. Commissioner Ostendorff said that the March 30, 2010 memorandum was provided to the Commission in the context of both the FY 2010 appropriation and the FY 2011 budget request and must, therefore, continue as standing guidance to staff.

Commissioner Ostendorff wrote, "It is my view that whatever the ultimate disposition of the High-Level Waste Repository activity, complete SER documents are the best and most appropriate way in which to memorialize the Staff's work product." He proposed that the Commission take action no later than October 8, 2010, to direct staff to continue to work on the remaining SER volumes as stated in the March 30, 2010 memorandum, at the rate for operations appropriate given the proposed FY 2011 budget as augmented by reprogrammed funds remaining from FY 2010 appropriations.

*Memo from NRC General Counsel Regarding CR Budget Guidance Memorandum*

OIG also reviewed an October 15, 2010 memorandum from NRC's General Counsel to the Chairman and Commissioners, providing the General Counsel's views regarding the October 4, 2010 CR budget guidance memorandum. The General Counsel concluded in the memorandum that focusing the agency's High-Level Waste Program activities during the CR period on activities related to the orderly closure of the Yucca Mountain review does not violate legal requirements or the principles of appropriations law. According to the General Counsel, the agency's guidance was appropriate for the following reasons:

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- The agency's proposed expenditures during the CR are consistent with the terms of the CR because they support and are within the scope of the continuing projects or activities conducted in the prior fiscal year; unless the CR contains more specific language, the phrase "projects or activities" generally refers to the total appropriation for the account, not to the specific activities contained as activities in a budget submission or committee report.
- While the Yucca Mountain license application may be on a different trajectory than in early fiscal years, it cannot be said that the agency is spending its High-Level Waste Program funds under the CR in a manner unrelated to its Yucca Mountain repository review or contrary to the express direction in the pertinent legislation. Even if activities under the EDO/CFO's guidance are of a more limited scope than in the previous fiscal year, it does not appear that such activities would irreversibly compromise or preclude NRC's ability to engage in a license application review if Congress were to increase NRC's High-Level Waste Program budget and direct a revival of the Yucca Mountain repository review.
- Agencies are directed to act prudently in expending funds under a CR so as not to impinge on the final funding prerogatives of Congress. NRC requested an appropriation from the Nuclear Waste Fund for FY 2011 of \$10 million, or about one-third of the FY 2010 appropriation, and there was no indication from the Senate or House that the FY 2011 budget would be increased.

The General Counsel's memorandum also noted that there had also been some internal debate over whether final NRC action permitting DOE to withdraw its application is a condition precedent to the orderly closure activities under the FY 2011 guidance reflected in the Commission's Congressional Budget Justification. Addressing this matter, the General Counsel wrote, "Considering the entire text of the NRC budget document and the context in which it was submitted, I do not believe such a conclusion necessarily follows."

*OIG Interviews of Agency Officials Related to CR Issue*Interviews of NMSS, OEDO, and OCFO Officials

OIG learned, through interviews with Office of Nuclear Material Safety and Safeguards (NMSS), Office of the Executive Director for Operations (OEDO), and Office of the Chief Financial Officer (OCFO) officials, that during the summer of 2010, NRC managers responsible for NRC's High-Level Waste Program anticipated there would be about \$7 million in high-level waste funding left over (carryover) at the end of FY 2010. The managers were interested in seeking Commission feedback about what to do with the carryover funding in FY 2011, given that FY 2010 High-Level Waste Program funding was for licensing review and FY 2011 High-Level Waste Program funding was for orderly shutdown of the High-Level Waste Program. Because a Commission decision was still pending concerning ASLB's denial of DOE's motion to withdraw its license application, the managers sought Commission feedback about how to proceed with the licensing review.

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OIG learned that the NMSS Director initially sought to write a paper for Commission review concerning the staff's plans for the carryover money; however, a decision was made instead to inform the Commission of the staff's plans via a CR budget guidance memorandum issued to staff from the EDO and CFO giving guidance on how to carry out programs and activities during the CR period. The Deputy Executive Director (DEDO) for Materials, Waste, Research, Tribal and Compliance Programs initially proposed that the CR budget guidance memorandum direct High-Level Waste Program staff to use FY 2010 funds until they were exhausted to continue the license application review; language to this effect was included in early versions of the CR budget guidance memorandum. However, the Chairman's office asked to review the draft memorandum and subsequently provided direction to OEDO staff and the CFO that resulted in the official memorandum, issued on October 4, 2010, directing staff to continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget.

Interview of NMSS Director

The NMSS Director<sup>9</sup> told OIG that she had written a memorandum that she planned to present to the Commission in September 2010 conveying the staff's intent to complete Volume 3 of the SER with the remaining FY 2010 funding and the remaining SER volumes no later than the 2<sup>nd</sup> quarter of FY 2011 provided the availability of resources and the agency had not terminated the license application review. However, the DEDO for Materials, Waste, Research, Tribal and Compliance Programs told her they did not need the memorandum and would handle the issue through guidance in the CR budget guidance memorandum. The DEDO initially told the NMSS Director that the CR guidance would be to use FY 2010 and FY 2011 funds to continue the review. However, the NMSS Director later learned that the direction from the Chairman was to transition to closure upon entering the new fiscal year. The NMSS Director was concerned about whether the agency could use the FY 2010 carryover – which had been appropriated for license review – during FY 2011 for close-out activities.

Interview of DEDO for Materials, Waste, Research, Tribal and Compliance Programs

The DEDO for Materials, Waste, Research, Tribal and Compliance Programs told OIG that in the absence of a Commission decision on the ASLB adjudicatory matter, he and the NMSS Director recognized the need to communicate to the Commission, and that the Commission needed to provide direction for the High-Level Waste Program. The DEDO told the NMSS Director he would rather communicate through the CR budget guidance memorandum than a paper because it would yield a quicker response. He thought that due to the diversity of views on the Commission, a memorandum simply to inform them would promptly be converted into a vote, and it was unlikely they would reach a decision within a month. The DEDO wanted to convey in the CR budget guidance memorandum that the staff would use FY 2010 carryover funds in FY 2011, which would yield a net of \$17 million (\$10 million from the FY 2011 budget

<sup>9</sup> The NMSS Director began working in that position in May 2010. Prior to that, she was the Deputy Director for NMSS, and the DEDO for Materials, Waste, Research, Tribal and Compliance Programs was the NMSS Director.

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and \$7 million in FY 2010 carryover funds) to move ahead with license application review activities until they had a final decision from the Commission. This was the language the DEDO originally inserted into early draft versions of the CR budget guidance memorandum. However, after the CFO shared the memorandum with the Chairman's office, the Chairman's Policy Director said she thought the Chairman would not want this type of language in the memorandum because it would constitute a change in policy. The DEDO said he had not previously viewed the language in that way, but the Chairman's Policy Director conveyed that when the Commission last addressed the issue in the FY 2011 Congressional Budget Justification, the language was to close out the program.

The DEDO said OEDO and OCFO staff subsequently worked with the Chairman's office to revise the language to reflect something like, "... should continue to follow the established Commission policy." He thought the language ultimately used in the memorandum seemed innocuous and did not indicate specifically that this meant "close down the licensing process and commence the orderly closure of the program." He asked the Chairman's Policy Director why not be more explicit in the CR budget guidance memorandum to reflect what was intended, and the Chairman's Policy Director told him it was unnecessary because the CR budget guidance memorandum was pointing to the FY 2011 Congressional Budget Justification, which already captured the intent in writing. The DEDO said he questioned both the Chairman's Policy Director and the Chairman's Chief of Staff as to whether people would understand the connection. The DEDO told them the Congressional Budget Justification paragraph on the High-Level Waste Program could be read as "entry conditions," providing that until the agency allowed "withdrawal or suspension," it should continue the license application review. The Chairman's Policy Director and Chief of Staff responded that this was incorrect and that the budget justification language was background and set the context for the status of the program. They said the program's status was described in the workload paragraph of the Congressional Budget Justification, which reflects what the agency is going to use its resources and funding for. In this case, they said, this was closing down the program.

The DEDO also said the Chairman's Chief of Staff told him that in anticipating the potential controversy that would ensue with the implementation of the CR budget guidance memorandum, the Chairman had consulted with the other Commissioners and that at least a majority of the Commission was supportive of moving forward with the orderly closure of the High-Level Waste Program. The DEDO also recalled a meeting with the Chairman during which the Chairman stated he would complete discussions with the other Commissioners before the end of September 2010, and then NRC would initiate an orderly closure of the High-Level Waste Program.

Interview of the CFO

The CFO told OIG that in August 2010 the staff began generating variations of the CR budget guidance memorandum. At one point, they were prepared to issue the memorandum at which time the Chairman asked to see it. Up until then, his office had not received any direction from the Chairman's office on the memorandum, and the CFO thought the Chairman just wanted to



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be informed about the document. He said that the Chairman's Policy Director e-mailed him the paragraph on the High-Level Waste Program and he directed his staff to insert the language into the memorandum. He recalled that just before one of the Chairman's regularly scheduled meetings, the Chairman called the CFO, the General Counsel, and the EDO into his office and asked whether they were "all okay with this memorandum." The CFO said the Chairman said, "I'm going to talk to my other Commissioners, but I think there's a good chance that this might turn into a vote on Yucca Mountain." The CFO said he did not understand how the memorandum could turn into a vote on Yucca Mountain because, in his view, the memorandum was a financial budget execution memorandum and not intended to redirect the staff programmatically. He said he was surprised at the interpretation by the Commission that the memorandum was providing programmatic direction. The CFO recalled that on October 1, 2010, Commissioner Ostendorff's Chief of Staff called him at home to tell him he had spoken with the Chairman's Chief of Staff about the CR budget guidance memorandum and had problems with the paragraph concerning high-level waste. Later that evening, the Chairman's Chief of Staff called him at home and said the Chairman's office had clearance on all of the Commission offices to sign out the memorandum. The CFO said that after the issuance of the CR memorandum and the direction to initiate High-Level Waste Program close-out activities, he asked the Chairman if he had missed something during the meeting with the General Counsel and EDO. The Chairman explained that his intent was that the memorandum would result in a change in direction for the staff and they were going to go from issuing an SER to a NUREG.<sup>10</sup> The CFO later asked the Chairman's Policy Director whether the conditions regarding withdrawal or suspension reflected in the FY 2011 Congressional Budget Justification had been met. She replied that the conditions were met when DOE submitted its motion to withdraw its license application.

Interview of the EDO

The EDO said that initially there was no plan to include specific language about the High-Level Waste Program in the CR budget guidance memorandum. At the same time, he said, given the Administration's direction to withdraw DOE's Yucca Mountain license application, the staff understood the High-Level Waste Program was on a path to closure. The EDO for Materials, Waste, Research, Tribal and Compliance Programs and he had asked to prepare a paper for the Commission describing how the staff would go about close-out and how much funding would be needed. The staff's intent was to use the \$7 million in carryover funds for continuation of the technical review and the \$10 million proposed for the FY 2011 budget for close-out activities. The EDO said that one of his primary responsibilities as EDO is to ensure the entire Commission is kept informed, and that a staff paper on the close-out plan would serve to inform the Commission and seek its input on the matter, which he felt was necessary. The EDO said the staff had never prepared any papers for the Commission discussing plans for the closure of the High-Level Waste Program in part because the NWPA required NRC to perform a quality

<sup>10</sup>NRC NUREG documents communicate various types of information, including support for regulatory decisions, guidance for complying with regulations, results of task force investigations, results of contractor research programs, resolution of generic safety issues, and proceedings of conferences and workshops,

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review in a timely manner. According to the EDO, his mindset and that of the staff was to accomplish as much of the technical review as they could. He and the NMSS staff believed that even if DOE were to withdraw the application, or the facility was not permitted to operate, it would benefit the country for NRC to have completed the technical review. Furthermore, he felt that because there had not been a Commission decision on DOE's withdrawal request, they should continue the technical review. However, over a period of weeks and months and interaction with the Chairman's office, they received direction from the Chairman to address the High-Level Waste Program in the CR budget guidance memorandum. The EDO said he understood that the Chairman's intent, prior to issuance of the CR budget guidance memorandum, was to close out the license application review process.

The EDO thought it would be okay to address the issue in the CR budget guidance memorandum because he believed the entire Commission would review the CR budget guidance memorandum. He thought the CR budget guidance memorandum would accomplish what needed to be done with regard to the High-Level Waste Program absent a paper from the staff. He believed that if the Commissioners decided the matter was a policy issue, they could vote on it. He said he expressed his concerns to the Chairman that the Commission needed to see the memorandum, and the Chairman told him the memorandum would not be issued until he had spoken with the other Commissioners and all were on board with the memorandum language. Prior to the EDO and CFO signing the memorandum, the Chairman told the EDO that all four Commissioners were in agreement with the language, understood that they were going to close out the High-Level Waste Program, and authorized the issuance of the CR budget guidance memorandum. The EDO anticipated that the contentious issue for the Commission would be whether they would close out or continue the technical review. The CR budget guidance memorandum did not provide any direction on the issue, so the EDO felt it was okay to sign because on face value, it did not provide questionable direction.

Interview of Commissioner Apostolakis

Commissioner Apostolakis told OIG that before the October 4, 2010 CR budget guidance memorandum was issued to the NRC staff, Chairman Jaczko advised him that he was prepared to authorize budget guidance under the CR process and wanted his support. During this conversation, which occurred on September 30, 2010, Chairman Jaczko asked Commissioner Apostolakis whether he would support him if a Commissioner challenged the CR guidance. Chairman Jaczko assured Commissioner Apostolakis that OGC advised him the planned CR guidance was appropriate. Chairman Jaczko requested that he respond to his question that same day. Commissioner Apostolakis told the Chairman that he did not see a problem but wanted to discuss the matter with his staff. Commissioner Apostolakis told OIG that the CR guidance to the staff to follow the Commission's FY 2011 budget direction subject to funding conditions under the CR seemed innocuous. His understanding of a CR was that the agency would continue ongoing work from the previous year.

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Following the September 30, 2010 discussion with Chairman Jaczko, Commissioner Apostolakis' staff received a copy of the paragraph that discussed the High-Level Waste Program in the CR budget guidance memorandum. He recalled that his staff showed him language from the Commission's FY 2011 budget request, which stated that the orderly transition would begin upon withdrawal of the license application or suspension of the licensing review. Commissioner Apostolakis advised that although Chairman Jaczko said he would ask the staff to conduct activities in accordance with the FY 2011 budget, this is not what he did. Commissioner Apostolakis stated that the FY 2011 budget reflected that if the proceedings were suspended, then the agency would proceed with close-out of the license application review. However, the proceedings were not suspended. The Chairman ignored the portion of the budget which referenced upon withdrawal or suspension and directed the staff to close out the High-Level Waste Program. Commissioner Apostolakis stated that Chairman Jaczko did not explain to him what the CR guidance would mean in practice.

Commissioner Apostolakis said that he did not know from his initial discussion with Chairman Jaczko that the likely effect of the October 4, 2010 CR guidance was that SER Volume 3 would not be issued in November 2010 as originally scheduled. Members of his staff raised the prospect that the NRC staff would not complete SER Volume 3 and would work to incorporate Volume 3 in a NUREG report. He did not know what work was required to complete Volume 3.

During the week of October 4, 2010, Chairman Jaczko sought Commissioner Apostolakis' support in opposing any challenge to the CR budget guidance memorandum based on Commissioner Ostendorff's October 6, 2010 COM. Commissioner Apostolakis told Chairman Jaczko he did not provide him with details of the practical impact of the CR guidance when the Chairman originally requested his support. Commissioner Apostolakis was concerned about preserving the staff's work product and he wanted the Commission to see the staff's plan for implementing the October 4, 2010 CR memorandum guidance. The Chairman told him that preserving the staff's work products, such as the draft SER Volume 3, in the internal agency records would not be a problem. However, the Chairman did not want to include regulatory conclusions in any public release of Volume 3.

During the week of October 4, 2010, Commissioner Apostolakis also discussed issues related to the budget guidance and Commissioner Ostendorff's COM with the Chairman and Commissioner Magwood. On October 7, 2010, Commissioner Apostolakis learned of a petition filed with the NRC Commission on behalf of Aiken County, SC, and the States of South Carolina and Washington, raising issues about the budget guidance and its relation to the adjudicatory High-Level Waste proceedings, from which he had recused himself. Based upon this action he decided he would not participate in voting on Commissioner Ostendorff's COM.

Interview of Commissioner Magwood

Commissioner Magwood told OIG that on September 28, 2010, during a regularly scheduled periodic meeting with Chairman Jaczko, the Chairman informed him that the NRC staff was developing a plan for operating under the CR passed by Congress and that this plan would

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move toward close-out of the High-Level Waste Program as anticipated by the Commission in the FY 2011 budget. According to Commissioner Magwood, the Chairman said that the NRC staff drafted language regarding the High-Level Waste Program and the Chairman asked if he would review the language and let him know if he had any objection. Commissioner Magwood told the Chairman that it would be appropriate to formulate a plan for moving forward and that he would review the draft guidance. He also told the Chairman that he would not support a "precipitous" termination of the High-Level Waste Program. According to Commissioner Magwood, the Chairman assured him that this was not his expectation.

Commissioner Magwood told OIG that his staff reviewed the draft language on the High-Level Waste Program and compared it to the FY 2010 budget and FY 2011 guidance. His staff concluded that the language, which indicated that the staff should begin implementing the FY 2011 plan as reflected in the agency's Congressional Budget Justification, was consistent with both Commission policy and Congressional actions to date. Commissioner Magwood said he thought it prudent to ensure that the NRC's rate of expenditures on the High-Level Waste Program remained within the \$10-million ceiling. He instructed his staff to inform the Chairman's office that he would not object to the instruction in the draft CR budget guidance memorandum.

Commissioner Magwood stated that after the October 4, 2010, CR budget guidance memorandum was issued, he learned this memorandum was interpreted as requiring the staff to shut down its work on the Yucca Mountain license application, not issue SER Volume 3 as planned in November 2010, remove the findings from SER Volume 3, and issue the document as a technical evaluation report (TER).

Commissioner Magwood said that after discussions with NRC senior staff members, he learned that what had been portrayed as guidance developed by senior agency staff had actually come from the Chairman. On October 7, 2010, he discussed concerns he had about Chairman Jaczko's actions with the Chairman. According to Commissioner Magwood, the Chairman became very agitated and said that he would never have taken these actions had both Commissioners Apostolakis and Magwood not agreed to support the guidance. Commissioner Magwood said he objected to this statement quite strongly and that the Chairman never told him his plan had been to shut down the High-Level Waste Program and withhold publication of SER Volume 3. The Chairman responded to him, "You should have asked." Commissioner Magwood said that under the statutory framework, the Chairman had an obligation to provide full and accurate information to Commissioners.

After the staff was directed to stop working on the SER, Commissioner Magwood considered writing a COM to address this matter directly. He later found out that Commissioner Ostendorff felt strongly about the actions of the Chairman and was in the process of publishing a COM. He encouraged Commissioner Ostendorff to proceed and offered suggestions to the COM's development which was published on October 6, 2010.

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On October 8, 2010, Commissioner Magwood concluded that Commissioner Ostendorff's views and his were in agreement with regard to the Chairman's actions. However, based on subsequent motions filed by petitioners from Aiken County, SC, and South Carolina and Commissioner Apostolakis' recusal from the matter, he decided the best thing to do was to step back from the matter to examine the issues, particularly the legal issue. Therefore, he decided not to participate in response to Commissioner Ostendorff's COM.

On November 12, 2010, Commissioner Magwood issued a COM to the Chairman and Commissioners pertaining to future activities of the High-Level Waste Program. As of the publication date of this report, this matter was still under deliberation by the Commission.

## Interview of Commissioner Ostendorff

Commissioner Ostendorff told OIG that on September 30, 2010, his Chief of Staff told him that the Chairman was planning to issue guidance on the CR and that this guidance would include language that would effectively have the staff discontinue work on DOE's license application, specifically SER Volume 3. His office received a copy of the draft language in the CR budget guidance memorandum pertaining to the High-Level Waste Program from the Chairman's Chief of Staff on the evening of September 30. Commissioner Ostendorff said his Chief of Staff was informed that Commissioners Magwood and Apostolakis had already given their support to this guidance, so there was no point in his office making an issue of it since a majority had already agreed to the CR guidance. The Chairman's Chief of Staff told Commissioner Ostendorff's Chief of Staff that if Commissioner Ostendorff disagreed with the CR guidance, they should discuss a compromise on the Yucca Mountain adjudicatory matter.

Commissioner Ostendorff stated that on October 1, 2010, Chairman Jaczko told him that the CR budget guidance memorandum would have the staff commence orderly closure of the Yucca Mountain license application review. Ostendorff told the Chairman that he disagreed with his direction, the direction was wrong, and he should not issue it. Chairman Jaczko told him he would consider his advice, and get back to him before he made a decision. Later that day, Chairman Jaczko informed him that he had decided to issue the guidance. Commissioner Ostendorff said he told the Chairman that he strongly disagreed with his decision. He said he asked Chairman Jaczko what he planned to do with respect to SER Volume 3. According to Commissioner Ostendorff, the Chairman told him that SER Volume 3 would not be issued in this current form, the staff's findings would be removed from the document, and a document would eventually be issued, possibly as a NUREG.

Commissioner Ostendorff advised OIG that he disagreed with the CR guidance memorandum's direction to follow FY 2011 budget guidance because the conditions that would authorize "orderly closure" had not been met. According to Commissioner Ostendorff, the FY 2011 budget request stated that such closure would not begin until "withdrawal or suspension of the licensing review." Since the issue of whether the license application may be withdrawn was currently before the Commission and a final decision had not been made, that condition clearly had not been met.

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On October 4, 2010, Commissioner Ostendorff related that he spoke with Commissioner Svinicki about the CR guidance memorandum, and explained his concerns on the matter and that he considered issuing a COM. Later that day he was informed that the EDO and CFO had published the CR budget guidance memorandum.

On October 5, 2010, Commissioner Ostendorff directed his staff to prepare a COM that would raise the CR guidance issue as a policy matter for Commission consideration. He met separately with Commissioners Apostolakis and Magwood to discuss his concerns and explain his objections concerning the CR budget guidance memorandum. The feedback he received from both Commissioners was that they felt the memorandum's guidance on the High-Level Waste Program was wrong. Commissioner Ostendorff's COM was issued on October 6, and on October 8, he learned that Chairman Jaczko and Commissioners Apostolakis and Magwood decided not to participate. Only Commissioner Svinicki voted on the matter.

Interview of Commissioner Svinicki

Commissioner Svinicki told OIG that on the morning of September 30, 2010, her staff learned that Chairman Jaczko was proposing to unilaterally issue guidance to the NRC staff on the use of funds for the High-Level Waste Program during the FY 2011 CR. The CR guidance would direct agency staff to follow the FY 2011 budget direction.

Commissioner Svinicki stated that although she attended a regularly-scheduled periodic meeting on the afternoon of September 30 with Chairman Jaczko, neither she nor the Chairman raised the CR budget guidance memorandum. She did not raise the issue because she was not sure if the CR budget guidance memorandum was a rumor. Nevertheless, her legal counsel contacted the NRC General Counsel to question the legal basis for the purported CR guidance. Also during the afternoon of September 30, she learned from Commissioner Ostendorff that he was aware of the same rumor concerning the CR budget guidance memorandum. Both she and Commissioner Ostendorff agreed that the CR guidance was not appropriate. During the evening of September 30, Commissioner Ostendorff e-mailed her a copy of the CR guidance language, which was identical to the language included in the final October 4, 2010 CR budget guidance memorandum. Commissioner Svinicki said that Commissioner Ostendorff's staff was approached by the Chairman's Chief of Staff to discuss the CR budget guidance memorandum. Commissioner Ostendorff's staff specifically asked the Chairman's Chief of Staff if Commissioner Svinicki's office had been informed of the CR budget guidance memorandum. The Chairman's Chief of Staff replied that Commissioner Svinicki's office was already aware of the guidance because her staff had made inquiries to the General Counsel.

While Commissioner Svinicki was on international travel from October 1 to 9, 2010, she learned that the CR budget guidance memorandum was officially issued on October 4. On October 5, her staff informed Chairman Jaczko's office that she objected to the CR guidance.

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Commissioner Svinicki stated that she did not have any direct communication with Chairman Jaczko regarding this matter before the CR budget guidance memorandum was issued on October 4, 2010. She learned on October 1 that the Chairman's staff left two messages for her staff on the evening of September 30 and on October 1. After the CR budget guidance memorandum was issued, she questioned the CFO about his knowledge and involvement in the development of the memorandum. The CFO told her although he was out of the office during much of the memorandum's development, when he returned, he inquired about the status of the memorandum and was told by the Chairman's Policy Director that Chairman Jaczko was walking the guidance memorandum around to the Commissioners.

Commissioner Svinicki said that in reviewing the FY 2011 Congressional Budget Justification and her vote on this budget, she noted that her vote contained specific edits to the narrative description of activities related to the High-Level Waste Program. Of note, she voted to change the language describing the commencement of orderly close-out of the high-level waste technical review from "Assuming withdrawal or suspension..." to "Upon withdrawal or suspension...." The purpose of this edit was to make clear that orderly close-out of the High-Level Waste Program would not begin unless and until the license application had been withdrawn or the technical review had been suspended. This edit was supported by the Commission at that time (Chairman Jaczko, then Commissioner Klein, and Commissioner Svinicki) and was incorporated into the final document.

Commissioner Svinicki told OIG that when reviewing her vote on the FY 2011 budget in light of the events related to the October 4, 2010 CR budget guidance memorandum, she recalled a conversation she had with Chairman Jaczko regarding her January 2010 vote. Shortly after she cast her vote, Chairman Jaczko requested to meet with her. During this meeting, Chairman Jaczko expressed his frustration that she had voted to edit language in the FY 2011 Congressional Budget Justification document, deeming most of her edits insignificant. Further, Chairman Jaczko interpreted her edits to the language describing the High-Level Waste Program to indicate a belief on her part that he was at the NRC for the purpose of dismantling and terminating the Yucca Mountain program at the bidding of Senator Reid. Commissioner Svinicki said the Chairman was very animated and objected to this perceived accusation. She told Chairman Jaczko that none of her edits were intended as an accusation, but rather they were offered to improve the quality of the document on substantive matters.

Commissioner Svinicki said that during the voting process on the appeal to OMB for the FY 2011 budget passback, she had proposed edits to the passback appeal letter. However, the Chairman called her and advised that he was leaving the building in "8 minutes" and if she did not retract her vote edits on the passback appeal letter, he would leave and not submit the letter on behalf of the agency to OMB, which would cause the agency to absorb the funding reductions proposed by OMB. Given this ultimatum, she agreed to the edits of another Commissioner which were similar to hers.

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Commissioner Svinicki told OIG that on October 14, 2010, she voted to approve Commissioner Ostendorff's COM because the FY 2010 budget direction governs during the CR, and even if that were not the case, the prerequisites in the FY 2011 budget under which "orderly closure" of high-level waste review activities would begin had not been satisfied. She objected to the Chairman's CR direction because the NRC Commission had not concluded action on the Commission's ongoing adjudicatory proceedings on the Yucca Mountain license application. She said the direction to NRC staff to stop the license application technical review could achieve the same practical result as overturning the ASLB's decision, effectively granting DOE's motion to withdraw. The proper vehicle for resolving the legal question of DOE's authority to withdraw the license application is through Commission action on the adjudicatory matter, and any direction on the use of funds during the CR, absent specific direction from Congress to the contrary, should not predetermine the outcome of the legal matter pending before the Commission.

Interview of Former Chairman Klein<sup>11</sup>

Former Chairman Klein recalled that he and Commissioner Svinicki wanted two things: first, to follow the NWPA's requirement that NRC evaluate DOE's license application and, second, to see a solution to the high-level waste issue. They felt strongly that the NRC staff needed to make a determination whether the Yucca Mountain site was acceptable or not, and they wanted to make sure the staff had the resources needed to make that determination. There was considerable uncertainty about the future of the High-Level Waste Program, and he and Commissioner Svinicki paid attention to the FY 2011 budget language to make sure it allowed NRC and the staff to fulfill these responsibilities. Even if there was a request to withdraw the license application, a determination had not, and has still not, been made as to whether or not it can be withdrawn. Former Chairman Klein said it was important to capture all the knowledge gained through the license application review and complete the work that staff had ongoing. For example, if they had an SER that was about to be finished, it should be finished. Former Chairman Klein felt strongly that until the license application was withdrawn legally and/or suspended legally, NRC needed to do as much as it could to evaluate the application.

Interview of Chairman's Chief of Staff

The Chairman's Chief of Staff told OIG that he had minimal involvement in the development and publication of the CR budget guidance memorandum and that the draft document was presented to the Chairman's office from the CFO's office. He said the Chairman's Policy Director provided guidance to the EDO and CFO regarding the memorandum on behalf of the Chairman and that it should follow established Commission policy and OMB Circular A-11. The Chairman spoke with Commissioners Ostendorff, Apostolakis, and Magwood about the CR budget guidance memorandum but did not talk to Commissioner Svinicki.

<sup>11</sup> From July 2006 to May 2009, Dale Klein was the NRC Chairman. From May 2009 until he resigned in March 2010, he served as a Commissioner.



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According to the Chairman's Chief of Staff, the intent of the CR guidance was to provide a spending limit against the proposed FY 2011 budget, which OMB had directed. However, in the case of high-level waste, Congress did not provide specific direction on how to spend those funds, and NRC actually conveyed its spending intent to Congress through its Congressional Budget Justification and its reclama process. The intent was to spend \$10 million, based on the President's budget, and the Commission's decision to proceed to close-out. The Commission knew that for the prior fiscal year, Congress had given NRC half of what it had requested, which conveyed that they were moving NRC toward close-out rather than ramping up the review. The Commission did not oppose OMB's proposed funding for the High-Level Waste Program for FY 2011, and the letter that NRC sent to OMB reflected that the Commission expected DOE to withdraw its license application and understood that the \$10 million would be used for orderly close-out. The policy was set when the Commission voted on the passback appeal letter to OMB.

Interview of the General Counsel

The General Counsel told OIG that the direction given in the CR budget guidance memorandum was consistent with existing Commission budget guidance. He recognized some ambiguities, but believed on the whole the CR budget guidance memorandum was consistent with existing Commission budget guidance, and was appropriate to issue. Had the Commission disagreed with that, they could have voted to overturn it, or given some other direction. The General Counsel said that changing this direction would require a majority vote by the Commission and that focusing on close-out activities was a rational and lawful way to proceed. Moreover, close-out activities do not constitute new work under the CR. The CR budget guidance memorandum does not preclude NRC from resuming its licensing review if Congress decides to fully fund DOE and NRC.

The General Counsel noted the wording difference between the OMB passback appeal letter and the NRC Congressional Budget Justification, indicating the OMB letter contained far less ambiguity concerning the conditions to begin close-out activities. He said the NRC's Congressional Budget Justification is an informative document that describes NRC's budget request but ultimately does not have any legal force and effect. Rather, it is the enacted budget that is appropriated by Congress that has authority. When the Congressional Budget Justification is not representative of the final appropriation, it is of somewhat limited value.

Interview of Chairman Jaczko

Chairman Jaczko told OIG that he met with the General Counsel, EDO, and CFO about the language in the CR budget guidance memorandum. During this meeting, he asked them what they thought it meant. He asked if everyone understood that the language meant close-out of the program and whether they were in alignment. He specifically asked, "Does everybody understand what this means, and that this means close-out?" He recalled the EDO said, "I don't really understand what the big deal is with this." Chairman Jaczko then told them he was going to talk to the Commission about the memorandum before he issued it. He said that "there may be Commissioners who don't agree with this, and will try and make it a policy issue." He told OIG that

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the CR budget guidance memorandum was his decision and he wanted to talk directly to the Commissioners to explain it. He did not recall whether he informed the EDO that the discussions had occurred; however, he recalled telling the EDO that he could publish the memorandum.

He told Commissioner Apostolakis that the memorandum would result in closing out the High-Level Waste Program and he was doing this under his authority. Chairman Jaczko explained that the other Commissioners could make an argument that this was a policy issue for the Commission, and he wanted his support if that happened. He specifically recalled coming back from the meeting with Commissioner Apostolakis with the impression that Commissioner Apostolakis did not understand what he meant. As a result, he asked his Chief of Staff to follow up with Commissioner Apostolakis' Chief of Staff to ensure his message was understood.

He did not recall much of the conversation he had with Commissioner Magwood, but did recall he was clear that the CR budget memorandum guidance was to begin closing out the High-Level Waste Program. Commissioner Magwood's Chief of Staff subsequently contacted his office and related that "Commissioner Magwood was fine with how you're going to go forward with the memo." Chairman Jaczko stated at this point he decided to go forward and direct the CFO and EDO to publish the memorandum. Chairman Jaczko said that Commissioner Magwood may not have understood what the CR guidance meant and if he did not understand that was not his fault. He then spoke with Commissioner Ostendorff about the CR budget guidance memorandum. Commissioner Ostendorff immediately understood and was very unhappy about it. Chairman Jaczko spoke with Commissioner Ostendorff twice on the matter during which Commissioner Ostendorff urged him not to publish the memorandum.

Chairman Jaczko told OIG that prior to the issuance of the CR budget guidance memorandum, he had two meetings with the staff about moving to close-out, and that they would stop working on the SER. In doing so, they would capture the information and publish a TER, and they were not going to be reporting findings for a project that they were no longer working on formally for licensing review. According to the Chairman, this was the general understanding long before October 1.

Chairman Jaczko related he had discussions with two Commissioners concerning the publication of the CR budget guidance memorandum and its result being to stop the publication of Volume 3 of the SER. He believed these discussions were subsequent to the memorandum's publication. During these discussions, the Commissioners asked what impact the CR budget guidance memorandum would have on the SER, and the Chairman responded that publishing the SER volumes was not something they were going to be doing as part of this close-out. Furthermore, he told OIG that if his colleagues did not understand, there was only so much he could do to explain. Chairman Jaczko related that these were heated, intense discussions, but his colleagues had given him a commitment to support him on the CR budget guidance memorandum.

Chairman Jaczko said the intent of the budget was that when DOE submitted its motion to withdraw, the license application would be withdrawn. Therefore, submittal of the motion was the triggering factor and not the actual withdrawal. In hindsight, the language in the Congressional Budget Justification, given what has materialized in the adjudicatory process,

appears to make it seem different that what it really meant. The intent as he understood it was that DOE would submit its motion to withdraw and that would be the agency's trigger to begin closing the program. That has always been his intent, and he could not read the budget any other way. Chairman Jaczko said that while the Commission composition has been different at various decisionmaking points during the FY 2010, FY 2011, and FY 2012 budget processes, in each case the Commission at the time has approved the budget documents currently in place. These budget documents show the agency's shift to program close-out, and include the FY 2012 Congressional Budget Justification, which the current Commission approved, and which reflects close-out of the program without conditioning it on a motion to withdraw. Chairman Jaczko said even if one read the FY 2011 Congressional Budget Justification to mean that the Commission should not have closed out the program at the beginning of FY 2011, waiting to see the completion of the motion to withdraw, he made the decision at the beginning of the fiscal year. He told the staff to "follow the guidance in the FY 2011 budget."

Chairman Jaczko said he asked the General Counsel about the significance of the language (withdrawal or suspension) in the FY 2011 Congressional Budget Justification, and the General Counsel told him that one of the Commissioners had made the point that the document does not mean begin close-out. Chairman Jaczko asked the General Counsel whether that viewpoint was consistent with the General Counsel's interpretation of the budget, and the General Counsel said "no." Chairman Jaczko said the withdrawal or suspension language in the Congressional Budget Justification was odd and probably got inserted through the Commission's editing process. He clearly missed it and it was not the intent of what they were doing. According to Chairman Jaczko, the language was irrelevant because if a withdrawal request came in, there was no way the Commission would disapprove it, and in his mind it did not change the operative nature of what the budget did. Moreover, the Congressional Budget Justification had to get approved by OMB, which missed it. He commented that the passback letter to OMB laid out the trigger as being the withdrawal request, which put them on the path to close-out.

He told OIG that the closure of the High-Level Waste Program was not an endeavor he accomplished through his executive authority over budget that he could not accomplish through the adjudicatory process. He commented that they were closing out the review in budget space, and that what was not understood was they had not resolved the adjudicatory matter.

#### *Coordination with U.S. Government Accountability Office*

OIG coordinated with the U.S. Government Accountability Office with regard to the allegation that the NRC Chairman had exceeded his authority during the CR period by stopping the review of the DOE license application for a geological repository at Yucca Mountain, NV. GAO declined to provide a formal legal opinion regarding this issue as it was too closely related to an authority matter rather than an appropriations matter.

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### *Coordination with U.S. Office of Management and Budget*

OIG coordinated with the Office of Management and Budget (OMB) regarding how it was determined to appropriate \$10 million for NRC's High-level Waste Program for FY 2011. OMB advised that it does not disclose this type of information in accordance with Circular A-11, paragraph 22.1, "Confidentiality of budget deliberations."

### **B. OIG Review of SER Issue**

OIG learned that between April and May 2010, NMSS staff informed the Chairman that they were ahead of schedule with their work on the SER volumes, and they inquired whether they should attempt to issue the volumes at earlier dates than those which had been established in March 2010. The Chairman responded in a June 2010 memorandum that they should not expedite issuance of the reports, but should instead maintain the timeline that had been announced publicly in March 2010. According to that timeline, Volume 1 would be issued in August 2010, and Volume 3 in November 2010. Volume 1 of the SER was issued as scheduled; however, in October 2010, at the start of the new fiscal year, Chairman Jaczko directed staff to stop working on all SER volumes. Subsequently, the Chairman gave direction to the staff to prepare a document for public release that captures the knowledge gained through the NRC's technical review of DOE's license application but would not contain any of the staff's findings and conclusions.

### *NRC's Plans for Developing SER To Meet NWPA Review Requirements*

Completion of NRC's technical review of DOE's license application and subsequent issuance of the SER are governed by the schedule established in 10 CFR, Part 2, Appendix D, which requires the SER be completed no later than 18 months following NRC's issuance of a Notice of Hearing regarding DOE's license application. The schedule in 10 CFR Part 2, Appendix D, codifies an NWPA stipulation that NRC issue a decision approving or disapproving the issuance of a construction authorization no later than 3 years after the date of the submission of an application for authorization to construct a geologic repository. The NWPA additionally allowed NRC to extend the 3-year deadline by no more than 1 year. NRC published the Notice of Hearing in the Federal Register on October 22, 2008, starting the 3-year clock. The date corresponding to the 18-month deadline for issuance of the SER was April 23, 2010. Originally, NRC planned to meet the April 23, 2010 deadline to complete and issue the SER; however, due to budgetary constraints, NRC indicated in July 2009 that it would not be able to issue the SER in accordance with the 10 CFR Part 2, Appendix D, schedule. It was at this point that the agency announced the SER would be issued serially in five volumes. As of July 2009, Volume 1 (General Information) was projected to be issued in March 2010, and Volume 3 (Review of Repository Safety after Permanent Closure) in September 2010; at the time, NRC was unable to estimate completion dates for the remaining three volumes.

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On January 27, 2010, NRC revised its schedule regarding issuance of SER Volumes 1 and 3; SER Volume 1 was now scheduled to be issued in August 2010 and SER Volume 3 in November 2010.

On March 30, 2010, the EDO sent a memorandum to the Commission informing the Commission of the staff's plans regarding the High-Level Waste Program, including its review of DOE's application, in light of the Administration's plan to terminate the Yucca Mountain repository program and DOE's March 3, 2010 request to withdraw its repository application. This memorandum proposed to the Commission that in light of the President's FY 2011 budget and assuming Congress provided no additional funding or direction to the contrary, the staff would continue the technical review of DOE's application and SER preparation until FY 2010 funds were exhausted. The memorandum also informed the Commission that as of the end of February 2010, DOE had responded to all of NRC's requests for additional information and, at that time, the NRC staff had not identified a need for additional information from DOE to complete the SER volumes. The memorandum included a projected schedule for completion of all SER volumes. Volumes 1 and 3 were still on schedule to be issued in August and November 2010, respectively, and all of the remaining volumes would be issued by the end of March 2011. OIG learned that between May and June 2010, the Commission was informed that SER Volumes 1 and 3 were ahead of schedule; however, on June 11, 2010, Chairman Jaczko sent a memorandum to the EDO titled, "Schedule for HLW SER," stating that the staff should not attempt to issue the volumes ahead of the projected schedule provided in the EDO's March 30, 2010 memorandum. The Chairman wrote:

I believe it is in the best interests of the agency not to alter the schedule for the completion of SER volumes at this time, but instead to maintain the predictable schedule previously provided to the Commission in March 2010, regarding plans for the High-Level Waste Repository Program. The agency's overall resources would be better utilized by maintaining the current schedule. Therefore, the information in Volume 1 of the SER should be finalized and presented no earlier than August 2010, and subsequent volumes consistent with and not earlier than the schedule provided to the Commission in March 2010.

In accordance with the March 2010 schedule for SER volume publication, Volume 1 was issued on August 23, 2010. No additional volumes have been issued.

*Interviews of Senior Staff on SER Issue*

The NMSS Director said that prior to the Chairman's June 11, 2010 memorandum instructing staff to maintain the March 30, 2010 SER publication schedule, she had attended meetings with the Chairman, EDO, and DEDO for Materials, Waste, Research, Tribal and Compliance Programs concerning the status of the staff's progression on the SER volumes. She said she informed the group that the staff was well ahead of schedule with regard to completing the SER. She said the group discussed the appropriateness of slowing down the work and that she and the EDO specifically indicated to the Chairman that it would be contrary to the agency's values

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of openness and transparency to do so. She recalled that the Chairman thanked them for their views and ended the discussion. The NMSS Director said she believed the motivation to slow down the work was related to the DOE's request to withdraw its license application and the formulation of the Blue Ribbon Commission to look at the national policy on waste. She had been told that if NRC were to publish the SER volumes, it would indicate that NRC was "out in front" of the Administration with regard to the disposal of high-level waste. The NMSS Director told OIG that she received SER Volume 1 for review, concurrence, and authorization to publish on June 24, 2010, and Volume 3 for review, concurrence, and authorization to publish on July 15, 2010. The NMSS Director believed that minimal resources were needed to complete the review process and issue Volume 3. She also commented that by September 30, 2010, NRC had all the information it needed from DOE to complete the SER. The NMSS Director recalled that prior to October 1, 2010, the DEDO directed that her staff would begin transition to closure on October 1.

The DEDO for Materials, Waste, Research, Tribal and Compliance Programs told OIG that when they met with the Chairman in June 2010 to discuss the staff's progress on the SER, the Chairman already knew that as of October 1, 2010, when the agency moved into the new fiscal year that he would be closing down the license application review. The DEDO said the reason that he and the NMSS Director went to meet with the Chairman was to inform him that they could publish the volumes ahead of the designated schedule if the Chairman preferred. However, the Chairman's preference was to stick to the original schedule. The DEDO said the practical effect of the Chairman's June memorandum was that it prevented the staff from issuing Volume 3 should it have been finalized prior to October 1.

The Deputy Division Director for the Licensing and Inspection Directorate, Division of High-Level Waste Repository Safety, NMSS, told OIG that Volume 3 of the SER was nearly finished, minus the office director comments and concurrence and review by the Office of the General Counsel (OGC). In early October 2010, staff were in the process of resolving OGC comments on Volume 3. He and the Deputy Division Director for the Technical Review Directorate had personally reviewed Volume 3 and they were both comfortable with the insights gained from the information DOE had provided. The Deputy Division Director for the Licensing and Inspection Directorate said the direction to stop working on the SER came directly from the Chairman, who met with the NMSS staff in early October 2010. The Chairman explained that the budget drove his decision and that the NRC General Counsel agreed with his decision. The Chairman did not indicate for the staff to shut down in a way from which they could not recover. Instead, the Chairman conveyed that the shutdown should take place in a reversible manner so that, if needed, they could resume their review activities.

The Deputy Division Director for the Licensing and Inspection Directorate also explained that an SER is a licensing product based on regulatory requirements, and a TER is a technical review without licensing requirements. He advised that a TER has scientific value, but little licensing value.

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The EDO told OIG that he had the impression that Volume 3 was ready for publication in late summer 2010. He recalled that it was around the period of the election and that they were going to wait until elections had concluded to publish the volume. He said the staff had advised the Chairman that the work on Volume 3 was done, and the Chairman said to maintain the original schedule because earlier publication of the volume could be interpreted as trying to influence the decision on whether DOE was authorized to withdraw its license application.

The Assistant General Counsel for High-Level Waste, Fuel Cycle & Nuclear Security, OGC, said that the completion status of Volume 3 was open to interpretation. She said that as of July 15, 2010, Volume 3 had been provided to the NMSS Director and was reported to be substantially complete. However, the document was undergoing additional editing and formatting, including a final quality control check, to assure appropriate nomenclature, proper numbering, and sequencing, and other minor administrative changes that may be necessary to ensure completeness and accuracy. OGC had been asked to review the document and indicate, by August 25, 2010, whether they had any legal objections regarding the document.

The Chairman's Chief of Staff recalled that when the Chairman was informed by NMSS staff that they were ahead of schedule with regard to the SER volumes, the Chairman did not think it best to change the timing that had been publicly announced as to the publication dates. The Chief of Staff said that Volume 3 had not undergone senior management or General Counsel review and was a predecisional document. His understanding was that the NMSS Director had not completed her review of the document, and that as of the new fiscal year NRC had transitioned to a categorically different activity (close-out) for which \$10 million had been allocated. Based on this transition, the agency needed to use the resources for that specific purpose.

The General Counsel acknowledged that under the NWPA, the NRC was to determine up or down within 4 years from the DOE application acceptance date on the license application. However, many factors have come to bear, such as a non-willing applicant and an unfunded program. This is budget reality and he would argue this course is a prudent way; if Congress decided to fund this project, the agency is actually in a better position to resume than shutting it off all together. He did not believe that the Chairman had put the Commission in jeopardy because Congress has not properly funded the program to meet its obligations. He further advised the activities and authorizations outlined in the Nuclear Waste Policy Act are subject to appropriations. He stated that "unless Congress appropriates money, you can't do any of those things."

*Interviews of Commissioners on SER Issue*

Commissioner Ostendorff recalled Chairman Jaczko informing him, during a routine periodic meeting on June 8, 2010, that the Chairman was considering whether to provide direction to NMSS to delay issuance of SER Volume 1, which was ready to be issued 2 months ahead of its scheduled issuance in August 2010. The Chairman asked him for his thoughts on the matter and said he thought it would look "funny" for the SER to be issued in the middle of the ongoing

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high-level waste adjudication. The Chairman told Commissioner Ostendorff he was directing this action in his capacity as NRC's principal executive officer and that it was not a policy matter. Following the meeting, Commissioner Ostendorff called the Chairman to tell him he strongly disagreed with the Chairman's proposed course of action. Commissioner Ostendorff thought it was a "big mistake" to provide direction to the staff to slow down the SER review, and that it would look very bad for the Chairman to interfere with the staff's activities, particularly in light of the ongoing high-level waste adjudication. Commissioner Ostendorff cautioned the Chairman that he would likely have to deal with any accusations of tampering with the proceedings if word got out that he had provided such direction.

Commissioner Ostendorff said that on June 11, 2010, during a routine periodic meeting with the General Counsel, he discussed his concerns with the Chairman's proposed direction on delaying issuance of SER Volume 1. The General Counsel told Commissioner Ostendorff that it was his opinion that the direction was not legally objectionable, but that he did not provide an opinion to the Chairman on the policy implications. The General Counsel told Commissioner Ostendorff that it was his experience that there were certain issues that the Chairman does not want to hear from him on. This conversation left him with the impression that there was possibly not an open environment for OGC to provide unfiltered advice to the Chairman without fear of retribution.

Commissioner Ostendorff was aware that the draft SER Volume 3 had been sent to the NMSS Director for review in July 2010. On October 1, when the Chairman informed Commissioner Ostendorff of his plans to issue the CR budget guidance memorandum and to remove the findings from SER Volume 3 prior to issuance, the Commissioner expressed his concerns about not completing SER Volume 3 as previously planned by the staff. Commissioner Ostendorff's concerns included censoring staff technical work already completed and the fact that the actions directed to the staff were directly related to the outcome of the high-level waste adjudication that was currently before the Commission but had not yet been decided.

Commissioner Svinicki advised OIG that she considered the issuance of the SER volumes to be a policy matter for Commission involvement, particularly in light of the Chairman's unilateral direction in June 2010 to direct agency staff to issue SER Volume 1 no earlier than the staff's scheduled date of August 2010. She recalled advising against that course of action when the Chairman informed her of his intent to issue that direction. According to Commissioner Svinicki, she voted to approve Commissioner Ostendorff's COM because she supported finalizing and issuing Volume 3.

Commissioner Magwood advised that the Chairman's actions relative to Volume 3 of the SER may not, strictly speaking, be illegal from the perspective of appropriations and CR law, but his actions under the Commission's organic statutes present a different picture. Under the Commission's statutes and standing procedures, policy determinations are made by majority vote of the Commission, not by the unilateral action of the Chairman. According to the Commissioner, the Chairman's specific direction to the staff regarding implementation of the CR



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(e.g., the decision not to issue SER Volume 3 as planned and previously communicated to the Commission) was a significant policy shift, not merely administrative guidance, and therefore was not proper.

Former Chairman Klein said that NRC is under a legal obligation to review DOE's application but he recognized that the agency needs the funding to complete the task. He recalled once making the point during a speech that guidance was needed from Congress on this matter. He thought it was inappropriate for Congress not to fund NRC for a law it had passed, and that the agency had to meet. He said because NRC had that law, and the requirement, but not the funds to carry it out, the agency needed relief. He said, "Either we needed to get the money to do it, or they needed to give us relief from it. And they have not given us relief from it."

*Interview of Chairman on SER Issue*

Chairman Jaczko told OIG that he did not want NRC to publish Volume 3 early because it could give an impression that the agency was trying to rush information out before it was actually complete, knowing the project was terminating. This would create challenges for NRC from a public communications perspective; it would look political if they moved forward in this way. He said that as Chairman, it is his responsibility to manage the agency's workload and workflow with regard to scheduling. Shortly after the CR budget guidance memorandum was published, he personally directed the staff that the agency would publish Volume 3 as a TER that would reflect where they were in the review process, but would not reflect NRC's findings. He said the staff's work on the SER would be preserved as an internal non-public document in ADAMS, the agency's document management system. Further, he never directed anyone to destroy or delete the document as the hearings have not ended. Chairman Jaczko said the agency has an obligation to preserve the document if hearings are to resume.

Chairman Jaczko advised that his office had contacted several members of Congress who told them there was nothing illegal or wrong with what he was doing in relation to the CR guidance and it was perfectly consistent with appropriations. The commentary and correspondence he received reflecting congressional dismay against his actions were solely political in nature. The agency had a budget from OMB that reflected "do close-out" and Congress had not passed an appropriation which was how they indicate to agencies what to do with their funding. He told OIG that several times, Congress passed a CR and had the opportunity to specifically direct the agency not to proceed with close-out activities but that several CRs had been passed with no direction to NRC to do anything different. He related the fundamental obligation for the agency was to go with the lower values of what has been approved by the House and the Senate. This was reflected in OMB Circular A-11. The FY 2011 budget that was approved by the Senate and the House for NRC was \$10 million for closure activities. Chairman Jaczko said that as the head of the agency, he was bound by the agency's budget. He also commented that the activities in the NWPA were subject to appropriations. For example, there are provisions in the NWPA that say NRC is supposed to finish its licensing review within 3 years. According to the Chairman, "that language is fairly meaningless

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because it has no enforcement mechanism. It does not say what happens if we miss that deadline. And clearly, based on the \$29 million that we were getting in FY 2010, we were not going to meet the 3-year deadline."

### C. Commission Voting on ASLB Decisions

OIG learned that the Office of the Secretary (SECY) did not enforce adherence to the Commission's adjudicatory voting process with regard to SECY-10-0102 and generally does not enforce the voting process to facilitate completion of adjudicatory matters. Although SECY staff attempt to enforce the process, their success is dependent on whether and how the Chairman and Commissioners respond to their attempts. According to NRC's General Counsel, the Commission's procedures are guidelines that have been developed based on practice but they are not requirements.

#### *Commission Procedures*

NRC's *Internal Commission Procedures* explain that Commission decisionmaking is accomplished through voting at scheduled Commission meetings, through notational voting on prescribed vote sheets, and by orally affirming a notational vote at an affirmation session. Appendixes 4 and 5 of the procedures address the basis for determining voting results and how to resolve a 2-2 vote. According to the procedures, votes from at least a quorum of three Commissioners are required to act, and action is based on the majority of those participating. As a general matter, requests for Commission action will be denied if the Commission vote is 2-2.

The *Internal Commission Procedures* also describe Commission voting on adjudicatory SECY papers<sup>12</sup> such as SECY-10-0102 and for holding the subsequent affirmation session vote; however, they do not provide details or direction on the process that occurs between the completion of an adjudicatory SECY paper vote and the conduct of an affirmation vote on the matter. OIG learned about the latter process through an interview with a SECY Technical Advisor who tracks adjudicatory SECY papers for the Commission.

According to the *Internal Commission Procedures*, Commissioners are expected to vote on adjudicatory SECY papers no later than 10 business days after receipt of the paper. The procedures state that when a majority of the Commission has voted, a request for an extension of time to vote beyond the 10 business day voting period or a request to delay the affirmation of the vote should be granted only by a majority of the Commission. Per the procedures, it is the Secretary of the Commission's responsibility to schedule a weekly affirmation session. It is also the Secretary's responsibility to, within 48 hours of the issuance of an adjudicatory SECY paper,

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<sup>12</sup> The *Internal Commission Procedures* state that written issue papers, referred to as SECY papers, are the "primary decision-making tool of the collegial Commission." These papers are submitted by the Office of the Executive Director for Operations, the Chief Financial Officer, or other office directors reporting directly to the Commission.

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notice the affirmation of the paper so that the affirmation will be held at the earliest available session following the close of the 10-day voting period unless a majority of the Commission has advised that the affirmation should be set for a later date. Although the *Internal Commission Procedures* state that it is the Secretary's responsibility to schedule these sessions, they also state that in order for Commissioners to vote orally at meetings, the Chairman must call for the vote.

A SECY Technical Advisor told OIG that although the procedures state that Commissioners are expected to vote within 10 days after the issuance of an adjudicatory SECY paper, in practice, the significant deadline in the process is the point at which the majority of Commissioners have voted. This is the point that the Technical Advisor tracks for adjudicatory SECY papers because at this point it is required that Commissioners who have not voted either submit a vote or request an extension to which a majority of other Commissioners must agree. The Technical Advisor said that he sends e-mail notices (addressed from the Secretary of the Commission) to the Commissioners who have not voted to request that they either vote or ask for an extension. If a Commissioner requests an extension, the Technical Advisor said he polls the other Commissioners to see if a majority agree to grant it. The Technical Advisor, who has been tracking Commission voting on adjudicatory matters for more than 20 years, could not recall any occasion where an extension request was denied by a Commissioner.

The Technical Advisor explained that after he has received all of the Commissioners' notational vote sheets on an adjudicatory SECY paper and the attached ASLB order, he drafts an affirmation notice that is high-level in nature and is used during the affirmation voting process. He said the affirmation notice simply provides the outcome of the vote; thus, when all Commissioners vote "aye" during the affirmation vote, they are voting to note their agreement with the language in the affirmation notice. In contrast, the vote sheets note whether a Commissioner is in favor of the order, against it, not participating, or abstaining and will sometimes include comments explaining why they are for or against, or suggesting modified language for the order.

The Technical Advisor also explained that OCAA may need to revise the order before an affirmation vote can be held if Commissioners indicate in their notational vote sheets that revision is needed. The Technical Advisor said that OCAA works with lawyers in the Commissioner offices to make the modifications requested and obtain their concurrence on the updated language. The length of time it takes for OCAA to make the Commissioners' changes in the order and obtain their concurrence on the update varies, depending on the level of change needed. The Technical Advisor said an affirmation vote is not held until all of the Commissioners are satisfied with both the affirmation notice and the order.

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## *OIG Review of Commission Adherence to Procedures*

OIG reviewed the Commissioners' voting process associated with SECY-10-0102<sup>13</sup> and learned that the *Internal Commission Procedures* were not followed relative to voting deadline, extension requests, or polling of other Commissioners to determine whether they agree with extension requests. As noted in section I of this report, OCAA issued SECY-10-0102 to SECY on August 10, 2010, and Commissioners were asked to provide completed vote sheets and comments to SECY by August 25, 2010. The paper was to be scheduled for an affirmation vote at an open meeting once all votes were received.

Despite the August 25, 2010 voting deadline, voting was not complete until Chairman Jaczko submitted his second vote (approximately 6 weeks after the majority of Commissioners had voted) on October 29, 2010. The voting process proceeded as follows:

Commissioner and Action	Date
Commissioner Apostolakis announced he would not participate	August 10, 2010
Commissioner Svinicki voted	August 25, 2010
Chairman Jaczko provided initial vote	August 25, 2010
Commissioner Ostendorff voted	August 26, 2010
Chairman Jaczko retracted initial vote	August 30, 2010
Commissioner Magwood voted	September 15, 2010
Chairman Jaczko voted for second time	October 29, 2010

OIG reviewed SECY documents associated with SECY-10-0102 and learned that the Commission Secretary sent an August 27, 2010 e-mail notice advising Commissioner Magwood to vote or request an extension to vote, but the request was withdrawn after Chairman Jaczko retracted his first vote. This occurred after the first time the majority of Commissioners had voted. After Commissioner Magwood voted on September 15, 2010, now constituting a majority, the Secretary sent an e-mail to Chairman Jaczko requesting his vote or an extension request. The e-mail stipulated absent the Chairman providing a vote or request for an extension, which must be approved by a majority of the Commission, it would be presumed, in accordance with the Commission's rule of procedure, the Chairman would not be participating in the action. There were no additional documents indicating that the Secretary followed up with the Chairman or his office. However, OIG identified (1) a September 16, 2010 e-mail from the Chairman's Chief of Staff to the Chairman recommending that the Chairman never request an extension on the Yucca Mountain matter and (2) an October 6, 2010 e-mail from the Secretary to NRC's General Counsel stating that the Chairman's Chief of Staff had indicated that the Chairman would vote the following week.

<sup>13</sup> Because this remains an open adjudicatory matter before the Commission, OIG could only report matters of process and not of substance.

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OIG reviewed 13 other adjudicatory SECY paper files<sup>14</sup> to assess whether Commission voting and polling procedures were followed in connection with these documents. OIG sought to determine whether (1) memoranda were sent to Commissioners reminding them to vote after a majority of Commissioners had voted, (2) Commissioners requested extensions or voted timely in response to the e-mail prompt, and (3) polling of other Commissioners occurred as warranted. OIG's review found that procedures were not followed in connection with 7 of the 13 files reviewed. In three of the seven cases, memorandum prompts should have been sent after the majority voted, but were not. In three other cases, memorandum prompts were sent; however, extension requests and polling did not occur. In one case polling was initiated but not concluded.

OIG also learned that 2 days after the Chairman voted on SECY-10-0102, the OCAA Director provided the Commission with a draft affirmation order detailing the status of the Commission's votes. Although the notational voting process associated with SECY-10-0102 was complete as of October 29, 2010, as of the date of this report the Commission has not held an affirmation vote on the matter and the draft order continues to sit in deliberation before the Commission for affirmation.

### *OIG Interviews of Agency Officials Concerning Commission Procedures*

The Secretary told OIG that she uses a "voting notice document" to prompt Commissioners who have not yet voted on an adjudicatory matter after the majority has voted, and that she sent such a notice to the Chairman concerning SECY-10-0102 on September 16, 2010. She said that although the Chairman never formally responded to the notice with a request for an extension to vote on SECY-10-0102, he told her on several occasions that he planned to vote. She never documented these exchanges, and did not proceed with the polling of other Commissioners to see whether they agreed with the delay. She recalled having conversations with some of the Commissioner staff members prior to Chairman Jaczko's second vote wherein they asked her to draft an affirmation statement even though Chairman Jaczko had not yet voted. She did not do this because the Chairman had told her he would be participating in the matter and because, based on discussions with one Commissioner and several Commissioner staff members, she believed that not all of the Commissioners who had voted were ready to affirm their votes during an affirmation session. The Secretary also said that while the *Internal Commission Procedures* direct her to schedule affirmation votes at the earliest opportunity after the 10-day voting period, Chairman Jaczko has wanted to make sure that all Commissioners are ready to affirm their votes before an affirmation session is scheduled.

The OCAA Director told OIG that in accordance with their process, following the Chairman's October 29, 2010 vote on SECY-10-0102, she prepared a draft affirmation order for circulation via e-mail that indicated the status of the votes at the completion of the voting process. She circulated the draft via e-mail to all of the Commissioners on November 1, 2010, and was subsequently called to the Chairman's office, where an OGC attorney and the Secretary were

<sup>14</sup> Files corresponded with adjudicatory SECY papers issued between March 2008 and August 2010.

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also present. The OCAA Director said the Chairman was animated and expressed displeasure that she had circulated the document. She told him she had done this as part of the normal process of circulating the draft decision. She was surprised and shaken up by the Chairman's manner and that he had never been angry with her before. The Chairman asked her something like, "Do you think this was a helpful thing to do?" She responded that she thought it was and he told her he was working with the Commissioners to settle the matter and to "just stay out of it." In hindsight, the OCAA Director said the Chairman may have felt that in circulating the draft decision, she did not give the other Commissioners time to consider the content of the Chairman's vote. However, at the time, she thought she was doing the correct thing by being prompt with a matter that was of interest to the Commission.

A majority of Commission staff members interviewed told OIG that with the exception of SECY-10-0102, the *Internal Commission Procedures* are generally followed. All of the staff members were aware that the procedures directed extension requests to be made and that extensions needed majority Commission approval. The Chairman's Chief of Staff acknowledged that although he was aware of the procedures concerning extension requests, he sent an e-mail to Chairman Jaczko recommending that the Chairman never ask for an extension to vote in connection with SECY-10-0102. A Commissioner's Chief of Staff asked the Secretary how her office would proceed given that a majority of the Commissioners had voted. The Secretary responded that she knew that one Commissioner would not proceed to affirmation before the Chairman voted, so she would not initiate measures to move the issue. According to this Chief of Staff, the Secretary was in a difficult position because she feared being "chewed out" by the Chairman if she were to proceed to affirmation before he cast his vote. A Commissioner's Legal Advisor told OIG that the Chairman wanted matters pertaining to the affirmation to be decided prior to scheduling an affirmation session and that he would not support the Secretary in moving to affirmation until that time.

The General Counsel told OIG that the *Internal Commission Procedures* should generally be followed, but that there are circumstances that require deviations, and the procedures themselves are not binding law. The procedures are a reflection of decisions among the Commissioners of how to handle and process certain matters, especially those matters identified in the Energy Reorganization Act and the Reorganization Plan. With regard to adjudicatory affirmation voting, the Commission needs to have a majority willing to go to affirmation. Normally, the Secretary would poll members to see if they were ready to go to affirmation; however, he said that if there is no consensus it is hard for the Secretary to go forward with a draft affirmation notice or order to reflect a consensus position. The General Counsel said that this is the situation with the high-level waste matter. He acknowledged that this matter has sat in abeyance with a draft affirmation order before the Commission since November 1, 2010. He said that as a theoretical matter, this could "rest in limbo" until NRC is posed with a forcing function, such as being party to litigation against the Government. He told OIG there have been matters previously before the Commission in appeal status that have gone unresolved for a year or longer.

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### *Interviews of Commissioners Concerning Commission Procedures*

Commissioner Ostendorff told OIG he queried Chairman Jaczko about when he planned to vote on SECY-10-0102 during meetings he had with the Chairman on September 9, September 14, October 5, October 19, and October 27, 2010, and the Chairman always responded that he would vote. Commissioner Ostendorff said Chairman Jaczko offered different reasons for not voting. For example, Chairman Jaczko told him he was concerned that a 2-2 vote would leave the ASLB "in limbo." He also told Commissioner Ostendorff that he would not take action until a majority of the Commission agreed to suspend the ASLB's adjudicatory proceedings. Commissioner Ostendorff disagreed with the Chairman's view that a 2-2 split could leave the matter unresolved. Rather, after discussions with OGC, OCAA, the Chief Administrative Judge of the ASLB, and Commissioner Ostendorff's legal counsel, Commissioner Ostendorff concluded that based on the *Internal Commission Procedures*, a 2-2 split would uphold the ASLB's decision. Commissioner Ostendorff communicated this view to the Chairman.

Commissioner Svinicki said she believed it was important for the Commission to act on the adjudicatory matter to resolve the legal question of DOE's authority to withdraw.

Commissioner Magwood advised that subsequent to the Chairman initially casting his vote on the matter, the Chairman allegedly withdrew his vote asserting he had done so as to afford Commissioner Magwood time to prepare a vote. Commissioner Magwood advised this representation was not accurate and he had not asked the Chairman to assist or to remove his vote on his behalf.

### *Interview of Chairman Concerning Commission Procedures*

Chairman Jaczko told OIG he did not recall the e-mail from his Chief of Staff advising him not to request an extension to vote on SECY-10-0102, and that he did not realize that an extension was required on adjudicatory matters if a vote was not cast within a 10-day period. He said that the Commission does not always act in accordance with the procedures. For example, the procedures say that the Commission votes on matters within 10 days of receiving them. Yet, he noted, the Secretary waits until three people have voted to issue notices to other Commissioners that they need to act. He said the Commission procedures are a guideline, and not absolute rules. However, he said he did at one point talk to the Secretary, who told him that he needed to request an extension, but he responded that he was getting ready to vote and, furthermore, told the Secretary she needed to proceed however she wanted to proceed. Chairman Jaczko told OIG that while some people have an impression that he is purposely holding up the affirmation vote, this is not the case. Instead, the reason the Commission has not held an affirmation vote on the Yucca Mountain matter is that the Commission has not come to majority agreement on the affirmation notice. He said NRC's governing statute directs that Commission action is accomplished by majority vote. According to Chairman Jaczko, his practice is to go to affirmation once the Commission is in agreement about the language in the

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affirmation notice even though the procedures describe a process wherein the affirmation is scheduled once the votes are in. He said that has proven to be an embarrassing situation because "voting does not end the process. It's just the beginning of the process for us."

Chairman Jaczko advised that all of the Commissioners agreed to the practice of proceeding to affirmation only after everyone agrees to the affirmation notice and "there has really been little discussion."

### D. Information Flow/Work Environment

During the course of the investigation, a number of interviewees conveyed their perception that Chairman Jaczko controls and restricts the information available to his fellow Commissioners and noted concerns about his interpersonal style. Senior officials, managers, and staff provided examples that they believed illustrated the Chairman's failure to share with his fellow Commissioners information needed to support their fully informed decisionmaking. Examples included the CR budget guidance memorandum described earlier in this report, the FY 2012 budget process, the Commission agenda planning process, and the Chairman's involvement in determining what constitutes a policy versus an administrative matter. In addition, a number of interviewees described instances of behavior by the Chairman that they viewed as unprofessional or manipulative. Examples included the Chairman's use of foreign travel or threats to contact members of the Administration as means of persuading his fellow Commissioners to support him on issues, and displays of anger towards individuals whom he does not view as supportive.

The Chairman defended his management style with regard to information flow as aligning with the division of Commission and Chairman responsibilities established by the Reorganization Plan and as necessary for efficiency and effectiveness. He acknowledged using forceful management techniques to accomplish his objectives but maintained that these techniques were necessary to facilitate the work of the Commission.

#### *The FY 2012 Budget Process*

OIG learned from Commissioner chiefs of staff and legal advisors that, historically, when the NRC Chairman presented his/her budget estimate to the other Commissioners, the Chairman included the staff's independently developed "Program Priorities and Considerations" document. This is a spreadsheet, prepared by staff, that presents each division's plans and priorities, which, historically, the Chairman has used to develop his/her budget proposal based on the staff's considerations. OIG learned that the FY 2012 process differed from past practice in that:

1. The Chairman personally met with division directors regarding their funding and programs and provided direction and priorities for the agency. Subsequently, the staff formulated their requirements for funding and programs based on the Chairman's direction, which was then incorporated into the Chairman's budget estimate.



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2. The Chairman's budget estimate was submitted to the Commission for its consideration without fundamental supporting documents developed by the staff.

The majority of Commissioner staff members and Commissioners indicated that this process caused problems in that the Commission could not assess the differences between the staff's projected needs and priorities and those of the Chairman. Furthermore, staff explained that the Chairman directed that if the Commissioners wanted to make inquiries to division directors regarding their funding needs and priorities, the requests needed to be funneled through the Chairman's office. Office responses, in turn, were submitted to the Chairman's office, and OIG learned that responses were either edited or not provided back to the requestor. OIG also learned that all of the Commissioner offices were able to obtain various versions of the "Program Priorities and Consideration Documents" through personal connections that Commissioner office staff had with NRC staff. However, the Commissioners remained unable to distinguish the staff's priorities from the Chairman's priorities due to the Chairman's process for developing the budget.

The CFO told OIG that the Chairman's FY 2012 budget process, wherein the Chairman had meetings with staff to discuss priorities directly before the offices developed their priorities document, was much quicker than the previous budget process. However, he said, the problem was that the Chairman did not provide the staff's supporting documents to the Commission. The CFO said he raised this issue to the Chairman's Chief of Staff and conveyed that without the supporting documents it would be difficult for the Commission to decide on a budget. The Chairman's Chief of Staff responded that the Commission did not need that level of detail, that this was the Chairman's budget, and that all inquiries to the CFO from the Commission about the budget should be cleared with the Chairman prior to providing a response.

The EDO told OIG that the Chairman did not want any differences between his budget and staff's budget and saw it as his budget proposal. The Chairman also wanted the opportunity to review and change any of the staff's responses to the Commissioners' questions.

An OEDO manager told OIG that he was familiar with the issue of information from the staff to the Commission being edited by the Chairman before it was provided to the Commission. He said the Energy Reorganization Act addressed this issue and that it could be debated in two ways. One way would be to edit information provided by the staff, and the other is to be passive and just present what the staff has identified on a matter. He said he discussed this matter with the General Counsel, who said the Chairman had the authority to edit information that was to be provided to the Commission. The OEDO manager said the Chairman did not believe there should be two separate budget proposals (Chairman's budget and staff budget). He said the Chairman viewed himself as the head of the agency and felt that there should be just one budget – the staff's proposal reviewed by the Chairman – presented to the Commission for its consideration.

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Chairman Jaczko told OIG that he was closely involved in the budget process as it is his responsibility to present the budget to the Commission and he was entitled to develop the budget however he wanted. He said he chose a method to help the staff shape a budget that would be more successful in getting through the Commission. He believes that this is what occurred with regard to the FY 2012 budget proposal. He said that the budget was presented 3 weeks earlier than usual and went through the Commission with almost no real change. He said he had assumed he did not have to provide the Commission with the "Program Considerations and Priorities" documents, but had since learned from the General Counsel that he had been incorrect. He said he now understood that once the budget was developed and presented to the Commission, the Commissioners were entitled to some of the draft documents.

### *Agenda Planning Process*

According to the *Internal Commission Procedures*, policy, rulemaking, and adjudicatory matters, as well as general information, are provided to the Commission for consideration in documents referred to as SECY papers. There are four categories of SECY papers. Commission meeting papers present a major issue on which collegial deliberation and vote at a Commission meeting, usually in a public session, is anticipated. Notation vote papers present an issue requiring consideration by the Commission or consultation with the Commission prior to action by the staff, but not requiring collegial deliberation among Commissioners or a formal vote in a meeting, thereby lending themselves to a written notation process. Affirmation papers convey Commission business that does not require deliberation among the Commissioners in a meeting mode, but must be voted on by the Commissioners in each others' presence. Information papers provide information on policy, rulemaking, or adjudicatory issues. These papers are purely informational and should not assume or request any action by the Commission.

The *Internal Commission Procedures* also describe monthly agenda planning sessions during which the Commission reviews and approves the Chairman's proposed meeting agendas that he has developed with the SECY and representatives from OGC, EDO, and the Office of Congressional Affairs. The procedures state, "In recognition of the collegial process, an individual Commissioner's request that a meeting be scheduled will be granted unless a majority of the Commission disapproves the request."

During this investigation, OIG learned that the process by which SECY papers are conceived by the staff and subsequently submitted for Commission consideration is subject to the Chairman's influence and allows him, in his role as principal executive officer, to influence information that staff develop for Commission review.

OIG learned that the general practice for developing a SECY paper is as follows:

- Staff develop an issue that is either identified as a potential policy matter or of significant interest to the Commission for their consideration.

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- The Division Director may have periodic meetings with individual Commission members with regard to this information and may present the issue as an informal informational matter.
- Senior staff coordinate the matters identified by the staff with their designated DEDO who holds "alignment meetings" to determine whether this information is to be conveyed to the Commission and in what form.
- If the alignment meeting consensus is to develop a paper, the paper is generated by staff and submitted to the EDO who provides a paper to SECY for tracking, and simultaneously tracks the paper in the EDO's system.
- The paper topic is provided to the Commission for consideration at the Chairman's agenda planning session at which time the Commissioners vote to determine when they will address the paper.

OIG learned that the Chairman, unlike the other Commission members, can direct the staff not to develop a paper for the Commission's review. Based on information learned during the periodic meetings or any other meetings, the Chairman sometimes directs the EDO not to develop a paper for Commission review. If other Commissioners disagree, they must prepare a COM and gain majority support to direct the staff to prepare a paper for Commission review.

The EDO told OIG that the Chairman's staff track staff-generated papers and the Chairman decides what is considered a policy matter and whether he will inform the Commission of the matter. The EDO said the only way a Commissioner can influence when a staff paper is submitted or the timing of presentation to the Commission would be to prepare a COM and gain a majority on the matter to direct the staff. The EDO said the Chairman told him that he wanted to control the flow of policy issues to the Commission to enable them to be more efficient and effective by not overloading them so they could focus on certain issues.

Several OEDO managers and managers of offices that report to the EDO told OIG of problems with information flow, while others said they were unaware of any incidents where information was not provided to the Commission. For example, one manager told OIG that the current approach to information flow to the Commission was not the best way, and the Chairman regulates the information to the extent he believes the Commission needs the information to make a decision. He said the Commission is "not working well at all today, unfortunately" and attributed this to the Chairman's interpretation of his role and responsibilities and the other Commissioners disagreeing with his interpretation. In addition, he said, there is so much distrust at the chief of staff level that the Commissioners often jump to conclusions about the Chairman's directions. In contrast, another manager believed the current Chairman has taken the initiative to better integrate the Commission's agenda through agenda planning. He said the Chairman has the view that there are policy matters and there are administrative matters and he believes the administrative matters should not go to the rest of the Commission. However, he

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acknowledged that the Chairman could incorrectly label something as administrative and not inform the Commission. He said the staff was sensitive to this and noted that with the CR budget guidance memorandum, a known controversial matter, the staff asked the Chairman if he was coordinating the matter with the other Commissioners.

The majority of Commissioner chiefs of staff and legal advisors told OIG that the Chairman withholds information to the Commission by either suppressing papers or manipulating the agenda planning process because he controls the sequencing of papers to be presented to the Commission for vote. They said that this, in turn, causes papers to sit for weeks or months as the Chairman decides when information meetings are to be scheduled. Commissioner staff perceived this as an effort to control information available to the Commission as the Chairman's priorities often did not align with those of individual Commissioners.

Commissioners Svinicki, Ostendorff, and Magwood told OIG that they sometimes learn of potential papers the staff intend to submit to the Commission during their periodic meetings with agency managers, but then the papers do not materialize. This makes them question whether they are sufficiently informed and aware of policy issues affecting the agency. In particular, the three Commissioners mentioned a paper on the National Fire Protection Association (NFPA) 805 rule,<sup>15</sup> where there were indications the staff wanted to raise policy matters to the Commission, but were unable to do so as the Chairman had determined the matter was not a policy issue. One DEDO told OIG that the Chairman stated he did not want a paper on NFPA 805 and as a result staff stopped working on the paper.

Another example provided by two Commissioner staff members was a paper on the International Regulatory Review Service (IRRS),<sup>16</sup> which the Chairman allegedly directed staff to stop preparing.<sup>17</sup> Commissioners told OIG that the distinction between policy issues and administrative actions was a subject of contention within the Commission. One Commissioner said that where disputes exist, the matters should be decided by the Commission; however, the Chairman has established a practice of categorizing a matter as "administrative" when it may have policy implications. The Commissioner noted that the CR budget guidance memorandum was a good example of this behavior.

<sup>15</sup> NRC regulation 10 CFR 50.48(c), otherwise known as NFPA 805, is a risk-informed, performance-based fire protection regulation adopted by the agency in 2004. Lessons learned by the NRC staff from their review of the two NFPA 805 pilot plant license amendment requests revealed that the NRC staff had underestimated the resources necessary to review NFPA 805 license amendment requests. The NRC staff anticipated receiving 25 license amendment requests by the end of June 2011 as a result of the current Commission enforcement policy related to NFPA 805. Completing the reviews of such a large number of submittals would be a significant challenge to the agency. The NRC staff desired to propose an approach to the Commission to address the expected large number of submittals.

<sup>16</sup> The IRRS is an International Atomic Energy Agency peer review and appraisal service. At the Government's request, during October 2010, an international team of safety experts reviewed NRC's regulatory framework for safety regarding operating U.S. nuclear power plants and the effectiveness of regulatory functions implemented by the NRC. The IRRS team identified a number of good practices, and made suggestions and recommendations where improvements are desirable or necessary.

<sup>17</sup> Since OIG's interviews with the Commissioners, the staff submitted a paper on NFPA 805 to the Commission for review, and the Commissioners received a copy of the IRRS assessment.

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The Chairman's Policy Director told OIG that she meets with the EDO and the Secretary of the Commission at least twice monthly to coordinate upcoming policy matters and open items before the Commission, the EDO, and SECY. The EDO maintains a tracking system for all open and upcoming policy items from staff, and that SECY maintains a separate tracking system for all matters before the Commission. She uses these coordination sessions to ensure that all matters are addressed and to ensure the Commission has been notified on all matters. She said that Chairman Jaczko is very transparent in keeping the other Commissioners informed on matters, including when he makes decisions from a non-policy, resources perspective. She cited the CR budget guidance memorandum as an example where the Chairman held back issuing the memorandum until he had coordinated the guidance with the other Commissioners.

Chairman Jaczko told OIG he decides what is and is not a policy matter by consulting with the General Counsel, his interpretations of his statutory authority, and consultations with the EDO. He said the statute notes that the Commissioners always have the option to raise a matter as policy, which is why he consulted as he did with the other Commissioners on the CR budget guidance memorandum. He said he knew the Commission did not support the budget guidance for the High-Level Waste Program and that he wanted to be prepared for battle. He said he proceeded to line up the votes on the matter to ensure if it was addressed as a policy matter, his position would be supported. Chairman Jaczko said the agenda planning process allows the Commission to decide by majority which direction to proceed. He said it is a tool for him to keep the agency's business moving and gives the Commission a more predictable and efficient way to manage its business.

Chairman Jaczko told OIG that it was within his authority to tell the staff to prepare or not prepare papers. With regard to NFPA 805, he said he never directed staff not to prepare a paper on the topic. He recalled the staff came to him and said they would not be able to complete the required number of license amendments applications for NFPA 805. Chairman Jaczko told the staff they had been budgeted to complete the license amendments and they needed to figure out how to accomplish the task. As Chairman, it was within his authority to execute the budget and manage the policy and workload of the agency. Consequently, he decided the issue would not be on the Commission's agenda. The staff later informed him that they were unable to conduct the application reviews, and that this would have enforcement discretion implications. As a result, he directed them to prepare a paper for the Commission because now this was a policy issue the Commission needed to work out.

*Foreign Travel*

NRC Management Directive (MD) 14.1, *Official Temporary Duty Travel*, assigns the Chairman responsibility for approving official foreign travel for himself and the Commissioners. The handbook associated with MD 14.1 assigns approving officials responsibility to ensure that the travel is necessary to carry out NRC's mission and directs officials reviewing requests for official foreign travel at NRC's expense to "scrutinize the official purpose of the trip and the value of collateral purposes to ensure validity."

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OIG learned the Chairman required different levels of justification from each Commissioner concerning their requests for foreign travel. For example, one Commissioner was required to provide written justification to the Chairman for international trips, while other Commissioners were granted approval by the Chairman based simply on verbal notification of the planned trip. Additionally, the Chairman used foreign travel as an incentive for supporting him on issues.

Commissioner Svinicki said the Chairman has ambiguous approval criteria for foreign travel, which has made her reluctant to pursue trips. She said it is not worth her time and effort to develop a justification for a trip that she may be denied and because the Chairman does not provide an answer in a timely manner. For example, when requested by a host country to speak at conferences, she is unable to provide a timely response. She is now reluctant to pursue foreign travel because she is concerned about having to cancel depending on the Chairman's decision and the impact this has on her reputation.

Commissioner Magwood relayed one example where Chairman Jaczko wanted Commissioner Magwood to withdraw his request for an additional staff member to support the Commission offices. He said the Chairman told him that if he pursued the request, he would withhold authorizations on Commissioner Magwood's foreign travel.

Chairman Jaczko told OIG that as the Chairman of the agency he is responsible for managing the agency's workload and workflow, and in that respect he has overall management authority of the staff. He related that it was within his discretion to approve or not approve his colleague's foreign travel requests. As Chairman, he has tools that he uses to manage the agency, including the Commission, and to negotiate and get leverage. One such tool is his discretion to approve foreign travel. It was his responsibility to decide who best represented the agency and if he had colleagues who did not support him on votes, he was not likely to send them to represent him and the agency on international travel. Chairman Jaczko commented that there is nothing unethical or inappropriate about that and, in fact, it was his job, to make those difficult decisions. Further, he has never taken away anybody's international travel, or not signed a request for international travel.

*Interpersonal Interactions with Commissioners and Staff*

Commissioner staff members told OIG of incidents they perceived as unprofessional behavior by Chairman Jaczko toward their Commissioners or members of the staff. For example, staff mentioned the Chairman's behavior toward the OCAA Director when she circulated the draft order for SECY-10-0102 shortly after the Chairman submitted his vote. Several Commissioner staff members relayed incidents where the Chairman angrily confronted their Commissioner on issues; however, the Commissioners themselves did not relay such examples. Several current and former Commission staff members said the Chairman's behavior caused an intimidating work environment. A former Chairman told OIG that the Chairman often yelled at people and his tactics had a negative effect on people. He described the behavior as ruling by intimidation. The former Chairman said he verbally counseled Chairman Jaczko on his behavior on two occasions before leaving the agency.

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A number of NRC senior managers interviewed described examples of the Chairman losing his temper with them or stories they had heard about him losing his temper with others. Some characterized these incidents as disagreements on matters where the Chairman held a strong view and they were reluctant to characterize the Chairman's behavior as unprofessional; however, they said that if they had subordinates who displayed the same behaviors, they would not tolerate it. Conversely, other senior managers interviewed said they never witnessed any unprofessional behavior on the Chairman's part.

Chairman Jaczko acknowledged that he sometimes loses his temper. He said he worked to control it and there are times when he has wished he has said or done things differently. He said he mainly loses his temper with the Commissioners, but acknowledged that there have been a few times when he has said some fairly strong things to the staff. He concluded that his behavior created an environment sometimes in which it is difficult for people to work with him, and he regretted that.

**III. FINDINGS**

1. OIG determined that Chairman Jaczko used a FY 2011 CR budget guidance memorandum to initiate NRC's FY 2011 plans to close out its Yucca Mountain license application review even though the FY 2011 budget had not yet been passed. The Chairman's decision to direct the staff to follow the FY 2011 budget guidance was supported by the NRC General Counsel and consistent with (1) the discretion within his budget execution authority under the Reorganization Plan, (2) OMB Circular A-11 guidance to spend prudently during a CR period, (3) the Administration's decision to terminate the Yucca Mountain repository project, and (4) the Chairman's interpretation of the Commission's FY 2011 budget policy decisions, which articulated close-out activities.

OIG determined that although the Chairman had the authority to direct staff to follow the FY 2011 budget guidance, he was not forthcoming with the other Commissioners about his intent to stop work on the SER as part of implementing close-out activities. This included stopping work on SER Volume 3 (Review of Repository Safety After Permanent Closure), which NRC staff believed to be near completion by the end of FY 2010. The Chairman anticipated that proceeding to close-out in this manner could be controversial and viewed as a policy decision for full Commission consideration. Therefore, prior to directing issuance of the CR budget guidance memorandum, he strategically provided three of the four other Commissioners with varying amounts of information about his intention to proceed to closure and not complete SER Volume 3. He did not provide Commissioner Svinicki with any information about his intentions. Although two of the three Commissioners he spoke with did not fully understand the implications of the CR

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budget guidance memorandum, the Chairman told the EDO and the Chairman's Chief of Staff told the CFO, prior to their signing the memorandum, that all the Commissioners were informed and supported issuance of the CR budget guidance memorandum. In fact, subsequent to the issuance of the CR budget guidance memorandum, a majority of Commissioners disagreed with the outcome of the memorandum, which was the Chairman's direction to stop work on SER Volume 3. Additionally, a majority of the Commissioners did not think the conditions to proceed to closure (i.e., withdrawal or suspension) had been met.

OIG also determined that after Commissioner Ostendorff issued a COM to the Commission asking to direct the staff to continue its work on the SER, the Chairman communicated to Commissioners Magwood and Apostolakis that he expected their continued support. He told them that he would not have directed issuance of the CR budget guidance memorandum had they not committed to support him. Despite their view that they had not been fully informed about the Chairman's intent behind the CR budget guidance memorandum, Commissioners Apostolakis and Magwood elected not to participate in voting on the COM. Therefore, without a majority, the Commission was unable to move the matter from budget space, within the Chairman's purview, to policy space, within the Commission's purview.

2. OIG determined that although the NWPA requires NRC to consider DOE's Yucca Mountain repository license application and issue a final decision approving or disapproving issuance of a construction authorization, there are various factors preventing the agency from meeting its statutory obligation. These factors include the Administration's decision to terminate the Yucca Mountain repository project, decreasing appropriations to NRC for the High-Level Waste Program, and the Chairman's direction to stop working on the SER.
3. OIG determined that although the Commission has internal procedures intended to facilitate collegial Commission decisionmaking based on majority rule, adjudicatory voting procedures are not consistently enforced. Furthermore, these written procedures do not provide details on the process that occurs between the completion of an adjudicatory SECY paper vote and the conduct of an affirmation vote on the matter. The lack of enforcement of and specificity in the Commission's written procedures, coupled with the Commission's practice not to move to affirmation until all Commissioners agree to the affirmation notice and order, allows matters to sit in abeyance without final Commission action.
4. OIG determined that the Chairman controls information provided to the other Commissioners based on his interpretation of his statutory authority as Chairman versus the authority given to the Commission. Because he acts as the gatekeeper to determine what is a policy matter versus an administrative matter, and manages and controls



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information available to the other Commissioners, they are uncertain as to whether they are adequately informed of policy matters that should be brought to their attention. Ultimately, however, all Commissioners have the ability to bring what they perceive as policy matters before the Commission by writing a COM and gaining majority Commission support.

Please respond to this office on what, if any, action you intend to take in response to this report.

cc: Commissioner Svinicki  
Commissioner Apostolakis  
Commissioner Magwood  
Commissioner Ostendorff



# NRC NEWS

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## STATEMENT OF NRC CHAIRMAN GREGORY B. JACZKO

The U.S. Nuclear Regulatory Commission's Inspector General conducted a comprehensive review of the agency's handling of the High-Level Waste program. The conclusions of the report reaffirm that my actions have been and remain consistent with established law, guidance, and my authorities as Chairman. With the IG report now completed, we can all move forward with a renewed commitment to ensuring public health and safety in the use of nuclear materials – the essential mission of the NRC.

The closeout of the Yucca Mountain license review has been a complicated issue, with dedicated and experienced people holding different viewpoints. All NRC Chairmen have the responsibility to make difficult and sometimes controversial decisions. The IG plays an important role in enabling the American people to continue to have confidence that my focus as Chairman – and the entire agency's focus – is on effectively carrying out the NRC's vital safety mission. Thus, I appreciate the thoroughness with which the IG and his staff conducted this comprehensive review over the last seven months.

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