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*NRC Delays Judicial Review of the Yucca Project  
Termination*

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## NRC Delays Judicial Review of the Yucca Project Termination

From its inception, the nuclear power industry has been hounded by its critics, who ask, “What will be done with the spent nuclear fuel?”, and its would-be friends, who say, “I’d like to see more reactors, but first we have to solve the spent nuclear fuel problem.”

Nuclear fuel goes into reactors as uranium pellets contained in tubes that are bundled into fuel assemblies. After four to six years in the reactor the fuel is “spent.” The spent nuclear fuel (SNF) is removed from the reactor and stored on-site for a cool-down period of at least ten years. After the cooling-off period, the SNF can be shipped off-site for recycling (the “closed cycle” approach) or burial (the “open cycle” approach).

SNF is a mix of uranium and radioactive materials formed in the reactor. It is a radiation hazard and remains so for a very long time. Currently, fifty-years’ worth of commercial SNF, 57,000 metric tons, is being stored at 131 locations in thirty-nine states. The volume is not large. It would cover an area the size of a football field to a depth of less than ten yards.<sup>1</sup>

### The Nuclear Waste Policy Act

The closed and open cycle solutions each have technical advantages and disadvantages, and different countries have chosen one or the other for policy reasons. Initially, in the United States, the industry took the closed cycle approach, with private sector facilities performing the recycling. This lasted until 1982, when Congress passed the Nuclear Waste Policy Act (NWPA).<sup>2</sup> The NWPA is the solution to the SNF “problem” in the United States. It mandates the open cycle approach managed by the U.S. Department of Energy (DOE) with burial of the SNF in a geologic repository at remote Yucca Mountain, Nevada.<sup>3</sup> The NWPA requires DOE to:

- Conduct a characterization study of the mandated Yucca site,<sup>4</sup>
- Recommend, after public hearings and notice to the State of Nevada, presidential approval of the Yucca site,<sup>5</sup> and
- Submit an application for authorization to construct the repository from the Nuclear Regulatory Commission (NRC).<sup>6</sup>

Based on a comprehensive evaluation by DOE and the recommendations of the Secretary and the President, Congress in 2002 approved, and the President signed, a Joint Resolution approving “the site at Yucca Mountain, Nevada, for a repository.”<sup>7</sup> DOE submitted the Yucca Project application to the NRC on June 3, 2008.<sup>8</sup> At that point, the matter was in the hands of the NRC. The NWPA requires the NRC to:

Consider an application for a construction . . . of a repository in accordance with the laws applicable to such applications, except that the Commission *shall* issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission. . . .<sup>9</sup>

Funding for the Yucca project is by congressional appropriation from the Nuclear Waste Fund, established by the NWSA,<sup>10</sup> with revenue from a one mil per kilowatt-hour fee charged on nuclear generation. The Nuclear Waste Fund has collected \$35.4 billion in fees plus interest since 1983. About \$10.8 billion has been spent on the Yucca Project. The fees are considered fuel costs and passed on to utility ratepayers.

DOE completed all the procedures necessary to file the application for the NRC and submitted it in June 2008 despite the persistent opposition of Senate Majority Leader Harry Reid. Senator Reid states:

- Since 1995 he defeated “numerous” attempts to bring nuclear waste to the Nevada Test Site for temporary storage and used his position in the democratic leadership to stop eight pro-Yucca bills and ten pro-Yucca amendments;
- From 2001 to 2009, he cut over \$1 billion from Yucca Mountain Budget Requests and stripped \$27 million from the FY2010 budget for the NRC;
- He convinced then-presidential candidate Obama to promise to oppose the Yucca Project; and
- He persuaded President Obama to promise to eliminate all funding of the project in his FY2011 budget.<sup>11</sup>

In early 2010, the NRC was on track to complete staff reviews and publish its preliminary environmental and safety findings by November 2010.

### **The President Keeps His Promise**

On January 29, 2010, the White House and DOE announced that the Administration no longer regarded nuclear waste storage at Yucca Mountain a “workable” option for SNF. They proposed to replace the NWSA statutory process for SNF management with a “Blue Ribbon Commission” that would have two years to make recommendations to the President and Congress. On February 1, 2010, DOE filed a motion with the NRC seeking a stay in hearing activities, stating that “the President directed that the Department of Energy ‘discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain . . . [and] that DOE intends to withdraw the pending application with prejudice. . .’.”<sup>12</sup> The DOE motion to withdraw with prejudice was filed on March 3, 2010. DOE undertook a number of unilateral actions to terminate the project:

- Closing the Yucca Mountain site and terminating contractors,
- Withdrawing over 100 Nevada state water permit applications necessary for the project,
- Reprogramming appropriated funds for Yucca Mountain, and
- Notifying DOE employees working on the project that they would be “separated.”

### **The Litigation Begins**

Petitions for review of the DOE action were filed by the states of South Carolina and Washington (each state has large quantities of defense waste slated to go to Yucca), plus local citizen groups. The petitioners brought the actions under a special NWSA provision, giving the

courts of appeal original and exclusive jurisdiction over NWPA disputes.<sup>13</sup> The proceedings were consolidated in the D.C. Circuit, with DOE, the NRC, and President Obama as the primary respondents.

The petitioners argue the withdrawal and abandonment of the Yucca Project violate:

- NWPA mandates to DOE and the NRC;
- NWPA and the National Environmental Policy Act (NEPA)<sup>14</sup> prohibitions against taking major federal action without an environmental impact statement;
- Administrative Procedure Act<sup>15</sup> requirements of an administrative record of decision, public notice and opportunity to comment, and an explanation of the reasons for the decision; and
- The separation of powers doctrine.

The petitioners filed these actions even before the NRC had ruled on the DOE motion. The respondents denied all these claims and argued that the NRC had primary jurisdiction and that the action was not ripe for review. Pursuant to NRC licensing procedure, the DOE motion to withdraw went to the Construction Authorization Board (CAB), a panel of administrative law judges. The CAB initially did not rule but stayed all NRC proceedings pending a decision from the D.C. Circuit, on the ground that the DOE had not offered any technical or safety reasons for its motion, the issues were entirely legal, and the court rather than the CAB was better suited to resolve them. DOE appealed to the full commission, which ordered the CAB to rule on the motion.

The petitioners pressed for speedy court consideration because, while the petitioners were filing briefs and motions, DOE was dismantling the project. The D.C. Circuit granted the request for expedited briefing and argument. Consistent with this order, the petitioners submitted briefs on June 18, 2010.

### **Action and Inaction at the NRC**

On June 29, 2010, the CAB denied the DOE motion to withdraw. It concluded that the NWPA

*“...directed . . . that the NRC consider the Application and issue a final, merits-based decision approving or disapproving the construction authorization application. Unless Congress directs otherwise, DOE may not single-handedly derail the legislated decision-making process by withdrawing the Application. DOE’s motion must therefore be denied.”<sup>16</sup>*

The CAB rejected all DOE claims that the motion was warranted<sup>17</sup>:

#### **1. Inherent DOE Power**

It rejected DOE’s argument that the agency’s power under Atomic Energy Act of 1954 (AEA) authorizes the withdrawal. It found the subsequently-enacted, more specific NWPA, trumped the AEA. Given the stated purposes and the detailed structure of the NWPA, the NRC could not allow DOE to withdraw the Application. Congress specified

in detail the steps that DOE, the President, the State of Nevada, and Congress itself had to take before the Yucca Mountain Application could be filed with the NRC. Congress would not have required all those steps if it meant to allow DOE to withdraw the application simply because the Secretary thought the project was not “workable.”

2. NRC regulations

DOE claimed that it had authority to withdraw because the NWPA requires the NRC to consider the Application “in accordance with the laws applicable to such applications,” including NRC procedures for withdrawals of applications. DOE asserted that it should be treated just like any private applicant, including the “right” to withdraw its application. The CAB stated DOE is not like a private sector applicant who voluntarily applies for a license. It is obligated under the NWPA to pursue the Yucca license. It said NRC regulations do not “authorize” withdrawals; they authorize licensing boards to deny unconditioned withdrawals.

3. Deference to a DOE policy decision

DOE asked that its motion to withdraw be given *Chevron*-type deference, and that it would be “absurd and unreasonable” to require DOE to proceed with an application that it no longer favors on policy grounds. The CAB found that the NWPA is clear on its face, so deference is inappropriate. It was not persuaded by the fact that even if the NRC issued the license, DOE and Congress could decide not to construct and operate the facility. The CAB said where the law requires it, DOE and other agencies within the executive branch must implement legislative directives with which they may not agree. Finally, it found that Congress’ funding of a Blue Ribbon Commission to review federal policy on SNF management and disposal and alternatives to Yucca Mountain was not relevant to the motion because Congress did not repeal the NWPA or declare that the Yucca Mountain site is inappropriate.

The Board’s conclusion was that if Congress does not wish to see the Yucca Mountain project go forward, it can change the law or decide not to fund the proposed repository. The NRC could not ignore the NWPA mandate that it make a decision on the merits. The NRC immediately asked the parties to submit briefs on the CAB decision and whether it should be affirmed. On July 28, 2010, the D.C. Circuit stayed its proceedings until the NRC final decision.

The matter has been at the NRC since July. NRC Chairman Gregory Jaczko, a former advisor to Senator Reid on Yucca, overruled the CAB on his own authority and directed the NRC staff to stop work on the Yucca license. Interveners made motions urging the recusal of three other commissioners on the ground that during their confirmation hearings, they were subject to an improper intrusion into the adjudicatory process of the commission in violation of the *Pillsbury* doctrine.<sup>18</sup> Senator Boxer asked the nominees, “at the request of Senator Reid,” if they would “second guess” the DOE decision to withdraw the Yucca application. All three said “No” and were confirmed. After the motions, Commissioner Apostolakis, decided to recuse himself, but on the ground that he had done technical work on Yucca for a National Lab in the past. That left four commissioners available to rule. Apparently the Commissioners voted twice “informally,”

the latest being on October 29, 2010. The NRC now says the date for final decision is “indeterminate.”

## Endgame

In November, the petitioners reported to the D.C. Circuit that the NRC was delaying and argued that “the government should not be allowed to ‘manipulate the judicial process so as to deny parties their statutory right to review.’” On December 10, 2010, the D.C. Circuit granted the petitioners’ motion to lift the stay and scheduled briefing to be completed by February 8, 2011 and oral argument on March 22, 2011. On February 18, 2011, the NRC, in response to a Freedom of Information Act request by The Heritage Foundation, released 1300 pages of the NRC Staff safety evaluation of the Yucca project. The evaluation was supposed to be released for public comment in November. The NRC made over 700 redactions in the released documents on the ground that the documents were “predecisional”, not official agency documents and the redacted material “could impact the adjudicatory process”.<sup>19</sup> Heritage, expressing its disappointment, noted that, by NRC regulation, the NRC staff safety report was supposed to be released for public comment before the Commission’s decision on the license, and that the unexpurgated version would be useful to inform the public debate over Yucca – and the oral arguments on March 22.

*\* C.J. Milmo is a nuclear industry consultant and Senior Policy Counsel for the U.S. Nuclear Infrastructure Council. The views expressed in the article are his own, and not those of the Council.*

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<sup>1</sup> Nuclear Energy Institute,

<http://www.nei.org/keyissues/nuclearwastedisposal/integratedusedfuelmanagement/>

<sup>2</sup> 42 USCA Chapter 108, §§ 10101-10226.

<sup>3</sup> 42 USCA § 10172

<sup>4</sup> NWPA Sec. 113.

<sup>5</sup> NWPA Sec. 114(a).

<sup>6</sup> Id.

<sup>7</sup> Pub. L. No. 107-200, 116 Stat. 735 (2002).

<sup>8</sup> NRC, “Licensing Yucca Mountain fact sheet”, <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-yucca-license-review.pdf>

<sup>9</sup> NWPA Sec. 114(d) 42 U.S.C. §10134 (emphasis added).

<sup>10</sup> NWPA Sec. 302, 42 U.S.C. §10222

<sup>11</sup> See, Senator Reid’s website, <http://reid.senate.gov/about/upload/yucca-mountain-accomplishments.pdf>

<sup>12</sup> In the Matter of DOE High Level Waste Repository, NRC ASLBP No. 09-892-HLW-CAB04, DOE Motion dated February 1, 2010

<sup>13</sup> 42 U.S.C. § 10139 (a)

<sup>14</sup> 42 U.S.C. §§ 4321, et seq.

<sup>15</sup> 5 U.S.C. §552 et. seq.

<sup>16</sup> In the Matter of U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW ASLBP No. 09-892-HLW-CAB04 June 29, 2010, (“CAB decision”), p.5.

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<sup>17</sup> CAB decision p.5-20.

<sup>18</sup> *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966)

<sup>19</sup> Heritage Foundation “*NRC Censors Flub Opportunity to Move Yucca Debate Forward*”  
<http://blog.heritage.org/2011/02/18/what-is-the-nuclear-regulatory-commission-hiding-on-yucca-mountain/>

### **Related Links:**

Department of Energy, Motion to Withdraw Yucca Mountain License Application:

[http://www.energy.gov/news/documents/DOE\\_Motion\\_to\\_Withdraw.pdf](http://www.energy.gov/news/documents/DOE_Motion_to_Withdraw.pdf)

Department of Energy, Historical Key Documents:

[http://www.energy.gov/environment/historical\\_key\\_documents.htm](http://www.energy.gov/environment/historical_key_documents.htm)

NRC's Yucca Mountain Licensing Activities: <http://www.nrc.gov/waste/hlw-disposal/licensing.html>

NRC, “Licensing Yucca Mountain fact sheet”, <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-yucca-license-review.pdf>

Nuclear Waste Policy Act of 1982, as Amended: <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0980/v2/sr0980v2.pdf#pagemode=bookmarks&page=141>

Nuclear Energy Institute, Key Issues: Repository Development:

<http://www.nei.org/keyissues/nuclearwastedisposal/yuccamountain>

Heritage Foundation “*NRC Censors Flub Opportunity to Move Yucca Debate Forward*”

<http://blog.heritage.org/2011/02/18/what-is-the-nuclear-regulatory-commission-hiding-on-yucca-mountain/>

Yucca Mountain Safety Evaluation Report: <http://www.scribd.com/doc/49039638/Yucca-Mountain-Safety-Evaluation-Report-Volume-3>

Senator Harry Reid, Issues: Yucca Mountain: <http://reid.senate.gov/issues/yucca.cfm>