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December 31, 2010

NWSC Update

Nuclear Regulatory Commission (NRC)

Chairman Jaczko continues to try to overturn the June 29, 2010, Atomic Safety and Licensing Board's (ASLB) Order, when it denied the Department of Energy's (DOE) motion to withdraw with prejudice its license application for the Yucca Mountain (YM) project. Meanwhile, he is using the Fiscal Year (FY) 2011 NRC Budget Justification Report as an excuse to close down the license application proceedings and stop staff from issuing Volume 3, the Safety Evaluation Report (SER).

The NRC technical staff was making fast progress with the scientific and technical review and was ready to release this report in September. This was due to the DOE's motion to withdraw its license application which suspended the ASLB hearing process; therefore, the staff concentrated their technical resources on their review, thus resulting in a faster than expected staff review of Volume 3, SER.

The most significant section of this report is on "post closure performance." This section is the heart of a geologic repository where the staff determines if the DOE has adequately demonstrated scientific regulatory compliance with the Environmental Protection Agency and NRC 10,000 year and million year performance standards.

Ironically, on November 18 the State of Nevada submitted a Motion requesting that the ASLB announce its schedule for deciding the outstanding Phase 1 legal issues. These issues pertain to approximately 130 or so outstanding contentions concerning the license support network. Consequently, the ASLB took it upon itself on December 8, 2010 to issue an Order to the NRC staff to provide no later than December 22, 2010, "a full explanation for its last minute schedule change and a full explanation of why, after so many months of preparation, the Staff cannot, at a minimum, establish a date by which it will issue Volume 3, SER."

The ASLB further directed that, "parties shall confer and seek agreement on a discovery status report and any proposals for modifications to Construction Authorization Board Case Management Order #2" by Friday, January 21, 2011. The Board is basically asking the parties to present their plans to resume the YM license hearing proceedings that were suspended after the DOE requested to withdraw its license application.

It appears that the ASLB is frustrated with Chairman Jaczko who directed the staff to stop work on the YM licensing and safety review after the Board ruled in late June that the licensing proceedings should continue as directed by the 1982 Nuclear Waste Policy Act, as amended (NWPA). Stopping the license proceedings was not the NRC staff's plan as demonstrated at an October NRC "all hands" meeting, where Chairman Jaczko was questioned and openly challenged by staff.

It is the NRC's Chairman prerogative to generally control the Commission's schedule.

He tried to justify his actions by responding in a November 5, 2010 letter to Senator Inhofe (R-OK) that he originally voted on this matter on August 25; he then withdrew his vote to continue consultation with his colleagues; and re-voted on October 29, 2010.

Since Commissioner Apostolakis recused himself due to technical work he carried out at the Sandia Laboratory that concluded the Yucca Mountain (YM) scientific work was sufficient to achieve an NRC license, Chairman Jaczko did not have sufficient votes to overturn Commissioners Svinicki and Ostendorff votes who most likely voted to uphold the ASLB's decision. It is assumed that Commissioner Magwood's vote is against the ASLB's ruling.

Meanwhile, several House Republicans, some of whom will be Chairmen of key committees have already stated that they plan to hold hearings in 2011 if it turns out that Commissioner Jaczko knew that he was facing a tie vote and delayed the outcome for political purposes.

In addition, NRC's Inspector General, Hubert Bell, has opened an internal investigation at the request of Representatives Upton (R-MI) and Whitfield (R-KY), with a separate request by the States of Washington, South Carolina, Aiken County, SC and Ferguson, et al., challenging Jaczko direction to stop the NRC's staff review of the license application; moreover, the release of the SER.

As soon as Congress passed its first Continuing Resolution for the FY 2011 budget, Chairman Jaczko claimed that the NRC's Budget Justification Report gave him the authority to stop all work on the YM project since no funds were allocated by Congress in the FY 2011 budget. Some members of Congress and parties involved in the proceedings disagree with his assertion.

Further, Representatives Hastings (R-WA), Ryan (R-WI) and Simpson (R-ID) sent a joint letter on November 16 to the Office of Management and Budget requesting detailed explanation of the legal budgetary authority used by Chairman Jaczko to justify his actions to terminate the DOE license application technical review. The letter states the current Continuing Resolution is based on the FY 2010 appropriations "that are law." Whereas, Chairman Jaczko is using the FY 2011 NRC Budget Justification Report to justify his actions.

Recap: The NRC requested in its FY 2010 budget \$56M from the NWF for the review of the license application; however, Congress appropriated \$29M. In its FY 2011 budget the NRC downgraded its request to \$10M from the NWF.

U.S. Court of Appeals for the D.C. Circuit

License Application: On Friday, December 10, the U.S. Court of Appeals for the D.C. Circuit lifted its stay on the States of South Carolina and Washington, Aiken County, SC and Robert Ferguson, et.al., lawsuit and set an expedited briefing schedule:

- January 18, 2011 – Joint Reply Brief of Petitioners.
- February 1, 2011 – Deferred Appendix.
- February 8, 2011 – Final Briefs.

Background: Earlier this year, the Court placed this case in "abeyance" pending an expected near term NRC decision, but ordered monthly status reports. Due to Chairman Jaczko's actions, the parties filed a motion asking the Court to lift its Order in light of the NRC's activities.

Speculation is that the Court may have to issue a “Writ of Mandamus” to compel DOE to follow the NWPA, an outcome which those that oppose the Yucca Mountain project may wish to avoid.

Nuclear Waste Fund Fees (NWF): The U.S. Court of Appeals for the D.C. Circuit dismissed the Nuclear Energy Institute’s (NEI) and the National Association of Regulatory Utility Commissioners’ (NARUC) case on Monday, December 13. The Court determined that the Secretary of Energy conducted an annual assessment of the NWF fee to determine whether it is adequate to offset the costs of its statutorily enumerated waste disposal activities.

However, the Court left the door open by stating that, “given the Secretary’s recent completion of his annual assessment, petitioners may now be able to properly raise this claim through a challenge to that assessment.”

Attached is a statement issued by Commissioner Tony Clark, Chairman, NARUC, concerning the Court’s ruling.

Recap: The DOE released its annual fee adequacy report; however, NEI wanted DOE to carry out a proper fee adequacy ***analysis*** report.

The NEI and NARUC then sent corresponding letters on July 8, 2009 to DOE requesting an update fee adequacy analysis since the corpus of the NWF has more than sufficient funds to cover license application and other program activities. Also, an immediate suspension of fees paid into the NWF in light of the Administration’s termination of the YM project.

The DOE responded on October 8, 2009 that it, “has consistently determined the current fee of 1/10-cent per kilowatt hour is adequate to cover the total system life cycle costs of disposing of the commercial spent nuclear fuel and high-level radioactive waste, using the assumptions in place at the time; and, in accordance of the Act, the fee will continue to be reviewed annually.” Further, it intends to continue collecting the fees from the rate payers as authorized by the NWPA.

In response to the Senate Energy and Water Appropriations language in H.R. 3181 relating to suspension of collected fees, the Administration issued a Statement of Administration Policy on July 27, 2009, “that all of the fees collected in the NWF are essential to meet the obligations of the Federal Government for managing and ultimately disposing spent nuclear fuel and high-level radioactive waste.”

On April 2010, NEI and NARUC filed separate petitions for review with the U.S. Courts of Appeals for the D.C. Circuit, requesting relief and deny request (a) to suspend the fee paid by the ratepayers into the NWF until DOE resumes the nuclear waste disposal program, and (2) for DOE to promptly perform an annual review of the NWF fees as required by the NWPA.

The NWPA, Section 302 (a)(4), requires the Secretary to annually review and evaluate whether the fees collected should be adjusted upwards or downwards to provide sufficient revenue to recover costs incurred for carrying out Program activities.

Congressional Activities

Congress is expected to reconvene and hold the swearing-in ceremony on Wednesday, January 5, 2011. Senator Harry Reid (D-NV) has already secured his position as the Senate Majority Leader, and so has Representative John Boehner (R-OH). He will be the next Speaker of the House of Representatives.

Key House Committee chairmen and ranking member positions have already been selected. We will be contacting them to initiate dialogue, visit and work with them and other key members of Congress for the continued support of the nuclear waste disposal program and other related issues.

Before adjourning, the 111th Congress extended the FY 2011 Continuing Resolution (CR) until March 4, 2011. The current CR essentially continues funding of most programs at the FY 2010 level; however, the total funding rate for the CR is \$1.16B higher than the 2010 level.

Senator Reid continues to try to slip in funds from the NWF for NV -- he slipped in \$5M in FY 2010 Omnibus Bill. He tried again to slip in \$2.5M in the FY 2011 Omnibus bill earmarks. The Omnibus bill was withdrawn.

Recap: Congress appropriated \$196.8M for FY 2010 for the nuclear waste disposal program - \$98.4M was from the NWF, \$5M of which was made available for the Blue Ribbon Commission, and \$98.4M was for defense nuclear waste disposal.

In the FY 2011 Budget request, DOE stated that The President identified the YM Project in the Terminations and Reductions section of the FY 2010 Budget request submitted to Congress in May 2009. The DOE also stated that it was evaluating a range of options for bringing the project to an orderly close and did not request any funds for the continuation of the disposal program.

Consequently, more than 30 years of scientific investigations and \$10 billion of ratepayer fees paid toward the development of a national repository evaporated together with decades of scientific and technological knowledge. The Administration's actions contradicted Congresses' directive to DOE to submit the licensing application through the NWPA.

Further, abandoning the pending license application contradicted the President's Memorandum on Scientific Integrity issued in March 2009 stating that "political officials should not suppress or alter scientific or technological findings and conclusions." Due to the Administration's actions, more than 700 personnel were laid off and OCRWM is now obsolete. The Office of Nuclear Energy is now supporting the work of the Blue Ribbon Commission and the development of an integrated approach to waste options.

In February 2010, the NWSC sent letters to the House and Senate Appropriations leadership expressing concern over the federal government's role in taking responsibility for the stranded SNF and HLRW in 121 sites at 39 states. The letters reminded the leadership of the Managers Joint Statement language in House Report 111-278 that, "the language and allocations set forth in House Report 111-203 and Senate Report 111-45 should be complied with unless specifically addressed to the contrary in the conference report and statement of managers."

The DOE should have submitted in writing to Congress a "reprogramming requirement" to move appropriations between appropriations accounts, before it could terminate the license or other program activities. It is unclear whether the DOE carried out Congress' mandate and adhered to the reprogramming requirement to terminate the disposal program.

Department of Energy

Disposal Program: During the June 2010 NWSC meeting, the DOE stated that it has set aside \$20M in case they are ordered to restart the YM project. It is rumored that there are 20 subcontractors, 4 of whom are still working full-time in NV. However, they do not work from DOE facilities. Additionally, DOE has personnel they can use

within Nuclear Energy and Legacy Divisions, General Counsel and scientists from DOE laboratories who have already worked on this program.

Nomination: President Obama has announced his intent to nominate Pete Lyons to Assistant Secretary, Office of Nuclear Energy. He is presently the Principal Deputy Assistant Secretary, Office of Nuclear Energy.

Blue Ribbon Commission (Commission)

Although Energy Secretary Chu appointed the Commission to evaluate alternatives for the management and disposal of spent nuclear fuel (SNF) and high-level radioactive waste (HLRW) currently stranded in 39 states, several members of Congress and organizations continue to remind the Secretary that DOE has no “Plan B” for the disposition of commercial and defense SNF and HLRW. And, the NWPA designates the Yucca Mountain site as the nation’s permanent repository.

Meanwhile, the Commission continues to actively carry out its mission. They are getting deeper into the disposal program issues and realizing the complexities involved with this program. It appears that they are rapidly learning that there are no easy fixes.

BRC staff is working hard going through submitted material and submit drafts of their potential findings and recommendations to the Commission. The staff goal is to have internal rough drafts ready by the end of this year, with a draft report issued by spring time to beat their July 29, 2011 deadline.

Meanwhile, former Representative Hamilton has called for meetings to be held beginning 2011 at the Savannah, SC site, with a follow-up meeting in Carlsbad, NM.

January 6-7, 2011 Meeting: According to the BRC’s tentative agenda there will be a tour on Thursday, January 6 at the Savannah River Site by the Commission to see first-hand the facilities. The Commission will then hold a meeting at the Augusta Marriott Hotel, Augusta, GA on Friday, January 7.

The purpose of the tour and meeting will be for the stakeholders to provide the Commission a range of local and regional perspectives involved in the treatment, packaging and storage of SNF and HLRW, and other facilities related to the back-end of the nuclear fuel cycle.

To download the draft agenda, go to: <http://www.energy.gov>.

November 15-16, 2010 Meeting: The Commission focused on the back-end of the fuel cycle in other countries and how they went about a repository site selection process. Some members of the Commission traveled to Finland and Sweden to learn first-hand how they carried out their site selection process.

It appears that the BRC learned that although knowledge can be gained from these countries how they selected their permanent repository; the basic U.S. problem is with host state governmental politics. The European parliamentary system is different from that of the U.S.; however, lessons were learned how from the onset these countries went about involving and working with the local communities in the decision making process for a site selection.

Lawsuits - 1998 Breach of Contract

Yankee Companies vs. DOE: The U.S. Court of Federal Claims issued a favorable decision early September 2010 awarding the three Yankee companies a total of \$143M - Yankee Atomic Electric Company, \$21M; CT Yankee Atomic Power Company, \$40M; and ME Yankee Atomic Power Company, \$82M.

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This ongoing litigation is due to DOE's failure to fulfill its statutory and contractual obligations to remove SNF and Greater-than-Class-C waste from the three New England decommissioned reactor sites. The three Yankee Companies individual damage claims are specific to each company and include costs incurred to construct an Independent Spent Fuel Storage Installations and store the used fuel at these sites through 2002 at the Maine Yankee site and 2001 at the Yankee Atomic and CT Yankee sites.

The three Yankee Companies initially filed litigation in the Federal Court in 1998, alleging that the federal government breached contracts entered into with each company in 1983 under the NWPA. In October 2006, the U.S. Court of Federal Claims awarded the Yankee Companies approximately \$143M in damages. The federal government appealed this ruling.

In August 2008, the U.S. Court of Appeals panel vacated the Federal Court claims decision, sending the case back to the U.S. Court of Claims. Apparently, a key find of the Court of Appeals decision was that the awards in the 2006 decision needed to be recalculated based upon a court-approved fuel pick-up rate.

Congressional Research Service (CRS): The CRS issued a report, "*The Yucca Mountain Litigation: Breach of Contract Under NWPA of 1982,*" on December 22, 2009, addressing key issues that emerged from the original 72 breach of contract claims filed against the DOE, for its failure to fulfill its statutory and contractual obligation to remove SNF and HLRW from commercial plants by January 31, 1998.

The report addresses, (a) DOE's attempt to curtail future damages by reaching settlement agreements with several nuclear utilities, (b) possible future liabilities that could add several years of litigation, and (c) the possibility that DOE could convince the U.S. Court of Federal Claims, the lack of an existing facility actually qualifies as an "unavoidable delay" under the Standard Contract. However, this argument was resoundingly rejected by the U.S. Court of Appeals for the District of Columbia Circuit. This is an excellent report since it outlines historical facts that led to the lawsuits against DOE.

Update: Of the 72 lawsuits that were filed against the government, 22 have reached judgment in the U.S. Court of Federal Claims and 11 have settled. It is estimated that the government settlements are more than \$2B, most of which remain in appeals in courts, with potential future liabilities up to \$52B. There maybe continued build-up of these damages, since DOE have dismantled the YM nuclear waste disposal program.

In addition, the Department of Justice have already spent more than \$29M in attorney costs, \$111M on experts and \$52M in litigation support costs.

Nuclear Waste Technical Review Board (Board)

According to a December 2010 Executive Summary titled, "*Evaluation of the Technical Basis for Extended Dry Storage and Transportation of Used Nuclear Fuel,*" the Board found that technical information currently available, together with the experience gained to date in the dry storage of used fuel, spent fuel can be safely stored in the short term and then transported for additional storage, processing, or repository disposal without concern. However, additional information is required to demonstrate with similarly high confidence that used fuel can be stored in dry-storage facilities for extended periods without the fuel degrading to the extent that it may not perform satisfactorily during continued storage and subsequent transportation.

However, the Board recommends that a number of research and development programs be implemented to demonstrate that used fuel can be stored safely in dry-storage facilities for extended periods. Research alone will not be sufficient. Because the experience base for extended dry storage of used fuel is short and the credible degradation phenomena are several and not robustly predictable in a quantitative sense, an in-service inspection

and maintenance program appears to be the only way of implementing long-term dry storage of used nuclear fuel. The technical details of such an in-service inspection program obviously will depend on the desired safety objectives of extended dry storage. Consequently, a practical engineering approach that is based on the observational method and periodic assessments will likely be required to provide an adequate safety basis in addition to what can be learned from targeted scientific investigations.

The regulations concerning dry storage of used fuel do not currently address storage for extended periods. There also is some inconsistency between the regulations that apply to dry storage and those that apply to transportation, and how to meet both sets of regulations is unclear. It would be helpful in managing extended dry storage of used fuel if the regulations were revised as an integrated set and based on a risk assessment for safety significance and consequence. In addition, the Board thinks that the regulatory requirements related to physical security and terrorist threats also should be reviewed on a risk-informed basis using potential consequence analysis and integrated with the storage and transportation regulations.

According to the Board, the nuclear waste management policy of the United States is unclear, and the result is that used fuel will be stored at reactor sites for longer than originally foreseen. It is essential that the appropriate research and development programs and monitoring and inspection programs are implemented as a matter of priority to demonstrate that used fuel can be stored safely for extended periods and then transported and handled as part of a future waste management program.

To download the report, go to: www.nwtrb.gov.

NWSC Meeting

Please set aside *Monday and Tuesday, March 28-29*, 2011. The meeting will be held at the Holiday Inn, 1501 Rhode Island Avenue, N.W., Washington, D.C. 20005. A guest room rate of \$179 per room, per night (single or double) has been negotiated with the hotel. Meeting information together with registration material will follow as soon as the meeting logistics are completed.

The meeting provides an ideal opportunity to bring together disparate parties with mutual concern regarding the ongoing activities currently occurring at the NRC and DOE. We will explore of how we can work together and with other organizations on actions and remedies to ensure the protection of the NWF fees and other related issues.

Next Telephone Conference Call

Please note that the next NWSC/NEI/NARUC telephone conference call will be held on **Wednesday, January 5, 2010, 10:00 a.m. ET, (9:00 a.m. CT)**. An agenda will follow under a separate email.

**PLEASE SHARE THIS MATERIAL WITH OTHER INTERESTED
PARTIES IN YOUR ORGANIZATION.**