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December 31, 2009

NWSC Update

NWSC Meeting February 14

Please set aside Sunday, February 14, 2010, for a meeting being held in Meeting Room 5, Renaissance Washington Hotel, 999 – 9th Street, N.W., Washington, D.C. 20001. A registration form will follow as soon as the meeting logistics are completed.

Guest rooms are available at the Renaissance (Marriott) Washington Hotel. Tel: 202-898-9000. Reservations can be made on-line: <http://www.marriott.com/hotels/travel/wasrb-renaissance-washington-dc-hotel/>. Alternatively, guest rooms are also available at the Marriott Hotel, 900 F Street, N.W. Tel: 202-638-4600. The hotel is approximately 3/4 blocks away from the Renaissance Hotel. Reservations can be made on-line: <http://www.marriott.com/hotels/travel/wascn-courtyard-washington-convention-center/>.

The meeting provides an ideal opportunity to bring together disparate, but interested parties, to discuss and explore possible future actions and/or legal options that can be taken if the Administration breaches its contract with the utilities, while it continues to collect Nuclear Waste Fund (NWF) fees from the ratepayers. Other topics for discussion will be the FY 2011 budget, usually released by the Administration the first week of February, on-going license application activities, Blue Ribbon Commission, waste confidence rule, and other topics.

The Congressional Research Service (CRS) issued a report on December 22, 2009, addressing key issues that emerged from the original seventy-one breach of contract claims filed against the Department of Energy (DOE), for its failure to fulfill its statutory and contractual obligation to remove spent nuclear fuel (SNF) and high-level radioactive waste (HLRW) from commercial plants by January 31, 1998.

The report also 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. This argument was resoundingly rejected by the U.S. Court of Appeals for the District of Columbia Circuit.

This is an excellent report to work from at the February 14 meeting since it outlines historical facts that led to the lawsuits against DOE. Currently, damages and settlements are estimated to be approximately \$1.2B, most of which remain in appeals in courts. It is estimated that potential future liabilities could run up to \$50B, and there maybe continued build-up of these damages, since the Obama Administration announced its intention to pursue other alternatives for disposal of SNF and HLRW. Report attached.

Congressional Activities

Recap Nuclear Waste Disposal Program (Program): As requested by the Administration, Congress appropriated \$196.8M for fiscal year (FY) 2010 for the Program - \$98.4M was appropriated from the NWF, \$5M of which was made available for the Blue Ribbon Commission, and \$98.4M was appropriated for defense nuclear waste disposal.

In a leaked internal October 23, 2009 draft Program Decision Memorandum, DOE was moving to stop licensing activities for the permanent repository in December 2009, even though the Administration stated in its FY 2010 budget it will continue licensing the Yucca Mountain permanent repository and “explore alternatives for nuclear waste disposal through OCRWM ...”

In response, the NWSC sent a letter 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 letter reminded the leadership of the managers joint statement language in the 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.” Therefore, DOE had to submit in writing a “reprogramming requirement” to move appropriations between appropriations accounts before it could terminate the license activities or other program activities.

Over the past few months, several members of Congress and organizations sent letters to Secretary of Energy Chu, stating that there is no “Plan B” for disposition of commercial and defense material, and under the current law, Yucca Mountains is the designated site as the nation’s permanent repository.

Nuclear Regulatory Commission (NRC): The NRC requested in its FY 2010 budget \$56M from the NWF for the review of the license application; however, \$29M was approved by Congress. According to NRC Chairman Gregory Jaczko, the Yucca Mountain license application will continue, but it will be linked directly to resources appropriated in the FY 2010 budget.

Department of Energy

FY 2011 Budget: In the above mentioned October 23 internal memo, it was also stated that the Administration will request only \$46.2 million for the DOE/Office of Civilian Radioactive Waste Management (OCRWM) for FY 2011. The budget request will be \$21.2M to support “site remediation and worker transition” and \$25M for “archiving of data associated with the Yucca Mountain program.” The internal memo did not discuss any funding for the Blue Ribbon Commission for FY 2011, but it outlined funding levels through 2015, which showed that FY 2011 will be the last year funds will be requested for the Program.

Meanwhile, it is speculated in the pass back process between Office of Management and Budget (OMB) and DOE, no refunds were allocated for the Program by OMB, whereas, Secretary Chu proposed \$20M.

Blue Ribbon Commission (Commission): During an open session of the National Academy of Sciences’ Nuclear and Radiation Studies Board, Assistant Secretary for Nuclear Energy Pete Miller, stated that the Commission will be announced, “very, very soon.” Attached is the NWSC Quick-Hitter Responses in preparation of this announcement.

The NWSC issued a press release on October 7 expressing significant concern about the rumors that the proposed Blue Ribbon Commission might be organized as a Presidential Panel rather than the preferred process under the Federal Advisory Committee Act (FACA). Under FACA, the Commission would provide an unbiased, impartial, fair and comprehensive waste management evaluation to the President, Congress and the stakeholders.

The NWSC release expressed concern that DOE would cut off all funds for the Program in the Administration's FY 2011 budget, would abandon the pending license application, as well as more than 40 years of scientific investigations and \$10 billion of ratepayer funding toward the development of a national repository, would terminate 700 jobs, would evaporate decades of scientific and technological knowledge, and would contradict Congresses' directive to DOE to submit the licensing application through the 1982 Nuclear Waste Policy Act, as amended, (NWPA). Further, abandoning the pending license application would contradict 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."

On December 16, 2009, the New England Governors' Conference wrote to Secretary Chu requesting that when the Commission is appointed, part of its mandate will be to examine alternatives to the current federal Program; initiate the "development of a sustainable, long-term policy that appropriately recognizes and balances national, regional and state interest."

The New England Governors also requested that the Commission will be directed to "develop policy alternatives and recommendation" leading to the expeditious removal of SNF and HLRW currently stranded at three decommissioned and operating reactor sites.

Withholding of Funds: In response to the July 8 letters sent by Nuclear Energy Institute (NEI), and the National Association of Regulatory Utility Commissioners (NARUC), DOE responded on October 8 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 collect the fees from the rate payers as authorized by the NWPA.

Additionally, in response to the Senate Energy and Water Appropriations language in H.R. 3181 relating to suspension of collected fees, on July 27, 2009, "the Administration issued a Statement of Administration Policy stating 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."

The NEI and NARUC sent corresponding letters 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, and immediate suspension of fees paid into the NWF in light of the Administration's position to terminate the Yucca Mountain project activities.

According to the NWPA, Section 302 (a)(4), the Secretary is required to review annually 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.

Retirement: Christopher Kouts, Acting Director of OCRWM, retired at the end of December. David Zabransky, who has extensive background in transportation issues, is currently overseeing the Program's activities. Russ Dyer, chief scientist of the Yucca Mountain Program, also announced his retirement from OCRWM.

Nuclear Regulatory Commission (NRC)

Waste Confidence Rule (WCR): In September 2009, the NRC Commissioners voted to reopen for public comment a draft revised WCR. In separate votes, NRC Chairman Gregory Jaczko voted in agreement with the proposed final rule language offered by the staff; whereas, Commissioners Kristine Svinicki and Dale Klein declined to support publication in the *Federal Register* of the draft final update and final rule on waste confidence in the management of commercial high-level radioactive waste.

In separate comments, Commissioners Svinicki and Klein recommended to reopen for a limited period solicitation of public comment since the draft final rule did not take into account the Administration's new policy to re-examine the nation's path-forward on high-level radioactive waste disposal, that may impact the timeframe of availability of a geologic repository. The Commissioners believe the NRC should solicit the views of the Administration since DOE did not submit comments on the NRC's proposed update and rule change.

In a vote called a "compromise," Jaczko concurred with the final staff proposal, given that it was not based on the Yucca Mountain permanent repository, but on the technical feasibility of "a mined geologic repository." He further noted the current state of the Yucca Mountain permanent repository and suggested to broadening the NRC's assurance in availability of a "mined" repository to "sufficient disposal capacity." Jaczko also appears to be open to alternative technologies.

Background: In June 2009, the NRC published its draft final rule amending 10 CFR 51.23(a), along with the draft final update and revision to the WCR findings. The Commission revised two of its findings as follows:

Finding 2: The Commission found reasonable assurance that sufficient mined geologic repository capacity will be available within 50-60 years beyond the licensed life for operation (which may include a revised or renewed license) of any reactor to dispose of commercial HLRW and SNF originated in such reactor and generated up to that time.

Finding 4: The Commission found reasonable assurance that, if necessary, SNF generated in any reactor can be stored safely and without significant environment impacts for at least 60 years beyond the licensed life for operation (which may include a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin, and either onsite, or offsite independent spent fuel storage installations.

The NRC stated that it believes the nation would know by the year 2025 whether the Yucca Mountain permanent repository will be constructed and operational, and it is "reasonable to assume that a new repository program would be available by 2050-2060."

DOE's License Application: Due to concern over reports in the media that DOE's FY 2011 budget request may terminate all license defense activities, the NEI wrote to Chairman Jaczko suggesting to "limit expenditure of resources" due to lack of funding for the continued progress of the DOE's license application. The NEI stated it supports continuation of the license process, but believe there is a compelling basis for the NRC to focus its resources solely on the technical review of DOE's application rather than conducting adjudicatory proceedings in parallel.

Attorney Martin Malsch retorted in a November 16 letter on behalf of the State of Nevada, the NEI's request "would deny other intervening parties to this first-of-a-kind proceeding their right under Section 114(d) of the

NWPA” ..., and “is a thinly disguised motion since it abrogate the entire regulatory scheme for the license proceeding.”

The letter further contends the NEI’s request was filed before the wrong tribunal, which is the presiding Construction Authorization Board (CAB); relies on gross supposition on leaked DOE document without any supportive affidavit or authoritative information from DOE; mischaracterizes NRC staff resources constraints; ignores a prior DOE formal representation filed before the CAB, congressional funding appropriations language regarding the licensing proceeding for 2010; usurps CAB’s authority to manage and control the licensing proceeding, including its published schedule for activities during 2010; and pretends to offer an approach to define issues for future adjudicatory proceeding.

Regardless of the State of Nevada’s contentions implying that DOE will have sufficient resources to defend the license application in 2010, DOE has yet to submit a Supplemental Environmental Impact Statement requested by the NRC early 2009.

The NRC concluded that the Yucca Mountain Final EIS and Repository SEIS issued by DOE late 2008 did not adequately address all of the repository related impacts on groundwater or from surface discharges of groundwater. Therefore, NRC requested DOE to prepare a Supplemental Environment Impact Statement. It is rumored that this report was finalized by DOE in March 2009. As stated by Chris Kouts, DOE/OCRWM, during the NWSC September meeting, the report has yet to be issued. **This is a very important document since the NRC staff position will be based on its Safety Evaluation Report on the proposed Yucca Mountain repository and its Environmental Impact Statement adoption review.**

Performance and Accountability Report: The FY 2009 shows the agency has achieved its safety and security performance goals over the past 12 months. The NRC serves the public by overseeing the civilian use and management of radioactive materials and nuclear fuel while protecting public health and safety and the environment, and promoting the security of the nation.

According to the report, the NRC continued to provide effective and efficient regulatory oversight of the nuclear industry, including the safe operation of 104 nuclear power plants, and the safe and secure use of nuclear materials. And, continued its active review of 17 new applications for 26 reactors across the country.

The annual report provides performance report and audited financial systems, business operations, and internal control program that enable Congress, the Administration and the public to assess the agency’s performance in achieving its mission and stewardship of its resources. For further details, go to, www.nrc.gov.

Nuclear Waste Technical Review Board (NWTRB)

Survey of National Programs for Managing HLRW and SNF: On October 30 2009, the NWTRB submitted this report in accordance with the NWPA to Congress and the Secretary of Energy.

Since the Administration announced its intention to consider alternative waste management strategies, the NWTRB report surveys and describes 30 technical and institutional attributes of nuclear waste programs in 13 countries which account for 83 percent of worldwide nuclear power generating capacity.

According to the report, these countries illustrate the broad range of options and considerations that structure national programs. Importantly, all of these efforts are relatively transparent, thereby engendering some confidence that the information provided is reliable. Other countries that might have been selected were ultimately omitted from this survey because their programs are in their infancy or because the status of their programs could not be independently documented. In the future, the Board may update this survey and include additional national programs.

According to the NWTRB, this report does not evaluate or make judgments about any of the programs. Rather the Board hopes that this survey and future reports on lessons learned from experiences in the U.S., and other countries will provide useful factual information for Congress and the Secretary of Energy as they consider options for managing SNF and HLRW in the U.S.

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

Executive Director: Mr. Nigel Mote became Executive Director of the NWTRB effective November 2009. According to the NWTRB, Mote has extensive background and expertise in nuclear fuel management. He was president of International Nuclear Consultants, Inc., which provided consulting support to industry, governments, and other organizations involved in the nuclear industry, worldwide. He has been responsible for a wide range of nuclear facility operations, including nuclear power plants, spent-fuel receipt and storage pools and reprocessing, and mixed-oxide-fuel fabrication and waste management facilities, and for managing contracts for reprocessing commercial spent nuclear fuel.

As a consultant, Mote also was responsible for managing DOE projects that assessed spent-fuel handling and storage facilities, cask-handling capabilities, and spent-fuel transportation routes at all U.S. commercial nuclear power stations and storage facilities. He was U.S. Deputy Co-Chair of the Joint U.S.-Russian Working Group on Cost Analysis and Economics in Plutonium Disposition supporting the Russian plutonium disposition program. Mote has a Bachelor of Science degree with honors in physics from the University of Manchester in England.

Lawsuits

The U.S. Court of Appeals for the Second Circuit, rejected a petition from three states challenging the NRC's conclusions on the environmental impact of SNF storage as part of license renewal.

Originally, the states of Massachusetts and California petitioned the NRC to change its rules regarding SNF pool storage. The NRC rejected the states' petitions. The states of New York, Connecticut and Massachusetts, then brought the case that ended up in the Second Circuit Court. The court deferred to the NRC's judgment on the issue and, in a decision handed down on December 21, denied the petition for further consideration.

The court stated that "given due consideration to the relevant studies, it must defer to the NRC's expertise in determining the proper risk level associated with the storage of nuclear material in spent fuel pools, and therefore deny the petition for review." The court further stated that studies conducted by the NRC indicated that the risk of fire from spent fuel pool was low.

Government Accountability Office (GAO)

In a report (GAO-10-48) issued in November titled, “*Key Attributes, Challenges, and Costs of the Yucca Mountain Repository and Two Potential Alternatives*,” that was requested by Senators Harry Reid (D-NV), John Ensign (R-NV), and Barbara Boxer (D-CA), the GAO did not make any recommendations as to how the U.S. should handle the disposing of SNF and HLRW; rather it outlined two principal alternatives to the permanent repository: Storing the nuclear waste at two centralized locations or continue to store the material at plant sites where it is generated. The report also stated the below comparisons between the two storage alternatives are simplified assumptions that make the GAO’s “alternatives hypothetical and not entirely representative of their real-world implementation.”

According to the report, the Yucca Mountain repository is designed to provide a permanent solution for managing nuclear waste, minimize the uncertainty of future waste safety, and enable DOE to begin fulfilling its legal obligation under the NWPA to take custody of commercial waste, which began in 1998. However, project delays have led to utility lawsuits that DOE estimates are costing taxpayers about \$12.3B in damages through 2020 and could cost \$500M per year after 2020, though the outcome of pending litigation may affect the government’s total liability. Also, the Administration has announced plans to terminate Yucca Mountain and seek alternatives. Even if DOE continues the Program, it must obtain a NRC construction and operations license, a process likely to be delayed by budget shortfalls. GAO’s analysis of DOE’s cost projections found that a repository to dispose of 153,000 metric tons would cost from \$41B to \$67B (in 2009 present value) over a 143-year period until the repository is closed. Nuclear power rate payers would pay about 80 percent of these costs, and tax payers would pay about 20 percent.

Centralized storage at two locations provides an alternative that could be implemented within 10 to 30 years, allowing more time to consider final disposal options, nuclear waste to be removed from decommissioned reactor sites, and the government to take custody of commercial nuclear waste, saving billions of dollars in liabilities. However, DOE’s statutory authority to provide centralized storage is uncertain, and finding a state willing to host a facility could be extremely challenging. In addition, centralized storage does not provide for final waste disposal, so much of the waste would be transported twice to reach its final destination. Using cost data from experts, GAO estimated the 2009 present value cost of centralized storage of 153,000 metric tons at the end of 100 years to range from \$15B to \$29B, but increasing to between \$23B and \$81B with final geologic disposal.

On-site storage would provide an alternative requiring little change from the status quo, but would face increasing challenges over time. It would also allow time for consideration of final disposal options. The additional time in on-site storage would make the waste safer to handle, reducing risks when waste is transported for final disposal. However, the government is unlikely to take custody of the waste, especially at operating nuclear reactor sites, which could result in significant financial liabilities that would increase over time. Not taking custody could also intensify public opposition to spent fuel storage site renewals and reactor license extensions, particularly with no plan in place for final waste disposition. In addition, extended on-site storage could introduce possible risks to the safety and security of the waste as the storage systems degrade and the waste decays, potentially requiring new maintenance and security measures. Using cost data from experts, GAO estimated the 2009 present value cost of on-site storage of 153,000 metric tons at the end of 100 years to range from \$13B to \$34B, but increasing to between \$20B to \$97B with final geologic disposal.

In the concluding observations, GAO acknowledged that developing a long-term national strategy for safely and securely managing the nation's high-level nuclear waste is a complex undertaking that must balance health, social, environmental, security, and financial factors. In addition, virtually any strategy considered will face many political, legal, and regulatory challenges in its implementation. Any strategy selected will need to have geologic disposal as a final disposition pathway. In the case of the Yucca Mountain repository, these challenges have left the nation with nearly three decades of experience.

In moving forward, whether the nation commits to the same or a different waste management strategy, federal agencies, industry, and policy makers at all levels of government can benefit from the lessons of Yucca Mountain. In particular, stakeholders can better understand the need for a sustainable national focus and community commitment. Federal agencies, industry, and policymakers may also want to consider a strategy of complementary and parallel interim and long-term disposal options — similar to those being pursued by some other nations — which might provide the federal government with maximum flexibility, since it would allow time to work with local communities and to pursue research and development efforts in key areas, such as reprocessing.

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

Next Telephone Conference Call

Please note that the next NWSC/NEI/NARUC telephone conference call will be held on [Wednesday, January 13, 2010, 10:00 a.m. ET, \(9:00 a.m. CT\)](#).

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PARTIES IN YOUR ORGANIZATION.**