

**Commissioner Magwood's Views on the Matter of
DOE's Request to Withdraw its Repository License Application
From NRC Consideration**

September 12, 2011

Over the past year and half, the Department of Energy's (DOE's) application for a construction authorization license for national High Level Waste repository at the Yucca Mountain, Nevada site has the subject of considerable attention in the public, in Congress, and at the Nuclear Regulatory Commission (NRC). As has been well publicized, DOE filed a motion to withdraw its license application in the spring of 2010, which was rejected by the NRC's trial-level Board. Since that time, the agency's actions—and inactions—have been heavily scrutinized. Many have questioned whether the NRC—which is proud of its culture of openness and transparency—has been unnecessarily secretive. Worse, some have come to believe that the agency's decision-making has been politicized.

In order to do what I can, as an individual Commissioner, to dispel these concerns, I have decided to take the unusual step of providing my personal views on this matter. In deference to the interests of my colleagues on the Commission and to avoid the risk of setting a precedent for the future, I am not releasing my actual vote. However, the discussion provided here captures the substance of my formal vote.

As I read it, Congress established a multi-step process for the evaluation of a national repository site in the Nuclear Waste Policy Act (NWPA). As a matter of policy, Congress identified the Yucca Mountain site as the site that is to be considered. Much of the Board's decision to reject DOE's motion to withdraw its application is based on the precept that DOE cannot substitute its policy judgment regarding the process to develop a national high level nuclear waste repository in place of the judgment applied by Congress in the form of standing law that has been implemented for many years.

DOE, for its part, counters:

It is the Secretary of Energy's judgment that scientific and engineering knowledge on issues relevant to disposition of high-level waste and spent nuclear fuel has advanced dramatically over the twenty years since the Yucca Mountain project was initiated... Future proposals for the disposition of such materials should thus be based on a comprehensive and careful evaluation of options supported by that knowledge, as well as other relevant factors, including the ability to secure broad public support...¹

In this context, a "Blue Ribbon Commission on America's Nuclear Future" has been assembled and has been asked to provide recommendations to policymakers by early 2012. While it might have been preferable to have received this panel's final recommendations before the present consideration as well as to have received more detailed information regarding the advances in "scientific and engineering knowledge on issues relevant to disposition of high-level waste and spent nuclear fuel" that DOE believes necessitate a change in policy, it is certainly appropriate for the Executive Branch to propose modifications to policies reflected in the NWPA. However,

¹ U.S. Department of Energy's Motion to Withdraw (March 3, 2010).

I agree with the Board's position that *implementing* such a change clearly requires Congressional action.

Nevertheless, a decision to withdraw an application is not the same as a decision to alter national policy, even though withdrawing an application *may*, in certain circumstances, have policy implications. I believe it essential that these two concepts not be confused. The NRC is a regulatory agency and, in my opinion, the NRC should have no role in supporting or opposing DOE's policy views. The NRC's role is to evaluate any application DOE submits to it in accordance with the requirements set by law without excursions into national policy.

My reading of the NWPA is that it directs the NRC to review DOE's application using the same laws and procedures the agency would use in considering any license application. I believe this requirement is central to consideration of this matter. The request by DOE—or any other applicant—to withdraw an application is at its base an administrative request. The NRC's normal procedural treatment—clear from our case law—is to grant an applicant's motion to withdraw. Divorced from the policy issues at play in this matter (as is appropriate for NRC's role as an independent regulator), I see no choice but to treat DOE's motion to withdraw like any other.

One question remains: What would be the result should DOE's application be withdrawn? I believe we would still be within the process Congress established in the NWPA though we would have moved back a step. We still would have Congress' joint resolution which designated the Yucca Mountain site as the site under consideration, but we would not have an application submitted by DOE. In effect, the proceeding would have reverted to pre-application status.

It must be borne in mind that while Congress has provided some guidance by altering the funding currently available for the Yucca Mountain program, it has not reversed the NWPA. As a result, the process ordered by Congress remains the law under which the NRC must operate. As is appropriate with all matters of national policy, Congress will and must have the final and definitive word on how we, as a nation, will manage our high-level radioactive waste.