

ANS and Court Challenge NRC Failure to Act on Yucca

By Cornelius Milmo^e *

In five letters dated August 22, Dr. Eric Loewen, President of the American Nuclear Society, urged NRC Chairman Gregory Jaczko and the other Commissioners, to do their duty and complete the Yucca Mountain licensing process as mandated by the Nuclear Waste Policy Act (NWPA). [Link: <http://www.new.ans.org/about/officers/>] President Loewen noted that the ANS has avoided entering the political disputes about the suitability of the Yucca Mountain site as a geological repository. But since 2009 it has supported the "expeditious processing of the Yucca Mountain license application in an open, technically sound manner". He wrote that the Department of Energy's effort to "withdraw" the Yucca license application and stop the NRC from acting on the application had "eroded" ANS confidence that the NRC would make the required licensing determination fairly and after thoroughly reviewing the scientific information in the application. On behalf of the ANS, President Loewen urged the Commissioners to protect the NRC traditions of openness, objectivity and excellence by completing the Yucca licensing process. His letter was a plea for the Commission to obey the law, perform the duties mandated by the NWPA, and complete its vital task of assuring the public that the country can and will dispose of spent nuclear fuel safely.

The Commission avoids a licensing decision

In June 2010, the NRC's Atomic Safety and Licensing Board (ASLB) determined that the DOE's attempted "withdrawal" of the Yucca Mountain license application could not relieve the Commission of its duty to make a decision on the application's technical merits. A year after the ASLB decision, the U.S. Court of Appeals ruled in the *Aiken County* case that the NWPA requires the Commission to review and act on the Yucca application, and that the Court would order the Commission to make a decision if it refused to do its duty.

Despite Dr. Loewen's plea, the ASLB ruling, and Court ruling, the NRC has suspended all agency action on the application and refused to release the Safety Evaluation Report (SER) prepared by NRC staff. The initial decision to suspend work and close out the license process was made unilaterally by Chairman Jaczko in October 2010. On September 9, 2011, the NRC made a final decision in a two-part order. First the Commission evenly divided on whether to overturn or uphold the ASLB decision. It would seem that with the divided vote, the ASLB decision denying the motion to withdraw would stand, and the licensing process would continue. But, the second part of the order directed the ALSB to complete all case management activities by September 30, effectively terminating the case without a decision, which is what the DOE motion sought. The Commission took this action not by a majority vote, but because it was deadlocked on what to do. In response to the Commission Order, the ASLB ruled that because the Commission was deadlocked, the DOE motion to withdraw was denied. It ordered that the licensing proceedings were "suspended".

The NWPA requirements

Today, the NWPA prescribes the NRC's waste management responsibilities, including its Yucca licensing duties.

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Before the NRC was created, all nuclear regulation including waste management, was the responsibility of the Atomic Energy Commission (AEC), was responsible for encouraging the use of nuclear power and regulating its safety. The AEC sought to ensure public health and safety without imposing excessive requirements that would inhibit the growth of the industry. In response to charges that AEC regulation was insufficiently rigorous, Congress decided in 1975 to abolish the AEC and assign its regulatory duties to the newly-created NRC. The AEC's function of nurturing the development of the nuclear industry went to the DOE.

The separation of the AEC's regulatory and promotional functions failed to acknowledge the unresolved problem of high level nuclear waste (HLW) management. Then as now, the nation had inventories of spent nuclear fuel (SNF) at reactor sites plus HLW from the AEC's nuclear weapons program, and no permanent repository for disposal. At the time the NRC was created, the nuclear industry planned to recycle the SNF as reactor fuel. But in the mid 1970s, the government decided to prohibit SNF reprocessing and recycling. Reactor owners had no choice but to store SNF on site until it could be removed to a geologic repository, even though none existed. Nuclear reactor opponents argued that because there was no repository and no credible program to remove the SNF from reactor sites, the NRC could not license new reactors without studying the environmental impact of perpetual SNF storage on-site. In short, they demanded that there be no new reactors until the "waste issue is solved". This popular view was reflected in legislation passed in thirteen states that banned new nuclear construction until the waste issue was solved, and by federal court reviews of NRC licensing decisions. The courts found the NRC's environmental impact review of new reactor licenses was adequate only to the extent the NRC expressed confidence SNF would not remain at reactor sites for extended periods. The NRC response to these court decisions was a promise that it would not license reactors unless it had reasonable confidence that the wastes would be disposed of safely in a geologic repository.

Congress thought it resolved the "waste issue" when it passed the original NWPA in 1982. Since then the Act has been amended and regularly funded by bi-partisan majorities in both Houses of Congress. The problem is that the NWPA fragmented responsibility among the NRC, DOE, and reactor owners as shown in Table 1:

TABLE 1- SNF Management Duties under the NWPA

DOE	NRC	Reactor Owners
<ul style="list-style-type: none"> • Establish SNF management office • Qualify repository site • Design repository • Prepare and apply for license • Build repository • Pick up and transport SNF to site • Pay Owners for storage costs if delayed fuel pick up • Operate repository 	<ul style="list-style-type: none"> • Manage licensing process • Review license • Approve or disapprove license 	<ul style="list-style-type: none"> Provide funding Manage SNF on-site

DOE has had some problems in complying with the NWPA requirements:

- It currently estimates that its failure to assume this SNF responsibility will cost taxpayers \$16.2 billion in damage awards to utilities by 2020 and increase by \$500 million annually after 2020.

- The Nuclear Waste Fund has received fee revenue far in excess of DOE expenditures, so it has an unspent balance of \$25 billion.
- DOE has abolished the program office it established in compliance with the Act.
- DOE derailed the NRC on its way to timely completion of the license when it filed a “motion to withdraw” the application in 2010.

Thus, the NWPA placed the key developmental need of the still-infant nuclear industry, a safe pathway for SNF disposal, in the hands of the NRC, an agency that was created to be independent from the industry and not engaged in its promotion. The NWPA adopted an NRC licensing regime which assumes there is an industry applicant with investment at stake actively seeking a license. Under that regime, the NRC conducts an independent review and makes a decision on the technical merits of the proposed design in a fair and open process. The NWPA required DOE to pursue the Yucca license, even though DOE is not part of the industry, and has no investment at stake. Now DOE has abandoned the project. It is no longer an advocate. It is an opponent. The Yucca licensing process featured two federal agencies subject to political pressure sharing responsibility. It was not likely to be successful, and it has not been.

The Inspector General Report on Chairman Jaczko

When DOE became an opponent of Yucca, the NRC, largely through the unilateral actions of Chairman Jaczko, became DOE’s facilitator. By accepting the Administration’s decision to ignore the NWPA, the NRC shed its independence within the executive branch. NRC Inspector General Hubert Bell described the tactics Chairman Jaczko used to stop staff work on the Yucca SER and prevent a Commission vote on the DOE motion to withdraw in a June 2011 Report. IG Bell noted that the law requires the Chairman and the Executive Director for Operations (EDO) to insure the Commission is “fully and currently informed about matters within its functions”. IG Bell’s Report found:

- The Chairman acted as the gatekeeper controlling information provided to the other Commissioners and characterizing his Yucca actions as “administrative” matters under his sole responsibility, thereby preventing the Commission from exercising its authority over “policy” matters. As a result, the other Commissioners were not adequately informed of policy matters that the Chairman should have brought to their attention.
- The Chairman “was not forthcoming with the other Commissioners about his intent to stop work on the SER”.
- The Chairman did not provide Commissioner Svinicki with any information about his intentions.
- The Chairman “strategically” provided the three other Commissioners with varying amounts of information about his intention to terminate the licensing process and staff work without a Commission vote.
- The Chairman induced the NRC’s EDO and CFO to sign the memorandum stopping work on the SER by telling them that all the Commissioners were informed and supported his position when in fact a majority of Commissioners disagreed.
- The Chairman's direction to stop working on the SER and the Administration's decision to terminate the Yucca Mountain repository project prevented the Commission from meeting its statutory obligation to make a decision on the Yucca license application.

Commissioners or fire marshals?

Chairman Jaczko's unilateral "administrative" decision to stop work on the Yucca license now appears to be ratified by the September 9 Commission order. It is the final action of the Commission in the most important policy matter to come before it in decades. Although they were not fully informed and did not agree with the Chairman's action, Commissioners Apostolakis and Magwood did not join with Commissioners Svinicki and Ostendorff to force a Commission vote to reverse the Chairman's decision to stop work on the license. Chairman Jaczko tried to justify his behavior in Congressional testimony, suggesting the Commission is the same as a municipal fire marshal. He said:

"I think of ... the best analogy as a developer wanting to build a shopping mall, and the fire marshal conducting inspections and reviewing fire safety for that particular shopping mall, and the developer deciding after two years to stop work and stop developing the project. The fire marshal doesn't still go out and tell the developer to keep building so they can conduct their licensing inspections. That's the scenario that we have."

This is a spectacular misreading of the NWPA, and fundamental misunderstanding of the role of the NRC as an independent agency in our Constitutional system. After the September 9 decision, Commissioner Magwood issued a statement that he believed the DOE motion to withdraw should be treated like any other applicant motion. His statement overlooks that neither the ASLB nor the Court of Appeals accepted this DOE argument. Both noted the NWPA requires the Commission to "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 of such application..." There is no such requirement for applications from the private sector or in fire safety codes. The NRC is not like a fire marshal, passively inspecting code compliance at a shopping mall pushed by a private developer. Rather, the NRC, with its expert staff, is expected to be an active participant in determining how a national program can safely remove SNF from reactor sites and HLW from weapons sites and store it at Yucca.

What Chairman Jaczko's analogy and the quiescent Commissioners fail to recognize is that the Yucca repository is the critical component of a national SNF management system. The project is important to the safety of the entire US nuclear infrastructure and the NRC safety decision is specifically required by law. Congressional leaders have characterized Chairman Jaczko's action to stop the licensing process as a dereliction of duty and called for his resignation.

Even within the Administration, there are adverse reactions. The Preliminary Report of the Administration's hand-picked Blue Ribbon Commission had this to say about the attempt to terminate the Yucca Mountain license application:

[It] has further diminished confidence in the government's ability to provide a safe and timely solution for the disposal of spent fuel and HLW. [I]t is clear ... that waste cleanup commitments were made to states and communities across the United States, and to the nuclear utility industry and its ratepayers and shareholders, that have not been upheld. The decision to suspend work on the repository has left all of these parties wondering, not for the first time, if the federal government will ever deliver on its promises.

Chairman Jaczko has induced the Commission to sacrifice its most valuable asset, its reputation as an independent guardian of the public interest in nuclear safety. It is cravenly serving the powerful special interests opposed to Yucca and nuclear development. If the Chairman said he supported a private sector applicant's action simply because that's what the applicant wanted, there would be a public outcry. Yet, he has done the same thing here for DOE.

Chairman Jaczko's anti-nuclear and anti-Yucca positions were well-known before he was appointed to the Commission. He had worked for Congressman Ed Markey, a leading nuclear opponent, and Senator Harry Reid, the leading Yucca opponent. His actions are no surprise. The surprise is that the other Commissioners are letting him get away with it. Maybe the other Commissioners believe they are just

fire marshals. They may be hoping that citizens interested in Yucca and the nuclear industry will aim their fire on DOE for withdrawing the Yucca license application, rather than NRC for not making the NWPA mandated decision on the application. They may believe NRC shouldn't be the "tail wagging the dog" with respect to Yucca. For whatever reason, they have voted to shut the case down.

Has the NRC has “abdicated its statutory responsibility”?

The three Court of Appeals judges in the *Aiken County* case rejected the theory that DOE rather than the NRC is responsible for the Yucca licensing decision. Chief Judge David Sentelle's opinion for the Court made it clear that if the NRC fails to fulfill its duty to make a decision on the Yucca application, the Court will order the Commission to make that decision.

Judge Janice Rogers Brown wrote a separate concurring opinion. She included a newspaper article quoting Chairman Jaczko on his plan to provide no money for licensing activities and to close out review of the license application so “unresolved legal questions, ... would stay unresolved legal questions.” She was not pleased and wrote separately to note, “[A]fter setting the President and his administration firmly in their sights, Petitioners all but ignore the NRC—a named party in this suit and the only agency with an existing obligation under the NWPA... It is arguable the NRC has abdicated its statutory responsibility under the NWPA.”

The opinion of Judge Brett Kavanaugh rejected the fallacy of the NRC tail wagging the DOE dog. He described the role of the NRC as an agency *independent of the Administration*. It is supposed to operate “free of presidential direction and supervision”. He called the Yucca case a “mess” because DOE in the executive branch and the independent NRC have overlapping statutory responsibilities with respect to the Yucca Mountain project. He recognized that President Obama has decided not to use Yucca Mountain as a repository for nuclear waste, but wrote that the President does not have the final word about whether to terminate the Yucca Mountain project. Judge Kavanaugh's conclusion was that “the ball in this case rests ... with the Nuclear Regulatory Commission.”

With the NRC making a final decision suspend the Yucca proceeding without approving or disapproving the application, the issue is now ripe for review by the Court of Appeals. If the Court retains the views expressed in the July decision, it will probably order the NRC to reinstitute the licensing proceeding and complete the process with a decision on the technical merits.