

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	Docket No. 63-001-HLW
)	
U.S. DEPARTMENT OF ENERGY)	
)	
(License Application for Geologic)	September 30, 2013
Repository at Yucca Mountain))	

**NYE COUNTY, NEVADA, THE STATES OF SOUTH CAROLINA AND
WASHINGTON, AIKEN COUNTY, SOUTH CAROLINA, AND THE
NATIONAL ASSOCIATION OF REGULATORY UTILITIES
COMMISSIONERS CONSOLIDATED RESPONSE TO NRC ORDER OF
AUGUST 30, 2013 AND TO OTHER PARTIES' SUBMITTALS**

On August 23, 2013, Nye County, Nevada, the States of South Carolina and Washington, Aiken County, South Carolina, and the National Association of Regulatory Utilities Commissioners (hereinafter "Five Participants") moved the Nuclear Regulatory Commission ("NRC") and the authorized Atomic Safety and Licensing Board ("ASLB") to immediately lift the suspension of the Yucca Mountain licensing proceeding, and take related administrative action to resume the licensing proceeding as required by the recent writ of mandamus issued by the United States Court of Appeals for the District of Columbia Circuit, *In re: Aiken County, et al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013).

On August 30, 2013, the Secretary of the Commission issued an Order inviting all participants in this proceeding to provide views on how the NRC should resume the licensing process, as well as respond to the Motions filed by Nye County and the State of Nevada. The following is the Five Participants' consolidated response to the Secretary's Order and previous filings by other parties.

SUMMARY OF RESPONSE TO NRC'S ORDER

The Five Participants maintain that an expeditious adjudication of the Yucca Mountain license application is in the Nation's best interest, and maintains that "the Commission's next chapter [in the Yucca Mountain licensing [must] begin[] with adherence to the law." *In re: Aiken County, et al.*, Case No. 11-1271, at *2 (D.C. Cir. Aug. 13, 2013) (Randolph, Senior Circuit Judge, concurring). At this juncture, full compliance with the Court's Order *In re: Aiken County, et al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013) requires the following:

- (1) Immediately order the prompt restoration, supervisory review where required, and issuance of the completed, or nearly completed, Safety Evaluation Reports ("SERs"), with the staff safety conclusions intact.
- (2) Immediately recognize the Atomic Safety Licensing Board ("ASLB") assigned to adjudicate the license application as authorized to proceed with the license review, which necessarily includes immediately convening a Case Management

Conference and making decisions about how to continue the licensing proceedings unlawfully suspended in 2011.

(3) Assiduously avoid imposing costly and unnecessary procedural and administrative burdens on the licensing process, such as requiring that the LSN be reinstated using the limited remaining funds available for the actual licensing process, or requiring that hearings be held in Nevada.

(4) Take additional actions in the interest of fairness, including restoring funds improperly spent on terminating the licensing process rather than going forward with adjudication of the license.

I. Expediently Release All Staff SERs with Conclusions Intact

As a major aspect of the NRC's "orderly closure," the former NRC Chairman blocked the release of the NRC staff's Safety Evaluation Report Volume 3, "Review of Repository Safety After Permanent Closure" ("SER-3"), even though a majority of NRC Commissioners disagreed with the Chairman's direction to stop work on SER-3. There is no legitimate reason for NRC, as its first action under the Court's mandate, to fail to restore the safety conclusions to the SERs, quickly conduct any required supervisory review, and then issue each with the staff safety conclusions intact.

Under both the NRC's promulgated schedule for carrying out its duties under 42 U.S.C. § 10134(d) and the ASLB's revised schedule for SER issuance, all

of the SERs should have *already been issued* when the NRC’s “orderly closure” was completed on September 30, 2011. *See* 10 C.F.R Part 2, Appendix D.

The publication of SER-3 was and is essential to consideration of post closure safety addressed in the license application, and is thus key to the fulfillment of NRC’s statutory obligation to consider the license application and issue a final decision approving or disapproving issuance of a construction authorization. *See* Order of ASLB, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 2 (July 21, 2009) (“Few non-NEPA contentions can be adjudicated before relevant portions of the SER are issued.”); Order of ASLB, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 3 (Feb. 25, 2011) (“[W]hen the Staff’s SER becomes available, the Board intends to move this proceeding forward as expeditiously as circumstances permit”). Moreover, all unissued volumes of the Yucca Mountain Safety Evaluation Report (SER) can and should be released expeditiously and at low cost. This position is shared by not only the Five Participants, but by White Pine County, Lincoln County, and the Nuclear Energy Institute (“NEI”).¹

¹ *See* White Pine County, Nevada Views Regarding How NRC Should Continue the Yucca Mountain Licensing Process, *In re U.S. Dep’t of Energy*, NRC No. 63-001-HLW, at *3–4 (Sept. 25, 2013) (hereinafter “White Pine County Views”); Lincoln County, Nevada Views Regarding How NRC Should Continue the Yucca Mountain Licensing Process, *In re U.S. Dep’t of Energy*, NRC No. 63-001-HLW, at *3 (Sept. 25, 2013) (hereinafter “Lincoln County Views”); Nuclear Energy Institute’s Answer to Motions Concerning Resumption of the Yucca Mountain

SER-3, regarding repository safety after permanent closure, can and should be issued immediately with the staff safety conclusions intact, closely followed by Volume 2 regarding repository safety before permanent closure, and the other volumes that were improperly converted to “TERs” (Technical Evaluation Reports) by stripping them of the staff’s conclusions. The following lists the as yet unreleased SERs and their status when the proceeding was suspended:

- SER-3: U.S. NUCLEAR REG. COMM’N, TECHNICAL EVALUATION REPORT ON THE CONTENT OF THE U.S. DEPARTMENT OF ENERGY’S YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION POSTCLOSURE VOLUME: REPOSITORY SAFETY AFTER PERMANENT CLOSURE, NUREG-2107, ML11223A273 (August 2011) (based on draft Safety Evaluation Report Volume 3) [the ASLB’s July 21, 2009 Order assumed delivery of SER-3 by September 2010]
- SER-2: U.S. NUCLEAR REG. COMM’N, TECHNICAL EVALUATION REPORT ON THE CONTENT OF THE U.S. DEPARTMENT OF ENERGY’S YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION PRECLOSURE VOLUME: REPOSITORY SAFETY BEFORE PERMANENT CLOSURE, NUREG-2108, ML11250A093 (September 2011) (based on draft Safety Evaluation Report Volume 2) [the ASLB’s July 21, 2009 Order assumed delivery of SER-2 by October 2011]
- SER-4: U.S. NUCLEAR REG. COMM’N, TECHNICAL EVALUATION REPORT ON THE CONTENT OF THE U.S. DEPARTMENT OF ENERGY’S YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION ADMINISTRATIVE AND PROGRAMMATIC VOLUME, NUREG-2109, ML11255A002 (September 2011) (based on draft Safety Evaluation Report Volume 4) [the ASLB’s July 21, 2009 Order assumed delivery of SER-4 by December 2010]

Licensing Activities, *In re U.S. Dep’t of Energy*, NRC No. 63-001-HLW, (Aug. 30, 2013) (hereinafter “NEI Answer”).

Congressional testimony by the NRC's own staff and senior managers confirms that the Yucca Mountain SER volumes can be completed and issued with relatively little effort and cost. This testimony also establishes that the past Chairman delayed issuing the SERs for the very reason that, once released, the SERs will materially advance the NRC's consideration of the Yucca Mountain application under 42 U.S.C. § 10134(d).

NRC Senior Project Manager Janet Kotra testified that Volume 3 of the SER was *complete* in September 2010, when the former Chairman of the NRC directed that all work on the SER must stop.² Further testimony by Newton Kingman Stablein, the NRC official responsible for leading the review of DOE's Yucca Mountain license application, noted that Volume 3 of the SER could have been ready for publication in September 2010, but was slowed because former NRC Chairman Jaczko directed that the document not be issued before November 2010.³ Thus, NRC "staff expected to issue Volume 3 in November 2010 and the other three volumes by March 2011." Dr. Stablein and Dr. Kotra went on to recount that in September 2010, NRC staff was directed to stop all work on the SER and instead issue Technical Evaluation Reports without regulatory findings. Dr.

² Janet Kotra, NRC Senior Project Manager, June 24, 2011 testimony before Congressional Subcommittee On Environment and the Economy, Committee On Energy and Commerce, transcript pp. 11, 12.

³ Newton Kingman Stablein, NRC Chief of Project Management Branch, June 24, 2011 testimony before Congressional Subcommittee On Environment and the Economy, Committee On Energy and Commerce, transcript pp. 18, 19.

Stablein summarized that, as a result, “The work of a generation of scientists and engineers continues to be systematically suppressed”⁴

Lawrence Kokajko, the Deputy Office Director for the Office of Nuclear Material Safety and Safeguards, testified: “Staff would have willingly followed any outcome from a faithfully executed legitimate process. Until such decision, staff was under the distinct impression that it could continue its safety review as long as sufficient funding existed. Further, I would go so far to say that many think as I do, the Nation paid for this review, and the Nation should get it.”⁵ Aby Mohseni, the NRC Acting Director of High-Level Waste Repository Safety, testified as follows: “[S]ome senior managers contributed to the manipulation of the budget process and information to apparently make sure that the Yucca Mountain project would be left unfunded even if the license application was still before the NRC.”⁶

Catherine Haney, the NRC Director of the Office of Nuclear Materials Safety and Safeguards, testified that: “we began the process of documenting and

⁴ See nn. 2-3 *supra*

⁵ Lawrence Kokajko, Deputy Office Director for the Office of Nuclear Material Safety and Safeguards, June 24, 2011 testimony before Congressional Subcommittee On Environment and the Economy, Committee On Energy and Commerce, transcript p. 30.

⁶ Aby Mohseni, Acting Director of the NRC Division of High-Level Waste Repository Safety, June 24, 2011 testimony before Congressional Subcommittee On Environment and the Economy, Committee On Energy and Commerce, transcript p. 24.

preserving the staff's review, which included converting the remaining volumes of the draft Safety Evaluation Report into a Technical Evaluation Report.”⁷ From these statements, it is clear that all SER volumes exist in NRC's archives in near final form and can be finalized and issued at little or no cost.

Dr. Kotra provided sound advice in her Congressional testimony: “I remain deeply concerned that the ground-breaking regulatory work accomplished over so many decades by my colleagues not be lost or wasted. This seminal work is documented in the draft SER volumes staff has prepared.” Her final plea cannot be stated more succinctly: “I implore you to take whatever action you deem necessary to allow completion and prompt, public release of the complete, unredacted and uncensored volumes of the NRC staff's SERs.”⁸

The Five Participants urge the NRC to heed Dr. Kotra's request, and order that the unredacted and uncensored SER-3 be issued immediately, and that the remaining SERs be restored to their original state, reviewed where required, and issued promptly. Moreover, contrary to the assertions of the State of Nevada, nothing in existing laws or regulations, including the Freedom of Information Act,

⁷ Catherine Haney, NRC Director of the Office of Nuclear Material Safety and Safeguards, June 24, 2011 testimony before Congressional Subcommittee On Environment and the Economy, Committee On Energy and Commerce, transcript p. 36.

⁸ Janet Kotra, NRC Senior Project Manager, June 24, 2011 testimony before Congressional Subcommittee On Environment and the Economy, Committee On Energy and Commerce, transcript p. 12.

preclude the immediate release of even the unredacted “draft” pre-decisional SERs.⁹ Under the circumstances, such a release would provide the transparency of decision-making so often advocated by this Administration and assure the public that the technical judgments of the staff have not been censored or manipulated.

The SERs were delayed and improperly stripped of their safety conclusions at the direction of the former NRC Chairman and released as Technical Evaluation Reports¹⁰ The staff SER reports are public assets, and not the private property of the NRC. They contain extremely valuable technical information and safety conclusions by those who worked directly in developing them. Those technical

⁹ Agencies may make "discretionary disclosures" of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so. *See, e.g., CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1334 n.1 (D.C. Cir. 1987) (explaining that an agency's FOIA disclosure decision can "be grounded either in its view that none of the FOIA exemptions applies, and thus that disclosure is mandatory, or in its belief that release is justified in the exercise of its discretion, even though the data fall within one or more of the statutory exemptions.").

¹⁰ *See* U.S. NUCLEAR REG. COMM’N, TECHNICAL EVALUATION REPORT ON THE CONTENT OF THE U.S. DEPARTMENT OF ENERGY’S YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION POSTCLOSURE VOLUME: REPOSITORY SAFETY AFTER PERMANENT CLOSURE, NUREG-2107, ML11223A273 (August 2011) (based on draft Safety Evaluation Report Volume 3); U.S. NUCLEAR REG. COMM’N, TECHNICAL EVALUATION REPORT ON THE CONTENT OF THE U.S. DEPARTMENT OF ENERGY’S YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION PRECLOSURE VOLUME: REPOSITORY SAFETY BEFORE PERMANENT CLOSURE, NUREG-2108, ML11250A093 (September 2011) (based on draft Safety Evaluation Report Volume 2); U.S. NUCLEAR REG. COMM’N, TECHNICAL EVALUATION REPORT ON THE CONTENT OF THE U.S. DEPARTMENT OF ENERGY’S YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION ADMINISTRATIVE AND PROGRAMMATIC VOLUME, NUREG-2109, ML11255A002 (September 2011).

conclusions will help inform all future efforts to develop a geological repository for nuclear waste, regardless of whether or not Yucca Mountain is ever built. In addition, issuance of the SERs with the safety conclusions intact is a key element in restoring public confidence in the integrity of the Yucca Mountain licensing process.

To ensure an expeditious release of the SERs, NRC should immediately reassign the NRC staff who are most knowledgeable regarding the SERs and were improperly prevented from completing their development and review of the SERs.

The Congressional testimony of the NRC staff cited previously also supports our contention that the reports can be issued for far less than the six million dollar-plus figure cited by Chairman Macfarlane in a recent Congressional hearing.¹¹ The Five Participants maintain that those cost figures are grossly exaggerated and do not take into account the fact that the SERs were nearly completed before the former Chairman's interference, and that the staff SERs are the work of government employees, whose pay is set according to Office of Personnel Management schedules and federal law.

¹¹ See generally, *Hearing on Implementing the Nuclear Waste Policy Act – Next Steps Before the H. Comm. On Energy and Commerce*, 113th Cong. (2013) (testimony of Allison M. Macfarlane). Even if the six million dollar figure is assumed, however, the SERs can still be issued within the NRC's available appropriated funds, while at the same time substantially advancing the NRC's duties under 42 U.S.C. § 10134(d).

We urge each individual Commissioner to carefully scrutinize such cost claims by anyone other than the NRC staff who previously developed the SERs. The Five Participants also believe that estimates of time required, and cost, by individuals other than the staff involved in the original development of the SERs, need not be taken at face value, but rather potentially subject to examination by all parties to the proceeding at a Case Management Conference and hearing before the ASLB on their soundness and legitimacy.

Under NRC regulations, the ASLB has “the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order.”¹² The ASLB also authorized to act to achieve those goals including, among others, the authority to: regulate the course of the hearing; set schedules for the conduct of the proceeding and take actions to maintain those schedules; and issue orders necessary to carry out ASLB duties.¹³ As parties to the proceeding, the NRC staff are subject to this authority. Despite assertions by some parties to the contrary, the ASLB plays a key oversight role in the issuances of SERs and had already issued several orders on SER- related matters on July 2, 2009; July 21, 2009, February 1, 2010; December 8, 2010, and February 25, 2011, including a show cause order

¹² 10 C.F.R. §§ 2.319, 2.321.

¹³ *Id.*

when the SERs were delayed,¹⁴ as we now know, from improper action by the former Chair.¹⁵ Issuance of the SERs should be a key topic addressed by NRC staff and other parties at the Case Management Conference previously requested by the Five Participants and discussed below.

II. Recognize the Role of the Initial ASLB and allow it to go forward with the Yucca Mountain licensing

On August 13, 2013, the Court ruled that the NRC “has continued to violate the law governing the Yucca Mountain licensing process” over the last several years, and therefore the Court issued the writ of mandamus that the Five Participants and other petitioners requested. *In re: Aiken County, et al.*, Case No. 11-1271, at *2–3 (D.C. Cir. Aug. 13, 2013) (Kavanaugh, Circuit Judge, writing for the majority). In doing so, the Court ordered the NRC to move forward with the licensing process as required by the Nuclear Waste Policy Act (“NWPA”). *Id.*¹⁶

The Five Participants assert that the Court’s Order finding the “orderly closure” of the NRC proceeding illegal under the NWPA necessarily means that

¹⁴ See Order, *In re U.S. Dep’t of Energy*, Docket No. 63-001-HLW (Feb. 25, 2011).

¹⁵ See generally Nuclear Regulatory Commission, Office of the Inspector General, NRC Chairman’s Unilateral Decision to Terminate NRC’s Review of DOE Yucca Mountain Repository License Application, OIG Case No. 11-05 (2011).

¹⁶ Nevada’s answer to the Five Participants’ Restart Motion restart is predicated upon ignoring the decision in the mandamus case and the findings by both Judge Kavanaugh and Judge Randolph that NRC, particularly its former Chairman, consistently violated the NWPA, 42

U.S.C. § 10134(d), by delaying and then halting consideration of the license application.

the ASLB assigned to the Yucca Mountain licensing proceeding is, by law, still authorized to manage and adjudicate Yucca Mountain licensing matters in the first instance. The Court's decision and writ invalidated NRC's September 9, 2011, Order directing the ASLB to, "by the close of the current fiscal year [i.e., September 30, 2011], complete all necessary and appropriate case management activities, including disposal of all matters pending before it" Memorandum and Order, *In re U.S. Dep't of Energy*, NRC No. 63-001, CLI-11-07 (Sept. 9, 2011).

On September 30, 2011, the ASLB issued an order suspending the Yucca Mountain License Application "***consistent with the Commission's Memorandum and Order of September 9, 2011.***" Memorandum and Order, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 3 (Sept. 30, 2011) (emphasis added). The order further stated in part:

Two hundred eighty-eight admitted contentions are pending. They would be ripe for adjudication at evidentiary hearings after deposition discovery, issuance by the NRC Staff of applicable Safety Evaluation Reports and (in the case of contentions arising under the National Environmental Policy Act) any necessary supplementation by the NRC Staff of DOE's Environmental Impact Statement. *Id.*

The Court's writ of mandamus was issued on August 13, 2013, and automatically became effective, in accordance with Circuit Rule 41(a)(3), twenty one (21) days later. When Nye County, joined by the other parties in this response,

filed its Motion¹⁷ with both the NRC and the ASLB requesting that the Order and suspensions of the proceedings be “lifted,” the writ was not yet effective. However, the 21 days has since passed and no stay of the Court’s decision has been requested by NRC, or issued by the Court. Therefore, the Court’s issuance of the writ based upon a finding that NRC violated the NWPA¹⁸ by halting its consideration of the license application necessarily means that NRC’s actions, including its Order of September 9, 2011, were illegal. As a consequence, that order is null and void.¹⁹

In any event, whether the ASLB is recognized as still being constituted and authorized as a result of the of the Court Order, or must be reinstated by an action of the NRC as a prudent, cost-effective measure in resuming the licensing process, the result is the same. The majority of the parties to the proceeding that have filed responses to NRC’s Order maintain that the same ASLB panel should continue to

¹⁷ Nye County’s Motion for Lifting of Suspension of Yucca Mountain Licensing Proceeding, Scheduling of Immediate Case Management Conference, and Issuance of Related Administrative Orders, *In re U.S. Dep’t of Energy*, NRC No. 63-001-HLW (Aug. 23, 2013) (hereinafter “Restart Motion”).

¹⁸ The NWPA requires NRC to “consider” an application for authorization to construct the Yucca Mountain geologic repository for high-level radioactive waste, and directs that NRC “shall issue a final decision approving or disapproving the issuance” of such authorization within three years of the application’s submission. 42 U.S.C. § 10134(d).

¹⁹ *See, e.g., Vandermolen v. Stetson*, 571 F.2d 617, 624 (D.C. Cir. 1977) (“Actions by an agency of the executive branch in violation of its own regulations are illegal and void.”) (citing *Vitarelli v. Seaton*, 359 U.S. 535, (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

adjudicate the license in the first instance, and conduct a Case Management Conference for the purpose of making decisions on the restarted licensing proceeding.²⁰ Continuing with the same ASLB is the most cost effective means of proceeding, given their extensive knowledge of the case, and also would provide public assurance that the NRC intends to proceed in a fair and even handed way now that the ASLB's decision denying DOE's attempted withdrawal of the license application has been left undisturbed by both the NRC and the Court.

The Five Participants reiterate their previous request that the ASLB schedule an immediate Case Management Conference at NRC's Washington, D.C. Offices for the purposes of finding a means to inexpensively expedite release of the unredacted NRC SERs and resume other aspects of the adjudication, including "Phase I" discovery previously scheduled in this proceeding. The Federal Government has conceded that there are approximately twenty-seven (27) million dollars in appropriated funds²¹ available to continue the Yucca Mountain repository licensing proceeding before the NRC. As described in greater detail below and in the Five Participants' Restart Motion, despite Nevada's assertions to the contrary, meaningful activities can and should be accomplished with these and

²⁰ See White Pine County Views at *4; Lincoln County Views at *4.

²¹ Before the U.S. Court of Appeals in *Aiken Co. et al v. NRC*, Civil Case No. 11-1271, DOJ and NRC admitted there are approximately ten (10) million dollars available for NRC licensing activities, and DOJ, arguing on behalf of the United States, admits there are about \$17 million dollars available for DOE licensing work. See DOJ Amicus Br. at 6.

other available funds that would substantially advance the goal of the NWPAs repository program.

III. Preserve Scarce Funds for the Actual Licensing

Despite the efforts of the Five Participants and others, NRC's former Chairman and DOE improperly diverted funds from the statutorily mandated licensing process, and instead erected as many impediments as they could to the licensing process. DOE and NRC illegally used funds meant to conduct the licensing proceeding to close down Yucca Mountain offices and programs, halt the licensing process, dismantle the LSN, reassign staff, sell computers and equipment, and close the Las Vegas ASLB hearing facility. The State of Nevada recommends that the scarce remaining funds be used to undo these illegal acts, rather than proceed with the licensing process itself.²² While Nye County and others opposed

²² The State of Nevada has filed a motion to reinstitute the LSN and conduct licensing proceedings in Las Vegas. State of Nevada Motion for Commission Action Related to a Possible Restart of the Yucca Mountain Licensing Proceeding, *In re U.S. Dep't of Energy*, Docket No. 63-001-HLW, (Aug. 23, 2013) (hereinafter "Nevada Motion"). These actions would only further deplete the \$11 Million dollars in NRC funds remaining to continue the licensing process and should be rejected. See discussion of the LSN *infra* at section B. Critical actions including issuance of the SERs and resumption of discovery should be ordered immediately without waiting for the LSN to be reinstated. Reinstatement should not be funded by any funds specifically appropriated for the Yucca Mountain licensing proceeding.

the original “closure” actions in timely filings with the NRC,²³ Nevada took no action to oppose them at the time.

Nevada in its recent filings attempts to argue that NRC’s previous actions were somehow meant to “preserve” the funding for the licensing proceeding, instead of simply wasting it, mimicking the assertions of the former NRC Chairman whose actions were repudiated by the Court’s Order.²⁴ This is nothing more than a transparent attempt to re-litigate issues that were already argued and lost in the writ of mandamus case, which NRC has not, to date decided to appeal.²⁵

The former NRC Chairman’s use of funds appropriated for the licensing process to instead terminate the licensing process violated what is commonly known as the “Purpose Statute,” 31 U.S.C. § 1301(a), which states that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise by law.” Congress appropriated those funds for the specific purpose of carrying out the licensing process, but NRC used them instead

²³ See, e.g., Nye County, Nevada’s Response in Opposition to NRC Staff’s June 20, 2011 Petition for Review of Board Orders, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (June 30, 2011).

²⁴ Nevada Answer to Nye County’s Motion for Lifting Suspension of Yucca Mountain Licensing Proceeding, *In re U.S. Dep’t of Energy*, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04 (Aug. 30, 2013) (hereinafter “Nevada Answer”).

²⁵ Nevada, which was not joined by the NRC, has filed a request for rehearing en banc of the writ of mandamus with the Court of Appeals for the DC Circuit on September 26, 2013. The Circuit Court is the only appropriate forum for attempting to relitigate the findings of the Court and the NRC’s own Inspector General regarding the conduct of the former NRC Chairman.

to try and shut down the process, which is not only an inappropriate purpose, but one that is in direct contradiction of the fund's intended use. *See Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60, 77–78 (D.D.C. 1973) (holding that funds appropriated to carry out a program could not be used to terminate instead terminate that program). In this case, restoration or reimbursement should be made to the Yucca Mountain appropriation, where funds are available, from other appropriations that are proper funding sources. *See 63 Comp. Gen. 422* (1984). Therefore, because of the NRC's illegal actions and violations of the Purpose Act, any restoration of facilities, offices, and equipment should be accomplished using NRC's overall administrative budget and not the 11 million dollars available for the license adjudication.²⁶

The Federal Government assured the United States Court of Appeals for the DC Circuit Court in *Aiken I*²⁷ that the licensing process could be readily restarted if NRC and DOE were required to do so. Given the issuance of the mandamus, NRC and DOE should at long last meet their statutory obligations under the

²⁶ Contrary to Nevada's assertions, NRC, and not Nye County, must specify what those funds are. Moreover, such action is authorized by law detailed above. Additionally, in a recent Congressional hearing on Yucca Mountain, Rep. Tim Murphy (PA) recently suggested that such actions would be appropriate. *See generally, Hearing on Implementing the Nuclear Waste Policy Act – Next Steps Before the H. Comm. On Energy and Commerce*, 113th Cong. (2013).

²⁷ *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011)(Transcript).

NWPA and honor their commitment to the Court without delay and without wasting funds.

A. Restoration of the LSN is Not Essential to Restart of the Licensing.

The NRC's "orderly closure" resulted in the illegal termination of the NRC's web-based LSN, which served as a database for all documentation regarding the application, including discovery and the hearing process. *See* 69 Fed. Reg. 32,836-37 (June 14, 2004). 10 C.F.R. § 2.1007(a)(2) states that access to the LSN "shall be provided" by the NRC through its website. Despite this requirement, and opposition from Nye County (but not Nevada) the LSN was shut down on August 5, 2011, as part of the NRC's "orderly closure" of license review.

On April 11, 2011, the ASLB issued an Order directing (1) parties to preserve and submit all LSN documents in portable document format ("PDF") along with associated bibliographic files to the NRC Office of the Secretary ("SECY"), and (2) SECY to "install the documents and associated bibliographic information into a separate LSN docket library of ADAMS for public access via www.nrc.gov." Order, *In re U.S. Dep't of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (April 11, 2011). Although NRC reported at oral argument that re-establishing the LSN would cost approximately \$5 million, counsel for NRC also informed the Court that the licensing proceeding and discovery could resume without the LSN, *In re: Aiken County, et al.*, Case No. 11-1271 (D.C. Cir.

Aug. 13, 2013), Oral Argument Transcript at 49:12-14, presumably because the ASLB took the prudent steps just mentioned.

Nevada places great weight on the need to have a “searchable” database for documents related to licensing proceeding. *See* Nevada Motion at *6. However, as was correctly pointed out by Lincoln County, all relevant documents have been converted to searchable PDF documents, and placement of these documents on the NRC’s ADAMS system provides “electronically accessible and searchable [documents] without having to bear the expense of reconstituting and maintaining the LSN.” *See* Lincoln County Views at *4. As appropriately interpreted by the Five Participants and NEI, Nevada’s request to have the LSN reconstituted is “nothing more than a transparent attempt to have the Commission waste ‘part of [its] funds on unpacking its boxes, and the remainder packing them up again’ ‘in order to preserve’ the LSN documentary material for future use.” NEI Answer at *6– 7 (quoting *In re Aiken County, et al.*, 2013 WL 4054877 at *9–10 (Garland, C.J., dissenting)).

Pursuant to its authority under 10 C.F.R. § 2.319, and “to fulfill [its] responsibility to preserve the document discovery materials residing on the LSN,” the Board issued an Order preserving the documents on the LSN in disk and other formats for use in the discovery process. Order, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 3 (April 11, 2011). Because of

the ASLB's foresight, Phase I discovery can be restarted by the ASLB panel at the Case Management Conference and then overseen by a single ASLB Judge assigned to the task, without the LSN.²⁸

B. Phase I Discovery Should be Resumed.

The Five Participants respectfully disagree with NEI and others who maintain, based on budgetary concerns, that Phase I discovery should not move forward until all the SERs have been issued. The Five Participants believe this is a false choice because funds are clearly available to quickly issue all of the nearly completed SERs and complete Phase I discovery.²⁹ In any event, it is premature to conclude that funds are not available until an ASLB Case Management Conference examines what are the legitimate expenses of completing the SERs.

The cost of discovery will be born primarily by the parties, including DOE and Nevada. Nye County reaffirms its intent to fully participate the licensing process, including all Phase I discovery and depositions. DOE has approximately \$17 million available to conduct the already planned Phase I discovery, and such

²⁸ ASLB Judges are compensated in accordance with law at no more than \$165,300. This pay rate is limited to the rate for level III of the Executive Schedule. *See* 5 U.S.C. § 5304(g)(2).

²⁹ Based on the original schedule for the issuance of the SERs, the ASLB began scheduling depositions in Phase I even though SER-3 had not been issued.

discovery should be resumed following the requested Case Management Conference.³⁰

The funds presently available to DOE and NRC are undeniably sufficient to complete critical portions of the licensing process, including the issuance of the unredacted NRC Staff SERs and continuation of Phase I of discovery previously ordered by the ASLB. *See In re: Aiken County, et al.*, Case No. 11-1271 (D.D.C. Aug. 13, 2013), Oral Argument Transcript at 49:12-18. Witnesses had already been identified and depositions scheduled in accordance with the ASLB's case management orders when the process was illegally brought to a halt by NRC's Chairman.³¹

CONCLUSION

As has now been made abundantly clear by the U.S. Court of Appeals, NRC and DOE's efforts to stop this licensing proceeding were illegal. *In re: Aiken County, et al.*, Case No. 11-1271 (D.C. Cir. Aug. 13, 2013). In light of the Court's

³⁰ Peter Lyons, Assistant Secretary for Nuclear Energy of DOE, in recent Congressional testimony, indicated that DOE has not unequivocally committed to defense of its license application, but instead is awaiting action by the NRC. *See generally, Hearing on Implementing the Nuclear Waste Policy Act – Next Steps Before the H. Comm. On Energy and Commerce*, 113th Cong. (2013).

³¹ Order (Concerning LSNA Memorandum and Parties' LSN Document Collections), dated April 11, 2011, at 3 ("Order") (unpublished). While Nevada asks for the administrative infrastructure of the hearing process to be restored, restoring this infrastructure is unnecessary, and yet another attempt to deplete scarce resources when other acceptable hearing facilities are available.

August 13, 2011 Order, and in compliance with the requirements of the NWPA and other federal law, the Yucca Mountain licensing proceeding should be resumed immediately. There are unquestionably sufficient funds available to complete critical portions of the licensing process, including the issuance of the NRC Staff SERs and continuation of discovery, and those funds should not instead be used for unnecessary inappropriate tasks (such as recreating the LSN) in an effort to once again stop the licensing process by depleting the available funds. Further, in light of NRC's illegal actions, and in accordance with law, NRC should restore funds illegally diverted from the licensing process by any appropriate means. Any administrative actions (such as restoration of hearing facilities, offices, and equipment) should be accomplished using NRC's overall administrative budget and not the funds appropriated for the license adjudication.

Respectfully Submitted this 30th day of September, 2013,

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High Level Waste Repository))	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing “Nye County, Nevada, the States of South Carolina and Washington, Aiken County, South Carolina, and the National Association of Regulatory Utilities Commissioners Consolidated Response to NRC Order of August 30, 2013 and Other Parties’ Submittals” has been served upon the following persons by the Electronic Information Exchange:

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