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IMPLEMENTING THE NUCLEAR WASTE POLICY ACT: NEXT STEPS

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

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IMPLEMENTING THE NUCLEAR WASTE POLICY ACT: NEXT STEPS

TUESDAY, SEPTEMBER 10, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:03 a.m., in room 2123 of the Rayburn House Office Building, Hon. John Shimkus (chairman of the subcommittee) presiding.

Members present: Representatives Shimkus, Gingrey, Whitfield, Pitts, Murphy, Latta, Harper, McKinley, Bilirakis, Johnson, Upton (ex officio), Tonko, Green, Capps, McNerney, Dingell, Barrow, and Waxman (ex officio).

Staff present: Nick Abraham, Legislative Clerk; Gary Andres, Staff Director; Charlotte Baker, Press Secretary; David Bell, Staff Assistant; Sean Bonyun, Communications Director; Andy Caputo, Professional Staff Member; Vincent Esposito, Fellow, Nuclear Programs; Brad Grantz, Policy Coordinator, Oversight and Investigations; David McCarthy, Chief Counsel, Environment and the Economy; Chris Sarley, Policy Coordinator, Environment and the Economy; Peter Spencer, Professional Staff Member, Oversight; Tom Wilbur, Digital Media Advisor; Jeff Baran, Democratic Senior Counsel; Alison Cassady, Democratic Senior Professional Staff Member; Greg Dotson, Democratic Staff Director, Energy and Environment; and Caitlin Haberman, Democratic Policy Analyst.

Mr. SHIMKUS. The committee will come to order. And we would like to welcome our colleagues back from the break and also our folks on the first panel.

Before we get down to my opening statement, I want to ask unanimous consent to submit for the record the August 13, 2013, decision of the U.S. Court of Appeals for the DC Circuit to issue a writ of mandamus. Without objection, so ordered.

[The information follows:]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 2, 2012 Decided August 13, 2013
Ordered Held in Abeyance August 3, 2012

No. 11-1271

IN RE: AIKEN COUNTY, ET AL.,
PETITIONERS

STATE OF NEVADA,
INTERVENOR

On Petition for Writ of Mandamus

Andrew A. Fitz, Senior Counsel, Office of the Attorney General for the State of Washington, argued the cause for petitioners. With him on the briefs were *Robert M. McKenna*, Attorney General, *Todd R. Bowers*, Senior Counsel, *Thomas R. Gottshall*, *S. Ross Shealy*, *Alan Wilson*, Attorney General, Office of the Attorney General for the State of South Carolina, *William Henry Davidson II*, *Kenneth Paul Woodington*, *James Bradford Ramsay*, *Robin J. Lunt*, *Barry M. Hartman*, *Christopher R. Nestor*, and *Robert M. Andersen*.

Jerry Stouck and *Anne W. Cottingham* were on the brief for *amicus curiae* Nuclear Energy Institute, Inc. in support of petitioners.

Charles E. Mullins, Senior Attorney, U.S. Nuclear Regulatory Commission, argued the cause for respondent.

With him on the brief were *Stephen G. Burns*, General Counsel, *John F. Cordes Jr.*, Solicitor, and *Jeremy M. Suttenberg*, Attorney.

Martin G. Malsch argued the cause for intervenor State of Nevada. With him on the briefs were *Charles J. Fitzpatrick* and *John W. Lawrence*.

Before: GARLAND, *Chief Judge*, KAVANAUGH, *Circuit Judge*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH, with whom *Senior Circuit Judge* RANDOLPH joins except as to Part III.

Concurring opinion filed by *Senior Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Chief Judge* GARLAND.

KAVANAUGH, *Circuit Judge*: This case raises significant questions about the scope of the Executive's authority to disregard federal statutes. The case arises out of a longstanding dispute about nuclear waste storage at Yucca Mountain in Nevada. The underlying policy debate is not our concern. The policy is for Congress and the President to establish as they see fit in enacting statutes, and for the President and subordinate executive agencies (as well as relevant independent agencies such as the Nuclear Regulatory Commission) to implement within statutory boundaries. Our more modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set by Congress. Here, the Nuclear Regulatory Commission has continued to violate the law governing the Yucca Mountain licensing

process. We therefore grant the petition for a writ of mandamus.

I

This case involves the Nuclear Waste Policy Act, which was passed by Congress and then signed by President Reagan in 1983. That law provides that the Nuclear Regulatory Commission "shall consider" the Department of Energy's license application to store nuclear waste at Yucca Mountain and "shall issue a final decision approving or disapproving" the application within three years of its submission. 42 U.S.C. § 10134(d). The statute allows the Commission to extend the deadline by an additional year if it issues a written report explaining the reason for the delay and providing the estimated time for completion. *Id.* § 10134(d), (e)(2).

In June 2008, the Department of Energy submitted its license application to the Nuclear Regulatory Commission. As recently as Fiscal Year 2011, Congress appropriated funds to the Commission so that the Commission could conduct the statutorily mandated licensing process. Importantly, the Commission has at least $11.1 million in appropriated funds to continue consideration of the license application.

But the statutory deadline for the Commission to complete the licensing process and approve or disapprove the Department of Energy's application has long since passed. Yet the Commission still has not issued the decision required by statute. Indeed, by its own admission, the Commission has no current intention of complying with the law. Rather, the Commission has simply shut down its review and consideration of the Department of Energy's license application.

Petitioners include the States of South Carolina and Washington, as well as entities and individuals in those States. Nuclear waste is currently stored in those States in the absence of a long-term storage site such as Yucca Mountain.

Since 2010, petitioners have sought a writ of mandamus requiring the Commission to comply with the law and to resume processing the Department of Energy's pending license application for Yucca Mountain. Mandamus is an extraordinary remedy that takes account of equitable considerations. The writ may be granted "to correct transparent violations of a clear duty to act." *In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (internal quotation marks omitted); *see also Arizona v. Inter Tribal Council of Arizona, Inc.*, No. 12-71, slip. op. at 17 n.10 (U.S. 2013) (noting that if the federal Election Assistance Commission did not act on a state's statutorily permitted request, "Arizona would be free to seek a writ of mandamus to 'compel agency action unlawfully withheld or unreasonably delayed'") (quoting 5 U.S.C. § 706(1)).

In 2011, a prior panel of this Court indicated that, if the Commission failed to act on the Department of Energy's license application within the deadlines specified by the Nuclear Waste Policy Act, mandamus likely would be appropriate. *See In re Aiken County*, 645 F.3d 428, 436 (D.C. Cir. 2011). In 2012, after a new mandamus petition had been filed, this panel issued an order holding the case in abeyance and directing that the parties file status updates regarding Fiscal Year 2013 appropriations. At that time, we did not issue the writ of mandamus. Instead, in light of the Commission's strenuous claims that Congress did not want the licensing process to continue and the equitable considerations appropriately taken into account in mandamus

cases, we allowed time for Congress to clarify this issue if it wished to do so. But a majority of the Court also made clear that, given the current statutory language and the funds available to the Commission, the Commission was violating federal law by declining to further process the license application. And the Court's majority further indicated that the mandamus petition eventually would have to be granted if the Commission did not act or Congress did not enact new legislation either terminating the Commission's licensing process or otherwise making clear that the Commission may not expend funds on the licensing process. *See* Order, *In re Aiken County*, No. 11-1271 (D.C. Cir. Aug. 3, 2012).

Since we issued that order more than a year ago on August 3, 2012, the Commission has not acted, and Congress has not altered the legal landscape. As things stand, therefore, the Commission is simply flouting the law. In light of the constitutional respect owed to Congress, and having fully exhausted the alternatives available to us, we now grant the petition for writ of mandamus against the Nuclear Regulatory Commission.

II

Our analysis begins with settled, bedrock principles of constitutional law. Under Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory *mandates* so long as there is appropriated money available and the President has no constitutional objection to the statute. So, too, the President must abide by statutory *prohibitions* unless the President has a constitutional objection to the prohibition. If the President has a constitutional objection to a statutory mandate or prohibition, the President may decline to follow the law unless and until a

final Court order dictates otherwise. But the President may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.

Those basic constitutional principles apply to the President and subordinate executive agencies. And they apply at least as much to independent agencies such as the Nuclear Regulatory Commission. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 525-26 (2009) (opinion of Scalia, J., for four Justices) (independent agency should be subject to same scrutiny as executive agencies); *id.* at 547 (opinion of Breyer, J., for four Justices) (independent agency's "comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to assure compliance with applicable provisions of the law").

In this case, however, the Nuclear Regulatory Commission has declined to continue the statutorily mandated Yucca Mountain licensing process. Several justifications have been suggested in support of the Commission's actions in this case. None is persuasive.

First, the Commission claims that Congress has not yet appropriated the *full* amount of funding necessary for the Commission to *complete* the licensing proceeding. But Congress often appropriates money on a step-by-step basis, especially for long-term projects. Federal agencies may not ignore statutory mandates simply because Congress has not yet appropriated all of the money necessary to complete a

project. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977) (when statutory mandate is not fully funded, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint"). For present purposes, the key point is this: The Commission is under a legal obligation to continue the licensing process, and it has at least $11.1 million in appropriated funds – a significant amount of money – to do so. *See* Commission Third Status Report, at 2 (Apr. 5, 2013).

Second, and relatedly, the Commission speculates that Congress, in the future, will not appropriate the additional funds necessary for the Commission to complete the licensing process. So it would be a waste, the Commission theorizes, to continue to conduct the process now. The Commission's political prognostication may or may not ultimately prove to be correct. Regardless, an agency may not rely on political guesswork about future congressional appropriations as a basis for violating existing legal mandates. A judicial green light for such a step – allowing agencies to ignore statutory mandates and prohibitions based on agency speculation about future congressional action – would gravely upset the balance of powers between the Branches and represent a major and unwarranted expansion of the Executive's power at the expense of Congress.

Third, the Commission points to Congress's recent appropriations to the Commission and to the Department of Energy for the Yucca Mountain project. In the last three years, those appropriations have been relatively low or zero. The Commission argues that those appropriations levels demonstrate a congressional desire for the Commission to shut down the licensing process.

But Congress speaks through the laws it enacts. No law states that the Commission should decline to spend previously appropriated funds on the licensing process. No law states that the Commission should shut down the licensing process. And the fact that Congress hasn't yet made additional appropriations over the existing $11.1 million available to the Commission to continue the licensing process tells us nothing definitive about what a future Congress may do. As the Supreme Court has explained, courts generally should not infer that Congress has implicitly repealed or suspended statutory mandates based simply on the amount of money Congress has appropriated. *See TVA v. Hill*, 437 U.S. 153, 190 (1978) (doctrine that repeals by implication are disfavored "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act"); *United States v. Langston*, 118 U.S. 389, 394 (1886) ("a statute fixing the annual salary of a public officer at a named sum . . . should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years"); *cf.* 1 GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW at 2-49 (3d ed. 2004) ("a mere failure to appropriate sufficient funds will not be construed as amending or repealing prior authorizing legislation").

In these circumstances, where previously appropriated money is available for an agency to perform a statutorily mandated activity, we see no basis for a court to excuse the agency from that statutory mandate.

Fourth, the record suggests that the Commission, as a policy matter, simply may not want to pursue Yucca Mountain as a possible site for storage of nuclear waste. But Congress sets the policy, not the Commission. And policy

disagreement with Congress's decision about nuclear waste storage is not a lawful ground for the Commission to decline to continue the congressionally mandated licensing process. To reiterate, the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress. *See Lincoln v. Vigil*, 508 U.S 182, 193 (1993) ("Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes . . . ."); 18 Comp. Gen. 285, 292 (1938) ("the question with the accounting officers is not the apparent general merit of a proposed expenditure, but whether the Congress, controlling the purse, has by law authorized the expenditure").[1]

---

[1] Like the Commission here, a President sometimes has policy reasons (as distinct from constitutional reasons, *cf. infra* note 3) for wanting to spend less than the full amount appropriated by Congress for a particular project or program. But in those circumstances, even the President does not have unilateral authority to refuse to spend the funds. Instead, the President must propose the rescission of funds, and Congress then may decide whether to approve a rescission bill. *See* 2 U.S.C. § 683; *see also Train v. City of New York*, 420 U.S. 35 (1975); Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President (Dec. 1, 1969), *reprinted in Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 279, 282 (1971) ("With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent.").

III[2]

We thus far have concluded that the Commission's inaction violates the Nuclear Waste Policy Act. To be sure, there are also two principles rooted in Article II of the Constitution that give the Executive authority, in certain circumstances, to decline to act in the face of a clear statute. But neither of those principles applies here.

First, the President possesses significant independent authority to assess the constitutionality of a statute. *See* U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause); U.S. CONST. art. II, § 1, cl. 8 (Oath of Office Clause); U.S. CONST. art. II, § 3 (Take Care Clause). But that principle does not help the Commission.

To explain: The President is of course not bound by Congress's assessment of the constitutionality of a statute. The Take Care Clause of Article II refers to "Laws," and those Laws include the Constitution, which is superior to statutes. *See* U.S. CONST. art. VI (Constitution is "supreme Law of the Land"). So, too, Congress is not bound by the President's assessment of the constitutionality of a statute. Rather, in a justiciable case, the Supreme Court has the final word on whether a statutory mandate or prohibition on the Executive is constitutional. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (Presidential Recordings and Materials Preservation Act is constitutional); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring) (congressional statutes that together preclude President from seizing steel mills are constitutional); *see generally Marbury v. Madison*, 5 U.S. 137 (1803).

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[2] Judge Kavanaugh alone joins Part III of the opinion.

So unless and until a final Court decision in a justiciable case says that a statutory mandate or prohibition on the Executive Branch is constitutional, the President (and subordinate executive agencies supervised and directed by the President) may decline to follow that statutory mandate or prohibition if the President concludes that it is unconstitutional. Presidents routinely exercise this power through Presidential directives, executive orders, signing statements, and other forms of Presidential decisions. *See, e.g.*, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (based on Article II, Presidents Bush and Obama refused to comply with statute regulating passports of individuals born in Jerusalem); *Myers v. United States*, 272 U.S. 52 (1926) (based on Article II, President Wilson refused to comply with statutory limit on the President's removal power); *see also Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (President has "the power to veto encroaching laws or even to disregard them when they are unconstitutional") (citation omitted); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199, 199-200 (1994) (Walter Dellinger) (describing as "uncontroversial" and "unassailable" the proposition that a President may decline to execute an unconstitutional statute in some circumstances); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (Jonathan Elliot ed., 2d ed. 1836) ("the President of the United States could shield himself, and refuse to carry into effect an act that *violates* the Constitution") (statement of James Wilson).[3]

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[3] In declining to follow a statutory *mandate* that the President independently concludes is unconstitutional, the President generally may decline to expend funds on that unconstitutional program, at least unless and until a final Court order rules otherwise. But in

But even assuming arguendo that an independent agency such as the Nuclear Regulatory Commission possesses Article II authority to assess the constitutionality of a statute and thus may decline to follow the statute until a final Court order says otherwise,[4] the Commission has not asserted that the relevant statutes in this case are unconstitutional. So that Article II principle is of no help to the Commission here.

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declining to follow a statutory *prohibition* that the President independently concludes is unconstitutional (and not just unwise policy, *cf. supra* note 1), the Appropriations Clause acts as a separate limit on the President's power. It is thus doubtful that the President may permissibly expend more funds than Congress has appropriated for the program in question. *See* U.S. CONST. art. I, § 9, cl. 7 (Appropriations Clause); *see also OPM v. Richmond*, 496 U.S. 414, 425 (1990) ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."). It is sometimes suggested, however, that the President may elect not to follow a statutory prohibition on how *otherwise available appropriated funds* are spent if the President concludes that the prohibition is unconstitutional, at least unless and until a final Court order rules otherwise. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 740 (2008). This case does not require analysis of those difficult questions.

[4] It is doubtful that an independent agency may disregard a statute on constitutional grounds unless the President has concluded that the relevant statute is unconstitutional. But we need not delve further into that question here. *Compare Humphrey's Executor v. United States*, 295 U.S. 602 (1935), *with Myers*, 272 U.S. 52, *and Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010).

Second, it is also true that, under Article II, the President possesses a significant degree of prosecutorial discretion not to take enforcement actions against violators of a federal law. But that principle does not support the Commission's inaction here. To demonstrate why, the contours of the Executive's prosecutorial discretion must be explained.

The Presidential power of prosecutorial discretion is rooted in Article II, including the Executive Power Clause, the Take Care Clause, the Oath of Office Clause, and the Pardon Clause. *See* U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause); U.S. CONST. art. II, § 1, cl. 8 (Oath of Office Clause); U.S. CONST. art. II, § 2, cl. 1 (Pardon Clause); U.S. CONST. art. II, § 3 (Take Care Clause); *see also* U.S. CONST. art. I, § 9, cl. 3 (Bill of Attainder Clause). The President may decline to prosecute certain violators of federal law just as the President may pardon certain violators of federal law.[5] The President may decline to prosecute or may pardon because of the President's own constitutional concerns about a law *or* because of policy objections to the law, among other reasons.[6] *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("The power to decide when to investigate,

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[5] The power to pardon encompasses the power to commute sentences. *See Schick v. Reed*, 419 U.S. 256, 264 (1974).

[6] One important difference between a decision not to prosecute and a pardon is that a pardon prevents a future President from prosecuting the offender for that offense. Prosecutorial discretion, meanwhile, might be exercised differently by a future President – subject to statute of limitations issues or any due process limits that might apply when an offender has reasonably relied on a prior Presidential promise not to prosecute particular conduct.

and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . . ."); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause."); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. Off. Legal Counsel 101, 125 (1984) (Theodore B. Olson) ("the constitutionally prescribed separation of powers requires that the Executive retain discretion with respect to whom it will prosecute for violations of the law"); *id.* at 115 ("The Executive's exclusive authority to prosecute violations of the law gives rise to the corollary that neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive Branch to prosecute particular individuals."); Congressman John Marshall, Speech to the House of Representatives (1800), *reprinted in* 18 U.S. app. at 29 (1820) (The President may "direct that the criminal be prosecuted no further. This is . . . the exercise of an indubitable and a constitutional power."); *see also United States v. Klein*, 80 U.S. 128, 147 (1871) ("To the executive alone is intrusted the power of pardon; and it is granted without limit.").

In light of the President's Article II prosecutorial discretion, Congress may not *mandate* that the President prosecute a certain kind of offense or offender. The logic behind the pardon power further supports that conclusion. As has been settled since the Founding, the President has absolute authority to issue a pardon at any time after an unlawful act has occurred, even *before* a charge or trial. *See Ex parte Grossman*, 267 U.S. 87, 120 (1925) ("The Executive

can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes . . . ."). So it would make little sense to think that Congress constitutionally could compel the President to prosecute certain offenses or offenders, given that the President has undisputed authority to pardon all such offenders at any time after commission of the offense. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 179 (2005) ("greater power to pardon subsumed the lesser power to simply decline prosecution").[7]

The Executive's broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution's separation of powers. One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior – more precisely, the power either not to seek charges against violators of a federal law or to pardon violators of a federal law.[8] The Framers saw the separation of the power to prosecute from the power to legislate as essential

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[7] If the Executive selectively prosecutes someone based on impermissible considerations, the equal protection remedy is to dismiss the prosecution, not to compel the Executive to bring another prosecution. *See United States v. Armstrong*, 517 U.S. 456, 459, 463 (1996); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *cf. Linda R.S. v. Richard D.*, 410 U.S. 614, 618-19 (1973).

[8] Congress obviously has tools to deter the Executive from exercising authority in this way – for example by using the appropriations power or the advice and consent power to thwart other aspects of the Executive's agenda (and ultimately, of course, Congress has the impeachment power). But Congress may not overturn a pardon or direct that the Executive prosecute a particular individual or class of individuals.

to preserving individual liberty. *See* THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., rev. ed. 1999) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); 1 MONTESQUIEU, THE SPIRIT OF LAWS bk. 11, ch. 6, at 163 (Thomas Nugent trans., 1914) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."). After enacting a statute, Congress may not mandate the prosecution of violators of that statute. Instead, the President's prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed (and still further protection comes from later review by an independent jury and Judiciary in those prosecutions brought by the Executive).[9]

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[9] It is likely that the Executive may decline to seek *civil* penalties or sanctions (including penalties or sanctions in administrative proceedings) on behalf of the Federal Government in the same way. Because they are to some extent analogous to criminal prosecution decisions and stem from similar Article II roots, such civil enforcement decisions brought by the Federal Government are presumptively an exclusive Executive power. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'") (quoting U.S. CONST. art. II, § 3); *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985); *Confiscation Cases*, 74 U.S. 454, 457 (1868); *see*

To be sure, a President's decision to exercise prosecutorial discretion and to decline to seek charges against violators (or to pardon violators) of certain laws can be very controversial. For example, if a President disagreed on constitutional or policy grounds with certain federal marijuana or gun possession laws and said that the Executive Branch would not initiate criminal charges against violators of those laws, controversy might well ensue, including public criticism that the President was "ignoring" or "failing to enforce" the law (and if a court had previously upheld the law in question as constitutional, additional claims that the President was also "ignoring" the courts). But the President has clear constitutional authority to exercise prosecutorial discretion to decline to prosecute violators of such laws, just as the President indisputably has clear constitutional authority to pardon violators of such laws. *See, e.g.*, 1963 Attorney Gen. Ann. Rep. 62, 62-63 (1963) (President Kennedy commuted the sentences of many drug offenders sentenced to mandatory minimums); Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 42, 43-44 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (President Jefferson both pardoned those convicted under the Sedition Act and refused to prosecute violators of the Act); President George

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also Butz v. Economou, 438 U.S. 478, 515 (1978); *Seven-Sky v. Holder*, 661 F.3d 1, 50 & n.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (referring to possibility that a President might exercise prosecutorial discretion not to seek civil penalties against violators of a statute). That said, it has occasionally been posited that the President's power not to initiate a civil enforcement action may not be entirely absolute (unlike with respect to criminal prosecution) and thus might yield if Congress expressly mandates civil enforcement actions in certain circumstances. *Cf. Heckler*, 470 U.S. at 832-33.

Washington, Proclamation (July 10, 1795), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 181 (James D. Richardson ed., 1896) (President Washington pardoned participants in the Pennsylvania Whiskey Rebellion).[10] The remedy for

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[10] As a general matter, there is widespread confusion about the differences between (i) the President's authority to disregard statutory mandates or prohibitions on the Executive, based on the President's constitutional objections, and (ii) the President's prosecutorial discretion not to initiate charges against (or to pardon) violators of a federal law. There are two key practical differences. *First*, the President may disregard a statutory mandate or prohibition on the Executive only on constitutional grounds, not on policy grounds. By contrast, the President may exercise the prosecutorial discretion and pardon powers on any ground – whether based on the Constitution, policy, or other considerations. *Second*, our constitutional structure and tradition establish that a President is bound to comply with a final Court decision holding that a statutory mandate or prohibition on the Executive is constitutional. But in the prosecutorial discretion and pardon context, when a Court upholds a statute that regulates private parties as consistent with the Constitution, that ruling simply *authorizes* prosecution of violators of that law. Such a Court ruling does not *require* the President either to prosecute violators of that law or to refrain from pardoning violators of that law. So the President may decline to prosecute or may pardon violators of a law that the Court has upheld as constitutional. To take one example, a President plainly could choose not to seek (or could commute) federal death sentences because of the President's own objections to the death penalty, even though the Supreme Court has upheld the death penalty as constitutional. *See* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1189-90 (2012) ("President Jefferson ended pending prosecutions under the Sedition Act and pardoned individuals previously convicted under that Act, even though the courts had upheld the Act's constitutionality. . . . [I]t can hardly be said that his pardons

Presidential abuses of the power to pardon or to decline to prosecute comes in the form of public disapproval, congressional "retaliation" on other matters, or ultimately impeachment in cases of extreme abuse.

So having said all of that, why doesn't the principle of prosecutorial discretion justify the Nuclear Regulatory Commission's inaction in this case? The answer is straightforward. Prosecutorial discretion encompasses the Executive's power to decide whether to initiate charges for legal wrongdoing and to seek punishment, penalties, or sanctions against individuals or entities who violate federal law. Prosecutorial discretion does not include the power to disregard other statutory obligations that apply to the Executive Branch, such as statutory requirements to issue rules, *see Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (explaining the difference), or to pay benefits, or to implement or administer statutory projects or programs. Put another way, prosecutorial discretion encompasses the discretion not to *enforce* a law against private parties; it does not encompass the discretion not to *follow* a law imposing a mandate or prohibition on the Executive Branch.[11]

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disregarded a duty to enforce or defend a congressional statute, given that the pardon power, by its nature, involves undoing the prior enforcement, via conviction, of a statute. And although the abatement of pending prosecutions failed in one sense to enforce the Sedition Act, given the breadth of prosecutorial discretion – whether rooted in the Constitution, in the presumed intention of Congress, or in some combination of the two – it is hard to view Jefferson as having disregarded a congressional mandate.") (footnotes omitted).

[11] Of course, for reasons already discussed, the President may decline to follow a law that purports to *require* the Executive

This case does not involve a Commission decision not to prosecute violations of federal law. Rather, this case involves a Commission decision not to follow a law mandating that the Commission take certain non-prosecutorial action. So the Executive's power of prosecutorial discretion provides no support for the Commission's inaction and disregard of federal law here.

IV

At the behest of the Commission, we have repeatedly gone out of our way over the last several years to defer a mandamus order against the Commission and thereby give Congress time to pass new legislation that would clarify this matter if it so wished. In our decision in August 2012, the Court's majority made clear, however, that mandamus likely would have to be granted at some point if Congress took no further action. *See* Order, *In re Aiken County*, No. 11-1271 (D.C. Cir. Aug. 3, 2012). Since then, Congress has taken no further action on this matter. At this point, the Commission is simply defying a law enacted by Congress, and the Commission is doing so without any legal basis.

We therefore have no good choice but to grant the petition for a writ of mandamus against the Commission.[12]

Branch to prosecute certain offenses or offenders. Such a law would interfere with the President's Article II prosecutorial discretion.

[12] In his dissent, Chief Judge Garland cites several cases to explain his vote against granting mandamus in this case. Of the eight cases he cites, however, five did not involve a statutory mandate with a defined deadline, as we have here. In the other three cases, the Court made clear that either the agency had to act or the Court would grant mandamus in the future. *See In re United*

This case has serious implications for our constitutional structure. It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by

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Mine Workers of America International Union, 190 F.3d 545, 554 (D.C. Cir. 1999) ("however modest [an agency's] personnel and budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction"); *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 477 (D.C. Cir. 1998) (denying mandamus partly because "this is not a case where an agency has been contumacious in ignoring court directions to expedite decision-making"); *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991) (mandamus inappropriate where it would interfere with agency priorities set by applying agency expertise but noting that "[w]here the agency has manifested bad faith, as by . . . asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities"). Consistent with those precedents, we followed a cautious approach in our decision more than a year ago when we declined to issue mandamus against the Commission at that time. But the Court's majority clearly warned that mandamus would eventually have to be granted if the Commission did not act or if Congress did not change the law. Since then, despite the clear warning, the Commission has still not complied with the statutory mandate. On the contrary, the Commission has reaffirmed that it has no plans to comply with the statutory mandate. In the face of such deliberate and continued agency disregard of a statutory mandate, our precedents strongly support a writ of mandamus. Our respectful factbound difference with Chief Judge Garland, then, is simply that we believe – especially given the Court's cautious and incremental approach in prior iterations of this litigation, the significant amount of money available for the Commission to continue the licensing process, and the Commission's continued disregard of the law – that the case has by now proceeded to the point where mandamus appropriately must be granted.

the Nuclear Regulatory Commission. Our decision today rests on the constitutional authority of Congress, and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here. To be sure, if Congress determines in the wake of our decision that it will never fund the Commission's licensing process to completion, we would certainly hope that Congress would step in before the current $11.1 million is expended, so as to avoid wasting that taxpayer money. And Congress, of course, is under no obligation to appropriate additional money for the Yucca Mountain project. Moreover, our decision here does not prejudge the merits of the Commission's consideration or decision on the Department of Energy's license application, or the Commission's consideration or decision on any Department of Energy attempt to withdraw the license application. But unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process. The petition for a writ of mandamus is granted.

So ordered.

RANDOLPH, *Senior Circuit Judge*, concurring: I join all of the majority opinion except part III, which I believe is unnecessary to decide the case.

I also believe some background information is needed to understand what has occurred here. The Nuclear Waste Policy Act states that the Commission "shall consider" the Yucca Mountain license application and "shall issue a final decision approving or disapproving" the application "not later than" three years after its submission. 42 U.S.C. § 10134(d). The Department of Energy filed the Yucca Mountain application in June 2008, *see* Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008), and Congress later provided substantial appropriations for the licensing process, *see* U.S. NUCLEAR REGULATORY COMMISSION, NUREG-1100, VOL. 26, CONGRESSIONAL BUDGET JUSTIFICATION FOR FY 2011 94–95 (2010). Although the Commission had a duty to act on the application and the means to fulfill that duty, former Chairman Gregory Jaczko orchestrated a systematic campaign of noncompliance. Jaczko unilaterally ordered Commission staff to terminate the review process in October 2010; instructed staff to remove key findings from reports evaluating the Yucca Mountain site; and ignored the will of his fellow Commissioners. *See* U.S. NUCLEAR REGULATORY COMMISSION, OFFICE OF THE INSPECTOR GENERAL, OIG CASE NO. 11-05, NRC CHAIRMAN'S UNILATERAL DECISION TO TERMINATE NRC'S REVIEW OF DOE YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION 7–10, 17, 44–46 (2011). These transgressions prompted an investigation by the Commission's Inspector General, as well as a letter from all four of the Commission's other members expressing "grave concerns" about Jaczko's performance in office. *See* Matthew Daly, *Nuclear Agency's Commissioners and Chief Trade War of Words*, WASH. POST, Dec. 10, 2011, at A18. After we heard oral argument in this case, Jaczko resigned.

Today's judgment should ensure that the Commission's next chapter begins with adherence to the law. In the Nuclear Waste Policy Act Congress required the Commission to rule on the Yucca Mountain application, and it appropriated funds for that purpose. The Commission's duty is to comply with the law and our duty is to make sure it does so. "Once Congress . . . has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

GARLAND, *Chief Judge*, dissenting: Mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted). Even if a petitioner can show that it has a "clear and indisputable" right to the writ, issuing the writ remains "a matter vested in the discretion of the court." *Id.* at 381, 391. Likewise, "mandamus[] does not necessarily follow a finding of a [statutory] violation." *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999) (second alteration in original) (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991)). To the contrary, this court has not hesitated to deny the writ even when an agency has missed a statutory deadline by far more than the two years that have passed in this case. *See id.* at 546, 551 (declining to issue the writ, notwithstanding that the agency missed an "express" statutory deadline by 8 years in "clear violation" of the statute).[1] Finally, and most relevant

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[1]*See also, e.g.*, *In re Core Commc'ns, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008) (noting that the court had declined to issue the writ after the agency failed to respond to the court's remand for 3 years, but issuing the writ when the delay reached 6 years); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-01 (D.C. Cir. 2003) (vacating and remanding the district court's determination that a 5-year delay was unreasonable, due to the district court's failure to consider the agency's resource constraints); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 477-78 (D.C. Cir. 1998) (declining to order agency action notwithstanding a 10-year delay in issuing a rule and a 20-year delay in achieving the rule's statutory objective); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1146-47, 1150 (D.C. Cir. 1992) (noting that the court had declined to issue the writ after a 3-year delay, but issuing the writ when the delay reached 6 years); *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 945-47 (D.C. Cir. 1988) (declining to issue the writ despite the agency's 3-year delay since the ALJ's initial decision, and 5-year delay since the start of agency proceedings); *Oil, Chem. & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985) (declining to issue the writ after a 5-year delay).

here, "[c]ourts will not issue the writ to do a useless thing, even though technically to uphold a legal right." *United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228, 232 (D.C. Cir. 1936).[2]

Unfortunately, granting the writ in this case will indeed direct the Nuclear Regulatory Commission to do "a useless thing." The NRC has not refused to proceed with the Yucca Mountain application. Rather, by unanimous votes of both the Commission and its Atomic Safety and Licensing Board, it has suspended the application proceeding until there are sufficient funds to make meaningful progress. *See* Mem. and Order at 1-2 (N.R.C. Sept. 9, 2011); Mem. and Order (Suspending Adjudicatory Proceeding) at 3 (A.S.L.B. Sept. 30, 2011); NRC Br. 53; NRC Resp. Br. 5; Oral Arg. Tr. 36. Five months prior to that suspension, Congress had given the Commission only the minimal amount it requested to "support work related to the orderly closure of the agency's Yucca Mountain licensing support activities." NRC, CONG. BUDGET JUSTIFICATION FOR FY 2011, at 95 (2010); *see* Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1423, 125 Stat. 38, 126 (2011). The following year, Congress completely zeroed out the Commission's funding for the project. And the year following that -- after we held this case in abeyance so that Congress could indicate whether it intended to fund the project going forward, *see* Order, *In re Aiken County*, No. 11-1271 (D.C. Cir. Aug. 3, 2012) -- Congress once again appropriated no money for Yucca Mountain activities.

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[2]*See Weber v. United States*, 209 F.3d 756, 760 (D.C. Cir. 2000) (declaring that the writ "is not to be granted in order to command a gesture"); *Realty Income Trust v. Eckerd*, 564 F.2d 447, 458 (D.C. Cir. 1977) (holding that "equity should not require the doing of a 'vain or useless thing'").

As a consequence, the agency has only about $11 million left in available funds. No one disputes that $11 million is wholly insufficient to complete the processing of the application. By way of comparison, the Commission's budget request for the most recent year in which it still expected the Yucca Mountain proceeding to move forward was $99.1 million. *See* Inspector Gen. Mem. at 8 (June 6, 2011) (describing NRC's FY 2010 performance budget request, which Congress did not grant).[3] The only real question, then, is whether the

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[3]To put the size of the application process in concrete terms, at the time the NRC suspended its licensing proceeding, 288 contentions -- claims that must be resolved before the application can be granted -- remained outstanding. *See* Mem. and Order (Suspending Adjudicatory Proceeding) at 3 (A.S.L.B. Sept. 30, 2011); *see also* Mem. and Order at 2 (N.R.C. June 30, 2009) (noting that the Yucca Mountain proceeding "is the most extensive . . . in the agency's history"). Over 100 expert witnesses had been identified for depositions, to address contentions on such diverse subjects as hydrology, geochemistry, climate change, corrosion, radiation, volcanism, and waste transport -- and those were just for the first phase of the proceeding. *See* Mem. and Order (Identifying Participants and Admitted Contentions), Attachment A at 1-10 (A.S.L.B. May 11, 2009); Dep't of Energy Mot. to Renew Temporary Suspension ("DOE Mot.") at 5 n.14 (A.S.L.B. Jan. 21, 2011).

Nor is funding for the NRC the only problem. The Department of Energy (DOE) is the license applicant and an indispensable party in the application process; it bears the burden of proof on each of the remaining 288 contentions. *See* 10 C.F.R. § 2.325. But Congress has zeroed out DOE's Yucca Mountain funding for three years running. It, too, has only a comparatively small amount of carryover funds available -- enough for less than two months' participation. *See* U.S. Amicus Br. 6; *see also infra* note 4.

Of course, processing the application is itself only the tip of the iceberg. Completing the project, including constructing the Yucca

Commission can make any meaningful progress with $11 million.

The Commission has concluded that it cannot. *See* NRC Resp. Br. 5; U.S. Amicus Br. 9; *see also* NRC Br. 42. And we are not in a position -- nor do we have any basis -- to second-guess that conclusion. Two years ago, citing insufficient funds to proceed and the need to preserve the materials it had collected, the NRC shuttered the licensing program, dismantled the computer system upon which it depended, shipped the documents to storage, and reassigned the program's personnel to projects that did have congressional funding. *See* Mem. and Order at 1-2 (N.R.C. Sept. 9, 2011); NRC Br. 3; Pet'rs Br. 16; Oral Arg. Tr. 45. The Commission believes it will take a significant part of the $11 million to get the process started again. *See* Oral Arg. Tr. 45-49; *see also* U.S. Amicus Br. 6.[4] Nor would that leave the Commission with the remainder to spend on moving the application along, however slightly. In light of the NRC's previous three years of appropriations experience, the only responsible use for the remaining money would be to spend it on putting the materials back into storage -- in order to preserve them for the day (if it ever arrives) that Congress provides additional funds. *See* Oral Arg. Tr. 48-49.

Mountain facilities themselves, would require another $50 billion, none of which has been appropriated. *See* Oral Arg. Tr. 63.

[4]The Department of Energy is in a position similar to that of the NRC. The DOE office with responsibility for the Yucca Mountain project ceased operations in September 2010. *See* DOE Mot. at 4-5. "An active licensing proceeding would thus require DOE to, among other things, re-hire employees, enter into new contracts for necessary services, and re-create capabilities . . . ." *Id.* at 5; *see also supra* note 3.

In short, given the limited funds that remain available, issuing a writ of mandamus amounts to little more than ordering the Commission to spend part of those funds unpacking its boxes, and the remainder packing them up again. This exercise will do nothing to safeguard the separation of powers, which my colleagues see as imperiled by the NRC's conduct. *See* Court Op. at 7, 21-22. And because "[i]t is within our discretion not to order the doing of a useless act," *Sierra Land & Water*, 84 F.2d at 232, I respectfully dissent.[5]

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[5]*Cf. In re Barr Labs.*, 930 F.2d at 76 ("Congress sought to get generic drugs into the hands of patients at reasonable prices -- fast. The record before us reflects a defeat of those hopes. There are probably remedies[, including] more resources. . . . [N]one is within our power, and a grant of [the] petition [for mandamus] is no remedy at all.").

Mr. SHIMKUS. I also would ask unanimous consent to submit for the record an August 20 editorial by The New York Times entitled, "Time to Stop Stalling on Nuclear Waste." Without objection, so ordered.

[The information follows:]

The New York Times

The Opinion Pages

August 20, 2013

Time to Stop Stalling on Nuclear Waste

By THE EDITORIAL BOARD

A federal appeals court has given the Nuclear Regulatory Commission a well-justified rebuke for "flouting the law" when it stopped analyzing the safety of the proposed nuclear waste site at Yucca Mountain in Nevada, some 100 miles northwest of Las Vegas. The commission engaged in some questionable maneuvers aimed at preventing the Yucca site from ever opening, thus carrying out pledges to scuttle the facility made by President Obama, while campaigning for the presidency in 2008, and Senator Harry Reid, a Democrat of Nevada and the majority leader, who has ferociously opposed the site for years.

A few years ago, the commission, then led by one of Mr. Reid's former aides, claimed that it lacked enough money to continue evaluating a licensing application for the site, including its overall safety, that had been submitted by the Department of Energy. It shut down the licensing program, dismantled the computer system upon which it depended, removed certain findings from reports evaluating the site, shipped the documents to storage and reassigned the program's personnel to other projects.

Last week, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit ruled 2 to 1 that the commission could not abort the licensing review while there was still money available for it. Although Congress has appropriated little or no money for the review in recent years, it has not told the commission it should not spend previously appropriated funds. There is $11 million left from past appropriations — enough to complete and publish a full safety evaluation, including conclusions that had previously been suppressed.

After spending decades and billions of dollars in studying Yucca, Congress ought to appropriate enough new funds to complete the overall licensing evaluation to determine whether or not Yucca would make an acceptable repository. Meanwhile, as a step in that process, we urge the commission not to appeal the court decision but instead use its remaining money to publish an unredacted safety evaluation. The information would be useful because underground burial, if not at Yucca then elsewhere, remains the preferred option for permanent disposal.

Meet The New York Times's Editorial Board »

Mr. SHIMKUS. I also ask unanimous consent to submit for the record a letter that Chairman Upton and I sent to the NRC on August 23 discussing the recent decision of the U.S. Court of Appeals for the DC Circuit and the NRC's response dated September 6, 2013. Without objection, so ordered.

[The information follows:]

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225-2927
Minority (202) 225-3641

August 23, 2013

The Honorable Allison M. Macfarlane
Chairman
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

Dear Chairman Macfarlane:

On August 13, the U.S. Court of Appeals for the District of Columbia Circuit issued a Writ of Mandamus compelling the Nuclear Regulatory Commission to resume its review of the Department of Energy's license application to construct a repository at Yucca Mountain. In light of this decision, the Committee on Energy and Commerce is continuing oversight of NRC's actions relating to its license review. Accordingly, we write to request your attendance at a hearing before the Subcommittee on Environment and the Economy, scheduled for September 10, 2013, to update the Committee on the Commission's actions to implement the Court's decision.

In a February 28, 2013 hearing before the Subcommittee on Environment and the Economy, you and your fellow commissioners committed to honor the Court's decision concerning resumption of the license review and to provide monthly reports on the staff's progress and expenditure of resources. The Committee will look forward to the monthly reports, beginning in September.

A critical milestone in the license review process is the NRC's public release of its Safety Evaluation Report (SER) on the proposed Yucca Mountain design. The SER documents the NRC technical staff's independent evaluation to determine whether the repository will comply with public health, environmental, and safety standards, including such standards that apply after the repository is closed. We understand from documents and testimony that outstanding volumes of this report may be completed and released within a matter of months. The NRC, in responses for the February 28 hearing record, confirmed that an estimated 6-8 months was needed to complete all volumes of the SER at a cost of $6.5 million. In a hearing before the House Energy and Water Appropriations Subcommittee, NRC staff testified that the NRC currently has $11.1 million in unobligated funds available for the purpose of reviewing the license application.

Given these available resources and the progress already made to complete the SER, it is our expectation that the NRC's first action to implement the Court's decision will be to diligently resume its review of the license application, complete the SER, and issue it publicly. Our country has invested 30 years and $15 billion in determining whether Yucca Mountain would be a safe repository. The NRC is this nation's nuclear safety regulator and its reputation for independence and objectivity rests on its transparency in this matter. As such, NRC's objective, scientific findings regarding the safety of Yucca Mountain would provide the public an independent, authoritative assessment of this important project.

To assist in the Committee's preparation for the forthcoming hearing, please provide the following information no later than September 6, 2013:

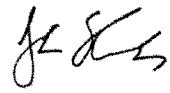
1) A description of actions already taken to comply with the August 13 Court Order, including any reassignment of staff; and

2) NRC's remaining schedule for releasing each volume of the Safety Evaluation Report.

Additional instructions relating to the hearing and the submission of testimony will be provided under a separate cover. If you have any questions or concerns, please contact Annie Caputo of the Energy and Commerce Committee staff at (202) 225-2927.

Sincerely,

Fred Upton
Chairman
Committee on Energy and Commerce



John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Henry A. Waxman, Ranking Member
Committee on Energy and Commerce

The Honorable Paul Tonko, Ranking Member
Subcommittee on Environment and the Economy

cc: The Honorable Kristine L. Svinicki, Commissioner, U.S. Nuclear Regulatory Commission

The Honorable George Apostolakis, Commissioner, U.S. Nuclear Regulatory Commission

The Honorable William D. Magwood, IV, Commissioner, U.S. Nuclear Regulatory Commission

The Honorable William C. Ostendorff, Commissioner, U.S. Nuclear Regulatory Commission

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

CHAIRMAN

September 6, 2013

The Honorable Fred Upton
Chairman, Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Upton:

On behalf of the Commission, I write in response to your August 23, 2013 letter discussing the recent decision by the U. S. Court of Appeals for the District of Columbia Circuit directing the U. S. Nuclear Regulatory Commission (NRC) to resume its review of the Department of Energy's (DOE) application to construct a geologic repository for high-level waste at Yucca Mountain, Nevada. The letter also indicated your intent to hold a hearing on September 10, 2013 before the Subcommittee on Environment and the Economy on the Commission's actions to implement the Court's decision.

In preparation for the upcoming hearing, you requested responses to two questions. Our responses are provided in the enclosure to this letter.

I also want to follow up on a commitment that the Commission made during the February 28, 2013 hearing held jointly by the Subcommittees on Energy and Power, and Economy and the Environment. When my colleagues and I appeared before you, we agreed that the NRC would submit monthly progress reports to the Committee if the Court ordered the agency to resume its review of the DOE license application. With the Court's decision now rendered, we will consider September 2013 to be the beginning point for activities to be captured in these monthly reports. Our first progress report to the Committee will be mid-October 2013, then continuing each month thereafter.

Please feel free to contact me or Rebecca Schmidt, Director of Congressional Affairs, at (301) 415-1776 if you have additional questions or need more information. I look forward to appearing before the Subcommittee on September 10, 2013.

Sincerely,

Allison M. Macfarlane

Enclosure:
As stated

cc: Representative Henry A. Waxman

1) A description of actions already taken to comply with the August 13 Court Order, including any reassignment of staff: and

On August 30, 2013, the Commission issued an Order inviting all participants to the suspended adjudication to provide the Commission with their views on how the NRC should continue with the licensing process. The responses from the parties are due on September 30, 2013. The Commission has also directed the NRC offices to gather pertinent budgeting information. This work by the NRC staff is currently underway.

Based on the input from the parties and the budget information provided by NRC offices, the Commission will determine the path forward.

2) NRC's remaining schedule for releasing each volume of the Safety Evaluation Report.

In August 2010, the NRC staff published the first volume of a five-volume Safety Evaluation Report (SER). The complete SER would represent the staff's technical determination as to whether the proposed repository meets NRC's safety and security regulations and whether construction should be authorized with appropriate license conditions. At the end of fiscal year 2011, the NRC formally suspended its review of the Yucca Mountain license application. At the time of the suspension, the four remaining volumes of the SER were in various stages of completion.

The Commission's decision on the path forward will address issues pertaining to the resumption of the NRC's review of the DOE license application to construct a repository at Yucca Mountain, including the schedule for completion of the SER volumes.

Identical letter to:

The Honorable Fred Upton
Chairman, Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515
cc: Representative Henry A. Waxman

The Honorable John Shimkus
Chairman, Subcommittee on Environment
and the Economy
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515
cc: Representative Paul Tonko

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225-2927
Minority (202) 225-3641

August 26, 2013

The Honorable Ernest Moniz
Secretary
U.S. Department of Energy
1000 Independence Ave, S.W.
Washington, D.C. 20585

Dear Secretary Moniz:

On August 13, the U.S. Court of Appeals for the District of Columbia Circuit issued a Writ of Mandamus compelling the Nuclear Regulatory Commission (NRC) to resume its review of the Department of Energy's (DOE's) license application to construct a repository at Yucca Mountain. In light of this decision, the Committee on Energy and Commerce is continuing oversight of DOE's actions relating to the license review. Accordingly, we write to request that you provide a witness for a hearing before the Subcommittee on Environment and the Economy, scheduled for September 10, 2013, to update the Committee on DOE's actions to cooperate with the NRC and with the Court's decision given DOE's status as the license applicant.

On April 11, 2013, Asst. Secretary Peter Lyons testified before the House Energy and Water Appropriations Subcommittee that DOE had $18.5 million in Nuclear Waste Fund money remaining from previous appropriations. In a July 31, 2013 hearing before the Subcommittee on Environment and the Economy, you testified that if the Court directed the NRC to resume its review of the Yucca Mountain license application, DOE would support it, given appropriations.

Our country has invested 30 years and $15 billion in determining whether Yucca Mountain would be a safe repository. A critical milestone in the license review process is the NRC's public release of its Safety Evaluation Report (SER) on the proposed Yucca Mountain design. The SER documents the NRC technical staff's independent evaluation to determine whether the repository will comply with public health, environmental, and safety standards, including such standards that apply after the repository is closed. It is our expectation that the NRC's first action to comply with the Court's decision will be to complete the SER and issue it publicly. Given DOE's available resources, and your testimony, we expect DOE to fully support the NRC in this objective. In keeping with a similar commitment made by the NRC, we ask that DOE begin providing monthly reports detailing actions and expenditures in support of the license review. We look forward to the first of these reports in September.

To assist in the Committee's preparation for the forthcoming hearing, please provide the following information no later than September 6, 2013:

1) A description of actions already taken to cooperate with the NRC and with the August 13 Court Order, including any reassignment of staff or direction given to contractors;
2) A list of active contracts that could be utilized in support of the license review;
3) A detailed description of all resources available to support the license review including any unexpended funds, either obligated or unobligated to existing contractors or national laboratories; and
4) Copies of any schedule or work plans developed by DOE or its contractors for the purpose of restarting the Yucca Mountain repository program.

Should you have any questions, please contact Annie Caputo of the Committee staff at 202-225-2927.

Sincerely,

Fred Upton
Chairman

John Shimkus
Chairman
Subcommittee on Environment and the Economy

Attachment

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Paul Tonko, Ranking Member
Subcommittee on Environment and the Economy

Department of Energy
Washington, DC 20585

August 30, 2013

The Honorable John M. Shimkus
Chairman, Environment and the Economy Subcommittee
Energy and Commerce Committee
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Shimkus:

Thank you for your letter of August 26, 2013 regarding the upcoming hearing of the Subcommittee on Environment and the Economy and your request for information. Secretary Moniz asked that I respond to your request for information.

The U.S. Court of Appeals for the District of Columbia Circuit issued a writ of mandamus on August 13, 2013, ordering the Nuclear Regulatory Commission to resume its review of the Yucca Mountain license application. As the Secretary and I have stated in testimony before you and other committees of the House and the Senate, the Department of Energy intends to comply with the law and will act to support the NRC's review should that review be recommenced, subject to the availability of funds. The writ of mandamus takes effect on September 3, 2013.

The NRC has not yet issued any notices or orders to the parties to the license application proceeding, including the Department of Energy, regarding how the NRC intends to move forward. Therefore, as yet, the Department has not taken any action with regard to the NRC proceeding on the Yucca Mountain license application.

The information you request in preparation for the upcoming hearing is included in this letter as enclosures.

Printed with soy ink on recycled paper

Should you have any questions, please contact me or Christopher Davis of the Office of Congressional and Intergovernmental Affairs at 202-586-5450.

Sincerely,

Peter B. Lyons
Assistant Secretary
for Nuclear Energy

Enclosures

Enclosure 1: *A description of the actions already taken to cooperate with the NRC and the August 13 Court Order, including any reassignment of staff or direction given to the Contractors.*

The Department of Energy has not yet taken any actions with regard to the Yucca Mountain licensing proceeding. It is anticipated that the Nuclear Regulatory Commission will inform the parties to the proceeding, including the Department of Energy, on how it will move ahead with the licensing proceeding and the Department will take appropriate actions in response to any NRC Order in the proceeding.

Enclosure 2: *A list of the active contracts that could be utilized in support of the license review.*

For purposes of this response, "support of the license review" is taken to mean being involved with a restart of the NRC licensing proceeding, including discovery followed by hearings before the Nuclear Regulatory Commission's (NRC) Atomic Safety and Licensing Board (ASLB) on the close to 300 contentions admitted into the proceeding. Active contracts that could be used to support these activities include those below. The actual contracts that would be utilized will in the end be dependent upon the path forward and specific activities implemented by the NRC.

Legal services:

- Hunton and Williams LLP
- Morgan, Lewis & Bockius LLP

National Laboratories:

- Sandia National Laboratories (as the lead lab)
- Argonne National Laboratory
- Lawrence Berkeley National Laboratory
- Lawrence Livermore National Laboratory
- Los Alamos National Laboratory
- Pacific Northwest National Laboratory

Other Contracts

- USA Repository Services LLC (the Management and Operating contractor for the Office of Civilian Radioactive Waste Management, for technical expertise, particularly related to preclosure contentions).
- Jason Associates Corporation (technical expertise related to Environmental Impact Statement-related contentions)

Enclosure 3: *A detailed description of all resources available to support the license review including any unexpended funds, either obligated or unobligated to existing contractors or national laboratories.*

Status of Prior Year Funds:

Prior Year Funds

	Unobligated	Obligated Uncosted	Total
Defense Nuclear Waste Disposal	$ 8,590,655	$ 14,229,473	$ 22,820,128
Nuclear Waste Disposal	$ 7,149,301	$ 15,547,411	$ 22,696,712
Total, Prior Year	$ 15,739,956	$ 29,776,884	$ 45,516,840

Obligated Uncosted Funds by Contractor:

Contractor Name	Obligated Uncosted Balance
Legal Services:	
HUNTON AND WILLIAMS LLP	$ 3,282,732.52
MORGAN, LEWIS & BOCKIUS LLP	$ 489,096.42
National Laboratories:	
SANDIA CORPORATION	$ 4,170,739.63
Other Contractors:	
USA REPOSITORY SERVICES LLC	$ 9,570,965.50
JASON ASSOCIATES CORPORATION	$ 1,098,850.19
U.S. GEOLOGICAL SURVEY, DEPT OF INTERIOR	$ 603,567.00
BOOZ ALLEN HAMILTON INC.	$ 3,263,463.90
BROOKFIELD RELOCATION INC. (Travel/PCS)	$ 3,021,962.41
OFFICES, BOARDS & DIVISIONS (Fed Prison Ind., Inc.)	$ 1,425,195.21
KPMG L.L.P.	$ 450,321.42
Other	$ 2,399,989.80
Total	$ 29,776,884.00

Enclosure 4: *Copies of any schedule or work plans developed by DOE or its contractors for the purpose of restarting the Yucca Mountain repository program.*

There are currently no work plans or schedules in place for restarting the Yucca Mountain repository program. However, as noted in DOE's response to the Government Accountability Office's report, "Effects of a Termination of the Yucca Mountain Repository Program and Lessons Learned," GAO-11-229, DOE took a number of steps when terminating the program to facilitate a restart of the licensing proceeding.

1. Preservation of Scientific Knowledge

DOE took extensive efforts to preserve the data related to its licensing efforts, as well as other scientific information relevant to the storage or disposal of nuclear waste. DOE has preserved technical databases relevant to the licensing process, including the Technical Data Warehouse System, the Total System Performance Assessment, and the Records Information System, all of which could be made available again.

2. Maintenance of the Licensing Support Network (LSN)

While the NRC shut down its portal when it suspended its work on the Yucca Mountain license application, DOE preserved the contents of the LSN in accordance with the determinations rendered by the National Archives and Records Administration (NARA), which is the agency that oversees federal records retention. The LSN collection can be made available again to support licensing.

3. Ability to Reconstitute Staff

During the shutdown process, the Department took significant steps to assist Federal employees to find alternate employment with the Department. The Department tailored these steps to maintain core federal capabilities in the science and program management areas that would be required, in the event DOE were to resume the license application process. In addition, the vast majority of contractor personnel who worked on the Yucca Mountain Project did so under contracts with either Sandia National Laboratory or USA Repository Services LLC, the project management and operations contractor. Those contracts have not been terminated, and through them the Department could access substantial contractor expertise if needed in the licensing process. In sum, DOE has taken steps to ensure that, while there would be some delay, it could resume the licensing proceeding if so ordered, subject to the availability of funds.

Mr. SHIMKUS. Then, finally, Chairman Upton and I received a letter from Ranking Members Waxman and Tonko indicating their desire to examine the status of Fukushima Nuclear Plant in Japan. We look forward to discussing those issues with the full commission when they appear this fall. And so we want to thank you for that input.

And I would like to recognize myself for 5 minutes for my opening statement.

OPENING STATEMENT OF HON. JOHN SHIMKUS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

On August 13, the U.S. Court of Appeals for the District of Columbia Circuit granted a writ of mandamus stating that "the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process." The purpose of our hearing today is to examine the next steps for the NRC and the Department of Energy to implement the court's decision.

Thank you, Chairman Macfarlane and Assistant Secretary Lyons, for your testimony today.

In its decision, the court rebuked the NRC for "simply flouting the law," something this committee recognized long ago. How is it that an independent agency with a clear statutory responsibility is criticized by a Federal court for having "no current intention of complying with the law"?

Today's hearing will be focused on looking forward, but we have to be cognizant of the agency actions that led to this situation and vigilant against resurgent efforts to undermine the statutory process. The Commission's recent order to give the parties until September 30 to comment on how the NRC should proceed, however well-intentioned, is eerily reminiscent of past NRC efforts to slow the review process and to stall the release of its Safety Evaluation Report.

On June 3, 2008, the DOE filed a license application for construction authorization to build a repository at Yucca Mountain. NRC accepted the application and docketed it on September 8, 2008. By the end of 2009, it was becoming clear that the DOE would close down the Yucca Mountain program, abandoning the 30 years of research and $15 billion invested. By March 3, 2010, the DOE filed a motion to withdraw the license application in a manner that would prevent any further consideration of the site.

On June 29, 2010, the NRC's Construction Authorization Board denied DOE's motion. In spite of this, then-NRC Chairman Greg Jaczko was already laying the groundwork to unilaterally cease the NRC's review of the license application, as we learned in our hearing to review the NRC Inspector General's report on this subject.

According to the IG's report, in spring of 2010, NRC staff informed Chairman Jaczko that they were ahead of schedule and could issue SER Volumes 1 and 3 earlier than the previously projected dates of August and November 2010. This is very important information. In fact, the NRC executive director had the impression that Volume 3 would be ready for publication in the summer of 2010. In June 2010, Chairman Jaczko directed the staff in a memo to maintain their public schedule and not issue Volumes 1 and 3 early.

At that point, it was clear to the deputy executive director that the chairman planned to close down the license review on October 1 and that "the practical effect of the Chairman's June memorandum was that it prevented the staff from issuing Volume 3 should it have been finalized prior to October 1."

Indeed, on October 4, Chairman Jaczko directed the staff to cease its review of the license citing the Continuing Resolution even though the CR would continue to provide funding for the review at the existing level of $29 million. He later told the IG that it was his responsibility to manage the agency's workload and workflow with regard to scheduling.

Here we are, nearly a month after the DC Circuit issued a writ of mandamus, and the NRC's only action we have seen so far is to invite the parties to comment by September 30. Electricity consumers and taxpayers have waited 30 years and paid $15 billion to find out whether our independent nuclear safety regulator concluded that Yucca Mountain would be safe or not. Releasing the SER is the next step in the NRC process. The NRC has the money to do it. A Federal court has ruled that the NRC must proceed, and the NRC says hold on; let's ask the parties what they think. This does not seem like the posture of an agency intent on complying with a writ of mandamus. Instead, the NRC appears again to be stalling.

I won't speak for other members on this committee but I want to be very clear: I strongly believe the NRC's first order of business is to complete and release the Safety Evaluation Report. Transparency in this matter is essential to rebuilding the agency's reputation as an independent and objective regulator.

[The prepared statement of Mr. Shimkus follows:]

PREPARED STATEMENT OF HON. JOHN SHIMKUS

On August 13, the U.S. Court of Appeals for the District of Columbia Circuit granted a writ of mandamus stating that "the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process." The purpose of our hearing today is to examine the next steps for NRC and the Department of Energy to implement the court's decision. Thank you, Chairman Macfarlane and Assistant Secretary Lyons for testifying today.

In its decision, the court rebuked the NRC for "simply flouting the law," something this committee recognized long ago. How is it that an independent agency with a clear statutory responsibility is criticized by a Federal court for having "no current intention of complying with the law"? Today's hearing will be focused on looking forward, but we have to be cognizant of the agency actions that led to this situation and vigilant against resurgent efforts to undermine the statutory process. The commission's recent order to give the parties until September 30th to comment on how the NRC should proceed, however wellintentioned, is eerily reminiscent of past NRC efforts to slow the review process and to stall the release of its safety evaluation report.

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According to the IG's report, in spring of 2010, NRC staff informed Chairman Jaczko that they were ahead of schedule and could issue SER Volumes 1 and 3 earlier than the previously projected dates of August and November of 2010. In fact, the NRC Executive Director had the impression that Volume 3 would be ready for publication in summer 2010. In June of 2010, Chairman Jaczko directed the staff in a memo to maintain their public schedule—and not to issue Volumes 1 and 3 early.

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Here we are, nearly a month after the DC Circuit issued a writ of mandamus, and the NRC's only action we've seen so far is to invite the parties to comment.by September 30. Electricity consumers and taxpayers have waited 30 years and paid $15 billion to find out whether our independent nuclear safety regulator concluded that Yucca Mountain would be safe or not, releasing the SER is the next step in the NRC's process, the NRC has the money to do it, a Federal court has ruled that the NRC must proceed, and the NRC says "hold on, let's ask the parties what they think." This does not seem like the posture of an agency intent on complying with a writ of mandamus. Instead, the NRC appears to again be stalling. I won't speak for other members on this committee, but I want to be very clear: I strongly believe the NRC's first order of business is to complete and release the Safety Evaluation Report. Transparency in this matter is essential to rebuilding the agency's reputation as an independent and objective regulator.

Mr. SHIMKUS. And with that, I yield back the balance of my time and I yield to the ranking member, Mr. Tonko, for 5 minutes.

OPENING STATEMENT OF HON. PAUL TONKO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. TONKO. Thank you, Chair Shimkus. Good morning, everyone.

And the United States Court of Appeals has now issued a ruling ordering the Nuclear Regulatory Commission to resume review of the Yucca Mountain license application. I do not think this action alone has resolved much related to the ongoing questions about the fate of nuclear waste. The court decision does not reverse the opposition to the Yucca Mountain project in the State of Nevada. It does not require the NRC or DOE to move forward without additional appropriated funds. And at this time, there is still a possibility that one or more of the parties to this case will appeal the ruling.

It seems we all still have a great deal of work to do if we are to move nuclear waste policy forward. Yucca Mountain may or may not be part of this policy. Even if it is, we are still many years, perhaps decades, from placing the first waste into this repository. If nuclear power is to play a role in our future energy supply, we need to explore other options for dealing with this waste that could be implemented more quickly.

I do not expect we will resolve anything today. I hope we will be able to move forward and work together to provide a constructive solution to this very critical, very important problem.

I want to thank Chair Macfarlane and Dr. Lyons for appearing before the subcommittee today and would yield my remaining time to the gentleman from Texas, Mr. Green.

OPENING STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GREEN. I thank my colleague and our ranking member for yielding.

Mr. Chairman, thank you for holding this timely hearing on nuclear waste at Yucca Mountain. I also want to thank Chair Macfarlane and Assistant Secretary Lyons for joining us this morning.

Earlier this year, Chair Macfarlane and her fellow commissioners before this very subcommittee committed to honoring the court's decision concerning the review of Yucca Mountain license application. Since that time, the DC court ruled that the NRC must resume its review in accordance with the Nuclear Waste Policy Act.

I hope to hear in today's hearing that the NRC and DOE will be following through with earlier statements and will use the available resources to move the review process as far along as possible. This should include plan to complete the Safety Evaluation Reports which this subcommittee is told would take an estimated 6 to 8 months to complete at a cost of 6.5 million. This should be all the more the case in light of the fact that the NRC currently has over 11 million and DOE has 16 million in unobligated funds appropriated specifically for Yucca licensing activities.

I also look forward to hearing how the NRC will be putting together the best staff possible to complete the SERs, hopefully with assigning many of the same people who worked on the review process before it was halted prematurely.

Finally, I believe the court's ruling gives this committee, the Energy Department, and the NRC an opportunity to redouble our collective efforts in finding a final solution on this matter that can be based on consensus science in honor of the $15 billion investment the American people have already made towards a permanent SNF storage.

Our country has a real serious and pending issue at hand with regard to the storage and the disposal of nuclear waste and must be dealt with sooner rather than later. Currently spent fuel and reprocessed waste is stored at nuclear plants and 77 sites scattered across the U.S. mounting to over 70,000 metric tons of spent nuclear fuel. Local communities are spending millions of dollars annually to ensure the safety and protection of our nuclear waste. Even with these current sites, we are still producing nuclear waste, and that waste will need to be stored for at least 1,000 years.

If we do not take action by following the circuit court's decision or Congress finding a different path forward on this important issue, all of us—DOE, NRC, and Congress—will be letting down the very people we were sent here for and endanger the health and safety of our communities.

Again, I thank Chair Macfarlane and Assistant Secretary Lyons for appearing today and I look forward to your testimony. And I again thank my colleague for my time.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the chairman of the full committee, Mr. Upton, for 5 minutes.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Thank you, Mr. Chairman. And I appreciate Chair Macfarlane and Dr. Lyons here today this morning as well.

As we know, the court recently ordered the NRC to proceed with the Yucca Mountain license review. And the first task in complying with the court's mandate and with the Nuclear Waste Policy Act is in fact to release the Safety Evaluation Report. Fortunately, you do indeed have the resources to proceed with that release.

Congress needs the opportunity to examine the NRC's long-overdue unredacted technical analysis, and the public who paid for it deserve to know the report's conclusions. During the last 3 years the administration has been suppressing this document, Congress has been denied an informed discussion about next steps.

For quite some time, Members on both sides of the aisle have been saying—with our words and with our votes—Yucca Mountain is in fact the law of the land. And a month ago, in August, the DC Circuit Court did agree and ordered that NRC must proceed with the license review. The path forward is unmistakable. Compliance with the law is not optional.

The framework of the Nuclear Waste Policy Act is simple: electricity consumers pay for the cost of used fuel disposal as part of the cost of that electricity, and taxpayers pay for the disposal costs of the high-level waste legacy of the Cold War. But the reality of our current situation is in fact a lot different. With no progress on a permanent repository, both ratepayers and taxpayers continue to be charged, yet they aren't getting what they are paying for.

DOE is spending the Nuclear Waste Fund money to shut down a licensing process which the court has said must proceed. NRC is spending resources to revise a Waste Confidence Rule as a result of the repository program being shut down. And DOE is spending taxpayer money on a sidetrack effort to supplant Yucca Mountain.

Unfortunately, the disjointed policies have resulted in higher costs. Moreover, electricity consumers are investing about $750 million each year for fuel disposal, but none of the money is currently being spent for that purpose and used fuel sits at reactor sites, piling up even more costs to consumers.

Resumption of the Yucca Mountain program remains the clearest, fastest, and most fiscally responsible way for the government to meet its obligation to provide disposal, to mitigate liability costs, and to reestablish a solid basis for the Waste Confidence Rule. Not to mention, it is the law.

Politics needs to be removed once and for all from this process. We have got to remember that while the administrations come and go, used fuel is here to stay, and after three decades it is time that we finally achieve a permanent storage site. The NRC's completion of the SER is the necessary and long-overdue next step.

The issue has enjoyed a long history of bipartisanship and we will work very hard to continue that tradition until the job gets done.

And I yield back my time.

[The prepared statement of Mr. Upton follows:]

PREPARED STATEMENT OF HON. FRED UPTON

The court recently ordered NRC to proceed with the Yucca Mountain license review. And the first task in complying with the court's mandate, and with the Nuclear Waste Policy Act, is releasing the Safety Evaluation Report. Fortunately, you already have the resources to proceed with its release.

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This issue has enjoyed a long history of bipartisanship and we will work to continue that tradition until the job gets done.

Mr. SHIMKUS. The gentleman yields back his time. The chair now recognizes the ranking member of the full committee, Mr. Waxman, for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you, Mr. Chairman.

Our nuclear waste laws are not working. Instead of holding yet another hearing on Yucca Mountain, this committee should be working to reform them. In 1987, Congress designated Yucca Mountain in Nevada as the sole site to be considered for a permanent geologic repository for spent nuclear fuel and high-level radioactive waste. There was no plan B. This decision to short-circuit the site selection process was widely viewed as political and provoked strong opposition in Nevada.

Twenty-five years later, it is clear that this top-down approach has broken down. President Obama wisely sought a new approach. He chartered a Blue Ribbon Commission to develop a new strategy for managing the country's nuclear waste. Last year, we heard testimony from the co-chairs of this Blue Ribbon Commission on the recommendations that resulted from their 2-year effort.

In July, Secretary Moniz testified about DOE's strategy for implementing many of those recommendations. He argued that a consent-based approach to siting was essential and his testimony raised a number of important policy questions, such as whether to create a new organization to manage the nuclear waste problem, how to use nuclear waste fees, and whether to construct one or more consolidated interim storage facilities in addition to one or more permanent geologic repositories.

These are policy questions that require Congress to respond. Answering these questions requires an open mind and willingness to move past a narrow obsession with Yucca Mountain. But this committee seems fixated on Yucca Mountain.

In August, the Court of Appeals issued a decision on the legality of the Nuclear Regulatory Commission's decision to suspend its review of DOE's application for a permanent repository at Yucca Mountain. The court ordered NRC to continue its review of the Yucca Mountain license application as long as it has any appropriated funds to do so. The problem with this decision is that NRC has just spent money so that 11 million in leftover funds is available for this purpose. This amount is not nearly enough to complete the review. In fact, the dissenting judge argued that the court was ordering NRC to "do a useless thing" because most of the $11 million would be spent restarting the process and the rest spent putting the materials back into storage.

The reality is that the court decision has not really changed anything. The decision does nothing to reduce the long-standing public opposition to Yucca Mountain. It does not establish a consent-based siting process or a new organization to focus on the waste problem, and it does not solve the tricky funding and appropriations issues to make sure that the funds put aside for constructing a repository or storage facility can actually be used for that purpose. A court decision was never going to resolve any of these issues.

Today, the majority has summoned NRC and DOE for another meeting of the Yucca Mountain fan club, but the Commission hasn't had a chance to evaluate its options, develop its response to the court decisions, or even decide whether to appeal the decision. We should spend our witnesses' valuable time discussing other pressing nuclear safety issues.

Yesterday, I sent a letter requesting a hearing on the troubling developments at the Fukushima plant in Japan. Radioactive water is leaking into the ground and the Pacific Ocean. Some hotspots have radiation levels high enough to deliver a lethal dose in 4 hours. The events in Japan deserve the subcommittee's attention, as do NRC's ongoing implementation of lessons learned from the Fukushima disaster and the closure of the San Onofre plant in California.

Yucca Mountain has become a hopelessly divisive issue. The sooner we recognize this and start considering a truer reform, the sooner we will be able to fulfill our responsibility to craft a sustainable nuclear waste policy for the Nation. Thank you, Mr. Chairman. I yield back my time.

Mr. SHIMKUS. The gentleman yields back his time. I would now like to recognize myself for 5 minutes. Oh, I am sorry. I am so excited about going to questions. So let me now recognize Madam

Chairman from the Nuclear Regulatory Commission, Ms. Macfarlane, for 5 minutes for an opening statement.

STATEMENTS OF ALLISON M. MACFARLANE, CHAIRMAN, NUCLEAR REGULATORY COMMISSION, AND PETER B. LYONS, ASSISTANT SECRETARY FOR NUCLEAR ENERGY, DEPARTMENT OF ENERGY

STATEMENT OF ALLISON M. MACFARLANE

Ms. MACFARLANE. Thank you, Chairman Shimkus.

Good morning, Chairman Shimkus, Ranking Member Tonko, and distinguished members of the subcommittee. On behalf of the U.S. Nuclear Regulatory Commission, I appreciate the opportunity to appear before you to discuss the actions the NRC is taking to comply with the court's decision on Yucca Mountain licensing activities. I am also pleased to appear with Assistant Secretary Lyons.

The written testimony I have submitted for the record contains information about the NRC's response to the recent court decision on Yucca Mountain and the status of the NRC's technical and adjudicatory activities at the time they were suspended in 2011.

As you are aware, on August 13, a panel of the U.S. Court of Appeals for the DC Circuit directed the NRC to resume its review of the Department of Energy's application to construct a geologic repository for high-level nuclear waste at Yucca Mountain. On August 30, the Commission issued an order requesting that all parties to the suspended adjudication provide their views within 30 days on how the NRC should continue with the licensing process. The Commission has also directed the NRC offices to gather pertinent budgeting information during this comment period.

The Commission will make an objective, transparent, and collegial determination about the path forward based on the internal and external input we receive. Because the Commission has not yet reached its decision, it would be inappropriate for me to speculate about what the final direction would be.

In March 2010, the DOE filed a motion to withdraw its license application, and at the end of fiscal year 2011, the NRC formally suspended its review. Between the time that the DOE submitted its application in 2008 and the suspension in 2011, the NRC staff conducted its regulatory review. Among other things, the staff's technical actions included work on the Safety Evaluation Report, otherwise known as the SER, the 5 volumes of which were left in various stages of completion.

Separately, on the adjudicatory side, multiple parties filed petitions seeking a hearing in this licensing proceeding and the Atomic Safety Licensing Board, or ASLB, granted most of the hearing requests. The focus of adjudicatory hearings is on whether the license applicant has demonstrated that the regulations have been met and the license should be issued. As the license applicant in this case, the DOE bears the burden of making this demonstration.

When the adjudicatory proceeding was suspended, the ASLB closed out all activities associated with the hearing process on the DOE application. At that time, a total of 288 contentions had been pending resolution on the merits. To date, no evidentiary hearings have been held.

In addition, the NRC had created a web-based Licensing Support Network, otherwise known as the LSN. This is required by our regulations as a means for making all documents related to the adjudicatory proceedings available electronically to all participants. The NRC has preserved these records but the LSN is no longer active.

I recognize that the completion of the 5-volume SER is of particular interest. The NRC is confronted with challenges associated with reconstituting a multidisciplinary team to resume the licensing process. In addition, this milestone represents one, albeit important, element in the overall required licensing process. All of the issues raised before the ASLB must also be resolved.

Finally, a completed adjudicated Environmental Impact Statement and supplement is also necessary for a licensed decision.

As this committee is aware, the NRC does not have sufficient resources to complete all the remaining steps. As part of the normal license review process, the NRC would also need the DOE's participation as the applicant to address any issues the NRC identifies. I defer to DOE officials to address the Department's ability to do so.

Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee, the Commission will act expeditiously to direct the staff on how to expend the agency's remaining resources under the Nuclear Waste Fund. The Commission's recent order will help ensure that our decision has the full benefit of views submitted by various parties to the adjudicatory proceedings. We will provide additional information to the subcommittee through monthly reports as our decision process continues.

I would be pleased now to respond to your questions.

[The prepared statement of Ms. Macfarlane follows:]

WRITTEN STATEMENT

BY ALLISON M. MACFARLANE, CHAIRMAN

UNITED STATES NUCLEAR REGULATORY COMMISSION

TO THE

HOUSE COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

SEPTEMBER 10, 2013

Good morning, Chairman Shimkus, Ranking Member Tonko, and distinguished members of the Subcommittee. On behalf of the U.S. Nuclear Regulatory Commission (NRC)[1], I appreciate the opportunity to appear before you today to talk about the recent court decision on Yucca Mountain and what it means for the NRC.

As you are aware, on August 13, 2013, a panel of the U.S. Court of Appeals for the District of Columbia Circuit issued its decision directing the NRC to resume its review of the Department of Energy's (DOE) application to construct a geologic repository for high-level waste at Yucca Mountain, Nevada. The NRC promptly began taking steps to comply with the court's direction following the issuance of the decision. While the full nature of the direction we will take remains under Commission review, I commit to provide additional information to you as our decision process continues.

COMMISSION ACTIONS PURSUANT TO COURT DECISION

On August 30, 2013, the Commission issued an Order requesting that all parties to the suspended adjudication provide the Commission with their views on how the NRC should continue with the licensing process. The responses from the parties are due on September 30,

[1] Commissioner George E. Apostolakis has recused himself from the adjudicatory proceeding and did not participate in the development or review of this testimony.

2013. The Commission has also directed the NRC offices to gather pertinent budget information during the 30 day comment period. Based on the input from the parties and the budget information provided by NRC offices, the Commission will determine the path forward in the licensing process. Because the Commission has not reached a decision on the path forward for the agency, it would be inappropriate for me to speculate about what the final direction will be.

ROLES AND RESPONSIBILITIES

The NRC is an independent regulatory agency, whose mission is to license and regulate the Nation's civilian use of radioactive materials, to protect public health and safety, promote the common defense and security, and protect the environment. Under the Nuclear Waste Policy Act, the DOE is responsible for developing and submitting to the NRC a license application for the construction of a high-level waste repository at Yucca Mountain. The NRC is required by law to review the application and determine whether to issue a construction authorization to the DOE, based in part on standards set by the Environmental Protection Agency (EPA) and implemented in NRC regulations. The focus of the NRC's review is on whether the DOE has demonstrated that it can construct and operate a repository safely and in compliance with NRC regulations.

The DOE submitted its license application to the NRC in June 2008. In September the application was accepted for docketing, and in October, the Commission published a notice in the *Federal Register* inviting interested persons to request a hearing. Multiple interested parties petitioned for a hearing on the DOE license application, and a hearing was granted. From that point forward, as the NRC staff conducted its technical review of the application, the Atomic Safety and Licensing Board (ASLB) presided over the adjudicatory proceeding. I will discuss the staff's actions first and then discuss the role of the ASLB and its extensive responsibilities.

NRC STAFF ACTIONS

The NRC expert technical staff was tasked with conducting an independent, thorough review of the repository design and making an objective determination on whether the design met the safety, security, and safeguards requirements under NRC regulations. The staff was also responsible for examining the DOE's environmental documents to determine whether the NRC could adopt the DOE Environmental Impact Statement (EIS) on the proposed repository. In September 2008, the NRC staff adopted the EIS, subject to additional supplementation on groundwater analyses. In October 2008, the DOE had notified the NRC of its intent to supplement the EIS. Subsequently, in July 2009, the DOE notified the NRC that it had decided not to prepare a supplement. To satisfy National Environmental Policy Act (NEPA) obligations, the EIS would need to be supplemented.

Between 2008 and 2010, the NRC staff, along with the Federally-funded Center for Nuclear Waste and Regulatory Analyses, conducted a detailed regulatory review and began the preparation of its safety evaluation report (SER). In March 2010, the DOE filed a motion to withdraw its application. At the end of fiscal year 2011, the NRC formally suspended its review of the Yucca Mountain license application. At the time of the suspension, the first of a five-volume SER had been published and there were four remaining volumes in various stages of completion. The complete SER would represent the staff's technical determination as to whether the proposed repository meets NRC's safety and security regulations and whether construction should be authorized with appropriate license conditions.

In response to the suspension of the Yucca Mountain licensing program, the staff did not complete the SER, but instead documented the technical review completed to date in three technical evaluation reports (TER). The TERs do not make regulatory findings on the adequacy of the proposed facility or its compliance with regulations.

With the court's decision in hand directing that the NRC resume its review, I recognize that the completion of the five-volume SER will be of particular interest. This milestone represents one, albeit significant, element in the overall process required by law and/or regulations. Our staff is now gathering budget information to facilitate Commission decisions regarding the path forward.

As the Commission noted in its last appearance before this committee, the agency is confronted with challenges associated with reconstituting the multi-disciplinary team to resume the licensing process if the court so directed. The staff's information will also take these staffing considerations into account.

As part of the normal license review process, the NRC would need the DOE's participation as the applicant to address any issues identified by the review team. I defer to DOE officials to address the Department's ability to do so.

ATOMIC SAFETY AND LICENSING BOARD ACTIVITIES

Additional considerations for the Commission in determining the path forward involve the adjudicatory proceeding and the related licensing support network (LSN). The Atomic Energy Act requires that an opportunity for a hearing must be provided for NRC licensing actions. This process is separate from the work the technical staff would be doing on the technical and environmental review. In the case of the licensing of a geologic repository for high-level waste, the Commission's regulations require that, if a member of the public requests a hearing and meets certain procedural requirements, including the submission of issues they wish to raise in opposition to the license application, referred to as contentions, the request for a hearing will be granted. That hearing must be completed before a final decision on whether to issue the license can be made. In that case, an Atomic Safety and Licensing Board (ASLB) is assigned to preside over the hearing. The Board is an independent panel of three administrative judges.

Multiple parties filed petitions seeking a hearing in this licensing proceeding and the ASLB granted most of the hearing requests. It is important to note that the focus of these adjudicatory hearings is on whether the license applicant, in this case the DOE, has demonstrated that the regulations have been met and the license should be issued. Therefore, the applicant bears the burden of making this demonstration. The NRC technical staff is required to be a party to these hearings and is required to explain its position, described in the SER, on whether the license should be granted. To date, no evidentiary hearings have been held.

When the adjudicatory proceeding was suspended, as directed by the Commission, the ASLB closed out all activities associated with the hearing process on the DOE application. At that time, a total of 288 contentions had been pending resolution on the merits. In addition to the appointment of the multiple boards, a specialized multimedia hearing facility was established in Las Vegas principally to serve as the venue for related hearings and conferences. We have since closed that facility. In addition, as required by regulations, the NRC created a web-based LSN, as a discovery tool that captures documentary material and makes it available electronically to all participants. The NRC has preserved these records but the LSN is no longer active.

Before the Commission can reach a decision on the license application, a number of other adjudication-related activities must occur, including the appointment of a board to conduct this proceeding; the completion of discovery; the conduct of a full evidentiary hearing on the nearly 300 pending contested issues that were raised by multiple parties in opposition to the license; and, finally, the issues before the ASLB would need to be resolved. A completed, adjudicated EIS and supplement is also necessary for a license decision to satisfy NEPA requirements. In addition, the parties would have the right to appeal the licensing boards' final

decisions resolving contentions to the Commission. All of these steps must be completed before a final agency decision on the construction authorization can be made.

Recognizing the significance of the adjudicatory process in an ultimate licensing decision, the Commission's August 30 Order sought views from the various participants.

FUNDING CONSIDERATIONS

The NRC currently has approximately $11.1 million in unobligated carryover money appropriated from the Nuclear Waste Fund. There is also an additional $2.5 million of obligated, unexpended Nuclear Waste Fund money.

As this Committee is aware, the NRC does not have in reserve sufficient resources to complete all of the necessary steps in this licensing process. No additional funds for high-level waste were requested or appropriated to the NRC in fiscal year 2012 or fiscal year 2013. The matter of whether or not funds are appropriated for the fiscal year 2014 is before Congress and the fiscal year 2015 budget development process is well underway. As the court noted in its decision, the underlying policy debate related to the matter of future funding for the NRC license review of DOE's Yucca Mountain license application is for Congress and the President to address.

CONCLUSIONS

Chairman Shimkus, Ranking Member Tonko, and members of the Subcommittee, the Commission remains committed to acting independently, collegially, transparently, and objectively in responding to the court's decision on Yucca Mountain. We will act expeditiously to direct the agency on how to proceed in the licensing process using the agency's limited remaining resources under the Nuclear Waste Fund. While the ultimate nature of that direction remains under Commission review, the Commission's recent Order will help ensure that our

decision has the full benefit of views submitted by the various parties to the adjudicatory proceedings. Finally, per our commitment to the Committee during the February 28, 2013 hearing, the Commission will submit monthly progress reports relative to the expenditure of unobligated carryover money appropriated from the Nuclear Waste Fund. These will begin with the September report, which is to be provided by mid-October of this year. I would be pleased to respond to your questions.

Mr. SHIMKUS. Thank you, Madam Chair.

I now would like to recognize Mr. Peter Lyons, Assistant Secretary for Nuclear Energy.

Sir, you are recognized for 5 minutes.

STATEMENT OF PETER B. LYONS

Mr. LYONS. Thank you, Mr. Chairman Shimkus, Ranking Member Tonko, and members of the subcommittee. I appreciate your invitation to testify at the subcommittee's hearing today.

The administration takes seriously its obligations to manage and dispose of used nuclear fuel and high-level radioactive waste, as emphasized in the testimony of Secretary Moniz to this subcommittee just a few weeks ago.

President Obama has made climate change mitigation a priority and set a goal of reducing emissions in the range of 17 percent below 2005 levels by 2020. He has emphasized the important role of nuclear power in his all-of-the-above clean energy strategy.

Nuclear power remains the United States single largest contributor with more than 60 percent of non-greenhouse gas emitting electric power generation while it has reliably and economically contributed almost 20 percent of electrical generation in the United States over the past two decades. We believe that nuclear energy will continue to be an important part of the Nation's low carbon future. Finding a solution to managing and disposing of the Nation's high-level radioactive waste and used nuclear fuel is a long-standing challenge. Such a solution, however, is necessary to assure the future viability of this important carbon-free energy supply and further strengthen America's standing as a global leader on issues of nuclear safety and nonproliferation.

The administration's strategy for the management and disposal of used nuclear fuel and high-level radioactive waste provides a framework for the administration and Congress to continue to develop the path forward for disposal of nuclear waste and provides near-term actions to be implemented by the Department of Energy pending enactment of new legislation. We are facing a unique opportunity to address the needs of the back end of the nuclear fuel cycle by setting it on a sustainable path providing the flexibility needed to engage potential host communities and anticipate advancements in technology development. The administration is ready and willing to engage with both chambers of Congress to move forward.

Since Secretary Moniz testified before this subcommittee, the U.S. Court of Appeals for the DC Circuit has issued a writ of mandamus ordering the NRC to resume its review of the Yucca Mountain license application. On August 30, the NRC issued an order inviting all participants in the license proceeding to provide by September 30 their views as to how the agency should proceed. The Department is carefully considering how to respond to this order.

As we have long made clear, however, the Department will comply with NRC or judicial orders that are directed to DOE subject of course to the availability of appropriated funds. And as recently reported to the subcommittee, the Department currently has approximately 16 million in unobligated funds originally appropriated for Yucca Mountain licensing activities, and in addition, the De-

partment has approximately 30 million in obligated on cost of balances already committed on existing contracts.

As we have said consistently, any workable solution for the final disposition of used fuel and nuclear waste must be based not only on sound science but also on achieving public acceptance at the local, State, and tribal levels. When this administration took office, the timeline for opening Yucca Mountain had already been pushed back by two decades with no end in sight. It was clear that stalemate could continue indefinitely. Rather than continuing to spend billions of dollars more on a project that faces such strong opposition, the administration believes a pathway similar to that that the Blue Ribbon Commission laid out, a consent-based solution, is one that meets the country's national and energy security needs and has the potential to gain the necessary public acceptance.

The administration looks forward to working with this committee and other Members of Congress on crafting a path forward for used nuclear fuel and high-level waste management and disposal. This progress is critical to assure that the benefits of nuclear power are available to current and future generations.

And I will be pleased to answer questions that you folks may have.

[The prepared statement of Mr. Lyons follows:]

Statement of Dr. Peter Lyons, Assistant Secretary for Nuclear Energy
U.S. Department of Energy
Before the
Subcommittee on Environment and the Economy
Energy and Commerce Committee
U.S. House of Representatives
September 10, 2013

Chairman Shimkus, Ranking Member Tonko, and members of the Subcommittee, thank you for your invitation to testify at the Subcommittee's hearing today. The Administration takes seriously its obligations to manage and dispose of used nuclear fuel and high-level radioactive waste, as emphasized in the testimony of Secretary Moniz to this Subcommittee a few weeks ago.

President Obama has made climate change mitigation a priority and set a goal of reducing emissions in the range of 17 percent below 2005 levels by 2020. He has emphasized the important role of nuclear power in his "all-of-the-above" clean energy strategy. Nuclear power remains the United States' single largest contributor (more than 60 percent) of non-greenhouse-gas-emitting electric power generation while it has reliably and economically contributed almost 20 percent of electrical generation in the U.S. over the past two decades. We believe that nuclear energy will continue to be an important part of the nation's low carbon future. Finding a solution to managing and disposing of the nation's high-level radioactive waste and used nuclear fuel is a long-standing challenge. Such a solution, however, is necessary to assure the future viability of this important carbon-free energy supply and further strengthen America's standing as a global leader on issues of nuclear safety and nonproliferation.

The Administration's *Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste* provides a framework for the Administration and Congress to continue to develop the path forward for disposal of nuclear waste and provides near-term actions to be implemented by the Department of Energy pending enactment of new legislation. We are facing a unique opportunity to address the needs of the back-end of the nuclear fuel cycle by setting it on a sustainable path and providing the flexibility needed to engage potential host communities and anticipate advancements in technology development. The Administration is ready and willing to engage with both chambers of Congress to move forward.

Recent Events

Since Secretary Moniz testified before this Subcommittee, the U.S. Court of Appeals for the D.C. Circuit has issued a writ of mandamus ordering the Nuclear Regulatory Commission to

resume its review of the Yucca Mountain license application. On August 30, the NRC issued an order inviting all participants in the licensing proceeding to provide, by September 30th, their views as to how the agency should proceed. The Department is carefully considering how to respond to this order. As we have long made clear, however, the Department will comply with NRC or judicial orders that are directed to DOE, subject, of course, to the availability of appropriated funds.

As recently reported to the Subcommittee, the Department currently has approximately $16 million in unobligated funds originally appropriated for Yucca Mountain licensing activities. In addition, the Department has approximately $30 million in obligated uncosted balances, already committed on existing contracts.

Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste

As we have said consistently, any workable solution for the final disposition of used fuel and nuclear waste must be based not only on sound science but also on achieving public acceptance at the local, state and tribal levels. When this Administration took office, the timeline for opening Yucca Mountain had already been pushed back by two decades with no end in sight. It was clear that stalemate could continue indefinitely. Rather than continuing to spend billions of dollars more on a project that faces such strong opposition, the Administration believes a pathway similar to that the Blue Ribbon Commission laid out — a consent-based solution — is one that meets the country's national and energy security needs and has the potential to gain the necessary public acceptance.

To that end, the Administration continues to support the development of a pilot interim storage facility with an initial focus on accepting used nuclear fuel from shut-down reactor sites. Acceptance of used nuclear fuel from shut-down reactors provides a unique opportunity to build and demonstrate the capability to safely transport and store used nuclear fuel, and therefore to make progress on demonstrating the federal commitment to addressing the used nuclear fuel issue. Beyond a pilot-scale facility, the Administration supports the development of a larger consolidated interim storage facility with greater capacity and capabilities that will provide flexibility in operation of the transportation system and disposal facilities. The Administration is committed to advancing development of both interim storage and geologic disposal facility options in parallel, even though they may become operational at different times. The development of geologic disposal capacity is currently the most cost-effective way of permanently disposing of used nuclear fuel and high-level radioactive waste while minimizing the burden on future generations.

The Administration looks forward to working with this Committee and other Members of Congress on crafting a path forward for used nuclear fuel and high-level waste management and disposal. This progress is critical to assure that the benefits of nuclear power are available to current and future generations. I would now be pleased to answer any questions you may have.

Mr. SHIMKUS. I thank you.

Now, before I start my questions, Madam Chairman, I am going to hand you four documents that I will be referring to in my questions. And I would like to recognize myself for 5 minutes.

Madam Chairman, have you read the June 6, 2011, NRC Inspector General's report that I referred to in my opening statement?

Ms. MACFARLANE. Sorry. Can you repeat the question?

Mr. SHIMKUS. It is right in front of you. Have you ever read that June 6, 2011, NRC Inspector General's report that I referred to in my opening statement? And if you would, could you please read——

Ms. MACFARLANE. I——

Mr. SHIMKUS [continuing]. The highlighted excerpt from the IG's report on page 28 regarding comments by the NRC's assistant general counsel?

Ms. MACFARLANE. Sure. You want me to read this?

Mr. SHIMKUS. Please.

Ms. MACFARLANE. Sure. And for the record I have not read this before.

Mr. SHIMKUS. OK. Then it is instructional to do so.

Ms. MACFARLANE. Good. She said that as of—she, I assume, is the assistant——

Mr. SHIMKUS. Assistant general counsel.

Ms. MACFARLANE [continuing]. General counsel. She said that "as of July 15, 2010, Volume 3 had been provided to the NMSS director and was reported to be substantially complete. However, the document was undergoing additional editing and formatting, including a final quality control check to assure appropriate nomenclature, proper numbering and sequencing, and other minor administrative changes that may be necessary to ensure completeness and accuracy."

Mr. SHIMKUS. Thank you. So Volume 3 was substantially complete except for editing and formatting. In fact, when Chairman Jaczko directed the staff to stop their work on October 4, 2010, the NRC was within about 3 months of issuing Volume 4, within 5 months of issuing Volume 2, and just 6 months from releasing Volume 5. And you kind of mentioned in your opening statement at various stages. According to the NRC's internal schedule, which this committee examined in our June 2011 hearing with the IG.

Now, I want to turn your attention to a commission memorandum and order labeled CLI–09–14, which you also have with you, which states, "today, we respond to appeals of the Construction Authorization Board's first prehearing conference order."

Ms. MACFARLANE. I don't have it I am afraid.

Mr. SHIMKUS. Oh. OK. I am sorry you don't have that. We can get it to you.

But now, according to Federal regulations Part 2, Appendix D, which is the schedule for NRC to conduct the construction authorization proceeding, 150 days after the application was docketed, the Commission was supposed to rule on appeals for the first prehearing conference order, which we know the Commission did based upon CLI–09–14. Chairman Macfarlane, would you please read the next item, which is highlighted on the schedule, which is the next step to take.

Ms. MACFARLANE. Certainly, yes. So this is Appendix D to Part 2 of the 10 CFR. And this is the schedule for proceeding with—this is the process laid out——

Mr. SHIMKUS. Right.

Ms. MACFARLANE [continuing]. In the regulations.

Mr. SHIMKUS. Transparent.

Ms. MACFARLANE. Right.

Mr. SHIMKUS. On your Web site—

Ms. MACFARLANE. Exactly.

Mr. SHIMKUS [continuing]. For everyone to see.

Ms. MACFARLANE. So on day 548 the action is that the Nuclear Regulatory Commission staff issues the Safety Evaluation Report.

Mr. SHIMKUS. Great. Thank you. This committee has previously established that NRC has enough funding to complete and release the SER in our February 28, 2013, so we are not going to allow you to commingle this financial debate based upon other activities. Our point is confirmed in testimony that you have the funds available to finish the SER.

In our February 28, 2013, hearing you agreed that if the Court required NRC to move forward, you would do so. As you have just read, releasing the SER is the very next action for the NRC to take. Given that the NRC was required to begin complying with the writ of mandamus last week on September 3, is the NRC currently taking any action to complete the remaining SER volumes?

Ms. MACFARLANE. We have taken action already. The Commission is operating expeditiously on this matter. We issued an order that requested——

Mr. SHIMKUS. But what have you done other than asking for other people to weigh in? What have you done in this month to start moving the SER forward?

Ms. MACFARLANE. Thank you for the question. We have asked our staff to provide us with budget information. We have to understand the lay of the land in terms of the——

Mr. SHIMKUS. And you will be providing us monthly updates——

Ms. MACFARLANE. And we will provide you monthly——

Mr. SHIMKUS. And we will ask you to provide monthly updates on exactly what we are doing to move the SER forward?

Ms. MACFARLANE. We will provide you monthly updates on where we are going and what we are doing. And I believe the first monthly update will begin in the middle of October.

Mr. SHIMKUS. And my last question, the "transparency page" of the NRC Web site states, "the U.S. Nuclear Regulatory Commission has a long-standing practice of conducting its regulatory responsibilities in an open and transparent manner."

Ms. MACFARLANE. Um-hum.

Mr. SHIMKUS. In that way, the NRC keeps the public informed of the agency's regulatory licensing and oversight activities, which you stated earlier. Dr. Macfarlane, especially in light of the NRC's commitment to transparency, you don't really see a scenario where the NRC will decide not to release a Safety Evaluation Report, do you?

Ms. MACFARLANE. You know, we are still deliberating on that so I can't say——

Mr. SHIMKUS. So you might find a way in which you might not——

Ms. MACFARLANE. I can't say one way or the other but I——

Mr. SHIMKUS. But the court has said you must and we know you have the money.

Ms. MACFARLANE. The court has said we must proceed with the licensing.

Mr. SHIMKUS. And you have already testified that you have the money——

Ms. MACFARLANE. We——

Mr. SHIMKUS [continuing]. For the Safety Evaluation Report.

Ms. MACFARLANE. We testified, I believe it was last spring—

Mr. SHIMKUS. You testified——

Ms. MACFARLANE. Yes, that there——

Mr. SHIMKUS [continuing]. That you would comply with the law.

Ms. MACFARLANE. I certainly did.

Mr. SHIMKUS. And you would submit the Safety Evaluation Report, and you also testified that we have the money to do so. So the question is you don't see any scenario that you would not do this?

Ms. MACFARLANE. We are still taking views from the parties——

Mr. SHIMKUS. So you do see a scenario where you may not do this?

Ms. MACFARLANE. We are still taking views from the parties and we will——

Mr. SHIMKUS. Madam Macfarlane, are you going to comply with the law based upon your previous statements and the fact that you have money available to do so?

Ms. MACFARLANE. Of course we will comply with the law.

Mr. SHIMKUS. Thank you very much.

I would like to now recognize Mr. Tonko for 5 minutes.

Mr. TONKO. Thank you, Chair Shimkus.

I would like to thank Chair Macfarlane and Dr. Lyons for appearing before the subcommittee today, but I regret that we didn't wait a few weeks to let NRC and DOE take some time to figure out a path forward in light of the Court of Appeals decision. I therefore ask about the status of the proceedings so that Members will have a better sense of what questions you are able to answer at this time.

On August 30, NRC issued an order inviting all participants to the Yucca Mountain proceeding to provide their views as to how the Commission should continue with the licensing process. This is an opportunity for both the opponents and supporters of Yucca Mountain to make suggestions to the Commission about how they should proceed. The deadline for providing their views, I believe, is September 30.

So, Chair Macfarlane, are you able to testify today about the likely outcome of that stakeholder process?

Ms. MACFARLANE. No.

Mr. TONKO. And, Dr. Lyons, has DOE responded to this order yet?

Mr. LYONS. No, Mr. Tonko.

Mr. SHIMKUS. Is your mike on or is it pulled close enough to you?

Mr. LYONS. I am sorry. Is this better?

Mr. SHIMKUS. Yes, sir.

Mr. LYONS. OK. Mr. Tonko, we are awaiting action by the NRC with regard to their decision before we decide how to proceed with the licensing effort.

Mr. TONKO. OK. Thank you. The Commission also directed the NRC staff to gather pertinent information, budget information, during this 30-day comment period. There is only $11 million available so you will need to know what the price tag would be for the range of possible activities. Chair Macfarlane, are you able to give definitive estimates today about the cost of various options without the budget information that is currently being developed?

Ms. MACFARLANE. No, I am not. That is why we asked the staff to collect the information for us.

Mr. TONKO. Thank you. And how long after that September 30 deadline will it take for NRC to compile all of the views and produce a plan for responding to that court decision?

Ms. MACFARLANE. I am not certain at this point in time but we will endeavor to work as expeditiously as possible.

Mr. TONKO. I thank you for that. It makes sense for NRC to await the outcome of this public comment process before reaching conclusions about the very best way to spend the agency's limited resources. You should get the facts and do the stakeholder outreach before making decisions.

So the story of the Yucca Mountain repository is a story of one group of stakeholders believing that they could ignore the concerns of another group of stakeholders. That is a mistake we do not want to repeat.

There is the separate question of whether the Court of Appeals decision will be appealed. Chairman Macfarlane, has a window for NRC to appeal the court's decision closed?

Ms. MACFARLANE. I am sorry. Can you repeat the question?

Mr. TONKO. Sure. Has the window for NRC to appeal the court's decision closed?

Ms. MACFARLANE. No, it has not.

Mr. TONKO. OK. And will you be able to share NRC's plans to appeal or to not appeal the decision with us today?

Ms. MACFARLANE. No, I cannot.

Mr. TONKO. Other parties may choose to appeal. Is that correct?

Ms. MACFARLANE. That is correct. Other parties may choose to appeal.

Mr. TONKO. So we don't even know whether the Court of Appeals decision will be the final answer in this case?

Ms. MACFARLANE. That is correct.

Mr. TONKO. In many ways, the Department of Energy's planning is contingent upon NRC determining its next step. Dr. Lyons, what actions can DOE take with regard to the license application before NRC determines how to proceed?

Mr. LYONS. I am sorry. Could you repeat that question? I am not—

Mr. TONKO. Sure. What actions can DOE take with regard to the license application before NRC determines how to proceed?

Mr. LYONS. We really are in a position where we must await the actions by the NRC, understand their path forward, and what we

may be required from the Department of Energy, and only then can I answer that question. It would be premature now.

Mr. TONKO. Thank you. And, Chair Macfarlane, would you have been in a better position to answer the subcommittee's questions about implementation of the court's order in a few weeks?

Ms. MACFARLANE. In a few weeks, yes.

Mr. TONKO. And, Dr. Lyons, what about you?

Mr. LYONS. Yes. Once we understand the path forward identified by the NRC, we can then evaluate how we will respond.

Mr. TONKO. Thank you. Well, I hope that members of the subcommittee will be mindful of the position have placed witnesses in by insisting that they testify today rather than in a few weeks. Members want to know what the plan is for responding to the court's order but the plan hasn't been developed yet. The court issued its order less than 2 weeks ago and the agencies need to examine the options and the cost of those options to see what can be done with the limited funds available.

These are questions that will be answered in due time I am convinced. Unfortunately, it seems obvious that we won't get those answers today.

And with that, I will yield back, Mr. Chair.

Mr. SHIMKUS. The gentleman yields back his time. I would just remind my colleague that they have had 30 days since the court order, and we can always have them come back, which I am sure they would be happy to do so.

Mr. TONKO. I am talking about valuable use of their time in a way that brings into working order all of the requirements that have been asked.

Mr. SHIMKUS. And I am talking about oversight by the legislative branch over the executive branch and independent agencies.

I yield now 5 minutes to Mr. Gingrey for his statement.

Mr. GINGREY. I thank the chairman for yielding and I agree with him completely the importance of the oversight of the legislative branch over the executive branch, and as he just pointed out, you have had 30 days. And why should we waste additional time, therefore the timeliness of this hearing. And I do appreciate both of you being here.

I strongly agree that the NRC should immediately work to issue the Safety Evaluation Report. The cost of completing and publicly releasing the SER has been estimated to be $6.5 million. Now, that seems a little high to me, but as I understand it, the Safety Evaluation Report is comprised of 5 volumes. Volume 1 was completed and released so that means there are 4 volumes left, as pointed out by Chairman Shimkus. Volume 3 was reportedly substantially complete. On page 27, the Inspector General's June 6 report, the IG report that the NMSS director believed that minimal resources were needed to complete the review process and issue Volume 3. She also commented that by September 30, 2010, NRC had all the information it needed from DOE to complete the SER.

To Chairman Macfarlane, please answer yes or no, Chairman Macfarlane. So Volume 3 is substantially complete and requires minimal resources, correct? Yes or no?

Ms. MACFARLANE. I have not seen Volume 3 and I understand it is in some stage of completion but I do not know the entire stage

of completion. I do not know how much, how many resources it will take to complete. That is why we have asked the staff to go and make some estimates—

Mr. GINGREY. Yes, but therefore, it shouldn't take long to issue that one. Is that also correct?

Ms. MACFARLANE. It depends largely on what the staff says it needs. I think we need to understand something to begin with here that the staff that we had originally assigned to work on the Safety Evaluation Report have since been reassigned; a number of them have retired. And so it will take some time to reassemble this group. Being mindful that there are a number of staff who are working now on mission-critical issues and we need to be careful that we don't—

Mr. GINGREY. Well, it seems——

Ms. MACFARLANE [continuing]. Lose that safety—

Mr. GINGREY. Madam Chairman, it sounds like what you are saying is it depends heavily on whether they are go-getters or foot-draggers, this replacement team that you are talking about.

Dr. Lyons, yes or no, is it your understanding that completing the SER doesn't require any additional information by the Department of Energy, thereby not costing the Department of Energy, DOE, any additional resources? Yes or no?

Mr. LYONS. I can't respond to that, sir, because it would depend on whether the NRC asks us additional questions if they were to choose to move in that direction. I haven't seen the SER either and I have no idea what NRC may request of us.

Mr. GINGREY. Well, during the June 14, 2011, hearing, this committee examined the NRC internal schedule for releasing the SER volumes. When former Chairman Jaczko shutdown the staff's review October the 4th, 2010, Volume 2 was about 5 months for being published. Now, this was 2010. Volume 4 was a little over 3 months from being published, and Volume 5 was less than 6 months from being published. That is a fact.

Chairman Macfarlane, given these volumes were nearly ready and do not require any input from DOE, why should it cost $6.5 million to complete and publish them?

Ms. MACFARLANE. I don't know how much it will cost to complete and publish these. That is why we have asked the staff to give us estimates of what they need in terms of resources and—

Mr. GINGREY. Well, do you know this, Dr. Macfarlane? How much money will be spent seeking comments from the parties?

Ms. MACFARLANE. A de minimis amount.

Mr. GINGREY. Does that money come from the Nuclear Waste Fund?

Ms. MACFARLANE. I am going to take that one for the record just to be sure.

Mr. GINGREY. If you will get back to me on that——

Ms. MACFARLANE. Sure.

Mr. GINGREY [continuing]. I would greatly appreciate it.

And lastly, Dr. Macfarlane, will you commit to having the Commission approve all NWF expenditures, Nuclear Waste Fund expenditures?

Ms. MACFARLANE. Have the Commission—

Mr. GINGREY. Will you commit to having the Commission approve all Nuclear Waste Fund expenditures?

Ms. MACFARLANE. I am going to have to take that one for the record, too. I need to find out what the required process is in regulations and in the law.

Mr. GINGREY. Well, I know you can't get that to me in 2 seconds, but I would very much appreciate that information.

Ms. MACFARLANE. Absolutely.

Mr. GINGREY. I yield back.

Mr. SHIMKUS. The gentleman yields back the time.

The chair now recognizes the chairman emeritus, Mr. Dingell, for 5 minutes.

Mr. DINGELL. Chairman, I commend you for the hearing. I thank you for the recognition. My questions will require mostly yes-or-no answers.

And I want to begin by saying we have a fine mess on our hands. The taxpayers are paying, ratepayers are paying, money is being dissipated, work that should be done is not being done.

Madam Chairman, I don't blame you for this. This antedates your work and a lot of it originates in a place in the United States Senate.

In any event, according to a recent ruling by the DC Circuit Court in testimony you have given to this subcommittee, NRC has approximately $11 million in funding for the licensing review process. Since you last testified before this subcommittee in February, has the NRC spent any of these funds? Yes or no?

Ms. MACFARLANE. Since the court decision, the NRC spent a de minimis amount. We are now focused on going forward in determining how to spend that remaining amount.

Mr. DINGELL. Would you submit to us a statement of how much has been spent and how much remains in that fund?

Now, Madam Chairman, I understand NRC has an open comment period soliciting feedback on how the Commission should move forward in light of the DC court's recent decision. One major step in the process is completion of the Safety Evaluation Report. One of the 5 volumes has already been completed and it is my understanding that the technological evaluation reports were completed on 3 of the 4 remaining volumes. Does NRC have staff in place to that is qualified to take these technical evaluations and complete the safety evaluations with the appropriate recommendations? Yes or no?

Ms. MACFARLANE. We don't have them all in place now. We are asking the staff to get back to us about staffing and resource needs.

Mr. DINGELL. Would you submit to us, please, a statement of the status of those matters for the record?

If NRC were only to focus on completion of the Safety Evaluation Reports, do you believe you have enough funds to complete the work on the reports? Would you please answer yes or no?

Ms. MACFARLANE. As referenced earlier in previous testimony, we said that it would cost to 6.5 million to complete the SER—

Mr. DINGELL. So the answer is——

Ms. MACFARLANE [continuing]. But we have asked our staff to update that number.

Mr. DINGELL. Would you submit us a statement of the status of those funds, please?

Now, Mr. Lyons, is DOE collecting fees into the Nuclear Waste Fund? Yes or no?

Mr. LYONS. Yes, the funds continue to be—

Mr. DINGELL. Thank you. The DC Circuit Court decision in 2012 ordered DOE to reevaluate the fee assessment. Since Yucca Mountain facility has not moved forward in recent years and there is still no statutorily alternative site for a permanent high-level waste repository, has DOE considered whether it should continue to assess the fee? Please answer yes or no.

Mr. LYONS. Mr. Dingell, as Secretary Moniz discussed when he was with this subcommittee, the fees continue to be collected because they—

Mr. DINGELL. So——

Mr. LYONS [continuing]. Reference a service of disposal of the used fuel.

Mr. DINGELL. Is that a yes or no, sir? My time is very limited. Please, yes or no? To the question, yes or no?

Mr. LYONS. Again, these—

Mr. DINGELL. OK. Would you please submit additional information on that matter for purposes of the record?

Now, because the Federal Government has not upheld its responsibility to provide a permanent high-level nuclear waste repository, it is my understanding that orders of nuclear facilities are suing the Federal Government for compensation to store waste on sites and locations across the country. According to the February 2012 report by CRS, there has been over $2 billion in awards and settlements as a result of these claims. These payments come from the judgment funded by taxpayers' dollars. The Department of Justice has spent approximately 200 million defending the government against these claims.

Now, Madam Chairman, I urge NRC to focus on the completion of the Safety Evaluation Reports. Should the reports determine that the Yucca Mountain facility is appropriate, hopefully opponents will allow the process to move forward. Should the reports deem the Yucca Mountain unsafe, I think this committee and I are prepared to work with all of our colleagues to amend the Nuclear Waste Policy Act and to find a viable path forward in order to deal with the safe disposition of nuclear waste. We have to find a way forward and I believe that the completion of the Safety Evaluation Report will significantly help us follow the path forward. Will you please comment on that with a yes or no? Do you agree or not?

Ms. MACFARLANE. Completion of—

Mr. DINGELL. Just yes or no.

Ms. MACFARLANE. Completion of the Safety Evaluation Report is one step in the overall process and we are already receiving other—

Mr. DINGELL. Madam Chairman, I am going to ask you just yes or no and then I am going to ask you to submit a further statement for the record on the matter.

Ms. MACFARLANE. It is a complex situation. I can't answer yes or no.

Mr. DINGELL. All right. Well, this demonstrates what a magnificent mess we have here, and I don't blame you, Madam Chairman, but you sure have got to get busy to get it fixed.

Thank you, Mr. Chairman.

Mr. SHIMKUS. And I thank my colleagues.

The chair now recognizes the gentleman from Kentucky, Mr. Whitfield, for 5 minutes.

Mr. WHITFIELD. Chairman Shimkus, I want to thank you very much for having this important hearing.

You know, my humble opinion, the Obama administration has really established a pattern of disregarding laws that they do not agree with.

Now, in 1987 Congress passed the Act identifying Yucca Mountain as a primary national repository site. Prior to that, DOE looked at nine sites, but in '87 Congress acted. And in this decision I would like to just read some excerpts from this decision that was just issued. "The Nuclear Regulatory Commission has continued to violate the law governing the Yucca Mountain licensing process. The statutory deadline for the Commission to complete the licensing process and approve or disapprove the Department of Energy's application has long since passed. Yet the Commission still has not issued the decision required by statute. Indeed by its own admission the Commission has no current intention of complying with the law. Rather, the Commission has simply shut down the review and consideration of the process."

Now, from a taxpayer standpoint, $15 billion has been spent on Yucca Mountain, and in 1983, the government entered into contracts with the 104 nuclear power plants roughly that the government would take possession of that material, that waste material in 1998. That time has come and gone and the Federal Government was sued because they did not take possession because Yucca Mountain was not completed. And so in addition to the $15 billion spent on Yucca Mountain, we now have judgments that, by 2020, is supposed equal $19 billion because the government cannot meet its contractual obligation.

And so here the taxpayers are with a $17 trillion Federal debt, 34 billion spent on Yucca Mountain, and the court is saying that the Nuclear Regulatory Commission, which you are now responsible for, Chairman Macfarlane—you have been there for a year and a half—and I don't blame you for this because you did not take the action that precipitated these lawsuits, but with all of this money spent and with a clear violation of the Federal law, I would hope that you and Mr. Lyons—Mr. Lyons has been at the Department of Energy since the beginning of the Obama administration, I believe. I hope that you will do everything possible to expedite this, not try to rewrite the law, not try to change other people's opinion, but make a decision based on the safety issues. And even the court says there is $11 million available right now to start this process.

And so can you commit to the committee that you intend to move forward to try to obey the law?

Ms. MACFARLANE. Certainly. We commit to moving as expeditiously as possible.

Mr. WHITFIELD. And I hope that you will direct your staff to do the same.

Ms. MACFARLANE. We have already done so.

Mr. WHITFIELD. Do you have any comments, Mr. Lyons?

Mr. LYONS. I would only comment that the dollar values that you cite are precisely the reason why the administration feels strongly that it is important that we move forward on a workable solution as opposed to spending still more money on an unworkable solution.

Mr. WHITFIELD. Well, I mean it is a Federal law right now that Yucca Mountain is the designated site. So I don't think that you all have a right to go around and—I mean, I know what the Blue Ribbon Commission said. They want to just start all over again, but we have a Federal law on the books. The courts have said that it needs to be enforced and the court has said that the Nuclear Regulatory Commission is violating the law. So with all due respect to the great work that you all do, the great responsibility that you have, I do think you also have a responsibility to be leaders and enforce the law and try to protect the taxpayers' money.

And the President frequently talks about an all-of-the-above policy. I support an all-of-the-above energy policy. And yet what he is doing in the area of nuclear would indicate that he is not really committed to that and we know that you cannot build a new coal-powered plant in America, the only country in the world where you cannot do so. So how can he say that he is for an all-of-the-above energy policy?

And my time is expired.

Mr. SHIMKUS. The gentleman's time is expired.

The chair now recognizes the ranking member of the full committee, Mr. Waxman, for 5 minutes.

Mr. WAXMAN. Thank you very much, Mr. Chairman.

I would like to ask Chairwoman, Chair Macfarlane?

Ms. MACFARLANE. Chairman.

Mr. WAXMAN. Chairman Macfarlane, you have testified today that the NRC is still formulating its response to the recent court ruling and that it is hard to discuss a plan that isn't yet created. Therefore, before turning to Yucca Mountain, I want to ask you and take this opportunity to inquire about some issues that are important to the people of California about recent events at the damaged Fukushima nuclear power plant in Japan.

Over the last several months, news reports have painted a troubling picture of the situation at Fukushima. The Tokyo Electric Power Company, TEPCO, announced that pits and tanks holding vast amounts of radioactive wastewater had begun leaking. Contaminated water is flowing into the Pacific Ocean at the rate of about 300 tons per day. At the same time, Japanese officials have said that TEPCO may need to release contaminated water from the storage tanks into the ocean. Some news reports have raised concerns about whether radiation entering the Pacific Ocean from Fukushima could eventually reach the shoreline of the United States and its territories.

Chairman Macfarlane, what impact if any will the contaminated water from Fukushima have on America's West Coast? What assurances can I give my constituents at this time?

Ms. MACFARLANE. Thanks for the question. This is an important issue and I know it has been in the news a lot lately so I know it is of concern to many people.

Contaminated water has essentially, my understanding, been leaking from the Fukushima site since the beginning of the accident. One thing people should keep in mind is that the largest releases of contamination of radioactive materials were 2½ years ago, and they were significantly larger than anything that is being released on a daily basis now. But the good news is the Pacific Ocean is very large and any radionuclides that get into the Pacific Ocean near Fukushima will be diluted by many thousands of times by the time they get anywhere near the West Coast of the United States. And so in the end there will be very little harm or negligible harm to the West Coast of the United States. So people in the U.S.—

Mr. WAXMAN. Well, that is comforting.

Ms. MACFARLANE. —can remain assured that they will be OK.

Mr. WAXMAN. It appears that TEPCO did not adequately anticipate the challenges of managing vast amounts of radioactive wastewater over a long period of time. This raises questions about additional lessons that we can learn from the Japanese experience. What is NRC's Fukushima task force doing to review the wastewater challenges at the Fukushima plant and apply any lessons learned to U.S. facilities?

Ms. MACFARLANE. Well, we are certainly and we have been taking lessons through the entire accident and now as well, and my understanding is that some of our research folks are looking into the situation of dealing with large volumes of contaminated water after an accident now.

Mr. WAXMAN. So you are continuing to prioritize preventing an accident at U.S. facilities but NRC has tasked some researchers with a question of how better to handle large primes of radioactive wastewater?

Ms. MACFARLANE. Yes.

Mr. WAXMAN. Is that your position?

Ms. MACFARLANE. Yes. We are——

Mr. WAXMAN. OK. Thank you.

Yesterday, Ranking Member Tonko and I sent a letter to Chairman Upton asking that the committee schedule a hearing to review the recent events at Fukushima and the lessons we can learn from them, and I am hopeful we can agree that this is a topic worthy of bipartisan examination.

Turning back to Yucca Mountain, the majority called this hearing to examine the recent court decisions requiring NRC to restart the license review process but the court didn't resolve the most fundamental outstanding question about the future of this possible waste repository.

Dr. Lyons, did the court decision alter the State of Nevada's longstanding opposition to the project?

Mr. LYONS. Well, I am not sure I am the best equipped to answer that question, sir, but not to my knowledge.

Mr. WAXMAN. OK. The President's Blue Ribbon Commission recommended that Congress create a new organization devoted en-

tirely to managing the nuclear waste problem. Did the court decision determine what that organization should look like?

Mr. LYONS. The court decision did not address that, sir.

Mr. WAXMAN. We also need to fix several funding and appropriations problems to make sure that the funds put aside for constructing a repository or storage facility can actually be used for that purpose. Did the court resolve those issues?

Mr. LYONS. No, sir.

Mr. WAXMAN. The court decision doesn't resolve any of the major policy questions facing this committee. We need to heed the advice of the Blue Ribbon Commission: adopt a new consent-based approach to tackling the Nation's nuclear waste problem. Nothing in the court decision changes the fact that Congress needs to act in a bipartisan manner to accomplish this.

Thank you, Mr. Chairman.

Mr. SHIMKUS. The gentleman's time is expired.

The chair now recognizes the gentleman from Ohio, Mr. Latta, for 5 minutes.

Mr. LATTA. Thank you, Mr. Chairman.

And thank you very much to our witnesses for being with us today. I greatly appreciate hearing your testimony today.

Chairman Macfarlane, if I could pose my first question to you, and if I may, I am going to have to read through a little bit here. But on April 11, 2011, from an order from the Nuclear Regulatory Commission's Atomic Safety and Licensing Board, it stated that in order to fulfill the responsibility to preserve the document discovery materials residing on the LSN, a system mandated by 10 CFR Part 2, Subpart J, et cetera, it said the board directs pursuant to its authority under the 10 CFR that each party shall take the following actions: preserve all LSN documents in PDF format, submit its LSN document collection together with the associated biographic files to the NRC Office Of Secretary on optical storage media specified in guidance for electronic submissions to the Commission for the inclusion in the docket, and then also for large collections taking more than a month to complete the PDF to submit those documents converted a little bit later. But it says that once received, the Secretary shall install the documents and associated biographic information into a separate LSN docket library on ADAMS for public access via www.NRC.gov.

Then a little later at another date it states that on May 12, 2012, an oral argument from the Aiken County case, one of the attorneys for the Commission stated, "in other words, we would, presuming that we would order us to take back up we may not activate the LSN; we may simply treat the case as a larger paper case."

I guess, Chairman Macfarlane, my question then is if I understand this correctly, the LSN documents are available to all parties and the public at this time, and hence, the LSN would not need to be immediately reconstituted prior to the resumption of the proceeding. Is that correct?

Ms. MACFARLANE. The LSN documents are not available at this point in time. They are in a safe from my understanding. And so the LSN network would have to be reconstituted as part of moving forward. That is required in our regulations.

Mr. LATTA. OK. But could you explain that different then from this order from April 11, 2011? If these——

Ms. MACFARLANE. I am going to have to take that for the record so I can see that order and give you a proper——

Mr. LATTA. OK. I tell you what, we will get this to you because we need to get that answered because it is saying here that once received, and then when they are talking about the NRC Office of the Secretary shall install the documents and associated biographic information into a separate LSN docket library of ADAMS for public access via www.NRC.gov.

Ms. MACFARLANE. Yes.

Mr. LATTA. So we will get this to you, but if we will get an answer to that, please.

Ms. MACFARLANE. Absolutely.

Mr. LATTA. And right now with the DOE's NRC action shutdown, the Yucca Mountain program and the license review triggered the 2 mandamus cases and the waste case before the DC Circuit Court, Dr. Lyons, if I could ask, since DOE has really caused, you know, the mess that is on out there by attempting to withdraw the license and the court has now corrected it, will you commit to this committee that DOE will not attempt to slow or obstruct the resumption or pace of the licensing review?

Mr. LYONS. At this point I can commit that we will continue to evaluate the NRC's decision and formulate a path forward. And I am not sure I heard all of your question.

Mr. LATTA. OK. But the question is when you say that you are going to commit to go forward, but you are not going to be slowing the process down to get to this decision, are you, where we are supposed to be?

Mr. LYONS. We have committed to respond to NRC requests within available appropriations.

Mr. LATTA. Well, we really want to make sure because there is a lot of money being spent out there and it is taxpayers' dollars, and we want to make sure that this is not slowed or obstructed and we want to make sure that the pace is going on in the licensing review. So that is one of the things we would like to see that is committed from DOE.

And, Mr. Chairman, I see my time is expired and I yield back the balance of my time.

Mr. SHIMKUS. The gentleman yields back his time.

The chair now recognizes the gentleman from Texas, Mr. Green, for 5 minutes.

Mr. GREEN. Chairman Macfarlane, in the record of the hearing before this subcommittee on February the 28th, you and your fellow commissioners committed to honor the decision of the Court of Appeals for the DC Circuit Court concerning resumption of Yucca Mountain licensing process. Recognizing that commitment, the court statement regarding the need to comply with Congress direction on the Nuclear Waste Policy Act, do you believe the agency should appeal the decision?

Ms. MACFARLANE. I can't say at this time. The period for seeking review hasn't expired so it wouldn't be appropriate for me to comment.

Mr. GREEN. Besides the August 30 commission order, what actions have been taken so far by the agency to respond to the court's decision?

Ms. MACFARLANE. We have issued an order asking the parties and participants to comment on how to proceed, and we have also requested from the staff budget information on how much it would cost to move forward to expend the 11 million.

Mr. GREEN. The Safety Evaluation Reports will inform the public and Congress of the results of NRC's extensive review of the license application. A number of entities have recommended that completion and publication of the SER should be the NRC's first priority. What is your view?

Ms. MACFARLANE. It is a significant part of the process that we talked about earlier that is set out in Appendix D, but it certainly doesn't constitute the entire licensing decision. The SER will not in and of itself provide a licensing decision. We have to also complete the adjudicatory hearing and the Commission has to hear contested and uncontested issues.

Mr. GREEN. OK. In my opening statement I was concerned about the funding. Parties in the Yucca Mountain licensing procedures have suggested the NRC reconstitute the hearing boards and restore the licensing network as a first priority. In light of the fact that their only remains 11.1 million available to NRC's review of the Yucca Mountain application, do you believe that implementing these suggestions would deplete those available funds without appreciably advancing the agency's review and adjudication of the application?

Ms. MACFARLANE. It would be inappropriate for me to comment now because we are still collecting information on this.

Mr. GREEN. OK. Could you, when the time comes—I know if we could get our committee——

Ms. MACFARLANE. Certainly. The Commission will make all its decisions public.

Mr. GREEN. Previously, NRC estimated 6 to 8 months was needed to complete all the volumes of the SER at the cost of 6.5 million. The budget is within the appropriated unobligated funds now available at the Commission. What steps have you taken to evaluate the basis for the 6.5 million estimate? Do you believe that 6.5 million is accurate?

Ms. MACFARLANE. We have asked the staff to go back and give us an updated estimate of that, and so we are waiting to see what the staff says.

Mr. GREEN. Are there any other efficiencies that the agency can adopt to it reduce the cost of completing the SERs without sacrificing their quality?

Ms. MACFARLANE. Well, we are in the process of collecting all that information now, so we will have a better answer for you in some time.

Mr. GREEN. What schedule do you believe is reasonable for the NRC to complete and publish the SERs?

Ms. MACFARLANE. Again, that is information that we are collecting right now. I can't comment.

Mr. GREEN. Given the import of the SERs as a part of the record, the NRC's adjudicatory proceedings, would you agree that the re-

sumption of the hearings should occur only after the completion of the SERs?

Ms. MACFARLANE. Again, we have to hear from all of the parties and participants to the proceeding and we have to get information from the staff on resources required.

Mr. GREEN. The Yucca Mountain license application utilized the total system performance assessment as a methodology to assess the long-term performance of the repository's acceptability. Chairman Macfarlane, before you became a member of the Commission, you were critical of that methodology. Can you assure the public that you can objectively evaluate the license application and include its reliance on the TPSA?

Ms. MACFARLANE. Absolutely. I have an open mind on this matter—on the Yucca Mountain licensing matter and I will maintain an open mind on it.

Mr. GREEN. When do you expect to be able to issue an order or a staff requirements memorandum announcing the Commission's response to the court's decision?

Ms. MACFARLANE. Well, we already did issue one order——

Mr. GREEN. OK.

Ms. MACFARLANE [continuing]. Asking the parties to comment and requesting the staff to collect budget information, and then the next steps I can't tell you exactly when we will——

Mr. GREEN. So——

Ms. MACFARLANE [continuing]. But we are working as expeditiously as possible.

Mr. GREEN. So there is no time frame on the staff reporting back?

Ms. MACFARLANE. The staff will report back and the parties will comment by the end of September. September 30 I believe is the close date for that information.

Mr. GREEN. OK. Mr. Chairman, thank you. Obviously, we need some more hearings.

Mr. SHIMKUS. Thank you.

And now the chair now recognizes the gentleman from West Virginia, Mr. McKinley, for 5 minutes.

Mr. MCKINLEY. Thank you, Mr. Chairman.

Several questions. One is I just was verifying the quote that was given on August 21. It was kind of a revealing quote from Senator Reid when the question was raised to him with a news broadcast in Nevada about the thoughts of the court decision. His response was "as a result of political compromise, we put some really bad judges on the circuit court and they produced a 2 to 1 decision requiring the Nuclear Regulatory Commission to license Yucca Mountain. Their opinion means nothing. Yucca Mountain is dead. It is padlocked. Nothing is going to happen there."

Now, we have had 3 votes in Congress over the last year on a vote of 4 to 1 ratio saying we want something to happen. Well, was Harry Reid correct that nothing is going to happen? It means nothing for the vote of the court and the vote of Congress to take this action? Either one of you.

Ms. MACFARLANE. I can't comment on the Senator's statement.

Mr. MCKINLEY. You can comment your opinion. Was he correct? I am just asking, was he correct?

Ms. MACFARLANE. I can't comment on the Senator's statement.

Mr. MCKINLEY. You don't know whether he was correct?

Ms. MACFARLANE. I can't comment on the Senator's statement.

Mr. MCKINLEY. OK. I hear you. Mr. Lyons?

Mr. LYONS. Well——

Mr. MCKINLEY. Was he correct? Yes or no?

Mr. LYONS. I certainly can't comment on what the Senator said. That is simply not appropriate. However, the court decision stands and we are awaiting——

Mr. MCKINLEY. Well, if you can't——

Mr. LYONS [continuing]. The NRC's review of the court decision.

Mr. MCKINLEY. I know your answer is on the thing but I was just curious to see if you would say it aloud.

But let's go back to this. Under the regulations, there was apparently an ability that the other States could override Nevada or that Congress could override Nevada, so I am just curious when they listen to the State of Nevada and this was a decision made and has been endorsed now by congressional votes that there is support, did you go back to the other 34 States and ask them their opinion before, Mr. Lyons?

Mr. LYONS. I have to confess that I am not sure I am following the line of your questioning, sir.

Mr. MCKINLEY. Well, the issue comes down to whether or not the definition of public support. If the public support of Nevada overrides the—I believe there are 34 other States that have spent nuclear fuel rods. Did you go back and ask them whether or not they concurred with this decision to stop the movement in Yucca Mountain? I think the answer is yes or no. Did you go to the other 34 States and ask for their input?

Mr. LYONS. The administration has stated on many occasions——

Mr. MCKINLEY. Yes——

Mr. LYONS [continuing]. A workable solution is a path forward.

Mr. MCKINLEY. So I am going to assume unless you say otherwise the answer is no. You only went to Nevada with that.

Can you tell me, if the Congress has acted this way, what authority do you have just to deem away an act of Congress that we are not going to do this, that we are not going to proceed? The court has had to step in and make you do it.

Mr. SHIMKUS. If the gentleman would yield. And to the members of the panel, you better take the questions seriously because he is asking a question why didn't you comply with the law? That is the basic question. If you are confused about what Mr. McKinley is asking, he is asking why the NRC walked away without a public hearing and not complied with the law and he is asking you for the DOE perspective why did the administration not comply with the law? And I think that is a very serious charge.

Ms. MACFARLANE. Let me say from the NRC's perspective that we of course intend to follow the law. We are now following the law. We are moving forward. We are forward-focused on this.

And in terms of your question of did you ask other States, we have asked all parties to the legal proceeding and participants to comment now moving forward.

Mr. MCKINLEY. So the other States, they have agreed?

Ms. MACFARLANE. It is up to them whether they comment.

Mr. MCKINLEY. OK. Just one in closing in a few seconds I have left on it, there was testimony earlier about in Michigan and elsewhere but at least in Michigan there was some $600 million has been spent in the Yucca Mountain project out there. If we don't advance this, are they going to be reimbursed? Or what did the State of Michigan get for the $600 million that the taxpayers spent at Yucca Mountain? What did they get for that?

Ms. MACFARLANE. You know, we as the NRC, our job is to ensure that a repository application and the repository itself would be safe and operate safely. That is our job. So in terms of policy questions associated with the Nuclear Waste Fund, that is something that I defer to the Department, to the administration and the Congress.

Mr. MCKINLEY. OK. I am sorry.

Mr. SHIMKUS. OK. The gentleman's time is expired.

The chair now recognizes the gentleman from California, Mr. McNerney, for 5 minutes.

Mr. MCNERNEY. Well, thank you, Mr. Chairman.

Chairman Macfarlane, it seems to me that the hearing we are holding here this morning is premature. We should be holding this hearing in 2 weeks or a month later, that you would be able to answer a lot of questions that have been asked this morning more satisfactorily. Would you agree with that?

Ms. MACFARLANE. I think in a number of weeks or a month or two, we will certainly be able to have more satisfying answers for you.

Mr. MCNERNEY. Would you be able to produce a more concrete answer in terms of when you would be ready to answer the questions that have been asked this morning?

Ms. MACFARLANE. In a number of weeks or a month, certainly after the time has expired for parties to comment and the staff to get back to us after the end of September and after we have a little bit of time to sift through those, we will have a much better idea of what the plan is to move forward.

Mr. SHIMKUS. Would the gentleman yield? Not to take away from your time, but the full commission will be coming back this fall and that will give us an opportunity also to fully vet this.

Ms. MACFARLANE. End of October we will be back.

Mr. MCNERNEY. Thank you.

Well, focusing funds on the Safety Evaluation Report is presumably one of the options that the Commission will be looking at but the safety report is just one of many steps needed. You have mentioned a couple of these. There will need to be an Environmental Impact Statement would need to be supplemented, more than 300 claims would have to be conducted, adjudicated, more than 100 depositions taken, and then there would need to be evidentiary hearings, and then the final decision will be made by the Commission. Is that about right?

Ms. MACFARLANE. There are some other steps in there, too. The Licensing Support Network that has gotten some discussion this morning would have to be put back and there are some other issues as well that the Environmental Impact Statement would have to be completed and the supplement would have to be completed as well.

Mr. MCNERNEY. Dr. Lyons, even if the license were issued sometime in the future, there would need to be more steps that would have to happen before the repository would be operational. For example, the State of Nevada is strongly opposed to the project and they would need to issue a number of permits. The Congress and the President would have to sign a land withdrawal bill and the Department of Energy would need to actually build the repository with tens of billions of dollars in appropriations over the next few years. Is that about right?

Mr. LYONS. That is all correct, sir.

Mr. MCNERNEY. So, Mr. Chairman, it is clear to me that the NRC and the DOE do not have sufficient funds to complete the Yucca Mountain licensing, and there is still a lot of public opposition in the State of Nevada. The Court of Appeals decision doesn't change either one of those facts. It is time for us in the subcommittee to start grappling with the tough policy questions we need to answer in order to establish a new consensus-based siting process that has a real chance of getting a repository built.

With that, I will yield back.

Mr. SHIMKUS. The gentleman yields back his time.

The chair now recognizes the gentleman from Pennsylvania, Mr. Pitts, for 5 minutes.

Mr. PITTS. I thank the gentleman. I apologize for coming in and out. We have a couple of hearings going on at the same time.

Chairman Macfarlane, in your written testimony you state "in September 2008 the NRC staff adopted the EIS subject to additional supplementation on groundwater analysis. In October 2008 the DOE had notified the NRC of its intent to supplement the EIS. Subsequently, in July of 2009, the DOE notified the NRC that it had decided not to prepare a supplement. To satisfy National Environmental Policy Act, NEPA, obligations, the EIS would need to be supplemented."

Now, I have here a report dated July of 2009 from DOE's Office of Civilian Radioactive Waste Management entitled "Analysis Of Post-Closure Groundwater Impacts." And this document notes the NRC staff's September 8, 2008, adoption report regarding the DOE's Environmental Impact Statements, EIS, and indicates "in response to NRC's staff adoption report, DOE has prepared this analysis of post-closure groundwater impacts. This analysis of post-closure groundwater impacts addresses the information identified by the NRC staff as needed to supplement DOE's Environmental Impact Statements."

I have another document here from the NRC's Web site indicating that the supporting documentation for this report was provided to the NRC's public document room and the NRC's file center. Dr. Lyons, do you know whether DOE provided NRC the groundwater analysis Chairman Macfarlane mentions in her testimony?

Mr. LYONS. The report that you reference, sir, was provided by the Department of Energy and it was—at least the understanding of our staff at the time that the supplemental details would be added by the NRC to the EIS. That could be revisited if the NRC wishes, but yes, we have provided that documentation as you cited.

Mr. PITTS. Chairman Macfarlane, is it possible that your staff made a mistake and the DOE did actually send the supplement that you need for the EIS?

Ms. MACFARLANE. My understanding is that we still need the supplement to the EIS, but I can get back to you with the longer answer for the record.

Mr. PITTS. Did you want to respond, Dr. Lyons?

Mr. LYONS. I think we are both saying the same thing. The EIS needs to be supplemented. The question is we think we have provided the information to the NRC to do the supplement, but if they wish us to do it, we would use the information that we provided to them. There may be a misunderstanding simply on who is going to write the supplement, but we provided the information.

Mr. PITTS. Well, is there an open action item here or can we cross this off the list of things that you folks need to do to comply with the court?

Ms. MACFARLANE. Clearly, the supplement needs to be completed, and this is one of the other steps that would have to be done to complete the licensing process, and it is a step that we would have to try to understand the resource allocation for and whether it would be the Department of Energy who would take this on or the NRC.

Mr. PITTS. OK.

Ms. MACFARLANE. But this is something that needs to be completed and needs to be decided how to move forward.

Mr. PITTS. Now, this administration shut down the Yucca Mountain program, and the issue that brings us here today, contrary to the Nuclear Waste Policy Act and stranding spent nuclear fuel indefinitely at plants across the country, Dr. Lyons, was there a scientific reason for shutting it down?

Mr. LYONS. As we have testified in other hearings, our concern has been whether this is a workable solution to move forward, and I believe that without a consent-based process, it is not a workable solution.

Mr. SHIMKUS. Will the gentleman yield?

So that is a no, Mr. Lyons? That is a no that it wasn't a science-based decision to shut it down? That is what you just said. You are saying it was a political——

Mr. LYONS. The Department of Energy submitted the license application based on the technical requirements.

Mr. SHIMKUS. Your answer to his question was no, that it was not science-based, it was a politically based decision. That is fine.

Mr. LYONS. Mr. Shimkus——

Mr. SHIMKUS. I will yield back to the gentleman from Pennsylvania.

Mr. LYONS. We can debate what you mean by a politically based decision. I am simply——

Mr. SHIMKUS. I am using your words, not mine. You are the one who just meandered on that it wasn't science-based. The question was was it science-based? And you said no.

Mr. LYONS. Based on a——

Mr. SHIMKUS. It is a consensus-based analysis, and we have always heard this story before. So your answer to my colleague from Pennsylvania was no.

Mr. LYONS. I have attempted to indicate the range of issues that were considered, sir.

Mr. SHIMKUS. We got you on record as no.

The gentleman from Pennsylvania has expired.

Mr. PITTS. Thank you, Mr. Chairman.

Mr. SHIMKUS. The chair now recognizes the gentleman from Georgia, Mr. Barrow, for 5 minutes.

Mr. BARROW. Thank you, Mr. Chairman.

And, Chair Macfarlane, I want to begin by thanking you for your personal interest in the expansion of nuclear generating capacity in this country. It has gone on in my backyard in Georgia and next door in South Carolina and you have taken a personal interest in this and I want to commend you for that and thank you and encourage you to help us through this renewal of nuclear energy generation in this country.

I gather that you all want input from the interested parties as to how best to proceed. I want to offer some input as to how best to proceed. Assuming that the Court of Appeals decision becomes final in the law of the case, I take it that the usual practice in cases of this sort is that the SER is formally adopted before you enter into any adjudicatory proceedings to rule on any contentions that raise objections to the SER. Is that correct?

Ms. MACFARLANE. That is correct.

Mr. BARROW. There is no reason to depart from that in this instance, is there?

Ms. MACFARLANE. Well, it depends on the parties and the participants and their views. We do have to weigh them all moving forward——

Mr. BARROW. I understand you have to weigh their views but you all get to decide how you proceed, how you go forward.

Ms. MACFARLANE. Right. I mean we are trying to understand what we can do with the limited resources that exist at the moment.

Mr. BARROW. Of course. And I guess the input I want to offer is that it seems to me it would make very little sense to enter into any formal adjudicatory proceedings to rule on any contentions that raise objections to the SER before the SER is even adopted.

Ms. MACFARLANE. Yes.

Mr. BARROW. The input that I would offer is it would make no sense whatsoever to be having hearings on objections to the SER before it is adopted and then at some distant time in the future have it adopted, and then have post-adoption contentions raising further objections ruled on later on. Let's just keep it one step at a time, shall we, one war at a time as Lincoln said.

Ms. MACFARLANE. I do very much so appreciate your input and we will take that into consideration as we deliberate and move forward.

Mr. BARROW. Thank you very much. No further questions.

Mr. SHIMKUS. The gentleman yields back his time.

The chair now recognizes the other gentleman from Pennsylvania, Mr. Murphy, for 5 minutes.

Mr. MURPHY. Thank you, Mr. Chairman.

To both of you, the fiscal year 2011 Continuing Resolution was the last time NRC and DOE received funding for the license review. Am I correct on that, Ms. Macfarlane?

Ms. MACFARLANE. I am sorry, the fiscal year—

Mr. MURPHY. The fiscal year 2011 Continuing Resolution was the last time NRC and DOE received funding for license review—

Ms. MACFARLANE. Yes.

Mr. MURPHY [continuing]. Am I correct, Mr. Lyons, is that true as well?

Ms. MACFARLANE. I do believe that is correct.

Mr. MURPHY. And the purpose of that funding was to carry out the purposes of the Nuclear Waste Policy Act, am I correct?

Ms. MACFARLANE. Sorry?

Mr. MURPHY. The purpose of that funding was to carry out the purposes of the Nuclear Waste Policy Act?

Ms. MACFARLANE. Yes.

Mr. MURPHY. Am I correct?

Ms. MACFARLANE. Certainly.

Mr. MURPHY. And, Dr. Lyons, but DOE used that money for the opposite purpose, to shut down the Yucca Mountain program in an attempt to withdraw the license application, am I correct?

Mr. LYONS. The fiscal year 2010 funding was used for shutdown of the program, yes.

Mr. MURPHY. All right. And, Dr. Macfarlane, the NRC also used that money to suspend the license review, correct?

Ms. MACFARLANE. Correct.

Mr. MURPHY. And, Dr. Lyons, how much money from the Nuclear Waste Fund did DOE spend to shut down the program?

Mr. LYONS. I would prefer to give you a precise number. It was around 130 million but we can give it to you precisely in writing.

Mr. MURPHY. I have 138 million. I just wanted to be sure but let me know the precise number.

Chairman Macfarlane, how much money from the Nuclear Waste Fund did NRC spend to suspend the license review?

Ms. MACFARLANE. I believe it was 7.4 million.

Mr. MURPHY. OK. I thought it was a little bit more. Could you double-check the number, please?

Ms. MACFARLANE. I can certainly double-check the number.

Mr. MURPHY. So, to both of you, together your two agencies have spent, by my calculations, a little bit under $150 million of electricity consumers' money shutting down a license review that the court has now said you have to complete. So electricity consumers throughout this country paid for you to conduct the license review, not to scuttle it. So how will your agencies restore that money to its lawful purpose?

Ms. MACFARLANE. In terms of the Nuclear Regulatory Commission, this is actually an issue that is under adjudication right now and so it is not appropriate for me to comment.

Mr. MURPHY. Are you going to have the money to do that?

Ms. MACFARLANE. Sorry?

Mr. MURPHY. Are you going to have the money to restore that?

Ms. MACFARLANE. Again, this is an issue that we have asked the staff to collect information on all budgeting——

Mr. MURPHY. And, Dr. Lyons, do you have a different answer on that? Do you have any idea where the money is going to come from?

Mr. LYONS. In my written testimony I gave the numbers for the currently available funds that we have, either unobligated or costed and obligated.

Mr. MURPHY. I appreciate that but I am trying to get to the point that isn't it fair that you have to restore that money to back to what its legal purpose was for? Am I correct?

Mr. LYONS. The position of the administration continues to be that if we want to stop wasting money, we should be moving in a direction to have a workable—

Mr. MURPHY. Well, no, no, no——

Mr. SHIMKUS. Will the gentleman yield for one second?

Mr. MURPHY. Yes.

Mr. SHIMKUS. Aren't you saying that the NRC and the DOE spent $150 million to break the law?

Mr. MURPHY. That is what I am hearing and now you are talking about something else.

Look, we need a straightforward answer on this. You know, the fairness to the American people who have been paying these rates is that money was misused by DOE and by NRC. And so now what I am asking you is are you going to work on a plan to restore that, you are talking about finding other ways to not waste money. This is a colossal waste of money. So now I don't understand. So just give me a straightforward answer. Isn't it fair that you find a way to restore that money to its lawful legal purpose?

Mr. LYONS. I am not aware, sir, what that mechanism would be. Perhaps someone on your side is. I am not aware of what that mechanism would be.

Mr. MURPHY. Oh, no, it is not my responsibility to fix your problem. Your breaking the law is not my responsibility to fix it. The misuse of money from your agencies is not the responsibility of the American people to come up with another answer. It is your responsibility. We are going to hold you to that.

Chairman McFarlane, in your testimony you mentioned the NRC currently has 13.6 million available to fund resumption of license review. Is that enough to fully comply with the court's decision?

Ms. MACFARLANE. Let me clarify. We have 11.1 million available and 2.6 million in obligated——

Mr. MURPHY. Will that be enough to complete the application review and issue a decision?

Ms. MACFARLANE. And issue the license?

Mr. MURPHY. Yes.

Ms. MACFARLANE. Absolutely not.

Mr. MURPHY. But you are both legally responsible now for complying with the law.

Ms. MACFARLANE. We will comply with the law, sir.

Mr. SHIMKUS. Would the gentleman yield? Ask that question on the Safety Evaluation Report. That is the question that we still need to get a firm answer from the chairman.

Mr. MURPHY. So let me ask that. On the Safety Evaluation Report, will you be able to comply?

Ms. MACFARLANE. We have asked the staff to update the information, update the resources needed to complete the Safety Evaluation Report and to do a number of other entities, and as soon as we get that information, the Commission will be able to provide a written response.

Mr. MURPHY. So just to cut to the chase, it sounds like neither of your agencies has enough resources to complete the licensing review mandated by the court and by law. So when was the last time either of your agencies asked for funding in your budget proposal to do any of this?

Mr. LYONS. The last funding we received was fiscal year 2010 to the best of my memory.

Mr. MURPHY. You haven't asked for any since then to comply? You have not asked for any since then?

Mr. LYONS. That is correct.

Mr. MURPHY. Will you be forwarding a supplemental budget request to fund these?

Mr. LYONS. Until we know the requirements from the NRC, until we have evaluated a path forward, it would simply be premature for me to speculate on whether that would be the course of action, sir.

Mr. MURPHY. Mr. Chairman, there is still follow-up here. The law says you have got to comply, the court said you have to comply, you said you don't have the money to comply, and now you are saying it is speculation to find out if you are going to—this is a simple thing that if your desire is to comply with the courts and you are legally bound to do so by law and you don't have the money to do it, I would hope that that is already in the works to say we are going to need more money to move forward on this and comply with the law. Do you have to hesitate on that?

Mr. LYONS. I would give you essentially the same response, sir. It is just simply premature at this stage of the process to speculate what will be required of the Department or to commit to any course of action.

Mr. MURPHY. I appreciate the note you have been handed but I am asking you this is——

Mr. SHIMKUS. The gentleman's time is expired.

The chair now recognizes the gentlelady from California for 5 minutes.

Ms. CAPPS. I thank you, Mr. Chairman.

And thank you to our witnesses today for your testimony and for being here.

Nuclear fuel storage obviously is an important issue, and for communities with nuclear power plants, it is a very local issue. That is the case with my district. I represent San Luis Obispo, California, which is home to Diablo Canyon nuclear power plant.

Before I get to fuel storage, I wanted to follow up on an issue I raised with you, Chairwoman Macfarlane, last time you testified and that is the topic of seismic safety. We are seeing fresh reminders from Fukushima of just how devastating an earthquake can be if we are not fully prepared. And as you know, Diablo Canyon sits on both the Hosgri and the recently discovered shoreline faults. Last February, I asked you about a peer-reviewed study by Dr. Jeanne Harderbeck that concludes an earthquake much larger

than current NRC estimates is possible along these very fault lines. I asked whether or not NRC is incorporating Dr. Harderbeck's findings into its safety standards for Diablo Canyon. Your written response states "the NRC staff believes that the views expressed by Dr. Harderbeck's paper will be fully considered by the experts involved in the seismic hazard reevaluation process."

So my question is, to give you an opportunity right now to update us on whether the NRC is taking any additional actions to address the concerns raised in this report.

Ms. MACFARLANE. So I believe that Dr. Harderbeck presented at the second Seismic Hazard Workshop that happened this past year, and her theories on the shoreline fault activity rate, the geometry, the fault geometry will be included in the overall seismic hazard characterization model.

Mrs. CAPPS. Does it involve any changes or concrete actions?

Ms. MACFARLANE. Well, we will see the results of the model at the next workshop, which I believe is coming up in the spring.

Mrs. CAPPS. OK. So we can expect a follow-up——

Ms. MACFARLANE. Yes.

Mrs. CAPPS [continuing]. Report after that time?

Ms. MACFARLANE. Yes.

Mrs. CAPPS. We will stay in touch with you on that and I appreciate that answer very much.

And now to the topic at hand today, fuel storage, given our inability to implement a permanent solution, my constituents are very concerned about Diablo Canyon becoming a de facto permanent storage site. I am sure other facilities around the country may have the same concerns. I have been pleased to see more spent fuel being moved into dry cask storage at Diablo Canyon and also across the country, but these casks are really not permanent solutions.

A few weeks ago I asked Secretary Moniz about this and he said the casks are safe for about 100 years. Chairwoman Macfarlane, do you agree with this estimate?

Ms. MACFARLANE. Well, we are actively trying to understand aging issues that are associated with casks. This is an important area of research for us at the Nuclear Regulatory Commission.

Mrs. CAPPS. So you don't want to comment on his estimate of 100 years?

Ms. MACFARLANE. We license the casks for 20 years and we have given a 20-year extension. We will continue to see if further extensions are warranted.

Mrs. CAPPS. Obviously, spent fuel has got to be safely stored for much longer than 20 years, even if it is reauthorized, and longer than 100 years. My follow-up question then to you is has the NRC evaluated onsite storage solutions that can safely store fuel for longer than 100 years? Because this to me is such a pressing issue for my constituents but it certainly isn't limited to my constituents.

Ms. MACFARLANE. We are certainly looking at the issues of longer-term storage both in the casks and in the spent fuel pools, so this is an area that we are actively considering.

Mrs. CAPPS. I appreciate that. Well, I firmly support finding a permanent solution, but I really think it is critical that we have a

backup plan. And can you tell me if there is one of those in the works?

Ms. MACFARLANE. A backup plan for—that is a policy issue and I defer to Congress to develop that policy issue.

Mrs. CAPPS. Well, then I defer to the chairman of this committee that that is something that we want to consider in the nature of our—and to our ranking member as well to the nature of our task that permanent storage is a huge issue with nuclear energy.

Mr. SHIMKUS. Yes, and if the gentlelady would yield, we currently have a law to deal with that and we are just trying to enforce the administration to comply with the law.

Mrs. CAPPS. All right. I yield back.

Mr. SHIMKUS. The gentlelady yields back.

The chair now recognizes the gentleman from Mississippi, Mr. Harper, for 5 minutes.

Mr. HARPER. Thank you, Mr. Chairman.

And I thank each of you for being here today.

And, Chairman Macfarlane, you just said regarding a backup plan you said I defer to Congress for that issue, but didn't Congress set the law that has been ignored that is the source of the opinion that was just handed down in August? And so we have that, yes, you say that but we have dealt with another experience through this.

But I wanted to ask you some questions if I could. And I understand, Chairman Macfarlane, that several parties have signed a motion questioning your impartiality and requesting your recusal and that you decided I believe last night not to recuse yourself. Considering the motion for your recusal was pending at the time, I want to know did you participate in the Commission's order for the parties to submit comments by September the 30th?

Ms. MACFARLANE. I did take part in that and that was a ministerial issue.

Mr. HARPER. Do you know Angela Coggins, the former chairman's policy director and chief of staff?

Ms. MACFARLANE. No, I do not. I have never met her.

Mr. HARPER. Are you familiar with her role in the closure of the license review as described in the NRC Inspector General's report dated June 6, 2011?

Ms. MACFARLANE. No, I am not.

Mr. HARPER. But you do know now that she is working in the high-level waste section of the general counsel's office?

Ms. MACFARLANE. No, I did not know that.

Mr. HARPER. Well, those are things you might want to take a look at and I would encourage you to do that.

And I would ask, too, that you review her past actions and review that IG report, look at her current role, and then answer back to us if you could let us know, given her past actions on this issue and her ability to influence future actions given her position, don't you think this contributes to the appearance that you are unable to be impartial? And I would like for you to answer that question and submit that in writing back to the committee after you have had a chance to review that and determine the position and history of Angela Coggins.

Chairwoman Macfarlane, as the IG indicated in his report, the former chairman believed that stalling the public release of the SER volumes was within his responsibility to manage the staff. Do you believe that conforms to your responsibility as chairman to uphold the President's commitments for transparency and open government?

Ms. MACFARLANE. I am sorry. Could you repeat the question?

Mr. HARPER. Certainly. As the IG indicated in his report, your former chairman believed that stalling the public release of the SER volumes was within his responsibility to manage the staff. Do you believe that conforms to your responsibility as chairman to uphold the President's commitments for transparency and open government?

Ms. MACFARLANE. I can't comment on the actions of my predecessor.

Mr. HARPER. You are not aware of the history and the actions and the history of your agency?

Ms. MACFARLANE. I am not aware of the details of what occurred to do with Yucca Mountain before I—

Mr. HARPER. Are you not aware of the IG report?

Ms. MACFARLANE. I am aware that it exists but I have not read it.

Mr. HARPER. OK. And you have been in your role for how long?

Ms. MACFARLANE. For a year and 2 months.

Mr. HARPER. Wouldn't you think that during the course of the year and 2 months and hopefully by the time you have been there a year and 3 months that reading your IG report would be something that would be very important?

Ms. MACFARLANE. It is certainly an important issue. We have a large mission at the Nuclear Regulatory Commission to oversee the safety and security of over 100 reactors and over 20,000 materials licensees. We have quite a bit on our plate. And until August 13, Yucca Mountain was not an active issue.

Mr. HARPER. Well, it was an active issue under the laws of this country, but your agency chose to ignore Congress even though you have said here today that you defer to Congress for a policy issue. There was a set law and you ignored that, did you not? Not you personally but your agency, and certainly now you have had it for a year and 2 months. But wouldn't an IG report be something that would be very important to be aware of in your role to make sure that you don't fall into any of those problems in the future?

Ms. MACFARLANE. Let me assure you this, that all decisions on the matter of Yucca Mountain will be full commission decisions and we will act collegially. I think my record shows we have acted over the last year and 2 months very collegially on all issues, and that is how we will work moving forward.

Mr. HARPER. But your agency unilaterally decided to ignore the law in this country, and now because the court has finally recognized that the executive authority has overstepped their bounds that we are now back trying to take care of something that should have long been done before. And I hope you understand our frustration. We want your agency to succeed. We want this to work for our country. And we urge you to continue to look at this and this concern that we have.

And I yield back.

Mr. SHIMKUS. The gentleman yields back his time.

The chair now recognizes the gentleman from Florida, Mr. Bilirakis, for 5 minutes.

Mr. BILIRAKIS. Thank you very much, Mr. Chairman. I appreciate it. Thanks for calling this hearing.

The administration's shutdown of the Yucca Mountain program in 2010—again, they shut it down—the ramifications of that shutdown are still reverberating. In a decision last year remanding the NRC's Waste Confidence Rule, the DC court observed "at this time there is not even a prospective site for repository, let alone progress toward the actual construction of one. The lack of progress on a permanent repository has caused considerable uncertainty regarding the environmental effects of temporary spent nuclear fuel storage and the reasonableness of continuing to license and relicense nuclear reactors." So the administration's actions to shut down the Yucca Mountain program have caused a Federal court order to question the reasonableness of licensing nuclear plants.

Dr. Lyons, if the administration really supported nuclear energy, wouldn't it want to reconstitute the Yucca Mountain program? Shouldn't they reconstitute the Yucca Mountain program, Dr. Lyons? Isn't it a demonstration that the Federal Government's will to follow the law the surest way to restore the waste confidence and provide a solid basis for the NRC to license? If you can answer that question.

Mr. LYONS. Thank you for your question. I noted in my testimony that we are already as a Nation 20 years past the anticipated opening of Yucca Mountain. We are at an impasse. The administration's approach is to try to work towards a workable solution that can move us past the impasse, and yes, support nuclear power by providing a consent-based approach to move ahead on this vital issue of the back end of the fuel cycle.

Mr. BILIRAKIS. Would you like to comment as well?

Ms. MACFARLANE. Would I like——

Mr. BILIRAKIS. Yes, please.

Ms. MACFARLANE. I didn't hear you. Not at this time.

Mr. SHIMKUS. Would the gentleman yield?

Mr. BILIRAKIS. Yes.

Mr. SHIMKUS. The real question is because of the delay and the stopping of Yucca Mountain, the Waste Confidence Rule for interim storage has been attacked and is causing problems in local storage areas because we don't have a location. So now the Waste Confidence Rule is up for litigation or review, which continues to cause additional problems. Isn't that correct?

Ms. MACFARLANE. No, they have nothing to do with each other right now.

Mr. SHIMKUS. They do have by the ruling and the statements Mr. Bilirakis just stated. The Waste Confidence Rule was predicated on a long-term geological storage.

Ms. MACFARLANE. Um-hum.

Mr. SHIMKUS. When you walk away from a long-term geological storage, you upset the whole Waste Confidence Rule. So I find it incredulous that you would say they have nothing to do with each other.

Ms. MACFARLANE. Well, I say that simply because the court that ruled on the waste confidence decision required us to consider the case where there is no repository. And——

Mr. SHIMKUS. And there is no repository because the administration has broken the law to not proceed.

Ms. MACFARLANE. I can't comment on that.

Mr. SHIMKUS. But I can and Mr. Lyons can. Is that why?

Mr. LYONS. As we have testified repeatedly, sir, our general counsel supported, endorsed our ability to withdraw the license back in that——

Mr. SHIMKUS. So you are blaming your general counsel for making a ruling that you could break the law that upset the court on the Waste Confidence Rule?

Mr. LYONS. And our focus is on finding a workable solution that can move this country forward.

Mr. SHIMKUS. And I apologize if I take my colleague's time. Where is the only vote from a legislative body on the floor of either chamber that talks about a bipartisan movement, Mr. Lyons?

Mr. LYONS. Again, sir, we are trying to find a workable——

Mr. SHIMKUS. You talk bipartisanship, 4 to 1 by this chamber in the House 3 consecutive years in a row in supporting Yucca Mountain. So that is where the bipartisan agreement is and it is about time that the administration started following it.

I yield back to Mr. Bilirakis.

Mr. BILIRAKIS. One last question for Dr. Lyons. Do you believe that the science done by our national labs in support of Yucca Mountain license application was sound?

Mr. LYONS. Yes.

Mr. BILIRAKIS. Thank you.

I yield back, Mr. Chairman.

Mr. SHIMKUS. The gentleman yields back time.

The chair now recognizes the gentleman from Ohio, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. I thank you, Mr. Chairman. You know, I want to make a couple of comments before I start.

Dr. Macfarlane, you made the statement in your testimony several times this morning—you qualified your answers with "you must understand something." I hope that you understand something and that you have seen the resolve of this committee to hold your agency accountable to the American people and to the laws that have been duly passed by this Congress. We have multiple ways of doing that. It doesn't just involve hearings. So I hope you understand the seriousness with which we are approaching these issues.

Dr. Lyons, in your testimony you said maybe someone on our side has a mechanism for restoring those lost funds. You used the phrase "on your side." We are supposed to be on the same side. It is the side of the American people. And the way this system works is that Congress passes laws and the administration implements the law, not sidestep the law, not avoid the law, not remake the law, but comply with the law.

So I hope both of you understand that it doesn't stop here today. We are going to hold you accountable. I hope that is clear.

Dr. Lyons, the NRC is committed to provide this committee with a monthly report detailing their actions and expenditures to comply with the court's decision. Will you make that same commitment to provide us with a monthly report on DOE's actions and expenditures as the applicant in support of the license review?

Mr. LYONS. We will be happy to commit to provide you with regular reports as there are events that lead to——

Mr. JOHNSON. A monthly report. I asked about a monthly report detailing the actions. Are you willing to provide us with a monthly report on the Department of Energy's actions and expenditures?

Mr. LYONS. If you wish it monthly——

Mr. JOHNSON. A monthly report——

Mr. LYONS. Yes, sir. We will do it monthly——

Mr. JOHNSON. OK.

Mr. LYONS. Our suggestion is doing it when there are changes——

Mr. JOHNSON. Well, no, I want a monthly report. This committee wants a monthly report just like we are going to get from the NRC. Can you commit to that?

Mr. LYONS. Yes, sir.

Mr. JOHNSON. OK. Thank you.

Initially, as the applicant, DOE advocated in favor of NRC granting construction authorization for a repository at Yucca Mountain. Later, DOE attempted to withdraw the application in such a way as to prevent the NRC from ever considering the Yucca Mountain in the future. In July when testifying before this committee, Secretary Moniz was asked if DOE would honor the court decision, and he indicated that DOE would follow the law.

So, Dr. Lyons, now that the court has decided and the law is clear, will DOE as the applicant in this proceeding once again advocate in favor of NRC granting construction authorization?

Mr. LYONS. Our path forward remains under evaluation. It depends on——

Mr. JOHNSON. No, no, that wasn't the question. I am not asking you about the evaluation. I am asking you about what Dr. Moniz, what he said, was Secretary Moniz said, that DOE would follow the law. And so now I am asking you a very simple question. Now that the court has decided and the law is clear, will DOE as the applicant in the proceeding once again advocate in favor of NRC granting construction authorization? Will you follow the law?

Mr. LYONS. We will certainly commit to following the law but——

Mr. JOHNSON. Great. That is what I needed to know.

Mr. LYONS [continuing]. It is premature to say what the exact path will be.

Mr. JOHNSON. Next question. I would like to follow up on some questions that I posed to Secretary Moniz in July. In your July 22 response to Chairman Shimkus, you noted that DOE's 2014 budget request money from the Nuclear Waste Fund to support storage and transportation activities for locations other than Yucca Mountain. Dr. Lyons, given the court's order, do you still believe that DOE is authorized to spend Nuclear Waste Fund money for purposes other than Yucca Mountain?

Mr. LYONS. My response in that letter very carefully distinguished between generic R&D which continues to be our focus which is nonstop——

Mr. JOHNSON. I am talking transportation activities. Let me repeat the question because it must not have been clear. You requested budget request from the Nuclear Waste Fund to support storage and transportation activities for locations other than Yucca Mountain. Given the court's order, do you still believe that DOE is authorized to spend Nuclear Waste Fund money for purposes other than Yucca Mountain, transportation activities, et cetera?

Mr. LYONS. Since this is a——

Mr. JOHNSON. Take your note because I think your guy back there in the back has got the answer for you. I think the answer is you should comply with the law, right?

Mr. LYONS. Anything that we are doing on transportation at this point is location-neutral. On the specifics of exactly which——

Mr. JOHNSON. If it is providing locations for any place other than Yucca Mountain, it is not location-neutral. And that is not the purpose of the Nuclear Waste Fund, Dr. Lyons. So given the court order, is it still your belief that DOE is authorized to spend Nuclear Waste Fund money for purposes other than Yucca Mountain? Because you and I both know what the law says.

Mr. LYONS. Nuclear Waste Fund money will be spent on Titles I and II of the Nuclear Waste Policy Act. I will rely on general counsel as to exactly what falls within that category.

Mr. JOHNSON. Clearly, I am not going to get a straight answer, Mr. Chairman. I yield back.

Mr. SHIMKUS. The gentleman's time is expired.

And we can pause and we are done. So we want to thank the panel for being here. I have to thank you. This is a tough issue. There are emotions rampant on both sides. We do appreciate you putting up with us, but you will see us again, I am sure.

In conclusion, I would like to thank again you all for being here and the Members who participated and remind my colleagues that they have 10 business days to submit questions for the record. And I ask the witnesses all to agree to respond as promptly as possible to all questions.

And with that, the hearing is adjourned.

[Whereupon, at 12:00 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225-2927
Minority (202) 225-3641

September 30, 2013

The Honorable Allison M. Macfarlane
Chairman
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

Dear Chairman Macfarlane:

Thank you for appearing before the Subcommittee on Environment and the Economy on Tuesday, September 10, 2013, to testify at the hearing entitled "Implementing the Nuclear Waste Policy Act – Next Steps."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Monday, October 14, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at Nick.Abraham@mail.house.gov and mailed to Nick Abraham, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Paul Tonko, Ranking Member,
Subcommittee on Environment and the Economy

Attachment

SUBCOMMITTEE QUESTIONS

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY
HOUSE COMMITTEE ON ENERGY AND COMMERCE

Hearing on
Implementing the Nuclear Waste Policy Act – Next Steps

Tuesday, September 10, 2013

Peter Lyons, Assistant Secretary for Nuclear Energy, DOE
Allison Macfarlane, Chairman, NRC

The Honorable John Shimkus

Question 1: You testified that "The Commission has also directed NRC offices to gather pertinent budgeting information during this 30 day comment period" referring to the time period for parties to submit comments. When will the staff provide recommendations to the Commission based on the budget information gathered? When will the staff provide recommendations to the Commission based on the comments by the parties?

Answer:

The Commission is actively considering the views of the participants, including the NRC staff,and expects to issue a decision soon.

The Honorable John Shimkus

Question 2: Is NRC examining options for restoring or reimbursing the Nuclear Waste Fund money that was misspent on terminating the Yucca Mountain license review? If so, please provide us a legal memo outlining NRC's conclusions.

Answer:
This question raises an issue that is pending before the Commission in its adjudicatory capacity. Therefore, it would be inappropriate for me to comment on this matter.

The Honorable Phil Gingrey

Question 1: What process will the Commission use to approve expenditures from the Nuclear Waste Fund?

Answer:
The NRC is using established processes and procedures for approving expenditures from the Nuclear Waste Fund to ensure that funds are used appropriately. NRC employees record their time in the agency's Human Resources Management System (HRMS). The NRC has established activity codes in HRMS to accurately account for activities that are charged to the Nuclear Waste Fund (NWF). Employees charge their time at quarter-hour intervals to these established activity codes. At the end of each pay period, supervisors are required to review and approve their employees' entries into HRMS for accuracy. The NRC employs internal controls to maintain consistency with the appropriation, appropriations laws, and/or the budget approved by Congress and accomplish the strategic goals set forth in the NRC Strategic Plan. The Commission is monitoring NWF expenditures through regular status reports and will provide a monthly activity and expenditure status report to the NRC oversight and appropriations committees.

The Honorable Phil Gingrey

Question 2: Please provide a list of the staff who were working on the Safety Evaluation Report in September of 2010 including a total in Full-Time-Equivalents (FTEs) and total salary cost. Please indicate whether they have since retired or left the NRC. If they remain employed at NRC, please indicate which office they are currently assigned to, what project or subject matter they are working on, and whether it is designated as "mission critical". Please also provide a definition of what the Commission considers to be "mission critical".

Answer:
The cumulative salary costs for NRC staff working only on the Safety Evaluation Report (SER) between September 2008, when the license application was docketed for NRC review, and September 2010, when orderly closure of the review activities began, is $11.4M, which corresponds to approximately 74 full-time equivalents (FTE). This includes both direct-charged staff hours and indirect charges for managers and support staff. The SER salary figure does not include other related NRC activities supported by Nuclear Waste Fund appropriations, such as adjudication, the hearing facility, and the Licensing Support Network. It also does not include contract support for the SER development from the Center for Nuclear Waste Regulatory Analyses, which has experienced loss in staff since this time period.

During the period of SER development, from September 2008 through September 2010, various NRC staff worked on the SER, depending on the specific tasks and the available resources. During September 2010, 47 NRC professional and technical staff were working on the SER, including both direct-charge staff and indirect-charge managers and support personnel. The attached table shows the staff, by position title at that time, who were actively working on the SER during September 2010 and their current status with the agency.

The Commission is currently determining how the agency will proceed to resume work on the high-level waste licensing process as directed by the court. The agency expects that, as necessary, individuals who continue to be employed by the NRC and currently work on other agency activities will be reassigned in order to resume high-level waste licensing activities. Table 1 lists positions working on Yucca Mountain Safety Evaluation Report in September 2010 who would need to be replaced because they are no longer NRC employees. All personnel in Table 2 are currently working on other assignments within the Office of Nuclear Material Safety and Safeguards (NMSS), the organizational element that would be charged with completing the SER if that is the Commission decision. Personnel listed in Table 3 are working on other assignments in other organizational elements within the NRC.

A project plan completed by the NRC staff would provide the necessary rigor on the position and skill sets needed if staff is directed by the Commission to resume work on the SER.

Table 1: NRC Staff Working on Yucca Mountain Safety Evaluation Report in September 2010 Who Would Need to Be Replaced

Position Title	Current Status
1. Geochemist	No longer with NRC
2. Materials Engineer	No longer with NRC
3. Project Manager	No longer with NRC
4. Senior Geologist	No longer with NRC
5. Senior Hydrogeologist	No longer with NRC
6. Senior Project Manager	No longer with NRC
7. Senior Project Manager	No longer with NRC
8. Senior Project Manager (Inspections)	No longer with NRC

Table 2: NRC Staff Working on Yucca Mountain Safety Evaluation Report in September 2010 Whose Current Duties Would Need to Be Backfilled

Position Title	Current Status[1]
1. Branch Chief	NMSS
2. Branch Chief	NMSS
3. Branch Chief (acting)	NMSS
4. Center Deputy Program Manager	NMSS
5. Criticality Engineer	NMSS
6. Deputy Division Director	NMSS
7. Materials Engineer	NMSS
8. Materials Engineer	NMSS
9. Nuclear Engineer	NMSS
10. Office Director	NMSS
11. Program Analyst	NMSS
12. Program Assistant	NMSS
13. Project Manager	NMSS
14. Senior Advisor, Performance Assessment	NMSS
15. Senior Geologist	NMSS
16. Senior Geotechnical Engineer	NMSS
17. Senior Geotechnical Engineer	NMSS
18. Senior Hydro-geologist	NMSS
19. Senior Material Engineer	NMSS
20. Senior Project Manager	NMSS
21. Senior Project Manager	NMSS
22. Senior Project Manager	NMSS
23. Senior Seismologist	NMSS
24. Senior Systems Performance Analyst	NMSS
25. Systems Performance Analyst	NMSS

Table 3: NRC Staff Working on Yucca Mountain Safety Evaluation Report in September 2010 Who Would Need to Be Transferred with Reassigned Duties

	Position Title	Current Status[1]
1.	Senior Onsite Licensing Representative	FSME
2.	Senior Advisor, Science	NRO
3.	Branch Chief (acting)	NRR
4.	Deputy Division Director	NRR
5.	Deputy Office Director	NRR
6.	Division Director	NRR
7.	Technical Assistant	NRR
8.	Assistant General Counsel	OGC
9.	Attorney	OGC
10.	Attorney	OGC
11.	Branch Chief	OGC
12.	Senior Systems Performance Analyst	RES
13.	Branch Chief	RIV
14.	Senior Onsite Licensing Representative	RIV

[1] **NRC Office Abbreviations**:
NMSS – Office of Nuclear Material Safety and Safeguards
NRO – Office of New Reactors
NRR -- Office of Nuclear Reactor Regulation
FSME – Office of Federal and State Materials and Environmental Management Programs
OIS – Office of Information Services
OGC – Office of the General Counsel
RES – Office of Nuclear Regulatory Research
RIV – Region IV

The Honorable Phil Gingrey

Question 3: Before deciding to request comments from the parties by Sept. 30, were Commissioners provided with a cost estimate for collecting and analyzing those comments? What was the estimated cost? Aside from recommending a comment period, what other options did the staff provide to the Commission? What was the staff's justification for seeking comments?

Answer:
The Commission determined that given the limited funding available (an amount insufficient to complete the entire licensing process) it was necessary and appropriate to solicit the views of proceeding participants before determining a path forward for the proceeding. Review of the information provided by the participants and the NRC staff is assisting the Commission in determining how best to use the available funds and ensures that all affected parties have an opportunity to be heard.

Nuclear Waste Fund money has not and will not be spent on planning efforts for resumption of the licensing proceeding. However, Nuclear Waste Fund money is being used, consistent with appropriations law and historical practice, in order to address matters in the adjudicatory portion of the proceeding and federal court litigation.

The Honorable Robert E. Latta

Question 1: Are all Licensing Support Network documents available electronically to the licensing proceeding parties and the public via NRC's ADAMS system?

Answer:
No. Pursuant to the directive of the Licensing Board, there is a large quantity of information (approximately 8 terabytes) that is maintained by the Office of the Secretary and does not reside in ADAMS, the NRC's electronic document management system. This includes the documentary material that the various parties, other than the NRC staff, have made available on the Licensing Support Network (LSN). Public information that the staff made available on the LSN is already available through ADAMS.

The Honorable Robert E. Latta

Question 2: Is it true that the licensing proceeding could resume without activation of the Licensing Support Network and be conducted "as a large paper case" as indicated by an NRC attorney in May 12, 2012, oral argument for the Aiken County case?

Answer:
This question raises an issue that is currently before the Commission in its adjudicatory capacity. Therefore, it would be inappropriate for me to comment on this matter.

The Honorable Robert E. Latta

Question 3: You testified that the Licensing Support Network "would have to be reconstituted as part of moving forward." Does this mean the Commission has made a decision in regard to "Nye County's Motion for Lifting of Suspension of Yucca Mountain Licensing Proceeding, Scheduling of Immediate Case Management Conference, and Issuance of Related Administration Orders" filed with the Atomic Safety and Licensing Board's Construction Advisory Board on August 23, 2013?

Answer:
No, the Commission has not made a decision on Nye County's motion. We are currently reviewing Nye County's motion, as well as the comments submitted by the proceeding participants and the NRC Staff on September 30, and pertinent budget information gathered by the NRC Staff, to determine the path forward in the licensing process.

The Honorable Greg Harper

Question 1: Does your Sept. 9, 2013, decision represent final agency action in response to "Nye County's Motion for Recusal/Disqualification of NRC Commissioner Allison M. Macfarlane and Point and Authorities in Support of Motion" date August 23, 2013?

Answer:

I carefully reviewed Nye County's Motion for Recusal/Disqualification and denied it. I do not intend to revisit the matter. Therefore, it is the last action to be taken on the motion. However, for purposes of review under the Nuclear Waste Policy Act, there is reason to doubt that the decision represents a "final decision or action." Nye County sought review of the Chairman's decision both as a petition for review and as a petition for a writ of mandamus (as well as a request for a preliminary injunction) before the D.C. Circuit. On October 22, 2013, the court issued an order denying Nye County's requests for both mandamus and injunctive relief. The Court's order contemplates additional proceedings on the petition for review, but there is reason to doubt that the recusal decision is properly reviewable under the NWPA at this stage of the proceeding.

The Honorable Greg Harper

Question 2: Have you reviewed the NRC Inspector General's June 6, 2011 report "NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository License Application (OIG Case No. 11-05)"?

Answer:
No, as I testified on September 10, 2013, I have not read the NRC Inspector General's June 6, 2011 report.

The Honorable Greg Harper

Question 3: **Have you reviewed Angela Coggins' current role in the Office of the General Counsel? If so, please explain what ability she would have in that role to influence actions related to the Yucca Mountain license review. Please describe any actions you plan to take to mitigate how this situation creates the appearance that you are unable to be impartial.**

Answer:
It is not appropriate for me to discuss in a public forum internal personnel matters involving career NRC staff. The NRC follows Office of Government Ethics requirements and guidance on conflict of interest matters. Career NRC staff assigned to Commission offices routinely return to staff offices in areas of their expertise.

The Honorable John D. Dingell

Question 1: According to the recent ruling by the D.C. Circuit Court and testimony you've given to this Subcommittee, the NRC has approximately $11 million of funding for the licensing review process. Since you last testified before this Subcommittee in February, has the NRC spent any of those funds? Please clarify how much and how those funds were spent.

Answer:
As of September 30, 2013, approximately $52,000 has been expended from the Nuclear Waste Fund. The expenditure is associated with NRC staff labor hours needed to implement the court's order.

The Honorable John D. Dingell

Question 2: **I understand the NRC has an open comment period soliciting feedback on how the Commission should move forward in light of the D.C. Court's recent decision. One major step in the process is the completion of the Safety Evaluation Reports. One of the five volumes has already been completed and it is my understanding that technical evaluation reports were completed for three of the four remaining volumes.**

a. **Does the NRC have staff in place that is qualified to take these technical evaluations and complete the safety evaluations with the appropriate recommendations?**

Answer:
The NRC and its principal contractor, the Center for Nuclear Waste Regulatory Analyses (CNWRA), have qualified staff who could work on completing the Safety Evaluation Reports (SER), provided that the Commission chooses to direct the NRC staff to complete the SER. The NRC staff stated in its September 30, 2013, response to the Commission's August 30, 2013 order that these staff are currently working on other agency activities and would need to be reassigned in order to complete the SER. The staff further stated that it would need to replace staff that have retired or otherwise left the NRC or CNWRA. The Commission is reviewing the views submitted by the parties to the proceeding, as well those it received NRC staff, and will decide the path forward in the licensing process.

b. **If NRC were to only focus on the completion of the Safety Evaluation Reports, do you believe you have enough funds to complete work on the Reports?**

Answer:
As noted above in the response to question 2a, parties to the high-level waste adjudicatory proceeding, including the NRC staff, provided views about how to proceed with the licensing process. The NRC staff's views indicated that the staff currently estimates that the SER can likely be completed with available funds and a focused effort. Until the Commission completes its deliberations and determines a path forward in the licensing process, it is premature for me to provide views regarding potential SER completion costs.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115
Majority (202) 225–2927
Minority (202) 225–3641

September 30, 2013

Dr. Peter B. Lyons
Assistant Secretary for Nuclear Energy
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Dr. Lyons:

Thank you for appearing before the Subcommittee on Environment and the Economy on Tuesday, September 10, 2013, to testify at the hearing entitled "Implementing the Nuclear Waste Policy Act – Next Steps."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Monday, October 14, 2013. Your responses should be e-mailed to the Legislative Clerk in Word format at Nick.Abraham@mail.house.gov and mailed to Nick Abraham, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

John Shimkus
Chairman
Subcommittee on Environment and the Economy

cc: The Honorable Paul Tonko, Ranking Member,
Subcommittee on Environment and the Economy

Attachment

Department of Energy
Washington, DC 20585

June 5, 2014

The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U. S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On September 10, 2013, Dr. Peter Lyons, Assistant Secretary for Nuclear Energy, testified regarding "Implementing the Nuclear Waste Policy Act – Next Steps".

Enclosed are the answers to 10 questions that were submitted by Representatives Bob Latta, Bill Johnson, John Dingell and you. Also enclosed are two Inserts that were requested by Representatives John Dingell and Tim Murphy to complete the hearing record.

If we can be of further assistance, please have your staff contact our Congressional Hearing Coordinator, Lillian Owen, at (202) 586-2031.

Sincerely,

Christopher E. Davis
Principal Deputy Assistant Secretary
for Congressional Affairs
Congressional and Intergovernmental Affairs

Enclosures

cc: The Honorable Paul Tonko, Ranking Member

Printed with soy ink on recycled paper

QUESTION FROM CHAIRMAN JOHN SHIMKUS

Q1. In terms of DOE's activities on spent nuclear fuel and high-level waste disposal, please indicate which activities receive higher priority and leadership focus:

a. Following the Nuclear Waste Policy Act, complying with the August 13, 2013 Writ of Mandamus by the D.C. Circuit Court, and defending the Yucca Mountain license application; or

b. DOE's Strategy for the Management and Disposal of Used Nuclear Fuel and High-level Radioactive Waste which has not been authorized by Congress.

A1. The Department is committed to meetings its obligations to dispose of used nuclear fuel and high-level radioactive waste. All DOE activities regarding the management and disposal of used nuclear fuel and high-level radioactive waste are important and receive the Department's focused attention. As the Department has consistently stated, it will comply fully with the law and will evaluate and determine how to respond to applicable orders from the courts or the NRC. In addition, as previously conveyed to the Subcommittee, we are conducting activities within existing Congressional authorization to plan for the eventual transportation, storage and disposal of spent nuclear fuel and high-level waste. These activities are intended to facilitate the development of an interim storage facility, of a geologic repository and of the supporting transportation infrastructure. These activities are designed to not limit the options of either the Administration or the Congress.

The Administration released its *Strategy for the Management and Disposal of Used Nuclear Fuel and High Level Waste* in January 2013. The Strategy provides the framework for sustainable management and disposal of used nuclear fuel and high-level waste that is founded on consent-based siting, interim storage, geologic disposal, a new entity to manage the program, and

sustainable funding mechanisms. The Administration looks forward to working with Congress to build and implement the principles and elements of this Strategy.

QUESTION FROM CHAIRMAN JOHN SHIMKUS

Q2. Your response to my letter of August 26, 2013, letter listed several active contracts. Please provide a list of the expiration dates for those contracts, whether DOE intends to allow those contracts to expire, and any actions DOE intends to take to extend contracts and preserve DOE's access to those services and expertise.

A2:

Contract	Expiration Date	Planned Actions
USA REPOSITORY SERVICES LLC	March 31, 2014	• Depending on actions to be undertaken by DOE in response to NRC requests or orders, this contract could be extended, in accordance with applicable law.
SANDIA CORPORATION	March 31, 2014	• DOE will use the Sandia National Laboratories capabilities through the NNSA contract for that site. DOE will continue to utilize the services of the lab as necessary to support DOE's response to NRC requests or orders.
HUNTON AND WILLIAMS	December 31, 2013	• Depending on actions to be undertaken by DOE in response to NRC requests or orders, this contract for legal services could be extended, in accordance with applicable law.
BOOZ ALLEN HAMILTON INC.	November 30, 2014	• This contract for preparation of the Nuclear Waste Fee Adequacy Assessment could be extended in accordance with applicable law.
BROOKFIELD RELOCATION INC.(Travel/PCS)	September 30, 2015	• This contract to reimburse employees for travel and permanent change of station expenses associated with the closure of the Office of Civilian Radioactive Waste Management could be extended in accordance with applicable law.
OFFICES, BOARDS & DIVISIONS (Fed Prison Ind., Inc.)	November 2015	• This contract to disposition property associated with the closure of the Office of Civilian Radioactive Waste Management could be extended in accordance with applicable law.
GEOLOGICAL SURVEY, UNITED STATES DEPT OF INTERIOR	N/A	• Interagency Agreement with USGS.
MORGAN, LEWIS & BOCKIUS LLP	December 31, 2016	• Depending on actions to be undertaken by DOE in response to NRC requests or orders, this contract for legal services could be extended, in accordance with applicable law.
KPMG L.L.P.	September 2014	• Auditing services for the Nuclear Waste Fund.

The Department's response to the referenced August 26, 2013 letter included a contract with Jason Associates Corporation as an active contract. In fact, that contract was not active at that time.

QUESTION FROM CHAIRMAN JOHN SHIMKUS

Q3. Is DOE preparing to assemble a team of personnel and contractor support necessary to defend the license application? If not, why not? If so, please describe the actions underway.

A3. On August 30, 2013, the Nuclear Regulatory Commission (NRC) issued an order requesting input from the parties to the licensing proceeding as to how the NRC should continue with the licensing process in light of the writ of mandamus from the U.S. Court of Appeals for the D.C. Circuit ordering the NRC to resume its review of the Yucca Mountain license application. As the Department has consistently stated, it will comply with the law and will evaluate and determine how to respond to applicable orders from the courts or the NRC.

QUESTION FROM CHAIRMAN JOHN SHIMKUS

Q4. When will DOE provide the Committee a detailed estimate of the resources necessary for DOE to resume its program to support completion of the license review?

A4. As the Department has consistently stated, it will comply with the law and will evaluate and determine how to respond to applicable orders from the courts or the NRC.

In FY 2010, the last year in which Congress appropriated funds for a repository at Yucca Mountain, the Administration's budget request for the Office of Civilian Radioactive Waste Management was $196,800,000.

QUESTION FROM CHAIRMAN JOHN SHIMKUS

Q5. What was the basis for DOE's conclusion that the NWPA funds could be used to shut down the licensing process?

A5. The principles underlying the Department's use of NWPA funds in connection with the orderly closure of the Yucca Mountain Project were addressed in an April 12, 2010 letter from Scott Blake Harris, General Counsel of the Department of Energy, to the Honorable Rodney P. Frelinghuysen, Ranking Member of the Subcommittee on Energy and Water Development, Committee on Appropriations, U.S. House of Representatives. A copy of that letter is enclosed. As stated in that letter, the Subcommittee was apprised of the Department's exercise of authority to reprogram funds for use in the orderly closure of the Yucca Mountain Project, the funds were used consistently with the purpose for which they were appropriated, and the Department's actions with respect to the discontinuation of OCRWM operations and reprogramming of appropriated funds were within its proper authority.

QUESTION FROM CHAIRMAN JOHN SHIMKUS

Q6. Has DOE examined whether the use of Nuclear Waste Fund money to close down the Yucca Mountain program was a violation of the Purpose Act? If so, please provide a legal memo outlining DOE's conclusions.

A6. The reprogrammed funds appropriated from the Nuclear Waste Fund that were used for the orderly closure of the Yucca Mountain Project were used consistently with the purpose for which they were appropriated as more fully explained in the enclosed April 12, 2010 letter.

QUESTION FROM CHAIRMAN JOHN SHIMKUS

Q7. Is DOE examining options for restoring or reimbursing the Nuclear Waste Fund money that was misspent on terminating the Yucca Mountain program? If so, please provide us a legal memo outlining DOE's conclusions.

A7. As more fully explained in the enclosed April 12, 2010 letter, the funding used for the orderly closure of the Yucca Mountain Project was used consistently with the purpose for which they were appropriated. The appropriate Subcommittee was timely apprised of the basis for DOE's actions addressing the reprogramming of appropriated funds for the orderly closure of the Yucca Mountain Project.

QUESTION FROM REPRESENTATIVE BOB LATTA

Q1. Please explain the basis for your refusal to commit that DOE will neither attempt to slow or obstruct the resumption or pace of the license review.

A1. As we have consistently said, the Department will comply with the law and evaluate and determine how to respond to orders by the courts or the NRC.. The Department does not intend to slow or obstruct any aspect of the process.

QUESTION FROM REPRESENTATIVE BILL JOHNSON

A1. Will DOE, as the applicant in the Yucca Mountain license proceeding, once again advocate in favor of NRC granting construction authorization?

As the Department has consistently stated, it will comply with the law and evaluate and determine how to respond to orders by the courts or the NRC.

QUESTION FROM REPRESENTATIVE JOHN DINGELL

Q1. A D.C. Circuit Court decision in 2012 ordered DOE to reevaluate the fee assessment. Since the Yucca Mountain facility has not moved forward in recent years and there is statutorily no alternative site for a permanent high-level waste repository, has DOE considered whether it should continue to assess the fee?

A1. The Department of Energy's *Nuclear Waste Fund Fee Adequacy Assessment Report*, published and submitted to the U.S. Court of Appeals for the D.C. Circuit in January 2013, supports the need for continued collection of the fee. The obligation to take possession and dispose of used nuclear fuel from commercial contract holders remains, and the fees collected and interest earned are intended to offset the costs of performing our statutory and contractual obligations. As the Department has consistently stated, it will comply with the law and evaluate and determine how to respond to orders by the courts.

953 complete the work on the reports? Would you please answer
954 yes or no?
955 Ms. {Macfarlane.} As referenced earlier in previous
956 testimony, we said that it would cost to 6.5 million to
957 complete the SER--
958 Mr. {Dingell.} So the answer is--
959 Ms. {Macfarlane.} --but we have asked our staff to
960 update that number.
961 Mr. {Dingell.} Would you submit us a statement of the
962 status of those funds, please?
963 Now, Mr. Lyons, is DOE collecting fees into the Nuclear
964 Waste Fund? Yes or no?
965 Mr. {Lyons.} Yes, the funds continue to be--
966 Mr. {Dingell.} Thank you. The D.C. Circuit Court
967 decision in 2012 ordered DOE to reevaluate the fee
968 assessment. Since Yucca Mountain facility has not moved
969 forward in recent years and there is still no statutorily
970 alternative site for a permanent high-level waste repository,
971 has DOE considered whether it should continue to assess the
972 fee? Please answer yes or no.
973 Mr. {Lyons.} Mr. Dingell, as Secretary Moniz discussed
974 when he was with this subcommittee, the fees continue to be
975 collected because they--
976 Mr. {Dingell.} So--

977 Mr. {Lyons.} --reference a service of disposal of the
978 used fuel.
979 Mr. {Dingell.} Is that a yes or no, sir? My time is
980 very limited. Please, yes or no? To the question, yes or
981 no?
982 Mr. {Lyons.} Again, these--
983 Mr. {Dingell.} Okay. Would you please submit
984 additional information on that matter for purposes of the
985 record?
986 Now, because the Federal Government has not upheld its
987 responsibility to provide a permanent high-level nuclear
988 waste repository, it is my understanding that orders of
989 nuclear facilities are suing the Federal Government for
990 compensation to store waste on sites and locations across the
991 country. According to the February 2012 report by CRS, there
992 has been over $2 billion in awards and settlements as a
993 result of these claims. These payments come from the
994 judgment funded by taxpayers' dollars. The Department of
995 Justice has spent approximately 200 million defending the
996 government against these claims.
997 Now, Madam Chairman, I urge NRC to focus on the
998 completion of the Safety Evaluation Reports. Should the
999 reports determine that the Yucca Mountain facility is
1000 appropriate, hopefully opponents will allow the process to

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WITNESS: PETER LYONS
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The Department of Energy's *Nuclear Waste Fund Fee Adequacy Assessment Report*, published and submitted to the U.S. Court of Appeals for the D.C. Circuit in January 2013, supports the need for continued collection of the fee. The obligation to take possession and dispose of used nuclear fuel from commercial contract holders remains, and the fees collected and interest earned are intended to offset the costs of performing our statutory and contractual obligations. As the Department has consistently stated, it will comply with the law and evaluate and determine how to respond to orders by the courts.

1721 Resolution was the last time NRC and DOE received funding for
1722 the license review. Am I correct on that, Ms. Macfarlane?
1723 Ms. {Macfarlane.} I am sorry, the fiscal year--
1724 Mr. {Murphy.} The fiscal year 2011 Continuing
1725 Resolution was the last time NRC and DOE received funding for
1726 license review--
1727 Ms. {Macfarlane.} Yes.
1728 Mr. {Murphy.} --am I correct, Mr. Lyons, is that true
1729 as well?
1730 Ms. {Macfarlane.} I do believe that is correct.
1731 Mr. {Murphy.} And the purpose of that funding was to
1732 carry out the purposes of the Nuclear Waste Policy Act, am I
1733 correct?
1734 Ms. {Macfarlane.} Sorry?
1735 Mr. {Murphy.} The purpose of that funding was to carry
1736 out the purposes of the Nuclear Waste Policy Act?
1737 Ms. {Macfarlane.} Yes.
1738 Mr. {Murphy.} Am I correct?
1739 Ms. {Macfarlane.} Certainly.
1740 Mr. {Murphy.} And, Dr. Lyons, but DOE used that money
1741 for the opposite purpose, to shut down the Yucca Mountain
1742 program in an attempt to withdraw the license application, am
1743 I correct?
1744 Mr. {Lyons.} The fiscal year 2010 funding was used for

1745 shutdown of the program, yes.

1746 Mr. {Murphy.} All right. And, Dr. Macfarlane, the NRC

1747 also used that money to suspend the license review, correct?

1748 Ms. {Macfarlane.} Correct.

1749 Mr. {Murphy.} And, Dr. Lyons, how much money from the

1750 Nuclear Waste Fund did DOE spend to shut down the program?

1751 Mr. {Lyons.} I would prefer to give you a precise

1752 number. It was around 130 million but we can give it to you

1753 precisely in writing.

1754 Mr. {Murphy.} I have 138 million. I just wanted to be

1755 sure but let me know the precise number.

1756 Chairman Macfarlane, how much money from the Nuclear

1757 Waste Fund did NRC spend to suspend the license review?

1758 Ms. {Macfarlane.} I believe it was 7.4 million.

1759 Mr. {Murphy.} Okay. I thought it was a little bit

1760 more. Could you double-check the number, please?

1761 Ms. {Macfarlane.} I can certainly double-check the

1762 number.

1763 Mr. {Murphy.} So, to both of you, together your two

1764 agencies have spent, by my calculations, a little bit under

1765 $150 million of electricity consumers' money shutting down a

1766 license review that the court has now said you have to

1767 complete. So electricity consumers throughout this country

1768 paid for you to conduct the license review, not to scuttle

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As of September 30, 2013, the Department has spent approximately $163.1 million on the shutdown of the Yucca Mountain project and the closure of the Office of Civilian Radioactive Waste Management. Of this total, $77.3 million were from the Nuclear Waste Fund with the remainder paid from appropriations for defense nuclear waste disposal activities.

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