

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

Case Caption: Aiken County _____

v.

Case No: 10-1050 _____

United States Department of Energy et al. _____

ENTRY OF APPEARANCE

Party Information

The Clerk shall enter my appearance as counsel for the following parties:

(List each party represented individually. Use an additional blank sheet as necessary)

- Appellant(s)/Petitioner(s)
- Appellee(s)/Respondent(s)
- Intervenor(s)
- Amicus Curiae

Aiken County _____

Names of Parties

Names of Parties

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Notes: This form must be submitted by a member of the Bar of the U.S. Court of Appeals for the D.C. Circuit.

Names of non-member attorneys listed above will not be entered on the court's docket.

Applications for admission are available on the court's web site at <http://www.cadc.uscourts.gov/>

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

IN RE: AIKEN COUNTY,)	No. 10-1050
)	
Petitioner.)	
_____)	
)	
ROBERT L. FERGUSON, et al.,)	
)	
Petitioners)	
v.)	
)	No. 10-1052
UNITED STATES DEPARTMENT)	
OF ENERGY, et al.,)	
)	
Respondents.)	
_____)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Petitioner)	
v.)	
)	No. 10-1069
UNITED STATES DEPARTMENT)	
OF ENERGY, et al.,)	
)	(CONSOLIDATED)
Respondents.)	
_____)	

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's Administrative Order of May 15, 2009, I hereby certify that on August 26, 2010, I caused the foregoing to be filed upon the Court through

the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service by e-mail is consistent with the preferences articulated by all counsel of record in the Service Preference Report.

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



SECRETARY

August 18, 2010

The Honorable Doc Hastings
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Hastings:

I am responding to your letter dated August 17, 2010, addressed to Chairman Jaczko, related to the pending adjudicatory proceeding that is associated with the U.S. Department of Energy's (DOE) application for the proposed Yucca Mountain high-level waste repository. You request that the Commission "decide on the merits of the claim that DOE acted illegally in seeking to withdraw its license application without delay."

Given the pendency of the adjudicatory proceeding the Commission cannot discuss or comment on issues involved in this matter. However, please be assured that the Commission, in its adjudicatory capacity and with due consideration to applicable law, is moving with all due haste in arriving at a decision relative to review of the Atomic Safety and Licensing Board decision LBP-10-11.

A copy of your letter and this response will be served on the participants in the *Yucca Mountain* proceeding. In addition, we will keep you informed of the Commission's decisions in this matter.

Sincerely,

A handwritten signature in black ink that reads "Annette Vietti-Cook". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Annette L. Vietti-Cook

cc: Service List



Congress of the United States House of Representatives

August 17, 2010

Chairman Gregory B. Jaczko
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001

Dear Chairman Jaczko:

I write today regarding the delay in the release of the Nuclear Regulatory Commission's decision on the Department of Energy's (DOE) move to withdraw the license application for Yucca Mountain with prejudice.

As you know, earlier this year several parties challenged the Obama Administration's decision to abandon the Yucca Mountain project as the site for permanent disposal of high level nuclear waste. These actions have been consolidated in the U.S. Circuit Court of Appeals for the D.C. Circuit, and were set for argument on September 23, 2010.

At the same time, DOE filed to withdraw the license application for the Yucca Mountain project from consideration by the NRC. The NRC directed the Atomic Safety and Licensing Board to consider the motion immediately. On June 29, 2010, the ASLB unanimously rejected DOE's motion and found that DOE must move forward with the application. The very next day, the NRC issued an order directing the parties to submit briefs by July 16 as to whether it should review the ASLB's decision.

Based on the NRC's action of requesting the parties provide briefs, the Department of Justice asked the D.C. Circuit to postpone the September 23 argument on the broader issue of abandoning the site, pending a decision by the NRC.

This matter has now been pending before the NRC since July 16, when all briefs were to have been filed. Although the NRC acted quickly in taking the case, and the D.C. Circuit postponed argument based on the NRC's response to the ASLB's opinion, the Commission has yet to act. I am also concerned that it took two commissioners almost a month to deny motions to recuse themselves, while a third commissioner decided to recuse himself in a matter of just six days of when the motions were filed, albeit for different reasons. I believe that every day of delay creates serious harm to the project. DOE continues to dismantle the Yucca Mountain project at great cost to taxpayers and in total disregard of the ASLB's decision that DOE has no authority to do so.

I would encourage you to decide on the merits of the claim that DOE acted illegally in seeking to withdraw its license application without delay. Thank you for your timely consideration and I would ask that you notify me when a decision will be reached.

Sincerely,

A handwritten signature in black ink, appearing to read "Doc Hastings". The signature is written in a cursive, flowing style.

Doc Hastings
Member of Congress

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY)
)
(High-Level Waste Repository))
)

Docket No. 63-001-HLW
ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Letter from the Secretary to the Honorable Doc Hastings**, dated August 18, 2010, have been served upon the following persons by Electronic Information Exchange.

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
Letter from the Secretary to the Honorable Doc Hastings

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
Letter from the Secretary to the Honorable Doc Hastings

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
Letter from the Secretary to the Honorable Doc Hastings

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
Letter from the Secretary to the Honorable Doc Hastings

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
Letter from the Secretary to the Honorable Doc Hastings

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
Letter from the Secretary to the Honorable Doc Hastings

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
Letter from the Secretary to the Honorable Doc Hastings

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[Original Signed by Linda D. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 19th day of August 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
William D. Magwood, IV
William C. Ostendorff

In the Matter of)

U.S. DEPARTMENT OF ENERGY)

(High Level Waste Repository))

) Docket No. 63-001-HLW
)
)

CLI-10-13

MEMORANDUM AND ORDER

The Department of Energy (DOE) has filed a motion to withdraw¹ its request for authorization to construct a permanent geologic spent fuel and high-level nuclear waste repository at Yucca Mountain, Nevada. Five new petitioners have sought to intervene in the proceeding, submitting proposed contentions that challenge the legality of DOE's proposed withdrawal.² After first scheduling briefing, the Construction Authorization Board issued a decision suspending briefing, suspending its consideration of the five

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

² See *Petition of the State of South Carolina to Intervene* (Feb. 26, 2010), *Supplement/Amendment to Petition of the State of South Carolina to Intervene* (Mar. 26, 2010); *State of Washington's Petition for Leave to Intervene and Request for Hearing* (Mar. 3, 2010); *Petition of Aiken County, South Carolina, to Intervene* (Mar. 4, 2010); *National Association of Regulatory Utility Commissioners, Petition to Intervene* (Mar. 15, 2010); *Petition to Intervene of the Prairie Island Indian Community* (Mar. 15, 2010).

- 2 -

new intervention petitions and DOE's motion to withdraw, and extending the stay of the proceeding it had entered previously.³ The Board based its suspension decision on its view that it was prudent and efficient to await guidance on the "motion to withdraw" issue from the U.S. Court of Appeals for the District of Columbia Circuit, which has before it several lawsuits challenging DOE's effort to halt the Yucca Mountain project.⁴ DOE has petitioned for interlocutory review of the Board's decision.⁵

³ Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010), at 12-13 (unpublished) (Suspension Order). See also Order (Granting Stay of Proceeding) (Feb. 16, 2010) (unpublished).

⁴ Suspension Order at 2-3 & 2 n.6. Four cases are pending in the U.S. Court of Appeals for the District of Columbia Circuit: *In re Aiken County*, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); *Ferguson v. U.S. Dep't of Energy*, No. 10-1052 (D.C. Cir. filed Feb. 25, 2010); *South Carolina v. U.S. Dep't of Energy*, No. 10-1069 (D.C. Cir. transferred Mar. 25, 2010). These cases were consolidated on April 8. The State of Washington also has filed a lawsuit, *Washington v. Dep't of Energy*, No. 10-1082 (D.C. Cir. filed Apr. 13, 2010), and asked that it be consolidated with the other three cases. All these lawsuits, except for *Ferguson*, include NRC and NRC officials among the respondents. Three of the petitioners in the court cases, South Carolina, Washington, and Aiken County (SC), also have sought intervention in the NRC proceeding.

⁵ *U.S. Department of Energy's Petition for Interlocutory Review* (Apr. 12, 2010). The State of Nevada filed an answer in support of DOE's petition. *State of Nevada Answer in Support of the Department of Energy's Petition for Interlocutory Review* (Apr. 14, 2010). Nye County, Nevada, an admitted party in the proceeding, joined DOE's petition. *Nye County Nevada's Petition for Interlocutory Review of CAB04 April 6, 2010 Order* (Apr. 15, 2010). Aiken County, the NRC Staff, the State of Washington, the State of South Carolina, and Clark County, Nevada (also an admitted party in the proceeding), responded to DOE's and Nye County's petitions. See *Aiken County's Response to Two Petitions for Interlocutory Review* (Apr. 16, 2010); *NRC Staff Answer to U.S. Department of Energy Petition for Interlocutory Review* (Apr. 20, 2010); *NRC Staff Answer to Nye County Nevada's Petition for Interlocutory Review of CAB04 April 6, 2010 Order* (Apr. 20, 2010); *State of Washington's Response to Petitions for Interlocutory Review* (Apr. 21, 2010); *Answer of the State of South Carolina to Petitions for Interlocutory Review* (Apr. 22, 2010); *Answer of Clark County, Nevada in Support of the Department of Energy's Petition for Interlocutory Review* (Apr. 22, 2010).

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Given the unique circumstances of this case, we review and vacate the Board's decision as an exercise of our inherent supervisory authority over adjudications.⁶ DOE's motion to withdraw invokes § 2.107 of our rules⁷ and statutes central to our mission — the Nuclear Waste Policy Act (NWPA) (particularly NWPA § 114(b), (d)) and the Atomic Energy Act of 1954, as amended (AEA).⁸ Courts generally accord considerable weight to an agency's construction of the statutes it administers,⁹ and defer to an agency's interpretation of its own regulations.¹⁰ Fundamental questions have been raised, both

⁶ The special NRC rules governing this high-level waste proceeding do not provide for the kind of interlocutory review that DOE seeks. See 10 C.F.R. § 2.1015. DOE asks that we invoke our inherent supervisory authority over adjudications, but we generally do not entertain such requests. See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009). Even so, were this an ordinary case, DOE's petition surely would qualify for interlocutory review because it challenges a Board decision that "[a]ffects the basic structure of the proceeding in a pervasive [and] unusual manner." See 10 C.F.R. § 2.341(f)(2); *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 62-63 (2009). Therefore, in these unique circumstances, we believe it appropriate to exercise our *sua sponte* review authority.

⁷ See Motion to Withdraw at 1-3. Among other things, section 2.107(a) provides that "[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe."

⁸ NWPA, 42 U.S.C. §§ 10101 et seq. (see Motion to Withdraw at 2, 4-8); NWPA § 114(b), (d), 42 U.S.C. § 10134(b), (d) (see Motion to Withdraw at 2, 5-6); AEA, 42 U.S.C. §§ 2011 et seq. (see Motion to Withdraw at 4 n.5).

⁹ See, e.g., *United States v. Eurodif S.A.*, 129 S.Ct. 878, 886-87 (2009); *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). See also *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.").

¹⁰ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (an agency's interpretation of its own regulation is controlling provided it is not "plainly erroneous or inconsistent with the regulation." (citing *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945))). Accord *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); see also *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978).

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before us and before the D.C. Circuit, regarding the terms of DOE's requested withdrawal, as well as DOE's authority to withdraw the application in the first instance. Interpretation of the statutes at issue and the regulations governing their implementation falls within our province. If judicial review is pursued after our final decision, the application of our expertise in the interpretation of the AEA, the NWPA, and our own regulations will, at a minimum, inform the court in its consideration of the issues raised by DOE's motion to withdraw.

The Board understandably has sought to manage this case with an eye toward the efficient use of NRC resources and in anticipation of an authoritative legal ruling from the D.C. Circuit on DOE's effort to withdraw its Yucca Mountain application. But we respectfully do not agree with the Board that freezing our consideration of DOE's motion to withdraw promotes respect for the courts or efficiency. As noted above, judicial review may well benefit from NRC's consideration of the issues surrounding DOE's motion. And, in any event, it is not clear when or if the D.C. Circuit will provide the guidance the Board expects on those issues. In the D.C. Circuit litigation, the government has raised substantial justiciability arguments that, if accepted, would block a judicial merits determination until after the NRC acts.¹¹

Thus, rather than await a judicial decision, the timing and result of which is uncertain, and absent a contrary instruction from the court, we think the prudent course of action is to resolve the matters pending before our agency as expeditiously and responsibly as possible.

¹¹ See *Respondents' Response in Opposition to the Petition, In re: Aiken County*, No. 10-1050 (D.C. Cir.) (filed Mar. 24, 2010).

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For these reasons, we vacate the Board's Suspension Order and remand the matter to the Board for prompt resolution of DOE's motion to withdraw. We direct the Board to establish a briefing schedule on DOE's motion to withdraw and issue a decision on that motion no later than June 1, 2010. The Board should continue case management and resolve all remaining issues promptly.

IT IS SO ORDERED¹².

For the Commission

(NRC SEAL)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of April, 2010.

¹² Commissioner Apostolakis did not participate in this order because he had not yet taken the oath of office.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	ASLBP No. 09-892-HLW-CAB04
(High-Level Waste Repository))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-10-13)**, dated April 23, 2010, have been served upon the following persons by Electronic Information Exchange.

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
COMMISSION MEMORANDUM AND ORDER (CLI-10-13)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
COMMISSION MEMORANDUM AND ORDER (CLI-10-13)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
COMMISSION MEMORANDUM AND ORDER (CLI-10-13)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
COMMISSION MEMORANDUM AND ORDER (CLI-10-13)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
COMMISSION MEMORANDUM AND ORDER (CLI-10-13)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
COMMISSION MEMORANDUM AND ORDER (CLI-10-13)

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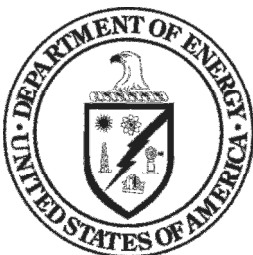
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[Original Signed by Linda D. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 23rd day of April 2010



U.S. Department of Energy
Office of Inspector General
Office of Audit Services

Special Report

Need for Enhanced Surveillance
During the Yucca Mountain Project
Shut Down

OAS-SR-10-01

JULY 2010



Department of Energy
Washington, DC 20585

July 21, 2010

MEMORANDUM FOR THE UNDER SECRETARY

FROM: 
Gregory H. Friedman
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SUBJECT: INFORMATION: "Need for Enhanced Surveillance During
the Yucca Mountain Project Shut Down"

INTRODUCTION

The Nuclear Waste Policy Act Amendments of 1987 (Act) designated Yucca Mountain in Southwestern Nevada as the site for a national geologic repository for high-level nuclear waste, primarily the waste generated by U.S. commercial nuclear plants. The Department of Energy (Department) assigned management of the program to the Office of Civilian Nuclear Waste Management (OCRWM) and formally designated the project as the Yucca Mountain Project (Project).

By every measure, this was to have been one of the largest efforts of its kind ever undertaken. In fact, since 1987, the Department has spent in excess of \$10.5 billion in pursuing the Project. These funds have been used to:

1. Evaluate the suitability of the site as repository, on a science and engineering basis;
2. Make major real property infrastructure improvements at the site, including tunneling through the mountain and constructing buildings for office and ancillary purposes;
3. Purchase significant quantities of personal property (computers, office furniture, etc.) to carry out ongoing operations; and,
4. Develop and accumulate massive amounts of scientific and technical data concerning the Project and a variety of related issues.

In accordance with the Act, the Project has been funded primarily by a rate premium charged to those customers of public utilities who relied on nuclear power for electricity generation. Federal funding has supported aspects of the Project, but to a much lesser degree.

On June 3, 2008, the Department filed a license application with the Nuclear Regulatory Commission (NRC) to begin construction of the repository.

PROJECT TERMINATION

In early 2009, the Department indicated that it intended to terminate the Project. As memorialized in the Fiscal Year (FY) 2011 budget request, the Department has sought to have virtually all funding for the Project eliminated and, in March 2010, moved to withdraw the NRC license application, with prejudice. Pending approval, the Department is moving to shut down all activities at the Yucca Mountain site by September 30, 2010.

Although the Office of Inspector General (OIG) takes no position regarding the policy judgment to terminate the Project, we have been and remain concerned that any shut down be consummated in a way that protects the national interest, including the interests of the ratepayers and taxpayers who financed the Project. Other than the termination of the Department's Super Conducting, Super Colliding Project in Texas in 1998, we know of no comparable single project termination in the Department's recent history as consequential as Yucca Mountain, given the importance of its intended mission, the massive investment in real and personal property and the development and compilation of huge quantities of Project-related, intellectual property.

On February 23, 2010, the OIG announced an audit to determine whether OCRWM had adequately planned for the Project's orderly shut down. On March 2, 2010, management informed us that it was in the process of preparing a master plan to manage the shut down process and that it would be completed by the end of March 2010. As described to us at the time, the master plan would have addressed many of the topics proposed for our audit. Management requested that the OIG defer its audit until the plan was completed.

We evaluated this request and, based on the circumstances, agreed to defer the audit until completion of the plan. However, given the importance of this matter, it was our intent to restart the audit once the plan was formulated. To that end, we monitored the progress of various judicial challenges to the license application withdrawal, including a court-imposed one month stay in shut down activities. On June 12, 2010, we met with OCRWM officials to determine the status of shut down planning in anticipation of restarting our audit. We were told that the plan was not complete and that events were moving so quickly that no further action on the master plan was contemplated. Instead, management described its strategy for meeting the September 2010 Project shut down date, essentially concentrating on various functional activities at the Project.

The Office of Inspector General issued a draft of this report for comment by Department management. Management responded on July 19, 2010, providing details on its commitment to close down the Project in a responsible and orderly manner. These comments, which are an integral part of this report, are provided in their entirety in the attachment.

SHUT DOWN OVERSIGHT

In our view, and as OCRWM officials readily acknowledged, the development, implementation and execution of an approved master plan or the equivalent for the shut down of Yucca Mountain, specifically, one that addressed the key issues in an analytical, coordinated and integrated manner would have been the preferred course of action given the magnitude of the

Project. Further, as virtually all parties recognized, such a planning framework would have increased the likelihood of overall success of the effort. OCRWM officials told us that shut down events had surpassed the planning initiative timeline and that the closing process was being expedited to meet the scheduled completion date of September 30, 2010. To help compensate for the lack of a master plan, OCRWM officials informed us that they had established focus groups to manage shut down activities organized along functional lines: contracts; records, including the Licensing Support Network; information technology; human relations; facilities and property; security; and, science. OCRWM officials also described the assistance being provided by Departmental organizations including the Office of General Counsel and the Office of Legacy Management. Taken together, these efforts were significant; although they did not, in our judgment, substitute for a master plan. Nonetheless, given the sequence of events and the timeline for shut down completion, we have decided not to restart our audit.

LESSONS LEARNED

In recent years, the OIG has been involved in a number of Departmental actions with attributes and characteristics similar to those that will be encountered during the Yucca Mountain shut down. In the interest of helping to assure an orderly Project termination, we are providing the Department's decision-makers with several of the most important lessons learned from these events.

Disposition of Personal Property

The Project's inventory included approximately \$6 million in personal property as of September 30, 2009. The Department is in the process of excessing or disposing of this inventory. Over time, the Department has experienced a number of instances in which both real and personal property were disposed of uneconomically or inefficiently. For example, the OIG reported in our audit report on "Property Disposals at the Yucca Mountain Project" (DOE/IG-0664, September 27, 2004) that the Project disposed of approximately 9,000 metric tons of property and the Government received no economic benefit from potentially reusable property.

Further, we have reported extensively on situations in which computers have been excessed without taking the steps necessary to ensure that hard drives have been sanitized to prevent the transfer of sensitive and/or personally identifiable data to new users. For example, we reported on the lack of controls over the proper clearing, sanitization, and destruction of memory devices (*Excessing of Computers Used for Unclassified Controlled Information at Lawrence Livermore National Laboratory*, DOE/IG-0759, March 2007; and, *Internal Controls for Excessing and Surplusing Unclassified Computers at Los Alamos National Laboratory*, DOE/IG-0734, July 2006). As noted in these reports, the Department has specific policies on how this is to be accomplished. As a preventative measure, it is important that OCRWM fully employ the appropriate computer disposition procedures.

The aggressive timeline for shut down of the Project makes it essential that the disposal of personal property be managed with care to minimize the inherent vulnerabilities associated with such an effort.

Maintaining Intellectual, Scientific and Technology Property

Since its inception, OCRWM has spent tens of millions of dollars on a wide variety of scientific and engineering studies, analyses, evaluations and reviews. These have addressed site characterization, topography, rock formation and water issues at Yucca Mountain itself, as well as related Project activities. Preservation of this information in a useful form may be critically important as the Department seeks the best path forward for resolving the U.S. nuclear waste disposition issue, a recognized challenge of major significance. We were told that the Department has proposed retaining data in the Licensing Support Network (which is the information system designed to compile data in support of the NRC licensing effort) for 100 years and core samples from characterization efforts for 25 years. While a formal system was in place to retain much of the information (specifically, the Licensing Support Network), we have identified past issues with the management of electronic and other records of which officials should be mindful. For example, we found that the Department had not developed methods for archiving e-mail and other electronic information and in planning for the schedule and disposition of records (*The Retention and Management of the Department's Records*, DOE/IG-0685, April 2005). This report, and our ongoing follow-up work in this same area, suggest that the Department needs to take special steps to ensure that the extraordinary documentary record of the Project be safeguarded for future use.

Prime Contractor and Subcontractor Management

The Project's management structure included a number of Federal personnel both in Washington and in Nevada. Consistent with the Department's general approach to mission activities, project effort has largely been the work of a significant number of contractors and subcontractors. Even in the normal course of government business, it is imperative that contracts and subcontracts be closed out in an analytical, thoughtful way to protect the interests of U.S. taxpayers. This includes the appropriate resolution of any contractor-incurred questioned or unallowed costs. In a situation such as the shut down of Yucca Mountain, where over \$10 billion has been spent and the process is proceeding on an expedited basis, employing a thorough, comprehensive and complete contract close out process takes on greater importance than normal. Related to this concern, the OIG will shortly issue a separate report on questioned Project contractor-incurred costs. These include:

- \$100 million in costs claimed by Bechtel SAIC, the former management and operating contractor for the Project, during FY 2001 through 2009. These costs were previously questioned during audits by internal auditors and the Defense Contract Audit Agency but have not been resolved by OCRWM; and,
- \$75 million in subcontract costs during FY 2004 through 2009 for which there is no evidence that Bechtel SAIC ever requested an audit of the incurred costs to determine allowability.

With at least \$175 million in costs to be resolved, the Department needs to ensure that the close out process is managed effectively and that all disallowed costs are settled and funds recouped; the remaining required audits of costs incurred are completed; and, that all excess funds are de-

obligated. As we have reported in the past, delays in the timely contract close out increase the risk that contractors and subcontractors will be unable to produce documentation to support previously submitted incurred cost claims. In a separate report to OCRWM management, the OIG is making specific recommendations for the resolution of the current issues at Yucca Mountain.

Contractor Employee Benefit Administration

The Department needs to exercise effective oversight of the administration of contractor employee pensions and post retirement health benefits associated with the Project. As of September 30, 2009, the Department's accumulated benefit obligation for Yucca Mountain employee pensions and post retirement health benefits was estimated at approximately \$20.1 million. Given the Department's significant overall unfunded liability for pensions and health benefits (most recently estimated at \$24.6 billion) and the negative impact contributions to those plans can have on operational tempo, the settlement with the Yucca Mountain contractors regarding pension and health benefits obligations needs intense scrutiny by OCRWM management.

Further, with regard to the general question of contractor employee benefits, at other Departmental sites, the OIG has raised recent concerns about the propriety of the severance payments made to contractor personnel and the consistency in the amounts of severance pay available to separated employees (*Contractor Severance Plans at the Department of Energy*, OAS-L-09-04, February 12, 2009) whose service at Departmental facilities or sites was no longer needed. Based on this experience, to the extent that the severance payments are utilized as the Project is terminating, the Department needs to ensure that such payments to separating contractor employees are consistent with existing contract provisions.

PATH FORWARD

The Department has taken a number of actions designed to bring the Project to closure. However, given the lack of an approved master plan to manage this process and the press of a very ambitious shut down schedule, special attention by senior level Department management will be necessary if the process is to be an orderly one. Although no recommendations are being made, we are hopeful that the consideration of reported past experiences will be helpful as this process moves forward.

cc: Assistant Secretary for Nuclear Energy
Chief of Staff
Acting Director, Office of Civilian Radioactive Waste Management
Director, Office of Legacy Management
Manager, Oak Ridge Office

Attachment



Department of Energy

Washington, DC 20585

July 19, 2010

**MEMORANDUM FOR GREG FRIEDMAN
INSPECTOR GENERAL**

**FROM: OFFICE OF CIVILIAN RADIOACTIVE WASTE
MANAGEMENT**

**SUBJECT: Management Comments on Draft Office of Inspector
General Report on the Need for Enhanced Surveillance
During the Yucca Mountain Project Shut Down**

The Department of Energy (DOE) appreciates the Office of Inspector General's (OIG) review of the Yucca Mountain Project shut down activities. The Department is committed to closing down the Program in a responsible and orderly manner, and has undertaken a significant effort to achieve this goal. The Office of Civilian Radioactive Waste Management (OCRWM) has been closely collaborating with relevant offices throughout the Department to ensure that scientific and Program records are appropriately preserved and maintained, and that all project property and contract requirements are properly disposed of prior to the closure of OCRWM. As the report notes, OCRWM has developed working groups organized around functional areas that are based on the draft master plan. The Department believes that it has maintained a strong and coordinated focus during the shut down process, ensuring that the records, property, and contracts are appropriately addressed, and personnel are provided the resources they need. Responses to the specific areas mentioned in the OIG report are discussed below.

Disposition of Personal Property:

OCRWM is focused on disposing all excess property, both real and personal, in accordance with current DOE orders and good business practices. We have successfully transferred property to other DOE sites and organizations, including the transfer of equipment, desks, cubicles, printers, supplies, and other office items from more than 900 offices at the Yucca Mountain location to the Hanford site, saving Hanford over \$2 million in acquisition costs. The Yucca Mountain project also successfully transferred equipment to the Nevada Site Office, the WIPP site in Carlsbad, the Tonopah Test Range, and several other DOE sites and Federal agencies. Some capital equipment items with remaining residual value were re-stocked to the original vendors or transferred to other DOE sites, with any recovered funds returned to the Nuclear Waste Fund, in accordance with Chapter 19 of the DOE Accounting Handbook. Surplus emergency vehicles have also been transferred to Nye County. For real property, facility leases are being terminated as expeditiously as possible, including facilities in Las Vegas and Washington, D.C. Site facilities have been shut down and are awaiting transfer of ownership to a successor program in DOE.

OCRWM is aware of, and takes seriously, the requirement to ensure that excess computer hard drives are sanitized to prevent the transfer of sensitive and/or personally identifiable information to new users. Other than the systems that will be transferred to the Office of Legacy



Printed with soy ink on recycled paper

Management with the data intact, OCRWM is and will continue to comply with the sanitization requirement, including sanitizing other devices such as network printers and copiers. Computers, printers and other electronic devices are being transferred to other DOE programs that need them. The remaining excess computers and associated equipment, after they have been sanitized, are being donated to Nevada county schools (Clark, Nye and Lincoln counties) under the Computers for Learning program.

Maintaining Intellectual, Scientific, and Technology Property

The Department will take all necessary actions to preserve the scientific record developed during the Yucca Mountain project. The Program has provided written direction to all participants to ensure that all records are properly archived and maintained. And, the Program has initiated discussions with the Nuclear Waste Technical Review Board to solicit the Board's assistance in helping the Department ensure that these records are maintained. We are committed to maintaining key intellectual, scientific, and technology property, and have developed plans to transition the management and maintenance of the License Support Network and other records to the Office of Legacy Management (OLM).

Prime Contractor and Subcontractor Management

OCRWM is in the process of reviewing the subcontracts that the OIG identified as requiring an audit. OCRWM will request an appropriate audit for those subcontracts that it determines require an incurred cost audit or a close-out audit. OCRWM is also in the process of reviewing other costs identified in the report and the Contracting Officer will make a determination of allowability for those costs. For unallowable costs, we plan to send a Contracting Officer determination letter to Bechtel requesting reimbursement of those costs.

Contractor Employee Benefits Administration

OCRWM is working with the Office of Management, the Office of Legacy Management, and the Office of General Counsel to determine the best approach to address Yucca Mountain employee pensions and post retirement health benefits and will ensure that the Department meets its obligations. Further, OCRWM is ensuring that contractor severance payments are being made consistent with existing contract provisions.

Contrary to the \$37M accumulated benefit obligation (ABO) number for Yucca Mountain cited on page 5 of the OIG report, our records indicate (FY09 FAS87 and FAS106 financial reports) a pension ABO of \$17.1M and a post-retirement medical ABO of \$3M (\$20.1M combined). Similarly, for the entire Department, our records indicate an unfunded pension liability of \$12.7B and an unfunded post-retirement medical liability of \$11.9B (\$24.6B combined).

We appreciate this opportunity to comment on the draft report and remain available to discuss these issues further.

IG Report No. OAS-SR-10-01

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The Office of Inspector General has a continuing interest in improving the usefulness of its products. We wish to make our reports as responsive as possible to our customers' requirements, and, therefore, ask that you consider sharing your thoughts with us. On the back of this form, you may suggest improvements to enhance the effectiveness of future reports. Please include answers to the following questions if they are applicable to you:

1. What additional background information about the selection, scheduling, scope, or procedures of the inspection would have been helpful to the reader in understanding this report?
2. What additional information related to findings and recommendations could have been included in the report to assist management in implementing corrective actions?
3. What format, stylistic, or organizational changes might have made this report's overall message more clear to the reader?
4. What additional actions could the Office of Inspector General have taken on the issues discussed in this report which would have been helpful?
5. Please include your name and telephone number so that we may contact you should we have any questions about your comments.

Name _____ Date _____

Telephone _____ Organization _____

When you have completed this form, you may telefax it to the Office of Inspector General at (202) 586-0948, or you may mail it to:

Office of Inspector General (IG-1)
Department of Energy
Washington, DC 20585

ATTN: Customer Relations

If you wish to discuss this report or your comments with a staff member of the Office of Inspector General, please contact Felicia Jones at (202) 253-2162.

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Department of Energy
Washington, DC 20585

10/2

MEMORANDUM FOR: [REDACTED]

FROM: DAVID ZABRANSKY 

SUBJECT: SPECIFIC REDUCTION IN FORCE NOTICE OF SEPARATION

DATE: JULY 7, 2010

This is to provide you with official notice that in accordance with the Deputy Secretary's memorandum of February 3, 2010 concerning the affect of the President's FY 2011 budget request eliminating funding for the Office of Civilian Radioactive Waste Management (RW), the position of [REDACTED] GS [REDACTED]-14, that you currently occupy, position number [REDACTED] located in the OFFICE OF TECHNICAL MANAGEMENT, will be abolished. It has been determined, through application of the Reduction in Force (RIF) regulations (5 CFR Part 351), that there are no other positions within the competitive area to which you have an assignment right.

This RIF action has been reached on the basis that the Office of Civilian Radioactive Waste Management and all positions within your competitive area and level will be abolished on September 30, 2010. Therefore, you will be separated from Federal service on September 30, 2010.

General information concerning the application of RIF procedures may be found at OPM's website at http://www.opm.gov/Reduction_In_Force/employee_resources/index.asp. Copies of the RIF regulations and the records on which this action is based are being maintained in the Headquarters Human Resources Operations Division. You may make an appointment to review this material by calling either your servicing Human Resources Specialist, Ms. Tiffany Sample on (202) 586-9289 or Ms. Tracy Warrick, Supervisory Human Resources Specialist on (202) 586-6788. If you are a bargaining unit employee, you are entitled to have a National Treasury Employees Union (NTEU) representative assist you in reviewing your personnel records or files relating to this RIF action. Questions concerning NTEU representation should be directed to Ms. Theresa Heinicke of the Headquarters Labor and Employee Relations Office on (202) 586-8469.



Because you are eligible for an immediate annuity, you are not entitled to severance pay. You are considered to be eligible for an immediate annuity if you meet the age and service requirements for a voluntary retirement (this includes MRA+10 for FERS employees), discontinued service retirement, or early out retirement. Information about benefits for separated employees and retirement benefits can be found in the Attachment 1 "The Employee's Guide to RIF Separation Benefits," which is also available at OPM's website at [http://www.opm.gov/Reduction In Force/employee_resources/EGRIFBEN.asp#TOD](http://www.opm.gov/Reduction%20In%20Force/employee_resources/EGRIFBEN.asp#TOD) . (NOTE: Any section of this guide that covers information related to severance pay and/or its computations are not applicable to you.). You may contact Ms. Toshia Brown at (202) 586-6726 if you have any questions about your RIF Separation or Retirement Benefits.

In addition, you will receive a lump-sum payment for the accumulated annual leave credited to you at the time of separation.

This notice also establishes your potential eligibility for priority consideration if you are found well qualified for Federal vacancies in your local commuting area under OPM's Interagency Career Transition Program (ICTAP). After you have been separated, you will be eligible for reemployment assistance through the Department of Energy's Reemployment Priority List. Information on the Department of Labor's Career One Stop Employment Tools and Career Transition website can be found at <http://www.careeronestop.org/>

You have the right to appeal this action to the Merit Systems Protection Board (MSPB). However, you may not file the appeal until the day after the effective date of your separation from Federal service, and you must file no later than 30 calendar days after the effective date. You have the right to be represented by an Attorney in this matter or any other person you may choose. Your appeal must be filed in writing with the appropriate MSPB office by personal delivery, by facsimile, by mail, by commercial overnight delivery, or via the MSPB online appeal process. Information on how and where to file an MSPB appeal are included in Attachment 2, "How to File an Appeal". Under the provisions of 5 CFR 1201.22(c), if you do not submit an appeal within 30 days, it will be dismissed as an untimely filed unless a good reason for the delay is shown. The MSPB judge will provide you an opportunity to show why your appeal should not be dismissed as untimely.

So that we have a record that you have received this notice, please sign and date the Acknowledgment of Receipt Form at the end of this letter and return it to an HR representative from your servicing Human Resources Office or mail it to the address noted on the form.

On behalf of the management of the Office of Civilian Radioactive Waste Management and the Department of Energy, I want to express my sincere appreciation for your dedicated service, commitment and the contributions you have made toward the accomplishment of our mission.

----- Original Message -----

From: DOE Technical Support

Sent: 07/02/2010 10:33 AM PDT

To: OCRWM West

Cc: Kelly Knopf; Kory.Hay@rw.doe.gov

Subject: System Shut Down List

The following applications will be shut down and will not longer be available after COB Friday, July 2, 2010:

License Application Completions (LAC)

Request for Additional Information System (RAIRS)

Contentions Action Tracking

Technical Data Management System (TDMS)

Curatorial Sample Information Tracking System (CSITS)

Controlled Document Information System (CDIS)

Document Input Reference System (DIRS)

AFSWeb

Lessons Learned/Generic Implications (LL/GI)

Training Server

One Point of Entry (OPE)

Requirements Traceability Network (RTN)

If you have any questions or concerns, please contact Scott McCord at 821-8169.