RECOMMENDATIONS

Nevada and, indeed, the nation are approaching a critical juncture with respect to the federal high-level radioactive waste program. During the next year, DOE will, under the current schedule, issue a final environmental impact statement for the Yucca Mountain project and determine whether to formally recommend Yucca Mountain for development as a repository. Following DOE’s actions, the new President will have to decide whether to ask Congress to endorse the site recommendation.

For Nevada, these decision points in the federal program represent both challenges and opportunities. On one hand, they constitute the “end game” wherein DOE and its allies in Congress will try to override the State’s objections and seek to force the Yucca Mountain project on Nevada. On the other hand, the upcoming statutorily prescribed actions represent the first time the State will have the opportunity to formally challenge final decisions on Yucca Mountain’s suitability and the legal, procedural, and technical processes that underlie those decisions.

The Commission believes that the technical case against a Yucca Mountain repository is compelling. Over the past two decades, the State of Nevada has amassed an impressive array of technical information pointing to serious flaws in the site. DOE’s own data, when not obscured by biased manipulations that characterize the performance assessment computer models used to make the site appear favorable, also clearly demonstrate that disqualifying conditions exist.

The ultimate decision about Yucca Mountain’s future, however, will not be made solely on the basis of scientific and technical suitability. It will also be made in the courts and in the political arena. The Commission believes that Nevada must be prepared to fight the Yucca Mountain battle in each of these arenas during the next two years.

No single factor will be more important in assuring Nevada’s success in this battle than the continuation of strong, consistent, and unified opposition on the part of the governor, the legislature, the attorney general, the State’s congressional delegation, and local governments. In this regard, advice originally articulated in the Commission’s first report in 1986 and repeated often since then remains central to a successful strategy for opposing this dangerous and ill-conceived federal project:

“... The Commission believes that strong and effective dissent on the part of the State’s Governor, Legislature, and congressional delegation is essential. Nevada is too small a state (in the national political context) to be able to afford conflicting positions on the part of key elected officials on this crucial issue. If congressional representatives from other states perceive equivocation or passive acquiescence on the part of Nevada’s representatives, the stage will be set for a truly political solution to the nation’s nuclear
waste problem - a solution that may result in a Nevada repository regardless of the technical merits of the Yucca Mountain site.”

The recommendations which follow are intended to help guide the governor and legislature in dealing with the critical decisions and milestones that are forthcoming in the near future and, ultimately, in successfully opposing any attempt by the federal government to move ahead with a Yucca Mountain repository over the State’s objections.

**Specific Recommendations**

(1) The Commission urges the governor and legislature to continue to speak with a single voice in opposing the Yucca Mountain program, especially in light of DOE’s anticipated recommendation, sometime in mid-2001, that Yucca Mountain be developed as a repository.

Discussion: The State’s ability to successfully challenge upcoming Yucca Mountain decisions and to prevail in anticipated legal and adjudicatory proceedings would be irrevocably damaged by any weakening of Nevada’s opposition or by any disunity (real or perceived) on the part of the governor and legislature on this critical issue. With DOE’s site recommendation decision on the horizon, the governor and legislature should anticipate that there will be calls from the commercial nuclear power industry and its surrogates in Nevada to lessen State opposition and initiate some form of negotiations for benefits in exchange for accepting - or not actively opposing - the Yucca Mountain project. Pressure for adopting such a position may be especially apparent in the upcoming legislative session, where Yucca Mountain supporters and industry lobbyists can be expected to be active.

The Commission believes, as it has stated consistently in reports and recommendations since 1986, that strong, consistent, and unified opposition to the ill-conceived Yucca Mountain project is essential if Nevada is to prevail in halting the program. A DOE decision to recommend Yucca Mountain as a high-level waste repository does not mark the end of Nevada’s battle. It is just the beginning. The State can prevail, but only by staying the course and resisting attempts by repository proponents to divide and weaken Nevada’s strong and united opposition.

(2) The Commission strongly recommends that the governor and legislature continue to support funding, both state and federal, for the Agency for Nuclear Projects to continue its oversight and impact assessment work, including funding for adequate legal counsel to

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review the final Yucca Mountain EIS and the site recommendation decision, and for related legal and constitutional challenges.

Discussion: The Commission commends the governor and legislature for their steadfast support of funding, both State and federal, for the Agency for Nuclear Projects and its important work in overseeing DOE’s activities. In the past, DOE and its supporters in Congress have used the threat of withdrawal of federal nuclear waste funds (as well as the actual withholding of funds) to influence and actually impede Nevada’s ability to carry out its responsibilities under the provisions of the Nuclear Waste Policy Act. Between 1996 and 1998, when Congress and DOE failed to provide federal funds for State oversight, the Legislature allocated State General Funds for Agency operations and continued that funding in the FY 2000 - FY 2001 biennium. Just last year, Governor Guinn and Senator Reid were successful in restoring federal oversight funds, albeit with significant constraints as to how these monies can be used.

It is essential that Nevada’s Yucca Mountain oversight program not be hostage to the willingness of Congress to continue providing federal funds for Agency activities. This will be especially true in the next few years when it is likely that the State will be forced into adversarial positions with the federal government over decisions regarding site suitability, the final Yucca Mountain EIS, and the ultimate recommendation of Yucca Mountain as a repository. A base level of State funding sufficient for the Agency to carry out critical oversight work that cannot be done with federal funds is essential. State funds are also critical should Congress again withdraw funds as a result of future actions and inevitable State-federal conflicts.

The Commission advises that the governor and legislature should anticipate that the State will likely be required to litigate federal agencies over pending rulemakings that will establish the health and safety standards for Yucca Mountain and urges that such litigation be supported with adequate resources.

Discussion: DOE, NRC, and the Environmental Protection Agency have all published draft rules related to standards for the Yucca Mountain site. Based upon reviews of draft regulations and revisions to existing regulations, it is anticipated that the State will likely challenge one or more of these rules. DOE is proposing, for example, to abandon the specific qualifying and disqualifying conditions that must currently be used to determine site suitability for a geologic repository and replace them with a process that ignores specific disqualifying factors in favor of a general and more subjective performance assessment-based evaluation. State scientists believe that Yucca Mountain would have to be disqualified under the existing siting guidelines, hence the push by DOE to change the rules. Likewise, the anticipated EPA radiation protection standard and NRC’s proposed
revisions to its repository licensing regulations are considered to afford inadequate protection to the public from radiation releases from a Yucca Mountain facility.

Because DOE can make Yucca Mountain appear marginally suitable only by altering regulations that are seen as impediments to the federal program, successful challenges to any of these proposed regulatory initiatives will dramatically affect the course of the federal program and greatly enhance Nevada’s case against the project.

(4) The Commission recommends in the strongest possible sense that the governor and legislature reject any efforts to negotiate for benefits tied to the Yucca Mountain program or to any scheme to locate an interim spent fuel storage facility at the Nevada Test Site.

Discussion: As noted in the discussions above, there remains a long way to go in the repository siting process. Simply because DOE moves to recommend that Yucca Mountain be developed as a repository does not mean that this decision will be upheld by the President or the courts or that NRC will ultimately issue a license to construct a facility. Nevertheless, there will undoubtedly be attempts during the upcoming legislative session to present Yucca Mountain as a “done deal” and to urge legislators to opt for some sort of negotiated benefits arrangement. The Commission believes strongly that to even consider negotiations at this stage of the process will irrevocably damage Nevada’s ability to successfully oppose the project and could lead to congressional passage of legislation to weaken environmental, health, and safety standards and even authorize the location of an above-ground, interim spent nuclear fuel storage facility at the NTS. Such legislation has been attempted in the past and was defeated largely due to Nevada’s strong, determined, and united opposition. It is no coincidence that the commercial nuclear power industry and its surrogates in Nevada are urging negotiations at a time when Nevada is about to finally have its day in court.

(5) The Commission recommends that the governor and legislature support efforts on the part of the State to carry out a national information campaign to raise awareness of the risks and impacts associated with the unprecedented radiological transportation campaign required to implement a Yucca Mountain repository.

Discussion: The Commission believes that there is an as yet untapped groundswell of opposition to the unprecedented and potentially dangerous nuclear waste shipping campaign that would be required if a repository is built at Yucca Mountain. DOE and the commercial nuclear industry have gone to great lengths to downplay the transportation aspects of the repository program and to obscure the dangers and risks faced by thousands of communities in 43 states directly impacted by spent fuel and high-level waste shipments. A national information campaign targeted at states and cities at risk of significant transportation impacts will energize opposition to the project in other states.
Ideally, such an effort should attempt to encourage other states, through legislative and gubernatorial organizations, to join Nevada’s likely litigation on the final Yucca Mountain EIS. The campaign would make other states and communities aware of the fact that, if DOE is legally allowed to ignore route identification and assessment of potential impacts and risks along highway and rail routes in other states in the final EIS, DOE will never be forced to deal with these issues.

The campaign will require adequate resources to be effective. The Commission has long believed that such an effort is essential to a successful strategy for opposing the Yucca Mountain project, and we urge the governor and legislature to support funding for a national information initiative.

The Commission advises the governor and the legislature that, in addition to the legal services afforded by the Attorney General’s staff, the State of Nevada will likely need to retain a law firm with proven and extensive experience dealing with the Nuclear Regulatory Commission’s licensing process and attendant case law to represent Nevada’s interests in any potential licensing proceeding before the NRC.

Discussion: As discussed earlier in this report, the U.S. Nuclear Regulatory Commission’s laws, regulations, and procedures governing licensing of nuclear facilities are extremely complicated and fraught with legal and procedural mine fields. NRC licensing has become a highly specialized field of law unto itself, one that requires legal services with expertise and experience beyond what a state like Nevada is able to provide using in-house legal staff. In order to assure that Nevada’s interests are adequately protected in the event NRC initiates a licensing proceeding for the Yucca Mountain project, the State must be represented by legal counsel intimately knowledgeable with the intricacies of the licensing process and with a track record of successful interventions in such proceedings.

While there is uncertainty about how much money may be needed and the time when these funds would be required, it is clear that such an initiative will be necessary. Estimates of the amount of funds required range from $2 to $3 million per year. By comparison, the Department of Energy has already retained such a firm at a cost of approximately $20 million. Given the amount of funds that may be required, the Commission recommends that consideration be given to the impact a request for this amount of money may have on the State’s Contingency Fund and that contingency plans be initiated, in the event the need to move ahead with securing such legal expertise should arise between legislative sessions.

The Commission strongly recommends that the 71st Session of the Nevada Legislature formally adopt a joint resolution of the Nevada State Assembly and the Nevada State
Senate stipulating that the Legislature strongly opposes the development of a high-level nuclear waste repository at Yucca Mountain and, further, that the Legislature adopt a joint resolution that can serve as the Legislature’s notice of disapproval in the event that such notice is required during the biennium between sessions.

Discussion: The Nuclear Waste Policy Act contains potentially conflicting provisions related to the notice of disapproval the State of Nevada is entitled to submit to Congress in the event the President decides to recommend Yucca Mountain for development as a repository. In Section 115 (a), the Act indicates that “the designation of a site as suitable for a construction authorization for a repository shall be effective at the end of the 60-day period beginning on the date that the President recommends the site to Congress ... unless the Governor and legislature of the State in which such site is located ... has submitted to Congress a notice of disapproval under Section 116 ... ”(emphasis added).

Section 116 (b) contains the following language: “Upon submission by the President to the Congress of a recommendation of a site for a repository, the Governor or legislature of the State in which such site is located may disapprove the site designation and submit to the Congress a notice of disapproval”(emphasis added).

The ambiguity in the statute as to whether it is the governor and the legislature or the governor or the legislature who is responsible for submitting the notice of disapproval is something DOE or the Congress could potentially use to thwart Nevada’s notice. To assure that such an eventuality does not arise, the Commission is recommending that the 2001 Nevada Legislature act proactively to make its intentions clear with regard to the notice of disapproval. This could be done by means of a joint resolution stipulating the legislature’s notice of disapproval to any decision the President might make recommending Yucca Mountain as a high-level waste repository.