

STATEMENT FOR THE RECORD
BY THE
INSPECTOR GENERAL
U.S. NUCLEAR REGULATORY COMMISSION

TO THE

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

THE NRC INSPECTOR GENERAL REPORT ON THE
“NRC CHAIRMAN’S UNILATERAL DECISION TO TERMINATE NRC’S REVIEW OF
DOE YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION”

JUNE 14, 2011

STATEMENT FOR THE RECORD

Introduction

Mr. Chairman and members of the Subcommittee, it is my pleasure to appear before you today.

I am accompanied today by Mr. Joseph McMillan, Assistant Inspector General for Investigations, and Ms. Rossana Raspa, Senior Level Assistant for Investigative Operations.

As you know, the mission of the Office of the Inspector General (OIG) at the Nuclear Regulatory Commission (NRC) is to assist NRC by ensuring integrity, efficiency, and accountability in the agency's programs that regulate the civilian use of byproduct, source, and special nuclear material in a manner that adequately protects public health and safety and the environment, while promoting the Nation's common defense and security. Specifically, OIG supports NRC by carrying out its mandate to (1) independently and objectively conduct and supervise audits and investigations related to NRC programs and operations; (2) prevent and detect fraud, waste, and abuse; and (3) promote economy, efficiency, and effectiveness in NRC programs and operations. OIG also keeps the NRC Chairman and members of Congress fully and currently informed about problems, recommends corrective actions, and monitors NRC's progress in implementing those actions. My fiscal year 2012 budget request is \$10.860 million and 58 full-time employees, which is consistent with my FY 2011 appropriation.

Background

To perform these activities, OIG employs auditors, analysts, criminal investigators, technical experts, legal counsel, and support personnel. OIG also uses private sector contractors to audit the NRC's financial statements as mandated by the Chief Financial Officers Act and for other audit, investigative, and information technology technical support services.

To fulfill our audit mission, OIG conducts performance, financial, and contract audits.

Performance audits focus on NRC administrative and program operations and evaluate the effectiveness and efficiency with which managerial responsibilities are conducted and whether the programs achieve intended results. Financial audits attest to the reasonableness of NRC's financial statements. Contract audits evaluate the cost of goods and services that NRC procured from commercial enterprises. In addition, the audit staff prepare evaluation reports that present OIG perspectives or information on specific topics.

OIG's investigative program carries out its mission by performing investigations relating to the integrity of NRC programs and operations. Most OIG investigations focus on allegations of fraud, waste, and abuse and violations of law or misconduct by NRC employees and contractors. Additionally, OIG investigates allegations of irregularities or abuses in NRC programs and operations with special emphasis on those activities that could adversely impact public health and safety. Periodically, the investigative staff conducts event inquiries, which yield investigative reports documenting the examination of events or agency regulatory actions that do not specifically involve individual misconduct. Instead, these reports identify staff actions that contributed to the occurrence of an event.

Allegation

OIG recently issued a report conveying the results of an investigation into an allegation that the NRC Chairman:

(1) unilaterally and improperly closed out NRC's review of the Department of Energy's (DOE's) Yucca Mountain repository application while the Government was operating under a continuing resolution (CR) during FY 2011, and (2) was purposely preventing the Commission from

completing its ruling on the Atomic Safety Licensing Board's decision to deny DOE's motion to withdraw its Yucca Mountain repository license application from NRC.

The investigation also looked into concerns that were raised about the Chairman's management style toward staff and Commissioners and whether his control of information prevents the other Commissioners from effectively fulfilling their statutory responsibility to address policy matters.

Background and Chronology

The Nuclear Waste Policy Act of 1982, as amended, and the Energy Policy Act of 1992 specify that spent nuclear fuel and high-level radioactive waste will be disposed of underground, in a deep geologic repository. The Nuclear Waste Policy Act names Yucca Mountain as the single candidate site for this potential repository. The act specifically states that NRC will "consider an application for a construction authorization for a repository" and "shall issue a final decision approving or disapproving the issuance of a construction authorization not later than 3 years after" the application is submitted.

DOE, which is charged with constructing and operating the repository, submitted its license application on June 3, 2008, and NRC formally accepted it for review in September 2008. This started the 3-year schedule set by Congress for NRC to reach a decision on whether to approve construction. NRC planned, at the end of its technical review, to issue a safety evaluation report (SER) containing its findings on the repository design. The SER would determine whether the proposed facility would meet NRC regulations to protect public health and safety. NRC staff decided to issue the SER in five volumes, and in March 2010 estimated that all volumes could be completed by March 2011.

In February 2010, the Energy Secretary noted during a Senate hearing that the Administration would seek to immediately suspend licensing for the Yucca Mountain repository because it was not a workable option. In March 2010, DOE submitted to the NRC Atomic Safety Licensing Board a motion to withdraw its Yucca Mountain License Application. On June 29, 2010, the Atomic Safety Licensing Board issued a decision that denied DOE's motion to withdraw, concluding that DOE lacked the authority to withdraw the application. The Commission decided to review the board's decision and, in accordance with NRC's process, on August 10, 2010, the Office of Commission Appellate Adjudication submitted adjudicatory SECY paper SECY-10-0102 on the Yucca Mountain matter to the Commission for its consideration.

On September 30, 2010, Congress issued the first in a series of CRs directing Federal agencies generally to spend money at FY 2010 levels, as necessary, to continue projects and activities that were conducted during FY 2010.

On October 4, 2010, the NRC Chief Financial Officer (CFO) and Executive Director for Operations (EDO) issued guidance to staff related to budget execution under the CR period. The memorandum stated that offices were to commit, obligate, and expend funds for ongoing activities at FY 2010 levels, with the exception of the High-Level Waste Program. With regard to the High-Level Waste Program, the memorandum directed staff to continue its activities on the Yucca Mountain license application during the CR period in accordance with the Commission's decisions on the FY 2011 budget. The Commission's decisions on the FY 2011 budget are reflected in the agency's Congressional Budget Justification for FY 2011, which allotted \$10 million for the Yucca Mountain repository to "support work related to the orderly closure of the agency's Yucca Mountain licensing support activities."

Shortly after the issuance of the CR budget guidance memorandum, Chairman Jaczko directed staff working on the Yucca Mountain license application review to stop working on the SER and proceed to orderly closure of the technical review.

Investigation Results

CR Budget Guidance Memorandum

OIG examined the circumstances surrounding the development of the EDO's and CFO's October 4, 2010, CR budget memorandum and learned that the language directing staff to follow FY 2011 budget guidance for High-Level Waste Program activities was based on instruction provided by the Chairman's office. The final language differed from earlier drafts of the memorandum prepared by the EDO's and CFO's offices. Earlier drafts of the memorandum either contained no mention of the Yucca Mountain license application review or directed that the agency would continue its review with any available FY 2010 carryover funds until exhausted.

OIG found that Chairman Jaczko used the FY 2011 CR budget guidance memorandum to initiate NRC's FY 2011 plans to close out its Yucca Mountain license application review even though the FY 2011 budget had not yet been passed. The Chairman's decision to direct the staff to follow the FY 2011 budget guidance was supported by the NRC General Counsel and consistent with the discretion within the Chairman's budget execution authority under the Reorganization Plan No. 1 of 1980 (Reorganization Plan). The Reorganization Plan states that the Chairman determines the use and expenditure of funds of the Commission in accordance with the distribution of appropriated funds according to major programs and purposes approved by the Commission. Chairman Jaczko's decision was also consistent with OMB Circular A-11 guidance to spend prudently during a CR period in a manner that does not impinge on final funding prerogatives of Congress, coupled with the Administration's decision to terminate the

Yucca Mountain repository project. The Chairman's decision was also consistent with his interpretation of the Commission's FY 2011 budget policy decisions, which articulated close-out activities for the High-Level Waste Program.

OIG also found that although the Chairman had the authority to direct staff to follow the FY 2011 budget guidance, he was not forthcoming with the other Commissioners about his intent to stop work on the SER as part of implementing close-out activities. This included stopping work on SER Volume 3 ("Review of Repository Safety After Permanent Closure"), which NRC staff believed to be near completion by the end of FY 2010. OIG learned that the Chairman anticipated that proceeding to close-out in this manner could be controversial and viewed as a policy decision for full Commission consideration. Therefore, prior to directing issuance of the CR budget guidance memorandum, he strategically provided three of the four other Commissioners with varying amounts of information about his intention to proceed to closure and not complete SER Volume 3. He did not provide Commissioner Svinicki with any information about his intentions. Although two of the three Commissioners he spoke with did not fully understand the implications of the CR budget guidance memorandum, the Chairman told the EDO prior to his signing the memorandum that all the Commissioners were informed and supported issuance of the CR budget guidance memorandum, and the Chairman's Chief of Staff told the CFO that he had clearance from the Commission offices to issue the memorandum. In fact, subsequent to the issuance of the CR budget guidance memorandum, a majority of Commissioners disagreed with the outcome of the memorandum, which was the Chairman's direction to stop work on SER Volume 3.

Additionally, a majority of the Commissioners did not think the conditions to proceed to closure had been met. These conditions were articulated in the FY 2011 Congressional Budget Justification as "upon the withdrawal or suspension of the licensing review," the NRC would

begin an orderly closure of the technical review and adjudicatory activities and would document the work and insights gained from the review.

OIG also learned that on October 6, 2010, Commissioner Ostendorff wrote a Commission action memorandum, or COM, to the other Commissioners seeking the Commission's involvement in the Chairman's direction to staff to stop working on the SER. Commissioner Ostendorff proposed that the Commission direct staff to continue to work on the remaining SER volumes at the rate for operations appropriate given the proposed FY 2011 budget as augmented by reprogrammed funds remaining from FY 2010 appropriations. In accordance with Commission procedures, Commissioner Ostendorff needed a majority of the Commission to support his proposal in order for it to become guidance for the staff. However, after the Commissioner issued his memorandum, Chairman Jaczko communicated to Commissioners Magwood and Apostolakis that he expected their continued support. He told both Commissioners that he would not have directed issuance of the CR budget guidance memorandum had they not committed to support him. Despite their view that they had not been fully informed about the Chairman's intent behind the CR budget guidance memorandum, Commissioners Magwood and Apostolakis elected not to participate in voting on Commissioner Ostendorff's COM. Therefore, without a majority, the Commission was unable to move the matter from budget space, within the Chairman's purview, to policy space, within the Commission's purview.

SER Issue

As part of this investigation, OIG reviewed circumstances related to development and issuance of the SER schedule and volumes. OIG learned that between April and May 2010, Office of Nuclear Material Safety and Safeguards staff informed the Chairman that they were ahead of schedule with their work on the SER volumes, and they asked whether they should attempt to issue the volumes at earlier dates than those that had been established in March 2010. The

Chairman responded in a June 2010 memorandum that they should not expedite issuance of the volumes, but should instead maintain the timeline that had been provided to the Commission in March 2010. According to that timeline, Volume 1 would be issued in August 2010, and Volume 3 in November 2010. Volume 1 of the SER was issued as scheduled; however, in October 2010, at the start of the new fiscal year, Chairman Jaczko directed staff to stop working on the remaining SER volumes. Subsequently, the Chairman gave direction to the staff to prepare a document for public release that captures the knowledge gained through the NRC's technical review of DOE's license application but would not contain any of the staff's findings or conclusions.

OIG found that the Chairman's decision to direct staff to stop working on the SER contributes to NRC's inability to meet its statutory obligation under the Nuclear Waste Policy Act to consider DOE's Yucca Mountain repository license application and issue a final decision approving or disapproving issuance of a construction authorization. Other factors preventing the agency from meeting its statutory obligation are the Administration's decision to terminate the Yucca Mountain repository project and decreasing appropriations to NRC for the High-Level Waste Program.

Adjudicatory Voting Process

Because the outcome of the Commission's vote SECY-10-0102 remains an open adjudicatory matter before the Commission, OIG could not assess the substantive reasons that are preventing this matter from finalization. However, OIG reviewed the Commission's adjudicatory SECY paper voting process and assessed the level to which the Commission adhered to its process with regard to SECY-10-0102 and with adjudicatory SECY papers in general.

OIG learned that the Commission has written internal procedures intended to facilitate Commission decisionmaking based on majority rule. For example, Commissioners are expected to vote on adjudicatory SECY papers within 10 business days of receiving the paper. Once a majority of the Commission has voted, those who have not voted are expected to submit a request for an extension, which must, in turn, be approved by a majority of the Commission. The written procedures do not provide details on the process that occurs between the completion of an adjudicatory SECY paper vote and the conduct of an affirmation vote. However, OIG learned that, in practice, an affirmation vote is not held until all of the Commissioners are satisfied with the affirmation notice and order describing the outcome of the adjudicatory vote.

OIG learned that the Office of the Secretary did not enforce adherence to the Commission's adjudicatory voting process with regard to SECY-10-0102 and generally does not enforce the voting process to facilitate completion of adjudicatory matters. With regard to SECY-10-0102, although all participating Commissioners had voted by September 15, 2010, the Chairman did not vote until October 29, 2010. He never requested an extension to vote, therefore, the other Commissioners were not polled to see if they agreed with the delay. OIG also learned that although the Commission was provided a draft affirmation order detailing the status of the Commission's votes 2 days after the Chairman voted, as of the date of OIG's report, the Commission had not held an affirmation vote on the matter, and the draft order continued to sit in deliberation before the Commission for affirmation.

OIG found that the lack of enforcement of and specificity in the Commission's written procedures, coupled with the Commission's practice not to move to affirmation until all Commissioners agree to the affirmation notice and order, allows matters to sit in abeyance

without final Commission action.

Information Flow/Work Environment

During the course of the investigation, a number of interviewees conveyed their perception that Chairman Jaczko controls and restricts the information available to his fellow Commissioners and noted concerns about his interpersonal style. Senior officials, managers, and staff provided examples that they believed illustrated the Chairman's failure to share with his fellow Commissioners information needed to support their fully informed decisionmaking. Examples included the CR budget guidance memorandum described earlier and the FY 2012 budget process, wherein the Chairman presented his FY 2012 budget proposal to the Commission without supporting documentation from the staff to allow Commissioners to assess how the Chairman's proposal aligns with the staff's budget requests. Previous Chairmen have provided this supporting documentation to the Commission along with their budget proposals to facilitate Commission decisionmaking related to the budget. Chairman Jaczko said his intent in FY 2012 was to help the staff shape a budget that would be more successful in getting through the Commission. Although he believes this is what occurred with the FY 2012 budget, he has since learned from the General Counsel that after his budget was developed and presented to the Commission, the Commissioners were entitled to some of the draft documents.

Other examples cited to illustrate the Chairman's control of information included the Commission agenda planning process and the Chairman's involvement in determining what constitutes a policy versus an administrative matter. In addition, a number of interviewees described instances of behavior by the Chairman that they viewed as unprofessional or manipulative.

The Chairman defended his management style with regard to information flow as aligning with the division of Commission and Chairman responsibilities established by the Reorganization Plan and as necessary for efficiency and effectiveness. He acknowledged using forceful management techniques to accomplish his objectives but maintained that these techniques were necessary to facilitate the work of the Commission.

OIG found that the Chairman controls information provided to the other Commissioners based on his interpretation of his statutory authority as Chairman versus the authority given to the Commission. Because he acts as the gatekeeper to determine what is a policy matter versus an administrative matter, and manages and controls information available to the other Commissioners, they are uncertain as to whether they are adequately informed of policy matters that should be brought to their attention. Ultimately, OIG notes, that all Commissioners have the ability to address any issue they perceive as a policy matter before the Commission by writing a Commission action memorandum to the full Commission and gaining a majority of the Commission's support.

Mr. Chairman, and members of the subcommittee, this concludes my report to you on my office's investigation. I would be pleased to answer any questions at this time.