

ONE HUNDRED TWELFTH 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

July 8, 2011

The Honorable Gregory B. Jaczko
Chairman
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

Dear Chairman Jaczko:

We write with regard to the Committee's investigation into the decision-making process related to the pending license application for construction of a high-level waste repository at Yucca Mountain. According to information developed during the investigation, you and your office staff were involved in decisions relating to the NRC staff's completion of its technical review, which was undertaken to determine whether the Department of Energy (DOE) application for a license to construct a repository satisfies NRC regulations.

The attached email (see Attachment A) between NRC personnel indicates that you or staff in the NRC Chairman's office were involved in the alteration of the original language in the professional staff's draft of the Technical Evaluation Report (TER). We understand that the TER was prepared at your direction to replace the staff-prepared Safety Evaluation Report regarding post-closure safety of the repository (SER Volume 3). Both the SER Volume 3 and the TER contain extremely important information regarding the safety and viability of the Yucca Mountain project.

Documents produced during the course of our investigation suggest that NRC professional staff was on track to complete the SER Volume 3 well before the scheduled November 2010 publication date. In July 2010, however, you ordered the NRC professional staff to slow down or delay its important work on SER Volume 3. Your purposeful delay then allowed you, in October 2010, to order the NRC staff to stop its work and close down its review prior to completing the SER Volume 3. Per your directions, the professional NRC staff stopped work on the SER Volume 3 in October 2010, but continued to work to complete a final, "reversible" SER document that could be stripped of its findings and converted into a TER.

On February 25, 2011, the Construction Authorization Board (CAB) issued an order demanding that the NRC show cause why the NRC should not be ordered to place an unredacted version of the SER Volume 3 into the Yucca licensing-proceeding database. The March 3, 2011, NRC response states that the SER Volume 3 was a preliminary draft, depicting preliminary views, and therefore was not ready for submission. However, NRC's response neglected to inform the CAB that a reversible SER Volume 3 had been or was about to be completed. NRC staff had, in fact, by March 2011, finished its work on all open issues in the SER Volume 3 and even obtained clearance to issue the volume from the NRC's Office of General Counsel. NRC professional staff then proceeded to strip out the SER's findings and converted the final document into a TER, which has been ready for publication since March 2011.

We seek to determine whether you, the NRC chairman's office staff, or NRC staff made all of the Commissioners aware of the completion of the reversible SER Volume 3 in a fulsome and timely manner. We also seek to determine whether NRC staff representations, made as part of the licensing proceeding, fully explained that the SER had been or was about to be completed, and was ready for formatting and the office director's signature. Therefore, we write to request additional information regarding communications relating to the reversible SER and your role in the SER and TER process.

Accordingly, pursuant to Rules X and XI of the Rules of the U.S. House of Representatives, we respectfully ask that you provide written responses to the following questions and provide the requested documents by July 22, 2011:

1. Provide all documents, including but not limited to emails, containing or referencing communications between or among NRC staff concerning the Construction Authorization Board's February 25, 2011, Board Order concerning the SER Volume 3¹ status.
2. Provide all documents, including but not limited to emails, containing or referencing communications between NRC staff and any of the five NRC Commissioners concerning the status of the SER Volume 3 or the TER.²
3. Provide all documents, including but not limited to emails, in your possession or the possession of staff in the NRC Chairman's office related in any way to the SER Volume 3 or the TER.
4. Have you or any staff in the NRC Chairman's office ever utilized an email account other than your official government email account to send or receive emails relating in any way to the Yucca Mountain project? If so, please identify the email account or accounts and produce all such emails between January 1, 2009, and the present.

¹ Document entitled: *Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada. Volume 3: Repository Safety After Permanent Closure.*

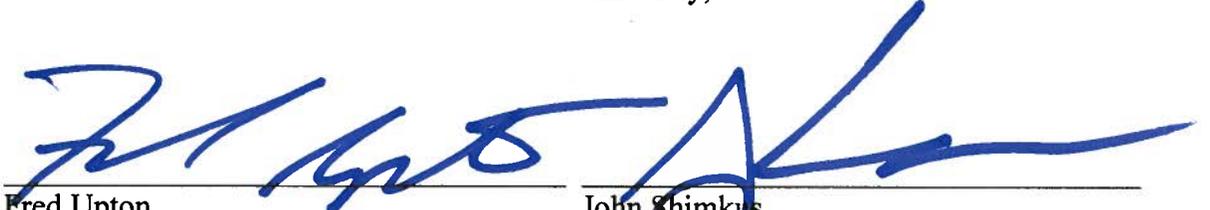
² Document entitled: *Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain License Application. Postclosure Volume: Repository Safety After Permanent Closure.*

We request that you adhere to instructions contained in Attachment B to this letter for responding to the Committee's document requests.

Furthermore, we request that you review your records and produce all documents in response to our March 31, 2011, letter. After examining your response to our March 31, 2011, letter, we have reason to believe that all responsive documents from you and office staff have not been produced. Other Commissioners have provided us with emails from your staff that were not provided in your production of documents. Additionally, please provide full unredacted copies of redacted documents previously produced to the Committee, which were redacted without explanation.

Should you have any questions, you may contact Peter Spencer or Carl Anderson of the Majority Committee Staff at (202) 225-2927.

Sincerely,



Fred Upton
Chairman

John Shimkus
Chairman
Subcommittee on Environment and the Economy

Attachments

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Gene Green, Ranking Member
Subcommittee on Environment and the Economy

The Honorable Kristine L. Svinicki
The Honorable George Apostolakis
The Honorable William D. Magwood, IV
The Honorable William C. Ostendorff

From: Mohseni, Aby
Sent: Tuesday, June 07, 2011 6:21 PM
To: Haney, Catherine
Cc: Itzkowitz, Marvin; Young, Mitzi; Kokajko, Lawrence; Davis, Jack; Weber, Michael; Borchardt, Bill
Subject: RE: TER Volume 3

Cathy,

I respectfully disagree with your June 6, 2011, decision not to approve the Technical Evaluation Report (TER) Postclosure Volume, as written, for publication and public distribution. I also disagree with the need to revise the TER. Therefore, I request your reconsideration and permission to publish the TER as soon as possible. Failing that, I request that the matter be referred to the Commission.

The basis for my disagreement and request that the issue be referred to the Commission is as follows:

- 1) You refer to the TER as draft. It is not draft; it is final and it was completed on or around March 31, 2011. It has gone through the process for signature by me as the acting Director of HLWRS in accordance with current practice. In addition, we received a "no legal objection" from OGC. It was then presented to you as a matter of courtesy because of the sensitivities surrounding activities associated with Yucca Mountain. You asked us to delay publication until you had discussed with your executive management.
- 2) As you stated in your March 2, 2011 affidavit, we developed the document based on the technical insights gained in the development of draft SER Volume 3 and associated documents. We removed references to the regulations and worked closely with OGC to reference the Yucca Mountain Review Plan (YMRP) appropriately and to ensure adherence to our agency requirements.
- 3) Your affidavit is related to an SER, an official NRC licensing document. The TER is a knowledge management document and contains multiple disclaimers that, according to OGC, could not be confused with an SER and could not be relied upon for licensing.
- 4) The TER reflects the knowledge acquired in preparation for and during the review of the Yucca Mountain License Application, using a risk informed, performance based approach. To that end, the reference to YMRP was viewed by the technical staff and by OGC as an integral part of the scope of the technical evaluation.
- 5) Lawrence, Jack Davis and I were present in your office on April 4, 2011, when Mike Weber called you to convey concerns about the references to YMRP in the TER. You indicated to Mike that consistent with the direction provided, we had developed a knowledge management document, and that you would not feel comfortable trying to change the technical content of a staff knowledge management document. To give you assurance that Mike's concerns were adequately addressed, we called Marv Itzkowitz (OGC) in your presence, and he confirmed that Mike's concerns were not shared by OGC. Nonetheless, we developed an additional section called "Note to Reader" which further highlighted the distinction between an SER and a TER to allay the concerns

conveyed by Mike. You indicated that when you asked for Mike's views on the Note, he said that you needed to talk to the Chairman.

- 6) I believe the availability of the TER to the public is beneficial from a scientific, technical assessment and evaluation standpoint and should be made publicly available immediately. It will also enhance NRC's credibility with respect to openness and transparency. Interested stakeholders include the Congress, Blue Ribbon Commission, EPA, DOE, industry, as well as our international counterparts.
- 7) Your third point about adding a disclaimer to the executive summary is reasonable. While there are disclaimers already, there is no harm in adding another one.
- 8) Since you make reference to the draft SER Volume 3, it should be stated for the record that it is complete in content, with OGC's "no legal objection" and no open issues, and available for issuance upon your signature and accompanying minor formatting and logistical preparation.
- 9) As you know, there are several ongoing investigations regarding NRC's activities and decision-making regarding Yucca Mountain licensing and closure. To avoid another potential issue concerning the integrity of the process, I request that you either provide your permission to issue the TER or take the matter of issuance of the TER to the full Commission for their direction.

In reaching this decision, I have conferred with the available Branch Chiefs and Deputy Director. Thank you for the opportunity to consider my response.

Aby

From: Haney, Catherine

Sent: Monday, June 06, 2011 4:13 PM

To: Mohseni, Aby

Cc: Itzkowitz, Marvin; Young, Mitzi; Kokajko, Lawrence; Davis, Jack; Weber, Michael; Borchardt, Bill

Subject: TER Volume 3

Aby

I have reviewed certain sections of the staff's draft "Technical Evaluation Report on the Content of the U.S. Department of Energy's Yucca Mountain License Application; Postclosure Volume: Repository Safety After Permanent Closure" (TER Postclosure Volume) and do not approve the document, as written, for publication and public distribution unless the draft document is revised.

1. Consistent with our original intent to make the TER a public document and a desire to be consistent with statements made by the Chairman that the document would not contain

any "findings," any references to a finding or conclusion against the YMRP need to be removed. In its current form, the draft Postclosure SER (Volume 3) and the TER Postclosure Volume are too similar. Findings against the Yucca Mountain Review Plan (YMRP) and a regulatory finding are virtually indistinguishable to stakeholders. I believe this to be especially true in light of the Commission's review and approval of the publication of the YMRP in 2002. To issue the TER for public distribution, as currently written, in my opinion would be inconsistent with my affidavit to the Licensing Board signed March 3, 2011 and Agency (Darren Ash and mine) statements related to the Heritage Foundation's FOIA request for an unredacted version of SER Volume 3. TER content should be consistent with the overall objective of the TER, which is to preserve the knowledge gained in preparation for and during the review of the Yucca Mountain license application, including the status of the review at the time of termination in early October 2010, independent review work completed, open issues at the time of termination, and plans for completing the review if it had continued. Much of the content of the TER remains the same, but it needs to be refocused consistent with the TER's objective.

2. The note to reader is no longer needed with the changes noted under #1.
3. The following text be included in the executive summary – "No licensing decision regarding a construction authorization for Yucca Mountain can be made until the NRC staff finishes its technical review and the preparation of the SER, the NRC's Construction Authorization Board adjudicate contentions admitted in the licensing proceeding, and the Commission concludes its supervisory review of contested and uncontested issues."

Cathy

NOT FOR PUBLIC DISCLOSURE

RESPONDING TO COMMITTEE DOCUMENT REQUESTS

In responding to the document request, please apply the instructions and definitions set forth below:

INSTRUCTIONS

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual named in the request has been, or is currently, known by any other name, the request should be read also to include such other names under that alternative identification.
4. Each document should be produced in a form that may be copied by standard copying machines.
5. When you produce documents, you should identify the paragraph(s) and/or clause(s) in the Committee's request to which the document responds.
6. Documents produced pursuant to this request should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. Indicate the office or division and person from whose files each document was produced.
7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph(s) and/or clause(s) of the request to which the documents are responsive, should be provided in an accompanying index.
8. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.
9. The Committee requests electronic documents in addition to paper productions. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, back up tape, or removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), you should immediately consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above.

10. If any document responsive to this request was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this request, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party.

11. If any document responsive to this request was, but no longer is, in your possession, custody or control, state:

- a. how the document was disposed of;
- b. the name, current address, and telephone number of the person who currently has possession, custody or control over the document;
- c. the date of disposition;
- d. the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.

12. If any document responsive to this request cannot be located, describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.

13. If a date or other descriptive detail set forth in this request referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

14. The request is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

15. All documents should be bates-stamped sequentially and produced sequentially. In a cover letter to accompany your response, you should include a total page count for the entire production, including both hard copy and electronic documents.

16. Two sets of the documents should be delivered to the Committee, one set to the majority staff in Room 316 of the Ford House Office Building and one set to the minority staff in Room 564 of the Ford House Office Building. You should consult with Committee majority staff regarding the method of delivery prior to sending any materials.

17. In the event that a responsive document is withheld on any basis, including a claim of privilege, you should provide the following information concerning any such document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; (e) the relationship of the author and addressee to each

other; and (f) any other description necessary to identify the document and to explain the basis for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, "claim of privilege" includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any statute, rule, or regulation.

18. If the request cannot be complied with in full, it should be complied with to the extent possible, which should include an explanation of why full compliance is not possible.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's request or in anticipation of receiving the Committee's request, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a privilege log provided to the Committee, as described in (17) above, or identified as provided in (10), (11) or (12) above.

DEFINITIONS

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail ("e-mail"), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term "document" includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto. The term "document" also means any graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, back up tape, memory sticks, recordings, and removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, electronic format, disk, videotape or otherwise. A document bearing any notation not part of the original text is considered to be a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "documents in your possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.

3. The term "communication" means each manner or means of disclosure, transmission, or exchange of information, in the form of facts, ideas, opinions, inquiries, or otherwise, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, instant message, discussion, release, personal delivery, or otherwise.

4. The terms "and" and "or" should be construed broadly and either conjunctively or disjunctively as necessary to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, limited liability corporations and companies, limited liability partnerships, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, other legal, business or government entities, or any other organization or group of persons, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The terms "referring" or "relating," with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

7. The terms "you" or "your" mean and refers to

For government recipients:

"You" or "your" means and refers to you as a natural person and the United States and any of its agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction; and includes any other person(s) defined in the document request letter.