

CONGRESSIONAL TESTIMONY OF ANDREW A. FITZ

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Before the

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON ENVIRONMENT AND THE ECONOMY

Hearing on

**Update on the Current State of Nuclear Waste Management Policy**

MAY 15, 2015

Good morning, Chairman Upton, Ranking Member Pallone, Chairman Shimkus, Ranking Member Tonko, and distinguished members of the Subcommittee. On behalf of the State of Washington, Office of the Attorney General, I appreciate the opportunity to appear before you today.

Washington State has a keen interest in the development of a permanent repository for high-level radioactive waste and spent nuclear fuel. For nearly eight decades, we have honored our duty to temporarily house nuclear waste that is a by-product of our nation's defense. We are still hosting nearly two-thirds of the nation's defense related high-level radioactive waste at the Department of Energy's Hanford Nuclear Reservation.

The Hanford Reservation adjoins the Columbia River, just upstream of the cities of Richland, Kennewick, and Pasco. There are currently 56 million gallons of high-level waste stored in 177 massive underground tanks.<sup>1</sup> All of this waste is awaiting future treatment through vitrification, which is a process to solidify the waste into glass form.

As planned, the treatment process will concentrate the high-level radioactive component of this waste into Immobilized High Level Waste. Under the Nuclear Waste Policy Act (NWPA), this waste is supposed to be disposed of at a deep geologic repository. Hanford's Immobilized High Level Waste accounts for approximately 63 percent of the defense generated high-level waste projected for disposal at the Yucca Mountain repository. *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca*

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<sup>1</sup> Hanford is also storing more than 2,000 metric tons of spent nuclear fuel, 1,335 capsules of cesium, and 601 capsules of strontium. All of this waste is associated with defense production and all of it also requires disposal at a deep geologic repository.

*Mountain, Nye County, Nevada*, DOE/EIS-0250 (2002), Vol. II, App. A, § A.1.1.4.1 at A-8.

Our greatest near-term concern is getting high-level waste retrieved from storage and treated. Right now, that waste is in various forms of liquid, sludges, and solids. Nearly 30 million gallons of the waste is stored in single-shell tanks that are failing and have already leaked to soil and groundwater. Yet, as I speak, we are arguing with the Department of Energy (Energy) in federal court, trying to get the federal government to commit to a schedule for getting the Waste Treatment Plant complex up and running in a reasonable timeframe.

Our long-term interest is in seeing that all this waste is properly disposed of in a deep geologic repository, as Congress intended. That is what led us into litigation over the effort to abandon Yucca Mountain in 2010.

The federal government's efforts to abandon Yucca Mountain have ignored and by-passed the careful process Congress set forth in the NWPA for developing a national repository. Washington State has been clear in its legal arguments that the decision of whether to license the Yucca Mountain repository should be made on the merits by the Nuclear Regulatory Commission (NRC). If Yucca Mountain is determined to be unsuitable by the NRC's technical standards, it should not be built. But absent that determination, the process Congress set out in law for establishing a repository should be respected and upheld.

In passing the NWPA, Congress recognized that accomplishing the long-term objective of a national repository requires a stepwise approach and a process cemented in the law. The House bill report that accompanied the NWPA concluded that "The failure

of the government to provide a permanent waste disposal facility during more than 30 years of Federal nuclear activities is unmitigated.” H.R. Rep. No. 97-491, Pt. 1, at 28 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3792, 3794. It criticized prior federal agency confidence in “[p]aper’ analyses and future plans” as failing to provide “adequate assurance that disposal facilities would be available when needed.” *Id.* at 26. It noted that two prior attempts to explore potential repository sites had already failed due to intense political pressure. *See id.* at 27. And it noted what it called a “solid consensus” of special task force and Presidential commission recommendations on the need for legislation that would “solidify a program and keep it on track.” *Id.* at 29. In particular, the report noted: “It is necessary . . . to provide close Congressional control and public and state participation in the program to assure that the political and programmatic errors of our past experience will not be repeated.” *Id.* at 29-30.

If it is to stand any chance of success, the process for developing a repository has to necessarily span—and withstand—changes in federal and state administrations and the political tides that accompany them. If you are going to complete a process measured in decades, you cannot be continually second-guessing the policy or switching course part-way through, or you will never accomplish the objective. The thing that keeps you on course is, and must be, the law.

This is at the heart of the NWPA’s stepwise, prescriptive structure. Again, it was intended to “solidify a program and keep it on track.” Toward that end, the NWPA set out detailed, specific procedures for site nomination, site characterization, site selection, and repository licensing, with defined roles for Energy, the Environmental Protection

Agency, the NRC, potential host states, affected Native American tribes, and the President.

Critically, Congress reserved for itself the ultimate decision of approving a potential repository site. *See* 42 U.S.C. § 10135(c)-(g). In the case of Yucca Mountain, Congress exercised that authority when it rejected Nevada’s disapproval of the site. In rejecting Nevada’s challenge to the recommendation preceding Yucca Mountain’s approval, the D.C. Circuit Court of Appeals said: “Congress has settled the matter, and we, no less than the parties, are bound by its decision.” *Nuclear Energy Inst., Inc. v. Env’tl. Prot. Agency*, 373 F.3d 1251, 1302 (D.C. Cir. 2004).

Once a repository site is approved, it triggers legal mandates for both Energy and the NRC. For Energy, it triggers a mandate to submit a construction authorization application to the NRC. 42 U.S.C. § 10134(b). For the NRC, it triggers a mandate to “consider” Energy’s application and to issue a “final decision approving or disapproving the issuance of a construction authorization” within a specified timeframe. 42 U.S.C. § 10134(d).

Energy disregarded these mandates. It attempted to withdraw from the licensing proceeding based not on any claim that Yucca Mountain is technically unsuitable, but on “the [Energy] Secretary’s judgment . . . that Yucca Mountain . . . is not a workable option” and that “alternatives will better serve the public interest.” U.S. Department of Energy’s Reply to the Responses to the Motion to Withdraw, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 31 n.102 (May 27, 2010).

The NRC’s Atomic Safety and Licensing Board (Board) agreed with our argument that the NWPA’s plain language, as supported by its legislative history, “does

not permit the Secretary to withdraw the Application that the NWPA mandates the Secretary file.” *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 3 (June 29, 2010). The Board concluded that the NWPA “directed both that [Energy] file the Application . . . and that the NRC consider the Application and issue a final, merits-based decision approving or disapproving the construction authorization application.” *Id.* at 5. In the words of the Board, “the NWPA does not give the Secretary the discretion to substitute his policy for the one established by Congress in the NWPA that, at this point, mandates progress toward a merits decision by the Nuclear Regulatory Commission . . . .” *Id.* at 3. Energy’s application thus remains pending before the NRC.

As the Committee may know, the NRC Chair nevertheless then initiated his own “orderly shutdown” of the NRC’s license review, despite the decision of the Board and despite the fact that he did not have the votes on the Commission to overturn the Board’s order. The shutdown included terminating the NRC staff’s technical review of the license application; blocking the release of Safety Evaluation Report volumes; and shutting down the NRC’s Web-based Licensing Support Network (LSN), which was a database for all documentation regarding the application. *See, e.g.*, Office of the Inspector General, Nuclear Regulatory Commission, “NRC Chairman’s Unilateral Decision to Terminate NRC’s Review of DOE Yucca Mountain Repository License Application,” OIG Case No. 11-05 (June 6, 2011). Despite having more than \$11 million available to continue its review, the NRC cited budgetary considerations for these actions, including the political prediction that Congress would not further fund its efforts.

It took Washington State and its fellow petitioners bringing a mandamus action—and the court issuing an order in August 2013—to finally stop the NRC’s unilateral

dismantling of the process Congress directed. In a clear and blunt order, the federal court concluded that the NRC “has declined to continue the statutorily mandated Yucca Mountain licensing process” and that “[a]s things stand . . . the Commission is simply flouting the law.” *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013) (*Aiken II*). It rejected the NRC’s budgetary arguments and cited the bedrock principle of constitutional law that “the President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress.” *Id.* at 260.

Here is where that leaves us: The NRC has now completed and released its Safety Evaluation Report volumes. We have final legal decisions in place that establish the obligation of both Energy and the NRC to continue the Yucca Mountain licensing process, provided the funding is in place to proceed.<sup>2</sup>

I understand there are those who think that Yucca Mountain is technically unsuitable. But the law provides an opportunity to prove that case in the pending NRC

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<sup>2</sup> Representatives from both the Department of Energy and the Department of Justice have represented that Energy will proceed with the licensing process if mandated. *See, e.g.,* Respondents’ Response in Opposition to Petitioner’s Motion for Preliminary Injunction, filed April 23, 2010, in *State of Wash. v. U.S. Dep’t of Energy*, No. 10-1082 (later consolidated with *Aiken I* petitions), at 16 (“However, if any NRC or court decision should require DOE to continue with the license application, a workforce can be reassembled and contracts can be renewed.”); *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 at 19-20 (June 29, 2010) (“The Board is confident<sup>72</sup> that DOE can and will prosecute the Application before the NRC in good faith, as we believe the NWPA requires.” [n.72: “As counsel for DOE stated at argument, ‘[w]e will do what we’re ordered to do.’ Tr. at 78 (June 3, 2010).”]; Oral argument comments of Ellen Durkee, Department of Justice, *In re: Aiken County*, No. 10-1050 (*Aiken I*) (D.C. Cir. Mar. 22, 2011), at Tr. 26:9-27:6 (“JUDGE KAVANAUGH: If the NRC rejects DOE’s effort to withdraw the license, will DOE comply?” / “JUDGE SENTELLE [sic—MS. DURKEE]: I think the DOE and Department of Justice recognize that when you have an order, you comply with that order until you can get it overturned.” / “JUDGE KAVANAUGH: Yes. If it’s not overturned on appeal will DOE comply?” / “MS. DURKEE: Yes. They have been clear throughout this process that if they were required in a non-appealable order and subject to funding, that they will comply and go forward with the license application process.”).

hearing. I also understand there are those who think that following the current scheme of the NWPA is unwise. But the method for pursuing that disagreement should be through changing the law, not disregarding it. Ultimately, given the multi-decade, multi-generational task of developing a nuclear waste repository, we will never have a repository—at Yucca Mountain or elsewhere—if the legal process for siting and licensing a repository is disregarded, now or by those who follow us.

Thank you. I'll be happy to take any questions.