



# RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) REQUEST

2017-0159

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RESPONSE  
TYPE

☐

INTERIM

☒

FINAL

REQUESTER:

Julian Tarver

DATE:

11/25/2016

DESCRIPTION OF REQUESTED RECORDS:

First 100 pages released in FOIA case 2011-0248

## PART I. -- INFORMATION RELEASED

- ☒ Agency records subject to the request are already available in public ADAMS or on microfiche in the NRC Public Document Room.
- ☐ Agency records subject to the request are enclosed.
- ☐ Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- ☐ We are continuing to process your request.
- ☐ See Comments.

## PART I.A -- FEES

AMOUNT\*

\$

0.00

\*See Comments for details

☐

You will be billed by NRC for the amount listed.

☒

None. Minimum fee threshold not met.

☐

You will receive a refund for the amount listed.

☐

Fees waived.

## PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- ☐ We did not locate any agency records responsive to your request. *Note:* Agencies may treat three discrete categories of law enforcement and national security records as not subject to the FOIA ("exclusions"). 5 U.S.C. 552(c). This is a standard notification given to all requesters; it should not be taken to mean that any excluded records do, or do not, exist.
- ☐ We have withheld certain information pursuant to the FOIA exemptions described, and for the reasons stated, in Part II.
- ☐ Because this is an interim response to your request, you may not appeal at this time. We will notify you of your right to appeal any of the responses we have issued in response to your request when we issue our final determination.
- ☐ You may appeal this final determination within 30 calendar days of the date of this response by sending a letter or email to the FOIA Officer, at U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, or [FOIA.Resource@nrc.gov](mailto:FOIA.Resource@nrc.gov). Please be sure to include on your letter or email that it is a "FOIA Appeal."

## PART I.C COMMENTS ( Use attached Comments continuation page if required)

In conformance with the FOIA Improvement Act of 2016, the NRC is informing you that: (1) you have the right to seek assistance from the NRC's FOIA Public Liaison;

SIGNATURE - FREEDOM OF INFORMATION ACT OFFICER

Nina Argent, Acting FOIA Officer

2011-0248

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**RESPONSE TO FREEDOM OF  
INFORMATION ACT (FOIA) / PRIVACY  
ACT (PA) REQUEST**RESPONSE  
TYPE ☒ FINAL ☐ PARTIAL

REQUESTER

Robert Bluey

DATE

JUN 13 2011

**PART I. -- INFORMATION RELEASED**

- ☐ No additional agency records subject to the request have been located.
- ☒ Requested records are available through another public distribution program. See Comments section.
- ☐ **APPENDICES** Agency records subject to the request that are identified in the listed appendices are already available for public inspection and copying at the NRC Public Document Room.
- ☐ **APPENDICES** Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.
- ☐ Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852-2738.
- ☐ **APPENDICES** Agency records subject to the request are enclosed.
- ☐ Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- ☐ We are continuing to process your request.
- ☐ See Comments.

**PART I.A -- FEES**

AMOUNT \*

\$

\* See comments  
for details☐

You will be billed by NRC for the amount listed.

☐

You will receive a refund for the amount listed.

☐

None. Minimum fee threshold not met.

☐

Fees waived.

**PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE**

- ☐ No agency records subject to the request have been located.
- ☐ Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.
- ☐ This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."

**PART I.C COMMENTS (Use attached Comments continuation page if required)**

The incoming request can be located in ADAMS at ML11164A006. Records with an ML accession number are available in the NRC's Library at [www.nrc.gov/reading-rm/adams.html](http://www.nrc.gov/reading-rm/adams.html). For assistance in obtaining any records, please contact the NRC's Public Document Room (PDR) at 1-800-397-4209 or by email at [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov)

The link to the NRC Office of Inspector General Report entitled, "NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository License Application (OIG Case No. 11-05)," is located at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Environment/061411/IGREPORT.pdf>

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Donna L. Sealing

**FOIA Resource**

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**From:** Bluey, Rob [Robert.Bluey@heritage.org]  
**Sent:** Friday, June 10, 2011 2:58 PM  
**To:** FOIA Resource  
**Subject:** FOIA request on Inspector General report of Yucca Mountain

Robert B. Bluey  
The Heritage Foundation  
214 Massachusetts Ave. NE  
Washington, DC 20002  
202-608-6155

June 10, 2011

FOIA/PA Officer  
U.S. Nuclear Regulatory Commission  
Mail Stop T6-D8  
Washington, DC 20555-0001

**FOIA REQUEST**

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and copies of the Office of the Inspector General report on Chairman Gregory Jaczko and the proposed waste repository at Nevada's Yucca Mountain, which was circulated to members of Congress on or around June 10, 2011.

I would like to receive the information in electronic format.

I agree to pay reasonable duplication fees for the processing of this request.

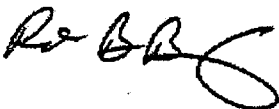
If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as a journalist and this information is of timely value, I would appreciate your communicating with me by telephone, rather than by mail, if you have questions regarding this request.

I look forward to your reply within 20 business days, as the statute requires.

Thank you for your assistance.

Sincerely,



Robert B. Bluey

**FOIA/PA REQUEST**  
**Case No.:** 2011-0248  
**Date Rec'd:** 6-10-11  
**Specialist:** Brown  
**Related Case:** \_\_\_\_\_

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**Rob Bluey**

*Director, Center for Media and Public Policy*

The Heritage Foundation

214 Massachusetts Avenue, NE

Washington, DC 20002

202-608-6155

heritage.org



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

**OFFICE OF THE  
INSPECTOR GENERAL**

June 6, 2011

**MEMORANDUM TO:** Chairman Jaczko

**FROM:**

*Hubert T. Bell*  
Hubert T. Bell  
Inspector General

**SUBJECT:** NRC CHAIRMAN'S UNILATERAL DECISION TO TERMINATE  
NRC'S REVIEW OF DOE YUCCA MOUNTAIN REPOSITORY  
LICENSE APPLICATION (OIG CASE NO. 11-05)

This report conveys the results of an Office of the Inspector General (OIG), U.S. Nuclear Regulatory Commission (NRC), investigation into an allegation that the NRC Chairman, Gregory Jaczko, unilaterally and improperly closed out the NRC's review of the Department of Energy's (DOE) Yucca Mountain repository license application while the Government was operating under a continuing resolution (CR) in fiscal year (FY) 2011. In addition, it was alleged that the Chairman was purposely preventing the Commission from completing its ruling on the Atomic Safety Licensing Board's (ASLB) decision to deny DOE's motion to withdraw its Yucca Mountain repository license application from NRC. During the course of this investigation, concerns were also 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.

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## OFFICIAL USE ONLY – OIG INVESTIGATION INFORMATION

OIG's investigation examined whether the Chairman exceeded his authority in directing the NRC staff to close out the Yucca Mountain license application review during the CR period, the Commission's adjudicatory voting process, and the impact the Chairman's management style has on the collegial functioning of the NRC Commission. The investigation findings appear in section III of this report.

### **I. BACKGROUND**

#### *NRC Mission and Commission Structure*

NRC was established in 1974 to ensure the safe use of civilian nuclear materials in the United States. NRC's regulatory mission covers nuclear reactors, nuclear materials, and nuclear waste. NRC is an independent regulatory agency headed by a five-member Commission. The Commissioners are appointed by the President and confirmed by the Senate for 5-year terms, and their terms are staggered so that one Commissioner's term expires on June 30 each year. One member is designated by the President to be the Chairman, and no more than three Commissioners may be from the same political party. This report uses the term Chairman to refer to the Commissioner appointed as Chairman, the term Commissioner to refer to the other members of the Commission, and the term Commission to refer to the entire body (Commissioners plus Chairman).

In 1979, 5 years after NRC's creation, the most serious nuclear accident in U.S. history occurred at Three Mile Island nuclear power plant in Pennsylvania. After the accident, President Jimmy Carter established the Kemeny Commission to examine and assess the events that led to the accident. In addition, NRC organized its own review, known as the Rogovin study. Both the Kemeny Commission and Rogovin study recommended that a single administrator should head NRC. However, President Carter decided to maintain a Commission structure, and he submitted Reorganization Plan No. 1 of 1980 (Reorganization Plan) to Congress with the intent to

... improve the effectiveness of the Nuclear Regulatory Commission by giving the Chairman the powers he needs to ensure efficient and coherent management in a manner that preserves, in fact enhances, the commission form of organization.<sup>1</sup>

President Carter's main goals were to strengthen the Chairman's role to clarify where agency responsibility resided while retaining the diversity that a commission form of organization offers.

On October 1, 1980, the Reorganization Plan, as amended, became effective. The Reorganization Plan is the statutory guidance by which the Commission operates. The plan articulates the role of the Chairman as it relates to executive powers and the Commissioners as

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<sup>1</sup> This statement was made by President Carter when he presented the Reorganization Plan to Congress on March 27, 1980.

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it relates to their policy role. Thus, the Commission's interpretation and implementation of the plan helps set the tone for how well the Commission members work together in a collegial fashion.

Section 1 of the Reorganization Plan establishes the Commission's functions and the Chairman's functions. It designates the Commission as responsible for (1) policy formulation, (2) rulemaking, and (3) orders and adjudications. It also provides that at any time, the Commission may "determine by majority vote, in an area of doubt, whether any matter, action, question or area of inquiry pertains to one of these functions."

Section 2 of the Reorganization Plan assigns the Chairman responsibility for all other functions, including (1) serving as official Commission spokesman, (2) serving as the Commission's principal executive officer responsible for developing policy planning and guidance for consideration by the Commission, (3) administrative functions of the Commission, (4) distribution of business among the offices of the Commission, (5) preparation of the Commission's budget estimate, and (6) the proposed distribution of appropriated funds according to major programs and purposes. 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."

The plan also states that the Chairman and the Executive Director for Operations (EDO), who reports to the Chairman, are responsible for insuring the Commission is fully and currently informed about matters within its functions.

NRC's *Internal Commission Procedures* reiterate the Reorganization Plan provisions concerning the role of the Commission as a whole and the Chairman's individual role. The procedures state that each Commissioner, including the Chairman, has equal responsibility and authority in all Commission decisions and actions, has full and equal access to information pertaining to Commission responsibilities, and has one vote. The procedures note that one of the Commission's collegial functions is revision of budget estimates and determining the distribution of appropriated funds according to major programs and purposes.

The procedures also reiterate the Reorganization Plan's provision that the Commission may determine by majority vote, in any area of doubt, whether any matter, action, question, or area of inquiry pertains to policy formulation or any of the Commission's functions. OIG learned that Commissioners use a written form of communication, referred to as a Commission action memorandum (COM), to seek votes from the other Commissioners to determine whether a matter falls into the Commission's purview as opposed to that of the Chairman. A majority vote by the Commission is needed for them to address the matter as policy.

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In December 1999, OIG issued a report, *Special Evaluation of the Role and Structure of NRC's Commission* (OIG-99-E-09), which identified that Commission members, from time to time, have different interpretations of the Reorganization Plan, which can adversely affect the Commission's collegiality.<sup>2</sup>

Chairman Jaczko has been a Commissioner since January 2005 and Chairman since May 2009. His term runs through June 2013.

### *U.S. Nuclear Waste Policy*

The current U.S. policy governing permanent disposal of spent nuclear fuel and high-level radioactive waste is defined by the Nuclear Waste Policy Act of 1982, as amended (NWPA), and the Energy Policy Act of 1992. These acts specify that spent nuclear fuel and high-level radioactive waste will be disposed of underground, in a deep geologic repository. The NWPA names Yucca Mountain, a high ridge in the Nevada desert approximately 100 miles northwest of Las Vegas, as the single candidate site for this potential geologic repository. The NWPA specifically states that NRC "shall 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 for a repository to hold no more than 70,000 metric tons of spent nuclear fuel and high-level radioactive waste to NRC on June 3, 2008, and NRC formally accepted it for review in September 2008. NRC published its Notice of Hearing in the *Federal Register* on October 22, 2008, starting the 3-year schedule set by Congress for NRC to reach a decision on whether to approve construction. If necessary, NRC may give notice to Congress of the need for an additional year to complete the review.

NRC's Atomic Safety and Licensing Board Panel<sup>3</sup> (ASLBP) is responsible for conducting hearings on a variety of legal and technical contentions regarding the Yucca Mountain license application.

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<sup>2</sup> The special evaluation defined collegiality as the relationship between a group of associates or coworkers, where authority is vested in all of the members, as they work towards a common duty or role. The full report and NRC's response to the report may be accessed at <http://www.nrc.gov/reading-rm/doc-collections/insp-gen/2000/>.

<sup>3</sup> The panel conducts all licensing and other hearings as directed by the Commission, primarily through individual Atomic Safety and Licensing Boards (ASLBs) or single presiding officers appointed by either the Commission or the Chief Administrative Judge. The panel, which has no fixed number of positions, is composed of (1) administrative judges (full-time and part-time), who are lawyers, engineers, and scientists, and (2) administrative law judges (ALJs) who are lawyers. Administrative judges and ALJs serve as single presiding officers or on three-member boards, which generally are chaired by a lawyer, for a broad range of proceedings.

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### *Continuing Resolutions (CR)*

A CR is a law that provides funding for Federal agencies, specific activities, or both to continue in operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year. For the most part, CRs are temporary and intended by Congress to be stop-gap measures enacted to keep existing Federal programs functioning after the expiration of previous budget authority and until regular appropriation acts can be enacted. Unlike regular appropriation acts, CRs typically do not appropriate specified sums of money. Instead, they usually appropriate "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations." An agency may determine the pattern of its obligations under a CR provided it operates under a plan that will keep it within the rate for operations limit set by the resolution.

Office of Management and Budget (OMB) Circular A-11, *Preparation, Submission, and Execution of the Budget*, provides guidance on operating under a CR. According to OMB Circular A-11, agencies should carefully review each CR to determine the formula provided and should keep in mind that the amount available under a CR is the product of negotiations among the various factions in Congress and the Administration. OMB Circular A-11 notes that agencies may not obligate funds under a CR that would impinge on final funding prerogatives of Congress. It also states that CRs usually include provisions directing agencies to execute programs using the most limited funding actions permitted in order to provide for continuing projects and activities.

The Comptroller General, head of the Government Accountability Office, has the legal authority to issue decisions and opinions on appropriations law.

### *Chronology of Events*

In September 2008, NRC formally accepted DOE's license application to build a geologic repository at Yucca Mountain and embarked on its review process. According to the NWPA, NRC was to reach a decision concerning the viability of the site within 3 years of the license application acceptance date.<sup>4</sup>

NRC planned, at the end of its technical review, to issue a safety evaluation report (SER) containing its findings on the repository design.<sup>5</sup> The SER would determine whether the proposed facility would meet NRC regulations to protect public health and safety. NRC staff responsible for developing the SER decided to issue the SER in five volumes, and estimated<sup>6</sup> that Volume 1 (General Information) would be complete in August 2010, Volume 3 (Review of

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<sup>4</sup> The NWPA additionally allows the NRC to extend the 3-year deadline by not more than 1 year.

<sup>5</sup> An SER summarizes the NRC staff's technical review and safety evaluation related to the anticipated effect of a proposed license application or licensing action on public health and safety.

<sup>6</sup> Dates reflect the NRC staff's last official estimate, announced in March 2010.

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Repository Safety After Permanent Closure) in November 2010, Volume 4 (Review of Administrative and Programmatic Requirements) in January 2011, and Volume 2 (Review of Repository Safety Before Permanent Closure) and Volume 5 (License Specifications and Conditions) in March 2011.

On February 2, 2010, Energy Secretary Steven Chu noted during a Senate hearing that President Barack Obama's Administration would seek to immediately suspend licensing for the Yucca Mountain repository because it was "not a workable option." DOE's budget proposed zero funding for the project in FY 2011, which conveyed the Administration's intent to terminate the Yucca Mountain project.

In February 2010, NRC published its FY 2011 Congressional Budget Justification, which also conveyed the Administration's intent concerning Yucca Mountain, stating:

The Administration has indicated that it does not support developing a repository at Yucca Mountain, Nevada. Consistent with that position, DOE may submit to the NRC a motion to withdraw or suspend its Yucca Mountain license application during FY 2010. The NRC Budget reflects that possibility. 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.

NRC's FY 2011 Congressional Budget Justification 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." This amount was \$19 million less than the \$29 million appropriated for license application review activities in FY 2010.

On March 3, 2010, DOE submitted to the ASLB a motion to withdraw its Yucca Mountain license application. On June 29, 2010, the ASLB issued a decision that denied DOE's motion to withdraw, concluding that DOE lacks the authority to seek to withdraw the application. The ASLB grounded its decision in its interpretation of the NWPA, reasoning that Congress directed DOE to file the application and the NRC to consider the application and issue a final, merits-based decision approving or disapproving.

On June 30, 2010, the Commission issued an order inviting hearing participants to file briefs as to whether the Commission should review, and reverse or uphold, the ASLB's decision, thus signifying the Commission's decision to review the ASLB's decision.

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On August 10, 2010, in accordance with NRC's process, the Office of Commission Appellate Adjudication (OCAA)<sup>7</sup> submitted adjudicatory paper SECY-10-0102, "U.S. Department of Energy (High-Level Waste Repository), Review of LBP-10-11, Docket No. 63-001-HLW," to the Commission for its review and vote. Commissioners began casting their votes on SECY-10-0102 on August 25, 2010, and a majority of Commissioners had voted by September 15, 2010. Chairman Jaczko did not cast his final vote at that time.

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 the EDO issued guidance to NRC staff related to budget execution under the CR. 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. The memorandum stated that during the CR period, new work that was not authorized and funded in FY 2010 should not be started in FY 2011. With regard to the High-Level Waste Program, the memorandum directed staff to continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR period.

In early October 2010, Chairman Jaczko directed NRC staff working on the Yucca Mountain license application review to stop working on Volume 3 of the SER and proceed to orderly closure of the technical review.

On October 29, 2010, Chairman Jaczko voted on SECY-10-0102, completing the Commission's notational voting process on the Yucca Mountain matter; however, as of the date of this report, the Commission has not held an affirmation vote on the matter and the draft order continues to sit in deliberation before the Commission for affirmation.

## **II. INVESTIGATIVE DETAILS**

### **A. OIG Review of CR Issue**

OIG learned that the language in the EDO's and CFO's October 4, 2010, CR budget guidance memorandum directing staff to follow FY 2011 budget guidance for High-Level Waste Program activities was based on instruction provided by the Chairman's office and was used by the Chairman to stop work on the SER and NRC's Yucca Mountain license application review.

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<sup>7</sup>OCAA assists the Commission in its adjudicatory functions including the resolution of appeals from decisions of ASLBs; assistance includes analysis of adjudicatory matters and preparation of adjudicatory decisions consistent with Commission policy and guidance.

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While the Chairman told NRC senior officials that the CR budget guidance memorandum language had been reviewed and agreed to by his fellow Commissioners, one Commissioner was not informed of the language, two were provided some information but did not recognize the impact the memorandum would have on the SER, and one Commissioner disagreed with the language because he recognized the impact it would have on the SER.

Furthermore, while all of the NRC Commissioners in February 2010 (Chairman Jaczko, Commissioner Kristine Svinicki, and former Chairman Dale Klein) agreed to the agency's FY 2011 Congressional Budget Justification, which specified criteria that needed to be met before the license application review process could be shut down, there is disagreement among current Commissioners and a former Chairman and agency officials as to (a) whether these criteria were met and (b) the Chairman's shutdown approach.

### *NRC's Budgets for the High-Level Waste Repository Program*

NRC's budget documents reflect a significant funding reduction for the High-Level Waste Program between FY 2010 and FY 2011 and elimination of the program by FY 2012. OIG learned that each NRC budget proposal and subsequent passback appeal letter<sup>8</sup> to OMB for increased funding was voted on and approved by the Commission, although the Commission composition was different for each year.

The Commission's FY 2010 performance budget request – which was voted on and approved by former Chairman Klein, then Commissioners Jaczko and Peter Lyons, and Commissioner Svinicki – sought \$99.1 million for the program to support two concurrent processes associated with the "ongoing license review": (1) assess the technical merits of the repository design, and (2) support the adjudicatory hearing before the NRC ASLB convened to hear the technical and legal challenges posed by parties to the DOE license application. Subsequently, Congress appropriated \$29 million to NRC for the High-Level Waste Program.

For FY 2011, the Commission (Chairman Jaczko, Commissioner Svinicki, and then Commissioner Klein) requested \$39.5 million to support the High-Level Waste Program. OMB responded with \$10 million for the program. In December 2009, Chairman Jaczko sent NRC's FY 2011 passback letter of appeal to OMB. This letter, which had been approved by the Commission, stated that DOE:

... is expected to submit to the NRC a motion to withdraw or suspend its Yucca Mountain license application before the end of FY 2010. Assuming this scenario, the \$10 million provided in the FY 2011 pass-back would allow for us to start the process for an orderly disposition of the adjudicatory and technical review activities. Additional resources may be needed for an orderly disposition of activities beyond FY 2011, the amount dependent upon the timing of the motion.

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<sup>8</sup> The passback appeal letter is also referred to as the reclama letter.

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NRC's FY 2011 Congressional Budget Justification, published in February 2010 after Commission approval, also referenced the possibility that DOE would move to suspend or withdraw its license application and noted:

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.

Although this document also stated that NRC had requested \$10 million, including 32 FTE, to provide for licensing activities, the only activities described were those related to the orderly closure of the agency's Yucca Mountain licensing support activities.

OIG noted differences between NRC's December 2009 passback letter of appeal and the February 2010 Congressional Budget Justification for FY 2011 with regard to (1) proposed activities and (2) prerequisites to trigger those activities. While the NRC passback appeal letter states that *orderly disposition of the adjudicatory and technical review activities* would be based upon a *motion to withdraw or suspend*, the Congressional Budget Justification states the *orderly closure of the technical review and adjudicatory activities* would be based on *withdrawal or suspension of the licensing review*.

For FY 2012, the Commission (Chairman Jaczko and Commissioners Svinicki, William Ostendorff, William Magwood, and George Apostolakis) requested \$4.0 million for the termination of all program activities. OMB, however, allocated no money to NRC for the High-Level Waste Program, which is reflected in NRC's FY 2012 Congressional Budget Justification.

### *CR Budget Guidance Memorandum*

OIG reviewed the EDO's and CFO's October 4, 2010, CR budget guidance memorandum and four earlier versions that predated the final document. The final October 4, 2010 memorandum stated that NRC's FY 2011 budget request sustains agency programs at about the same level as FY 2010, with the exception of the High-Level Waste Program and that offices should therefore proceed to commit, obligate, and expend funds for ongoing activities to effectively use available resources during the CR. The memorandum specified that, "During the CR period, new work that was not authorized and funded in FY 2010 should not be started in FY 2011." It also provided:

With respect to the High-Level Waste Program, the CR legislation does not include specific restrictions on spending funds. Therefore, the staff should continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR.

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The first version of this memorandum – dated August 31, 2010, contained no mention of the Yucca Mountain repository license application review. Two later versions (dated September 13 and September 14, 2010) directed that the agency would continue to conduct its Yucca Mountain license application review with any available FY 2010 carryover funds until exhausted, and made no reference to the FY 2011 budget. The first version reviewed by OIG that made mention of the FY 2011 budget was dated September 27, 2010. This version directed staff to continue its activities on Yucca Mountain in accordance with the FY 2011 budget.

### *Commissioner Ostendorff's COM*

OIG reviewed a COM prepared by Commissioner Ostendorff, titled, "Commission Direction on Staff Budget Guidance Under Fiscal Year (FY) Continuing Resolution." This document was submitted by Commissioner Ostendorff to the other Commissioners on October 6, 2010, in response to the CR budget guidance memorandum sent from the EDO and CFO to the staff on October 4, 2010. The COM states that the direction given to staff in the October 4, 2010 memorandum to continue its Yucca Mountain activities in accordance with FY 2011 budget guidance "is a significant policy matter that I believe warrants the Commission's attention, and which requires that the Commission give direction to the staff to avoid confusion on the Commission's intent for operation under the Continuing Resolution." Commissioner Ostendorff referred to a March 30, 2010 memorandum titled, "Plans for the High-Level Waste Repository Program," from the EDO to the Commission that conveyed the staff's intent to complete SER Volumes 1 and 3 no later than August and November 2010, respectively, and the staff's plan to continue to work on any remaining SER volumes until FY 2010 funds were exhausted. Commissioner Ostendorff said that the March 30, 2010 memorandum was provided to the Commission in the context of both the FY 2010 appropriation and the FY 2011 budget request and must, therefore, continue as standing guidance to staff.

Commissioner Ostendorff wrote, "It is my view that whatever the ultimate disposition of the High-Level Waste Repository activity, complete SER documents are the best and most appropriate way in which to memorialize the Staff's work product." He proposed that the Commission take action no later than October 8, 2010, to direct staff to continue to work on the remaining SER volumes as stated in the March 30, 2010 memorandum, at the rate for operations appropriate given the proposed FY 2011 budget as augmented by reprogrammed funds remaining from FY 2010 appropriations.

### *Memo from NRC General Counsel Regarding CR Budget Guidance Memorandum*

OIG also reviewed an October 15, 2010 memorandum from NRC's General Counsel to the Chairman and Commissioners, providing the General Counsel's views regarding the October 4, 2010 CR budget guidance memorandum. The General Counsel concluded in the memorandum that focusing the agency's High-Level Waste Program activities during the CR period on activities related to the orderly closure of the Yucca Mountain review does not violate legal requirements or the principles of appropriations law. According to the General Counsel, the agency's guidance was appropriate for the following reasons:

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- The agency's proposed expenditures during the CR are consistent with the terms of the CR because they support and are within the scope of the continuing projects or activities conducted in the prior fiscal year; unless the CR contains more specific language, the phrase "projects or activities" generally refers to the total appropriation for the account, not to the specific activities contained as activities in a budget submission or committee report.
- While the Yucca Mountain license application may be on a different trajectory than in early fiscal years, it cannot be said that the agency is spending its High-Level Waste Program funds under the CR in a manner unrelated to its Yucca Mountain repository review or contrary to the express direction in the pertinent legislation. Even if activities under the EDO/CFO's guidance are of a more limited scope than in the previous fiscal year, it does not appear that such activities would irreversibly compromise or preclude NRC's ability to engage in a license application review if Congress were to increase NRC's High-Level Waste Program budget and direct a revival of the Yucca Mountain repository review.
- Agencies are directed to act prudently in expending funds under a CR so as not to impinge on the final funding prerogatives of Congress. NRC requested an appropriation from the Nuclear Waste Fund for FY 2011 of \$10 million, or about one-third of the FY 2010 appropriation, and there was no indication from the Senate or House that the FY 2011 budget would be increased.

The General Counsel's memorandum also noted that there had also been some internal debate over whether final NRC action permitting DOE to withdraw its application is a condition precedent to the orderly closure activities under the FY 2011 guidance reflected in the Commission's Congressional Budget Justification. Addressing this matter, the General Counsel wrote, "Considering the entire text of the NRC budget document and the context in which it was submitted, I do not believe such a conclusion necessarily follows."

### *OIG Interviews of Agency Officials Related to CR Issue*

#### Interviews of NMSS, OEDO, and OCFO Officials

OIG learned, through interviews with Office of Nuclear Material Safety and Safeguards (NMSS), Office of the Executive Director for Operations (OEDO), and Office of the Chief Financial Officer (OCFO) officials, that during the summer of 2010, NRC managers responsible for NRC's High-Level Waste Program anticipated there would be about \$7 million in high-level waste funding left over (carryover) at the end of FY 2010. The managers were interested in seeking Commission feedback about what to do with the carryover funding in FY 2011, given that FY 2010 High-Level Waste Program funding was for licensing review and FY 2011 High-Level Waste Program funding was for orderly shutdown of the High-Level Waste Program. Because a Commission decision was still pending concerning ASLB's denial of DOE's motion to withdraw its license application, the managers sought Commission feedback about how to proceed with the licensing review.

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OIG learned that the NMSS Director initially sought to write a paper for Commission review concerning the staff's plans for the carryover money; however, a decision was made instead to inform the Commission of the staff's plans via a CR budget guidance memorandum issued to staff from the EDO and CFO giving guidance on how to carry out programs and activities during the CR period. The Deputy Executive Director (DEDO) for Materials, Waste, Research, Tribal and Compliance Programs initially proposed that the CR budget guidance memorandum direct High-Level Waste Program staff to use FY 2010 funds until they were exhausted to continue the license application review; language to this effect was included in early versions of the CR budget guidance memorandum. However, the Chairman's office asked to review the draft memorandum and subsequently provided direction to OEDO staff and the CFO that resulted in the official memorandum, issued on October 4, 2010, directing staff to continue its activities on the Yucca Mountain license application in accordance with the Commission's decisions on the FY 2011 budget.

### Interview of NMSS Director

The NMSS Director<sup>9</sup> told OIG that she had written a memorandum that she planned to present to the Commission in September 2010 conveying the staff's intent to complete Volume 3 of the SER with the remaining FY 2010 funding and the remaining SER volumes no later than the 2<sup>nd</sup> quarter of FY 2011 provided the availability of resources and the agency had not terminated the license application review. However, the DEDO for Materials, Waste, Research, Tribal and Compliance Programs told her they did not need the memorandum and would handle the issue through guidance in the CR budget guidance memorandum. The DEDO initially told the NMSS Director that the CR guidance would be to use FY 2010 and FY 2011 funds to continue the review. However, the NMSS Director later learned that the direction from the Chairman was to transition to closure upon entering the new fiscal year. The NMSS Director was concerned about whether the agency could use the FY 2010 carryover – which had been appropriated for license review – during FY 2011 for close-out activities.

### Interview of DEDO for Materials, Waste, Research, Tribal and Compliance Programs

The DEDO for Materials, Waste, Research, Tribal and Compliance Programs told OIG that in the absence of a Commission decision on the ASLB adjudicatory matter, he and the NMSS Director recognized the need to communicate to the Commission, and that the Commission needed to provide direction for the High-Level Waste Program. The DEDO told the NMSS Director he would rather communicate through the CR budget guidance memorandum than a paper because it would yield a quicker response. He thought that due to the diversity of views on the Commission, a memorandum simply to inform them would promptly be converted into a vote, and it was unlikely they would reach a decision within a month. The DEDO wanted to convey in the CR budget guidance memorandum that the staff would use FY 2010 carryover funds in FY 2011, which would yield a net of \$17 million (\$10 million from the FY 2011 budget

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<sup>9</sup> The NMSS Director began working in that position in May 2010. Prior to that, she was the Deputy Director for NMSS, and the DEDO for Materials, Waste, Research, Tribal and Compliance Programs was the NMSS Director.

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and \$7 million in FY 2010 carryover funds) to move ahead with license application review activities until they had a final decision from the Commission. This was the language the DEDO originally inserted into early draft versions of the CR budget guidance memorandum. However, after the CFO shared the memorandum with the Chairman's office, the Chairman's Policy Director said she thought the Chairman would not want this type of language in the memorandum because it would constitute a change in policy. The DEDO said he had not previously viewed the language in that way, but the Chairman's Policy Director conveyed that when the Commission last addressed the issue in the FY 2011 Congressional Budget Justification, the language was to close out the program.

The DEDO said OEDO and OCFO staff subsequently worked with the Chairman's office to revise the language to reflect something like, "... should continue to follow the established Commission policy." He thought the language ultimately used in the memorandum seemed innocuous and did not indicate specifically that this meant "close down the licensing process and commence the orderly closure of the program." He asked the Chairman's Policy Director why not be more explicit in the CR budget guidance memorandum to reflect what was intended, and the Chairman's Policy Director told him it was unnecessary because the CR budget guidance memorandum was pointing to the FY 2011 Congressional Budget Justification, which already captured the intent in writing. The DEDO said he questioned both the Chairman's Policy Director and the Chairman's Chief of Staff as to whether people would understand the connection. The DEDO told them the Congressional Budget Justification paragraph on the High-Level Waste Program could be read as "entry conditions," providing that until the agency allowed "withdrawal or suspension," it should continue the license application review. The Chairman's Policy Director and Chief of Staff responded that this was incorrect and that the budget justification language was background and set the context for the status of the program. They said the program's status was described in the workload paragraph of the Congressional Budget Justification, which reflects what the agency is going to use its resources and funding for. In this case, they said, this was closing down the program.

The DEDO also said the Chairman's Chief of Staff told him that in anticipating the potential controversy that would ensue with the implementation of the CR budget guidance memorandum, the Chairman had consulted with the other Commissioners and that at least a majority of the Commission was supportive of moving forward with the orderly closure of the High-Level Waste Program. The DEDO also recalled a meeting with the Chairman during which the Chairman stated he would complete discussions with the other Commissioners before the end of September 2010, and then NRC would initiate an orderly closure of the High-Level Waste Program.

### Interview of the CFO

The CFO told OIG that in August 2010 the staff began generating variations of the CR budget guidance memorandum. At one point, they were prepared to issue the memorandum at which time the Chairman asked to see it. Up until then, his office had not received any direction from the Chairman's office on the memorandum, and the CFO thought the Chairman just wanted to

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be informed about the document. He said that the Chairman's Policy Director e-mailed him the paragraph on the High-Level Waste Program and he directed his staff to insert the language into the memorandum. He recalled that just before one of the Chairman's regularly scheduled meetings, the Chairman called the CFO, the General Counsel, and the EDO into his office and asked whether they were "all okay with this memorandum." The CFO said the Chairman said, "I'm going to talk to my other Commissioners, but I think there's a good chance that this might turn into a vote on Yucca Mountain." The CFO said he did not understand how the memorandum could turn into a vote on Yucca Mountain because, in his view, the memorandum was a financial budget execution memorandum and not intended to redirect the staff programmatically. He said he was surprised at the interpretation by the Commission that the memorandum was providing programmatic direction. The CFO recalled that on October 1, 2010, Commissioner Ostendorff's Chief of Staff called him at home to tell him he had spoken with the Chairman's Chief of Staff about the CR budget guidance memorandum and had problems with the paragraph concerning high-level waste. Later that evening, the Chairman's Chief of Staff called him at home and said the Chairman's office had clearance on all of the Commission offices to sign out the memorandum. The CFO said that after the issuance of the CR memorandum and the direction to initiate High-Level Waste Program close-out activities, he asked the Chairman if he had missed something during the meeting with the General Counsel and EDO. The Chairman explained that his intent was that the memorandum would result in a change in direction for the staff and they were going to go from issuing an SER to a NUREG.<sup>10</sup> The CFO later asked the Chairman's Policy Director whether the conditions regarding withdrawal or suspension reflected in the FY 2011 Congressional Budget Justification had been met. She replied that the conditions were met when DOE submitted its motion to withdraw its license application.

### Interview of the EDO

The EDO said that initially there was no plan to include specific language about the High-Level Waste Program in the CR budget guidance memorandum. At the same time, he said, given the Administration's direction to withdraw DOE's Yucca Mountain license application, the staff understood the High-Level Waste Program was on a path to closure. The DEDO for Materials, Waste, Research, Tribal and Compliance Programs and he had asked to prepare a paper for the Commission describing how the staff would go about close-out and how much funding would be needed. The staff's intent was to use the \$7 million in carryover funds for continuation of the technical review and the \$10 million proposed for the FY 2011 budget for close-out activities. The EDO said that one of his primary responsibilities as EDO is to ensure the entire Commission is kept informed, and that a staff paper on the close-out plan would serve to inform the Commission and seek its input on the matter, which he felt was necessary. The EDO said the staff had never prepared any papers for the Commission discussing plans for the closure of the High-Level Waste Program in part because the NWPA required NRC to perform a quality

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<sup>10</sup>NRC NUREG documents communicate various types of information, including support for regulatory decisions, guidance for complying with regulations, results of task force investigations, results of contractor research programs, resolution of generic safety issues, and proceedings of conferences and workshops,

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review in a timely manner. According to the EDO, his mindset and that of the staff was to accomplish as much of the technical review as they could. He and the NMSS staff believed that even if DOE were to withdraw the application, or the facility was not permitted to operate, it would benefit the country for NRC to have completed the technical review. Furthermore, he felt that because there had not been a Commission decision on DOE's withdrawal request, they should continue the technical review. However, over a period of weeks and months and interaction with the Chairman's office, they received direction from the Chairman to address the High-Level Waste Program in the CR budget guidance memorandum. The EDO said he understood that the Chairman's intent, prior to issuance of the CR budget guidance memorandum, was to close out the license application review process.

The EDO thought it would be okay to address the issue in the CR budget guidance memorandum because he believed the entire Commission would review the CR budget guidance memorandum. He thought the CR budget guidance memorandum would accomplish what needed to be done with regard to the High-Level Waste Program absent a paper from the staff. He believed that if the Commissioners decided the matter was a policy issue, they could vote on it. He said he expressed his concerns to the Chairman that the Commission needed to see the memorandum, and the Chairman told him the memorandum would not be issued until he had spoken with the other Commissioners and all were on board with the memorandum language. Prior to the EDO and CFO signing the memorandum, the Chairman told the EDO that all four Commissioners were in agreement with the language, understood that they were going to close out the High-Level Waste Program, and authorized the issuance of the CR budget guidance memorandum. The EDO anticipated that the contentious issue for the Commission would be whether they would close out or continue the technical review. The CR budget guidance memorandum did not provide any direction on the issue, so the EDO felt it was okay to sign because on face value, it did not provide questionable direction.

### Interview of Commissioner Apostolakis

Commissioner Apostolakis told OIG that before the October 4, 2010 CR budget guidance memorandum was issued to the NRC staff, Chairman Jaczko advised him that he was prepared to authorize budget guidance under the CR process and wanted his support. During this conversation, which occurred on September 30, 2010, Chairman Jaczko asked Commissioner Apostolakis whether he would support him if a Commissioner challenged the CR guidance. Chairman Jaczko assured Commissioner Apostolakis that OGC advised him the planned CR guidance was appropriate. Chairman Jaczko requested that he respond to his question that same day. Commissioner Apostolakis told the Chairman that he did not see a problem but wanted to discuss the matter with his staff. Commissioner Apostolakis told OIG that the CR guidance to the staff to follow the Commission's FY 2011 budget direction subject to funding conditions under the CR seemed innocuous. His understanding of a CR was that the agency would continue ongoing work from the previous year.

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Following the September 30, 2010 discussion with Chairman Jaczko, Commissioner Apostolakis' staff received a copy of the paragraph that discussed the High-Level Waste Program in the CR budget guidance memorandum. He recalled that his staff showed him language from the Commission's FY 2011 budget request, which stated that the orderly transition would begin upon withdrawal of the license application or suspension of the licensing review. Commissioner Apostolakis advised that although Chairman Jaczko said he would ask the staff to conduct activities in accordance with the FY 2011 budget, this is not what he did. Commissioner Apostolakis stated that the FY 2011 budget reflected that if the proceedings were suspended, then the agency would proceed with close-out of the license application review. However, the proceedings were not suspended. The Chairman ignored the portion of the budget which referenced upon withdrawal or suspension and directed the staff to close out the High-Level Waste Program. Commissioner Apostolakis stated that Chairman Jaczko did not explain to him what the CR guidance would mean in practice.

Commissioner Apostolakis said that he did not know from his initial discussion with Chairman Jaczko that the likely effect of the October 4, 2010 CR guidance was that SER Volume 3 would not be issued in November 2010 as originally scheduled. Members of his staff raised the prospect that the NRC staff would not complete SER Volume 3 and would work to incorporate Volume 3 in a NUREG report. He did not know what work was required to complete Volume 3.

During the week of October 4, 2010, Chairman Jaczko sought Commissioner Apostolakis' support in opposing any challenge to the CR budget guidance memorandum based on Commissioner Ostendorff's October 6, 2010 COM. Commissioner Apostolakis told Chairman Jaczko he did not provide him with details of the practical impact of the CR guidance when the Chairman originally requested his support. Commissioner Apostolakis was concerned about preserving the staff's work product and he wanted the Commission to see the staff's plan for implementing the October 4, 2010 CR memorandum guidance. The Chairman told him that preserving the staff's work products, such as the draft SER Volume 3, in the internal agency records would not be a problem. However, the Chairman did not want to include regulatory conclusions in any public release of Volume 3.

During the week of October 4, 2010, Commissioner Apostolakis also discussed issues related to the budget guidance and Commissioner Ostendorff's COM with the Chairman and Commissioner Magwood. On October 7, 2010, Commissioner Apostolakis learned of a petition filed with the NRC Commission on behalf of Aiken County, SC, and the States of South Carolina and Washington, raising issues about the budget guidance and its relation to the adjudicatory High-Level Waste proceedings, from which he had recused himself. Based upon this action he decided he would not participate in voting on Commissioner Ostendorff's COM.

### Interview of Commissioner Magwood

Commissioner Magwood told OIG that on September 28, 2010, during a regularly scheduled periodic meeting with Chairman Jaczko, the Chairman informed him that the NRC staff was developing a plan for operating under the CR passed by Congress and that this plan would

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move toward close-out of the High-Level Waste Program as anticipated by the Commission in the FY 2011 budget. According to Commissioner Magwood, the Chairman said that the NRC staff drafted language regarding the High-Level Waste Program and the Chairman asked if he would review the language and let him know if he had any objection. Commissioner Magwood told the Chairman that it would be appropriate to formulate a plan for moving forward and that he would review the draft guidance. He also told the Chairman that he would not support a "precipitous" termination of the High-Level Waste Program. According to Commissioner Magwood, the Chairman assured him that this was not his expectation.

Commissioner Magwood told OIG that his staff reviewed the draft language on the High-Level Waste Program and compared it to the FY 2010 budget and FY 2011 guidance. His staff concluded that the language, which indicated that the staff should begin implementing the FY 2011 plan as reflected in the agency's Congressional Budget Justification, was consistent with both Commission policy and Congressional actions to date. Commissioner Magwood said he thought it prudent to ensure that the NRC's rate of expenditures on the High-Level Waste Program remained within the \$10-million ceiling. He instructed his staff to inform the Chairman's office that he would not object to the instruction in the draft CR budget guidance memorandum.

Commissioner Magwood stated that after the October 4, 2010, CR budget guidance memorandum was issued, he learned this memorandum was interpreted as requiring the staff to shut down its work on the Yucca Mountain license application, not issue SER Volume 3 as planned in November 2010, remove the findings from SER Volume 3, and issue the document as a technical evaluation report (TER).

Commissioner Magwood said that after discussions with NRC senior staff members, he learned that what had been portrayed as guidance developed by senior agency staff had actually come from the Chairman. On October 7, 2010, he discussed concerns he had about Chairman Jaczko's actions with the Chairman. According to Commissioner Magwood, the Chairman became very agitated and said that he would never have taken these actions had both Commissioners Apostolakis and Magwood not agreed to support the guidance. Commissioner Magwood said he objected to this statement quite strongly and that the Chairman never told him his plan had been to shut down the High-Level Waste Program and withhold publication of SER Volume 3. The Chairman responded to him, "You should have asked." Commissioner Magwood said that under the statutory framework, the Chairman had an obligation to provide full and accurate information to Commissioners.

After the staff was directed to stop working on the SER, Commissioner Magwood considered writing a COM to address this matter directly. He later found out that Commissioner Ostendorff felt strongly about the actions of the Chairman and was in the process of publishing a COM. He encouraged Commissioner Ostendorff to proceed and offered suggestions to the COM's development which was published on October 6, 2010.

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On October 8, 2010, Commissioner Magwood concluded that Commissioner Ostendorff's views and his were in agreement with regard to the Chairman's actions. However, based on subsequent motions filed by petitioners from Aiken County, SC, and South Carolina and Commissioner Apostolakis' recusal from the matter, he decided the best thing to do was to step back from the matter to examine the issues, particularly the legal issue. Therefore, he decided not to participate in response to Commissioner Ostendorff's COM.

On November 12, 2010, Commissioner Magwood issued a COM to the Chairman and Commissioners pertaining to future activities of the High-Level Waste Program. As of the publication date of this report, this matter was still under deliberation by the Commission.

### Interview of Commissioner Ostendorff

Commissioner Ostendorff told OIG that on September 30, 2010, his Chief of Staff told him that the Chairman was planning to issue guidance on the CR and that this guidance would include language that would effectively have the staff discontinue work on DOE's license application, specifically SER Volume 3. His office received a copy of the draft language in the CR budget guidance memorandum pertaining to the High-Level Waste Program from the Chairman's Chief of Staff on the evening of September 30. Commissioner Ostendorff said his Chief of Staff was informed that Commissioners Magwood and Apostolakis had already given their support to this guidance, so there was no point in his office making an issue of it since a majority had already agreed to the CR guidance. The Chairman's Chief of Staff told Commissioner Ostendorff's Chief of Staff that if Commissioner Ostendorff disagreed with the CR guidance, they should discuss a compromise on the Yucca Mountain adjudicatory matter.

Commissioner Ostendorff stated that on October 1, 2010, Chairman Jaczko told him that the CR budget guidance memorandum would have the staff commence orderly closure of the Yucca Mountain license application review. Ostendorff told the Chairman that he disagreed with his direction, the direction was wrong, and he should not issue it. Chairman Jaczko told him he would consider his advice, and get back to him before he made a decision. Later that day, Chairman Jaczko informed him that he had decided to issue the guidance. Commissioner Ostendorff said he told the Chairman that he strongly disagreed with his decision. He said he asked Chairman Jaczko what he planned to do with respect to SER Volume 3. According to Commissioner Ostendorff, the Chairman told him that SER Volume 3 would not be issued in this current form, the staff's findings would be removed from the document, and a document would eventually be issued, possibly as a NUREG.

Commissioner Ostendorff advised OIG that he disagreed with the CR guidance memorandum's direction to follow FY 2011 budget guidance because the conditions that would authorize "orderly closure" had not been met. According to Commissioner Ostendorff, the FY 2011 budget request stated that such closure would not begin until "withdrawal or suspension of the licensing review." Since the issue of whether the license application may be withdrawn was currently before the Commission and a final decision had not been made, that condition clearly had not been met.

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On October 4, 2010, Commissioner Ostendorff related that he spoke with Commissioner Svinicki about the CR guidance memorandum, and explained his concerns on the matter and that he considered issuing a COM. Later that day he was informed that the EDO and CFO had published the CR budget guidance memorandum.

On October 5, 2010, Commissioner Ostendorff directed his staff to prepare a COM that would raise the CR guidance issue as a policy matter for Commission consideration. He met separately with Commissioners Apostolakis and Magwood to discuss his concerns and explain his objections concerning the CR budget guidance memorandum. The feedback he received from both Commissioners was that they felt the memorandum's guidance on the High-Level Waste Program was wrong. Commissioner Ostendorff's COM was issued on October 6, and on October 8, he learned that Chairman Jaczko and Commissioners Apostolakis and Magwood decided not to participate. Only Commissioner Svinicki voted on the matter.

### Interview of Commissioner Svinicki

Commissioner Svinicki told OIG that on the morning of September 30, 2010, her staff learned that Chairman Jaczko was proposing to unilaterally issue guidance to the NRC staff on the use of funds for the High-Level Waste Program during the FY 2011 CR. The CR guidance would direct agency staff to follow the FY 2011 budget direction.

Commissioner Svinicki stated that although she attended a regularly-scheduled periodic meeting on the afternoon of September 30 with Chairman Jaczko, neither she nor the Chairman raised the CR budget guidance memorandum. She did not raise the issue because she was not sure if the CR budget guidance memorandum was a rumor. Nevertheless, her legal counsel contacted the NRC General Counsel to question the legal basis for the purported CR guidance. Also during the afternoon of September 30, she learned from Commissioner Ostendorff that he was aware of the same rumor concerning the CR budget guidance memorandum. Both she and Commissioner Ostendorff agreed that the CR guidance was not appropriate. During the evening of September 30, Commissioner Ostendorff e-mailed her a copy of the CR guidance language, which was identical to the language included in the final October 4, 2010 CR budget guidance memorandum. Commissioner Svinicki said that Commissioner Ostendorff's staff was approached by the Chairman's Chief of Staff to discuss the CR budget guidance memorandum. Commissioner Ostendorff's staff specifically asked the Chairman's Chief of Staff if Commissioner Svinicki's office had been informed of the CR budget guidance memorandum. The Chairman's Chief of Staff replied that Commissioner Svinicki's office was already aware of the guidance because her staff had made inquiries to the General Counsel.

While Commissioner Svinicki was on international travel from October 1 to 9, 2010, she learned that the CR budget guidance memorandum was officially issued on October 4. On October 5, her staff informed Chairman Jaczko's office that she objected to the CR guidance.

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Commissioner Svinicki stated that she did not have any direct communication with Chairman Jaczko regarding this matter before the CR budget guidance memorandum was issued on October 4, 2010. She learned on October 1 that the Chairman's staff left two messages for her staff on the evening of September 30 and on October 1. After the CR budget guidance memorandum was issued, she questioned the CFO about his knowledge and involvement in the development of the memorandum. The CFO told her although he was out of the office during much of the memorandum's development, when he returned, he inquired about the status of the memorandum and was told by the Chairman's Policy Director that Chairman Jaczko was walking the guidance memorandum around to the Commissioners.

Commissioner Svinicki said that in reviewing the FY 2011 Congressional Budget Justification and her vote on this budget, she noted that her vote contained specific edits to the narrative description of activities related to the High-Level Waste Program. Of note, she voted to change the language describing the commencement of orderly close-out of the high-level waste technical review from "Assuming withdrawal or suspension..." to "Upon withdrawal or suspension...." The purpose of this edit was to make clear that orderly close-out of the High-Level Waste Program would not begin unless and until the license application had been withdrawn or the technical review had been suspended. This edit was supported by the Commission at that time (Chairman Jaczko, then Commissioner Klein, and Commissioner Svinicki) and was incorporated into the final document.

Commissioner Svinicki told OIG that when reviewing her vote on the FY 2011 budget in light of the events related to the October 4, 2010 CR budget guidance memorandum, she recalled a conversation she had with Chairman Jaczko regarding her January 2010 vote. Shortly after she cast her vote, Chairman Jaczko requested to meet with her. During this meeting, Chairman Jaczko expressed his frustration that she had voted to edit language in the FY 2011 Congressional Budget Justification document, deeming most of her edits insignificant. Further, Chairman Jaczko interpreted her edits to the language describing the High-Level Waste Program to indicate a belief on her part that he was at the NRC for the purpose of dismantling and terminating the Yucca Mountain program at the bidding of Senator Reid. Commissioner Svinicki said the Chairman was very animated and objected to this perceived accusation. She told Chairman Jaczko that none of her edits were intended as an accusation, but rather they were offered to improve the quality of the document on substantive matters.

Commissioner Svinicki said that during the voting process on the appeal to OMB for the FY 2011 budget passback, she had proposed edits to the passback appeal letter. However, the Chairman called her and advised that he was leaving the building in "8 minutes" and if she did not retract her vote edits on the passback appeal letter, he would leave and not submit the letter on behalf of the agency to OMB, which would cause the agency to absorb the funding reductions proposed by OMB. Given this ultimatum, she agreed to the edits of another Commissioner which were similar to hers.

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Commissioner Svinicki told OIG that on October 14, 2010, she voted to approve Commissioner Ostendorff's COM because the FY 2010 budget direction governs during the CR, and even if that were not the case, the prerequisites in the FY 2011 budget under which "orderly closure" of high-level waste review activities would begin had not been satisfied. She objected to the Chairman's CR direction because the NRC Commission had not concluded action on the Commission's ongoing adjudicatory proceedings on the Yucca Mountain license application. She said the direction to NRC staff to stop the license application technical review could achieve the same practical result as overturning the ASLB's decision, effectively granting DOE's motion to withdraw. The proper vehicle for resolving the legal question of DOE's authority to withdraw the license application is through Commission action on the adjudicatory matter, and any direction on the use of funds during the CR, absent specific direction from Congress to the contrary, should not predetermine the outcome of the legal matter pending before the Commission.

### Interview of Former Chairman Klein<sup>11</sup>

Former Chairman Klein recalled that he and Commissioner Svinicki wanted two things: first, to follow the NWPA's requirement that NRC evaluate DOE's license application and, second, to see a solution to the high-level waste issue. They felt strongly that the NRC staff needed to make a determination whether the Yucca Mountain site was acceptable or not, and they wanted to make sure the staff had the resources needed to make that determination. There was considerable uncertainty about the future of the High-Level Waste Program, and he and Commissioner Svinicki paid attention to the FY 2011 budget language to make sure it allowed NRC and the staff to fulfill these responsibilities. Even if there was a request to withdraw the license application, a determination had not, and has still not, been made as to whether or not it can be withdrawn. Former Chairman Klein said it was important to capture all the knowledge gained through the license application review and complete the work that staff had ongoing. For example, if they had an SER that was about to be finished, it should be finished. Former Chairman Klein felt strongly that until the license application was withdrawn legally and/or suspended legally, NRC needed to do as much as it could to evaluate the application.

### Interview of Chairman's Chief of Staff

The Chairman's Chief of Staff told OIG that he had minimal involvement in the development and publication of the CR budget guidance memorandum and that the draft document was presented to the Chairman's office from the CFO's office. He said the Chairman's Policy Director provided guidance to the EDO and CFO regarding the memorandum on behalf of the Chairman and that it should follow established Commission policy and OMB Circular A-11. The Chairman spoke with Commissioners Ostendorff, Apostolakis, and Magwood about the CR budget guidance memorandum but did not talk to Commissioner Svinicki.

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<sup>11</sup> From July 2006 to May 2009, Dale Klein was the NRC Chairman. From May 2009 until he resigned in March 2010, he served as a Commissioner.

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According to the Chairman's Chief of Staff, the intent of the CR guidance was to provide a spending limit against the proposed FY 2011 budget, which OMB had directed. However, in the case of high-level waste, Congress did not provide specific direction on how to spend those funds, and NRC actually conveyed its spending intent to Congress through its Congressional Budget Justification and its reclama process. The intent was to spend \$10 million, based on the President's budget, and the Commission's decision to proceed to close-out. The Commission knew that for the prior fiscal year, Congress had given NRC half of what it had requested, which conveyed that they were moving NRC toward close-out rather than ramping up the review. The Commission did not oppose OMB's proposed funding for the High-Level Waste Program for FY 2011, and the letter that NRC sent to OMB reflected that the Commission expected DOE to withdraw its license application and understood that the \$10 million would be used for orderly close-out. The policy was set when the Commission voted on the passback appeal letter to OMB.

### Interview of the General Counsel

The General Counsel told OIG that the direction given in the CR budget guidance memorandum was consistent with existing Commission budget guidance. He recognized some ambiguities, but believed on the whole the CR budget guidance memorandum was consistent with existing Commission budget guidance, and was appropriate to issue. Had the Commission disagreed with that, they could have voted to overturn it, or given some other direction. The General Counsel said that changing this direction would require a majority vote by the Commission and that focusing on close-out activities was a rational and lawful way to proceed. Moreover, close-out activities do not constitute new work under the CR. The CR budget guidance memorandum does not preclude NRC from resuming its licensing review if Congress decides to fully fund DOE and NRC.

The General Counsel noted the wording difference between the OMB passback appeal letter and the NRC Congressional Budget Justification, indicating the OMB letter contained far less ambiguity concerning the conditions to begin close-out activities. He said the NRC's Congressional Budget Justification is an informative document that describes NRC's budget request but ultimately does not have any legal force and effect. Rather, it is the enacted budget that is appropriated by Congress that has authority. When the Congressional Budget Justification is not representative of the final appropriation, it is of somewhat limited value.

### Interview of Chairman Jaczko

Chairman Jaczko told OIG that he met with the General Counsel, EDO, and CFO about the language in the CR budget guidance memorandum. During this meeting, he asked them what they thought it meant. He asked if everyone understood that the language meant close-out of the program and whether they were in alignment. He specifically asked, "Does everybody understand what this means, and that this means close-out?" He recalled the EDO said, "I don't really understand what the big deal is with this." Chairman Jaczko then told them he was going to talk to the Commission about the memorandum before he issued it. He said that "there may be Commissioners who don't agree with this, and will try and make it a policy issue." He told OIG that

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the CR budget guidance memorandum was his decision and he wanted to talk directly to the Commissioners to explain it. He did not recall whether he informed the EDO that the discussions had occurred; however, he recalled telling the EDO that he could publish the memorandum.

He told Commissioner Apostolakis that the memorandum would result in closing out the High-Level Waste Program and he was doing this under his authority. Chairman Jaczko explained that the other Commissioners could make an argument that this was a policy issue for the Commission, and he wanted his support if that happened. He specifically recalled coming back from the meeting with Commissioner Apostolakis with the impression that Commissioner Apostolakis did not understand what he meant. As a result, he asked his Chief of Staff to follow up with Commissioner Apostolakis' Chief of Staff to ensure his message was understood.

He did not recall much of the conversation he had with Commissioner Magwood, but did recall he was clear that the CR budget memorandum guidance was to begin closing out the High-Level Waste Program. Commissioner Magwood's Chief of Staff subsequently contacted his office and related that "Commissioner Magwood was fine with how you're going to go forward with the memo." Chairman Jaczko stated at this point he decided to go forward and direct the CFO and EDO to publish the memorandum. Chairman Jaczko said that Commissioner Magwood may not have understood what the CR guidance meant and if he did not understand that was not his fault. He then spoke with Commissioner Ostendorff about the CR budget guidance memorandum. Commissioner Ostendorff immediately understood and was very unhappy about it. Chairman Jaczko spoke with Commissioner Ostendorff twice on the matter during which Commissioner Ostendorff urged him not to publish the memorandum.

Chairman Jaczko told OIG that prior to the issuance of the CR budget guidance memorandum, he had two meetings with the staff about moving to close-out, and that they would stop working on the SER. In doing so, they would capture the information and publish a TER, and they were not going to be reporting findings for a project that they were no longer working on formally for licensing review. According to the Chairman, this was the general understanding long before October 1.

Chairman Jaczko related he had discussions with two Commissioners concerning the publication of the CR budget guidance memorandum and its result being to stop the publication of Volume 3 of the SER. He believed these discussions were subsequent to the memorandum's publication. During these discussions, the Commissioners asked what impact the CR budget guidance memorandum would have on the SER, and the Chairman responded that publishing the SER volumes was not something they were going to be doing as part of this close-out. Furthermore, he told OIG that if his colleagues did not understand, there was only so much he could do to explain. Chairman Jaczko related that these were heated, intense discussions, but his colleagues had given him a commitment to support him on the CR budget guidance memorandum.

Chairman Jaczko said the intent of the budget was that when DOE submitted its motion to withdraw, the license application would be withdrawn. Therefore, submittal of the motion was the triggering factor and not the actual withdrawal. In hindsight, the language in the Congressional Budget Justification, given what has materialized in the adjudicatory process,

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appears to make it seem different than what it really meant. The intent as he understood it was that DOE would submit its motion to withdraw and that would be the agency's trigger to begin closing the program. That has always been his intent, and he could not read the budget any other way. Chairman Jaczko said that while the Commission composition has been different at various decisionmaking points during the FY 2010, FY 2011, and FY 2012 budget processes, in each case the Commission at the time has approved the budget documents currently in place. These budget documents show the agency's shift to program close-out, and include the FY 2012 Congressional Budget Justification, which the current Commission approved, and which reflects close-out of the program without conditioning it on a motion to withdraw. Chairman Jaczko said even if one read the FY 2011 Congressional Budget Justification to mean that the Commission should not have closed out the program at the beginning of FY 2011, waiting to see the completion of the motion to withdraw, he made the decision at the beginning of the fiscal year. He told the staff to "follow the guidance in the FY 2011 budget."

Chairman Jaczko said he asked the General Counsel about the significance of the language (withdrawal or suspension) in the FY 2011 Congressional Budget Justification, and the General Counsel told him that one of the Commissioners had made the point that the document does not mean begin close-out. Chairman Jaczko asked the General Counsel whether that viewpoint was consistent with the General Counsel's interpretation of the budget, and the General Counsel said "no." Chairman Jaczko said the withdrawal or suspension language in the Congressional Budget Justification was odd and probably got inserted through the Commission's editing process. He clearly missed it and it was not the intent of what they were doing. According to Chairman Jaczko, the language was irrelevant because if a withdrawal request came in, there was no way the Commission would disapprove it, and in his mind it did not change the operative nature of what the budget did. Moreover, the Congressional Budget Justification had to get approved by OMB, which missed it. He commented that the passback letter to OMB laid out the trigger as being the withdrawal request, which put them on the path to close-out.

He told OIG that the closure of the High-Level Waste Program was not an endeavor he accomplished through his executive authority over budget that he could not accomplish through the adjudicatory process. He commented that they were closing out the review in budget space, and that what was not understood was they had not resolved the adjudicatory matter.

### *Coordination with U.S. Government Accountability Office*

OIG coordinated with the U.S. Government Accountability Office with regard to the allegation that the NRC Chairman had exceeded his authority during the CR period by stopping the review of the DOE license application for a geological repository at Yucca Mountain, NV. GAO declined to provide a formal legal opinion regarding this issue as it was too closely related to an authority matter rather than an appropriations matter.

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### *Coordination with U.S. Office of Management and Budget*

OIG coordinated with the Office of Management and Budget (OMB) regarding how it was determined to appropriate \$10 million for NRC's High-level Waste Program for FY 2011. OMB advised that it does not disclose this type of information in accordance with Circular A-11, paragraph 22.1, "Confidentiality of budget deliberations."

### **B. OIG Review of SER Issue**

OIG learned that between April and May 2010, NMSS staff informed the Chairman that they were ahead of schedule with their work on the SER volumes, and they inquired whether they should attempt to issue the volumes at earlier dates than those which had been established in March 2010. The Chairman responded in a June 2010 memorandum that they should not expedite issuance of the reports, but should instead maintain the timeline that had been announced publicly 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 all 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 and conclusions.

### *NRC's Plans for Developing SER To Meet NWPA Review Requirements*

Completion of NRC's technical review of DOE's license application and subsequent issuance of the SER are governed by the schedule established in 10 CFR, Part 2, Appendix D, which requires the SER be completed no later than 18 months following NRC's issuance of a Notice of Hearing regarding DOE's license application. The schedule in 10 CFR Part 2, Appendix D, codifies an NWPA stipulation that NRC issue a decision approving or disapproving the issuance of a construction authorization no later than 3 years after the date of the submission of an application for authorization to construct a geologic repository. The NWPA additionally allowed NRC to extend the 3-year deadline by no more than 1 year. NRC published the Notice of Hearing in the Federal Register on October 22, 2008, starting the 3-year clock. The date corresponding to the 18-month deadline for issuance of the SER was April 23, 2010. Originally, NRC planned to meet the April 23, 2010 deadline to complete and issue the SER; however, due to budgetary constraints, NRC indicated in July 2009 that it would not be able to issue the SER in accordance with the 10 CFR Part 2, Appendix D, schedule. It was at this point that the agency announced the SER would be issued serially in five volumes. As of July 2009, Volume 1 (General Information) was projected to be issued in March 2010, and Volume 3 (Review of Repository Safety after Permanent Closure) in September 2010; at the time, NRC was unable to estimate completion dates for the remaining three volumes.

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On January 27, 2010, NRC revised its schedule regarding issuance of SER Volumes 1 and 3; SER Volume 1 was now scheduled to be issued in August 2010 and SER Volume 3 in November 2010.

On March 30, 2010, the EDO sent a memorandum to the Commission informing the Commission of the staff's plans regarding the High-Level Waste Program, including its review of DOE's application, in light of the Administration's plan to terminate the Yucca Mountain repository program and DOE's March 3, 2010 request to withdraw its repository application. This memorandum proposed to the Commission that in light of the President's FY 2011 budget and assuming Congress provided no additional funding or direction to the contrary, the staff would continue the technical review of DOE's application and SER preparation until FY 2010 funds were exhausted. The memorandum also informed the Commission that as of the end of February 2010, DOE had responded to all of NRC's requests for additional information and, at that time, the NRC staff had not identified a need for additional information from DOE to complete the SER volumes. The memorandum included a projected schedule for completion of all SER volumes. Volumes 1 and 3 were still on schedule to be issued in August and November 2010, respectively, and all of the remaining volumes would be issued by the end of March 2011. OIG learned that between May and June 2010, the Commission was informed that SER Volumes 1 and 3 were ahead of schedule; however, on June 11, 2010, Chairman Jaczko sent a memorandum to the EDO titled, "Schedule for HLW SER," stating that the staff should not attempt to issue the volumes ahead of the projected schedule provided in the EDO's March 30, 2010 memorandum. The Chairman wrote:

I believe it is in the best interests of the agency not to alter the schedule for the completion of SER volumes at this time, but instead to maintain the predictable schedule previously provided to the Commission in March 2010, regarding plans for the High-Level Waste Repository Program. The agency's overall resources would be better utilized by maintaining the current schedule. Therefore, the information in Volume 1 of the SER should be finalized and presented no earlier than August 2010, and subsequent volumes consistent with and not earlier than the schedule provided to the Commission in March 2010.

In accordance with the March 2010 schedule for SER volume publication, Volume 1 was issued on August 23, 2010. No additional volumes have been issued.

### *Interviews of Senior Staff on SER Issue*

The NMSS Director said that prior to the Chairman's June 11, 2010 memorandum instructing staff to maintain the March 30, 2010 SER publication schedule, she had attended meetings with the Chairman, EDO, and DEDO for Materials, Waste, Research, Tribal and Compliance Programs concerning the status of the staff's progression on the SER volumes. She said she informed the group that the staff was well ahead of schedule with regard to completing the SER. She said the group discussed the appropriateness of slowing down the work and that she and the EDO specifically indicated to the Chairman that it would be contrary to the agency's values

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of openness and transparency to do so. She recalled that the Chairman thanked them for their views and ended the discussion. The NMSS Director said she believed the motivation to slow down the work was related to the DOE's request to withdraw its license application and the formulation of the Blue Ribbon Commission to look at the national policy on waste. She had been told that if NRC were to publish the SER volumes, it would indicate that NRC was "out in front" of the Administration with regard to the disposal of high-level waste. The NMSS Director told OIG that she received SER Volume 1 for review, concurrence, and authorization to publish on June 24, 2010, and Volume 3 for review, concurrence, and authorization to publish on July 15, 2010. The NMSS Director believed that minimal resources were needed to complete the review process and issue Volume 3. She also commented that by September 30, 2010, NRC had all the information it needed from DOE to complete the SER. The NMSS Director recalled that prior to October 1, 2010, the DEDO directed that her staff would begin transition to closure on October 1.

The DEDO for Materials, Waste, Research, Tribal and Compliance Programs told OIG that when they met with the Chairman in June 2010 to discuss the staff's progress on the SER, the Chairman already knew that as of October 1, 2010, when the agency moved into the new fiscal year that he would be closing down the license application review. The DEDO said the reason that he and the NMSS Director went to meet with the Chairman was to inform him that they could publish the volumes ahead of the designated schedule if the Chairman preferred. However, the Chairman's preference was to stick to the original schedule. The DEDO said the practical effect of the Chairman's June memorandum was that it prevented the staff from issuing Volume 3 should it have been finalized prior to October 1.

The Deputy Division Director for the Licensing and Inspection Directorate, Division of High-Level Waste Repository Safety, NMSS, told OIG that Volume 3 of the SER was nearly finished, minus the office director comments and concurrence and review by the Office of the General Counsel (OGC). In early October 2010, staff were in the process of resolving OGC comments on Volume 3. He and the Deputy Division Director for the Technical Review Directorate had personally reviewed Volume 3 and they were both comfortable with the insights gained from the information DOE had provided. The Deputy Division Director for the Licensing and Inspection Directorate said the direction to stop working on the SER came directly from the Chairman, who met with the NMSS staff in early October 2010. The Chairman explained that the budget drove his decision and that the NRC General Counsel agreed with his decision. The Chairman did not indicate for the staff to shut down in a way from which they could not recover. Instead, the Chairman conveyed that the shutdown should take place in a reversible manner so that, if needed, they could resume their review activities.

The Deputy Division Director for the Licensing and Inspection Directorate also explained that an SER is a licensing product based on regulatory requirements, and a TER is a technical review without licensing requirements. He advised that a TER has scientific value, but little licensing value.

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The EDO told OIG that he had the impression that Volume 3 was ready for publication in late summer 2010. He recalled that it was around the period of the election and that they were going to wait until elections had concluded to publish the volume. He said the staff had advised the Chairman that the work on Volume 3 was done, and the Chairman said to maintain the original schedule because earlier publication of the volume could be interpreted as trying to influence the decision on whether DOE was authorized to withdraw its license application.

The Assistant General Counsel for High-Level Waste, Fuel Cycle & Nuclear Security, OGC, said that the completion status of Volume 3 was open to interpretation. She said that as of July 15, 2010, Volume 3 had been provided to the NMSS Director and was reported to be substantially complete. However, the document was undergoing additional editing and formatting, including a final quality control check, to assure appropriate nomenclature, proper numbering, and sequencing, and other minor administrative changes that may be necessary to ensure completeness and accuracy. OGC had been asked to review the document and indicate, by August 25, 2010, whether they had any legal objections regarding the document.

The Chairman's Chief of Staff recalled that when the Chairman was informed by NMSS staff that they were ahead of schedule with regard to the SER volumes, the Chairman did not think it best to change the timing that had been publicly announced as to the publication dates. The Chief of Staff said that Volume 3 had not undergone senior management or General Counsel review and was a predecisional document. His understanding was that the NMSS Director had not completed her review of the document, and that as of the new fiscal year NRC had transitioned to a categorically different activity (close-out) for which \$10 million had been allocated. Based on this transition, the agency needed to use the resources for that specific purpose.

The General Counsel acknowledged that under the NWPA, the NRC was to determine up or down within 4 years from the DOE application acceptance date on the license application. However, many factors have come to bear, such as a non-willing applicant and an unfunded program. This is budget reality and he would argue this course is a prudent way; if Congress decided to fund this project, the agency is actually in a better position to resume than shutting it off all together. He did not believe that the Chairman had put the Commission in jeopardy because Congress has not properly funded the program to meet its obligations. He further advised the activities and authorizations outlined in the Nuclear Waste Policy Act are subject to appropriations. He stated that "unless Congress appropriates money, you can't do any of those things."

### *Interviews of Commissioners on SER Issue*

Commissioner Ostendorff recalled Chairman Jaczko informing him, during a routine periodic meeting on June 8, 2010, that the Chairman was considering whether to provide direction to NMSS to delay issuance of SER Volume 1, which was ready to be issued 2 months ahead of its scheduled issuance in August 2010. The Chairman asked him for his thoughts on the matter and said he thought it would look "funny" for the SER to be issued in the middle of the ongoing

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high-level waste adjudication. The Chairman told Commissioner Ostendorff he was directing this action in his capacity as NRC's principal executive officer and that it was not a policy matter. Following the meeting, Commissioner Ostendorff called the Chairman to tell him he strongly disagreed with the Chairman's proposed course of action. Commissioner Ostendorff thought it was a "big mistake" to provide direction to the staff to slow down the SER review, and that it would look very bad for the Chairman to interfere with the staff's activities, particularly in light of the ongoing high-level waste adjudication. Commissioner Ostendorff cautioned the Chairman that he would likely have to deal with any accusations of tampering with the proceedings if word got out that he had provided such direction.

Commissioner Ostendorff said that on June 11, 2010, during a routine periodic meeting with the General Counsel, he discussed his concerns with the Chairman's proposed direction on delaying issuance of SER Volume 1. The General Counsel told Commissioner Ostendorff that it was his opinion that the direction was not legally objectionable, but that he did not provide an opinion to the Chairman on the policy implications. The General Counsel told Commissioner Ostendorff that it was his experience that there were certain issues that the Chairman does not want to hear from him on. This conversation left him with the impression that there was possibly not an open environment for OGC to provide unfiltered advice to the Chairman without fear of retribution.

Commissioner Ostendorff was aware that the draft SER Volume 3 had been sent to the NMSS Director for review in July 2010. On October 1, when the Chairman informed Commissioner Ostendorff of his plans to issue the CR budget guidance memorandum and to remove the findings from SER Volume 3 prior to issuance, the Commissioner expressed his concerns about not completing SER Volume 3 as previously planned by the staff. Commissioner Ostendorff's concerns included censoring staff technical work already completed and the fact that the actions directed to the staff were directly related to the outcome of the high-level waste adjudication that was currently before the Commission but had not yet been decided.

Commissioner Svinicki advised OIG that she considered the issuance of the SER volumes to be a policy matter for Commission involvement, particularly in light of the Chairman's unilateral direction in June 2010 to direct agency staff to issue SER Volume 1 no earlier than the staff's scheduled date of August 2010. She recalled advising against that course of action when the Chairman informed her of his intent to issue that direction. According to Commissioner Svinicki, she voted to approve Commissioner Ostendorff's COM because she supported finalizing and issuing Volume 3.

Commissioner Magwood advised that the Chairman's actions relative to Volume 3 of the SER may not, strictly speaking, be illegal from the perspective of appropriations and CR law, but his actions under the Commission's organic statutes present a different picture. Under the Commission's statutes and standing procedures, policy determinations are made by majority vote of the Commission, not by the unilateral action of the Chairman. According to the Commissioner, the Chairman's specific direction to the staff regarding implementation of the CR

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(e.g., the decision not to issue SER Volume 3 as planned and previously communicated to the Commission) was a significant policy shift, not merely administrative guidance, and therefore was not proper.

Former Chairman Klein said that NRC is under a legal obligation to review DOE's application but he recognized that the agency needs the funding to complete the task. He recalled once making the point during a speech that guidance was needed from Congress on this matter. He thought it was inappropriate for Congress not to fund NRC for a law it had passed, and that the agency had to meet. He said because NRC had that law, and the requirement, but not the funds to carry it out, the agency needed relief. He said, "Either we needed to get the money to do it, or they needed to give us relief from it. And they have not given us relief from it."

### *Interview of Chairman on SER Issue*

Chairman Jaczko told OIG that he did not want NRC to publish Volume 3 early because it could give an impression that the agency was trying to rush information out before it was actually complete, knowing the project was terminating. This would create challenges for NRC from a public communications perspective; it would look political if they moved forward in this way. He said that as Chairman, it is his responsibility to manage the agency's workload and workflow with regard to scheduling. Shortly after the CR budget guidance memorandum was published, he personally directed the staff that the agency would publish Volume 3 as a TER that would reflect where they were in the review process, but would not reflect NRC's findings. He said the staff's work on the SER would be preserved as an internal non-public document in ADAMS, the agency's document management system. Further, he never directed anyone to destroy or delete the document as the hearings have not ended. Chairman Jaczko said the agency has an obligation to preserve the document if hearings are to resume.

Chairman Jaczko advised that his office had contacted several members of Congress who told them there was nothing illegal or wrong with what he was doing in relation to the CR guidance and it was perfectly consistent with appropriations. The commentary and correspondence he received reflecting congressional dismay against his actions were solely political in nature. The agency had a budget from OMB that reflected "do close-out" and Congress had not passed an appropriation which was how they indicate to agencies what to do with their funding. He told OIG that several times, Congress passed a CR and had the opportunity to specifically direct the agency not to proceed with close-out activities but that several CRs had been passed with no direction to NRC to do anything different. He related the fundamental obligation for the agency was to go with the lower values of what has been approved by the House and the Senate. This was reflected in OMB Circular A-11. The FY 2011 budget that was approved by the Senate and the House for NRC was \$10 million for closure activities. Chairman Jaczko said that as the head of the agency, he was bound by the agency's budget. He also commented that the activities in the NWPA were subject to appropriations. For example, there are provisions in the NWPA that say NRC is supposed to finish its licensing review within 3 years. According to the Chairman, "that language is fairly meaningless

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because it has no enforcement mechanism. It does not say what happens if we miss that deadline. And clearly, based on the \$29 million that we were getting in FY 2010, we were not going to meet the 3-year deadline."

### C. Commission Voting on ASLB Decisions

OIG learned that the Office of the Secretary (SECY) 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. Although SECY staff attempt to enforce the process, their success is dependent on whether and how the Chairman and Commissioners respond to their attempts. According to NRC's General Counsel, the Commission's procedures are guidelines that have been developed based on practice but they are not requirements.

#### *Commission Procedures*

NRC's *Internal Commission Procedures* explain that Commission decisionmaking is accomplished through voting at scheduled Commission meetings, through notational voting on prescribed vote sheets, and by orally affirming a notational vote at an affirmation session. Appendixes 4 and 5 of the procedures address the basis for determining voting results and how to resolve a 2-2 vote. According to the procedures, votes from at least a quorum of three Commissioners are required to act, and action is based on the majority of those participating. As a general matter, requests for Commission action will be denied if the Commission vote is 2-2.

The *Internal Commission Procedures* also describe Commission voting on adjudicatory SECY papers<sup>12</sup> such as SECY-10-0102 and for holding the subsequent affirmation session vote; however, they do not provide details or direction on the process that occurs between the completion of an adjudicatory SECY paper vote and the conduct of an affirmation vote on the matter. OIG learned about the latter process through an interview with a SECY Technical Advisor who tracks adjudicatory SECY papers for the Commission.

According to the *Internal Commission Procedures*, Commissioners are expected to vote on adjudicatory SECY papers no later than 10 business days after receipt of the paper. The procedures state that when a majority of the Commission has voted, a request for an extension of time to vote beyond the 10 business day voting period or a request to delay the affirmation of the vote should be granted only by a majority of the Commission. Per the procedures, it is the Secretary of the Commission's responsibility to schedule a weekly affirmation session. It is also the Secretary's responsibility to, within 48 hours of the issuance of an adjudicatory SECY paper,

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<sup>12</sup> The *Internal Commission Procedures* state that written issue papers, referred to as SECY papers, are the "primary decision-making tool of the collegial Commission." These papers are submitted by the Office of the Executive Director for Operations, the Chief Financial Officer, or other office directors reporting directly to the Commission.

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notice the affirmation of the paper so that the affirmation will be held at the earliest available session following the close of the 10-day voting period unless a majority of the Commission has advised that the affirmation should be set for a later date. Although the *Internal Commission Procedures* state that it is the Secretary's responsibility to schedule these sessions, they also state that in order for Commissioners to vote orally at meetings, the Chairman must call for the vote.

A SECY Technical Advisor told OIG that although the procedures state that Commissioners are expected to vote within 10 days after the issuance of an adjudicatory SECY paper, in practice, the significant deadline in the process is the point at which the majority of Commissioners have voted. This is the point that the Technical Advisor tracks for adjudicatory SECY papers because at this point it is required that Commissioners who have not voted either submit a vote or request an extension to which a majority of other Commissioners must agree. The Technical Advisor said that he sends e-mail notices (addressed from the Secretary of the Commission) to the Commissioners who have not voted to request that they either vote or ask for an extension. If a Commissioner requests an extension, the Technical Advisor said he polls the other Commissioners to see if a majority agree to grant it. The Technical Advisor, who has been tracking Commission voting on adjudicatory matters for more than 20 years, could not recall any occasion where an extension request was denied by a Commissioner.

The Technical Advisor explained that after he has received all of the Commissioners' notational vote sheets on an adjudicatory SECY paper and the attached ASLB order, he drafts an affirmation notice that is high-level in nature and is used during the affirmation voting process. He said the affirmation notice simply provides the outcome of the vote; thus, when all Commissioners vote "aye" during the affirmation vote, they are voting to note their agreement with the language in the affirmation notice. In contrast, the vote sheets note whether a Commissioner is in favor of the order, against it, not participating, or abstaining and will sometimes include comments explaining why they are for or against, or suggesting modified language for the order.

The Technical Advisor also explained that OCAA may need to revise the order before an affirmation vote can be held if Commissioners indicate in their notational vote sheets that revision is needed. The Technical Advisor said that OCAA works with lawyers in the Commissioner offices to make the modifications requested and obtain their concurrence on the updated language. The length of time it takes for OCAA to make the Commissioners' changes in the order and obtain their concurrence on the update varies, depending on the level of change needed. The Technical Advisor said an affirmation vote is not held until all of the Commissioners are satisfied with both the affirmation notice and the order.

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### *OIG Review of Commission Adherence to Procedures*

OIG reviewed the Commissioners' voting process associated with SECY-10-0102<sup>13</sup> and learned that the *Internal Commission Procedures* were not followed relative to voting deadline, extension requests, or polling of other Commissioners to determine whether they agree with extension requests. As noted in section I of this report, OCAA issued SECY-10-0102 to SECY on August 10, 2010, and Commissioners were asked to provide completed vote sheets and comments to SECY by August 25, 2010. The paper was to be scheduled for an affirmation vote at an open meeting once all votes were received.

Despite the August 25, 2010 voting deadline, voting was not complete until Chairman Jaczko submitted his second vote (approximately 6 weeks after the majority of Commissioners had voted) on October 29, 2010. The voting process proceeded as follows:

Commissioner and Action	Date
Commissioner Apostolakis announced he would not participate	August 10, 2010
Commissioner Svinicki voted	August 25, 2010
Chairman Jaczko provided initial vote	August 25, 2010
Commissioner Ostendorff voted	August 26, 2010
Chairman Jaczko retracted initial vote	August 30, 2010
Commissioner Magwood voted	September 15, 2010
Chairman Jaczko voted for second time	October 29, 2010

OIG reviewed SECY documents associated with SECY-10-0102 and learned that the Commission Secretary sent an August 27, 2010 e-mail notice advising Commissioner Magwood to vote or request an extension to vote, but the request was withdrawn after Chairman Jaczko retracted his first vote. This occurred after the first time the majority of Commissioners had voted. After Commissioner Magwood voted on September 15, 2010, now constituting a majority, the Secretary sent an e-mail to Chairman Jaczko requesting his vote or an extension request. The e-mail stipulated absent the Chairman providing a vote or request for an extension, which must be approved by a majority of the Commission, it would be presumed, in accordance with the Commission's rule of procedure, the Chairman would not be participating in the action. There were no additional documents indicating that the Secretary followed up with the Chairman or his office. However, OIG identified (1) a September 16, 2010 e-mail from the Chairman's Chief of Staff to the Chairman recommending that the Chairman never request an extension on the Yucca Mountain matter and (2) an October 6, 2010 e-mail from the Secretary to NRC's General Counsel stating that the Chairman's Chief of Staff had indicated that the Chairman would vote the following week.

<sup>13</sup> Because this remains an open adjudicatory matter before the Commission, OIG could only report matters of process and not of substance.

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OIG reviewed 13 other adjudicatory SECY paper files<sup>14</sup> to assess whether Commission voting and polling procedures were followed in connection with these documents. OIG sought to determine whether (1) memoranda were sent to Commissioners reminding them to vote after a majority of Commissioners had voted, (2) Commissioners requested extensions or voted timely in response to the e-mail prompt, and (3) polling of other Commissioners occurred as warranted. OIG's review found that procedures were not followed in connection with 7 of the 13 files reviewed. In three of the seven cases, memorandum prompts should have been sent after the majority voted, but were not. In three other cases, memorandum prompts were sent; however, extension requests and polling did not occur. In one case polling was initiated but not concluded.

OIG also learned that 2 days after the Chairman voted on SECY-10-0102, the OCAA Director provided the Commission with a draft affirmation order detailing the status of the Commission's votes. Although the notational voting process associated with SECY-10-0102 was complete as of October 29, 2010, as of the date of this report the Commission has not held an affirmation vote on the matter and the draft order continues to sit in deliberation before the Commission for affirmation.

### *OIG Interviews of Agency Officials Concerning Commission Procedures*

The Secretary told OIG that she uses a "voting notice document" to prompt Commissioners who have not yet voted on an adjudicatory matter after the majority has voted, and that she sent such a notice to the Chairman concerning SECY-10-0102 on September 16, 2010. She said that although the Chairman never formally responded to the notice with a request for an extension to vote on SECY-10-0102, he told her on several occasions that he planned to vote. She never documented these exchanges, and did not proceed with the polling of other Commissioners to see whether they agreed with the delay. She recalled having conversations with some of the Commissioner staff members prior to Chairman Jaczko's second vote wherein they asked her to draft an affirmation statement even though Chairman Jaczko had not yet voted. She did not do this because the Chairman had told her he would be participating in the matter and because, based on discussions with one Commissioner and several Commissioner staff members, she believed that not all of the Commissioners who had voted were ready to affirm their votes during an affirmation session. The Secretary also said that while the *Internal Commission Procedures* direct her to schedule affirmation votes at the earliest opportunity after the 10-day voting period, Chairman Jaczko has wanted to make sure that all Commissioners are ready to affirm their votes before an affirmation session is scheduled.

The OCAA Director told OIG that in accordance with their process, following the Chairman's October 29, 2010 vote on SECY-10-0102, she prepared a draft affirmation order for circulation via e-mail that indicated the status of the votes at the completion of the voting process. She circulated the draft via e-mail to all of the Commissioners on November 1, 2010, and was subsequently called to the Chairman's office, where an OGC attorney and the Secretary were

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<sup>14</sup> Files corresponded with adjudicatory SECY papers issued between March 2008 and August 2010.

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also present. The OCAA Director said the Chairman was animated and expressed displeasure that she had circulated the document. She told him she had done this as part of the normal process of circulating the draft decision. She was surprised and shaken up by the Chairman's manner and that he had never been angry with her before. The Chairman asked her something like, "Do you think this was a helpful thing to do?" She responded that she thought it was and he told her he was working with the Commissioners to settle the matter and to "just stay out of it." In hindsight, the OCAA Director said the Chairman may have felt that in circulating the draft decision, she did not give the other Commissioners time to consider the content of the Chairman's vote. However, at the time, she thought she was doing the correct thing by being prompt with a matter that was of interest to the Commission.

A majority of Commission staff members interviewed told OIG that with the exception of SECY-10-0102, the *Internal Commission Procedures* are generally followed. All of the staff members were aware that the procedures directed extension requests to be made and that extensions needed majority Commission approval. The Chairman's Chief of Staff acknowledged that although he was aware of the procedures concerning extension requests, he sent an e-mail to Chairman Jaczko recommending that the Chairman never ask for an extension to vote in connection with SECY-10-0102. A Commissioner's Chief of Staff asked the Secretary how her office would proceed given that a majority of the Commissioners had voted. The Secretary responded that she knew that one Commissioner would not proceed to affirmation before the Chairman voted, so she would not initiate measures to move the issue. According to this Chief of Staff, the Secretary was in a difficult position because she feared being "chewed out" by the Chairman if she were to proceed to affirmation before he cast his vote. A Commissioner's Legal Advisor told OIG that the Chairman wanted matters pertaining to the affirmation to be decided prior to scheduling an affirmation session and that he would not support the Secretary in moving to affirmation until that time.

The General Counsel told OIG that the *Internal Commission Procedures* should generally be followed, but that there are circumstances that require deviations, and the procedures themselves are not binding law. The procedures are a reflection of decisions among the Commissioners of how to handle and process certain matters, especially those matters identified in the Energy Reorganization Act and the Reorganization Plan. With regard to adjudicatory affirmation voting, the Commission needs to have a majority willing to go to affirmation. Normally, the Secretary would poll members to see if they were ready to go to affirmation; however, he said that if there is no consensus it is hard for the Secretary to go forward with a draft affirmation notice or order to reflect a consensus position. The General Counsel said that this is the situation with the high-level waste matter. He acknowledged that this matter has sat in abeyance with a draft affirmation order before the Commission since November 1, 2010. He said that as a theoretical matter, this could "rest in limbo" until NRC is posed with a forcing function, such as being party to litigation against the Government. He told OIG there have been matters previously before the Commission in appeal status that have gone unresolved for a year or longer.

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### *Interviews of Commissioners Concerning Commission Procedures*

Commissioner Ostendorff told OIG he queried Chairman Jaczko about when he planned to vote on SECY-10-0102 during meetings he had with the Chairman on September 9, September 14, October 5, October 19, and October 27, 2010, and the Chairman always responded that he would vote. Commissioner Ostendorff said Chairman Jaczko offered different reasons for not voting. For example, Chairman Jaczko told him he was concerned that a 2-2 vote would leave the ASLB "in limbo." He also told Commissioner Ostendorff that he would not take action until a majority of the Commission agreed to suspend the ASLB's adjudicatory proceedings. Commissioner Ostendorff disagreed with the Chairman's view that a 2-2 split could leave the matter unresolved. Rather, after discussions with OGC, OCAA, the Chief Administrative Judge of the ASLBP, and Commissioner Ostendorff's legal counsel, Commissioner Ostendorff concluded that based on the *Internal Commission Procedures*, a 2-2 split would uphold the ASLB's decision. Commissioner Ostendorff communicated this view to the Chairman.

Commissioner Svinicki said she believed it was important for the Commission to act on the adjudicatory matter to resolve the legal question of DOE's authority to withdraw.

Commissioner Magwood advised that subsequent to the Chairman initially casting his vote on the matter, the Chairman allegedly withdrew his vote asserting he had done so as to afford Commissioner Magwood time to prepare a vote. Commissioner Magwood advised this representation was not accurate and he had not asked the Chairman to assist or to remove his vote on his behalf.

### *Interview of Chairman Concerning Commission Procedures*

Chairman Jaczko told OIG he did not recall the e-mail from his Chief of Staff advising him not to request an extension to vote on SECY-10-0102, and that he did not realize that an extension was required on adjudicatory matters if a vote was not cast within a 10-day period. He said that the Commission does not always act in accordance with the procedures. For example, the procedures say that the Commission votes on matters within 10 days of receiving them. Yet, he noted, the Secretary waits until three people have voted to issue notices to other Commissioners that they need to act. He said the Commission procedures are a guideline, and not absolute rules. However, he said he did at one point talk to the Secretary, who told him that he needed to request an extension, but he responded that he was getting ready to vote and, furthermore, told the Secretary she needed to proceed however she wanted to proceed. Chairman Jaczko told OIG that while some people have an impression that he is purposely holding up the affirmation vote, this is not the case. Instead, the reason the Commission has not held an affirmation vote on the Yucca Mountain matter is that the Commission has not come to majority agreement on the affirmation notice. He said NRC's governing statute directs that Commission action is accomplished by majority vote. According to Chairman Jaczko, his practice is to go to affirmation once the Commission is in agreement about the language in the

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affirmation notice even though the procedures describe a process wherein the affirmation is scheduled once the votes are in. He said that has proven to be an embarrassing situation because "voting does not end the process. It's just the beginning of the process for us."

Chairman Jaczko advised that all of the Commissioners agreed to the practice of proceeding to affirmation only after everyone agrees to the affirmation notice and "there has really been little discussion."

### **D. 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 in this report, the FY 2012 budget process, 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. Examples included the Chairman's use of foreign travel or threats to contact members of the Administration as means of persuading his fellow Commissioners to support him on issues, and displays of anger towards individuals whom he does not view as supportive.

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.

#### *The FY 2012 Budget Process*

OIG learned from Commissioner chiefs of staff and legal advisors that, historically, when the NRC Chairman presented his/her budget estimate to the other Commissioners, the Chairman included the staff's independently developed "Program Priorities and Considerations" document. This is a spreadsheet, prepared by staff, that presents each division's plans and priorities, which, historically, the Chairman has used to develop his/her budget proposal based on the staff's considerations. OIG learned that the FY 2012 process differed from past practice in that:

1. The Chairman personally met with division directors regarding their funding and programs and provided direction and priorities for the agency. Subsequently, the staff formulated their requirements for funding and programs based on the Chairman's direction, which was then incorporated into the Chairman's budget estimate.

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2. The Chairman's budget estimate was submitted to the Commission for its consideration without fundamental supporting documents developed by the staff.

The majority of Commissioner staff members and Commissioners indicated that this process caused problems in that the Commission could not assess the differences between the staff's projected needs and priorities and those of the Chairman. Furthermore, staff explained that the Chairman directed that if the Commissioners wanted to make inquiries to division directors regarding their funding needs and priorities, the requests needed to be funneled through the Chairman's office. Office responses, in turn, were submitted to the Chairman's office, and OIG learned that responses were either edited or not provided back to the requestor. OIG also learned that all of the Commissioner offices were able to obtain various versions of the "Program Priorities and Consideration Documents" through personal connections that Commissioner office staff had with NRC staff. However, the Commissioners remained unable to distinguish the staff's priorities from the Chairman's priorities due to the Chairman's process for developing the budget.

The CFO told OIG that the Chairman's FY 2012 budget process, wherein the Chairman had meetings with staff to discuss priorities directly before the offices developed their priorities document, was much quicker than the previous budget process. However, he said, the problem was that the Chairman did not provide the staff's supporting documents to the Commission. The CFO said he raised this issue to the Chairman's Chief of Staff and conveyed that without the supporting documents it would be difficult for the Commission to decide on a budget. The Chairman's Chief of Staff responded that the Commission did not need that level of detail, that this was the Chairman's budget, and that all inquiries to the CFO from the Commission about the budget should be cleared with the Chairman prior to providing a response.

The EDO told OIG that the Chairman did not want any differences between his budget and staff's budget and saw it as his budget proposal. The Chairman also wanted the opportunity to review and change any of the staff's responses to the Commissioners' questions.

An OEDO manager told OIG that he was familiar with the issue of information from the staff to the Commission being edited by the Chairman before it was provided to the Commission. He said the Energy Reorganization Act addressed this issue and that it could be debated in two ways. One way would be to edit information provided by the staff, and the other is to be passive and just present what the staff has identified on a matter. He said he discussed this matter with the General Counsel, who said the Chairman had the authority to edit information that was to be provided to the Commission. The OEDO manager said the Chairman did not believe there should be two separate budget proposals (Chairman's budget and staff budget). He said the Chairman viewed himself as the head of the agency and felt that there should be just one budget – the staff's proposal reviewed by the Chairman – presented to the Commission for its consideration.

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Chairman Jaczko told OIG that he was closely involved in the budget process as it is his responsibility to present the budget to the Commission and he was entitled to develop the budget however he wanted. He said he chose a method to help the staff shape a budget that would be more successful in getting through the Commission. He believes that this is what occurred with regard to the FY 2012 budget proposal. He said that the budget was presented 3 weeks earlier than usual and went through the Commission with almost no real change. He said he had assumed he did not have to provide the Commission with the "Program Considerations and Priorities" documents, but had since learned from the General Counsel that he had been incorrect. He said he now understood that once the budget was developed and presented to the Commission, the Commissioners were entitled to some of the draft documents.

### *Agenda Planning Process*

According to the *Internal Commission Procedures*, policy, rulemaking, and adjudicatory matters, as well as general information, are provided to the Commission for consideration in documents referred to as SECY papers. There are four categories of SECY papers. Commission meeting papers present a major issue on which collegial deliberation and vote at a Commission meeting, usually in a public session, is anticipated. Notation vote papers present an issue requiring consideration by the Commission or consultation with the Commission prior to action by the staff, but not requiring collegial deliberation among Commissioners or a formal vote in a meeting, thereby lending themselves to a written notation process. Affirmation papers convey Commission business that does not require deliberation among the Commissioners in a meeting mode, but must be voted on by the Commissioners in each others' presence. Information papers provide information on policy, rulemaking, or adjudicatory issues. These papers are purely informational and should not assume or request any action by the Commission.

The *Internal Commission Procedures* also describe monthly agenda planning sessions during which the Commission reviews and approves the Chairman's proposed meeting agendas that he has developed with the SECY and representatives from OGC, EDO, and the Office of Congressional Affairs. The procedures state, "In recognition of the collegial process, an individual Commissioner's request that a meeting be scheduled will be granted unless a majority of the Commission disapproves the request."

During this investigation, OIG learned that the process by which SECY papers are conceived by the staff and subsequently submitted for Commission consideration is subject to the Chairman's influence and allows him, in his role as principal executive officer, to influence information that staff develop for Commission review.

OIG learned that the general practice for developing a SECY paper is as follows:

- Staff develop an issue that is either identified as a potential policy matter or of significant interest to the Commission for their consideration.

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- The Division Director may have periodic meetings with individual Commission members with regard to this information and may present the issue as an informal informational matter.
- Senior staff coordinate the matters identified by the staff with their designated DEDO who holds "alignment meetings" to determine whether this information is to be conveyed to the Commission and in what form.
- If the alignment meeting consensus is to develop a paper, the paper is generated by staff and submitted to the EDO who provides a paper to SECY for tracking, and simultaneously tracks the paper in the EDO's system.
- The paper topic is provided to the Commission for consideration at the Chairman's agenda planning session at which time the Commissioners vote to determine when they will address the paper.

OIG learned that the Chairman, unlike the other Commission members, can direct the staff not to develop a paper for the Commission's review. Based on information learned during the periodic meetings or any other meetings, the Chairman sometimes directs the EDO not to develop a paper for Commission review. If other Commissioners disagree, they must prepare a COM and gain majority support to direct the staff to prepare a paper for Commission review.

The EDO told OIG that the Chairman's staff track staff-generated papers and the Chairman decides what is considered a policy matter and whether he will inform the Commission of the matter. The EDO said the only way a Commissioner can influence when a staff paper is submitted or the timing of presentation to the Commission would be to prepare a COM and gain a majority on the matter to direct the staff. The EDO said the Chairman told him that he wanted to control the flow of policy issues to the Commission to enable them to be more efficient and effective by not overloading them so they could focus on certain issues.

Several OEDO managers and managers of offices that report to the EDO told OIG of problems with information flow, while others said they were unaware of any incidents where information was not provided to the Commission. For example, one manager told OIG that the current approach to information flow to the Commission was not the best way, and the Chairman regulates the information to the extent he believes the Commission needs the information to make a decision. He said the Commission is "not working well at all today, unfortunately" and attributed this to the Chairman's interpretation of his role and responsibilities and the other Commissioners disagreeing with his interpretation. In addition, he said, there is so much distrust at the chief of staff level that the Commissioners often jump to conclusions about the Chairman's directions. In contrast, another manager believed the current Chairman has taken the initiative to better integrate the Commission's agenda through agenda planning. He said the Chairman has the view that there are policy matters and there are administrative matters and he believes the administrative matters should not go to the rest of the Commission. However, he

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acknowledged that the Chairman could incorrectly label something as administrative and not inform the Commission. He said the staff was sensitive to this and noted that with the CR budget guidance memorandum, a known controversial matter, the staff asked the Chairman if he was coordinating the matter with the other Commissioners.

The majority of Commissioner chiefs of staff and legal advisors told OIG that the Chairman withholds information to the Commission by either suppressing papers or manipulating the agenda planning process because he controls the sequencing of papers to be presented to the Commission for vote. They said that this, in turn, causes papers to sit for weeks or months as the Chairman decides when information meetings are to be scheduled. Commissioner staff perceived this as an effort to control information available to the Commission as the Chairman's priorities often did not align with those of individual Commissioners.

Commissioners Svinicki, Ostendorff, and Magwood told OIG that they sometimes learn of potential papers the staff intend to submit to the Commission during their periodic meetings with agency managers, but then the papers do not materialize. This makes them question whether they are sufficiently informed and aware of policy issues affecting the agency. In particular, the three Commissioners mentioned a paper on the National Fire Protection Association (NFPA) 805 rule,<sup>15</sup> where there were indications the staff wanted to raise policy matters to the Commission, but were unable to do so as the Chairman had determined the matter was not a policy issue. One DEDO told OIG that the Chairman stated he did not want a paper on NFPA 805 and as a result staff stopped working on the paper.

Another example provided by two Commissioner staff members was a paper on the International Regulatory Review Service (IRRS),<sup>16</sup> which the Chairman allegedly directed staff to stop preparing.<sup>17</sup> Commissioners told OIG that the distinction between policy issues and administrative actions was a subject of contention within the Commission. One Commissioner said that where disputes exist, the matters should be decided by the Commission; however, the Chairman has established a practice of categorizing a matter as "administrative" when it may have policy implications. The Commissioner noted that the CR budget guidance memorandum was a good example of this behavior.

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<sup>15</sup> NRC regulation 10 CFR 50.48(c), otherwise known as NFPA 805, is a risk-informed, performance-based fire protection regulation adopted by the agency in 2004. Lessons learned by the NRC staff from their review of the two NFPA 805 pilot plant license amendment requests revealed that the NRC staff had underestimated the resources necessary to review NFPA 805 license amendment requests. The NRC staff anticipated receiving 25 license amendment requests by the end of June 2011 as a result of the current Commission enforcement policy related to NFPA 805. Completing the reviews of such a large number of submittals would be a significant challenge to the agency. The NRC staff desired to propose an approach to the Commission to address the expected large number of submittals.

<sup>16</sup> The IRRS is an International Atomic Energy Agency peer review and appraisal service. At the Government's request, during October 2010, an international team of safety experts reviewed NRC's regulatory framework for safety regarding operating U.S. nuclear power plants and the effectiveness of regulatory functions implemented by the NRC. The IRRS team identified a number of good practices, and made suggestions and recommendations where improvements are desirable or necessary.

<sup>17</sup> Since OIG's interviews with the Commissioners, the staff submitted a paper on NFPA 805 to the Commission for review, and the Commissioners received a copy of the IRRS assessment.

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The Chairman's Policy Director told OIG that she meets with the EDO and the Secretary of the Commission at least twice monthly to coordinate upcoming policy matters and open items before the Commission, the EDO, and SECY. The EDO maintains a tracking system for all open and upcoming policy items from staff, and that SECY maintains a separate tracking system for all matters before the Commission. She uses these coordination sessions to ensure that all matters are addressed and to ensure the Commission has been notified on all matters. She said that Chairman Jaczko is very transparent in keeping the other Commissioners informed on matters, including when he makes decisions from a non-policy, resources perspective. She cited the CR budget guidance memorandum as an example where the Chairman held back issuing the memorandum until he had coordinated the guidance with the other Commissioners.

Chairman Jaczko told OIG he decides what is and is not a policy matter by consulting with the General Counsel, his interpretations of his statutory authority, and consultations with the EDO. He said the statute notes that the Commissioners always have the option to raise a matter as policy, which is why he consulted as he did with the other Commissioners on the CR budget guidance memorandum. He said he knew the Commission did not support the budget guidance for the High-Level Waste Program and that he wanted to be prepared for battle. He said he proceeded to line up the votes on the matter to ensure if it was addressed as a policy matter, his position would be supported. Chairman Jaczko said the agenda planning process allows the Commission to decide by majority which direction to proceed. He said it is a tool for him to keep the agency's business moving and gives the Commission a more predictable and efficient way to manage its business.

Chairman Jaczko told OIG that it was within his authority to tell the staff to prepare or not prepare papers. With regard to NFPA 805, he said he never directed staff not to prepare a paper on the topic. He recalled the staff came to him and said they would not be able to complete the required number of license amendments applications for NFPA 805. Chairman Jaczko told the staff they had been budgeted to complete the license amendments and they needed to figure out how to accomplish the task. As Chairman, it was within his authority to execute the budget and manage the policy and workload of the agency. Consequently, he decided the issue would not be on the Commission's agenda. The staff later informed him that they were unable to conduct the application reviews, and that this would have enforcement discretion implications. As a result, he directed them to prepare a paper for the Commission because now this was a policy issue the Commission needed to work out.

### *Foreign Travel*

NRC Management Directive (MD) 14.1, *Official Temporary Duty Travel*, assigns the Chairman responsibility for approving official foreign travel for himself and the Commissioners. The handbook associated with MD 14.1 assigns approving officials responsibility to ensure that the travel is necessary to carry out NRC's mission and directs officials reviewing requests for official foreign travel at NRC's expense to "scrutinize the official purpose of the trip and the value of collateral purposes to ensure validity."

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OIG learned the Chairman required different levels of justification from each Commissioner concerning their requests for foreign travel. For example, one Commissioner was required to provide written justification to the Chairman for international trips, while other Commissioners were granted approval by the Chairman based simply on verbal notification of the planned trip. Additionally, the Chairman used foreign travel as an incentive for supporting him on issues.

Commissioner Svinicki said the Chairman has ambiguous approval criteria for foreign travel, which has made her reluctant to pursue trips. She said it is not worth her time and effort to develop a justification for a trip that she may be denied and because the Chairman does not provide an answer in a timely manner. For example, when requested by a host country to speak at conferences, she is unable to provide a timely response. She is now reluctant to pursue foreign travel because she is concerned about having to cancel depending on the Chairman's decision and the impact this has on her reputation.

Commissioner Magwood relayed one example where Chairman Jaczko wanted Commissioner Magwood to withdraw his request for an additional staff member to support the Commission offices. He said the Chairman told him that if he pursued the request, he would withhold authorizations on Commissioner Magwood's foreign travel.

Chairman Jaczko told OIG that as the Chairman of the agency he is responsible for managing the agency's workload and workflow, and in that respect he has overall management authority of the staff. He related that it was within his discretion to approve or not approve his colleague's foreign travel requests. As Chairman, he has tools that he uses to manage the agency, including the Commission, and to negotiate and get leverage. One such tool is his discretion to approve foreign travel. It was his responsibility to decide who best represented the agency and if he had colleagues who did not support him on votes, he was not likely to send them to represent him and the agency on international travel. Chairman Jaczko commented that there is nothing unethical or inappropriate about that and, in fact, it was his job, to make those difficult decisions. Further, he has never taken away anybody's international travel, or not signed a request for international travel.

### *Interpersonal Interactions with Commissioners and Staff*

Commissioner staff members told OIG of incidents they perceived as unprofessional behavior by Chairman Jaczko toward their Commissioners or members of the staff. For example, staff mentioned the Chairman's behavior toward the OCAA Director when she circulated the draft order for SECY-10-0102 shortly after the Chairman submitted his vote. Several Commissioner staff members relayed incidents where the Chairman angrily confronted their Commissioner on issues; however, the Commissioners themselves did not relay such examples. Several current and former Commission staff members said the Chairman's behavior caused an intimidating work environment. A former Chairman told OIG that the Chairman often yelled at people and his tactics had a negative effect on people. He described the behavior as ruling by intimidation. The former Chairman said he verbally counseled Chairman Jaczko on his behavior on two occasions before leaving the agency.

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A number of NRC senior managers interviewed described examples of the Chairman losing his temper with them or stories they had heard about him losing his temper with others. Some characterized these incidents as disagreements on matters where the Chairman held a strong view and they were reluctant to characterize the Chairman's behavior as unprofessional; however, they said that if they had subordinates who displayed the same behaviors, they would not tolerate it. Conversely, other senior managers interviewed said they never witnessed any unprofessional behavior on the Chairman's part.

Chairman Jaczko acknowledged that he sometimes loses his temper. He said he worked to control it and there are times when he has wished he has said or done things differently. He said he mainly loses his temper with the Commissioners, but acknowledged that there have been a few times when he has said some fairly strong things to the staff. He concluded that his behavior created an environment sometimes in which it is difficult for people to work with him, and he regretted that.

### III. FINDINGS

1. OIG determined that Chairman Jaczko used a 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 (1) the discretion within his budget execution authority under the Reorganization Plan, (2) OMB Circular A-11 guidance to spend prudently during a CR period, (3) the Administration's decision to terminate the Yucca Mountain repository project, and (4) the Chairman's interpretation of the Commission's FY 2011 budget policy decisions, which articulated close-out activities.

OIG determined 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. 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

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budget guidance memorandum, the Chairman told the EDO and the Chairman's Chief of Staff told the CFO, prior to their signing the memorandum, that all the Commissioners were informed and supported issuance of the CR budget guidance 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 (i.e., withdrawal or suspension) had been met.

OIG also determined that after Commissioner Ostendorff issued a COM to the Commission asking to direct the staff to continue its work on the SER, the Chairman communicated to Commissioners Magwood and Apostolakis that he expected their continued support. He told them 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 Apostolakis and Magwood elected not to participate in voting on the 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.

2. OIG determined that although the NWPA requires NRC to consider DOE's Yucca Mountain repository license application and issue a final decision approving or disapproving issuance of a construction authorization, there are various factors preventing the agency from meeting its statutory obligation. These factors include the Administration's decision to terminate the Yucca Mountain repository project, decreasing appropriations to NRC for the High-Level Waste Program, and the Chairman's direction to stop working on the SER.
3. OIG determined that although the Commission has internal procedures intended to facilitate collegial Commission decisionmaking based on majority rule, adjudicatory voting procedures are not consistently enforced. Furthermore, these 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 on the matter. 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.
4. OIG determined 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

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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, however, all Commissioners have the ability to bring what they perceive as policy matters before the Commission by writing a COM and gaining majority Commission support.

Please respond to this office on what, if any, action you intend to take in response to this report.

cc: Commissioner Svinicki  
Commissioner Apostolakis  
Commissioner Magwood  
Commissioner Ostendorff

Dear FOIA Requester:

The FOIA Improvement Act of 2016, which was enacted on June 30, 2016, made several changes to the Freedom of Information Act (FOIA). Federal agencies must revise their FOIA regulations to reflect those changes by December 27, 2016. In addition to revising our regulations, we intend to update the Form 464, which we use to respond to FOIA requests.

In the interim, please see the comment box in Part I.C of the attached Form 464. The comment box includes information related to the recent changes to FOIA that is applicable to your FOIA request, including an updated time period for filing an administrative appeal with the NRC.

Sincerely yours,

*Nina Argent /S/*

Nina Argent  
FOIA Officer (Acting)