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TO: Blue Ribbon Commission on America's Nuclear Future

FROM: Van Ness Feldman, P.C.

DATE: December 9, 2011 (Revised)

RE: Co-Mingled and Defense-Only Repositories

At the request of the staff to the Blue Ribbon Commission on America's Nuclear Future ("BRC"), we have reviewed the following questions:

1. Is there legal authority for DOE or any other entity to undertake to site a repository for "co-mingled" nuclear materials (*i.e.*, civilian and defense spent nuclear fuel (SNF) and high-level radioactive waste (HLW)) at any site other than Yucca Mountain?

2. Is there authority to proceed with a permanent repository exclusively for defense-related SNF and HLW at a site other than Yucca Mountain, notwithstanding the decision of President Reagan in 1985 that a separate repository for "defense waste" was not "required?"

I. UNDER EXISTING LAW, COULD DOE SITE A REPOSITORY FOR CO-MINGLED WASTE OTHER THAN AT YUCCA MOUNTAIN?

In Section 160 of the Nuclear Waste Policy Act as amended (NWPA), Congress designated Yucca Mountain as the only site that DOE could consider for disposal of civilian SNF and HLW.

> SUBTITLE E-REDIRECTION OF THE NUCLEAR WASTE PROGRAM
> SELECTION OF YUCCA MOUNTAIN SITE
>
> SEC. 160. (a) IN GENERAL.-(1) The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.
>
> (2) The Secretary shall terminate all site specific activities (other than reclamation activities) at all candidate sites, other than the Yucca Mountain site, within 90 days after the date of enactment of the Nuclear Waste Policy Amendments Act of 1987.

This language is clear, and provided for a "phase-out of site specific activities" (other than reclamation activities) "at all candidate sites other than Yucca Mountain."[1]

In addition to the specificity of Section 160 (quoted *supra*) about sites other than Yucca Mountain, Congress also enacted Section 161 of the NWPA to make it absolutely clear that DOE could not consider any other site for such disposal without obtaining authorization and appropriations from Congress:

> SITING A SECOND REPOSITORY
>
> SEC. 161. (a) CONGRESSIONAL ACTION REQUIRED. The Secretary may not conduct site-specific activities with respect to a second repository unless Congress has specifically authorized and appropriated funds for such activities.
>
> (b) REPORT. The Secretary shall report to the President and to Congress on or after January 1, 2007, but not later than January 1, 2010, on the need for a second repository.[2]

This language is also clear, and precludes DOE's consideration of a site for a repository for SNF or HLW other than at Yucca Mountain without subsequent Congressional authorization and appropriations.[3]

Taken together, Sections 160 and 161 make it clear that there is no authority for the Secretary to proceed with any site for any SNF or HLW to which the NWPA applies. Section 8(c) of the Act provides that the NWPA applies to any repository not used exclusively for defense-related SNF or HLW. Accordingly, if defense-related SNF or HLW is co-mingled with civilian SNF or HLW, it is covered by the NWPA and subject to the bar on proceeding with any repository other than Yucca Mountain.

II. CAN DOE SITE A REPOSITORY EXCLUSIVELY FOR DEFENSE-RELATED SNF OR HLW?

As we note above, the NWPA permits a repository for co-mingled defense and civilian SNF or HLW only at Yucca Mountain. It also defines the circumstances under which a repository exclusively for defense-related SNF or HLW may proceed without being subject to the "Yucca-only" restriction. In Sections 8(b)(1)-(2) of the NWPA,[4] Congress required that the

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[1] Codified at 42 U.S.C. § 10172.

[2] Codified at 42 U.S.C. § 10172a.

[3] Note that DOE did have the duty under Section 161(b) to report to Congress about the "need for a second repository," but, given the language in the rest of Section 161, that does not give DOE authority to proceed with consideration of the site for a second repository.

[4] Codified at 42 U.S.C. § 10107.

President determine, within two years of the date of enactment of the NWPA, whether a defense-only repository exclusively for "high-level radioactive waste" was "required."[5] In 1985, President Reagan determined "[i]n accordance with the Act" that such a repository for "defense waste" was not "required."[6] As a result, defense-related SNF and HLW is currently destined for a co-mingled repository, which must be at Yucca Mountain.

The question arises whether, given that President Reagan completed the only action expressly contemplated by Sections 8(b)(1)-(2), the current or a future President could reconsider that determination. Normally, Presidents and administrative agencies are assumed to have the inherent right to reconsider prior Presidential or agency decisions.[7] Under certain statutes, however, reconsideration must proceed in compliance with particular provisions of the authorizing statute under which the decision was made in the first instance, in addition to compliance with more general statutes such as the Administrative Procedure Act.[8]

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[5] Section 8 (b)(1)-(2) refers expressly only to "high-level radioactive waste," and not also to "spent nuclear fuel," but that Section 8(c) does refer to "spent nuclear fuel." Courts generally assume that, when Congress uses a word or phrase in one portion of a statute, but does not use the same word or phrase in another section of the same statute, it intends that there be a different interpretation applied to the two sections. Some may consider the reference only to "high-level radioactive waste" in Sections 8(b)(1)-(2), and the failure to refer therein to "spent nuclear fuel" as well, to be a drafting error, and that "high-level radioactive waste" must also mean to refer to "spent nuclear fuel." However, drafting errors in statutes are not lightly assumed, unless the wording Congress enacted makes no sense. Here, Congress referred specifically to "spent nuclear fuel" in Section 8(c), demonstrating that Congress knew how to refer to spent nuclear fuel when it so intended. Moreover, because there may be rational reasons to confine a defense-only repository to "high-level radioactive waste," Congress must be presumed not to have compelled "spent nuclear fuel" to be included in the Presidential determination required by Sections 8(b)(1)-(2).

[6] President Reagan's determination made reference to the evaluation by DOE Secretary Hodel. *See An Evaluation of Commercial Repository Capacity for the Disposal of Defense High-Level Waste*. DOE/DP/0020/1. Washington DC: U.S. Department of Energy, 1985. In the legislation authorizing WIPP, Congress permitted the creation of a defense-only low-level waste repository without the necessity for a license from the Nuclear Regulatory Commission ("NRC"). However, in Section 8(b)(3) of the NWPA, Congress provided that repositories for defense-only high-level waste may be constructed and operated only with an NRC license.

[7] *E.g.*, *Spanish Int'l Broadcasting Corp. v. FCC,* 385 F.2d 615, 621 (D.C. Cir. 1967), *citing Albertson v. FCC*, 182 F.2d 397, 399-400 (D.C. Cir. 1950)("The power to reconsider is inherent in the power to decide.").

[8] *E.g., New Jersey v. Environmental Protection Agency*, 517 F.3d 574, 582-83 (D.C. Cir. 2008) (reversing an EPA rule that overturned a prior rule listing electric generating units as regulated sources under Clean Air Act Section 112 on the basis that that EPA failed to comply with the de-listing requirements of Section 112(c)(9)); *see also Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (finding that NHTSA could terminate a rulemaking

Here, Sections 8(b)(1)-(2) are silent about a subsequent re-determination. However, in accordance with the general principle that Presidents and administrative agencies are free to reconsider decisions made by the same or a prior President or by the same agency, we believe that it is likely that Congress did not intend to preclude a subsequent Presidential re-determination, provided in the case of HLW that the list of considerations that applied to President Reagan's original determination would be applicable to any such re-determination. Accordingly, although the question is not free from doubt, we conclude that President Reagan's determination that a defense-only repository for HLW is not required may be reconsidered, taking into account the list of considerations that applied to the original determination.

In the case of a repository exclusively for defense-related SNF, there is no statutory requirement for a Presidential determination in order to proceed with such a repository.[9] We believe it is clear that President Obama or a subsequent President may determine that DOE can proceed with a repository for defense-only SNF.

If such a determination were made either for HLW or SNF, DOE would probably have authority to proceed with a defense-only repository, under provisions of the Atomic Energy Act of 1954,[10] subject to:

1. Availability of appropriations;
2. State veto, and Congressional override provisions, under the NWPA; [11] and
3. NRC licensing.[12]

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proceeding about passive seat belts, but in doing so was required to comply with the same APA standards as were applicable to the promulgation of the rule). Rarely, reconsideration is expressly precluded, such as a recommendation as to rates by the Postal Rate Commission (because of the financial exigencies of the situation). The few such situations in which reconsideration is not permitted are very much the exception to the general rule that the President or an agency generally has the inherent power to reconsider a decision previously made.

[9] The determination made by President Reagan in 1985 was made with respect to "defense waste," rather than "defense high-level waste," raising the question whether defense SNF was also included. Even if defense SNF were included, the President would have clear authority to revisit that determination since, by its terms, section 8(b) was applicable to HLW and not to SNF, and there would be little basis to argue that the statute constrained the President's ordinary ability to reverse or modify a previous determination.

[10] AEA § 91(a)(3), 42 U.S.C. § 2121(a)(3).

[11] NWPA § 101, 42 U.S.C. § 10121.

[12] NWPA § 8(b)(3) (42 U.S.C. § 10107) requires licensing of repositories that take defense HLW. NRC licensing regulations for repositories other than at Yucca Mountain appear to cover both defense-related HLW and defense-related SNF, indicating that a defense-related SNF repository would also require licensing. 10 C.F.R. § 60.3.