

**BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES**

**COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON ENERGY AND AIR QUALITY**

**TESTIMONY OF THE HONORABLE SAM J. ERVIN, IV
COMMISSIONER, NORTH CAROLINA UTILITIES COMMISSION
ON**

**“A Review of the Department of Energy's Yucca Mountain Project, and Proposed Legislation to Alter
the Nuclear Waste Trust Fund (H.R. 3429 and H.R. 3981)”**

March 25, 2004



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Summary of Comments by
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North Carolina Utilities Commission
On behalf of
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
March 25, 2004

- NARUC's goal for the civilian radioactive waste management program is for the federal government to meet its statutory and contractual obligations to accept commercial spent nuclear fuel for storage and geologic disposal in a safe, timely and cost-effective manner.
- The ratepayers of this country who use nuclear-generated electricity have done their part by paying through their utilities over \$21 billion in fees and interest. They have been paying for the repository program for over 20 years.
- Even though Congress approved Yucca Mountain in 2002, meeting the 2010 initial waste disposal target date is not a *fait accompli*. The program faces continuing challenges, including:

The license review process before the Nuclear Regulatory Commission for this first-of-a-kind facility has yet to begin and will take three to four years of thorough technical scrutiny.

Litigation by the State of Nevada and others opposing the repository is proceeding in federal court.

The biggest obstacle to opening the repository by 2010 may be the risk that funding available for the program may be inadequate to meet the schedule.

- Congress has cut the repository budget for the past nine years while revenue continues to flow in with increased nuclear production leaving a \$14 billion "balance" in the Nuclear Waste Fund that is basically inaccessible for its intended purpose.
- The key to timely completion of the Yucca Mountain project is for Congress to reform the process by which monies from the Nuclear Waste Fund are made available for the repository program. This hearing addresses a number of acceptable ways for the current funding problems to be resolved. NARUC supports a range of alternatives as long as the imbalance between revenue and annual appropriations is fixed allowing nuclear waste acceptance by 2010.
- There are significant consequences for failing to begin repository operations in 2010. The costs of delay continue to accrue to utilities and ratepayers in the form of increased costs of the program and for on-site storage, and costs to taxpayers are increasing for damage liabilities.
- The Nation needs to move forward to assure the availability of safe, permanent disposal of nuclear waste without further delay. To enable that, we urge Congress to act quickly on effective reform of the appropriation of the Nuclear Waste Fund.

My name is Sam J. Ervin, IV. I am a member of the North Carolina Utilities Commission, having served in that capacity for four years. I also serve as the Chairman of the Subcommittee on Nuclear Issues and Waste Disposal of the Electricity Committee of the National Association of Regulatory Utility Commissioners (NARUC). As Chairman of the NARUC Subcommittee that focuses directly on the issues that are the subject of today's hearing, I am testifying today on behalf of that organization. In addition, my testimony reflects the views of the North Carolina Utilities Commission. On behalf of NARUC and the North Carolina Utilities Commission, I very much appreciate the opportunity to appear before you this morning. The issues that you are addressing in this oversight hearing are very important to NARUC's membership and the North Carolina Utilities Commission, and I am grateful to have this opportunity to present our point of view concerning the progress of the Yucca Mountain project.

NARUC is a quasi-governmental, non-profit organization founded in 1889. Its membership includes the State public utility commissions serving all States and territories. NARUC's mission is to serve the public interest by improving the quality and effectiveness of public utility regulation. NARUC's members regulate the retail rates and services of electric, gas, water, and telephone utilities. We are obligated under the laws of our respective States to ensure the establishment and maintenance of such utility services as may be required by the public convenience and necessity and to ensure that such services are provided under rates and subject to terms and conditions of service that are just, reasonable, and non-discriminatory.

NARUC's goals in the nuclear waste area are well known and have been stated before this and other Congressional committees on a number of prior occasions. NARUC believes that the federal government needs to meet its obligation under the Nuclear Waste Policy Act of 1982, as amended, to accept spent nuclear fuel from utilities and other nuclear generators in a timely manner. NARUC further believes that the nation's ratepayers have upheld their end of the bargain struck in the Nuclear Waste Policy Act by providing, either directly or through income generated on prior payments, over \$21 billion for use in constructing a nuclear waste repository. Finally, NARUC believes that the Nuclear Waste Fund should only be employed for its intended purpose and that the monies in the Nuclear Waste Fund should be utilized, along with appropriations from the Department of Defense budget, for the sole purpose of supporting the opening of the Yucca Mountain facility in a timely fashion. The basic principles underlying NARUC's approach to the nuclear waste issue provide a solid foundation for future policy decisions concerning the nuclear waste program.

The process of attempting to open a geologic repository for the storage of high-level radioactive waste, including spent nuclear fuel, has been a protracted one. As you know, the Nuclear Waste Policy Act contemplated that the proposed repository would begin to accept waste in 1998. Instead, over five years later, the Department of Energy (DOE) is still engaged in the process of attempting to license, construct, and open the proposed repository. In the meantime, the customers of the nation's nuclear facilities continue to pay the required one mill per kilowatt-hour fee that is intended to finance the

proposed repository while, at the same time, continuing to bear the cost of on-site waste storage as well. The nation's debt to these customers is long past due. Moreover, the Administration indicated in its FY 2003 budget request that it will cost \$500 million annually to manage government high-level radioactive waste at Department of Energy sites in the event waste acceptance at the proposed Yucca Mountain facility is delayed past the currently-scheduled 2010 opening date. Finally, the federal courts have decided that the Department of Energy has breached its statutory and contractual obligation to take spent nuclear fuel by the date specified in the Nuclear Waste Policy Act, subjecting the nation's taxpayers to significant damage liabilities that have yet to be quantified and that will continue to increase with the passage of time. In evaluating the potential impact of these liabilities on the federal budget, it is important to remember that the United States Court of Appeals for the Eleventh Circuit has determined that monies from the Nuclear Waste Fund may not be used to pay any damages ultimately awarded to the nuclear industry for breach of the Department of Energy's obligation to take nuclear waste beginning in 1998. While we do not have an agreed-upon estimate of the government's liability for the added storage costs for commercial spent fuel that will result from further delay in waste acceptance at Yucca Mountain, we can safely assume that the cost of delay relating to commercial spent nuclear fuel is several times the cost of delay identified for government material since there is nine times more commercial waste than governmental waste. These factors make taking action to ensure that further delay in opening the Yucca Mountain facility does not occur even more imperative.

The decision by both Houses of Congress to uphold the President's proposal to proceed with the development of the Yucca Mountain facility in 2002 was gratifying to NARUC and its members. Although the process that led to the recommendation of the Yucca Mountain site by Secretary Abraham, the President's decision to concur in the Secretary's recommendation, and the Congress' decision to override Governor Guinn's veto brought much needed attention to the nuclear waste disposal issue, the passage of the Congressional resolution reaffirming the federal government's commitment to the development of the Yucca Mountain facility does not end the need for Congressional supervision of and commitment to this program. In other words, the adoption of the 2002 Congressional resolution should certainly not lead to complacency on the part of any branch of the federal government. The timely opening of the Yucca Mountain facility is not, as this committee well knows, a *fait accompli*. As you are aware, the United States Court of Appeals for the District of Columbia Circuit heard arguments in January concerning a number of legal challenges by the State of Nevada and others to numerous facets of the repository program and related portions of the Code of Federal Regulations, including the federal government's decision to proceed with the selection of the Yucca Mountain site. Assuming that the outcome of these proceedings is generally favorable to the Yucca Mountain program, certain budgetary issues still need to be resolved in order to minimize the risk of additional delay. In all honesty, the biggest obstacle to the beginning of waste acceptance at the proposed repository in accordance with the Department of Energy's current schedule is the risk of inadequate funding during the next few years.

As a result, NARUC believes that it is vitally important for Congress to take certain specific steps on an expedited basis to ensure that the Yucca Mountain facility opens without additional delay. Most importantly, Congress should act to ensure that adequate money is made available for the licensing, construction, and operation of the proposed facility. Unless adequate money is appropriated for the Yucca Mountain project, the proposed facility will not open in accordance with the current schedule, resulting in increased costs to both the federal government, the nuclear industry, and the customers of the nation's nuclear generators. Therefore, I repeat, the most important issue for Congress to address in connection with the nuclear waste program at this time is ensuring that adequate monies are appropriated for the Yucca Mountain project.

The history of funding for the Yucca Mountain program is and has been a source of concern to NARUC and its members. Over the past decade, fee revenue has continued to flow into the Nuclear Waste Fund at an ever-increasing level, a pattern that reflects improving nuclear industry productivity. Earnings on the balance in the Nuclear Waste Fund have grown to the point where they have exceeded fee revenue in some years. In the face of this increase in the amount of available resources, annual appropriations have consistently been reduced from the amount requested by the present and past Administrations for the last decade. Although over \$21 billion dollars has been collected for the Nuclear Waste Fund from ratepayers to date, only about \$6 billion has been expended from the fund to support the repository program. This reduces the likelihood that important milestones associated with the repository program will be met, the most important of which is the date upon which nuclear waste begins moving to the repository

for storage. Furthermore, spent nuclear fuel continues to accumulate in 77 locations that were never intended to be indefinite storage facilities. Although the Nuclear Regulatory Commission and the nuclear industry express confidence that the present practice of storing spent fuel at reactor sites is safe, NARUC agrees with Secretary Abraham that permanent storage of nuclear waste at the Yucca Mountain repository would be more secure than on-site storage and that the prospect of further delays in opening the Yucca Mountain facility raises a serious homeland security issue.

The history of the budget process relating to the Civilian Radioactive Waste Management program suggests that there is a risk that past funding problems will continue in the future. For most of FY 2003, funding for the Yucca Mountain program was determined by a series of continuing resolutions, a development that left the amount of money available for use in connection with the repository program in a state of fundamental uncertainty. When the relevant appropriations bill was finally passed, the approved amount was 23 percent lower than the amount that the Administration had said was absolutely necessary to assure the submission of an adequate license application to the Nuclear Regulatory Commission by the end of 2004. Although the Secretary of Energy and the individuals managing the repository program stated that transportation planning would be “ramped up” in 2003, that aspect of the program became one of the first casualties resulting from the FY 2003 budget reduction. As a result, reductions in the amount requested for the Yucca Mountain program have real world consequences that could affect the date upon which waste acceptance begins.

The leadership shown by the House of Representatives in approving an increase over the President's FY 2004 Budget request of \$591 million to \$765 million was an encouraging attempt to both support the President's initial budget request and to make up for the \$134 million cut that occurred in 2003. Although the final amount approved in conference was only \$580 million, it was the closest Congress has ever come to fully funding the repository program consistently with Administration requests in recent years and resulted from the monumental efforts of many members of this subcommittee and others to avoid further delay in the date upon which waste begins to be accepted at the proposed repository. Similar efforts may not, however, be sufficient in future years because the program is just approaching the period when the Department of Energy will need ever-higher appropriations in order to meet the heavy cash requirements inherent in building the repository and procuring very expensive shipping and disposal waste containers.

These funding difficulties need not persist. There is a solution to the funding problem that seems perfectly obvious to us. The money is available to sustain the required level of program spending through the use of the very funding mechanism contemplated in the Nuclear Waste Policy Act. The \$14 billion balance in the Nuclear Waste Fund, which continues to grow every year, provides more than enough money to permit the Department of Energy to maintain the current schedule, assuming that these monies are actually made available for use in the program. The real problem lies in developing an approach to funding the Yucca Mountain program that ensures that the monies paid in to the Nuclear Waste Fund by the nation's electric ratepayers are actually

devoted to the purposes for which that fund was created. The best way to achieve that result is for Congress to reform the process by which monies from the Nuclear Waste Fund are appropriated for repository program activities.

As we understand it, the existing budget rules applicable to the Yucca Mountain program make no distinction between monies appropriated from the Nuclear Waste Fund and other general funds available to the Department of Energy as a whole. As a result, any increase in the amount appropriated for the program from the Nuclear Waste Fund currently must be offset by decreases in expenditures for other Department of Energy programs despite the fact that the nuclear waste program is the only Department of Energy program that can be appropriately paid for from the Nuclear Waste Fund. Although the existence of such a limitation might constitute sound budgetary policy in the event that all Department of Energy programs were supported through general appropriations, such a limitation seems overly restrictive given the Nuclear Waste Fund's status as a special fund containing monies contributed by a specific group of Americans for use in a particular way. As a result, NARUC believes that the key to timely completion of the Yucca Mountain project is for Congress to reform the process by which the monies from the Nuclear Waste Fund are made available for use in connection with the repository program.

There have been a number of efforts to attempt to resolve this problem in the recent past. As I have already pointed out, the House has taken a leading role in trying to solve the funding problem. In addition to last year's increase in the repository program

budget, the House has evaluated the appropriateness of more fundamental solutions to this problem on a number of occasions. The report accompanying the FY 2001 appropriations bill issued by the House Appropriations Committee requested the Secretary of Energy to review the management and financing of the Civilian Radioactive Waste program. Secretary Abraham submitted a report in September 2001, in response to this request entitled an “Alternative Means of Financing and Managing the Civilian Radioactive Waste Program.” The Secretary’s report indicated, consistently with statements made in connection with the Administration’s FY 2004 budget request, that annual funding for the Yucca Mountain program needed to average \$1.3 billion to ensure that the repository begins to accept waste in 2010. As far as NARUC is aware, no action has been taken on the basis of the recommendations of that report to date. NARUC was, however, encouraged by the House’s 2002 decision to consider including a provision in H.R. 4 that would have taken the Nuclear Waste Fund “off-budget.” As NARUC understood it, the adoption of such an approach would have meant that annual appropriations from the Nuclear Waste Fund for use in the repository program would be limited only by the amount of revenue coming into the Fund in any particular year. It is our understanding that this provision was removed at the direction of the Budget and Rules Committees. Taking the Nuclear Waste Fund “off-budget” remains, in our opinion, a viable option that should be given further consideration in addition to other proposals that have recently been placed on the table. The Administration’s FY 2004 budget alluded to an “alternative funding proposal” that would permit temporary cap adjustments for FY 2004 and FY 2005. So far as NARUC is aware, however, no specific alternative funding proposal of this nature was submitted to Congress in connection with

the FY 2004 budget process. Although there are certainly legitimate reasons for the Congress to retain budgetary control over expenditures for the Yucca Mountain facility, it is NARUC's hope that the means chosen to achieve that end will not result in a continuation of the program's past budget problems and that fundamental changes in the funding process will be adopted that make the monies in the Nuclear Waste Fund more readily available for use in supporting the repository program.

The manner in which the mechanics of the appropriations process are designed is, of course, a matter committed to the sound judgment of Congress and not to an association of State regulators. However, as is evidenced by the letter sent by public utility regulators from 23 States to the Director of the Office of Management and Budget late in 2002, NARUC believes that State commissions have a valid justification for promoting reform of the process by which monies from the Nuclear Waste Fund are expended in support of the Yucca Mountain project. There are probably a number of acceptable ways for the current problem to be resolved, ranging from modification of the existing budget rules to taking the Nuclear Waste Fund "off-budget." At this point, we are willing to support a range of alternative methods for reforming the appropriations process as long as the imbalance between the amount of revenue entering the Nuclear Waste Fund and the amount of monies actually expended from the fund in support of the repository program ends. Any reform, however structured, should ensure that future annual appropriations are limited by the needs of the program rather than the amount appropriated in the past, particularly given that past appropriations were barely adequate for the study period and are totally inadequate for the licensing, construction, and waste

transportation phases that lie ahead. There is no question but that measures to assure that monies from the Nuclear Waste Fund are spent wisely are appropriate. Those measures should not, however, thwart the entire purpose of the Yucca Mountain program. Assuming that Congress believes that expenditures from the Nuclear Waste Fund need to be capped for budget oversight reasons, such expenditures should only be capped at the sum of fee revenues and earnings on the balance of the fund received in a particular year. As we understand it, expected program needs, even in peak years, should not exceed the total that would be available under the application of such a formula. The Department of Energy projects that \$1.5 billion will be added to the Nuclear Waste Fund each year during the remainder of this decade and that the Department of Defense budget will contribute an additional \$600 million per year toward the repository program. For these reasons, there is no question that the amount of money flowing into the Nuclear Waste Fund coupled with adequate support from the Department of Defense budget will suffice to pay for needed work on the Yucca Mountain program over the next several years as we near initial repository operations. Any reform proposal should also provide that increased expenditures from the Nuclear Waste Fund for support of the repository program would not necessarily result in the reduction of other Department of Energy expenditures, since the funds used to support those other programs come from a different source that is not directly tied to the programs in question. A failure to reform the process by which monies from the Nuclear Waste Fund are appropriated for use in the repository program as NARUC suggests will condemn the Yucca Mountain program to additional years of fiscal uncertainty and undermine the progress made by the 2002 decision to approve the Administration's recommendation that the program go forward.

As NARUC understands it, there are at least two proposals for reforming the budgetary process relating to the Yucca Mountain program pending before the House that merit serious consideration. The first is the proposed Nuclear Waste Financing Act, H.R. 3429, introduced by Congressmen Shimkus and Rush. As I understand it, H.R. 3429 would treat the receipts, proceeds, and recoveries realized by Department of Energy associated with the Nuclear Waste Fund as offsetting collections and authorize expenditures from the Nuclear Waste Fund for nuclear waste disposal activities in the amount of \$725 million for FY 2005 and in the amount deposited in the Nuclear Waste Fund for FY 2006 through FY 2010. H.R. 3429 also includes provisions intended to preserve the corpus of the Nuclear Waste Fund and make it available in future fiscal years. The enactment of H.R. 3429 would accomplish many of the objectives I have previously outlined for fiscal years 2005 through 2010, assuming that sufficient monies are included in the Department of Defense budget to meet expected repository program needs in those critical years. NARUC particularly approves of the provision in H.R. 3429 that ensures that revenue collected in any year in excess of that year's program needs may be rolled over for use in connection with the repository program in future years rather than allowing such excess revenue to be diverted to other uses. The enactment of H.R. 3429 would allow Congress to ensure adequate funding for the program from the beginning of the construction phase through the existing anticipated waste acceptance date. After the construction license is issued, NARUC assumes that Congress could consider revising the funding mechanism to provide adequate sustenance for the program once waste shipments begin.

The second proposal well worth considering is the one referenced in the President's budget proposal for FY 2005. At the time that the President's budget proposal for FY 2005 was submitted, the Administration indicated that it would submit a legislative proposal to reclassify Nuclear Waste Fund fee revenue from its current status to "offsetting collections" beginning this year and continuing until construction of the surface facilities for a fully operating repository have been completed. As a matter of fact, the President's budget proposal assumes that dedicating the \$749 million in fee revenues forecast for this year for use in connection with the repository project would eliminate the need for any appropriations from the Department of Energy's discretionary budget. On February 27, 2004 Energy Secretary Spencer Abraham submitted proposed legislation containing the specifics of the Administrations' proposal to Congress. Chairman Barton has introduced the Administration's proposal as H.R. 3981 by request. Although the Administration's proposal is similar to H.R. 3429, it is both simpler and would have a longer-lasting impact given that the Administration's proposal does not halt the dedication of current revenues from the Nuclear Waste Fund for use in connection with the repository project until construction of the surface facilities has been completed. The intent of both bills is identical and the enactment of either piece of proposed legislation would further NARUC's objectives of ensuring that the ratepayers' contributions to the Nuclear Waste Fund will be used for their intended purpose and that the Department of Energy is provided with the resources that it says are necessary to begin waste acceptance in 2010. At its Winter Committee Meetings held a couple of weeks ago, NARUC adopted a resolution, a copy of which is attached to this testimony,

urging enactment of any legislation, including H.R. 3429 or the Administration proposal, that has the effect of reforming the budgetary process so as to ensure the timely availability of sufficient funds to enable initial waste acceptance at the repository in 2010.

The nuclear waste program is of immense national importance. Having overcome the political hurdle inherent in the vote on the joint resolution in 2002 to move forward with the Yucca Mountain process, the Congress should focus on ensuring that the means to complete the process of licensing, constructing, and operating the repository are made available to the Department of Energy. Nuclear energy is an inevitable component of both our energy present and our energy future. Congress recognized that fact when it enacted the Nuclear Waste Policy Act two decades ago. Congress reaffirmed that determination when it voted to proceed with the repository program in 2002. The nation needs to move forward to assure the availability of a safe, permanent nuclear waste disposal site for future generations without further delay. The nation's electric ratepayers have been paying for a nuclear waste repository for over twenty years. North Carolina ratepayers alone have contributed more than \$1.7 billion dollars to the Nuclear Waste Fund since its inception. It is past time that the ratepayers get what they have paid for. The best way for Congress to assure that this result occurs is to reform the process of funding the repository program so that monies from the Nuclear Waste Fund are more readily available for use connection with the Yucca Mountain facility. We urge this committee and other relevant committees to make reforming the use of the Nuclear Waste Fund a priority in this Congress, to identify a way to provide stable financing for the program using the ample revenue stream that is available for the purpose, and to enact

any legislation necessary to effectuate that decision. Thank you for your attention and I look forward to your questions.