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Yucca Mountain Bills (S. 2589 and S. 2610): A Wholesale Rollback of Public Health and Safety Laws; States' Rights

Sens. Domenici and Inhofe have introduced a bill (S. 2589, "Nuclear Fuel Management and Disposal Act"), written by the Department of Energy, that would (1) eliminate state, local, and tribal rights; (2) weaken public health, safety, scientific, and technical standards; and (3) reward DOE for its incompetence at the proposed nuclear waste dump at Yucca Mountain, Nevada.

Sen. Inhofe, chairman of the Environment and Public Works Committee (EPW), has also introduced a separate bill (S. 2610), which contains identical provisions from S. 2589 (Sections 4, 6, and 9) that are under the jurisdiction of EPW.

These bills are fundamentally contrary to the findings and purposes of the Nuclear Waste Policy Act (section 111), including a finding "to ensure that such waste and spent fuel do not adversely affect public health and safety and the environment for this or future generations."

Eliminates State, Local, and Tribal Rights

- **Eliminates federal, state, interstate, and local authority over transportation of radioactive waste; Gives all authority to DOE [Sec. 7]**

This section would abolish state, local and tribal government transportation authority, which is currently authorized by the Hazardous Materials Transportation Authorization Act of 1994, over the shipment of nuclear waste by rail, highway and barge from around the country to the dump site. According to DOE, shipments to Yucca Mountain will affect 45 states, 700 counties, and 50 Native American tribes. As many as 120 million people live in the counties that would be crossed by rail and truck routes and between 8 million and 11 million people live within half a mile of a potential truck or rail route to the site.

All authority for transporting this waste would be given to DOE, in direct contradiction to a February 2006 National Academy of Sciences report that advocated a central role for state and tribal governments. The NAS study concluded that a successful transportation program requires the active involvement of other federal agencies, including the Nuclear Regulatory Commission, the Department of Homeland Security, and the Department of Transportation, "in strict adherence to regulations." The NAS found that states and tribal governments must also play a central role in any waste transportation program. In particular, the report found that "state- and

tribal-supplied information on local transport conditions is an essential element in route selection decisions.” The committee expressed concerns about the DOE’s ability to plan and manage a safe program, finding that “the challenges of sustained implementation should not be underestimated.”

- **Exempts the Yucca site, as well as potentially all DOE sites, from the Resource Conservation and Recovery Act [Sec. 6(a)]**

This section would exempt hazardous and mixed waste at Yucca Mountain from the Resource Conservation and Recovery Act (RCRA),¹ which would eliminate Nevada’s authority in the management of these wastes. The provision is so broad that it would actually exempt every state’s RCRA authority over the management of hazardous, mixed, low-level and transuranic wastes if the waste is stored or transported in an NRC-licensed container. DOE has millions of tons of hazardous and mixed waste at DOE weapons sites that is currently required to be disposed of in RCRA-permitted landfills. This provision would allow the waste to be dumped anywhere without EPA or state oversight.

The exempted waste would also include (1) irradiated fuel stored at commercial nuclear power plants if DOE were to take title to the waste and (2) DOE irradiated fuel at DOE sites if DOE were to obtain NRC licenses for the waste containers. Waste transported to and stored at the Waste Isolation Pilot Plant (WIPP), a transuranic waste dump in New Mexico, is packaged in NRC-licensed containers and would be exempted from New Mexico oversight. This provision would mean a wholesale revision of RCRA and the Federal Facilities Compliance Act of 1992.²

- **Waives state and local air quality laws for the Yucca Mountain site [Sec. 6(b)]**

The Environmental Protection Agency (EPA) would be the sole agency responsible for air quality permits at the Yucca Mountain site. State and local governments have a significant role in meeting federal air quality standards, but Nevada and its counties would not be allowed to issue, administer, or enforce existing or new air quality permits affecting the site. This provision would set a dangerous precedent nationally for federal projects.

- **Preempts states’ traditional authority to manage its waters [Sec. 8]**

This provision eliminates states’ authority to manage its waters, a particularly complicated issue in the arid Western U.S. DOE would be given the exclusive right to take water (“through purchase or otherwise”) for use at Yucca Mountain or for related activities. The bill would legislate that the use of the water is “beneficial to interstate commerce” and “does not threaten to prove detrimental to public interest” regardless of how much water DOE demands.

¹ The Resource Conservation and Recovery Act (RCRA) of 1976 established a “cradle-to-grave” regulatory structure for the management of solid and hazardous wastes from generation to disposal. Many states implement the federal law; many states also have state laws that exceed the federal RCRA regulations.

² The Federal Facility Compliance Act of 1992 establishes that federal facilities are not exempt from state enforcement of state environmental laws. Therefore, all federal agencies that manage or dispose of solid or hazardous waste are subject to the applicable federal, state, and local laws and regulations related to solid and hazardous waste. Under this law, federal facilities are required to pay fines assessed by states, and states are allowed to charge a fee for permitting and inspecting federal facilities.

- **Hands DOE the rights to land around and airspace above Yucca Mountain; Eliminates mining rights at the site [Sec. 3]**

Despite the fact that it is unclear when, if ever, the repository will open, this section would permanently withdraw 147,000 acres of Bureau of Land Management, Department of Defense, and Department of Energy land from public and private use, including denying the State of Nevada the right to build roads and bridges in the area. DOE would be allowed to close the entire area off from the public at its discretion.

DOE would have authority over the Air Force and the National Nuclear Security Administration (NNSA) by allowing DOE to set the terms by which they may use the land. DOE would also be permitted to close the airspace above the site and stop the Air Force training missions from Nellis Air Base near the site. The withdrawal would include 37,000 acres from Nellis.

This section prohibits geothermal leasing and surface and subsurface mining rights in the area. Grazing, hunting, and trapping rights in the area would be under the control of DOE.

This provision gives DOE the authority to trade land, along with the associated water and control rights, from within the withdrawal area for any federal land outside of it. The land trade would include the associated water rights and land use control.

- **Expedites federal, state, local, and tribal authorizations for the repository and infrastructure activities; Declares all actions related to the repository to be “beneficial” [Sec. 4(d)]**

Federal, state, local and tribal governments would be required to rush approval for any authorizations related to the repository or infrastructure activity. If the government entity fails to grant authorization within one year after receiving a request from DOE, it would be required to report to Congress on the reason for missing the deadline or refusing the request. In addition to undermining state and local authority and tribal sovereignty, this provision would politicize decisions that should be made on scientific and technical bases.

This section would also codify that any action related to the repository and infrastructure activity is “beneficial and not detrimental to the public interest and interstate commerce and consistent with the public convenience and necessity.” To legislate that any possible action proposed by DOE will be beneficial *before* an analysis of the action has been done is absurd.

Undermines safety, scientific, and technical standards

- **Renders an NRC license meaningless by allowing DOE to change its design *after* license approval [Sec. 4(b)(3)]**

This section would allow the DOE to change the site design even after the NRC issues a construction license according to a specific design, thereby rendering the license essentially irrelevant. DOE could make an unlimited number of changes in the design without a formal

hearing. NRC review would be limited to 18 months using “expedited, informal procedures” that minimize discovery procedures. This provision would seriously undermine NRC’s ability to fulfill its mandate to ensure public safety. The unreasonable schedule and expedited process means that the NRC could be prevented from adequately addressing safety issues of proposed design changes during construction. This provision gives DOE a way to manipulate the system by allowing the agency to get a license for a design that it never intends to use, and then simply make the changes it wants with minimal oversight.

This section also allows DOE to start constructing infrastructure, such as rail lines, access roads, and support facilities, before obtaining a construction license. Dumping more ratepayer and taxpayer money into the site, and artificially creating momentum for the stalled project, puts further political pressure on what should be a scientific and technical decision about whether the site should be licensed by the NRC.

- **Undermines the National Environmental Policy Act (NEPA) by exempting DOE from having to consider actions connected to the repository [Sec. 4(b)(3)]**

Any Environmental Impact Statement (EIS) related to infrastructure at the site would not need to consider the need for the action, alternative actions, or a no-action alternative—the key analysis of an EIS. Simply writing down all of the impacts, but failing to analyze the need or compare the impacts to other alternatives utterly defeats the purpose of an EIS. Furthering rendering the EIS meaningless, this provision requires the agency to adopt, “to the extent practicable,” the EIS “without further action.”

- **Codifies NRC’s “waste confidence rule” into law [Sec. 9]**

This provision would make law the Nuclear Regulatory Commission’s (NRC) “waste confidence rule,” stating that there *will* be a dump for spent fuel “in a timely manner.” Besides the uncertainty of the government’s ability to take commercial nuclear waste (the federal government missed its 1998 legislated deadline and is paying out hundreds of millions in settlements), this provision is politicizing what should be a scientific and technical determination about the suitability of the Yucca Mountain site. While it could help enable the licensing of new nuclear power plants by preventing members of the public from raising concerns about the waste in the licensing process, it does not change the reality that we do not have a viable, permanent solution for nuclear waste.

Rewards DOE for Incompetence

- **Allows unlimited amount of highly radioactive waste that can legally be stored at the Yucca dump, enabling the site to become the world’s radioactive waste dump [Sec. 4(b)(2)]**

The DOE’s flawed scientific and quality assurance practices have cast serious doubt over the suitability of the Yucca Mountain site. In particular, the validity of the research related to the geology of the site and the proposed engineered barriers, both of which are supposed to protect

groundwater by hindering the movement of radionuclides, have been called into question. Despite these ongoing and yet unresolved questions, this section would lift the 70,000 metric ton cap at the site and allow an unlimited amount of highly radioactive waste to be stored there.

This provision could facilitate the importation and reprocessing of foreign irradiated fuel in the U.S., as proposed under the Global Nuclear Energy Partnership (GNEP) program. Yucca Mountain would become the dump site for the world's reprocessing waste, increasing the public health risks of storing waste there. It would also dramatically increase the number of waste shipments, as well as the associated security risks, both in the U.S. and globally.

- **Gives DOE unfettered access to ratepayer money [Sec. 5]**

Despite a long history of waste, scientific fraud and mismanagement by the DOE and its contractors, this provision would give DOE direct access to the Nuclear Waste Fund, which is funded by a 1 mil per kilowatt-hour fee paid by nuclear power ratepayers. Fees paid into the Fund from October 1, 2007 through the end of the year in which the surface and Nevada rail construction are completed would be credited as “discretionary offsetting collections.” Reclassifying the Nuclear Waste Fund is simply a budgeting gimmick that artificially reduces federal spending and hides the real costs to consumers and taxpayers. DOE should not be rewarded for its incompetence by being given unlimited access to the Nuclear Waste Fund. State utility commissions require that utilities operate in a “prudent” manner and Congress should have no less of a standard when managing ratepayers’ money.

Congress should reject S. 2589 and S. 2610, and any other legislation that would weaken public health, safety, scientific, or technical standards for the proposed nuclear waste dump at Yucca Mountain.