

Response to the Nevada Independent article: *Concerns about government bullying and safety were the top reasons for those opposing the House Yucca bill*

The recent Nevada Independent article<sup>1</sup> illustrates that article's author, and those members of Congress who were polled in an effort to understand why they had voted against passage of the *Nuclear Waste Policy Amendments Act of 2018*<sup>2</sup> had limited understanding of how the country arrived at the situation it faces today, including important actions taken by Congress, and the efforts of the Department of Energy in assessing the suitability and safety of the Yucca Mountain site.

Before turning to the assertion of "bullying," it is meaningful to look at the assessment of safety of the Yucca Mountain site. Demonstrations of the safety of the site have been made by several National Laboratories, the Department of Energy and the Nuclear Regulatory Commission staff. Although Nevada claims that the site is not safe, the State has fought every effort to have their safety concerns adjudicated in the process required by Commission regulations. Nevada's refusal to enter into the licensing hearings before the Nuclear Regulatory Commission, where technical issues are to be adjudicated, must be viewed in this light.

Yucca Mountain was not designated as the national repository in the 1987 amendment to the Nuclear Waste Policy Act<sup>3</sup> as the article states; rather, that Congressional action selected Yucca Mountain as the only site to be studied for the first repository. That decision was political and came in Congressional budget reconciliation action; however, technical documents available at that time<sup>4</sup> that compared the sites being studied for the first repository clearly supported Yucca Mountain as the preferred site, and that preference was conveyed to Congress in 1986.<sup>5</sup>

The Yucca Mountain site was not designated, that is, approved by Congress, for development of a repository until 2002.<sup>6</sup> Before that happened Congress was presented with opportunities to assess whether or not the Department of Energy had demonstrated the suitability of the Yucca Mountain site for a repository and its safety. In the 1997 Energy and Water appropriation, Congress directed the Department of Energy to perform an assessment of the viability of the Yucca Mountain site for a repository.<sup>7</sup> The Department of Energy presented that assessment in late 1998.<sup>8</sup> No counter arguments were presented that precluded Congress from funding the Department to complete the next steps. In 2002, the Secretary of Energy made his recommendation to Congress<sup>9</sup> that the site was suitable. Nevada submitted its Notice of Disapproval<sup>10</sup> as allowed under law. After lengthy debates<sup>11</sup> that included many of the arguments presented in the Nevada Independent article, Congress overrode the Notice of Disapproval and passed the aforementioned Joint Resolution.<sup>12</sup> No persuasive countervailing technical arguments were presented to convince Congress that the Yucca Mountain site was not suitable.

Following the Site Recommendation and the overruling of Nevada's Notice of Disapproval, Nevada challenged the constitutionality of the Congressional Resolution designating the Yucca Mountain site, arguing that Congress impermissibly singled out the State to bear the unique burden of housing the nation's nuclear waste. The Court of Appeals for the District of Columbia Circuit rejected Nevada's claim<sup>13</sup> and upheld the Resolution, finding that Yucca Mountain is located on federal land, and Congress has the authority under the Property Clause to designate the site for development as a repository. The Court found no viable basis in the Constitution supporting Nevada's claim that Congress must in all instances exercise its Property Clause powers solely pursuant to neutral criteria that are generally applicable to all federal lands. The Congressional Resolution selecting the Yucca Mountain site for development was found to represent an appropriate exercise of Congress's Article IV, section 3 authority over federal property.

The "bullying" question of *Who gets to make the decision?*<sup>14</sup> is not new. It is important to understand that Congress, in passing the Nuclear Waste Policy Act, struggled long and hard with the issue of whether or not the selected state should have the right to veto the decision to place a repository in that state. States wanted to have the authority to opt out if they were selected; some states wanted an absolute veto. This was abundantly clear in 1976 when President Ford sent letters to thirty-six state governors informing

them of federal plans to look for repository sites. The response was overwhelming; a repository for high-level radioactive waste disposal was not desired by any state. When the country addressed the issue in development of the 1982 Nuclear Waste Policy Act, an issue of great importance would be, *Should the state in which the proposed repository site was to be located have absolute veto authority?*

An attempt was made by Senator McGovern, in 1978, to introduce an absolute veto related to siting the high-level radioactive waste repository into legislation. Senator McGovern proposed an amendment to the Energy Reorganization Act of 1974 to afford the states veto power over repository site selection. Senator Church addressed this:

... for years we have been trying to find a permanent depository for the wastes we have already created. As yet, we have not found a state government that has been willing to accept that depository. .... Under ... DOE policy it appears that if each of the states were to object to any site selected in that state, none would be available for establishment of the repository.

A second effort was made to delegate absolute veto authority to the states. Senator Proxmire was insistent on the protection of states' rights to the maximum possible extent. Two possible options were being considered: the first was that, with the issuance of a Notice of Disapproval by the state, the disapproval would not be automatically effective unless one house of the Congress supported the state's position. The second option was one where the state's notice was automatically effective with the requirement for both houses of Congress to vote to override the state. Senator Proxmire wanted a requirement that the state's position had to be overridden by a joint resolution of Congress. Proxmire believed that no other action could do more to put the host state on an equal footing with the Department of Energy.

Also, in response to a Congressional committee request, the General Accounting Office provided specific guidance in early 1981 during the debate on the Nuclear Waste Policy Act. That guidance noted:

...No matter how successful the technical aspect of DOE's waste isolation program, a repository will not likely be built until the political aspects and public fears are adequately addressed and resolved. We further concluded that if all state concurrence efforts fail, the federal government may have to act unilaterally to override state and local opposition and select the best repository site available. The waste problem is already of such paramount importance that a solution must be obtained, even if one or more segments of the public are dissatisfied.

Furthermore, the issue of delegation of veto authority to state governments had been considered at length by the State Planning Council on Radioactive Waste Management established by President Carter. The recommendation of the Council was for a statutorily defined conflict resolution mechanism that called upon the president or the Congress to make the final siting decision if the parties reached an impasse. Moreover, after significant consideration of the veto authority, the Council did not support the position that states should have an absolute veto, and agreed that states should not have veto authority.

Thus, the Senate, in passing the Nuclear Waste Policy Act, and recognizing its accountability in remediating the waste situation, made a deliberate decision to retain the siting decision within the collective Congress.

When President Obama shut down the Yucca Mountain program in 2010 to honor a commitment to Senator Reid, who was the Senate Majority leader from 2007 to 2015, it was not done through law, but through lack of appropriations. And even that was eventually reversed by a *mandamus*<sup>15</sup> decision forcing the Nuclear Regulatory Commission to complete its staff review of the Yucca Mountain License application — which found that the repository could be built and operated safely. Senator Reid was not able to bring legislation to the floor to change the country's high-level waste disposal policies, notwithstanding the fact that such legislation would never pass in the House. The Blue Ribbon Commission on America's Nuclear Future on America's Nuclear Future was created to forestall

arguments about lack of progress in high-level waste disposal. There were no new ideas put forth, and, as is clear today, there is limited appetite for a storage facility until there is a definite long-term repository.<sup>16</sup>

Finally, many of the respondents expressed concerns about transportation that seem not to reflect Department of Energy positions presented in the Environmental Impact Statements provided to the Nuclear Regulatory Commission with the license application. The concerns appear to reflect a belief that moving the high-level wastes to the repository would be by a large number of truck shipments. The Environmental Impact Statement is clear that the majority of the shipments would be by rail. Shipment by truck would occur for those wastes that could not be packed in large canisters and shipped by rail.<sup>17</sup>

---

<sup>1</sup> <https://thenevadaindependent.com/article/concerns-about-government-bullying-and-safety-were-the-top-reasons-for-those-opposing-the-house-yucca-bill>

<sup>2</sup> H.R. 3053, 115<sup>th</sup> Congress, Second Session. May 14, 2018

<sup>3</sup> Nuclear Waste Policy Act of 1982, *Public Law 97-425* as amended by *Public Law 100-203*.

<sup>4</sup> U.S. Department of Energy, *A Multiattribute Utility Analysis of Sites Nominated for Characterization for the First Radioactive Waste Repository—A Decision Aiding Methodology*, DOE/RW-0074, May 1986

<sup>5</sup> U.S. Department of Energy, *Recommendation by the Secretary of Energy of Candidate Sites for Site Characterization for the First Radioactive-Waste Repository*. DOE/RW-0048. May 1986.

<sup>6</sup> Joint Resolution Approving the Site at Yucca Mountain, Nevada, for the Development of a Repository for the Disposal of High-Level Radioactive Waste and Spent Nuclear Fuel, Pursuant to the Nuclear Waste Policy Act of 1982. *Public Law 107-200*. July 23, 2002.

<sup>7</sup> U.S. Congress. *Making Appropriations for Energy and Water Development for the Fiscal Year Ending September 30, 1997, and for Other Purposes*. H.R. Rep. No. 104-782. September 12, 1996.

<sup>8</sup> U.S. Department of Energy, *Viability Assessment of a Repository at Yucca Mountain*. DOE/RW-0508. December 1998

<sup>9</sup> Spencer Abraham, *Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982*. February 15, 2002.

<sup>10</sup> Kenny C. Guinn, *Official Notice of Disapproval of the Yucca Mountain Site*. April 8, 2002.

<sup>11</sup> See Congressional Record May 8, 2002; Congressional Record July 9, 2002. Points of discussion both for and against the override of Nevada's Notice of Disapproval in the House and Senate are summarized in: Michael D Voegele and Donald L. Vieth. *Waste of a Mountain*. Nye County Press, Tonopah Nevada. 2016. Chapter 11.7.

<sup>12</sup> *Op. Cit.* *Public Law 107-200*. July 23, 2002.

<sup>13</sup> United States Court of Appeals for the District of Columbia Circuit, *Nuclear Energy Institute, Inc., Petitioner, v. Environmental Protection Agency, Respondent*. Case No. 01-1258. July 9, 2004.

<sup>14</sup> Material summarized from: *Op. Cit.*: Voegele and Vieth. *Waste of a Mountain*: Chapter 6

<sup>15</sup> U.S. Court of Appeals for the District of Columbia Circuit, *In Re: Aiken County, et al., Petitioners. On Petition for Writ of Mandamus*. No. 11-1271. August 3, 2012

<sup>16</sup> See, for example, Tripp Stelnicki. *New Mexico lawmakers hear arguments on temporary nuclear waste storage*. May 18, 2018. [http://www.santafenewmexican.com/news/local\\_news/new-mexico-lawmakers-hear-arguments-on-temporary-nuclear-waste-storage/article\\_68e03ca7-a325-506f-8cfe-939b1a18f28c.html](http://www.santafenewmexican.com/news/local_news/new-mexico-lawmakers-hear-arguments-on-temporary-nuclear-waste-storage/article_68e03ca7-a325-506f-8cfe-939b1a18f28c.html)

<sup>17</sup> U.S. Department of Energy, *Record of Decision on Mode of Transportation and Nevada Rail Corridor for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, NV*. 69 FR 18557. April 8, 2004.