

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

CHAIRMAN:  
Allison M. Macfarlane

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In the Matter of )  
U.S. DEPARTMENT OF ENERGY ) Docket No. 63-001-HLW  
(High-Level Waste Repository) )  
\_\_\_\_\_ )

**DECISION ON THE MOTION OF NYE COUNTY, NEVADA, FOR  
RECUSAL/DISQUALIFICATION OF NRC CHAIRMAN ALLISON M. MACFARLANE**

**Introduction**

Nye County, Nevada, filed a motion on August 23, 2013, requesting that I recuse myself and be disqualified from any participation in the above-captioned proceeding, which involves the Department of Energy's (DOE) license application for a geologic repository at Yucca Mountain in Nevada.<sup>1</sup> The State of Nevada filed an answer opposing the Motion for Recusal,<sup>2</sup> and Nye County requested an opportunity to reply to Nevada's answer.<sup>3</sup> Although I do not find that Nye County has demonstrated compelling circumstances or that Nye County could not reasonably have anticipated Nevada's arguments, as a matter of discretion, I allow Nye County leave to file

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<sup>1</sup> *Nye County's Motion for Recusal/Disqualification of NRC [Chairman] Allison M. Macfarlane and Points and Authorities in Support of Motion* (Aug. 23, 2013) (Motion for Recusal), at 1. The State of South Carolina, Aiken County, South Carolina, and the National Association of Regulatory Utilities Commissioners joined in this motion.

<sup>2</sup> *State of Nevada Answer in Opposition to Nye County's Motion for Recusal/Disqualification of Chairman Macfarlane* (Aug. 30, 2013).

<sup>3</sup> *Nye County's Request for Leave to File Reply to State of Nevada's Answer in Opposition to Nye County's Motion for Recusal/Disqualification of Chairman Macfarlane* (Sept. 5, 2013); *Nye County's Reply to State of Nevada's Answer in Opposition to Nye County's Motion for Recusal/Disqualification of Chairman Macfarlane* (Sept. 5, 2013) (Reply).

its reply.<sup>4</sup> I have considered all of these pleadings in reaching my decision to deny Nye County's Motion for Recusal.

Nye County has raised several concerns about my ability to be objective and fair in this adjudicatory proceeding, and I appreciate the opportunity to address these concerns. One of my most important duties as a member of the Commission is to ensure that our adjudicatory process is conducted fairly and impartially, and I am fully committed to fulfilling that duty – I owe the public no less.

Nye County's Motion for Recusal is premised upon the mistaken notion that I have somehow prejudged DOE's license application. I can state without hesitation that I have not prejudged the technical, policy, or legal issues in this adjudicatory proceeding, and that my expertise will enhance the Commission's deliberations and decision-making. In fact, I have not looked at the Department of Energy's (DOE) license application, the Nuclear Regulatory Commission (NRC) staff's safety or environmental reviews, or considered how to apply the law or NRC regulations to determine the adequacy of the application, and I have not made up my mind on any of the issues raised by the application.

In the United States, the regulatory process contemplates that people with expertise will lead regulatory commissions. These agencies exist to bring their independent technical expertise to bear on issues within their jurisdiction. Those who have been selected to serve on the Nuclear Regulatory Commission have relevant expertise in the field of nuclear energy. Some gained that experience in the Nuclear Navy, some have addressed nuclear issues in service to the Congress, and some have been professors of nuclear engineering. It is to be *expected* that Commissioners' technical backgrounds will inform, in part, their decision-making.

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<sup>4</sup> Under the NRC's rules of practice, a moving party "has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer." See 10 C.F.R. §§ 2.323(c), 2.1000. "Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it wishes to reply." 10 C.F.R. § 2.323(c).

Nye County's motion confuses scientific and academic research and writing with regulatory decision-making in contested proceedings on licensing applications. In the former, an academic or scientist attempts to put before the reader the complexities and uncertainties surrounding an issue in order to invite debate and further scientific research. In reaching a licensing decision, however, the Commission is required to review all the positions advanced by the parties and determine whether the application satisfies regulatory requirements. As to the sufficiency of this license application, I can state unequivocally that I have not reached any conclusions, and I have an open mind. I will address the legal arguments Nye County raises below.

### **Background**

In 2008, the DOE filed an application seeking authorization from the NRC to construct a geologic repository for the storage of high-level nuclear waste at Yucca Mountain, Nevada.<sup>5</sup> In September 2008, the NRC accepted the application for docketing, and in October 2008 the Commission published a *Federal Register* notice offering members of the public an opportunity to request a hearing.<sup>6</sup> Several interested parties, including Nye County, requested and were granted a hearing in this matter.<sup>7</sup> The NRC staff initiated a comprehensive technical review of the application and issued one volume of its Safety Evaluation Report (SER), but has not completed or issued the remaining four volumes of the SER.<sup>8</sup>

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<sup>5</sup> See Department of Energy; Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, NV, 73 Fed. Reg. 53,284, 53,284 (Sept. 15, 2008).

<sup>6</sup> *Id.*; U.S. Department of Energy (High Level Waste Repository); Notice of Hearing and Opportunity to Petition for Leave to Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain. 73 Fed. Reg. 63,029 (Oct. 22, 2008)

<sup>7</sup> LBP-09-06, 69 NRC 367, 377-78 (2009).

<sup>8</sup> Hearing on the Re-nomination of Allison Macfarlane to be a Member of the Nuclear Regulatory Commission Before the S. Comm. on Environment and Public Works, 113th Cong.

In 2010, the DOE filed a motion to withdraw its application, which the NRC Atomic Safety and Licensing Board (ASLB) ultimately denied.<sup>9</sup> In 2011, the Commission directed the staff and the ASLB to conduct an orderly closing of the technical review and adjudicatory proceeding.<sup>10</sup>

The States of South Carolina and Washington, as well as interested parties within those states, sought a writ of mandamus requiring the NRC to complete its review of the DOE application.<sup>11</sup> On August 13, 2013, the United States Court of Appeals for the D.C. Circuit granted the writ of mandamus and ordered the NRC to “promptly continue with the legally mandated licensing process” for the DOE’s Yucca Mountain application.<sup>12</sup> Nye County filed its motion requesting my recusal on August 23, 2013.

### Discussion

As part of my academic work, I co-edited a book entitled, *Uncertainty Underground: Yucca Mountain and the Nation’s High-Level Nuclear Waste*, which was published in 2006.<sup>13</sup> In 2003 and 2006, I also testified before Congress on the topic.<sup>14</sup> Nye County uses my past

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(May 24, 2013) (Responses by Allison Macfarlane to Additional Questions from Senator Vitter) (unofficial transcript).

<sup>9</sup> U.S. Department of Energy’s Motion to Withdraw (March 3, 2010); *U.S. Department of Energy* (High Level Waste Repository), LBP-10-11, 71 NRC 609 (2010).

<sup>10</sup> CLI-11-07, 73 NRC 212 (2011).

<sup>11</sup> *In re Aiken County, et al.*, No. 11-1271 (D.C. Cir. Aug. 13, 2013) (slip op. at 4).

<sup>12</sup> *Id.* (slip op. at 22.).

<sup>13</sup> Motion for Recusal at 3, 5, 6, 8, 9, 11 (citing UNCERTAINTY UNDERGROUND: YUCCA MOUNTAIN AND THE NATION’S HIGH LEVEL WASTE (Allison M. Macfarlane & Rodney C. Ewing eds., The MIT Press 2006)).

<sup>14</sup> Status of the Yucca Mountain Project: Hearing Before the S. Comm. on Environment and Public Works, 109th Cong. 32 (March 1, 2006) (Statement of Allison Macfarlane, Research Associate, Program in Science, Technology and Society, Massachusetts Institute of Technology) (unofficial transcript); Oversight of Department of Energy Activities at the Yucca

academic work, Congressional testimony, and a quote in an article dated June 23, 2009,<sup>15</sup> to argue that now, in 2013, I should recuse myself from participating in the consideration of DOE's license application and the NRC staff's analysis of that application—neither of which I have even seen. Based largely upon my academic work, Nye County argues that I have “echoed the arguments of opponents to the repository,” and consequently have prejudged the issues that would come before me as Chairman of the NRC in the Yucca Mountain licensing proceeding.<sup>16</sup> My skills as a scientist and as a geologist are valuable tools in my role as a regulator—among those skills is objectivity in the face of new data. Academic work performed on the basis of data available in the early 2000s is not a basis for recusal now.

NRC Commissioners look to the standards that apply to federal judges<sup>17</sup> and make their own decisions regarding motions for recusal from adjudicatory proceedings.<sup>18</sup> However “mere proof that [a Commissioner] has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute” does not in and of itself overcome the presumption of objectivity or require disqualification.<sup>19</sup>

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Mountain Site: Hearing Before the Subcomm. on Energy and Water Development of the S. Comm. on Appropriations, 108th Cong 12 (May 28, 2003) (Statement of Allison Macfarlane, Senior Research Associate, Massachusetts Institute of Technology) (unofficial transcript).

<sup>15</sup> Motion for Recusal at 3, 5, 6, 9, 10 (citing David Talbot, *Life After Yucca Mountain*, MIT Technology Review, June 23, 2009).

<sup>16</sup> Motion for Recusal at 8 - 13; Reply at 5 - 7.

<sup>17</sup> 28 U.S.C. § 455(a) provides that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(b) provides for disqualification where a justice, judge, or magistrate judge of the United States, “has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.”

<sup>18</sup> *In re Joseph Macktal*, CLI-89-14, 30 NRC 85, 91 (1989).

<sup>19</sup> *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980) (citing *Hortonville Joint School District No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) and *United States v. Morgan*, 313 U.S. 409, 413 (1941)).

It is well-established that mere knowledge of the subject matter or prior expression of a general opinion is not grounds for disqualification. For example, in his seminal opinion denying a motion for disqualification Justice Rehnquist pointed out that Justice Black, who had introduced the Fair Labor Standards Act as a Senator and also presided over hearings on the Act, participated in the case reviewing the Act's constitutionality.<sup>20</sup> Justice Rehnquist then reviewed the actions of several justices including Justices Frankfurter and Jackson and Chief Justices Vinson and Hughes, and concluded that making general statements of policy and position do not disqualify a Justice from participating in a case involving that area of the law.<sup>21</sup> Similarly, Judge Kavanaugh pointed out that Justice Breyer had participated in a case reviewing the constitutionality of the Sentencing Guidelines, after having served on the Sentencing Commission that helped draft the guidelines.<sup>22</sup>

Indeed, it is often precisely *because of* their knowledge of and intense involvement in a specific regulated field that persons are appointed to lead regulatory commissions and, ultimately, to issue adjudicatory decisions with respect to issues arising in that field. Accordingly, Commissioners have consistently considered the issue of recusal not simply by inviting litigants to peruse past writings and speeches in an effort to identify disqualifying knowledge or views about a particular issue. Instead, the relevant inquiry has focused on whether a particular Commissioner possesses knowledge from an extrajudicial source *and* that

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<sup>20</sup> *Laird v. Tatum*, 409 U.S. 824, 831 (1972).

<sup>21</sup> *Id.* at 831-33.

<sup>22</sup> *Baker & Hostetler v. Department of Commerce*, 471 F.3d 1355, 1358 (D.C. Cir. 2006). See also *National Rifle Association v. City of Evanston*, 2008 WL 3978293 (N.D. Ill. 2008) (judge who had written an article in 1976 on federal gun control legislation denied request for recusal); *Carter v. West Publishing Company*, 1999 WL 994997 at \*9 (11th Cir. 1999) ("Courts have uniformly rejected the notion that a judge's previous advocacy for a legal, constitutional, or policy position is a bar to adjudicating a case, even when that position is directly implicated before the Court.").

knowledge has served or threatens to serve as the basis for a judicial decision,<sup>23</sup> or whether judicial conduct demonstrates a pervasive bias or prejudice.<sup>24</sup> These considerations reflect the fundamental principle that a Commissioner “should disqualify himself only if ‘a reasonable man, cognizant of all the circumstances, would harbor doubts about the judge’s impartiality.’”<sup>25</sup>

I don’t believe that a reasonable observer, who is familiar with the entire body of my work, including my work as a sitting Commissioner, and who is familiar with Commission processes, and the applicable legal principles, would question my ability to render judicial decisions in this proceeding fairly and impartially. With respect to the actual material that the Commission would be called upon to review in a Yucca Mountain licensing proceeding, including the key question of whether compliance with Commission regulations has been demonstrated, I have not yet formed, let alone expressed, any views at all regarding the DOE license application. In fact, I have not looked at the DOE’s license application, or any of the NRC’s Technical Evaluation Reports (TER) or SER volumes. In my capacity as a scientist, years before the DOE license application was filed, I conducted research related to Yucca Mountain, and I wrote and spoke on the topic. But many years have passed since my Yucca-related research, and that research was conducted without the benefit of the DOE’s license application, or the NRC staff’s technical or environmental review. I can say without hesitation that I have formed no views on the adequacy of the DOE license application.

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<sup>23</sup> *In re Joseph Macktal*, CLI-89-14, 30 NRC at 91; *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC 1363, 1366 (1982); see, e.g., *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 590-91 (D.C.Cir.1970) (agency chairman should have recused himself in light of his public statements indicating prejudgment of the case).

<sup>24</sup> *In re Joseph Macktal*, CLI-89-14, 30 NRC at 91 (citing *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), CLI-82-9, 15 NRC at 1366).

<sup>25</sup> *Id.* at 91 (quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-88-29, 28 NRC 637, 639 (1988)).

Although Nye County argues that I have “echoed the arguments of opponents to the repository,”<sup>26</sup> my research and published work was completed *years before* the DOE submitted its license application. As a result of my research and analyses, I addressed, based on information then available to me, matters such as Total System Performance Assessment (TSPA) modeling, the nuclear waste policy process, and the geologic environment of the proposed repository.<sup>27</sup> None of my analyses or statements address whether an application for a waste repository at Yucca Mountain would satisfy NRC regulatory requirements.

While I have made public statements concerning Yucca Mountain, I did so as a professor and a geologist in order to further scientific research and public debate. I highly value understanding the full range of views on any issue, a point I have consistently made to the staff at the Nuclear Regulatory Commission since I arrived in 2012. For instance, during my speech at the Regulatory Information Conference in March 2013, I noted, “In order for our regulatory process to be successful, we must take a broad range of viewpoints into account.”<sup>28</sup> My past research has always been set in the broader context of understanding the technical and societal issues associated with the back end of the nuclear fuel cycle. When I have written about Yucca Mountain, it has been in the context of geologic disposal of nuclear waste writ large, so that any country could draw lessons from U.S. experience to improve on their own nuclear waste disposal program. In my book, I note, “Although the Yucca Mountain site is unique in many

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<sup>26</sup> Motion for Recusal at 8 – 13; Reply at 5 – 7.

<sup>27</sup> UNCERTAINTY UNDERGROUND: YUCCA MOUNTAIN AND THE NATION’S HIGH LEVEL WASTE, *supra* n.13; Rodney Ewing and Allison Macfarlane, Yucca Mountain, *Science*, at 296, 659-660 (Apr. 26, 2002); and Allison Macfarlane, Underlying Yucca Mountain: The Interplay of Geology and Policy in Nuclear Waste Disposal, *Social Studies of Science*, 33/5, 783-807 (Oct. 2003).

<sup>28</sup> Allison Macfarlane, *The Next 25 Years*, Regulatory Information Conference, Rockville, MD, March 12, 2013.

respects, many of the issues that we highlight here are the same for other geologic repositories.”<sup>29</sup>

My purpose in researching, writing, and speaking about Yucca Mountain was to ensure that any geologic repository built in the United States or elsewhere would be as safe and secure as it could possibly be. In that sense, I view my prior work as a geologist to be consistent with the NRC’s mission, and similar to the work of the NRC staff, which is dedicated to fulfilling that mission. The NRC conducts rigorous reviews of the design and license applications it receives; we do not “rubber stamp” design or license applications. Where we challenge or criticize design or license applications, we do so for the purpose of protecting public health and safety, the common defense and security, and the environment.

Nye County asserts that I support withdrawal of the DOE license application, oppose the technical and policy approaches in DOE’s license application, support efforts to develop an entirely new approach to nuclear waste disposal, and advocate “going back to the drawing board” to “develop new alternatives.”<sup>30</sup> These assertions are unfounded and inconsistent with my prior work and statements on Yucca Mountain.

As I stated in the book, I was “not trying to suggest abandoning Yucca Mountain and going back to the drawing board.”<sup>31</sup> Instead, I was trying to “put forth some ideas for improving the current situation” based on my analyses and those of the other scientists who contributed to the book.<sup>32</sup> I noted that, in selecting contributors for the book, my co-editor and I “attempted to include authors from a wide range of disciplines who hold differing views on the suitability of

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<sup>29</sup> UNCERTAINTY UNDERGROUND: YUCCA MOUNTAIN AND THE NATION’S HIGH LEVEL WASTE, *supra* n. 13, at 4.

<sup>30</sup> Motion for Recusal at 4.

<sup>31</sup> UNCERTAINTY UNDERGROUND: YUCCA MOUNTAIN AND THE NATION’S HIGH LEVEL WASTE, *supra* n. 13, at 406.

<sup>32</sup> *Id.*

Yucca Mountain as a repository site.”<sup>33</sup> And we explicitly state in the book that, “This [book] is not a judgment on the suitability of Yucca Mountain as a repository for spent nuclear fuel and high-level nuclear waste. We leave that judgment to the reader.”<sup>34</sup>

Nye County asserts that my knowledge of the issues involved in the adjudication requires my disqualification and recusal.<sup>35</sup> My prior knowledge of an issue in an adjudicatory proceeding does not automatically result in my disqualification. Clearly, Commissioners have and develop expertise and knowledge that they use in regulatory decision-making. My views are not etched in stone, I will allow myself to be persuaded by new information or evidence that is presented in the proceeding, and I will be fair to all parties in the proceeding.<sup>36</sup>

As a member of the Commission, sitting in an adjudicatory capacity in a licensing proceeding, I do not make decisions about the facts in the case. The parties are responsible for establishing a sound record that addresses the issues, and the ASLB governs that process. When a party appeals an ASLB decision, the Commission reviews the record much the same way a court of appeals might. Decisions I make as a member of the Commission sitting in an adjudicatory capacity are based on the record, the parties’ arguments, and whether the ASLB properly applied the Commission’s rules and precedents in reaching its decision. If called upon to do so in this proceeding, I will review the comprehensive record developed by the NRC in light of the applicable regulatory requirements and render an impartial decision on the

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<sup>33</sup> *Id.* at x.

<sup>34</sup> *Id.*

<sup>35</sup> Motion for Recusal at 11-13; Reply at 3-5.

<sup>36</sup> See *United Steelworkers of America v. Marshall*, 647 F.2d at 1208, 1210 (citing *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (other citations omitted)) (Disqualification of an agency adjudicator is required when his public statements about pending cases revealed she “has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it[.]” and had “demonstrably made up her mind about important and specific factual questions and was impervious to contrary evidence.”).

application. Analyses that I conducted for the book, which were completed in the early 2000 time frame, years before the DOE submitted its license application, will not govern; obviously, my decision on the merits of the Yucca Mountain license application must ultimately be based on the adjudicatory record, not on the information I analyzed many years ago in my writings. As I have testified, I have not analyzed the DOE license application or the NRC's technical analyses, I remain impartial about whether the DOE's license application meets the NRC's regulatory requirements, and I will keep an open mind.<sup>37</sup>

As support for its assertion that I have prejudged the issues in this licensing proceeding, Nye County references a quote attributed to me in a 2009 article, in which I was asked if the Yucca Mountain site was unsuitable and I replied "yes."<sup>38</sup> I have made strong statements that sparked useful debate about Yucca Mountain, but I made these statements as a geologist and professor in an entirely different setting, without attempting to address whether any DOE application could or would satisfy NRC regulatory requirements. I had not reviewed the application or the NRC's safety or environmental reviews, or considered how to apply the law and the applicable NRC regulations to determine the adequacy of the application.

When asked whether I believe Yucca Mountain to be unsuitable as a permanent waste repository during my first confirmation hearing, I testified that "I have not examined all the recent evidence on Yucca Mountain, including the Department of Energy's application and the NRC's technical review of that application and would have to do so to reach a judgment about its

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<sup>37</sup> Hearing on the Nomination of Allison Macfarlane and Re-nomination of Kristine L. Svinicki to be Members of the Nuclear Regulatory Commission Before the S. Comm. on Environment and Public Works, 112th Cong. (June 13, 2012) (Responses by Allison Macfarlane to Additional Questions from Senators Sessions, Barrasso, and Crapo) (unofficial transcript); Hearing on the Re-nomination of Allison Macfarlane to be a Member of the Nuclear Regulatory Commission Before the S. Comm. on Environment and Public Works, 113th Cong. (May 23, 2013) (Responses by Allison Macfarlane to Additional Questions from Senator Vitter) (unofficial transcript).

<sup>38</sup> David Talbot, *Life After Yucca Mountain*, MIT Technology Review, June 23, 2009.

current suitability.”<sup>39</sup> When asked about this quote during a House Energy and Commerce Committee Hearing on July 24, 2012, I testified that while I was not sure of the context of the quote, the quote was made before the license application was submitted, I had not read the license application or the NRC’s technical analyses, and that with time, knowledge changes, more evidence comes to light, and I intend to keep an open mind.<sup>40</sup> I stand by my testimony; I have and will keep an open mind. The quote attributed to me in June 2009, taken together with everything else that I have written and said on this subject, does not support the conclusion that I have prejudged the facts and the law regarding the particular license application at issue.<sup>41</sup> I recognize that any NRC decision on site suitability must be based on a complete, current, and fully developed record.

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<sup>39</sup> Hearing on the Nomination of Allison Macfarlane and Re-nomination of Kristine L. Svinicki to be Members of the Nuclear Regulatory Commission Before the S. Comm. on Environment and Public Works, 112th Cong. (June 13, 2012) (Response by Allison Macfarlane to an Additional Question from Senator Barrasso) (unofficial transcript).

<sup>40</sup> NRC Policy and Governance Oversight: Hearing Before the Subcomm. on Environment and the Economy and the Subcomm. on Energy and Power of the H. Comm. on Energy & Commerce, 112th Cong. \_ (July 24, 2012)(unofficial transcript):

Mr. Murphy: In 2009, when you were asked by a writer for the MIT Technology Review, the question “is Yucca really unsuitable?” you answered yes at that time. Are you saying your opinion has changed? And I put this in the context of what the other commissioner said, the value of having a more lengthy and detailed answer to things because maybe these things cannot be reduced to a yes/no answer. Has your position changed? Is it yes? Is it no? Is it we have more work to do?

Ms. Macfarlane: I am not sure of the context of that quote, so I can’t speak directly to that quote, but what I can tell you – and maybe in a sense of reassuring – is that I have spent much time researching Yucca Mountain. I believe all the analyses that I have done are technically defensible. As a scientist, I would not try to publish anything that wasn’t technically defensible; it wouldn’t be publishable. Most of the analyses that I did of Yucca Mountain for the book, which was published in 2006, were done in the early 2000 time frame. That was before the license application was submitted. I have not read the license application. I have not read yet the NRC’s technical analyses. Of course, with time, knowledge changes, more evidence comes to light, and I intend to keep an open mind.

<sup>41</sup> *NIRS v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 2007).

Finally, I believe there are other factors to consider on the issue of my recusal. I do not believe it would serve the public interest for a Commissioner, particularly one with substantial technical expertise in geology and on geologic disposal of nuclear waste, to recuse herself where it is unnecessary to do so.<sup>42</sup> Of course, the duty to sit as a Commissioner in difficult cases is a factor to carefully weigh, but that duty does not override the public's right to a fair and impartial adjudicatory process.<sup>43</sup>

Although Nye County asserts that many have already concluded that I have prejudged the issues in this case,<sup>44</sup> any decision whether my impartiality "can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported."<sup>45</sup> Fair minded people, having considered the entire body of my work, including my work as Chairman of the NRC, applicable legal principles, and my statements explaining my decision on this motion, will not doubt my ability to be fair and impartial in this licensing proceeding, recognizing that I have not examined the application or prejudged the facts or the law.

### **Conclusion**

Throughout my service as Chairman of the NRC, I have kept an open mind and have fairly and objectively considered all of the matters that have come before me on their individual merits, based on the evidence in the record and the parties' arguments, and without prejudice. I will consider all of the issues that arise in this proceeding with the same level of

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<sup>42</sup> See *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913, 915 (2004) ("We do not think it would serve the public interest to go beyond the requirements of the statute and recuse ourselves, out of an excess of caution ... Even one unnecessary recusal impairs the functioning of the Court.") (SCALIA, J., respecting recusal).

<sup>43</sup> See *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d at 591 (citing *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (1962) (An "administrative hearing 'must be attended, not only with every element of fairness but with the very appearance of complete fairness[.]").

<sup>44</sup> Reply at 5 (citations omitted).

<sup>45</sup> *Cheney v. United States District Court for the District of Columbia*, 541 U.S. at 915 (SCALIA, J., respecting recusal) (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (REHNQUIST, C.J., respecting recusal)).

fairness and objectivity. I have sworn to faithfully execute the laws of the United States and I fully intend to do so, in this and every matter that comes before me.

I have carefully considered the Motion for Recusal seeking my disqualification from participating in this proceeding, the Reply, and the applicable legal standards. I find no basis requiring my recusal or disqualification, and therefore deny the motion.

**/RA/**

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Allison M. Macfarlane  
NRC Chairman

Dated at Rockville, Maryland  
this 9th day of September, 2013.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )

U.S. DEPARTMENT OF ENERGY )  
(High-Level Waste Repository) )

) Docket No. 63-001-HLW  
) ASLBP No. 09-892-HLW-CAB04  
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "**DECISION ON THE MOTION OF NYE COUNTY, NEVADA, FOR RECUSAL/DISQUALIFICATION OF NRC CHAIRMAN ALLISON M. MACFARLANE,**" have been served upon the following persons by Electronic Information Exchange and by e-mail. Some participants do not have current digital certificates.

U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board (ASLBP)  
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**Construction Authorization Board 04 (CAB04)**

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**DECISION ON THE MOTION OF NYE COUNTY, NEVADA, FOR RECUSAL/DISQUALIFICATION OF  
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