

SUSTAINABILITY WITHOUT POLITICS: HOW THE NERO ACT CAN ENERGIZE THE NUCLEAR REGULATORY COMMISSION

*Congressman Lee Terry**

Introduction

Oversight and Government Reform Committee Hearing Concerning the Leadership of the Nuclear Regulatory Commission, 2157 Rayburn House Office Building December 14th, 2011

[S]o, basically, one of the Commissioners just lied under oath is what you're saying," Rep. Darrel Issa (R-CA) queried staring down at Chairman Jaczko from his position at the head of the House Oversight and Government Reform Committee Panel.¹ The tension in the room is palpable as Jaczko pauses to collect his thoughts before giving a vague diplomatic response. The exchange between Issa and Jaczko goes back and forth like this for several minutes, Issa aggressively directing questions at Jaczko, Jaczko attempting to divert the questions with bland, non-controversial responses. The purpose of the hearing this day is to explore allegations of managerial misconduct levied at Chairman Jaczko from Nuclear Regulatory Commission (NRC) staff and Commissioners. Specifically, he has been accused of using bullying and intimidation tactics to manage the agency, as well as, manipulating the flow of information to his fellow Commissioners. Seemingly unconcerned, Chairman Jaczko sits calmly in the midst of the other Commissioners, all of whom have accused him of impeding the functions of the NRC, and all of whom are testifying against him this day.

Since its inception in 1974, the Nuclear Regulatory Commission (NRC) has been viewed as a world-class regulatory agency. In recent years, this archetype of good government has faltered. Under the leadership of Chairman Jackzo, we have

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1. See *The Leadership of the Nuclear Regulatory Commission: Hearing Before the H. Oversight and Gov't Reform Comm.*, 112th Cong. (2011) (statement of Rep. Darrel Issa, Chairman, H. Oversight and Gov't Reform Comm.).

seen how a single individual, determined to expand the bounds of his authority, can undermine the Commission's effectiveness.² Organizational weaknesses have been exposed to the Commission and in order for the NRC to function effectively, these weaknesses must be addressed. With the passage of my bill, The Nuclear Emergency Re-Establishment of Obligation (NERO) Act, I hope to strengthen the current legislation and in doing so, return the NRC to its former prominence.

In Part I of this paper I will provide you with background information about how the agency operates, its traditional practices, and how the Commission has recently deviated from its established norms under the leadership of Gregory Jaczko. Part II gives a brief summary of the current legislation that dictates how the Nuclear Regulatory Commission functions, and Part III is a description of my proposed legislation, the NERO Act, which would clarify the role and obligations of the Chairman.

I. Background

A. How the Agency Functions

In order to understand the need for NERO it is necessary to explain how the Nuclear Regulatory Commission functions. When the Energy Reorganization Act of 1974 was passed, it created an independent agency whose duty it is to regulate the civilian use of radioactive materials.³ The agency is headed by five commissioners, who are nominated by the President, and confirmed by the Senate for five-year terms. To provide a regular rotation of membership their terms are staggered so that one Commissioner's term expires on June 30th every year. So as to avoid partisanship, no more than three Commissioners may be from the same political party.⁴ Including Chairman Jaczko, President Obama has appointed three of the five present NRC Commissioners. The Commission is currently operating with a 3-2 democratic majority.

From the five Commissioners, the President selects one to be the Chairman and official spokesperson of the Commission. The Chairman's unique responsibilities include serving as the agency's principal executive officer and exercising control over the Commission's executive and administrative functions.⁵ All the Commissioners, including the Chairman, have equal responsibility and authority over the decisions and actions of the Commission. In order to best do their jobs, each Commissioner is entitled full access to all information relating to the performance of his or her duties, and one vote. No action is taken unless it is

2. See generally *The Leadership of the Nuclear Regulatory Commission: Hearing Before the H. Subcomm. on Env't and the Econ.*, 112th Cong. (2012).

3. See U.S. Nuclear Regulatory Comm'n, History, <http://www.nrc.gov/about-nrc/history.html#aec-to-nrc> (last visited Oct. 17, 2012).

4. See U.S. Nuclear Regulatory Comm'n, Organization & Functions, <http://www.nrc.gov/about-nrc/organization.html> (last visited Oct. 17, 2012).

5. See U.S. Nuclear Regulatory Comm'n, Policymaking <http://www.nrc.gov/about-nrc/policymaking.html> (last visited Oct. 17, 2012).

approved by a majority vote of the members present.⁶

When making decisions, the primary tool used is a written paper referred to as a “SECY Paper.” SECY Papers primarily stipulate policy, security, rulemaking, and adjudicatory matters, as well as, general information.⁷ Commissioners also utilize COMs, which are written memorandum exchanged between the five members. COMs can present new issues for Commission consideration, or comment on an action already pending review. Occasionally, a staff memorandum may contain a recommendation to obtain direction from the Commission. When that occurs, the memorandum is circulated in the COM system as a COMSECY.⁸ The Secretary records the results of the Commission action on each SECY paper and action memorandum (COM or COMSECY) in a Staff Requirements Memorandum (SRM). The Secretary then issues a Commission Voting Record (CVR), which includes a record of the votes and the individual views of each Commissioner. Following Commission meetings, SRMs are issued that detail all discussion and/or requests that were made throughout the duration of the meeting.⁹

The Commission operates under the statutory guidance known as the Reorganization Plan.¹⁰ This is supplemented by the Internal Commission Procedures, which reiterates the Reorganization Plan Provisions concerning the role of the Commission as a whole and the Chairman’s individual roles.¹¹

For years the Nuclear Regulatory Commission was held to be an archetype of how good government functions. Despite their political differences, the Commissioners were able to work together, functioning as a scientific body, as free from political maneuvering as is possible in a governmental agency. This cohesiveness arguably made the NRC the strongest regulatory agency in the country and it is largely because of this strength that we, as a country, have been able to avoid a large-scale nuclear incident.

Recently, the agency has moved away from its traditional practices. In 2005, at the urging of Sen. Harry Reid (D-NV), Gregory Jaczko was appointed to the NRC. Prior to his tenure as an NRC Commissioner, Jaczko served as Reid’s Appropriations Director and science policy. adviser Jaczko had also previously been employed as a legislative assistant to Rep. Ed Markey (D-MA), an outspoken opponent of nuclear energy.¹² In 2009, despite the NRC generally pulling from the rank of long-time commissioners, President Barack Obama appointed Jaczko as Chairman of the NRC.

6. *See id.*

7. *See id.*

8. *See* U.S. Nuclear Regulatory Comm’n, Commission Action Memoranda (COMs and COMESCYS), <http://www.nrc.gov/reading-rm/doc-collections/commission/comm-secy/> (last visited Oct. 17, 2012).

9. *See* U.S. Nuclear Regulatory Comm’n, Policymaking, <http://www.nrc.gov/about-nrc/policymaking.html> (last visited Oct. 17, 2012).

10. *See* Nuclear Regulatory Comm’n, Governing Legislation, <http://www.nrc.gov/about-nrc/governing-laws.html> (last visited Oct. 17, 2012).

11. *See* Nuclear Regulatory Comm’n, Internal Commission Procedures, <http://www.nrc.gov/about-nrc/policy-making/internal.html> (last visited Oct. 17, 2012).

12. *See* Matthew L. Wald, *Chairman of the NRC to Resign Under Fire*, N.Y. TIMES, May 22, 2012, at A13.

Three years into his five-year term Jaczko has chosen to step down as Chairman.¹³ His resignation came after extensive allegations of misconduct from lawmakers and colleagues.¹⁴ Specifically, Chairman Jaczko was accused of unilaterally and improperly closing out the NRC's review of the Department of Energy's Yucca Mountain repository license application while the government was operating under a continuing resolution (CR) in fiscal year 2011.¹⁵ He was also accused of purposefully preventing the Commission from completing its ruling on the Atomic Safety Licensing Board's decision to deny the Department of Energy's motion to withdrawal its Yucca Mountain repository license application from the NRC.¹⁶ The Inspector General's report also raised concerns about the Chairman's management style towards staff and Commissioners,¹⁷ and whether the Chairman withheld information from the other Commissioners that kept them from effectively fulfilling their statutory responsibility.¹⁸ In June 2011, after conducting an investigation into the alleged misconduct of Jaczko, the NRC Inspector General (IG) published a report with his findings. Shortly after its publication, a second internal probe was initiated after new accusations were made against Chairman Jaczko. That report was released in June 2012.

B. Findings of the Reports

The first Inspector General's Report dealt predominantly with the closure of the Yucca Mountain Project. Yucca Mountain, located 100 miles northwest of Las Vegas, was the proposed site for a deep geological repository storage facility for spent nuclear reactor fuel and other high level radioactive waste.¹⁹ Currently, the policy for the disposal of spent nuclear fuel and high-level radioactive waste is defined by the Nuclear Waste Policy Act of 1982,²⁰ as amended (NWSA) and the Energy Policy Act of 1992.²¹ These Acts dictate that spent nuclear fuel and high-level radioactive waste must be disposed of underground, in a deep geological repository. The NWSA specifically names Yucca Mountain as the sole candidate for such a facility. NWSA guidelines state, the NRC "shall consider an application

13. *Id.*

14. See Mary Bruce, *Nuclear Safety Chief Resigns Amid Criticism*, May 21, 2012, <http://abcnews.go.com/blogs/politics/2012/05/nuclear-safety-chief-resigns-amid-criticisms/> (last visited Oct. 17, 2012).

15. See Hubert Bell, NRC, Office of the Inspector General, OIG-11-05, *Investigation into NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository License Application* (2011) at 7.

16. See *id.* at 29 ("Under the Commission's statutes and standing procedures, policy determinations are made by a majority vote of the Commission, not by the unilateral action of the Chairman.")

17. See *id.* at 35.

18. See *id.* at 37.

19. See Jay Schecker, *Yucca Mountain: The Million-Year Promise*, Los Alamos Science and Technology, Dec. 2008, at 15, available at <http://lanl.gov/science/1663/issues/december2008.pdf> (last visited Oct. 17, 2012).

20. See Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425 (1982).

21. See Energy Policy Act of 1992, Pub. L. No. 102-486 (1992).

for a construction authorization for all or part of a repository”²² and shall issue a final decision approving or disapproving the issuance of a construction authorization not later than three years after the application is submitted.²³ License applications are submitted by the Department of Energy (DOE), the department tasked with constructing and operating the repository.²⁴

The licensing review for the Yucca Mountain Project formally commenced on October 22nd, 2008. Following the end of its technical review, the NRC intended to publish a safety evaluation report (SER) that would contain its conclusions as to whether the repository would meet NRC public safety and health regulations. The SER was to be issued in 5 volumes; it was estimated that the first would be done in August 2010, the third was to be completed in November 2012, the fourth in January 2011, and the second and fifth volumes in March 2011.²⁵ However, in February 2010 President Obama’s Administration announced that the Yucca Mountain repository was “not a workable option” and immediately sought to halt the licensing procedures.²⁶ For Fiscal Year (FY) 2011, the Department of Energy’s budget allocated no funding for Yucca Mountain, further communicating the current Administration’s intent to discontinue the project.²⁷

The NRC recognized the impending termination of the Yucca Mountain repository in its FY 2011 Congressional Budget Justification, stating that, due to lack of Administrative support, the DOE could submit a motion to withdrawal or suspend its Yucca Mountain license application in FY 2011.²⁸ Upon approval of withdrawal or suspension, the NRC would commence with the orderly closure of the technical review and adjudicatory activities and would document the current findings to date. On March 2, 2010 the Department of Energy submitted to the Atomic Safety and Licensing Board (ASLB) Panel a motion to withdraw the Yucca Mountain licensing application. On June 29th, 2010, the ASLB delivered their judgment denying the DOE’s request. Their denial was based on the finding that the DOE lacked the authority to apply for such a withdrawal.²⁹ The ASLB reached this conclusion after studying the NWPA and determining that Congress directed the DOE to file the licensing request and the NRC to consider the application before issuing a final merit-based judgment.³⁰ Shortly after the license withdrawal was denied, it was determined that the Commission would review the ASLB’s decision. In accordance with NRC processes, the Office of Commission Appellate Adjudication submitted adjudicatory paper SECY-10-0102, (U.S. Department of Energy High-Level Waste Repository, Review of LBP-10-11, Docket No. 63-001-

22. See Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, § 114(2)(B)(4)(B)(d) (1982).

23. See *id.*

24. See *id.*

25. See Hubert Bell, NRC, Office of the Inspector General, OIG-11-05, Investigation into NRC Chairman’s Unilateral Decision to Terminate NRC’s Review of DOE Yucca Mountain Repository License Application (2011) at 6.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. See *id.*

HLW,) to the Commission for its review and vote. Commissioners began casting votes on August 25th, 2010, and though a majority of Commissioners had voted by September 15th, 2010, Chairman Jaczko did not move to cast his final vote.³¹

It wasn't until two months later on October 29, 2010, that Chairman Jaczko voted on SECY-10-0102, completing the Commission's notational process on Yucca Mountain; however as of June 2011, when the first IG report was issued, the Commission had yet to hold a vote of affirmation and the draft order continued to sit before the Commission for consideration.³²

With regards to voting procedures, the Inspector General noted, that while it is the responsibility of the NRC to issue a final decision concerning the Yucca Mountain license application, they have been prevented from doing so because of various reasons. These reasons include: the Administration's decision to terminate the project, the lack of funding for the High-Level Waste Program, and the Chairman's direction to halt work on the SER.³³ Furthermore, internal procedures concerning adjudicatory voting practices are not consistently enforced and lack specificity. This allows matters to sit in abeyance before the Commission indefinitely.³⁴ While Jaczko cannot be faulted for the shortcomings of NRC internal procedures, he can be criticized for taking advantage of them. After nearly 50 years of efficient bipartisan operation, politics have come to the forefront of what has predominately operated as a scientific agency, and in the process have exposed weaknesses in the NRC's system.

The Inspector General next considered whether Jaczko had exceeded the authority granted to him as Chairman when he used the FY 2011 budget to close out review of Yucca Mountain. In September of 2010 Congress issued the first series of Continuing Resolutions (CRs). A CR is a law that provides temporary funding for those parts of the federal government for which annual appropriations laws have not yet been enacted. In this initial issuance, Congress directed federal agencies to spend money at FY 2010 levels, as needed, to carry on projects and activities that were initiated in FY 2010.

On October 4th, the NRC Chief Financial Officer and the Executive Director of Operations issued guidance via a memorandum to the NRC staff, directing them to commit, obligate and expend funds for ongoing activities at FY 2010 levels, with the exception of the High-Level Waste Program.³⁵ The memorandum stated that during the CR period, new work that was not authorized and funded in 2010 should not be started in 2011. With regards to Yucca Mountain, the memorandum instructed staff to continue its activities on the license application in accordance with the Commission's decisions on the FY 2011 budget using available Nuclear Waste Fund resources during the CR period.³⁶ Shortly after the issuance of this memorandum, Chairman Jaczko directed NRC staff working on the Yucca

31. *See id.* at 7.

32. *See id.*

33. *See id.* at 45.

34. *See id.*

35. *See id.* at 7.

36. *See id.*

Mountain license application review to stop working on Volume III of the SER, which was slated for completion near the end of fiscal year 2010.³⁷

The Inspector General determined that it was within the purview of Chairman Jaczko to use FY 2011 budget guidance as a vehicle to initiate the close out of the Yucca Mountain project.³⁸ However, though he had the authority to direct staff to follow FY 2011 budget, he was not forthcoming with the other Commissioners about his intent to halt work on SER Volume III as part of shutting down process of Yucca Mountain.³⁹

The Chairman, recognizing that this action would be construed by the other Commissioners as being controversial, tactically supplied three of the four Commissioners with varying amounts of information about his intent to proceed to closure and not complete SER Volume III.⁴⁰ Two of the Commissioners, Commissioner Magwood and Commissioner Apostolakis did not understand the significance of the CR budget guidance memorandum. Commissioner Ostendorff understood the implications of the memorandum and communicated his disapproval to Chairman Jaczko, and Commissioner Svinicki was given no information about the CR budget guidance memorandum.⁴¹ Despite this, Chairman Jaczko assured the Executive Director of Operations and the Chief Financial Officer that all Commissioners were in agreement concerning the CR budget guidance memorandum and they could proceed with its issuance.⁴² In reality, the majority of Commissioners opposed the outcome of the memorandum, which was the Chairman's instruction to stop work on SER Volume III. In addition, the other Commissioners felt the criteria that needed to be met before the license application review process could be shut down had yet to be completed.⁴³

Following the circulation of the CR budget guidance memorandum, NRC Commissioner William Ostendorff attempted to force a vote that would compel commission staff to continue working on its assessment of the Yucca proposal. Chairman Jaczko immediately informed Commissioners Magwood and Apostokalis that he fully expected their support.⁴⁴ Despite feeling like the Chairman had not been forthcoming with his intentions to use the CR budget guidance memorandum to shut down all Yucca Mountain operations, including the completion of SER Volume III, both Commissioners elected to recuse themselves from the vote. As a result, there was no majority, and the Commission was incapable of moving the matter from budget space, which is within the authority of the Chairman, to policy space, which is within the authority of the Commission.⁴⁵

Throughout the course of the investigation, the IG was presented with extensive testimony concerning the Chairman's management style. A former Chairman

37. *See id.*

38. *See id.* at 44.

39. *See id.*

40. *See id.*

41. *See id.* at 45.

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

remarked that Jaczko, “often yelled at people and [that] his tactics had a negative effect on people.” He described the behavior as “ruling by intimidation.”⁴⁶ Other Commissioner staff members gave examples of unprofessional behavior and stated that Jaczko created an intimidating work environment. Commissioner Svinicki and Commissioner Magwood relayed specific instances where the Chairman used travel funds as leverage in order to push his agenda.⁴⁷ The IG also concluded that the Chairman controlled information provided to the other Commissioners based on *his* interpretation of his statutory authority as Chairman.⁴⁸ Because he acted as gatekeeper to determine what was a policy matter versus an administrative matter, and managed and controlled information available to the other Commissioners, they could never be certain that they were fully informed about policy matters that should be brought to their attention.⁴⁹

The initial IG report determined that Chairman Jaczko had broken no laws or Commission rules, and his actions had been within the authority he was granted as Chairman, a fact that he was quick to reiterate in a public statement.⁵⁰ What he failed to address was the disapproval from lawmakers on both sides of the political spectrum censuring his handling of Yucca Mountain and the Inspector General’s determination that while Jaczko’s behavior was not illegal, it was “wrong.”⁵¹ What these various criticisms seem to suggest, is that Jaczko had not broken any Commission rules because before his tenure as Chairman, rules of this nature were not necessary. Previous Chairmen had never used the shortcomings that exist in the internal procedures to manipulate the system and push their own political agendas.

In August 2011, four Republican Senators requested that a second inquiry take place, in order to investigate Jaczko for what they claimed was a continued pattern of withholding information from colleagues and acting unilaterally on the Commission’s behalf.⁵² Specifically, they cited Jaczko’s declaration in March that Japan’s nuclear crisis constituted an emergency in the United States.⁵³ After considering the new allegations, the Inspector General’s Office determined that there was enough evidence to warrant a second investigation. Two months later, all four of the NRC Commissioners - Commissioners Magwood, Apostolakis, Ostendorff, and Svinicki - wrote a letter to former White House Chief of Staff Bill Daley voicing their concerns that Chairman Jaczko’s actions were causing “serious damage” to the Agency’s ability to protect health and safety. The letter stated that Jaczko has “intimidated and bullied” senior staff, ordered staff to withhold

46. See 158 CONG. REC. S2457-2462 (daily ed. April 18, 2012) (Statement of Sen. Mitch McConnell).

47. See Hubert Bell, *supra* note 25 at 43.

48. See *id.* at 40.

49. See *id.* at 41.

50. See Stephen Power, *Report Slams U.S. Nuclear Regulator*, WALL ST. JOURNAL, June 10, 2011, at A1.

51. See Matthew Daly, *Gregory Jaczko, NRC Chairman, Targeted By GOP Senators Over Japan Crisis Comments*, Huffington Post, August 25, 2011, http://www.huffingtonpost.com/2011/08/25/gregory-jaczko-nrc-gop_n_936914.html (last visited Oct. 17, 2012).

52. See Matthew Daly, *Republicans Seek New Probe of NRC Chairman Jaczko*, Associated Press, Aug. 25, 2011, http://seattletimes.nwsourc.com/html/politics/2016011340_apusnuclearchiefjapan.html (last visited Oct. 17, 2012).

53. See *id.*

information meant for NRC members, and tried to “intimidate” an independent NRC committee from reviewing aspects of the NRC’s analysis of the accident at Japan’s Fukushima Daiichi plant. The Commissioners explained that Jaczko “ignored the will” of the majority of the Commission and treated his fellow Commissioners with such “intemperance and disrespect” that the Commission no longer functions as effectively as it should. As they wrote, “[w]e believe that his actions and behavior are causing serious damage to this institution and are creating a chilled work environment at the NRC. We are concerned that this will adversely affect the NRC’s central mission to protect the health, safety and security of the American people.”⁵⁴ Though this letter had no bearing on the investigation being conducted by the Inspector General, it further reiterated the deep-seated dissonance that existed between Jaczko and his fellow Commissioners.

Jaczko formally announced his resignation in May 2012, a month before the second IG report was set to be released. The investigation cleared Jaczko of any wrongdoing concerning the Fukushima incident, but confirmed that Jaczko’s management style was impeding the collegial function of the Commission.⁵⁵ The Inspector General’s Office “identified more than 15 examples of interactions between the Chairman and NRC senior executives and Commissioners where the chairman’s behavior was not supportive of an open and collaborative work environment.” In addition, the Inspector General found the Chairman’s December 2011 testimony before the House and Senate Committees was inconsistent in five areas, with testimony provided to the Inspector General by NRC senior officials during the investigation.⁵⁶ Due to his decision to step down, it’s unlikely that Jaczko will face perjury charges.

The resignation of Chairman Jaczko does not lessen the need for supplementary regulations. The NRC has spent years functioning as a scientific body, which has allowed it to remain insulated from the politics that influence most government agencies, but recent events illustrate the need to clarify the internal procedures that guide the NRC, and the role of those who sit on the Commission. In order to ensure that the NRC is never again manipulated to serve the agenda of one man, we must analyze current legislation, determine where it is lacking, and strengthen it.

II. *Current Legislation*

Since the inception of nuclear energy we, as a country, have tried to create an agency of experts to address the technical complexities of developing nuclear material to be a sustainable energy force. Throughout the years many acts have been passed in order to create a highly functioning, efficient agency. The first of these was the Atomic Energy Act of 1954. This Act is the fundamental U.S. law on

54. See Press Release, U.S. Senate Committee on Environment and Public Works, NRC IG Report Serves as Vindication for Four “Courageous” NRC Commissioners (June 26, 2012) (on file with author) [hereinafter Press Release].

55. See Matthew L. Wald, *Inquiry on Nuclear Chief Finds No Rules Were Broken*, N.Y. TIMES GREEN BLOG, June 27, 2012, <http://green.blogs.nytimes.com/2012/06/27/inquiry-on-nuclear-chief-finds-no-rules-were-broken> (last visited Oct. 29, 2012).

56. See Press Release, *supra* note 54.

both the civilian and the military uses of nuclear materials. On the civilian side, it provides for both the development and the regulation of the uses of nuclear materials and facilities in the United States. It declares the policy that “the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.”⁵⁷ The Act requires that civilian uses of nuclear materials and facilities be licensed, and it empowers the NRC to establish by rule or order, and to enforce such standards to govern these uses, as “the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property.”⁵⁸ Commission action under the Act must conform to the Act’s procedural requirements, which provide an opportunity for hearings and federal judicial review in many instances.⁵⁹

Under section 274 of the Act, the NRC may enter into an agreement with a State for discontinuance of the NRC’s regulatory authority over some materials licensees within the State.⁶⁰ The State must first show that its regulatory program is compatible with the NRC’s and adequate to protect public health and safety. The NRC retains authority over, among other things, nuclear power plants within the State and exports from the State. A major amendment to the Act established compensation for, and limits on, licensee liability for injury to off-site persons or damage to property caused by nuclear accidents.⁶¹

The Energy Reorganization Act of 1974, which established the Nuclear Regulatory Commission (NRC), followed this Act. Prior to the passing of the Energy Reorganization Act, the Atomic Energy Commission had the sole responsibility for the development and production of nuclear weapons in addition to the development and the safety regulation of acceptable civilian uses of nuclear material. With the passing of the 1974 Act, these functions were divided, assigning to one agency, now known as the Department of Energy, the responsibility for the development and production of nuclear weapons, the promotion of nuclear power, and other energy-related work. The newly established Nuclear Regulatory Commission was assigned regulatory duties, not including the supervision of defense nuclear facilities.⁶²

Reorganization Plan No. 1 of 1980 strengthened the executive and administrative roles of the NRC Chairman, particularly in emergencies, transferring to the Chairman “all the functions vested in the Commission pertaining to an emergency concerning a particular facility or materials . . . regulated by the Commission.”⁶³ This amendment was passed, largely due to the Three Mile Island incident in 1979 during which there was a disastrous attempt by the Lieutenant

57. See Atomic Energy Act of 1954, Pub. L. No. 83-703, § 1(b) (1953).

58. See Atomic Energy Act of 1954, § 161(b) (1953).

59. See U.S. Nuclear Regulatory Comm’n, *Governing Legislation*, <http://www.nrc.gov/about-nrc/governing-laws.html> (last visited Oct. 17, 2012).

60. See *id.*

61. See *id.*

62. See *id.*

63. See *id.*

Governor of Pennsylvania to interfere in the control room. Now, with the passage of Reorganization Plan No. 1, not even the President of the United States has jurisdiction in the control room during an emergency.

Detailed in the 1980 House and Senate committee reports was a means for which controversial issues were to be resolved within the NRC. These established practices have worked extremely well until recently. As with all administrative agencies, throughout the agency's history, its Chairman has attempted to gain administrative power. In the past, the other Commissioners have always served as the Chairman's voice of reason, pulling him or her back whenever he or she overstepped their bounds. Today, the NRC is functioning differently than it was meant to. The discord between the previous Chairman and his staff led to an uncertainty of the Chairman's duties. This confusion has led to changes that have come without the benefit of new legislation, and as we have garnered from recent events, these changes are far from beneficial. There have always been weaknesses in the system, but Jaczko brought them to light when he used them to promote his own interests and agenda. In order for the NRC to return to functioning efficiently and within its parameters, new legislation is needed to clarify the role of the NRC Chairman. In response to this need, I have proposed the Nuclear Emergency Re-Establishment of Obligation Act (NERO).

III. *Nuclear Emergency Re-Establishment of Obligation Act*

The purpose of the Nuclear Emergency Re-Establishment of Obligation Act is to clarify the authority of the Chairman of the NRC. The Act is separated into eight sections.

The first section simply introduces the title of the proposed Act.⁶⁴ The second section pertains to the emergency authority of the Chairman. This section would establish that the Chairman of the NRC must refrain from exercising emergency authority, which includes making decisions or taking action otherwise reserved for the full Commission, unless the Chairman has declared an emergency based on an imminent safety threat to a facility or material licensed or regulated by the Commission. In addition to the Chairman, the Secretary of Homeland Security, the Secretary of Energy, the Secretary of Transportation, the Director of Federal Bureau of Investigation, the Director of the Central Intelligence Agency, or the Director of National Intelligence, may also determine a security incident exists that poses an imminent threat to a facility or materials licensed or regulated by the Commission.⁶⁵ If the Chairman declares an emergency under his own authority, he must notify each of the other Commissioners, as well as appropriate Commission staff offices within one hour.⁶⁶ Within four days, the Chairman must notify Congress of the declaration, including specific reference to the emergency on which the declaration is based; and all actions and recommendations made under the

64. See Nuclear Emergency Re-Establishment of Obligations Act of 2011, H.R. 3557, 112th Cong. §1 (2011).

65. See *id.* §2(a).

66. See *id.* §2(b)(1).

emergency authority.⁶⁷ Furthermore, the Chairman shall ensure that all members of the Commission and all Commission staff involved receive timely and current access to all records and information relating to actions taken during the emergency.⁶⁸ Throughout the emergency, to the extent practicable, the Chairman shall consult with the full Commission before taking action.⁶⁹

After the termination of the threat, the Chairman shall declare an end to the emergency period.⁷⁰ Within one day, the Chairman shall notify his fellow Commissioners and Congress that the emergency has passed.⁷¹ No later than ten days after the termination of the emergency, the Chairman must submit a complete report to the Commission on the actions taken during the emergency.⁷² With the passage of this proposed legislation, the Nuclear Regulation Commission will need to amend its procedures in order to comply with the requirements laid out in Section 2 of NERO. Within 90 days after the enactment of NERO, revisions must be made defining the roles of the Commissioners during an emergency.⁷³ These changes would specify complete access to records and information relating to action taken during the emergency, access to Commission staff involved in the management of the emergency, access to the location or locations where decisions are made during the emergency and participation in decisions that affect Commission actions and policies beyond the response to a particular emergency.⁷⁴

Section 3 of NERO addresses the certification of documents transmitted to Congress. Any letter or document transmitted by the NRC on behalf of the full Commission that is sent to a member of Congress in his or her capacity as Chairman or ranking minority shall include a certification that the transmission is in accordance with the published procedures of the Commission.⁷⁵ This will ensure that the Commission is acting within the bounds of its authority and with the knowledge and acquiescence of the full Commission.

Section 4 states that the full Commission must approve all of the NRC Chairman's appointments of officers, and the officer's continued service shall be contingent on an affirmative vote by the full Commission at least once every two years.⁷⁶

Section 5 of NERO sets time limits for Commission review of briefs requested. In general, if the NRC issues an order requesting parties to file briefs relating to whether the Commission should review, uphold, or overturn a decision by the licensing board, the Commission shall vote on the matter not later than 40 days after the receipt of such briefs. Additionally, within 10 days after such a vote, the Commission shall publish its decision,(except in the case of adjudicatory matters),

67. *See id.*

68. *See id.* §2(b)(2).

69. *See id.* §2(b)(3).

70. *See id.* §2(b)(4).

71. *See id.* §2(b)(5).

72. *See id.* §2(b)(6).

73. *See id.* §2(c).

74. *See id.*

75. *See id.* §3.

76. *See id.* §4.

including the votes of each members of the Commission.⁷⁷ The exception to the rule would be orders requesting parties to file briefs relating to revocation of a previously issued license.⁷⁸

Should the Chairman be subject to allegations of wrongdoing, Section 6 ~~six~~ requires that the matter be referred to the Inspector General of the Commission.⁷⁹ Throughout the duration of the Inspector General's investigation, he or she will be supervised by a member of the Commission other than the Chairman.⁸⁰ These modifications to current NRC procedures must be made no later than 90 days after the date of the enactment of this Act.⁸¹

Section 7 addresses the approval of Commissioner travel. With this legislation, the NRC Chairman shall authorize all domestic and international travel requested by other members of the Commission for official business unless the Chairman submits a notice of disapproval that specifies the reasons for disapproving.⁸² The notice of disapproval shall be submitted within five 5 days after the travel is requested or the travel shall be deemed approved.⁸³

The final section of NERO pertains to budget review and development. With the passing of this Act, no budget or budget revision shall be adopted for the Nuclear Regulatory Commission unless each member of the Commission has been given the opportunity to participate in the development of the said budget or its revision.⁸⁴ This includes the Commissioners being provided access to all relevant information used in such development and making the approval of the budget subject to a vote by the full Commission.⁸⁵

The actions of former Chairman Jaczko have demonstrated a need for this legislation. In order for the NRC to effectively do the job they were meant to, it is clear that we must clarify and define the roles of the Chairman and the Commissioners. Each section of my Act is tailored to address a deficiency that exists in the current rules and procedures that govern the NRC.

Conclusion

I strongly believe that nuclear power is capable of meeting this country's increasing energy demands and providing electricity in a manner that safeguards the environment. Nuclear energy alone has the capacity to meet our industrial and municipal needs while emitting no pollutants or greenhouse gases. By using thorium, an abundant natural resource, instead of uranium to fuel nuclear reactors we can create a sustainable energy source with minimal hazardous waste and

77. *See id.* §5(a).

78. *See id.* §5(b).

79. *See id.* §6(a).

80. *See id.* §6(b).

81. *See id.* §6(a).

82. *See id.* §7.

83. *See id.*

84. *See id.* §8(1).

85. *See id.* §8(2).

virtually no threat of weaponization. The use of small modular reactors in place of the current larger versions will further decrease the already minute chance of a nuclear incident. My views address only some of the many decisions that will need to be made about nuclear energy in the near future. No matter where one stands on nuclear energy, we can all agree the Nuclear Regulatory Commission has an extremely important role to play. In order to ensure the best result, we need the NRC to be functioning at its highest level, not bogged down with competing political agendas and the power plays of its members. The passage of NERO will allow the NRC to return to its previous highly efficient state and allow our country to develop a clean, sustainable energy source.

Since the commencement of this article, President Obama has nominated Allison McFarlane, a geologist and associate professor of environmental science at George Mason University, to take the place of Gregory Jaczko as Chairman of the Nuclear Regulatory Commission. At her Senate confirmation hearing, McFarlane pledged, “a strong commitment to collegiality at all levels,” saying an agency empowered to protect public safety, such as the NRC, “requires a respectful working environment to assure its integrity.” In addition, she declared that she is prepared to “devote all my energies to serving on the NRC with the attributes I consider important to good governance - openness, efficiency and transparency.” McFarlane was confirmed as Chairman of the Nuclear Regulatory Commission on June 29, 2012. It is my sincerest hope that with this new Chairperson and my legislation the NRC can return to its former status as a premier regulatory agency.