UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

U.S. DEPARTMENT OF ENERGY

High-Level Waste Repository

Docket No. 63-001-HLW

NRC STAFF RESPONSE TO INITIAL BRIEFS REGARDING REVIEW OF LBP-10-11

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Pursuant to the Commission’s June 30, 2010 Order, the staff of the U.S. Nuclear Regulatory Commission (Staff) files this response to participants' initial briefs addressing whether the Commission should review, and reverse or uphold, the Atomic Safety and Licensing Board (Board or CAB 04) order granting intervention petitions and denying the Department of Energy’s (DOE) motion to withdraw its license application (LA) seeking authorization to construct a high-level geologic waste repository at Yucca Mountain, Nevada. See U.S. Dep’t of Energy (High-Level Waste Repository), LBP-10-11, 71 NRC __ (June 29, 2010) (slip op.) (“LBP-10-11”). For the reasons set forth below, the Staff maintains that Commission review and reversal of LBP-10-11, in part, is warranted.

BACKGROUND

On June 29, 2010, the Board issued an order denying DOE’s Motion to Withdraw and granting intervention petitions.\(^1\) LBP-10-11 at 3. On June 30, 2010, the Commission issued an order inviting participants to file briefs with the Commission addressing whether the Commission

\(^1\) For the sake of brevity, the Staff has not repeated the relevant procedural posture and background of this proceeding set forth in its initial brief. See NRC Staff Brief in Response to the Secretary of the Commission’s June 30, 2010 Order, dated July 9, 2010 (“Staff Initial Brief”), at 2-5.
should review, and reverse or uphold LBP-10-11 by July 9, 2010, and replies to initial briefs by July 16, 2010.² Briefs were filed by the Nuclear Energy Institute (NEI); the State of Nevada; the State of Washington; the State of California; the State of South Carolina; Aiken County, South Carolina; Nye County, Nevada; Inyo County, California; Churchill, Esmeralda, Lander and Mineral Counties, Nevada; Prairie Island Indian Community (PIIC); National Association of Regulatory Utility Commissioners (NARUC); and DOE.³

The Staff’s reply to the initial briefs is set forth below and is limited to addressing arguments that directly impact the Commission’s responsibilities under the NWPA or its processes and procedures for reviewing license applications and withdrawal requests.

² This deadline was extended to July 19, 2010 by an Order dated July 14, 2010.

DISCUSSION

Participants' initial briefs contain the following arguments that impact the Commission’s responsibilities: (1) the Commission should not review LBP-10-11 because similar issues are pending before a Federal Court (see, e.g., Aiken County Initial Brief at 6-7; NEI Initial Brief at 7; NARUC Initial Brief at 6); (2) the Commission should uphold LBP-10-11 because it does not have authority under the Nuclear Waste Policy Act (NWPA)\(^4\) to grant DOE’s motion to withdraw (see, e.g., PIIC Initial Brief at 26-27; South Carolina Initial Brief at 8-10; Washington Initial Brief at 16); and (3) in the event the Commission reviews and reverses LBP-10-11, conditions on the withdrawal are necessary (see, e.g., Nye County Initial Brief at 32-33; DOE Initial Brief at 36-37; Nevada Initial Brief at 28; Washington Initial Brief at 22-23; Inyo Initial Brief at 2).

I. The Commission May Review LBP-10-11

Some parties argue that the Commission should decline to review LBP-10-11 because identical issues are pending before the U.S. Court of Appeals for the District of Columbia. See Aiken County Initial Brief at 7; NEI Initial Brief at 7; NARUC Initial Brief at 6. To support this proposition, parties reference a 1976 Appeal Board decision stating that “‘considerations of comity between court and agency’ dictate agency restraint in addressing an issue pending at the same time in the federal courts, to ‘allow the court to act on the matter first.’” See, e.g., NEI Initial Brief at 7 (quoting Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-350, 4 NRC 365, 366 (1976)).

The Commission has, however, specifically acknowledged that despite the pending legal actions in the District of Columbia Circuit, the questions raised by DOE’s Motion to Withdraw are within the Commission’s province and that “[i]f judicial review is pursued after our final decision,

the application of our expertise in the interpretation of the AEA, the NWPA and our own regulations will, at a minimum, inform the court in its consideration of the issues raised by DOE’s motion to withdraw.” U.S. Dep’t of Energy (High-Level Waste Repository), CLI-10-13, 71 NRC __ (slip op. at 4) (emphasis added). The Board’s unreviewed decision does not constitute binding precedent or a final NRC decision at this juncture. See Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998) (“unreviewed Board rulings do not constitute precedent or binding law at this agency”) (citing Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1998)). Accordingly, consistent with the Commission’s previous direction in this proceeding, Commission consideration of the DOE Motion to Withdraw should not be suspended or delayed until future action by the Federal Court.5

II. The Commission has authority under the NWPA to consider DOE’s Motion to Withdraw in accordance with applicable laws, which includes 10 C.F.R. § 2.107, a duly promulgated regulation.

Some parties seek to uphold the Board’s conclusion that, at this point, the NRC is required by the NWPA to make a merits based decision approving or disapproving DOE’s application for a construction authorization. See LBP-10-11 at 5 (concluding that Congress directed “that the NRC consider the Application and issue a final, merits-based decision

5 On July 9, 2010, Washington, South Carolina, White Pine County, and Aiken County filed a joint motion seeking recusal/disqualification of Commissioners Magwood, Apostolakis, and Ostendorff. State of Washington, State of South Carolina, Aiken County, South Carolina, and White Pine County Nevada’s Motion for Recusal/Disqualification, dated July 9, 2010 (“Joint Motion”). These parties argue that the Commission should not take discretionary review of LBP-10-11 because the Commission will lack a quorum if three Commissioners properly recuse themselves. See Washington Initial Brief at 10-11; South Carolina Initial Brief at 5; Aiken County Initial Brief at 2-5. On July 15, 2010, Commissioner Apostolakis filed his “Notice of Recusal” based on reasons unrelated to those reflected in the Joint Motion. The arguments presented by the Joint Motion are speculative and are based upon presumed future actions by individual Commissioners. The Staff maintains its position that the Commission should review LBP-10-11. The Commission will undoubtedly ensure that the process will continue appropriately once the recusal/disqualification motion is addressed.
approving or disapproving the construction authorization application.”); PIIC Initial Brief at 26-27; South Carolina Initial Brief at 8-10; Nye Initial Brief at 11. Parties argue that the Board correctly concluded that this obligation was triggered when DOE submitted its LA to the NRC and that the Commission does not have authority to terminate the licensing process before fulfilling its duty to issue a final merits based decision. See LBP-10-11 at 5, 17; PIIC Initial Brief at 26-27; NEI Initial Brief at 12; Washington Initial Brief at 16.

As the Staff has previously asserted, this rigid interpretation of the NWPA should not be sustained because, if accepted as correct, it would require the Commission to consider any application, regardless of the circumstances. See Staff Initial Brief at 10-11 & n.10 (citing 10 C.F.R. §§ 2.101(e), 2.1023). The statement in NWPA § 114 directing the Commission to “consider an application for a construction authorization . . . in accordance with the laws applicable to such applications,” requires the NRC to consider an application that is properly before it and being sought by an applicant. See NRC Staff Answer to DOE’s Motion to Withdraw its Application with Prejudice, dated May 17, 2010, at 8 (“Staff Answer”); Initial Brief at 9 n.8 (citing Energy Reorganization Act § 201, 42 U.S.C. § 5841 and stating the NRC is an independent regulator and not a promoter of licensed activities).

The direction that the Commission shall consider an application “in accordance with the laws applicable to such applications” indicates, contrary to the Board and certain parties’ interpretation,6 that Congress intended the Commission to follow its usual processes under which the NRC executes its statutory mandate to consider license applications. See Staff Answer at 8. This includes procedural processes like 10 C.F.R. § 2.107, which was

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6 See, e.g., LBP-10-11 at 14-16; South Carolina Initial Brief at 13-14; Nye County Initial Brief at 18; Washington Initial Brief at 18.

Significantly, nothing in the legislative history specifically evidences Congress’ intent to exclude particular procedural rules like 10 C.F.R. § 2.107; rather, the legislative history indicates that Congress was generally aware of and relied on NRC licensing procedures. See Staff Brief at 12-13 (citing H.R. 97-141, at 52; S. REP. NO. 97-282, at 15 (1981)); DOE Initial Brief at 15 (citing H.R. 5016, 1st Sess. (Nov. 18, 1981); H.R. REP. NO. 97-411(l) at 21 (1981)). Accordingly, because there are questions regarding the proper interpretation of the Commission’s obligations under § 114(d) and the applicability of a duly promulgated NRC regulation, Commission review is warranted.

III. Placing Conditions on the Withdrawal Is Not Necessary

Some parties in this proceeding argue that conditions should be placed on DOE’s withdrawal, if permitted, including a “with prejudice” condition, environmental conditions, and

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7 In addition to the argument that 10 C.F.R. § 2.107 cannot be applied under the framework of the NWPA, NEI questions whether 10 C.F.R. § 2.107 can be applied to this Subpart J proceeding under the structure of 10 C.F.R. Part 2. See NEI Initial Brief at 10-11 & n.17. NEI reasons that 10 C.F.R. § 2.107 is contained in Subpart A, the provisions of which do not apply to this proceeding unless explicitly stated. See id. at n.17 (citing 10 C.F.R. § 2.1000). However, Subpart A is a generic section that provides procedures for issuance, amendment, transfer and renewal of licenses and for processing applications. See 10 C.F.R. §§ 2.100 (Scope of Subpart); 2.107 (Withdrawal of application); 2.108 (Denial of application for failure to supply information); 2.109 (Effect of timely renewal application). These generic regulations should not be limited in application as NEI suggests. For example, where the regulations did not specifically identify 10 C.F.R. § 2.107 as applicable in the past, it was nevertheless applied. See, e.g., Philadelphia Electric Co. (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 974, 979 (1981) and 10 C.F.R. § 2.700 (1981). Further, NEI’s claim is not persuasive because, if accepted as correct, then 10 C.F.R. § 2.103 also could not apply to this proceeding, because like 10 C.F.R. § 2.107, the Commission’s regulations do not indicate that this regulation is specifically applicable to this proceeding. See 10 C.F.R. § 2.1000. Section 2.103, however, specifically mentions a construction authorization for a high-level waste repository. 10 C.F.R. § 2.103(a).
LSN conditions. See, e.g., Washington Initial Brief at 22-23; PIIC Initial Brief at 36-39; Nye Initial Petition at 30-33; Inyo Initial Brief at 2; DOE Initial Brief at 36-37. As explained below, a “with prejudice” condition would not be appropriate, environmental conditions would not be necessary, and although the Staff did not object to DOE voluntarily agreeing to LSN conditions,8 such conditions would not be necessary.

A. Withdrawal With Prejudice is Not Appropriate

With regard to DOE’s request that the LA should be withdrawn with prejudice, the Board found that if DOE were permitted to withdraw its LA, a “with prejudice” condition would not be appropriate. LBP-10-11 at 21. The Board stated that NRC practice indicates “it is highly unusual to dispose of a proceeding on the merits, i.e., with prejudice, when in fact the health, safety and environmental merits of the application have not been reached.” Id. (quoting Puerto Rico Elec. Power Auth. (North Coast Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981) (emphasis in original)).

DOE argues that the Board’s analysis is flawed because the Board relies on cases involving intervenors, not applicants, seeking the “with prejudice” condition and, therefore, these cases are distinguishable. See DOE Initial Brief at 36 (citing LBP-10-11 at 21-22). In addition, Nevada argues that a “with prejudice” condition does not require a merits decision, and NRC precedent suggesting otherwise should be limited to mean that withdrawal “with prejudice is warranted when (but not only when) the opposing party [i]s about to prevail on the merits.” Nevada Initial Brief at 28-30 (internal citations omitted). DOE and Nevada suggest that Federal

8 The Joint Report proposing LSN conditions filed by Nevada on behalf of the participants stated that the report was “being filed without prejudice to, or waiving, the position of any party that advocates either that no condition be attached to the CAB’s disposition of DOE’s Motion to Withdraw, or alternatively, that terms or conditions should be attached to the CAB’s disposition of DOE’s Motion to Withdraw or that the Motion be denied.” Joint Report Concerning Conditions Regarding the DOE LSN Document Collection, dated June 18, 2010, at 1 n.3 (“Joint Report”).
court cases should be used as guidance in considering DOE’s Motion to Withdraw. See DOE Initial Brief at 36 (citing Federal Rule of Civil Procedure 41(a)(2)); Nevada Initial Brief at 31-32. As explained below, these arguments are not persuasive. The Board correctly found that even if the specific facts of NRC case law addressing dismissal with prejudice can be distinguished, the general principles reflected in the case law should still apply.

The general principle articulated by the Appeal Board in *Fulton*, is that dismissal with prejudice requires a showing on the record of an injury to a public or private interest by the proponent of the sanction.\(^9\) Further, NRC case law indicates a “with prejudice” condition is ordinarily associated with some resolution of the merits, regardless of who seeks dismissal with prejudice. See Staff Answer at 10 (quoting *North Coast*, ALAB-662, 14 NRC at 1131 (“it is highly unusual to dispose of a proceeding on the merits, *i.e.*, with prejudice, when in fact the health, safety and environmental merits of the application have not been reached”)). In order to hold a hearing on whether the withdrawal should be with prejudice, the allegations must be serious and “supported by a showing, typically through affidavits or unrebutted pleadings, of sufficient weight and moment to cause reasonable minds to inquire further.” *Id.* (quoting *North Coast*, ALAB-662, 14 NRC at 1133-34). Further, at least one licensing Board has considered and rejected an applicant’s request for withdrawal with prejudice. In *Cincinnati Gas & Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-84-33, 20 NRC 765, 767 (1984), applicants moved for withdrawal of their application for an operating license and included in their draft order accompanying the motion, a provision stating that the withdrawal would be with prejudice.

\(^9\) See Staff Answer at 9 (quoting *Fulton*, ALAB-657, 14 NRC at 974, 979), 10 (quoting *Puerto Rico Electric Power Auth.* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981) (the party requesting a severe and unusual sanction, such as withdrawal with prejudice, bears “a more compelling burden of justification—both for its imposition and for demonstrating that the allegation should be pursued in the shape of an evidentiary hearings.”)).
The licensing board rejected this condition, reasoning that no party had attempted to show that such a condition was necessary and despite years of consideration of the construction permit and operating license, a final agency decision had not been rendered. *Id.* at 767-77 (citing *North Coast* and *Fulton*).

Here, the Board correctly found that there has been no showing on the merits; nor is there any support to demonstrate that withdrawal with prejudice is appropriate. See LBP-10-11 at 21 (quoting *North Coast*, ALAB-662, 14 NRC at 1133); Tr. at 169 (Silvia, June 3, 2010). Although Nevada, not DOE, attempted to demonstrate that withdrawal with prejudice was appropriate due to the substantial litigation costs they have incurred, the Board correctly concluded that “the prospect of a second lawsuit [with its expenses and uncertainties] . . . or . . . another application . . . does not provide the requisite quantum of legal harm to warrant dismissal with prejudice.” LBP-10-11 at 22 (quoting *Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)*, CLI-99-24, 50 NRC 219, 222 n.3 (1999) (internal citation omitted)). Further, the Board appropriately stated that it would be in the public interest not to attach the “with prejudice” condition because this would leave the “option open to the applicant should changed conditions warrant its pursuit.” See id. at 21-22 (quoting *North Coast*, ALAB-662, 14 NRC at 1132).

Because dismissal with prejudice implies, and is ordinarily associated with a ruling on the merits and because of the NWPA’s mandate for the NRC to consider “an application,” it would be inappropriate for the NRC to grant DOE’s motion for withdrawal of the license application with prejudice. *See North Coast*, ALAB-662, 14 NRC at 1135 (citing *Jones v. SEC*, 298 US 1, 19 (1936) (“the usual rule [is] that a dismissal should be without prejudice.”) (emphasis added)).

Further, unlike the tribunal in Federal court which DOE and Nevada rely on for support, the adjudicator here – the NRC – is specifically required by statute (NWPA § 114(d)) to consider an application before it, without regard to whether the applicant had earlier sought, or obtained,
dismissal with prejudice. The Staff is not aware of and the parties have not cited, any statute that places a similar legal obligation for a Federal Court to “consider” a particular complaint. Accordingly, the analogy to Federal Court actions is not persuasive and the Board’s conclusion that withdrawal with prejudice is not appropriate should be upheld.

B. Environmental Conditions Are Not Necessary

Some parties argue that environmental related conditions may be appropriate. For example, PIIC argues that at a minimum the Commission should hold DOE’s Motion to Withdraw in abeyance and require DOE to conduct additional National Environmental Policy Act (NEPA)\textsuperscript{10} studies. PIIC Initial Brief at 37. Nye County requests that the NRC “prohibit DOE from taking any irreversible action related to land use, water rights, contracts, or permits necessary for construction and operation pending further action by Congress.” See Nye Initial Brief at 33. Nye County also requests that the NRC impose custodial and oversight conditions on any suspension or withdrawal. \textit{Id.}

Nothing in the NWPA’s legislative history indicates that Congress intended the NRC to enforce DOE’s independent obligations under the NWPA or NEPA. See Tr. at 315 (Silvia, June 3, 2010) (“The NRC does not have the role in enforcing DOE record of decision regulations or other DOE regulations.”); Staff Initial Brief at 8-10 (citing § 201, 42 U.S.C. § 5841; \textit{NEI v. EPA}, 373 F.3d 1251, 1259 (D.C. Cir. 2004)). Accordingly, the NRC should neither mandate that DOE perform additional NEPA analyses regarding withdrawal; nor enforce DOE’s independent NWPA, NEPA, and other obligations.

Congress did, however, contemplate that DOE would take reasonable steps to reclaim the site and mitigate environmental impacts, if necessary. See NWPA § 113(c)(3)(D) (“take

\textsuperscript{10} Pub. L. No. 91-190 (codified as amended at 42 U.S.C. §§ 4321 \textit{et seq.}).
reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities at such site.”). In fact, DOE’s 2002 FEIS and 2008 SEIS indicate that under the no-action alternative, DOE would work to reclaim the site.\textsuperscript{11} Thus, NRC Staff expects that DOE would take actions to reclaim the site in the event the project is terminated.

C. LSN Conditions Are Not Necessary

Some parties agree with the Board’s conclusion that if DOE were allowed to withdraw, it should be required to preserve its Licensing Support Network document collection (LSNdc) in a useable form. See LBP-10-11 at 22; Nye Initial Brief at 30-31; Inyo Initial Brief at 4. Specifically, the Board provided a list of conditions in Appendix A to its order, which were based “in substantial part” on an agreement submitted by the participants on June 18, 2010. See LBP-10-11 at 23, Appendix A (citing Joint Report). However, not all parties agreed to the terms in the Joint Report, for example, the NRC Staff did not agree to language in Condition BB-1 proposed by the other parties, which stated that “[i]f DOE has physical samples and specimens in its or its agents’ possession that currently have no LSN headers, DOE will work with Nye County or other interested participants to verify whether such sample or specimen should have been represented by a header.” A similar condition appears in Appendix A of LBP-10-11. See Appendix A ¶7 (“If DOE has physical samples and specimens in its or its agents’ possession that currently have no LSN headers, DOE shall work with parties and IGPs to verify whether such samples or specimens should have been represented by a header”). As DOE notes in its

Initial Brief, “[t]his condition is inconsistent with the regulatory definition of documentary materials to be included in the LSN . . . .” DOE Initial Brief at 38 (citing 10 C.F.R. §§ 2.1001, 2.1003).

The Staff, however, does not object, as a general matter, to the preservation of information and recognizes the benefit of preserving this information, but notes that such conditions are not necessary. DOE has stated that it would maintain its LSN throughout the proceeding and archive LSN materials in accordance with the Federal Records Act and other relevant laws. DOE Initial Brief at 37. Should DOE ever resubmit an application to the NRC for a high-level waste geologic repository, it would be required by 10 C.F.R. § 2.1003 to “make available, no later than six months in advance of submitting its license application for a geologic repository, . . . [a]n electronic file including bibliographic header for all documentary material . . . .” 10 C.F.R. § 2.1003(a)(1). Accordingly, while the Staff does not object, as a general matter, to the preservation of LSN information, attaching such conditions to DOE’s withdrawal is unnecessary.
CONCLUSION

For the reasons set forth above and as explained in the Staff’s Initial Brief, the Commission should review and reverse, in part, LBP-10-11.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
this 19th day of July, 2010
CERTIFICATE OF SERVICE

I hereby certify that copies of the “NRC STAFF RESPONSE TO INITIAL BRIEFS REGARDING REVIEW OF LBP-10-11” in the above-captioned proceeding have been served on the following persons this 19th day of July, 2010, by Electronic Information Exchange.

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