

ORAL ARGUMENT SCHEDULED 03/22/2011
NO. 10-1050, 10-1052, 10-1069, 10-1082 *Consolidated*

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 10-1050
IN RE AIKEN COUNTY, Petitioner

No. 10-1052
ROBERT L. FERGUSON, *et al.*, Petitioners,
v.
BARACK OBAMA, President of the United States, *et al.*, Respondents.

No. 10-1069
STATE OF SOUTH CAROLINA, Petitioner,
v.
UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

No. 10-1082
STATE OF WASHINGTON, Petitioner,
v.
UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

On Petitions for Review and for Other Relief With Respect to Decisions of the
President, the Secretary of Energy, the Department of Energy, and the Nuclear
Regulatory Commission

**FINAL BRIEF OF THE STATE OF NEVADA, INTERVENOR
SUPPORTING RESPONDENTS**

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STATE OF NEVADA'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and *Amici Curiae*

The following is a list of parties, intervenors, and *amici curiae* in these consolidated actions.

1. Parties

The Petitioners in these consolidated actions are: Aiken County, South Carolina (Case No. 10-1050); Robert L. Ferguson, William Lampson, and Gary Peterson (Case No. 10-1052); State of South Carolina (Case No. 10-1069), and State of Washington (Case No. 10-1082).

The Respondents in these consolidated actions are: U.S. Department of Energy (Case Nos. 10-1050, 10-1052, 10-1069, 10-1082); Steven Chu, Secretary of the U.S. Department of Energy (Case Nos. 10-1050, 10-1052, 10-1069, 10-1082); U.S. Nuclear Regulatory Commission (Case Nos. 10-1050, 10-1069, 10-1082); Gregory B. Jaczko, Chairman of the U.S. Nuclear Regulatory Commission (Case Nos. 10-1050, 10-1069); U.S. Nuclear Regulatory Commission Atomic Safety and Licensing Board (Case Nos. 10-1050, 10-1069); Thomas Moore, Paul Ryerson, and Richard Wardwell, U.S. Nuclear Regulatory Commission Atomic Safety and Licensing Board Judges (Case Nos. 10-1050, 10-1069); and Barack Obama, President of the United States (Case Nos. 10-1052, 10-1069).

2. **Intervenors**

The intervenors in these consolidated actions are: National Association of Regulatory Utility Commissioners (for the Petitioners); and the State of Nevada (for the Respondents).

3. *Amicus Curiae*

The *amicus curiae* in these consolidated actions is the Nuclear Energy Institute (for the Petitioners).

B. **Rulings Under Review**

The Petitioners seek judicial review of what they describe as a decision by the Respondent Department of Energy (“DOE”), made on or about January 29, 2010, to withdraw with prejudice its license application for a construction authorization for a geologic repository for the permanent disposal of spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nevada, which is now pending before Respondent Nuclear Regulatory Commission (“NRC”).

DOE filed a motion to withdraw its Yucca Mountain license application on March 3, 2010, and NRC’s Atomic Safety and Licensing Board denied that motion on June 29, 2010. *U.S. Department of Energy (High Level Waste Repository)*, LBP-10-11, ___ NRC ___ (2010). However, that Board decision is **not** a ruling under review by this Court. As of the time this brief was filed, the Commission is considering whether to review and reverse or uphold the Board’s decision.

C. Related Cases

These consolidated actions have not been previously before this Court, and there are no related judicial cases.

Respectfully submitted,

/s/ signed electronically

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Dated: February 8, 2011

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

AEC	United States Atomic Energy Commission (a predecessor to both NRC and DOE)
ASLB	Atomic Safety and Licensing Board
DOE	United States Department of Energy
EPA	United States Environmental Protection Agency
NRC	United States Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101, <i>et seq.</i>
NWPAA	Nuclear Waste Policy Act Amendments Act of 1987, 42 U.S.C. § 10172, Pub. L. 100-203, Title V, § 5011(a), Dec. 22, 1987, 101 Stat. 1330-227

I. SUMMARY OF ARGUMENT.

The NWPA, 42 U.S.C. §§ 10101, *et seq.*, does not include any language instructing DOE that it cannot withdraw its license application for Yucca Mountain, and withdrawing the application is not mentioned, let alone discussed, anywhere in the NWPA's voluminous legislative history. All of the Petitioners' arguments that a withdrawal is prohibited are based on inferences that they draw from other language in the statute and legislative history. 42 U.S.C. § 10134(d) features prominently in their arguments. However, a careful analysis of this NWPA subsection and its legislative history will show that the only plausible inference is the opposite one, that DOE may withdraw its application.

It would be extraordinary to force any license applicant to attempt to meet its burden of proof on an application it prefers to withdraw. One would have expected Congress to have spoken clearly if it had intended such a course, but it did not.

II. STATEMENT OF FACTS.

Nevada believes a brief history of the Nation's high-level radioactive waste repository program is necessary to place this case in its proper context.

This case, and the closely related proceeding before the NRC on DOE's motion to withdraw its license application, come at a pivotal point in the history of high-level radioactive waste disposal in the United States, when potential new directions are being pursued by fresh minds unburdened by the mistakes of the

past. Contrary to the impression that Petitioners convey, the Yucca Mountain repository project has been plagued with problems from the very beginning, and insurmountable obstacles to repository operation will likely remain even if the NRC licensing proceeding were to be continued.

Four events in repository history prior to the filing of this case and DOE's motion to withdraw stand out: the failed repository project at Lyons, Kansas; the site nomination and selection process under the 1982 NWPA; the enactment of the 1987 NWPA; and NRC's consideration of DOE's license application for Yucca Mountain.

In the 1960s a clamor arose over the potential that high-level radioactive wastes would leak from AEC storage facilities at the National Reactor Testing Station in Idaho, the Savannah River Site in South Carolina, and the Hanford Site in Washington. As a result, the AEC promised Idaho Senator Church that the Idaho wastes would be transferred out of Idaho to a permanent geologic repository by the end of the 1970s. The AEC pinned its hopes on an abandoned salt mine in Lyons, Kansas. However, rather than taking the time to complete necessary scientific investigations, the AEC offered disputable safety conclusions and pressed ahead. Ultimately, the Lyons, Kansas site proved to be unsuitable. The AEC also bungled the political aspects of the debate. It knew that State and local support was essential, but it lost that support when it failed to give any credence to

the legitimate concerns of Kansas experts and committed to the project before completing scientific studies.¹

Two lessons may be learned from Lyons, Kansas. The first is that the Federal Government should not even appear to commit to a repository site unless the necessary scientific investigations are completed and the legitimate safety concerns of State and local experts are addressed satisfactorily. The second is that State and local support is critical to success.²

After Lyons, Kansas failed, the AEC's successor agency (DOE) continued to investigate other possible repository sites, and Congress enacted the NWPA in 1982. In accordance with the NWPA, DOE nominated five sites for more detailed study (characterization): salt deposits in Mississippi, Texas, and Utah; basalt formations in Washington; and volcanic tuff rock in Nevada.³ Potential sites in Louisiana were excluded based on a private agreement between Louisiana and DOE.⁴ The NWPA then called upon DOE to narrow the choices to three, and all

¹ J. Samuel Walker, "The Road to Yucca Mountain," University of California Press, 2009 (Walker), at 50-51, 74-75 [See NA3-6]. Mr. Walker is the NRC Historian, and this book is the fifth in a series of volumes on the history of nuclear regulation sponsored by the NRC. The book does not represent the official position of the NRC.

² Walker at 74-75 [See NA5-6].

³ Walker at 181-182 [See NA9-10].

⁴ The agreement was discussed during Senate debates on the enactment of the NWPA. 128 Cong. Rec. D485 S4133, April 28, 1982 [See NA12-13].

three were to be fully characterized so that any one failure would not prematurely destroy the whole repository program.⁵

In 1986, the DOE Secretary announced that the final three choices were located in Deaf Smith County, Texas, Yucca Mountain, Nevada, and Hanford, Washington. The designation prompted angry protests from all three areas, whose representatives believed that the scientific investigations were not completed, and the protests became part of a nationwide movement when DOE cancelled the search for a site in the eastern United States, notwithstanding an informal agreement among NWPAA supporters that the second site called for by the NWPAA would be located in an eastern State.⁶

With the program now in shambles, and the costs increasing, Congress reacted by enacting the NWPAA, which directed DOE to limit its site characterization efforts to Yucca Mountain, notwithstanding the advice from NRC (and others) that scientific information was insufficient to make an informed safety conclusion about the suitability of the site.⁷ In fact, the selection of the Yucca

⁵ 42 U.S.C. §§ 10132(b) and 10133.

⁶ Walker at 182 [*See* NA10].

⁷ 42 U.S.C. § 10172; prepared testimony of Robert Bernero, June 29, 1987, appearing in S. Rep. No. 100-152, 100th Cong., 1st Sess. [*See* NA17] at 194 ("At the Yucca Mountain site, the major issues include geological concerns such as the presence of potentially active faults and related ground motion, the potential for volcanism, and the origin and significance of mineral veins in the area. Hydrology is also a concern in the saturated and unsaturated zones; groundwater flow patterns

Mountain site, using DOE's so-called "Multiattribute Utility Analysis of Sites," depended in important part on the assumption that little groundwater would move downward from the mountaintop and seep into the tunnels where the waste would be disposed of, and this assumption later proved to be false.⁸

The NWPAA attempted to place the entire high-level waste disposal burden on one western state with no nuclear power plants or other high-level waste generating facilities. The supporters of the NWPAA flagrantly ignored both of the lessons learned from Lyons, Kansas. They effectively committed the Nation to a single disposal site not only before the necessary scientific investigations were

and regimes and travel times have yet to be fully determined. As at Hanford, the ability of the medium (tuff) to retard movement of radionuclides is not yet well understood.") Mr. Bernero was the Deputy Director of the NRC Office in charge of evaluating the safety of high-level waste disposal facilities. NRC did not object to studying (characterizing) Yucca Mountain further.

⁸ Compare the June 29, 1987 testimony of Donald L. Vieth, DOE Project Manager, Waste Management Project Office, Nevada Operations Office, appearing in S. Rep. No. 100-152, 100th Cong., 1st Sess. at 133, 138 [*See* NA15-16] ("[L]ittle groundwater is expected to be available to dissolve and move the waste even if a waste canister is damaged") with DOE's June 2008 license application at 2.1-21 [*See* NA20] ("On average over all waste packages, the amount of seeping water is 1.2, 4.6, and 14.4 kg/yr per waste package for the present-day, monsoon, and glacial-transition climate states, respectively"). Accordingly, DOE plans to install thousands of titanium alloy drip shields in the tunnels "to divert seepage away from the waste package." June 2008 license application at 2-7 [*See* NA19]. However, eventually the drip shield and waste packages are all degraded by corrosion. *Id.*

completed, but also before any final licensing standards were in place.⁹ Also, supporters ignored the objections of the host State, which believed (with good reason) that Nevada had been singled out simply because it was "the small kid on the block."¹⁰

By 2001, DOE had spent about \$4.5 billion characterizing the Yucca Mountain site, and its efforts established that the site was more complex than originally thought and that (as indicated above) the underground environment was not as dry as Yucca proponents had expected.¹¹ But DOE pressed forward with Yucca Mountain much like its predecessor AEC pressed forward with Lyons, Kansas. In February 2002, DOE Secretary Abraham formally recommended the Yucca Mountain site to President Bush, notwithstanding the Nuclear Waste Technical Review Board's conclusion that DOE "has yet to make a convincing case that nuclear waste can safely be buried at Yucca Mountain."¹² President Bush

⁹ When the NWPA was amended in 1987 to single out Yucca Mountain, the EPA's repository standards, which controlled important elements of the NRC's licensing regulation, had been partially vacated and remanded by the First Circuit. *NRDC v. EPA*, 824 F.2d 1258 (1st Cir. 1987).

¹⁰ Walker at 182 [*See* NA10].

¹¹ Walker at 183 [*See* NA11].

¹² Hearings before the Senate Committee on Energy and Natural Resources on S.J. Res. 34, May 23, 2001 (S. Hrg. 107-483 at 157, May 16, 22-23, 2002) [*See* NA22]. The Board elaborated that DOE's safety case was only "weak to moderate." *Id.* The Board was established by Congress to advise DOE on repository safety. Its members were (and are) appointed by the President based on recommendations from the National Academy of Sciences. 42 U.S.C. §§ 10261-64.

promptly agreed with Secretary Abraham and recommended the site to the Congress. Citing numerous scientific flaws, Nevada Governor Guinn formally disapproved of the site, using the state veto procedure set forth in the NWPA.¹³ Congress then formally overrode Nevada's veto by enacting H.J. Res. 87. The designation of Yucca Mountain as a repository site then became effective on July 23, 2002, when the President signed H.J. Res. 87 into law.¹⁴

The NWPA required DOE to file its license application within 90 days after the President's site recommendation became effective, or by October 21, 2002.¹⁵ October 21, 2002 came, went, and receded into history without any application being filed. This was not a surprising development, given the scientific and engineering challenges DOE still faced when Nevada's veto was overridden. DOE also failed to plan adequately to meet NRC's pre-application discovery requirements.¹⁶ DOE's plan to file its application in 2004 was aborted, and the application was not filed and docketed by the NRC until September 8, 2008, more than five years after the statutory deadline.

¹³ Walker at 183 [*See* NA11].

¹⁴ 42 U.S.C. § 10135 *note*.

¹⁵ 42 U.S.C. § 10134(b).

¹⁶ *U.S. Department of Energy (High-Level Waste Repository, Pre-Application Matters)*, LBP-04-20, 60 NRC 300 (2004).

The NRC then admitted over 300 contentions (formal objections to the application) as matters in controversy in the NRC Yucca Mountain licensing proceeding, more than in any other case in the history of NRC licensing.¹⁷ All of the technical contentions were supported by the equivalent of an expert report under Fed. R. Civ. P. 26(a)(2)(B), and accordingly, the NRC found that each of them presented a "genuine dispute" supported by "facts or expert opinions."¹⁸ DOE faced other serious obstacles. For example, when DOE's motion to withdraw was filed on March 3, 2010, no significant progress had been made on funding or constructing the enormously expensive rail line that would be necessary to transport high-level nuclear waste through Nevada to the site in the safest manner. Construction and operation of a repository also would require the appropriation of water resources owned by the public and administered by Nevada, and Nevada vigorously opposed the granting of the necessary State water use permits. A disinterested observer would reasonably conclude that a repository at Yucca Mountain would probably never be built and operated, even if the necessary NRC licenses were granted.

In the meantime, the near crisis atmosphere that permeated the Congressional debates over the original NWPA had completely dissipated. In

¹⁷ See *U.S. Department of Energy (High Level Waste Repository)*, CLI-09-14, 69 NRC 580 (2009).

¹⁸ 10 C.F.R. § 2.309(f)(1)(v) and (vi).

1982, NRC licensees and the Congress were gravely concerned that nuclear power plants would shut down because of a lack of adequate storage space for spent reactor fuel that was piling up in storage pools pending disposal.¹⁹ When DOE moved to withdraw its application 28 years later, more than 50 independent spent fuel storage installations across the United States stored more than 45,000 spent fuel assemblies and greater-than-Class C waste in more than 1,200 dry storage casks.²⁰ The NRC opined that such dry storage would be safe for at least 100 years and is evaluating whether it may be safe for extended periods beyond 100 years.²¹

DOE cannot withdraw its application without NRC's permission.²² DOE moved for permission to do so on March 3, 2010. On June 29, 2010, the NRC's presiding Atomic Safety and Licensing Board denied DOE's motion.²³ As of the time this brief was filed, the Commission is considering whether to review and reverse or uphold the Board's decision. Consequently, there is no final agency decision on DOE's motion.

¹⁹ See NWPA Section 111(a)(2), 42 U.S.C. § 10131(a)(2). Senator Alan Simpson, a key supporter of the NWPA, declared in 1982 that "[w]e're about to bring the nuclear industry to its knees unless we act now." Walker at 176 [See NA7].

²⁰ NRC "Plan for Integrating Spent Nuclear Fuel Regulatory Activities," Revision 00, June 21, 2010, at C-1 [See NA24].

²¹ Supra note 20 and COMSECY-10-0007, Enclosure 1 at 4 [See NA30].

²² 10 C.F.R. § 2.107(a).

²³ *U.S. Department of Energy (High Level Waste Repository)*, LBP-10-11, __ NRC __ (2010).

III. ARGUMENT.

A. The Statute and Legislative History Suggest Strongly that DOE is Not Prohibited from Withdrawing Its Application.

The NWPA does not include any language instructing DOE that it cannot withdraw its Yucca Mountain license application. However, the NWPA provides that "[t]he Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than [two alternate time periods]." ²⁴ This is strong evidence that Congress must have contemplated that DOE could withdraw its application. This is because one of the "laws" applicable to all NRC licensing proceedings is the NRC's regulation at 10 C.F.R. § 2.107, which contemplates that applications may be withdrawn and provides a procedure for doing so.

Congress was quite familiar with the NRC's rules when it considered and enacted the NWPA. For example, the House Committee on Science and Technology considered but ultimately rejected provisions that would have amended NRC's rules in very particular respects, including requiring an informal hearing to scope the issues for the formal hearing. The Committee must have reviewed the NRC's issue scoping rule in (then) 10 C.F.R. § 2.714 and recognized

²⁴ 42 U.S.C. § 10134(d).

that it did not provide for such a hearing.²⁵ If Congress knew enough about 10 C.F.R. § 2.714 to consider superseding it, it must also have known enough about 10 C.F.R. § 2.107 to consider superseding it as well, but instead it referred to "the laws applicable to such applications" without making any exception for § 2.107 or expressly prohibiting DOE from withdrawing its application.

But as the Petitioners would have it, 10 C.F.R. § 2.107 does not apply here because the "except that" clause in Section 114(d) makes § 2.107 inapplicable by requiring a merits decision. They read this section of the NWPA as if it required the Commission to apply the laws applicable to such applications, "except that such applications may not be withdrawn." The subsection does not so read. It requires the Commission to apply the laws applicable to such applications, "except that" it shall render a final decision not later than two specified time periods. The NRC's rules purported to give the Commission an unlimited amount of time to render final decisions on license applications. The "except that" clause in section 114(d) merely created a statutory exception from the NRC's rules by prohibiting the Commission from delaying its final decision beyond the specified time periods, assuming the application was still under consideration.

²⁵ H.R. Rep. 411 Part 1, 97th Cong., 1st Sess. at 47-48 [*See* NA26-27].

B. Requiring a Reluctant DOE to Proceed Makes No Sense.

No NRC license applicant has ever been told it cannot withdraw its application. Doing so would lead to a unique if not bizarre NRC licensing experiment, testing whether a reluctant applicant can meet its burden of proof and then, if it succeeds, whether it can create and sustain the kind of safety culture NRC expects. There is no good reason why such an experiment should ever be conducted under any circumstances short of an unambiguous Congressional direction to do so, which is absent here.

The Yucca Mountain licensing proceeding is the very last proceeding one would choose for such an experiment. This is a first-of-a-kind licensing proceeding where the applicant will need to meet its burden of proof in the face of determined and expert opponents. Nevada does not assume that DOE personnel will simply refuse to carry out their duty if the application cannot be withdrawn. But in this uniquely difficult and contentious proceeding the Commission has every right to expect a dedicated and enthusiastic applicant and potential licensee, not a reluctant one performing out of a sense of obligation. And if, in the end, Nevada prevailed over a reluctant and unenthusiastic applicant, there is the real danger that the decision would lack credibility because project supporters in Congress and elsewhere would forever claim that a more dedicated and enthusiastic applicant could have carried the day.

IV. CONCLUSION.

DOE is not prohibited from withdrawing its application and the petitions for review should be denied.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPESTYLE
REQUIREMENTS**

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's order of May 13, 2010, setting a limit of 23,000 words for the Brief(s) of Intervenors and Respondents, because this brief of Intervenor State of Nevada contains 2,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as agreed upon by the parties.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point and Times New Roman typestyle.

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Dated: February 8, 2011

CERTIFICATE OF SERVICE

I certify that on February 8, 2011, the *Final Brief of Intervenor State of Nevada Supporting Respondents* was filed with the Court by electronic service and served on all parties or their counsel of record electronically by email or by serving a true and correct copy at the addresses listed below:

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