

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of :)	July 19, 2010
)	
U.S. Department of Energy (Docket No. 63-001))	Docket No. 63-001-HLW
)	
(High Level Waste Repository Construction Authorization Application))	ASLBP No. 09-892-HLW-CAB04
)	

**NYE COUNTY REPLY BRIEF SUPPORTING CAB04 DECISION DENYING
DEPARTMENT OF ENERGY'S MOTION TO WITHDRAW WITH PREJUDICE
ITS LICENSE APPLICATION FOR YUCCA MOUNTAIN REPOSITORY AND
GRANTING INTERVENTION TO STATE OF WASHINGTON, STATE OF
SOUTH CAROLINA, AKIN COUNTY, SOUTH CAROLINA, AND PIIC**

The issue before the Nuclear Regulatory Commission ("NRC") can be starkly summarized. Is it reasonable to conclude that Congress intended to authorize the Department of Energy ("DOE") to unilaterally withdraw its Yucca Mountain license application ("LA"), without technical justification, given the overwhelming number of clear statutory demands to the contrary, including: (1) the Nuclear Waste Policy Act ("NWPA") obligations predicated upon a repository being operational by 1998; (2) Congressional designation of Yucca Mountain as the sole site for the repository, over State of Nevada opposition, and NWPA direction to abandon all other sites; (3) express NWPA requirements that DOE file an LA and that NRC review the LA and approve or disapprove it; (4) numerous other NWPA mandates designed to achieve the goal of implementing a Yucca Mountain project schedule grounded upon the need to follow "the optimum way to attain the operation of the repository" and to avoid delay; and (5) decades of effort and billions of public dollars expended to comply with the NWPA and the statutory goal of solving the Nation's nuclear waste problems? "Certainly not" is the only reasonable answer.

The State of Washington and other parties that support the CAB04 decision have clearly and persuasively analyzed the reasons why NRC should not undertake a voluntary review of the CAB04 decision. Nye County's positions on that issue and the need for DOE to comply with **all** of the CAB04 conditions related to preservation of, and access to, scientific data and physical samples are presented in detail in its original brief filed with NRC.¹ Therefore, Nye County will devote this Reply Brief to the other issues raised by the parties in their July 9, 2010 filings.

ARGUMENT

I. DOE MISCONSTRUES SECTION 114 OF THE NWPA AND IGNORES THE TEXT OF THE NWPA AS A WHOLE WHICH MAKES IT ABUNDANTLY CLEAR CONGRESS DID NOT GRANT DOE THE AUTHORITY TO UNILATERALLY WITHDRAW ITS LA

DOE, Nevada,² and other proponents of DOE's Motion to Withdraw base their conclusion that the LA may be withdrawn upon a selective reading of section 114(d) of the NWPA. As will be demonstrated, the unedited language of Section 114(d), coupled with other NWPA mandates, renders all of those arguments untenable. Section 114(d) provides in full:

The 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 the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadlines by not more than 12 months.

42 U.S.C. § 10134(d) (emphasis added). In interpreting this provision, CAB04 correctly concluded that "the Nuclear Waste Policy Act of 1982, as amended (NWPA), does not permit the

¹ See generally Nye County Brief Supporting CAB04 Decision Denying Department of Energy's Motion to Withdraw Its License Application with Prejudice and Granting Intervention (July 9, 2010) at Section I. & Section VI. (Hereinafter referred to as "Nye County NRC Brief"). For brevity and convenience, citation to other parties' briefs filed with NRC on July 9, 2010, will be cited in a similar manner. For example, "DOE NRC Brief at ___"

² Nevada argues that the text and legislative history of NWPA do not answer the question of whether DOE may withdraw its application. Nevada NRC Brief (July 9, 2010) at 24. As will be demonstrated, that is an incorrect and cramped reading of section 114, the NWPA as a whole, and its legislative history. The totality of the NWPA and its entire legislative history, taken as a whole, lead to only one reasonable conclusion: Congress did not intend to allow DOE to unilaterally withdraw its LA once filed. See text and accompanying notes 2-7, *infra*.

Secretary to withdraw the Application that the NWPA mandates the Secretary file. Specifically, the NWPA does not give the Secretary the discretion to substitute his policy for the one established by Congress in the NWPA that, at this point, mandates progress toward a merits decision by the Nuclear Regulatory Commission on the construction permit." ³

Under this provision, and the statutory structure it is embedded within, whatever opportunities to withdraw the LA allegedly available to DOE under the generic "applicable laws" clause are removed by the express exception clause which follows. That exception clause provides that the NRC *must* issue a "final decision" that "approv[es] or disapprov[es]" the "issuance of a construction authorization." 42 U.S.C. § 10134(d). This NWPA provision is a substantive mandate, and not merely the statement of an internal scheduling mandate, as DOE and others contend. It is consistent with other NWPA mandates, and directly implements Congress' stated goal of opening a repository as expeditiously as possible, subject only to NRC licensing review and Congressional approval. Any reading that does not give full effect to these words must be rejected.⁴

The arguments by DOE, NRC Staff, and others that the NRC obligation to issue a final decision is only triggered so long as an application is "docketed" before the NRC,⁵ and the argument made by Nevada and others that the "except that" clause is merely a scheduling provision, are specious. State of Nevada's Answer to the Department of Energy's Motion with Respect to Withdrawal of the License Application (May 17, 2010) at 3. The arguments not only

³ Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11 (June 29, 2010) (unpublished), at 3 (footnote omitted) (hereinafter referred to as "CAB04 Order Denying Motion").

⁴ This includes any construction of 10 C.F.R. § 2.107 that would allow unilateral withdraw of the LA. *See* detailed discussion of section 2.107 in Nye County NRC Brief at Section III. *See, e.g., City of Portland, City of Portland, Or. v. EPA*, 507 F.3d 706, 711 (D.C. Cir. 2007) (statute should be construed to give every word meaning); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole") (quotations and citations omitted).

⁵ U.S. Department of Energy's Reply to the Responses to the Motion to Withdraw (May 27, 2010) at 10-11, NRC Staff Answer to DOE's Motion to Withdraw its Application with Prejudice (May 17, 2010) at 13.

fail to give full effect to all the words of Section 114(d), but also render meaningless other provisions of the NWPA, including the requirement that the NRC provide Congress with status reports on its consideration of DOE's application "until the date on which such authorization is granted." 42 U.S.C. § 10134(c). As pointed out by CAB04, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n.*, 531 U.S. 457, 468 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 160 (2000) ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *Citizens Bank v. Strumpf*, 516 U.S. 16, 20 (1995) ("It is an elementary rule of construction that the act cannot be held to destroy itself." (quotation omitted))

Other NWPA's provisions confirm Congress' expectation that the NRC will issue a final decision on the merits of DOE's application, thus furthering the Congressional goal of opening a safe repository, albeit not by the originally specified date of 1998. The NWPA requires DOE to prepare a project decision schedule "that portrays *the optimum way to attain the operation of the repository*," including identifying activities that will "*cause a delay in beginning repository operation*." 42 U.S.C. § 10134(e)(1) (emphasis added). Any federal agency that cannot comply with the project decision schedule must report to Congress and specify its "*estimated time for completion of the activity*," along with any actions it will take "*to mitigate the delay involved*." 42 U.S.C. § 10134(e)(2) (emphasis added). Moreover, independent of the project decision schedule, the NWPA requires the NRC to provide Congress with status reports on its consideration of DOE's application "until the date *on which such authorization is granted*." 42 U.S.C. § 10134(c) (emphasis added).

Significantly, DOE was given express authority to terminate the repository process on technical, not policy, grounds, but only during the site characterization phase if the site was found unsuitable. 42 U.S.C. § 10133(c)(3). Conspicuously absent is any authority for DOE to make a project termination decision after that time has passed. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418-19 (1998)(citations and quotations omitted). Thus, Congress did not intend to give DOE authority to voluntarily terminate the process once site characterization had concluded. This conclusion is consistent with the NWPA's legislative history which reflects Congress' desire to "solidify the repository program. . . and keep it on track,"⁶ as well as to remove the repository project from the vagaries of political pressure that may arise from time to time during the course of the repository licensing and construction process.⁷

All of these NWPA provisions read together clearly indicate that Congress did intend that Yucca Mountain would someday become operational, subject to NRC license review and further

⁶ H.R. Rep. No. 97-49 (I), at 28-29.

⁷ The Atomic Energy Commission, predecessor to the Department of Energy and the Nuclear Regulatory Commission, reacted with a rush to develop a pilot permanent high level waste disposal facility. *The rejection of a site for the facility in Lyons, Kansas in 1971 after an intense political attack on the program*, followed quickly by revelations of serious technical flaws in the site, are now widely recognized as the landmark event in nuclear waste management history which would color future repository siting activities through the present day.

* * *

Increased pressure to resolve the problem sent the Federal nuclear establishment in 1976 . . . looking for a site in Michigan, *where political uproar quickly brought the program to defeat again*, this time even before enough drilling could be accomplished to determine whether technical flaws in the site existed. H.R. Rep. No. 97-491(I), at 27 (emphasis added).

* * *

The status of our technical ability to provide these permanent disposal facilities, or “repositories”, is considered by the Committee to be technically advanced to a point which justifies implementation of the technology. . . . In practice, however, management of nuclear wastes has been inadequate to guarantee that the risks will be small in fact. *It is necessary, therefore, to provide close Congressional control and public . . . to assure that the political and programmatic errors of our past experience will not be repeated.* H.R. Rep. No. 97-491(I), at 29-30 (emphasis added).

Congressional action. Therefore, many of the NWPA key provisions would be rendered meaningless if the statute were construed to permit DOE's unilateral withdrawal. *See, e.g., City of Portland, Oregon v. EPA*, 507 F.3d 706, 711 (D.C. Cir. 2007) (statute should be construed to give every word meaning). The fact that further NRC licensing and Congressional action are required before Yucca becomes operational does not support DOE's and Nevada's position,⁸ but only confirms that Congress reserved for itself key policy decisions during Yucca Mountain's development, informed by independent NRC safety and technical reviews.

Nevada counters by stating that CAB04's interpretation of section 114(d) would not allow DOE to "withdraw" its LA even if the Yucca repository is unsafe. Nevada NRC Brief at 12-13, 16. That argument is patently absurd. There are several avenues under the NWPA for having the LA properly dismissed under such circumstances. First, the most likely avenue of finding a substantial safety flaw in the LA is during the NRC licensing process—the very process Nevada now seeks to halt. Any uncorrectable safety flaw identified by DOE once the LA is filed could certainly be brought to the attention of both the NRC, the parties to the licensing proceeding, and Congress. NRC, faced with a dispositive motion from DOE that is supported by an appropriate technical record on the safety issue, would be in a position to "disapprove" the LA on the merits pursuant to 42 U.S.C. § 10134(d), and not its withdrawal regulation. Moreover, by simultaneously reporting the same insuperable safety issues to Congress pursuant to 42 U.S.C. § 10134(e), DOE would be pursuing another lawful avenue for permanently abandoning the Yucca Mountain LA through affirmative Congressional action.

It remains unexplained why DOE has not pursued a Congressional amendment to the NWPA here. That avenue is still available, but the NWPA does not authorize DOE to abandon Yucca Mountain unilaterally. It should be emphasized that in the instant case, in contrast to

⁸ *See, e.g.,* DOE NRC Brief at 27-28.

Nevada's hypothetical, DOE admits that “the Secretary’s judgment here [to withdraw the LA] is not that Yucca Mountain is unsafe or that there are flaws in the LA, but rather that it is not a workable option and that alternatives will better serve the public interest.”⁹

Nevada also apparently finds justification for DOE's withdrawal in the assertion that “no significant progress has 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,” and because Nevada is vigorously opposing the issuance of necessary water use permits. Nevada NRC Brief at 6. From these observations, Nevada wrongly concludes that “[a] disinterested observer would reasonably conclude that a repository at Yucca Mountain would never be built and operated, even if the necessary NRC license were granted.” *Id.* The only conclusion that a disinterested observer could draw from these particular statements is that Nevada is doing everything in its power to stop the licensure and construction of the repository, regardless of what the NWPA and federal policy have to say on the matter.

Finally, neither DOE nor the President is ultimately authorized to *approve* a repository site. Instead, the host State holds a disapproval authority that can be overridden by the recommendation of the President, with Congress holding ultimate authority to approve the repository site in accordance with a detailed resolution process. That very process was followed in designating Yucca Mountain. *See* 42 U.S.C. § 10135(c)-(g).¹⁰ Because Congress designated Yucca Mountain as the sole repository site, there is no basis to assume that the NWPA allows the Secretary to *unilaterally reverse* the designation that Congress itself has made. Granting DOE's request for dismissal with prejudice would result in just such a unilateral Executive Branch nullification of the Congressional designation of Yucca Mountain as the sole repository site.

⁹ DOE Reply Brief (May 27, 2010) at 31, note 102.

¹⁰ That designation process is not in dispute and is detailed in Nye County's Original Brief in Support of the CAB04 decision at 10, 14-16.

II. THE ATOMIC ENERGY ACT DOES NOT PROVIDE THE SECRETARY OF ENERGY WITH AUTHORITY OR DISCRETION TO IGNORE THE SPECIFIC PROVISIONS OF THE NWPA AND UNILATERALLY WITHDRAW DOE'S LICENSE APPLICATION WITHOUT CONGRESSIONAL APPROVAL

DOE has repeatedly asserted during oral argument and in its filings with NRC that DOE has "discretion" as a matter of "policy" to unilaterally withdraw its LA at any time, citing irrelevant general provisions of the Atomic Energy Act.¹¹ DOE insists that, by enacting the NWPA, Congress did not limit in any way the discretion or other powers allegedly enjoyed by DOE under the Atomic Energy Act of 1954 ("AEA") to withdraw the Yucca Mountain repository license after it was filed.¹² The AEA however contains no specific authorizations or directives applicable to the Yucca Mountain LA once it is filed. Therefore, there is no inconsistency between the AEA and the NWPA.

For example, DOE stated during oral argument¹³ that the Secretary's discretionary authority to withdraw the LA is based upon section 161(p) of the AEA, which generally authorizes DOE to "make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act." 42 U.S.C. § 2201(p). CAB04 found that DOE reliance on section 161(b) is clearly misplaced. In seeking to withdraw the LA, DOE has not taken any of the actions identified in that section, such as promulgating, issuing, rescinding or amending rules and regulations authorized in section 161(p) to carry out the purposes of the AEA. *See also* AEA section 161(b), *Id.* § 2201(b), to the same effect. Nor has DOE even issued an Order supported by a technical record to document the Secretary's "policy" determination. CAB04 Order Denying Motion at 16, n. 59. Rather, DOE relies solely on its FY-

¹¹ *See, e.g.*, U.S. Department of Energy's Brief in Support of Review and Reversal of Board's Rulings on the Motion to Withdraw (July 9, 2010) at 1, 3, 8-10 (hereinafter referred to as "DOE NRC Brief").

¹² *See also* DOE Reply Brief (May 27, 2010) at 5.

¹³ Tr. at 11 (June 3, 2010)

2011 budget *request* to Congress and upon counsel's Motion to Withdraw the LA filed in this case as the documentary support for the Secretary's action in cavalierly obviating decades of work in furtherance of the Yucca Mountain project.

Grasping for straws, DOE now introduces citations to other general sections of the AEA that allegedly provide unfettered discretion allowing DOE to withdraw the LA. DOE NRC Brief at 5, 8-9. For example, DOE points to the general authority granted to DOE, allowing it to "direct the possession, use, and production of atomic energy and special nuclear material..." citing 42 U.S.C. §2013(c). DOE NRC Brief at 8. Perhaps sensing that the cited AEA section says nothing of relevance to the case, DOE elaborates further concerning the conferred "discretion"—a word never used in the section cited—by stating that the discretion "encompasses 'nuclear waste management responsibilities,' including 'the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear waste' " citing section 203 (a)(8)(C) of the DOE Organization Act. 42 U.S.C. §7133(a)(8)(C). DOE fails to inform NRC that the section cited is merely a definitional one, taken from a portion of the law authorizing appointment of assistant secretaries within DOE. That section itself later states that "nothing in this section shall be construed as granting to the Department regulatory functions presently within the Nuclear Regulatory Commission, or any additional functions than those already conferred by law." *Id.* at §7133(a). Moreover, the law provides that each new assistant secretary "shall" perform all duties, in accordance with "applicable law"¹⁴ such as the later enacted NWPA.

¹⁴ *Id.* at §7133(a). DOE, quite fond of finding "applicable law" when it suits the Department, surely concedes that the NWPA is an "applicable law" that the assistant secretaries must abide by. Contrary to its AEA arguments in this proceeding, DOE has previously readily acknowledged that the later enacted, specific statutory scheme of the NWPA limits DOE's authority under the AEA. DOE, *Report to Congress on the Demonstration of the Interim Storage of Spent Nuclear Fuel* (Dec. 2008) at 7. Therefore, at most, DOE's citation to the assistant secretaries' duties forces us to look at what the NWPA requires, and nothing more, for resolution of this dispute. Far from granting DOE authority to ignore the NWPA, the specific Act controls if inconsistent with the AEA.

Clearly, these wholly irrelevant AEA provisions do not grant discretion to the Secretary to take actions inconsistent with the NWPA. They don't **substantively** provide anything whatsoever governing the disposition of nuclear waste in a repository, let alone speak to the licensing of a nuclear waste repository designated later by Congress for development at Yucca Mountain. Nevada joins the chorus of irrelevancy and maintains that section 161b of the AEA grants DOE the authority to issue "orders" to "minimize danger to life or property." Nevada NRC Brief at 16. DOE filed a Motion to Withdraw, it did not issue an order. DOE also did not predicate its Motion to Withdraw on safety grounds or flaws in the LA, but rather upon undocumented policy judgments.¹⁵ Counsel-prepared motions provide direction to no one, request orders from someone else (in this case CAB04 and NRC), and are not "orders" within the meaning of the Administrative Procedure Act ("APA"), either formal or informal.

DOE then inexplicably maintains that any interpretation of the NWPA that limits DOE discretion in withdrawing its LA based upon the Secretary's policy judgment constitutes a "repeal" of AEA provisions. Nothing could be further from the truth. First of all, DOE fails to clearly and precisely identify the sections of the AEA that would be repealed—and it can't, since a *general* grant of administrative discretion (assuming it exists) is always reconcilable with later-enacted specific limits on that discretion. This is not a situation where one statute (the AEA) instructs DOE to do a specific thing, and the NWPA instructs it to do another. There is in fact no inconsistency between the AEA and the NWPA on relevant issues. Just as DOE admonishes, the

¹⁵ See text and accompanying note 9, *supra*. Nevada's argument only serves to underscore how DOE has violated the APA. See Nye County NRC Brief at Section IV. DOE's assertion that it should be afforded *Chevron* deference in its interpretation of the NWPA is also erroneous on several counts. First, the implementing agency for the critical licensing provisions and 10 C.F.R. § 2.107 is NRC, not DOE. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Second, if Congress has spoken on the issue, as it is in this case, no agency is free to interpret the statute otherwise. *Id.* at 842. Finally, even assuming DOE is the appropriate implementing agency, and that the NWPA and NRC rules are unclear, deference is reserved for formal interpretations of agency enabling statutes such as those contained in promulgated rules or adjudicatory orders under the APA, vehicles not used by DOE in this case. *Id.* See also *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) and other authorities cited by CAB04 Order Denying Motion at 16.

two statutes can be construed together in a manner that gives effect to both Acts. *Vimar Sweguras y Reasegues, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) ("[W]hen two statutes are capable of co-existence... it is the duty of the courts, absent a clearly expressed intention to the contrary, to regard each as effective."). The CAB04 decision has done just that. Nothing in the AEA directly addresses DOE's and NRC's responsibilities during the licensing of the nuclear waste repository, let alone the licensing of the Congressional designated site at Yucca Mountain under the NWPA. Therefore, there is no statutory inconsistency needing resolution, and no repeal of the AEA, implied or otherwise.

Nevertheless, the result is the same even if we assume that the NWPA is inconsistent with, and limits DOE's specific discretion authority granted by the AEA. The NWPA is a subsequently-enacted statute that specifically controls the identification, siting, designation, licensing, and development of the Yucca Mountain repository and directly resolves the issues in this case.¹⁶ It is the AEA that must be construed consistently with the NWPA, not the other way around. As the Supreme Court has stated, "'a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.'"¹⁷ That is especially true when the alleged inconsistent provision in the earlier statute is a general grant of authority and the later statute is specific.¹⁸

III. THE EXISTENCE OF A BLUE RIBBON STUDY PANEL IS IRRELEVANT AND DOES NOT JUSTIFY DOE'S IGNORING THE CLEAR MANDATES OF THE NWPA

Until it filed the Motion to Withdraw, DOE claimed no authority under the NWPA to unilaterally withdraw its LA. In May 2009, the Secretary of DOE testified before Congress that DOE would "continue participation in the Nuclear Regulatory Commission (NRC) license

¹⁶ See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

¹⁷ *Id.* at 143 (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)).

¹⁸ *Id.*

application process, consistent with the provisions of the Nuclear Waste Policy Act.”¹⁹ DOE has now reversed field and stated that the site is "unworkable" as the geological repository for nuclear waste. Yet, they provide no scientific evidence to support that conclusion, and did not so much as bother to explain why the site was unworkable in a technical record or order. DOE Motion to Withdraw at 1; DOE Reply Brief at 31, n. 102. The Administration's premature and unsupportable decision to attempt withdrawal was made well before the development of recommendations for alternatives from the President's own Blue Ribbon Panel, and prior to any action by Congress in accepting the Administration's budget proposal relative to DOE's FY-2011 appropriation.

Nevertheless, DOE cites Congressional funding for the Blue Ribbon Panel's examination of nuclear waste disposal alternatives as support for its position. However, as a matter of law, the existence of the Blue Ribbon Panel is irrelevant to the legal issues in this case. Most importantly, the same Act that funded the Blue Ribbon Panel also appropriated \$93,400,000 for "nuclear waste disposal activities to carry out the purposes of the [NWPA];" that is, for Yucca Mountain licensing activities.²⁰ The Administration requested, and Congress approved, funding for the current fiscal year in order to continue the Yucca Mountain license application process. DOE, *FY 2010 Congressional Budget Request, Vol. 5*, 504 (FY-2010 budget request "is dedicated solely to supporting ... the NRC LA process."), 505, 520, 540; P.L. 111-85, 123 Stat. 2864, 2868. Thus, there is nothing inconsistent with proceeding with the NRC licensing while the Blue Ribbon panel deliberates. Indeed, in the FY 2010 House Committee Report, the

¹⁹ FY-2010 Appropriations Hearing Before the Subcomm. on Energy and Water Development, and Related Agencies of the S. Comm. on Appropriations, 111th Cong. (2009). The Administration requested, and Congress approved, funding for the current fiscal year in order to continue the Yucca Mountain license application process. DOE, *FY 2010 Congressional Budget Request, Vol. 5*, 504 (FY-2010 budget request "is dedicated solely to supporting ... the NRC LA process."), 505, 520, 540; P.L. 111-85, 123 Stat. 2864, 2868.

²⁰ FY-2010 Appropriations Hearing Before the Subcomm. on Energy and Water Development, and Related Agencies of the S. Comm. on Appropriations, 111th Cong. (2009).

Committee actually stated its support for the position that the Yucca Mountain application review should continue in order to answer all relevant technical questions. The Committee made \$5,000,000 available for the Blue Ribbon Commission “*provided that Yucca Mountain is considered in the review.*” H.R. Report No 111-203 at 82, 85 (emphasis added). The Conference Report states that the Blue Ribbon Commission shall “consider *all* alternatives for nuclear waste disposal.” Energy and Water Development and Related Agencies Appropriations Act, 2010 Conference Report, H.R. Report No. 111-278 at 21 (2009) (emphasis added). The Conference Report contains a reconciliation provision directing that “report language included by the House which is not contradicted by the report of the Senate or the conference, and Senate report language which is not contradicted by the report of the House or the conference is approved by the committee of conference.” See H.R. Report No. 111-278 at 39 (2009). There is no express contradiction of the House Report language, which requires the Blue Ribbon Commission to consider Yucca Mountain, in either the Conference Report or the Senate Report, and thus the language in the House Report is law. See S. Report No. 111-45 (2009); H.R. Report No. 111-278. Thus, Congress' decisions to fund the Blue Ribbon Commission and to keep Yucca Mountain as an alternative to be considered do not indicate any Congressional intent to disrupt the licensing process mandated by the NWPA.

NRC review of this issue should be informed by logic and practical considerations. Clearly DOE's withdrawal of the LA can not be predicated upon the results of a technical and policy report that has yet to be written. If there is any integrity and independence in the study process, some of the distinguished panelists may well find that a repository is needed and that reprocessing is, at best, a waste *minimization* not *elimination* strategy that still requires decades of technical advancement before it is viable. Published reports from the early meetings of the

Blue Ribbon Panel indicate little new will come of the Panel's discussions beyond what has already been explored in hundreds of other studies of the problems. In short, DOE's invocation of the panel is an excuse not a justification for withdrawing the LA.

IV. NRC'S REGULATIONS DO NOT AUTHORIZE DOE WITHDRAWAL OF ITS LA

A. Whether or Not NRC's General Procedural Rule On Withdrawal of License Applications is Applicable, the Rule Does Not Resolve the Substantive Issue in This Case

The reach of NRC's rules, particularly 10 C.F.R § 2.107 concerning the withdrawal of a nuclear license application in general, was analyzed in detail in Nye County's Brief in Support of the CAB04 decision.²¹ That analysis will not be repeated herein. Only a few points require comment here, given the new filings of the parties before NRC. DOE, Nevada, and other supporters of the Motion to Withdraw fail to recognize the elementary difference between allegedly "applicable" law and law which is dispositive of a particular legal position. Even if we assume 10 C.F.R § 2.107 is "applicable law" that is not obviated by section 114 of the NWP, the rule on its face does not dispose of the issues before NRC because the rule simply specifies a procedure for handling motions to withdraw in commercial licensing cases and for determining whether such motions should be granted or denied, or what conditions should be imposed. 10 C.F.R § 2.107(a) ("Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.") Therefore, in an ordinary licensing case, when an applicant for a commercial nuclear license requests a withdrawal after a notice for hearing has been issued, the presiding officer (CAB or Licensing Board) will determine, in the first instance, whether it is appropriate to deny the request, or dismiss with or without prejudice. *See, e.g., Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45,*

²¹ Nye County NRC Brief at Section III.

50-51, 1999 WL 595216, *3 (NRC July 28, 1999). Thus, even if the procedures specified in 10 C.F.R § 2.107(a) are "applicable" to this case, they do not direct a substantive outcome.

B. While None of the NRC Cases Interpreting 10 C.F.R § 2.107 Are On Point or Dispositive, their Principles Uniformly Support the CAB04 Decision in this Case

DOE, Nevada, and other parties' collective assertion that the NRC case law under 2.107 is "applicable" law borders on the ludicrous, if they in fact mean such cases are controlling or dispositive of the issues before NRC. Such an assertion would require that the NRC cases be found "on all fours" with the matter now before the NRC. The factual and legal contexts of the NRC withdrawal cases do not remotely resemble the Yucca Mountain licensing case, as the questions presented in the Yucca Mountain licensing are ones of first impression. Most importantly, as the CAB04 noted in its decision, none of the NRC cases involved a license application that was required to be filed by law after the site was designated by Congress in accordance with a detailed statutory plan for the siting, licensing, and development of the facility.

Nevertheless, Nevada points to a long line of NRC cases and argues that NRC should not second-guess any licensee's decisions to abandon a nuclear project. Nevada NRC Brief at 22, 28-30. A typical applicant's request to withdrawal a commercial license application **without prejudice** is based solely upon "business judgment." *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51, 1983 WL 31390, *2 (NRC 1983). That reasoning, however, does not apply to the Yucca Mountain repository. Unlike power reactor or other commercial license applications, the Yucca application was not voluntary, but was filed on behalf of the citizens of the United States by DOE in accordance with the mandates of the NWPA. The Yucca Mountain location, unlike a commercial facility, was selected after decades

of study by the Executive and Legislative Branches with federal dollars, driven by federal law and public policy concerns, not profit motives.

To the extent NRC case law is instructive at all in resolving this matter, that body of law forecloses any possibility of withdrawal with prejudice. NRC has never granted a Motion to Dismiss with prejudice in any reported case. It has uniformly held that dismissal with prejudice is a severe sanction that should be reserved for those unusual situations that involve substantial prejudice to the proposing party or to the public, following an adjudication on the merits of the contentions. *See, e.g., Yankee Atomic Electric Company* (Yankee Nuclear Power Station), 50 NRC 45, 51, 1999 WL 595216 (July 28, 1999) (requests for dismissal with prejudice denied where final adjudication not reached); *Energy Fuels Nuclear, Inc.*, 42 N.R.C. 197, 198, 1995 WL 808338, *1 (Nov. 3, 1995); *Puerto Rico Electric Power Authority*, 14 NRC at 1132-1133; *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, 50 NRC at 51. *Northern States Power Company* (Independent Spent Fuel Storage Installation), 46 NRC. 227, 231, 1997 WL 687861, *3 (NRC Oct 15, 1997) (“*Northern States Power*”). In the case *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-84-33, 20 NRC 765, 767-768 (1984), the Licensing Board refused to grant a motion to dismiss with prejudice, notwithstanding the fact that the applicant acquiesced in the moving party's request for dismissal with prejudice. NRC has reviewed the types of prejudice and harm raised by Nevada here and has uniformly determined that they do not justify a withdrawal with prejudice.²²

²² Nye County NRC Brief at Section III. B. Nye County also believes that establishment of "special counsel" to prosecute the LA, as advocated by numerous other opponents of the Motion to Dismiss at oral argument, is an effective method of assuring independence and good faith prosecution of the application. Therefore, Nye County no longer maintains, as it originally did, that such prosecution is untenable because DOE is a reluctant applicant.

C. DOE Is the License Applicant and Movant in this Case Not Nevada and Any Harm That Nevada Will Allegedly Suffer Does Not Justify Withdrawal With or Without Prejudice

As pointed out in detail by Nye County and the other opponents of the Motion to Withdraw in their filings and during oral argument, the principal harm that must be considered is that which the States with spent fuel, and the public at large, will suffer if NRC's consideration of the Yucca Mountain license is prematurely halted. Final siting and operation of the Nation's waste repository would certainly be delayed. Billions of taxpayer dollars utilized to assess the Yucca Mountain site and develop the LA will have been utterly wasted if the licensing process is not carried forward, at least to the point of an NRC determination on the technical and safety merits of construction authorization. As even the Secretary of Energy publicly admitted, that process would provide valuable scientific information on the feasibility of geological repositories in the future. Nuclear utilities that have paid billions of dollars into the nuclear waste fund would have to continue to store nuclear waste at over a hundred sites until an alternative is sited and built. Projects tied to Yucca Mountain would be have to be halted

To counter this and other indisputable harm to the public, Nevada attempts to justify withdrawal with prejudice by astounding claiming that no one will be prejudiced by such a withdrawal, and because Nevada has hired expert witnesses and will incur litigation expenses now and in the future. Nevada NRC Brief at 31-33. The federal government and all parties to this license proceeding have incurred such costs. The CAB properly disposed of this issue when it ruled against Nevada. CAB04 Order Denying Motion at 22. Nevertheless, Nevada continues to argue that its huge expenditures and discovery efforts have prejudiced Nevada and justify a dismissal with prejudice, even though there has been no adjudication on the merits of any of

Nevada's contentions.²³ Nevada NRC Brief at 35-36. Nevada now also criticizes DOE for its delay in submitting its LA,²⁴ a delay that Nevada itself sought and contributed to by raising issues that DOE attempted to address.

Nevada's arguments are curiously circular. That Nevada has aggressively and strenuously fought selection, characterization and ultimately licensure of the Yucca Mountain site as a repository is unquestioned. Nevada now points to its own litigation efforts, and **without final adjudication of a single contention in its favor** or citation to a single binding precedent, seeks to use that same delay and litigation effort as a justification for dismissal with prejudice. If that were the basis for NRC dismissal with prejudice, the merits of any contention would be irrelevant, and mere resolve and litigation effort could defeat any license application. The argument is curious in another way: DOE is the license applicant and movant in this case, not Nevada.

Nevertheless, assuming NRC cases interpreting 2.107 are relevant as DOE and Nevada contend, they unequivocally defeat Nevada's argument that such costs justify a dismissal. To the contrary, litigation costs, past or even future, do not justify a dismissal with prejudice. *Duke Power Co.*, 16 NRC at 1135, *citing Jones v. SEC*, 298 U.S. 1, 19 (1936); 5 Moore's Federal Practice 41.05(1) at 41-72 to 41-73 (2nd ed. 1981); *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 50, 1983 WL 31390, *3 (Jan. 19, 1983). *Puerto Rico Electric Power Authority* 14 NRC at 1132, 1135; *Philadelphia Electric Co.* 14 NRC at 978-979.

²³ Nevada utterly ignores, however, the waste of billions of dollars of public funds that would be result if the LA were dismissed, and dismisses any consideration of public harm or prejudice to other State nuclear waste programs directly tied to the Yucca Mountain project. *See* CAB04 Order Denying Motion at 21-22

²⁴ Nevada NRC Brief at 36-37

Nevada also argues that clearly inapplicable federal decisions on harm should guide NRC in its decision in determining whether DOE's requested withdrawal of its LA can be granted with prejudice. Nevada NRC Brief at 31-32. Nevada is again incorrect. The cases cited by Nevada are inapposite for any proceeding before the Commission. While 10 C.F.R. § 2.107 was loosely modeled after a federal rule,²⁵ federal cases are ill-adapted to NRC licensing cases, where an applicant files for a license and intervenors file contentions. Any effort to apply the cited federal cases directly will result in erroneous, convoluted, and confusing results.

As noted previously, DOE was compelled to file its license application by the NWPA. More importantly, plaintiffs in federal court are the parties complaining that they have been injured in some way by the various named defendants. DOE is the license applicant and makes no complaints against the State of Nevada or any of the other intervening participants in this case; nor do license applicants make such claims before the NRC. To the contrary, at NRC, the complaining parties are the intervening parties (who file contentions, not a complaint).

Therefore, the decision to withdraw in this case, even without prejudice, should be denied, assuming NRC regulations are "applicable." NRC has noted that 10 C.F.R. § 2.107 would allow the denial of a request to simply withdraw a voluntarily submitted license application under certain circumstances, such as where the result would be unlawful. *See Sequoyah Fuels Corporation*, 41 N.R.C. 179, 192; Nuclear Reg. Re. P 31234, 1995 WL 135729 (NRC). Therefore, if 10 C.F.R. § 2.107 is an applicable procedure in this case, NRC should affirm the CAB04 Order in the public interest and because withdrawal violates the NWPA. *Id.* *See also Florida Power and Light Company (Turkey Point Plant Unit Nos. 3 and 4)*, 32 N.R.C.

²⁵ NRC's rule is modeled after Federal Rule of Civil Procedure 41(a)(2). That rule deals with voluntary and involuntary dismissals of civil cases in Federal Court, and the rule is not easily adapted to the instant repository licensing proceeding. For example, involuntary dismissals (with prejudice) are usually reserved for instances of plaintiff misconduct.

181, 185-86, 1990 WL 324437, *3 (Sept. 25, 1990) (Board's sua sponte authority used to protect the public interest).

CONCLUSION

As demonstrated above, the briefs filed by DOE, NRC Staff, Nevada, and others fail to demonstrate that the CAB04 decision should be reviewed, or, if reviewed, reversed. Accordingly, Nye County renews its requests that NRC either refuse to review CAB04's decision and simply certify it as a final agency decision, or expeditiously review and affirm CAB04's decision denying DOE's Motion to Withdraw its License Application for construction authorization for the repository at Yucca Mountain, Nevada.

Respectfully Submitted,

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July 19, 2010

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	Docket No.	63-001-HLW
)		
U.S. DEPARTMENT OF ENERGY)	ASLBP Nos.	09-892-HLW-CAB04
)		
(High-Level Waste Repository))		
)		

CERTIFICATE OF SERVICE

I hereby certify that copies of the Nye County Reply Brief Supporting CAB04 Decision Denying DOE's Motion to Withdraw LA, dated July 19, 2010, in the above-captioned proceeding have been served on the following persons by Electronic Information Exchange.

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