

May 27, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

Before Administrative Judges:
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

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

U.S. DEPARTMENT OF ENERGY'S REPLY TO THE RESPONSES TO
THE MOTION TO WITHDRAW

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TABLE OF ABBREVIATIONS

Abbreviation	Description
AEA	Atomic Energy Act
AEC	Atomic Energy Commission
Board	Atomic Safety and Licensing Board
BRC	Blue Ribbon Commission
DOE	Department of Energy
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
HLW	High-Level Waste
LSN	Licensing Support Network
NARUC	National Association of Regulatory Utility Commissioners
NEI	Nuclear Energy Institute
NEPA	National Environmental Policy Act
NRC or Commission	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act
PIIC	Prairie Island Indian Community
SC	South Carolina
Secretary	Secretary of Energy
SEIS	Supplemental Environmental Impact Statement
SNF	Spent Nuclear Fuel
Staff	NRC Staff
WA	Washington
WIPP	Waste Isolation Pilot Plant
YMDA	Yucca Mountain Development Act

I. PRELIMINARY STATEMENT

The plain language of all applicable statutes makes it perfectly clear that DOE has the authority to withdraw the pending license application for a permanent repository at Yucca Mountain. Moreover, the opponents to DOE's motion to withdraw do not dispute that applicants in all other proceedings before the NRC may withdraw pending license applications; indeed, the NRC has never rejected such a request. The opponents nonetheless argue that the NWPA denies DOE that same right. Three key points, which the opponents do not and cannot dispute, compel rejection of their argument.

First, the opponents do not contest that the AEA vests the Secretary with wide discretion over the disposal of spent nuclear fuel and high-level radioactive waste. The authority bestowed by the AEA is “virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.”¹

Second, the opponents identify no provision of the NWPA that strips the Secretary of his AEA authority regarding the matter in dispute here – whether to seek withdrawal of a license application for a repository when the Secretary has determined, as a matter of policy, not to proceed with that repository. The parties cite no statutory text – and there is none – that, by its terms, directs the Secretary not to withdraw a pending application in these circumstances. To the contrary, as DOE stressed in its motion to withdraw, Congress mandated in the NWPA that any application is subject to the Commission's “laws applicable to such applications,”² which

¹ *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

² NWPA § 114(d), 42 U.S.C. § 10134(d).

includes the Commission’s longstanding rule and practice allowing motions to withdraw.³ Thus, far from treating DOE differently from ordinary applicants, Congress specified that *the same body of rules and precedents that the NRC has relied upon to permit withdrawal in all prior cases applies here as well*. As Staff properly emphasizes, basic canons of construction prescribe that Congress is presumed to know the regulatory background against which it legislates.⁴ Congress plainly knew how to limit the Secretary’s discretion in the NWPA, and it did so specifically as to a number of other matters. That Congress did not do so with respect to the withdrawal of a license application confirms that Congress did not cabin the Secretary’s discretion in this regard.

Third, the opponents identify nothing in the NWPA that compels construction of the Yucca Mountain repository. No provision compels DOE to proceed with construction even if the NRC grants construction authorization. Indeed, as discussed in DOE’s motion to withdraw,⁵ DOE could not construct the Yucca Mountain repository absent further legislative action (as well as numerous other steps not mandated by the NWPA) even if the Commission approved the

³ 10 C.F.R. § 2.107. Before Congress passed the NWPA in December 1982, the NRC (and its predecessor the AEC) had permitted the withdrawal of applications in a significant number of reported decisions. *E.g.*, *Duke Power Company* (Perkins Nuclear Power Station, Units 1, 2 and 3), LBP-82-81, 16 N.R.C. 1128 (1982); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 N.R.C. 1125 (1981); *Philadelphia Electric Company* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 N.R.C. 967 (1981); *Boston Edison Company* (Pilgrim Nuclear Generating Station, Units 2 and 3), LBP-74-62, 8 A.E.C. 324 (1974).

⁴ *Newark Morning Ledger Co. v. U.S.*, 507 U.S. 546, 575 (1993) (Congress presumed to have “accepted the understanding” set out in relevant regulations and judicial decisions clarifying regulations); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.”); *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (there is a “well-settled presumption that Congress understands the state of existing law when it legislates.”); *see also Bullcreek v. NRC*, 359 F.3d 536, 542 (D.C. Cir. 2004) (holding that Congress is presumed to have been familiar with, and taken into account, NRC regulations when it enacted the NWPA).

⁵ DOE Motion to Withdraw at 7.

license application and DOE wanted to proceed. Congress understood this fact, stating, for instance, in the Senate Report accompanying the adoption of the joint resolution overruling Nevada's notice of disapproval that its action did not compel construction of the Yucca Mountain repository but merely authorized DOE to apply for a license application:

It bears repeating that enactment of the joint resolution will *not* authorize construction of the repository or allow DOE to put any radioactive waste or spent nuclear fuel in it or even allow DOE to begin transporting waste to it. Enactment of the joint resolution *will only allow DOE to take the next step* in the process laid out by the Nuclear Waste Policy Act and *apply* to the NRC for authorization to construct the repository at Yucca Mountain.⁶

At bottom, the opponents' arguments rest on the implausible contention that Congress (even though it did not say so) intended to require the Secretary to continue to prosecute this particular application to conclusion even though Congress has not required – and, in fact, not even enabled – the Secretary to take other steps necessary to open a repository. That interpretation reads the NWPA to impose futile and wasteful requirements, and should not be adopted absent extraordinarily clear statutory text of the kind that does not exist here.⁷

Such an interpretation also makes no sense. As the opponents repeatedly note, the NWPA grants the Secretary discretion unilaterally to end the evaluation process for a repository before an application for that repository is filed.⁸ There is no reason to conclude that the same

⁶ S. Rep. No. 107-159, at 13, 2002 WL 1288812 (2002) (emphasis added)

⁷ *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 673 (1988) (declining to interpret the AEA to mean that Congress required DOE to promulgate regulations restricting its enrichment of foreign-source uranium when the regulations would not serve the statutory goal of protecting the domestic enrichment industry, stating: “it seems strained to assert that . . . Congress nevertheless intended DOE to impose restrictions that were somehow calculated to serve that unattainable goal.”); *see also Kaseman v. District of Columbia*, 444 F.3d 637, 642 (D.C. Cir. 2006) (“When possible, statutes should be interpreted to avoid ‘untenable distinctions,’ ‘unreasonable results,’ or ‘unjust or absurd consequences.’”); *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451, 468 (D.C. Cir. 1996) (holding that statute should be interpreted to “avoid ‘absurd or futile results.’”).

⁸ WA Resp. at 9-10; NARUC Resp. 10-11 n. 37.

statute treats the application process inconsistently and deprives the Secretary of discretion to end that process if the Secretary determines at that stage that completing the application process is contrary to sound policy. Preservation of the Secretary's authority during the application phase is particularly clear under the statute because, as emphasized, Congress expressly adopts the NRC's existing practices and precedents – which, in turn, give applicants discretion to withdraw a pending application.

The opponents' contrary reading is all the more unpersuasive in light of Congress's recent decision to fund a Blue Ribbon Commission to consider “alternatives” to the Yucca Mountain project.⁹ Congress's authorization for the Blue Ribbon Commission to consider these alternatives evidences its understanding that an inexorable march to opening a repository at Yucca Mountain is not required over the contrary judgment of the Secretary.

In sum, the AEA empowers the Secretary to decide not to proceed with seeking a construction authorization for the Yucca Mountain repository, and nothing in the NWPA, or the Commission's rules and practice, takes away that authority. Because the Secretary has decided not to pursue the Yucca Mountain repository, continued prosecution of the license application is pointless and wasteful.

The Board thus should grant DOE's motion to withdraw the license application, and the Board should grant it on the conditions DOE requests. In particular, dismissal with prejudice is appropriate in light of the Secretary's conclusion that Yucca is not a workable option, and such dismissal would not legally prejudice any party. The opponents may disagree with the Secretary's judgment about the workability of Yucca and the need to have finality as to the Yucca approach, but that is a policy dispute that the opponents must press elsewhere. It provides

⁹ Energy and Water Development and Related Agencies Appropriations Act, 2010 Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (Oct. 2009).

no basis for the Board not to grant this form of withdrawal when the applicant itself has affirmatively requested it.

II. ARGUMENT

A. DOE’S MOTION COMPLIES WITH THE NWPA

In moving to withdraw the license application, DOE is exercising authority granted to it by the AEA in a manner that is consistent with the NRC’s rules, as the NWPA explicitly contemplates. None of the opponents’ arguments demonstrates otherwise.

1. The NWPA Preserves DOE’s Authority Under The AEA

Although the opponents to DOE’s motion claim that DOE lacks authority to seek withdrawal,¹⁰ none of them comes to grips with the Secretary of Energy’s broad authority under the AEA. The Secretary’s authority under the AEA, which was explicitly relied upon in the motion to withdraw,¹¹ is fundamental to the issue before the Board.

The Secretary, as a successor to the AEC,¹² has authority to direct “the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare.”¹³ That discretion encompasses “nuclear waste

¹⁰ *E.g.*, NEI Resp. at 6-7.

¹¹ DOE Motion to Withdraw at 4 & n.5.

¹² In 1974, the Energy Reorganization Act, Pub. L. 93-438, 88 Stat. 1233, 42 U.S.C. § 5801 *et seq.* abolished the AEC and assigned its “licensing and related regulatory” authority to a new Nuclear Regulatory Commission. ERA § 201(f), 42 U.S.C. § 5841(f). All of the AEC’s other powers, including those over nuclear waste, were assigned to another new agency, the ERDA. ERA § 104(a)-(c), 42 U.S.C. § 5814(a)-(c). Three years later, in 1977, Congress established a new Department of Energy in the Department of Energy Organization Act, Pub.L. 95-91, 91 Stat. 570, 42 U.S.C. § 7101, *et seq.* Among other actions, the statute merged ERDA, and all of its legal authorities and powers, into the new DOE. *Id.* § 301(a), 42 U.S.C. § 7151(a).

¹³ AEA § 3(c), 42 U.S.C. § 2013(c) (“[i]t is the purpose of this Act to effectuate the policies set forth ... by providing for – (c) a program for Government control of the possession,

management responsibilities,” including in particular “the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes.”¹⁴

It has long been recognized that the statutory scheme that Congress established under the AEA is “virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.”¹⁵ That grant of power allows agency decision-making over the management and disposition of nuclear waste unless such action is affirmatively barred or otherwise constrained by express statutory language.¹⁶

The NWPA preserves that grant of power. The NWPA does not repeal the AEA, and the former must be read consistently with preserving authority under the latter. Absent an express

use, and production of atomic energy and special nuclear material”); *see also* 42 U.S.C. § 7133(a)(8)(C).

¹⁴ DOE Organization Act, § 203(a)(8)(C), 42 U.S.C. § 7133(a)(8)(C). The DOE Organization Act described these nuclear waste management responsibilities as being “already conferred by law” and not “within the Nuclear Regulatory Commission,” *i.e.*, merely declarative of existing authority transferred from ERDA. *Id.* § 203(a)(8)(G), 42 U.S.C. § 7133(a)(8)(G).

The Staff confirms the Secretary’s AEA authority, but notes that the AEA’s legislative history suggests that DOE and the NRC share authority for the “control of the possession, use and production of atomic energy and special nuclear material.” Staff Resp. at 16. DOE agrees that the NRC has adjudicatory and regulatory authority, but the NRC’s authority over “licensing and related regulatory functions” under 42 U.S.C. § 5841 does not strip the Secretary of his broad *policymaking* AEA functions. The Secretary’s authority under 42 U.S.C. § 7133(a)(8)(C) embraces nuclear waste management responsibilities and the storage and disposal of such wastes, and the exercise of this authority to withdraw its application does not conflict with the NRC’s licensing authority.

¹⁵ *Siegel*, 400 F.2d at 783.

¹⁶ *E.g.*, *Public Citizen v. NRC*, 573 F.3d 916, 927 (9th Cir. 2009) (construing 42 U.S.C. § 2210e of the AEA, the court held that because “Petitioners cite no authority to so limit the Commission’s discretion where a factor is not mandated by Congress,” the court “decline[d] to imply any such limitation.”); *Massachusetts v. NRC*, 878 F.2d 1516, 1523 (1st Cir. 1989) (recognizing that, under the AEA, the “scope of review of NRC actions is extremely limited” and citing *Siegel*, 400 F.2d at 783).

provision in the NWPA affirmatively withdrawing authority under the AEA, therefore, the NWPA leaves intact an agency's AEA powers.¹⁷ That decision reflects the settled canon that Congress is presumed to "intend to achieve a consistent body of law," and that two statutes "must, if possible, [be] . . . read so as to give effect to both."¹⁸

The opponents to DOE's motion ignore these principles. They presume that DOE cannot withdraw the license application unless the NWPA affirmatively empowers the Secretary to do so. But they have the analysis backwards. The AEA gives the Secretary his authority here, and the relevant question is whether the NWPA affirmatively repeals that pre-existing authority. Further, that repeal cannot be implied. It must be express.

The NWPA contains no express repeal of the Secretary's authority not to proceed with an application to construct a repository. To the contrary, as DOE has emphasized, the NWPA reiterates the Federal Government's responsibility to provide for the permanent disposal of high-level radioactive waste and spent nuclear fuel,¹⁹ and retains in DOE "primary responsibility" for developing and administering the nuclear waste disposal program.²⁰ Those opponents that suggest DOE is violating the NWPA by withdrawing its application²¹ are simply mistaken.

¹⁷ *Vimar Seguras y Reasegures, 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 congressional intention to the contrary*, to regard each as effective.") (emphasis added); *see also United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001) (RCRA does not impliedly repeal DOE's AEA authority); *Bullcreek*, 359 F.3d at 542 ("It is a 'cardinal rule [of statutory construction],'" the court of appeals reasoned, "that repeals by implication are not favored"), quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974).

¹⁸ 1A N. Singer, *Sutherland Statutory Construction* § 23:9 (6th ed. 2000). *Accord*, *Vimar Seguras*, 515 U.S. at 533.

¹⁹ NWPA § 111(a)(4); 42 U.S.C. § 10131(a)(4).

²⁰ *National Ass'n of Regulatory Utility Comm'rs v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988) ("Congress delegated primary responsibility for developing and administering the waste disposal program to the Department of Energy (DOE) . . ."). *Accord*, *General Elec. Uranium*

2. NWPA §§ 114(b) And 114(d) Do Not Bar DOE's Motion

In an attempt to find an express statutory prohibition on the Secretary's moving to withdraw the pending application (or the NRC granting such a motion), the opponents rely nearly exclusively on NWPA §§ 114(b) and (d).²² Neither provision bars DOE's motion.

Section 114(b) states, in relevant part, that the Secretary "shall submit to the Commission an application for a construction authorization for a repository not later than 90 days" after a site designation becomes effective.²³ Section 114(d), in pertinent part, requires the Commission to "consider an application for . . . a repository in accordance with the laws applicable to such applications."²⁴ That statutory text does not support the opponents' argument for multiple reasons.

First, although these opponents claim that the plain meaning of the statute supports their position, their interpretation is actually contrary to the statutory text.²⁵ Section 114(b) focuses exclusively on the commencement of a licensing proceeding – identifying who submits an application (the Secretary) and when it is to be submitted (within 90 days after a site designation

Mgmt. Corp. v. DOE, 764 F.2d 896, 905 (D.C. Cir. 1985) ("We find, first, that DOE is indubitably entrusted with the administration of the Waste Act.").

²¹ WA Resp. at 14-15; PIIC Resp. at 7; Aiken County Resp. at 4-5.

²² Aiken County Resp. at 2-3, 6; NEI Resp. at 5-7; Nye County Resp. at 10-11; PIIC Resp. at 6-7, 13; SC Resp. at 8-9; WA Resp. at 4-9, 11-12.

²³ 42 U.S.C. § 10134(b).

²⁴ 42 U.S.C. § 10134(d). Section 114(d) also permits such an application to apply to "all or part of" a repository, and instructs the NRC to control its schedule so as to complete any necessary proceedings and "issue a final decision approving or disapproving the" issuance of a construction authorization" within three years (subject to a potential one-year extension).

²⁵ *E.g.*, *Advanced Nuclear Fuels Corporation* (Import of South African Enriched Uranium Hexafluoride), CLI-87-9, 26 N.R.C. 109, 115 (1987) ("The Supreme Court has held that the plain meaning of a statute must prevail unless there is 'clear evidence' of a 'clearly expressed legislative intention' to the contrary."), citing *Bread Political Action Committee v. FEC*, 455 U.S. 577, 581 (1982) (other citations omitted).

is effective). Submittal of an application is distinct from, and does not preclude, its later withdrawal during the course of the proceeding.

Indeed, consistent with the other tight time periods in §§ 113 and 114, the focus of the provision appears to be in ensuring that an application is filed promptly after congressional action. After all, given that, under the statutory scheme, at the timing of the contemplated application filing, the Secretary and the President would only recently have recommended the site, there would be little reason to believe that, *at that time*, absent statutory mandate, the Secretary would otherwise decline to file the application.

On the other hand, if, as the opponents argue, Congress intended to prevent DOE from *later* withdrawing a pending application over the following three or four years, Congress could and would have articulated that prohibition plainly in the NWPA. There are provisions throughout the NWPA in which Congress has stated that DOE “shall not” do the subject act.²⁶ In yet other places in the NWPA, Congress expressly limited the reach of then-existing regulatory procedures.²⁷

If Congress’s intent was to prohibit DOE from withdrawing the license application, Congress could have included in the NWPA a provision that expressly said that DOE cannot withdraw a license application, or it could have carved out the NRC rule on withdrawals, 10

²⁶ *E.g.*, 42 U.S.C. § 10132(b)(3) (Secretary “shall not conduct any preliminary borings or excavations at a site unless” certain conditions are met, but in any event “preliminary borings or excavations under this section shall not exceed a diameter of 6 inches.”); 42 U.S.C. § 10156(a)(1) (regarding the interim storage fund, the “Secretary shall not enter into contracts for spent nuclear fuel in amounts in excess of the available storage capacity specified in section 135(a).”); 42 U.S.C. § 10162(a) (respecting monitored retrievable storage, “the Secretary shall make no presumption or preference to [certain] sites by reason of their previous selection.”).

²⁷ 42 U.S.C. § 10155(a)(4). This provision relates to interim storage of spent nuclear fuel, and states that when “providing storage capacity through any method described in paragraph (1), the Secretary shall comply with any applicable requirements for authorization of such method, *except as provided in paragraph (1)(A)(i).*” *Id.* (emphasis added).

C.F.R. § 2.107, from the rules applicable to a license application. It would have been simple for Congress to have expressly done either of those things, and it would have been consistent with how Congress expressed prohibitions in other sections of the NWPAA. The absence of such a prohibition, therefore, must be read as allowing withdrawal of DOE’s license application.²⁸

Additionally, the opponents’ reading § 114(b) is at odds with § 114(d)’s express adoption of NRC rules of practice for the license proceeding. That reading forces onto § 114(b) a meaning that Congress never expressed, and it overrides the intent Congress did express in § 114(d). If the Board adopted the opponents’ reading, there would be one provision (§ 114(d)) that calls for application of NRC’s withdrawal rule embodied in § 2.107 while another provision (§ 114(b)) disallows any withdrawal regardless of the contrary text of § 2.107 (and the precedent under that provision). A reading that causes an internal inconsistency in a statute should be rejected.²⁹

3. The Three-Year Limit On Commission Review Is Irrelevant

Also unavailing is the argument by certain opponents³⁰ that withdrawal of DOE’s application would contravene the NRC’s obligation under § 114(d) of the NWPAA to make a decision “approving or disapproving” an application within three years.³¹ As the Commission

²⁸ *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (“[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.”) (citations omitted).

²⁹ *E.g., FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959) (adjudicatory bodies should, “if possible, [read] all parts into an harmonious whole.”).

³⁰ NARUC Resp. at 12-13; NEI Resp. at 5-6; PIIC Resp. at 16-17; WA Resp. at 10, 12-14; SC Resp. at 14-15.

³¹ 42 U.S.C. § 10134(d).

has already determined, that requirement pertains only while an application is docketed before the NRC.³²

Once withdrawn, DOE's application will not be docketed before the Commission, and correspondingly the Commission will have no obligation to render a decision. That common-sense construction comports with the legislative history, which shows that this aspect of § 114(d) was directed not at the actions or discretion of DOE but at the NRC. It was intended to ensure that the NRC reach a timely decision on the application before it.³³

In all events, granting DOE's request to withdraw with prejudice would result in a final NRC judgment on DOE's application. Such a final judgment precluding "filing a new application to construct"³⁴ a permanent repository under the NWSA for high-level waste and spent nuclear fuel would thus satisfy the NRC's obligations under § 114(d) by constituting a timely "disapprov[al]" under the statute, 42 U.S.C. § 10134(d).

³² 66 Fed. Reg. 29,453, 29,453 n.1 (2001) ("The Commission interprets the requirement in Section 114(d) of the NWSA that the Commission 'shall issue a final decision approving or disapproving the issuance of a construction authorization not later than three years after the date of submission' . . . of the license application, as three years from the docketing of the application."); Staff Resp. at 13.

³³ Congress wanted to avoid a protracted proceeding, and sought to add to special legislative procedures to "preclude unnecessary delay" during the NRC's licensing hearing. H.R. Rep. 97-411(I), at 47 (1982). NRC commissioners informed Congress that the NRC's existing procedures were more appropriate for this proceeding (*id.* at 58-59), but also testified that the NRC should be able to reach a decision on the application in three to four years. *See High-Level Nuclear Waste Management: Oversight Hearing before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs*, House of Representatives, 97th Cong. 2d Sess. 50-51 (1982) (testimony of Nunzio J. Palladino, Chairman, NRC) ("Under existing laws and regulations, [the NRC] estimate[d]" that its review would take three-and-a-half years, and the schedule in H.R. 3809 was "tight yet reasonable."). The NRC was aware of Congress's concerns, and to meet the time goals under § 114(d), it proposed the LSN rules in subpart J (then known as the Licensing Support System). 53 Fed. Reg. 44,411, 44,412 (Nov. 3, 1988).

³⁴ *Fulton*, ALAB-657, 14 N.R.C. at 973.

4. DOE's Motion Is Consistent With The NWPA's Overall Purpose And Structure

Contrary to the opponents' arguments, DOE's motion does not defeat the NWPA's purpose. Washington and South Carolina, for example, contend that the procedural rule in 10 C.F.R. § 2.107 cannot be applied when application of that rule would conflict with the NWPA.³⁵ That asserted conflict assumes that the NWPA's purpose was to construct a repository at Yucca Mountain, but that is not the case. The purpose of the NWPA's Subtitle A is to establish a process that *could* lead to a repository at Yucca Mountain if, ultimately, the Secretary and other actors considered it appropriate to construct one there.

Congress listed the purposes of Subtitle A of the NWPA, and none of those purposes directs DOE or the NRC to construct or operate a repository at Yucca Mountain.³⁶ Indeed, as DOE has emphasized throughout – *and no one has disputed* – the NWPA does not permit, much less require or enable, the operation of a repository absent further legislation and other regulatory proceedings. An operational repository could not exist at Yucca Mountain even if the Commission approved DOE's application unless at least all of the following additional actions occurred:

- Congress must enact additional legislation authorizing the withdrawal of lands necessary for the Yucca Mountain repository; such legislation was introduced in 2006 and 2007 without ever passing³⁷;

³⁵ WA Resp. at 13-14; SC Resp. at 10-11.

³⁶ 42 U.S.C. § 10131(b)(1) - (4).

³⁷ Nuclear Fuel Management & Disposal Act, S. 2589, 109th Cong., 2d Sess. (April 6, 2006); Nuclear Fuel Management & Disposal Act, H.R. 5360, 109th Cong., 2d Sess. (May 11, 2006); Nuclear Fuel Management & Disposal Act, S. 3962, 109th Cong., 2d Sess. (Sept. 27, 2006); Nuclear Waste Access to Yucca Act, S. 37, 110th Cong., 1st Sess. (May 23, 2007); Clean, Reliable, Efficient and Safe Energy Act of 2007, S. 1602, 110th Cong., 1st Sess. (June 12, 2007).

- DOE must apply for, and the Commission must approve, an additional license to receive and possess spent nuclear fuel and high-level radioactive waste in the repository;
- DOE must obtain federal and state permits, including water permits from Nevada that Nevada has vigorously opposed granting³⁸; and
- Congress must fund the construction of the repository and the rail line to the repository.

The NWPA in no way commits Congress to enact the necessary legislation. The NWPA likewise does not direct DOE to apply for permits necessary for construction of a repository or to file an application with the NRC to receive and possess, and it certainly does not guarantee DOE success if it were to pursue them. It is nonsense, then, to suggest that the NWPA’s purpose requires construction of the Yucca Mountain repository. In fact, the legislative history indicates that Congress understood that there were many ways that the NWPA process may not ultimately yield a repository, much less one at Yucca Mountain.³⁹

It is the opponents – not DOE – that ignore the structure of the NWPA as a whole. They try to argue that because Congress gave the Secretary the ability to terminate site characterization activities under § 113(c)(1)(A), if the Secretary, in his discretion, concluded that the site was unsuitable, the “structure” of the NWPA indicates that Congress did not intend for DOE to have

³⁸ *United States v. Morros*, 268 F.3d 695 (9th Cir. 2001) (the Federal Government appealed from an order of the U.S. District Court of Nevada choosing to abstain from deciding whether the State Engineer’s denial of water permit applications was pre-empted by the NWPA, which the Ninth Circuit reversed and remanded finding that there were not insubstantial federal preemption claims, and the court was obligated to take jurisdiction and review the matter); *United States v. State of Nevada*, Case No. CV-S-00-268-RLH-(LRL) (seeking review of the Nevada State Engineer’s denial of the government’s applications filed in 1997 to replace six existing water permits for 430 acre-feet of water annually concerning Yucca Mountain).

³⁹ H.R. Rep. 97-491(I), at 44 (1982), *as reprinted in*, 1982 U.S.C.C.A.N. 3792, 3810 (stating that “it is not possible to resolve all uncertainties or predict all obstacles” to a permanent geologic repository and “[t]he potential for failure or serious delay in the program exists.”).

that authority for its license application.⁴⁰ But that provision merely demonstrates that Congress intended to preserve throughout the Secretary's discretion to end the Yucca project if he determined it was contrary to sound policy, and not to force the Secretary to continue to characterize a site that he has decided is not in the public interest (and when he has decided not to take the other actions that would be necessary to create a repository). As Staff properly explains, Congress ensured that the Secretary's policy discretion to end the project was preserved for the application phase by applying the NRC's rules and practice,⁴¹ which already allow for the withdrawal of application.

Also notable is the fact that under § 113, approval by the President and Congress is required only if the Secretary decides to go forward with the repository, *not*, as here, if he decides to end the process. In that respect, § 113, which preserves the Secretary's discretion not to go forward, and § 114, which likewise preserves that discretion by incorporating ordinary NRC practice, are parallel and consistent.

In sum, the NRC's construction authorization is merely a license that permits, but does not mandate, construction of the repository.⁴² The NWPA does not impose a substantive requirement that the Yucca Mountain repository be constructed even after that process has run its course and the NRC has approved it. *The NWPA leaves that ultimate decision to the discretion of DOE.*

⁴⁰ WA Resp. at 12-14.

⁴¹ 42 U.S.C. § 10134(d).

⁴² *Cf. Shoreham-Wading River Central School Dist. v. NRC*, 931 F.2d 102, 107 (D.C. Cir. 1991) (refusing to enjoin Long Island Lighting Company's surrender of its operating license for the completed, but never commercially operated Shoreham nuclear plant, noting that LILCO possessed "a license to operate," not "a sentence to do so.").

In this context, it would be perverse to conclude that the NWPA's purpose is advanced by requiring DOE to continue with a license proceeding, at enormous taxpayer expense, when the Secretary has determined that another course of action would better serve the public interest. To borrow South Carolina's "stop sign" analogy, DOE, like a prudent driver at a stop sign, has properly considered whether to go forward given the specific facts before it, instead of barreling ahead with the license application regardless of those facts. Congress did not bar that reasonable approach.

5. The NWPA's Legislative History Supports DOE's Interpretation

Finding no express statutory provision in the NWPA that limits DOE's authority under the AEA to withdraw the application, the opponents resort to the NWPA's legislative history to argue that DOE cannot withdraw its application. These attempts also fail. The NWPA's legislative history confirms that Congress's intent in the statute was merely to provide a process that *could* lead to a repository, subject to the AEA discretion of the Secretary and actions by other parties, and not to mandate construction of the Yucca Mountain repository.

Washington cites to legislative history that implies that the NWPA establishes a process to prevent past political and programmatic errors from being revisited.⁴³ But that snippet of legislative history merely suggests that the NWPA is intended to define a process to follow, which includes the "major steps in the proposed repository development program and the *proposed schedule* for implementation of the program"⁴⁴ That quotation and others like it

⁴³ WA Resp. at 5-9, 11, citing: H.R. Rep. No. 97-491(I) (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3792; H.R. Rep. No. 100-495 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 2313; H.R. Rep. No. 107-425, at 2 (2002), *as reprinted in* 2002 U.S.C.C.A.N. 532.

⁴⁴ H.R. Rep. No. 97-491(I), at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. at 3797 (emphasis added); *see also id.* at 53, *as reprinted in* 1982 U.S.C.C.A.N. at 3819 ("Section 114(b) requires the Secretary to submit an application for licensing of the repository to the Commission not later than 90 days after a recommendation of a site is effective."); H.R. Rep. No. 97-785(I),

merely demonstrate that the NWPA set a schedule and created a sequence of decisions, but that structure allows the Secretary discretion to end the process.

Put differently, no party disputes that the NWPA put in place a process. That process, however, was not intended to – and did not – guarantee the construction or operation of a repository.⁴⁵ In fact, Congress acknowledged that there were many factors that might lead to a repository not opening and that Congress was “not committed forever to Yucca Mountain.”⁴⁶

Significantly in this regard, Congress in fact considered, but expressly omitted from the NWPA, any requirement that an approved repository be constructed. One of the earlier House versions of the bill (H.R. 5016, 97th Cong., 1st Sess. (Nov. 18, 1981)) included language requiring construction and operation of an approved repository. In particular, § 8(d)(7) of that bill would have directed the Secretary to complete construction within 6 years after receiving construction authorization and to operate the repository at the earliest practical date after receiving a license from the NRC. Congress omitted that and any other comparable requirement from the NWPA, thereby reiterating that Congress left intact the Secretary’s ultimate authority under the AEA to decide whether to construct and operate a particular repository.

at 33 (1982) (“Title I, Subtitle A provides the procedures by which a repository for disposal of high level radioactive waste and spent nuclear fuel is to be established. The intent is to set a *schedule*, identify key events and decisions of the President, the Department of Energy, and the Nuclear Regulatory Commission, and provide the procedures for state and public participation and review.”) (emphasis added).

⁴⁵ See, e.g., *Harrison v. PPG Indus.*, 446 U.S. 578, 592 (1980) (“[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.”).

⁴⁶ 148 Cong. Rec. 7166 (2002) (Rep. Norwood) (regarding the passage of the YMDA); see also *id.* at 7155 (Rep. Dingell) (stating that the Yucca Mountain Site Approval Act “is just about a step in a process”); *id.* at 12340 (Sen. Crapo) (“[T]his debate is not about whether to open the Yucca Mountain facility so much as it is about allowing the process of permitting to begin to take place.”); see *supra* note 39.

Similarly, and contrary to the opponents' suggestions,⁴⁷ the history of NWPA § 114(d) shows that likewise Congress considered, but rejected, legislation that would have superseded the ordinary NRC rules of practice that govern a license proceeding. Early drafts of the NWPA contained not only a reference to NRC procedures, but also specific procedures for a license application proceeding at the Commission. For example, H.R. 5016 (Nov. 18, 1981) included such procedures in the aforementioned § 8(d) at subsections (2)-(9).⁴⁸ Congress, however, eventually stripped all the special licensing procedures from the bill and substituted in their place § 114(d), which adopts the NRC's rules.⁴⁹ Those adopted rules included 10 C.F.R. § 2.107. There is nothing in the legislative history evidencing Congress's desire to jettison 10 C.F.R. § 2.107 from this proceeding. To the contrary, Congress reflected its satisfaction with the NRC's rules and, as Staff has properly emphasized, is presumed to understand the regulatory scheme that it incorporates them by reference.⁵⁰

South Carolina also cites legislative history to argue that DOE's motion allegedly contravenes the NRC's authority because Congress intended the NRC to make a final decision

⁴⁷ See Aiken County Resp. at 2-3, 6; NEI Resp. at 5-7; Nye County Resp. at 10-11; PIIC Resp. at 6-7, 13; SC Resp. at 8-9; Washington Resp. at 4-9, 11-12.

⁴⁸ These procedures were supposed to truncate the licensing process. See 128 Cong. Rec. S15644 (Dec. 20, 1982) (Senator Mitchell). Under these proposed procedures, the NRC would have held an adjudicatory hearing only "if there is genuine and substantial dispute over technical matters upon which a licensing decision of NRC is likely to depend." H.R. Rep. No. 97-411(I), at 21 (1982). Also, a court could have reviewed a Commission decision only if a "timely objection was made, and the Commission's decision precluded a fair consideration of the issue." *Id.*

⁴⁹ H.R. Rep. 97-411(I), at 52 (1982) (statement of Rep. Lundine) (objecting to inclusion in NWPA of rules for license proceeding and preferring use of NRC's rules of practice, noting that the NRC's "procedural regulations have been carefully drawn after many months of careful consideration and debate.").

⁵⁰ *Bullcreek*, 359 F.3d at 542 (holding that Congress is presumed to have been familiar with, and taken into account, NRC regulations when it enacted the NWPA). Accord, *Newark Morning Ledger Co.*, 507 U.S. at 575 (Congress presumed to have "accepted the understanding" set out in relevant regulations and judicial decisions clarifying regulations).

about the issuance of a license.⁵¹ No party disputes that the NRC will make the final decision in this licensing proceeding, but that does not suggest that, contrary to the NRC's rules and the Secretary's AEA authority, DOE cannot request that the proceeding be completed through action on a motion to withdraw.

Likewise, the opponents' resort to the 2002 YMDA legislative history is inapt. Congress understood in 2002 that, when it approved Yucca Mountain as the site of a potential repository, such approval simply authorized the Secretary to seek authority to construct. It did not mean that a repository would be built, that the Secretary had to take all actions necessary to build a repository, or that the Secretary had to continue with an application if he decided that action is contrary to the public interest: "Enactment of the joint resolution will only allow DOE to take the next *step in the process* laid out by the [NWPA] and apply to the NRC for authorization to construct the repository at Yucca Mountain."⁵² Accordingly, the legislative history of the 2002 YMDA strongly supports DOE, not the opponents of withdrawal.

6. The Result Sought By The Opponents Is Absurd And Unreasonable

Virtually all of the opponents offer up some version of an "absurdity" argument against DOE.⁵³ In essence, they claim it would be "absurd" for DOE to withdraw its license application when the NWPA states that DOE "shall" submit a license application 90 days after the President has recommended the Yucca Mountain site. This is not absurd, nor does it render the NWPA a

⁵¹ SC Resp. at 3-4 (citing S. Rep. 107-159 at 8 (2002)). The Staff asserts that the legislative history of the AEA suggests that DOE and the NRC share authority for the "control of the possession, use and production of atomic energy and special nuclear material." Staff Resp. at 16.

⁵² S. Rep. No. 107-159, at 13, 2002 WL1288812 (2002) (emphasis added)

⁵³ NARUC Resp. at 3-8; Nye County Resp. at 6-11; PIIC Resp. at 17; SC Resp. at 3-4, 8, 10-12; WA Resp. at 13-14; White Pine Resp. at 6. NEI says that DOE's interpretation of the NWPA would render it a "nullity." NEI Resp. at 5.

nullity. It is a result that is consistent with the Secretary's continuing policy discretion under the AEA; that is specifically contemplated under the NWPA by virtue of Congress' reliance on the NRC's procedures; and that avoids a significant waste of taxpayer resources by proceeding with a licensing proceeding for an application to construct a project that the Secretary has decided not to complete even if this application were ultimately approved. Like the other provisions in Subtitle A, § 113(b)'s "shall submit" language focuses on the schedule of pursuing a repository. It says nothing about the Secretary's ability to revisit the submission in the exercise of his discretion during the period of years when the application is pending.

By contrast, the result sought by the opponents would compel DOE to take each of the actions required to defend its license application in a highly contentious adjudicatory proceeding and to meet the burden of proof required for the NRC to decide to grant a construction authorization for a repository – at the same time that DOE has determined this same repository not to be a workable option and the pursuit of which is contrary to the public interest. Congress should not be understood to have intended this result.⁵⁴

Indeed, although the opponents of withdrawal purport to read the statute to require the Secretary to proceed with this application no matter his view as to whether that is wise policy, they implicitly acknowledge that such an understanding of the statute is absurd and unworkable. Thus, Nye County, for instance, proposes (at 22-23) an "indefinite stay" because it would be "clearly untenable" to "order DOE to provide a good faith defense for an LA that the highest levels of the Executive Branch seek to abandon." Leaving aside Nye County's pejorative tone,

⁵⁴ See *Huffman*, 486 U.S. at 673 (declining to interpret the AEA to mean that Congress required DOE to promulgate regulations restricting its enrichment of foreign-source uranium when the regulations would not serve the statutory goal of protecting the domestic enrichment industry, stating: "it seems strained to assert that . . . Congress nevertheless intended DOE to impose restrictions that were somehow calculated to serve that unattainable goal.").

DOE agrees that it is “untenable” to require the Secretary to proceed with such an application where it is contrary to his policy judgment. Yet Nye County and the other opponents of withdrawal read the statute to require precisely that result, even though there is no statutory text mandating such a conclusion. Because the statute does not clearly require the Secretary to proceed with an application he has determined to be contrary to sound policy, it should be rejected.

7. **The Opponents’ Other NWPA Arguments Do Not Support Denying DOE’s Motion to Withdraw**

The other arguments that the opponents advance about the NWPA lack merit as well. None provides any ground for denying DOE’s motion to withdraw the license application.

- Various opponents assert that Congress’ appropriations to fund the Blue Ribbon Commission cannot be interpreted as a statutory amendment to the NWPA giving DOE the authority to withdraw its license application.⁵⁵ But DOE does not contend that Congress’s funding of the Blue Ribbon Commission is any kind of repeal or amendment to the NWPA. Rather, Congress’s appropriation indicates that it understands the NWPA in a manner consistent with DOE’s interpretation and actions here, *i.e.*, that Congress understands that DOE is not required to construct a repository at Yucca Mountain, so that it makes sense for the Blue Ribbon Commission to consider alternatives for disposal of spent nuclear fuel and high-level waste.⁵⁶

⁵⁵ *E.g.*, Aiken County Resp. at 9-10.

⁵⁶ *E.g.*, *Brooks v. Dewar*, 313 U.S. 354, 360-61 (1941) (Congressional ratification of agency action found when, *inter alia*, “[t]he information in the possession of Congress” concerning agency action “was plentiful and from various sources,” including annual agency reports); *Stewart v. Smith*, 673 F.2d 485, 499 (D.C. Cir. 1982) (finding Congressional acquiescence because Congress did not expressly require agency action).

Congress's decision to provide this funding thus should provide the Board further comfort that DOE can withdraw its license application under the AEA and NWPA.⁵⁷

- PIIC relies almost exclusively on two cases involving unrelated provisions of the NWPA that have no relevance to the question before this Board and, in any event, are distinguishable.⁵⁸ The issue before the court in the first of those decisions, *Indiana Michigan*, was whether DOE's interpretation of the nuclear waste fund provision -- § 302(d), 42 U.S.C. § 10222(d) in Title III of the NWPA -- was reasonable. The court disagreed with DOE's view that it had no obligation to begin accepting nuclear waste by 1998 because a geologic repository, or an interim storage facility, was not available to receive such waste by that date.⁵⁹ The court held that DOE had an obligation to begin disposing of spent nuclear fuel *even if it did not have an operational repository or interim storage facility*.⁶⁰ In the sequel to that case, *Northern States*, certain utilities sought a writ of mandamus to force DOE to actually accept their nuclear waste by 1998 even though no operational repository or interim storage facility existed.⁶¹ The court denied the utilities' broad requests for mandamus relief, but issued mandamus to prohibit "DOE from excusing its own delay on the grounds that it has not yet prepared a permanent

⁵⁷ Some opponents claim further that neither the Blue Ribbon Commission Charter nor its legislative history specifically foreclose consideration of Yucca Mountain as a possible option for a geologic repository. Nye County Resp. at 11, n.15; NEI Resp. at 8, n.12. As an initial matter, the Blue Ribbon Commission is not a "siting" commission. In all events, the conference report accompanying Pub. L. No. 111-85, 123 Stat. 2845, states that the Blue Ribbon Commission shall consider "alternatives," not "Yucca Mountain and alternatives," which indicates that Congress intended review of options other than the one then being pursued (Yucca Mountain). H.R. Rep. No. 111-278 at 21 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 1003.

⁵⁸ PIIC Resp. at 8, 10-17, 25, citing *Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272 (D.C. Cir. 1996) and *Northern States Power Co. v. DOE*, 128 F.3d 754 (D.C. Cir. 1997). *See also* Nye Resp. at 16, 19-20.

⁵⁹ *Indiana Michigan*, 88 F.3d at 1277.

⁶⁰ *Id.*

⁶¹ *Northern States*, 128 F.3d at 758.

repository or interim storage facility.”⁶² These decisions clearly find that the government obligation to begin disposing of spent fuel is *independent* of the availability of a repository.⁶³ Neither decision held (or even suggested) that DOE had any statutory or contractual obligation to construct a repository at Yucca Mountain (much less to pursue an application for a repository at a site that it no longer found workable).

- Two opponents claim that DOE’s decision to withdraw its license application, even if allowed by the NWPA, violates the APA because DOE’s decision is allegedly “arbitrary and capricious.”⁶⁴ That claim is meritless. By the APA’s terms, the arbitrary and capricious standards pertain to an Article III court’s review of final agency action.⁶⁵ They do not apply here because the Board’s review of DOE’s motion is not pursuant to the judicial review provisions of the APA and the Board is not an Article III court. In all events, although the Board need not and should not reach the issue, as described below DOE has ample basis for its policy conclusions.

- DOE’s reporting duties under the NWPA are simply *reporting* requirements and contrary to claims by opponents do not mean that the Secretary has no discretion to seek to withdraw its license application when he no longer believes that application will accomplish the purposes behind the NWPA as well as the AEA and DOE Organization Act. These do not compel DOE to pursue a particular course of action for disposal of spent nuclear fuel and high-

⁶² *Id.* at 761.

⁶³ *Indiana Michigan*, 88 F.3d at 1276 (“Nowhere, however, does the [NWPA] indicate that the obligation established in subsection (B) [of § 302(a)(5)] is somehow tied to the commencement of repository operations referred to in subsection (A).”).

⁶⁴ PHIC Resp. at 22-23; White Pine Resp. at 12.

⁶⁵ 5 U.S.C. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to *judicial review* thereof.”); 5 U.S.C. § 703 (“The form of proceeding for *judicial review* is the special statutory review proceeding relevant to the subject matter in a *court* specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, . . . in a *court of competent jurisdiction.*”) (emphasis added).

level radioactive waste. NWPA Section 114(e), 42 U.S.C. § 10134(e), in particular, does not evidence a congressional intent to compel DOE to march relentlessly forward with developing a repository at Yucca Mountain regardless of evolving knowledge and circumstances. This provision does not demonstrate that Congress imposed a specific and enforceable mandate to construct and operate a repository at Yucca Mountain. In fact, as discussed above (at page 17), Congress considered, but did not create, such a mandate. The fact that Congress instead chose a mere reporting requirement thus supports DOE's argument.

- South Carolina argues that the Secretary's withdrawal of its license application violates the principle of separation of powers.⁶⁶ South Carolina's argument adds nothing to its statutory claims. DOE does not assert that it is entitled to act contrary to the statutes passed by Congress. Rather, as DOE has explained, it is acting in a manner consistent with the authority granted by those statutes. Accordingly, this case is nothing like *Youngstown Sheet & Tube Co. v. Sawyer*,⁶⁷ and the other decisions cited by South Carolina, because DOE is not claiming any authority to act in the absence of (or contrary to) congressional authorization.

8. The Opponents' Deference Arguments Are Unavailing

Several of the opponents contend that DOE's interpretation of the NWPA is not entitled to deference in the event the Board concludes that the NWPA contains a gap or is otherwise ambiguous with respect to withdrawal of DOE's application.⁶⁸ Their analysis is incorrect.

In the first place, the opponents erroneously contend that withdrawal of the license application is not within DOE's purview under the NWPA, but falls exclusively under NRC's

⁶⁶ Aiken County Resp. at 3-5; SC Resp. at 5-7.

⁶⁷ 343 U.S. 579 (1952).

⁶⁸ *E.g.*, SC Resp. at 7; NEI Resp. at 7; NARUC Response at 11; PIIC Resp. at 9-10.

sphere of authority because it is the NRC that must adjudicate the licensing proceeding.⁶⁹ Whether to proceed with the Yucca Mountain repository, and accordingly whether prosecution of the license application should continue, falls squarely within DOE's scope of authority under both the AEA – which DOE plainly administers – and § 114(b), the relevant provision of the NWPA, which is to be implemented by the “Secretary,” not the NRC. Accordingly, these statutory matters are entrusted to DOE's decisionmaking.

The relevant rule is that this Board should defer to the Secretary to fill in a statutory gap because Congress “did not unambiguously manifest its intent” to adopt the view pressed by the parties challenging agency action.⁷⁰ Thus, *if* this Board concludes that DOE does not have a clear statutory basis to withdraw its license application, it is inescapable that DOE's reading of the NWPA is entitled to deference.⁷¹ Congress did “not unambiguously manifest its intent” in the NWPA to prohibit DOE from employing NRC procedures to withdraw its application (or preclude the NRC from permitting withdrawal). The most that can be said in favor of the opponents is that Congress left a gap in the NWPA. But in that event, DOE is entitled to fill that

⁶⁹ Aiken County Resp. at 3-5.

⁷⁰ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703 (1995).

⁷¹ Several opponents also argue that DOE is not entitled to *Chevron* deference because its decision to seek to withdraw its application does not “carry the force of law.” SC Resp. at 13, WA Resp. at n. 11. That is incorrect. *Chevron* deference is appropriate where (as here) the agency's interpretation constitutes the official and deliberate determination of the agency. Courts have held that agency decisions resulting from an informal process are entitled to deference. *E.g.*, *Davis v. EPA*, 348 F.3d 772, 780 n.5 (9th Cir. 2003) (holding that EPA review of waiver application under the Clean Air Act was entitled to *Chevron* deference even though “EPA reached its interpretation through means less formal than notice and comment rulemaking . . .”) (citation omitted). The Secretary's interpretation is entitled to deference. *Id.*; *see also Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Auer v. Robbins*, 519 U.S. 452 (1997).

gap, and the Board should be “especially reluctant to substitute [its] views of wise policy” for those of the agency.⁷²

Nor is there anything to the opponents’ argument that DOE is not entitled to *Chevron* deference because DOE allegedly has changed its interpretation of the NWPA. DOE has not altered its interpretation. The statutory question before the Board is whether the NWPA precludes withdrawal. DOE has not previously interpreted the NWPA to preclude withdrawal, and no opponent has cited any evidence otherwise. What has changed is the Secretary’s judgment as to whether it is advisable to continue with this license application. A change in agency consideration “is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”⁷³ Nor is an agency’s change in interpretation of a statutory provision any basis not to accord *Chevron* deference – *Chevron* itself involved a situation where the agency had changed its interpretation of the statutory provision over time.⁷⁴

B. THE BOARD SHOULD GRANT WITHDRAWAL ON DOE’S SUGGESTED TERMS

Section 2.107 governs the disposition of DOE’s motion to withdraw, as both this Board and the Commission have recognized.⁷⁵ The opponents offer no basis under § 2.107 for denying

⁷² *Babbitt*, 515 U.S. at 708, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984).

⁷³ *United States v. Eurodif S.A.*, 129 S. Ct. 878, 887 (2009), quoting *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

⁷⁴ *See Chevron*, 467 U.S. at 856-57.

⁷⁵ *U.S. Department of Energy* (High Level Waste Repository), Memorandum and Order, CLI-10-13 at 3 & n.7 (April 23, 2010) (noting that DOE “has invoked” § 2.107, reciting the regulation’s contents, and observing that reviewing courts “generally ... defer to an agency’s interpretation of its own regulations.”); *U.S. Department of Energy* (High Level Waste Repository), CAB Order (Concerning LSNA Memorandum), ASLBP No. 09-892-HLW-CAB04, at 2 (Dec. 22, 2009) (“the parties are reminded that, pursuant to 10 C.F.R. § 2.107, withdrawal shall be on such terms as the Board may prescribe.”).

DOE's motion or for imposing additional or different conditions on withdrawal than those DOE has requested.

1. Section 2.107 Applies To This Proceeding

NEI and NARUC suggest that § 2.107 may not apply to DOE's motion. They base that suggestion on the proposition that subpart A of the Rules of Practice, which contains § 2.107, is not identified generally in § 2.1000 as "govern[ing]" the conduct of subpart J proceedings, unlike subparts C and G.⁷⁶

As an initial matter, the NEI-NARUC "suggestion" is directly contrary to the statements by both this Board and the Commission that § 2.107(a) applies to this proceeding.⁷⁷ Beyond that, it is simply wrong. Subpart A, in contrast to other subparts of Part 2, applies generically to *all types of NRC licensing proceedings*.⁷⁸ It relates to the filing and processing of applications beginning even *before their acceptance for docketing* by the NRC (§§ 2.101-2.106), as well as to other generic issues including but not limited to application withdrawal (§ 2.107).⁷⁹ The other subparts of Part 2 (including Subparts C, G, J) each are addressed to specific types of proceeding. They prescribe procedures particular to those various proceedings, but they do not supplant the general provisions of Subpart A.

In short, § 2.107(a) applies generally to applications filed under *all* subparts of Part 2. For instance, subpart G does not specifically reference § 2.107, yet § 2.107(a) has been the basis for Commission decisions on (and approval of, in each case) requests for withdrawal of over 20

⁷⁶ NEI Resp. at 11; NARUC Resp. at 23 n. 54.

⁷⁷ See *supra* note 75.

⁷⁸ Subpart A "prescribes the procedure for issuance,... amendment, ... transfer and renewal of a license" under any NRC process. 10 C.F.R. Pt. 2, Subpt. A, § 2.100.

⁷⁹ See also 10 C.F.R. § 2.108 (application denial for failure to provide information); *id.* § 2.109 (effect of timely license renewal filing); *id.* § 2.111 (prohibition against sex discrimination).

subpart G applications involving reactor licenses in reported decisions going back to 1974.⁸⁰ The same is true with respect to requests to withdraw applications involving materials licenses.⁸¹ The only possible conclusion is that subpart A is recognized as being generally applicable to other subparts. Indeed, if subpart A did not apply to this proceeding, it is impossible to understand why the provision NEI and NARUC cite, § 2.1000, specifically refers to subsections of § 2.101 and § 2.105, which are in subpart A. Under the NEI-NARUC interpretation, the citation to those provisions in § 2.1000 makes no sense, as they are not in subparts C and G and thus supposedly irrelevant. Additionally, it is worth noting that if subpart A did not apply, that would mean that fundamental and non-controversial commission rules, such as § 2.111's prohibition on sex discrimination in licensing, would likewise not apply.

Finally, there is absolutely no evidence of any intent in the legislative history of the NWPA and the regulatory history of subpart J that § 2.107(a) should play a different role in repository licensing proceedings than it plays in other types of cases. As far back as its initial issuance in proposed form in 1988,⁸² there is no indication whatever of any intent to treat withdrawal of an application under subpart J differently than would be the case with applications

⁸⁰ *Boston Edison Company* (Pilgrim Nuclear Generating Station, Units 2 and 3), LBP-74-62, 8 A.E.C. 324 (1974), is the earliest reported case under § 2.107.

⁸¹ *Sequoyah Fuels Corporation* (Source Materials License No. SUB-1010), CLI-93-7, 37 N.R.C. 175 (1993) (Commission treated Licensee's pleading purporting unilaterally to withdraw application for license amendment, as a request for permission to withdraw application under § 2.107(a), which, the Commission noted, "is the controlling NRC regulation for the withdrawal of applications," *id.* at 179); *Fansteel Inc.* (Muskogee, Oklahoma Facility), LBP-03-03, 58 N.R.C. 96, 2003 WL 22170174 (2003).

⁸² Nuclear Regulatory Commission, 10 CFR Pt. 2, Rule on the Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste (Notice of Proposed Rulemaking), 53 Fed. Reg. 44,411, 44,412 (Nov. 3, 1988) (observing that subpart J was proposed to seek "consensus on the procedures that would govern the HLW licensing proceeding, . . . to provide for the effective review of the . . .DOE...license application within the three-year time period required by § 114(d) of the [NWPA].").

governed by other Part 2 subparts. There is simply no support for the NEI-NARUC contrary suggestion.

2. The Commission Should Follow Precedent and Defer To DOE's Policy Judgment That Withdrawal Is Appropriate

NRC precedent firmly establishes that the “law on withdrawal does not require a determination on whether [an applicant’s] decision is sound.”⁸³ That is because “[n]o useful purpose would be served for requiring an analysis to be made to determine the soundness” of that decision.⁸⁴ Thus, although it is appropriate to determine whether there is a statutory barrier to granting DOE’s request – and, as demonstrated above, there is no such barrier – there is no basis for the NRC to second-guess DOE’s exercise of its policy discretion.

3. As The Secretary Has Explained, The Relevant Science Has Advanced In the Past Decades And The Yucca Repository Has Proven Not To Be A Workable Option

Even if the Board were to review the policy basis for the Secretary’s decision to withdraw, that basis is in fact a reasonable one. As DOE has explained, it has decided that it will not move forward to construct and operate a permanent repository for high-level waste and spent nuclear fuel at Yucca Mountain. Given that decision, it is reasonable to decide that it would be wasteful to continue prosecuting an application to build such a facility.

Even beyond that, the Secretary has repeatedly stated his conclusions, both in this proceeding⁸⁵ and elsewhere,⁸⁶ that Yucca Mountain has not proven to be a workable option for a permanent repository for high-level waste and spent nuclear fuel and that the technical and

⁸³ *Pacific Gas and Electric Company* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 N.R.C. 45, 51-52 (1983).

⁸⁴ *Id.* at 2.

⁸⁵ Motion to Withdraw at 1.

⁸⁶ *See, e.g.*, March 4, 2010, Transcript of Testimony Before Senate Energy and Water Development Appropriations Hearing, at 38, 2010 WL 763712.

scientific context is significantly different today than it was at the time of the 1982 enactment of the NWPA.

There is ample support for those conclusions. In the years leading up to 1982, nuclear utilities had only one storage option for spent fuel – onsite pool storage – and were rapidly running out of pool storage space.⁸⁷ In 1982, there were no dry storage facilities in the nation; the first such facility was not licensed by the NRC until 1986.⁸⁸ Since 1982, dry storage of SNF has evolved into a storage option capable of providing safe and environmentally acceptable storage for 100 years or longer. In 1990, the NRC concluded that dry storage of SNF is safe and environmentally acceptable for 100 years.⁸⁹ In 1999, the NRC noted that “substantial advances in spent fuel storage” had occurred during the past decade.⁹⁰ According to a recent conference sponsored by the International Atomic Energy Association, the duration of dry storage has been trending upwards towards an upper limit of 300 years.⁹¹ Therefore, the emergence of dry storage technology provides the nation with time to develop an alternative approach to permanent disposal.

The state of knowledge in advanced recycling technology has also progressed since the enactment of the NWPA. The U.S. banned commercial reprocessing in the 1970s due to

⁸⁷ Board on Radioactive Waste Management, Earth and Life Studies, Safety and Security of Commercial Spent Nuclear Fuel Storage: Public Report, National Research Council at 60 (National Academies Press 2006), *available at* http://www.nap.edu/openbook.php?record_id=11263&page=60.

⁸⁸ Dry Cask Storage, U.S. Nuclear Regulatory Commission (Feb. 13, 2007), *available at* <http://www.nrc.gov/waste/spent-fuel-storage/dry-cask-storage.html>.

⁸⁹ 55 Fed. Reg. 38,474, 38,482 (Sept. 18, 1990).

⁹⁰ 64 Fed. Reg. 68,005, 68,006 (Dec. 6, 1999).

⁹¹ Conference Report, International Conference on Storage of Spent Fuel from Power Reactors, (June 2-6, 2003), *available at* http://www.iaea.org/OurWork/ST/NE/NEFW/nfcms_spentfuel_conf2003_res.html.

concerns over proliferation.⁹² By 1982, even though President Reagan had just lifted the ban on commercial reprocessing, all initiatives to develop a commercial reprocessing facility in the United States had been discontinued.⁹³ Since 2002, however, DOE has conducted research and development on advanced recycling methods which have yielded “significant advancements” in proliferation-resistant technology.⁹⁴ Although advanced recycling technology is still in its early stages, it has the potential to “greatly reduce the long-lived, high-level actinides in nuclear waste, and to improve the waste forms for disposal of high-level nuclear waste.”⁹⁵

Moreover, since the enactment of the NWPA, DOE has also successfully constructed and operated the nation’s first deep geologic repository for the disposal of transuranic radioactive waste, located at the WIPP in New Mexico. WIPP also represents one of a very small number of permanent repositories in salt beds for any type of waste (WIPP does not accept high-level waste).⁹⁶ Construction of the WIPP repository was completed in 1989 and the first shipments of waste were disposed at WIPP in 1999.⁹⁷ The State of New Mexico has cooperated with DOE by

⁹² DOE, Draft Preliminary Global Nuclear Energy Partnership Programmatic Environmental Impact Statement, App. A at 1-4 (Oct. 2008), *available at* http://nepa.energy.gov/EIS-0396_Appendix_A.pdf (“Draft GNEP EIS”).

⁹³ Anthony Andrews, Nuclear Fuel Reprocessing: U.S. Policy Development, Congressional Research Service (March 27, 2008), *available at* <http://www.fas.org/sgp/crs/nuke/RS22542.pdf>.

⁹⁴ DOE, Advanced Fuel Cycle Initiative, Global Nuclear Energy Partnership, Status Report for FY 2006 at 3, *available at* http://www.nuclear.gov/pdfFiles/AFCI_2006.pdf; Draft GNEP EIS at A-32.

⁹⁵ Board on Energy and Environmental Systems, Engineering and Physical Sciences, Review of DOE’s Nuclear Energy Research and Development Program, National Research Council at 56-57 (National Academies Press 2008), *available at* <http://www.nap.edu/catalog/11998.html>.

⁹⁶ DOE, Pioneering Nuclear Waste Disposal, The Long Road to the WIPP -- Part 1, at 9 (Feb. 2000), *available at* <http://www.wipp.energy.gov/library/pioneering/LongRoad1.pdf>.

⁹⁷ DOE, WIPP Chronology (Feb. 2007), *available at* <http://www.wipp.energy.gov/fctshts/Chronology.pdf>.

granting necessary environmental permits for the WIPP repository.⁹⁸ The local community that hosts WIPP – Carlsbad, New Mexico – has also been a strong supporter of the repository.⁹⁹ Therefore, WIPP represents an example of successful federal, state, and local cooperation in the development of a repository, and can provide valuable lessons for future repositories.¹⁰⁰

The advances in scientific and engineering knowledge described above have, as the Secretary has repeatedly stated,¹⁰¹ provided an opportunity to develop better alternatives to Yucca Mountain.¹⁰² To that end, the Blue Ribbon Commission is specifically directed by its charter to consider, among other things: (1) “[o]ptions for safe storage of used nuclear fuel while final disposition pathways are selected and deployed,” (2) “fuel cycle technologies and R&D

⁹⁸ *Id.*

⁹⁹ *See, e.g.*, DOE, Public Scoping Meeting For The Greater-Than-Class C Low-Level Radioactive Waste Environmental Impact Statement, Carlsbad, N.M. (Aug. 13, 2007), at 33, *available at* http://www.gtceis.anl.gov/documents/sctrans/SCTrans_Carlsbad_8_13_07.pdf (statement from New Mexico State Representative John Heaton: “WIPP has operated safely for more than eight years, and has clearly demonstrated its ability to transport and dispose of GTCC-like waste. In my district, it’s clear that the [WIPP] project, when we had hearings related to it, we had a tremendous turn out, tremendous support for that project.”); *see id.* at 64 (statement from Carlsbad Mayor Bob Forrest: “And looking back, and a lot of things you would change in 30 years, you couldn’t have written a better script than what we did with WIPP, and the success we’ve had. And it was the best thing that ever[] happened to Carlsbad.”).

¹⁰⁰ The NRC has recognized that developments at the WIPP repository are relevant to the development of a long-term repository for SNF and HLW. 55 Fed. Reg. 38,474, 38,476 (Sept. 18, 1990) (“Although the NRC does not have oversight responsibility for the WIPP project, NRC does monitor DOE progress on WIPP insofar as it may offer valuable insight into efforts to license a repository for commercial high-level waste and spent fuel.”).

¹⁰¹ *See, e.g.*, March 5, 2009, Senate Committee on Energy Natural Resources Hearing Transcript at 38; 2009 WL 583765; June 3, 2009, House Energy and Water Development Committee Hearing Transcript at 18, 2009 WL 1554206.

¹⁰² Washington has argued that DOE’s reliance on such advances to support withdrawal “does not address the fact that DOE submitted the instant application less than two years ago, and that the application can be updated to reflect advances in scientific and engineering knowledge.” WA Resp. at 19. However, the Secretary’s judgment here 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.

programs,” and (3) “[o]ptions for permanent disposal of used fuel and/or high-level nuclear waste, including deep geological disposal.”¹⁰³

Another key and irrefutable aspect of this problem is the continuing lack of public support for the repository among the people of the State of Nevada.¹⁰⁴ Public acceptance is a key component of a workable solution to permanent disposal of these materials. As the NRC stated in 2008, “[i]nternational developments have made clear that technical experience and confidence in geologic disposal, on their own, have not sufficed to bring about the broader societal and political acceptance needed to realize the authorization of a single national repository.”¹⁰⁵ As a result, many national programs have given “increasing focus not only to the scientific and technical issues, but also to societal, political, legal and economic aspects” of implementing a geologic repository in their countries.¹⁰⁶ The general consensus emerging from the international waste management community is that “confidence building is the key remaining issue to facilitate the decision making process in geological repository projects.”¹⁰⁷

¹⁰³ Blue Ribbon Commission on America’s Nuclear Future, U.S. Department of Energy, Advisory Committee Charter, at 1, available at http://brc.gov/pdfFiles/BRC_Charter.pdf (“BRC Charter”).

¹⁰⁴ Over the past two decades, public opinion polls in Nevada have consistently shown that many Nevadans oppose the Yucca Mountain project and believe that Nevada should do everything in its power to stop it. Nevada Yucca Mountain Survey Summary Report at 3 (Oct. 2006), *available at* <http://www.state.nv.us/nucwaste/news2006/pdf/nv2006summary.pdf>; Nevada Agency for Nuclear Projects, “Why Does the State Oppose Yucca Mountain,” (Feb. 4, 1998), *available at* <http://www.state.nv.us/nucwaste/yucca/state01.htm>.

¹⁰⁵ Proposed Rules, Waste Confidence Decision Update, 73 Fed. Reg. 59,551, 59,559 (Oct. 9, 2008).

¹⁰⁶ International Atomic Energy Agency, Geological Repositories: The Last Nuclear Frontier, Statements of the Director General (Dec. 8, 2003), *available at* <http://www.iaea.org/NewsCenter/Statements/2003/ebsp2003n028.html>.

¹⁰⁷ *Id.*

It is now appropriate to consider alternatives to the Yucca Mountain Project given the long-term inability to obtain public acceptance. Congress has thus provided \$5 million to fund the Blue Ribbon Commission to consider such “alternatives.”¹⁰⁸ Notably, moreover, the Commission is required to consider, among other things, “[o]ptions for decision-making processes for management and disposal that are flexible, adaptive, and responsive; [and] [o]ptions to ensure that decisions on management of used nuclear fuel and nuclear waste are open and transparent, with broad participation.”¹⁰⁹

4. The Board Should Grant Dismissal With Prejudice

The opponents also offer no reason why the Board should not grant withdrawal with prejudice, as DOE requests. Not a single case they cited is relevant since each case involved an applicant that *opposed* dismissal with prejudice.¹¹⁰ In those cases, the *intervenors* asked that the application be dismissed with prejudice, over the objection of the applicant, and the issue in each case was whether the harm to intervenors or to a public interest from dismissal without prejudice was sufficient to overcome the normal presumption of dismissal on terms requested by the applicant. This difference from the current situation is, of course, critical and makes inapposite the Staff’s argument that DOE bears a burden to justify dismissal with prejudice.¹¹¹

By contrast, the law is clear that the analysis is very different where a party requests dismissal of its own case with prejudice. In particular, federal court cases under analogous Fed.

¹⁰⁸ Energy and Water Development and Related Agencies Appropriations Act, 2010 Conference Report, H.R. Rep. No. 111-278 at 21 (2009), *as reprinted in* 2009 U.S.C.C.A.N. 1003.

¹⁰⁹ BRC Charter at 1.

¹¹⁰ *Philadelphia Electric Company* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 N.R.C. 967 (1981); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 N.R.C. 1125 (1981); *Duke Power Company* (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 N.R.C. 1128 (1982).

¹¹¹ Staff Resp. at 19, citing *Fulton* and *North Coast*.

R. Civ. P. 41(a)(2), to which the NRC looks to for guidance in this context,¹¹² direct that when a “plaintiff moves . . . to voluntarily dismiss its complaint with prejudice, the district court must grant that request.”¹¹³ In fact, “[i]t is generally considered an *abuse of discretion* for a court to deny a plaintiff’s request for voluntary dismissal with prejudice.”¹¹⁴ It is this standard that should be followed here.

Furthermore, the dispute over the Secretary’s conclusion that the need for finality justifies a dismissal with prejudice is essentially a policy disagreement that should be decided by political bodies, not this Board.¹¹⁵ The Secretary’s conclusion is that, absent finality, the issues about whether or not to go forward with the Yucca Mountain project will continue to plague the attempts by the Blue Ribbon Commission (as well as later policymakers informed by the Commission’s recommendations) to advance alternative solutions to the disposal of nuclear waste. Simply put, it is the Secretary’s judgment that there cannot be a fresh start and new direction on these issues if the arguments about past policies can be rehashed over and over again, as they will be absent finality to the Yucca Mountain repository.¹¹⁶

¹¹² *E.g., Duke Power*, 16 N.R.C. at 1134-35.

¹¹³ *United States v. Estate of Rogers*, 2003 WL 21212749 *1 (E.D. Tenn. April 3, 2003), citing *Smoot v. Fox*, 340 F.2d 301, 303 (6th Cir. 1964); *York v. Ferris State Univ.*, 36 F. Supp. 2d 976, 979 (W.D. Mich. 1998); 9 CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2367 (2d ed. 1995).

¹¹⁴ *Degussa Admixtures, Inc. v. Burnett*, 471 F. Supp. 2d 848, 852 (W.D. Mich. 2007), citing *Smoot*, 340 F.2d at 303.

¹¹⁵ For instance, regardless of what this Board decides, if Congress wished, it could pass a new statute requiring the submission of a new application under that statutory scheme.

¹¹⁶ DOE agrees with Nevada to the extent that dismissal of its application with prejudice has the effect of barring a new application for the repository, but that it does not operate as a disposition on the merits of each of the individual issues admitted into contention. *See Nev. Resp.* at 10.

These conclusions are within the Secretary’s policy discretion under the AEA. Staff acknowledges (Staff Resp. at 16) that policy discretion, and, although it suggests that the NRC also has authority under AEA, that authority is not to make policy, but rather to engage in “licensing and related regulatory functions” under 42 U.S.C. § 5841.¹¹⁷ Accordingly, even if the Board had to determine whether the requested relief would avoid harm to the public interest, as Staff suggests (Staff Resp. at 19), the Secretary has explained why it would avoid such harm, and this Board should respect that policy judgment.

Nor has any opponent established that granting the requested relief would cause them “legal prejudice.” NARUC, NEI and Washington seek to predicate harm based on the continued onsite retention of the nuclear waste that might otherwise go to Yucca Mountain were the repository to open.¹¹⁸ But that asserted harm presumes that, absent the decision the Secretary has made, a nuclear waste repository at Yucca Mountain would be licensed, constructed, and operated. The earliest such a facility could exist is 2020 – and it could be much longer, or never. As highlighted above, there are many contingencies that need to be satisfied before such a repository could be operational. By the same token, it may well be that one or more of the alternative methods analyzed by the Blue Ribbon Commission (such as interim storage) would

¹¹⁷ See also *supra* note 14.

¹¹⁸ NEI claims, without more, that “abandonment of the license application by DOE is contrary to the NWPA and the YMDA,” and that “[w]ithdrawal with prejudice would be detrimental to the interests of NEI and potentially other intervenors....” NEI Resp. at 16. If NEI is correct in its views on the NWPA and the YMDA, then it will receive relief on grounds other than the terms of dismissal. Otherwise, its skeletal assertion of a bare legal claim on its own behalf is insufficient to provide relief, and it has no standing to assert harm on behalf of other parties. Similarly, NARUC asserts that “granting the motion with prejudice unquestionably harms the interests of those who support the application and to the public interest codified in the NWPA in the requirement for DOE to file and the NRC to consider an application....” NARUC Resp. at 17. The NARUC argument suffers from the same weaknesses as that of NEI. The Staff does not make an argument that it will suffer legal harm from dismissal with prejudice.

lead to the taking of such waste more quickly than the never-ending pursuit of Yucca Mountain. The claimed harm is thus entirely speculative, and relies on a series of contingencies that provide no sound basis to deny the relief the Secretary has requested.

Finally, the Staff and NEI seek to distinguish the four cases cited by DOE in which the NRC deferred to other agencies operating within their spheres of special responsibility.¹¹⁹ The short answer to these responses is that the four cases are in fact instances where the NRC deferred to other agencies as to matters within their policy discretion. Neither the Staff nor NEI challenges that. The Board should follow these examples and defer to DOE's judgment that its application should be dismissed with prejudice.

5. No Further Conditions Are Necessary

The Board also should not condition withdrawal on any requirements regarding preservation of DOE's LSN document collection. The Federal Records Act¹²⁰ already requires DOE to retain its records. And as explained in its answers to the Board's questions, DOE has committed to maintain the functionality of its LSN document collection until there is a final non-appealable order and this proceeding is terminated.¹²¹ DOE is also committed to, among other things, (1) preserving the relevant scientific information respecting the storage or disposal of high-level waste and spent nuclear fuel, and (2) archiving its LSN collection in compliance with the Federal Records Act.¹²² Those preservation steps more than satisfy any reasonable needs.

Nye County professes vaguely that the Board should impose a "remediation" condition, but it does not specify what conditions it thinks are necessary; or why, absent such a

¹¹⁹ Staff Resp. at 16-19; NEI Resp. at 15 n. 14.

¹²⁰ 44 U.S.C. § 3101, *et seq.*

¹²¹ DOE Answers to ASLB Questions from Order Dated April 21, 2010, responses to Questions 2.8, 5.10.5, 6.5.

¹²² *Id.*, response to Question 4.15.

commitment, DOE would not adhere to its legal obligations under relevant law.¹²³ In fact, DOE has already identified the steps that would be necessary to remediate Yucca Mountain in DOE's EIS, and it will adhere to all applicable legal requirements in doing so.¹²⁴ This commitment already satisfies Nye County's condition.

C. DOE'S MOTION DOES NOT CONSTITUTE A "MAJOR FEDERAL ACTION" REQUIRING AN ENVIRONMENTAL IMPACT STATEMENT UNDER NEPA

Nye County and PIIC argue that DOE's motion to withdraw constitutes a "major federal action" for which DOE has failed to do the environmental analysis required by NEPA, 42 U.S.C. 4321 *et seq.*¹²⁵ This argument fails as a matter of law and fact.

DOE's motion does not constitute a major federal action because it does not change the environmental status quo.¹²⁶ It is undisputed that the proposed Yucca Mountain repository does not yet exist, and, as discussed, it cannot exist absent congressional action and numerous other steps. The mere act of seeking to withdraw the license application has thus not changed the status quo or had any effect whatever on the quality of the human environment.¹²⁷ Thus, DOE cannot be required to conduct an analysis of the impacts of its actions on the environment, the

¹²³ Nye County Resp. at 26.

¹²⁴ *E.g.*, DOE EIS, Volume 1, Chap. 2, § 2.2.1 (For example: "DOE would remove equipment and materials from the underground drifts and test rooms . . . Excavated rock piles would be stabilized . . . Areas disturbed by surface studies . . . would be restored.")

¹²⁵ *See* Nye County Resp. at 21-22; PIIC Resp. at 18-22,

¹²⁶ *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2002) ("NEPA procedures do not apply to federal actions that maintain the environmental status quo.").

¹²⁷ The cases cited by PIIC are readily distinguishable. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146 (9th Cir. 1998), *overruled by*, 537 F.3d 1146 (9th Cir. 2008), involved a timber sale, *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1992), involved federal actions directly affecting fishing and protection of endangered species in the Northern Pacific Ocean (and affirmed the Finding of No Significant Impact on the Environment) and *California ex rel Lockyer v. U.S. Dep't of Agriculture*, 575 F.3d 999 (9th Cir. 2009), the issuance of a rule. None involved the withdrawal of an application in an ongoing proceeding.

core requirement of NEPA, because its “actions” have no such impacts.¹²⁸ Moreover, before DOE makes any decisions as to what new path to follow, the congressionally funded Blue Ribbon Commission will analyze the relevant scientific and policy issues regarding treatment of these materials and make recommendations to the Secretary. It is well-settled that a party cannot challenge under NEPA the mere adoption of a plan to look at other waste disposal options, but rather must wait to challenge decisions to implement such options.¹²⁹

In any event, even if environmental analysis were required, as PIIC itself acknowledges (PIIC Resp. at 19), DOE has already analyzed the potential environmental impacts of not proceeding with Yucca Mountain through the no-action alternative in DOE’s 2002 FEIS and 2008 SEIS. PIIC claims (Resp. at 19) that the analysis in those documents “cannot be retroactively applied on a post-hoc basis,” but an EIS necessarily (and properly) precedes a decision and thus cannot be criticized for being done before the filing of the current motion. Whether or not the decision to withdraw the license application was “unforeseen” or “situational,” as PIIC asserts, the fact remains that the potential effects of termination of the project were evaluated. Moreover, without conceding the accuracy of PIIC’s prediction that the

¹²⁸ For example, in *City of Santa Clara v. Andrus*, 572 F.2d 660, 680 (9th Cir. 1978), cited by Nye County, the court found that to meet the NEPA threshold that a federal action must “significantly affect the quality of the human environment” a federal action must have an “absolute quantitative adverse effect” and found the disputed action in that case to have no such effect. *Id.* (citations omitted).

¹²⁹ See *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726 (1998); *Northcoast Env’tl. Center v. Glickman*, 136 F.3d 660, 669 (9th Cir. 1998) (preliminary research and development efforts do not trigger NEPA EIS requirements or constitute final agency action under the APA). Nye County seeks support for its position in *Andrus v. Sierra Club*, but cites to *dicta* in a decision that decided that no EIS was required for appropriations requests. Moreover, the cited language in *Andrus* clearly refers to actions that change an *ongoing* program, which is not the situation here since Yucca Mountain has never operated. This latter point is supported by the other case cited by Nye County, *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232 (9th Cir. 1990), which notes that, “This circuit has held that where a proposed federal action would not change the status quo, an EIS is not necessary.” *Id.* at 235.

license withdrawal will lead to “strand[ing] such waste indefinitely or permanently at present sites” (PIIC Resp. at 21), this is the very contingency that DOE analyzed in the EIS and SEIS.¹³⁰

PIIC also argues that the EIS and SEIS are inadequate because they do not analyze the potential effects of termination of Yucca Mountain at individual (presumably non-DOE) locations. As a review of nation-wide impacts, it was obviously not possible to conduct in-depth analysis at each of the 72 commercial sites where spent fuel is stored. There is no such requirement, however. The EIS provided a “hard look” at the potential environmental impacts of not proceeding with Yucca and leaving in place the wastes which might have been transported to and disposed of at Yucca. The EIS, moreover, considered two variations of this scenario, one in which the wastes left in their current storage locations would be subject to custodial care, and one in which no such care would be provided. These analyses informed the public of the potential consequences of not proceeding with Yucca Mountain in a manner that allows consideration of what might happen if no reasonable alternative to Yucca were to be found.¹³¹ Thus, the analyses were bounding of the range of reasonably anticipated alternatives. These analyses show that damage would not be expected to occur, even under these conditions, for more than 100 years, which gives the Federal Government ample time to provide for the safe management of spent nuclear fuel.¹³²

¹³⁰ Since DOE analyzed the “no-action” alternative in the EIS and Supplemental EIS, it is hardly correct to claim, as does PIIC, that “DOE’s Motion attempts to moot out and make irrelevant the FEIS” PIIC Resp. at 21.

¹³¹ Similarly, in *Edwardson v. Department of Interior*, 268 F.3d 781, 784 (9th Cir. 2001), the court held that: “We review an EIS under a rule of reason to determine whether it contains ‘a reasonably thorough discussion of the significant aspects of probable environmental consequences.’” *Id.*, citing *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998). In the *Edwardson* case the court found that the absence of a “site-specific analysis” in the EIS was insufficient to render the EIS inadequate. *Id.* at 786.

¹³² Moreover, each commercial site where spent fuel is stored is subject to NRC licensing and oversight and NRC will assure continued protection of human health and the environment.

III. CONCLUSION

The Board should grant DOE's motion in full and not impose any additional conditions. In moving to withdraw the license application, DOE is merely exercising authority expressly granted to it by the Atomic Energy Act and DOE Organization Act in a manner that is consistent with the NRC's rules, as the NWPA explicitly contemplates. The NWPA provides that an application for a geologic repository is subject to the NRC's rules. One of those rules, 10 C.F.R. § 2.107, allows an applicant to withdraw an application. DOE's motion to withdraw, made as a consequence of the Secretary's determination that withdrawal promotes the public interest, seeks relief under 10 C.F.R. § 2.107 and is thus entirely authorized by the NWPA.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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May 27, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

Before Administrative Judges:
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the **U.S. DEPARTMENT OF ENERGY'S REPLY TO THE RESPONSES TO THE MOTION TO WITHDRAW** have been served on the following persons on this 27th day of May 2010 through the Nuclear Regulatory Commission's Electronic Information Exchange.

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