

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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	)	ASLBP No. 09-892-HLW-CAB04
(License Application for Geologic Repository at Yucca Mountain)	)	May 6, 2010
	)	
	)	
	)	

**AIKEN COUNTY RESPONSE  
IN OPPOSITION TO DOE’S MOTION TO WITHDRAW**

Aiken County has consistently argued that the Federal Court of Appeals is the appropriate, Congressionally-sanctioned forum for civil actions stemming from a violation of the Department of Energy’s, (“DOE’s”), duty to seek licensure for the Yucca Mountain repository under the Nuclear Waste Policy Act, (“NWPA”). Aiken County petitioned for mandamus relief before the United States Court of Appeals for the District of Columbia Circuit pertaining to DOE’s motion to withdraw. Because Aiken County also petitioned to intervene before the Licensing Board, following DOE’s submission of its motion to withdraw, Aiken County submits this response in opposition to the motion to withdraw, for the reasons set forth below. Essentially, DOE is required to submit its application for construction authorization, and

withdrawal of the application would be contrary to the Congressional mandate of the NWPA. The DOE cannot ignore Congress.<sup>1</sup>

### **I. The NWPA requires DOE to pursue the License Application.**

Congress has chosen a means (geologic repository) and site (Yucca Mountain) for the long-term disposal of nuclear waste. *See* 42 U.S.C.A. §§ 10132 & 10134; *see also* Act of January 7, 1983, Pub. L. No. 97-425, 1982 U.S.C.C.A.N. (97 Stat.) 3792, 3796. In enacting the NWPA, Congress acknowledged that the private sector had not been able to solve this problem, that various presidential administrations tried different approaches to no avail, and that “there is a solid consensus on major elements of the Federal program and on the need for legislation to solidify a program and keep it on track.” 1982 U.S.C.C.A.N. (97 Stat.) 3792, 3795.

In 1987, Congress adopted an amendment to the NWPA that directed DOE to limit its site selection efforts to Yucca Mountain. *See* 42 U.S.C.A. §§ 10134(f)(6), 10172. In February 2002, following a comprehensive site evaluation, the Secretary of Energy recommended to the President that Yucca Mountain be developed as a nuclear waste repository.<sup>2</sup> The President then recommended the Yucca Mountain site to Congress.<sup>3</sup> Nevada filed a notice of disapproval, to which Congress responded with a joint resolution in July 2002 approving the development of a

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<sup>1</sup> Aiken County files this brief with “particular attention to the statutory scheme, history, and legislative intent of the Nuclear Waste Policy Act,” in accordance with the Licensing Board’s order of April 27, 2010, and in support of the following contentions: SOC-MISC- 01 (Withdrawal of Application Without Congressional Authority); SOC-MISC-02 (Withdrawal of Application in Violation of Separation of Powers); SOC-MISC-03 (If the Commission Were To Grant DOE’s Anticipated Motion to Withdraw the Application, that Grant Would Exceed the Commission’s Powers Under the NWPA).

<sup>2</sup> Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982 at 6 (February 2002), *available at*: [http://www.ocrwm.doe.gov/uploads/1/Secretary\\_s\\_Recommendation\\_Report.pdf](http://www.ocrwm.doe.gov/uploads/1/Secretary_s_Recommendation_Report.pdf)

<sup>3</sup> *See* John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA. Available from World Wide Web: <http://www.presidency.ucsb.edu/ws/?pid=72967>

repository at Yucca Mountain. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135).

This official site designation required DOE to submit a License Application to construct a high-level waste geologic repository at Yucca Mountain. 42 U.S.C.A. § 10134(b) (“the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site. . . .”). This requirement is mandatory. *Zivotofsky v. Sec’y of State*, 571 F.3d 1227, 1243 (D.C. Cir. 2009) (“‘Shall’ has long been understood as ‘the language of command’” except for “rare exceptions . . . that apply only where it would make little sense to interpret ‘shall’ as ‘must.’”). The use of the word “shall” is “a command that admits of no discretion on the part of the person instructed to carry out the directive.” *Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994).

Because nuclear waste disposal is of broad national interest and politically sensitive, Congress delineated a procedure designed to result in the licensing and construction of a suitable repository. *See* Act of January 7, 1983, Pub. L. No. 97-425, 1982 U.S.C.C.A.N. (97 Stat.) 3792, 3794 & 3797 (noting change in course between Ford and Carter administrations and stating an essential element of the program includes “[a] legislated schedule for Federal decisions and actions for repository development.”). Under DOE’s reading of 42 U.S.C.A. § 10134, the Secretary of Energy can single-handedly derail this legislated schedule by withdrawing the License Application. DOE erroneously contends that the provisions of the NWPA requiring DOE to make a License Application do not prevent DOE from withdrawing it at any time.

DOE asks for indulgence for its interpretation under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), which held that courts should defer to a reasonable interpretation by the administering agency where Congress has not directly spoken on an issue. As a preliminary

matter, DOE's interpretation of its NWPA mandate is not entitled to *Chevron* deference because DOE is not the administering agency of the NWPA at the licensing stage, under the NWPA's "carefully crafted statutory scheme and timing." *In re United States DOE*, 67 N.R.C. 205, 216 (2008). Rather, "under the sequential process prescribed in the Waste Policy Act," *id.*, NRC is charged with administering the NWPA once DOE has applied for construction authorization. *See* Commission Order of April 23, 2010 at 3.

Next, even if DOE was considered to be the "administering agency" of the NWPA during the construction authorization phase, its interpretation of the NWPA-mandated duty to apply for licensure is not entitled to deference, because Congress has directly spoken on the issue.<sup>4</sup> Finally, even if Congress had not specifically spoken on the issue, DOE's interpretation would be impermissible because it unreasonably contravenes the underlying purpose of the NWPA to permit and establish a geologic repository, and renders impossible the fulfillment of the NWPA mandate that NRC approve or disapprove the construction authorization within three years. *See* 42 U.S.C. § 10134(d)

"It is an elementary rule of construction that 'the act cannot be held to destroy itself.'" *Citizens Bank v. Strumpf*, 516 U.S. 16, 20 (1995) (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)). *See also MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) ("An agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."); *Mullins v. Andrus*, 664 F.2d 297, 309 (D.C. Cir. 1980) ("We must reject a statutory interpretation ...when it flouts a

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<sup>4</sup> "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context. It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal citations omitted).

legislative edict.”); *March v. United States*, 506 F.2d 1306, 1316 (D.C. Cir. 1974) (“‘[O]beisance to administrative action cannot be pressed so far’ as to justify adoption of an administrative construction that ‘flies in the face of the purposes of the statute and the plain meaning of its words’”)(quoting *Haggar Co. v. Helvering*, 308 U.S. 389, 398 (1940)).

DOE concedes that the NWPA requires that the Secretary “shall submit an application for construction authorization,” but suggests that the statute “neither directs nor circumscribes the Secretary’s actions on the application after that submission.” See DOE Motion to Withdraw at 5. This interpretation is patently inconsistent with the purpose and plain language of the NWPA and cannot stand. The NWPA does not permit DOE to withdraw its License Application.

## **II. 10 C.F.R. § 2.107 permits denial of DOE’s motion to withdraw its license application.**

DOE asserts that it is moving to withdraw its license application “pursuant to 10 C.F.R. § 2.107.” DOE Motion to Withdraw at 1. DOE characterizes 10 C.F.R. § 2.107 as merely allowing this Licensing Board to impose *terms and conditions* upon withdrawal, and not permitting this Licensing Board to deny a withdrawal request, even if it were improper or unlawful. See *id.* at 3 (“Thus, applicable Commission regulations empower this Board to regulate the terms and conditions of withdrawal.”). Contrary to DOE’s characterization of the regulation, the Licensing Board’s discretion to deny an improper motion to withdraw a license application is not curtailed by 10 C.F.R. § 2.107.<sup>5</sup>

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<sup>5</sup> DOE’s interpretation of NRC regulations does not warrant deference by the Licensing Board in this adjudication. See *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) (“It is true that we do not generally accord deference to one agency’s interpretation of a regulation issued and administered by another agency.”); *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997) (“We generally do not accord deference to an agency’s interpretation of regulations promulgated by another agency that retains authority to administer the regulations.”).

“On its face, this provision [10 C.F.R. § 2.107] gives the boards substantial leeway in defining the circumstances in which an application may be voluntarily withdrawn.” *In re Philadelphia Electric Co.*, 14 N.R.C. 967 (1981). The NRC, acting in its adjudicatory capacity, has previously noted that 10 C.F.R. § 2.107 may admit of discretion by the Licensing Board to deny a withdrawal request in certain instances to avoid a result that is unlawful:

We need not decide today under what circumstances a presiding officer may deny a request to withdraw an application [under] section 2.107(a) .... However, we do not foreclose the possibility that in limited instances denial may be appropriate, as, for example, where a licensee seeks to withdraw a license renewal application but in fact continues to conduct some production activity.

*In re Sequoyah Fuels Corporation*, 41 N.R.C. 179 (1995). While it might be said that a private applicant should almost always be allowed to withdraw its application, the same cannot be said for the DOE, which is statutorily mandated to seek application by Congress, as discussed above. To the contrary, “the NRC retains the authority under the NWPAA and the Energy Reorganization Act to take appropriate action to remedy DOE misconduct.” *In re United States DOE*, 69 N.R.C. 580, 607 n.152 (N.R.C. June 30, 2009).

10 C.F.R. § 2.107 does not prohibit the Licensing Board from denying a motion to withdraw a License Application, but rather affirms the authority of the Licensing Board and Commission to set terms on *voluntary* withdrawals. The regulation is intended to ratify the Licensing Board’s broad authority rather than limit it. *See In re Puerto Rico Electric Power Authority*, 14 N.R.C. 1125 (N.R.C. 1981) (“Commission has undoubted authority, confirmed in its regulations, to condition the withdrawal of an application on such terms as it thinks just.”); *In re Philadelphia Electric Co.*, 14 N.R.C. 967 (1981) (“Indeed, 10 CFR 2.107(a) authorizes a licensing board to permit withdrawal of an application ‘on such terms as the [board] may

prescribe.’). Thus, a rule permitting the Licensing Board to set terms on voluntary withdrawals does not circumscribe its ability to deny unlawful withdrawals. Logic dictates that the authority to impose conditions upon withdrawal necessarily includes the authority to deny withdrawal if an essential condition – such as compliance with the NWPA – cannot be met consistent with withdrawal.

### **III. A grant of withdrawal would contravene NRC’s duties under the NWPA.**

DOE’s motion to withdraw is not a garden variety withdrawal motion, but rather seeks to contravene the duties of the NRC itself under the NWPA, which mandates that NRC approve or disapprove the construction authorization within three to four years in accordance with applicable laws.

DOE cites a portion of a federal statutory provision in its filings: “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....” *See* DOE Petition for Interlocutory Review at 6 (quoting 42 U.S.C. § 10134(d)); *see also* DOE Motion to Withdraw at 2 (same). However, consideration of DOE’s motion to withdraw its license application does not involve application of NRC regulations in a vacuum. This becomes apparent when the NWPA provision cited by DOE is read further than what was quoted:

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 [extendable up to 12 months with certain reporting requirements].*

42 U.S.C. § 10134(d)(emphasis added).

The NWPA clearly dictates that NRC procedures should be used *except to the extent* their application jeopardizes the fulfillment of NRC’s duty to render a final approval or disapproval of the construction authorization within three to four years. The NWPA precludes interpretation of a regulation in such a way as to prevent final approval or disapproval. To the extent 10 C.F.R. § 2.107 would allow withdrawal in most cases, it does not allow withdrawal where such allowance makes impossible the fulfillment of the NWPA mandate that NRC approve or disapprove the construction authorization within three years.

In a filing before another court, DOE suggests that a grant of the motion to withdraw under 10 C.F.R. §2.107 would constitute a “disapproval” of construction authorization under the NWPA, implying that the NRC could grant the withdrawal and still be in compliance with the timing requirements of the NWPA. *See* DOE Response to Washington Motion for Preliminary Injunction at 11 n.6. However, 10 C.F.R. § 2.107 does not use the term “disapprove” to describe actions that may be taken by the Licensing Board upon a motion to withdraw.<sup>6</sup> More importantly, this interpretation of NRC’s duty to “approve or disapprove” ignores the statutory framework of the NWPA, because NRC “approval” or “disapproval” necessarily requires a review of the scientific and safety contentions regarding Yucca Mountain. A grant of a motion to withdraw does not meet NRC’s “statutory obligation *to complete its examination of the application* within three years of its filing.” *In re United States DOE*, 63 N.R.C. 143, 146 (N.R.C. 2006) (emphasis added). While it is possible that NRC could eventually disapprove the license application, such disapproval must be based a review of the technical merits. *See In re*

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<sup>6</sup> “The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.” 10 C.F.R. § 2.107(a).

*United States DOE*, 69 N.R.C. 367, 464 (N.R.C. May 11, 2009) (“Congress thus envisioned a situation where, *after the Commission's review*, the Commission could find that DOE, although the designated Applicant, would not be the designated licensee.”)(emphasis added). Just as denial of DOE’s motion to withdraw would not constitute an “approval” of Yucca Mountain construction authorization under the NWPA, a grant of a motion to withdraw is not a “disapproval” of construction authorization.

#### **IV. Funding of a Blue Ribbon Commission does not change substantive law.**

DOE’s reliance on its recently established “Blue Ribbon Commission,” which has no authority to amend the NWPA, is erroneous. *See* DOE Motion to Withdraw at 7. The existence of a Blue Ribbon Commission does not alter the duties of either DOE or NRC under the NWPA. While the agency is free to recommend amendments to the NWPA, only Congress can amend its provisions. *Cf. McCready v. Nicholson*, 465 F.3d 1, 12 (D.C. Cir. 2006). DOE cites a FY 2010 appropriations item enacted “to create a Blue Ribbon Commission to consider all alternatives for nuclear waste disposal.” This appropriations language in no way conflicts with the NWPA, but rather expresses that the committee consider *all* alternatives, which includes Yucca Mountain. Even assuming, *arguendo*, such language conflicted with the NWPA, it would not suffice to amend the NWPA’s substantive provisions. “[T]he established rule [is] that, when appropriations measures arguably conflict with the underlying authorizing legislation, their effect must be construed narrowly. Such measures have the limited and specific purpose of providing

funds for authorized programs." *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000) (quoting *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984)).<sup>7</sup>

No amending language appears in the FY2010 appropriations act funding the “Blue Ribbon Commission.” Rather, the very item of the appropriations act cited by DOE specifically expresses the intent of Congress to effectuate the NWPA and continue licensing activities at Yucca Mountain. See 111 P.L. 85; 123 Stat. 2845; 2009 Enacted H.R. 3183; 111 Enacted H.R. 3183 (“For nuclear waste disposal activities to carry out the purposes of the Nuclear Waste Policy Act of 1982 ... [funding] shall be provided to the Office of the Attorney General of the State of Nevada ... to ... participate in licensing activities pursuant to the NWPA ... to affected units of local government ... to ... participate in licensing activities under Section 116(c) of the NWPA ... [and] to the affected federally-recognized Indian tribes ... to ... participate in licensing activities under section 118(b) of the NWPA ....”). DOE may not rely on the formation of a Blue Ribbon Commission to substantiate its motion to withdraw the license application mandated by the NWPA. The Blue Ribbon Commission alters neither DOE’s duty to seek licensure nor NRC’s duty to approve or disapprove construction authorization within the timeframe set forth by the NWPA.

For the reasons set forth above, and summarized below, DOE’s Motion to Withdraw should be denied.

1. The NWPA mandates that, as a consequence of a carefully crafted federal process, DOE submit an application for construction authorization for Yucca Mountain, withdrawal of

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<sup>7</sup> Furthermore, even where appropriations acts amend substantive law, the change is only intended for one fiscal year, unless there is clear language that a permanent amendment to substantive law is intended. See *Whatley v. District of Columbia*, 447 F.3d 814, 819 (D.C. Cir. 2006).

which would render the NWPA provisions meaningless without the Licensing Board's assessment of the scientific merits of the application.

2. 10 C.F.R. § 2.107 is a permissive regulation that expresses the ability of the Licensing Board to set terms and conditions of withdrawal of applications, and should not be interpreted to restrict the Licensing Board's authority to deny an improper withdrawal request.
3. To permit a withdrawal of the license application would contravene the duties of the NRC itself under the NWPA, which mandates that NRC approve or disapprove the construction authorization upon its merits within a statutory timeframe.
4. The Blue Ribbon Commission alters neither DOE's Congressional mandate to seek licensure nor NRC's duty to approve or disapprove construction authorization within the timeframe set forth by the NWPA.

Respectfully submitted,

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May 6, 2010

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **AIKEN COUNTY RESPONSE IN OPPOSITION TO DOE'S MOTION TO WITHDRAW** in the above-captioned proceeding have been served on the following persons this 6<sup>th</sup> day of May, 2010, by Electronic Information Exchange.

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