

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
U.S. Department of Energy	)	Docket No. 63-001-HLW
(High Level Waste Repository)	)	ASLB No. 09-892-HLW-CAB-04
	)	
	)	

OPPOSITION OF THE NUCLEAR ENERGY INSTITUTE TO  
THE DEPARTMENT OF ENERGY’S MOTION FOR WITHDRAWAL

I. INTRODUCTION

On March 3, 2010, the Department of Energy (“DOE”) filed a Motion<sup>1</sup> seeking consent to withdrawal of its application for a license from the Nuclear Regulatory Commission (“NRC”) to authorize construction of a geologic repository at Yucca Mountain in Nye County, Nevada (“DOE Motion”). The DOE Motion specifically seeks withdrawal of the license application “with prejudice.” The Construction Authorization Board issued a decision suspending briefing, adopting the view that it was prudent and efficient to await guidance on the “motion to withdraw” issue from the U.S. Court of Appeals for the District of Columbia Circuit, which has before it several lawsuits challenging DOE’s effort to halt the Yucca Mountain project.<sup>2</sup> However, on April 23, 2010, the Commission vacated the suspension order.<sup>3</sup>

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<sup>1</sup> “U.S. Department of Energy’s Motion to Withdraw,” dated March 3, 2010.

<sup>2</sup> Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010).

<sup>3</sup> *U.S. Dept. of Energy* (High Level Waste Repository), CLI-10-13 (April 23, 2010).

Accordingly, the Construction Authorization Board issued a scheduling order requiring the parties to respond to DOE's Motion by May 17, 2010.<sup>4</sup>

The Nuclear Energy Institute ("NEI") herein opposes the DOE Motion. For the reasons discussed below, the DOE Motion for withdrawal with prejudice should be denied. Instead, this proceeding should be suspended, with all parties required during the period of suspension to preserve all documents and other records related to the development of the repository, including documents currently maintained on the Licensing Support Network ("LSN"). If withdrawal is granted, consistent with prior NRC precedent it should be granted only without prejudice.

## II. BACKGROUND

In 1982 Congress enacted the Nuclear Waste Policy Act, 42 U.S.C. § 10101, *et seq.* ("NWPA"), establishing the federal policy and schedule for the siting, licensing, construction, funding and operation of one or more repositories for the geologic disposal of spent nuclear fuel. *See generally* 42 U.S.C. § 10131(b). In accordance with Section 112 of the NWPA, DOE was required to evaluate and nominate candidate sites for further characterization in accordance with Section 113 of the NWPA. However, in 1987, through the Nuclear Waste Policy Amendments Act, Congress directed DOE to focus its study exclusively on the Yucca Mountain site in Nevada. *See* Pub. L. No. 100-203, §§ 5001-5065, 101 Stat. 1330, 1330-227 to 1320-255 (1987) (codified throughout 42 U.S.C.); *see also* 42 U.S.C. § 10133(a).

In accordance with Section 113 of the NWPA, DOE completed extensive characterization of the Yucca Mountain site over a period of many years. In addition, DOE developed a final environmental impact statement for the high level waste repository at Yucca

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<sup>4</sup> Order (Setting Briefing Schedule) (April 27, 2010).

Mountain and the transportation of spent fuel to the repository site.<sup>5</sup> Based on this record, and in accordance with Section 114 of the NWPA, in February 2002 the Secretary of DOE made a recommendation to the President that the Yucca Mountain site be developed as the federal high level waste repository. As specified in Section 114(a)(2) of the NWPA, the President shortly thereafter submitted his recommendation of the site to Congress.

Sections 115 and 116 of the NWPA provided a process by which the host state and affected Indian tribes could disapprove the site recommendation. Nevada exercised its right to submit to Congress a “notice of disapproval,” which in the absence of further action would negate the Presidential recommendation. However, NWPA Sections 115(a), (d) and (e), further provided a mechanism whereby Congress could act to override the notice of disapproval. Following appropriate legislative hearings and pursuant to procedures specified in the NWPA, Congress enacted in the Yucca Mountain Development Act (“YMDA”) a Joint Resolution approving the Yucca Mountain site for a repository, notwithstanding the disapproval of Nevada. The legislation was signed by the President on July 23, 2002. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002). As subsequently characterized by the United States Court of Appeals for the D.C. Circuit, “[t]he Resolution affirmatively and finally approved the Yucca site for a repository, thus bringing the site selection process to a conclusion.” *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F.3d 1251, 1309 (D.C. Cir. 2004). Approval of the site remains subject only to the NRC licensing process.

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<sup>5</sup> Department of Energy, *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*, (DOE/EIS-0250), February 28, 2002; Department of Energy, *Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*, (DOE/EIS-0250F-S1), June 2008.

On June 3, 2008, DOE filed its application with the NRC for a license authorizing construction of the Yucca Mountain repository. On October 22, 2008, the NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene. 73 Fed. Reg. 63,029. On May 11, 2009, ten parties were granted intervenor status in the licensing hearing, including NEI. Since that time, DOE has been diligently pursuing issuance of a license through the NRC hearing process. However, in a filing with this Licensing Board on February 4, 2010,<sup>6</sup> DOE indicated that the Administration's budget request for Fiscal Year ("FY") 2011, released on February 1, 2010, stated that DOE would discontinue its pursuit of a license and that "[a]ll funding for development of the Yucca Mountain facility and the Office of Civilian Radioactive Waste Management will be eliminated at the end of FY 2010."<sup>7</sup> Accordingly, DOE announced its intent to withdraw the license application. Now, in the DOE Motion of March 3, 2010, DOE confirms that intent and unilaterally seeks to walk away from pursuing the license application for Yucca Mountain. Further, by seeking withdrawal with prejudice, DOE seeks to "provide finality" and foreclose a renewed application in the future.<sup>8</sup>

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<sup>6</sup> "The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference."

<sup>7</sup> *Id.* at 1.

<sup>8</sup> *See* DOE Motion at 3. In footnote 3, DOE states that it "does not intend to refile an application to construct a permanent repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain." This statement comes after DOE has steadfastly pursued the project for 27 years since the enactment of the NWPA, through the Administrations of five different presidents, 15 terms of Congress, and under the leadership of nine different Secretaries.

### III. DISCUSSION

#### A. DOE's Lacks the Authority to Withdraw the License Application

DOE's site characterization process for the Yucca Mountain site has been completed. The site was recommended by the Secretary and, in the YMDA, has been approved for NRC license review by Congress. DOE was bound by the NWPA to submit a license application to the NRC. Specifically, Section 114(b) of the NWPA requires that the "Secretary shall submit to the Commission an application for a construction authorization for a repository at such site . . . ." 42 U.S.C. § 10134(b). Action by DOE to unilaterally walk away from an application, and to seek to preclude any future application for the Yucca Mountain site, is contrary to the intent of Congress in enacting the NWPA and YMDA. As DOE has argued in court, following the enactment of the YMDA and in accordance with Section 114(b) of the NWPA, "DOE is not only authorized but required to submit a license application for a repository at Yucca Mountain to the NRC."<sup>9</sup> The Act cannot reasonably be read, as DOE now suggests, to require the Department to submit an application only to withdraw that application shortly thereafter. This would render the YMDA, the NWPA process for site characterization, and the NWPA language requiring an application, a nullity.<sup>10</sup>

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<sup>9</sup> Final Brief for the Respondents at 22, *State of Nevada v. U.S. Dept. of Energy*, Nos. 01-1516, 02-1036, 02-1077, 02-1179, and 02-1196 (D.C. Cir. May 28, 2003)(emphasis added).

<sup>10</sup> There is a strong presumption against a construction of a statute which virtually nullifies the statute and defeats its object. *United States v. Chavez*, 228 U.S. 525 (U.S. 1913). DOE's interpretation of the NWPA is inconsistent with the NWPA, which compels DOE to pursue an application for a repository. See *Bd. of Educ. of City Sch. Dist. of City of New York v. Harris*, 622 F.2d 599, 611 (2d Cir. 1979) (refusing to adopt reading of statute that would render it "in operation, a nullity"); *Trichilo v. Sec'y of Health & Human Servs.*, 823 F.2d 702, 706 (2d Cir. 1987) ("we will not interpret a statute so that some of its terms are rendered a nullity"); *Garnes v. Barnhardt*, 352 F. Supp. 2d 1059, 1065 (N.D. Cal. 2004)(an "agency interpretation that nullifies part of a formally promulgated regulation deserves no deference."); *Frazier v. City of Richmond* (1986) 184

DOE does not even attempt to argue that its actions are based on science related to the repository site. Indeed, it is arguable whether, under the NWPA and the YMDA, DOE even has the option to do so at this point in the process. As discussed in *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, the Secretary of DOE completed the site characterization in 2002 and recommended the site based on a substantial record of decision. 373 F.3d at 1309. The President and ultimately Congress approved that recommendation as discussed above, leaving the site approval subject only to the review of the NRC. In accordance with Section 114(d) of the NWPA, the Commission now “shall consider an application for a construction authorization for all or part of the repository in accordance with the laws applicable to such application. . . .” 42 U.S.C. § 10134(d). Congress did not give either DOE or the Commission authority to simply terminate the review in its infancy, much less to terminate that review with prejudice.

Furthermore, DOE has not pointed to any basis supporting a conclusion that the Yucca Mountain site will not be capable of meeting NRC licensing requirements. Indeed, the entire record to date — including the site recommendation, the final environmental impact statements, and the license application itself — leads to the opposite conclusion, that the site is appropriate and that the proposed repository will meet NRC performance standards. DOE states that, “[i]t is the Secretary of Energy’s judgment that scientific and engineering knowledge on issues relevant to disposition of high-level waste and spent nuclear fuel has advanced dramatically over the twenty years since the Yucca Mountain project was initiated.” DOE

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Cal. App. 3d 1491, 1496 (“[u]nder the guise of construction, a court should not rewrite the law, add to it what has been omitted, omit from it what has been inserted, give it an effect beyond that gathered from the plain and direct import of the terms used, or read into it an exception, qualification, or modification that will nullify a clear provision or materially affect its operation so as to make it conform to a presumed intention not expressed or otherwise apparent in the law.”)

Motion at 3. However, DOE does not explain what gives the Secretary the legal authority to make such a “judgment” at this time and after such longstanding pursuit of the project. DOE is quite clearly seeking withdrawal based only on a policy determination of the Administration, as made manifest in the DOE budget.

*B. The Licensing Proceeding Should Remain Suspended*

The DOE Motion is based explicitly on (1) the President’s determination to establish the Blue Ribbon Commission on America’s Nuclear Future (“Blue Ribbon Commission”) to review the federal policy on spent nuclear fuel management and disposal and to examine alternatives to Yucca Mountain, and (2) a decision to discontinue the license application as announced in DOE’s FY 2011 Congressional budget request. DOE Motion at 1-2. In essence, DOE has stated that, based on the Administration’s request, it will have funding for FY 2010 only to terminate this proceeding and to bring the Yucca Mountain project and the Office of Civilian Radioactive Waste Management to an orderly close. This is not in any way a determination that the NWPA and YMDA no longer apply, or that the Yucca Mountain site is inappropriate. This action raises significant legal and policy issues that the Commission need not resolve at this time. In the present circumstances, continued suspension of this proceeding, rather than withdrawal of the license application, is appropriate.<sup>11</sup>

The White House press release announcing the Blue Ribbon Commission (dated January 29, 2010) states that the “the Nation’s approach, developed more than 20 years ago, to managing materials derived from nuclear activities, including nuclear fuel and nuclear waste, has not proven effective.” The Blue Ribbon Commission Advisory Committee Charter (dated

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<sup>11</sup> Presumably, the power to terminate a proceeding encompasses the power to suspend it. See, e.g., *Duke Power Company* (Perkins Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1133 (1982) (describing Licensing Board two-year suspension of a construction permit proceeding).

March 1, 2010), states that the objective of the Commission is to “conduct a comprehensive review of policies for managing the back end of the nuclear fuel cycle, including all alternatives for the storage, processing, and disposal of civilian and defense used nuclear fuel, high-level waste, and materials derived from nuclear activities.” Specifically, the Commission is to consider “[o]ptions for permanent disposal of used fuel and/or high-level nuclear waste, including geological disposal.” The Charter does not mention, but does not foreclose, Yucca Mountain as a possible option for geological disposal.<sup>12</sup>

The NRC clearly cannot ignore the fact that the Administration and DOE have decided, and Congress has funded, a re-evaluation of the technical and policy issues previously addressed in the NWPAs. The fact remains, however, that changes to the NWPAs may or may not be forthcoming to reflect any recommendations from the Blue Ribbon Commission. In this situation, NEI believes that the NRC should simply continue to suspend this proceeding in the interim — pending legislative action on appropriations or other legislative developments

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<sup>12</sup> In the FY 2010 House Committee Report, the Committee actually stated its support for the position that the Yucca Mountain application review should continue in order to answer all relevant technical questions. The Committee made \$5,000,000 available for the Blue Ribbon Commission “provided that Yucca Mountain is considered in the review.” H.R. Report No 111-203 at 82 (emphasis added). The Conference Report states that the Blue Ribbon Commission shall “consider all alternatives for nuclear waste disposal.” Energy and Water Development and Related Agencies Appropriations Act, 2010 Conference Report, H.R. Report No. 111-278 at 21 (2009) (emphasis added). While the Conference Report generally supersedes prior House and Senate Reports, the Conference Report specifically directs that the language in House Report 111-203 and Senate Report 111-45 should be complied with unless specifically addressed to the contrary in the Conference Report or statement of managers. H.R. Report No. 111-278 at 26, 39 (2009)(“Report language included by the House which is not contradicted by the report of the Senate or the conference, and Senate report language which is not contradicted by the report of the House or the conference is approved by the committee of conference.”)



impacting the requirements of the NWPA or YMDA. Suspension is also consistent with the limited FY 2010 funding available to DOE.

DOE argues that the NWPA does not require the Secretary to obtain a license for the Yucca Mountain repository, or to pursue other permits that would be necessary to open the repository. DOE Motion at 5-6. DOE also argues that “it has not been the NRC’s practice to require any litigant to maintain a license application that the litigant does not wish to pursue.” *Id.* at 6. While this is true in the normal course of reactor licensing under the Atomic Energy Act, the NRC has never faced a situation remotely like this one, where the applicant is a federal entity and proceeding with licensing is directed by statute. While the Secretary may believe that other courses of action with respect to spent nuclear fuel management might be better than Yucca Mountain, the best course of action for the NRC is to suspend this proceeding while the policy direction is fully ventilated and resolved by Congress.

The NRC has previously suspended its licensing hearing process for substantial periods of time while construction of proposed nuclear projects has been suspended, pending further review by the applicants of the future of the projects. For example, in *Washington Public Power Supply Co.* (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780 (1983), the Licensing Board ordered that a contested proceeding be held in abeyance because of a hiatus in construction, anticipated to last for up to five years, and because the NRC Staff’s allocation of resources to the license application would be on only a “manpower available” basis.<sup>13</sup> Unlike that situation, however, DOE is not a private applicant with unfettered discretion to make a business decision on whether or not to proceed with a project. DOE and the NRC remain subject

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<sup>13</sup> The licensing proceeding was ultimately terminated by the Licensing Board in 2000. *Washington Public Power Supply System* (Nuclear Project 1), LBP-00-18, 52 NRC 9 (2000).

to the NWPA and YMDA, and the Blue Ribbon Commission must still complete its review. In light of the uncertainty surrounding the project, continued suspension of this proceeding is an appropriate interim remedy.

Also in contrast to the DOE Motion, on April 22, 1977, the Energy Research and Development Administration (“ERDA”), one of the predecessor agencies to DOE, moved that all hearing procedures be suspended with respect to the NRC licensing of the Clinch River Breeder Reactor Plant. The ERDA action was initiated because the Carter Administration had determined that construction of the plant would be contrary to its policy objectives and would be indefinitely deferred. As a result, on April 25, 1977, the Licensing Board ordered that the hearing procedures and schedules be suspended. In 1981 President Reagan signed a budget which expressed the intention that the project be expeditiously completed. The applicants then filed a motion to lift the suspension of the hearing (which was granted). *See U.S. Dept. of Energy Project Management Corporation Tennessee Valley Authority (Clinch River Breeder Reactor Plant), LBP-83-8, 17 NRC 158, 163-64 (1983)*. This case history illustrates that policies and funding priorities may change over time, and that suspending an NRC proceeding pending further developments is an appropriate approach.

Finally, Yucca Mountain technical information, records, and documents constitute an important and irreplaceable resource and, potentially, an important project legacy — funded by electric ratepayers through a portion of the more than \$23 billion that has been paid or committed to the Nuclear Waste Fund. While this proceeding is suspended, DOE and all parties should be required to maintain and preserve all Yucca Mountain technical information, records, documents, in *status quo*. Consistent with DOE’s commitment (DOE Motion at 8), DOE should also be required to retain the “full LSN functionality” throughout the period of suspension.

C. *NRC Should Not Grant Withdrawal with Prejudice*

If the current suspension is not continued and DOE is allowed to withdraw the application, the question remains whether a withdrawal should be granted with or without prejudice. Further, a question remains regarding what conditions should be attached to withdrawal. NEI concludes that withdrawal with prejudice is not appropriate given that the current directives of the NWPA and the YMDA still apply, that no merits determinations have been made by the NRC on any admitted contentions, and that no cognizable legal harm will result to any party from withdrawal without prejudice. The conditions that are needed to preclude harm from withdrawal relate only to preservation of the documentary record and the LSN, as discussed above and further below.

At the outset, it should be noted that the applicability of 10 C.F.R. § 2.107(a) to the withdrawal of the Yucca Mountain license application is itself subject to doubt. Specifically, 10 C.F.R. § 2.1000 states, in part, that “The rules in this subpart [J], together with the rules in subparts C and G of this part, govern the procedure for an application for authorization to construct a high-level radioactive waste repository at a geologic repository operations area noticed under §§ 2.101(f)(8) or 2.105(a)(5) . . . .” Section 2.107 is contained within subpart A of 10 C.F.R. Part 2. So, by the plain terms of § 2.1000, § 2.107 doesn’t directly govern the Yucca Mountain proceeding. Significantly, there are certain provisions of subpart A, such as § 2.101(e), that are — by their terms — explicitly applicable to this proceeding. Accordingly, it can be inferred that Section 2.107(a) was not intended to apply.

Even if 10 C.F.R. § 2.107(a) does apply, the regulation provides that, “Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.” Ordinarily, dismissal without prejudice means that no

merits decision has been made, while dismissal with prejudice suggests otherwise. *Philadelphia Electric Company* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 973 (Nov. 17, 1981) (citing *Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560, 564 (3d Cir. 1976); 5 Moore’s Federal Practice ¶41.05[2] at 41-75 (2d. ed. 1981)). Certainly, no merits decision has been made in this case, and there is no basis for a Licensing Board action such as a dismissal with prejudice that suggests otherwise.

While the licensing boards under Section 2.107 might be vested with the discretion to dismiss applications with prejudice, a board may not abuse this discretion. *Philadelphia Electric Company*, 14 NRC at 974 (citing *LeCompte v. Mr. Chip, Inc.* 528 F.2d 601, 604 (5<sup>th</sup> Cir. 1976)). Any conditions prescribed by a licensing board at the time of withdrawal must bear a rational relationship to the conduct and legal harm that they are meant to address. *Id.* In the context of nuclear reactor licensing, the prospect of a subsequent application to construct a nuclear facility alone “does not provide the requisite quantum of legal harm to warrant dismissal with prejudice.” *Id.* at 979. Similarly, the prospect of a future proceeding on a renewed application for the Yucca Mountain repository would not involve any harm to any party — including Nevada — that would warrant dismissal with prejudice. Indeed, Nevada would be in the same position as intervenors in other licensing cases in which requests for dismissal with prejudice upon cancellation of a project have been routinely denied by the NRC. It is well settled in NRC case law that the prospect of a second lawsuit or another application does not provide the requisite quantum of legal harm to warrant dismissal with prejudice. *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132, 1135 (1981).

The *Fulton* proceeding, discussed previously, involved a motion by the applicant, Philadelphia Electric Company (PECO), requesting permission to withdraw, without prejudice, its application for construction of the Fulton Station, a high temperature gas-cooled reactor. The intervenors supported PECO's motion, but requested that motion be granted with prejudice. The intervenors cited the costs incurred by the NRC and other parties since the start of the licensing proceeding, and alleged adverse physical and mental health effects, as well as diminution of property values, as a consequence of PECO's refusal to abandon the project. The Licensing Board initially dismissed PECO's application with prejudice. The Appeal Board, however, vacated the Licensing Board's decision, finding that the decision was not supported by the record and there was no showing of harm that would result from the withdrawal. *Fulton*, ALAB-657, 14 NRC at 979.

Less than a year after the Appeal Board decision in *Fulton*, the Licensing Board in *Duke Power Company* (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128 (Sept. 20, 1982), reached a similar conclusion in another construction permit case. Like *Fulton*, *Perkins* involved an applicant's motion to withdraw without prejudice, which was met with opposition from intervenors requesting that the withdrawal be granted with prejudice. 16 NRC 1128, 1130. In *Perkins*, the applicant's motion for withdrawal came after issuance of three partial initial Licensing Board decisions, and a two-year suspension of the proceeding at the applicant's request. Relying on the "firm guidance" provided in *Fulton*, the Licensing Board recognized that the federal rules "clearly favor dismissals without prejudice where no other party will be harmed thereby." *Id.* at 1134.

In considering the motion, the Board in *Perkins* addressed cases governing civil litigation, and distinguished them from "mandatory" reactor hearings. In the civil litigation

context, the Board explained that dismissal with prejudice was often ordered because the litigation had moved so far along that the substantial expense of defending had already been imposed on the party opposing dismissal without prejudice. In those cases, the costs of defending against the litigation were substantial enough to require dismissal with prejudice. But, the Board reasoned, unlike civil litigation, “mandatory” reactor licensing adjudication involves an applicant seeking to further its interests and meet its responsibility to supply electric power in its service area. In these situations, the applicant does not seek out intervenors as adversaries, nor does it sue for judgment against them. *Id.* Instead, the intervenors voluntarily involve themselves in the adjudication. Therefore, the Board concluded that “in the circumstances of a mandatory licensing proceeding, the fact that the motion for withdrawal comes after most of the hearings should not operate to bar the withdrawal without prejudice where the applicant has prevailed or where there has been a non-suit as to particular issues.” *Id.* at 1136.

By analogy, if not by direct application of 10 C.F.R. § 2.107, the same principles must apply to a DOE request for withdrawal of the Yucca Mountain license application. Unlike the past cases involving cancelled projects, in this case the applicant is asking for the withdrawal with prejudice. Such a request appears to be unprecedented in NRC practice. Nonetheless, a withdrawal with prejudice would need to be based on a showing of some public interest or legal harm (other than the prospect of a renewed application). Neither such harm nor public interest exists here. Given the status of this proceeding, where discovery has just begun, any harm to the parties would be far less than was the case in *Perkins*, where there had been hearings and three partial initial decisions. And the public interest clearly favors the government retaining the option of a future application.

Beyond indicating a desire for “finality,” DOE does not indicate any legal harm to it or any other factor that would justify withdrawal with prejudice. DOE cites four cases to argue that the NRC must “defer to the judgment of policymakers in the Executive Branch.” DOE Motion at 4, fn. 4. The first three of these cases do not even involve the issue of withdrawal and prejudice, and all are easily distinguishable from the present circumstances.<sup>14</sup> The fourth case is *Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1)*, LBP-83-2, 17 NRC 45, 52 (1983). In this case, as in the cases discussed above, it was an intervenor who sought conditions on a withdrawal requested by an applicant. The basis for the withdrawal was a state law that made it impractical for the applicant to proceed with the project. The applicant was actively seeking to overturn the law, but the prospects for such a result were unknown. Unlike the present case,<sup>15</sup> there was a law preventing advancement of the project. The licensing board granted the withdrawal requested by the applicant, but not with prejudice.

Civil litigation also provides instructive guidance. A dismissal with prejudice bars a subsequent action between the same parties or their privies on the same claim. Thus,

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<sup>14</sup> These cases each involve an NRC refusal to overturn actions of other agencies where Congress had explicitly delegated decision-making authority to the other agencies. In *U.S. Dept. of Energy (Plutonium Export License)*, CLI-04-17, 59 NRC 357 (2004), the NRC stated that it was entitled to rely on State Department and Department of Defense non-inimicality determinations involving strategic judgments and foreign policy and national security expertise regarding the common defense and security of the United States, and denied a petition to intervene which challenged such a determination; in *Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation)*, LBP-03-30, 58 NRC 454 (2003), the NRC deferred to the Bureau of Land Management’s (“BLM”) determination as to the wilderness status of a plot of land (a determination that is explicitly delegated to BLM by statute); and in *Environmental Radiation Protection Standards for Nuclear Power Operators*, 40 C.F.R. 190, CLI-81-4, 13 NRC 298 (1981), the NRC denied a petition for stay of enforcement of EPA standards as applied to NRC licensed activities, finding that another agency’s regulations are presumed valid until the promulgating agency or a court modifies or invalidates them.

<sup>15</sup> In the present case the existing law is embodied in the NWPA and the YMDA. To cancel the project, it would appear that future action would be needed to change the law.

when an action is dismissed with prejudice, there is generally no potential for harm to the defendant. In most cases, a court will grant a plaintiff's motion to dismiss with prejudice, because the defendant will have obtained a judgment on the merits that vindicates his rights and precludes any future suit by the plaintiff. *United States v. T.J. Manalo, Inc.*, 659 F. Supp. 2d 1297 (Ct. Int'l Trade 2009). A dismissal with prejudice may be denied however where another party (such as a third party intervenor) would suffer harm. *ITV Direct, Inc. v. Healthy Solutions, LLC*, 445 F.3d 66, 70 (1st Cir. Mass. 2006). In the present case, abandonment of the license application by DOE is contrary to the NWPA and the YMDA. Withdrawal with prejudice would be detrimental to the interests of NEI and potentially other intervenors in this matter. Accordingly, dismissal without prejudice is necessary to avoid an inaccurate resolution on the merits and to prevent harm to NEI, its members, and potentially other parties.

*D. The Board Should Impose Conditions to Preserve the Entire Record*

As noted previously, the Yucca Mountain technical information, records, and documents constitute an important and irreplaceable resource and, potentially, an important project legacy — funded by the billions of dollars paid by electric ratepayers through Nuclear Waste Fund fees. As a condition on any withdrawal, the Licensing Board should require that DOE and all parties continue to maintain and preserve all Yucca Mountain technical information, records, and other documents, as well as scientific data and physical materials, such as core borings and samples. DOE's proposal to move LSN materials to the National Archives and Records Administration is insufficient because it does not account for the preservation of the universe of scientific data and physical materials which are not stored on the LSN. DOE should be required to preserve all materials related to the Yucca Mountain repository, including those materials that are not part of the LSN.



Respectfully submitted,

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Dated in Washington, D.C.  
this 17th day of May 2010

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Opposition of the Nuclear Energy Institute to the Department of Energy’s Motion for Withdrawal” have been served upon the following persons on this 17<sup>th</sup> day of May 2010 by Electronic Information Exchange.

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