

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

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

June 29, 2010

MEMORANDUM AND ORDER
(Granting Intervention to Petitioners and Denying Withdrawal Motion)

I. Introduction

The Commission has variously described the adjudicatory portion of the proceeding on the application of the Department of Energy (DOE) for authorization to construct a national high-level nuclear waste repository at Yucca Mountain, Nevada, as “unusual,” “extensive,” and “unique.”¹ Ensuring that these labels remain current and valid, we now have before us DOE’s motion to withdraw with prejudice its 17-volume, 8600-page construction authorization application (Application), an application submitted just a little over 24 months ago, but over two

¹ U.S. Dep’t of Energy (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 582, 609 (2009). The adjudicatory portion of the proceeding is only part of the agency’s extensive review process. The technical staff of the NRC reviews the entirety of the application and produces a safety evaluation report on the safety and technical merits of the application, while the adjudicatory process involves only the admitted contentions (i.e., issues) put forth by those petitioners accepted as parties.

decades in the making and undergirded by millions of pages of studies, reports, and related materials at a reported cost of over 10 billion dollars.²

Conceding that the Application is not flawed nor the site unsafe, the Secretary of Energy seeks to withdraw the Application with prejudice as a “matter of policy”³ because the Nevada site “is not a workable option.”⁴ In response to the Secretary’s action, we also have before us five new petitions to intervene in the ongoing proceeding filed by the State of Washington (Washington), the State of South Carolina (South Carolina), Aiken County, South Carolina (Aiken County), the Prairie Island Indian Community (PIIC), and the National Association of Regulatory Utility Commissioners (NARUC), as well as the amicus curiae filing of the Florida Public Service Commission.⁵ In addition to DOE and the NRC Staff, which are regulatorily designated parties, there are currently ten admitted parties and two interested governmental participants in the ongoing high-level waste (HLW) proceeding.⁶

² Department of Energy, Office of Civilian Radioactive Waste Management, Office of Business Management, Summary of Program Financial & Budget Information 9 (Jan. 31, 2010), available at <http://www.energy.gov/media/ocrwm-budget-summary.pdf>.

³ U.S. Department of Energy’s Reply to the Responses to the Motion to Withdraw (May 27, 2010) at 1 [hereinafter DOE Reply].

⁴ U.S. Department of Energy’s Motion to Withdraw (Mar. 3, 2010) at 1 [hereinafter DOE Motion].

⁵ See State of Washington’s Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010) [hereinafter Washington Petition]; Petition of the State of South Carolina to Intervene (Feb. 26, 2010) [hereinafter South Carolina Petition]; Petition of Aiken County, South Carolina, to Intervene (Mar. 4, 2010) [hereinafter Aiken County Petition]; Petition to Intervene of the Prairie Island Indian Community (Mar. 15, 2010) [hereinafter PIIC Petition]; National Association of Regulatory Utility Commissioners Petition to Intervene (Mar. 15, 2010) [hereinafter NARUC Petition]. The Florida Public Service Commission timely filed an unopposed motion for leave to file a memorandum opposing DOE’s withdrawal motion with its memorandum attached. See Motion of the Florida Public Service Commission for Leave to Participate as Amicus Curiae and File Memorandum (May 14, 2010). The Florida Commission’s motion is granted.

⁶ The history of the proceeding dating back to 2004 can be found in numerous memoranda and orders of the Pre-License Application Presiding Officer (PAPO) Board, the Advisory Pre-License

As detailed in Part II, we deny DOE's motion to withdraw the Application. We do so because the Nuclear Waste Policy Act of 1982, as amended (NWPA),⁷ does not permit the Secretary to withdraw the Application that the NWPA mandates the Secretary file. Specifically, the NWPA does not give the Secretary the discretion to substitute his policy for the one established by Congress in the NWPA that, at this point, mandates progress toward a merits decision by the Nuclear Regulatory Commission on the construction permit.

As set forth in Part III, we grant the intervention petitions of all five petitioners because we conclude that each has established standing, addressed the timeliness of its petition, demonstrated compliance with the Licensing Support Network (LSN) requirements, and set forth at least one admissible contention.

II. DOE Motion to Withdraw

DOE's motion to withdraw the construction authorization application raises two issues. First, does DOE have authority to withdraw the Application before the NRC reviews it? Second, if DOE has such authority, what if any requirements should the Board impose as conditions of withdrawal?

Application Presiding Officer (APAO) Board, the Construction Authorization Boards (CABs), and the Commission, and that background need not be repeated here. See, e.g., U.S. Dep't of Energy (High-Level Waste Repository), LBP-09-6, 69 NRC 367, aff'd in part, rev'd in part, CLI-09-14, 69 NRC 580 (2009); U.S. Dep't of Energy (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), LBP-08-10, 67 NRC 450 (2008); U.S. Dep't of Energy (High-Level Waste Repository: Pre-Application Matters), LBP-08-5, 67 NRC 205 (2008); PAPO Board Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 6, 2007) (unpublished) [hereinafter RSCMO]; U.S. Dep't of Energy (High-Level Waste Repository: Pre-Application Matters), LBP-04-20, 60 NRC 300 (2004); U.S. Dep't of Energy (High-Level Waste Repository: Pre-Application Matters), CLI-04-32, 60 NRC 469 (2004).

⁷ Pub. L. No. 97-425, 96 Stat. 2201 (1982) (codified as amended at 42 U.S.C. §§ 10101-10270 (2009)).

The Commission has directed the Board to consider both issues. In accordance with the Commission's April 23, 2010 order, the Board will address "DOE's authority to withdraw the application in the first instance" as well as "the terms of DOE's requested withdrawal."⁸

The five new petitioners, i.e., Washington, South Carolina, Aiken County, PIIC, and NARUC, along with four existing parties including the Nuclear Energy Institute (NEI) and the six Nevada counties of Nye, White Pine, Churchill, Esmeralda, Lander, and Mineral,⁹ all oppose DOE's motion to withdraw with prejudice, as does the Florida Public Service Commission as amicus curiae. The State of Nevada (Nevada)—joined by Clark County, Nevada (Clark County), the Joint Timbisha Shoshone Tribal Group (JTS), and the Native Community Action Council (NCAC)—supports DOE's motion to withdraw with prejudice. The NRC Staff advocates for withdrawal without prejudice, and the State of California (California) supports the motion to withdraw but takes no position on the issue of prejudice. The remaining party and the interested governmental participants take no position on DOE's motion.

A. DOE's Authority to Withdraw

In moving to withdraw the Application with prejudice, DOE makes clear that "the Secretary's judgment here is not that Yucca Mountain is unsafe or that there are flaws in the [Application], but rather that it is not a workable option and that alternatives will better serve the public interest."¹⁰ DOE also acknowledges, however, that it cannot withdraw the Application if that would be contrary to the statutes passed by Congress.¹¹

⁸ U.S. Dep't of Energy (High-Level Waste Repository), CLI-10-13, 71 NRC __, __ (slip op. at 4) (Apr. 23, 2010).

⁹ The counties of Churchill, Esmeralda, Lander, and Mineral sought intervention and were admitted as a single party (Nevada 4 Counties). See Dep't of Energy, LBP-09-6, 69 NRC at 377-78, 483.

¹⁰ DOE Reply at 31 n.102.

¹¹ Id. at 23.

Section 114(d) of the NWPA provides that the NRC “shall consider” the Application and “issue a final decision approving or disapproving the issuance of a construction authorization.”¹² The key question is therefore whether DOE retains discretion to decide, by withdrawing the Application, that the NRC should not consider it and issue a final decision. Having filed the Application with the NRC pursuant to a process mandated by Congress, can DOE unilaterally decide, on policy grounds, that the Yucca Mountain repository is not a “workable option” and that the NRC should proceed no further? Or, under the legislative scheme enacted by Congress, has responsibility for determining the technical merits of the Application at this stage necessarily passed to the NRC?

For the reasons explained below, we conclude that Congress directed both that DOE file the Application (as DOE concedes) and that the NRC consider the Application and issue a final, merits-based decision approving or disapproving the construction authorization application. Unless Congress directs otherwise, DOE may not single-handedly derail the legislated decision-making process by withdrawing the Application. DOE’s motion must therefore be denied.¹³

We look first to the statute. Congress enacted the NWPA in 1982 for the purpose of establishing a “definite Federal policy” for the disposal of high-level radioactive waste and spent nuclear fuel.¹⁴ In section 111, entitled “Findings and Purposes,” Congress found that “[f]ederal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate.”¹⁵ Congress’ solution was to establish,

¹² 42 U.S.C. § 10134(d).

¹³ Because we conclude that DOE’s motion clearly must be denied under the NWPA, the Board does not address objections that have been raised on other grounds, such as DOE’s alleged failure to comply with the National Environmental Policy Act of 1969 (NEPA).

¹⁴ 42 U.S.C. § 10131(b)(2).

¹⁵ Id. § 10131(a)(3).

through the NWPA, “a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance” of safe disposal of these materials.¹⁶ To that end, the NWPA set out a detailed, specific procedure for site selection and review by the Secretary of Energy, the President, and the Congress, followed by submission of the Application for a construction permit, review, and final decision thereon by the NRC.¹⁷

In 1987, Congress adopted an amendment to the NWPA that directed DOE to limit its site selection efforts to Yucca Mountain and to “provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.”¹⁸ In February 2002, following a comprehensive site evaluation, the Secretary of Energy concluded that Yucca Mountain was “likely to meet applicable radiation protection standards”¹⁹ and recommended to the President that Yucca Mountain be developed as a nuclear waste repository.²⁰ The President then recommended the Yucca Mountain site to Congress.²¹ Pursuant to section 116, Nevada filed a notice of disapproval.²² Congress responded—pursuant to section 115 (a

¹⁶ Id. § 10131(b)(1).

¹⁷ See id. §§ 10132-10135.

¹⁸ Id. § 10172(a); see also id. § 10134(f)(6).

¹⁹ 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 26 (Feb. 2002), available at http://www.energy.gov/media/Secretary_s_Recommendation_Report.pdf [hereinafter Secretary’s Recommendation].

²⁰ Id. at 6.

²¹ Letter from President George W. Bush to Congress (Feb. 15, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020215-10.html>.

²² See Guinn, Kenny C., Statement of Reasons Supporting the Governor of Nevada's Notice of Disapproval of the Proposed Yucca Mountain Project (Apr. 8, 2002), available at <http://www.yuccamountain.org/pdf/govveto0402.pdf> [hereinafter Nevada Notice of Disapproval].

special expedited procedure that prevented delay and limited debate)—with a joint resolution in July 2002 approving the development of a repository at Yucca Mountain.²³

As DOE agrees,²⁴ this official site designation then required DOE to submit an application to construct a high-level waste geologic repository at Yucca Mountain pursuant to section 114(b) (“the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site”).²⁵ Likewise, submission of the Application triggered a duty on the NRC’s part to consider and to render a decision on the Application pursuant to section 114(d) of the NWPA (“[t]he Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadlines by not more than 12 months”).²⁶

Given the stated purposes of the NWPA and the detailed structure of that legislation, it would be illogical to allow DOE to withdraw the Application without any examination of the merits. For instance, under the NWPA, ultimate authority to make a siting decision is not committed to the discretion of either the Secretary of Energy or the President, but instead rests

²³ See Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135). Although not required by the NWPA, the joint resolution was presented to the President and signed into law. See Nuclear Energy Inst. v. Env’tl. Prot. Agency, 373 F.3d 1251, 1302 (D.C. Cir. 2004) (holding that “Congress has settled the matter” of Yucca Mountain’s approval for development because “Congress’s enactment of the Resolution . . . was a final legislative action once it was signed into law by the President”).

²⁴ DOE Motion at 5.

²⁵ 42 U.S.C. § 10134(b).

²⁶ Id. § 10134(d).

with Congress. Why would Congress have specified in detail the steps that the Secretary, the President, the State of Nevada, and even Congress itself had to take to permit the Yucca Mountain Application to be filed, and included provisions mandating that the Application be filed with and considered by the NRC, if DOE could simply withdraw it at a later time or in the same breath if the Secretary so desired?²⁷

Allowing withdrawal would also ignore the distinction that Congress drew between the site characterization phase and the Application phase. Congress expressly contemplated that, during site characterization, DOE might determine the Yucca Mountain site to be “unsuitable” for development as a repository.²⁸ In section 113 of the NWPA, Congress specified numerous steps that DOE must undertake in that event, such as reporting to Congress “the Secretary’s recommendations for further action,” including “the need for new legislative authority.”²⁹ Clearly, when Congress wished to permit DOE to terminate activities, it knew how to do so (while keeping control of what might happen next).³⁰ In contrast, the absence of any similar provision in section 114 of the NWPA, which spells out what is to transpire after DOE has submitted its Application to the NRC, strongly implies that Congress never contemplated that DOE could withdraw the Application before the NRC considered its merits in accordance with

²⁷ Indeed, it would appear that, until DOE filed the instant motion, DOE claimed no such authority. In May 2009, Secretary Chu testified before Congress that DOE would “continue participation in the Nuclear Regulatory Commission (NRC) license application process, consistent with the provisions of the Nuclear Waste Policy Act.” FY 2010 Appropriations Hearing Before the Subcomm. on Energy and Water Development, and Related Agencies of the S. Comm. on Appropriations, 111th Cong. (2009) [hereinafter FY 2010 Appropriations Hearing].

²⁸ 42 U.S.C. § 10133(c)(3). DOE promulgated detailed site suitability guidelines. See 10 C.F.R. Part 963; Secretary’s Recommendation at 12-18.

²⁹ 42 U.S.C. § 10133(c)(3)(F).

³⁰ See, e.g., id. § 10172a(a) (prohibiting DOE from characterizing a second repository site “unless Congress has specifically authorized and appropriated funds for such activities”).

section 114(d). “[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.”³¹

Finally, allowing DOE to withdraw the Application at this stage in the process would be contrary to congressional intent, as reflected in the legislative history of the NWPA. Well aware of the failed efforts to address nuclear waste disposal prior to the NWPA, Congress believed it “necessary, therefore, to provide close Congressional control and public and state participation in the program to assure that the political and programmatic errors of our past experience will not be repeated.”³² In enacting the NWPA, Congress stated 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.”³³

Did Congress, which so carefully preserved ultimate control over the multi-stage process that it crafted, intend—without ever saying so—that DOE could unilaterally withdraw the Application and prevent the NRC from considering it? We think not. When Congress selected the Yucca Mountain site over Nevada’s objection in 2002, it reinforced the expectation in the 1982 Act that the project would be removed from the political process and that the NRC would complete an evaluation of the technical merits:

If this resolution is approved, a license application will be submitted by the Department of Energy for Yucca Mountain and over the next several years, the Nuclear Regulatory Commission will go through all of the scientific and

³¹ KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 118 (2004) (internal quotations omitted).

³² H.R. REP. NO. 97-491(I), at 29-30 (1982), as reprinted in 1982 U.S.C.C.A.N. 3792, 3796.

³³ Id. at 29.

environmental data and look at the design of the repository to make sure that it can meet environmental and safety standards. This will be done by scientists and technical experts.³⁴

DOE's arguments to the contrary are not persuasive.

First, DOE contends that its conclusion that Yucca Mountain is not a "workable option" and that "alternatives will better serve the public interest" constitutes a policy judgment with which the NRC should not interfere.³⁵ Insofar as relevant, however, the pertinent policy—that DOE's Yucca Mountain Application should be decided on the merits by the NRC—is footed on controlling provisions of the Nuclear Waste Policy Act that DOE lacks authority to override. Regardless of whether DOE thinks the congressional scheme is wise, it is beyond dispute that DOE and the NRC are each bound to follow it. In section 115 Congress clearly stated that Congress itself was to decide the policy question as to whether the Yucca Mountain project was to move forward by reserving final review authority of site selection. By overruling Nevada's disapproval of the Yucca Mountain site, Congress was commanding, as a matter of policy, that Yucca Mountain was to move forward and its acceptability as a possible repository site was to be decided based on its technical merits.

Moreover, this congressional withdrawal of DOE authority is not unique within the NWPA, in which Congress undisputedly took numerous other policy determinations out of DOE's hands. For example, section 113(a) of the NWPA directed DOE to carry out site characterization activities only at Yucca Mountain, section 114(b) required DOE to submit an application for a construction authorization, and section 114(f)(6) directed that DOE's environmental impact statement not consider the "need for the repository, the time of initial

³⁴ 148 CONG. REC. S6476 (2002) (statement of Sen. Levin). For an extensive discussion of the structure and legislative background of the NWPA, see generally Nuclear Energy Inst., 373 F.3d at 1258-62.

³⁵ DOE Motion at 4.

availability of a repository, alternative sites to the Yucca Mountain site, or nongeologic alternatives to such site.” Surely Congress did not contemplate that, by withdrawing the Application, DOE might unilaterally terminate the Yucca Mountain review process in favor of DOE’s independent policy determination that “alternatives will better serve the public interest.”³⁶ As the United States Court of Appeals for the District of Columbia Circuit has stated, “[i]t is not for this or any other court to examine the strength of the evidence upon which Congress based its judgment” to approve the Yucca Mountain site.³⁷ Nor, at this point in the process created by Congress, is it for DOE to do so.

Second, DOE contends that, by enacting the NWPA, Congress did not expressly take away the broad powers that DOE otherwise enjoys under the Atomic Energy Act of 1954 (AEA).³⁸ The NWPA, however, is a subsequently-enacted, much more specific statute that directly addresses the matters at hand.³⁹ As the Supreme Court has stated, “a specific policy

³⁶ We rule as a matter of law that DOE lacks discretion to withdraw the Application, and do not evaluate the grounds on which it purports to rely. See DOE Reply at 28-33. We must express surprise, however, that DOE invokes the assertion that “many Nevadans oppose the Yucca Mountain project” (DOE Reply at 32 n.104)—surely something of which Congress was aware when it rejected Nevada’s disapproval of the site in 2002. Indeed, most of the developments cited by DOE in support of its motion to withdraw predate Congress’ selection of the Yucca Mountain site, over Nevada’s objection, in 2002. Almost all of these developments were cited by Nevada before Congress and were rejected by Congress when it selected the Yucca Mountain site. See Nevada Notice of Disapproval, supra note 22.

³⁷ Nuclear Energy Inst., 373 F.3d at 1304.

³⁸ See DOE Reply at 5. DOE contended at argument (Tr. at 11 (June 3, 2010)) that the Secretary’s authority to withdraw the Application is footed on section 161(p) of the AEA which authorizes DOE to “make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act.” 42 U.S.C. § 2201(p). In seeking to withdraw the Application, however, DOE has not taken any of the actions (i.e., made, promulgated, issued, rescinded or amended rules and regulations) authorized in section 161(p) to carry out the purposes of the AEA. See also AEA section 161(b), id. § 2201(b), to like effect.

³⁹ See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000).

embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.”⁴⁰

Although the NWPA does not expressly repeal the AEA—indeed, it specifically refers to it⁴¹—it would be erroneous to interpret the AEA in a manner that would contravene the statutory scheme that Congress specifically adopted in the NWPA. “An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.”⁴² As explained above, the language, structure, and legislative history of the NWPA all contravene the notion that Congress intended to allow DOE to terminate the NRC’s consideration of the Application.⁴³ The meaning—or absence—of statutory language cannot be considered in isolation. 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.”⁴⁴ As the Court of Appeals explained concerning the relationship between the NRC’s own authority before and after enactment of the NWPA: “That Congress may have authorized NRC to regulate DOE’s disposal of radioactive waste before it enacted the NWPA . . . hardly negates the fact that in the NWPA Congress specifically directed

⁴⁰ Id. at 143 (quoting United States v. Estate of Romani, 523 U.S. 517, 530-31 (1998)).

⁴¹ See, e.g., 42 U.S.C. §§ 10134, 10141.

⁴² Burns v. United States, 501 U.S. 129, 136 (1991).

⁴³ DOE relies on Siegel v. Atomic Energy Comm’n, 400 F.2d 778 (D.C. Cir. 1968), for the proposition that the AEA’s statutory scheme 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.” Id. at 783. But Siegel was decided before Congress enacted the NWPA, which specifically narrows DOE’s discretionary authority in the area of high-level waste disposal, thereby overriding the AEA’s broad grant of authority.

⁴⁴ Brown & Williamson, 529 U.S. at 133 (internal citation omitted).

NRC to issue ‘requirements and criteria’ for evaluating repository-related applications and, not insignificantly, how to do so.”⁴⁵

Third, DOE argues that, because the NWPA requires the NRC to consider the Application “in accordance with the laws applicable to such applications,” Congress necessarily intended to incorporate 10 C.F.R. § 2.107, an NRC regulation that DOE claims “authorizes” withdrawals.⁴⁶ This argument fails on several grounds. In the first place, section 2.107 does not “authorize” withdrawals. It states, in relevant part, that “[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.”⁴⁷ In the absence of section 2.107, most license applicants, whose applications are filed voluntarily, presumably might seek to abandon their applications at any time. Fairly characterized, section 2.107 does not “authorize” withdrawal here, but rather clarifies that licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances.⁴⁸ In effect, section 2.107 authorizes licensing boards to deny unconditioned withdrawals. Nothing in section 2.107 gives any applicant the presumptive permission to unilaterally withdraw its application. Furthermore, the Commission’s case law is not helpful in this circumstance because no previous case involved an applicant that was mandated by statute to submit its application, as is the case here with DOE’s Application under the NWPA.

⁴⁵ Nuclear Energy Inst., 373 F.3d at 1288 (emphasis in original).

⁴⁶ DOE Motion at 5.

⁴⁷ 10 C.F.R. § 2.107(a).

⁴⁸ Indeed, in the statement of considerations accompanying the final rule, the Commission did not characterize section 2.107 as providing the authority for withdrawal. On the contrary, the Commission explained, “This section describes how the Commission will process a withdrawal of an application by an applicant.” Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2216 (Jan. 14, 2004) (emphasis added).

DOE's reliance on section 2.107 is also misplaced for an entirely separate and independent reason. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."⁴⁹ It would require a strained and tortured reading of the NWPA to conclude that Congress intended that its explicit mandate to the NRC—to consider and decide the merits of the Application—might be nullified by a nonspecific reference to an obscure NRC procedural regulation as being among the "laws" to be applied.⁵⁰ As the Supreme Court has admonished, "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."⁵¹ Here, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."⁵²

⁴⁹ Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001).

⁵⁰ DOE finds an inconsistency between its opponents' reading of section 114(b)—that section 114(b) precludes withdrawal after submittal of the Application—and its own reading of section 114(d)—that 10 C.F.R. § 2.107 is among the "laws applicable" to the Application and plainly authorizes DOE to withdraw. Noting that "[a] reading that causes an internal inconsistency in a statute should be rejected," DOE therefore rejects its opponents' reading of section 114(b). DOE Reply at 10. But any perceived inconsistency between sections 114(b) and (d) flows entirely from DOE's misreading of the NWPA.

⁵¹ Brown & Williamson, 529 U.S. at 133.

⁵² Id. at 160. The three cases and one dissent DOE cites do not advance its position that we should presume Congress was aware of 10 C.F.R. § 2.107 when enacting the NWPA. In Newark Morning Ledger Co. v. United States, 507 U.S. 546, 575 (1993), the dissent presumed that Congress understood the IRS interpretation of "goodwill" in a tax code regulation only because the regulation was sixty-five years old, Congress re-enacted the tax code not less than six times without substantial change, and the legislative history indicated Congress was specifically aware of the IRS definition of goodwill. In Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988), the Court attributed to Congress only a general awareness that state workers' compensation laws provided a variety of compensation schemes. In Bowen v. Massachusetts, 487 U.S. 879, 896-98 (1988), the Court presumed that Congress was aware of the definition of "monetary damages" when it selected the language for a statute, in part, because "monetary damages" was explicitly addressed in the legislative history. Similarly, in Bullcreek v. Nuclear Regulatory Comm'n, 359 F.3d 536, 542 (D.C. Cir. 2004), the court

The better reading of the language of the NWPA consistent with the content and detailed legislative scheme is to the contrary. The NRC is directed by section 114(d) to consider the Application in accordance with existing laws “except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization” within the prescribed time period.⁵³ Insofar as application of section 2.107 might possibly be construed to interfere with that prime directive, by the terms of the statute it cannot apply.

Additional support for this conclusion is found in the legislative history. During the floor debate on S. 1662—which contained a provision that was substantially identical to section 114(d) of the NWPA in its current form⁵⁴—the bill’s sponsor, Senator McClure, explained:

The Nuclear Regulatory Commission has been established as an independent body to check upon whether or not the administrative bodies are functioning according to the statutes and policies that have been already enacted. The Nuclear Regulatory Commission will have that same function with respect to determining whether this program is being administered correctly or not.⁵⁵

As this explanation plainly suggests, “the laws applicable to such applications” was primarily intended as a blanket reference to the substantive standards that the NRC applies in judging applications. There is no suggestion in the legislative history that Congress had in mind the

presumed (to the extent it applied such presumption at all) that Congress was aware of the NRC’s regulations for licensing private away-from-reactor storage facilities because the substantive regulations were specifically discussed in the legislative history. In none of these cases did the court presume that Congress was aware of one specific agency rule when that rule was not expressly discussed in the legislative history. DOE points to no such legislative history addressing section 2.107.

⁵³ 42 U.S.C. § 10134(d) (emphasis added).

⁵⁴ Section 405(e) of S. 1662, as amended, read as follows:

(e) The Commission shall consider an application for authorization to construct a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the first such application not later than December 31, 1989, and the second such application not later than December 31, 1992.

⁵⁵ 128 CONG. REC. S4128 (1982).

relatively obscure procedural regulation that DOE seeks to invoke here to nullify the otherwise unambiguous command of Congress, in section 114(d) of the NWPA, that the NRC “shall consider” the Application and “shall issue a final decision approving or disapproving the issuance of a construction authorization.”⁵⁶

Fourth, DOE claims that its decision to seek to withdraw the Application is entitled to deference.⁵⁷ But where the statute is clear on its face, or is clear in light of its statutory scheme and legislative history, deference is inappropriate: “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”⁵⁸ This is especially so where, as here, DOE’s interpretation is reflected in nothing more formal than a motion before this Board—and not, for example in a formal agency adjudication or notice-and-comment rulemaking.⁵⁹ Moreover, as DOE’s counsel appeared to concede at argument,⁶⁰ the NRC does not owe deference to DOE’s understanding

⁵⁶ DOE advances a further argument in this regard. As DOE points out, the NRC has interpreted the three-year deadline in section 114(d) to commence with the docketing, rather than the submission, of the Application. See Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating in Websites, 66 Fed. Reg. 29,453, 29,453 n.1 (2001). DOE suggests, therefore, that the NRC’s requirement to reach a merits decision on the Application “pertains only while an application is docketed before the NRC.” DOE Reply at 11. If the NRC grants DOE’s motion to withdraw, thereby removing the Application from the docket, DOE contends that the NRC is relieved of its obligation to render a decision within three years. But the Commission’s decision to define the term “submission” as “docketing” is relevant only to the statutory deadline, not to the NRC’s mandate to reach a merits decision on the Application. Surely, Congress did not intend that the NRC could unilaterally nullify its statutory duty to consider the Application by simply removing that Application from the docket.

⁵⁷ DOE Motion at 7.

⁵⁸ Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984). Thus, contrary to DOE’s arguments (DOE Motion at 8), there is no legislative “gap” in the NWPA.

⁵⁹ See Christensen v. Harris County, 529 U.S. 576, 587 (2000).

⁶⁰ Tr. at 77 (June 3, 2010).

of the NRC's own responsibilities under section 114(d). Once DOE has applied for a construction authorization, the NRC—not DOE—is charged with granting or denying the construction permit application under the sequential process prescribed by the NHPA.⁶¹

Fifth, DOE claims that Congress intended that DOE be treated just like any private applicant, including the right to seek freely to withdraw its application.⁶² Under the framework of the NHPA, however, DOE's application is not like any other application, and DOE is not just "any litigant," because its policy discretion is clearly limited by the NHPA. The obvious difference is that Congress has never imposed a duty on private NRC applicants to pursue license applications, nor has Congress required that the Commission reach a decision on a private licensing application that the applicant chooses to withdraw. In contrast, Congress here required DOE to file the Application. Statutes should not be interpreted so as to create internal inconsistencies, an absurd result, or an interpretation inconsistent with congressional intent.⁶³ DOE claims that the "law on withdrawal does not require a determination of whether [the applicant's] decision [to withdraw] is sound,"⁶⁴ but neglects to note that the rationale for the decision from which it quotes was that the applicant's filing was "wholly voluntary" in the first place.⁶⁵

⁶¹ See Nuclear Energy Inst., 373 F.3d at 1289 ("We defer to NRC's interpretation of the NHPA under Chevron" in promulgating regulations to be applied in administering the licensing stage).

⁶² Tr. at 297 (June 3, 2010).

⁶³ See United States v. Turkette, 452 U.S. 576, 580 (1981); United States v. Raynor, 302 U.S. 540, 547 (1938).

⁶⁴ DOE Reply at 28.

⁶⁵ Pac. Gas & Elec. Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983).

Sixth, DOE claims significance in the fact that the NWPA does not mandate construction and operation of the repository, even if the NRC should approve a construction authorization.⁶⁶ We find that fact insignificant. Congress crafted a multi-stage process for consideration of the Yucca Mountain repository, including the requirements that DOE file the Application and that the NRC consider it and issue a “final decision” approving or disapproving construction. That further steps must take place before a repository might actually be constructed and become operational does not entitle DOE to ignore the process that Congress created. The Board is mindful that the NWPA does not compel the NRC to grant a construction authorization for a repository at Yucca Mountain. But the possibility that the Application might not be granted—or, if granted, that the repository might ultimately not be constructed and become operational for any number of reasons—does not entitle DOE to terminate a statutorily prescribed review process.

Seventh, DOE claims that Congress’ funding of a Blue Ribbon Commission on America’s Nuclear Future (Blue Ribbon Commission) to review federal policy on spent nuclear fuel management and disposal and to examine alternatives to Yucca Mountain is inconsistent with continuing to process the Yucca Mountain Application.⁶⁷ We disagree. In including funding for the Blue Ribbon Commission in the 2010 Appropriations Bill,⁶⁸ Congress did not repeal the NWPA or declare that the Yucca Mountain site is inappropriate, as DOE concedes in its reply.⁶⁹

⁶⁶ DOE Motion at 5.

⁶⁷ Id. at 7.

⁶⁸ See Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009) [hereinafter Appropriations Act].

⁶⁹ See DOE Reply at 20. In appropriating funds for the Blue Ribbon Commission, Congress instructed the Commission to “consider all alternatives for nuclear waste disposal,” necessarily including a geologic repository at Yucca Mountain. Appropriations Act at 2865 (emphasis added). In the House Committee Report accompanying the appropriations bill, the Committee

Unless and until Congress does so, both DOE and the NRC are bound to follow the existing law.

Finally, DOE says that it would be “absurd and unreasonable” to require DOE to proceed with an application that it no longer favors on policy grounds.⁷⁰ Where the law is declared to require it, however, DOE and other agencies within the Executive Branch are often required to implement legislative directives in a manner with which they do not necessarily agree.⁷¹ The Board is confident that DOE can and will prosecute the Application before the NRC in good

conditioned its funding of the Blue Ribbon Commission, “provided that Yucca Mountain is considered in the review.” See H.R. REP. NO. 111-203 at 85 (2009). The Conference Report contains a reconciliation provision directing that “[r]eport language included by the House which is not contradicted by the report of the Senate or the conference, and Senate report language which is not contradicted by the report of the House or the conference is approved by the committee of conference.” See H.R. REP. NO. 111-278 at 39 (2009). There appears to be no express contradiction of the House Report language, which requires the Blue Ribbon Commission to consider Yucca Mountain, in either the Conference Report or the Senate Report and thus the language in the House Report appears to be the law. See S. REP. NO. 111-45 (2009); H.R. REP. NO. 111-278. See also Blue Ribbon Commission on America’s Nuclear Future Advisory Committee Charter (Mar. 1, 2010), available at http://www.energy.gov/news/documents/BRC_Charter.pdf (requiring the Commission to evaluate all alternatives for permanent disposal of HLW, including deep geologic disposal). Thus, Congress’ decision to fund the Blue Ribbon Commission—and to keep Yucca Mountain as an alternative to be considered—does not indicate any congressional intent to disrupt the process mandated by the NWPA. Indeed, in the same Appropriations Act, Congress also appropriated \$93,400,000 for “nuclear waste disposal activities to carry out the purposes of the [NWPA],” i.e., for Yucca Mountain licensing activities. Appropriations Act at 2864. But see Steven Chu, Sec’y, Dep’t of Energy, Remarks at the Meeting of the Blue Ribbon Commission on America’s Nuclear Future 27 (Mar. 25, 2010) (transcript available at <http://brc.gov/pdfFiles/0325scur.pdf>), where the Secretary stated, “I don’t want the committee . . . spending time and saying by looking at past history was Yucca Mountain a good decision or a bad decision and whether it can be used as a future repository.”

⁷⁰ DOE Reply at 18.

⁷¹ See, e.g., Massachusetts v. Env’tl. Prot. Agency, 549 U.S. 497 (2007) (requiring EPA to include greenhouse gases within its regulatory purview under the Clean Air Act); N. States Power Co. v. U.S. Dep’t of Energy, 128 F.3d 754 (D.C. Cir. 1997) (granting a partial mandamus against DOE to enforce its prior holding in Ind. Mich. Power Co. v. U.S. Dep’t of Energy, 88 F.3d 1272 (D.C. Cir. 1996), that the NWPA creates an obligation for DOE to dispose of spent nuclear fuel by January 31, 1998); see also U.S. Const. art. II, § 3, cl. 4 (the President shall “take Care that the Laws be faithfully executed”).

faith,⁷² as we believe the NWPA requires. Moreover, DOE has acknowledged that its decision to seek to withdraw the Application is not based on a judgment that Yucca Mountain is unsafe or on flaws in the Application. It should be able to proceed with an evaluation of the technical merits, as directed by the NWPA, without undue discomfort.

If Congress does not wish to see the Yucca Mountain project go forward, it can of course change the law or decide not to fund the proposed repository. Likewise, this Board's decision does not in any way bear upon whether, after considering the merits, the NRC will ultimately authorize construction. As directed by the Commission, we merely decide whether DOE's motion to withdraw the Application from the NRC's consideration should be granted. We conclude that, under the statutory process Congress created in the NWPA, which remains in effect, DOE lacks authority to seek to withdraw the Application. DOE's motion must therefore be denied.

B. Conditions of Withdrawal

Because the Board concludes that DOE lacks discretion to withdraw the Application at this time, the question of appropriate conditions is moot. The Commission apparently contemplated, however, that the Board would address "the terms of DOE's requested withdrawal, as well as DOE's authority to withdraw the application in the first instance."⁷³ Accordingly, we briefly address the conditions that the Board concludes should apply if DOE were permitted to withdraw.

⁷² As counsel for DOE stated at argument, "[w]e will do what we're ordered to do." Tr. at 78 (June 3, 2010).

⁷³ Dep't of Energy, CLI-10-13, 71 NRC at ___ (slip op. at 4).

1. Dismissal without Prejudice

DOE seeks dismissal of the Application with prejudice “because it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain.”⁷⁴ According to DOE, dismissal with prejudice “will provide finality in ending the Yucca Mountain project for a permanent geologic repository and will enable the Blue Ribbon Commission, as established by the Department and funded by Congress, to focus on alternative methods of meeting the federal government’s obligation to take high-level waste and spent nuclear fuel.”⁷⁵

Contrary to DOE’s request, if dismissal were allowed at all it should be without prejudice. The Board is not aware, in previous NRC practice, of any applicant voluntarily seeking dismissal with prejudice of its own application. Moreover, no aspect of the Application has been adjudicated on the merits. In NRC practice, “it is highly unusual to dispose of a proceeding on the merits, i.e., with prejudice, when in fact the health, safety and environmental merits of the application have not been reached.”⁷⁶

While the current Secretary may have no intention of refiling, his judgment should not tie the hands of future Administrations for all time.⁷⁷ Rather, “the public interest would best be served by leaving the . . . option open to the applicant should changed conditions warrant its

⁷⁴ DOE Motion at 3 n.3.

⁷⁵ Id. at 3.

⁷⁶ P.R. Elec. Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1133 (1981) (emphasis in original).

⁷⁷ To date, since 1982, the repository process has moved forward through five Administrations and the leadership of nine different DOE Secretaries. See Opposition of the Nuclear Energy Institute to the Department of Energy’s Motion for Withdrawal (May 17, 2010) at 4 n.8.

pursuit.”⁷⁸ The Board appreciates that Nevada and other opponents of the Yucca Mountain repository have expended substantial resources, but, as the Commission has stated, “it is well settled that the prospect of a second lawsuit [with its expenses and uncertainties] . . . or . . . another application . . . does not provide the requisite quantum of legal harm to warrant dismissal with prejudice.”⁷⁹

2. Preservation of LSN Document Collection

For similar reasons, if DOE were permitted to withdraw the Application, it should be required to preserve, in usable form, the millions of documents that DOE has placed in its LSN document collection (LSNdc).

On December 17, 2009, the LSN Administrator (LSNA) submitted a memorandum concerning potential impacts on the LSN should DOE be allowed to withdraw the Application.⁸⁰ In response, this Board issued various orders and held case management conferences with the parties, the interested governmental participants, and the petitioners⁸¹ concerning how DOE’s potential withdrawal would affect the LSN and to propose withdrawal conditions necessary to assure DOE meets its commitment to: (1) maintain its LSN website until final appellate review of any order terminating this proceeding,⁸² and (2) “preserve and archive its project records

⁷⁸ North Coast, ALAB-662, 14 NRC at 1132.

⁷⁹ Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 n.3 (1999) (quoting Philadelphia Elec. Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 979 (1981)).

⁸⁰ Memorandum from Daniel J. Graser, LSNA, to Administrative Judges (Dec. 17, 2009).

⁸¹ See CAB Order (Concerning LSNA Memorandum) (Dec. 22, 2009) (unpublished); Tr. at 345-405 (Jan. 27, 2010); CAB Order (Questions for Several Parties and LSNA) (Apr. 21, 2010) (unpublished); Tr. at 316-447 (June 4, 2010).

⁸² The Department of Energy’s Status Report on Its Archiving Plan (Feb. 19, 2010) at 2.

thereafter in compliance with federal requirements and consistent with DOE's objective of preserving the core scientific knowledge from the Yucca Mountain project."⁸³

As part of this process, the Board submitted written questions to DOE to provide a better understanding of the structure of DOE's document collection and its archiving plans, so that the Board might fashion appropriate conditions if DOE's motion to withdraw the Application were to be granted.⁸⁴ DOE submitted its answers to these questions on May 24, 2010. On June 1, 2010, Nevada and Nye County exercised the option provided to all parties, interested governmental participants, and petitioners to respond to DOE's answers. These responses and comments from other parties, interested governmental participants, and petitioners were discussed at the case management conference held on June 4, 2010.⁸⁵

Based on the foregoing, it was apparent that all were in close agreement regarding the conditions necessary to preserve LSN documentary material. Subsequently, the Board directed the parties, the interested governmental participants, and the petitioners to confer with DOE and to submit agreed-upon proposed conditions.⁸⁶

A set of proposed conditions regarding DOE's LSNdc, based in substantial part on the submitted agreement,⁸⁷ is set forth in the Appendix. In the Board's view, these conditions would assure that DOE's LSNdc is appropriately preserved and archived. Therefore, the Board

⁸³ The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010) at 2.

⁸⁴ See CAB Order (Questions for Several Parties and LSNA) (Apr. 21, 2010) (unpublished).

⁸⁵ See Tr. at 316-447 (June 4, 2010).

⁸⁶ CAB Order (June 7, 2010) at 1 (unpublished).

⁸⁷ Joint Report Concerning Conditions Regarding DOE LSN Document Collection (June 18, 2010) [hereinafter Joint Report].

concludes that, in the event DOE's motion to withdraw the Application for the Yucca Mountain geologic repository were granted, the conditions set forth in the Appendix should be imposed.

III. Intervention Petitions

To attain party status in this one-of-a-kind proceeding, each of the five new petitioners (Washington, South Carolina, Aiken County, PIIC, and NARUC) must establish standing, address the timeliness of its petition, demonstrate compliance with the LSN requirements, and set forth at least one admissible contention. DOE, the movant and applicant, does not oppose the intervention of the five petitioners. Nye County, Nevada, the host county of the proposed repository, filed a brief answer supporting the five intervention petitions, as did the party comprised of the four Nevada counties of Churchill, Esmeralda, Lander, and Mineral. The NRC Staff and Nevada each filed answers opposing the petitions on various grounds, with NCAC, JTS, and Clark County joining Nevada's answers.⁸⁸

In the sections that follow, we conclude that all five petitioners have met the applicable requirements. Accordingly, we grant each of the intervention petitions. We also conclude that Washington, South Carolina, Aiken County and PIIC meet the lesser requirements for participation as interested governmental participants under 10 C.F.R. § 2.315(c).

A. Standing

In determining whether an individual or organization should be granted party status "as of right," the NRC applies judicial standing concepts that require a petitioner to establish: (1) a

⁸⁸ Clark County's answer also included a brief argument regarding the timeliness of the five petitions. See infra text accompanying note 127. Additionally, the County of Inyo, California, and Eureka County, Nevada, an interested governmental participant, each filed brief responses stating they took no position regarding the five petitions. The other parties to the proceeding, California, White Pine County, Nevada, and NEI, filed no answers to the petitions.

distinct and palpable harm that constitutes injury-in-fact; (2) the harm is fairly traceable to the challenged action; and (3) the harm is likely to be redressed by a favorable decision.⁸⁹

1. Washington, South Carolina, Aiken County, and PIIC

Petitioners Washington, South Carolina, Aiken County, and PIIC assert similar injuries as a basis for standing. All four petitioners either have within their boundaries temporary HLW storage facilities or represent communities located adjacent to such facilities. Washington is home to the Hanford Nuclear Reservation (Hanford), where, Washington asserts, millions of gallons of highly toxic radioactive weapons program waste and foreign reactor waste are stored in aging underground tanks.⁹⁰ South Carolina declares that it is home to seven commercial reactors that store HLW onsite, as well as the Savannah River Site (SRS), where, similar to Hanford, weapons program waste is currently housed.⁹¹ Aiken County points out that it is the county in which the SRS is found,⁹² and PIIC states that its reservation is located close to a

⁸⁹ See Dep't of Energy, LBP-09-6, 69 NRC at 381-82. The NRC requirements for standing, which generally track judicial concepts, are set forth at 10 C.F.R. § 2.309(d).

⁹⁰ Washington Petition at 2.

⁹¹ South Carolina Petition at 4.

⁹² Aiken County Petition at 2. Aiken County's petition incorporates South Carolina's petition by reference, necessarily including South Carolina's contentions, as well as its timeliness and standing arguments. No party objects to this incorporation, except for the NRC Staff, which argues that "[t]he Commission's strict pleading requirements disfavor incorporation by reference in an intervention petition." NRC Staff Answer to Petition of Aiken County, South Carolina, to Intervene (Mar. 29, 2010) at 5. In support of this position, the Staff quotes dicta in a Commission decision suggesting that the NRC would not accept "incorporation by reference of another petitioner's issues" in an instance where the petitioner has not submitted "at least one admissible issue of its own." *Id.* at 6 (quoting Consol. Edison Co. of N.Y. (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 133 (2001)). In the instant case, where Aiken County is a subsidiary governmental unit, whose standing is based upon the same injury as that of South Carolina, in which it is located, we find incorporation appropriate. Moreover, where Aiken County relies on precisely the same legal arguments as South Carolina—arguments that do not require any factual support—we see no reason to prohibit its adoption of South Carolina's contentions. Similarly, where, as here, Aiken County's contentions are based on the same triggering event as those of South Carolina—namely, DOE's decision to seek withdrawal—we accept Aiken County's incorporation of South Carolina's timeliness arguments.

nuclear reactor and immediately adjacent to an independent spent fuel storage installation (ISFSI), where spent nuclear fuel is currently stored.⁹³ According to petitioners, DOE's decision to abandon Yucca Mountain leaves this nation without the permanent disposal solution mandated by the NWPA, and thus without a federally promised process and timetable for removal of HLW from temporary storage facilities. As a result, petitioners assert they will be forced to bear the associated health and safety risks indefinitely,⁹⁴ or at least until Congress legislates an alternative method of disposal—a prospect that, if achievable at all, would mean decades of delay. The petitioners are correct. This prolonged risk of harm, and the cessation of the legislatively established process looking to alleviate it, constitute injury-in-fact.

The second and third requirements for standing—causation and redressability—necessarily follow from petitioners' injury. With respect to causation, DOE's decision to abandon the Yucca Mountain project, in the absence of any ongoing alternative solution, will delay indefinitely any possible removal of HLW from the temporary storage sites affecting petitioners, thereby prolonging the associated risks. With regard to redressability, a decision to reject DOE's withdrawal motion will require that DOE continue to follow the licensing process established by the NWPA, along the path toward the prospect of a permanent HLW repository.

As previously indicated, DOE does not challenge the standing of any petitioner. Only Nevada particularizes arguments that petitioners lack standing, while Clark County, NCAC, and

⁹³ PIIC Petition at 2.

⁹⁴ For example, Washington describes the ongoing leakage of radioactive waste from underground tanks at Hanford as threatening to inflict "irreversible environmental harm within Washington, and beyond." Washington Petition at 3. Additionally, Washington contends that abandoning Yucca Mountain will require the redesign and reconstruction of a costly and 52-percent-finished Waste Treatment Plant, which serves as "the linchpin for completing Hanford's tank waste mission." *Id.* at 4-5.

JTS join those arguments.⁹⁵ Nevada tailors its objections to the circumstances of each petitioner, but its arguments are essentially the same. First, Nevada characterizes the alleged injury as too “general” to support standing and faults petitioners for failing “to explain how abandoning Yucca Mountain would give rise to impacts beyond those already present.”⁹⁶ Citing the Licensing Board’s ruling in White Mesa, Nevada argues that petitioners fail to explain “how the alleged impacts would arise from the proposed . . . activities as opposed to past activities not in issue.”⁹⁷ But White Mesa was a license amendment case, where the Board found no “larger risk of injury” flowing from the processing and storage activities sought to be authorized by the amendment. In the instant case, petitioners have clearly established a larger risk of injury, flowing from DOE’s attempt to abandon its responsibilities under the NWPA, thereby virtually insuring that the risks associated with temporary storage of HLW will continue to impact

⁹⁵ NRC Staff opposes only Aiken County’s standing on the grounds that that it “does not explain how its injury can be redressed by a favorable decision in this proceeding.” NRC Staff Answer to Aiken County at 5. Because we accept Aiken County’s incorporation of South Carolina’s petition, see supra note 92, and the Staff does not object to South Carolina’s standing, its argument necessarily fails.

⁹⁶ See, e.g., Answer of the State of Nevada to the State of South Carolina’s Petition to Intervene (Mar. 29, 2010) at 2 [hereinafter Nevada Answer to South Carolina].

⁹⁷ Id. (citing Int’l Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-01-15, 53 NRC 344, aff’d, CLI-01-21, 54 NRC 247 (2001)). In its answer to PIIC’s petition, Nevada cites two additional license amendment cases for the same proposition. State of Nevada’s Answer to Prairie Island Indian Community’s Petition to Intervene (May 4, 2010) at 4 [hereinafter Nevada Answer to PIIC]. In Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185 (1999), the Commission upheld the Licensing Board’s denial of standing, where the petitioner failed to “indicate how [the alleged] harms might result from the license amendments, particularly given not only the shutdown status of the facility, but also the continued applicability of the NRC’s safety-oriented regulations governing defueled nuclear plants.” Id. at 192. In Atlas Corp. (Moab, Utah Facility), LBP-97-9, 45 NRC 414 (1997), the Board held that petitioner failed to specify any radiological contacts “with enough concreteness to establish some impact on him that is sufficient to provide him with standing.” Id. at 426. Neither case bears any similarity to the case at hand, where petitioners establish quite clearly how a denial of DOE’s motion would prolong their exposure to health and safety risks.

petitioners indefinitely (i.e., beyond “temporary” storage). Thus, petitioners’ injury is sufficiently “distinct and palpable” to give rise to standing.⁹⁸

Second, Nevada challenges what it characterizes as petitioners’ attempts to assert purely procedural rights (i.e., the right to have DOE’s application be considered on its merits) without concrete interests in the outcome of the proceeding.⁹⁹ Nevada relies upon the Supreme Court’s ruling in Lujan, which allows petitioners to enforce procedural rights only if “the procedures in question are designed to protect some threatened concrete interest of [theirs] that is the ultimate basis of [their] standing.”¹⁰⁰ But here, petitioners do assert a concrete interest—

⁹⁸ With respect to PIIC, Nevada advances two related arguments. First, it argues that PIIC’s asserted injury is “indistinguishable” from a “generalized concern” about the destruction of scenery and wildlife in a national forest, which the Supreme Court found insufficient to confer standing upon a national environmental group, the Sierra Club. Nevada Answer to PIIC at 2 (citing Sierra Club v. Morton, 405 U.S. 727, 739 (1972)). Second, Nevada argues that PIIC “bears a special obligation . . . to identify the approximate times when contamination and exposures may occur,” in light of the NRC’s generic “waste confidence” rulemaking determination that spent fuel can be stored safely onsite for at least 30 years. Neither argument defeats petitioners’ standing. As to the first, PIIC—unlike the Sierra Club—is an Indian Tribe whose reservation is adjacent to facilities where spent nuclear fuel is currently stored. PIIC asserts harm to the health and safety of its members, the nearest of which resides just 600 yards from an ISFSI. PIIC Petition at 3. Thus, the alleged impacts amount to more than a “mere interest in a problem,” as Nevada would have it. Nevada Answer to PIIC at 2 (citing Morton, 405 U.S. at 739). As to Nevada’s second argument, Nevada cites no support for such a claimed “special obligation,” and there is none. As should be obvious, there is no requirement that a petitioner identify the time at which the asserted harm will occur when the subject is the storage of HLW any more than a petitioner must identify the moment an asserted accident might happen in a reactor proceeding.

⁹⁹ See, e.g., Nevada Answer to PIIC at 5-6.

¹⁰⁰ Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n.8 (1992). Nevada cites two additional circuit court cases for this proposition. In Elec. Power Supply Ass’n v. Fed. Energy Regulatory Comm’n, 391 F.3d 1255 (D.C. Cir. 2004), in which the petitioner challenged a FERC rule permitting certain ex parte communications in agency hearings, Nevada suggests that the court granted standing only “because [petitioner’s] members had concrete financial interests at stake and were participating as parties in the hearings where the rule applied.” See, e.g., Nevada Answer to PIIC at 5. Nevada overlooks, however, the court’s unequivocal statement that “[petitioner’s] standing is not defeated by the fact that it cannot show, with any certainty, that its or its members’ financial interests will be damaged by the operation of [FERC’s rule].” Elec. Power Supply, 391 F.3d at 1262. Thus, the Elec. Power Supply holding actually supports

namely, the interest in removal of HLW from temporary storage facilities, in accordance with the process mandated by the NWPAA.¹⁰¹ Moreover, Nevada's suggestion that petitioners will "disappear from the scene" once their procedural right is vindicated (i.e., DOE's motion is denied), thus leaving their interests "at the mercy of other parties,"¹⁰² is wholly unfounded. None of the petitioners affirmatively asserts that denial of DOE's motion will terminate its participation. Indeed, as PIIC states,¹⁰³ given DOE's recent reversal of position, the petitioners have every reason to remain active participants as proponents of the Application in this proceeding.

petitioners' bids for standing here, where the petitioners have established a concrete risk of harm, albeit without absolute certainty that it will come to pass. Nevada cites Guerrero v. Clinton, 157 F.3d 1190 (9th Cir. 1998), also to no avail. In that case, the court explicitly declined to decide whether petitioners' "concrete interests" were affected, because it found "there is nothing that can be done by way of judicial review to redress the adverse consequences . . . that they say they are suffering." Id. at 1194. The instant circumstances hardly fit that mold. Thus, Guerrero does nothing to bar the petitioners' "concrete interests" from establishing standing.

¹⁰¹ Under the Supreme Court's ruling in Lujan, one who asserts a procedural right to protect a concrete interest "can assert that right without meeting all the normal standards for redressability and immediacy." 504 U.S. at 572 n.7. Nevada states, however, that in the event we decline to treat this as a procedural rights case, petitioners fail to meet the "normal standards for redressability." Specifically, Nevada submits that petitioners' injury can only be redressed if Yucca Mountain is ultimately licensed—an outcome that is far from certain. See, e.g., Nevada Answer to PIIC at 5 n.2. But Nevada misapprehends the petitioners' statement of redressability. Redress will occur not if and when Yucca Mountain is ultimately licensed, but rather upon resumption of the licensing process, which is designed to move the nation further along the path to a geologic repository. This form of redress, as articulated by petitioners, is absolutely certain to result from the denial of DOE's motion. But even if we were to accept Nevada's formulation of redress, petitioners need not demonstrate a "substantial likelihood" of redressability. See, e.g., id. (citing Duke Power Co. v. Carolina Env'tl. Study Group, 438 U.S. 59, 78 (1978)). Rather, petitioners need only show that redress is "likely," as opposed to "speculative." See Lujan, 504 U.S. at 561. Although it did not make the licensing of Yucca Mountain a certitude, DOE's filing of an 8600-page application, after the expenditure of many billions of dollars and more than two decades of study, certainly moved the likelihood of licensure out of the realm of what reasonably can be labeled "speculative."

¹⁰² See, e.g., Nevada Answer to South Carolina at 3.

¹⁰³ Reply of the Prairie Island Indian Community to Answers to Petition to Intervene (May 11, 2010) at 7 [hereinafter PIIC Reply].

Having rejected Nevada's objections, we conclude that petitioners Washington, South Carolina, Aiken County, and PIIC have all established standing pursuant to 10 C.F.R. § 2.309(d). Accordingly, we need not address their respective bids for discretionary intervention under 10 C.F.R. § 2.309(e). We do find, however, that, if not admitted as parties, these petitioners would qualify for participation under 10 C.F.R. § 2.315(c) as interested governmental participants.¹⁰⁴

2. NARUC

To establish representational standing, an organization must: (1) demonstrate that the licensing action will affect at least one of its members; (2) identify that member by name and address; and (3) show it is authorized by that member to request a hearing on his or her behalf.¹⁰⁵

NARUC is a national organization comprised of state public utility commissioners charged with the duty to protect the health, safety, and economic interests of ratepayers. In its petition to intervene, as amended,¹⁰⁶ NARUC seeks to demonstrate representational standing

¹⁰⁴ We reject Nevada's argument that "PIIC has not designated a single representative" as is required under 10 C.F.R. § 2.315(c). Nevada Answer to PIIC at 7. Nevada apparently overlooks page four of PIIC's petition, where PIIC explicitly identifies its General Counsel, Philip R. Mahowald. PIIC Petition at 4. Indeed, PIIC's designation of its General Counsel is no different than Nevada's designation of its Attorney General in its intervention petition. See State of Nevada's Petition to Intervene as a Full Party (Dec. 19, 2008) at 1.

¹⁰⁵ Vt. Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

¹⁰⁶ NARUC filed an amendment to its intervention petition on May 11, 2010, in which it named one of the Commissioners of Minnesota as an additional member to demonstrate representational standing. Supplement/Amendment to Petition of the National Association of Regulatory Utility Commissioners to Intervene (May 11, 2010) at *1 [hereinafter NARUC Petition Amendment]. Both the Staff and Nevada characterize the amendment as an unauthorized filing, which the Board should reject. See State of Nevada's Answer in Opposition to Supplement/Amendment to Petition of [NARUC] to Intervene (May 19, 2010) at 2; NRC Staff Answer to Supplemental/Amendment to Petition of [NARUC] to Intervene (May 21, 2010) at 4. In the unique circumstances of this proceeding, we find it appropriate to accept NARUC's

by submitting the affidavits of two member state Commissioners—a Commissioner with the Minnesota Public Utilities Commission and a Commissioner with the South Carolina Public Service Commission.¹⁰⁷

NARUC characterizes the injury to its members as follows: DOE's withdrawal of the Application will delay indefinitely the federal government taking title to and disposing of HLW pursuant to the NWPA, which will increase the costs to regulated utilities of interim storage and security measures.¹⁰⁸ NARUC states that ratepayers, via the pass-throughs of regulated utilities, have contributed over seventeen billion dollars to the Nuclear Waste Fund (NWF) established under the NWPA, and will continue to pay into the NWF, even if DOE is permitted to abandon Yucca Mountain.¹⁰⁹ We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers' interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members' injury-in-fact.

The causation and redressability requirements for standing follow from NARUC's alleged injury. With respect to causation, DOE's abandonment of the Application will delay the removal of wastes from interim storage sites nationwide, increasing costs to regulated utilities and fees paid by ratepayers. In regard to redressability, a decision to reject DOE's motion to withdraw will substantially diminish the economic harms alleged by NARUC by maintaining the NWPA

amendment to its petition. In similar fashion, because of the significance of the issues at hand, we permitted DOE to reply to the answers to its motion to withdraw, a right to which it is not entitled under the regulations. See 10 C.F.R. § 2.323(c). Further, in accepting DOE's forty-page reply, we have allowed DOE great latitude to make and to respond to arguments that could have been reasonably anticipated in its initial nine-page motion to withdraw. Having allowed DOE such leeway, basic fairness requires us to allow NARUC to amend its petition and permit a like treatment of all participants' filings.

¹⁰⁷ See NARUC Petition at 9-10; NARUC Petition Amendment at *1.

¹⁰⁸ NARUC Petition at 11.

¹⁰⁹ Id.

licensing process and continuing along the legislatively established course toward a possible permanent repository for HLW.

Both Nevada and the Staff challenge NARUC's standing. The Staff concedes that NARUC's claimed injury is similar to the economic harm asserted by NEI, which a previous Construction Authorization Board held was sufficient to establish standing.¹¹⁰ The Staff, however, distinguishes NARUC's economic harm from NEI's, stating that the intended beneficiaries of the NWPA are the nuclear utilities, not ratepayers.¹¹¹ We find this distinction neither meaningful nor persuasive. The fact that nuclear utilities are the "intended beneficiaries" of the NWPA is irrelevant to NARUC's standing.¹¹² On the contrary, the economic harms alleged by NEI and NARUC are indistinguishable because the fees required to be paid into the NWF, pursuant to the NWPA, by nuclear utilities regulated by NARUC members are directly passed through to ratepayers.¹¹³

Nevada objects to NARUC's standing on the grounds that the Commissioner of the South Carolina Public Service Commission cannot establish standing as of right because the

¹¹⁰ Dep't of Energy, LBP-09-6, 69 NRC at 433.

¹¹¹ NRC Staff Answer to National Association of Regulatory Utility Commissioners' Petition to Intervene (May 4, 2010) at 7 [hereinafter NRC Staff Answer to NARUC].

¹¹² The Staff relies solely upon Roedler v. U.S. Dep't of Energy, 255 F.3d 1347 (Fed. Cir. 2001), asserting that only nuclear utilities are the intended beneficiaries of the NWPA. But Roedler involved a class action suit brought by ratepayers seeking damages based on the established breach of the Standard Contract. Id. at 1350. The court held that ratepayers were not third-party beneficiaries of the Standard Contract and therefore could not sue for breach of contract when the DOE failed to dispose of nuclear waste by the statutory deadline. Id. at 1353. No question of standing was involved in Roedler. Nor is "third-party beneficiary" status, a contract law concept, relevant to any element of the standing analysis in this instance. Thus, Roedler is not pertinent to NARUC's claim of economic injury as the basis for its standing.

¹¹³ We need not linger on the Staff's argument that an economic harm is insufficient to establish standing under the AEA. See NRC Staff Answer to NARUC at 7. As we explained above, economic harm itself has been held sufficient to establish standing under the NWPA in the circumstances of this proceeding. Dep't of Energy, LBP-09-6, 69 NRC at 433.

State of South Carolina is also petitioning to intervene in this proceeding.¹¹⁴ Under 10 C.F.R. § 2.309(d)(2)(ii), Nevada argues, only a “single designated representative” of a state may be admitted as a party. Nevada’s argument is without merit. The Commissioner of the South Carolina Public Service Commission is not seeking to be admitted as a party to represent the State of South Carolina. Rather, NARUC names the Commission member for the purpose of establishing representational standing, so that NARUC may be admitted as a party. In any event, while NARUC’s initial intervention petition named only a South Carolina Commissioner, NARUC amended its petition with an affidavit prepared by a Commissioner of the Minnesota Public Utilities Commission, another one of NARUC’s members.¹¹⁵ Accordingly, we conclude that NARUC has sufficiently demonstrated representational standing.¹¹⁶

B. Timeliness

Before the Board can grant an intervention petition filed outside the time set forth in the hearing notice,¹¹⁷ the eight factors of 10 C.F.R. § 2.309(c)(1) must be addressed by the petitioners and balanced by the Board.¹¹⁸ Factor (i), good cause, is the most significant of the

¹¹⁴ State of Nevada’s Answer to the National Association of Regulatory Utility Commissioners’ Petition to Intervene (May 4, 2010) at 1-2 [hereinafter Nevada Answer to NARUC].

¹¹⁵ See supra note 106, accepting NARUC’s amendment to its petition.

¹¹⁶ Nevada also argues that NARUC’s alleged injury is “purely procedural” and insufficient to demonstrate standing—the same argument Nevada asserts with respect to the other four petitioners. See Nevada Answer to NARUC at 2-3. For the same reasons stated above, this argument lacks merit. See supra text accompanying notes 99-103.

¹¹⁷ U.S. Department of Energy (High Level Waste Repository); Notice of Hearing and Opportunity to Petition for Leave to Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008).

¹¹⁸ The Board need not detour to discuss the applicability of 10 C.F.R. § 2.309(c) rather than section 2.309(f)(2) in evaluating the timeliness of the petitions to intervene, as all petitioners agree that section 2.309(c) is applicable here.

late-filing factors.¹¹⁹ Absent a showing of good cause, the Board will not entertain a petition filed after the deadline established in the hearing notice unless the petitioner makes a compelling showing on the remaining factors.¹²⁰ Further, the availability of new information is central to determining whether a petitioner has good cause for late filing. A petitioner must show that the information on which its new contention is based was not reasonably available to the public previously and that it filed its intervention petition promptly after learning of such new information.¹²¹

1. Good cause: 10 C.F.R. § 2.309(c)(1)(i)

With respect to the five petitions before the Board, as all but Nevada (joined by JTS, NCAC, and Clark County) do not contest, there is good cause for the nontimely filings. The petitioners filed their intervention petitions in response to DOE's decision to withdraw the Application with prejudice.¹²² We agree that DOE's motion to withdraw could not have been reasonably anticipated prior to its filing. For nearly two years, DOE has supported and actively prosecuted the Application, therein fully participating in the NWPA process, as mandated by Congress. Never, during that time, did DOE articulate that it would seek to withdraw the Application or claim that it had discretion to do so. Moreover, DOE never wavered in its defense

¹¹⁹ Tenn. Valley Auth. (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC __, __ (slip op. at 4) (Mar. 26, 2010); Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009).

¹²⁰ Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565 (2005).

¹²¹ Id. at 564-65.

¹²² See Washington Petition at 1; South Carolina Petition at 2; Aiken County Petition at 3; PIIC Petition at 2; NARUC Petition at 3.

of the technical, safety, and environmental merits of the Application.¹²³ Thus, DOE's decision to withdraw is an unforeseeable change in DOE's posture in this proceeding constituting new information that was not reasonably available to the public, and each petitioner filed promptly after receiving notice of DOE's decision.¹²⁴ In the circumstances presented, petitioners clearly have established good cause for not filing their intervention petitions by December 22, 2008, the deadline set in the notice of hearing.¹²⁵

In arguing that none of the petitioners has shown good cause, Nevada asserts that they should have sought to intervene in support of the Application at the outset of the proceeding, rather than be "lulled into inaction" by the petitions of the other participants.¹²⁶ In a similar vein, Clark County chastises petitioners for presuming that this proceeding will inevitably result in approval of the Application and claims it would have been prudent for petitioners to seek

¹²³ DOE opposed every prior intervention petition, including all 318 proffered contentions challenging the Application. See Dep't of Energy, LBP-09-6, 69 NRC at 375. DOE also opposed all but one new contention subsequently proffered by the parties. See U.S. Dep't of Energy, LBP-09-29, 70 NRC __, __ (slip op. at 3-12) (Dec. 9, 2009).

¹²⁴ See Millstone, CLI-05-24, 62 NRC at 564-65; Dominion Nuclear Conn., Inc., (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009) ("To show good cause, a petitioner must show that the information on which the new contention is based was not reasonably available to the public . . ." (emphasis in original)); Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-70 (1992) (explaining that new information may constitute good cause for late intervention if petitioners file promptly thereafter).

¹²⁵ See 73 Fed. Reg. at 63,030.

¹²⁶ See e.g., Nevada Answer to South Carolina at 7. The cases Nevada relies upon for the proposition that a petitioner may not justify intervening after the established deadline by claiming it was "lulled into inaction" by the participation of other parties are completely inapposite to the unique circumstances at hand. Unlike the petitioners in those cases, the five instant petitioners seek neither to re-enter an ongoing proceeding nor to litigate a withdrawing intervenor's admitted contentions. Here, each petitioner seeks to intervene for the first time to litigate a newly raised legal issue, which was prompted by DOE's unforeseen motion to withdraw.

intervention in December 2008.¹²⁷ These arguments misapprehend the requirements for intervention. Under the Commission's rules of practice, a petitioner cannot base an intervention petition on an unforeseeable "possibility" that an applicant might later withdraw an application, or on the possibility that the Commission might ultimately deny an application. At the outset of this proceeding the five petitioners were justifiably satisfied that the Application would be fully and fairly adjudicated on the merits without their intervention. With no challenge to the Application, they could not, for example, have set forth contentions that demonstrate a "genuine dispute with the applicant/licensee on a material issue of law or fact," as required by 10 C.F.R. § 2.309(f)(1)(vi). Indeed, as long as DOE continued to prosecute the Application, the five instant petitioners could not have satisfied the Commission's strict requirements for intervention in a licensing proceeding, and any attempt to intervene would have been denied.

Nevada also insists that, based upon the President's campaign promises to abandon Yucca Mountain, which were made prior to the original filing deadline, the petitioners were on notice that DOE would withdraw the Application. According to Nevada, they should have anticipated DOE's motion to withdraw and sought to intervene, if not before the original deadline lapsed, then shortly thereafter.¹²⁸ We disagree. Campaign promises of a political candidate on the stump in no way equate to notice that DOE would seek to withdraw the Application with prejudice and cannot form the basis for filing a petition in advance of the motion to withdraw. In fact, subsequent to such campaign statements and to any press speculation that DOE would seek withdrawal, DOE's own lawyers in this proceeding stated unequivocally that DOE's policy

¹²⁷ See, e.g., Answer of Clark County, Nevada to Petitions to Intervene of the State of South Carolina, Aiken County, South Carolina and the State of Washington (Mar. 29, 2010) at 2-3.

¹²⁸ See, e.g., Nevada Answer to South Carolina at 5-7.

toward Yucca Mountain had not been changed by the election.¹²⁹ Moreover, the Secretary of Energy requested and received funding for DOE “to continue participation in the [NRC] license application process, consistent with the provisions of the Nuclear Waste Policy Act” during the 2010 fiscal year.¹³⁰ Thus, DOE gave no indication it would reverse course and discontinue prosecuting the Application until the eve of its filing a motion to withdraw the Application, with prejudice, and petitioners could not have had cause to file any sooner.

Remaining nontimely factors: 10 C.F.R. § 2.309(c)(1)(ii)-(viii)

Factors (ii) through (iv) of section 2.309(c)(1) largely mirror the requirements for standing,¹³¹ and as such, the petitioners’ arguments, with one exception,¹³² simply reference or mirror their standing arguments.¹³³ Similarly, the positions of the Staff and Nevada as to whether the petitioners satisfy these three nontimely factors are identical to their positions with

¹²⁹ Tr. at 76-77 (Mar. 31, 2009).

¹³⁰ FY 2010 Appropriations Hearing, supra note 27, at 10-11.

¹³¹ 10 C.F.R. § 2.309(c)(1)(ii)-(iv) (concerning the petitioners’ right to be made parties, their interest in this proceeding, and the possible effect on them of any Board order).

¹³² Regarding factor (iv)—the effect of any NRC order on the petitioners’ interests—South Carolina asserts that if it is not made a party to this proceeding, it might be held not to have a right to petition for review in the Court of Appeals any NRC decision on DOE’s motion to withdraw. See South Carolina Petition at 11. In response, the NRC Staff claims that a grant of an intervention petition is not a prerequisite for judicial review. See NRC Staff Answer to South Carolina Petition to Intervene and Supplement (Mar. 29, 2010) at 8 [hereinafter NRC Staff Answer to South Carolina]. However, given the uncertain state of the law on the judicial review provision, section 119 of the NWPA, the Staff can in no way be the guarantor of South Carolina’s appellate rights. See Nuclear Energy Inst., 373 F.3d at 1287. For its part, Nevada asserts that South Carolina’s argument warrants an “A+ for chutzpah” because “[w]hy, on earth, would the NRC ‘shoot itself in the foot’ by exercising its discretion to grant party status to a petitioner just to enable the petitioner to sue the agency.” Nevada Answer to South Carolina at 10. We reject outright Nevada’s specious claim that the possibility of an appeal is a reason to deny South Carolina’s petition.

¹³³ See Washington Petition at 11; NARUC Petition at 16; PIIC Petition at 11; South Carolina Petition at 7-12. As stated supra note 92, we accept Aiken County’s incorporation of South Carolina’s timeliness arguments.

respect to petitioners' standing.¹³⁴ Accordingly, because the Board has concluded that all petitioners have standing,¹³⁵ so too do these three nontimely factors weigh in favor of the petitioners.¹³⁶

With respect to factor (v)—the availability of other means to protect the petitioners' interests¹³⁷—as the Staff concedes, intervention in this proceeding is the most direct and adequate remedy for the petitioners to challenge DOE's motion.¹³⁸ Furthermore, the Staff does not dispute that factor (vi)—the extent to which other parties represent the petitioners' interests¹³⁹—weighs in favor of each petitioner, except with respect to NARUC, whose interests, the Staff claims, are adequately represented by NEI.¹⁴⁰ Nevada also concedes that Washington has unique interests in this proceeding;¹⁴¹ however, it insists that the other petitioners' interests

¹³⁴ See, e.g., Nevada Answer to South Carolina at 8-10; NRC Staff Answer to State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 29, 2010) at 7 [hereinafter NRC Staff Answer to Washington].

¹³⁵ See supra section III.A.

¹³⁶ See Watts Bar, CLI-10-12, 71 NRC at __ (slip op. at 7) (declining to overturn the Licensing Board's decision to use the petitioners' demonstration of standing as "the basis for [its] conclusion that these [three] factors weighed in Petitioners' favor").

¹³⁷ 10 C.F.R. § 2.309(c)(1)(v).

¹³⁸ Nevada asserts that factor (v) weighs against the petitioners because each seeks to raise legal issues and may participate effectively before the NRC by filing an amicus brief. See, e.g., Nevada Answer to NARUC at 9-10. We disagree. A petitioner always has the option to seek to file an amicus brief, and following Nevada's reasoning, this factor therefore could never weigh in favor of any petitioner's interest, a result at odds with the regulation's call for a "balancing" of the 10 C.F.R. § 2.309(c)(1) factors. Moreover, amicus curiae participation does not provide the same rights of participation as party status and cannot be considered a substitute means to protect a petitioner's interest or to preserve a petitioner's appellate rights.

¹³⁹ 10 C.F.R. § 2.309(c)(1)(vi).

¹⁴⁰ See NRC Staff Answer to NARUC at 14.

¹⁴¹ See Answer of the State of Nevada to the State of Washington's Petition to Intervene (Mar. 29, 2010) at 7 [hereinafter Nevada Answer to Washington].

are represented by NEI.¹⁴² We disagree. Notwithstanding Nevada's and the Staff's arguments to the contrary, the interests of each petitioner are sufficiently special and will not be represented by NEI, a policy organization (i.e., a trade association) with a diverse membership representing the nuclear industry.¹⁴³ Thus, both factors (v) and (vi) weigh in favor of the petitioners.

Further, as to factor (vii), admitting the petitioners as parties will not broaden or delay the proceeding, as Nevada argues.¹⁴⁴ On the contrary, it was DOE, not the petitioners, that broadened the proceeding by submitting its motion to withdraw, thereby putting into issue DOE's authority to request withdrawal. Moreover, entertaining petitioners' legal issue contentions will not cause further delay because existing parties have raised the same issues in briefing DOE's motion to withdraw, and, in any event, the Board has already stayed discovery and the prosecution of all other admitted contentions in this proceeding.

Finally, as to factor (viii), the petitioners' participation will assist in developing a sound record.¹⁴⁵ In arguing otherwise,¹⁴⁶ Nevada interprets the relevant record as the evidentiary

¹⁴² Nevada also claims that if South Carolina's intervention petition is granted, NARUC's interests will be represented by South Carolina. This argument fails, however, because factor (vi) instructs the Board to consider the extent a petitioner's interests are represented by existing parties, not potential parties. See 10 C.F.R. § 2.309(c)(1)(vi).

¹⁴³ See Dep't of Energy, LBP-09-6, 69 NRC at 429; The Nuclear Energy Institute's Petition to Intervene (Dec. 19, 2008) at 1-2.

¹⁴⁴ 10 C.F.R. § 2.309(c)(1)(vii). The NRC Staff points out that South Carolina, and Aiken County by reference, did not address whether their participation might broaden the issues in this proceeding. NRC Staff Answer to South Carolina at 7. Still, the Staff concludes that this factor does not weigh for or against these petitioners, and we agree.

¹⁴⁵ 10 C.F.R. § 2.309(c)(1)(viii).

¹⁴⁶ Warranting only brief mention, the Staff asserts that no petitioner can contribute to the record because none has proffered an admissible contention. See, e.g., NRC Staff Answer to NARUC at 13. This Board will evaluate the admissibility of the petitioners' proffered contentions only after it decides whether to entertain the nontimely petitions at all, which it determines by

record and asserts that, because the petitioners proffer legal issue contentions, their legal arguments will contribute no evidence.¹⁴⁷ Nevada's narrow reading of the word "record" in the regulation not only overlooks that the regulation contains no such limitation, but also fails to account for the uniqueness of this proceeding.¹⁴⁸ The Commission has recognized that the record of this proceeding includes legal arguments, explaining in its remand decision that DOE's motion raises fundamental legal questions, both before this Board and before the United States Court of Appeals for the District of Columbia Circuit.¹⁴⁹ The Commission specifically noted the importance of the Board's decision, and hence necessarily the record, in informing the Court of Appeals' consideration of DOE's motion to withdraw.¹⁵⁰ Thus, the participation of the five

balancing the section 2.309(c)(1) factors. Thus, the Staff's argument that somehow an admissible contention is relevant to analyzing whether a nontimely factor weighs in favor of a petitioner, an analysis that is a prerequisite to determining contention admissibility, is without merit.

¹⁴⁷ See, e.g., Nevada Answer to Washington at 8.

¹⁴⁸ Nevada cites Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1979) to support its narrow interpretation of the record; that case does not, however, actually support Nevada's position. In fact, in Pebble Springs, the Commission explained that the relevant record includes legal issues and necessarily legal arguments. Id. at 617 ("Permission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented . . ." (emphasis added)). Likewise, the other two cases Nevada relies upon do not support Nevada's interpretation of the regulatory term "record." In Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508 (1982), the petitioner sought to intervene well after the commencement of the evidentiary hearing and raised an evidentiary matter. Similarly, in Kan. Gas & Elec. Co. (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878 (1984), the petitioner sought intervention during the evidentiary hearing and proffered a factual contention. Neither case involved legal issue contentions, and thus both cases are actually consistent with Pebble Springs, in that the relevant record encompasses issues of both law and fact.

¹⁴⁹ Dep't of Energy, CLI-10-13, 71 NRC at ___ (slip op. at 3-4).

¹⁵⁰ Id. (slip op. at 4).

petitioners will ensure full briefing and argument on the DOE motion before us and the Commission, thereby assisting the development of the judicially reviewable record.

In sum, because each of the petitioners has demonstrated good cause, and because the remaining factors weigh in favor of petitioners, or are neutral at worst, on balance we conclude that we must entertain all five petitioners' intervention petitions.

LSN Compliance

Before a petitioner can be granted party status in the HLW proceeding, it must be able to demonstrate substantial and timely compliance with the LSN requirements.¹⁵¹ As part of compliance, each petitioner must identify all its documentary material¹⁵² required by 10 C.F.R. § 2.1003 and designate a responsible LSN official, who can certify that "to the best of his or her knowledge" all such material has been made electronically available.¹⁵³ The certification requirement embodies a good faith standard, meaning that a petitioner need only make a reasonable effort to produce all of its documentary material.¹⁵⁴ Further, as the PAPO Board determined, what constitutes a "reasonable effort" depends on the following factors: the time

¹⁵¹ 10 C.F.R. § 2.1012(b)(1). If a petitioner fails to make such a demonstration, it may later request party status upon a showing of "subsequent compliance." Id. § 2.1012(b)(2).

¹⁵² "Documentary material" is defined as (1) "[a]ny information upon which a party, potential party, or interested governmental participant intends to rely and/or to cite in support of its position in the proceeding . . ."; (2) "[a]ny information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party's position"; and (3) "[a]ll reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, including all related 'circulated drafts,' relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party." Id. § 2.1001.

¹⁵³ Id. § 2.1009.

¹⁵⁴ Dep't of Energy, LBP-09-6, 69 NRC at 387.

petitioner has to assemble its collection, the extent of petitioner's control over the certification deadline, the importance of petitioner's obligation, and petitioner's status and financial ability.¹⁵⁵

All five petitioners have filed initial certifications of LSN compliance¹⁵⁶ and subsequent monthly certifications. DOE does not challenge any of those certifications. Only the NRC Staff and Nevada (with Clark County and NCAC joining Nevada's answer) raise objections, insisting that some petitioners have failed to satisfy the requirements of 10 C.F.R. § 2.1009 and to compile fully their document collections.¹⁵⁷ It is apparent that petitioners have struggled to meet the requirements of Subpart J, but as previously stated, a petitioner or party is not held to a standard of perfection.¹⁵⁸ Unlike Nevada and the Staff, who compiled their respective document collections over the course of many years, these five petitioners have been forced to achieve compliance in just a few months—a timeframe thrust upon them by DOE's sudden reversal of position in this proceeding. In these circumstances, we find that petitioners “have made every reasonable effort to produce all of their documentary material.”¹⁵⁹ While we expect that

¹⁵⁵ Dep't of Energy, LBP-04-20, 60 NRC at 314-15.

¹⁵⁶ Aiken County Certification of Electronically Available Documentary Material (Mar. 15, 2010); State of South Carolina's Initial Certification and Certification of Licensing Support Network Supplementation (Apr. 1, 2010); National Association of Regulatory Utility Commissioners Designation of Responsible Person, Initial Certification, and Certification of Licensing Support Network Supplementation (Apr. 1, 2010); State of Washington Licensing Support Network Initial Certification (Apr. 2, 2010); Prairie Island Indian Community's Initial and Supplemental Certification of Licensing Support Network, and Designation of Responsible Person (Apr. 30, 2010).

¹⁵⁷ Nevada raises objections to South Carolina, Washington, PIIC, and Aiken County, while the NRC Staff objects to the compliance of South Carolina, Washington, and PIIC. No party objects to NARUC's compliance with the LSN requirements.

¹⁵⁸ See, e.g., Dep't of Energy, LBP-09-6, 69 NRC at 387-88; Dep't of Energy, LBP-04-20, 60 NRC at 313.

¹⁵⁹ Dep't of Energy, LBP-09-6, 69 NRC at 387 (citing Dep't of Energy, LBP-04-20, 60 NRC at 313).

petitioners will update their collections “as promptly as possible in each monthly supplementation,”¹⁶⁰ we credit the good-faith efforts they have expended thus far and find sufficient their respective demonstrations of compliance with the standards of 10 C.F.R. § 2.1003.

Moreover, none of the newly proffered contentions raises a factual dispute. Rather, all five petitioners advance legal issue contentions—contentions which, as the Commission has affirmed, do not require any supporting facts.¹⁶¹ Nevada insists that petitioners rely upon a “vast array of factual information” that should be made publicly available, including a transcript of a DOE press conference, a waste management report, and expert affidavits, together with their underlying source documents.¹⁶² Apparently, Nevada interprets “documentary material” to mean any document attached to an intervention petition.¹⁶³ But many of these documents set forth undisputed facts (i.e., DOE’s decision to abandon Yucca Mountain), and some do not even relate to petitioners’ contentions (e.g., affidavits setting forth a basis for standing). Such information hardly constitutes “documentary material” as the regulations define it.¹⁶⁴

¹⁶⁰ RSCMO, supra note 6, at 21.

¹⁶¹ See Dep’t of Energy, CLI-09-14, 69 NRC at 590, aff’g LBP-09-6, 69 NRC at 422.

¹⁶² See, e.g., Nevada Answer to Washington at 11; Nevada Answer to South Carolina at 14.

¹⁶³ Petitioners do not in the first instance rely upon these attachments as factual support for their contentions. They note them only out of an abundance of caution. For example, PIIC cites to the Affidavit of Ronald C. Callen only “[t]o the degree factual matters are involved” in its contentions. PIIC Petition at 21. In fact, the Callen Affidavit speaks more to PIIC’s standing than to its contentions. No factual support is required for PIIC’s purely legal contentions.

¹⁶⁴ It would appear that none of the remaining documents that Nevada alleges to be missing are subject to production under 10 C.F.R. § 2.1005. Section 2.1005 specifically excludes such material as “[p]ress clippings and press releases” and “[r]eadily available references.”

Given the unique circumstances described above, we find that all five petitioners have demonstrated substantial and timely compliance with the LSN requirements.¹⁶⁵ Accordingly, nothing about their LSN collections bars them being granted party status in this proceeding.¹⁶⁶

C. Contention Admissibility

All five petitioners proffer virtually identical contentions, which advance claims under the NWPA, NEPA, the Administrative Procedure Act (APA), and certain constitutional provisions. Because only one admissible contention is required for each petitioner to intervene,¹⁶⁷ and given the exceptional circumstances of this proceeding, the Board finds it unnecessary to determine whether all of their contentions meet the admissibility criteria.¹⁶⁸ Instead, we conclude that each petitioner's first proffered contention is admissible, and we reserve judgment on the admissibility of the remaining contentions until a later date, as appropriate.¹⁶⁹ The contention we admit,

¹⁶⁵ PIIC's reply, filed on May 11, 2010, indicates that testing of its LSN arrangements "revealed a glitch in URL's or other connectivity that unexpectedly delayed the interconnection." PIIC Reply at 29. This "glitch" was promptly resolved, and PIIC's LSN document collection came into operation on May 13, 2010. See Corrected Memorandum from Daniel J. Graser, LSNA, to the Administrative Judges (June 22, 2010).

¹⁶⁶ As stated in the initial order admitting the original parties to this proceeding, the failure of any petitioner to participate in the pre-license application phase—which the Board is instructed to consider under 10 C.F.R. § 2.309(a)—did not, in the circumstances presented, preclude the grant of any petition. Dep't of Energy, LBP-09-6, 69 NRC at 389. The same circumstances obviously also attend here.

¹⁶⁷ 10 C.F.R. § 2.309(a).

¹⁶⁸ See Dep't of Energy, LBP-09-6, 69 NRC at 389-91 for an explanation of the six contention admissibility requirements, which can be found at 10 C.F.R. § 2.309(f)(1).

¹⁶⁹ As the Commission held in affirming the Licensing Board's action in admitting only one of many proffered contentions in Shieldalloy Metallurgical Corp. (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 501 (2007), it is appropriate for a licensing board to defer the consideration of all but one contention in some limited and exceptional circumstances. If ever there were such circumstances, they are plainly present here.

although worded slightly differently by each of the petitioners, generally provides as follows:

DOE lacks the authority under the NWPA to withdraw the Application.

As noted previously, DOE does not object to the admissibility of this contention, or any of petitioners' other contentions.

Only the NRC Staff raises objections to this contention's admissibility.¹⁷⁰ Specifically, the Staff argues that it falls outside the scope of the proceeding, is immaterial to the findings the NRC must make to support the licensing action, and does not raise a genuine dispute with the applicant on a material issue of law or fact.¹⁷¹ The Staff defines the scope of the proceeding according to the Commission's initial hearing notice: whether DOE's application "satisfies applicable safety, security and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met."¹⁷² By this logic, the Staff claims, a contention challenging DOE's authority to withdraw the Application falls outside the scope of the proceeding because it does not raise a safety, security, technical, or environmental issue. Moreover, the Staff argues that the contention is not material to the merits of the Application, because it does not directly controvert or allege any omission from the Application.¹⁷³ Thus, according to the Staff, it must be rejected.

¹⁷⁰ With respect to PIIC, Nevada (joined by Clark County, NCAC, and JTS) does object to this contention insofar as it questions DOE's compliance with the Standard Contract. Nevada Answer to PIIC at 19. However, Nevada does not challenge PIIC's claims under the NWPA, as expressed in our formulation of the contention. We need not consider the breadth of PIIC's contention at this stage, given that we find it to be admissible at least in part.

¹⁷¹ 10 C.F.R. § 2.309(f)(1)(iii), (iv), (vi).

¹⁷² See, e.g., NRC Staff Answer to Washington at 12 (citing 73 Fed. Reg. 63,029).

¹⁷³ See, e.g., NRC Staff Answer to Washington at 14-15.

We disagree. Unlike the Staff, the Board does not read the Commission's initial hearing notice without regard for the Commission's subsequent pronouncements. The Commission emphatically broadened the scope of the proceeding on April 23, 2010 when it directed the Board to rule on DOE's motion to withdraw. In its order, the Commission recognized that

[f]undamental issues have been raised, both before us and before the D.C. Circuit, regarding the terms of DOE's requested withdrawal, as well as DOE's authority to withdraw the application in the first instance. Interpretation of the statutes at issue and the regulations governing their implementation falls within our province.¹⁷⁴

We can imagine no clearer expansion of this proceeding's scope. Namely, the Commission has ordered us to consider the merits of DOE's withdrawal motion—a purely legal question, unrelated to the technical merits of the Application. Just as DOE offers no merits-based justification for its motion to withdraw, petitioners need not identify any safety, security, technical, or environmental concerns in support of their legal issue contention.

Because we conclude that the petitioners' contention is now clearly within the scope of the proceeding, the legal issue contention is certainly material to this Board's decision on DOE's motion to withdraw. Moreover, the contention raises a genuine dispute with the DOE on a material issue of law—specifically, its authority to withdraw the Yucca Mountain Application. Accordingly, we find that petitioners have all proffered at least one admissible contention.¹⁷⁵

¹⁷⁴ Dep't of Energy, CLI-10-13, 71 NRC at ___ (slip op. at 3-4).

¹⁷⁵ Because the contention is purely legal in nature, we also note that petitioners need not satisfy all of the contention admissibility requirements applicable to a factual contention. The Commission has confirmed, for example, that a proponent of a legal issue contention need not provide supporting facts or expert opinion, as required by 10 C.F.R. § 2.309. Dep't of Energy, CLI-09-14, 69 NRC at 590. In the instant case, because petitioners' contention responds to a motion that is purely legal in nature, anything more than merely stating the legal issue and providing the foundational explanation for the issue is not required. Moreover, motion practice is part and parcel to any proceeding, and any procedural motion by an applicant necessarily falls within the scope. A contention based on such a motion is material because procedural issues must be addressed before reaching the merits issues of the proceeding.

IV. Conclusion

For the foregoing reasons:

1. The petitions to intervene of Washington, South Carolina, Aiken County, PIIC, and NARUC are granted.
2. As to each such petitioner, the following contention is admitted: DOE lacks the authority under the NWPA to withdraw the Application.
3. Judgment on the admissibility of all other contentions proffered by the foregoing five petitioners is reserved.
4. The motion of the Florida Public Service Commission for leave to participate as amicus curiae and to file a memorandum opposing DOE's withdrawal motion is granted.
5. DOE's motion to withdraw the Application is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

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Appendix

Proposed License Conditions Should DOE's Motion to Withdraw be Granted

Proposed conditions are set forth herein to help preserve the Department of Energy's (DOE) documentary material should DOE's motion to withdraw the construction authorization application for the Yucca Mountain geologic repository (Application) be granted.¹ These conditions are based in substantial part on previous DOE representations² and the joint report from the parties, the interested governmental participants (IGPs), and the petitioners.³

These conditions include: (1) those applicable prior to the conclusion of final appellate review (including resolution of any petitions for certiorari to the United States Supreme Court) of an order granting or denying DOE's motion to withdraw the Application (Final Termination); and (2) conditions for the period after Final Termination, including conditions applicable should DOE ever attempt to renew the Application or file a new application seeking authority to establish a facility at Yucca Mountain for the disposal or storage of spent nuclear fuel or other high-level nuclear waste (HLW).

In the Board's view, these conditions would help to assure that DOE's LSN document collection (LSNdc) will be appropriately archived.⁴ Therefore, the Board concludes that these

¹ Nothing in these conditions should be considered as superseding the NRC's policy decisions on the continued operation of the Licensing Support Network (LSN) in accordance with 10 C.F.R. Part 2, Subpart J.

² These include DOE's representations and answers to the Board's questions during the January 27 and June 4, 2010 case management conferences and DOE's written filings of February 4, February 19, and May 24, 2010. *See* Tr. at 345-405 (Jan. 27, 2010); Tr. at 316-447 (June 4, 2010); The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010); The Department of Energy's Status Report on Its Archiving Plan (Feb. 19, 2010); U.S. Department of Energy Answers to ASLB Questions from Order (Questions for Several Parties and LSNA) (May 24, 2010).

³ Joint Report Concerning Conditions Regarding DOE LSN Document Collection (June 18, 2010) [hereinafter Joint Report].

⁴ The use of the phrase DOE's "LSNdc" means the entire collection of documentary material (whether in full text or header only) currently available on its LSN participant website.

conditions should be imposed in any order granting DOE's motion to withdraw the application for the Yucca Mountain geologic repository.

A. Conditions Applicable Until Final Termination

1. DOE shall not take its LSNdc offline until there is Final Termination.
2. DOE shall maintain its LSNdc such that the public shall continuously have access to it through the NRC's LSN web portal with its current functionality until Final Termination.
3. As stated in A.1 above, DOE shall maintain⁵ the existing functionalities of its LSNdc via the NRC portal until Final Termination, independent of which office within DOE is assigned maintenance responsibility.
4. Unless this designation is modified by DOE, DOE's Team Leader,⁶ Archives and Information Management Team at DOE's Office of Legacy Management (LM) shall: (a) serve as LM's relevant point of contact for specific questions about problems with DOE documents or images that may be reported by other parties and IGPs to the proceeding; and (b) serve as LM's point of contact for persons who wish to acquire specific documents or categories of documents from the DOE LSNdc (according to current protocol) or copies of the entire DOE LSNdc (in accordance with B.13 and B.14 below).⁷
5. Should DOE wish to designate a different organization or person to serve as the point of contact for these tasks, DOE shall notify CAB-04, or such other presiding officer as the Commission may designate, all parties, and IGPs of the replacement and schedule for the change.
6. The transfer of DOE's institutional knowledge of the program activities, its records, and HLW issues shall be facilitated by the continuing involvement of the DOE Office of General Counsel in LM's response to requests for DOE LSNdc documents.

⁵ Maintenance of existing functionalities includes: (1) adding documents to the LSNdc as any relevant documents are generated or discovered; (2) modifying documents currently on the DOE LSNdc by changing their status from full text to header only or vice versa if a privilege is claimed or waived; (3) adding redacted documents, as appropriate; (4) producing privilege logs, as appropriate; and (5) producing documents when requested in accordance with Subpart J and applicable case management orders.

⁶ As confirmed by DOE, currently John V. Montgomery is serving as DOE's Team Leader, Archives and Information Management Team at LM. See Joint Report at 4.

⁷ The expertise and the mission of DOE's LM is the maintenance and preservation of archived records, which shall include the maintenance of DOE's LSNdc, its preservation, and its public availability as stated herein.

7. Until Final Termination, to ensure the electronic availability of DOE's documentary material,⁸ and to resolve any disputes with respect thereto during the period prior to Final Termination, CAB-04, or such other presiding officer as the Commission may designate, shall maintain continuing jurisdiction to enforce the terms of these obligations.
8. DOE shall apply previously appropriated funds, seek in good faith additional necessary appropriations, and, if funded, expend those appropriations to maintain the existing functionality of the DOE LSNdc in a manner consistent with the various conditions in this section until Final Termination.

B. Conditions Applicable After Final Termination

1. After Final Termination, the text, image, and bibliographic header files that comprise the DOE LSNdc shall be archived by LM. The archiving of the DOE LSNdc in the LM facility shall not commence until Final Termination.
2. The files that comprise the DOE LSNdc shall be on magnetic tapes that shall be maintained by DOE's LM. LM shall archive the following files that comprise each document in the DOE LSNdc: (a) text files (HTML format); (b) image files (TIFF or JPEG formats); and (c) bibliographic header files (XML format).
3. On or before the time LM loads the DOE LSNdc onto its storage area network, it shall create a compiled PDF file of each imageable document in the LSNdc and thereafter shall preserve those PDF files.⁹
4. As currently planned by DOE, the tapes shall be stored at a facility in Morgantown, West Virginia, and the data, including a PDF file of each document, shall be loaded onto a storage area network which can be electronically searched and retrieved. Consistent with the period before Final Termination, DOE shall notify CAB-04, or such other presiding officer as the Commission may designate, all parties, and IGPs to this proceeding of any change should DOE designate a different LM team leader or organization to archive the DOE LSNdc.
5. While text and image files of: (a) non-imageable documentary material;¹⁰ (b) documents upon which DOE has asserted a legal privilege as represented on DOE's privilege log; (c) copyright documents; and (d) documents from DOE's employee concerns program will not be loaded onto the magnetic tapes and LM's storage area network, bibliographic

⁸ See 10 C.F.R. §§ 2.1001 and 2.1003 (defining the scope of documentary material).

⁹ DOE asserts that the compiled PDF file will not be in a searchable PDF format. Joint Report at 7.

¹⁰ "Non-imageable" material may include, but is not limited to, items such as data currently stored on DVDs or CDs that could not be scanned and made available on the LSN in text or image format, digital computer printouts, over-sized drawings, physical items (e.g., core samples, metallurgic specimens), and strip charts.

headers for these categories of the DOE LSNdc shall be loaded onto the LM tapes. LM shall provide copies of non-imageable documentary materials in accordance with B.13 and B.14.

6. The documentary material represented only by bibliographic headers in the LSNdc shall be archived and retained in accordance with the same records schedule as the rest of the DOE LSNdc.
7. DOE shall preserve the physical samples, specimens, and other items that are only represented on the DOE LSNdc by bibliographic headers for the same duration as the LSN collection. Upon request, DOE shall work with a requester to provide access to such items. If physical items were produced by another party to this proceeding, but were represented on the DOE LSNdc as a bibliographic header only, DOE shall consult with that party about the physical items' storage. If DOE has physical samples and specimens in its or its agents' possession that currently have no LSN headers, DOE shall work with parties and IGPs to verify whether such samples or specimens should have been represented by a header. If so, DOE shall produce a header and insert it into the LSN in the next monthly LSN update cycle. Controversies regarding whether an item is or is not documentary material shall be forwarded to CAB-04, or such other presiding officer as the Commission may designate, for resolution.
8. After Final Termination, DOE shall preserve its LSNdc for 100 years. This commitment shall be met regardless of whether the DOE LSNdc shall be deemed temporary or permanent. Upon request, the public shall be entitled to receive copies of the DOE LSNdc through DOE's LM during the 100-year period. Such requests must comply with B.13 and B.14. DOE shall likewise comply with the Federal Records Act and any requirements of the National Archives and Records Administration (NARA).
9. The archived DOE LSNdc shall be compiled into documents at the directory level with each directory containing the bibliographic header file, the text file, and all of the image files comprising a document. The directory name shall correspond to the participant accession number of the document.¹¹
10. Because the compiled PDF files that shall be created and stored by LM (see B.3) will not be in a searchable PDF format, DOE shall maintain with the PDF files its existing text files that have the optical character recognition (OCR) searchability.¹²
11. After Final Termination, LM shall use a replacement search index that will allow LM to search for documents in the archived DOE LSNdc in order to conduct word searches or search for a particular document using its DOE OCR text files, identify the document, and then electronically produce the corresponding document.

¹¹ This is intended to ensure that, even without a document management software system, the directory structure will define where one document ends and another begins.

¹² DOE asserts that it plans to maintain its text files created for the LSNdc because they have superior quality and searchability characteristics as compared to those generated through a standard PDF creation of a document. Joint Report at 7.

12. DOE shall ensure that the integrity and content of the LSNdc remains intact following any change in format or storage location of the LSNdc. If a problem or issue is identified with respect to the integrity or content of the LSNdc, the issue shall be brought to the attention of LM, which shall work with the requester in a good faith effort to resolve the issue.
13. DOE shall make and provide a copy on electronic media to the LSN Administrator and/or CAB-04, or such other presiding officer as the Commission may designate, of the entire DOE LSNdc, or those documents that are responsive to specific search requests, which documents were previously publicly available on the DOE LSNdc. If requested by others, DOE shall make and provide to the requester a copy on electronic media of the same DOE LSNdc. The requester shall submit all requests in writing and reimburse DOE for all of the costs of copying, including all labor costs associated with such response. DOE shall provide an itemized statement for reimbursement to the requester. Only those documents which were previously publicly available on the LSNdc shall be provided. DOE shall provide such copies after the transition of the LSNdc to LM, and after LM has created its replacement search index, activated its new search engine, and compiled PDF files.
14. After a requester receives a copy of the DOE LSNdc, or specific documents in the DOE LSNdc, and LM notifies the requester that the requested material contains privacy-protected information and identifies those documents that contain such information, DOE shall work with the requester to redact the identified privacy-protected information, or otherwise delete the copy of the document that contains such information, and provide the requester with a replacement copy of the document with the privacy information redacted. As discussed in B.5 to B.7, LM shall also provide copies of non-imageable material to the extent such information can be readily copied, the requester identifies the information with specificity, and the requester complies with the terms of paragraph B.13 and of this paragraph. Unless DOE and the requester agree otherwise, the requester shall receive the entire DOE LSNdc, or particular documents from the DOE LSNdc that are responsive to the requester's specific document request, in bibliographic header (XML file), text (HTML file), and image (PDF file) form.
15. To the extent possible, DOE shall redact unclassified but sensitive security information (e.g., unclassified Naval Nuclear Propulsion Information and Safeguards Information), proprietary information, and privacy information from documents containing such information. If such information cannot be redacted from documents in the DOE LSNdc, then a bibliographic header file for such documents, but not a text or image file, shall be contained in the LM tapes of the DOE LSNdc. The documentary material represented only by bibliographic headers in the LSN shall be transferred to LM for archiving with the DOE LSNdc, and these unredacted copies shall also be retained in accordance with the same records schedule as the rest of the DOE LSNdc.
16. Following Final Termination, DOE's LSN vendor, CACI, shall submit its then-current copy of the DOE LSNdc to LM. Such information provided by CACI shall be preserved for 100 years following Final Termination.
17. While there is currently no search engine for the DOE LSN collection outside the LSN, such a search engine shall be developed by LM (loading the data onto servers and creating a

search engine for that collection). The search engine shall function in a manner consistent with the way the LSN is currently managed relative to being able to search for and retrieve documents.

18. Since the header and text files in DOE's LSNdc are currently in a searchable format, LM shall use a replacement index utility to search for documents using those same files, and no files need to be converted for that purpose.¹³
19. Because DOE cannot represent how NARA will make the DOE LSNdc available, LM shall create a search function for DOE's LSNdc and maintain it for the 100-year period following Final Termination, regardless of whether the documents are deemed to be temporary or permanent.
20. The copy of DOE's complete LSNdc to be provided to a requester by DOE shall include any existing LM index of materials.
21. In the event the LSN needs to be re-established for whatever purpose, DOE shall work with the NRC to make all the documents presently in its LSNdc electronically available on the LSN, or whatever successor system is established.
22. While DOE does not know the specific cost of the tasks to be performed to archive and preserve its LSNdc,¹⁴ DOE shall apply existing resources, seek in good faith additional necessary appropriations, and, if funded, expend those appropriations to meet the commitments stated herein relating to the maintenance of its LSNdc after Final Termination through the 100-year period.

¹³ The existing header files and the existing text files of the DOE LSN collection are presently in a searchable format, and LM shall create an index or spidering-type function to replace what the NRC's LSN portal now does. DOE confirms that, in using the copy which a requester would receive from DOE of its complete LSNdc, no unique proprietary DOE software will be involved and that presumably off-the-shelf software will work. Joint Report at 10.

¹⁴ DOE does not know the specific costs because these costs are still being developed and funding of such costs is subject to congressional appropriations.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY)
)
(High-Level Waste Repository))
)

Docket No. 63-001-HLW
ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting Intervention to Petitioners and Denying Withdrawal Motion) (LBP-10-11)**, dated June 29, 2010, have been served upon the following persons by Electronic Information Exchange.

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MEMORANDUM AND ORDER (Granting Intervention to Petitioners and Denying Withdrawal Motion)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
MEMORANDUM AND ORDER (Granting Intervention to Petitioners and Denying Withdrawal Motion)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
MEMORANDUM AND ORDER (Granting Intervention to Petitioners and Denying Withdrawal Motion)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
MEMORANDUM AND ORDER (Granting Intervention to Petitioners and Denying Withdrawal Motion)

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[Original Signed by Linda D. Lewis]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
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