

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of :)	July 9, 2010
)	
U.S. Department of Energy (Docket No. 63-001))	Docket No. 63-001-HLW
)	
(High Level Waste Repository Construction Authorization Application))	ASLBP No. 09-892-HLW-CAB04
)	

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

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GRANTING INTERVENTION TO STATE OF WASHINGTON, STATE OF
SOUTH CAROLINA, AKIN COUNTY, SOUTH CAROLINA, AND PIIC**

Nye County, Nevada ("Nye County"), the host County for the proposed geological repository for nuclear waste at Yucca Mountain, hereby submits the following brief in support of the June 29, 2010 decision by the Construction Authorization Board 04 ("CAB04" or "Board") of the Nuclear Regulatory Commission ("NRC" or "Commission") denying the Department of Energy's ("DOE") Motion to Withdraw its License Application With Prejudice ("Motion to Withdraw") and granting intervention to additional parties.¹

BACKGROUND

A. Overview of the Yucca Mountain NRC Licensing Proceeding

On June 3, 2008, DOE submitted the "Yucca Mountain Repository License Application," ("LA") with NRC seeking authorization to begin construction of a permanent high-level waste

¹ Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11 (June 29, 2010) (unpublished)(Hereinafter "Order Denying Withdrawal").

repository at Yucca Mountain pursuant to the Nuclear Waste Policy Act ("NWPA").² Prior to submitting the LA, DOE had spent decades locating the appropriate site for the repository, determining that it could be safely constructed and operated, obtaining approval for the site location from the President and Congress, and then preparing the LA.³

On October 17, 2008, the Commission issued a "Notice of Hearing and Opportunity to Petition for Leave to Intervene," which provided a 60-day window for intervention petitions to be filed.⁴ Nye County and numerous other petitioners submitted timely petitions to intervene, as well as safety and environmental contentions and requests for a hearing; two petitioners filed requests to participate as interested government participants. *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-09-14, 2009 WL 1883741 *1 (2009), *citing* Memorandum and Order, (Identifying Participants and Admitted Contentions), LBP-09-6 at pp. 3-8 (May 11, 2009) (unpublished).

The three Construction Authorization Boards ("CABs") designated to rule on the petitions granted the petitions to intervene; granted the interested governmental participant requests under 10 C.F.R. § 2.315(c); and admitted over 300 of the proposed contentions. 10 C.F.R. § 2.315(c) (2010). Memorandum and Order, (Identifying Participants and Admitted Contentions), LBP-09-6 (May 11, 2009) (unpublished) at pp. 105-106.⁵ Pursuant to CAB04's "Case Management Order #2," dated September 30, 2009 (unpublished), formal discovery began in the proceeding with the submission of initial witness disclosures by the parties on or before

² See Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008); corrected 73 Fed. Reg. 40,883 (July 16, 2008).

³ See discussion, *infra*, at Section II B., pp 15-17.

⁴ *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-08-25, 68 NRC 497 (2008); *see also*, *In the Matter of U.S. Dept. 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 (October 22, 2008).

⁵ Later, CAB04 also granted NCAC and the Joint Timbisha Tribal Group party status after both parties satisfied LSN certification requirements. Memorandum and Order (Granting Party Status to the Native Community Action Council) (August 27, 2009) (unpublished) at 2; Memorandum and Order (Granting Party Status to the Joint Timbisha Shoshone Tribal Group) (August 27, 2009) (unpublished) at 2.

October 10, 2009.⁶ Discovery was limited to "Phase I" issues: contentions that related to the subject-matter of Volumes 1 and 3 of the NRC Staff's Safety Evaluation Report scheduled for completion. Depositions were scheduled to begin on February 16, 2010. *Id.* at 7. In addition, CAB04 conducted hearings on legal contentions on January 26-27, 2010, but no decision has been rendered on those issues.

On February 1, 2010, just before the first scheduled depositions were to be conducted, DOE filed a "Motion to Stay the Proceeding" ("Stay Motion"). DOE's Stay Motion stated that the President, in the proposed budget for fiscal year 2011, "directed that the Department of Energy 'discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010 . . .'" Stay Motion at 1. DOE also stated that funding for Yucca Mountain would be eliminated in 2011.⁷ *Id.*

Ultimately, DOE indicated its intent to withdraw the LA by March 3, 2010, and requested a stay of discovery pending consideration of the Motion to Withdraw in order to avoid unnecessary expenditure of resources by the Board and parties. Stay Motion at 2. The Stay Motion was unopposed by the parties, and CAB04 granted an interim stay of the discovery on February 2, 2010, and a stay of the proceeding on February 16, 2010.⁸

B. DOE's Motion to Withdraw With Prejudice

On March 3, 2010, DOE filed a Motion to Withdraw its license application for a permanent geological repository at Yucca Mountain, and asked that the withdrawal be granted with prejudice, but with no other conditions. Motion to Withdraw at 1. DOE sought dismissal with prejudice "because it does not intend ever to re-file an application to construct a permanent repository for spent fuel and high-level radioactive waste at Yucca Mountain." Motion to

⁶ Memorandum and Order, (CAB Case Management Order #2) (Sept. 30, 2009) (unpublished).

⁷ The Stay Motion referenced statements in the proposed budget prepared by the Office of Management and Budget for Fiscal Year 2011. Budget of the U.S. Government, Fiscal Year 2011, Appendix at 437 (available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/doe.pdf>).

⁸ Memorandum and Order, (Granting Interim Suspension of Discovery) (February 2, 2010) (unpublished); Memorandum and Order, (Granting Stay of Proceeding) (February 12, 2010) (unpublished).

Withdraw at 3, note 3. In its only other attempt to actually justify the withdrawal with prejudice, DOE further asserted that the NRC "should defer to the Secretary [of Energy's] judgment that dismissal of the pending application with prejudice is appropriate..." Motion to Withdraw at 4 & n. 4. DOE requested that no other conditions be placed on the dismissal, beyond those related to the LSN. Subsequent to DOE filing its Motion to Withdraw, Congress has not:

- amended the NWPA in response to the President's budget request;
- altered the statutory designation of Yucca Mountain as the sole site for the geological repository; or
- acted in any way upon the President's 2011 budget request as it pertains to the DOE in general or the Yucca Mountain repository in specific.

Nevertheless, DOE has moved forward with reprogramming its FY-2010 appropriation funding the licensing proceedings.⁹

The State of South Carolina, the State of Washington, Akin County, South Carolina, and a group of private individuals residing in the area of DOE's Hanford Reservation in the State of Washington have filed federal lawsuits seeking to halt DOE's actions. Those suits have been consolidated in the United States Court of Appeals for the District of Columbia Circuit.¹⁰ Five Petitions to Intervene in the NRC licensing proceedings were also filed by the State of South Carolina, the State of Washington, Aiken County, South Carolina, the National Association of Regulatory Utility Commissioners (NARUC), and the Prairie Island Indian Community (PIIC) [the "Five Additional Petitioners"]¹¹ specifically to challenge DOE's right to withdraw the

⁹ See, e.g., Letter from Steve Isakowitz, Chief Financial Officer, DOE, to Senator Peter J. Visclosky, Chairman, Subcommittee on Energy and Water Development, Committee on Appropriations, United States House of Representatives (Feb. 17, 2010)

¹⁰ Currently pending before the U.S. Court of Appeals for the District of Columbia Circuit are four cases challenging the ability of DOE to withdraw its pending Yucca Mountain license application. All of those cases have been consolidated: *In re Aiken County*, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); *State of South Carolina v. U.S. Dept. of Energy, et al.* (D.C. Cir., docketed Mar. 26, 2010) (filed in the 4th Cir. on Feb. 26, 2010 and transferred to the D.C. Cir. on Mar. 25, 2010); and *Ferguson, et al., v. U.S. Dept. of Energy, et al.* (D.C. Cir. filed Feb. 25, 2010). A fourth case was filed after DOE petitioned the Commission for interlocutory review: *State of Washington v. U.S. Dept. of Energy, et al.* (D.C. Cir. filed April 13, 2010) and has now been consolidated.

¹¹ Petition of the State of South Carolina to Intervene (February 26, 2010); State of Washington's Petition For Leave To Intervene and Request for Hearing (March 3, 2010); Petition of Aiken County, South Carolina (March 4, 2010); National Association of Regulatory Utility Commissioners Petition to Intervene (March 15, 2010), and the Petition to Intervene of the Prairie Island Indian Community (March 16, 2010).

license application under the NWPA, the National Environmental Policy Act ("NEPA"), the Administrative Procedure Act ("APA"), and NRC regulations.

On March 5, 2010, CAB04 issued a scheduling order for briefing on the various petitions to intervene.¹² Memorandum and Order, (Scheduling Order) (March 5, 2010) (unpublished). The parties completed briefing on the first three intervention petitions on April 5, 2010, and on the petitions by NARUC and PIIC on May 11, 2010. Nye County supported all the petitions to intervene and continues to do so.¹³ DOE did not oppose intervention by the Five Additional Petitioners, but sought certain conditions assuring the prompt briefing and resolution of the contentions related to its Motion to Withdraw.

On April 6, 2010, CAB04, acting on its own authority, issued an order suspending further briefing on the pending petitions to intervene and on DOE's Motions to Withdraw and stated that CAB04 would await review of similar statutory and regulatory claims filed with the United States Court of Appeals for the District of Columbia Circuit.¹⁴ DOE and Nye County filed petitions with the Commission for Interlocutory Review of the April 6, 2010 CAB04 Order on April 12 and April 15, respectively. On April 23, 2010, the Commission vacated the April 6, 2010 CAB04 Order suspending the Licensing case and noted that the CAB should render a decision on DOE's Motion to Withdraw no later than June 1, 2010.¹⁵

CAB04 responded to the Commission's April 23, 2010 Order, by noting the complexity of the issues involved and the need for further briefing and oral argument. It therefore stated that CAB04 would decide DOE's Motion "as soon as possible after June 1 and, in no event, later than

¹² On March 16, 2010, the CAB issued a similar scheduling Order pertaining to the pending Petitions to Intervene filed by the National Association of Regulatory Commissioners and the Prairie Island Indian Community. Memorandum and Order (Filing Times for Answers and Replies) (March 16, 2010) (unpublished).

¹³ CAB04 granted the Motions to Intervene when it issued its Order Denying Withdrawal on June 29, 2010. Nye County supports CAB04 intervention decisions for the reasons articulated in Nye's previous filings regarding the additional intervenors, and incorporates those filings by reference herein.

¹⁴ Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (April 6, 2010) (unpublished).

¹⁵ *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-10-13, 71 NRC ____ (slip op. at 5.) (April 23, 2010).

June 30." ¹⁶ On May 17, 2010 Nye County and the other participants and intervenors docketed their briefs regarding DOE's Motion to Withdraw in accordance with the CAB04 April 27, 2010 scheduling Order. Nye County was among the parties that opposed DOE's Motion to Withdraw. On May 27, 2010, DOE submitted its response to the various briefs opposing DOE's Motion to Withdraw.

On June 3 and 4, 2010, CAB04 conducted hearings in Las Vegas, Nevada. On June 3, 2010, CAB04 conducted oral arguments pertaining to DOE's Motion to Withdraw. On June 4, 2010, CAB04 conducted a Case Management Conference relating to the preservation of DOE's LSN collection if the current proceeding were to be terminated and DOE's license application withdrawn. Pursuant to the instructions of CAB04, the participants and petitioning parties negotiated a Joint Report to the CAB concerning the preservation and disposition of DOE's LSN collection and physical specimens and samples. Joint Report Concerning Conditions Regarding DOE LSN Document Collection (June 18, 2010), (unpublished).

On June 29, 2010, CAB04 issued its Memorandum and Order (Hereinafter "Order Denying Withdrawal"), simultaneously granting the pending Petitions to Intervene by the State of Washington, State of South Carolina, Aiken County, and PIIC, and denying DOE's Motion to Withdraw its LA.¹⁷ On June 30, 2010, the Secretary to the Commission issued an Order establishing the briefing schedule for participants to support or oppose CAB04s decision.¹⁸ This Brief is submitted pursuant to the Secretary's Order.

C. Standard of Review

A licensing board's principal role in the NRC adjudicatory process "is carefully to review all of the evidence, including testimony and exhibits, and to resolve any factual disputes."

¹⁶ Memorandum and Order (Setting Briefing Schedule) (April 27, 2010) at 1-2 (unpublished).

¹⁷ Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11 (June 29, 2010) (unpublished) (Hereinafter "Order Denying Withdrawal").

¹⁸ Order (June 30, 2010) (unpublished).

AmerGen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259 (2009), citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 411 (2005). The Commission will not exercise its authority to make *de novo* findings of fact “where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003); *See also General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit No. 1) ALAB-881, 26 NRC 465, 473 (1987); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 723 (2005). Thus, CAB04's factual basis for granting intervention in this case and any factual determinations based upon the administrative record made by CAB04 in support of its interpretation of the NWPA are entitled to deference under the cases cited previously.

Conversely, the Commission has noted that “[a]s for conclusions of law, our standard of review is more searching. We review legal questions *de novo*. We will reverse a licensing board's legal rulings if they are 'a departure from or contrary to established law.'" *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Nuc. Reg. Rptr. P 31608, 2009 WL 5246219 *5 (N.R.C.) CLI-10-05, (January 2, 2010), quoting *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 190 (2004).

The principal legal issue in the instant appeal is CAB04's determination that DOE lacked the legal authority under the NWPA and the Commission's regulations to unilaterally withdraw its docketed license application for a Yucca Mountain repository. Accordingly, if the Commission decides to review the legal aspects of the CAB04 decision, it will do so *de novo*.

ARGUMENT

I. THE NRC SHOULD NOT REVIEW THE CAB04 DECISION TO DENY DOE'S MOTION TO WITHDRAW, BUT SIMPLY CERTIFY IT AS A FINAL AGENCY DECISION RIPE FOR JUDICIAL REVIEW

In its June 30, 2010 Scheduling Order, the Commission invited participants, among other actions, "to file briefs with the Commission as to whether the Commission should review the Board's decision." Order (June 30, 2010)(unpublished). No participant in this proceeding is entitled to an appeal as of right from the Order denying DOE's motion with withdraw. CAB04's Order is interlocutory by its nature, because the order does not resolve the merits of the LA and construction authorization for the Yucca Mountain geologic repository.¹⁹ Therefore, any NRC review is a matter of discretion. Given CAB04's clearly correct interpretation of the NWPA precluding unilateral DOE withdrawal of the LA without Congressional action, and the statements of three NRC Commissioners during their recent confirmation hearings before the United States Senate on February 9, 2010, it is appropriate for NRC to leave the CAB04 decision un-reviewed, and simply certify it as the final agency decision of the Commission. Such action would also expedite this matter, and allow it to be consolidated with litigation raising identical and similar issues under the NWPA now pending before the United States Court of Appeals for the District of Columbia.²⁰

Should NRC decide to review the CAB04 decision, that decision should be upheld in its entirety for the reasons presented in Sections II. through V. below.

II. CAB04 PROPERLY FOUND THAT YUCCA MOUNTAIN IN NYE COUNTY, NEVADA, WAS DESIGNATED BY LAW AS THE SOLE SITE FOR THE REPOSITORY AND THAT THE NWPA PRECLUDES WITHDRAWAL OF THE LA WITHOUT CONGRESSIONAL ACTION

In summarizing its decision, CAB04 denied DOE's Motion to Withdraw because:

¹⁹ See 10 C.F.R. § 2.1015.

²⁰ See note 10, *supra*.

[T]he Nuclear Waste Policy Act of 1982, as amended (NWPA), 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.²¹

As more fully discussed below, CAB04's interpretation of the NWPA is the only reasonable construction of the NWPA, since that Act grants DOE no discretion to withdraw its LA once it has been docketed with the Commission. The express provisions of the NWPA, its legislative history, and key decisions under the NWPA all unequivocally support this conclusion and CAB04's decision on the merits.

A. The NWPA Grants DOE No Discretion to Withdraw the LA Once it had been Docketed at the Commission.

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.²² In section 111 of the Act, 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."²³ Congress decided to solve the problem by enacting the NWPA, which mandated "a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance" of safe disposal of the nuclear materials.²⁴

Because of the long-term nature of such a massive project in the national interest, and the recognized political sensitivity of the project, Congress specified detailed procedures in the NWPA designed to result in the licensing and construction of a scientifically acceptable repository. *See* Pub. L. No. 97-425; 97 Stat. 3792, 3794, 3797 (Jan. 7, 1983) (noting the change

²¹ Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11 (June 29, 2010) (unpublished), at 3 (footnote omitted).

²² 42 U.S.C. § 10131(b)(2). DOE argues that the Secretary of DOE has discretion to unilaterally set policy in any manner he sees fit for the repository under the Atomic Energy Act, in spite of the fact that Congress established specific policy for the repository when it enacted the NWPA and amendments related to Yucca Mountain.

²³ *Id.* at § 10131(a)(3).

²⁴ *Id.* at § 10131(b)(1).

in course between Administrations and stating an essential feature of the statute is a "legislated schedule for Federal decisions and actions for repository development.") All the NWPA's provisions governing the repository licensing process are written in terms of the *mandatory* duties of the President, the Secretary of DOE, and the NRC, which, when read together, make it clear that the LA may not be unilaterally withdrawn by DOE. *See Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1243 (D.C. Cir. 2009). DOE acknowledges that it cannot withdraw its LA if such action would be contrary to a statute passed by Congress,²⁵ but then ignores or misconstrues the relevant NWPA mandates directing that the Yucca Mountain LA, once docketed, must be considered by NRC until a merits-based decision is reached.

In 1987, Congress amended the NWPA to focus exclusively on the assessment and development of the Yucca Mountain site. Pub. L. No. 100-203, Title V, Subtitle A §§5001-5065, 101 Stat 1330, 13330-227 to 1330-255 (Dec. 22, 1987) *codified* throughout the NWPA, 42 U.S.C §10100 et seq. Following the requirements of the NWPA, 42 U.S.C. § 10135, Congress overrode opposition from the State of Nevada in 2002 and designated Yucca Mountain as the sole site for development of a deep geological repository for nuclear waste in the United States.²⁶ Following that designation, the Secretary of Energy **was required** to submit an application for construction authorization by section 114 (b) of the NWPA. 42 U.S.C. § 10134(b) ("the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site...").

Congress did not include a provision in the NWPA for DOE withdrawal of the LA once it was filed and docketed. To the contrary, the Secretary of Energy was directed to update

²⁵ DOE Reply Brief (May 27, 2010) at 21.

²⁶ *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. EPA*, 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").

Congress annually on the status of the application, and to prepare and update a schedule for project decision-making that "portrays the optimum way to attain operation of the repository." 42 U.S.C. § 10134(c), 10134(e)(1), respectively. DOE withdrawal of the LA without scientific justification is certainly antithetical to DOE finding "an optimum way for attaining operation." Congress also directed that all site-specific activities at possible repository locations other than Yucca Mountain be phased out by DOE in an orderly manner. 42 U.S.C. § 10172(a) (1).

Once the LA was filed by DOE, the NWPA directs that NRC "shall consider" DOE's application and "shall issue a final decision approving or disproving the issuance of a construction authorization" within three years of the date of LA submission, unless a statutorily authorized extension is granted. 42 U.S.C. § 10134(d) (NWPA section 114(d)). In interpreting these key provisions of the NWPA, CAB04 reached the only conclusion possible and determined that the NWPA precluded DOE from unilaterally withdrawing the application prior to NRC's decision on the merits of the LA.²⁷ The plain meaning of these NWPA directives, well-established principles of statutory construction, and relevant federal case law all support the CAB04 decision.

"'Shall' has long been understood as 'the language of command'" except for "rare exceptions ... that apply only where it would make little sense to interpret 'shall' as 'must.'" *Zivotofsky v. Sec'y of State*, 571 F.3d at 1243. The use of the word "shall" is "a command that admits of no discretion on the part of the person instructed to carry out the directive." *Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). As pointed out by several parties at the oral argument on June 3, 2010, it would make no sense to command DOE to file a LA, and compel NRC to "consider" it, if DOE could unilaterally

²⁷ Order Denying Withdrawal at 8, 11.

withdraw the application once docketed. That interpretation renders key provisions of the NWPA a nullity, in contravention of well-established principles of statutory construction.²⁸

In reviewing the Congressional actions related to the designation of Yucca Mountain as the sole repository site, the United States Court of Appeals for the District of Columbia Circuit stated that "Congress had affirmatively approved the Yucca site for development of a repository" and because "Congress has settled the matter, ... we [the court], no less than the parties, are bound by its decision." *Nuclear Energy Inst., Inc. v. EPA*, 373 F. 3d 1251, 1302, 1310 (D.C. Cir. 2004). That designation as the sole repository site triggered an interrelated set of statutory requirements for DOE to prepare and file the LA and for the NRC to process and review the LA until a final decision on the merits is reached by NRC. The plain language of those statutory requirements supports the argument that *affirmative* Congressional action is required to permanently halt the licensing proceeding. *See F.T.C. v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Circuit 2009), *citing Williams v. Taylor*, 529 U.S. 420 (2000).

As CAB04 pointed out, allowing DOE to unilaterally withdraw the LA would also ignore the distinction that Congress drew between the site characterization phase and the License Application and NRC processing phase.²⁹ Congress expressly contemplated that, during site characterization, DOE might determine the Yucca Mountain site to be "unsuitable" for development as a repository. 42 U.S.C. § 10133(c)(3). 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." 42 U.S.C. § 10133(c)(3)(F).

Clearly, when Congress wanted to permit DOE to terminate activities, it knew how to do so, while still maintaining control of the process. In contrast, the absence of any similar

²⁸ *City of Portland, Oregon v. EPA*, 507 F.3d 706, 711 (D.C. Cir 2007).

²⁹ Order Denying Withdrawal at 8.

provision in section 114 of the NWPA, which directs what is to transpire after DOE has submitted its LA to the NRC, demonstrates that Congress never authorized DOE to withdraw the LA before the NRC considered its merits in accordance with the NWPA requirements. “[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.” *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (internal quotations omitted).

Indeed, until it filed the Motion to Withdraw, DOE claimed no authority under the NWPA to unilaterally withdraw its LA. In May 2009, the Secretary of DOE testified before Congress that DOE would “continue participation in the Nuclear Regulatory Commission (NRC) license application process, consistent with the provisions of the Nuclear Waste Policy Act.”³⁰ DOE and the President have now reversed field and stated that the site is “unworkable” as the geological repository for nuclear waste. Yet, they provide no scientific evidence to support that conclusion, and did not so much as bother to explain why the site was unworkable in a technical record or order. DOE Motion to Withdraw at 1; DOE Reply Brief at 31, n. 102. Indeed, DOE admits that “the Secretary’s judgment here is not that Yucca Mountain is unsafe or that there are flaws in the LA, but rather that it is not a workable option and that alternatives will better serve the public interest.”³¹ The Administration’s premature and unsupported decision to attempt withdrawal was made despite DOE’s own extensive scientific record to the contrary, well in advance of NRC’s decision on the merits of the LA, before the development of recommendations

³⁰ FY-2010 Appropriations Hearing Before the Subcomm. on Energy and Water Development, and Related Agencies of the S. Comm. on Appropriations, 111th Cong. (2009). The Administration requested, and Congress approved, funding for the current fiscal year in order to continue the Yucca Mountain license application process. DOE, *FY 2010 Congressional Budget Request, Vol. 5*, 504 (FY-2010 budget request “is dedicated solely to supporting ... the NRC LA process.”), 505, 520, 540; P.L. 111-85, 123 Stat. 2864, 2868. However, on February 17, 2010, DOE advised Congress that it intends to “reprogram” these funds and use them instead to immediately begin to shut down the entire Yucca Mountain project.

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

for alternatives from the President's own Blue Ribbon Panel, and prior to any action by Congress in accepting the Administration's budget proposal relative to DOE's FY-2011 appropriation.

There are two possibilities for Congressional action that would render the President's plan for permanent abandonment of Yucca Mountain legally enforceable. First, Congress could directly amend the NWPA to eliminate both the designation of Yucca Mountain as the sole repository site and the statutory timetables for decision-making by NRC on the LA. In the alternative, if Congress enacts the President's Yucca Mountain appropriations exactly as the Administration has requested it, and includes unambiguous report language supporting the termination of further consideration of the Yucca Site, it could conceivably be argued that Congress has passed legislation that effectively eliminates Yucca from further consideration without directly amending the NWPA.³² In the absence of such legislation, however, DOE, however, is prohibited from withdrawing its pending LA.

B. The Legislative History of the NWPA Also Demonstrates that Congress Had No Intention to Allow DOE to Unilaterally Withdraw its LA Once Docketed with NRC

Congress bemoaned the well-documented difficulties in siting a geologic repository as early as 1982. *See*, H.R. Rep. No. 97-491(I) at 26 (1982). Those difficulties led Congress to enact the NWPA, which prescribed a detailed process for identifying a permanent geological

³² Where an appropriations act amends substantive law, the change is only intended for one fiscal year, unless there is clear language that a permanent amendment to substantive law is intended. *See Whatley v. District of Columbia*, 447 F.3d 814, 819 (D.C. Cir. 2006). In the FY 2010 House Committee Report, the Committee actually stated its support for the position that the Yucca Mountain application review should continue in order to answer all relevant technical questions. The Committee made \$5,000,000 available for the Blue Ribbon Commission "*provided that Yucca Mountain is considered in the review.*" H.R. Report No 111-203 at 82, 85 (emphasis added). The Conference Report states that the Blue Ribbon Commission shall "consider *all* alternatives for nuclear waste disposal." Energy and Water Development and Related Agencies Appropriations Act, 2010 Conference Report, H.R. Report No. 111-278 at 21 (2009) (emphasis added). The Conference Report contains a reconciliation provision directing that "report language included by the House which is not contradicted by the report of the Senate or the conference, and Senate report language which is not contradicted by the report of the House or the conference is approved by the committee of conference." *See* H.R. 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. 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 licensing 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]," that is, for Yucca Mountain licensing activities. Appropriations Act at 2864

repository site for the safe containment of both civilian and defense nuclear waste and spent nuclear fuel. 42 U.S.C § 10101 *et seq.* (1982).

Following the mandates of the NWPA, DOE continued the search begun in the 1970s for multiple acceptable repository sites. In 1986, DOE ranked the appropriateness of the various sites it had investigated and assigned Yucca Mountain the highest ranking, using an "accepted, formal scientific method." DOE, *A Multiattribute Utility Analysis of Sites Nominated For Characterization For the First Radioactive Waste Repository — A Decision Aiding Methodology* 1-5-1-15 (1986). From 1987 to 2002, DOE continued its intensive and probing analysis of the Yucca Mountain site pursuant to the NWPA. 42 U.S.C. §§ 10132-10133 (2009); DOE, *Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the NWPA of 1982* (2002) ("Suitability Determination") at 7-8; 10 C.F.R. Part 963 (Yucca Mountain Site Suitability Guidelines). DOE investigated for the better part of two decades and invested "billions of dollars and millions of hours of research" on Yucca Mountain. Suitability Determination at 1. As a result of this investigation, DOE determined that the site was "far and away the most thoroughly researched site of its kind in the world." *Id.*

In 1987, Congress amended the NWPA to focus exclusively on the Yucca Mountain site, departing from the statute's original multiple site selection and designation scheme. Pub. L. No. 100-203, Title V, Subtitle A §§5001-5065, 101 Stat 1330, 13330-227 to 1330-255 (Dec. 22, 1987) *codified* throughout the NWPA, 42 U.S.C §10100 *et seq.* In January 2002, the Secretary of Energy formally advised the President that a geological repository could be safely located at Yucca Mountain.³³

[T]he amount and quality of research the [DOE] has invested into [determining the safety and suitability of Yucca Mountain as the Site for a repository] – done by top flight people. . . – is nothing short of staggering. After careful evaluation, I am convinced that the product of over 20 years, millions of hours, and four billion

³³ H.R. Rep. No. 107-425, at 3 (2002); Suitability Determination at 1.

dollars ... provides a sound scientific basis for concluding that the site can perform safely during both the pre- and post-closure periods, and that it is indeed scientifically and technically suitable for development as a repository.

Suitability Determination at 45.

Based upon the Secretary's findings and DOE's Suitability Determination, the President recommended Yucca Mountain to Congress in February 2002 as the nation's sole geological repository. 42 U.S.C. § 10134(a)(2)(A) (2009); H.R. Rep. No. 107-425 at 3. The Governor and legislature of the State of Nevada submitted a notice to Congress opposing DOE's and the President's recommendation. H.R. Rep. No. 107-425 at 3.

Following the procedures of the NWPA, 42 U.S.C. § 10135, Congress overrode opposition from the State of Nevada and designated Yucca Mountain as the sole site for development of a deep geological repository for nuclear waste in the United States. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002); 42 U.S.C. §§ 10172; 10132-10135 (1987). The concerted Executive and Legislative Branch efforts over two decades indicate that Congress did not intend to allow DOE to unilaterally abandon Yucca Mountain based its view of nuclear waste policy. The NWPA plan for the repository certainly cannot lawfully be undone by the current Administration's FY-2011 budget **request**. Well over ten billion dollars and more than twenty-years of time and effort have been expended in locating, analyzing, designating, and preparing both the site and the DOE's LA. *As a matter of law*, Yucca Mountain's designation as the sole site for the nuclear waste repository may *only* be modified by an affirmative legislative act that either directly amends the NWPA or manifests Congressional intention to permanently abandon the site. *See Nuclear Energy Inst., Inc. v. EPA*, 373 F. 3d 1251, 1302, 1310 (D.C. Cir. 2004).

A Presidential budget request asking Congress to zero-out the Yucca Mountain appropriations for FY 2011, transfer DOE's Yucca Mountain program offices to other elements within DOE, and fund a blue ribbon panel to explore alternatives, standing alone, does not amount to the required Congressional action.

C. Ancillary Provisions of the NWPA and Decided Federal Cases Under that Statute All Point to the Same Conclusion: DOE May Not Unilaterally Withdraw Its LA Without Congressional Action

The NWPA contains numerous provisions that clearly anticipate completion of a nuclear waste repository and federal receipt of nuclear waste before 1998. Therefore, the NWPA and the Standard Contract entered into by nuclear utilities and DOE for the disposal of nuclear waste³⁴ assigned DOE a mandatory duty to develop a repository for spent nuclear fuel ("SNF"), pursuant to a timely designated schedule. *Indiana Michigan Power Co v. United States Department of Energy*, 88 F.3d 1272, 1277 (1996); *Tennessee v. Herrington*, 806 F.2d 642, 648 (1986). As the Court held in *Indiana Michigan*, there exists a reciprocal obligation between the payment of SNF fees under the NWPA and Standard Contract, and DOE's performance of its SNF disposal duties: "we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." *Indiana Michigan, supra*, at 1277.

It is impossible to reconcile DOE's Motion to Withdraw, which is not predicated upon any safety concern or flaw in the LA, with its duties under the NWPA and Standard Contract to begin receiving waste by 1998. Congress surely did not set such a deadline and at the same time authorize DOE to withdraw its LA based solely upon asserted "policy grounds" documented only in DOE's Motion to Dismiss and without a record of decision.

³⁴ Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11 *et seq.*)

III. CAB04 CORRECTLY DETERMINED THAT DOE'S REQUEST TO WITHDRAW ITS LICENSE APPLICATION WITH PREJUDICE IS NOT AUTHORIZED UNDER NRC REGULATIONS AND DECISIONS

A. Applicability of NRC's Regulations Governing LA Withdrawals "With and Without Prejudice"

CAB04 correctly concluded that NRC regulations, including 10 C.F.R. § 2.107 which deals generally with withdrawal of NRC license applications, cannot override the clear statutory mandates of the NWPA. However, even if 10 C.F.R. § 2.107 is deemed a "law applicable" to the repository licensing,³⁵ the Motion to Withdraw should nevertheless be denied.

The NWPA directed the NRC to develop regulations governing the licensing of the repository and to review the LA "in accordance with the laws applicable to such applications." 42 U.S.C. § 10134(d). 10 C.F.R. Part 63 contains no specific provisions for DOE to withdraw the repository application. Part 2 provides the following regarding the withdrawal of NRC license applications in general:

10 C.F.R. Sec. 2.107 Withdrawal of Application.

- (a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.
- (b) The withdrawal of an application does not authorize the removal of any document from the files of the Commission.
- (c) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the Federal Register a notice of the withdrawal of an application if notice of receipt of the application has been previously published. 10 C.F.R. § 2.107 (2010).³⁶

³⁵ NEI and CAB04 have made a strong case that it does not apply. See Order Denying Withdrawal at 13-14; NEI Opposition to DOE Motion for Withdrawal at 11.

³⁶ This particular NRC rule is modeled after Federal Rule of Civil Procedure 41(a)(2). That rule deals with voluntary and involuntary dismissals of civil cases in Federal Court, and the rule is not easily adapted to the instant repository licensing proceeding. For example, involuntary dismissals (with prejudice) are usually reserved for instances of plaintiff misconduct. For purposes of this discussion, we assume the 10 C.F.R. § 2.107 (2010) applies to some degree. Under either the Federal Rule or NRC's regulation, DOE has the burden of proof to demonstrate that withdrawal should be granted. The administrative hearing record itself must provide evidence that supports any

As CAB04 pointed out, section 2.107 does not authorize an applicant to withdraw a license application as DOE asserts.³⁷ Rather, when an applicant for a nuclear license requests a withdrawal after a notice for hearing has been issued, the presiding officer (CAB or Licensing Board) will determine, in the first instance, whether it is appropriate to deny the request, or dismiss with or without prejudice. 10 C.F.R § 2.107(a); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 50-51, 1999 WL 595216, *3 (NRC July 28, 1999).

In the absence of section 2.107, applicants for nuclear power licenses, who filed their applications voluntarily, might seek to abandon their applications at any time. Properly construed, however, 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. In effect, section 2.107 authorizes licensing boards to deny unconditioned withdrawals.³⁸

Nothing in section 2.107 gives any applicant the presumptive right to unilaterally withdraw its application. Furthermore, the Commission’s case law cannot be considered truly “applicable” or controlling because no previously decided case involved an applicant that was mandated by statute to submit its application, as is the case with DOE’s LA under the NWPAA. Applicant withdrawal of a nuclear reactor license is based solely upon business judgment. *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51, 1983

findings concerning a dismissal, any conditions imposed, and any harm alleged. *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134, 1982 WL 31593, *2+ (NRC Sep 20, 1982), citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice §41.05(1) at 41-58. DOE has spent billions of dollars in support of the Yucca Mountain project, and developed a substantial record in support of its safety. DOE's request that its own LA be dismissed with prejudice, requires an explanation for the 180 degree shift in its policy and legal position on the repository. In making that demonstration DOE is faced with and must overcome its own record that was intended to demonstrate that the site is safe and in the public interest. Indeed, DOE admits that its Motion is not predicated upon the fact that Yucca is unsafe or the LA flawed in any way. DOE Reply at 31, note 102.

³⁷ Order Denying Withdrawal at 13.

³⁸ *Id.*

WL 31390, *2 (NRC 1983). That reasoning, however, does not apply to the Yucca Mountain repository. Unlike power reactor license applications, the Yucca application was not voluntary, but was filed by DOE in accordance with the mandates of the NWPA. Yucca Mountain, unlike a nuclear power plant, was selected after decades of study by the Executive and Legislative Branches with federal dollars.

To the extent NRC case law is instructive at all in resolving this matter, that body of law forecloses the possibility of withdrawal with prejudice. In determining whether to permit DOE to withdraw its application with prejudice, the CAB04 applied the above-referenced withdrawal rule to the facts already developed in the record. *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134, 1982 WL 31593, *2+ (NRC Sep 20, 1982), *citing LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice §41.05(1) at 41-58. CAB04 found no facts in this record support dismissal with prejudice.

The ordinary meaning of “dismissal with prejudice” is “an adjudication on the merits, and a final disposition, barring the right to bring or maintain an action on the same claim or cause.” It is well-settled law that a dismissal with prejudice under section 10 CFR § 2.107 is treated as a decision on the merits. *Philadelphia Electric Co.*, (Fulton Generating Units 1 and 2), ALAB-657, 14 NRC 967, 973, 1981 WL 27754 (1981), *citing Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560, 564 (3rd Cir. 1976); 5 Moore’s Federal Practice 41.05[2] at 41-75 (2d ed. 1981). In this licensing proceeding, the Board has considered intervention petitions, admitted over three hundred contentions, started formal discovery, and noticed and conducted hearings on Phase 1 legal contentions. There has been, however, no CAB or NRC ruling on the merits of any admitted contention. Nevertheless, DOE has inexplicably requested that NRC grant its Motion to Withdraw and dismiss the LA with prejudice in direct contravention of the relevant precedent discussed in detail below. Motion to Withdraw at 1.

B. CAB04 Properly Determined That There is No Legal Basis for Granting DOE's Extraordinary Request for a Withdrawal With Prejudice, Since NRC Has Not Finally Adjudicated Any Admitted Contention

NRC has never granted a Motion to Dismiss with prejudice in any reported case and has uniformly held that dismissal with prejudice is a severe sanction that should be reserved for those unusual situations that involve substantial prejudice to the proposing party or to the public interest in general. *See, e.g., Energy Fuels Nuclear, Inc.*, 42 N.R.C. 197, 198, 1995 WL 808338, *1 (Nov. 3, 1995); *Puerto Rico Electric Power Authority*, 14 NRC at 1132-1133; *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, 50 NRC at 51. In *Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1)*, LBP-84-33, 20 NRC 765, 767-768 (1984), the Licensing Board refused to grant a motion to dismiss with prejudice, notwithstanding the fact that the applicant acquiesced in the moving party's request for dismissal with prejudice.

Dismissal in this case would contravene a uniform line of NRC decisions since at least 1981 that conform to the standard federal view that a dismissal with prejudice should only be granted after the merits of the case have been evaluated and finally adjudicated and severe harm will befall the moving party. *See, e.g., Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3)*, LBP-8281, 16 NRC 1128, 1135, 1982 WL 31593, *4+ (NRC Sept 20, 1982); *Yankee Atomic Electric Company (Yankee Nuclear Power Station)*, 50 NRC 45, 51, 1999 WL 595216 (July 28, 1999) (requests for dismissal with prejudice denied where final adjudication not reached). Dismissals with prejudice are not favored. *Sequoyah Fuels Corporation*, 38 N.R.C. 304, 304, 1993 WL 534753, *1 (Dec 15, 1993).

DOE, the license applicant in this case, has inexplicably asked for a dismissal of its own license application with prejudice. With the exception of the *Cincinnati Gas and Electric Co.*, the relevant reported cases all involve intervenors opposing a project, and not the license applicant, requesting dismissal with prejudice and seeking to preclude the applicant from re-filing.

Even though there has been no adjudication on the merits of any contention in the Yucca Mountain license proceeding, DOE, the States of Nevada and California, and other intervenors have stated their support for DOE's Motion to withdraw with prejudice. DOE's Motion to Withdraw does not adequately explain why it seeks a dismissal with prejudice.³⁹ DOE's request is without a rational explanation or record-based finding to support it. Therefore, should NRC honor DOE's request, that action would not only contravene the NWPA and NRC's regulations, but would also violate the Administrative Procedure Act ("APA") as a final agency action that is unreasonable, arbitrary, capricious, and otherwise contrary to law. 5 U.S.C. § 706 (2010). As previously noted, the NRC has uniformly rejected dismissal with prejudice requests where no contention has been adjudicated in the petitioner's favor.

Notwithstanding DOE's assertions to the contrary, NRC owes no deference to DOE in interpreting the NWPA's licensing requirements for the repository or in construing NRC's own regulations, such as 10 CFR § 2.107. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *U.S. Dept. of Energy (High-Level Waste Repository)*, 67 N.R.C. 205, 216, 2008 WL 6600193 (2008). NRC is the sole licensing authority for Yucca Mountain under the NWPA, and it alone is authorized to impose conditions on a withdrawal, such as withdrawal with prejudice, based upon the facts in the record.

In a waste storage facility case, the Board refused an intervenor's request for a dismissal with prejudice in a decision that is perhaps most instructive to this proceeding, *Northern States Power Company* (Independent Spent Fuel Storage Installation), 46 NRC. 227, 231, 1997 WL 687861, *3 (NRC Oct 15, 1997) ("*Northern States Power*"). In *Northern States Power*, NRC noted that the merits of the intervenor's contentions had not been reached, and further held that the existence of other, more suitable nuclear storage sites did not constitute grounds for dismissal with prejudice. *Id.*

³⁹ See discussion, *supra*, at pp. 3-4.

The President and DOE have similarly stated that Yucca Mountain is "not workable" and that DOE will seek more suitable alternatives to nuclear disposal at Yucca Mountain in the Administration's budget proposal. Motion to Stay at 1 and n.6, *supra*. Pursuant to *Northern States Power*, seeking alternatives to disposal at Yucca Mountain does not justify dismissal of the LA with prejudice. Moreover, the NWPA clearly states that nuclear disposal alternatives to Yucca need not be considered in this licensing proceeding. 42 U.S.C. § 10134 (f)(6). Therefore, seeking alternatives to storage at Yucca Mountain should not be grounds for dismissal with prejudice of the instant action.

Even Board adjudication of a contention is insufficient, standing alone, to impose dismissal with prejudice. Appeal Boards have held that if an applicant requests termination of a construction permit proceeding prior to Commission resolution of issues raised by an intervenor on appeal from the initial Board decision authorizing construction, fundamental fairness dictates that termination of the proceedings be accompanied by a vacation of the initial decision on the ground of mootness. *Rochester Gas & Electric Corporation* (Sterling Power Project, Nuclear Unit 1), ALAB-596, 11 NRC 867, 869 (1980); *U.S. Dept. of Energy* (Clinch River Breeder Reactor Plant), ALAB-755, 18 NRC 1337, 1338-1339 (1983), *vacating* LBP-83-8, 17 NRC 158 (1983). In addition, a withdrawal of a license transfer application also moots an adjudicatory proceeding on the proposed transfer if final judgment has not been reached. *Niagara Mohawk Power Corp., et. al.* (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-00-9, 51 NRC 293, 294 (2000). At most, dismissal with prejudice is justified, if at all, only where a party has finally prevailed on that contention before the Commission. *See Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3)*, 16 NRC at 1135. In such cases, the NRC determines whether a *partial* dismissal with prejudice is justified by examining the status of the adjudication or appeal and determining whether it should impose a condition on the withdrawal—such as finding that an

applicant is precluded from litigating certain issues in the event of a re-filing. Such action is regarded as partial dismissal with prejudice. *Id.*

In the seminal *Philadelphia Electric Company* case, referenced above, the ALAB noted that a dismissal with prejudice in that case could have resulted in several possible limitations on applicant's future activities. *Philadelphia Electric Co.*, 14 NRC at 967. The Philadelphia Electric Company could have been barred from: (1) re-filing an identical application to construct an HTGR reactor at the Fulton site; (2) filing a new application to construct any type of reactor at any site; or (3) filing a new application to construct any type of nuclear reactor at Fulton. *Id.* In over-ruling a Licensing Board's decision to grant the dismissal with prejudice, the ALAB in *Philadelphia Electric Company* emphasized that a dismissal with prejudice **requires** a showing of harm to either a party or the public interest in general. *Id.* at 973-74, *citing* Fed. R. Civ. Pro. 41(2)(2); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d at 604; 5 Moore's Federal Practice 41.05[1] at 41-73 (2d ed. 1981); *Boston Edison Co.*, (Pilgrim Station Units 2 and 3), LBP-74-62, 8 AEC 324, 327 (1975). The ALAB stated that the dismissal with prejudice, and the effective prohibition against Philadelphia Electric Company's future use of the Fulton site for any nuclear reactor, was "particularly harsh and punitive," and required a strong demonstration of harm that the dismissal with prejudice served to remedy. *Philadelphia Electric Co.*, 14 NRC at 974. It found no such harm and, instead, directed dismissal without prejudice. *Id.* *See also* *U.S. Army* (Jefferson Proving Ground Site), 62 NRC 546, 2005 WL 4131573 (NRC Oct. 26, 2005).

Similar reasoning applies to DOE's withdrawal of the license application for Yucca Mountain. DOE does not contend that Yucca Mountain would be unsafe or that the LA is flawed. No safety contentions have been adjudicated yet.

C. CAB04 Properly Concluded That the Record Contains No Evidence of Harm Of the Type That Justifies Any Withdrawal

The administrative hearing record itself must provide evidence that supports (1) any findings concerning a dismissal , (2) any conditions imposed, and (3) any harm alleged. *Duke Power Co.*, 16 NRC at 1134, citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d at 604; 5 Moore's Federal Practice §41.05(1) at 41-58. In the instant case, DOE has built a massive record which supports a determination that the repository can be safely constructed and operated at the Yucca Mountain site.⁴⁰ After decades of preparing its safety case and priming its witnesses to support its LA, DOE now wants to ignore its own factual record and withdraw the LA with prejudice.

Neither DOE, Nevada, nor any other party can point to the requisite harm, demonstrated on the record, justifying a dismissal with prejudice in this case. Order Denying Withdrawal at 21-22. This issue was discussed in depth in the *Northern States Power Company* case, in which intervenor Florence Township requested dismissal with prejudice. The Township detailed in its petition to intervene and contentions the damage its population would allegedly suffer if the applicant's site for an ISFSI were approved. *Northern States Power Company* 46 NRC 227, 1997 687861 *3. The NRC noted that these *allegations of injury* had not been adjudicated before the request for withdrawal was submitted, and could therefore be re-raised if a new storage facility was sought later. The only discrete factor that Florence Township asserted to support a with-prejudice termination was the availability of other sites for applicant to use as an ISFSI, if necessary. The NRC noted, however, that such factors could be considered in the context of a new application, when and if Northern States resubmitted its application. NRC considered it premature to consider the argument during the motion to withdraw proceedings. *Id.* Thus, mere allegations of injury, standing alone, do not justify dismissal with prejudice. *Northern States Power Company* at 46 NRC 227, 1997 687861 *3.

⁴⁰ See discussion and authorities cited , supra, at pp. 6-7.

The mere possibility of the application being re-filed, or of another hearing, standing alone, certainly does not justify a dismissal with prejudice. That kind of harm - the possibility of future litigation with its expenses and uncertainties - is the consequence of any dismissal without prejudice. It does not provide a basis for departing from the traditional rule that a dismissal should be without prejudice. *Duke Power Co.*, 16 NRC at 1135, citing *Jones v. SEC*, 298 U.S. 1, 19 (1936); 5 Moore's Federal Practice 41.05(1) at 41-72 to 41-73 (2nd ed. 1981); *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 50, 1983 WL 31390, *3 (Jan. 19, 1983). *Puerto Rico Electric Power Authority* 14 NRC at 1132, 1135; *Philadelphia Electric Co.* 14 NRC at 978-979; *LeCompte v. Mr. Chip Inc.*, 528 F.2d at 603.

Similarly, an intervenor's allegations of psychological harm from the pendency of the application, even if supported by the facts on the record, do not warrant the dismissal of an application with prejudice. *Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)*, LBP-84-43, 20 NRC 1333, 1337-1338 (1984), citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

The State of Nevada and some of the other intervenors have also alleged that water or other natural resources will be negatively impacted, and that land values will suffer if Yucca Mountain is licensed. These unproven allegations, standing alone, are insufficient to grant dismissal with prejudice. Where an intervenor opposes a project and raises allegations of harm to natural resources or property values that have not been adjudicated in favor of the intervenor, such allegations do not provide a basis for dismissal of an application with prejudice. See *Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)*, 20 NRC at 1337, citing *Puerto Rico Electric Power Authority*, 14 NRC at 1133-34; *Philadelphia Electric Co.*, 14 NRC at 979.

The principal harm that must be considered is that which the public will suffer if NRC's consideration of Yucca Mountain site is prematurely halted. Final siting and operation of the

Nation's waste repository would be delayed. Billions of taxpayer dollars utilized to assess the Yucca Mountain site and develop the LA will have been wasted if the licensing process is not carried forward, at least to the point of an NRC determination on the technical merits of construction authorization. As even the Secretary of Energy publicly admitted, that process would provide valuable scientific information on the feasibility of geological repositories in the future. Nuclear utilities that have paid billions of dollars into the nuclear waste fund would have to continue to store nuclear waste at over a hundred sites until an alternative is sited and built.

Therefore, the decision to withdraw in this case, even without prejudice, should be denied assuming NRC regulations are applicable. NRC has noted that 10 C.F.R. § 2.107 would allow the denial of a request to simply withdraw a voluntarily submitted license application under certain circumstances, such as where the result would be unlawful. *See Sequoyah Fuels Corporation*, 41 N.R.C. 179, 192; Nuclear Reg. Re. P 31234, 1995 WL 135729 (NRC). Therefore, if we assume that 10 C.F.R. § 2.107 is applicable to this case, NRC should affirm the CAB04 Order in the public interest and because withdrawal violates the NWPA. Even if no party to the proceeding had opposed DOE's Motion to Withdraw, NRC, acting as protector of the public interest, should, on its own authority, *sua sponte*, raise the issue and decide that a withdrawal is not in the public interest. *See Florida Power and Light Company (Turkey Point Plant Unit Nos. 3 and 4)*, 32 N.R.C. 181, 185-86, 1990 WL 324437, *3 (Sept. 25, 1990) (Board's *sua sponte* authority to be used to protect the public interest).

IV. PERMANENT ABANDONMENT OF THE YUCCA MOUNTAIN SITE REQUIRES A DECISION ON THE RECORD UNDER THE ADMINISTRATIVE PROCEDURE ACT AND CONGRESSIONAL APPROVAL

Because CAB04 concluded that DOE's Motion to Withdraw must be denied under the NWPA, CAB04 declined to address various positions raised by the participants pertaining to the Administrative Procedures Act and the National Environmental Policy Act ("NEPA"). *See Order Denying Withdrawal at 5, n. 13.* Nevertheless, Nye County maintains that these two

statutes provide additional and independent legal bases for denial of DOE's Motion to Withdraw, regardless of NRC's ultimate position on the NWPA issues.

During oral argument on June 3, 2010, CAB04 endeavored in vain to obtain from counsel for DOE the administrative record supporting DOE's Motion to Withdraw with prejudice.⁴¹ DOE's position is that its docketing Motion to Withdraw is the **only** documentary support required, because DOE has discretion to withdraw its LA at any time, based upon policy considerations pursuant to the Atomic Energy Act and the NWPA.⁴² 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).⁴³ The NWPA, however, is a subsequently-enacted, much more specific statute that directly addresses the matters at hand.⁴⁴ As the Supreme Court has stated, "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended."⁴⁵ Utter failure to document the bases for this nationally significant decision to withdraw-- beyond counsel's assertions in the Motion to Withdraw-- violates the APA and is arbitrary, capricious, and unreasonable. 5 U.S.C. § 706 (2010). NRC authorization of such a withdrawal would similarly violate the APA.

⁴¹ Transcript at 307-309.

⁴² *Id.*

⁴³ 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.

⁴⁴ See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

⁴⁵ *Id.* at 143 (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)).

V. PERMANENT ABANDONMENT OF THE YUCCA MOUNTAIN SITE IS A "MAJOR FEDERAL ACTION" UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT WHICH REQUIRES AN ENVIRONMENTAL IMPACT STATEMENT

NEPA requires federal agencies to prepare an environmental impact statement (EIS) with alternatives for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The Council on Environmental Quality regulations implementing NEPA define a "major federal action," to include "concerted actions to implement a specific policy or plan" and "systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.18(b)(3).

DOE's decision to terminate the licensing proceeding and abandon the Yucca Mountain site certainly constitutes a major federal action under NEPA, as does any revision or expansion of an ongoing federal program that substantially alters its operational status. *See Andrus v. Sierra Club*, 442 U.S. 347, 363 (1979.); *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 234-35 (9th Cir. 1990). Therefore, DOE's proposal to forever terminate the Yucca Mountain project requires the preparation of an EIS that assesses the potential harm from yet another delay in implementing the Congressional approved solution to the nation's nuclear waste problems. Indeed, DOE's own NEPA regulations require an EIS for actions affecting high level waste facilities, including geological repositories. 10 CFR § 1021, Appendix D to Subpart D. Over 100 nuclear power plants and numerous defense nuclear waste facilities throughout the nation would be required to modify temporary and permanent waste disposal plans tied to the eventual operation of Yucca Mountain, the centerpiece for such programs. These plans have environmental, economic, and social impacts for communities located near existing nuclear facilities, and for the Nation as a whole.

In spite of these unequivocal NEPA mandates, DOE asks NRC to permit permanent dismantlement of the project without first preparing the required EIS. Abandonment of the Yucca Mountain site is not, as DOE asserts, adoption of the "No Action" alternative briefly analyzed in DOE's previous EISs regarding the Yucca Mountain project. DOE's Motion to Withdraw, if granted, would alter the direction of a long-standing national program set by statute and aimed at resolving an entrenched environmental nuclear waste problem. DOE's unsupported about-face on the Yucca Mountain repository would alter not just the operational status quo of the repository itself, but an entire national nuclear waste program tied to Yucca Mountain. Such action clearly requires an EIS.

VI. REGARDLESS OF THE ULTIMATE DECISION ON THE MERITS OF DOE'S MOTION TO WITHDRAW, DOE'S REQUEST FOR DISMISSAL WITHOUT CONDITIONS MUST NOT BE GRANTED

As noted previously, dismissal of the LA was rejected by the CAB in its Order Denying Withdrawal based upon the NWPA and the administrative record in this case. The Commission always has the authority to condition the withdrawal of a license application on such terms as it thinks just. 10 C.F.R. 2.107(a) (2010). DOE has requested that no other conditions, except those related to the LSN, be imposed by the NRC. CAB04 adopted numerous LSN-related conditions, which were set forth in the Appendix to the Order Denying Withdrawal. Nye County believes that three conditions are of such importance that they warrant being addressed here.

Prior to and during the case management hearing on June 4, 2010, the various participants, including DOE, were able to reach a general agreement regarding retention and preservation of DOE's LSN documents and its physical samples and specimens. Order Denying Withdrawal at 23. Subsequently, the Board directed that the parties, interested governmental participants, and the petitioners to intervene confer with DOE and submit agreed-upon proposed conditions. A set of proposed conditions regarding DOE's LSN documents was submitted by the

various parties and participants. Order Denying Withdrawal at 23-24. CAB04 proposed conditions, based in substantial part on the submitted agreement, are set forth in the Appendix of the Order Denying Withdrawal. Order Denying Withdrawal, Appendix.

The parties and interested governmental participants were not able to agree on all aspects of preserving and retaining DOE's research, scientific, and data files or its physical samples and specimens. Over DOE's objection, CAB04 imposed the following provision regarding physical samples and specimens as one of its retention and preservation conditions:

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. Order Denying Withdrawal, Appendix, Section B (7).

The conditions and terms prescribed at the time of any withdrawal or stay must bear a rational relationship to the conduct and legal harm at which they are aimed. A Licensing Board has substantial leeway in defining the circumstances in which an application may be stayed or withdrawn, so long as the conditions and terms set by the Board bear a rational relationship to the conduct and legal harm at which they are aimed. *See Philadelphia Electric Co.* 14 NRC at 974; *Pacific Gas and Electric Co.*, 17 NRC at 49.

All of the parties to the Yucca Mountain proceedings agree that appropriate terms and conditions for the preservation of documents, the administrative record, and data are necessary. Such terms and conditions are also supported by relevant NRC decisions. *See, e.g., Pacific Gas*

& *Electric Co.*, 17 NRC at 51 (dismissal without prejudice granted with the condition that millions of discovery documents be preserved).

Nye County noted in its February 16, 2010 preliminary filing and in its Brief Opposing DOE's Motion to Withdraw its License Application With Prejudice, that Nye County believes that all Yucca Mountain technical information, records, documents, physical samples and scientific data, as well as the materials in the LSN collection, constitute a critical national resource and source of information.⁴⁶ DOE's proposed handling of such samples and specimens would potentially allow some items to be destroyed in a matter of months following final termination of this proceeding, assuming DOE is permitted to withdraw its LA. Nye County reiterates that all of the above-listed Yucca Mountain information, paid for by citizen taxpayers, should be protected and preserved for future scientific and policy purposes. As such, CAB04's decision to impose a retention and preservation requirement for the physical samples and specimens related to DOE's Yucca Mountain technical information, records, documents, scientific data, research, and characterization efforts are reasonable and should be affirmed by the Commission.

All of the parties to the proceedings also recognize that if the site is not to be used for the Yucca Mountain project, some site restoration will be required. Even the Administration has acknowledged in its budget request for FY-2011 that site restoration activities are required as a part of any withdrawal.⁴⁷ NRC has previously dismissed cases without prejudice and still imposed site restoration conditions when an applicant abandons a license application after site activities or construction have taken place. *Gulf States Utility Company*, (River Bend Station, Units 1 and 2), 20 N.R.C. 1478, 1483, 1984 WL 49886, *4 (Nov 20, 1984); *Public Service Company of Oklahoma Associated Electric Cooperative, Inc.* (Black Fox Station, Units 1 and 2), 17 NRC 410, 410, 1983 WL 31420, *1 (Mar 07, 1983). Regardless of NRC's position on the

⁴⁶ Nye County Preliminary Response to DOE's February 4, 2010, Answers to CAB04's LSN Questions (February 16, 2010) at 2.

⁴⁷ See authorities cited at n. 6, *supra*.

merits of the Motion to Withdraw, custodial and/or remedial terms and conditions must become an integral part of any NRC ruling on the Motion to Withdraw. If DOE is allowed to abandon the site, either temporarily or permanently, continued oversight will be required by DOE, the State of Nevada, and Nye County in order to protect the public and residents of Nye County. Consistent with the grant and oversight provisions of 42 U.S.C. § 10136, NRC should impose appropriate custodial and oversight conditions on any suspension or withdrawal it determines is appropriate in this case. 42 U.S.C. § 10136 (2010).

Finally, NRC should prohibit DOE from taking any irreversible action related to land use, water rights, contracts, or permits necessary for construction and operation of Yucca Mountain, pending further action by Congress. DOE should not be allowed to indirectly disable the project without Congressional approval any more than it should be allowed to directly abandon the project in contravention of the NWPA, the APA, and NEPA.⁴⁸

CONCLUSION

The plain language of the NWPA precludes DOE from unilaterally withdrawing its filed Yucca Mountain LA without Congressional action. The NWPA has not been amended to allow permanent abandonment of the Yucca Mountain license. Nor has Congress yet acted upon the Administration's budget request for FY-2011, which proposes actions in furtherance of DOE's stated goal of permanently closing the Yucca Mountain repository project. NRC's general regulation governing withdrawal of nuclear license applications, 10 C.F.R. §2.107, cannot override the NWPA statutory requirements. However, even if NRC's regulation is considered applicable, it does not alter the result in this case. No NRC case has authorized a withdrawal with prejudice, even where the applicant agreed to the withdraw. NRC has uniformly refused to grant such requests, or to impose conditions that preclude re-filing of the application, where there has been no final adjudication on the merits of the contentions and where there has been a failure to

⁴⁸ See discussion, *supra*, at Section I.

demonstrate harm to the parties or the public. Granting any form of withdrawal without the involvement of Congress would harm the public and is contrary to important national interests. Moreover, DOE's request for withdrawal is unsupported by the administrative record in this case and premature. Even the Administration's 2011 budget request for Yucca Mountain has not been acted upon by Congress. Permanent abandonment of Yucca Mountain without Congressional action clearly violates statutory requirements of the NWPA, the APA, and NEPA. In short, DOE's request lacks any legally cognizable basis. Therefore, Nye County asks that the NRC either refuse to review CAB04's Order, or expeditiously review it and determine that the NWPA, NEPA, and APA preclude permanent abandonment of the Yucca Mountain project, absent an amendment to the NWPA or other Congressional action which unambiguously signals that the Legislative Branch agrees with DOE's plans.

Accordingly, Nye County requests that NRC either refuse to review CAB04's decision and simply certify it as a final agency decision, or expeditiously review and affirm CAB04's decision denying DOE's Motion to Withdraw its License Application for a repository at Yucca Mountain, Nevada, for the reasons stated herein.

Respectfully Submitted,

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July 9, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Nye County Brief Supporting CAB04 Decision Denying DOE's Motion to Withdraw LA, dated July 9, 2010, in the above-captioned proceeding have been served on the following persons by Electronic Information Exchange.

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