

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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| In the Matter of |) | |
| |) | |
| U.S. DEPARTMENT OF ENERGY |) | Docket No. 63-001-HLW |
| |) | |
| (High Level Waste Repository) |) | July 9, 2010 |

**BRIEF OF THE STATE OF NEVADA IN SUPPORT OF REVIEW AND
REVERSAL OF THE LICENSING BOARD'S DECISION DENYING THE
DEPARTMENT OF ENERGY'S MOTION TO WITHDRAW ITS LICENSE
APPLICATION WITH PREJUDICE**

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I. INTRODUCTION.

In accordance with the Commission Secretary's June 30, 2010 Order, the State of Nevada ("Nevada") submits the following brief in support of Commission review and reversal of the Construction Authorization Board's ("CAB") June 29, 2010 Memorandum and Order ("M&O") insofar as it denied the Department of Energy's ("DOE") motion to withdraw, with prejudice, its application for a construction authorization for the proposed Yucca Mountain high-level waste repository. Nevada does not request review of any of the other elements of the M&O. In addition, the following parties to this proceeding support and join in Nevada's brief: Joint Timbisha Shoshone Tribal Group, Native Community Action Council, and Clark County.

II. STATEMENT OF FACTS.

DOE's motion comes at a pivotal point in the history of high-level radioactive waste disposal in the United States, when potential new directions are being pursued by fresh minds unburdened by the mistakes of the past. A brief history of that program is in order to place DOE's motion in its proper context. Four events in that history prior to the filing of DOE's motion stand out: Lyons,

Kansas; the site nomination and selection process under the 1982 NWPA; the 1987 NWPA amendments; and the filing of DOE's license application.

The effort to site a repository in Lyons, Kansas, in the early 1970's failed because, rather than taking the time to complete the necessary scientific investigations, the Atomic Energy Commission ("AEC") offered disputable safety conclusions and pressed ahead. Ultimately, the site proved to be unsuitable. The AEC also bungled the political aspects of the debate. It was aware that construction of the repository would not proceed without the support of the State and local governments. However, the AEC lost the state and local political support it needed by failing to give any credence to the legitimate concerns of Kansas experts and by appearing to commit to the project before the scientific studies were completed in order to meet a promise to a powerful Senator to begin removing wastes from the State of Idaho. *See* J. Samuel Walker, "The Road to Yucca Mountain," University of California Press, 2009 (Walker), at 51, 74-75.

Two lessons may be learned from Lyons, Kansas. The first is that the Federal Government should not commit or even appear to commit to a site unless the necessary scientific investigations are completed and the results are favorable. The second is that State and local support is critical to success. The two lessons are related – acquiring and maintaining State and local support will be difficult if not impossible if the Government proponent fails to maintain its technical

credibility, and one sure way to lose that credibility is to commit to the project before the necessary scientific investigations and performance assessments are completed.

After Lyons, Kansas, failed, the AEC's successor agency (DOE) continued to investigate other possible repository sites. In accordance with the Nuclear Waste Policy Act of 1982 ("NWPA" or "Act"), DOE selected five sites for more detailed study: salt deposits in Mississippi, Texas, and Utah; basalt formations in Hanford, Washington; and volcanic tuff rock in Nevada. Walker at 181. The NWPA then called upon DOE to narrow the choices to three, all three of which were to be fully characterized so that any one failure would not destroy the whole program. *See* NWPA §§ 112(b), 113. In 1986, the DOE Secretary announced that the final three choices were the ones in Deaf Smith County, Texas; Yucca Mountain, Nevada; and Hanford, Washington. Walker at 182. The designation prompted angry protests from all three areas, whose representatives believed that the scientific investigations were not completed, and the protests became part of a nationwide movement when DOE cancelled the search for an eastern site, notwithstanding an informal agreement among NWPA supporters that the second site called for by the NWPA would be located in an eastern State. *Id.*

With the program now in shambles, Congress reacted by enacting the Nuclear Waste Policy Act Amendments Act of 1987, which directed DOE to limit

its future site characterization efforts to Yucca Mountain, notwithstanding the advice from NRC (and others) that the scientific information was insufficient to make an informed safety conclusion.¹ 42 U.S.C. 10172, Pub. L. 100-203, Title V, § 5011(a), Dec. 22, 1987, 101 Stat. 1330-227. The NWPA Amendments Act of 1987 nullified the site selection procedures in the original NWPA and attempted to place the entire high-level waste disposal burden on one western state with no nuclear power plants or other high-level waste generating facilities. The supporters of the NWPA Amendments Act of 1987 flagrantly ignored both of the lessons learned from Lyons, Kansas. First, they prematurely committed the Nation to a single disposal site not only before the necessary scientific investigations were completed, but also before any final licensing standards were in place. As one Congressional Staff member observed, "It's a roll of the dice with Yucca Mountain." Walker at 182. Second, supporters flagrantly ignored the objections of the host State, which believed (with good reason) that Nevada had been singled out simply because it was "the small kid on the block." *Id.*

By 2001, DOE had spent about \$4.5 billion characterizing the Yucca Mountain site, and its efforts established that the site was more complex than

¹ Prepared testimony of Robert Bernero, Deputy Director NMSS, June 29, 1987, appearing in S. Rep. No. 100-152, 100th Cong., 1st Sess. at 195 ("At the Yucca Mountain site, the major issues include geological concern such as the presence of potentially active faults and related ground motion [and] the presence of volcanism. . . . Hydrology is also a concern . . . groundwater flow patterns and regimes and travel times have yet to be fully determined. As at Hanford, the ability of the medium (tuff) to retard movement of radionuclides is not yet well understood.")

originally thought and that the underground environment was not as dry as Yucca proponents had expected. Walker at 183. But DOE pressed forward with Yucca Mountain much like its predecessor AEC pressed forward with Lyons, Kansas. In February 2002, DOE Secretary Abraham formally recommended the Yucca Mountain site to the President notwithstanding the Nuclear Waste Technical Review Board's conclusions that it had "limited confidence in current performance estimates generated by DOE's performance assessment model" and that DOE "has yet to make a convincing case that nuclear waste can safely be buried at Yucca Mountain." Hearings before the Senate Committee on Energy and Natural Resources on S.J. Res. 34, May 23, 2001, at 143, 157. President Bush promptly agreed with Secretary Abraham and recommended the site to the Congress. Citing numerous scientific flaws, Nevada Governor Guinn formally disapproved of the site, using the state veto procedure set forth in the NWPA. Walker at 183. Congress then formally overrode Nevada's veto by enacting H.J. Res. 87, using the special voting procedures set forth in the NWPA. The designation of Yucca Mountain as a repository site then became effective on July 23, 2002, when the President signed S.J. Res. 34 into law. 42 U.S.C. § 10135 *note*.

NWPA section 114(b), 42 U.S.C. § 10134(b), required DOE to file its license application within 90 days after the President's site recommendation became effective, or by October 21, 2002. October 21, 2002 came, went, and

receded into history without any application being filed. DOE also failed to plan adequately to meet its LSN requirements, and as a result its initial LSN certification was struck and its revised plan (one of many) to file the application in late 2004 was aborted. *See U.S. Department of Energy (High-Level Waste Repository, Pre-Application Matters)*, LBP-04-20, 60 NRC 300 (2004). The application was finally tendered on June 3, 2008, almost six years after the statutory deadline, and docketed three months later, on September 8, 2008.

Over 300 contentions were subsequently admitted in the NRC licensing proceeding, probably more than at any other time in the history of NRC regulation. Moreover, DOE faced other serious obstacles. For example, at the time DOE's motion to withdraw was filed on March 3, 2010, no significant progress had been made on funding or constructing the enormously expensive rail line that would be necessary to transport high-level nuclear waste through Nevada to the site. Moreover, construction and operation of a repository would require the appropriation of water resources owned by the public and administrated by the State of Nevada, and the State vigorously opposed the granting of the necessary State water use permits. A disinterested observer would reasonably conclude that a repository at Yucca Mountain would never be built and operated, even if the necessary NRC licenses were granted.

In the meantime, the near crisis atmosphere that permeated the Congressional debates over the NWPA of 1982 had completely dissipated. In 1982, NRC licensees and the Congress were gravely concerned that nuclear power plants would shut down because of a lack of adequate storage space for spent reactor fuel that was piling up in storage pools pending disposal. *See* NWPA section 111(a)(2), 42 U.S.C. § 10131(a)(2).² When DOE moved to withdraw its application twenty eight years later, more than 50 independent spent fuel storage installations across the United States stored more than 45,000 spent fuel assemblies and greater-than-Class C waste in more than 1,200 dry storage casks. NRC "Plan for Integrating Spent Nuclear Fuel Regulatory Activities," Revision 00, June 21, 2010, at C-1. The NRC opined that dry storage would be safe for at least 100 years and is evaluating whether it may be safe for 300 years. *Id.*; COMSECY-10-1007, Enclosure 1 at 10.

III. NEED FOR COMMISSION REVIEW.

The Commission's Rules of Practice indicate that Commission review of a Presiding Officer's order is warranted when "necessary to prevent detriment to public interest or unusual delay or expense," or when the order "involves a novel issue that merits Commission review at the earliest opportunity." 10 C.F.R. §§ 2.1015(d) and 2.323(f) (the latter is made applicable to this proceeding by 10

² Senator Alan Simpson, a key supporter of the NWPA, declared in 1982 that "[w]e're about to bring the nuclear industry to its knees unless we act now." Walker at 176.

C.F.R. § 2.1000). The M&O satisfies all of these review criteria. Whether the Yucca Mountain application may be withdrawn, enabling the Nation to put the troubled history of the Yucca Mountain Project finally behind it so that other solutions to the high-level waste disposal problem may be explored without prejudice, is a question of national importance. It would be contrary to the public interest for a subordinate tribunal to speak for the agency on a matter of this importance. Further, review and reversal of the M&O is necessary to avoid the unusual delay and expense associated with continuation of a licensing proceeding over the applicant's objection. Finally, it is clear that the M&O presents novel issues that should be addressed and finally resolved by the Commission at the earliest opportunity.

IV. THE NUCLEAR WASTE POLICY ACT ALLOWS DOE TO WITHDRAW.

A. Approach and Summary.

Whether the NWPA allows DOE to withdraw its application is obviously the key question. Nevada believes that the Commission should answer this question using the Supreme Court's methodology in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, the NRC should strive to adopt an interpretation of the NWPA that is reasonable and makes the most regulatory sense unless "Congress has directly spoken to the precise question at issue" and rejected the Commission's choice. *Chevron* at 842-843.

This interpretation approach comports with the relative roles of the courts, the Congress, and the Commission. The courts are not part of the political and policy-making branches of the government and are not accountable to the people. Congress makes policy choices and is, of course, accountable to the people. However, even when enacting a detailed and seemingly comprehensive program, Congress often leaves important questions unanswered. When it does, the answers must almost always be supplied by the agency charged with the administration of the statute. That agency is accountable to the people through the President who, among other things, appoints the agency head (in this case the full Commission whose members are appointed by the President by and with the advice and consent of the Senate). As the Supreme Court observed in *Smiley v. Citibank*, 517 U.S. 735, 742 (1996), "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."

There is ample support for the proposition that Congress must have contemplated that a withdrawal would be possible; otherwise, DOE could be placed in the absurd and untenable position of pressing forward with an application for an unsafe repository. However, as Nevada will explain in detail below, a careful and comprehensive analysis of the NWPA indicates that Congress has not spoken to the precise question whether DOE may withdraw its license application. Therefore, whether DOE may withdraw is a matter to be decided based on a

reasonable exercise of agency discretion, considering not only the policies and purposes of the NWPA, to the extent these can be determined at all, but also considering whether it makes regulatory sense, in this or in any other case, to force an applicant to go forward with an application it wants to withdraw.

B. *Chevron* Step One – Congress has not Addressed the Precise Question Whether DOE May Withdraw Its Application.

Chevron step one asks the question whether "Congress has directly spoken to the precise question at issue." *Chevron* at 842. As indicated above, Nevada believes the answer to this question is "no."

1. The NWPA and Its Legislative History.

(a) The statutory sequence of events associated with the possible development of a repository at Yucca Mountain began with DOE's recommendation that the Yucca Mountain site (among others) be characterized, NWPA section 112(b), 42 U.S.C. § 10132(b), and Congress's subsequent selection of the Yucca Mountain site as the only one to be characterized. NWPA section 160, 42 U.S.C. § 10172. It continued with DOE's characterization of the Yucca Mountain site, NWPA section 113, 42 U.S.C. § 10133, DOE's recommendation of the site to the President, NWPA section 114(a), 42 U.S.C. § 10134(a), the President's approval and recommendation of the site to the Congress (*id.*), Nevada's notice of disapproval of the site, NWPA section 115(b), 42 U.S.C. § 10135(b), Congress's override of Nevada's notice of disapproval, NWPA section

115(c), 42 U.S.C. § 10135(c), and DOE's submission of the application. NWPA section 114(b), 42 U.S.C. § 10134(b).

At this point in the detailed statutory development scheme one might expect to see a direction to DOE to prosecute the application to the fullest possible extent, but there is no such direction. Nor to be fair, is there any mention of a possible withdrawal of the application and, it may be argued, how would it make any logical sense for Congress to direct DOE to file an application if DOE could simply withdraw it. But it also may be argued that it makes no logical sense to suppose that Congress would have insisted that DOE prosecute an application for a facility that it believes will never be built or operated. Appeals to logic produce a stalemate.

(b) NWPA section 114(d) addresses the NRC's role in the process. Under section 114(d), 42 U.S.C. § 10134(d):

The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection (e)(2).

The CAB concluded that this paragraph required NRC to reach a final decision on the merits of the application, eliminating the possibility that the

application may be withdrawn. M&O at 16. But there is frequent discussion of this paragraph in the NWPA legislative history, and this discussion is always confined to the reasonableness of the three or four year limit. In fact, making an exception just to add time limits was appropriate because time limits were the only thing missing from the NRC's otherwise comprehensive and detailed rules in 10 C.F.R. Parts 2 and 60. There is never the slightest suggestion in the legislative history that the paragraph was intended to require the Commission to reach the merits of an application. *See e.g.*, S. Rep. No. 97-282 (to accompany S. 1662), November 30, 1981, at 33.

Moreover, construing the requirement that the Commission "shall issue a final decision approving or disapproving the issuance of a construction authorization not later than [specified dates]" as a requirement to render a final decision on the merits of the application would eliminate the possibility of DOE withdrawing its application under any circumstances. Such a reading would prevent DOE from withdrawing an application for a repository it believed was unsafe.³ "When that meaning has lead to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act." *U.S. v. American*

³ It is no answer to say that the NRC Staff will recommend denial of the application in such a case. The Staff may not agree that the repository would be unsafe. Moreover, even if Staff agreed, there is nothing in the Commission's rules that would allow the proceeding to be terminated without the application of 10 C.F.R. § 2.107. The only rule remotely applicable is 10 C.F.R. § 2.103(b), but this rule applies only when Staff proposes to deny an application over an applicant's objection because it requires Staff to offer a hearing to the applicant so that it may contest Staff's findings.

Trucking Assn's, 310 U.S. 534, 543 (1940), cited approvingly in *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 120-121 (1988). One of the purposes of Subtitle A of the NWPA is "to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected. . . ." NWPA section 111(b)(1), 42 U.S.C. § 10131(b)(1). Construing section 114(d) so as to prevent DOE from withdrawing an application for a repository it believed was unsafe would be absurd and also contrary to the ultimate purpose of the Act to provide reasonable assurance that any repository will adequately protect the public and the environment. Therefore, *U.S. v. American Trucking Assn's* and *EEOC v. Commercial Office Products Co.*, cited above, counsels strongly against such an interpretation.⁴

(c) As indicated above, NWPA section 114(d) provides that the Commission shall consider an application for a construction authorization for all or part of a repository "in accordance with the laws applicable to such applications." While the text here is not completely free of any ambiguity, the statutory direction to "consider an application . . . in accordance with the laws

⁴ Likewise, while NWPA section 114(b) of the NWPA, 42 U.S.C. § 10134(b), provides that DOE "shall submit" its application not later than 90 days after the site designation takes effect, it would not be reasonable to construe this language to require DOE to submit an application it believed was unsafe. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2007) (refusing to construe a statutory requirement that certain crimes "shall" be prosecuted as mandatory in view of "deep-rooted nature of law enforcement discretion.")

applicable to such applications' fairly implies that an application may be withdrawn because the "laws applicable to such applications" include the Commission's regulations and the Commission's regulations include (and included in 1982) a provision (10 C.F.R. § 2.107 (a)) providing that license applications may be withdrawn.⁵ Congress must have been knowledgeable about the "laws applicable to such applications," including 10 C.F.R. § 2.107, because it would not otherwise have known of the need to make an exception. And the fact that only one exception was made, reflecting the fact that the "laws applicable to such applications" have no deadlines for NRC merits decisions, suggests quite clearly that no other exception (such as an exception for 10 C.F.R. § 2.107) was contemplated.

It may be true that, in some cases, it would be shaky business to presume Congressional knowledge of rules like 10 C.F.R. § 2.107. *See* M&O at 14. But the legislative history of the NWPA includes specific evidence that Congress was aware of the details of NRC's Rules of Practice, for it considered and rejected provisions that would have altered particular aspects of rules in order to expedite

⁵ The M&O points out (at 13) that 10 C.F.R. §2.107 does not, by its express terms, "authorize" withdrawals, but presumes that applicants may want to withdraw and describes an NRC process for accomplishing this result. However this does not affect the argument in the text above. If, as argued, the "laws applicable to such applications" include 10 C.F.R. §2.107, then such laws incorporate the presumption that DOE may withdraw its application. Moreover, it is not relevant that DOE was required to file its application. *Id.* 10 C.F.R. § 2.107 presumes that an application has been filed, and there is nothing on the face of the rule to suggest it does not apply when the filing was required by law. Of course, the rule cannot apply if Congress prohibited DOE from withdrawing, but this begs the question under consideration.

contested licensing hearings. *See* H.R. Rep. No. 97-411(I), at 47-48.⁶ And while the CAB was correct in observing that Congress does not "hide elephants in mouseholes" by altering the fundamental details of a regulatory scheme through the use of vague terms or ancillary provisions (M&O at 14), this presumes that the application of 10 C.F.R. § 2.107 here would alter the fundamental details of the NWPA scheme, which begs the question whether the fundamental details include a provision prohibiting DOE from withdrawing its application.

(d) Section 113(c)(3) of the NWPA, 42 U.S.C. § 10133(c)(3), contemplated that DOE might decide during the course of site characterization that the site was unsuitable. In this event DOE was required not only to terminate the program, but also to take various other steps, including notifying Congress. There is no counterpart in the text of section 114, 42 U.S.C. § 10134, giving rise to the question whether this omission suggests a Congressional intent that DOE be precluded from terminating its activities during the "application phase," as opposed to the "site characterization phase." *See* M&O at 8-9.

But construing these sections of the NWPA such that DOE cannot terminate its activities during the "application phase" would mean that DOE could not even

⁶ It is worth noting that, in reversing the CAB's admission of NEV-SAFETY-001 and 002 (challenging DOE's qualifications to be an applicant), the Commission presumed that Congress possessed sufficient knowledge of DOE management to conclude that DOE possessed the requisite attributes of an applicant. *U.S. Department of Energy (High-Level Waste Repository)*, CLI-09-14, 69 NRC 580, 604-605 (2009). Such a presumption is at least comparable the presumption that Congress was aware of the NRC's Rules of Practice, including 10 C.F.R. § 2.107.

withdraw an application for a repository it believed was unsafe. As explained above, such an interpretation would be absurd and contrary to one of the fundamental purposes of the NWPAA. In any event, as explained above, NWPAA section 114 incorporates a Commission procedure whereby an application may be withdrawn, and therefore sections 113 and 114 may be construed as parallel and consistent provisions.

(e) Section 161b of the Atomic Energy Act ("AEA"), 42 U.S.C. §§ 2201(b), grants DOE the power to issue orders with respect to the possession of nuclear waste materials in order to "minimize danger to life or property." Section 161i. of the AEA, 42 U.S.C. §§ 2201(i), grants DOE the power to issue orders "governing any activity authorized pursuant to this Act [the AEA]." *Siegel v. AEC*, 400 F. 2d 778, 783 (D.C. Cir. 1968), observes that this AEA 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." The Lyons, Kansas project was initiated and then cancelled pursuant to this AEA authority. Nothing in the NWPAA expressly removes this DOE power, which on its face is broad enough to include a decision (or order) that the Yucca Mountain license application should be withdrawn.

To be sure, the NWPA is a later-enacted and more specific statute than the AEA, and therefore if the NWPA included an unambiguous direction that the Yucca Mountain application cannot be withdrawn and must be considered on its merits, then that direction would prevail over anything in the AEA. *See* M&O at 11-12. And it is also true, as the M&O states (at 12), that Congressional silence on the matter of DOE's pre-existing AEA authority would not be credited if it ran contrary to all other textual and contextual evidence of Congressional intent. But these arguments beg the question whether all the evidence of Congressional intent is to the effect that Congress made an unambiguous decision that the application cannot be withdrawn and must be considered on its merits. This cannot be presumed. The absence of any language in the NWPA removing DOE's AEA authority to withdraw from a nuclear waste project bolsters the argument that withdrawal is allowed. At the least, it adds to the uncertainty with respect to Congress' actual intentions.⁷

(f) Congress enacted the NWPA to establish a "definite Federal policy" for the disposal of spent nuclear fuel and high-level radioactive waste. NWPA section 111(b)(2), 42 U.S.C. § 10131(b)(2). It found that "Federal efforts during the past 30 years to devise a permanent solution to the problems of

⁷ DOE's decision to withdraw, reflected in its motion to withdraw, constitutes an informal order within the meaning of the AEA. *See* 5 U.S.C. § 551 (6). Unlike a rule or regulation, such an order may be issued without any prior public procedure.

civilian radioactive waste disposal have not been adequate." NWPA section 111(a)(3), 42 U.S.C. § 10131(a)(3). Congress's solution was to establish "a schedule for the siting, construction and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected. . . ." NWPA section 111(b)(1), 42 U.S.C. § 10131(b)(1). Congress also established a detailed statutory scheme that addressed site nomination, recommendation and selection, State and Congressional reviews, the filing of an application, the laws that NRC would apply to the application, and a timetable for Commission consideration. NWPA sections 112 - 116, 42 U.S.C. §§ 10132-36. However, as explained below, these provisions do not answer the precise question whether DOE may withdraw its application.

Congress' statement that it was enacting a "definite Federal policy" for the disposal of spent nuclear fuel and high-level radioactive waste leaves open the question what that definite policy includes and, in particular, whether that definite policy included a prohibition on DOE withdrawing its application.

The finding that Federal efforts during the past 30 years have not been adequate raises the question why this was so, and the further question whether in enacting the NWPA Congress sought to address the causes for the previous failures in a way that suggests an answer to the withdrawal question. In H.R. Rep. No. 97-491, Part 1, at 27, the Committee on Interior and Insular Affairs opined that Lyons,

Kansas, failed because the AEC "reacted with a rush" to develop the site, an "intense political attack" on the program resulted, and there were "serious technical flaws in the site." The 1982 NWPA addressed the reasons for the previous failure by requiring in section 114(a), 42 U.S.C. § 10134(a), that a site be fully characterized before it can be recommended as a repository. This tells us nothing about whether an application may be withdrawn.

The NWPA's stated purpose to "establish a schedule for the siting, construction and operation of repositories" cannot actually mean that Congress established a roadmap that would necessarily lead to the siting, construction, and operation of one or more repositories, because this would eliminate DOE's and the President's discretion not to recommend or approve of a site under NWPA section 114(a), 42 U.S.C. § 10134(a), and the NRC's ability to refuse to docket an incomplete application or deny one that has been docketed under section 114(d), 42 U.S.C. § 10134(a). The purpose of the NWPA was to establish a schedule for certain decisions, but there was no guarantee that those decisions would be favorable to development of a repository, and some decisions (for example, the NRC's decision the application is sufficiently complete for docketing) are missing from the schedule.

Finally, as indicated above, while the detailed statutory scheme addresses site nomination, recommendation and selection, State and Congressional reviews,

the filing of an application, the laws that NRC would apply to the application, and a timetable for Commission consideration, the statutory language does not specify whether DOE may withdraw its application.

(g) The legislative history of the NWPA includes evidence of Congressional intent to "assure that the political and programmatic errors of our past experience will not be repeated." *See* M&O at 9. This begs the question what those "political and programmatic errors" might have been, and whether and how Congress attempted to address them. As explained above, Congress' apparent solution to the errors it identified offers no clear guidance on whether DOE may withdraw its application.

(h) The legislative history of the NWPA also demonstrates a Congressional understanding that the NWPA reflected 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." *See* M&O at 9. But this begs the question whether the "major elements" of the program include an element denying DOE any authority to withdraw its license application. Similarly, an expression of intent to keep the program "on track" begs the question whether the "track" includes a requirement to prosecute an application once it was filed.

2. The Joint Resolution.

Nevada concedes that, in enacting H.J. Res. 87, 42 U.S.C. § 10135 *note*, the Congress apparently expected that the next steps would be the filing of an application followed by a Commission decision on the merits of the application. *See* M&O at 9-10. But this chapter of the legislative history cannot override all of the previous textual and contextual evidence of ambiguity. The reason for this is simple – the evidence of Congressional intent here is not associated with any statutory language requiring a decision on the merits of an application. The Joint Resolution merely overrode Nevada's veto by enacting into law the precise text dictated by section 115(a) of the NWPA, 42 U.S.C. § 10135(a). Nothing in the NWPA was amended in any way, and everything in the previous analysis of the NWPA remains true.

C. *Chevron* Step Two.

The text and the legislative history of the NWPA do not answer the precise question whether DOE may withdraw its application. The term "withdrawal" is not mentioned anywhere and, as indicated above, the other evidence of Congressional intent, in either the statute as a whole or its legislative history, is either ambiguous or, in the particular case of the history of H.J. Res. 87, not fully persuasive. Therefore, this presents a classic case where the administering agency should strive to interpret the law in a way that considers not only the policies and

purposes of the NWPA, to the extent these can be determined at all, but also considering what makes regulatory sense. *See Smiley v. Citibank, supra*.

1. The policies and purposes of the 1982 NWPA, to the extent these can be determined at all, were to establish a step-wise program that could possibly lead to the construction and operation of several safe geologic repositories at locations yet to be determined. However, it was never the purpose or policy of that Act to eliminate all the potential obstacles to success, and Congress stopped short of actually requiring any repository to be constructed and operated. In 1987, the step-wise program was eliminated in favor of a “roll of the dice” on Yucca Mountain, but Congress again stopped short of actually requiring a repository to be constructed and operated. Congress even left in place certain obstacles that it must have known would likely doom the program if Nevada was not satisfied with it, for example the preservation of State authority in section 124, 42 U.S.C. § 10144, to deny the water permits needed for construction and operation, and the need for additional land withdrawal legislation. Clearly, no NWPA policy or purpose requires DOE to go forward with an application for a repository project that is very unlikely to succeed.

2. A long and consistent line of Commission decisions holds that the Commission does not second-guess licensees’ decisions to abandon nuclear projects. *Northern States Power Company (Tyrone Energy Park, Unit 1)*, CLI-80-

36, 12 NRC 523, *7 (1980); *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, CLI-90-08, 32 NRC 201 (1990), *affirmed on reconsideration*, CLI-91-02, 33 NRC 61 (1991), *petition for review denied*, *Shoreham-Wading River Central School District v. NRC*, 931 F.2d 102 (D.C. Cir. 1991); *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-93-03, 37 NRC 135 (1993). If, as the Commission held in *Tyrone Energy Park*, *Shoreham*, and *Rancho Seco*, the Commission does not second-guess licensees' decisions to abandon their previously licensed nuclear projects, it logically follows that the Commission also should not second-guess applicants' decisions to withdraw their license applications. Indeed, consistent with this train of logic, the Commission has never prohibited an applicant from withdrawing its license application.

Therefore, a denial of DOE's motion would be unprecedented. It would lead to a unique if not bizarre NRC licensing experiment, testing whether a reluctant applicant can meet its burden of proof and then, if it succeeds, whether it can create and sustain the kind of safety culture NRC expects. There is no good reason why such an experiment should ever be conducted under any circumstances short of an unambiguous Congressional direction to do so, which is absent here.

The Yucca Mountain licensing proceeding is the very last proceeding one would choose for such an experiment. This is a first-of-a-kind licensing

proceeding where the applicant will need to meet its burden of proof in the face of determined and expert opponents. Nevada does not assume that DOE personnel will simply refuse to carry out their duty if the withdrawal motion is finally denied. But in this uniquely difficult and contentious proceeding the Commission has every right to expect a dedicated and enthusiastic applicant and potential licensee, not a reluctant one performing out of a sense of duty.⁸ And if, in the end, Nevada prevailed over a reluctant and unenthusiastic applicant, there is the real danger that the decision would lack credibility because project supporters in Congress and elsewhere would forever claim that a more dedicated and enthusiastic applicant could have carried the day.

D. Conclusion.

The text and the legislative history of the NWPA do not answer the precise question whether DOE may withdraw its application. Therefore, this presents a classic case where the administering agency should strive to interpret the law in a way that considers not only the policies and purposes of the NWPA, to the extent these can be determined at all, but also considering whether it makes regulatory sense, in this or in any other case, to force an applicant to go forward with an

⁸ In fact, some opponents of DOE's motion (including NEI and Nye County) are sufficiently concerned about DOE's performance as a reluctant applicant that they have asked for the proceeding to be suspended if DOE's motion is denied. Nye, in particular, argues that it would be "clearly untenable" to "order DOE to provide a good-faith defense for an LA that the highest levels of the Executive Branch seek to abandon. Even the best efforts of DOE would not be able to overcome the inherent conflict of interest of defending an LA that its own Administration seeks to bury." Nye County Response in Opposition to DOE's Motion to Withdraw (May 17, 2010) at 23. *See also* NEI Opposition to DOE's Motion (May 17, 2010) at 2.

application it wants to withdraw. Interpreting the NWPA to allow DOE to withdraw its application does not contravene any discernable Congressional purpose or policy in the NWPA and makes regulatory sense. Congress clearly contemplated that a dedicated and enthusiastic applicant might not prevail before the NRC; it cannot have imagined that the application might fail out of a lack of enthusiasm and dedication to the project.

V. GRANTING DOE'S MOTION TO WITHDRAW WOULD NOT VIOLATE NEPA.

A. Introduction.

Some of the petitioners (now parties) below argued that granting of DOE's motion would be a major Federal action significantly affecting the environment that requires the preparation of an environmental impact statement (EIS). CAB did not address this argument because it disposed of DOE's motion on NWPA grounds. M&O at 5, n.13. As argued above, Nevada believes that nothing in the NWPA, properly construed, prohibits NRC from granting DOE's motion to withdraw its application. If the Commission agrees, it must then address the NEPA question in order to reach a final decision on DOE's motion.

B. No EIS is Required.

No EIS is required for the simple reason that granting DOE's motion would not change the status quo. *See Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2002) ("NEPA procedures do not apply to federal actions that

maintain the environmental status quo"). There is no geologic repository for the disposal of spent nuclear fuel and high-level waste in the United States (or elsewhere, for that matter). Withdrawing the application does not change this.

C. Even if an EIS Were Required, DOE has Already Done One.

Withdrawing the license application would be the environmental equivalent of the "no-action" alternative – denial of DOE's application. This alternative was evaluated in DOE's 2002 FEIS and 2007 SEIS, and none of the petitioners or parties, other than Nevada, have submitted an admissible contention challenging these EISs.⁹ This effectively moots the petitioners' (and parties') claim that DOE's decision to seek withdrawal of the application violates NEPA.

D. NRC Incurs No NEPA Obligations in Ruling on DOE's Motion to Withdraw.

As explained below, the NRC will not incur any NEPA obligation to evaluate the alternative of a continuation of the Yucca Mountain licensing proceeding in ruling on DOE's Motion.

This NEPA legal question was addressed in *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, CLI-90-08, 32 NRC 201 (1990). In *Shoreham* the licensee and the State of New York formally agreed that the Shoreham nuclear power plant would not be operated and, at the licensee's request,

⁹ NEV-NEPA-22 argues that DOE's EISs overstate the environmental impacts associated with the no-action alternative. This contention is of no help to the petitioners and parties pressing the NEPA claim because they apparently believe the opposite is true.

the NRC amended the operating license to prohibit operation without Commission approval and approved changes in the physical security and emergency plans that were incompatible with actual operation. Proponents of continued plant operation argued that these actions should not have been taken without an NRC NEPA review that included consideration of resumed operation as an environmentally beneficial alternative. The Commission disagreed. It held that because resumed operation was only an alternative to a decision not to operate, but the decision not to operate was not a Commission action, it followed that resumed operation was not an alternative to any Commission action that required consideration under NEPA. The Commission ultimately concluded that "the NRC Staff need not file an EA or an EIS reviewing and analyzing 'resumed operation' of Shoreham as a nuclear power plant as an alternative under NEPA." *Id.* at *18.

The Commission's decision in CLI-90-08 was affirmed on reconsideration in CLI-91-02, 33 NRC 61 (1991), and a related petition for review was denied in *Shoreham-Wading River Central School District v. NRC*, 931 F.2d 102 (D.C. Cir. 1991). *Shoreham* was followed in *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-93-03, 37 NRC 135 (1993).

If the NRC had no NEPA obligation to consider continued operation as an alternative in *Shoreham* and *Rancho Seco*, it follows for the same reasons that it

has no obligation here to consider continuation of the Yucca Mountain licensing proceeding as a NEPA alternative.

E. Conclusion.

Nothing in NEPA stands in the way of granting DOE's motion.

VI. THE APPLICATION SHOULD BE WITHDRAWN WITH PREJUDICE.

A. Introduction.

The CAB held that, if the application is withdrawn, it must be without prejudice. It so held because (1) "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, " (2) the current DOE's Secretary's judgment "should not tie the hands of future Administrations for all time" and "the public interest would best be served by leaving the . . . option open to the applicant should changed conditions warrant its pursuit," and (3) "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." M&O at 21-22 (citing Commission or Appeal Board decisions it believed supported all three propositions).

Nevada respectfully disagrees. As explained below, a dismissal with prejudice does not constitute or presume any decision on the merits of the application; a dismissal with prejudice will not necessarily tie the hands of future

Administrations for all times; and factors other than the prospect of a second lawsuit or application, which the CAB failed to address, provide the basis for a dismissal with prejudice.

B. A Dismissal with Prejudice does not Constitute or Presume Any Decision on the Merits of the Application.

As explained below, a withdrawal with prejudice does not constitute or even presume any prior Commission decision on the merits of the application, contrary to what the CAB thought. However, the CAB may have been misled by prior Appeal Board decisions that appeared to support its holding. The Commission should take this occasion to clarify the effect of these prior decisions so that Commission case law is in accord with the practice in the Federal courts.

A Commission decision granting DOE's motion to withdraw its application with prejudice is equivalent to a federal court order dismissing a case with prejudice. Such a dismissal gives rise to claim preclusion (*res judicata*), which usually means that the plaintiff may not refile the same cause of action. *See Riley v. American Family Mutual Insurance Company*, 881 F.2d 368, 370-73 (7th Cir. 1989); MOORE'S FEDERAL PRACTICE, 3rd Edition at ¶ 41.40[9][f]. In an NRC context, a withdrawal with prejudice means that the application may not be refiled absent a supervening development.

However, a dismissal with prejudice does not constitute or presume an adjudication on the merits because, if it did, it would give rise to issue preclusion

(*collateral estoppel*), and the law is clear that no issue preclusion arises from a dismissal with prejudice. *Lawlor v. National Screen Service Corporation*, 349 U.S. 322 (1955); *Pelletier v. Zweifel*, 921 F.2d 1465, 1501 (11th Cir. 1991) ("The preclusive effect of a dismissal with prejudice, an unlitigated matter, thus is examined under the requirements for claim preclusion. Since such a judgment is unaccompanied by findings, it does not, however, collaterally estop the plaintiff from raising issues that might have been litigated if the case had proceeded to trial").

Cases such as *P.R. Electric Power Auth. (North Coast Nuclear Plant, Unit 1)*, ALAB-662, 14 NRC 1125, 1133 (1981), cited by the CAB, may be read as suggesting that a withdrawal of an application and a dismissal of a proceeding with prejudice normally mean that there was some merits disposition. However, this would be wrong because a dismissal with prejudice does not give rise to issue preclusion. Instead, *North Coast* and similar cases should be read as merely suggesting, consistent with federal case law, that a withdrawal and dismissal with prejudice is warranted when (but not only when) the opposing party was about to prevail on the merits. *See Pace v. Southern Express Company*, 409 F.2d 331, 334 (7th Cir. 1969); *Duke Power Company (Perkins Nuclear Power Station, Units 1, 2, and 3)*, LBP-82-81, 16 NRC 1128, 1135 (1982). The application of this principle to the case at hand is discussed further below.

C. A Dismissal with Prejudice will not Necessarily Tie the Hands of Future Administrations for All Times.

The claim preclusion (*res judicata*) effect of a dismissal with prejudice is appropriately decided only if and when an attempt is made to refile the application. *Louisiana Energy Services (Claiborne Enrichment Center)*, CLI-98-5, 47 NRC 113, 114 (1998). If and when such an attempt is made, the Commission will need to make a judgment whether some action by Congress has effectively overruled the Commission's acceptance of a withdrawal with prejudice. For now, in deliberating on DOE's motion, it would be completely speculative to presume that future Administrations hands will be tied.

D. A Withdrawal with Prejudice will Prejudice No One, But a Withdrawal Without Prejudice will Prejudice Nevada.

1. DOE's Motion for a Withdrawal With Prejudice Must Be Granted Because No Other Party (or Petitioner) Demonstrated Prejudice.

The CAB correctly observed that no prior applicant for an NRC license has voluntarily sought dismissal of its application with prejudice. M&O at 21. Accordingly, the matter before the Commission is a case of first impression. Nevada believes that the Commission should look to case law in the Federal Courts for guidance in this situation. That case law is crystal clear that a plaintiff's motion for a voluntary dismissal with prejudice must be granted unless some other party demonstrates that it would be prejudiced. *ITT Direct, Inc. v. Healthy Solutions, LLC*, 445 F.3d 66, 70 (1st Cir. 2006); *Smoot v. Fox*, 340 F.2d 301, 303

(6th Cir. 1964). No party (or petitioner) in the case at hand made any showing of prejudice.

2. Nevada Would Be Entitled To a Dismissal With Prejudice Even If DOE Had Not Requested One.

Nevada would be entitled to a dismissal with prejudice even if DOE had not requested one. The Federal courts have enumerated various factors that should be evaluated in deciding whether a dismissal should be with prejudice, including "[t]he defendant's effort and expense of preparation for trial," "excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action," and "the fact that a motion for summary judgment has been filed by the defendant." *Kunz v. DeFelice*, 538 F.3d 667, 677-678 (7th Cir. 2008), citing *Pace v. Southern Express Company*, 409 F.2d 331, 334 (7th Cir. 1969). Other courts have considered also the potential unavailability of witnesses in a second suit. *Fisher v. Puerto Rico Marine Management Inc.*, 940 F.2d 1502, 1503 (11th Cir. 1991). Nevada argued that each of these factors warranted a dismissal with prejudice, and supported its argument with evidence in an affidavit that no party (or petitioner) contested.¹⁰ State of Nevada's Answer to the Department of Energy's Motion with Respect to Withdrawal of the License Application (May 17, 2010) at 9-25 and attached affidavit of Bruce Breslow. The CAB failed to address any of Nevada's

¹⁰ Nevada withdrew its argument that withdrawal with prejudice was warranted because of an inability to conduct meaningful discovery on the LSN should the application be refiled based on DOE's commitments to preserve and maintain the accessibility of its document collection. See M&O at 22-24 and Appendix.

arguments. Instead, the CAB considered and rejected an argument Nevada did not make – that the expenses and uncertainties of a future hearing on a second application require dismissal with prejudice. M&O at 22. In fact, the focus of Nevada’s argument was on its past expenditures rather than its potential future ones.

(a) As indicated above, the substantial prejudice associated with the potential unavailability of witnesses in a second proceeding warrants a dismissal with prejudice. A withdrawal and dismissal *without* prejudice would mean that DOE could refile the application at any time in the future. In theory, this could be one year from now, five years from now, or a century from now. Nevada provided un rebutted evidence that attested to its sustained and concerted effort to find expert witnesses in the key scientific disciplines so that DOE’s application could be reviewed, technical contentions could be filed, and experts would be available for discovery and testimony. Because of business and other conflicts, Nevada had to look world-wide for experts. Expert and consulting contracts cannot be kept in force for some indefinite period and, if the application is resubmitted, Nevada will find it almost impossible to put its scientific team together again.

In another, less complex licensing proceeding, the Commission held that "the amount and complexity of information the intervenors and their experts

reviewed . . . were formidable. To compel them now to wait years without knowing when or if there will be any further hearing imposes an unacceptable and unfair burden." *Hydro Resources, Inc. (Rio Rancho, NM)*, CLI-01-04, 53 NRC 31, 2001 NRC LEXIS 12, Slip Op. at 8 (2001). The burden on Nevada here would be even greater.

(b) Eleven legal issues were fully briefed and argued and a decision on them was imminent when DOE moved to suspend the proceeding because of its intention to withdraw the application. A decision adverse to DOE on some of these legal issues, particularly issues 8 (whether the defense in depth principle requires a drip shield neutralization analysis) and 10 (the propriety of DOE's proposal to install drip shields only after the wastes are emplaced) would strike at the heart of DOE's post-closure safety case, and would likely pave the way for a summary rejection of the application unless DOE re-evaluates its safety case and is able to make substantial changes to its application. Thus, the pending briefs and arguments over legal issues are the functional equivalent of motions and arguments for partial summary judgment.

As indicated above, in the federal courts the fact that a motion for summary judgment had been filed by the defendant when the plaintiff filed its motion for dismissal is another factor supporting a dismissal with prejudice. In fact, "a dismissal to avoid the effect of other unfavorable, but not necessarily dispositive

rulings by the court may constitute legal prejudice" (MOORE'S FEDERAL PRACTICE, 3rd Edition, ¶ 41.40[7][b][v]). Therefore, the pendency and imminence of a ruling on the 11 legal issues is another factor supporting a withdrawal with prejudice.

(c) As indicated above, another factor the federal courts consider in deciding whether a withdrawal should be with prejudice is the defendant's already-incurred efforts and expenses of trial preparation.

DOE's Motion comes almost one and one half years after publication of the Notice of Hearing, and almost six years after DOE first tendered its LSN certification, effectively opening the discovery process. When this proceeding was suspended, depositions were just scheduled, but the scheduling was preceded by years of document discovery, especially production of documents on the LSN. Moreover, unlike in the federal courts where notice pleading is the norm, NRC's rules require that contentions be filed at the very beginning of the proceeding, and each technical contention must be accompanied by information establishing a genuine dispute. For Nevada, this meant that Nevada's expert team had to plan years in advance, keep up-to-date on DOE's application plans and, when the application was finally filed after years of delay, engage in a time-consuming and expensive review of the sixteen-volume application. Nevada eventually filed over 200 contentions, all of them supported by the equivalent of an expert report. Nevada also needed to review no less than six draft or final DOE environmental

impact statements, and examine the basis for two DOE LSN certifications, as well as comply with its own LSN responsibilities. In addition, Nevada sponsored scientific research on key subjects such as metals corrosion and volcanism.

These efforts are described in more detail in Nevada's affidavit. Nevada expended many millions of dollars of its own funds to oversee the Yucca Mountain Project and to prepare for and participate in this licensing proceeding and closely related judicial challenges (for example challenges to EPA's and NRC's Yucca Mountain licensing rules). This is *in addition to* the much larger sums Nevada received in federal oversight funding to oversee DOE's scientific work, conduct its own scientific investigations and research, and participate in the licensing proceeding.

This is probably the only legal proceeding in the history of the United States where efforts and expenditures of this magnitude were required by an opposing party just to advance to the deposition discovery phase. These remarkable and unprecedented efforts and expenses of trial preparation warrant a withdrawal with prejudice.

(d) Finally, also as indicated above, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action is another factor the federal courts consider in deciding whether dismissal should be with prejudice.

NWPA section 114(b) (42 U.S.C. § 10134(b)) required DOE to file its license application within 90 days after the President's site recommendation became effective, or by October 21, 2002. October 21, 2002 came, went, and receded into history without any application being filed. DOE also failed to plan adequately to meet its LSN requirements, and as a result its initial LSN certification was struck and its revised plan (one of many) to file the application in late 2004 was aborted. *See U.S. Department of Energy (High-Level Waste Repository, Pre-Application Matters)*, LBP-04-20, 60 NRC 300 (2004). The application was finally tendered on June 3, 2008, almost six years after the statutory deadline, and docketed three months later, on September 8, 2008. During the year period from October 21, 2002, when the application was supposed to be filed, and June 3, 2008, when it was finally tendered, Nevada had to maintain its legal and expert team so that it would be prepared to contest the application when it was filed. This would have been unnecessary had DOE met the statutory deadline.

DOE's Yucca Mountain Project stumbled for years without adequate management and supervision. NEV-SAFETY-001, which was admitted by the Board but rejected by the Commission on purely legal grounds, details numerous examples of DOE management deficiencies, including a policy of giving NRC only the "minimum information" (e-mail message Rickertsen to Swift, August 1,

2002, DEN001231578 at 1) and the idea that "proof that will get us through the regulatory hoops" need not be "rigorous" (Rickertsen e-mail string, September 3, 1996, DEN001222278 at 1).

DOE's excessive delay and lack of diligence in prosecuting the action warrants a withdrawal with prejudice.

E. Conclusion.

DOE's motion for a dismissal "with prejudice" must be granted because no other party (or petitioner) demonstrated that it would be prejudiced thereby. Moreover, a dismissal with prejudice does not constitute or presume any decision on the merits of the application; it would be speculative to presume that a dismissal with prejudice will tie the hands of future Administrations for all times; and factors which the CAB failed to address would have required a dismissal with prejudice even if DOE had not requested one.

VII. OVERALL CONCLUSION.

The Commission should reverse the CAB's M&O by granting DOE's motion to withdraw its application with prejudice.

Respectfully submitted,

(signed electronically)

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Dated: July 9, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of the State of Nevada in Support of Review and Reversal of the Licensing Board's Decision Denying the Department of Energy's Motion to Withdraw Its License Application with Prejudice has been served upon the following persons by the Electronic Information Exchange:

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