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-HLW**
(High Level Waste Repository Construction Authorization Application)	)	

U.S. DEPARTMENT OF ENERGY'S BRIEF IN SUPPORT OF REVIEW AND REVERSAL OF THE BOARD'S RULING ON THE MOTION TO WITHDRAW

Scott Blake Harris
Sean A. Lev
James Bennett McRae
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Donald P. Irwin
Michael R. Shebelskie
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

Counsel for the U.S. Department of Energy

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Table of Abbreviations

Abbreviation	Description
AEA	Atomic Energy Act of 1954, as amended
AEC	Atomic Energy Commission
Board	Atomic Safety and Licensing Board
Board Order or Order	*U.S. Department of Energy* (High-Level Waste Repository), Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11 (Jn. 29, 2010)
BRC	Blue Ribbon Commission
DOE	Department of Energy
DOE Organization Act	DOE Organization Act of 1977
LSN	Licensing Support Network
NRC or Commission	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act of 1982, as amended
Staff	NRC Staff
YMDA	Yucca Mountain Development Act

By an Order of the Secretary of the Commission dated June 30, 2010, the parties were invited to file briefs on whether the Commission should review, and reverse or uphold, the Board's Order. DOE respectfully submits this brief in response to the Secretary's Order.

I. PRELIMINARY STATEMENT

The Commission should review and reverse the Board's Order to the extent it denies DOE's motion to withdraw its application for authorization to construct a geologic repository at Yucca Mountain. The Board's denial of DOE's motion is the result of flawed legal analysis and significant misunderstandings as to the relevant statutes and applicable legal principles.

The AEA and the DOE Organization Act authorize the Secretary of Energy to make policy decisions regarding disposal of nuclear waste and spent nuclear fuel. The Secretary's scope of authority encompasses "[n]uclear waste management responsibilities," including in particular "the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes."[1] That authority necessarily provides the Secretary discretion to determine not to proceed with an application for a particular repository.

Far from revoking that pre-existing authority, the NWPA affirmatively preserves the Secretary's authority not to proceed. This conclusion flows from the NWPA's plain text and structure. The NWPA's plain terms, in § 114(d), mandate that the Commission "*shall* consider" any application "*in accordance with the laws applicable to such applications*."[2] Those applicable laws plainly include the Commission's rule and precedent permitting license applicants to withdraw their pending applications. More broadly, the NWPA specifies approvals the Secretary must obtain from outside entities (*e.g.,* Congress, this Commission) to *proceed* with the Yucca Mountain repository, but requires no such approvals if the Secretary decides to

[1] DOE Organization Act, § 203(a)(8)(C), 42 U.S.C. § 7133(a)(8)(C).

[2] NWPA § 114(d), 42 U.S.C. § 10134(d) (emphasis added).

end the project. By structuring the NWPA that way, Congress maintained in the Secretary the authority to discontinue the Yucca Mountain project.

In sum, as the Staff has explained, the "NWPA does not reflect a limitation on the applicability of the AEA or the Commission rules" regarding withdrawal.[3] DOE's motion to withdraw thus "may be granted . . . ."[4]

The Board's contrary conclusion is wrong. Most fundamentally, the Board disregarded the plain meaning of the directly relevant statutory text. The Commission's precedent overwhelmingly establishes – and the Board does not dispute – that applicants in NRC licensing proceedings may withdraw their applications. That should have been the end of the matter because, as noted above, the NWPA makes clear in § 114(d) that the Commission *must* apply to DOE's application the ordinary rules governing license applications.[5] In direct conflict with the text of that provision, the Board decided without justification that the existing Commission precedent "is not helpful in this circumstance" and that DOE should *not* be "treated just like any private applicant."[6]

The Board's attempt to read NWPA § 114(d) to support its contrary conclusion is insupportable. The Board declared that Congress intended the reference in § 114(d) to "laws applicable to such applications" to be limited to "substantive standards."[7] That reads into § 114(d) a limitation that does not exist on its face and is at odds with the statute.

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[3] NRC Staff Answer to DOE's Motion to Withdraw at 12 (May 17, 2010) ("Staff Answer").

[4] *Id.* at 8. While supporting DOE's reading of the NWPA and its right to withdraw the application, the Staff recommended against the requested condition that the dismissal be with prejudice. The propriety of that condition is addressed in section IV below.

[5] NWPA § 114(d), 42 U.S.C. § 10134(d).

[6] Board Order at 13, 17.

[7] *Id.* at 15.

Section 114(d)'s one exception to the blanket incorporation of existing Commission law is a *procedural* one – the adoption of a three-year time limit for any Commission decision. That exception confirms that the general reference to "laws" in § 114(d) encompasses both substantive *and* procedural matters. The Board's fundamental error in interpreting the statutory provision directly relevant to DOE's motion provides ample basis, by itself, to reverse the Board.

That is not the Board's only error. The Board's analysis rests largely on the belief that Congress "carefully preserved ultimate control over the multi-stage process that it crafted."[8] But that belief cannot alter the statutory text, which provides the Secretary the authority to halt the Yucca Mountain repository process pre-application through NWPA § 113(c)(3) and post-application through NWPA § 114(d)'s incorporation of Commission laws that permit withdrawal of license applications. Giving effect to § 114(d)'s plain text, and its clear incorporation of Commission procedural rules and precedent permitting withdrawal, therefore, creates no inconsistency with the NWPA's structure and multi-stage process.

The Board makes numerous other errors of statutory interpretation. For instance, in finding that the NWPA *impliedly* repeals the Secretary's existing AEA and DOE Organization Act authority,[9] the Board disregards clear case law from the Supreme Court and the Commission establishing stringent standards for implied repeals. The Board's analysis, moreover, relies heavily on a snippet of statutory text that it cites out of context. In particular, the Board states that § 114(d) provides that the Commission "shall issue a final decision approving or disapproving the issuance of a construction authorization," but the pertinent statutory text reads in full 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*

[8] *Id*. at 9.

[9] The Board concedes that there is no "express[] repeal." *Id.* at 12

submission of such application."[10] Read in full, this requirement is simply a time deadline – indeed, a time limit that the Board appears to acknowledge would not be violated if the application is withdrawn.[11] It is *not* a substantive obligation on the NRC to reach the merits of an application even when DOE has determined not to proceed. Thus, as the Staff has explained, the language providing the three-year time limit for NRC action "does not address the authority of DOE to withdraw [its] application, nor the authority of the Board to permit such withdrawal."[12]

Nor does the Board come to terms with the inconsistencies and other problems that its statutory construction would create. The Board acknowledges that Congress did not require DOE to build a repository even if a license is granted.[13] In fact, DOE would have to obtain numerous other regulatory approvals – *none* of which the NWPA requires DOE to seek – and obtain additional statutory authority before it could build a repository. The Board dismisses this fact as "insignificant"[14] without explaining why it was reasonable to conclude that Congress mandated what would truly be a process to nowhere – a costly and wasteful licensing proceeding that must march to conclusion even though other necessary steps both from this Commission and other entities need not even be sought, and will not be sought.

Basic principles of statutory interpretation counsel against imposing such futile requirements.[15] It is similarly absurd to conclude, as the Board would require, that Congress

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[10] NWPA § 114(d), 42 U.S.C. § 10134(d) (emphasis added).

[11] Board Order at 16, n.56

[12] Staff Answer at 13.

[13] Board Order at 18.

[14] *Id*.

[15] *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 673 (1988) (declining to interpret the AEA to mean that Congress required DOE to promulgate regulations restricting its enrichment of

intended the Secretary to prosecute a license application that he believes is contrary to the public interest. An adjudicatory proceeding that the applicant has determined should not proceed, but the applicant is nevertheless compelled to litigate, is not one likely to inspire public confidence, to say the least. Nothing in the NWPA compels the conclusion that Congress intended to impose such an unreasonable and wasteful result, and the Commission should reject it.

The Board also errs in rejecting DOE's request that any dismissal be with prejudice. The Board's analysis relies on inapposite cases where intervenors sought to impose a "with prejudice" condition on a non-consenting applicant. Where an applicant, as here, proposes dismissal with prejudice of its own application, it is an abuse of discretion not to grant that relief.

The Commission also should review the propriety of the conditions that the Board recommends regarding preservation of DOE's LSN document collection following the termination of this proceeding. No such conditions are necessary or appropriate, and in particular the condition concerning the preservation of physical specimens is inconsistent with governing regulations and unreasonable. The Commission should omit that condition even if it otherwise accepts the Board's other recommendations.

II. THE COMMISSION SHOULD GRANT REVIEW

The Board's decision is a fundamental determination about the structure of this proceeding that warrants Commission review. As this Commission stated in reversing the Board's prior decision to await a court ruling before addressing DOE's motion, DOE's motion to withdraw raises "[f]undamental questions" central to the NRC's mission.[16] The Commission

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foreign-source uranium when they would not serve the statutory goal of protecting the domestic enrichment industry, stating: "it seems strained to assert that . . . Congress nevertheless intended DOE to impose restrictions that were somehow calculated to serve that unattainable goal.").

[16] *U.S. Department of Energy* (High Level Waste Repository), Memorandum and Order, CLI-10-13 (slip op. at 3-4), 71 N.R.C. ___ (Apr. 23, 2010) ("CLI-10-13").

further recognized that the same earlier Board decision would be appealable on an interlocutory basis in an ordinary case pursuant to 10 C.F.R. § 2.341(f)(2), because the ruling "[a]ffects the basic structure of the proceeding in a basic [and] unusual manner."[17] Indeed, the Board's earlier decision was sufficiently significant that it warranted the exercise of the Commission's *sua sponte* review authority.[18] For the same reasons, the Board's decision on the merits of DOE's motion even more strongly warrants Commission review. The Commission should exercise the same authority here that it did several months ago to ensure that it has an opportunity to rule on these crucial legal issues in this important proceeding.

The Board's Order also satisfies the standard for certification to the Commission for review pursuant to 10 C.F.R. § 2.319(l), made expressly applicable to this proceeding by 10 C.F.R. § 2.1015(d). Section 2.341(f)(1) provides the standard for certification under § 2.319(l). It states that a ruling "will be reviewed if [(1)] the certification or referral raises significant and novel legal or policy issues, and [(2)] resolution of the issues would materially advance the orderly disposition of the proceeding."[19]

Those standards are readily satisfied here. The Commission has already recognized that these legal issues are "[f]undamental."[20] They are novel as well. As the Board itself has stated, "no Board has ever ruled that an application cannot be lawfully withdrawn at all" and "no agency adjudicatory tribunal has addressed this issue in the context of the unique NWPA."[21] Further,

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[17] *See id*. at 3, n.6 (citations omitted).

[18] *Id*.

[19] 10 C.F.R. § 2.341(f)(1).

[20] CLI-10-13 at 3-4.

[21] *U.S. Department of Energy* (High Level Waste Repository), Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) at 11 (Apr. 6, 2010), vacated on other grounds by CLI-10-13.

resolution of these questions would materially advance the orderly disposition of the proceeding. It will determine whether there will be any further proceeding at all. The Board's denial of DOE's motion thus qualifies for review under § 2.341(f)(1).

Review by the Commission also will aid the U.S. Court of Appeals for the District of Columbia Circuit in its consideration of the pending petitions for review of DOE's decision to withdraw its license application. As the Commission stated in directing the Board to rule on DOE's motion, "judicial review will benefit from the NRC's consideration of the issues surrounding DOE's motion," especially given the Commission's expertise on these matters.[22] The Commission should review the Board's ruling to ensure the Court of Appeals has the benefit of the Commission's expertise and its considered views.

In sum, the Commission should review the Board's denial of DOE's motion, and it should do so *de novo*.[23] The policy determination whether to terminate the Yucca Mountain project rests with the Secretary, as the official ultimately responsible under the AEA, the DOE Organization Act, and the NWPA for management and disposition of radioactive waste. The desirability or wisdom of that policy determination was not (and should not have been) resolved by the Board, and that issue is not before the Commission. The issue presented here is a legal one: whether the NWPA impliedly repeals the Secretary's pre-existing authority and prohibits DOE from withdrawing its application. The Board's decision on this significant legal issue is incorrect in its legal analysis and conclusions. The Commission should reverse that decision, and allow DOE to withdraw its application.

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[22] CLI-10-13 at 4.

[23] *E.g., Amergen Energy Company, L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 259 (2009) ("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.'") (citations omitted).

III. DOE IS AUTHORIZED TO WITHDRAW ITS LICENSE APPLICATION

A. The Secretary Has The Discretion To Withdraw The License Application

In moving to withdraw its license application for a long-term repository for high level waste and spent nuclear fuel at Yucca Mountain, DOE exercised the authority granted to it by the AEA and DOE Organization Act.[24] The Secretary has authority under these statutes to direct "the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare."[25] That discretion encompasses "nuclear waste management responsibilities," including in particular "the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes."[26]

It has long been recognized that the statutory scheme established by Congress under the AEA 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."[27] That grant of power to DOE includes decision-making

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[24] In 1974, the Energy Reorganization Act, Pub. L. No. 93-438, 88 Stat. 1233, 42 U.S.C. § 5801 *et seq.* abolished the AEC and assigned its "licensing and related regulatory" authority to a new Nuclear Regulatory Commission. ERA § 201(f), 42 U.S.C. § 5841(f). All of the AEC's other powers, including those over nuclear waste, were assigned to another new agency, the ERDA. ERA § 104(a)-(c), 42 U.S.C. § 5814(a)-(c). Three years later, in 1977, Congress established a new Department of Energy in the DOE Organization Act, Pub. L. No. 95-91, 91 Stat. 570, 42 U.S.C. § 7101, *et seq*. Among other actions, the statute merged ERDA, and all of its legal authorities and powers, into the new DOE. *Id*. § 301(a), 42 U.S.C. § 7151(a).

[25] AEA § 3(c), 42 U.S.C. § 2013(c); *see also* 42 U.S.C. § 7133(a)(8)(C).

[26] DOE Organization Act, § 203(a)(8)(C), 42 U.S.C. § 7133(a)(8)(C). While the NRC has authority over "licensing and related regulatory functions" under 42 U.S.C. § 5841, that provision does not strip the Secretary of his *policymaking* AEA functions. The Secretary's authority under 42 U.S.C. § 7133(a)(8)(C) embraces nuclear waste management responsibilities and the storage and disposal of such wastes, and the exercise of this authority to withdraw DOE's application does not conflict with the NRC's licensing authority.

[27] *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). The Board suggested that the NWPA somehow limited the above-quoted language from *Siegel* because the NWPA was passed

over the management and disposition of nuclear waste unless such action is affirmatively barred or otherwise constrained by express statutory language.[28]

The NWPA preserves that grant of power with respect to the decision to discontinue the Yucca Mountain license application. The NWPA contains no express repeal of the Secretary's authority to decide not to construct a repository at Yucca Mountain and to withdraw the pending application. To the contrary, the NWPA reiterates the Federal Government's responsibility to provide for the permanent disposal of high-level radioactive waste and spent nuclear fuel,[29] and retains in DOE "primary responsibility" for developing and administering the nuclear waste disposal program.[30]

To be sure, the NWPA channels the Secretary's authority over the disposal of high level waste and spent nuclear fuel in certain ways. For instance, the NWPA directs the Secretary not to engage in site characterization for repository options other than Yucca Mountain.[31] And, in 2002, Congress approved the Yucca Mountain site for a construction application, triggering the

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after *Siegel*. Not so. Courts have continued to rely on *Siegel* after the NWPA's enactment. *E.g., Public Citizen v. NRC*, 573 F.3d 916, 927 (9th Cir. 2009) (relying on *Siegel* to deny a petition to review the NRC's design basis threat rules); *Massachusetts v. NRC*, 878 F.2d 1516, 1523 (1st Cir. 1989) (recognizing that, under the AEA, the "scope of review of NRC actions is extremely limited" and citing *Siegel*, 400 F.2d at 783).

[28] *E.g., Public Citizen*, 573 F.3d at 927 (construing 42 U.S.C. § 2210e of the AEA, the court held that because "Petitioners cite no authority to so limit the Commission's discretion where a factor is not mandated by Congress," the court "decline[d] to imply any such limitation.").

[29] NWPA § 111(a)(4), 42 U.S.C. § 10131(a)(4).

[30] *National Ass'n of Regulatory Utility Comm'rs v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988) ("Congress delegated primary responsibility for developing and administering the waste disposal program" to DOE); *General Elec. Uranium Mgmt. Corp. v. DOE*, 764 F.2d 896, 905 (D.C. Cir. 1985) (holding "that DOE is indubitably entrusted with the administration of the Waste Act.").

[31] *See* NWPA § 160, 42 U.S.C. § 10172.

requirement under § 114(b) of the NWPA that the Secretary file within 90 days an application to construct a repository.[32]

Congress plainly understood, however, that its 2002 decision merely required the filing of an application within 90 days; it did not impose further obligations. As the legislative history states, "[e]nactment of the joint resolution *will only allow DOE to take the next step* in the process laid out by the Nuclear Waste Policy Act and *apply* to the NRC for authorization to construct the repository at Yucca Mountain."[33] The D.C. Circuit similarly understood that this resolution was merely "a step in the repository-development process" and "the Resolution likewise confirms that members of Congress intended the Resolution to approve the Yucca site, conclude the site-selection process, and *permit DOE to proceed to seek a license for the repository*."[34]

Even more to the point, the language in the NWPA preserves the Secretary's discretion to withdraw that application after it has been filed, if, as has now occurred, the Secretary determines that proceeding with the application is contrary to the public interest. The plain text of NWPA § 114(b) requires "the Secretary [to] submit to the Commission an application."[35] Nothing in that provision directs or circumscribes DOE's actions regarding the application after its submission. On the contrary, the NWPA specifically provides in § 114(d) what should occur

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[32] *Id*. § 114(b), 42 U.S.C. § 10134(b).

[33] S. Rep. No. 107-159, at 13, 2002 WL 1288812 (2002) (emphasis added)

[34] *NEI v. EPA*, 373 F.3d 1251, 1304, 1310 (D.C. Cir. 2004) (emphasis added). The Board erred when it stated that the *NEI* court held that Congress' 2002 resolution "'settled the matter' of Yucca Mountain's approval for development." Board Order at 7 n.23. The D.C. Circuit held merely that the resolution "settled the matter" as to *site approval* and rendered "moot Nevada's challenges to the preceding site-selection-related actions of executive branch officials, federal agencies, the Secretary and the President." *NEI*, 373 F.3d at 1302. Contrary to the Board's suggestion, the court did not hold that Congress decided that a repository would definitely be developed at Yucca Mountain, but only that a license application could be filed. *Id*. at 1310.

[35] NWPA § 114(b), 42 U.S.C. § 10134(b).

after a license is filed – the Commission "shall consider" the application "in accordance with the laws applicable to such applications."[36] Among those laws is the Commission's longstanding rule, 10 C.F.R. § 2.107, and precedent recognizing the right of applicants to withdraw their applications.[37] By that provision in § 114(d), Congress specified that *the same body of rules and precedents that allow applicants the discretion to withdraw applications in all other cases applies here as well*.[38]

The text of NWPA § 114(d) controls here, and it authorizes DOE to withdraw this application (and this Commission to grant such a request). The Board's contrary conclusion disregards the plain meaning of Congress' reference in that provision to the "laws applicable to such applications." The Board suggests that the reference to "'the laws applicable to such applications' was primarily intended as a blanket reference to the substantive standards that the NRC applies in judging applications."[39] But the clear statutory text refers to "laws" without qualification, and thus includes procedural laws and not just substantive standards.

The unqualified scope of the reference to "laws" is further shown by the one exception to the Commission's laws that § 114(d) carves out – the deadline for a Commission decision. That

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[36] NWPA § 114(d), 42 U.S.C. § 10134(d).

[37] Before Congress passed the NWPA in December 1982, the NRC (and its predecessor the AEC) had recognized the right of applicants to withdraw applications in a number of reported decisions. *E.g., Duke Power Company* (Perkins Nuclear Power Station, Units 1, 2 and 3), LBP-82-81, 16 N.R.C. 1128 (Sept. 20, 1982); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 N.R.C. 1125 (1981); *Philadelphia Electric Company* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 N.R.C. 967 (1981); *Boston Edison Company* (Pilgrim Nuclear Generating Station, Units 2 and 3), LBP-74-62, 8 A.E.C. 324 (1974).

[38] It is well established that an unqualified reference to "laws" in a federal statute includes decisional law. *E.g., Commissioner v. Estate of Bosch*, 387 U.S. 456, 464 (1967); *United States v. Santee Sioux Tribe*, 135 F.3d 558, 565 (8th Cir. 1998). Regulations also are laws. *United States v. Nixon*, 418 U.S. 683, 695 (1974) ("So long as [the] regulation is extant it has the force of law.").

[39] Board Order at 15.

deadline is a procedural requirement, which confirms that the preceding unqualified reference to "laws" encompasses both substantive and procedural laws.

Also significant is the difference in terminology between § 114(d) and § 114(f)(5). Section § 114(f)(5) states: "Nothing in this Act shall be construed to amend or otherwise detract from the *licensing requirements* of the Nuclear Regulatory Commission established in Title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 *et seq.*)."[40] The term "licensing requirements" in § 114(f)(5) refers to the "substantive standards" that apply to "judging applications."[41]

If Congress had intended to limit § 114(d) to substantive standards, it presumably would have used in that section the same language it used in § 114(f)(5). That would have supported the Board's view because "[i]dentical words used in different parts of the same act are intended to have the same meaning."[42] But Congress did not use the same terms in § 114(d) and § 114(f)(5). Rather, Congress deliberately chose other words for § 114(d), and those are words of broader application that must be given a different meaning than "licensing requirements."[43]

Even beyond the plain meaning of the text, basic canons of construction prescribe that Congress is presumed to know the regulatory and statutory background against which it legislates.[44] The Supreme Court has held that: "Congress is presumed to be aware of an

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[40] NWPA § 114(f)(5), 42 U.S.C. § 10134(f)(5) (emphasis added).

[41] Board Order at 15.

[42] *NEI*, 373 F.3d at 1283 (internal quotations and citation omitted).

[43] *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) ("[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.") (internal quotations omitted).

[44] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) ("*ISFSI*"), CLI-02-29, 56 N.R.C. 390, 401 (2002) ("Congress is presumed to know the state of the law when it enacts legislation") (citations omitted); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174,

administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . . So too, where, as here, Congress adopts a new law incorporating sections of a prior law Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."[45]

The Board misapprehends this canon of construction. Rather than point to anything in the NWPA or its legislative history to rebut the presumption, the Board opines that it was up to DOE to prove that Congress specifically considered § 2.107 in the legislative history.[46] That turns the presumption on its head. The point of a presumption is to direct a result where there is not a specific answer to a statutory question. By requiring direct proof of Congress' awareness of § 2.107, the Board eviscerates the very meaning of "presumption" and the canon itself, improperly relying upon the lack of legislative history over the presence of explicit statutory language.[47]

But DOE need not rely solely on a presumption. The right of applicants before the NRC to withdraw their applications was well established when Congress enacted the NWPA: § 2.107

184-85 (1988) (stating that "[w]e generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts" and the Court in "the absence of affirmative evidence in the language or history of the statute" was "unwilling to assume that Congress was ignorant" of the existing law) (citation omitted).

[45] *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (citations omitted). In *Lorillard*, the Court held that litigants were entitled to a jury trial in claims brought under the Age Discrimination in Employment Act (ADEA) by virtue of the Fair Labor Standards Act procedures that were incorporated into the ADEA.

[46] Board Order at 14-15, n. 52.

[47] *E.g., Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (holding that it "would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.") (citation omitted).

had been on the books since 1963,[48] and the NRC had decided the seminal cases recognizing the right to withdraw.[49] Indeed, as noted above, the Board itself stressed that "no Board has ever ruled that an application cannot be lawfully withdrawn at all."[50] The right of an applicant to withdraw, albeit on terms set by the Commission, was thus well established when Congress passed the NWPA.

The Board mischaracterizes DOE's position regarding this matter. The Board states that DOE claims § 2.107 "'authorizes' withdrawals," when according to the Board § 2.107 merely empowers licensing boards to attach conditions to withdrawal.[51] DOE's motion, however, does not hinge on a contrary reading of § 2.107. As DOE stated in its motion, § 2.107 "authorizes withdrawals on terms the Board prescribes."[52]

The relevant point that the Board overlooks is that § 2.107 contemplates, and makes sense only if, applicants have the underlying right to withdraw. That is confirmed by the decisions interpreting and applying § 2.107, and was established before the NWPA's enactment.[53] Accordingly, regardless of the Board's irrelevant analysis, the right to withdraw pending applications and the terms for doing so were not, as the Board suggests, an "obscure"

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[48] 28 Fed. Reg. 19,152 (Sept. 17, 1963).

[49] *Perkins*, LBP-82-81, 16 N.R.C. 1128; *North Coast*, ALAB-662, 14 N.R.C. 1125; *Fulton*, ALAB-657, 14 N.R.C. 967; *Pilgrim*, LBP-74-62, 8 A.E.C. 324.

[50] *U.S. Department of Energy* (High Level Waste Repository), Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) at 11 (Apr. 6, 2010), vacated on other grounds by CLI-10-13.

[51] Board Order at 13.

[52] DOE Motion to Withdraw at 5.

[53] *Fulton*, 14 N.R.C. at 974 (§ 2.107 "gives the boards substantial leeway in defining the circumstances in which an application may be voluntarily withdrawn," but "[t]he terms prescribed at the time of withdrawal must bear a rational relationship to the conduct and legal harm at which they are aimed."); *Pacific Gas and Electric Company* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 N.R.C. 45, 51 (1983) (holding, a year after the NWPA was enacted, that the "law on withdrawal does not require a determination of whether [the] decision is sound.").

aspect of the NRC's applicable laws,[54] but rather well-established aspects of NRC jurisprudence in the years prior to the NWPA's passage.

Additionally, there *is* relevant legislative history that the Board ignores. The NWPA's history shows that Congress' decision to incorporate all of the NRC's laws applicable to applications was deliberate. Early drafts of the NWPA contained special rules that would have superseded the ordinary NRC rules of practice that govern a licensing proceeding.[55] Congress eventually rejected that approach and stripped from the bill all the special licensing procedures, substituting in their place § 114(d), which adopts the NRC's rules and makes no exception for § 2.107.[56]

In short, the plain language of the NWPA expressly provides that the Commission's laws applicable to license applications attach to this proceeding. Nothing in the legislative history evidences Congress' intent to exclude 10 C.F.R. § 2.107 and the Commission precedent on withdrawal from that incorporation. To the contrary, the NWPA reflects Congress' satisfaction with NRC law. Thus, whether to discontinue the Yucca Mountain repository and whether to withdraw the application remain squarely within DOE's scope of authority under both the AEA and DOE Organization Act.

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[54] Board Order at 14.

[55] For example, H.R. 5016, 97th Cong., 1st Sess. (Nov. 18, 1981) included such procedures in H.R. 5016 § 8(d) at subsections (2)-(9). These special procedures were supposed to truncate the licensing process. *See* 128 Cong. Rec. S15644 (Dec. 20, 1982) (Senator Mitchell). Under these proposed procedures, the NRC would have held an adjudicatory hearing only "if there is genuine and substantial dispute over technical matters upon which a licensing decision of NRC is likely to depend." H.R. Rep. No. 97-411(I), at 21 (1982). Also, a court could only review a Commission decision if a "timely objection was made, and the Commission's decision precluded a fair consideration of the issue." *Id*.

[56] *See especially* H.R. Rep. 97-411(I), at 52 (1982) (statement of Rep. Lundine) (objecting to inclusion in NWPA of rules for license proceeding and preferring use of NRC's rules of practice, noting that the NRC's "procedural regulations have been carefully drawn after many months of careful consideration and debate.").

B. The NWPA Does Not Expressly Prohibit Withdrawal

The Board's conclusion that the NWPA strips the Secretary of his pre-existing authority to withdraw the license application misconceives the interaction between the AEA and NWPA, as well as the relevant legal standards. The Board cites no express provision in the NWPA that prohibits the Secretary's AEA-derived discretion to withdraw a license application. That is because there is none. Yet the Board holds that the NWPA overrides the AEA and DOE Organization Act because there is no provision in the NWPA that affirmatively authorizes DOE to exercise its discretion under pre-existing law and withdraw the application. The Commission has rejected similar logic in the *ISFSI* decision.[57]

In *ISFSI*, the State of Utah argued that § 135(h), 42 U.S.C. § 10155(h), in Subtitle B of the NWPA, stripped the NRC of its pre-existing AEA licensing authority over private away-from-reactor interim storage facilities. In particular, Utah advanced a claim similar to the Board's holding below. Arguing that the NWPA is a later enacted, specific statute that "contemplates a comprehensive and exclusive solution to the problem of spent nuclear fuel," Utah contended that the NRC was prohibited from licensing private away-from reactor interim storage facilities because the NWPA did not itself affirmatively authorize such facilities.[58]

The Commission disagreed, noting that through the NWPA "Congress intended to supplement, rather than replace, existing law."[59] As a result, and "[c]ontrary to Utah's claims, where an activity is already authorized by another provision of law, declining to 'authorize' it

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[57] *ISFSI*, 56 N.R.C. 396-97. The D.C. Circuit denied Utah's petition for review of this decision in *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004).

[58] *ISFSI*, 56 N.R.C. at 393.

[59] *Id*. at 405.

anew – or encourage it or require it – is not the same as prohibiting it."[60] The Commission further held that when Congress included "facially neutral [language] on the question of the NRC's general AEA authority to license away-from-reactor ISFSIs," then "Section 135(h) says what the then-new NWPA authorized, but it says nothing to override existing law."[61]

Though the particular authority under consideration was different, *ISFSI*'s principles of statutory construction apply in this case. No provision in the NWPA expressly overrides the Secretary's pre-existing authority not to proceed with an application to construct a repository that he has decided will not be built or operated. On the contrary, § 114(d) makes clear that the ordinary NRC rules, which have always permitted withdrawals, should apply.

The Commission observed in *ISFSI* that "Congress knows how to draft legislation that clearly states its intent."[62] As the Commission held: "[i]f Congress intended an absolute prohibition against private offsite storage, it could have accomplished that with concrete and specific language, such as: 'Notwithstanding any other provision of law, this Act *prohibits* the private or Federal use . . .,' or 'there shall be no private or Federal storage of spent nuclear fuel on any site . . . .'"[63]

The same is true here. Congress could have said in concrete and specific terms that DOE must proceed to build the Yucca Mountain repository. In fact, before passage of the NWPA, *Congress had such legislation before it, but ultimately rejected it*.[64] Similarly, Congress could

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[60] *ISFSI,* at 397.

[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] H.R. 5016 (Nov. 18, 1981). Section 8(d)(7) of this draft legislation would have directed the Secretary to complete construction within 6 years after receiving construction authorization and to operate the repository at the earliest practical date after receiving a license from the NRC.

have included in the NWPA a provision that expressly said that DOE cannot withdraw a license application; or it could have carved out from its blanket incorporation of NRC laws those that pertain to withdrawals of license applications; or it could have specifically required DOE to pursue an application, once filed, to the point of decision on the merits. It would have been simple for Congress to have expressly done any of those things, and it would have been consistent with how Congress expressed prohibitions in other sections of the NWPA. The absence of any such prohibition on withdrawal thus leaves DOE's otherwise pre-existing right to withdraw its own application intact.

In this regard, the Board errs in reasoning that, because Congress told DOE in the NWPA that it could not do certain things, it would not be "unique" for Congress to take away as well the policy discretion whether to discontinue the Yucca Mountain project.[65] The Board has the analysis backward. "'[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.'" [66] Under that principle of interpretation, since Congress specifically prohibited *other* actions by the Secretary, but was silent about withdrawal, no prohibition on withdrawal may be inferred.

C. The NWPA Does Not Implicitly Repeal The Secretary's Authority

Because, as the Board concedes, the "NWPA does not expressly repeal the AEA," and, in fact, "specifically refers to it," [67] the Board's analysis rests in the end on a strained theory of implied repeal. Its reasoning is flawed.

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[65] Board Order at 10-11 (discussing NWPA §§ 113 and 115).

[66] *KP Permanent Make-Up,* 543 U.S. at 118 (citations omitted).

[67] Board Order at 12.

1. Implied Repeals Are Strongly Disfavored

As the United States Supreme Court and the Commission have held, "[o]ne of the strongest maxims of statutory interpretation is that the law disfavors implied repeals."[68] Instead, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective."[69] This is because "without the presumption against implied repeals, the difficulty in determining the effect of a bill on the body of pre-existing law would turn the legislative process into 'blind gamesmanship,' in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose."[70]

The Commission itself, in construing the NWPA and the AEA in *ISFSI*, concluded that "only if there is no way to reconcile the AEA's general authority with the NWPA should we find that the latter overruled the former. For us to find an implied repeal, where two laws can be reconciled, would give the NWPA a wider impact than Congress intended."[71] An implied repeal can exist only if there is an "irreconcilable conflict" between the NWPA's provisions and the AEA-authorized authority.[72] There must be a "real incompatibility" and "positive repugnancy"

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[68] *ISFSI,* 56 N.R.C. at 401; *see also National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007) (holding that "'repeals by implication are not favored'" and "[a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" (citation omitted); *Vimar Seguras y Reasegures, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) ("'[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, *absent a clearly expressed congressional intention to the contrary*, to regard each as effective.") (emphasis added); *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974) (holding that the "'cardinal rule [is] that repeals by implication are not favored.'") (citations omitted).

[69] *ISFSI*, 56 N.R.C. at 401.

[70] *Id*. at 401-02 (citation omitted).

[71] *Id*.

[72] *Id*. at 402.

to find that the NWPA implicitly repealed the "general regulatory authority over spent fuel" given by the AEA.[73]

While the Commission in *ISFSI* wrestled with its own authority under the AEA, the basic maxim recognized in *ISFSI* fully applies here – "in [the] face of the presumption against implied repeals, [the Commission] would have to find an irreconcilable conflict between the NWPA's provisions and [DOE's] AEA-authorized" discretion over nuclear waste "to find that the NWPA implicitly limited" DOE's general authority over spent nuclear fuel.[74] There is "no irreconcilable conflict" between a statute setting up a process to select, site and *possibly* obtain a construction authorization from the Commission (the NWPA) and another set of statutes that provides DOE the discretion *not* to move forward with the construction or operation of such a repository (the AEA and DOE Organization Act). The former must be read consistently with preserving authority under the latter. Absent an express provision in the NWPA affirmatively withdrawing authority under the AEA and DOE Organization Act, or the existence of an otherwise irreconcilable conflict not shown here, the NWPA leaves intact DOE's AEA powers.[75]

2. The Statutory Language The Board Emphasizes Does Not Meet The Standard For An Implied Repeal

The Board predicates its theory of implied repeal on a single phrase from § 114(d) of the NWPA, in particular the provision that states that the Commission shall "issue a final decision approving or disapproving the issuance of" an application within three-to-four years.[76] The Board states that "[o]nce DOE has applied for a construction authorization, the NRC – not DOE

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[73] *Id*. at 405.

[74] *Id*. at 402-03.

[75] *ISFSI*, 56 N.R.C. at 403; *Home Builders*, 551 U.S. at 662-63; *see also United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001) (RCRA does not impliedly repeal DOE's AEA authority).

[76] Board Order at 5, quoting NWPA § 114(d), 42 U.S.C. § 10134(d).

– is charged with granting or denying the construction permit application under the sequential process prescribed the NWPA."[77] In other words, according to the Board, the NWPA *sub silentio* divests the Secretary of his pre-existing discretion not to move forward with a repository at Yucca Mountain.[78] The Board misreads § 114(d).

As an initial matter, this portion of § 114(d) says nothing about the *Secretary's* authority. It simply imposes a schedule on the Commission.[79] It is difficult to imagine, and there is no legislative history to suggest, that Congress intended to limit the Secretary's authority by a statutory provision that imposes a limit on the *NRC's* actions and makes no mention of the Secretary. Such a provision does not create the "irreconcilable conflict" and "positive repugnancy" that governing law requires for an implied repeal.

At least as important, the portion of § 114(d) that the Board relies on, read fairly and fully, merely imposes a time limit on the Commission for licensing action rather than requiring the Commission to march forward toward a decision on the merits regardless of whether the Secretary seeks to withdraw the application. That time limit has relevance only so long as an application is pending. As the Staff has properly explained,[80] DOE's application, once withdrawn, will no longer be docketed before the Commission, and correspondingly the Commission will have no remaining obligation to render a "final decision" within the specified time period. That common-sense construction comports with the Commission's prior interpretation of § 114(d), which construed the three-year requirement to apply only during the

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[77] Board Order at 17; *see also id*. at 5 (DOE cannot withdraw its application because the NRC must "consider the Application and issue a final, merits-based decision approving or disapproving the construction authorization application" under § 114(d)).

[78] *Id*. at 12 & n. 43 (discussing *Siegel*, the Board said that the NWPA "override[s] the AEA's broad grant of authority.").

[79] NWPA § 114(d), 42 U.S.C. § 10134(d).

[80] Staff Answer at 13.

period in which the application is docketed before the NRC.[81] Even the Board itself appears to agree that the "statutory deadline" applies only while the application is docketed.[82]

Additionally, the Board's reading of § 114(d) is at odds with that provision's express adoption of Commission rules of practice (the "laws applicable to such applications") for the license proceeding. Under the Board's view, there is one part of § 114(d) that calls for application of NRC's ordinary withdrawal procedures (including § 2.107), while another part disallows any withdrawal regardless of § 2.107 and the precedent under it. The Commission should reject a reading that would cause an internal inconsistency in the NWPA.[83]

In all events, even if the language cited by the Board were understood to impose a separate and independent obligation on the Commission to approve or disapprove an application regardless of whether the Secretary wishes to pursue it, a Commission order granting DOE's motion to withdraw with prejudice would result in a final NRC judgment on DOE's application. Such a final judgment precluding "filing a new application to construct" a permanent repository under the NWPA for high level waste and spent nuclear fuel would thus constitute a "disapprov[al]" under § 114(d).[84]

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[81] 66 Fed. Reg. 29,453, 29,453 n.1 (May 31, 2001) ("The Commission interprets the requirement in Section 114(d) of the NWPA that the Commission 'shall issue a final decision approving or disapproving the issuance of a construction authorization not later than three years after the date of submission' . . . of the license application, as three years from the docketing of the application."); *see also U.S. Department of Energy* (High-Level Waste Repository: Pre-Application Matters), Memorandum and Order, CLI-06-05 (slip op. at 3-4) (Feb. 2, 2006) ("The purpose of the regulations is to enable the Commission to meet its statutory obligation to complete its examination of the application within three years of its filing," citing NWPA § 114(d)).

[82] Board Order at 16 n. 56.

[83] *E.g., FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959) (adjudicatory bodies should, "if possible, [read] all parts into an harmonious whole.").

[84] *See Fulton*, ALAB-657, 14 N.R.C. at 973.

3. The Cases The Board Relies Upon To Support Its Incorrect Reading Of The NWPA Are Distinguishable

The Board's Order relies mainly on two Supreme Court decisions to hold that the NWPA implicitly repeals the authority bestowed upon the Secretary under the AEA and DOE Organization Act.[85] Those cases arose in fundamentally different contexts than the situation presented by DOE's motion and are not pertinent here.

In *Brown & Williamson*, the Supreme Court considered whether the Food and Drug Administration (FDA) was entitled to *Chevron* deference for its changed interpretation of the Food, Drug and Cosmetic's Act (FDCA). After decades of openly declaring that it lacked authority to regulate tobacco under the FDCA, the FDA reversed course in 1995 and issued a proposed rule regulating the sale of tobacco products. The Court reversed the FDA's action, holding "that Congress has directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products."[86]

The Court reached this holding because statutes enacted after the FDCA *specifically* "foreclosed the removal of tobacco products from the market."[87] Congress "enacted this [subsequent] legislation against the background of the FDA repeatedly and consistently asserting that it lacks jurisdiction under the FDCA to regulate tobacco products as customarily marketed," and, "[f]urther, Congress ha[d] persistently acted to preclude a meaningful role for *any* administrative agency in making policy on the subject of tobacco and health."[88] Thus, "Congress ha[d] affirmatively acted to address the issue of tobacco and health, relying on the

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[85] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000) (Board Order at 11-12, 14); *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001) (Board Order at 14).

[86] *Brown & Williamson*, 529 U.S. at 133.

[87] *Id*. at 137.

[88] *Id*. at 155-56 (emphasis in original).

representations of the FDA that it had no authority to regulate tobacco . . . . As a result, Congress' tobacco-specific statutes preclude[d] the FDA from regulating tobacco products as customarily marketed." Against that history, the Court rejected as "implausible" the FDA claim that it had jurisdiction under the FDCA to regulate tobacco products because, according to the FDA, tobacco products were actually "safe" under the FDCA.[89]

Unlike the later-enacted statutes examined in *Brown & Williamson*, the NWPA does not expressly contradict the exercise of the Secretary's discretion under the AEA and the DOE Organization Act. And, unlike the FDA, DOE has not disclaimed its responsibility for managing nuclear waste nor, more directly, its authority respecting the licensing, construction, and operation of a repository at Yucca Mountain – including its authority to halt that process. Additionally, unlike the FDA's construction of the FDCA, DOE's interpretation of the NWPA is not "implausible," because Congress directly incorporated existing NRC laws pertaining to license applications into the NWPA – laws that specifically recognize the right of an applicant to withdraw its application once filed. Contrary to the Board's ruling, the specific incorporation of these NRC laws is not "obscure," "cryptic" or "implausible." These NRC laws had been around since at least 1963 and had been construed by NRC decisions multiple times before enactment of the NWPA.[90]

The Board likewise errs in relying on *Whitman*. In that case, the Supreme Court addressed EPA's consideration of the cost of implementation in setting national ambient air quality standards (NAAQS). The Court held that EPA could not consider such costs because the

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[89] *Id*. at 139, 141. The FDA claimed taking cigarettes off the market completely was less "safe" than regulating them because a complete ban on tobacco products could result in a black market on cigarettes and adverse health consequences associated with quitting smoking.

[90] *Perkins*, LBP-82-81, 16 N.R.C. 1128; *North Coast*, ALAB-662, 14 N.R.C. 1125; *Fulton*, ALAB-657, 14 N.R.C. 967; *Pilgrim*, LBP-74-62, 8 A.E.C. 324.

statute relating to NAAQS did not explicitly permit EPA to consider them when establishing NAAQS, and EPA could not infer that it had the power to do so from an ambiguous provision.[91]

Unlike in *Whitman*, the NWPA's incorporation of the NRC's laws applicable to license applications, including the rules applicable to withdrawal, is not ambiguous. Here the Secretary's authority starts with the AEA and runs through the DOE Organization Act and § 114 of the NWPA.

Instead of focusing on these two inapposite cases, the Board should have relied on the line of Supreme Court precedent, including *Morton v. Mancari*[92] and *Home Builders*, holding that statutes must be construed harmoniously wherever possible, so that one statute does not implicitly repeal another. Had it done so, the Board would have been left with no choice but to grant DOE's motion.

In *Home Builders*, the Court stated that it "will not infer a statutory repeal 'unless the later statute 'expressly contradict[s] the original act' or unless such a construction 'is *absolutely necessary* . . . in order that [the] words [of the later statute] shall have any meaning at all.'"[93] DOE's construction of the NWPA, AEA, and DOE Organization Act gives rational effect to all three of these statutes – as the Court did in *Home Builders* by giving effect to the provisions of the Clean Water Act and Endangered Species Act.[94] The Board's ruling fails to do so. Moreover, the Board's ruling runs afoul of this Commission's statement in *ISFSI* that the NWPA "supplement[s], rather than replace[s], existing law."[95]

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[91] *Whitman*, 531 U.S. at 467-68.

[92] 417 U.S. 535 (1974).

[93] *Home Builders*, 551 U.S. at 662 (citations omitted) (emphasis added).

[94] *See id*. at 664-65.

[95] *ISFSI*, 56 N.R.C. at 405.

D. The Board's Purpose, Structure, And Legislative History Rationale Is Flawed

Finding no plain language to support its ruling, the Board attempts to rely on the NWPA's purpose, structure, and legislative history to support a conclusion that the Secretary lacks the authority to withdraw an application to construct a repository that he does not intend to build. The Board is mistaken.

1. The NWPA's Purpose Does Not Strip The Secretary's Preexisting Authority

None of the "purposes" enumerated in the NWPA provides that the Secretary must prosecute an application that he has determined is not in the public interest.[96] The purpose of the NWPA's Subtitle A is to establish a process that *could* lead to a repository at Yucca Mountain if, ultimately, the Secretary and other actors determine it appropriate to construct one there. Indeed, the NWPA does not permit, much less require or enable, the operation of a repository absent further legislation and other regulatory proceedings beyond the construction authorization proceeding at issue here. Even if the Commission approved DOE's application, an operational repository could not exist at Yucca Mountain unless at least all of the following additional actions occurred:

- Congress must enact additional legislation authorizing the withdrawal of lands necessary for the Yucca Mountain repository (such legislation was introduced in 2006 and 2007 without ever passing)[97];

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[96] *See* NWPA § 111(b)(1) - (4), 42 U.S.C. § 10131(b)(1) - (4).

[97] Nuclear Fuel Management & Disposal Act, S. 2589, 109th Cong., 2d Sess. (April 6, 2006); Nuclear Fuel Management & Disposal Act, H.R. 5360,109th Cong., 2d Sess. (May 11, 2006); Nuclear Fuel Management & Disposal Act, S. 3962, 109th Cong., 2d Sess. (Sept. 27, 2006); Nuclear Waste Access to Yucca Act, S. 37, 110th Cong., 1st Sess. (May 23, 2007); Clean, Reliable, Efficient and Safe Energy Act of 2007, S. 1602, 110th Cong., 1st Sess. (June 12, 2007).

- DOE must apply for, and the Commission must approve, an additional license to receive and possess spent nuclear fuel and high-level radioactive waste in the repository;
- DOE must obtain federal and state permits, including water permits from Nevada that Nevada has vigorously opposed granting[98]; and
- Congress must fund the construction of the repository and the rail line to the repository.

The NWPA in no way commits Congress to enact the necessary legislation. The NWPA likewise does not direct DOE to apply for the other permits necessary for construction of a repository or to file an application with the NRC to receive and possess waste, and it certainly does not guarantee DOE success if it were to seek them. The Board is incorrect, then, to suggest that the NWPA's purpose requires the Secretary to prosecute this application. In fact, the legislative history indicates that Congress understood that there were many ways that the NWPA process might not ultimately yield a repository.[99]

In this regard, the Board errs in dismissing as "insignificant" the reality that the NWPA does not mandate (or even authorize) DOE to construct or operate the repository and in ignoring that the NWPA does not compel DOE to seek, much less pursue to conclusion, additional

[98] *E.g., United States v. Morros*, 268 F.3d 695 (9th Cir. 2001) (the Federal Government appealed from an order of the U.S. District Court of Nevada choosing to abstain from deciding whether the State Engineer's denial of water permit applications was pre-empted by the NWPA, which the Ninth Circuit reversed and remanded finding that there were not insubstantial federal pre-emption claims, and the court was obligated to take jurisdiction and review the matter).

[99] H.R. Rep. 97-491(I), at 44 (1982), *as reprinted in*, 1982 U.S.C.C.A.N. 3792, 3810 (stating that "it is not possible to resolve all uncertainties or predict all obstacles" to a permanent geologic repository and "[t]he potential for failure or serious delay in the program exists.").

licenses from the NRC and others that would be necessary.[100] These facts are significant because they mean, under the Board's reading, that Congress would have established a licensing process to nowhere – a process under which DOE has to prosecute a construction application to its conclusion before the Commission, while it need not even file numerous other applications required to construct an actual repository. One would further have to assume that Congress intended the Commission and its Staff to expend their time and resources reviewing and adjudicating an application for a project that is not going forward and for which other necessary approvals are not being sought. There is no reason to assume that Congress intended such a futile and wasteful process.[101]

Additionally, for the Board's conclusion to be correct, one would also have to believe that Congress intended DOE to expend public money prosecuting a highly contentious license application despite the Secretary's judgment that continuing with the proceeding is contrary to the public interest. Such an awkward circumstance would not instill public confidence in the Commission's result in this proceeding. Indeed, Nye County has implicitly acknowledged this fact and proposed in its brief to the Board that there be an "indefinite stay" of this case because 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."[102]

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[100] Board Order at 18.

[101] *Huffman*, 486 U.S. at 673 (stating that "it seems strained to assert that . . . Congress nevertheless intended DOE to impose restrictions [on foreign-source uranium] that were somehow calculated to serve that unattainable goal."); *see also Kaseman v. District of Columbia*, 444 F.3d 637, 642 (D.C. Cir. 2006) ("When possible, statutes should be interpreted to avoid 'untenable distinctions,' 'unreasonable results,' or 'unjust or absurd consequences.'").

[102] Nye County Opp. to DOE Motion to Withdraw at 22-23 (May 17, 2010).

The Board tries to gloss over these incongruities,[103] but its analysis misses the point. The issue is not whether Congress *could* have mandated such an awkward result – whether it has the power to do so – but, rather, whether it should be understood to have done so absent extraordinarily clear evidence of legislative intent on the face of the NWPA. There is no such language in the NWPA, and the Commission therefore should not mandate the unreasonable result that the Board would require.

2. The Statutory Structure Supports The Exercise Of The Secretary's Discretion

The Board also misreads the NWPA's structure. Pointing to NWPA § 113(c)(3)(A), which allows the Secretary the ability to terminate site characterization activities if the Secretary, in his discretion, concludes that the site is unsuitable, the Board notes that comparable provisions are lacking in § 114 with respect to the subsequent license application phase. According to the Board, this "structure" indicates that Congress did not intend for DOE to have withdrawal authority over its license application.[104]

Section 113(c)(3)(A) demonstrates the exact opposite. It shows that Congress intended to preserve the Secretary's discretion to *end* the Yucca Mountain project if he determines that is sound policy, and not to force the Secretary to continue with a project that he has decided was not in the public interest.

The repetition of § 113(c)(3)(A)'s text in § 114 was not necessary to preserve that authority. Because § 114(d) affirmatively incorporates the NRC's usual licensing procedures, there was no need for Congress specifically to provide in § 114 a termination method for the application phase similar to the one provided in § 113 for the pre-application phase. As the Staff

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[103] Board Order at 18-20.

[104] *Id*. at 6-9.

has explained, Congress ensured that the Secretary's policy discretion to end the project was preserved for the application phase by applying the NRC's rules and practice,[105] which allow for the Secretary to discontinue this project. In other words, the inclusion of § 113's language in § 114 would have been redundant.

In this respect, § 113, which preserves the Secretary's discretion not to go forward during the site characterization phase, and § 114, which likewise preserves that discretion thereafter by incorporating ordinary NRC practice, are parallel and consistent. Section 114 also parallels § 113 to the extent that both provisions contain a reporting requirement to Congress.[106] These requirements ensure that Congress is made aware of the Secretary's determination and recommendations are made for further legislative action.

The NWPA's structure also provides a complete answer to the Board's rhetorical question at page 8 of its Order as to why Congress would have included such detailed steps to move forward with a Yucca Mountain repository, yet permit the Secretary to withdraw the license application. The NWPA provides that the Secretary may move forward with selecting, siting, and obtaining a license to construct a repository at Yucca Mountain *only if* the President, Congress and NRC permit him to do so. This ensures that the repository will not proceed without the approval of those other actors. At the same time, the NWPA leaves in place the

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[105] Staff Answer at 13-14.

[106] *Compare* NWPA § 113(c)(3)(F), 42 U.S.C. § 10133(c)(3)(F) (the Secretary must "report to Congress not later than 6 months after such determination [to halt Yucca Mountain] the Secretary's recommendations for further action to assure the safe, permanent disposal of [nuclear waste], including the need for new legislative authority") *with* § 114(c), 42 U.S.C. § 10134(c) (the Commission must submit annual reports to "Congress describing the proceeding undertaken through the date of such report with regard to such application, including a description of" among other things "any Commission actions regarding the granting or denial of such [application]") *and* § 114(e)(2), 42 U.S.C. § 10134(e)(2) ("Any Federal agency" must submit a report to Congress if it cannot comply with the project decision schedule, and such report, *inter alia*, must contain "recommendations" for "changes" to applicable "statutory directives or authority . . . .").

Secretary's pre-existing discretion to halt a repository at Yucca Mountain without leave of the President, Congress, or NRC. Even the granting of the NRC's construction authorization is merely a license that permits, but does not mandate, construction of the repository, and still leaves the Secretary the discretion as to whether to go forward.[107] The detailed structure of the NWPA conditions the terms on which the Secretary may move forward with Yucca Mountain, but it leaves with the Secretary the ultimate decision whether to continue with the process up through the construction of a repository.

3. The Board Misreads The Legislative History

The legislative history the Board cites does *not* address the precise question before this Commission, namely, whether the NWPA precludes DOE from exercising authority under the AEA and DOE Organization Act, to make decisions with respect to continuation of the Yucca Mountain project once DOE has filed its application with the NRC.

The Board relies primarily on a snippet from a committee report stating the need "to provide close Congressional control and public and state participation in the program to assure that the political and programmatic errors of our past experience will not be repeated."[108] That bit of text has nothing to do with whether DOE has the discretion to withdraw its application. Rather, it indicates concern of the House Committee on Interior and Insular Affairs that the NWPA needed a process that required participation from State and local government, Indian, and

[107] *Cf. Shoreham-Wading River Central School Dist. v. NRC*, 931 F.2d 102, 107 (D.C. Cir. 1991) (refusing to enjoin Long Island Lighting Company's surrender of its operating license for the completed, but never commercially operated Shoreham nuclear plant, noting that LILCO possessed "a license to operate," not "a sentence to do so.").

[108] Board Order at 9, quoting H.R. Rep. No. 97-491(I), at 29-30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3792, 3796.

public participation to avoid past errors, which involved the Secretary of Energy's predecessors *seeking to go forward* with a repository without adequate consultation with affected entities.[109]

This legislative history is not of significant value because it is "cited out of context" and did not occur "in any discussion of the question here under review."[110] Significantly, nowhere in that legislative history that has been cited did Congress say that it intended through the NWPA to take away DOE's authority under the AEA or DOE Organization Act. Yet the Board's ruling presumes that the absence of such commentary proves that the NWPA took away the Secretary's discretion. Courts generally do not rely on the absence of legislative history to construe a statute and ascribe it any particular meaning.[111] As the D.C. Circuit has explained, "silence in legislative history is almost invariably ambiguous. If a statute is plain in its words, the silence may simply mean that no one in Congress saw any reason to restate the obvious."[112] Conversely, "[i]f the words of a statute are otherwise ambiguous, it is difficult to conceive of situations in which congressional silence would lend great clarity."[113]

Because the legislative history that the Board relies upon does not relate to the question at hand, the Commission should rely on the plain language of the NWPA and other principles of

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[109] *See* H.R. Rep. No. 97-491(I), at 27 (describing the "intense political attack" to the AEC's pilot facility in Lyons, Kansas, and the ERDA's efforts to find a site in Michigan); *see also* 128 Cong. Rec. S15666 (Dec. 20, 1982) (Senator Jackson) (stating that the "major political stumbling block for the Department of Energy in proceeding" with a program for achieving "ultimate disposal of high-level waste or spent nuclear fuel is that States and Indian tribes currently have no legal right to participate in the process leading to the development of a repository.").

[110] *Avco Corp. v. DOJ*, 884 F.2d 621, 624-25 (D.C. Cir. 1989).

[111] *Harrison*, 446 U.S. at 592.

[112] *Avco*, 884 F.2d at 625.

[113] *Id*.

statutory construction, all of which indicate that the Secretary's pre-existing authority and discretion to exercise it were not trumped by or repealed by implication in the NWPA.[114]

E. The Board Misstates The Purpose Of The Blue Ribbon Commission

Congress' appropriation of $5 million for a Blue Ribbon Commission to consider "alternatives" for disposal of high-level waste and spent nuclear fuel demonstrates that Congress understands the NWPA in a manner consistent with DOE's interpretation and actions here. In particular, Congress' action shows its understanding that DOE is not required to construct a repository at Yucca Mountain, so that it makes sense to consider alternatives for disposal of these materials. If DOE had no choice under the NWPA but to proceed inexorably through the licensing process and then build the repository, it would make little sense to fund analysis of alternatives. Congress would have instead refused funding and insisted that DOE proceed with the Yucca Mountain application.[115]

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[114] Notably, the Board fails to address any of the legislative history that showed that Congress did consider the NRC's rules, found them adequate, and incorporated them into the NWPA through § 114(d). Early drafts of the NWPA – which were ultimately rejected because existing NRC rules were adequate – contained not only a reference to NRC laws, but also specific procedures for a license application proceeding at the Commission. H.R. 5016, § 8(d)(2)-(9) (Nov. 18, 1981); H.R. Rep. 97-411(I), at 52 (1982) (statement of Rep. Lundine) (objecting to inclusion in NWPA of rules for license proceeding and preferring use of NRC's rules of practice, noting that the NRC's "procedural regulations have been carefully drawn after many months of careful consideration and debate."). Nor did the Board ever address the Congressional statement in 1982 that the Yucca Mountain project could fail for any reason, H.R. Rep. 97-491(I), at 44 (1982), *as reprinted in*, 1982 U.S.C.C.A.N. 3792, 3810 (stating that "[t]he potential for failure or serious delay in the program exists."), or those Congressional statements in 2002 that recognized that Congress was not "committed" to Yucca Mountain. 148 Cong. Rec. 7166 (2002) (Rep. Norwood) (regarding the passage of the YMDA); *see also id.* at 7155 (Rep. Dingell) (stating that the Yucca Mountain Site Approval Act "is just about a step in a process"); *id*. at 12340 (Sen. Crapo) ("[T]his debate is not about whether to open the Yucca Mountain facility so much as it is about allowing the process of permitting to begin to take place.")

[115] *See, e.g., Brooks v. Dewar*, 313 U.S. 354, 360-61 (1941) (Congressional ratification of agency action found when, *inter alia*, "[t]he information in the possession of Congress" concerning agency action "was plentiful and from various sources," including annual agency reports).

The point here is not that Congress' decision "repeal[ed] the NWPA," as the Board characterizes the issue,[116] but rather that Congress took action that evinces an understanding of the NWPA consistent with DOE's interpretation. Congress' decision to provide this funding thus should give the Commission further comfort that DOE can withdraw its license application. In contrast, the Board's reasoning here is based on a misunderstanding of the relevant Appropriations Act.[117]

F. The Board's Deference Analysis Is Wrong

Because the NWPA incorporates existing law (which allows withdrawals) and nowhere prohibits withdrawal, the Commission need not decide what deference is due to DOE to rule in its favor. But if the Commission does reach that issue, it should reject the Board's analysis.[118]

In the first place, the Board erroneously finds that the decision not to pursue the license application is not within DOE's purview, but falls exclusively under the NRC's sphere of authority because it is the NRC that must adjudicate the licensing proceeding.[119] DOE's authority to act here comes from the AEA and the DOE Organization Act, two statutes that DOE administers, and the issue is whether the NWPA somehow limits the authority of DOE, not the authority of the NRC, under those pre-existing statutes.

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[116] Board Order at 18.

[117] Contrary to the Board's critique of DOE's argument about the BRC, it is not "the law" that the House Committee Report required the BRC to look at Yucca Mountain in its review. Board Order at n. 69. The Conference Report stated that "[t]he conferees provide $5,000,000 for the Secretary of Energy to establish the Blue Ribbon Commission. *All guidance provided by the House and Senate reports is superseded by the conference agreement*." H. Conf. Rep. No. 111-278, p.126 (2009) (emphasis added). In any event, it is well settled that committee report language is not law. *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (holding that in appropriations acts "'indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on' the agency.") (citation omitted).

[118] Board Order at 16-17.

[119] *Id.* at 16.

Second, the Board is wrong that DOE is entitled to no deference because its "interpretation is reflected in nothing more than a motion before this Board – and not, for example in a formal agency adjudication or notice-and-comment rulemaking."[120] The Supreme Court's decision in *Christensen v. Harris County*,[121] the case the Board cites for this proposition, does not support the Board's sweeping statement. There, the Court determined that the particular letter at issue was not entitled to "*Chevron*-style deference," but it held that "interpretations contained in formats such as opinion letters" may be "entitled" to deference under the Court's decision in *Skidmore v. Swift & Co*.[122]

The Board is also wrong in concluding that an agency is entitled to no deference when its deliberate and official position is announced in a legal pleading. The Supreme Court flatly rejected this position in *Auer v. Robbins*.[123] There, the Supreme Court held that when the agency's considered judgment is in the form of a "legal brief," "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[124] *If* the Commission finds there is a gap in the legislation, then deference is appropriate where (as here) the agency's interpretation constitutes the official and deliberate determination of the agency.[125]

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[120] *Id*. at 16, n. 59.

[121] 529 U.S. 576 (2000).

[122] *Id*. at 587, citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[123] 519 U.S. 452 (1997).

[124] *Id*. at 462; *see also Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156-57 (1991) (holding that the Secretary of Labor's interpretation of Occupational Safety and Health Act regulations in administrative litigation before the Occupational Safety and Health Review Commission is "not a *post hoc* rationalization," and "the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard.").

[125] *Id*.; *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

* * *

At bottom, the Board's Order rests on the erroneous conclusion that Congress (even though it did not say so) intended to require the Secretary to continue to prosecute this particular application to conclusion even though Congress has not required – and, in fact, not even authorized – the Secretary to take other steps necessary to open a repository. That interpretation ignores the NWPA's plain text, incorporating ordinary NRC procedures, which in turn authorize withdrawal on such conditions as the NRC determines appropriate. Moreover, the Board's Order improperly reads the NWPA to implicitly repeal the AEA and DOE Organization Act, and to impose futile and wasteful requirements. The Board's interpretation should not be adopted absent extraordinarily clear statutory text of the kind that does not exist here.

IV. DOE IS ENTITLED TO WITHDRAWAL WITH PREJUDICE

The Board also improperly rejects DOE's request to dismiss its own application with prejudice. In reaching that result, the Board cites and quotes cases where an intervenor had sought to impose a "with prejudice" condition on an applicant.[126] Those cases are irrelevant where, as here, an applicant has voluntarily agreed to dismiss its own application with prejudice.

While no NRC decision has addressed whether the NRC may deny a licensee's affirmative request to dismiss its own application with prejudice, analogous federal court cases under Rule 41(a)(2) of the Federal Rules of Civil Procedure, to which the NRC looks to for guidance in this context,[127] direct that when a "plaintiff moves . . . to voluntarily dismiss its complaint with prejudice, the district court *must grant that request*."[128] In fact, "[i]t is generally

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[126] Board Order at 21-22.

[127] *E.g., Perkins*, 16 N.R.C. at 1134-35.

[128] *United States v. Estate of Rogers*, 2003 WL 21212749 *1 (E.D. Tenn. April 3, 2003) (emphasis added), citing *Smoot v. Fox*, 340 F.2d 301, 303 (6th Cir. 1964); *York v. Ferris State*

considered an *abuse of discretion* for a court to deny a plaintiff's request for voluntary dismissal with prejudice."[129] This standard should be followed here. And given that the Board does not find (and could not have found) legal prejudice to any party from the relief DOE seeks,[130] there is no basis whatsoever to deny DOE withdrawal on the terms it proposes.

V. THE COMMISSION SHOULD PERMIT DOE TO WITHDRAW ITS LICENSE APPLICATION WITH NO OTHER CONDITIONS

The only condition that should be imposed on DOE's withdrawal is that it be dismissed with prejudice. DOE has already represented that it will, at a minimum, maintain the LSN throughout this proceeding, including any appeals, and then archive the LSN materials in accordance with the Federal Records Act and other relevant law. Nothing further is necessary. In all events, even if the Commission were to impose the LSN conditions from Appendix A of the Board's Order, then the Commission should strike the Board's proposed condition B.7.

Condition B.7 requires, in part and over DOE's objection, that:

> 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 [interested governmental participants] to verify whether such samples or specimens should have been

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Univ., 36 F. Supp. 2d 976, 979 (W.D. Mich. 1998); 9 CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2367 (2d ed. 1995).

[129] *Degussa Admixtures, Inc. v. Burnett,* 471 F. Supp. 2d 848, 852 (W.D. Mich. 2007) (emphasis added), citing *Smoot*, 340 F.2d at 303.

[130] Some parties in this proceeding have sought to predicate harm based on the continued onsite retention of the nuclear waste that might otherwise go to Yucca Mountain were the repository to open. But that asserted harm presumes that, absent the decision the Secretary has made, a nuclear waste repository at Yucca Mountain would be licensed, constructed, and operated. The earliest such a facility could exist is 2020 – and it could be much longer, or never. There are many contingencies that need to be satisfied before such a repository could be operational. By the same token, it may well be that one or more of the alternative methods analyzed by the Blue Ribbon Commission (such as interim storage) would lead to the taking of such waste more quickly than the never-ending pursuit of Yucca Mountain. The claimed harm is thus entirely speculative, and relies on contingencies that provide no basis to deny DOE's requested relief.

> 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.[131]

This condition is inconsistent with the regulatory definition of documentary materials to be included in the LSN, and is unduly burdensome.

Under the Commission's regulations, DOE is under no obligation essentially to audit its physical item collection and add these materials to its LSN collection and then archive those rocks for the anticipated 100-year archive period. The only items DOE must include in its LSN collection are "documentary material"[132] and "basic licensing documents."[133] The Commission's regulations define "documentary material" as "information" that supports DOE's position in the licensing proceeding, "information" that does not support DOE's position, and certain "reports and studies."[134] Rocks and other physical samples are not "information" or "reports and studies" and thus are excluded from the LSN. They also are not "basic licensing documents."

To be sure, whatever information may have been extracted from these physical items and met the definition of documentary material has already been placed on the DOE LSNdc and will be archived. Furthermore, if some party thought that the physical materials needed a bibliographic header on the LSN, that party has had several years already to bring this issue before any of the Licensing Boards tasked with deciding LSN disputes or seek to modify the Commission's regulations. No party has done that, and that should speak volumes as to whether these items are documentary material.

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[131] Board Order, App. A, B.7.

[132] 10 C.F.R. § 2.1003(a).

[133] 10 C.F.R. § 2.1003(b).

[134] *Id*. § 2.1001 (definition of "documentary material").

Moreover, this condition should not be imposed on DOE for the simple reason that if DOE's motion to withdraw is granted and there will be no repository at Yucca Mountain, there is little to no value in retaining these items for an extended period of time and certainly not for 100 years. This condition would cause DOE to expend limited resources on maintaining the warehouses that store these materials and on associated staff and systems. No justification has been provided for imposing these costs on DOE. If there are parties who are interested in these items, then DOE is willing to discuss with them the transfer of such items to them at their own costs.

VI. CONCLUSION

For the reasons discussed herein, the Commission should reverse the Board's decision, order that DOE be permitted to withdraw its license application with prejudice, and further order that no other conditions be imposed on DOE.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Electronically Signed by Sean Lev

Donald P. Irwin
Michael R. Shebelskie
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

Scott Blake Harris
Sean Lev
James Bennett McRae
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Counsel for the U.S. Department of Energy

July 9, 2010

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-HLW**
(High Level Waste Repository Construction Authorization Application)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the **U.S. DEPARTMENT OF ENERGY'S BRIEF IN SUPPORT OF REVIEW AND REVERSAL OF THE BOARD'S RULING ON THE MOTION TO WITHDRAW** have been served on the following persons on this 9th day of July 2010 through the Nuclear Regulatory Commission's Electronic Information Exchange.

CAB 04
Atomic Safety and Licensing Board Panel
Thomas S. Moore, Chair
E-mail: tsm2@nrc.gov
Paul S. Ryerson
E-mail: psr1@nrc.gov
Richard E. Wardwell
E-mail: rew@nrc.gov

Parties Served	**E-mail Addresses**
Adams, Marta	madams@ag.nv.gov
Andersen, Robert M.	robert.andersen@akerman.com
Bailey, Annie	baileys@lcturbonet.com
Barlow, Gregory	lcda@lcturbonet.com
Baughman, Mike	mikebaughman@charter.net
Bauser, Michael A.	mab@nei.org
Bell, Kevin W.	kwbell@energy.state.ca.us
Berkey, Curtis	cberkey@abwwlaw.com
Berger, Michael	michael@lawofficeofmichaelberger.com

Parties Served	E-mail Addresses
Berry, Elva Bowden	Elva.BowdenBerry@nrc.gov
Beutel, Theodore	tbeutel@eurekanv.org
Bollwerk III, G. Paul	gpb@nrc.gov; paul.bollwerk@nrc.gov
Borski, Laurie	lborski@nuclearlawyer.com
Brooks, Felicia M.	fbrooks@ndnlaw.com
Carter, Lorraine	lcarter@captionreporters.com
Cereghino, Stephen	stephen_cereghino@ymp.gov
Choate, Zoie	zchoate@co.nye.nv.us
Colburn, Ross	rcolburn@ndnlaw.com
Cottingham, Anne	awc@nei.org
Crosland, Martha S.	Martha.Crosland@hq.doe.gov
Culler, Sara	Sara.culler@nrc.gov
Curran, Diane	dcurran@harmoncurran.com
Damele, Ronald	rdamele@eurekanv.org
Deucher, Joseph	Joseph.deucher@nrc.gov
Dinunzio, Nicholas	Nicholas.Dinunzio@hq.doe.gov
Dobie, Julie	jdobie@gklaw.com
Dreher, Michael	michael.dreher@nrc.gov
Dudley, Sherry	sdudley@co.nye.nv.us
Dunning, Michael	MichaelD@atg.wa.gov
Durbin, Susan	susan.durbin@doj.ca.gov
Eiteim, Anthony C.	Anthony.Eitreim@nrc.gov
ThinElk, Shane	sthinelk@ndnlaw.com
Eredia, Sally	seredia@ndnlaw.com
Fitz, Andrew	andyf@atg.atg.wa.gov
Fitzpatrick, Charles J.	cfitzpatrick@nuclearlawyer.com
Francis, Karin	Karin.francis@nrc.gov
Fraser, Matthew	mfraser@harmoncurran.com
Frishman, Steve	steve.frishman@gmail.com
Gitter, Rebecca	rll@nrc.gov
Gilman, Joseph	jsg1@nrc.gov
Ginsberg, Ellen C.	ecg@nei.org
Gores, Jennifer A.	jgores@armstrongteasdale.com
Gottshall, Thomas R.	tgottshall@hsblawfirm.com
Graser, Daniel J.	djg2@nrc.gov
Gutierrez, Jocelyn	Jocelyn.Gutierrez@ymp.gov
Hanna, Robert S.	robert@lawofficeofmichaelberger.com
Harich, Patricia	Patricia.harich@nrc.gov
Harrington, Arthur J.	aharrington@gklaw.com
Harris, Scott Blake	Scott.Harris@hq.doe.gov
Hawkens, E. Roy	erh@nrc.gov
Hearing Docket	hearingdocket@nrc.gov
Heinzen, Steven A.	sheinzen@gklaw.com
Hembacher, Brian	brian.hembacher@doj.ca.gov
Horin, William	whorin@winston.com
Houck, Darcie L.	dhouck@ndnlaw.com
James, Gregory L. Esq.	gljames@earthlink.net
Johnson, Abigail	eurekanrc@gmail.com

Parties Served	E-mail Addresses
Julian, Emile	Emile.julian@nrc.gov
Keskey, Don	donkeskey@publiclawresourcenter.com
Klevorick, Phil	klevorick@co.clark.nv.us
Larimore, Patricia	plarimore@talisman-intl.com
Lawrence, John W.	jlawrence@nuclearlawyer.com
Leigh, Rovianne	rleigh@abbwlaw.com
Lembke, Alisa	alembke@inyocounty.us
Lenehan, Daniel	daniel.lenehan@nrc.gov
Lev, Sean	sean.lev@hq.doe.gov
Lewis, Linda	linda.lewis@nrc.gov
List, Robert F.	rlist@armstrongteasdale.com
Loveland, Bryce	bloveland@jsslaw.com
Lunt, Robin	rlunt@naruc.org
Lynch, Susan	slynch1761@gmail.com; szeee@nuc.state.nv.us
Maerten, Daniel	Daniel.Maerten@caci.com
Mahowald, Phillip	pmahowald@piic.org
Malsch, Martin G.	mmalsch@nuclearlawyer.com
Martin, Circe	ogcmailcenter@nrc.gov
Martinez, Melanie	wpnucwst2@mwpower.net
Mathias, Linda	yuccainfo@mineralcountynv.org
MacDonald, Diana	dianam@atg.wa.gov
McRae, Ben	Ben.McRae@hq.doe.gov
Mercado, Michele	michele.mercado@doj.ca.gov
Miras-Wilson, Rachel	rwilson@winston.com
Montesi, Susan	smontesi@nuclearlawyer.com
Moore, Thomas S.	tsm2@nrc.gov
Mueller, Edwin	muellered@msn.com
Murphy, Malachy	mrmurphy@chamberscable.com
Nelson, Sharon	sharonn@atg.wa.gov
Nezhad, Cyrus	Cyrus.Nezhad@hq.doe.gov
Niegemann, Brian	bniegemann@ndnlaw.com
OCAA Mail Center	OCAAMAIL@nrc.gov
Overton, H. Lee	Leeo1@atg.wa.gov
Pak, Christina	Christina.Pak@hq.doe.gov
Peebles, John M.	jpeebles@ndnlaw.com
Pitchford, Loreen, LSN Coordinator	lpitchford@comcast.net
Pitts, Jason	jayson@idtservices.com
Poland, Douglas M.	dpoland@gklaw.com
Putzu, Frank	frank.putzu@navy.mil
Ramsay, James	jramsay@naruc.org
Renfro, Hanna	hrenfro@gklaw.com
Repka, David A.	drepka@winston.com
Rhoan, Robert	rrhoan@ndnlaw.com
Robbins, Alan	arobbins@jsslaw.com
Roby, Debra	droby@jsslaw.com
Rosenthal, Alan S.	Alan.rosenthal@nrc.gov
Rotman, Matthew	matthew.rotman@nrc.gov
Ryan, Tom	Tom.Ryan@nrc.gov

Parties Served	E-mail Addresses
Ryerson, Paul S.	psr1@nrc.gov
Schwartz, Jacqueline	jschwartz@gklaw.com
Sears, Richard	rwsears@wpcda.org
Shealy, Ross	rshealy@hsblawfirm.com
Silberg, Jay E.	jay.silberg@pillsburylaw.com
Silvia, Andrea L.	alc1@nrc.gov
Simkins, Connie	jcciac@co.lincoln.nv.us
Simon, Mike	wpnucast1@mwpower.net
Sisco, Carlos L.	csisco@winston.com
Sommer, Josephine	Josephine.Sommer@ymp.gov
Sullivan, Timothy E.	timothy.sullivan@doj.ca.gov
Thompson, Jonathan	JonaT@atg.wa.gov
Tucker, Katherine	Katie.Tucker@nrc.gov
VanNiel, Jeffrey D.	nbrjdvn@gmail.com
Vazquez, Tameka	purpose_driven@yahoo.com
Vibert, Elizabeth A**.**	Elizabeth.Vibert@ccdanv.com
Walsh, Timothy J.	timothy.walsh@pillsburylaw.com
Wardwell, Richard E.	rew@nrc.gov
Webb, Maria	maria.webb@pillsburylaw.com
Welkie, Andrew	Axw5@nrc.gov
Whetstine, Jack	jgw@nrc.gov
Whipple, Bret	bretwhipple@lcturbonet.com
Williams, Scott	swilliams@abbwlaw.com
Woodington, Kenneth	kwoodington@dml-law.com
Young, Mitzi A.	may@nrc.gov
Zabarte, Ian	mrizabarte@gmail.com
Zobler, Marian L.	mlz@nrc.gov

U.S. DEPARTMENT OF ENERGY

By Electronically Signed by Stephanie E. Meharg

Donald P. Irwin
Michael R. Shebelskie
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

Scott Blake Harris
Sean Lev
James Bennett McRae
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Counsel for the U.S. Department of Energy