

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)

U.S. DEPARTMENT OF ENERGY)

(High-Level Waste Repository))

) Docket No. 63-001-HLW
)
)

NRC STAFF BRIEF IN RESPONSE
TO THE SECRETARY OF THE COMMISSION'S JUNE 30, 2010 ORDER

Jessica A. Bielecki
Daniel W. Lenehan
Counsel for NRC Staff

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INTRODUCTION

Pursuant to the Secretary of the Commission's June 30, 2010 Order, the staff of the U.S. Nuclear Regulatory Commission (Staff) files its brief explaining whether the Commission should review, and reverse or uphold, the Atomic Safety and Licensing Board (Board or CAB 04) order granting intervention petitions and denying the Department of Energy's (DOE) motion to withdraw its license application (LA) seeking authorization to construct a high-level geologic waste repository at Yucca Mountain, Nevada. See *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-10-11, 72 NRC __ (June 29, 2010) (slip op.). In LBP-10-11, the Board, among other things, held that the Nuclear Waste Policy Act (NWPA) of 1982¹ does not allow DOE to withdraw its LA and, therefore, the Board denied DOE's Motion to Withdraw. *Id.* at __ (slip op. at 3). The Commission may review this decision in accordance with its inherent supervisory power over adjudications.² As discussed below, Commission review is appropriate

¹ Pub. L. No. 97-425, 96 Stat. 2201 (1982) (codified as amended at 42 U.S.C. § 10101 *et seq.* (2006)).

² In LBP-10-11, the Board granted intervention petitions of five petitioners. See *High-Level Waste Repository*, LBP-10-11, 72 NRC __ (slip op. at 3). Although the Staff maintains its position that the National Association of Regulatory Utility Commissioners does not have standing and it and the other late petitioners failed to plead an admissible contention under 10 C.F.R. § 2.309, review of these issues is not warranted at this time.

because LBP-10-11 raises unique questions of law that impact the Commission's ability to interpret and apply regulations consistent with its statutory obligations.

STATEMENT OF THE CASE

On October 17, 2008, the Commission issued a "Notice of Hearing and Opportunity to Petition for Leave to Intervene" regarding the DOE LA, which seeks authorization to construct a permanent high-level waste repository at Yucca Mountain. Notice of Hearing and Opportunity to Petition for Leave to Intervene on an Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008). The notice also indicated that the Staff determined it was practicable to adopt, with supplementation, DOE's Environmental Impact Statement (EIS) and supplements. *Id.*

Following oral arguments on March 31 through April 2, 2009, the Construction Authorization Boards designated to rule on intervention petitions, granted intervenor and interested government participant status, and admitted nearly 300 contentions, including contentions identified as legal issues. *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 381, 422, 455, 485-500 (2009), *rev'd in part, aff'd in part*, CLI-09-14, 69 NRC 580 (2009).

On June 19, 2009, Construction Authorization Board 04 (CAB 04) was established "to preside over matters concerning discovery, Licensing Support Network [LSN] compliance, new or amended contentions, grouping or consolidation of contentions, scheduling, [and] case management matters relating to any of the foregoing" Establishment of Atomic Safety and Licensing Board; Department of Energy, 74 Fed. Reg. 30,644 (June 26, 2009). CAB 04 issued a case management order pacing discovery with the planned Safety Evaluation Report schedule. See CAB Case Management Order #2, dated September 30, 2009 (unpublished), at 3.

Subsequent to the briefing of legal issues and commencement of discovery, DOE filed a "Motion to Stay the Proceeding," dated February 1, 2010 (Stay Motion), stating that the President, in the proposed budget for fiscal year 2011, "directed that the Department of Energy 'discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010'" See Stay Motion at 1 (internal citation omitted). DOE stated its intent to withdraw the license application by March 3, 2010, and requested an interim suspension of discovery and a stay of the proceeding in order to avoid unnecessary expenditure of resources. See Stay Motion at 2. CAB 04 granted DOE's suspension and stay requests, pending disposition of DOE's expected motion to withdraw. See Order (Granting Interim Suspension of Discovery), dated February 2, 2010 (unpublished); Order (Granting Stay of Proceeding), dated February 16, 2010 (unpublished).

On March 3, 2010, DOE filed a motion to withdraw its LA with prejudice. U.S. Department of Energy's Motion to Withdraw, dated March 3, 2010 (Motion to Withdraw). The Board established a briefing schedule regarding the Motion to Withdraw, but subsequently suspended briefing pending guidance from the U.S. Court of Appeals for the District of Columbia Circuit. See Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion), dated April 6, 2010, (unpublished) (Suspension Order) at 12-13. The Board also noted that the Staff's ongoing independent technical review of the LA is not affected by the Suspension Order. *Id.* at 3.³

³ For information regarding the Staff's ongoing review, see NRC Staff Response to State of Nevada Petition for Relief with Respect to Possible Issuance of Partial Safety Evaluation Report, dated June 24, 2010.

DOE petitioned for interlocutory review of the Suspension Order. U.S. Department of Energy's Petition for Interlocutory Review, dated April 12, 2010, at 1. As an exercise of its inherent supervisory authority over adjudications, the Commission granted interlocutory review and vacated the Suspension Order, remanding the matter back to the Board for prompt resolution. *U.S. Dep't of Energy (High-Level Waste Repository)*, CLI-10-13, 72 NRC __ (Apr. 23, 2010) (slip op. at 3-5). On April 27, 2010, the Board issued an order establishing a new briefing schedule. Order (Setting Briefing Schedule), dated April 27, 2010 (unpublished).

Five late intervention petitioners⁴ opposed the Motion to Withdraw, and the hearing participants and late petitioners were permitted to file answers to the DOE Motion by May 17, 2010. See Memorandum and Order (Logistics for Oral Argument), dated May 18, 2010 (unpublished), at 2; Order (Setting Briefing Schedule), dated April 27, 2010 (unpublished), at 2.⁵ DOE filed a single reply to these answers. U.S. Department of Energy's Reply to Responses to Motion to Withdraw, dated May 27, 2010 (DOE Reply).

CAB 04 held oral argument and a case management conference on June 3 and 4, 2010, to address the Motion to Withdraw and plans for preserving DOE's LSN collection. Order (Scheduling Argument and Further Proceeding), dated May 3, 2010 (unpublished); Transcript,

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

⁵ The Board phrased the Staff's position as advocating for withdrawal without prejudice, *High-Level Waste Repository*, LBP-10-11, 72 NRC __ (slip op. at 4). More aptly stated, the Staff's position is that the withdrawal is permissible under the Commission's regulations, and if granted, should be granted without prejudice. NRC Staff Answer to DOE's Motion to Withdraw its Application with Prejudice, dated May 17, 2010 (Staff Answer), at 1. The Staff takes no position on whether DOE's decision to withdraw is sound.

U.S. Dep't of Energy (High-Level Waste Repository), dated June 3-4, 2010 (Tr.). On June 29, 2010, CAB 04 issued LBP-10-11 denying DOE's Motion to Withdraw and granting intervention petitions. *High-Level Waste Repository*, LBP-10-11, 72 NRC __ (slip op. at 3). Parties were invited to file briefs "as to whether the Commission should review, and reverse or uphold, the Board's decision" by July 9, 2010. Order, dated June 30, 2010 (unpublished). For the reasons explained below, Commission review and reversal of LBP-10-11 is warranted.

STATEMENT OF THE ISSUES

Whether Commission review of LBP-10-11 is warranted because the order raises unique legal questions that have not been previously addressed on appeal, affect the basic structure of the proceeding, and affect the Commission's ability to interpret and apply its own regulations consistent with statutory obligations. Whether LBP-10-11 should be reversed because the Board erred in concluding that NWSA § 114 requires the Commission to make a merits determination and precludes the Commission from considering a motion to withdraw under 10 C.F.R. § 2.107.

DISCUSSION

I. Legal Standards for Commission Review

The Commission may review interlocutory Board decisions (1) as provided for in its regulations or (2) through its own inherent supervisory authority. See, e.g., 10 C.F.R. §§ 2.341, 2.1015; *U.S. Dep't of Energy* (*High-Level Waste Repository*), CLI-10-10, 72 NRC __ (Mar. 11, 2010) (slip op. at 4). The regulation that governs Commission review in this proceeding provides that no appeals from any Board "decision issued under this subpart are permitted, except as prescribed in paragraphs (b), (c), and (d) of this section." 10 C.F.R. § 2.1015. Commission review of a Board's decision on a motion to withdraw or late intervention petitions

is not permitted under 10 C.F.R. § 2.1015. See *id.*; *High-Level Waste Repository*, CLI-10-10, 72 NRC __ (slip op. at 3-4).

The Commission may nonetheless review the Board's decision on DOE's Motion to Withdraw by exercising its inherent "supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself," even when an appeal does not lie. See *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992) (reviewing Board order that presented novel question regarding consolidation of two licensing proceedings).

Sua sponte review does not require a showing of harm. See *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-01, 65 NRC 1, 3-4 (2007). Rather, it allows the Commission to take various types of adjudicatory actions, such as addressing issues of wide implication, addressing legal issues, suspending a proceeding, ruling on issues where review later could not rectify an erroneous order, and vacating an unreviewed board order after withdrawal of a challenged application. *Vermont Yankee*, CLI-07-01, 65 NRC at 4-5 (referencing decisions addressing *sua sponte* review); *Duke Energy Corp.* (Catawba Nuclear Station Units 1 & 2), CLI-04-6, 59 NRC 62, 70 (2006) (overturning erroneous disclosure order) (citing *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, OH 44041), ALAB-929, 31 NRC 271, 279 (1990) (indicating discretionary interlocutory review is appropriate where a ruling involves a question of law, has generic implications, and has not been previously addressed on appeal)).

For example, the Commission exercised its supervisory authority to review *sua sponte* a Board decision previously suspending the above-captioned proceeding pending a District of Columbia Circuit decision regarding DOE's Motion to Withdraw. *High-Level Waste Repository*, CLI-10-13, 72 NRC __ (slip op. at 2-3). The Commission noted that although it does not

generally entertain requests to exercise its inherent supervisory authority, DOE's request "would qualify for interlocutory review because it challenges a Board decision that '[a]ffects the basic structure of the proceeding in a pervasive [and] unusual manner.'" *Id.* (internal citations omitted).

II. Commission Review of LBP-10-11 is Warranted.

The Board, in LBP-10-11, denied DOE's Motion to Withdraw. *High-Level Waste Repository*, LBP-10-11, 72 NRC __ (slip op. at 3). The Board determined that the NWPA requires DOE to file an application and the NRC to consider that application and "issue a final, merits-based decision approving or disapproving the construction authorization application." *Id.* at __ (slip op. at 5). The Board also found that "[i]nsofar as application of section 2.107 might possibly be construed to interfere with [the] prime directive" in the NWPA for the NRC to issue a final decision approving or disapproving issuance of a construction authorization, "by the terms of the statute it cannot apply." *See id.* at __ (slip op. at 15).

Commission review of LBP-10-11 is warranted because the order raises unique questions of law regarding the proper interpretation of NWPA § 114 and the applicability of 10 C.F.R. § 2.107 to the Commission's consideration of an application under NWPA § 114(d). *See, e.g., Vermont Yankee*, CLI-07-01, 65 NRC at 4-5. These questions impact the NRC's authority and ability to interpret and apply its regulations lawfully promulgated consistent with statutory mandates, affect the basic structure of the proceeding, and have not been previously addressed on appeal. *See id.; High-Level Waste Repository*, CLI-10-13, 72 NRC __ (slip op. at 2-3); *Advanced Med. Sys., Inc.*, ALAB-929, 31 NRC at 279. The Board's failure to evaluate DOE's request under 10 C.F.R. § 2.107 also affects the basic structure of the proceeding, given that the adjudication would not occur if the motion is granted.

III. LBP-10-11 should be reversed because the Board erred in interpreting NWPA § 114.

As explained below, LBP-10-11 should be reversed because the Board erred in ruling that the NWPA (1) requires the NRC to make a merits based decision once an application is submitted, regardless of the circumstances, and (2) prohibits the Commission from entertaining a motion to withdraw under 10 C.F.R. § 2.107, a regulation duly promulgated under the Atomic Energy Act (AEA).

The Board determined that, once an application is submitted, the NRC is required to consider that application “and issue a final, merits-based decision approving or disapproving the issuance of a construction authorization.” *High-Level Waste Repository*, LBP-10-11, 72 NRC ___ (slip op. at 5). Based on its interpretation of the stated purposes and structure of the NWPA, the Board reasoned that it would be illogical to allow DOE to withdraw the LA without examining the merits. *Id.* at ___ (slip op. at 7-9). The Board’s ruling, however, incorrectly suggests that the Commission’s duty to consider an application and reach a merits based determination is triggered once an application is submitted, without regard to the circumstances including whether an applicant wishes to pursue its docketed application.⁶

The NWPA establishes a schedule and multi-step process for the siting, construction and operation of a repository. See NWPA § 111(b)(1), 42 U.S.C. § 10131(b)(1). In addition, it

⁶ DOE’s Motion to Withdraw states the President’s proposed budget for FY2011 indicates that the Yucca Mountain project will be discontinued. Motion to Withdraw at 2 n.2. However, Congress has not determined what, if any, funds will be appropriated for the Yucca Mountain project in FY2011. See Staff Answer at 20. If Congress chooses not to appropriate funds for the project and the Board’s decision is upheld, a suspension of the proceeding may be appropriate. See Staff Answer at 20-21 & n.18 (citing the U.S. Gov’t Accountability Office, *Principles of Federal Appropriations Law*, Vol. I (3d ed. 2004) and discussing the Clinch River Breeder Reactor case suspension). It should, however, be emphasized that in light of its independent regulatory responsibilities, the NRC Staff does not have an interest in whether or not DOE’s application proceeds and is not an advocate for withdrawal. Rather, as discussed herein and in the Staff’s Answer, the NWPA and the Commission’s regulations provide that withdrawal is a legally permissible option available to an applicant, including DOE, in this proceeding.

establishes different roles and responsibilities for DOE and NRC. See *NEI v. EPA*, 373 F.3d 1251, 1259 (D.C. Cir. 2004) (“The NWPA assigned distinct regulatory roles to the Department of Energy . . . and the Nuclear Regulatory Commission” directing the “NRC to assume responsibility for licensing a DOE-proposed repository”). Specifically, the NWPA requires DOE to *submit* an application to the Commission. NWPA § 114(b), as amended, 42 U.S.C.

§ 10134(b). The Commission is then required to *consider* the application

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

NWPA § 114(d), as amended, 42 U.S.C. § 10134(d).⁷ As the plain language illustrates, NWPA § 114(d) addresses NRC, not DOE, obligations with respect to an application and provides that the NRC’s role is to review⁸ the LA in accordance with applicable laws within a specific schedule. See NWPA § 114(d), as amended, 42 U.S.C. § 10134(d).⁹ Nothing in the NWPA or

⁷ In addition, the NWPA requires the Commission to review and determine whether it is practicable to adopt DOE’s EIS. NWPA § 114(f)(4), 42 U.S.C. § 10134(f)(4). NWPA § 114(c) also includes Commission reporting requirements. These requirements were later repealed by the Federal Reports Elimination and Sunset Act of 1995, Pub. L. 104-66, 109 Stat. 707.

⁸ The NRC’s responsibility to review the application is consistent with its role as an independent regulator, not a promoter of a licensed activity, as established by the Energy Reorganization Act of 1974 (ERA), Pub. L. No. 93-438, 42 U.S.C. § 5801 *et seq.* ERA § 201, 42 U.S.C. § 5841(a)(1).

⁹ The Commission interprets the NWPA § 114(d) three-year schedule requirement to mean “three years from the docketing of the application” rather than three years from DOE’s submission of the application because such an “interpretation is consistent with the Commission’s general practice since its establishment in 1975 to tie hearing schedules to the docketing of a license application rather than the tendering of the application by the applicant, for the obvious reason that a license application may be substantially deficient in some material respect and must be returned to the applicant.” Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating Websites, 66 Fed. Reg. 29,453, 29,453 n.1 (May 31, (continued. . .)

its legislative history indicates that Congress intended that this role would include enforcing DOE's obligations under the Act. The Board states that DOE may not "derail the legislated decision-making process by withdrawing" its LA, but does not explain or identify NRC's authority to in effect enforce DOE's obligations under the NWPA, and declines to permit DOE's decision to withdraw its LA. See *High-Level Waste Repository*, LBP-10-11, 72 NRC __ (slip op. at 5). As discussed below, the NRC's procedural rules allow an applicant to request and a presiding officer to entertain withdrawal requests.

The Board's view would appear to require a merits based determination in all circumstances. Under NRC procedural rules applicable to the DOE LA, however, completion of a docketing determination,¹⁰ Staff technical and environmental reviews, the adjudicatory proceeding, and the Commission's review of contested and uncontested matters under 10 C.F.R. § 2.1023 is required before the Commission can determine the merits of the application. The Board's rigid interpretation of NWPA § 114, however, suggests that the Commission is required to conduct a detailed technical review to reach a merits based decision

(. . .continued)

2001). A detailed technical review does not commence until after docketing. See Department of Energy; Notice of Acceptance for Docketing of a License Application for Authority To Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, NV, 73 Fed. Reg. 53,284 (Sept. 15, 2008) (indicating that the LA had been docketed and the Staff would commence its detailed technical review).

¹⁰ As noted in 10 C.F.R. § 2.101(e), the Commission's procedures for docketing an application for a geologic repository, the staff initially examines the LA to determine whether it is sufficient for docketing. A detailed technical review does not begin until after docketing. See 73 Fed. Reg. at 53,284. Thus, a merits based determination is contingent upon satisfaction of NRC procedures. See Letter from Michael F. Weber to Edward F. Sproat, III, Notice of Acceptance for Docketing of the Department of Energy's License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, Nevada (Sept. 8, 2008) (ML082490751). Although this is not the focus of the Board's decision, its view that § 114 "requires" a merits based, NRC decision would preclude application of this procedural rule.

on *any* application that is submitted to the NRC. The Board's interpretation in this regard is illustrated by its conclusion that the NWPA directs "both that DOE file the application . . . and that the NRC consider the Application and issue a final, merits-based decision approving or disapproving the construction authorization application." *High-Level Waste Repository*, LBP-10-11, 72 NRC __ (slip op. at 5). This result cannot be sustained. The Commission's obligations to apply substantive technical rules and reach a technical merits based determination are relevant only if an application is properly before, and actively sponsored before,¹¹ the NRC, consistent with applicable NRC regulations and processes. If an applicant no longer wishes to pursue an application and seeks to withdraw it, the regulation governing that request (10 C.F.R. § 2.107) should be applied. As to the Board's concern about addressing the merits, *see, e.g., High-Level Waste Repository*, LBP-10-11, 72 NRC __ (slip op. at 5, 7, 8-9), withdrawal without prejudice does not preclude a future merits based determination.

Similarly, the Board erred in ruling that the legislative history shows the Commission is prohibited from entertaining a motion to withdraw because the term "in accordance with the laws applicable to such applications" was intended to include substantive regulations only, not procedural regulations like 10 C.F.R. § 2.107. *See High-Level Waste Repository*, LBP-10-11, 72 NRC __ (slip op. at 15-16). The Board reasoned that there was nothing in the legislative

¹¹ Based on statements DOE has made in Federal court, the Staff assumes that if DOE is required to pursue its application, it will do so in good faith. *See* Respondents' Response in Opposition to Petition Motion for Preliminary Injunction, filed April 23, 2010 in the US Court of Appeals for the District of Columbia Circuit, at 2. *See also High-Level Waste Repository*, LBP-10-11, 72 NRC __ (slip op. at 19-20). However, if DOE were unable (due to a lack of funding) or unwilling, to pursue its application, and the Commission is nonetheless required to reach a merits based determination, the Commission could be in the untenable position of supporting continuation of the project, absent an applicant able to respond to requests for additional information and discovery requests, or to provide evidence on the admitted contentions in the adjudicatory proceeding. This could be viewed as the NRC being a promoter of the application, which would be contrary to the Commission's statutory role as an independent regulator. *See* ERA § 201, 42 U.S.C. § 5841(a)(1).

history specifically indicating that Congress contemplated 10 C.F.R. § 2.107. See *id.* at ___ (slip op. at 15-16). Significantly, however, there is nothing in the language of § 114 or the legislative history that clearly indicates that procedural rules like 10 C.F.R. § 2.107 are not to be applied. See Staff Answer at 12. Congress had the opportunity to prescribe specific procedures for a high-level waste proceeding, considered doing so, but ultimately declined to do so.¹²

Further, the Board's characterization of 10 C.F.R. § 2.107 as "an obscure NRC procedural regulation" is puzzling. *High-Level Waste Repository*, LBP-10-11, 72 NRC ___ (slip op. at 14). Section 2.107 was promulgated approximately twenty years before the NWPA and has been applied in a number of NRC proceedings. See Staff Answer at 8-11 (citing *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967 (1980); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant Unit 1), 14 NRC 1125 (1981)); Tr. at 168 (June 3, 2010). In addition, the statement by Senator McClure upon which the Board relies to support its view that § 2.107 does not apply, is broad and of little probative value here. See *High-Level Waste Repository*, LBP-10-11, 72 NRC ___ (slip op. at 15) (quoting Senator McClure in 128 CONG. REC. S4128 (1982)). In that statement Senator McClure said that the NRC was "established as an independent body to check upon whether or not the

¹² As DOE noted in its Reply, at one time, H.R. 5016 included procedures for the NRC hearings. DOE Reply at 17 (discussing High Level Radioactive Waste Management and Policy Act, H.R. 5106, § 8(d), 97th Cong. (Nov. 18, 1981)). These procedures did not survive the legislative process and were not included in the NWPA. For example, Congressman Lundine opined that such procedures should not be included because the NRC has recently issued final procedural rules governing the licensing of repositories. H.R. 97-141, at 52 (Report together with Additional Views, including "Additional Views of Congressman Stan Lundine on H.R. 5016") (1981). The fact that specific procedures were contemplated, but not included in the statute, illustrates that Congress was aware that NRC had an established process for reviewing license applications, relied on the NRC process and chose not to change that process. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390, 401 (2002) ("Congress is presumed to know the state of the law when it enacts legislation. Therefore, courts can normally assume that Congress will specify any provisions of law that are to be superseded by new legislation.").

administrative bodies are functioning according to the statutes and policies that have been already enacted” See *id.* at ___ (slip op. at 15). Senator McClure’s broad statement does not specifically mention regulations, let alone distinguish between procedural and substantive regulations. See *id.* Further, NWPA legislative history contains statements regarding NWPA environmental provisions which indicate that Congress was aware of the Commission’s usual licensing process and did not intend to limit its applicability. For example, in a November 1981 Joint Report discussion of the NWPA’s provisions regarding the EIS for a high-level waste repository, it was recognized that “[u]pon authorization by Congress *the usual requirements of the licensing process*, including the requirements of the National Environmental Policy Act, will apply, with only one exception” and that is in preparing the EIS alternatives to site selection and the design criteria set shall not be considered. S. REP. NO. 97-282, at 15 (1981) (Joint Report to accompany S.1662) (emphasis added);¹³ see also *infra* at n.11 (recognizing the NRC’s hearing procedures). Thus, the Senator McClure statement upon which the Board relies provides little support for the Board’s conclusion.

The Board’s logic that 10 C.F.R. § 2.107 does not apply here, in effect, vitiates the Commission’s ability to apply procedural regulations lawfully promulgated under its AEA authority. See AEA § 161p, 42 U.S.C. § 2201p. As an independent regulator, the Commission has broad authority to “make, promulgate, issue, rescind, and amend such rules and regulations

¹³ Although not adopted, the provision being discussed in this report is similar to § 114(f). Compare The National Nuclear Waste Policy Act of 1981, S.1662 (as reported Nov. 22, 1981) (Any authorized facility “shall be subject to a license under section 202(3) of the Energy Reorganization Act of 1974 (88 Stat. 1233), except that in its consideration of the application . . . the Commission may not consider any alternative to the design criteria . . . but shall comply with the requirements of the licensing process as otherwise provided by law.”) with NWPA § 114(f)(4), (5) (“nothing in this subsection shall affect any independent responsibilities of the Commission to protect public health under the [AEA]” and “[n]othing in this Act shall be construed to amend or otherwise detract from the licensing requirements of the” NRC as established by the ERA).

as may be necessary to carry out the purposes of this Act.” AEA § 161p, 42 U.S.C. § 2201p. The Board discussed DOE’s AEA authority in relation to the NWPA, *see High-Level Waste Repository*, LBP-10-11, 72 NRC ___ (slip op. at 11-12), but failed to recognize and discuss the Commission’s AEA authority. Nothing in the NWPA suggests that the Commission’s AEA authority to promulgate regulations should be constrained in any way. *See, e.g., Public Citizen v. NRC*, 573 F.3d 916, 927 (9th Cir. 2009) (declining to imply limitations on Commission authority under 42 U.S.C. § 2210(e) where petitioners “cite[d] no authority to so limit the Commission’s discretion where a factor it not mandated by Congress”). In fact, NWPA § 121(b) recognizes the Commission’s authority under the AEA to promulgate regulations. NWPA § 121(b), 42 U.S.C. § 10141(b) (requiring the Commission to promulgate technical requirements and criteria under the AEA and ERA). *See also* NWPA § 114(f)(5), 42 U.S.C. § 10134(f)(5).

The better view, as the Staff previously argued, is that the NWPA direction for the Commission to consider an application “in accordance with the laws applicable to such applications” reflects the fact that the Commission is to consider DOE’s application consistent with its usual processes and procedures, including procedural regulations such as 10 C.F.R. § 2.107. *See* Staff Answer at 8-9. The Commission’s procedural regulations in Part 2, including 10 C.F.R. § 2.107 and Subpart J, and substantive technical regulations in 10 C.F.R. Part 63, were lawfully promulgated consistent with its authority under the AEA.¹⁴ If Congress intended to preclude DOE from requesting (and the NRC from considering withdrawal) it could have

¹⁴ *See* Part 2—Rules of Practice, Part 3—Rules of Procedure in Contract Appeals: Revision of Rules, 27 Fed. Reg. 377, 379 (Jan. 13, 1962); Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, NV, 66 Fed. Reg. 55,732, 55,793 (Nov. 2, 2001); *Nuclear Energy Institute*, 373 F.3d at 1287-88 (holding that the requirements in 10 C.F.R. Part 63 were promulgated, at least in part, under the NWPA and recognizing the NWPA required their promulgation pursuant to the AEA and ERA).

specified that in the NWPA. See Staff Answer at 14; Tr. at 168 (June 3, 2010). It did not. Thus, the NWPA does not preclude the applicability of 10 C.F.R. § 2.107.

CONCLUSION

As set forth above, Commission review of LBP-10-11 is warranted because the order raises unique questions that impact the structure of the proceeding and the Commission's ability to interpret and apply its statutory obligations and regulations. LBP-10-11 should be reversed because the Board erred in interpreting NWPA § 114 to require a merits based determination and to preclude consideration of a motion to withdraw under 10 C.F.R. § 2.107.

Respectfully submitted,

/signed (electronically) by/

Jessica A. Bielecki
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O15-D21
Washington, DC 20555-0001
(301) 415-1391
Jessica.Bielecki@nrc.gov

/Executed in accord with 10 C.F.R. § 2.304(d)/

Daniel W. Lenehan
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O15-D21
Washington, DC 20555-0001
(301) 415-3501
Daniel.Lenehan@nrc.gov

Dated at Rockville, Maryland
this 9th day of July, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF BRIEF IN RESPONSE TO THE SECRETARY OF THE COMMISSION'S JUNE 30, 2010 ORDER" in the above-captioned proceeding have been served on the following persons this 9th day of July, 2010, by Electronic Information Exchange.

CAB 04

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: tsm2@nrc.gov
psr1@nrc.gov
rew@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
ocaamail@nrc.gov

Charles J. Fitzpatrick, Esq.
John W. Lawrence, Esq.
Egan, Fitzpatrick, Malsch & Lawrence PLLC
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
E-mail: cfitzpatrick@nuclearlawyer.com
jlawrence@nuclearlawyer.com

Martin G. Malsch, Esq.
Egan, Fitzpatrick & Malsch, PLLC
1750 K Street, N.W. Suite 350
Washington, D.C. 20006
E-mail: mmalsch@nuclearlawyer.com

Brian W. Hembacher, Esq.
Deputy Attorney General
California Attorney General's Office
300 South Spring Street
Los Angeles, CA 90013
E-mail: brian.hembacher@doj.ca.gov

Timothy E. Sullivan, Esq.
Deputy Attorney General
California Department of Justice
1515 Clay Street., 20th Flr.
P.O. Box 70550
Oakland, CA 94612-0550
E-mail: timothy.sullivan@doj.ca.gov

Kevin W. Bell, Esq.
Senior Staff Counsel
California Energy Commission
1516 9th Street
Sacramento, CA 95814
E-mail: kwbell@energy.state.ca.us
Bryce C. Loveland
Jennings Strouss & Salmon, PLC
8330 W. Sahara Avenue, Suite 290
Las Vegas, NV 89117-8949
Email: bloveland@jsslaw.com

Alan I. Robbins, Esq.
Debra D. Roby, Esq.
Jennings Strouss & Salmon, PLC
1350 I Street, NW Suite 810
Washington, D.C. 20005-3305
E-mail: arobbins@jsslaw.com
droby@jsslaw.com

Donald J. Silverman, Esq.
Thomas A. Schmutz, Esq.
Thomas C. Poindexter, Esq.
Paul J. Zaffuts, Esq.
Alex S. Polonsky, Esq.
Lewis Csedrik, Esq.
Raphael P. Kuyler, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
E-mail: dsilverman@morganlewis.com
tschmutz@morganlewis.com
tpoindexter@morganlewis.com
pzaffuts@morganlewis.com
apolonsky@morganlewis.com
lcsedrik@morganlewis.com
rkuyler@morganlewis.com

Malachy R. Murphy, Esq.
18160 Cottonwood Rd. #265
Sunriver, OR 97707
E-mail: mrmurphy@chamberscable.com

Robert M. Andersen
Akerman Senterfitt
801 Pennsylvania Avenue N.W., Suite 600
Washington, DC 20004 USA
E-mail: robert.andersen@akerman.com

Martha S. Crosland, Esq.
Angela M. Kordyak, Esq.
Nicholas P. DiNunzio
James Bennett McRae, Esq.
U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20585
E-mail: martha.crosland@hq.doe.gov
angela.kordyak@hq.doe.gov
nick.dinunzio@rw.doe.gov
ben.mcrae@hq.doe.gov

George W. Hellstrom
U.S. Department of Energy
Office of General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-Mail: george.hellstrom@ymp.gov

Jeffrey D. VanNiel, Esq.
530 Farrington Court
Las Vegas, NV 89123
E-mail: nbridvn@gmail.com

Susan L. Durbin, Esq.
Deputy Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
E-mail: susan.durbin@doj.ca.gov

Frank A. Putzu
Naval Sea Systems Command Nuclear
Propulsion Program
1333 Isaac Hull Avenue, S.E.
Washington Navy Yard, Building 197
Washington, DC 20376
E-mail: frank.putzu@navy.mil

John M. Peebles
Darcie L. Houck
Fredericks Peebles & Morgan LLP
1001 Second Street
Sacramento, CA 95814
E-mail: jpeebles@ndnlaw.com
dhouck@ndnlaw.com

Shane Thin Elk
Fredericks Peebles & Morgan, LLP
3610 North 163rd Plaza
Omaha, Nebraska 68116
E-mail: sthinelk@ndnlaw.com

Ellen C. Ginsberg
Michael A. Bauser
Anne W. Cottingham
Nuclear Energy Institute, Inc.
1776 I Street, N.W., Suite 400
Washington, D.C. 20006
E-mail: ecg@nei.org
mab@nei.org
awc@nei.org

David A. Repka
William A. Horin
Rachel Miras-Wilson
Winston & Strawn LLP
1700 K Street N.W.
Washington, D.C. 20006
E-mail: drepka@winston.com
whorin@winston.com
rwilson@winston.com

Jay E. Silberg
Timothy J.V. Walsh
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-1122
E-mail: jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com

Gregory L. James
710 Autumn Leaves Circle
Bishop, California 93514
Email: gjames@earthlink.net

Arthur J. Harrington
Godfrey & Kahn, S.C.
780 N. Water Street
Milwaukee, WI 53202
E-mail: aharring@gklaw.com

Steven A. Heinzen
Douglas M. Poland
Hannah L. Renfro
Godfrey & Kahn, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
E-mail: sheinzen@gklaw.com
dpoland@gklaw.com
hrenfro@gklaw.com

Robert F. List, Esq.
Jennifer A. Gores, Esq.
Armstrong Teasdale LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237
E-mail: rlist@armstrongteasdale.com
jgores@armstrongteasdale.com

Diane Curran
Harmon, Curran, Spielberg, & Eisenberg,
L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
E-mail: dcurran@harmoncurran.com

Ian Zabarte, Board Member
Native Community Action Council
P.O. Box 140
Baker, NV 89311
E-mail: mrizabarte@gmail.com

Richard Sears
District Attorney No. 5489
White Pine County District Attorney's Office
801 Clark Street, Suite 3
Ely, NV 89301
E-mail: rwsears@wpcda.org

Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
E-mail: dirwin@hunton.com
mshbelskie@hunton.com
kfaglioni@hunton.com

Curtis G. Berkey
Scott W. Williams
Rovianne A. Leigh
Alexander, Berkey, Williams, & Weathers
LLP
2030 Addison Street, Suite 410
Berkley, CA 94704
E-mail: cberkey@abwwlaw.com
swilliams@abwwlaw.com
rleigh@abwwlaw.com

Bret O. Whipple
1100 South Tenth Street
Las Vegas, Nevada 89104
E-mail: bretwhipple@nomademail.com

Gregory Barlow
P.O. Box 60
Pioche, Nevada 89043
E-mail: lcda@lcturbonet.com

Michael L. Dunning
Andrew A. Fitz
H. Lee Overton
Jonathan C. Thompson
State of Washington
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
E-mail: MichaelD@atg.wa.gov
AndyF@atg.wa.gov
LeeO1@atg.wa.gov
JonaT@atg.wa.gov

Thomas R. Gottshall
S. Ross Shealy
Haynesworth Sinkler Boyd, PA
1201 Main Street, Suite 2200
Post Office Box 11889
Columbia, SC 29211-1889
E-mail: tgottshall@hsblawfirm.com
rshealy@hsblawfirm.com

Connie Simkins
P.O. Box 1068
Caliente, Nevada 89008
E-mail: jcciac@co.lincoln.nv.us

Kenneth P. Woodington
Davidson & Lindemann, P.A.
1611 Devonshire Drive
P.O. Box 8568
Columbia, SC 29202
E-mail: kwoodington@dml-law.com

Dr. Mike Baughman
Intertech Services Corporation
P.O. Box 2008
Carson City, Nevada 89702
E-mail: bigoff@aol.com

Michael Berger
Robert S. Hanna
Attorney for the County of Inyo
233 East Carrillo Street Suite B
Santa Barbara, California 93101
E-mail: mberger@bsglaw.net
rshanna@bsglaw.net

Don L. Keskey
Public Law Resource Center PLLC
505 N. Capitol Avenue
Lansing, MI 48933
E-mail: donkeskey@publiclawresourcenter.com

Philip R. Mahowald
Prairie Island Indian Community
5636 Sturgeon Lake Road
Welch, MN 55089
E-mail: pmahowald@piic.org

James Bradford Ramsay
National Association of Regulatory Utility
Commissioners
1101 Vermont Avenue NW, Suite 200
Washington, DC 20005
E-mail: jramsay@naruc.org

/Signed (electronically) by/

Jessica A. Bielecki
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O15-D21
Washington, DC 20555-0001
(301) 415-1391
Jessica.Bielecki@nrc.gov