United States Of America Nuclear Regulatory Commission

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

FOUR NEVADA COUNTIES OF CHURCHILL, ESMERALDA, LANDER AND MINERAL RESPONSE TO THE COMMISSION'S JUNE 30, 2010 ORDER

Pursuant to Commission's June 30, 2010 Order directing the participants to "file briefs with the Commission as to whether the Commission should review, and reverse or uphold, the Board's decision" denying the U.S. Department of Energy's Motion to Withdraw the Construction Authorization Application, the Four Nevada Counties of Churchill, Esmeralda, Lander and Mineral (the "Four Counties") file the following response. *See* Commission Order, June 30, 2010. The Four Counties conclude that the Board's June 29, 2010 Memorandum and Order denying the U.S. Department of Energy's Motion to Withdraw is correct. The Commission should exercise its discretion and decline to review the Board's decision. However, if the Commission determines it should review the Board's decision, the Four Counties believe that the Commission should uphold the Board's Order denying the U.S. Department of Energy's Motion to Withdraw.

The Four Counties conclude that the Board's June 29, 2010 Order is correct based on the Board's well reasoned memorandum, the June 3, 2010 Oral Argument on the Motion to Withdraw, and the Four Counties' May 17, 2010 Response To The U.S. Department Of Energy's March 3, 2010 Motion To Withdraw (attached hereto as Exhibit 1). For the foregoing reasons, the Four Counties conclude that the Commission should decline to review the Board's Order. However, if the Commission determines that it is appropriate to review the Board's Order, the Commission should uphold the Board's decision denying the U.S. Department of Energy's Motion to Withdraw the Construction Authorization Application.

Respectfully submitted,

(electronically signed)

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EXHIBIT 1

United States Of America Nuclear Regulatory Commission
Atomic Safety And Licensing Board

Before Administrative Judges:
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of	)	Docket No. 63-001-HLW
	)	ASLBP No. 09-892-HLW-CAB04
U.S. DEPARTMENT OF ENERGY	)	
High-Level Waste Repository	)	May 17, 2010

FOUR NEVADA COUNTIES OF CHURCHILL, ESMERALDA, LANDER AND MINERAL RESPONSE TO U.S. DEPARTMENT OF ENERGY'S MARCH 3, 2010 MOTION TO WITHDRAW.

On March 3, 2010, the U.S. Department of Energy filed its Motion to Withdraw with Prejudice (the "Motion"). On April 27, 2010, the ASLBP ordered all parties to file their responses to DOE's Motion by May 17, 2010. CAB Order (Setting Briefing Schedule), April 27, 2010. This order directed the parties "to give particular attention to the statutory scheme, history and legislative intent of the Nuclear Waste Policy Act." CAB Order at 2. Accordingly, the Four Nevada Counties of Churchill, Esmeralda, Lander and Mineral (the "Four Counties") submit the following response to the Motion.

We are mindful that the Nuclear Waste Policy Acts does not compel NRC to grant a construction authorization for a repository at Yucca Mountain. Ultimately, the contentions filed with, and admitted by, the Board may demonstrate that the site is unsuitable for the permanent disposal of high-level nuclear waste and spent nuclear fuel. The Four Counties recognize that a repository at Yucca Mountain has the potential for adverse impacts, the extent of which can only be determined through the license review process. DOE's motion to withdraw the license application is a procedural matter that has no bearing on the merits of the license application and, if granted, terminates a statutorily prescribed license review. The Four Counties response to DOE's motion narrowly focuses on this procedural issue set forth before the Board

and does not directly, or indirectly, speak to the merits of the contentions filed by parties to these proceedings. Our response should not be construed as support for or opposition to a construction authorization, but rather to comply with the Board's expressed desire for parties "to give particular attention to the statutory scheme, history and legislative intent of the Nuclear Waste Policy Act" in their response.

Upon review of the statutory scheme and intent of the Nuclear Waste Policy Act (the "NWPA"), the Four Counties fail to identify any statutory basis upon which the Department of Energy ("DOE") has the authority to withdraw the License Application for the Repository at Yucca Mountain ("License Application") at this stage in the licensing process. The Four Counties base its conclusion on the following grounds: 1) the NWPA specifically identifies a problem with, and procedural solution for, disposal of high-level waste and spent nuclear fuel; 2) the statutory scheme clearly mandates a duty on the part of DOE to submit a license application for the repository at Yucca Mountain and for NRC to review and issue a final decision on the License Application; 3) statutory construction indicates DOE only has authority to halt site activities at the Yucca Mountain Repository during one specific stage of the proceeding; and 4) DOE's arguments to the contrary are unpersuasive.

1. THE NWPA SPECIFICALLY IDENTIFIES A PROBLEM WITH AND PROCEDURAL SOLUTION FOR THE DISPOSAL OF HIGH-LEVEL WASTE AND SPENT NUCLEAR FUEL.

The NWPA was enacted by Congress with the specific goal of addressing the issue of safely storing and disposing of high-level waste and spent nuclear fuel. 42 USCA § 10131 et seq. The NWPA includes specific procedures and directives for various legislative and executive bodies to follow throughout the licensing process, with the goal of ultimately reviewing and reaching a final decision on the Yucca Mountain Repository. Id.

Section 111 of the NWPA finds that "federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate…." NWPA §111(1)(3), 42 USCA § 10131(1)(3). Congress' solution to this finding

was to "establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance" of safe disposal of high-level waste and spent nuclear fuel. NWPA §111(b)(1), 42 USCA §10131(b)(1). The NWPA continues on to set out a specific procedure for site selection and review by Congress, the President and the Secretary of Energy, followed by submission of a license application, review and final decision on the application by the Nuclear Regulatory Commission ("NRC"). *See* NWPA § 112 et seq. Section 113(a) of the NWPA directs the Secretary to carry out site characterization activities at the Yucca Mountain site and Section 114(f)(6) directs the environmental impact statement to not consider the "need for the repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or nongeologic alternatives to such site." NWPA § 114, 42 USC § 10134. In short, Congress identified a specific issue and a specific solution to that problem, as well as a defined location, Yucca Mountain, and procedure, application by DOE and review/final decision by NRC, for executing that solution. Withdrawal at this stage is not contemplated by the NWPA. Deviation from NWPA's procedure is only appropriate if Congress enacts changes to the statute.

2. THE STRUCTURE OF THE NWPA INDICATES A SPECIFIC, DEFINED PROCEDURE FOR SUBMISSION AND REVIEW OF THE LICENSE APPLICATION.

The NWPA directs that the Secretary "shall" submit to NRC an application for construction authorization. NWPA § 114(b), 42 USCA §10134(b). This directive leaves no question as to DOE's role and authority, with respect to the License Application, within the statutory scheme: it is to submit and support the License Application. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (stating that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). The NWPA does not provide any indication in this section, or otherwise, that DOE has the authority to withdraw the License Application once it has been submitted to NRC for review.

Additionally, NWPA provides that "[t]he Commission shall consider an application for construction authorization in accordance with the laws applicable to such application, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than 3 years after the date of the submission of such application." NWPA § 114(d), 42 USC 10134(d). This NRC requirement to review and issue a final decision precludes any implied right, on the part of DOE, to withdraw the application; withdrawal contravenes the express NWPA mandate for NRC review and final decision. If Congress, or any other entity, wishes to discontinue NRC's review of the license application before NRC reaches a final decision, then Congress must change the law to allow for a premature end to the review process.

3. STATUTORY CONSTRUCTION OF THE NWPA INDICATES DOE DOES NOT HAVE AUTHORITY TO WITHDRAW THE LICENSE APPLICATION AT THIS STAGE.

Section 113(a) directs that the Secretary "shall" carry out site characterization activities at Yucca Mountain. 42 USCA § 10133(a). However, if the Secretary "determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall – (A) terminate all site characterization activities at such site; (B) notice the Congress, the Governor and legislature of Nevada of such termination and reasons for such termination…." NWPA Section § 113(c)(3), 42 USCA § 10133(c)(3). Section 113 continues on to specify the steps DOE must take subsequent to its determination that the Yucca Mountain site is unsuitable. Id.

In contrast, under Section 114, addressing Site Approval and Construction Authorization, the Secretary "shall" submit an application for construction authorization. NWPA § 114(b), 42 USCA § 10134(b). Section 114 does **not** provide DOE the ability or procedures for withdrawing the Application or determining the Yucca Mountain site is unsuitable at the construction authorization stage of the proceedings. Thus, the logical conclusion is that Congress did not intend for DOE to have the ability to withdraw the license application. *See* Michigan Citizens For An Independent Press v. Thornburgh, 868 F.2d 1285, 1293 (D.C. 1989) (interpreting "expressio

unius est exclusio alterius" to mean that, where a statutory scheme specifically, explicitly mentions a term or right, but not another, then that term or right is not implied or read into the lacking provision.). It is improper to read into Section 114 any inherent authority to withdraw the application when the authority is clearly specified in other sections of the NWPA, but not in this Section.

4. DOE'S ARGUMENTS ARE NOT PERSUASIVE BECAUSE THEY IGNORE THE UNIQUE STATUTORY AND PROCEDURAL POSTURE OF THIS PROCEEDING.

DOE seems to assume that, because the Board is authorized to regulate the terms and conditions of withdrawal under 10 C.F.R. § 2.107, DOE has the authority to withdraw its application for the Yucca Mountain Repository. *See* U.S. Department of Energy's Motion to Withdraw, March 3, 2010, Page 2. However, DOE fails to address or explain the logical leap between generally applicable regulations on terms of withdrawal and DOE having the authority to withdraw under the NWPA. The Four Counties do not appreciate how regulatory language prescribing terms of withdrawal for a myriad of types of applicants coming before the NRC overrides the clear mandate, in the NWPA, for DOE to submit and NRC to review and issue a final decision on the application.

The language of Section 2.107 only states that the "withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe." 10 C.F.R. § 2.107(a). This broad regulation applies to proceedings other than the licensing of the Yucca Mountain Repository, including licensing of private facilities. Section 2.107 provides no persuasive guidance on whether DOE may withdraw its own application under the highly unique circumstances of the NWPA mandate for a repository.

Additionally, Section 2.107 does not say that the Commission must or shall dismiss the application. *See* 10 C.F.R. § 2.107(a). In contrast, NWPA Section 114 does state that the Commission "shall consider an application…in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision." 42 USCA § 10134(b).

The express language of the NWPA, requiring a final decision on the License Application, overrides any implied authority on the part of DOE, or NRC, to withdraw the application at this stage. Permitting DOE to withdraw the License Application, based on reading that authority into § 2.107, would contravene NRC's direct mandate to review and issue a final decision. DOE's illogical reliance on 10 C.F.R. § 2.107 and the express language of Section 114 does not support DOE's claimed authority to withdraw the license application or NRC's ability to permit withdrawal.

DOE also argues that the statute only requires the Secretary to submit an application; it does not "direct or circumscribe the Secretary's actions…after that submission" and, therefore, DOE can withdraw the application. U.S. Department of Energy Motion to Dismiss, March 3, 2010, Page 5. Simply put, this argument is illogical. The NWPA was enacted to "establish a schedule for the siting, construction, and operation of repositories…." NWPA Section 111(b)(1), 42 USCA § 10131(b)(1). NWPA established a policy and procedure for opening a repository; it makes absolutely no sense that the entirety of DOE's obligation stops at filing the application when the purpose of the Act is to construct a repository. DOE's withdrawal is a direct contravention of the purposes and process set out in the NWPA.

Finally, DOE's emphasis that the Secretary is "permitted," but not required to continue an application, based on the D.C. Circuit's language in *Nuclear Energy Institute, Inc*, misconstrues the context of the Court's discussion and meaning of that "permitted" language. *See* U.S. Department of Energy's Motion to Withdraw, March 3, 2010, Page 7. The court, in *Nuclear Energy Institute, Inc. v. EPA,* was addressing the question of whether the process for site selection had been properly concluded, allowing DOE to move forward with the application phase of the process. *See* 373 F.3d 1251, 1309-10 (D.C. Cir. 2004). DOE understands the "permitted" language of this opinion to mean that it is not required to file an application. A much more logical interpretation of the D.C. courts "permitted" language is as permissive verbiage relating to the completion of the site selection and proper filing of the application. The Court

concluded the site selection process had been completed; thus, DOE was allowed, or "permitted", to submit an application. Id at 1310 (stating that "[t]he practical effect of the legislation is to conclude the site-selection process and to permit DOE to seek authorization from NRC to construct and operate a repository at this site.")*; See also* Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/permitted (defining "permitted" as: 1. to consent to expressly or formally, 2. to give leave, 3. to make possible). Neither the *Nuclear Energy Institute* opinion itself, nor the "permitted" language in the opinion addresses or relates to DOE's obligation to file or continue to support its license application. As such, this argument is not persuasive.

In summary, the legislative intent and procedures in the Nuclear Waste Policy Act do not support license withdrawal with prejudice at this stage of the proceedings. DOE's arguments to the contrary in its Motion to Withdraw are not persuasive of that right.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the NEVADA COUNTIES OF CHURCHILL, ESMERALDA, LANDER AND MINERAL RESPONSE TO 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.

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July 9, 2010

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