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)	July 19, 2010

RESPONSE BRIEF OF THE STATE OF WASHINGTON PURSUANT TO THE JUNE 30, 2010, COMMISSION ORDER

ROBERT M. MCKENNA
Attorney General

ANDREW A. FITZ
TODD R. BOWERS
Senior Counsel
MICHAEL L. DUNNING
H. LEE OVERTON
JONATHAN C. THOMPSON
Assistant Attorneys General

State of Washington
Office of the Attorney General
PO Box 40117
Olympia, WA 98504-0117
(360) 586-6770
AndyF@atg.wa.gov
ToddB@atg.wa.gov
MichaelD@atg.wa.gov
LeeO1@atg.wa.gov
JonaT@atg.wa.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Legislative History

I. INTRODUCTION

Pursuant to the Commission's June 30, 2010, Order, the State of Washington (Washington) submits this brief in response to initial briefs filed with the Commission on July 9, 2010. Washington reiterates the position set forth in its initial brief that the Commission should decline to take discretionary interlocutory review of this matter.[1] In the event the Commission takes review, Washington provides this response to arguments made by the United States Department of Energy (DOE),[2] the State of Nevada (Nevada),[3] and the NRC Staff[4] that the Commission should reverse the June 29, 2010, decision[5] of the Atomic Safety and Licensing Board (ASLB or Board). The ASLB's Order denied DOE's motion to withdraw with prejudice its application for a license to construct a geologic repository for high-level radioactive waste and spent nuclear fuel at Yucca Mountain, Nevada.

II. ARGUMENT

The arguments made by DOE, Nevada and, to a lesser extent, NRC Staff share a common characteristic. All read a piece of the NWPA, particularly one clause of Section 114(d), in isolation to support their position. However, basic grammar and the rules of statutory construction preclude the statute from being interpreted and read in the manner they suggest. Doing so ignores Congress' clear command embodied in the plain language of

---

[1] *See* Initial Brief of the State of Washington Pursuant to the June 30, 2010, Commission Order (Washington Br.) (July 9, 2010) at 10-11.

[2] U.S. Department of Energy's Brief in Support of Review and Reversal of the Board's Ruling on the Motion to Withdraw (DOE Br.) (July 9, 2010).

[3] Brief of the State of Nevada in Support of Review and Reversal of the Licensing Board's Decision Denying the Department of Energy's Motion to Withdraw its License Application with Prejudice (Nevada Br.) (July 9, 2010). Nevada's Brief is joined by the Joint Timbisha Shoshone Tribal Group; the Native American Action Council; and Clark County, Nevada.

[4] NRC Staff Brief in Response to the Secretary of the Commission's June 30, 2010 Order (NRC Staff Br.) (July 9, 2010).

[5] Atomic Safety and Licensing Board's Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion) (June 29, 2010) (Order).

the NWPA. The grammatical structure of Section 114(d) and the rules of statutory construction require that, once DOE submits an application for a license to construct a permanent repository, DOE is without authority to withdraw that application, and the NRC must issue a decision on the ultimate merits of that application. Consequently, if review of the Board's Order is taken, the Board's Order should be upheld.

A. The Incorporation of "Laws Applicable to Such Applications" in NWPA Section 114(d) Does Not Authorize DOE or NRC to Terminate the NWPA's Licensing Stage Short of a Decision on the Merits Approving or Disapproving a Construction Authorization

The heart of DOE's argument is that by providing in NWPA Section 114(d) that the NRC "shall consider" DOE's application "in accordance with the laws applicable to such applications," Congress intended that DOE could avail itself of the NRC's withdrawal provision, 10 C.F.R. § 2.107, in the same manner as any voluntary applicant for an NRC license. *See, e.g.*, DOE Br. at 10-11 (quoting 42 U.S.C. § 10134(d)). However, as noted in Washington's Brief at 12-16, the complete language of Section 114(d) defeats DOE's argument. Section 114(d) provides in full:

> The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, *except that* the Commission *shall issue a final decision approving or disapproving the issuance of a construction authorization* not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadlines by not more than 12 months.

42 U.S.C. § 10134(d) (emphasis added).

According to the rules of statutory construction, "statutes or regulations are to be read as a whole, with 'each part or section . . . construed in connection with every other part or section.'" *Am. Fed'n of Gov't Employees, Local 2782 v. Fed. Labor Relations Auth.*,

803 F.2d 737, 740 (D.C. Cir. 1986) (quoting 2A Sutherlands, Statutes and Statutory Construction § 46.05, at 90 (C. Sands rev. 4th ed. 1984)). Read this way, the grammatical structure of Section 114(d) supports only one interpretation. Specifically, while the requirement to consider an application "in accordance with laws applicable," considered alone, might conceivably give the Commission freedom to stop short of a final decision approving or disapproving DOE's application, the "except that" clause immediately following precludes any such freedom, operating precisely to ensure that the Commission *may not* stop short of such a decision. This exception clause provides that the NRC *must* issue a "final decision" that "approv[es] or disapprov[es]" the "issuance of a construction authorization." 42 U.S.C. § 10134(d).

The NWPA does not define what it means to "approv[e]" or "disapprov[e]" a construction authorization. However, where not defined by statute, words will be interpreted taking their ordinary, contemporary, common meaning. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994); *Perrin v. United States,* 444 U.S. 37, 42 (1979). According to a dictionary definition contemporaneous with enactment of the NWPA, "approve" means "to judge and find commendable or acceptable; to think well of; have or express a favorable opinion or judgment of." *Webster's Third New International Dictionary* 106 (1971). "Disapprove" means "to pass unfavorable judgment upon." *Id.* at 643. A "final decision" that "approves" or "disapproves" issuing a construction authorization is thus a final judgment on the merits of issuing that authorization. Therefore, by the plain terms of Section 114(d), the "except that" clause precludes any action under the "in accordance with laws applicable" clause inconsistent with the requirement on the NRC to issue a final

decision on the merits of whether to grant a license to DOE to construct the Yucca Mountain repository.[6]

As described below, DOE, Nevada, and the NRC Staff all read the "in accordance with applicable laws" clause of Section 114(d) in isolation from the full sentence containing it, and then further isolate Section 114(d) from the context provided by the NWPA as a whole. As a result, their arguments should be rejected.

First, both DOE and Nevada argue that the words of the "except that" clause do not mean what they say: that the Commission must issue a final decision approving or disapproving the issuance of a construction authorization. Instead, they treat most of the words of the clause as surplusage and argue that the clause merely provides a procedural deadline for a decision that, depending on the current stance of DOE or the NRC, may or may not occur. *See* DOE Br. at 11-12, 21; Nevada Br. at 12, 14. DOE characterizes the "except that" clause as simply a "deadline for a Commission decision" and a "time limit on the Commission for licensing action," DOE Br. at 11, 21, and argues it is "*not* a substantive obligation on the NRC to reach the merits of an application." *Id*. at 4. Nevada argues that the clause exists "because time limits were the only thing missing" from the NRC's otherwise comprehensive licensing rules, prompting Congress to fill in the gap. Nevada Br. at 12.

These arguments fail for two reasons. First, while the time limit portion of the "except that" clause may be procedural, the portion requiring a final Commission decision approving or disapproving the license application is not. The time limit refers to performing

[6] As further argued in Washington's Brief, these plain terms are supported by the larger structure and context of the NWPA and the NWPA's legislative history. *See* Washington Br. at 12-16.

a substantive act: it is a deadline for *doing something*. Second, that substantive act is specified in the statute. The "except that" clause tells the Commission not only by when it must act, but *what it is that must be done*. Contrary to DOE's wishes, the words of the statute do not provide that the NRC has a three-year limit to complete an unspecified "licensing action" or make a generic "Commission decision." *See* DOE Br. at 21, 11. Instead, the words provide that the time limit is for the Commission to perform a specific, substantive and non-procedural act: issue a "final decision approving or disapproving the issuance of a construction authorization." 42 U.S.C. § 10134(d). While Nevada claims there is "never the slightest suggestion in the legislative history that the paragraph was intended to require the Commission to reach the merits of an application," Nevada Br. at 12, this is, in fact, *exactly* what the words of the statute itself say.[7]

In contrast to DOE and Nevada, the NRC Staff recognizes that the terms of the "except that" clause of Section 114(d) do establish a time limit for making a substantive, merits-based decision on the license application. NRC Staff Br. at 11 (referring to "The Commission's obligations to . . . reach a technical merits based determination. . ."). However, the Staff errs in subsequently asserting that these terms are only triggered "if an application is properly before, and actively sponsored before, the NRC," maintaining that "[i]f 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." NRC Staff Br. at 11.

[7] Because the words of the statute do, in fact, require this, Nevada's attempt to find ambiguity in the statute on the question of whether DOE may withdraw its application fails. Nevada asks whether "Congress has directly spoken to the precise question at issue," answers that it has not, and concludes that deference under *Chevron* to the agency's interpretation of the statute is appropriate. Nevada Br. at 8, 10. However, in the face of the plain language of the statute, the statute is not ambiguous.

The NRC Staff's argument, like that of DOE and Nevada, ignores the plain language of the "except that" clause. That language provides an express *exception* to the "applicable laws" clause immediately preceding it, removing any possibility that the requirement to reach a merits-based decision is simply relieved if DOE withdraws its application. Like the arguments made by DOE and Nevada, the Staff's argument, if accepted, would nullify Congress' directive, clearly expressed in the "except that" clause of Section 114(d), that the NRC reach a decision on the merits of a DOE's license application.

The Staff's argument appears to be based on concerns that, upon closer examination, disappear. For example, the Staff appears concerned that accepting the Board's interpretation of Section 114(d) would require a "merits based determination in all circumstances," which would, in turn, preclude the application of the NRC's normal pre-docketing procedures to evaluate and summarily reject (without prejudice) patently insufficient applications before commencing an adjudication. NRC Staff Br. at 10 n.10. However, the Staff's brief provides its own answer to this concern, noting that under Commission precedent, the three-year schedule requirement means "three years from the docketing of the application," NRC Staff Br. at 9 n.9, thus triggering the obligation to reach a final merits-based determination only after an application has been docketed.

The NRC Staff also appears to be troubled by a concern that the Board's Order obliges the NRC to step into the role of promoting DOE's application. *See* NRC Staff Br. at 11 n.11. The Staff argues that the Board does not explain or identify NRC's authority "to in effect enforce DOE's obligations under the NWPA," complaining that nothing in the NWPA or its legislative history indicates that Congress intended for the NRC to take on this role. NRC Staff Br. at 10.

However, the Staff misses a key point. At issue is not whether the NRC may or must enforce DOE's obligations under the NWPA, but rather the NRC's own duty under the Act to "consider" and reach a "final decision approving or disapproving" the construction authorization that the NWPA compels DOE to submit. 42 U.S.C. § 10134(d). Once DOE's application is docketed, this duty precludes the NRC from taking any action other than reaching a decision on the merits of DOE's application.[8] Allowing a non-merits based withdrawal does not satisfy the NRC's obligation to "approve" or "disapprove" a construction authorization under Section 114(d). It simply allows the matter to leave NRC's hands, with no assurance it will ever return. This would not effectuate the "legislated schedule" that is an "essential element" of the NWPA. H.R. Rep. No. 97-491(I), at 30 (1982). The position of the NRC Staff thus fails to give effect to the full terms of Section 114(d).[9]

Finally, Nevada argues that construing the "except that" clause to require a final decision on merits "would eliminate the possibility of DOE withdrawing its application under any circumstances," even if it believed the repository was "unsafe." Nevada Br. at 12. This is incorrect. In the event DOE determines that the merits of its application are fatally flawed, or that Yucca Mountain is objectively "unsafe" as a repository site, DOE is free to use the vehicle of 10 C.F.R. § 2.107, or another appropriate legal vehicle, to request a final,

[8] These requirements also provide the clear basis upon which to distinguish the body of the NRC's "normal" withdrawal precedent developed under 10 C.F.R. § 2.107. *See* DOE Br. at 11. As the ASLB observed: "Under the framework of the NWPA, DOE's application is not like any other application, and DOE is not just 'any litigant,' because its policy discretion is clearly limited by the NWPA." Order at 17. Based on the language of Section 114(d), the same is true of the NRC in considering DOE's application.

[9] To the extent the Staff is concerned about DOE failing to prosecute its application, other legal mechanisms are available through which such inaction may be addressed. *See, e.g.,* 42 U.S.C. § 10139. Even in the absence of such mechanisms, however, the Staff's concern does not warrant interpreting a statute to relieve it of its own clearly expressed duty, any less than if DOE were to argue that a concern about the NRC's review of its application would relieve DOE of its statutory obligation to submit the application.

merits-based determination from the NRC "approving or disapproving" DOE's construction authorization.

Critically, however, this is not the circumstance in this case. DOE's motion to withdraw the application does *not* go to the merits of the underlying application; in fact, it bears no relation to those merits. DOE has made it clear that in requesting prejudicial withdrawal, "the Secretary's judgment here is not that Yucca Mountain is unsafe or that there are flaws in the LA [license application], but rather that it is not a workable option and that alternatives will better serve the public interest." U.S. Department of Energy's Reply to the Responses to the Motion to Withdraw (May 27, 2010) at 31 n.102. Granting DOE's motion would thus not be a "final decision approving or disapproving the issuance of a construction authorization" under Section 114(d), nor could it be construed to be.[10]

All of the arguments advanced by DOE, Nevada, and the NRC Staff share one common characteristic: That a single clause of Section 114(d) can be removed from that section and read in isolation to support the result they seek. However, Congress' intent with

[10] DOE argues that a Commission order granting DOE's motion to withdraw with prejudice would constitute a 'disapprov[al]' under [Section] 114(d)." DOE Br. at 22. Washington disagrees that an application that has been prejudicially dismissed without reaching the merits may truly be considered "disapproved" on the merits. Rather, such (inappropriate) dismissal would, by closing off the possibility of a merits-based resolution, carry at least the impact of having made such an adjudication. *See, e.g., In re Duke Power Co. (Perkins Nuclear Station, Units 1, 2, & 3)*, LBP-82-81, 16 NRC 1128, 1135 (1982) (holding that dismissal with prejudice would amount to an adjudication on the merits); *In re Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)*, LBP-99-27, 50 NRC 45, 51 (1999) (same). That said, DOE's request for prejudicial dismissal is based on the simple statement that it "does not intend ever to refile its application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain." U.S. Department of Energy's Motion to Withdraw (Mar. 3, 2010) at 3 n.3. This does not satisfy the NRC's standards for imposing a prejudicial sanction upon withdrawal dismissal. *See, e.g.*, *In re Puerto Rico Elec. Power Auth. (North Coast Nuclear Plant, Unit 1)*, ALAB-662, 14 NRC 1125, 1133 (1981) ("[i]t is highly unusual to dispose of a proceeding on the merits, *i.e., with prejudice*, when in fact the health, safety and environmental merits of the application have not been reached."); *In re Philadelphia Elec. Co. (Fulton Generating Station, Units 1 & 2)*, ALAB-657, 14 NRC 967, 974 (1981) (dismissal is a "particularly harsh and punitive term imposed upon withdrawal" that should be reserved for only those situations in which re-considering the application would involve substantial prejudice to the opposing parties or the public interest in general). DOE cannot gratuitously wish a prejudicial sanction upon itself, then claim that the sanction amounts to a "disapproval" on the merits.

regard to Section 114(d) can only be ascertained by reading that Section as a whole. When this is done, it is clear that the NRC Staff's assertion that, "[i]f Congress intended to preclude DOE from requesting (and the NRC from considering withdrawal) [sic] it could have specified that in the NWPA," is incorrect. NRC Staff Br. at 14-15. In fact, this is precisely what Congress did in Section 114(d). In plain words, Congress directed DOE to submit a construction authorization application and the NRC to reach a final decision on whether to approve or disapprove the merits of that authorization. Congress has clearly spoken in the statute.

B. The NWPA Directs and Constrains DOE's Exercise of Pre-existing Authority, Precluding DOE From Terminating the NWPA's Licensing Stage Short of a Decision on the Merits Approving or Disapproving a Construction Authorization

DOE argues that because the NWPA did not expressly repeal DOE's pre-existing authority under the Atomic Energy Act (AEA) or the DOE Organization Act—including authority over "the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes," DOE Br. at 8 (quoting 42 U.S.C. § 7133(a)(8)(C)), the AEA "necessarily provides the Secretary discretion to determine not to proceed with an application for a particular repository." DOE Br. at 1; *see also*, DOE Br. at 3, 8-9, 26-31.

It is not necessary to address whether the NWPA repeals some provision of the AEA. The NWPA unquestionably directs and constrains whatever broad pre-NWPA AEA and organic act discretion DOE may have enjoyed to develop (or not develop) a repository for high-level waste and spent nuclear fuel. The same is true of the other federal agencies

implicated by the NWPA; notably, the NRC and the Environmental Protection Agency. Among the examples of this:

- Through the NWPA, Congress directed DOE to promulgate repository siting guidelines and directed DOE as to certain criteria the guidelines must address, 42 U.S.C. § 10132(a);
- Through the NWPA, Congress mandated that DOE consult with the NRC and prospective host state(s) on repository candidate site characterization plan(s), including receiving approval before conducting certain activities, 42 U.S.C. § 10133(a), (b), (c);
- In 1987, Congress through the NWPA mandated DOE to terminate all characterization activities at repository candidate sites other than Yucca Mountain, 42 U.S.C. § 10172(a);
- Through the NWPA, Congress precluded DOE from conducting site-specific activities with respect to any potential repository other than Yucca Mountain "unless Congress has specifically authorized and appropriated funds for such activities," 42 U.S.C. § 10172a(a);
- The NWPA's Section 113(c)(3) allows the Secretary to terminate "site characterization activities" during the pre-decisional stage only upon a specific determination that a site is "unsuitable for development as a repository," with a requirement that DOE report to Congress on matters that include "the need for new legislative authority," 42 U.S.C. § 10133(c)(3);
- The NWPA directs the NRC and the Environmental Protection Agency to, "pursuant to authority under other provisions of law," promulgate certain

standards and criteria applicable to repositories developed pursuant to the NWPA, including prescribing the form that such standards and criteria must take, 42 U.S.C. § 10141(a), (b);

- The NWPA compels DOE to submit a license application to the NRC at the post-decisional stage, 42 U.S.C. § 10134(b), which the NRC then must "consider" and act upon to issue a "final decision approving or disapproving," 42 U.S.C. § 10134(d);
- The NWPA's Section 114(e) also compels DOE to prepare a project decision schedule at the post-decisional stage "that portrays *the optimum way to attain the operation of the repository,* within the time periods specified in this part," 42 U.S.C. § 10134(e)(1), with concurrent obligations imposed on "all Federal agencies required to take action." *Id*.; 42 U.S.C. § 10134(e)(2).

In each of these instances, the NWPA directs and constrains DOE's preexisting authority relating to nuclear waste management and the establishment of facilities for "storage, management, and ultimate disposal of nuclear wastes," as well as the preexisting authority of other agencies such as the NRC. It is unnecessary to argue about whether the NWPA expressly or impliedly repeals any of the AEA's authority-granting provisions in each instance because, whatever the answer, it cannot be denied that the NWPA directs and constrains how such authority is used to effectuate Congress' defined policy aim of providing for the "siting, construction, and operation of repositories."[11] 42 U.S.C. § 10131(b)(1).

[11] For this reason, DOE's lengthy recitation of the standards for implied repeal, *see* DOE Br. at 18-25, is irrelevant.

This relationship between the NWPA and earlier-granted authority has been recognized by the D.C. Circuit Court of Appeals:

> NRC insists that NRC's authority to regulate the DOE's disposal of high-level radioactive wastes predated the passage of the NWPA and therefore NRC had no need to, and did not, act "under" the NWPA in promulgating part 63. Specifically, NRC alleges that section 202 of the [Energy Reorganization Act], 42 U.S.C. § 5842, (not the NWPA) "gave the NRC the power (and the obligation) to regulate DOE's proposed Yucca Mountain repository." NRC's argument, however, is somewhat beside the point. *That Congress may have authorized NRC to regulate DOE's disposal of radioactive waste before it enacted the NWPA, hardly negates the fact that in the NWPA Congress specifically directed NRC to issue "requirements and criteria" for evaluating repository-related applications and, not insignificantly, how to do so*.

Nuclear Energy Inst., Inc. v. EPA, 373 F.3d 1251, 1288 (D.C. Cir. 2004) (emphasis added) (citations omitted); *see also, id*. at 1287 ("NRC overlooks the fact that [NWPA] section 121 itself—and not any of NRC's preexisting authority under the AEA and the ERA—*specifically directs NRC to adopt 'requirements and criteria'* to review the specified applications. NRC likewise ignores that, in addition to directing NRC to adopt 'requirements and criteria,' section 121 *imposes constraints on the form the 'requirements and criteria' may take*.") (emphasis added).

Nevertheless, in the fashion of arguing that day is night and night is day, DOE maintains that 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," while "leav[ing] in place the Secretary's pre-existing discretion to halt a repository at Yucca Mountain without leave of the President, Congress or the NRC." DOE Br. at 30-31. This turns the NWPA on its head. Congress devised the NWPA's "comprehensive, step-by-step approach to repository development" to

"solidify a program *and keep it on track*." H.R. Rep. No. 97-491(I), at 28-29 (emphasis added). The NWPA was enacted not to provide a check on DOE's ability to move *forward* with a repository, but rather to remedy the demonstrated inability of DOE and its predecessors to *sustain* a repository siting effort in the face of agency apathy and political pressure. *See generally*, H.R. Rep. No. 97-491(I), at 26-30; *see also*, 42 U.S.C. § 10131(a)(3) ("Federal efforts during the past 30 years to devise a permanent solution to the problems . . . have not been adequate").

If it were true that the NWPA leaves in place, undisturbed, the Secretary's pre-existing discretion to terminate a repository effort at any time, *see* DOE Br. at 31, then there would be no need for the NWPA's Section 113(c)(3) termination provision. This provision provides express authority for the Secretary to cease pre-decisional site characterization activities upon a specific finding that a location is "unsuitable for development as a repository." *See* 42 U.S.C. § 10133(c)(3). That authority—only without the limitations included in Section 113(c)(3)—would *already be vested* in the Secretary, negating the need for Congress to specify such authority in the NWPA (and further negating the need for the Secretary to report back to Congress on "the need for new legislative authority," *see* 42 U.S.C. § 10133(c)(3)(F)).[12] *See e.g., Stone v. I.N.S.,* 514 U.S. 386, 397-98 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Given this limited grant to DOE of termination authority at the pre-decisional stage, the fact that Congress displaced the authority of the Secretary and the President at the decisional stage (by providing for state disapproval authority and

[12] The parallel DOE attempts to draw between the pre-decisional Section 113(c)(3) termination condition and the post-decisional Section 114(d) incorporation of unspecified "laws applicable to such applications" stretches both logic and the rules of statutory construction beyond the breaking point. *See* DOE Br. at 29-30 & n.106.

reserving ultimate approval authority with Congress), and the post-decisional Section 114 licensing phase requirements that DOE and the NRC must prosecute and reach a merits-based licensing application decision, it is illogical and absurd to conclude that Congress intended for DOE to retain unfettered discretion to unilaterally abandon the NWPA's process at the licensing stage, effectively reversing a siting decision Congress itself has made. *See Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 402 (6th Cir. 2008); Washington Br. at 12-16.

Congress' words also answer DOE's curious claim that because the NWPA does not require repository construction, DOE is somehow excused from complying with the law. DOE Br. at 27-28. While the current Secretary may believe that the NWPA provides a "licensing process to nowhere," it is nevertheless a process that Congress has commanded in law and funded DOE to follow, including in the current budget cycle.[13] The current Secretary, however, does not hold the only relevant view on whether, if authorized, the construction and operation of Yucca Mountain should proceed. If the NRC approves a construction authorization, the option will be available to Congress (as one of the "other actors" DOE references, DOE Br. at 26) to, now or at some point in the future, initiate the next steps toward realizing repository construction and operation. This is nothing new; it has been the structure of the NWPA since the day it became law. As argued in Washington's Brief, DOE's logic would render the entire NWPA superfluous and excuse the need for *any* compliance with the Act, since every action required under the NWPA is but an "intermediate step" toward an operating repository. Washington Br. at 21.

[13] *See* the Order at 18-19 n.69 (citing to FY 2010 budget).

The plain, unambiguous language of the NWPA, and particularly Section 114(d), does not allow DOE to withdraw its license application with prejudice, or the NRC to allow that withdrawal, and not reach a final, merit-based approval or disapproval of a construction authorization for Yucca Mountain. The Board properly reached this conclusion in its Order. That Order should be upheld.

III. CONCLUSION

Washington requests that the Commission decline to take discretionary interlocutory review of the ASLB's June 29, 2010, Order. If the Commission chooses to review that Order, Washington respectfully requests that the Order be upheld in all respects as outlined above and in Washington's Brief.

DATED this 19th day of July, 2010.

ROBERT M. MCKENNA
Attorney General

Signed (electronically) by Andrew A. Fitz
ANDREW A. FITZ
TODD R. BOWERS
Senior Counsel
MICHAEL L. DUNNING
H. LEE OVERTON
JONATHAN C. THOMPSON
Assistant Attorneys General
State of Washington
Office of the Attorney General
(360) 586-6770

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)	July 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that copies of the Response Brief of the State of Washington Pursuant to the June 30, 2010, Commission Order have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, D.C. 20555-0001

Construction Authorization Board 04
Thomas S. Moore, Chair
tsm2@nrc.gov
Paul S. Ryerson, Administrative Judge
psr1@nrc.gov
Richard E. Wardwell, Administrative Judge
rew@nrc.gov
E. Roy Hawkens
erh@nrc.gov
Paul G. Bollwerk III
gpb@nrc.gov
Anthony C. Eitreim, Esq., Chief Counsel
Anthony.Eitreim@nrc.gov
Daniel J. Graser, LSN Administrator
djg2@nrc.gov

Alan S. Rosenthal
Alan.Rosenthal@nrc.gov
Zachary Kahn, Law Clerk
zxk1@nrc.gov
Matthew Rotman, Law Clerk
matthew.rotman@nrc.gov
Katherine Tucker, Law Clerk
katie.tucker@nrc.gov
Joseph Deucher
joseph.deucher@nrc.gov
Andrew Welkie
axw5@nrc.gov
JackWhetstine
jgw@nrc.gov
Patricia Harich
patricia.harich@nrc.gov
Sara Culler
sara.culler@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary
ATTN: Docketing and Service
Mail Stop: O-16C1
Washington, D.C. 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, D.C. 20555-0001
Jessica A. Bielecki
Jessica.Bielecki@nrc.gov
Karin Francis, Paralegal
kxf4@nrc.gov
Adam Gendelman, Esq.
adam.gendelman@nrc.gov
Joseph S. Gilman, Paralegal
jsg1@nrc.gov
Daniel W. Lenehan, Esq.
daniel.lenehan@nrc.gov
Andrea L. Silvia, Esq.
alc1@nrc.gov
Mitzi A. Young, Esq.
may@nrc.gov
Marian L. Zobler, Esq.
mlz@nrc.gov
ogcmailcenter@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001
Rebecca Giiter
rll@nrc.gov
OCAA Mail Center
ocaamail@nrc.gov

Office of General Counsel
1551 Hillshire Dr.
Las Vegas, NV 89134-6321
Jocelyn M. Gutierrez, Esq.
jocelyn.gutierrez@ymp.gov
Josephine L. Sommer, Paralegal
josephine.sommer@ymp.gov

U.S. Department of Energy
Office of General Counsel
1000 Independence Ave. S.W.
Washington, DC 20585
Sean A. Lev, Esq.
sean.lev@hq.doe.gov
Martha S. Crosland, Esq.
martha.crosland@hq.doe.gov
Nicholas P. DiNunzio, Esq.
nicholas.dinunzio@hq.doe.gov
James Bennett McRae
ben.mcrae@hq.doe.gov
Cyrus Nezhad, Esq.
cyrus.nezhad@hq.doe.gov
Christina C. Pak, Esq.
christina.pak@hq.doe.gov

Counsel for U.S. Department of Energy
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
Clifford W. Cooper, Paralegal
ccooper@morganlewis.com
Lewis M. Csedrik, Esq.
lcsedrik@morganlewis.com
Jay M. Gutierrez, Esq.
jgutierrez@morganlewis.com
Raphael P. Kuyler, Esq.
rkuyler@morganlewis.com
Charles B. Moldenhauer, Esq.
cmoldenhauer@morganlewis.com
Thomas D. Poindexter, Esq.
tpoindexter@morganlewis.com
Alex S. Polonsky, Esq.
apolonsky@morganlewis.com
Thomas A. Schmutz, Esq.
tschmutz@morganlewis.com
Donald J. Silverman, Esq.
dsilverman@morganlewis.com
Shannon Staton, Legal Secretary
sstaton@morganlewis.com
Annette M. White, Esq.
annette.white@morganlewis.com
Paul J. Zaffuts, Esq.
pzaffuts@morganlewis.com
Hunton & Williams LLP
Riverfro Plaza, East Tower
951 East Byrd St.
Richmond, VA 23219
Kelly L. Faglioni, Esq.
kfaglioni@hunton.com
Donald P. Irwin, Esq.
dirwin@hunton.com
Stephanie Meharg, Paralegal
smeharg@hunton.com
Micahel R. Shebelskie, Esq.
mshebelskie@hunton.com
Belinda A. Wright, Sr. Professional Asst.
bwright@hunton.com

For U.S. Department of Energy
USA-Repository Services LLC
Yucca Mountain Project Licensing Group
1160 N. Town Center Dr., Suite 240
Las Vegas, NV 89144
Stephen J. Cereghino
stephen_cereghino@ymp.gov

For U.S. Department of Energy
Tailsman International, LLC
1000 Potomac St., NW, Suite 300
Washington, DC 2007
Patricia Larimore
plarimore@talisman-intl.com

Counsel for State of Nevada
Egan, Fitzpatrick , Malsch & Lawrence, PLLC
1750 K St. N.W., Suite 350
Washington, D.C. 20006
Martin G. Malsch, Esq.
mmalsch@nuclearlawyer.com
Susan Montesi
smontesi@nuclearlawyer.com

Egan, Fitzpatrick, Malsch & Lawrence PLLC
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
Charles J. Fitzpatrick, Esq.
cfitzpatrick@nuclearlawyer.com
John W. Lawrence, Esq.
jlawence@nuclearlawyer.com
Laurie Borski, Paralegal
lborski@nuclearlawyer.com

Counsel for Lincoln County, Nevada
Whipple Law Firm
1100 S. Tenth St.
Las Vegas, NV 89017
Annie Bailey, Legal Assistant
baileys@lcturbonet.com
Adam L. Gill, Esq.
adam.whipplelaw@yahoo.com
Eric Hinckley, Law Clerk
erichinckley@yahoo.com
Bret Whipple, Esq.
bretwhipple@nomademail.com

Lincoln County Nuclear Oversight Program
P.O. Box 1068
Caliente, NV 89008
Connie Simkins, Coordinator
jcciac@co.lincoln.nv.us

Bureau of Government Affairs
Nevada Attorney General
100 N. Carson St.
Carson City, NV 89701
Marta Adams, Chief Deputy Attorney General
madams@ag.nv.gov

Nevada Agency for Nuclear Projects
Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706
Steve Frishman, Tech. Policy Coordinator
steve.frishman@gmail.com
Susan Lynch, Administrator of Technical Programs
slynch1761@gmail.com

Lincoln County District Attorney
P.O. Box 60
Pioche, NV 89403
Gregory Barlow, Esq.
lcda@lcturbonet.com

For Lincoln County, Nevada
Intertech Services Corporation
P.O. Box 2008
Carson City, NV 89702
Mike Baughman, Consultant
mikebaughman@charter.net

Counsel for Nye County Nevada
Jeffrey D. VanNiel, Esq.
530 Farrington Court
Las Vegas, NV 89123
nbrjdvn@gmail.com

Nye County Regulatory/Licensing Advisor
18160 Cottonwood Rd. #265
Sunriver, OR 97707
Malachy R. Murphy, Esq.
mrmurphy@chamerscable.com

Nye Co. Nuclear Waste Repository
Project Office
2101 E. Calvada Blvd., Suite 100
Pahrump, NV 89048
Zoie Choate, Secretary
zchoate@co.nye.nv.us
Sherry Dudley Admin. Technical Coordinator
sdudley@co.nye.nv.us

Counsel for Nye County, Nevada
Ackerman Senterfitt
801 Pennsylvania Ave. NW #600
Washington, DC 20004
Robert Andersen, Esq.
robert.andersen@akerman.com

Counsel for Eureka County, Nevada
Harmon, Curran, Speilberg & Eisenberg, LLP
1726 M. St. NW, Suite 600
Washington, DC 20036
Diane Curran, Esq.
dcurran@harmoncurran.com
Mathew Fraser, Law Clerk
mfraser@harmoncurran.com

Nuclear Waste Advisory for Eureka
County, Nevada
1983 Maison Way
Carson City, NV 89703
Abigail Johnson, Consultant
eurekanrc@gmail.com

Eureka County, Nevada
Office of the District Attorney
701 S. Main St., Box 190
Eureka, NV 89316-0190
Theodore Beutel, District Attorney
tbeutel.ecda@eurekanv.org

Eureka County Public Works
P.O. Box 714
Eureka, NV 89316
Ronald Damele, Director
rdamele@eurekanv.org

For Eureka County, Nevada
NWOP Consulting, Inc.
1705 Wildcat Lane
Ogden, UT 84403
Loreen Pitchford, Consultant
lpitchford@comcast.net

Clark County Nevada
500 S. Grand Central Parkway
Las Vegas, NV 98155
Phil Klevorick, Sr. Mgmt Analyst
klevorick@co.clar.nv.us
Elizabeth A. Vibert. Deputy District Attorney
elizabeth.vibert@ccdanv.com

Counsel for Clark County, Nevada
Jennings, Strouss & Salmon
8330 W. Sahara Ave., #290
Las Vegas, NV 89117
Bryce Loveland, Esq.
bloveland@jsslaw.com
1350 I St. NW, Suite 810
Washington, DC 20005-3305
Elene Belte, Legal Secretary
ebelete@jsslaw.com
Alan I. Robbins, Esq.
arobbins@jsslaw.com
Debra D. Roby, Esq.
droby@jsslaw.com

Mineral County Nuclear Projects Office
P.O. Box 1600
Hawthorne, NV 89415
Linda Mathias, Director
yuccainfo@mineralcountynv.or

White Pine County, Nevada
Office of the District Attorney
801 Clark St., #3
Ely, NV 89301
Richard Sears, District Attorney
rwsears@wpcda.org

For White Pine County, Nevada
Intertech Services Corporation
P.O. Box 2008
Carson City, NV 89702
Mike Baughman, Consultant
bigboff@aol.com

Inyo County Yucca Mountain Repository
Assessment Office
P.O. 367
Independence, CA 93526-0367
Alisa M. Lembke, Project Analyst
alembke@inyocounty.us

Esmeralda County Repository Oversight Program
Yucca Mountain Project
P.O. Box 490
Goldfield, NV 89013
Edwin Mueller, Director
muellered@msn.com

Counsel for Churchill, Esmerald, Lander,
and Mineral Counties, Nevada
Armstrong Teasdale, LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237
Jennifer A. Gores, Esq.
jgores@armstrongteasdale.com
Robert F. List, Esq.
rlist@armstrongteasdale.com

For City of Caliente, Lincoln County,
and White Pine County, Nevada
P.O. Box 126
Caliente, NV 89008
Jason Pitts, LSN Administrator
jayson@idtservices.com

White Pine County Nuclear Waste Project Office
959 Campton St.
Ely, NV 89301
Mike Simon, Director
wpnucwst1@mwpower.net
Melaine Martinez, Sr. Management Assistant
wpnucwst2@mwpower.net

Counsel for Inyo County, California
Greg James, Attorney at Law
710 Autumn Leaves Circle
Bishop, CA 93514
gljames@earthlink.net
Law Office of Michael Berger
479 El Sueno Rd.
Santa Barbara, CA 93110
Michael Berger, Esq.
michael@lawofficeofmichaelberger.com
Robert Hanna, Esq.
robert@lawofficeofmichaelberger.com

Nuclear Energy Institute
Office of the General Counsel
1776 I St. NW, Suite 400
Washington, DC 20006-3708
Michael A. Bauser, Esq.
mab@nei.org
Anne W. Cottingham, Esq.
awc@nei.org
Ellen C. Ginsberg, Esq.
ecg@nei.org

Counsel for Nuclear Energy Institute
Pillsbury Winthrop Shaw Pittman LLP
2300 N St. N.W.
Washington, DC 20037-1122
Jay E. Silberg, Esq.
jay.silberg@pillsburylaw.com
Timothy J.V. Walsh, Esq.
timothy.walsh@pillsburylaw.com
Maria D. Webb, Senior Energy Legal Analyst
maria.webb@pillsburylaw.com
Winston & Strawn LLP
1700 K St. NW
Washington, DC 20006-3817
William A. Horin, Esq.
whorin@winston.com
Rachel Miras-Wilson, Esq.
rwilson@winston.com
David A. Repka, Esq.
drepka@winston.com
Carlos L. Sisco, Senior Paralegal
csisco@winston.com

California Energy Commission
1516 Ninth St.
Sacramento, CA 95814
Kevin W. Bell, Senior Staff Counsel
kwbell@energy.state.ca.us

C

alifornia Department of Justice
Office of the Attorney General
1300 I St., P.O. Box 944255
Sacramento, CA 94244-2550
Susan Durbin, Deputy Attorney General
susan.durbin@doj.ca.gov
Michele Mercado, Analyst
michele.mercado@doj.ca.gov
1515 Clay St., 20th Floor
P. O. Box 70550
Oakland, CA 94612-0550
Timothy E. Sullivan, Deputy Attorney General
timothy.sullivan@doj.ca.gov
300 South Spring St., Suite 1702
Los Angeles, CA 90013
Brian W. Hembacher, Deputy Attorney General
brian.hembacher@doj.ca.gov

Native Community Action Council
P.O. Box 140
Baker, NV 89311
Ian Zabarte, Member of Board of Directors
mrizabarte@gmail.com

Counsel for Native Community Action Council
Alexander, Berkey, Williams & Weathers LLP
2030 Addison St., Suite 410
Berkeley, Ca 94704
Curtis G. Berkey, Esq.
cberkey@abwwlaw.com
Rovianne A. Leigh, Esq.
rleigh@abwwlaw.com
Scott W. Williams, Esq.
swilliams@abwwlaw.com

Counsel for Joint Timbisha Shoshone
Tribal Group
Fredericks, Peebles & Morgan LLP
1001 Second St.
Sacramento, CA 95814
Felicia M. Brooks, Data Administrator
fbrooks@ndnlaw.com
Ross D. Colburn, Law Clerk
rcolburn@ndnlaw.com
Sally Eredia, Legal Secretary
seredia@ndnlaw.com
Darcie L. Houck, Esq.
dhouck@ndnlaw.com
Brian Niegemann, Office Manager
bniegemann@ndnlaw.com
John M. Peebles, Esq.
jpeebles@ndnlaw.com
Robert Rhoan, Esq.
rrhoan@ndnlaw.com
3610 North 163rd Plaza
Omaha, NE 68116
Shane Thin Elk, Esq.
sthinelk@ndnlaw.com
Godfrey & Kahn, S.C.
One East Main St., Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Julie Dobie, Legal Secretary
jdobie@gklaw.com
Steven A. Heinzen, Esq.
sheinzen@gklaw.com
Douglas M. Poland, Esq.
dpoland@gklaw.com
Hanna L. Renfro, Esq.
hrenfro@gklaw.com
Jacqueline Schwartz, Paralegal
jschwartz@gklaw.com

Godfrey & Kahn, S.C.
780 N. Water St.
Milwaukee, WI 53202
Arthur J. Harrington, Esq.
aharrington@gklaw.com

For Joint Timbisha Shoshone Tribal Group
3560 Savoy Boulevard
Pahrump, NV 89601
Joe Kennedy, Executive Directory
joekennedy08@live.com
Tameka Vazquez, Bookkeeper
purpose_driven12@yahoo.com

Counsel for State of South Carolina
Davidson & Lindemann, P.A.
1611 Devonshire Dr., 2nd Floor
P.O. Box 8568
Columbia, SC 29202
Kenneth P. Woodington
kwoodington@dml-law.com

Counsel for Aiken County, South Carolina
Haynesworth Sinkler Boyd, PA
1201 Main Street, Suite 2200
P.O. Box 11889
Columbia, SC 29211-1889
Thomas R. Gottshall
tgottshall@hsblawfirm.com
Ross Shealy
rshealy@hsblawfirm.com

Counsel for Prairie Island Indian Community
Public Law Resource Center PLLC
505 N. Capitol Avenue
Lansing, MI 48933
Don L. Keskey
donkeskey@publiclawresourcenter.com

Counsel for National Association of Regulatory Utility Commissioners (NARUC)
1101 Vermong Avenue, Suite 200
Washington, DC 20005
James Ramsay
jramsay@naruc.org
Robin Lunt
rlunt@naruc.org

ROBERT M. MCKENNA
Attorney General

Signed (electronically) by Andrew A. Fitz
ANDREW A. FITZ
TODD R. BOWERS
Senior Counsel
MICHAEL L. DUNNING
H. LEE OVERTON
JONATHAN C. THOMPSON
Assistant Attorneys General
State of Washington, Office of the Attorney General
PO Box 40117
Olympia, WA 98504-0117
(360) 586-6770
andyf@atg.wa.gov
toddb@atg.wa.gov
michaeld@atg.wa.gov
leeo1@atg.wa.gov
jonat@atg.wa.gov