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Table of Abbreviations

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

DOE respectfully submits this reply brief pursuant to the June 30 and July 14, 2010 Orders of the Commission's Secretary. The Commission should review and reverse the Board's Order for the reasons stated in DOE's initial and reply briefs.

I. INTRODUCTION

The parties opposing review and reversal of the Board's Order largely parrot the Board's reasoning and add nothing to justify the Board's incorrect denial of DOE's motion to withdraw. Their arguments provide nothing close to the clear mandate that would be necessary to strip DOE of its pre-existing authority to make decisions regarding the disposition of nuclear waste. Most importantly, like the Board, the opponents identify no provision of the NWPA that by its terms prohibits DOE from withdrawing its application. The significance of this fact cannot be overstated. These parties' legal position is not founded on the NWPA's plain text – as there is no plain text directing the result they seek – but relies instead on inferences they read into the statute to claim an *implied* repeal of DOE's pre-existing authority under the AEA and DOE Organization Act.

The opponents' theory of implied repeal is not sustainable. That theory fails to give effect to NWPA § 114(d), which expressly subjects DOE's application to the ordinary NRC law that governs licensing proceedings, including the law permitting applicants to withdraw. In straining to find an implied repeal, the opponents either ignore § 114(d) or assert, without textual support, that it carves out the long-recognized NRC law that authorizes withdrawal of applications. The former approach contravenes fundamental canons of statutory construction. The latter approach is no better. It improperly reads a limitation into § 114(d) that does not appear on its face. Nor is there even any legislative history suggesting that § 114(d)'s unqualified incorporation of NRC law somehow excludes the law on withdrawal.

The opponents' theory also unnecessarily assumes that Congress intended a wasteful and unreasonable scheme under which the Secretary would be required to prosecute an application that he has concluded is contrary to the public interest and despite his clear decision not to build the repository. There is no sound reason to read such a perverse congressional intent into the NWPA absent clear statutory language that does not remotely exist here.

More broadly, the opponents' arguments about the NWPA start from the assumed premise that Congress intended to require DOE to prosecute an application for the Yucca Mountain repository, no matter what (even though Congress never said that). The opponents then seek to retrofit the meaning of statutory provisions and legislative history addressing other issues (such as the time-line for NRC decision) to comport with that pre-ordained outcome. That is an incorrect approach to statutory construction. The necessary starting point is the statutory language itself; and where, as here, that language is clear and directly resolves the issue at hand, that is the end of the matter.

The bottom line is that the NWPA has no provision that bars withdrawal and contains instead a provision that incorporates without any relevant exception the NRC law for licensing proceedings. The opponents' arguments do not overcome that dispositive statutory language, and certainly do not meet the stringent standard necessary to establish an implied repeal

II. ARGUMENT

A. **The Opponents Identify No Reason To Decline Review**

As DOE explained in its initial brief,¹ the Commission has inherent authority to review the Board's Order, and the reasons for review now are even more compelling than when the Commission reviewed and vacated the Board's April 6, 2010 Memorandum and Order

¹ DOE Brief in Support of Review and Reversal of the Board's Ruling on the Motion to Withdraw (July 9, 2010) ("DOE Br.") at 5-7. For convenience, the opponents' briefs filed at the same time are cited as "Opp." preceded by the pertinent party name. The Staff's brief is cited as "Staff Br."

suspending action on DOE's motion to withdraw. No party contests the Commission's authority to grant that review. To the contrary, even the opponents concede that the Commission "clearly has inherent supervisory authority" to review the Board's Order.²

Nor does any party dispute that the Board's denial of DOE's motion to withdraw would qualify for interlocutory appeal in the ordinary case pursuant to 10 C.F.R. § 2.341(f)(2). Similarly, there is no dispute that the Board's denial of that motion satisfies the criteria for certification pursuant to 10 C.F.R. § 2.341(f)(1). This matter self-evidently involves significant and novel legal and policy issues, and it is equally clear that the resolution of those issues will advance the orderly disposition of the proceeding. As PIIC aptly observes: "DOE's motion is not simply a pedestrian procedural motion that may arise in a routine NRC case."³

Several opponents argue instead that review is unnecessary because they believe the Board correctly decided DOE's motion and issued what they consider a "thorough" and "reasoned" decision.⁴ DOE strenuously disagrees with these characterizations, but much more to the point, the opponents' views do not change the fact that DOE's motion raises what the Commission has recognized are "fundamental questions."⁵ As the Staff properly observes, the Board's denial of DOE's motion raises "unique questions of law" that "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

² NEI Opp. at 5; *see also* Aiken Opp. at 2 (acknowledging that the Commission "retains the inherent authority to take review of the Licensing Board Order"); NARUC Opp. at 1 (same).

³ PIIC Opp. at 17.

⁴ NARUC Opp. at 1; NEI Opp. at 6.

⁵ CLI-10-13 at 3-4.

addressed on appeal.”⁶ The Commission’s *de novo* review of these significant issues is singularly important.⁷

These same opponents argue additionally that the Commission should not grant review because related matters are pending in the U.S. Court of Appeals for the District of Columbia Circuit.⁸ That argument has matters backwards. The Commission reviewed and reversed the Board’s April 6, 2010 Memorandum and Order precisely because, as the Commission explained, the Court of Appeals would “benefit” from “application of [the Commission’s] expertise” on DOE’s motion.⁹ The opponents’ argument is thus directly contrary to the Commission’s reasoning in this very proceeding.¹⁰

⁶ Staff Br. at 7.

⁷ While conceding that legal questions are subject to *de novo* review, Nye County asserts that “any factual determinations based upon the administrative record made by CAB04 in support of its interpretation of the NWPA” are entitled to deference. Nye Opp. at 7. Nye County does not explain what, if any, such findings it believes the Board made.

Regardless, Nye County’s contention is incorrect. The Board interpreted the NWPA, holding “*as a matter of law* that DOE lacks the discretion to withdraw the Application” Board’s Order at 11, n.36 (emphasis added). The interpretation of a statute is a legal question subject to *de novo* review. *E.g.*, *United States v. Cook*, 594 F.3d 883, 886 (D.C. Cir. 2010). *See also* Aiken Opp. at 10 (stating that DOE’s authority to withdraw its license application is a “legal issue”); NARUC Opp. at 2 (noting that there are “*no real factual disputes*” here) (emphasis in original).

⁸ Aiken Opp. at 5-7; NARUC Opp. at 5; NEI Opp. at 6-7.

⁹ CLI-10-13 at 4.

¹⁰ Aiken County, NARUC and NEI cite *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1&2), ALAB-350, 4 N.R.C. 365 (1976), to advocate abstention. There, intervenors moved the Appeal Board to reconsider even though they had filed a petition for review with the Court of Appeals. The Appeal Board questioned whether the petition for review divested it of jurisdiction. It also questioned the propriety of the same party simultaneously moving for the same relief in two tribunals. The Appeal Board abstained from reconsidering its decision in those circumstances pending direction from the Court of Appeals.

The instant situation could not be more different. The Commission is not being asked to reconsider an appellate decision it has already rendered, much less a decision that is the subject of a pending petition for review. Rather, the opponents seek to bypass Commission review of the Board’s Order in the first instance in favor of judicial review, in contravention of 10 C.F.R. § 2.341(b)(1). Nor is DOE seeking relief before the Commission while simultaneously seeking judicial review of the Board’s Order. Nothing in ALAB-350 suggests that the Commission ought to leave the Board’s Order

Finally, several opponents have moved to recuse three of the Commissioners.¹¹ DOE will respond to that issue in its opposition to that motion and will demonstrate that the motion is inconsistent with precedent and sound principles. It presents no valid reason to deprive the Court of Appeals of the considered views of the full Commission on what even the opponents agree is a matter of “immense national importance.”¹²

B. The Opponents Cannot Show That The NWPA Strips DOE Of Its Authority To Withdraw The Application

Although the opponents vociferously deny that DOE can withdraw its license application, they leave two key points unrebutted in their opening briefs:

First, no party contests that the AEA and DOE Organization Act vest DOE with broad authority over the management of nuclear waste, including the authority to terminate a repository and to cease all licensing activities associated with the abandoned repository. Indeed, they conceded below that DOE has “plenary” authority under those statutes.¹³

Second, no party identifies any provision of the NWPA that expressly repeals the AEA and DOE Organization Act, either generally or with respect to DOE’s pre-existing plenary authority to withdraw a license application and terminate a repository program. Simply put, there is no language in the NWPA stating that DOE cannot withdraw a pending application.

unreviewed in these circumstances. If anything, prudential considerations suggest that the Court of Appeals should not rule until the agency process is complete.

¹¹ State of Washington, State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada’s Motion for Recusal/Disqualification (July 9, 2010). Commissioner Apostolakis has recused himself for reasons unrelated to those raised in the motion.

¹² PIIC Opp. at 17; *accord* Aiken Opp. at 10 (“nationally significant issue”).

¹³ State of Washington’s Response to U.S. Department of Energy’s Motion to Withdraw (May 17, 2010) at 11.

NEI argues for the first time in its reply that the AEA does not allow DOE to consider the “public interest” with respect to high level waste issues. The AEA, however, specifically empowers DOE to act with reference to the “national welfare.” 42 U.S.C. § 2013(c).

Like the Board, therefore, the opponents have no choice but to rely on a theory of implied repeal of the AEA and DOE Organization Act. They argue that the Commission should *read into* the NWPA an implicit bar on DOE’s withdrawal of the license application.¹⁴ Yet, as with the Board, the opponents ignore the settled law regarding implied repeals. Implied repeals are strongly disfavored, and “when two statutes are capable of co-existence . . . it is the *duty* of the courts, *absent a clearly expressed congressional intention to the contrary*, to regard each as effective.”¹⁵

The relevant question, therefore, is not whether the NWPA *could* be interpreted in the manner the opponents advocate. Rather, the question is whether the NWPA can be interpreted in a manner that co-exists with the AEA and DOE Organization Act and continues to give effect to them. Quite clearly that is the case. There is a textually sound interpretation of the NWPA that logically reconciles the AEA, the DOE Organization Act, and the NWPA – namely, DOE’s interpretation that the NWPA imposes requirements DOE must satisfy to proceed with the Yucca Mountain repository, but leaves intact DOE’s authority to end the project. That interpretation is not merely permissible, it is the only interpretation that comports with the NWPA’s plain text stating that the Yucca Mountain licensing proceeding shall be conducted “in accordance with the laws applicable to such proceedings.”¹⁶ The law compels adoption of that interpretation to reconcile the various statutes and avoid an implied repeal. Indeed, that would be required even if the issue were a closer one than is presented here, and DOE’s position were not supported by such plain language.

¹⁴ See, e.g., S.C. Opp. at 20 (arguing that “the requirement to file the application *implies* a duty to prosecute it in good faith”) (emphasis added).

¹⁵ *Vimar Seguras y Reasegures, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (emphasis added).

¹⁶ NWPA § 114(d), 42 U.S.C. § 10134(d).

Nor is it any answer, as the opponents repeatedly argue, that the NWPA is a later-enacted, more specific statute. As an initial matter, that argument begs the question whether the NWPA addresses the specific question presented here – whether DOE can withdraw an application once it is filed – and, if the NWPA does so, how it resolves that question. The NWPA’s plain text resolves this question in a way contrary to these parties’ argument. It mandates application of the ordinary rules governing licensing proceedings – which includes the rules allowing withdrawal by an applicant.

Moreover, the Commission has already rejected in *ISFSI* the very type of argument the opponents advance here.¹⁷ *ISFSI* concerned specifically whether the NWPA impliedly repealed the AEA, including claims that the NWPA as a later-enacted, more specific statute overrode the AEA. The Commission rejected those claims. The NWPA, the Commission concluded, was “intended to supplement, rather than replace, existing law.”¹⁸ The Commission further observed that the NWPA reflects a “great deal of compromise” within Congress,¹⁹ and to respect that compromise the Commission gave the NWPA “no greater effect than what [its] provision clearly said”²⁰

The opponents’ contrary approach is at odds with *ISFSI*. They do not seek to avoid a conflict between the AEA and the NWPA. They urge instead an interpretation that unnecessarily creates a conflict between those statutes. Their reading also requires insertion into the NWPA of limitations – including a limitation on Congress’ requirement that this proceeding must be handled “in accordance with the laws applicable to such applications” – that Congress did not

¹⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 N.R.C. 390 (2002).

¹⁸ *Id.* at 405.

¹⁹ *Id.* at 407.

²⁰ *Id.* at 410.

enact and that would improperly limit DOE's clear AEA authority to withdraw its application. The Commission resoundingly rejected in *ISFSI* any such effort to blue pencil the NWPA.²¹

Indeed, the opponents' arguments create a distinction that can be found nowhere in the NWPA's text (or even its legislative history). As the State of Washington conceded before the Board, it "makes sense" to read the NWPA to allow withdrawal if DOE learns something after filing the application that calls into question the safety of the Yucca Mountain site.²² Washington nevertheless argues that withdrawal is not legally permitted under the NWPA here. But there is nothing in the NWPA that suggests that withdrawal can be allowed in some circumstances but not others. Alternatively, to the extent the opponents now contend that withdrawal is never permitted, they are claiming that Congress illogically intended to bar withdrawal even when Washington would concede that withdrawal "makes sense."

The Commission should likewise reject the opponents' other arguments about the NWPA. DOE has responded to a number of these arguments in its opening brief. Among other things, our brief demonstrates that neither the NWPA's structure nor its legislative history supports (much less compels, as would be necessary for an implied repeal) the result the opponents seek. The legislative history demonstrates that as late as 2002 Congress understood

²¹ Aiken County asserts for the first time on page 2 of its reply brief that DOE took a different position with respect to its AEA authority, in a report to Congress in December 2008, entitled *Demonstration of the Interim Storage of Spent Nuclear Fuel from Decommissioned Nuclear Power Plants*. Aiken County misreads the report. The report is totally consistent with DOE's position here. The subject of the report, as its title indicates, is interim storage of spent nuclear fuel, not disposal in a repository. As DOE noted on page 7 of that report, the portion of the NWPA that concerns interim storage, Title I, Subtitle B, *expressly* limits DOE's authority under the AEA to accept spent nuclear fuel for interim storage prior to completion of a geologic repository. NWPA § 135, 42 U.S.C. § 10155. In contrast, there is no express prohibition on DOE's AEA authority to withdraw an application in the portion of the NWPA governing high-level waste repositories, Title I, Subtitle A, NWPA §§ 111-125, 42 U.S.C. §§ 10131-10145. Subtitle A includes the NWPA provisions at issue in this proceeding.

²² June 3, 2010 Tr. at 209-10 (statement of A. Fitz, State of Washington counsel).

that it was not mandating a march to the opening of a Yucca Mountain repository, but instead merely allowing the filing of an application.²³ The statutory structure, which in NWPA § 113, explicitly allows the Secretary unilaterally to end the process toward that repository without approval by Congress or this Commission prior to filing an application, is fully consistent with reading NWPA § 114 according to its plain terms to permit analogous action by the Secretary after filing an application.²⁴ DOE will not repeat those arguments here, but instead adds the following points:

NWPA § 114(b). Several parties argue that, because NWPA § 114(b) compels DOE to submit an application, DOE necessarily cannot later withdraw the application, no matter the Secretary of Energy's later determinations about the public interest.²⁵ Section 114(b) will not bear that interpretation, which is presumably why the Board's Order does not rest on it. Section 114(b) simply states in relevant part that, if a site designation is permitted to take effect, "the Secretary shall submit to the Commission an application for a construction authorization at such site not later than 90 days" later.²⁶ Given that the site designation could take effect under the statutory scheme only if the Secretary had very recently (a few months earlier) recommended approval of the site,²⁷ this provision acts primarily to require a prompt filing after action by the President and Congress, not to force the Secretary to file an application against his will.

²³ See, e.g., 148 Cong. Rec. S6460 (daily ed. July 9, 2002) (Sen. Crapo) ("[T]his debate is not about whether to open the Yucca Mountain facility so much as it is about allowing the process of permitting to begin to take place."); see also DOE Motion to Withdraw (March 3, 2010) at 7; DOE Reply to the Responses to the Motion to Withdraw (May 27, 2010) at 18.

²⁴ DOE Br. at 29-31; NRC Staff Answer to DOE's Motion to Withdraw (May 17, 2010) at 13-14.

²⁵ See, e.g., Wash. Opp. at 17.

²⁶ 42 U.S.C. § 10134(b).

²⁷ See *id.* § 10135(b), (c).

Even more to the point, § 114(b) says nothing one way or the other about what occurs *after* DOE files an application, much less prohibits DOE from withdrawing its application. All § 114(b) does is identify who should file an application (the Secretary) and specify when it should be filed (within 90 days of congressional override of a host state notice of disapproval). The statutory provision that controls how DOE’s application should be handled *after* filing is NWPA § 114(d), which, as DOE has explained, adopts NRC laws for licensing proceedings. Nothing in § 114(b) purports to curtail that express adoption.

It is also notable that § 114(b), when originally enacted, was not unique to the Yucca Mountain repository, but was a general provision applicable to any repository that DOE might seek to construct.²⁸ The original, general version of § 114(b) contained the same language to the effect that the Secretary “shall submit” to the Commission a construction authorization application not later than 90 days after a site designation is effective.²⁹ If the opponents’ construction of § 114(b) were correct, that would mean Congress intended the “shall submit” language to mean DOE could never withdraw *any* application for *any* repository. It makes no sense that Congress would have handcuffed DOE in that way for all future applications for all future repositories. Nothing on the face of § 114(b) compels that reading, and the opponents identify nothing from the legislative history to show that Congress believed § 114(b) imposed such a constraint.

NWPA § 114(d). The opponents’ construction of § 114(d) is no more persuasive. The opponents emphasize that § 114(d) states that the Commission “shall consider” DOE’s application. They ignore, however, that the “shall consider” language is followed in the same

²⁸ The NWPA when enacted in 1982 contemplated the development of multiple repositories. It was later, in 1987, that Congress limited DOE’s consideration to Yucca Mountain. P.L. 100-203, 101 Stat. 1330.

²⁹ P.L. 97-425, 96 Stat. 2201.

sentence by the following: “in accordance with the laws applicable to such applications.” Indeed, when South Carolina purports to quote § 114(d) it omits the language about incorporation of NRC law.³⁰

All parts of a statute must be given effect and interpreted as a harmonious whole.³¹ Acting as though part of the NWPA does not exist, and refusing to give meaning to the key statutory provision at issue, violates that command and invalidates the opponents’ argument.

It is manifest that the “shall consider” language in § 114(d), when read in context and as a whole, is not a mandate on the NRC to review DOE’s application to a final decision on the merits. It is merely part of the instruction to NRC to follow its usual adjudicative process. It is error to rip the “shall consider” phrase out of this context and impart to it an independent mandate, especially a mandate that would inconsistently instruct NRC not to follow its usual adjudicative process by ignoring its law about withdrawal.

Because the “shall consider” phrase cannot bear the construction they advocate, some opponents also try to add to § 114(d) a limitation that does not exist on its face. They acknowledge that § 114(d) incorporates the NRC’s ordinary licensing rules, but argue that NRC’s withdrawal rule should be carved out from its ambit. Washington explained its position to the Board thusly: “Congress intended the NRC to employ its usual adjudicative process, but not when that process would conflict with the NWPA itself.”³²

But it is the “NWPA itself” that states that NRC law applies here. The statutory text is unqualified. It contains no exclusion for NRC’s withdrawal rule. Because § 114(d) is unqualified, its application to that rule cannot be said to be at odds with the NWPA.

³⁰ S.C. Opp. at 9.

³¹ *E.g., FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959) (adjudicatory bodies should, “if possible, [read] all parts into an harmonious whole.”).

³² State of Washington’s Response to DOE Motion to Withdraw (May 17, 2010) at 14.

Nor is there any conflict between the plain meaning of § 114(d)'s unqualified incorporation of the NRC's usual adjudicative process and the same subsection's three-year deadline for a decision by the NRC. The three-year deadline proviso does not override, supersede, or otherwise replace any usual NRC law. It merely *supplements* NRC law by adding an outside time limit that otherwise was not part of the NRC process. Nothing about Congress' addition of that time limit contradicts adherence to NRC laws applicable to license applications.

Nor does that deadline compel a "final decision on the merits," as the opponents argue. The deadline merely avoids delay by the NRC for an application that is being pursued, but does not address one way or the other whether DOE may withdraw its application. As the legislative history confirms, Congress was concerned about the protracted length of NRC licensing proceedings and added this proviso to make sure any proceeding would not drag out.³³ Nothing in the legislative history suggests in any way that Congress understood the three-year deadline on *NRC* action constrained the authority of *DOE* to withdraw an application. As the Staff explains in rejecting the opponents' argument: "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 review the LA in accordance with applicable laws within a specific schedule."³⁴

Nor is there anything "illogical" about Congress mandating a decision from the NRC within three years and also allowing DOE to withdraw its application. The deadline ensures that NRC will not delay consideration of a pending application that DOE is pursuing. If DOE

³³ H.R. Rep. 97-411(I) (1982) at 47.

³⁴ Staff Br. at 9 (footnote omitted). DOE has not previously taken a different view of this clause as Aiken County asserts for the first time in its reply. Both documents Aiken County cites for its argument (at page 5, fn. 6) merely recount the NRC's obligation to render a decision within three years when there is a pending, docketed application that DOE is pursuing. Neither document addresses whether DOE can withdraw an application and, certainly, neither states nor suggests that the three-year deadline implies a bar on DOE's right to withdraw.

withdraws its application, there is no occasion for delay. Allowing DOE to withdraw an application thus in no way contradicts or “nullifies” the three-year deadline on the NRC. This conclusion is consistent with the Commission’s prior conclusion that the three-year period runs while the application is “docketed,” which indicates that if an application is withdrawn and no longer on the docket, the three-year deadline would not apply.³⁵

What would not make sense are the wasteful consequences that would occur if the opponents’ interpretation were accepted. The opponents concede that DOE is not required to construct the repository even if a construction license is approved.³⁶ Yet like the Board, they would have the NRC expend its resources considering a futile application for a repository that will not be built. Nor do they have any explanation why Congress would have wanted to establish a scheme whereby DOE must advocate in contested litigation for a result that the Secretary of Energy has concluded is contrary to sound policy. As DOE noted in its initial brief, even Nye County concedes that such a result is “clearly untenable.”³⁷ The opponents never provide a reasonable explanation why Congress would have imposed such an illogical and wasteful obligation on the NRC.³⁸

³⁵ 66 Fed. Reg. 29,453, 29,453 n.1 (2001); *see also* NRC Staff Answer to Motion to Withdraw (May 17, 2010) at 13 (agreeing with this view of the Commission’s interpretation of the three-year deadline).

³⁶ June 3, 2010 Tr. at 74, 187, 240.

³⁷ Nye County’s Response in Opposition to DOE’s Motion to Withdraw with Prejudice Its License Application for Yucca Mountain Repository (May 17, 2010) at 23.

³⁸ It is more than ironic that NARUC argues against Commission review of the Board’s Order because, it contends, “review will be an incredible waste of NRC resources at a time when the federal government has very little resources to waste.” NARUC Opp. at 2. NARUC and the other opponents are not concerned, however, about wasting tens of millions of taxpayer dollars on a pointless licensing proceeding.

10 C.F.R. § 2.107. One opponent argues that § 2.107 cannot override the NWPA's express terms.³⁹ That argument is a straw man. DOE does not contend that an agency regulation can contradict a federal statute. DOE's point is that the NWPA incorporates NRC law, including § 2.107, and thus there is no inconsistency between the statute and regulation. As the Staff explains: "the better view" of the statutory scheme is that NWPA §114(d) "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."⁴⁰

Another straw man is the opponents' contention that § 2.107 does not authorize withdrawal of applications.⁴¹ This argument, if correct, would apply equally to private sector applicants as well as DOE's application. But, of course, § 2.107 has been used for decades to allow withdrawal of such applications after being docketed by the NRC.

In the end, though, it does not matter whether § 2.107 itself authorizes withdrawal, or instead recognizes the pre-existing right of applicants to withdraw subject to conditions in appropriate instances. In either case, the rules and precedent of the NRC plainly permit withdrawal, and it is that body of law that Congress, in NWPA § 114(d), made applicable in this proceeding.⁴²

Likewise, NEI's argument that § 2.107 does not apply to Subpart J proceedings is flawed.⁴³ Not even the Board adopted that argument, and for good reason.

³⁹ S.C. Opp. at 13; Wash. Opp. at 19.

⁴⁰ Staff Br. at 14.

⁴¹ NEI Opp. at 11.

⁴² *See, e.g.*, Nye Opp. at 19 ("In the absence of section 2.107, applicants for nuclear power licenses, who filed their applications voluntarily, might seek to abandon their applications at any time.").

⁴³ NEI Opp. at 11, n.17.

Section 2.107 is part of the NRC's rules of practice contained in 10 C.F.R. Part 2. That part expressly "governs the conduct of *all* proceedings" before the NRC, except for rulemaking and certain other irrelevant matters.⁴⁴ Contrary to NEI's argument, therefore, Subpart J does not need to incorporate § 2.107 specifically to make that regulation applicable to this proceeding. It already is applicable by force of § 2.1.

By comparison, Subpart G nowhere mentions § 2.107(a) as being applicable to applications within its scope; yet § 2.107(a) has been the basis for decisions on (and in each case, approval of) requests for withdrawal of over twenty Subpart G applications involving reactor licenses in reported decisions going back to 1974.⁴⁵ The same is true with respect to requests to withdraw applications involving materials licenses.⁴⁶

Reporting Requirements. The NWPA's various reporting provisions do not bear on DOE's motion, contrary to the arguments of several opponents.⁴⁷ Those provisions are entirely procedural insofar as applicable to DOE. They impose no substantive obligation on DOE and can be reconciled easily with DOE's right to withdraw its application. They merely require reports about the status of the repository and the licensing proceeding, and provide ample mechanism to allow DOE to report that it is no longer pursuing a license.

Legislative History. Though they contend the legislative history supports their interpretation, the opponents do not identify anytime where Congress stated, or otherwise

⁴⁴ 10 C.F.R. § 2.1 (emphasis added).

⁴⁵ *E.g., Boston Edison Company* (Pilgrim Nuclear Generating Station, Units 2 and 3), LBP-74-62, 8 A.E.C. 324 (1974).

⁴⁶ *E.g., Sequoyah Fuels Corporation* (Source Materials License No. SUB-1010), CLI-93-7, 37 N.R.C. 175, 179 (1993) (Commission treated licensee's pleading purporting to unilaterally withdraw application for license amendment as a request for permission to withdraw application under § 2.107(a), which the Commission noted "is the controlling NRC regulation for the withdrawal of applications"); *In The Matter Of Fansteel Inc.* (Muskogee, Oklahoma Facility), LBP-03-03, ___ N.R.C. ___, 2003 WL 22170174 (Aug. 20, 2003).

⁴⁷ Nye Opp. at 10-11; S.C. Opp. at 6, n.2; Wash. Opp. at 13-14.

evinced any understanding, that DOE could not withdraw an application. In fact, most of the opponents actually cite no legislative history at all in their briefs.

Washington and South Carolina alone cite a few isolated passages from a single House Report dating from the NWPA's enactment in 1982 (out of an extensive multi-year history that preceded its enactment), but those snippets do not concern DOE's authority to withdraw an application. They are generalized, high-level statements about avoiding "mistakes" of the past. In context, those statements concern Congress' desire to ensure that DOE will not move forward with a repository prematurely, without participation by the affected State and the public, and without an adequate basis for believing the site is safe (unlike what Congress believed occurred with the Lyons, Kansas site). That is entirely consistent with DOE's view of the NWPA - that the statute imposes steps that DOE must meet to proceed with a repository. Those snippets do not address in any way, however, DOE's right to decide not to move forward with a particular repository.

Standard Contract. There is nothing to Nye County's and PIIC's argument that DOE's Standard Contract with utilities for disposition of their spent nuclear fuel bars withdrawal of DOE's application.⁴⁸ They identify no provision of the Standard Contract that imposes any such bar, and there is none. As even the cases on which they rely make clear, DOE's obligations under the Standard Contract are *distinct* from the Yucca Mountain repository.⁴⁹ DOE has reiterated that it remains committed to fulfilling its obligations for the disposal of spent nuclear fuel notwithstanding its decision to terminate the Yucca Mountain program.⁵⁰ The withdrawal of DOE's application does not alter that commitment or the Standard Contract.

⁴⁸ Nye Opp. at 17; PIIC Opp. at 6-7, 26-28.

⁴⁹ *Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272, 1277 (D.C. Cir. 1996).

⁵⁰ DOE Motion to Withdraw (March 3, 2010) at 1.

Separation of Powers. The opponents' separation of powers argument is irrelevant.⁵¹ These parties argue that DOE cannot disregard statutory requirements. DOE agrees, and it claims no such authority here. Rather, as DOE has explained, the NWPA does not preclude withdrawal, and thus there is no statutory bar or separation of powers issue. DOE is exercising the power Congress gave it in the AEA and DOE Organization Act.

C. Dismissal With Prejudice Is Appropriate

The opponents offer no sound reason why the Commission should not grant withdrawal with prejudice, as DOE requests. They contend that DOE must demonstrate that it will be harmed absent dismissal with prejudice, but the law has never required such a showing from an applicant/plaintiff. On the contrary, as DOE explained, it is considered an abuse of discretion *not* to grant an applicant/plaintiff's request for dismissal with prejudice absent proof that dismissal with prejudice will cause legal harm to someone else.⁵²

DOE, accordingly, is not required to demonstrate harm. The Secretary has made the judgment to seek dismissal with prejudice, and that decision should be respected absent legal harm to someone else, which no one has shown.

Nor does it matter, as the opponents additionally argue, that their admitted contentions have not been adjudicated on the merits. There is simply no basis in regulation or precedent, or logic, that requires adjudication on the merits of contentions before an applicant can voluntarily withdraw its application with prejudice. Like the Board, the opponents emphasize cases in

⁵¹ S.C. Opp. at 20-21.

⁵² DOE Br. at 37.

which intervenors sought to impose a dismissal with prejudice on unwilling applicants. That is not the situation here.⁵³

D. No Conditions On Withdrawal Are Necessary

None of the opponents provides any basis for imposition of the conditions on withdrawal that the Board recommended. As DOE has explained, DOE will preserve its LSN document collection for 100 years pursuant to the Federal Records Act.⁵⁴ No opponent gives any reason why that is not sufficient.

Nye County professes vaguely that the Commission should impose a site “remediation” condition, but it does not specify what conditions it thinks are necessary; or explain why, absent such a commitment, DOE would not adhere to its legal obligations under relevant law.⁵⁵ DOE has already identified the steps that would be necessary to remediate Yucca Mountain in its EIS, and it will adhere to all applicable legal requirements in doing so.⁵⁶ This commitment already satisfies Nye County’s condition, and thus it is neither necessary nor appropriate to address this in the order granting withdrawal of DOE’s application. Indeed, not even the Board indicated that such a remediation condition would be appropriate if withdrawal were granted.

There is likewise no basis to require, as Nye County advocates⁵⁷ and the Board has proposed, that “physical samples” be retained. As DOE has explained,⁵⁸ these physical samples

⁵³ Nye County says the “standard federal view” is that “dismissal with prejudice should only be granted after the merits of the case have been evaluated and finally adjudicated and severe harm will befall the moving party.” Nye Opp. at 21. That is incorrect. As DOE has explained, the Federal Rules of Civil Procedure allow plaintiffs to voluntarily dismiss with prejudice at any time without showing harm to it. DOE Br. at 36-37.

⁵⁴ DOE Br. at 38.

⁵⁵ Nye Opp. at 32.

⁵⁶ *E.g.*, DOE EIS, Volume 1, Chap. 2, § 2.2.1 (For example: “DOE would remove equipment and materials from the underground drifts and test rooms . . . Excavated rock piles would be stabilized . . . Areas disturbed by surface studies . . . would be restored.”).

⁵⁷ Nye Opp. at 31-32.

do not qualify for inclusion in the LSN under the Commission’s regulations. Accordingly, while DOE has committed to retain data gleaned from these samples, there is no sound basis to waste resources preserving these materials for years on end.

E. The Opponents’ APA Arguments Are Erroneous

Two opponents contend that DOE has not explained the reasons for the Secretary’s decision to withdraw the application.⁵⁹ That is incorrect. Although the reasons for the Secretary’s decision are not at issue under DOE’s motion, DOE explained those reasons in the record before the Board.⁶⁰

Likewise misplaced is these parties’ argument that DOE’s decision to withdraw the application allegedly violates the APA, as allegedly would the Commission’s approval of that motion. The short answer to their argument is that the APA, by its terms, does not apply here. The APA allows a “person suffering legal wrong because of agency action” to obtain judicial review of “final agency action” in a “reviewing court.”⁶¹ “No ‘final agency action’ has occurred with respect to DOE’s motion, much less final agency action that harmed the opponents in as much as the Board denied DOE’s motion.⁶² Further, the NRC is considered an “agency” under the APA, and not a “reviewing court.”⁶³ The APA thus does not apply to these proceedings.

F. The Opponents’ NEPA Arguments Are Erroneous

The opponents’ NEPA arguments fail because DOE’s motion to withdraw does not represent a “major federal action” that triggers NEPA. Agency action must effect a change in

⁵⁸ DOE Br. at 38-39.

⁵⁹ NEI Opp. at 28-32; PIIC Opp. at 32-36.

⁶⁰ DOE Motion to Withdraw (March 3, 2010) at 1-4; DOE Reply to the Responses to the Motion to Withdraw (May 27, 2010) at 28-33.

⁶¹ 5 U.S.C. § 702, 704, 706.

⁶² See *Bennett v. Spears*, 520 U.S. 154, 177-78 (1997).

⁶³ 5 U.S.C. § 551(1)

the environmental status quo before it can trigger NEPA.⁶⁴ DOE's withdrawal of its license application would have no effect on the environmental status quo. No action would be taken or ceased that would either have a physical impact on the human environment or create the risk of such an impact. Spent fuel and high level waste will not be moved from their present locations; nor will any movements or imminent movements of such materials be halted or prevented. Cleanup activities at Hanford will go on with no change whatever.

Furthermore, DOE has already performed any NEPA analysis that could be required as part of the EIS that accompanied the license application. That EIS considers the environmental impacts of a "no action" alternative (in two variations). Contrary to PIIC's characterization, the analysis of this alternative does not "constitute a non-plan," but instead assumes the extreme case in order to perform a bounding analysis of potential impacts. Whether PIIC welcomes such impacts (which DOE believes would be small and remote in time) is not relevant. The relevant fact is that DOE has done the analysis. It also bears emphasizing that withdrawal of the license application is not a *de facto* decision to cease efforts to deal with the issue of spent fuel and high level waste disposal. The Blue Ribbon Commission is specifically authorized and funded by Congress to tackle that very issue and can be expected to carry out faithfully its function. The specifics of that Commission's recommendations do not yet exist, however. It thus makes no sense to argue that DOE should perform a NEPA analysis now for those future recommendations.

III. CONCLUSION

The opponents offer no valid arguments to justify the Board's Order. The Commission should reverse that decision.

⁶⁴ *E.g., Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2001).

Respectfully submitted,

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July 19, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

_____)	
In the Matter of)	July 19, 2010
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
(High Level Waste Repository)	
Construction Authorization Application))	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the **U.S. DEPARTMENT OF ENERGY'S REPLY BRIEF IN SUPPORT OF REVIEW AND REVERSAL OF THE BOARD'S RULING ON THE MOTION TO WITHDRAW** have been served on the following persons on this 19th day of July 2010 through the Nuclear Regulatory Commission's Electronic Information Exchange.

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