

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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In the Matter of)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 09-892-HLW-CAB04
(License Application for Geologic)	July 19, 2010
Repository at Yucca Mountain))	
_____)	

**NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
REPLY BRIEF TO THE COMMISSION**

In response to briefs filed supporting full commission review of the June 29, 2010 Atomic Safety and Licensing Board’s LBP-10-11 Order (*Board Order* or *Order*) denying the Department of Energy’s (DOE’s) motion to withdraw, the National Association of Regulatory Utility Commissioners (NARUC) submits this brief response.

In our original July 9th Brief, NARUC pointed out the absence of any factual disputes, the absolute deficit of any evidence in the record presented to justify a withdrawal motion – much less a withdrawal with prejudice, and the clear conflict between DOE’s proposed action and the clear commands of Congress. We stated the Board Order on its face provides a devastating, accurate, and comprehensive critique of DOE’s distorted view of the statute and demonstrates the fact that the record is bereft of any empirical or legal justifications sufficient to permit the DOE motion to be granted.

NARUC noted the difficulty those that support the Board's order face in improving upon the rationale the Board articulated to support its conclusions. Significantly, we also argued, accurately as it turns out, that it would be extremely unlikely DOE or any proponent of the motion could present any credible critique of the Board decision on the merits. The initial briefs filed by Nevada,¹ DOE,² NRC staff, and others supporting review did not.

The bulk of the arguments they present to support review are rewinds of the very same flawed arguments rejected by the Board.

For example, Nevada spends 10-21 of its initial brief arguing Chevron deference is due DOE. On pages 22 -23 they cite a private company's withdrawal motion for the proposition that the NRC "does not second-guess" licensees' decisions to abandon their previously licensed nuclear projects and that the Commission has never prohibited an applicant for withdrawing its license application."

I. Because the DOE's statutory duty to file and pursue and the NRC's statutory duty to consider the merits of the application is clear, no Chevron deference is due.

The Board's decision points out the obvious flaws in this reasoning directly and succinctly, at 16-17, dealing first with the claim that Chevron deference is due DOE and second with the ludicrous suggestion that DOE should be considered just like any other private entity – when DOE is acting pursuant to specific Congressional instructions.

¹ 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).

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).

The Board on Chevron Deference:

“DOE claims that its decision to seek to withdraw the Application is entitled to [Chevron] deference. [footnote omitted] But where the statute is clear on its face, or is clear in light of its statutory scheme and legislative history, deference is inappropriate: “If 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.” [footnote and citations omitted] Moreover, as DOE’s counsel appeared to concede at argument,[footnote omitted] the NRC does not owe deference to DOE’s understanding of the NRC’s own responsibilities under section 114(d). Once DOE has applied for a construction authorization, the NRC—not DOE—is charged with granting or denying the construction permit application under the sequential process prescribed by the NWPA. {emphasis added}

The Supreme Court has instructed: “[I]n interpreting a statute a [tribunal] should always turn to one cardinal canon before all others. . . . [Tribunals] must presume that a legislature says in a statute what it means and means in a statute what it says there.”³ In this case, as the Board has persuasively articulated, the statutory text is clear and unambiguous.⁴ Congress has required both DOE to submit the license and the NRC to review the license application on the merits.

³ *Connecticut Nat’l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

⁴ DOE originally argued that “the Secretary’s interpretation of the NWPA” should be entitled to deference under, *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-45 (1984), March 3 *DOE Motion to Withdraw* at 7. However, no deference is due the Secretary’s interpretation of the statute because Congress’s mandate for the filing and review of the license application is clear on face of the statute. *Id.* at 844; see also *The Missouri Municipal League, et al v. FCC*, 299 F.3d 949 at 952 (8th Cir. 2002) (“under. . .Chevron. . .[i]f congressional intent is clear, a contrary interpretation by an agency is not entitled to deference.”) (internal citation omitted). In this brief DOE repeats the same arguments – and the same arguments on pages 34-35 of its brief.

Indeed, both DOE⁵ and the Licensing Board have previously conceded that DOE is “required to submit an application for a construction authorization to the NRC”⁶

Section 10134(b)⁷ specifies that DOE “*shall submit* to the [NRC] an application for a construction authorization for a repository at such site. . .” upon the approval of the Yucca Mountain site as a repository pursuant to the NWPRA. {Emphasis added.}

Similarly, Section 10134(d)⁸ specifies that the NRC “*shall consider* an application for a construction authorization for all or part of a repository” and “*shall issue a final decision* approving or disapproving the issuance of a construction authorization . . .” {Emphasis added.}

Neither provision provides DOE with discretion or authority to summarily terminate the Yucca Mountain licensing process or the NRC with discretion to do other than consider the license application on its merits (and render a “final decision approving or disapproving” the application). The use of the “shall” in both subsections - “a command that admits of no discretion on the part of the person instructed to carry out the directive”⁹ - does not admit any other construction.¹⁰

⁵ “DOE is not only authorized but required to submit a license application for a repository at Yucca Mountain to the NRC.” Final Brief for the Respondents at 22, *State of Nevada v. U.S. Dept. of Energy*, Nos. 01-1516, 02-1036, 02-1077, 02-1179, and 02-1196 (D.C. Cir. May 28, 2003){emphasis added}.

⁶ *U.S. Department of Energy* (High Level Waste Repository), LBP-09-6, 69 NRC __ (May 11, 2009) (slip op) at 27.

⁷ 42 U.S.C. § 10134(b)

⁸ 42 U.S.C. § 10134(d)

⁹ *Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). Compare, *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). (“The mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”) See also, *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (“The word 'shall' is ordinarily 'The language of command'” citing *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)). See

As evidenced by other provisions of the NWPA,¹¹ had Congress wanted to provide either DOE with discretion to terminate the proceedings by withdrawing the application or the NRC authority to do anything but review the application on the merits, it could have done so. It did not.

Moreover, accepting the notion either that DOE has unbridled discretion to withdraw the license application or that the NRC can – without any examination of the merits – grant the DOE motion, necessarily renders both Sections 10134(b) and (d) nullities. Even if there were not ample precedent proscribing such an approach,¹² the illogic of such an interpretation of these

also, *Zivotofsky v. Sec’y of State*, 571F.3d 1227, 1243 (D.C. Cir. 2009) (“‘Shall’ has long been understood as ‘the language of command’” except for “rare exceptions . . . that apply only where it would make little sense to interpret ‘shall’ as ‘must.’”).

¹⁰ See also *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989). (This case notes, the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters. Clearly that is not the case presented for review here.)

¹¹ 42 U.S.C. A. § 10133, also uses the mandatory “shall” to require DOE to carry out the site characterization. (“The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization . . .”) However, there, unlike the unqualified mandates in both 42 U.S.C.A. §§ 10134(b) and (d), Congress specified a detailed procedure for DOE to follow to terminate the proceedings presumably if the characterization turn up some non-remediable significant flaw. Indeed, even in the same section, at § 10134(a)(2)(A), Congress gave the President discretion to make an independent judgment of the suitability of the Secretary’s recommendation (“If, after recommendation by the Secretary, the President considers the Yucca Mountain site qualified for application for a construction authorization for a repository . . .). Again, Congress did not chose to include similar discretionary terms in the text of 42 U.S.C.A. § 10134(b) or (d). See, e.g., *Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (Statute was explicit in making one section applicable to habeas cases pending on date of enactment, but was silent as to parallel provision). Compare, *Bates v. United States*, 522 U.S. 23, 29 (1997) (inclusion of “intent to defraud” language in one provision and exclusion in a parallel provision); *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991) (Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.)

¹² And there is: *Negonsott v. Samuels*, 507 U.S. 99 (1993). (A court must, if possible, give effect to every clause and word of a statute.) *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985). (A statute should be interpreted so as not to render one part inoperative.)

provisions is obvious. Why would Congress have specified in such great detail the specific steps that the President, the Secretary, the State of Nevada, and even Congress itself had to take to permit the Yucca Mountain license application to be filed, and include provisions mandating that application be filed and examined by the NRC, if DOE could, based on a bare allegation that things have changed could simply withdraw it (or the NRC could permit such action). Both actions are tantamount to an agency repealing a federal statute.

II. DOE is not analogous to a private party voluntarily pursuing a license application.

Again, the Board's decision has already succinctly disposed of this Nevada argument. Nevada's most recent regurgitation, referenced, supra, does nothing to undermine or highlight any flaw in the Board's rationale.

The Board on comparisons of the DOE application to private party applications:

DOE claims that Congress intended that DOE be treated just like any private applicant, including the right to seek freely to withdraw its application.[footnote omitted] Under the framework of the NWPA, however, 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. The obvious difference is that Congress has never imposed a duty on private NRC applicants to pursue license applications, nor has Congress required that the Commission reach a decision on a private licensing application that the applicant chooses to withdraw. In contrast, Congress here required DOE to file the Application. Statutes should not be interpreted so as to create internal inconsistencies, an absurd result, or an interpretation inconsistent with congressional intent. [citing *United States v. Turkette*, 452 U.S. 576, 580 (1981); *United States v. Raynor*, 302 U.S. 540, 547 (1938)]. DOE claims that the "law on withdrawal does not require a determination of whether [the applicant's] decision [to withdraw] is sound," [footnote omitted]

See also, *United States v. Chavez*, 228 U.S. 525 (U.S. 1913); *Bd. of Educ. of City Sch. Dist. of City of New York v. Harris*, 622 F.2d 599, 611 (2d Cir. 1979) (refusing to adopt reading of statute that would render it "in operation, a nullity"); *Trichilo v. Secretary of Health & Human Services*, 823 F.2d 702, 706 (2d Cir. 1987) ("we will not interpret a statute so that some of its terms are rendered a nullity"); *Garnes v. Barnhardt*, 352 F. Supp. 2d 1059, 1065 (N.D. Cal. 2004)(an "agency interpretation that nullifies part of a formally promulgated regulation deserves no deference.").

but neglects to note that the rationale for the decision from which it quotes was that the applicant's filing was "wholly voluntary" in the first place.

The Board order points out the obvious - past NRC practice is hardly relevant to the situation presented here where Nevada's arguments ignore the fact that the litigant's wishes in this case are irrelevant. Unlike any case involving a typical licensee, in this case, Congress passed a law requiring DOE, whatever its views, to file the application.

III. DOE is not entitled to withdraw the application with prejudice.

And the list of regurgitated and facially flawed arguments continues. For example, DOE, at page 36 of its brief again raises the unusual claim that the agency is entitled to withdraw the Yucca Mountain application with prejudice.

Again, the Board's response, at page 22 of the June 29th Order, is illuminating:

The Board is not aware, in previous NRC practice, of any applicant voluntarily seeking dismissal with prejudice of its own application. Moreover, no aspect of the Application has been adjudicated on the merits. In NRC practice, "it 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."[] While the current Secretary may have no intention of refiling, his judgment should not tie the hands of future Administrations for all time.⁷⁷ Rather, "the public interest would best be served by leaving the . . . option open to the applicant should changed conditions warrant its pursuit."[] The Board appreciates that Nevada and other opponents of the Yucca Mountain repository have expended substantial resources, but, as the Commission has stated, "it is well settled that the prospect of a second lawsuit [with its expenses and uncertainties] . . . or . . . another application . . . does not provide the requisite quantum of legal harm to warrant dismissal with prejudice."[] {footnotes omitted}

DOE argues that the cases the Board cites are irrelevant where "as here, an applicant has voluntarily agreed to dismiss its own application with prejudice." DOE Br. at 26. The problem with this argument - as with most of DOE's arguments - is that here - CONGRESS, not DOE, specified that the motion would be filed and would be addressed by the NRC on the merits. Moreover, in the face of that Congressional instruction, examination of the DOE's original

motion to withdraw indicates there is no real effort to provide any justification.¹³ The motion does provide a bare statement that the science has improved during the last 20 years, but fails to cite any flaw in the license application or reference any record evidence that Yucca Mountain site will not be capable of meeting NRC licensing requirements. Indeed, the extensive record built to date and submitted by DOE strongly suggests the proposed repository will in fact meet NRC performance standards. In short, DOE has offered no factual evidence to explain why either the Board or the NRC should accept its implied characterization that the application is inadequate. The motion to withdraw does not provide any reasoning or explanation besides the decision of the Secretary of Energy to abandon the project. In the face of the clear statutory mandates, DOE does not identify any specific advance that purportedly could justify ignoring the law – much less reversing without explanation or record – the nation’s long standing nuclear waste policy, and effectively abandoning billions of dollars and decades of work invested in the Yucca Mountain facility.

The Board Order comes to the only possible conclusion: there is no basis to grant the DOE motion to withdraw, much less grant it “with prejudice.”

¹³ The only justification DOE presents is found on page 3 of its motion: “It is the Secretary of Energy’s judgment that scientific and engineering knowledge on issues relevant to disposition of high-level waste and spent nuclear fuel has advanced dramatically over the twenty years since the Yucca Mountain project was initiated.” The motion also notes “the Secretary of Energy has decided that a geological repository at Yucca Mountain is not a workable option for long term disposition of these materials.” There is no explanation why it may not be workable – or why – the Secretary’s unsupported judgment can trump Congressional conclusions to the contrary signed into law by the President of the United States.

CONCLUSION

The issues presented for review are currently being considered by the Court of Appeals. The Board's decision incinerates DOE's legal rationale beyond rehabilitation. Moreover, both efficiency and principles of comity compel the Commission to forego any additional review of the Licensing Board Order and certify it as a final agency decision ripe for judicial review. Therefore, NARUC respectfully requests the Commission decline to take discretionary interlocutory review of the Board's June 29, 2010, Order. If the Commission chooses to review that Order, we request the Order be upheld in all respects.

DATED this 19th day of July, 2010.

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CERTIFICATE OF SERVICE

I, James Bradford Ramsay, hereby certify that copies of the foregoing have been served upon the following persons by Electronic Information Exchange.

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[Signed Electronically by James Bradford Ramsay]

Dated at Washington, DC
This 19th day of July 2010

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ADDITIONAL CERTIFICATION

Availability of Material

As required by 10 C.F.R. § 2.1012(b) and 10 C.F.R. §2.1003, the undersigned also has made a good faith effort to substantially comply with the “Availability of Material” requirements, 10 C.F.R. § 2.1003. NARUC has been in communication with Daniel J. Graser, the NRC’s Licensing and Support Network Administrator to obtain technical guidance to comply with this provision.

[Signed Electronically by James Bradford Ramsay]

Dated at Washington, DC
this 19th day of July 2010

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