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NO. 10-1050, 10-1052, 10-1069, 10-1082 *Consolidated*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

IN RE AIKEN COUNTY, Petitioner

No. 10-1052

ROBERT L. FERGUSON, *et al.*, Petitioners,

v.

BARACK OBAMA, President of the United States, *et al.*, Respondents.

No. 10-1069

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

No. 10-1082

STATE OF WASHINGTON, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

On Petitions for Review and for Other Relief With Respect to Decisions of the President, the Secretary of Energy, the Deparment of Energy, and the Nuclear Regulatory Commission

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Reply Brief of Petitioners, Aiken County, Robert L. Ferguson, William Lampson, Gary Petersen, State of South Carolina, State of Washington, and Intervenor-Petitioner, National Association of Regulatory Utility Commissioners

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GLOSSARY OF ABBREVIATIONS

AEA	Atomic Energy Act
APA	Administrative Procedure Act
ASLB	Atomic Safety and Licensing Board
BRC	Blue Ribbon Commission on America's Nuclear Future
DOE	Means the Department of Energy and the Secretary unless otherwise specifically indicated
EIS	Environmental Impact Statement
NARUC	National Association of Regulatory Utility Commissioners
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act
OCRWM	Office of Civilian Radioactive Waste Management
Secretary	Secretary of the United States Department of Energy
SRS	Savannah River Site
YM FEIS	Yucca Mountain Final Environmental Impact Statement
Respondents	Means the President, Secretary of Energy, and Department of Energy. The term "Respondents" does not include the NRC unless otherwise specifically indicated.

I. SUPPLEMENTAL STATEMENT OF FACTS

The following relevant events have occurred since the June 18, 2010, filing of Petitioners' Brief, in addition to those cited by Respondents.

A. DOE's Continued Dismantling of the Yucca Mountain Project

DOE has continued to dismantle the Yucca Mountain project, paying no heed to an order denying license withdrawal, *see infra* at 2. Most significantly, on September 20, 2010, DOE advised that the OCRWM, the agency created under the NWPA to administer DOE's duties under the statute,[1] would "cease to exist" on September 30, 2010. Petitioners' Corrected Motion to Lift Stay (9/28/10), Ex. A. Petitioners have brought DOE's continuing actions to the Court's attention. *See* Petitioners' Status Reports (8/27/10) (9/27/10) (11/29/10); Petitioners' Corrected Motion to Lift Stay (9/28/10); Petitioners' Reply on Motion to Lift Stay (10/15/10); Petitioners' Supplemental Filing (10/26/10).

B. NRC's Termination of Review of the Yucca Mountain License Application

In October 2010, the NRC terminated its staff's review of DOE's license application. *See* Petitioners' Reply on Motion to Lift Stay (10/15/10). This occurred despite the NRC operating under continuing budget resolutions that have maintained funding for such review. *See* Petitioners' Supplemental Filing (10/26/10).

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[1] *See* 42 U.S.C. § 10224(a).

C. NRC's Inaction on the License Application Withdrawal

On June 29, 2010, the Atomic Safety and Licensing Board (ASLB) denied DOE's motion to withdraw the Yucca Mountain license application. [JA 785-831]. The following day, the NRC *sua sponte* requested that the parties file opening and responsive briefing in consecutive weeks on whether the NRC should review the ASLB's decision, and if so, whether to affirm or reverse it. [JA 838]. Briefing was completed on July 19.[2] The NRC has still not indicated whether it will review the ASLB order.

II. SUMMARY OF REPLY ARGUMENT

Petitioners raise two straightforward and distinct issues: (1) may Respondents abandon the NWPA-mandated process to develop the Yucca Mountain repository, and (2) may Respondents withdraw with prejudice an NWPA-mandated application for a license to construct the repository. Resolution

[2] Concurrent with their initial briefs, those Petitioners also before the NRC moved for recusal of three NRC Commissioners based on statements made during a February 9, 2010, Senate confirmation hearing. Each Commissioner testified that he would not "second guess" DOE's decision to withdraw the Yucca Mountain license application. *See* Petitioners' Opposition to Motion to Vacate Schedule (7/7/10), and Ex. A thereto. One Commissioner subsequently recused himself on other grounds, while two others declined recusal. [JA 839] (July 15, 2010, Notice of Recusal (Commissioner Apostolakis)); [JA 846-51] August 11, 2010, Decision of the Motion for Recusal/Disqualification (Commissioner Ostendorff); *Id.* [JA 840-45] (Commissioner Magwood).

of one issue will not necessarily resolve the other. Each claim is justiciable for different reasons, and each is resolved on the merits by a plain reading of the NWPA.

Respondents' standing and justiciability arguments confuse the separate claims being asserted and are premised on the mistaken assertion that Petitioners claim a right to have Yucca Mountain built. In fact, each challenge is premised on the right to have the stepwise process that the NWPA mandates followed expeditiously and without delay, a proposition that this Court has repeatedly endorsed. One claim seeks enforcement of a very specific and singular step in that process. The other claim seeks to reverse Respondents' larger decision to repudiate the entire process.

Respondents' position ignores the plain meaning of the NWPA. To avoid grappling with that plain meaning, Respondents argue the unprecedented principle that the AEA and the DOE Organization Act grant them amorphous and unlimited authority to ignore the later-enacted NWPA whenever they believe the "public interest" is different than the policy Congress has adopted in the Act. Respondents' tortured reading of the NWPA leads to a conclusion that is directly at odds with the Act and this Court's prior holdings.

III. STANDING AND JUSTICIABILITY

A. Respondents' Decision to Abandon the NWPA's Process is Properly Before This Court

1. Petitioners Have Standing to Challenge Respondents' Decision

Respondents contend that Petitioners suffer no actual, imminent injury sufficient to support standing to challenge the decision to abandon the NWPA's process because Petitioners' claim is predicated "on the opening of a Yucca Mountain repository." Respondents' Brief (Resp.) at 24-25. That contention is wrong. Petitioners' claim is based not on a claim of right to Yucca Mountain, but on Respondents' failure to follow the *process* mandated by Congress in the NWPA to determine if the repository will be constructed. Petitioners' Brief (Pet.Br.) at 9-10, 19-25.

Respondents' decision to abandon the Yucca Mountain project delays forever a development process that was designed to protect Petitioners' interests. *See* Pet.Br. at 4-7, 9-10, 19-20. This is directly analogous to the kind of harm this Court found sufficient to confer standing in *Nuclear Energy Inst., Inc. v. EPA (NEI)*, 373 F.3d 1251, 1278-79 (D.C. Cir. 2004). There, this Court recognized that NEI's members would suffer financial harm resulting from further *delay* of "the date on which the Energy Department will take stored waste off NEI members' hands," caused by EPA's challenged action. *Id.* at 1278.

Here, the Respondents' shutdown of the project is not just a matter of delay, but permanent termination. The harm resulting from that delay is as imminent and concrete as the harm found sufficient in *NEI*, if not more so. The only difference is that in *NEI* the harm from the delay was monetary, while here it is continued exposure to the dangers of "temporarily" stored nuclear waste and spent fuel, with no statutory process for resolving the problem. *See* Pet.Br. at 19-25; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992).

Under Respondents' "there is always a contingency" theory of standing, review would never be appropriate for violations of the NWPA because further Congressional action (among other things) will always be necessary before Yucca Mountain may open. This Court has effectively rejected that position. *See NEI*, 373 F.3d at 1279.

Respondents also assert that Petitioners' claim is not redressable because Petitioners have not shown a substantial likelihood that nuclear material would be transported away from sites in Washington and South Carolina sooner than without the requested relief. *See* Resp. at 26. Again, Respondents ignore the nature of Petitioners' claim. A favorable ruling for Petitioner will ensure that the process that Congress *currently* requires in the NWPA is restored. Thus, "substantial probability" exists that Petitioners' requested relief will redress the

harm caused by Respondents' abandonment of that process. *NEI*, 373 F.3d at 1279.

Because Respondents incorrectly assert that Petitioners' claim is based on an alleged substantive right to have waste taken to Yucca Mountain, their argument against application of the relaxed standards for imminence and redressability also must be rejected. *See* Resp. at 27. Moreover, unlike in *Summers v. Earth Island Inst.*, 129 S.Ct. 1142 (2009), *see* Resp. at 27, the substantive injuries to Petitioners in this matter have *not* been resolved, so Petitioners' procedural standing remains. *Id.* at 1148, 1151.

Respondents essentially contend that Petitioners cannot meet the imminence and redressability standard applicable to procedural claims because there is no guarantee that following the NWPA-mandated process will alleviate any concrete harm suffered by Petitioners. *See* Resp. at 24-27.[3] However, the law does not require this guarantee. A person living adjacent to the site for a proposed federally licensed dam, for instance, has standing to challenge the licensing agency's failure to prepare an EIS, even without establishing with any certainty that completing the EIS will cause the license to be withheld

[3] Respondents' argument that their Blue Ribbon Commission might eliminate this harm, Resp. at 25, is legally irrelevant. *See infra* at 20-21.

or altered. *See Lujan*, 504 U.S. at 572 n.7. It is undisputed that Petitioners live, work, own property, and have interests where the harm to be addressed by the statutory procedures is occurring, and are challenging the failure of Respondents to follow those procedures.[4] Petitioners need not show that following the procedures will result in definite removal of that harm when it is clear that the procedures are designed to achieve that goal. Petitioners have clearly shown that "the procedural step *[is] connected* to the substantive result." *Sugar Cane Growers Co-op. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002) (emphasis added).[5]

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[4] DOE argues that South Carolina has not alleged it has any property interests near the SRS or the private reactors. Resp. at 30. This is incorrect, as shown by Petitioners' citation of *Hodges v. Abraham,* 300 F.3d 432, 444 (4th Cir. 2002), where such interests were already recognized, together with South Carolina's interest as an environmental regulator. *See* [SJA 216-42] (listing state property ownership near SRS); AR 44 (SRS EIS at 3-2, 2-23, 7-2, 7-8) (listing state statutes imposing regulatory oversight). Washington has similar property and regulatory interests. *See, e.g*, Wash. Rev. Code § 90.03.010 (2010) (state proprietorship of ground and surface water; *e.g.*, Columbia River); Addendum at [043-44, 047]. Here, the harm of continued exposure to the dangers of indefinite "temporary" storage of high-level waste and spent nuclear fuel is the basis for the NWPA, *see* 42 U.S.C. § 10131(a)(1), (2), and is recognized by DOE in its agency decision-making. *See* Addendum at [073]. Dr. Triay's affidavit does not contest this harm. *See* Respondent's Addendum at 28-34. In addition, the NWPA places states within the zone of interests intended to be protected by the Act. *See* S.C. Petition ¶ 13 [JA 359].

[5] It must be assumed for purposes of standing that the NWPA *precludes* Respondents from abandoning the Yucca Mountain development process. *See Am. Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982).

2. Respondents' Decision is Final and Justiciable

Respondents misunderstand the interplay between the NWPA and the APA. Resp. at 34. First, the APA's waiver of sovereign immunity, 5 U.S.C. § 702,[6] is not restricted to suits brought under the APA. *See Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006). Instead, the APA broadly waives sovereign immunity for "[a]n action in a court of the United States *seeking relief other than money damages*," 5 U.S.C. § 702 (emphasis added), not just for an action under the APA. *Trudeau*, 456 F.3d at 186-87.

Second, an APA cause of action is not limited *solely* to review of "final agency action." Resp. at 34. Instead, the APA separately provides for judicial review of agency action "made reviewable by statute." 5 U.S.C. § 704. This is exactly what Section 119 of the NWPA provides. Thus, "final agency action" within the meaning of the APA is not necessary for the decision to be judicially reviewable by this Court. *See* Pet.Br. at 26-27, 30-31.

In any event, the unilateral decision of the Secretary, ordered by the President, to take Yucca Mountain "off the table" and forever abandon the NWPA's process, constitutes "final agency action" under the traditional APA test.

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[6] Copies of pertinent statutes, regulations, and other materials are included in the separately bound addenda to Petitioners' Opening Brief (Addendum) or this reply brief (Reply Addendum).

The decision marks the admitted consummation of the Secretary's decision-making process, *see* Resp. at 3, with legal consequences flowing directly from that decision. *See* Pet.Br. at 28-29, 31.

Respondents attempt to avoid review of their decision to abandon the Yucca Mountain development process by contending it is just a "generalized policy" that cannot be reviewed. Resp. at 39-40. However, it is the *substance* of what Respondents have done, and not the label applied, that is decisive. *See* Pet.Br. at 28. This decision is at least as concrete, final, and consequential as other decisions this Court has found to be final. *See* Pet.Br. at 28-29.[7] Respondents completely ignore this precedent.[8]

3. Petitioners' Challenge is Not Time-Barred

Respondents' argument that Petitioners' claim is time-barred, Resp. at 41, must be rejected for two reasons. First, if, as Respondents contend, the January 29, 2010, decision is not final, then Petitioners cannot be time-barred for not bringing challenge at the time of even *earlier* 2009 Congressional testimony and budget submissions.

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[7] For example, Respondents admit that the decision has been applied in a binding fashion. *See* Resp. at 40 n.14.

[8] Notably absent from Respondents' brief is any response to the assertion of jurisdiction as to the decision to stop the process under 42 U.S.C. § 10139(a)(1)(B)—the failure of Respondents to take action under the NWPA. Pet.Br. 26-27.

Second, the 2009 Congressional testimony and budget submissions are substantively different than the January 29, 2010, decision. Critically, the 2009 Congressional testimony and budget submissions were not coupled with any simultaneous action by Respondents. To the contrary: (1) DOE continued to prosecute its Congressionally-mandated license application until it made the January 29 decision; (2) in its fiscal year 2010 budget request, DOE requested (and received) nearly $200 million to, among other things, allow it to maintain its license application; (3) Secretary Chu testified that DOE intended to continue with its licensing application; and (4) Congress fully funded DOE's request. *See* [JA 703]; [JA 645-46, 651-53]; [JA 666-67]; [SJA 042-43, 044].

The January 29, 2010, decision, however, marked a turning point. That decision was accompanied by numerous concrete implementing actions by Respondents, demonstrating its finality for purposes of Section 119 of the NWPA and judicial review by this Court. *See* Pet.Br. at 13-16. While Respondents may have talked about flouting the NPWA in 2009, they waited until 2010 to do it.

B. Respondents' Decision to Withdraw the Yucca Mountain License Application is Properly Before This Court

1. Petitioners Have Standing to Challenge Respondents' Decision to Withdraw the License Application

Respondents argue that the ASLB's order deprives Petitioners of standing because it has corrected any "injury" Petitioners suffered. Resp. at 23.

Respondents are incorrect. While the ASLB correctly denied DOE's withdrawal motion, the denial has provided no relief whatsoever. Despite the ASLB order, Respondents have continued undeterred in their shutdown of the NWPA process. And while the NRC continues to do nothing with the ASLB's order, it has already made its decision in practical terms by terminating its own staff's license review. *See supra* at 1-2; Petitioners' Corrected Motion to Lift Stay (9/28/10), Ex. A.

Further waiting is futile. The injury prong of standing is satisfied where, as here, "[i]t is clear what the [agency] will do absent judicial intervention and what the effect of the agency's action will be." *Teva Pharms. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1312 (D.C. Cir. 2010). Petitioners will not gain relief without an authoritative ruling from this Court, which Congress vested with original and exclusive jurisdiction over NWPA challenges. 42 U.S.C. § 10139(a)(1)(A)-(B). The ASLB order does not deprive Petitioners of standing to challenge the Respondents' decision to withdraw the license application.

2. DOE's Decision to Withdraw the License Application is Final and Ripe for Review

Respondents argue that DOE's decision to withdraw the license application with prejudice is not final. Resp. at 36-39. Respondents are incorrect. DOE's withdrawal motion declares that DOE "does not intend to ever refile an application" for a repository at Yucca Mountain and that the Secretary has determined the Yucca Mountain repository is not a "workable option." [JA 718,

720]. The Secretary's decision to withdraw the license application is the "deliberative determination of the agency's position at the highest available level." *Nat'l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701 (D.C. Cir. 1971). It is thus final for DOE, which as argued below is the only relevant consideration.

Respondents argue that Petitioners' challenge to DOE's decision to withdraw is not ripe for review because the claim is contingent upon the NRC granting a motion that its ASLB has denied. Respondents miss the point. DOE's motion should have never been filed in the first place. It is no different than DOE's outright refusal to submit an application in the first instance, and is thus directly actionable in this Court. 42 U.S.C. § 10139(a)(1)(A)-(B).

Importantly, while the NRC is responsible for judging the technical merits of DOE's license application, it is not responsible for enforcing DOE's duties under the NWPA to put that license before it. 42 U.S.C. § 10134(d). The NWPA assigns each Respondent duties in the repository siting and licensing process, with each duty often triggered by the completion of the previous one. Pet.Br. at 29. If ripeness for adjudication depended on the actions of the next actor in the NWPA sequence, the NWPA's judicial review provision would be stripped of its efficacy.

The purely legal challenge to DOE's decision to withdraw its application is ripe. It does not depend on action by NRC.

3. The Primary Jurisdiction Doctrine is Inapplicable

Similarly, Respondents erroneously contend that this Court should decline to hear the case based on the primary jurisdiction doctrine. As discussed above, the NWPA provides this Court with "original and exclusive jurisdiction" over any civil action challenging final decisions and failures to act by the Secretary under the NWPA. 42 U.S.C. § 10139. The initial petitions challenging DOE's withdrawal decision were filed after DOE announced its decision to terminate the licensing process, but prior to DOE's *ultra vires* motion to withdraw the license application. *See* Pet.Br. at 3, 13-14. Just as this Court would have primary jurisdiction if DOE failed to submit its mandatory application, *see* 42 U.S.C. § 10139(a)(1)(B), this Court has primary jurisdiction over a challenge to DOE's decision to withdraw a mandatory application.

IV. ARGUMENT

A. Respondents Lack Authority to Abandon the Yucca Mountain Process

Respondents have unilaterally abandoned the NWPA's process to develop a repository at Yucca Mountain. Each discrete action taken by DOE, however, is merely the execution of a singular, root decision by the Secretary on order of the President: "The Secretary [has] determined that, as a policy matter, DOE will not move forward to construct and operate a permanent geologic repository at Yucca Mountain." Resp. at 3.

It is this root decision that Petitioners challenge in their broader claim. Because Respondents' decision fundamentally repudiates the plain terms and policy dictated by the NWPA, it is contrary to law.

Respondents assert that the agency's pre-existing authority and organic discretion to make policy decisions regarding the disposal of nuclear waste can still trump the NWPA. *See* Resp. at 48-55. They are wrong.

1. The NWPA's Scheme is Expressly Aimed at Opening a Repository and Commencing Waste Disposal

Respondents characterize the NWPA as "setting up a process to select, site, and *possibly* obtain a construction authorization from the NRC," Resp. at 50 (emphasis original), but establishing no expectation that DOE will actually construct and operate a repository.

Respondents understate the pervasive, goal-driven scheme of the NWPA. The NWPA is not a mere statutory check on DOE's ability to move *forward. See* Resp. at 68. Instead, the NWPA is directed at achieving a specific purpose—"the siting, *construction, and operation* of repositories"—to effectuate a "definite Federal policy" for the disposal of high-level radioactive waste and spent nuclear fuel. 42 U.S.C. § 10131(b)(1), (2) (emphasis added).

To this end, the NWPA is replete with Congress' expectation that the Act will result in both an operating repository and the actual disposal of waste.[9] The obligations arising from these expectations have been consistently echoed by the courts in cases involving the NWPA.[10] This Court has held that the NWPA imposes a strict obligation on DOE to begin disposing of waste by 1998, and that the "specific statutory procedures regarding the siting and development of a repository . . . *envince a strong congressional intent that DOE's various obligations be performed in a timely manner.*" *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1277 (D.C. Cir. 1996) (emphasis added).

The NWPA thus "put[s] the United States on course to using geologic repositories." *NEI,* 373 F.3d at 1258. The fact that Congressional appropriation and other support incidental to construction is necessary after licensing, *see* Resp. at 66, does not obviate this statutory goal.[11]

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[9] *See, e.g.,* 42 U.S.C. §§ 10107(b); 10134(a)(1); 10134(e)(1); 10134(e)(2); 10140(a)(1); 10222(a)(5).

[10] *See, e.g., Bullcreek v. Nuclear Regulatory Comm'n*, 359 F.3d 536, 538 (D.C. Cir. 2004); *NEI,* 373 F.3d at 1258-59; *Nat'l Ass'n of Regulatory Util. Comm'rs v. Dep't of Energy*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *Tennessee v. Herrington*, 806 F.2d 642, 648 (6th Cir. 1986), cert denied, 480 U.S. 946 (1987); *Gen. Elec. Uranium Mgmt. Corp. v. Dep't of Energy*, 764 F.2d 896, 898 (D.C. Cir. 1985).

[11] *See, e.g.,* [SJA 104-157].

Respondents, however, argue that they need not engage in a "futile and wasteful process" when they have already decided the Yucca Mountain repository will not be built. Resp. at 63-64. Respondents' logic would render the entire NWPA superfluous and excuse the need for *any* compliance with the Act, since every action required of the Secretary or DOE under the NWPA is but an intermediate step toward the goal of an operating repository. Beyond this, Respondents' position demonstrates their fundamental misconception of the NWPA, which is the basis of Petitioners' challenge.

2. DOE's Pre-NWPA Authority Does Not Give DOE the Power to Override the NWPA

While conceding that the NWPA "circumscribes" its authority, *see* Resp. at 49 n.20, Respondents argue that the NWPA "preserves" the Secretary's preexisting authority under the AEA and DOE Organization Act, including the power to decide not to construct a repository at Yucca Mountain. *See, e.g.,* Resp. at 48-51.[12] This argument fails to recognize the extent to which the NWPA's circumscription precludes the Secretary from substituting his policy preferences for those already made in law by Congress.

[12] Circumscribe: "To constrict the range or activity of definitely and clearly <his role was carefully circumscribed>." Available at http://www.merriam-webster.com/dictionary/circumscribe (last visited Jan.17, 2010).

Respondents' position ignores the pervasive manner in which the NWPA channels, constrains, and commands the Secretary's pre-NWPA discretion to develop (or not develop) a repository for high-level waste and spent nuclear fuel. *See* Pet.Br. at 7-10, 43-45; 42 U.S.C. §§ 10132(a); 10133(a)-(c); 10172(a); 10134(a) and 10135(b), (c)-(g); 10134(e)(1); 10172a(a). This relationship between the NWPA and earlier-granted authority has been recognized by this Court:

> 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.*

NEI, 373 F.3d at 1288 (emphasis original) (emphasis added) (citations omitted).[13]

This makes perfect sense. The NWPA's later-enacted and much more specific statutory scheme controls over the more general AEA and DOE Organization Act. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (more specific statute addressing the same subject controls). Further, the NWPA was enacted in specific response to the past

[13] Based on the specific provisions and overall structure of the NWPA, the Court's *Chevron* analysis ends with the words of Congress. *See Indiana Michigan Power,* 88 F.3d at 1274-77*; see also, Am. Chemistry Council v. Johnson*, 406 F.3d 738, 741-42 (D.C. Cir. 2005).

failures of DOE's predecessor agencies to effectively exercise their discretion under the AEA. *See* Pet.Br. at 5-6; 39.

In light of these facts, it is illogical to conclude that Congress intended for DOE to retain unilateral, unfettered discretion under the AEA to abandon the NWPA's process. *See Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 402 (6th Cir. 2008). Indeed, if it were true that the NWPA leaves undisturbed the Secretary's pre-existing discretion to terminate a repository effort, then there would be no need for the NWPA's Section 113(c)(3) termination provision, which provides specific authority for the Secretary to cease pre-site approval characterization activities upon specific criteria. *See* 42 U.S.C. § 10133(c)(3). That termination authority would *already be vested* in the Secretary, negating the need for Congress to grant such authority in the NWPA. *See e.g., Stone v. INS,* 514 U.S. 386, 397-98 (1995) (presuming that Congress intends to have real and substantial effect when it acts).

Contrary to Respondents' assertion, *see* Resp. at 56-57, just because Congress did not affirmatively prohibit every possible way in which DOE could ignore its commands does not give DOE free license to ignore what the statute *does* say, and to do violence to the statutory framework. This is not a matter of an agency choosing to forgo prosecution of a matter firmly within the discretion granted to it by Congress. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Rather, it is a matter of an agency refusing to follow requirements mandated by Congress simply because it disagrees with the policy underlying those requirements.

Respondents cite no authority holding that an agency's generic organic statute may trump a specific act of Congress directing specific programs and projects. The Secretary's authority under the AEA and the DOE Organization Act does not trump the NWPA. Nor does the Secretary's organic authority allow the Secretary to substitute his views of the "public interest" for those of Congress. *See Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985) ("the public interest should be gauged [by the decrees of] Congress, the elected representatives of the entire nation . . .").[14]

Congress has designated Yucca Mountain as the nation's sole current repository site. If Yucca Mountain is successfully licensed, Congress—and not the Secretary—will be presented with the choice of whether to proceed with construction.[15] In the meantime, the NWPA dictates a specific process for DOE, the NRC, and other federal agencies to follow.

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[14] Nor do Respondents cite anything in the AEA or the DOE Organization Act that supports their decision to abandon the process because there is political opposition to it, times have changed, or they might have a better idea. *See* Resp. at 13-16.

[15] This is precisely what is indicated in the Senate Report accompanying Congress' 2002 resolution. *See* Resp. at 65.

3. Congress' FY 2010 Appropriations Do Not Support Respondents' Position

Contrary to Respondents' assertion, Congress' FY 2010 funding of the Blue Ribbon Commission (BRC) does not conflict with the NWPA. *See* Resp. at 16-17, 60. Indeed, Congress' recent appropriation decisions support Petitioners' claim.

As a general matter, even if appropriations language conflicted with the NWPA, it would not suffice to amend the NWPA's substantive provisions. *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000).[16] And while the BRC (or the President) is free to recommend amendments to the NWPA, only Congress can amend its provisions. *Cf. McCready v. Nicholson*, 465 F.3d 1, 12 (D.C. Cir. 2006).

In this case, however, there is no conflict. Congress provided $5 million to fund the BRC with the directive that it "consider *all alternatives* for nuclear waste disposal."[17] [SJA 043] (emphasis added). In the very same appropriation, Congress allocated nearly $200 million to continue the Yucca Mountain licensing process. [SJA 042-43, 044].

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[16] Respondents' attempt create ambiguity in the otherwise clear terms of the NWPA by referring to later legislative history or action is impermissible under the first step of a *Chevron* analysis. *Tax Analysts v. IRS*, 350 F.3d 100, 104 (D.C. Cir. 2003).

[17] According to Respondents, "all alternatives" do not include Yucca Mountain. *See* Pet.Br. at 13-16; Resp. at 2-3.

Respondents suggest the Petitioners need to resolve their dispute "in the offices of the Executive branch or the halls of Congress." Resp. at 40. It is Respondents, however, who need to take their case to Congress if they do not like the policy of the NWPA. Unless the law is changed, Respondents' obligation is to follow the NWPA.

B. Respondents' Actions Disregard the NWPA, and Therefore Violate the Separation of Powers Doctrine

Respondents argue that because they "make no claim [of] inherent presidential authority," no separation of powers concerns are implicated. Resp. at 82. Nowhere, however, do Respondents claim that the NWPA, AEA or DOE Organization Act, or any other law, authorize the President to order shut down of the Yucca project. *Id.* Thus, this case is analogous to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), except here Respondents fail to even acknowledge they are relying on a theory of inherent authority to support the President's directive to DOE to ignore the NWPA, NEPA, and the APA. *See infra* at 27-28. The President's directive, tethered to no statute, is at odds with the Constitution. *See* Pet.Br. at 57-59.

Respondents' "interpretation" of organic authority amounts to the Executive Branch revisiting and reversing matters that have already been determined by Congress. If the plain language of the NWPA prescribing definite duties can be so facilely avoided under a claim of statutory interpretation, then the Executive

Branch will have usurped Congress' legislative power. The level of disregard shown by Respondents in disobeying Congress' clear commands violates the Constitution's command that the President "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

C. Because DOE's Decision Changes the Status Quo, DOE Must First Analyze Its Decision Under NEPA

Respondents argue that DOE has no obligation to analyze its decision to terminate Yucca Mountain under NEPA because the decision "effects [no] change in the physical environmental status quo."[18] They further argue that sufficient NEPA analysis already exists to inform the decision. Resp. at 74-79. DOE is wrong on both counts.

The test of whether the status quo has changed is not whether a change has occurred on the ground, *see* Resp. at 75-76, but whether there is a change in the human effect an agency's program will have on the environment. *Kootenai Tribe of Idaho v. Venamen*, 313 F.3d 1094, 1114-15 (9th Cir. 2002) (rejecting argument that increase in roadless area protection did not alter status quo by "leaving nature alone"); *see also*, *California ex rel. Lockyer v. Dep't of Agric.*, 575 F.3d 999, 1014-15 (9th Cir. 2009). That a repository at Yucca Mountain does not yet exist

[18] Ripeness aside, Respondents do not dispute that the decision to abandon the Yucca Mountain development process is a "major federal action." *See* Resp. at 75.

is immaterial. What is material is that a program *to establish* the repository has been abandoned, and in its place DOE has committed itself to a new, unknown, and *different* course.[19] *See* Pet.Br. at 47-48.

While Respondents insist DOE has already "extensively analyzed" the impacts of changing course, none of its existing efforts satisfy NEPA. Dr. Triay's declaration submitted in litigation does not substitute for a NEPA analysis. DOE's draft EIS analysis of long-term waste storage impacts at Hanford cannot, by DOE's own regulations, provide support for a decision. 10 C.F.R. § 1021.210(b), 1021.212(b).

Most critically, DOE cannot rely on the YM FEIS to support its decision. DOE has not published a NEPA Record of Decision (ROD) indicating reliance on the YM FEIS, or any other NEPA analysis, as required by 10 C.F.R. § 1021.315(b), (d). This is not "harmless error." *See* Resp. at 77 n.38. A ROD outlines an agency's weighing of environmental impacts and policy considerations. 40 C.F.R. § 1505.2. Just as important to this case, issuing a ROD would open the way to challenge the underlying adequacy of the NEPA analysis relied upon.

[19] In addition, DOE's focus on only the physical Yucca Mountain site is circumscribed. Petitioners have already described the extent to which key national waste management and cleanup decisions are tied to the NWPA's process. *See* Pet.Br. at 48-49.

Here, there would be a serious basis on which to challenge the adequacy of the YM FEIS' alternatives analysis. Ordinarily, an EIS must contain a detailed discussion of the environmental impacts of, *and alternatives to*, a proposed action. 42 U.S.C. § 4332(2)(C). However, because the NWPA focuses DOE solely on Yucca Mountain, Congress relieved DOE from the need to evaluate any alternatives to the Yucca Mountain repository. 42 U.S.C. § 10134(f)(2), (3). The YM FEIS was thus not developed to inform comparative decision-making, as the YM FEIS frankly acknowledges. *See* [JA 468].

DOE insists that a comparison of alternatives to Yucca Mountain is not yet necessary. However, a comparison of those alternatives would have been required in the YM FEIS absent Congress' exemption. *See, e.g., Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 834-35 (D.C. Cir. 1972). Such a comparison would inform the Secretary whether other alternatives truly are "better solutions" than Yucca Mountain. By rejecting the alternative dictated by Congress, DOE has lost the shield of the NWPA's exemption. And because the YM FEIS does not examine a reasonable range of alternatives, it is insufficient to support DOE's Yucca Mountain termination even if adopted in a ROD.

D. Respondents' Decision to Abandon the Yucca Mountain Project Violates the APA

1. Respondents Fail to Rebut Evidence That This Decision is an APA Rulemaking

Respondents argue that DOE's failure to comply with the rulemaking requirements of the APA is excused because there is no final agency action to which the rulemaking requirements of the APA apply. *See* Resp. at 80. This argument confuses the question of whether the January 29, 2010, decision is final (discussed supra at 8-10), with the question of what kind of final action (rulemaking or adjudication) it is (discussed below).

Respondents do not address Petitioners' arguments, Pet.Br. at 52, that the *nature* of this decision is a rulemaking within the meaning of 5 U.S.C. § 551(4). It meets the hallmarks of a rulemaking more squarely than other agency actions found by this Court to constitute improper rulemakings. *See* Pet.Br. at 28. Rather than addressing those precedents, Respondents assert, relying exclusively on *Hudson v. FAA*, 192 F.3d 1031, 1036-37 (D.C. Cir. 1999), that this decision is an informal adjudication exempt from the record requirements of the APA. However, *Hudson* involved only an FAA statement announcing changes in the format for reviews of aircraft evaluation data, a policy that created no new obligations and affected no existing rights. It is hardly comparable to the decision

here. Nonetheless, even informal adjudications are subject to review under the APA's arbitrary and capricious standard. *Hudson*, 192 F.3d at 1034.

2. DOE has No Rational, Record-Based Explanation for Its Decision

Even if DOE has the discretionary power to abandon the Yucca Mountain project, the decision constitutes a 180-degree departure from its prior position. Pet.Br. at 10-16; Resp. at 2-3. The APA permits DOE to engage in such a policy shift only where it provides a reasoned basis for the change based on a contemporaneous record. *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Jicarilla Apache Nation v. Dep't of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010). DOE has provided no such basis. For example, Respondents do not dispute that DOE never considered any of the prior determinations made by the relevant agencies and officials, such as the 2002 "Suitability Determination" made by the Secretary's predecessor. *See* Pet.Br. at 56. This alone renders the January 29 decision arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Respondents' *post hoc* rationalizations of counsel, citing vague "times have changed" tropes and the unpopularity of the decision to some Nevada politicians, *see* Resp. at 15-16 and 81, are improper. Apart from those considerations being contrary to the NWPA, *see supra* at 15-17, none were presented in a record that accompanied the decision. *See, e.g., Chamber of Commerce v. SEC*, 443 F.3d

890, 899 (D.C. Cir. 2006); *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of Fed. Res. Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984); *see also, Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

E. The President is a Proper Party

Contrary to Respondents' assertions, Resp. at 86, Petitioners do not seek review of Presidential action under the APA, but rather claim that his order to shut down the Yucca Mountain project is *ultra vires* under the NWPA. Because Congress *twice* expressly named the President in Section 119, Congress necessarily intended to create a right to seek review of those Presidential actions identified in Section 119. *See, e.g., Karahalios v. Nat. Fed'n of Fed. Employees*, 489 U.S. 527, 532-33 (1989). Respondents' argument ignores the language of the statute and renders meaningless the references to the President in Section 119.[20]

The President may not violate the NWPA, or order others to do so. *Kendall v. United States*, 37 U.S. 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution"). Here, the

[20] Additionally, sovereign immunity does not extend to executive actions, including Presidential actions, that violate laws, including the Constitution. *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949); *Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002); *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332 (D.C. Cir. 1996). *See* discussion *supra* 21-22.

undisputed facts demonstrate that the Secretary took action because ***"we work for the President, we take our direction from the President, the President has been clear that Yucca Mountain is not an option."*** *See* Pet.Br. at 13; [SJA 160] (emphasis added). If the Secretary follows the directive of the President in violation of a Congressional enactment, there is no reason to believe that he will not do the same when faced with an order from this Court. The President is therefore a necessary party to this action.

F. Respondents May Not Withdraw the Yucca Mountain License Application

1. Respondents Fail to Legally Justify DOE's Decision to Withdraw the License Application in Violation of the NWPA

Respondents argue Congress "preserved" the Secretary's authority to unilaterally withdraw the Yucca Mountain license application by incorporating into the NWPA a "long-standing NRC regulation" that DOE contends allows applicants an unfettered right of withdrawal. Resp. at 11-12, 52-55. This is wrong for two reasons.

First, Respondents misquote the operative statutory language. *See* Resp. at 11.[21] Respondents omit a key exception clause in NWPA Section 114(d), which provides that the NRC "shall consider an application for . . . a repository in

[21] "NWPA § 114(d) provides that NRC shall 'consider an application for . . . a repository in accordance with the laws applicable to such applications *and* shall issue a final decision [. . .].' " (Emphasis added.)

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

The "except that" clause in Section 114(d) specifically qualifies the preceding language. It precludes application of any otherwise "applicable law" to the extent that such law (or regulation) would preclude the NRC from reaching a merits decision on the application, within the applicable timeframe. Thus, even if the NRC's withdrawal regulation, 10 C.F.R. § 2.107, could be read to give voluntary applicants an unfettered right to withdraw an application, the "except that" clause precludes such withdrawal under the NWPA.

The "except that" clause is not simply a "deadline." *See* Resp. at 59. That argument ignores the statutory language that provides "the Commission shall issue a *final decision approving or disapproving* the issuance of a construction authorization. . . ." 42 U.S.C. § 10134(d) (emphasis added).[22] To reach a "final decision" that "approves" or "disapproves" a construction authorization is to reach the merits of DOE's application for such authorization. Statutes should be

[22] Because the NWPA places this affirmative obligation on the NRC, Petitioners' requested relief against the NRC is appropriate.

interpreted so as to give meaning to every word. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

Second, it is clear Congress did not *intend* to incorporate 10 C.F.R. § 2.107 in a way to allow DOE or the Secretary unfettered discretion to abandon the NWPA process. Where Congress intended the Secretary to have termination powers within the NWPA process, it explicitly said so. *See, e.g.,* 42 U.S.C. § 10133(c)(3). Further, the legislative history of the NWPA confirms that DOE's decision to withdraw the application is exactly the type of derailment the NWPA was intended to avoid. *See* Pet.Br. at 6-7. Finally, nothing in the regulatory language supports Respondents' claim, *see* Resp. at 59, that granting DOE's motion to withdraw would amount to a "disapproval" of the license application by NRC in satisfaction of the NWPA's requirements. The word "disapprove" appears nowhere in the regulation. *See* 10 C.F.R. § 2.107. Just as denying DOE's motion to withdraw is not an "approval" of construction authorization under the NWPA, granting a motion to withdraw would not be a "disapproval" by NRC. In short, Congress did not intend to allow DOE to undo what the NWPA authoritatively commands to be done: submission of the license application, upon site designation, to allow complete technical review and a merits decision by NRC.

2. Mandamus is Appropriate Because the Alternative Remedies Asserted by Respondents are Inadequate Under the NWPA

Respondents argue that Petitioners have other adequate remedies to compel DOE to rescind its motion to withdraw. Resp. at 82-84. Respondents maintain that the NRC may eventually deny the motion and would be subject to lawsuit itself if it grants the motion. *Id.* The undisputed facts, however, belie the adequacy of these remedies.

The NRC has terminated its staff's review of the license application, *see supra* at 1-2, even after asking this Court to stay its hand while the Commission purportedly deliberates. Respondents' Motion to Vacate (7/2/10). Two of the four voting Commissioners promised not to second guess the DOE withdrawal. *Id.* DOE has utterly ignored the ASLB order, and over six months have passed without the NRC even deciding to review the issue. *Id.* Respondents' reliance on an NRC ruling is hollow.

Furthermore, Respondents would have the Court defer any challenge to the February 1, 2010, decision until a yet-to-be filed appeal. This is wholly inadequate under the NWPA, which provides for expeditious resolution of such controversies in the courts to keep the NWPA process on track. *See* Pet.Br.at 62; 42 U.S.C. § 10139.

Mandamus is appropriate.

V. CONCLUSION

For the foregoing reasons Petitioners request judgment in their favor.

RESPECTFULLY SUBMITTED this 8th day of February 2011.

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This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's orders of May 13, 2010, and December 10, 2010, setting a limit of 7,000 words on this reply brief of Petitioners, because this brief contains 6,994 words, excluding the parts of the reply brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).

This reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this reply brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt. and Times New Roman type style.

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