

March 3, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

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

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

U.S. DEPARTMENT OF ENERGY'S MOTION TO WITHDRAW

The United States Department of Energy ("DOE") hereby moves, pursuant to 10 C.F.R. § 2.107, to withdraw its pending license application for a permanent geologic repository at Yucca Mountain, Nevada. DOE asks the Board to dismiss its application with prejudice and to impose no additional terms of withdrawal.

While DOE reaffirms its obligation to take possession and dispose of the nation's spent nuclear fuel and high-level nuclear waste, the Secretary of Energy has decided that a geologic repository at Yucca Mountain is not a workable option for long-term disposition of these materials. Additionally, at the direction of the President, the Secretary has established the Blue Ribbon Commission on America's Nuclear Future, which will conduct a comprehensive review

and consider alternatives for such disposition.¹ And Congress has already appropriated \$5 million for the Blue Ribbon Commission to evaluate and recommend such “alternatives.” Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009). In accord with those decisions, and to avoid further expenditure of funds on a licensing proceeding for a project that is being terminated, DOE has decided to discontinue the pending application in this docket,² and hereby moves to withdraw that application with prejudice.

Under the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 *et seq.* (“NWPA”), this licensing proceeding must be conducted “in accordance with the laws applicable to such applications” NWPA § 114(d), 42 U.S.C. § 10134(d). Those laws necessarily include the NRC’s regulations governing license applications, including, as this Board has already recognized, 10 C.F.R. § 2.107(a). *See* CAB Order (Concerning LSNA Memorandum), ASLBP No. 09-892-HLW-CAB04, at 2 (Dec. 22, 2009) (stating that “the parties are reminded that, pursuant to 10 C.F.R. § 2.107, withdrawal shall be on such terms as the Board may prescribe.”). That section provides in relevant part that “[w]ithdrawal of an application after the

¹ *See* Presidential Memorandum -- Blue Ribbon Commission on America’s Nuclear Future (Jan. 29, 2010) (“Presidential Memorandum”), *available at* <http://www.whitehouse.gov/the-press-office/presidential-memorandum-blue-ribbon-commission-americas-nuclear-future>; Department of Energy Press Release, Secretary Chu Announces Blue Ribbon Commission on America’s Nuclear Future (January 29, 2010), *available at* <http://www.energy.gov/news/8584.htm>; Charter, Blue Ribbon Commission on America’s Nuclear Future (filed March 1, 2010), *available at* http://www.energy.gov/news/documents/BRC_Charter.pdf. The Commission will conduct a comprehensive review of policies for managing the back end of the nuclear fuel cycle, including all alternatives for the storage, processing, and disposal of civilian and defense used nuclear fuel and materials derived from nuclear activities. *See id.*

² This decision was announced in the Administration’s Fiscal Year 2011 Budget, which states that “[i]n 2010, the Department will discontinue its application to the Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geologic repository at Yucca Mountain, Nevada.” Budget of the U.S. Government, Fiscal Year 2011: Terminations, Reductions, and Savings, at 62 (Feb. 1, 2010). The Department of Energy’s Fiscal Year 2011 Congressional Budget Request similarly states that “in 2010, Department will discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain.” Department of Energy, FY 2011 Congressional Budget Request, Vol. 7, at 163 (Feb. 2010).

issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.” 10 C.F.R. § 2.107(a).

Thus, applicable Commission regulations empower this Board to regulate the terms and conditions of withdrawal. *Philadelphia Electric Company* (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 N.R.C. 967, 974 (1981). Any terms imposed for withdrawal must bear a rational relationship to the conduct and legal harm at issue. *Id.* And the record must support any findings concerning the conduct and harm in question to impose a term. *Id.*, citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604-05 (5th Cir. 1976); 5 Moore's Federal Practice ¶ 41.05[1] at 41-58.

A. The Board Should Grant Dismissal With Prejudice

In this instance, the Board should prescribe only one term of withdrawal—that the pending application for a permanent geologic repository at the Yucca Mountain site shall be dismissed with prejudice.³

That action will provide finality in ending the Yucca Mountain project for a permanent geologic repository and will enable the Blue Ribbon Commission, as established by the Department and funded by Congress, to focus on alternative methods of meeting the federal government's obligation to take high-level waste and spent nuclear fuel. 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. *See also* Presidential Memorandum at 1. Future proposals for the disposition of such materials should thus be based on a comprehensive and

³ DOE seeks this form of dismissal because it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain.

careful evaluation of options supported by that knowledge, as well as other relevant factors, including the ability to secure broad public support, not on an approach that “has not proven effective” over several decades. *Id.*

The Board should defer to the Secretary’s judgment that dismissal of the pending application with prejudice is appropriate here. Settled law in this area directs the NRC to defer to the judgment of policymakers within the Executive Branch.⁴ And whether the public interest would be served by dismissing this application with prejudice is a matter within the purview of the Secretary.⁵ From public statements already made, we of course understand that some will nevertheless argue that dismissing this application is contrary to the NWPA. Although it is impossible to anticipate exactly what parties will argue at this point, at least one litigant seeking to raise these issues in federal court has said the NWPA obligation to file the pending application is inconsistent with the decision to withdraw the application. This is simply wrong.

Nothing in the text of the NWPA strips the Secretary of an applicant’s ordinary right to seek dismissal. In fact, the text of the statute cuts sharply in favor of the Secretary’s right to seek

⁴ *U.S. Department Of Energy* (Plutonium Export License), CLI-04-17, 59 N.R.C. 357, 374 (2004) (deferring, upon “balanc[ing] our statutory role in export licensing with the conduct of United States foreign relations, which is the responsibility of the Executive Branch,” to Executive Branch determination on an export license application). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-30, 58 N.R.C. 454, 472 (2003) (expressing “considerable doubt” about the NRC’s authority to “second-guess” the Bureau of Land Management on an issue relating to recommendations as to the wilderness status of land, and declining an invitation to do so); *see also Environmental Radiation Protection Standards for Nuclear Power Operations*, 40 CFR 190, CLI-81-4, 13 N.R.C. 298, 301 (1981) (deferring to EPA standards for radiation protection: “This agency does not sit as a reviewing court for a sister agency’s regulations....”). *See generally Pacific Gas & Electric Company* (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 N.R.C. 45, 52 (1983) (“The law on withdrawal does not require a determination of whether [the applicant’s] decision [to withdraw] is sound.”).

⁵ The Atomic Energy Act (“AEA” or “Act”) gives the Secretary broad authority to carry out the Act’s purposes, including the authority to direct the Government’s “control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare.” AEA § 3(c), 42 U.S.C. § 2013(c). Indeed, as the D.C. Circuit has recognized, the AEA established “a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.” *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). While *Siegel* concerned directly the branch of the then-Atomic Energy Commission that later became the NRC, its recognition that broad discretion is to be given to the governmental agencies charged with administering the AEA’s objectives applies equally to the Department of Energy, the other lineal descendant of the AEC.

dismissal. The statute simply requires that the Secretary “shall submit . . . an application for a construction authorization.” NWPA § 114(b), 42 U.S.C. § 10134(b). It neither directs nor circumscribes the Secretary’s actions on the application after that submission.⁶

Indeed, far from imposing special limitations on DOE after the submission, the NWPA expressly requires that the application be considered “in accordance with the laws applicable to such applications.” NWPA § 114(d), 42 U.S.C. § 10134(d). Those laws include 10 C.F.R. § 2.107, which, as this Board has recognized, authorizes withdrawals on terms the Board prescribes. Congress, when it enacted the NWPA in 1982, could have dictated that special rules applied to this proceeding to prevent withdrawal motions, or could have prescribed duties by DOE with respect to prosecution of the application after filing, but it chose not to do so.

Nor does the structure of the NWPA somehow override the plain textual indication in the statute that ordinary NRC rules govern here or dictate that the Secretary must continue with an application he has decided is contrary to the public interest. The NWPA does not prescribe a step-by-step process that leads inexorably to the opening of a repository at Yucca Mountain. Indeed, even if the NRC granted the pending application today, the Secretary would not have the authority to create an operational repository. That would require further action by DOE, other agencies, and Congress itself, yet none of those actions is either mandated or even mentioned by the NWPA. The NWPA does not require the Secretary to undertake the actions necessary to obtain the license to receive and possess materials that would be necessary to open a repository. 10 C.F.R. §§ 63.3, 63.32(d). Rather, the NWPA refers only to the need for a “construction

⁶ After filing the application, the only NWPA mandate imposed on the Secretary is a *reporting* requirement to Congress to note the “project decision schedule that portrays the optimum way to attain the operation of the repository, within the time periods specified in this part.” NWPA § 114(e)(1), 42 U.S.C. § 10134(e)(1).

authorization,” NWPA § 114(b), 42 U.S.C. § 10134(b) – and even there, as discussed, it mandates only the submission of an application. To open a facility, moreover, the Department would be required to obtain water rights, rights of way from the Bureau of Land Management for utilities and access roads, and Clean Water Act § 404 permits for repository construction, as well as all the state and federal approvals necessary for an approximately 300-mile rail line, among many other things. None of those actions is mandated by the NWPA. At least as important, as the prior Administration stressed, *Congress* would need to take further action not contained in the NWPA before any such repository could be opened.⁷ In short, there are many acts between the filing of the application and the actual use of the repository that the NWPA does not require.

Where, even if the NRC granted the pending application, Congress has not authorized the Secretary to make the Yucca Mountain site operational, or even mandated that he take the many required steps to make it operational, it would be bizarre to read the statute to impose a non-discretionary duty to continue with any particular intermediate step (here, prosecuting the application), absent clear statutory language mandating that result. More generally, it has not been the NRC’s practice to require any litigant to maintain a license application that the litigant does not wish to pursue. That deference to an applicant’s decisions should apply more strongly where a government official has decided not to pursue a license application because he believes that other courses would better serve the public interest.

Finally, the fact that Congress has approved Yucca Mountain as the site of a repository, *see* Pub. L. No. 107-200, 116 Stat. 735 (2002) (“there hereby is approved the site at Yucca Mountain, Nevada, for a repository, with respect to which a notice of disapproval was submitted

⁷ *See* January 2009 Project Decision Schedule at 1 (“This schedule is predicated upon the enactment of legislation ... [regarding] land withdrawal.”). *See also, e.g.*, Nuclear Fuel Management and Disposal Act, S.2589, 109th Congress, 2d Sess. § 3 (2006) (proposed legislation authorizing the withdrawal of lands necessary for the Yucca Mountain repository).

by the Governor of the State of Nevada on April 8, 2002”), means, in the D.C. Circuit’s words, simply that the Secretary is “permitted” to seek authority to open such a site and that challenges to the prior process to select that site are moot. *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1309-10 (D.C. Cir. 2004). It does *not* require the Secretary to continue with an application proceeding if the Secretary decides that action is contrary to the public interest. *See, e.g.*, S. Rep. No. 107-159, at 13 (2002) (“It bears repeating that enactment of the joint resolution will not authorize construction of the repository or allow DOE to put any radioactive waste or spent nuclear fuel in it or even allow DOE to begin transporting waste to it. Enactment of the joint resolution will only allow DOE to take the next step in the process laid out by the Nuclear Waste Policy Act and apply to the NRC for authorization to construct the repository at Yucca Mountain.”); H.R. Rep. No. 107-425, at 7 (2002) (“In accordance with the Nuclear Waste Policy Act (NWPA), such approval would allow the Department of Energy (DOE) to apply for a license with the Nuclear Regulatory Commission to construct a nuclear waste storage facility on the approved site.”).⁸ That conclusion is even more strongly compelled now, in light of Congress’s recent decision to provide funding to a Blue Ribbon Commission, whose explicit purpose is to propose “alternatives” for the disposal of high-level waste and spent nuclear fuel.

Even if there were any ambiguity on these points, the Secretary’s interpretation of the NWPA would be entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Gen. Elec. Uranium Mgmt. Corp. v. DOE*, 764 F.2d 896, 907 (D.C. Cir. 1985) (applying *Chevron* deference to uphold DOE’s interpretation of the NWPA); *see also Skidmore v Swift Co.*, 323 U.S. 65 (1944); *Auer v. Robbins*, 519 U.S. 452 (1977); *Coeur*

⁸ *See also* 148 Cong. Rec. 7155 (2002) (Rep. Dingell) (stating that Yucca Mountain Site Approval Act “is just about a step in a process”); *id.* at 7166 (Rep. Norwood) (“The vote today does not lock us in forever and we are not committed forever to Yucca Mountain.”); *id.* at 12340 (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.”).

Alaska, Inc. v. Southeastern Alaska Conservation Council, 129 S. Ct. 2458 (2009). Simply put, the text of the NWPA does not specify actions the Secretary can or must take once the application is filed. Accordingly, while some may disagree with the wisdom of the Secretary's underlying policy decision, the Secretary may fill this statutory "gap." The Secretary's interpretation is a reasonable one that should be given great weight and sustained. *See, e.g., Tennessee v. Herrington*, 806 F.2d 642, 653 (6th Cir. 1986) ("[W]e are mindful of the Supreme Court's statement in *Chevron, supra*, that: 'When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.'").

B. No Conditions Are Necessary As to the Licensing Support Network

Finally, there is no reason to impose conditions relating to the Licensing Support Network ("LSN") as a term of withdrawal. As DOE's prior filings with this Board explain, DOE will, at a minimum, maintain the LSN throughout this proceeding, including any appeals, and then archive the LSN materials in accordance with the Federal Records Act and other relevant law. *See* Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (filed Feb. 4, 2010); Department of Energy's Status Report on Its Archiving Plan (filed Feb. 19, 2010). Thus, DOE will retain the full LSN functionality throughout this proceeding, including appeal, and then follow well established legal requirements that already govern DOE's obligations regarding these documents. DOE is also considering whether sound public and fiscal policy, and the goal of preserving the knowledge gained both inside and outside of this proceeding, suggest going even further than those legal

requirements. There is thus no need for this Board to impose additional conditions concerning the preservation of records.

* * *

DOE counsel has communicated with counsel for the other parties commencing on February 24, 2010, in an effort to resolve any issues raised by them prior to filing this Motion, per 10 C.F.R. § 2.323(b). The State of Nevada and the State of California have stated that they agree with the relief requested here. The Nuclear Regulatory Commission Staff has stated that it takes no position at this time. The Nuclear Energy Institute has stated that it does not consent to the relief requested and will file its position in a response. All other parties that have responded have stated that they reserve their positions until they see the final text of the motion.⁹

⁹ These parties include: Clark County, Eureka County, Four Counties (Esmeralda, Lavender, Churchill, Mineral), Inyo County, Lincoln County, Native Community Action Council, Nye County, Timbisha Shoshone Tribal Group, White Pine County.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **U.S. DEPARTMENT OF ENERGY'S MOTION TO WITHDRAW** have been served on the following persons on this 3rd day of March 2010 through the Nuclear Regulatory Commission's Electronic Information Exchange.

CAB 04

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