IN THE 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.

UNITED STATES DEPARTMENT OF ENERGY, et al.,
Respondents

No. 10-1069

STATE OF SOUTH CAROLINA,
Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,

RESPONDENTS' MOTION TO HOLD THE CASES IN ABEYANCE AND RESPONSE IN OPPOSITION TO MOTIONS TO EXPEDITE

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Pursuant to the Court's April 8, 2010, order, and for the reasons set forth in the respondents[1/] hereby oppose the pending motions for expedited consideration and move to hold this case in abeyance for thirty days, to May 12, 2010, in order to allow the Nuclear Regulatory Commission opportunity to consider the Department of Energy's petition for review of the Licensing Board's April 6, 2010, suspension order.

BACKGROUND

On February 19, 2010, a petition styled as "Petition for Declaratory and Injunctive Relief and Writ of Mandamus," seeking relief against the Department of Energy ("DOE"), Nuclear Regulatory Commission ("NRC"), and agency officials was filed in this Court and docketed as *In re Aiken County*, D.C. Cir. No. 10-1050. Federal respondents filed a response to the petition on March 24, 2010. On February 25, 2010, a petition for review, docketed as *Ferguson v. Obama,* D.C. Cir. No. 10-1052, was filed in this Court against the Department of Energy and President purporting to seek review of the "final action of the President and Secretary of Energy to abandon and not to proceed with plans to apply for and pursue a license for, and to construct, a repository for high level radioactive waste

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[1/] For the purposes of this motion and response, "respondents" refers to the Department of Energy, the Secretary of Energy, and the President.

at Yucca Mountain." On February 26, 2010, South Carolina filed in the Fourth Circuit a "Petition for Review and Petition for Writ of Mandamus, Writ of Prohibition, Stay, and/or Declaratory and Injunctive Relief" naming as respondents the Department of Energy, President Obama, the Nuclear Regulatory Commission, and agency officials; that case was transferred to this Court and docketed as *South Carolina v. U.S. Dep't of Energy*, D.C. Cir. No. 10-1069. On April 8, 2010, the three petitions were consolidated and the Court ordered a response to motions to expedite filed by *Ferguson* and *State of South Carolina* petitioners.

These consolidated cases relate to an ongoing proceeding before the NRC, *In the Matter of U.S. Dep't of Energy*, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04. That proceeding involves a license application submitted by DOE for construction authorization for a permanent spent nuclear fuel and high-level radioactive waste geologic repository at Yucca Mountain, Nevada. While the three consolidated petitions differ in some material respects, the gist of the petitions is that, as a matter of law, the Nuclear Waste Policy Act prohibits DOE from withdrawing the license application for any reason.

On January 29, 2010, at the direction of the President, the Secretary of Energy established the Blue Ribbon Commission on America's Nuclear Future, which will conduct a comprehensive review of, and consider alternatives for,

disposition of spent nuclear fuel and high-level radioactive waste.[2/] Congress had already endorsed creation of this Commission by appropriating $5 million in October 2009 for a 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).

On February 1, 2010, the Administration's Fiscal Year 2011 Budget was announced and stated that "[i]n 2010, the Department [of Energy] will discontinue its applications to the Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geological repository at Yucca Mountain, Nevada." Budget of the U.S. Government, Fiscal Year 2011: Terminations, Reductions, and Savings, at 62 (Feb. 1, 2010), Attach. A. The budget further states that "all funding for development of the Yucca Mountain facility will be eliminated" for fiscal year 2011. *Id*. DOE remains committed, however, to fulfilling its obligation to take possession and dispose of the nation's spent nuclear fuel and high-level nuclear waste, and DOE has established the Blue Ribbon Commission to review alternatives for such disposition.

[2/] *See* 75 Fed. Reg. 5485, 2010 WL 1038736 (Jan. 29, 2010); Presidential Memorandum – Blue Ribbon Commission on America's Nuclear Future (Jan. 29, 2010), available at http://www.whitehouse.gov/the-press-office/presidential-memorandum-blue-ribbon-commission-americas-nuclear-future.

On February 1, 2010, DOE filed with the NRC hearing tribunal, the Atomic Safety and Licensing Board ("NRC Licensing Board"), a motion to stay the licensing proceeding (with one exception not relevant here), pending "the disposition by the Board of any DOE motion under Section 2.107 filed within the next 30 days." Attach. B at 2. The motion explained that DOE intended to move to withdraw the pending licensing application pursuant to 10 C.F.R. § 2.107 within 30 days and that a stay would avoid unnecessary expenditure of resources by the Board, NRC, and other parties to the proceeding. Attach. B at 1-2. On February 16, 2010, the NRC Licensing Board granted the stay motion pending resolution of DOE's then-expected motion to withdraw the license application. Attach. C. The instant three consolidated petitions were then filed in federal court. Subsequent to the filing of the three consolidated petitions, on March 3, 2010, DOE filed in the NRC proceeding a motion to withdraw the license application. Attach D. Five parties, including South Carolina and Aiken County, two of the petitioners in this Court, thereafter filed petitions to intervene in the NRC proceeding to oppose DOE's motion to withdraw. On March 5, 2010, the NRC Licensing Board issued a scheduling order providing a due date for answers to the then-pending petitions to intervene and stating that "[t]he Board will set a time for responses to DOE's motion to withdraw after" resolving the petitions to intervene. Attach. E. However, in an April 6, 2010, order the NRC Licensing Board changed course and

announced that it will withhold a decision on the petitions to intervene and DOE's motion to withdraw pending this Court's ruling on the petitions before this Court. Attach. F. The Board deemed it more expedient for this Court to provide it guidance by deciding in the first instance whether DOE has authority to withdraw the license application.[3/] The NRC Licensing Board's April 6 order, however, is an interlocutory order of an administrative hearing tribunal within the NRC and does not necessarily reflect the views of the Commission itself. On April 12, 2010 – just before the filing of the instant response – DOE filed a request for review of the Board's interlocutory order by the Commission, the body with the final authority over NRC adjudications. Attach. G.

On April 2 and April 7, petitioners in *Ferguson* and *State of South Carolina* filed motions to expedite briefing and consideration of the petitions in this Court. They contend that any delay in judicial review will cause a substantial delay in the opening of any permanent repository for high level waste at Yucca Mountain, and

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[3/] The Board also opined that this Court had jurisdiction over the petitions despite the absence of a final reviewable order from NRC on DOE's motion to withdraw the license application. Attach. F at 10. The Board's view of this Court's jurisdiction is not binding on this Court or the Commission. Notably, the Board's analysis is directly contrary to jurisdictional arguments made in federal respondents' response to the *Aiken County* petition. That response was signed by NRC counsel on behalf of the Nuclear Regulatory Commission and Chairman of the Commission in his official capacity. As explained in the response (at 1 n.1), Board members are improperly named as respondents in the *Aiken County* case and, as an independent hearing tribunal, the Board expressed no view on any matters discussed in the response.

consequently delay the time when they will cease being exposed to risks from exposure to high level waste stored at the Hanford Nuclear Reservation (Ferguson Mot. at 10-12) or Savannah River Site (South Carolina Mot. at 13).[4/] Petitioners also contend that the case should be expedited because there is an unusual public interest in prompt disposition of this suit (Ferguson Mot. at 17-18; South Carolina Mot. at 18-19).

DISCUSSION

I. RESPONDENTS' MOTION TO HOLD THE CASES IN ABEYANCE

Respondents move this Court to hold these consolidated cases in abeyance for an initial 30-day period, to May 12, 2010, to allow time for the Commission to consider DOE's request to review the Licensing Board's April 6, 2010, interlocutory order. Respondents propose to file a report to the Court on May 12, 2010, on the status of the Commission's consideration so that the Court can than reassess the schedule in these cases.

In the absence of a final decision from the Commission on DOE's motion to withdraw its license application, there are fundamental questions concerning this Court's jurisdiction, the petitions' justiciability, and whether or not petitioners

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[4/] Petitioners in the *Ferguson* case are individuals who live and work in eastern Washington, near the Hanford Nuclear Reservation. Hanford is a 586-acre site located in eastern Washington State at which the federal government manufactured plutonium for nuclear weapons beginning in the 1940s until 1987. The Savannah River Site is located in South Carolina. Both are federal facilities.

have stated a claim upon which relief can be granted. None of the petitioners, for example, has ever identified a final agency action taken by either DOE or the Commission that provides this Court with original jurisdiction under the Nuclear Waste Policy Act, 42 U.S.C. § 10139(a)(1)(A), or petitioners with a cause of action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq*.

In fact, despite being required to do so by Fed. R. App. P. 15(a)(2)(C) and the Clerk's order dated March 3, 2010, the *Ferguson* petitioners have failed to "specify the order or part thereof to be reviewed." Instead, petitioners cite materials that they assert are "evidence of the decision."[5/] This so-called evidence, however, is nothing more than evidence of DOE's general policy towards the Yucca Mountain facility. There is no dispute that, as a policy matter, DOE wants to take a new approach regarding disposition of spent nuclear fuel and high-level radioactive waste. It is well-settled, however, that generalized agency policies are not the proper subject of judicial review. *See, e.g., Cobell v. Kempthorne*, 455 F.3d

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[5/]The "evidence" consists of: (1) a DOE press relief announcing the "formation of a Blue Ribbon Commission on America's Nuclear Future to provide recommendations for developing a safe, long-term solution to managing the Nation's used nuclear fuel and nuclear waste" as a part of the "Administration's commitment to restarting America's nuclear industry"; (2) two "unofficial transcripts" of DOE Press Conferences, on January 29 and February 2, 2010; (3) excerpts from Budget of the U.S. Government, February 1, 2020; (4) Letter from DOE to the Nevada Dept. of Conservation and Natural Resources, February 8, 2010; (5) an Article from the Las Vegas Sun, dated February 1, 2010; and (6) a letter from Secretary of Energy to Rep. Doc Hastings, dated January 14, 2010.

301, 307 (D.C. Cir. 2006) ("Because an on-going program or policy is not, in itself, a final agency action under the APA, our jurisdiction does not extend to reviewing generalized complaints about agency behavior."); *see also Fund for Animals v. BLM*, 460 F.3d 13, 19-20 (D.C. Cir. 2006) (rejecting an APA challenge to a budget request).

The petitioners in *Aiken County* and *State of South Carolina* have identified motions filed by DOE in the ongoing administrative proceedings before the NRC. Aiken County Pet. at 12-13; South Carolina Pet. at 14-15. However, for the reasons articulated in the federal respondents' opposition to the petition for mandamus in *Aiken County*, the filing of these motions does not constitute final agency action and, in any event, these two petitions are non-justiciable in the absence of final NRC action on DOE's motions.

The petitioners in *Aiken County* and *State of South Carolina* also suggest that this Court has jurisdiction over their petitions based on 42 U.S.C. § 10139(a)(1)(B), providing that courts of appeals shall have original and exclusive jurisdiction over any civil action "alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part" or a similar provision of the APA, 5 U.S.C. § 706(1), authorizing a court to compel agency action unlawfully withheld. Petitioners' argument is that DOE's action of seeking to withdraw the license application is a failure to take

required action. However, in the absence of NRC's grant of DOE's motion, DOE has not effected a withdrawal of the application; thus, there has as yet been no failure to take the alleged required action. Even if the NRC grants DOE's motion to withdraw, this would not give rise to a "genuine failure to act" claim because petitioners' are objecting to DOE's affirmative act of withdrawing the license application. *See Ecology Center, Inc. v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999). Courts have repeatedly refused to allow plaintiffs to evade a finality requirement by dressing up complaints about the sufficiency or substance of an agency action as an agency's supposed "failure" to act. *See e.g., Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988); *Nevada v. Watkins*, 939 F.2d 710, 714 n. 11 (9th Cir. 1991).

In the end, there is insufficient reason for the parties to spend extensive time and resources briefing these fundamental problems with the various petitions, and this Court resolving them, when some or all of these problems could be eliminated should the Commission issue a final reviewable order. The Commission even may take action – such as denying the motion to withdraw – that would eliminate some or all of petitioners' complaints in this case. At the very least, the Commission may take action that would help crystallize the jurisdictional and merits issues in this case. This Court should hold this matter in abeyance for at least 30 days to allow opportunity for the Commission to review DOE's April 12 petition and to

take further action. Only after the Commission's review will it be clear whether the NRC Licensing Board or Commission will (as it should) decide in the first instance the issues surrounding DOE's motion to withdraw its application, and only then will the jurisdiction and justiciability issues pending before this Court be properly framed for this Court's review and decision. And, for reasons to which we now turn, this temporary stay would not cause petitioners undue hardship.

II. RESPONSE IN OPPOSITION TO PETITIONERS' MOTION FOR EXPEDITED BRIEFING AND CONSIDERATION

Petitioners argue that any delay in obtaining judicial relief requiring DOE to resume the license application process will result in substantial delays in the opening of the repository at Yucca Mountain and consequently prolong the time they risk exposure to high-level nuclear waste stored at Hanford or Savannah River. However, this claim rests on a series of errors and speculative assumptions.

As an initial matter, petitioners' argument ignores the fact that, as DOE represented to the NRC Licensing Board, DOE is maintaining all the functionalities of the database (known as "licensing support network") containing the documents relevant to the licensing proceeding as well as materials of scientific significance. *See* Attach. H (Feb. 19, 2010 status report); Attach. B at 2 n.1. Thus, materials currently used in relation to the licensing application should be retrievable, as necessary, in the future.

Moreover, DOE has not taken any action with respect to Yucca Mountain that would prevent DOE from complying with any future NRC or court decision indicating that DOE should proceed with the license application.[6/] Although no one can attest that there will be no delays in the licensing proceeding, such delays must be put in context. Under the most optimistic of prior scenarios, a Yucca Mountain repository would not have opened until 2020. Attach. I at 8 (Testimony of Edward F. Sproat III, Director, Office of Civilian Radioactive Waste Management, U.S. Department of Energy before the Subcommittee on Energy and Air Quality, Committee on Energy and Commerce, U.S. House of Representatives, July 15, 2008). Additionally, as the NRC Licensing Board stated, the current posture of the licensing proceeding does not affect the NRC Staff's independent technical review of the application; rather, the Staff expects to complete only two of five volumes of the Safety Evaluation Report on the application by November 2010, and to complete the remaining three volumes not until February, 2012,

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[6/] With respect to personnel decisions referred to by petitioners (Ferguson Pet. at 8-9; South Carolina Mot. at 10), DOE has initiated a process to assist federal employees assigned to the Yucca Mountain project, both at Headquarters and in Las Vegas, to find other positions within the Department. Ensuring that Yucca Mountain employees remain with the Department would facilitate efforts to reconstitute the Yucca Mountain federal work force, should the need arise. Many of the Department's scientific experts are National Laboratory employees, and it is likely that they will continue to work for the National Laboratories on other projects and thus could be available if contractual arrangements were re-established for them to support the Yucca Mountain project.

according to 2009 estimates. Attach. J (NRC Licensing Board Order, July 21, 2009); *see also* Attach. F at 3 (NRC Licensing Board Order, April 6, 2010). Hearings in the proceeding on contested factual issues ordinarily would not take place until after the NRC Staff issues relevant portions of the Safety Evaluation Report. *Id.*

Petitioners also mistakenly assume that, if DOE were ordered to resume processing the license application for Yucca Mountain, a repository at that location would necessarily be built. In fact, such a facility could not be built without changes in current law. Among many other actions necessary before a repository could open, Congress would have to enact land withdrawal legislation. *See, e.g.*, Nuclear Fuel Management and Disposal Act, S. 2589, 109th Cong., 2d Sess. § 3 (2006) (proposed legislation authorizing withdrawal of lands necessary for Yucca Mountain repository). Thus, contrary to petitioners' contention, every day of delay in the license application proceeding does not necessarily cause a delay in opening a Yucca Mountain repository because, even if DOE took the license application process to conclusion, one cannot say whether the NRC would grant the construction license application or, if it did, whether or when Congress would take the action required to construct and open the facility.

Additionally, petitioners are wrong to assume that unless high level waste at Hanford and Savannah River is sent to a completed repository at Yucca Mountain,

there will inevitably be delay in DOE ultimately removing the waste from these sites. The policy decisions made regarding Yucca Mountain do not affect DOE's repeatedly reiterated commitment to dispose of the nation's spent nuclear fuel and high-level nuclear waste. Alternative strategies may, in fact, result in removing the waste from these sites more quickly than waiting for a repository to be completed at the Yucca Mountain site given the history of constant slippage of the anticipated date for opening such a repository. For instance, the Charter of the recently established Blue Ribbon Commission (which must issue recommendations within 24 months), makes clear that the Commission will consider solutions not only for commercial spent nuclear fuel but also for DOE high level waste that may provide a quicker solution than construction of a repository at Yucca Mountain. Attach. K (Advisory Committee Charter).[7/]

[7/] Beyond this, DOE has been, and will continue to be, engaged in activities to address and lessen risks associated with storage of high level waste at Hanford and Savannah River, and those actions are independent of whether there is a repository at the Yucca Mountain site. High level waste at Hanford is already being addressed by DOE's ongoing long term cleanup, irrespective of whether Yucca Mountain is delayed or never constructed at all, that includes the retrieval of highly radioactive mixed waste stored in underground storage tanks, the construction of a massive waste treatment plant to treat that high level waste, and ultimately the treatment of that waste by the treatment plant, by embedding it in glass through a vitrification process. Vitrification of high level waste from Hanford is a prerequisite to transportation and storage at a repository at Yucca Mountain. The pace of the Hanford cleanup and construction of the treatment plant is proceeding regardless of whether Yucca Mountain is delayed or never constructed. Moreover, the schedule for accomplishing this cleanup is already the subject of a pending federal district court enforcement action brought by the State of Washington, *State*

In sum, petitioners will not be harmed by allowing a modest amount of time for the Nuclear Regulatory Commission to consider DOE's request for review of the Board's April 6 order. Certainly, there is no threat of imminent harm to petitioners that warrants the very accelerated briefing schedule they propose.

III. SHOULD THE COURT DENY THE MOTION TO HOLD THE CASE IN ABEYANCE AND INSTEAD GRANT EXPEDITED BRIEFING, PETITIONERS' PROPOSED SCHEDULE IS OVERLY BURDENSOME AND SHOULD NOT BE ADOPTED

Finally, petitioners err in suggesting that imposing an unduly condensed briefing schedule which dispenses with the filing of an administrative record would be "appropriate." Ferguson Mot. at 18-19; South Carolina Mot. at 19-20. Specifically, Petitioners suggest the following schedule: April 30 – petitioners' opening brief and respondents' dispositive motions; May 17 – petitioners opposition to respondents' dispositive motions and respondents' brief on the merits; June 1 – petitioners' reply brief on the merits and respondents' reply on dispositive motions. See, *id.* This proposal is unnecessary and inappropriate

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of Washington v. Chu, No. 08 5085 FVS (E.D. Wa.). The parties in that case have proposed a settlement, which recently underwent a public comment process, that would, if finalized, require treatment of all the high level mixed waste from the tanks no later than 2047.

At the Savannah River Site, the Defense Waste Processing Facility is currently treating high-level waste from the on-site tanks by vitrifying the material. An additional facility for processing of tank waste, the Salt Waste Processing Facility, is currently under construction. It is anticipated that all of the Savannah River Site high level waste will be vitrified by approximately 2030.

because it assumes that this Court should decide the merits of petitioners' claims without the benefit of an administrative record and because it unduly burdens the respondents.

Petitioners assert that the filing of an administrative record is unnecessary because they raise "purely a question of law." Ferguson Mot. at 19; South Carolina Pet. at 19. Yet contradictorily petitioners also assert that the respondents' decision is "arbitrary and capricious." Ordinarily a petition to review agency action, particularly a claim that an agency action is arbitrary and capricious, can be resolved only on the basis of review of an administrative record. *See, e.g., Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 401, 419-20 (1971); *Florida Power & Light co. v. Lorion*, 470 U.S. 729, 743-44 (1985); Fed. R. App. P. 17. Although we cannot know from petitioners' motions to expedite what they will actually argue in their briefs, their motions certainly provide no sound basis for dispensing entirely with the filing of an administrative record.[8/] Thus, an expedited schedule should include a date for filing of an administrative record.

Petitioners did not file their opening briefs with their motions to expedite. Instead, as of the filing of their motion to expedite, petitioners have already

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[8/] Petitioners suggest that there is no administrative record. Ferguson Pet. at 19; South Carolina Pet. at 16, 19. Although we do not believe that the petitioners have challenged any final agency action, there are nonetheless agency documents supporting the respondents' actions or interpretations of their authority and statutes they are charged with implementing. *See* Fed. R. App. P.17.

received the benefit of more than 60 days since the latest "order" issued by the respondents that petitioners assert causes them harm, *and* the benefit of more than 37 days since the filing of both the *Ferguson* and *South Carolina* petitions for review. Under their schedule, despite having already had more than 60 days to prepare opening briefs, petitioners' proposal gives themselves four full business weeks from the filing of the first motion to expedite. In contrast, however, petitioners suggest that it is "appropriate" that the federal respondents have **only 11 business days** to prepare and file a brief responding to all of the allegations in three consolidated petitions for review. Petitioners give themselves this same amount of time to prepare and file their *optional* reply briefs. It is unduly burdensome and inappropriate to expect the federal respondents to defend this case on petitioners' proposed schedule because it does not provide a reasonable amount of time to respond.

Petitioners have not indicated whether they plan to file one consolidated brief of up to 14,000 words in length for all cases or whether they intend to file three separate briefs of up to this length. Federal respondents respectfully suggest that if petitioners are interested in expediting this Court's review, they should be limited to filing a single consolidated brief. Should petitioners be allowed to file three separate briefs, however, respondents would likely seek to file one overlength brief in response. Preparing a brief responding to multiple briefs filed by

petitioners and potential intervenors in **11 days** would be manifestly unreasonable, particularly where petitioners have already had more than 60 days to prepare their opening briefs.

Thus, even if the Court were to conclude that expedition is warranted and that the case should not be held in abeyance pending NRC's resolution of DOE's request for the Commission's review of the NRC Licensing Board order, the Court should adopt a more reasonable schedule that would allow sufficient time for respondents to prepare their brief responding to the opening brief(s) filed by the *Ferguson*, *South Carolina*, and *Aiken County* petitioners.

For these reasons, the federal respondents request that any forthcoming scheduling order in these consolidated cases allow time for the preparation and filing of an administrative record, and at least 45 days from the filing of petitioners' opening brief(s) for respondents to prepare an answering brief. The 45 days to file an answering brief are particularly necessary given that the petitions collectively challenge alleged actions of the President of the United States, the Secretary of Energy, the Department of Energy, the Nuclear Regulatory Commission, and the United States (among others). The requested 45 days is required, among other reasons, to allow for the necessary inter- and intra-agency coordination and review of the federal respondents' brief. At a minimum, the brief of the federal respondents must be reviewed by the Department of Energy, the

NRC, White House Counsel, and various components of the Department of Justice, and the Department of Justice must also review and coordinate anything that the NRC (which has independent litigating authority) plans to file as a respondent. Therefore, any expedited schedule must allow at least 45 days for the filing of respondents' brief.

Contrary to petitioners' contention (Ferguson Mot. at 17-18; South Carolina Mot. at 18-19), the high level of public interest in the issue of how to manage and dispose of high level waste does not justify their proposed accelerated schedule. To the contrary, precisely because of the level of public interest and importance of the issues – assuming the cases are not held in abeyance to permit the NRC to act – federal respondents should be accorded sufficient time to prepare a thorough and fully coordinated brief. This in turn would aid the Court's resolution of the case.

Thus, if expedition is deemed warranted and the cases are not held in abeyance, the federal respondents offer the following alternative schedule that would both accommodate more expedited consideration while also accommodating the orderly filing of an administrative record and 45 days for preparation of the respondents' brief answering brief:

- April 30 – Filing of the Certified Index to the Administrative Record;
- May 10 – Filing of Petitioners' Opening Brief(s);

- June 24 – Filing of Federal Respondents' and Intervenor Respondent's Briefs (including jurisdictional objections);
- July 15 – Filing of Petitioners' Optional Reply Brief(s).

This proposed schedule provides for more than 50 days between the filing of the reply briefs and the first full week of September. If this Court's September calendar is already full, the federal respondents do not oppose stipulating to the consolidated cases being placed in the stand-by pool of cases to be slotted into openings that become available on the Court's calendar. For the foregoing reasons, if the Court denies respondents' motion to hold the cases in abeyance and decides to expedite the cases, federal respondents request that the Court follow the briefing schedule outlined above.

CONCLUSION

For the foregoing reasons, this Court should hold these cases in abeyance for at least 30 days to allow time for the NRC to consider DOE's request for review. Respondents propose that at the end of the 30-day period a status report be filed by respondents and that the Court then reassess how these cases should proceed. The Court should deny petitioners' motions to expedite. In the alternative, if the cases are expedited, respondents request that their proposed schedule be adopted.

Respectfully submitted.

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90-13-5-13057
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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's Administrative Order of May 15, 2009, I hereby certify that on April 12, 2010, I caused the foregoing to be filed upon the Court prior to 4 P.M. through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service by e-mail is consistent with the preferences articulated by all counsel of record in the Service Preference Report. In addition, pursuant to the Court's April 8, 2010, order, I caused four paper copies to be hand delivered to the Clerk's Office prior to 4 PM on April 12, 2010.

s/

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ATTACHMENT A

Appendix

Budget of the U. S. Government

Fiscal Year 2011

Office of Management and Budget
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THE BUDGET DOCUMENTS

Budget of the United States Government, Fiscal Year 2011 contains the Budget Message of the President, information on the President's priorities, budget overviews organized by agency, and summary tables.

Analytical Perspectives, Budget of the United States Government, Fiscal Year 2011 contains analyses that are designed to highlight specified subject areas or provide other significant presentations of budget data that place the budget in perspective. This volume includes economic and accounting analyses; information on Federal receipts and collections; analyses of Federal spending; information on Federal borrowing and debt; baseline or current services estimates; and other technical presentations.

The *Analytical Perspectives* volume also contains supplemental material with several detailed tables, including tables showing the budget by agency and account and by function, subfunction, and program, that is available on the Internet and as a CD-ROM in the printed document.

Historical Tables, Budget of the United States Government, Fiscal Year 2011 provides data on budget receipts, outlays, surpluses or deficits, Federal debt, and Federal employment over an extended time period, generally from 1940 or earlier to 2011 or 2015.

To the extent feasible, the data have been adjusted to provide consistency with the 2011 Budget and to provide comparability over time.

Appendix, Budget of the United States Government, Fiscal Year 2011 contains detailed information on the various appropriations and funds that constitute the budget and is designed primarily for the use of the Appropriations Committees. The *Appendix* contains more detailed financial information on individual programs and appropriation accounts than any of the other budget documents. It includes for each agency: the proposed text of appropriations language; budget schedules for each account; legislative proposals; explanations of the work to be performed and the funds needed; and proposed general provisions applicable to the appropriations of entire agencies or group of agencies. Information is also provided on certain activities whose transactions are not part of the budget totals.

AUTOMATED SOURCES OF BUDGET INFORMATION

The information contained in these documents is available in electronic format from the following sources:

Internet. All budget documents, including documents that are released at a future date, spreadsheets of many of the budget tables, and a public use budget database are available for downloading in several formats from the Internet at *www.budget.gov/budget*. Links to documents and materials from budgets of prior years are also provided.

Budget CD-ROM. The CD-ROM contains all of the budget documents in fully indexed PDF format along with the software required for viewing the documents. The CD-ROM has many of the budget tables in spreadsheet format and also contains the materials that are included on the separate *Analytical Perspectives* CD-ROM.

For more information on access to electronic versions of the budget documents (except CD-ROMs), call (202) 512-1530 in the D.C. area or toll-free (888) 293-6498. To purchase the budget CD-ROM or printed documents call (202) 512-1800.

GENERAL NOTES

1. All years referenced to are fiscal years, unless otherwise noted.
2. Detail in this document may not add to the totals due to rounding.

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ISBN 978-0-16-084796-7

PAYMENTS TO STATES UNDER FEDERAL POWER ACT—Continued

Program and Financing—Continued

Identification code 89–5105–0–2–806		2009 actual	2010 est.	2011 est.
23.95	Total new obligations	–3	–3	–3
	New budget authority (gross), detail:			
	Mandatory:			
60.20	Appropriation (special fund)	3	3	3
	Change in obligated balances:			
73.10	Total new obligations	3	3	3
73.20	Total outlays (gross)	–3	–3	–3
	Outlays (gross), detail:			
86.97	Outlays from new mandatory authority	3	3	3
	Net budget authority and outlays:			
89.00	Budget authority	3	3	3
90.00	Outlays	3	3	3

The States are paid 37.5 percent of the receipts from licenses for occupancy and use of national forests and public lands within their boundaries issued by the Federal Energy Regulatory Commission (16 U.S.C. 810).

NORTHEAST HOME HEATING OIL RESERVE

For necessary expenses for Northeast Home Heating Oil Reserve storage, operation, and management activities pursuant to the Energy Policy and Conservation Act, $11,300,000, to remain available until expended. *(Energy and Water Development and Related Agencies Appropriations Act, 2010.)*

Program and Financing (in millions of dollars)

Identification code 89–5369–0–2–274		2009 actual	2010 est.	2011 est.
	Obligations by program activity:			
00.01	NEHOR	10	11	11
10.00	Total new obligations (object class 25.2)	10	11	11
	Budgetary resources available for obligation:			
21.40	Unobligated balance carried forward, start of year	1	1	1
22.00	New budget authority (gross)	10	11	11
23.90	Total budgetary resources available for obligation	11	12	12
23.95	Total new obligations	–10	–11	–11
24.40	Unobligated balance carried forward, end of year	1	1	1
	New budget authority (gross), detail:			
	Discretionary:			
40.00	Appropriation	10	11	11
	Change in obligated balances:			
72.40	Obligated balance, start of year	9	10	10
73.10	Total new obligations	10	11	11
73.20	Total outlays (gross)	–9	–11	–12
74.40	Obligated balance, end of year	10	10	9
	Outlays (gross), detail:			
86.90	Outlays from new discretionary authority		9	9
86.93	Outlays from discretionary balances	9	2	3
87.00	Total outlays (gross)	9	11	12
	Net budget authority and outlays:			
89.00	Budget authority	10	11	11
90.00	Outlays	9	11	12

The Northeast Home Heating Oil Reserve provides an emergency supply of home heating oil supply for the Northeast States during times of inventory shortages and significant threats to immediate further supply. Two million barrels of heating oil will provide supplemental emergency supply over a 10-day delivery period, the time required for ships to carry heating oil from the Gulf Coast to New York Harbor.

Four-year contracts for the storage, operation and maintenance of the reserve were awarded in August 2007 to Hess Corp (for 1,000,000 barrels in New York harbor) to Morgan Stanley (for 750,000 barrels in New Haven, CT), and to Hess Corp (for 250,000 barrels in Groton, CT). A sale of 35,000 barrels was conducted at the time to offset storage costs. The Department repurchased 19,253 barrels of the oil in 2008. Purchase of the remainder, 15,427 barrels of oil, is scheduled for 2010. New storage contracts are planned for award in late 2011.

[NUCLEAR WASTE DISPOSAL]

[For nuclear waste disposal activities to carry out the purposes of the Nuclear Waste Policy Act of 1982, Public Law 97–425, as amended (the "NWPA"), $98,400,000, to remain available until expended, and to be derived from the Nuclear Waste Fund: *Provided*, That of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities, 2.54 percent shall be provided to the Office of the Attorney General of the State of Nevada solely for expenditures, other than salaries and expenses of State employees, to conduct scientific oversight responsibilities and participate in licensing activities pursuant to the NWPA: *Provided further*, That notwithstanding the lack of a written agreement with the State of Nevada under section 117(c) of the NWPA, 0.51 percent shall be provided to Nye County, Nevada, for on-site oversight activities under section 117(d) of the NWPA: *Provided further*, That of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities, 4.57 percent shall be provided to affected units of local government, as defined in the NWPA, to conduct appropriate activities and participate in licensing activities under Section 116(c) of the NWPA: *Provided further*, That of the amounts provided to affected units of local government, 7.5 percent of the funds provided for the affected units of local government shall be made available to affected units of local government in California with the balance made available to affected units of local government in Nevada for distribution as determined by the Nevada affected units of local government: *Provided further*, That of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities, 0.25 percent shall be provided to the affected federally-recognized Indian tribes, as defined in the NWPA, solely for expenditures, other than salaries and expenses of tribal employees, to conduct appropriate activities and participate in licensing activities under section 118(b) of the NWPA: *Provided further*, That notwithstanding the provisions of chapters 65 and 75 of title 31, United States Code, the Department shall have no monitoring, auditing or other oversight rights or responsibilities over amounts provided to affected units of local government: *Provided further*, That the funds for the State of Nevada shall be made available solely to the Office of the Attorney General by direct payment and to units of local government by direct payment: *Provided further*, That 4.57 percent of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities shall be provided to Nye County, Nevada, as payment equal to taxes under section 116(c)(3) of the NWPA: *Provided further*, That within 90 days of the completion of each Federal fiscal year, the Office of the Attorney General of the State of Nevada, each affected federally-recognized Indian tribe, and each of the affected units of local government shall provide certification to the Department of Energy that all funds expended from such payments have been expended for activities authorized by the NWPA and this Act: *Provided further*, That failure to provide such certification shall cause such entity to be prohibited from any further funding provided for similar activities: *Provided further*, That none of the funds herein appropriated may be: (1) used directly or indirectly to influence legislative action, except for normal and recognized executive-legislative communications, on any matter pending before Congress or a State legislature or for lobbying activity as provided in 18 U.S.C. 1913; (2) used for litigation expenses; or (3) used to support multi-State efforts or other coalition building activities inconsistent with the restrictions contained in this Act: *Provided further*, That all proceeds and recoveries

realized by the Secretary in carrying out activities authorized by the NWPA, including but not limited to, any proceeds from the sale of assets, shall be available without further appropriation and shall remain available until expended: *Provided further*, That of the funds made available in this Act for Nuclear Waste Disposal, $5,000,000 shall be provided to create a Blue Ribbon Commission to consider all alternatives for nuclear waste disposal: *Provided further*, That no funds provided in this Act or any previous Act may be used to pursue repayment or collection of funds provided in any fiscal year to affected units of local government for oversight activities that had been previously approved by the Department of Energy, or to withhold payment of any such funds.] *(Energy and Water Development and Related Agencies Appropriations Act, 2010.)*

Special and Trust Fund Receipts (in millions of dollars)

Identification code 89–5227–0–2–271		2009 actual	2010 est.	2011 est.
01.00	Balance, start of year	20,494	22,162	24,028
01.99	Balance, start of year	20,494	22,162	24,028
	Receipts:			
02.20	Nuclear Waste Disposal Fund	770	773	779
02.40	Earnings on Investments, Nuclear Waste Disposal Fund	1,096	1,224	1,323
02.99	Total receipts and collections	1,866	1,997	2,102
04.00	Total: Balances and collections	22,360	24,159	26,130
	Appropriations:			
05.00	Nuclear Waste Disposal	–145	–98	
05.01	Salaries and Expenses	–49	–29	–10
05.02	Salaries and Expenses	–4	–4	–2
05.99	Total appropriations	–198	–131	–12
07.99	Balance, end of year	22,162	24,028	26,118

Program and Financing (in millions of dollars)

Identification code 89–5227–0–2–271		2009 actual	2010 est.	2011 est.
	Obligations by program activity:			
00.01	Repository	76	44	
00.02	Program Direction	63	70	
10.00	Total new obligations	139	114	
	Budgetary resources available for obligation:			
21.40	Unobligated balance carried forward, start of year	10	16	
22.00	New budget authority (gross)	145	98	
23.90	Total budgetary resources available for obligation	155	114	
23.95	Total new obligations	–139	–114	
24.40	Unobligated balance carried forward, end of year	16		
	New budget authority (gross), detail:			
	Discretionary:			
40.20	Appropriation (special fund)	145	98	
	Change in obligated balances:			
72.40	Obligated balance, start of year	87	62	33
73.10	Total new obligations	139	114	
73.20	Total outlays (gross)	–164	–143	
74.40	Obligated balance, end of year	62	33	33
	Outlays (gross), detail:			
86.90	Outlays from new discretionary authority	93	98	
86.93	Outlays from discretionary balances	71	45	
87.00	Total outlays (gross)	164	143	
	Net budget authority and outlays:			
89.00	Budget authority	145	98	
90.00	Outlays	164	143	
	Memorandum (non-add) entries:			
92.01	Total investments, start of year: Federal securities: Par value	42,570	44,643	46,529
92.02	Total investments, end of year: Federal securities: Par value	44,643	46,529	48,631

The Nuclear Waste Disposal Account was established as part of the Nuclear Waste Policy Act of 1982 (P.L. 97–425), as amended, to provide funding to implement Federal policy for disposal of commercial spent nuclear fuel and high-level radioactive waste. The Administration has determined that developing a repository at Yucca Mountain, Nevada, is not a workable option and that the Nation needs a different solution for nuclear waste disposal. As a result, the 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 in 2010 and establish a Blue Ribbon Commission to develop a new strategy for nuclear waste management and disposal. All funding for development of the Yucca Mountain facility will be eliminated, such as further land acquisition, transportation access, and additional engineering. Ongoing responsibilities under the Act, including administration of the Nuclear Waste Fund and the Standard Contract, will continue under the Office of Nuclear Energy, which will lead future waste management activities. Residual responsibilities for site remediation will be assumed by NNSA and the Office of Environmental Management.

Object Classification (in millions of dollars)

Identification code 89–5227–0–2–271		2009 actual	2010 est.	2011 est.
	Direct obligations:			
	Personnel compensation:			
11.1	Full-time permanent	26	25	
11.3	Other than full-time permanent	1	1	
11.5	Other personnel compensation	1	1	
11.9	Total personnel compensation	28	27	
12.1	Civilian personnel benefits	6	5	
21.0	Travel and transportation of persons	1	1	
23.2	Rental payments to others	3	3	
25.1	Advisory and assistance services	31	6	
25.2	Other services	32	16	
25.3	Other purchases of goods and services from Government accounts	3	5	
25.4	Operation and maintenance of facilities	9	25	
41.0	Grants, subsidies, and contributions	26	26	
99.9	Total new obligations	139	114	

Employment Summary

Identification code 89–5227–0–2–271		2009 actual	2010 est.	2011 est.
	Direct:			
1001	Civilian full-time equivalent employment	243	243	

URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND

For necessary expenses in carrying out uranium enrichment facility decontamination and decommissioning, remedial actions, and other activities of title II of the Atomic Energy Act of 1954, and title X, subtitle A, of the Energy Policy Act of 1992, [$573,850,000] *$708,498,000*, to be derived from the Uranium Enrichment Decontamination and Decommissioning Fund, to remain available until expended. *(Energy and Water Development and Related Agencies Appropriations Act, 2010.)*

Special and Trust Fund Receipts (in millions of dollars)

Identification code 89–5231–0–2–271		2009 actual	2010 est.	2011 est.
01.00	Balance, start of year	4,453	4,536	4,649
01.99	Balance, start of year	4,453	4,536	4,649
	Receipts:			
02.20	Domestic Utility Fees, Decontamination and Decommissioning Fund			200
02.40	Earnings on Investments, Decontamination and Decommissioning Fund	156	224	228
02.41	General Fund Payment - Defense, Decontamination and Decommissioning Fund	463	463	497
02.99	Total receipts and collections	619	687	925
04.00	Total: Balances and collections	5,072	5,223	5,574

Terminations, Reductions, and Savings

Budget of the U.S. Government
Fiscal Year 2011

Office of Management and Budget
www.budget.gov

GENERAL NOTES

1. All years referenced for budget data are fiscal years unless otherwise noted. All years referenced for economic data are calendar years unless otherwise noted.

2. Detail in this document may not add to the totals due to rounding.

3. Web address: *http://www.budget.gov.*

Office of Management and Budget
Washington, D.C. 2010

TERMINATION: YUCCA MOUNTAIN NUCLEAR WASTE REPOSITORY

Department of Energy

The Administration has determined that Yucca Mountain, Nevada, is not a workable option for a nuclear waste repository and will discontinue the Department of Energy's program to construct a repository at the mountain in 2010. The Department will carry out its responsibilities under the Nuclear Waste Policy Act within the Office of Nuclear Energy as the Administration develops a new nuclear waste management strategy.

Funding Summary
(In millions of dollars)

	2010 Enacted	2011 Request	2011 Change from 2010
Budget Authority	197	0	-197

Justification

The Nuclear Waste Disposal Account was established as part of the Nuclear Waste Policy Act of 1982 (Public Law 97-425), as amended, to provide funding to implement Federal policy for disposal of commercial spent nuclear fuel and high-level radioactive waste. The Administration has determined that developing a repository at Yucca Mountain is not a workable option and that the Nation needs a better solution for nuclear waste disposal. The President has made clear that the Nation needs a better solution than the proposed Yucca Mountain repository, saying that such a solution must be based on sound science and capable of securing broad support, including support from those who live in areas that might be affected by the solution.

In 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. Secretary of Energy Chu has announced that he will establish a Blue Ribbon Commission to help inform the Administration as it develops a new strategy for nuclear waste management and disposal.

In the interim, all funding for development of the facility will be eliminated, such as further land acquisition, transportation access, and additional engineering. While a new strategy is developed, ongoing responsibilities under the Act, including administration of the Nuclear Waste Fund and the Standard Contract, will continue within the Office of Nuclear Energy, which will lead all future waste management activities, including research on alternative waste management and disposal pathways, such as deep borehole disposal, salt disposal, and geologic disposal sites. Residual responsibilities for site remediation will be assumed by the Office of Environmental Management and responsibilities for security at the site will be assumed by the National Nuclear Security Administration.

ATTACHMENT B

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

In the Matter of	)	Docket No. 63-001
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 09-892-HLW-CAB04
(High-Level Waste Repository)	)	February 1, 2010

U.S. DEPARTMENT OF ENERGY'S MOTION TO STAY THE PROCEEDING

Today, the President announced the Administration's budget for fiscal year 2011. In that budget, the President directed that the Department of Energy "discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010 . . . ." *Budget of the U.S. Government, Fiscal Year 2011*, Appendix at 437 (available at http://www.whitehouse.gov/omb/budget/fy2011/assets/doe.pdf); *see id., Terminations, Reductions, and Savings* at 62 (available at http://www.whitehouse.gov/omb/budget/fy2011/assets/trs.pdf) (Attached). Moreover, the budget specifies that "all funding for development of the Yucca Mountain facility will be eliminated" for fiscal year 2011. *Id.*

In accord with these determinations, DOE has advised the undersigned counsel that DOE intends to withdraw the pending application with prejudice and to submit a separate Motion, pursuant to 10 C.F.R. § 2.107(a), within the next 30 days, to determine the terms and conditions,

if any, of that withdrawal. To avoid the unnecessary expenditure of resources by the Board, the NRC Staff, and all other parties to this proceeding, DOE hereby requests that the Board stay proceedings (with one exception discussed below) in this matter through the disposition by the Board of any DOE motion under Section 2.107 filed within the next 30-days. *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), unpublished Commission Order (Jan. 30, 2004) *and Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), 1966 WL 627, 640 (N.R.C.) (Oct. 2, 1996) (Commission granting "housekeeping" stay to accommodate time for future Staff filings and parties' responsive filings); *see generally Nat'l Audubon Soc'y, Inc. v. Watt*, 678 F.2d 299, 307 (D.C. Cir. 1982) (discussing parties' agreement "to a stay of the proceedings 'to conserve judicial resources' . . . [T]he need for a stay was premised, in large part, on a new policy toward federal water projects adopted by an incoming Administration").

The one exception that DOE proposes to this stay of proceedings would apply to DOE's submission addressing the Board's questions at the January 27, 2010 Case Management Conference, as well as the other parties' written responses to that filing. DOE intends to adhere to its commitment to make that filing. That document, and other parties' responses, may provide information relevant to the winding up of this proceeding.[1]

Finally, DOE notes that Answers to this Motion are due in 10 days, but depositions are scheduled to begin approximately two weeks from today, and the electronic indexes associated with derivative discovery for those depositions under 10 C.F.R. § 2.1019 are due next week. In order to preserve the resources of the parties, DOE requests that the Board issue as soon as possible an interim Order suspending discovery pending its resolution of this Motion.

[1] In accordance with this Board's Order of December 22, 2009, that parties "not [] take any actions at this time that would prevent or hinder their ability to archive LSN documentary material in a readily accessible format," DOE will preserve and maintain its LSN collection pending further instruction.

DOE counsel has made a sincere attempt to confer with counsel for the other parties prior to filing this Motion, per 10 C.F.R. § 2.323(b), including holding a telephone conference to which counsel for each party was invited. As a result of that consultation, the following parties concur with this Motion: State of Nevada, State of California, Nuclear Energy Institute, Clark County, Nye County, Inyo County, and Eureka County.

The following parties take no position as of the time of this filing: the NRC Staff, JTS, NCAC, and the "Four Counties" (*i.e.*, Nevada Counties of Mineral, Lander, Churchill, and Esmeralda).

White Pine County opposes the Motion.

Respectfully submitted,

Signed (electronically) by Donald J. Silverman
Donald J. Silverman
Alex S. Polonsky
Counsel for the U.S. Department of Energy
Morgan, Lewis & Bockius LLP
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Scott Blake Harris
Sean Lev
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U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue, SW
Washington, DC 20585

Dated in Washington, DC
this 1st day of February

ATTACHMENT C

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

In the Matter of	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	ASLBP No. 09-892-HLW-CAB04
(High Level Waste Repository)	February 16, 2010

ORDER
(Granting Stay of Proceeding)

On February 1, 2010, the Department of Energy (DOE) moved for an interim suspension of discovery as well as a stay of most aspects of this construction authorization proceeding through the disposition of a further motion (which DOE stated that it will file within the next 30 days) seeking to withdraw its license application. DOE clarified that it was not requesting to stay "DOE's submission addressing the Board's questions at the January 27, 2010 Case Management Conference, as well as the other parties' written responses to that filing."[1] On February 2, 2010, the Board granted DOE's unopposed request for an interim suspension of discovery, pending disposition of DOE's motion to stay.[2]

DOE's motion to stay is supported by nearly all parties.[3] No party or interested governmental participant has filed a timely opposition. Therefore, to avoid potentially unnecessary expenditure of resources, but with the exception noted below, the Board grants

[1] U.S. Department of Energy's Motion to Stay the Proceeding (Feb. 1, 2010) at 2 [hereinafter DOE Motion].

[2] CAB Order (Granting Interim Suspension of Discovery) (Feb. 2, 2010) (unpublished).

[3] DOE Motion at 3; White Pine County Notice of Non Opposition to DOE's Motion to Stay (Feb. 1, 2010); NRC Staff Response to U.S. Department of Energy Motion to Stay the Proceeding (Feb. 2, 2010).

DOE's motion to stay the proceeding until the Board resolves DOE's expected motion to withdraw its license application. The grant of this stay shall not in any way affect the Board's future actions regarding the preservation and archiving of the Licensing Support Network document collections of the parties and interested governmental participants. The Board expects to set a schedule for further filings in that regard after DOE submits a status report on its archiving plan, as promised no later than February 19, 2010.[4]

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 16, 2010

[4] The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010) at 4.

ATTACHMENT D

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

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

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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

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[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

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[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

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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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ATTACHMENT E

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

In the Matter of	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	ASLBP No. 09-892-HLW-CAB04
(High Level Waste Repository)	March 5, 2010

ORDER
(Concerning Scheduling)

Before the Board are several related matters. First, the Department of Energy (DOE) has moved to withdraw its application.[1] Second, the State of South Carolina (South Carolina), the State of Washington (Washington), and Aiken County, South Carolina (Aiken County) have each petitioned to intervene, challenging whether DOE's motion should be granted and, if so, on what terms.[2] Third, the parties have not yet been afforded an opportunity to comment on DOE's filings regarding the preservation and archiving of its Licensing Support Network (LSN) document collection.[3]

The stay imposed by our February 16, 2010 Order does not prevent briefing of these matters, which shall proceed as follows:

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[1] U.S. Department of Energy's Motion to Withdraw (Mar. 3, 2010).

[2] Petition of the State of South Carolina to Intervene (Feb. 26, 2010); State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010); Petition of Aiken County, South Carolina, to Intervene (Mar. 4, 2010).

[3] The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010); The Department of Energy's Status Report on Its Archiving Plan (Feb. 19, 2010); see CAB Order (Granting Stay of Proceeding) (Feb. 16, 2010) at 2 (unpublished) (stating that a schedule for further filings regarding the preservation and archiving of the LSN documentation collection will be set in a subsequent order).

1. In accordance with CAB Case Management Order #1[4] and Commission regulations,[5] answers to the South Carolina, Washington and Aiken County petitions would ordinarily be due 25 days after service, and replies due seven days thereafter. For convenience, there shall be common filing dates: that is, answers to the three petitions shall be due Monday, March 29, 2010, and the replies of South Carolina, Washington and Aiken County shall be due Monday, April 5, 2010. To the extent practicable, the parties are encouraged to file answers jointly with other parties asserting similar positions.

2. The ten-day deadline for answers to DOE's motion to withdraw is waived.[6] The Board will set a time for responses to DOE's motion to withdraw after it has determined whether South Carolina, Washington and Aiken County shall be permitted to intervene.

3. The Board expects shortly to seek written responses from DOE to additional questions concerning DOE's LSN collection. After the Board's questions have been answered, we will establish a schedule for comments by the parties on DOE's preservation and archiving plans.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 5, 2010

[4] CAB Case Management Order #1 (Jan. 29, 2009) at 3 (unpublished).

[5] See 10 C.F.R. § 2.309(h)(1)-(2).

[6] See id. at § 2.323(c).

ATTACHMENT F

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

In the Matter of	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	ASLBP No. 09-892-HLW-CAB04
(High Level Waste Repository)	April 6, 2010

MEMORANDUM AND ORDER
(Suspending Briefing and Consideration of Withdrawal Motion)

In June 2008, the Department of Energy (DOE) filed with the NRC an application (Application) for authorization to construct a national high-level nuclear waste repository at Yucca Mountain, Nevada. The seventeen volume, 8,600 page Application—underlain by millions of pages of supporting documentation and related materials—followed a decades-long process that was initiated under the Nuclear Waste Policy Act of 1982, as amended (NWPA). The Commission contemplated that the NRC's adjudicatory proceedings on DOE's Application alone (as distinct from the NRC Staff's extensive technical review) had "the potential to be one of the most expansive proceedings in agency history."[1]

Initially, twelve potential parties petitioned to intervene, collectively presenting for adjudication some 318 contentions that alleged various problems with the Application. DOE opposed every intervention petition and each of the 318 contentions. Eventually, NRC

[1] U.S. Dep't of Energy (High Level Waste Repository), CLI-08-14, 67 NRC 402, 405 (2008).

Construction Authorization Boards admitted all but one of the petitioners as parties, and accepted most of their contentions for further adjudicatory proceedings.[2]

Quite recently, some of the parties have changed their positions. DOE has now decided that "a geologic repository at Yucca Mountain is not a workable option" for long-term disposition of the nation's spent nuclear fuel and high-level nuclear waste.[3] DOE therefore moves, pursuant to 10 C.F.R. § 2.107, to withdraw its Application.

Five new petitioners seek to intervene to oppose DOE's motion to withdraw.[4] Rather than challenging the Application, as the original petitioners did, they challenge its withdrawal as being unlawful. Several other parties (former petitioners themselves) now oppose the intervention of all the new petitioners.[5]

The principal issues raised by the new petitioners, as well as by DOE's motion itself, are presently before the United States Court of Appeals for the District of Columbia Circuit in at least three pending actions.[6] That Court's rulings have the potential to resolve or moot most if

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[2] See generally U.S. Dep't of Energy (High Level Waste Repository), LBP-09-6, 69 NRC 367 (2009), aff'd in part, rev'd in part, CLI-09-14, 69 NRC 580 (2009).

[3] U.S. Department of Energy's Motion to Withdraw (Mar. 3, 2010) at 1.

[4] Petition of the State of South Carolina to Intervene (Feb. 26, 2010) [hereinafter South Carolina Petition]; State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010) [hereinafter Washington Petition]; Petition of Aiken County, South Carolina, to Intervene (Mar. 4, 2010) [hereinafter Aiken County Petition]; Petition to Intervene of the Prairie Island Indian Community (Mar. 15, 2010) [hereinafter PIIC Petition]; National Association of Regulatory Utility Commissioners Petition to Intervene (Mar. 15, 2010) [hereinafter NARUC Petition].

[5] Answer of the State of Nevada to the State of South Carolina's Petition to Intervene (Mar. 29, 2010) at 1; Answer of the State of Nevada to the State of Washington's Petition to Intervene (Mar. 29, 2010) at 1; Answer of the State of Nevada to Aiken County's Petition to Intervene (Mar. 29, 2010) at 1; Answer of Clark County, Nevada to Petitions to Intervene of the State of South Carolina, Aiken County, South Carolina and the State of Washington (Mar. 29, 2010) at 1; Joint Timbisha Shoshone Tribal Group Response to Petitions to Intervene by the States of South Carolina and Washington, and Aiken County, South Carolina (Mar. 29, 2010) at 1.

[6] In re Aiken County, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); Ferguson v. Obama, No. 10-1052 (D.C. Cir. filed Feb. 25, 2010); South Carolina v. U.S. Dep't of Energy, No. 10-1069 (D.C. Cir. transferred Mar. 25, 2010). The latter action was initiated in the Fourth Circuit on February 26, 2010, but was subsequently transferred to the District of Columbia Circuit.

not all issues raised by the new petitions and by DOE's motion before this Construction Authorization Board. In the interest of judicial efficiency, therefore, the Board will suspend further briefing of the new petitions to intervene and consideration of DOE's motion, pending guidance from the Court of Appeals on the relevant legal issues. The parties are encouraged to seek expedited resolution of their claims in that Court.

I. Procedural Status

On February 16, 2010, this Board granted (with certain exceptions) DOE's motion to stay discovery and other aspects of this adjudicatory proceeding until the Board resolves DOE's motion to withdraw the Application.[7] The Board is not generally empowered to direct the NRC Staff in the performance of the Staff's independent responsibilities.[8] Hence, the Staff's independent technical review of the Application is not affected by the Board's stay order. The Staff has informed the Board that it expects to complete two of the five volumes of the Safety Evaluation Report (SER) on the Application by November 2010.[9] Even if the Board had not stayed discovery, hearings on contested factual issues would ordinarily not take place until after the NRC Staff issues relevant portions of the SER.

II. New Petitions to Intervene

The five new petitioners allege their respective interests in this proceeding to be as follows:

A. Washington

Washington hosts DOE's Hanford Nuclear Reservation (Hanford), which stores radioactive, mixed radioactive and hazardous wastes.[10] The wastes are stored in underground

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[7] CAB Order (Granting Stay of Proceeding) (Feb. 16, 2010) (unpublished).

[8] See, e.g., Shaw Areva Mox Servs., LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 (2009).

[9] See CAB Case Management Order #3 (Feb. 1, 2010) at 1 (unpublished).

[10] Washington Petition at 2.

tanks, of which more than one third are leaking and have discharged approximately one million gallons of waste into the soil at the Hanford site. The released wastes have migrated into the Hanford groundwater, which flows into the Columbia River, negatively impacting Washington's environment and economy.[11]

DOE has proposed to process the released wastes in a waste treatment plant (WTP), thereby eliminating the need to store waste in leaking tanks.[12] Pursuant to the NWPA, the design is predicated on the assumption that the WTP's high-level waste output will be disposed of at the national repository. Accordingly, the WTP was designed and partially constructed to satisfy Yucca Mountain facility performance standards. To date more than half of the design and construction has been completed for the four components of this complex plant. Termination of the Yucca Mountain project at this time might require the WTP facility to be demolished and re-constructed in accordance with another repository's waste acceptance criteria.[13] This delay would require the waste to remain in leaking storage tanks indefinitely. Additionally, Hanford is storing four other types of waste, and in the absence of a national repository, Washington fears that it will be forced to store high-level wastes indefinitely, with no designated final disposal path.[14]

B. South Carolina

The Savannah River Site (SRS) and seven commercial reactors with onsite storage of spent nuclear fuel are located in South Carolina.[15] Thus, South Carolina is uniquely situated as a potential candidate state for a waste disposal or storage facility, should the Yucca Mountain

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[11] Id. at 3.

[12] Id. at 4.

[13] Id. at 5-6.

[14] Id. at 6.

[15] South Carolina Petition at 3-4.

facility be abandoned. Further, abandonment of the Yucca Mountain project would prolong the inherent risks associated with onsite storage of high-level waste at the SRS and statewide commercial reactors. This action would require South Carolina to develop emergency preparedness and transportation plans.[16]

C. Aiken County, South Carolina

The SRS is located in Aiken County, South Carolina.[17] Aiken County also owns real property close to the SRS. Failure to go forward with the Yucca Mountain project could result in widespread contamination of spent nuclear fuel at the SRS, negatively impacting human health.[18]

D. National Association of Regulatory Utility Commissioners

The National Association of Regulatory Utility Commissioners (NARUC) is a national organization comprised of state public utility commissioners responsible for regulating the rates and conditions of interstate electricity.[19] NARUC's members have a statutory duty to protect the health, safety and economic interest of ratepayers. Pursuant to the NWPA, ratepayers have paid more than $17 billion dollars into the Nuclear Waste Fund to support the development of a geologic repository for high-level waste. Abandoning Yucca Mountain would undercut the federal government's ability to dispose of high-level waste and spent nuclear fuel and waste the billions of dollars that ratepayers have already spent on Yucca Mountain.[20]

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[16] Id.

[17] Aiken County Petition at 2.

[18] Id.

[19] NARUC Petition at 3.

[20] Id. at 4.

E. Prairie Island Indian Community

The Prairie Island Indian Community (PIIC) is a Federally-recognized Indian Tribe, located adjacent to an Independent Spent Fuel Storage Installation and the Prairie Island Nuclear Generating Plant, both of which store spent nuclear fuel.[21] Pursuant to the NWPA, this spent nuclear fuel must be permanently disposed of at the national repository, where it will no longer subject PIIC members to health and safety risks. PIIC also represents the interests of ratepayers in the Community, who are among the nation's ratepayers that have paid billions of dollars under the Standard Contract for the disposal of spent nuclear fuel.[22]

III. New Contentions

Collectively, the five new petitions proffer sixteen contentions that are based upon the NWPA and the Standard Contract;[23] the National Environmental Policy Act (NEPA); the Administrative Procedure Act (APA); the United States Constitution; and the NRC's own precedents. All sixteen contentions are legal issue contentions, which do not involve disputed facts. Moreover, all sixteen address the same basic question: whether DOE acts beyond its authority or otherwise unlawfully in seeking to withdraw the Application.

Answers to two of the new petitions—PIIC's and NARUC's—are not due until April 9, 2010. The answers to Aiken County's, South Carolina's and Washington's petitions, however, reveal three basic positions.

Ironically—because it is, after all, DOE's motion that the new petitions challenge—DOE adopts the most generous stance. DOE would allow all the new petitioners to intervene in

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[21] PIIC Petition at 2-3.

[22] Id. at 2.

[23] The Court of Appeals previously addressed the NWPA and the Standard Contract in Ind. Mich. Power Co. v. Dep't of Energy, 88 F.3d 1272 (D.C. Cir. 1996) and Northern States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754 (D.C. Cir. 1997).

opposition to its motion to withdraw.[24] "DOE believes that States and State subdivisions, affected tribes, and NARUC should be able to present their differing view of the law on this issue in this unique proceeding."[25] DOE is nonetheless "confident that its Motion to Withdraw is consistent with all governing law."[26]

The NRC Staff is more cautious. Because it concludes that neither Washington, South Carolina nor Aiken County has proffered an admissible contention, the Staff asserts that none can be admitted as a party.[27] The Staff would, however, allow Aiken County to participate as an interested governmental body under 10 C.F.R. § 2.315(c).[28] The Staff would also allow such participation by Washington and South Carolina, if requested.[29]

Among other things, the Staff asserts that the issues that may be contested in this adjudicatory proceeding are limited by the Commission's initial hearing notice—that is, to whether the Application "satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met."[30] Because all new contentions pertain to DOE's motion to withdraw, and not to the issues identified in the Commission's hearing notice, the Staff asserts that none: (1) is properly within

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[24] U.S. Department of Energy's Response to Petitions to Intervene of the State of Washington, the State of South Carolina, Aiken County, the National Association of Regulatory Utility Commissioners, and the Prairie Island Indian Community (Mar. 29, 2010) at 3.

[25] Id. at 2.

[26] Id.

[27] See 10 C.F.R. § 2.309(a).

[28] See Aiken County Petition at 3 (seeking alternative relief as an interested government body).

[29] In their replies, Washington and South Carolina have requested such participation in the alternative. State of Washington's Reply to Answers of the State of Nevada, NRC Staff, U.S. Department of Energy, and Clark County, Nevada (Apr. 5, 2010) at 13 n.16; Reply Brief of the State of South Carolina on Its Petition to Intervene (Apr. 5, 2010) at 18.

[30] NRC Staff Answer to State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 29, 2010) at 12.

the scope of the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii);[31] (2) is "material to the findings the NRC must make to support the action that is involved in the proceeding," as required by 10 C.F.R. § 2.309(f)(1)(iv);[32] or (3) controverts a specific portion of the Application, as required by 10 C.F.R. § 2.309(f)(1)(vi).[33]

The State of Nevada is least generous. Nevada—joined by Clark County, Nevada, the Joint Timbisha Shoshone Tribal Group, and the Native Community Action Council—says that Aiken County, South Carolina and Washington should not be allowed to participate at all. Specifically, Nevada asserts that none has demonstrated standing, that their petitions are untimely, and that all have failed to demonstrate substantial and timely compliance with licensing support network (LSN) requirements.[34] Nevada also argues that Aiken County has failed to demonstrate entitlement to participate as an interested governmental entity.[35]

As set forth above, the new petitioners demonstrate substantial interests in this proceeding. Although not deciding their status or the admissibility of their contentions at this time, it appears to the Board that, at a minimum, Aiken County, South Carolina and Washington would all likely qualify for participation as interested governments under 10 C.F.R. § 2.315(c), if they satisfy LSN requirements. On the same conditions, PIIC would appear, at a minimum, to qualify under 10 C.F.R. § 2.315(c) as an affected, Federally-recognized Indian Tribe if it desires such status.

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[31] See id. at 12-13.

[32] Id. at 14-15.

[33] Id. at 15.

[34] See 10 C.F.R. § 2.1012(b)(1).

[35] Nevada is silent on the potential status of South Carolina and Washington as interested governments—presumably because, unlike that of Aiken County, their original petitions did not expressly request such status in the alternative.

IV. Pending Actions in the Court of Appeals

Two of the five petitioners—Aiken County and South Carolina—have filed in the United States Courts of Appeals actions under Section 119 of the NWPA that challenge withdrawal of the Application on many of the same grounds asserted in the petitions before this Board. Both actions are now pending in the District of Columbia Circuit, where briefing is underway in the Aiken County action (which was filed there) and briefing has been scheduled in the South Carolina action (which was transferred there).[36]

Section 119 of the NWPA authorizes original actions in the federal courts of appeals that are unusual and perhaps unique. It provides that "the United States courts of appeals shall have original and exclusive jurisdiction over any civil action" alleging specified violations of the NWPA and certain related violations of the Constitution or NEPA. Unlike more typical jurisdictional statutes, Section 119 is not just limited to review of "final" agency actions.

V. Reasons for the Board to Defer to the Court of Appeal's Rulings on Legal Issues

For several reasons, the Board concludes that the pending actions in the Court of Appeals will likely yield quicker and more authoritative resolution of most if not all relevant legal issues than if the Board were to address them without waiting for the Court's guidance.

First, while the Board expresses no view on the merits of the claims before the Court of Appeals, such claims appear to be properly before the Court. Although Section 119(a)(1)(A) of the NWPA authorizes the federal courts of appeals to review pertinent "final" agency actions, in addition Section 119(a)(1)(B) vests in such courts "original and exclusive jurisdiction" over any

[36] The South Carolina action, originally filed in the Fourth Circuit, was transferred to the District of Columbia Circuit on March 25, 2010. Also pending in the District of Columbia Circuit is a third action on behalf of certain individuals from the State of Washington. Although styled as a petition for review of the "final action of the President and Secretary of Energy to abandon and not to proceed with plans to apply for and pursue a license for, and to construct a repository for high level radioactive waste at Yucca Mountain"—and not as an original action under Section 119—that matter also raises many of the same issues. Ferguson v. Obama, No. 10-1052 (D.C. Cir. filed Feb. 26, 2010).

civil action "alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part."

Assuming arguendo that the Secretary of Energy was obligated to file the Application in the first place, it would elevate form over substance not to construe allegations of unlawful withdrawal of the Application as tantamount to alleging the Secretary's "failure" regarding that obligation. Likewise, given the interactive nature of both the adjudicatory process before the Board and the NRC Staff's ongoing technical review of the Application, withdrawal would also appear tantamount to a "failure" to prosecute. In the circumstances of this Application, a motion to withdraw and failure to prosecute are two sides of the same coin.

Second, unlike in most administrative proceedings, the Court of Appeals would not likely benefit from the development of an administrative record in this case. The relevant issues are all legal issues, which require no factual development. With respect to certain issues, such as those arising under the APA and the Constitution, the NRC can claim no specialized expertise to which the Court of Appeals might wish to defer. With respect to other issues, such as those arising under the NWPA and NEPA, the NRC and DOE might each claim expertise—effectively neutralizing this factor in areas of disagreement.

Third, the pending actions in the Court of Appeals do not seem to the Board to be premature. The key issue is clear and well-defined: that is, whether DOE has lawful authority to withdraw the Application. From the standpoint of efficient judicial administration, there appears little practical advantage for the Court of Appeals to defer consideration of the matter. Given the lengthy, contested nature of the Yucca Mountain proceeding (which has spawned at least two earlier decisions of the D.C. Circuit),[37] it is unrealistic to expect that no party would appeal a final NRC decision, regardless of what it might be. If not addressed now, the same issues will almost certainly return to the Court of Appeals in the future.

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[37] See Nevada v. Dep't of Energy, 457 F.3d 78 (D.C. Cir. 2006); Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency, 373 F.3d 1251 (D.C. Cir. 2004).

Fourth, this Construction Authorization Board's own authority to adjudicate the relevant issues has been challenged. As noted, the NRC Staff contends that all the new petitioners' claims are beyond the scope of the proceeding that the Commission has asked the Board to conduct concerning the safety, security and environmental impact of the proposed Yucca Mountain facility.[38] Petitioner Washington has itself questioned the Board's jurisdiction to adjudicate certain of its claims under NEPA and the APA.[39]

Unlike the Court of Appeals, the Board has no power to issue injunctions or hold parties in contempt. Pursuant to 10 C.F.R. § 2.107, other Boards and the Commission have addressed the terms and conditions upon which an application might be withdrawn,[40] but to our knowledge no Board has ever ruled that an application cannot lawfully be withdrawn at all. Obviously, however, no agency adjudicatory tribunal has addressed this issue in the context of the unique NWPA.

The Board's authority over DOE may be especially problematic. As the Commission has instructed, absent "strong and concrete evidence otherwise," the Board must extend some degree of comity to DOE and presume "that government agencies and their employees will do their jobs honestly and properly."[41] This does not mean, of course, that it is not the Board's responsibility to "scrutinize DOE's construction authorization application with care, or that the NRC would hesitate to reject that application if it is fatally flawed."[42] But just as that

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[38] See 10 C.F.R. § 63.31.

[39] Washington Petition at 21, 24.

[40] See, e.g., Sequoyah Fuels Corp. (Source Material License No. SUB-1010), CLI-95-2, 41 NRC 179, 192-93 (1995); P.R. Elec. Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981); Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 50-55 (1999); Pac. Gas & Elec. Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 53 (1983); Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128, 1140-41 (1982).

[41] Dep't of Energy, CLI-09-14, 69 NRC at 606.

[42] Id.

responsibility does not authorize the Board to "go beyond the application itself and inquire broadly into DOE's institutional honesty and capability,"[43] arguably it might not permit the Board to overrule DOE's own judgment on whether DOE has discretion to withdraw the Application.

Finally, a fundamental objective of the NWPA—that a decision be made promptly on whether construction of the Yucca Mountain facility shall proceed—would be advanced by receiving guidance from the Court of Appeals now, rather than at the end of the process. The NWPA directs the NRC to make a prompt decision on the Application within a specified time period.[44] The implementing NRC regulations, which apply both to the NRC Staff's technical review and this Construction Authorization Board's resolution of adjudicatory challenges, do likewise.[45]

The Congressional mandate for a reasonably prompt, final decision on whether the Yucca Mountain facility will go forward is best served by adjudication of DOE's right to withdraw the Application through the Section 119 actions now pending in the Court of Appeals, where briefing has already begun. If the Board were to address the new petitions, and then turn to DOE's motion to withdraw, our rulings might first be appealed to the Commission and only thereafter to the Court of Appeals. It makes little sense to initiate such a parallel route to the Court—which in the best of circumstances could take many months—when the relevant issues are already before the Court.

VI. Conclusion

Accordingly, the Board will withhold decision on the five new petitions and DOE's motion to withdraw, pending further developments in the related actions in the United States Court of

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[43] Id. at 607.

[44] See 42 U.S.C. § 10134(d).

[45] See 10 C.F.R. Part 2, App. D.

Appeals for the District of Columbia Circuit. The parties are encouraged to seek expedited resolution of their claims in that Court.

Answers and replies regarding PIIC's and NARUC's petitions need not be filed until the Board so orders. The stay of this proceeding entered on February 16, 2010 remains in effect.[46]

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Paul S. Ryerson
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 6, 2010

[46] If they have not already done so, however, all new petitioners are encouraged to complete all steps to meet the agency's LSN regulations, including certifying that their LSN document collections are available. See 10 C.F.R. § 2.1009(b); Dep't of Energy, LBP-09-6, 69 NRC at 383. Additionally, once each petitioner certifies its LSN document collection, it must continue to meet the supplementation requirements. See PAPO Board Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 6, 2007) at 21 (unpublished); CAB Case Management Order #1 (Jan. 29, 2009) at 2 (unpublished).

ATTACHMENT G

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	ASLBP No. 09-892-HLW-CAB04
(High-Level Waste Repository)	)	April 12, 2010

U.S. DEPARTMENT OF ENERGY'S PETITION FOR INTERLOCUTORY REVIEW

I. Preliminary Statement

The U.S. Department of Energy ("DOE") respectfully requests the Commission to take immediate interlocutory review of the Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) ("M&O"), issued on April 6, 2010, without notice or opportunity for parties to comment by the Atomic Safety and Licensing Board ("Board") in the Yucca Mountain repository licensing docket. DOE further respectfully requests the Commission to review the M&O on an expedited basis and, upon review, reverse it.

In the M&O, the Board abdicates its obligation to rule on critical motions properly pending before it -- namely, DOE's motion to withdraw its license application and five petitions by putative intervenors that oppose DOE's motion. Equally important, the M&O, unless reversed, *will preclude the Commission from reviewing, and applying its expertise to, the important issues raised by DOE's motion.* Instead of allowing the Commission that opportunity, the Board encourages resolution of those issues *outside the Commission* in separate, independent litigation that two of the putative intervenors and others have brought in the U.S. Court of Appeals to challenge DOE's motion to withdraw. The M&O indicates that the Board intends to

take no further action pending receipt of "guidance" from the Court of Appeals in those other proceedings. The Board is, apparently, not interested in guidance from the Commission.

The M&O directly contradicts the position that the Commission has taken in the proceedings before the Court of Appeals. The federal government brief, filed on behalf of the Commission and DOE just two weeks before the M&O, explains in detail why the Court of Appeals should not undertake review (indeed, that it lacks authority to do so) until the Commission completes its review of DOE's motion to withdraw. As that brief states, because "the NRC has not yet rendered a decision on the motion to withdraw," review in the Court of Appeals at this time constitutes an impermissible "attempt to circumvent the administrative process."[1] The federal government accordingly urged the Court of Appeals to "allow[] the NRC to decide these issues in the first instance."[2]

The M&O runs head-on into the well-established principles discussed in the Government Response. Even more to the point, the M&O, unless promptly reversed, will deprive the Commission of the opportunity to provide, and the Court of Appeals the benefit of receiving, the Commission's considered judgment on important matters within its jurisdiction and expertise.

DOE urges the Commission to grant this petition as expeditiously as possible, lest the Court of Appeals believe that the Commission has no interest in considering the issues raised by DOE's motion to withdraw and thus act in a way that deprives the Commission of ever having an

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[1] Respondents' Response in Opposition to the Petition at 2-3, *In re Aiken County*, No. 10-1050 (D.C. Circuit Court of Appeals) (filed March 24, 2010) ("Government Response"). A copy of the Government Response, without its exhibits, is attached. The Commission noted in the Government Response that it did not speak for the Board and that the litigating position of the Commission did not necessarily represent a deliberative adjudication. *Id.* at 1, n.1.

[2] *Id.* at 20.

opportunity to do so. Given the fast-developing proceedings in the Court of Appeals,[3] the Commission should act promptly to protect its jurisdiction and interest here. If the Commission grants review, DOE further requests an expedited schedule for resolution of the issues presented by its petition. DOE likewise suggests that the Commission adopt an expedited schedule for review of its underlying motion to withdraw, either by the Board or, if the Commission so chooses, by the Commission in the first instance.

II. Background

On March 3, 2010, DOE filed a motion with the Board pursuant to 10 C.F.R. § 2.107 requesting to withdraw its license application with prejudice.[4] Five entities, consisting of two States, a county, a federally recognized Indian tribe, and an association, have filed petitions to intervene to oppose that motion.[5] The petitions advance what the Board characterized as purely legal contentions in opposition to DOE's motion.[6]

Two of the putative intervenors (South Carolina and Aiken County) have also filed petitions for judicial review and other forms of relief in federal court; both petitions are now pending in the U.S. Court of Appeals for the D.C. Circuit.[7] Several individuals who have not

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[3] On April 8, 2010, the Court of Appeals entered an Order consolidating the judicial petitions challenging DOE's motion to withdraw and directed expedited briefing, to be completed by April 13, 2010, on the motions for expedited consideration of those petitions.

[4] DOE Motion to Withdraw (Mar. 3, 2010).

[5] Petition of the State of South Carolina to Intervene (Feb. 26, 2010); Petition to Intervene of Prairie Island Indian Community (Feb. 26, 2010); State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010); Petition of Aiken County, South Carolina to Intervene (Mar. 4, 2010); National Association of Regulatory Utility Commissioners, Petition to Intervene (Mar. 15, 2010).

[6] M&O at 6.

[7] *In re Aiken County*, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); *South Carolina v. U.S. Dep't of Energy*, No. 10-1069 (4th Cir. filed Feb. 26, 2010). The latter action was transferred to the D.C. Circuit on March 25, 2010.

sought to intervene in this proceeding have filed a third petition for judicial review in that same court.[8]

The Board issued scheduling orders for briefing on the petitions to intervene.[9] The parties completed briefing on the first three petitions on April 5, 2010. The Board issued the M&O the next day. The Board did so without notice and opportunity for the parties to be heard, and before the completion of briefing on the remaining two petitions.

In the M&O, the Board observed that the petitions for judicial review are based on "many of the same grounds asserted in the petitions before this Board"[10] and then opined, without benefit of briefing or argument by the parties or reference to the Government Response, that: (1) the claims "appear to be properly before the Court";[11] (2) the Court of Appeals "would not likely benefit from the development of an administrative record";[12] (3) "the pending actions in the Court of Appeals do not seem to the Board to be premature";[13] (4) the Board might not be permitted "to overrule DOE's own judgment on whether DOE has discretion to withdraw the Application";[14] and (5) any decision by the Board and then the Commission on DOE's motion to withdraw is likely to be appealed to the Court of Appeals.[15]

For these reasons, the Board held that it would "withhold decision on the five new petitions and DOE's motion to withdraw pending further developments in the related actions in

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[8] *Ferguson v. Obama*, No. 10-1052 (D.C. Cir. filed Feb. 25, 2010).

[9] Order (Concerning Scheduling) (March 5, 2010); Order (March 15, 2010).

[10] M&O at 9.

[11] *Id.*

[12] *Id.* at 10.

[13] *Id.*

[14] *Id.* at 12.

[15] *Id.*

the" Court of Appeals.[16] The Board additionally "encouraged" the parties "to seek expedited resolution of their claims in that Court."[17]

III. Discussion

The Commission has inherent "supervisory power over adjudications to step in at any stage of a proceeding and decide a matter itself." *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 N.R.C. 79, 85 (1992); *see also Pa'ina Hawaii, LLC* (Materials License Application), CLI-09-17, __ N.R.C. __, Docket No. 30-36974-ML, 2009 WL 2486185 *1 (N.R.C.) (Aug. 13, 2009) (slip op. at 2); *U.S. Dept. of Energy* (High Level Waste Repository), CLI-08-11, 67 N.R.C. 379, 383 (2008); *U.S. Energy Research & Develop. Admin.* (Clinch River Reactor Plant), CLI-76-13, 4 N.R.C. 67, 75-76 (1976). Indeed, the Commission has exercised this authority on its own initiative. *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-01, __ N.R.C. __, 2007 WL 96998 (N.R.C.) (Jan. 11, 2007) (Commission took *sua sponte* review of otherwise unreviewable decision, despite rejecting petitioner's request for certification, in view of the "significant" and "novel" issues raised" by licensing board orders).

This case presents an extraordinarily compelling circumstance for the Commission's exercise of its supervisory authority. The M&O is a direct threat to the Commission's authority to act in this significant proceeding. If allowed to stand, the M&O will deprive the Commission of its rightful opportunity to apply its expertise and perspective on important questions involving the interpretation of statutes and regulations within its jurisdiction. Instead of providing the Commission that opportunity, the Board has arrogated to itself the unprecedented authority to certify those issues to a federal court, and, in so doing, has cut the Commission out of the

[16] *Id.* at 12-13.

[17] *Id.* at 13.

adjudicatory process.

The Board's decision is misguided -- turning on their heads core principles of administrative procedure. The recent Government Response filed on behalf of the Commission and DOE in the Court of Appeals relied on those very principles to urge it not to act until the Commission ruled on the motion to withdraw. The relevant principles include lack of ripeness,[18] failure to exhaust administrative remedies,[19] and lack of final agency action.[20] Those principles require the Court of Appeals to defer action until the Commission has issued a final, reviewable decision. The M&O would prevent that from ever occurring and may lead to the courts resolving this case without any decision by the Commission as to the motion to withdraw.

Nor does the Board's rationale for reaching a contrary conclusion survive scrutiny. Most basically, the Board is fundamentally incorrect in ascribing little benefit to the Commission's consideration of DOE's motion to withdraw. DOE's motion is brought under one of the Commission's regulations, 10 C.F.R. § 2.107, which § 114 of the NWPA makes directly applicable to this proceeding.[21] The Commission's construction of its own regulation as it applies in this context is thus central to this case and should be of significant assistance to the Court of Appeals. Indeed, *as the Board itself acknowledged*, the Commission has expertise in the interpretation of the NWPA (and NEPA).[22] Accordingly, far from what the Board imagined, this is indisputably an occasion in which the Court of Appeals would benefit from agency

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[18] Government Response at 15-18.

[19] *Id.* at 18-20.

[20] *Id.* at 9-11.

[21] *See* NWPA § 114(d), 42 U.S.C. § 10134(d) ("The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications . . . .").

[22] M&O at 10.

review. The Court of Appeals may be required to defer to the Commission's reasonable interpretations made in ruling on DOE's motion to withdraw and thus would unquestionably benefit from final agency action.[23]

The Board likewise erred in suggesting that DOE's expertise under the NWPA might "neutralize" the Commission's expertise "in areas of disagreement."[24] The issue is wholly speculative, and, in any event, any potential for conflict in no way diminishes the importance of agency review and the development of a record for the Court of Appeals. If anything, the potential for *agreement* between DOE and the Commission strongly favors allowing the administrative process to proceed to completion before the Court of Appeals acts because that agreement would present an especially compelling occasion for deference.

Also infirm is the Board's concern about deferring to DOE's judgment in deciding to withdraw its license application. The Board has jurisdiction to decide DOE's motion,[25] and it did not conclude otherwise. That the Board may have to defer to DOE on some issues when exercising that jurisdiction provides no reason in law or logic for the Board to forgo deciding matters before it. Any deference incumbent on the Board is a consequence of the statutory scheme Congress enacted and is no cause for inaction. Indeed, the Board's action can be read as an attempt to avoid legally binding principles it would prefer did not apply.

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[23] *E.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' . . . This broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program' . . . .") (citations omitted).

[24] M&O at 10.

[25] Licensing boards are conferred "all the powers necessary" to execute their duties. 10 C.F.R. § 2.319 (g), (q) & (r).

Further, the Board's statement that judicial consideration is not "premature" suffers the same problem as its statement that claims are properly before the Court of Appeals -- it ignores settled law regarding, among other things, ripeness, exhaustion of administrative remedies, and finality, as reflected in the Government Response on these same issues recently filed in the Court of Appeals. By contrast, what is premature is the Board's suggestion that an agency record will not assist the Court of Appeals *before* the parties have had a full opportunity to make such a record. If the Board concluded that the issues posed by DOE's motion to withdraw deserve immediate attention at a higher level, the appropriate course of action would have been to follow NRC regulations and certify the issues to the Commission where the administrative record could have been completed.[26] Under no circumstances was it proper for a Board to resolve such issues by withholding action on them and bypassing the Commission by essentially "certifying" them to a federal court because the Board believes the issues are ready for decision there.

The Board's conclusion -- reached without briefing or argument -- that the petitioners' claims "appear to be properly before the Court" also grossly misreads § 119(a)(1)(B) of the NWPA. As an initial matter, the jurisdiction of the Court of Appeals is an issue for it to decide, not the Board, and even if one were to assume (incorrectly) that the Court of Appeals has statutory jurisdiction here, that would not excuse the Board from deciding the issues before it.

Beyond that, § 119 does not apply here. That provision vests in the Courts of Appeals "original and exclusive jurisdiction" over actions "alleging the failure of the Secretary [of Energy], the President, or the Commission to make any decision, or take any action, required under this part."[27] The Board claims that the withdrawal of the application would constitute a

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[26] 10 C.F.R. §§ 2.319(*l*), 2.1015(d).

[27] 42 U.S.C. § 10139(a)(1)(B).

failure to act, but that conclusion is contrary to precedent.[28] Separate and apart from that, § 119 parallels the general judicial review provisions of the Administrative Procedures Act, 5 U.S.C § 706, dealing with review of agency actions, § 706(2), and failures to act, § 706(1), respectively. The well-developed law under the APA imposes requirements of ripeness, exhaustion, and finality to claims under either provision, and those requirements likewise apply to the parallel provisions of the NWPA.[29] There is nothing in § 119 or any other provision of the NWPA that establishes that Congress intended to depart from these settled administrative principles to favor pre-emptive judicial review when it included the language from the APA into § 119.[30]

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[28] The Board's suggestion that the withdrawal of the application is a failure to act is incorrect. DOE has acted. The potential intervenors may or may not agree with DOE's action, but courts have held that challengers to agency actions cannot dress up their challenges about the sufficiency of such action as a supposed failure to act. *See, e.g., Public Citizen v. NRC*, 845 F.2d 1105, 1108 (D.C. Cir. 1988); *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991); *see also Ecology Center, Inc. v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999) ("complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act'" is not a failure to act). *Ecology Center* quoted *Watkins*, 939 F.2d at 714 n.11 (9th Cir. 1991), a case that arose under § 119(a)(1)(B).

[29] Regarding exhaustion, the Ninth Circuit held in *General Atomics v. NRC*, 75 F.3d 536, 541 (9th Cir. 1996), that it "is well established in administrative law that before a federal court considers the question of an agency's jurisdiction, sound judicial policy dictates that there be an exhaustion of administrative remedies" and it "requires that 'an agency be accorded an opportunity to determine initially whether it has jurisdiction.'" *Id.* (citation omitted); *see also Darby v. Cisneros*, 509 U.S. 137, 137-38 (1993) (exhaustion applies to actions under the APA "to the extent that it is required by statute or by agency rule as a prerequisite to judicial review."). Concerning finality, an agency action must be final to be judicially reviewable. *E.g., National Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005) ("First, the action under review must mark the consummation of the agency's decisionmaking process - it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which rights or obligations have been determined, or for which legal consequences flow.") (citation omitted). Regarding ripeness, the D.C. Circuit dismissed Nevada's petition from review in an earlier challenge because it was not "ripe." *Nevada v. DOE*, 457 F.3d 78, 85 (D.C. Cir. 2005) (a "'claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'") (citation omitted).

[30] *E.g., Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (there is a "well-settled presumption that Congress understands the state of existing law when it legislates.") (citation omitted); *Louisiana Pub. Serv. Com'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007) ("Congress

Finally, the Board's surmise that the Commission's decision on DOE's motion to withdraw will be appealed to the Court of Appeals provides no justification for the Board's abdication. The prospect of ultimate judicial review is routine in agency adjudicatory proceedings. That prospect has never justified short-circuiting the completion of the administrative process in favor of a preemptive judicial ruling.

IV. Conclusion

The M&O is the type of decision that the Commission's supervisory power is intended to correct. DOE respectfully urges the Commission to accept the M&O for interlocutory review and to reverse it as promptly as possible. If the Commission grants review, DOE is willing to accept any expedited schedule for resolution of the issues presented by its petition. DOE is likewise willing to agree to an expedited schedule for review of the underlying motion to withdraw, either by the Board or, if the Commission so chooses, by the Commission in the first instance.

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is presumed to know how the courts have interpreted extant law when it enacts new law.") (citation omitted).

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY
By Electronically Signed by Donald P. Irwin

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ATTACHMENT H

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

09-892-HLW-CAB04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

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

THE DEPARTMENT OF ENERGY'S STATUS REPORT ON ITS ARCHIVING PLAN

In its "Answer to the Board's Questions at the January 27, 2010 Case Management Conference," filed by the U.S. Department of Energy ("DOE") on February 4, 2010, with the Atomic Safety and Licensing Board Construction Authorization Board 04 ("Board") ("DOE's February 4, 2010 Answer"), DOE stated that it "will continue to comply with LSN requirements during the remainder of the licensing proceeding and will preserve and archive its project records thereafter in compliance with federal requirements and consistent with DOE's objective of preserving the core scientific knowledge from the Yucca Mountain project." DOE's February 4, 2010 Answer, at 2. DOE further stated that it would "provide the Board a status report on its archiving plan by no later than February 19, 2010." *Id.* at 4. Accordingly, DOE provides the following status report regarding the archiving plan for its document collection on the Licensing Support Network ("LSN").

1. **LSN Participant Website.** DOE reaffirms that it will keep its LSN participant website compliant and accessible via the NRC's LSN portal until there is a final non-appealable order dismissing the license application for a repository at Yucca Mountain and terminating these proceedings. That includes maintaining the existing functionalities of its LSN website during the pendency of this proceeding, including any appeals, as long as the NRC maintains its LSN portal. Further, DOE will add to its LSN collection any existing documentary material that is currently in process for production onto the LSN notwithstanding the suspension order. Also, DOE expects to transition responsibility for keeping its LSN participant website operational, and for any archiving of DOE's LSN collection, to DOE's Office of Nuclear Energy from DOE's Office of Civilian Radioactive Waste Management ("OCRWM"), though DOE reserves the right to assign implementation of these responsibilities to another DOE office to maximize efficiency. Such transition will not affect the functionality of DOE's LSN collection.

2. **Request for Records Disposition Authority**. Since its February 4, 2010 filing, DOE has undertaken further discussions with representatives of the National Archives and Records Administration ("NARA") regarding the maintenance and disposition of its LSN documents after the conclusion of this proceeding. Based on those discussions, and in order to comply with the Federal Records Act and the requirements of NARA, DOE plans to file with NARA a "Request for Records Disposition Authority" (Standard Form 115 or SF-115) for DOE's LSN collection. In a SF-115, an agency recommends final action or "disposition" for its records. Following receipt of a SF-115, NARA staff reviews the recommended disposition set forth on the SF-115, solicits public comments through a Federal Register notice, and determines if the recommended disposition is appropriate. Although NARA will consider DOE's disposition recommendation, NARA is the agency authorized to decide how long records will be

retained and whether any portion of the DOE LSN collection should be deemed permanent (i.e., never destroyed). Legal title to any records deemed permanent will transfer to NARA in accordance with the instructions contained in the SF-115. DOE will work with NARA to determine an appropriate retention schedule to recommend for its LSN collection that is consistent with DOE's objective of preserving the scientific knowledge from the Yucca Mountain project.

Barring unforeseen circumstances, DOE intends to file its SF-115 for its LSN collection as soon as possible and, in any event, within sixty days of this status report. NARA has advised DOE that the SF-115 review process and approval usually takes approximately one year to complete but could take longer. When the SF-115 is approved by NARA, adherence to the disposition instructions contained in the SF-115 is mandatory.

NARA record formatting requirements may vary depending on NARA's characterization of DOE's records as temporary (which could be for a hundred years or longer) or permanent. NARA staff have indicated that, if the records are deemed temporary, the electronic records that comprise DOE's LSN collection are acceptable in their current format. If NARA categorizes the records as permanent, DOE likely would need to seek exemptions from NARA for those records in compressed TIFF or JPEG format. If such exemptions were not granted, DOE would work with NARA to transfer the records to NARA in a manner acceptable to NARA. However, regardless of the categorization NARA gives DOE's LSN collection, NARA staff has confirmed with DOE that (1) NARA would not require the DOE LSN collection to be converted to PDF format, and (2) NARA would not require DOE to restructure its LSN collection to archive each document in that collection as a single file, rather than being stored page by page in separate

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Original Signed by Michael R. Shebelskie

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ATTACHMENT I

Statement of Edward F. Sproat, III, Director
Office of Civilian Radioactive Waste Management
U.S. Department of Energy
Before the
Subcommittee on Energy and Air Quality
Committee on Energy and Commerce
U.S. House of Representatives

July 15, 2008

Mr. Chairman and Members of the Committee, I appreciate the invitation to appear before the Committee to discuss the current status of the Yucca Mountain Program, including funding and liability issues associated with the development and operation of the repository.

In July 2006, I appeared before this Committee to discuss my plans to move the Yucca Mountain Program forward. I outlined four strategic objectives that I intended to pursue and implement during my tenure as Director:

1. Submit a high-quality and docketable License Application to the United States Nuclear Regulatory Commission (USNRC) no later than June 30, 2008;

2. Design, staff, and train the Office of Civilian Radioactive Waste Management (OCRWM) organization such that it has the skills and culture needed to design, license, and manage the construction and operation of the Yucca Mountain Project with safety, quality, and cost effectiveness;

3. Develop and begin implementation of a comprehensive national transportation plan that accommodates State, local and Tribal concerns and input to the greatest extent practicable; and

4. Minimize the Government's liability associated with the unmet contractual obligations to move spent nuclear fuel from nuclear plant sites.

In my testimony, I also outlined a number of intermediate milestones with dates that would need to be met in order to submit the License Application, including supplementing the repository environmental impact statement. I am pleased to report that we met or beat all but one of those milestones (we missed one by two weeks) and submitted the License Application to the USNRC on June 3 of this year in spite of FY 2007 and FY 2008 appropriations reductions totaling over $200 million less than the President's requests. We were able to accomplish this due to significant improvements the Program has made in management practices and processes. Following a 90-day acceptance review by the USNRC, the Department of Energy (the Department or DOE) believes the License Application will be docketed, thus beginning the formal licensing phase that is anticipated to last three to four years.

Concerning organizational development, the Program is transitioning from a science focus to a project execution focus and the organization must be ready to function successfully as a USNRC licensee to construct and operate the repository, as well as manage the transport and receipt of spent nuclear fuel and high-level radioactive waste.

Internal assessments have identified the need to establish and improve critical business processes, implement human capital management systems to provide a high quality workforce, and implement the organizational structure necessary to achieve optimal productivity and efficiencies during the licensing, construction, and operation phases of the project. The Department is currently developing and implementing the management processes and performance indicators needed to drive continuous improvement, improve individual employee and management job performance, and develop leadership capabilities.

Our focus on transportation has increased. The Department has issued a final rail alignment environmental impact statement for the Nevada Rail Line, submitted an application to the Surface Transportation Board at the U.S. Department of Transportation for a certificate of public convenience and necessity to construct and operate the proposed rail line, and issued a draft National Transportation Plan for comment. In May 2008, the Department also awarded contracts for the design, licensing and demonstration of the Transportation, Aging, and Disposal (TAD) canister system. The TAD canister is planned to be the primary means for packaging spent nuclear fuel for transportation to, and disposal in, the repository at Yucca Mountain. The TAD canister will minimize the need for repetitive handling of spent nuclear fuel by using the same canister from the time the fuel leaves a nuclear power plant; it is a significant step in the transportation planning process.

The DOE has also actively worked with the Department of Justice to achieve settlements

with more than 25 percent of the nuclear industry in connection with lawsuits relating to the Government's delay in beginning acceptance of spent nuclear fuel. The growing liability associated with the Department's inability to begin acceptance of spent nuclear fuel under the Standard Contracts with utilities provides further impetus for the Federal government to move forward with the repository program. To make this happen, it is essential that the Department have access to the Nuclear Waste Fund and its revenue streams as intended under the Nuclear Waste Policy Act of 1982.

To allow the licensing of new nuclear plants, we have informed utilities interested in constructing new reactors that DOE is prepared to discuss a revision to the Standard Contract to cover the new plants. The Department has developed an amendment to the Standard Contract which we believe adequately protects the interests of the taxpayer and the contract holder. The Nuclear Waste Policy Act of 1982 requires that utilities have such a disposal contract with DOE, or be engaged in good faith negotiations with DOE for such a contract, before USNRC may issue a license for a new commercial reactor. Numerous utilities have recently indicated their desire to enter into contracts with the Department for new nuclear power plants they intend to construct. Execution of disposal contracts with the utilities is an essential step in the development of new reactors that are needed to meet our Nation's growing demands for electricity.

My office has also completed four reports that are in DOE review and we expect that they will be released in the near future. The first report is the Total System Life Cycle Cost estimate for the development, construction, operation, and final decommissioning

of the Yucca Mountain repository system and the second report is the fee adequacy assessment of the 1 mil per kilowatt/hour fee paid by nuclear utilities into the Nuclear Waste Fund using the new total cost estimate. The third report addresses the need for a second repository and it is required by the Nuclear Waste Policy Act of 1982 to be submitted by the Secretary of Energy to the President and the Congress. The fourth report concerns the interim storage of spent nuclear fuel from decommissioned reactors, as requested in the House Report that accompanied the Consolidated Appropriations Act, 2008.

FUNDING REFORM

The significant reductions in appropriations funding for FY 2007 and FY 2008 have negated the Department's ability to meet the March 2017 opening date I outlined for this Committee in 2006. To have confidence in any milestones after 2008, it is imperative that the funding process for the OCRWM Program allow the Nuclear Waste Fund and the annual receipts from the nuclear waste generators to be used for their intended purpose. The Nuclear Waste Policy Act of 1982 established the requirement that the generators of spent nuclear fuel must pay for its disposal costs. As a result, the Nuclear Waste Fund was created and is funded by a 1 mil per kilowatt-hour fee on all nuclear generation in this country. As of today, the Fund has a balance of approximately $21 billion which is invested in U.S. Treasury instruments. The Government receives approximately $750 million per year in revenues from on-going nuclear generation and approximately $1 billion from interest earnings.

At the present time, due to technical scoring requirements, the Department cannot receive appropriations from the Nuclear Waste Fund equal to its annual fee receipts or interest or some combination of the two to use for their intended purpose without incurring a significant recorded negative impact on the Federal budget deficit. The monies collected are counted as mandatory receipts in the budgetary process, and spending from the Nuclear Waste Fund is scored against discretionary funding caps for the appropriations process. The Administration has proposed fixing this problem by reclassifying mandatory Nuclear Waste Fund fees as discretionary, in an amount equal to appropriations from the Fund for authorized waste disposal activities. Funding for the Program would still have to be requested by the President and appropriated by the Congress from the Nuclear Waste Fund.

The projected budget authority needed through repository construction is well above current and historic levels, and the current funding level is insufficient to build the repository and the transportation system. The current funding level will not allow the placement of the design and construction contracts for the repository or the transportation systems. In short, DOE will not be able to execute its responsibilities under the Nuclear Waste Policy Act of 1982 and will not be able to set a date for meeting its contractual obligations. Government liability will continue to grow with no apparent limit.

LIABILITY

The calculation of potential liability costs to taxpayers is a complex matter that depends on a number of variables that change year to year; however, on average the taxpayers' liability will increase $500 million annually for every year the Department is required to delay the opening of Yucca Mountain due to funding shortfalls. The DOE estimates that taxpayers' potential liability to contract holders who have paid into the Nuclear Waste Fund will increase from approximately $7 billion to approximately $11 billion because the opening of the repository is delayed from 2017 to 2020. Moreover, the liability costs to the taxpayers do not include the additional costs associated with keeping defense waste sites open longer than originally anticipated. The Department has not yet estimated those costs. It can be seen, however, that each year of delay in opening the repository has significant taxpayer cost implications. Therefore, the Administration believes it is in the Nation's best interest to expedite construction of the repository and the transportation infrastructure necessary to bring both defense and commercial spent nuclear fuel and high-level waste to Yucca Mountain.

CONCLUSION

Two years ago, when I first appeared before this Committee, I made a number of commitments intended to show that the Yucca Mountain Program was viable and could make progress. I am pleased to report that we have met those commitments, developed and submitted the long delayed License Application to the USNRC, and made substantial

progress in improving the management of this Program. I have every confidence in the senior Federal management team who will run this Program following my departure. They will need the help of Congress, however, to obtain the funding required to execute their mission. Assuming the USNRC grants the Department a Construction Authorization to build the repository in the next three to four years, the Department could be ready to begin accepting spent nuclear fuel by 2020, but only if adequate funding is provided. For the DOE to achieve its mission, it must be allowed to use the Nuclear Waste Fund and its revenue streams as intended by Congress when the Fund was established.

Thank you for this opportunity to discuss the status of the Program. I would be pleased to answer any questions the Committee may have at this time.

ATTACHMENT J

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

In the Matter of	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	ASLBP No. 09-892-HLW-CAB04
(High Level Waste Repository)	July 21, 2009

ORDER
(Concerning Serial Case Management)

On July 10, 2009, the NRC Staff responded to the Board's July 2, 2009 order concerning scheduling.[1] The Staff stated that it will not be able to issue its Safety Evaluation Report (SER) in accordance with the schedule in 10 C.F.R. Part 2, Appendix D.

Rather, at present, the Staff intends to issue the SER serially. The Staff estimates that the SER will be issued as follows: Volume 1 (Review of General Information) in March 2010 and Volume 3 (Review of Repository Safety After Permanent Closure) in September 2010. The Staff asserts that completion dates for three other volumes – Volume 2 (Review of Repository Safety Before Permanent Closure); Volume 4 (Review of Administrative and Programmatic Requirements); and Volume 5 (License Specifications and Conditions) – cannot be estimated with a reasonable degree of certainty at this time. In the absence of a Staff estimate, unless and until informed to the contrary, the Board will assume solely for case management purposes that these volumes will be issued approximately as follows: Volume 4 (December 2010); Volume 2 (October 2011); and Volume 5 (February 2012).

[1] NRC Staff Answer to the CAB's July 2, 2009 Order Concerning Scheduling (July 10, 2009); Licensing Board Order (Concerning Scheduling) (July 2, 2009) (unpublished).

The fact that the Staff will likely issue the SER serially, over several years, requires a different approach to scheduling discovery and hearings than would be appropriate if the entire SER were available in April 2010, as contemplated by Appendix D. Few non-NEPA contentions can be adjudicated before relevant portions of the SER are issued. To proceed expeditiously and efficiently, therefore, the Board believes that discovery and hearings should proceed serially as well. Accordingly, to assist the Board in preparing a Case Management Order, the Board directs the parties as follows:

First, the NRC Staff shall clarify the subject matter of each of the five volumes of the SER. Specifically, on or before July 31, 2009, the Staff shall file and serve electronically an explanation of which specific sections of the Safety Analysis Report (SAR) or other portions of the Application pertain to each of the five SER volumes.

Second, all parties shall consult and seek agreement upon responses to the following questions:

> 1. Which admitted contentions are associated with each of the five proposed volumes of the SER?
>
> 2. Separately, which admitted legal issue contentions, as identified in the Construction Authorization Boards' May 11, 2009 Memorandum and Order,[2] are associated with each of the five proposed volumes of the SER?
>
> 3. As to each admitted legal issue contention, what other admitted Safety, NEPA or Miscellaneous contentions might potentially be resolved on the basis of how that legal issue contention is decided?
>
> 4. Which admitted NEPA contentions have no safety component, such that they could efficiently and appropriately be adjudicated without regard to the status of the SER or any similar safety-related contention?
>
> 5. Which, if any, admitted NEPA contentions (in addition to NYE-NEPA-001) involve matters that are the subject of pending supplementation of DOE's environmental impact statement concerning the proposed repository?
>
> 6. Which, if any, contentions identified in response to question 4, but not in response to question 5, require discovery before being ripe for adjudication? Describe the general nature of any such discovery.

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[2] U.S. Dep't of Energy (High Level Waste Repository), LBP-09-06, 69 NRC __ (May 11, 2009).

The parties shall file their joint response to the foregoing six questions on or before August 17, 2009. To avoid potential confusion, contentions should be identified in the same manner as in Attachment A to the Construction Authorization Boards' May 11, 2009 order (e.g., JTS-NEPA-001). In the event one or more parties cannot agree, any differing views shall be filed within five (5) days of the majority filing.

Given the range of issues to be addressed in light of the Staff's July 10 response, it will be more productive to meet with the parties in person, rather convene a teleconference as originally contemplated by the Board's July 2 order. Accordingly, after receiving the parties' responses to the foregoing questions, the Board expects to schedule a further prehearing conference in the Las Vegas Hearing Facility. The parties should hold September 14 and, if necessary, September 15, 2009, as tentative dates. The order scheduling the conference will specify issues that the Board wishes the parties to be prepared to address, in light of the parties' various June filings concerning a Case Management Order and the responses to be filed in August.

The NRC Staff is reminded of the commitment in its July 2, 2009 filing to advise the Board of any significant changes to the SER completion schedule. Additionally, the Staff should immediately advise the Board if it has reason to believe that any of the Board's projections of SER volume completion dates are unrealistic.

Finally, DOE is reminded of the Board's request, in our July 2, 2009 order, that counsel for DOE undertake or cause to be undertaken a reasonable investigation in good faith whether there may be constraints upon DOE's ability to proceed in this matter. Because the Board no

longer intends to convene the teleconference at which such constraints might have been discussed, the Board requests that DOE submit a written report concerning these matters on or before August 17, 2009.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 21, 2009

ATTACHMENT K

Blue Ribbon Commission on America's Nuclear Future
U.S. Department of Energy

Advisory Committee Charter

1. **Committee's Official Designation.** Blue Ribbon Commission on America's Nuclear Future (the Commission).

2. **Authority.** The Commission is being established in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2, and as directed by the President's Memorandum for the Secretary of Energy dated January 20, 2010: Blue Ribbon Commission on America's Nuclear Future. This charter establishes the Commission under the authority of the U.S. Department of Energy (DOE).

3. **Objectives and Scope of Activities.** The Secretary of Energy, acting at the direction of the President, is establishing the Commission to 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, high-level waste, and materials derived from nuclear activities. Specifically, the Commission will provide advice, evaluate alternatives, and make recommendations for a new plan to address these issues, including:

   a) Evaluation of existing fuel cycle technologies and R&D programs. Criteria for evaluation should include cost, safety, resource utilization and sustainability, and the promotion of nuclear nonproliferation and counter-terrorism goals.

   b) Options for safe storage of used nuclear fuel while final disposition pathways are selected and deployed;

   c) Options for permanent disposal of used fuel and/or high-level nuclear waste, including deep geological disposal;

   d) Options to make legal and commercial arrangements for the management of used nuclear fuel and nuclear waste in a manner that takes the current and potential full fuel cycles into account;

   e) Options for decision-making processes for management and disposal that are flexible, adaptive, and responsive;

   f) Options to ensure that decisions on management of used nuclear fuel and nuclear waste are open and transparent, with broad participation;

g) The possible need for additional legislation or amendments to existing laws, including the Nuclear Waste Policy Act of 1982, as amended; and

h) Any such additional matters as the Secretary determines to be appropriate for consideration.

The Commission will produce a draft report to the Secretary and a final report within the time frames contained in paragraph 4.

4. **Description of Duties.** The duties of the Commission are solely advisory and are as stated in Paragraph 3 above.

A draft report shall be submitted within 18 months of the date of the Presidential memorandum directing establishment of this Commission; a final report shall be submitted within 24 months of the date of that memorandum. The reports shall include:

a) Consideration of a wide range of technological and policy alternatives, and should analyze the scientific, environmental, budgetary, financial, and management issues, among others, surrounding each alternative it considers. The reports will also include a set of recommendations regarding policy and management, and any advisable changes in law.

b) Recommendations on the fees currently being charged to nuclear energy ratepayers and the recommended disposition of the available balances consistent with the recommendations of the Commission regarding the management of used nuclear fuel; and

c) Such other matters as the Secretary determines to be appropriate.

5. **Official to Whom the Committee Reports.** The Commission reports to the Secretary of Energy.

6. **Agency Responsible for Providing the Necessary Support.** DOE will be responsible for financial and administrative support. Within DOE, this support will be provided by the Office of the Assistant Secretary for Nuclear Energy or other Departmental element as required. The Commission will draw on the expertise of other federal agencies as appropriate.

7. **Estimated Annual Operating Cost and Staff Years.** The estimated annual operating cost of direct support to, including travel of, the Commission and its subcommittees is $5,000,000 and requires approximately 8.0 full-time employees.

8. **Designated Federal Officer.** A full-time DOE employee, appointed in accordance with agency procedures, will serve as the Designated Federal Officer (DFO). The DFO will

approve or call all of the Commission and subcommittee meetings, approve all meeting agendas, attend all Commission and subcommittee meetings, adjourn any meeting when the DFO determines adjournment to be in the public interest. Subcommittee directors who are full-time Department of Energy employees, as appointed by the DFO, may serve as DFOs for subcommittee meetings.

9. **Estimated Number and Frequency of Meetings.** The Commission is expected to meet as frequently as needed and approved by the DFO, but not less than twice a year.

   The Commission will hold open meetings unless the Secretary of Energy, or his designee, determines that a meeting or a portion of a meeting may be closed to the public as permitted by law. Interested persons may attend meetings of, and file comments with, the Commission, and, within time constraints and Commission procedures, may appear before the Commission.

   Members of the Commission serve without compensation. However, each appointed non-Federal member may be reimbursed for per diem and travel expenses incurred while attending Commission meetings in accordance with the Federal Travel Regulations.

10. **Duration and Termination.** The Commission is subject to biennial review and will terminate 24 months from the date of the Presidential memorandum discussed above, unless, prior to that time, the charter is renewed in accordance with Section 14 of the FACA.

11. **Membership and Designation.** Commission members shall be experts in their respective fields and appointed as special Government employees based on their knowledge and expertise of the topics expected to be addressed by the Commission, or representatives of entities including, among others, research facilities, academic and policy-centered institutions, industry, labor organizations, environmental organizations, and others, should the Commission's task require such representation. Members shall be appointed by the Secretary of Energy. The approximate number of Commission members will be 15 persons. The Chair or Co-Chairs shall be appointed by the Secretary of Energy.

12. **Subcommittees.**

    a) To facilitate functioning of the Commission, both standing and ad hoc subcommittees may be formed.

    b) The objectives of the subcommittees are to undertake fact-finding and analysis on specific topics and to provide appropriate information and recommendations to the Commission.

c) The Secretary or his designee, in consultation with the Chair or Co-Chairs, will appoint members of subcommittees. Members from outside the Commission may be appointed to any subcommittee to assure the expertise necessary to conduct subcommittee business.

d) The Secretary or his designee, in consultation with the Chair or co-Chairs will appoint Subcommittees.

e) The DOE Committee Management Officer (CMO) will be notified upon establishment of each subcommittee.

13. Recordkeeping. The records of the Commission and any subcommittee shall be handled in accordance with General Records Schedule 26, Item 2 and approved agency records disposition schedule. These records shall be available for public inspection and copying, subject to the Freedom of Information Act, 5 U.S.C. 552.

14. Filing Date.

Date filed with Congress: MAR - 1 2010

Carol A. Matthews
Committee Management Officer