NOT YET SCHEDULED FOR ORAL ARGUMENT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050
Consolidated With Nos. 10-1052, 10-1069, 10-1082

IN RE AIKEN COUNTY,
PETITIONER

ON PETITIONS FOR MANDAMUS AND PETITIONS FOR REVIEW AND INJUNCTIVE RELIEF

# BRIEF FOR RESPONDENTS

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

**(A) Parties and Amici:** In addition to the parties, intervenors, and amici listed in Petitioners' Rule 28 certificate, Paul Ryerson, a Judge on the Atomic Safety and Licensing Board, is named as a respondent in No. 10-1050. D.C. Cir. R. 28(a)(1)(A).

**(B) Ruling Under Review:** Petitioners' brief states that Petitioners seek review of two decisions: (1) a determination allegedly made on or about January 29, 2010, by President Obama, Secretary Chu, and the Department of Energy ("DOE") to withdraw with prejudice a license application for construction of a permanent geologic repository at Yucca Mountain, Nevada, for high-level nuclear waste and spent nuclear fuel; and (2) a determination allegedly made on or about January 29, 2010, by President Obama, Secretary Chu and DOE to "unilaterally and irrevocably terminate the Yucca Mountain repository process." Br. ii. As explained in the Argument Below, there are no rulings properly subject to review by this Court.

Petitioners state that they have claims and seek relief against the Nuclear Regulatory Commission ("NRC"), *see* Br. ii, 66, but do not identify a specific NRC ruling under review.

**(C) Related Cases:** These cases have not been before this Court previously and there are no related cases.

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## GLOSSARY

| | |
|---|---|
| AEA | Atomic Energy Act |
| AEC | Atomic Energy Commission |
| APA | Administrative Procedure Act |
| AR | Administrative Record |
| ASLB | Atomic Safety and Licensing Board |
| Br. | Petitioners' Brief filed June 18, 2010 |
| DOE | Department of Energy |
| EIS | Environmental Impact Statement |
| ERDA | Energy Research and Development Administration |
| FEIS | Final Environmental Impact Statement |
| FY | Fiscal Year |
| NARUC | National Association of Regulatory Utility Commissioners |
| NEI | Nuclear Energy Institute |
| NEPA | National Environmental Policy Act |
| NRC | Nuclear Regulatory Commission |
| NWPA | Nuclear Waste Policy Act |
| OCRWM | Office of Civilian Radioactive Waste Management |
| WIPP | Waste Isolation Pilot Plan |

## STATEMENT OF JURISDICTION

Petitioners invoke § 119(a) of the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10139(a), as the basis for this Court's jurisdiction. For the reasons set forth in Argument Sections I, II, and III, the Court lacks jurisdiction to consider the petitions.

## STATUTES AND REGULATIONS

Except for the following, which are reproduced in the Addendum to this brief at 1-20, all applicable statutes and regulations are contained in the Addendum to Petitioners' brief ("Br.") at 1-25: 42 U.S.C. §§ 2013, 2201, 7133(a), 7253(a); 123 Stat. 2845, 2864-65; 10 C.F.R. § 2.107.

## STATEMENT OF ISSUES

1. Have Petitioners demonstrated standing to bring these petitions?

2. Should Petitioners' challenge to DOE's authority to withdraw the license application be dismissed under the principles of ripeness and primary jurisdiction given the absence of any final decision by NRC granting DOE's motion to withdraw the license application?

3. Does the Court have jurisdiction and have Petitioners stated a claim on which relief may be granted?

4. Should the claims against NRC be summarily dismissed?

5. Does the plain language of the NWPA repeal DOE's discretionary authority under the Atomic Energy Act ("AEA") and DOE Organization Act to withdraw the license application and to discontinue the Yucca Mountain project while exploring other alternatives?

6. Have DOE's decisions or actions violated the National Environmental Policy Act ("NEPA")?

7. Have DOE's decisions or actions violated the Administrative Procedure Act ("APA")?

8. Have Respondents violated the separation of powers principle?

9. Are Petitioners entitled to mandamus or permanent injunctive relief?

10. Should this Court dismiss the President as a named defendant or refuse to direct any relief at the President himself?

## STATEMENT OF THE CASE

These consolidated petitions purport to challenge the Secretary of Energy's exercise of his broad authority conferred by the AEA and DOE Organization Act and preserved by the NWPA. Those statutes authorize the Secretary to make discretionary policy decisions regarding disposal of nuclear waste and spent nuclear fuel. In an exercise of this authority, the Secretary has concluded that developing a permanent geologic repository at Yucca Mountain, Nevada, is not a

workable option and that, in light of advances in the scientific and engineering knowledge since Congress enacted the NWPA in 1982, a better solution is to develop alternatives to Yucca Mountain. To that end, the Secretary – at the direction of the President and with funds appropriated for this purpose by Congress – has established a Blue Ribbon Commission to evaluate alternatives to the proposed repository at Yucca Mountain and to make recommendations for a new plan for the back end of the nuclear fuel cycle; that Commission must issue draft recommendations by July 2011. The Secretary also determined that, as a policy matter, DOE will not move forward to construct and operate a permanent geologic repository at Yucca Mountain.

Given these events, DOE moved to withdraw with prejudice its pending application before NRC[1/] for construction authorization for a repository at Yucca Mountain. However, NRC has not granted DOE's motion to withdraw the license application, and, in fact, at this time an interlocutory body within NRC has denied it. The NRC itself is currently considering whether it should review, and reverse or uphold, that decision and thus there does not yet exist any final agency action that adversely affects Petitioners.

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[1/] *In the Matter of U.S. Dep't of Energy*, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04; *see* Administrative Record ("AR") 36 (hearing docket).

**A. Nature of the Petitions**

Rather than awaiting a final decision in the NRC proceeding on DOE's motion to withdraw the license application, on February 19, 2010, Petitioner Aiken County, South Carolina filed a "Petition for Declaratory and Injunctive Relief and Writ of Mandamus," seeking relief against DOE, NRC, and certain agency officials. D.C. Cir. No. 10-1050. A group of individuals residing in the State of Washington ("*Ferguson*") (10-1052), the State of South Carolina (10-1069), and the State of Washington (10-1082) also filed petitions for review in the court of appeals seeking relief against DOE, NRC, certain agency officials, and the President on February 25 and 26, and April 13, 2010, respectively.[2/]

Petitioners' brief, filed June 18, 2010,[3/] purports to bring two types of challenges: (1) for purposes of the mandamus writs sought by South Carolina and Aiken County, Petitioners assert that Respondents failed to comply with an alleged nondiscretionary duty to pursue a license construction application for the Yucca

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[2/] On May 3, 2010, this Court denied Washington's motion for a preliminary injunction because Petitioners failed to show that they will suffer irreparable harm absent a preliminary injunction.

[3/] On July 28, 2010, this Court issued an order holding the cases in abeyance to await the Commission's final decision on DOE's motion to withdraw. Although the Commission has not yet issued a decision, on December 10, 2010, this Court granted Petitioners' motion to lift the stay.

Mountain repository; and (2) for purposes of the petitions for review filed by Washington, the *Ferguson* petitioners, and South Carolina, Petitioners purport to challenge "Respondents' decision and actions to unilaterally and irrevocably terminate the Yucca Mountain repository development process." Br. 17. Petitioners allege that DOE's decisions and actions violate the NWPA, NEPA, the APA, and the separation of powers principle. Br. 35-59. Petitioners seek various declarations from this Court regarding the Respondents' obligations under the NWPA and NEPA, mandamus relief ordering DOE to pursue the application, an order vacating DOE's policy to abandon Yucca Mountain, and a permanent injunction preventing Respondents from taking additional action to abandon the Yucca Mountain process. Br. 65.

**B. Related Proceedings Before NRC**

At about the same time they filed the instant petitions, all Petitioners except those in *Ferguson* petitioned to intervene in the ongoing NRC proceeding to oppose DOE's motion to withdraw. Petitioners make largely the same arguments in the NRC proceeding as they make here. On June 29, 2010, NRC's hearing tribunal, the Atomic Safety and Licensing Board ("Licensing Board" or "Board"), issued an order that both granted the petitions to intervene (which DOE did not oppose) and denied DOE's motion to withdraw the license application. AR 36.

On June 30, 2010, the Commission, the body with final authority over NRC decisionmaking, invited briefing (now completed) on whether it should review, and reverse or uphold, the Board's decision. AR 36. As of this writing, the Commission has made no final decision on DOE's motion to withdraw. As reflected in Respondents' November 24, 2010 Status Report, it is a matter of public record that all four Commissioners participating in the case (one Commissioner has recused himself) have voted on the matter, but the Commissioners have yet to agree on a final order. Meanwhile, the NRC's Licensing Board continues to consider and decide various adjudicatory issues related to DOE's Yucca Mountain application. See AR 36 (Dec. 14, 2010, Order Deciding Phase 1 Legal Issues and Denying Rule Waiver Petitions).

Because the Commission has not reached a decision on the motion to withdraw, NRC does not join the merits-based arguments set forth in this brief on behalf of DOE and portions of both Statements bearing on the merits. NRC does join the arguments set forth in Sections II, III.A, III.B.1, and IV.

## STATEMENT OF FACTS

### A. Statutory and Regulatory Background

#### 1. Atomic Energy Act and DOE Organization Act

The AEA, enacted in 1954, established a comprehensive regulatory regime for defense and civilian nuclear energy and vested in the Atomic Energy Commission ("AEC") the exclusive, plenary responsibility to regulate nuclear materials covered by the Act. 42 U.S.C. § 2011 *et seq*.; *see, e.g., id*. §§ 2201(b), 2201(i)(3). The Secretary, as successor to the AEC,[4/] has authority and power to direct "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." 42 U.S.C. § 2013; *see also id*. §§ 2201, 7133. As made clear by the DOE Organization Act, that discretion encompasses "nuclear waste management responsibilities," including control over existing government facilities for the

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[4/] In 1974, the Energy Reorganization Act, Pub. L. No. 93-438, 88 Stat. 1233 (1974), 42 U.S.C. § 5801 *et seq*., abolished the AEC and assigned its "licensing and related regulatory" authority to the NRC. 42 U.S.C. § 5841(f). All of the AEC's other powers, including those over nuclear waste, were assigned to another new agency, the Energy Research and Development Administration ("ERDA"). 42 U.S.C. § 5814(a)-(c). Three years later, in 1977, Congress established DOE in the DOE Organization Act, Pub. L. No. 95-91, 91 Stat. 567 (1977), 42 U.S.C. § 7101, *et seq*. Among other actions, the statute merged ERDA, and all of its legal authorities and powers, into DOE. 42 U.S.C. § 7151(a).

treatment and disposal of nuclear wastes and "the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes." 42 U.S.C. § 7133(a)(8)(C). The DOE Organization Act declared that these nuclear waste management responsibilities were "already conferred by law" and were not "within the Nuclear Regulatory Commission." *Id.* § 7133(a)(8)(G).

**2. Nuclear Waste Policy Act**

In 1982, Congress enacted the NWPA, 42 U.S.C. § 10101 *et seq.*, to address further the disposal of the Nation's high-level radioactive waste and spent nuclear fuel.[5/] Subtitle A of the NWPA establishes a process for siting a permanent geologic repository and continues to delegate to DOE "primary responsibility for developing and administering the waste disposal program," including selection and development of a repository. *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988). The NWPA specifies approvals the Secretary must obtain from other entities, including the President, Congress and NRC, to *proceed* with the Yucca

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[5/] "Spent nuclear fuel" refers to irradiated nuclear fuel that has been withdrawn from a nuclear reactor, but has not been reprocessed to separate and remove the uranium and plutonium from the waste products. *See* 42 U.S.C. § 10101(23). "High-level radioactive waste" generally refers to highly radioactive waste left after spent nuclear fuel has been reprocessed and other highly radioactive material that NRC determines requires permanent isolation. *Id.* § 10101(12).

Mountain repository, but the statute requires no such approvals if the Secretary decides to *end* the project. *See* 42 U.S.C. §§ 10134(a), 10135.

As originally enacted, NWPA § 113 required the Secretary of Energy to search for potentially suitable sites for a repository and to conduct site characterization, a period of intensive on-site investigation, at sites approved by the President. 42 U.S.C. § 10132(b). Pursuant to the § 113 process, in 1986, the Secretary recommended three sites for site characterization, and the President approved that recommendation. However, before the Secretary could characterize any of the three sites, Congress amended the NWPA in 1987 to designate Yucca Mountain as the only site to be characterized by DOE for possible development as a permanent geologic repository. Pub. L. No. 100-203, 100th Cong., 1st Sess., §§ 5011(e), (f), and (g) (1987), codified at 42 U.S.C. § 10133(a).

NWPA § 113(c)(3) provides that the Secretary may terminate the project at any time during site characterization if he determines Yucca Mountain is unsuitable for a repository. 42 U.S.C. § 10133(c)(3). Upon completion of site characterization, the Secretary could decide in his discretion to recommend (or not to recommend) to the President approval of Yucca Mountain site. 42 U.S.C. § 10134(a). If the Secretary chose not to pursue the Yucca Mountain site, his decision would have become effective without approval by the President,

Congress, or any other entity. *Id*. Any recommendation to the President to approve the site must be accompanied by a Final Environmental Impact Statement ("FEIS") prepared in accordance with NWPA § 114(f) and NEPA, with exceptions that narrow the scope of alternatives that must be evaluated.[6/] 42 U.S.C. § 10134(a).

In February 2002, the Secretary transmitted to the President a recommendation to approve the Yucca Mountain site and the President recommended the site to Congress pursuant to NWPA § 114(a)(2). As permitted by NWPA §§ 115(b) and 116(b)(2), the State of Nevada submitted a notice of disapproval to Congress. 42 U.S.C. §§ 10135(b), 10136(b)(2). Nevada's disapproval had the effect of ending further consideration of the site for the repository unless Congress passed a joint resolution approving the site designation. 42 U.S.C. § 10135(c). On July 9, 2002, Congress passed a joint resolution that "approved the site at Yucca Mountain for a repository." Pub. L. 107-200, 116 Stat. 735 (2002); *see also* S. Conf. Rep. No. 107-159, 107th Cong., 2d Sess., at 13 (2002)

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[6/] NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") for "recommendation[s] or report[s] on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The President is not a federal agency and thus is not subject to NEPA. *See* 40 C.F.R. § 1508.12. For purposes of NEPA, legislation "does not include requests for appropriations." 40 C.F.R. § 1508.17.

("joint resolution will only allow DOE to take the next step in the process . . . and apply to the NRC for authorization to construct the repository at Yucca Mountain").

NWPA § 114(b) states that the Secretary "shall submit to the [Nuclear Regulatory] Commission an application for a construction authorization for a repository not later than 90 days" after a site designation becomes effective. 42 U.S.C. § 10134(b). In 2008, DOE submitted to NRC its application for construction authorization for the repository at Yucca Mountain.

NWPA § 114(d) provides that NRC shall "consider an application for . . . a repository in accordance with the laws applicable to such applications and shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of three years after the date of submission of such application." *Id.* § 10134(d). The three-year time period can be extended if reporting conditions are met. *Id.* The "laws applicable to such applications" include a long-standing NRC regulation, 10 C.F.R. § 2.107, and substantial NRC precedent allowing an applicant to request withdrawal of a license

application and empowering NRC to regulate the withdrawal's terms and conditions.[7]

DOE cannot construct a repository at Yucca Mountain absent construction authorization from the NRC. By the same token, no provision of the NWPA compels DOE to construct a repository at Yucca Mountain if NRC does approve a construction license. *See infra* at 65-68. In fact, even if NRC were to approve a construction license and DOE wanted to proceed, DOE could not construct and operate a Yucca Mountain repository absent further congressional action, as well as numerous other steps not mandated by the NWPA. *Id*.

**B. Factual Background**

In an exercise of the authority accorded him by the AEA, DOE Organization Act, and NWPA, Secretary of Energy Chu is steering DOE in a new policy direction with respect to nuclear waste disposal. Secretary Chu concluded that

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[7] In relevant part, 10 C.F.R. § 2.107 provides:

> The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

developing a permanent geologic repository for high-level waste and spent nuclear fuel at Yucca Mountain has not proven to be a workable option. *See*, *e.g.*, AR 1 at 3; AR 21 at 18. He also concluded that the technical and scientific context is significantly different today than when the NWPA was enacted, and that advances in scientific and engineering knowledge provide an opportunity to develop better alternatives to Yucca Mountain. *See*, *e.g.*, AR 1, p.3; AR 15, p. 38; AR 16, p. 18; AR 19, p. 14; AR 20, pp. 7-8; AR 21, pp. 14-15, 17-18. The Secretary accordingly decided that it is appropriate to study and consider other options and that DOE will not move forward to construct and operate a permanent repository for high-level waste and spent nuclear fuel at Yucca Mountain.

A number of factors led to the Secretary's conclusions and policy judgment. In the years leading up to 1982, nuclear utilities had only one storage option for spent fuel – onsite pool storage – and were rapidly running out of pool storage space. *See* 42 U.S.C. § 10131(a)(2); AR 36 (DOE Reply, filed May 27, 2010 (hereafter cited as "DOE Reply"), p. 29). Since 1982, dry storage of spent nuclear fuel has evolved into an option capable of providing safe and environmentally acceptable storage for at least 100 years. *See*, *e.g.*, AR 36 (DOE Reply), p. 29; AR 29, p. 59557; AR 55, pp. 11-12; AR 65, p. 5-6; 64 Fed. Reg. 68,005, 68,006 (Dec. 6, 1999); 75 Fed. Reg. 81,037, 81,071-73 (Dec. 23, 2010). The emergence of dry

storage technology provides the Nation with time to develop an alternative approach to permanent disposal. AR 36 (DOE Reply, p. 29). The scientific community's knowledge of advanced recycling technology that avoids proliferation risks has also progressed considerably in the past decades.[8/] AR 36 (DOE Reply), pp. 29-30; AR 16, p. 18. Although advanced recycling technology is still in its early stages, it has the potential to "greatly reduce the long-lived, high-level actinides in nuclear waste, and to improve the waste forms for disposal of high-level nuclear waste." AR 78, p. 57; AR 36 (DOE Reply, p. 30).

Moreover, since the NWPA's enactment, DOE has successfully constructed and operated the Nation's first deep geologic repository for the disposal of transuranic radioactive waste, the Waste Isolation Pilot Plan ("WIPP"), located in New Mexico. AR 36 (DOE Reply, p. 30); AR 79. (WIPP does not accept high-level waste.) The State of New Mexico has cooperated with DOE by granting necessary environmental permits and the local host community has been a strong supporter of the WIPP repository. AR 36 (DOE Reply, pp. 30-31); AR 79. Thus, WIPP represents an example of successful federal, state, and local cooperation in

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[8/] "Advanced recycling" refers to technologies currently under development that enable spent nuclear fuel to be reused with less of the waste problems associated with older technologies and without providing separated plutonium that could be used by rogue states or terrorists for nuclear weapons. *See* AR 47, pp. 1-2.

the development of a repository. By contrast, the State of Nevada and much of the Nevada citizenry vigorously oppose the Yucca Mountain repository. AR 36 (DOE Reply, p. 32); AR 73, p. 3; AR 74.

Based on these factors, the Secretary determined that the Nation needs a better solution for nuclear waste disposal than the proposed permanent geologic repository at Yucca Mountain and that a comprehensive study of alternative approaches to disposition of the Nation's spent nuclear fuel and high-level nuclear waste should be undertaken. Thus, as long ago as March 11, 2009, Secretary Chu announced this policy before the Senate Budget Committee, stating that "the [Fiscal Year ("FY") 2010] Budget begins to eliminate funding for Yucca Mountain as a repository for our nation's nuclear waste" because "Yucca Mountain is not a workable option." AR 1 at 3. The Secretary stated that it would be DOE's policy to "begin a thoughtful dialogue on a better solution for our nuclear waste storage needs." *Id.* Six days later, in response to questions from members of the House of Representatives Committee on Science and Technology, the Secretary reiterated DOE's new policy, explaining that the landscape had changed since the Yucca Mountain project commenced. The Secretary explained further that there is time to take a fresh look at storage and disposal of nuclear waste and develop a more

comprehensive plan, and announced that a blue ribbon panel would take a "fresh look at how we can store nuclear waste." AR 16 at 18.

In its May 2009 budget request for FY 2010, DOE reiterated its policy "decision to terminate the Yucca Mountain program while developing nuclear waste disposal alternatives" and proposed elimination of all funding for development of the Yucca Mountain facility, such as transportation access, and funding for a Blue Ribbon Commission to evaluate alternative approaches. AR 2, p. 9; *see also* AR 1, p. 3; AR 3, p. 504, AR 4 & 5. In testimony before the relevant congressional appropriations subcommittees in May and June 2009, Secretary Chu further explained DOE's new policy, and the purpose of the Blue Ribbon Commission, and made clear that "Yucca Mountain as a long-term repository is definitely off the table." AR 21, pp. 17-18; *see also* AR 20, p. 7. In October 2009, Congress appropriated funds consistent with DOE's request, specifically appropriating $5 million for the Blue Ribbon Commission to evaluate alternatives for nuclear waste disposal. *See* Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009); H.R. Rep. No. 111-278, 111th Cong., 1st Sess., at 21 (2009), *reprinted in* 2010 U.S.C.C.A.N. 1003.

On January 29, 2010, at the direction of the President, the Secretary announced the formation of the Blue Ribbon Commission, chaired by former

National Security Advisor Brent Scowcroft and former Congressman Lee Hamilton, to evaluate alternatives to a permanent geologic repository at Yucca Mountain and to make recommendations for a new plan for the back end of the fuel cycle. AR 22, 23; 75 Fed. Reg. 5,485 (Jan. 29, 2010). The Blue Ribbon Commission's charter directs it to consider, among other things: (1) "[o]ptions for safe storage of used nuclear fuel while final disposition pathways are selected and deployed," (2) "fuel cycle technologies and R&D programs," and (3) "[o]ptions for permanent disposal of used fuel and/or high-level nuclear waste, including deep geological disposal." AR 24 ¶ 3.

The Commission must issue draft recommendations by the summer of 2011, and a final report six months later. AR 24 ¶ 10. Future proposals for the disposition of high-level waste and spent nuclear fuel will be informed by the Blue Ribbon Commission's analysis. AR 7, p. 176.

In its February 2010 budget request for FY 2011, DOE stated that it "has been evaluating a range of options for bringing the [Yucca Mountain] project to an orderly close. In FY 2010, [DOE] will withdraw from consideration by [NRC] the license application for construction of a geologic repository at Yucca Mountain, Nevada, in accordance with applicable regulatory requirements." AR 7, p. 176. It

further stated that "all funding for development of the [Yucca Mountain] facility will be eliminated" for FY 2011.[9] *Id*.; *see also* AR 6, 8, 9.

DOE remains committed, however, to fulfilling the federal responsibility to provide for the permanent disposal of the Nation's spent nuclear fuel and high-level radioactive waste and to meet its contractual obligations under the Standard Contract with nuclear utilities. AR 5, 6, 7, 8. Meeting this commitment does not depend on development of a repository at Yucca Mountain. *See Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272, 1277 (D.C. Cir. 1996).

## SUMMARY OF ARGUMENT

These consolidated petitions are non-justiciable and suffer from other jurisdictional infirmities that preclude judicial review. First, Petitioners lack standing to bring these petitions because they have failed to demonstrate that they have or will suffer an imminent injury from the challenged decisions or actions that

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[9] Although Congress has not yet enacted an appropriations bill for DOE for FY 2011, the draft appropriations bill for FY 2011 reported out of the Senate Committee on Appropriations contained no funding for Yucca Mountain. S. 3635, 111th Cong., 2d Sess., reported out of committee on July 22, 2010; *see also* S. Rep. No. 111-228, 111th Cong., 2d Sess. (2010). In anticipation that Congress would appropriate zero funding for the Yucca Mountain project for FY 2011 and pursuant to authority conferred by 42 U.S.C. § 7253 (*see infra* at 44 n.16), DOE's Office of Civilian Radioactive Waste Management ("OCRWM") ceased operation on September 30, 2010. Remaining Yucca Mountain-related responsibilities, such as site closure and litigation, were assigned to other offices within DOE.

this Court can redress. Beyond that, the petitions should be dismissed under the principles of ripeness and primary jurisdiction because the NRC has not reached a final decision on DOE's motion to withdraw the license application.

Even if Petitioners were found to have standing and the petitions otherwise were justiciable, this Court lacks subject matter jurisdiction. The NWPA provides jurisdiction in the courts of appeals to review timely challenges to final decisions or actions, and the APA provides the cause of action. DOE's filing of the motion to withdraw the license application is not a final decision or action. By the same token, DOE's general policy toward Yucca Mountain is not a final action, nor are any of the specific actions that Petitioners mention (such as filing of a budget request). Petitioners thus fail to present any valid cause of action under the APA to challenge circumscribed, discrete, and final agency action. In any event, Petitioners filed suit well more than 180 days after DOE announced that it would not build a permanent repository at Yucca Mountain and thus a challenge to that decision is untimely under the NWPA.

Respondent NRC agrees Petitioners' lawsuits are premature, given the ongoing NRC adjudicatory process. But because that process is ongoing, NRC does not join DOE-specific portions of this brief, including standing, reviewability and merits arguments (and associated discussions in the Statement of the Case and

Statement of Facts). Regardless, Petitioners' opening brief makes no specific claims against NRC.

As for the other Respondents, assuming justiciability and the existence of jurisdiction and a valid and timely cause of action, the petitions should be rejected on the merits. The Secretary of Energy's broad discretionary authority under the AEA and the DOE Organization Act encompasses the power to withdraw a DOE license application and to rethink a project that in the Secretary's reasoned judgment is not in the public interest. That authority is not repealed by the NWPA. The language of NWPA § 114(b) and 114(d) does not bar the Secretary from withdrawing the license application, nor does it impose a nondiscretionary duty, enforceable by mandamus, to pursue licensing of the Yucca Mountain repository when the Secretary has decided this course is not in the public interest and that the repository will not be constructed. On the contrary, the language specifically adopts existing NRC rules, including the rule that has for many decades authorized applicants such as DOE to withdraw a pending application. Beyond that, the structure of the NWPA supports withdrawal authority because it requires approval for DOE to *proceed* with the filing of a license application for Yucca Mountain, but the NWPA does not require approval from Congress or any other entity for DOE to *end* the project. And it would be particularly awkward to construe the

NWPA to require DOE to maintain a license application when the statute plainly does not mandate – or, without further legislation, even permit – DOE actually to construct a repository at Yucca Mountain. In such circumstance, maintaining the application would be an enormous waste of limited resources. Finally, there is no support in the statute's language, structure, or legislative history for Petitioners' suggestion that the Secretary lacks authority to terminate development and construction of the project outside of the licensing process.

Petitioners' NEPA argument fares no better. The policy to terminate the Yucca Mountain program and actions implementing it do not constitute "major federal actions" for NEPA purposes and do not change the environmental status quo. They therefore do not give rise to an obligation to undertake NEPA analysis. In any event, DOE already has completed detailed NEPA analyses of a potential decision *not* to proceed with Yucca Mountain.

DOE's decisions and actions are supported by the administrative record, to the extent one is required. Any issues Petitioners have with the record stem largely from their own failure to identify the circumscribed, discrete, and final agency action being challenged. Their arguments concerning the record also fail because they mistakenly rely on inapposite requirements for agency rulemaking under the APA.

Nor did Respondents violate the separation of powers principle. *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579 (1952), is inapplicable here because Respondents do not claim to rely on inherent Presidential authority to disregard statutory law.

Finally, should Petitioners prevail on their claims, they are still not entitled to certain relief they request. Petitioners are not entitled to mandamus because, among other reasons, they have other adequate remedies available to them. Petitioners are not entitled to a permanent injunction because they have failed to show that they will suffer irreparable harm without one; indeed, this Court already denied a preliminary injunction because of the lack of irreparable injury. Petitioners also are not entitled to relief against the President because the President is not a properly named defendant in these proceedings. And, in any event, this Court typically declines to direct relief at the President where, as here, relief can be directed instead at his subordinates.

## ARGUMENT

### I. Petitioners Lack Article III Standing

Petitioners are (1) State and local governments where DOE's Hanford Site or Savannah River Site are located and (2) individuals who live, work, or recreate near these sites. Their geographic proximity to these sites, however, does not alone

confer standing. *See City of Olmstead Falls v. FAA*, 292 F.3d 261, 267 (D.C. Cir. 2002). To establish standing,[10/] Petitioners must demonstrate by affidavit or other evidence that they have suffered: (1) a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical;" that is (2) fairly traceable to the challenged action; and that is (3) likely to be redressed by the relief requested, if that relief is granted. *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Circumstances unfolding since the filing of the opening brief, lead to the conclusion that, even assuming Petitioners at one time had standing to challenge the motion to withdraw the license application, they no longer do. On June 29, 2010, the NRC Licensing Board denied DOE's motion to withdraw. Although the Commission may review the Board's decision, at this time Petitioners are not injured by the motion and thus lack standing. Because "[a] plaintiff must maintain

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[10/] Petitioners assert (Br. 19) that "the Court construes the complaint in favor of the Petitioner." At this stage of the proceeding, however, which is equivalent to the summary judgment stage in district court, Petitioners cannot rest on mere allegations in the complaint/petition, but must conclusively prove their standing. *See Sierra Club v. EPA*, 292 F.3d 895, 898-900 (D.C. Cir. 2002).

standing throughout the course of litigation," *Foretich v. United States*, 351 F.3d 1198, 1210 (D.C. Cir. 2003), this case must be dismissed.

Petitioners also lack standing for other, independent reasons. Petitioners have uniformly failed to explain in any detail what particular actual or imminent injury they have or will suffer from a withdrawal of the license application or from DOE's policy to terminate the Yucca Mountain project while exploring different alternatives to long-term disposal of spent fuel and high-level waste. Such an explanation is particularly necessary here because Petitioners were not the object of DOE's alleged decisions. *See Sierra Club*, 292 F.3d at 900.

To the extent a particularized allegation of injury can be gleaned from their submissions, Petitioners seemingly allege an injury stemming from the retention of spent nuclear fuel or high-level nuclear waste at the Hanford or Savannah River facilities that might otherwise eventually go to Yucca Mountain. Br. 20-22. Such injury is not, however, imminent because even under the most optimistic scenarios, Yucca Mountain would not open until at least 2020.

Furthermore, Petitioners' theory of injury necessarily is predicated on the false assumption that, absent the decisions that DOE has allegedly made, there would necessarily be an operating Yucca Mountain repository at some presently unidentifiable future date. Any claim predicated on the opening of a Yucca

Mountain repository is inherently speculative, distant, and contingent, and therefore insufficient to confer Article III standing. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("allegations of possible future injury do not satisfy the requirements of Article III"). Before a Yucca Mountain repository may open, a number of significant, independent contingencies would have to be resolved, including the passage of legislation. *See infra* at 65-68; Addendum at 25-26 (Zabransky Decl. (originally filed in opposition to Washington's motion for preliminary injunction)). The failure to fulfill any one of these prerequisites could derail the Yucca Mountain repository.

Contrary to Petitioners' contention (Br. 23), they have not demonstrated that every day of delay in opening a Yucca Mountain repository injures them. They cannot make this demonstration both because there is no assurance that Yucca Mountain would ever open and because it is possible that alternative strategies analyzed by the Blue Ribbon Commission could lead to taking waste *more* quickly from Hanford or Savannah River than would pursuing the Yucca Mountain alternative.

For similar reasons, a favorable judgment is unlikely to redress Petitioners' alleged injuries. To satisfy the redressability aspect of standing, there must be a "substantial likelihood" that the spent nuclear fuel and high-level nuclear waste at

the Hanford and Savannah River facilities would be transported away from those sites sooner than it would be without the requested judicial relief. *See Cmty for Creative Non-Violence v. Pierce*, 814 F.2d 663, 670 (D.C. Cir. 1987). Speculation is insufficient. *See Lujan*, 504 U.S. at 561. Petitioners failed to provide any evidence that transport would occur sooner. Moreover, in the NRC proceeding, most of the Petitioners conceded that nothing in federal law requires Yucca Mountain to be built at all, even if this Court were to require DOE to proceed with the license application. AR 36 (June 3, 2010, hearing transcript, pp. 187, 191, 240). Whether the repository is built depends on NRC granting the license, and on Yucca Mountain's proponents gathering enough support for it in Congress to pass additional legislation, among other things. *See infra* at 65-68. Where the ultimate redress of Petitioners' alleged harm rests within Congress's discretion, the possibility of redress here is too attenuated to confer Article III standing. *See The Wilderness Society v. Norton*, 434 F.3d 584, 591-94 (D.C. Cir. 2006) (likelihood of redress too attenuated to confer Article III standing where congressional action is required to redress plaintiff's harm).

Apparently recognizing the deficiencies in their standing, Petitioners contend (Br. 19) that the imminence and redressability requirements for standing are relaxed when the alleged injury results from a violation of a procedural right.

They thus claim that they "need not show that Yucca Mountain repository would ultimately ever be opened in order to have standing." As the Supreme Court recently reiterated, however, alleging the deprivation of a procedural right without also alleging, as Petitioners fail to do here, the deprivation of some concrete interest affected by that right is insufficient to confer Article III standing. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). Moreover, even if the imminence and redressability requirements could be relaxed for procedural rights, even pre-*Summers* cases made clear that those requirements do not vanish altogether and that the injury-in-fact requirement is not relaxed. *See Center for Law and Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226-27 (9th Cir. 2008). Here, Petitioners have failed to make even a minimal showing of imminence and redressability, and have identified no particularized injury-in-fact.

Furthermore, to the extent courts relax the imminence and redressability requirements, they do so only with respect to procedural rights. *See Lujan*, 504 U.S. at 573 & n.7; *City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1187 n.1 (D.C. Cir. 2007). Petitioners' primary claims are founded on the NWPA and based on an alleged substantive right to have material taken to a Yucca Mountain repository. The imminence and redressability requirements apply with full force to

Petitioners' NWPA claims. *See Lujan*, 504 U.S. at 573; *The Wilderness Society*, 434 F.3d at 591.

Contrary to its suggestion (Br. 22), Washington is not in a materially stronger position as to standing than other Petitioners because of the need to address tank waste at Hanford. As detailed in the Declaration of Dr. Ines Triay, DOE's Assistant Secretary for Environmental Management, high-level waste at Hanford already is being addressed by DOE's ongoing long-term cleanup, and that process is going on independently of whether Yucca Mountain is delayed or ever constructed. Addendum at 30-33 (originally filed in opposition to Washington's motion for preliminary injunction). That cleanup includes the retrieval of highly radioactive waste stored in underground storage tanks, the construction of a massive waste treatment plant to treat that waste, and ultimately the treatment of that waste at the plant, by converting it to glass through vitrification, which is a prerequisite to transportation and disposal at any repository. The vitrification process for all liquid waste will take several decades to accomplish; thus, Petitioner has long known that such waste would remain on site for a lengthy period of time. *Id*. Sufficient capacity exists or will be constructed at Hanford to store the vitrified wastes with no adverse impacts on the environment. AR 46 at 4-213, 4-218. In

sum, the notion that the Hanford cleanup is dependent on opening Yucca Mountain is simply incorrect.[11/] Addendum at 30-31.

Intervenor National Association of Regulatory Utility Commissioners ("NARUC") submits no affidavit attesting to its standing and, for that reason alone, it fails to demonstrate standing. *See Sierra Club*, 292 F.3d at 900 (citing *Lujan*, 504 U.S. at 562). NARUC states (Br. 23) that it represents the interests of State utility commissioners. NARUC contends (Br. 24) that utilities "have paid more than $17 billion into the Nuclear Waste Fund, in part, to support the process of reviewing a permanent repository" and these costs have been passed through to ratepayers. The injury to NARUC itself is not explained nor is it self-evident. And any claims NARUC has with respect to fee assessments for the Nuclear Waste Fund are beyond the scope of these petitions. NARUC and amicus Nuclear Energy Institute ("NEI") filed separate suits in this Court regarding fee assessments. *See* D.C. Circuit Nos. 10-1074, 10-1076. On December 13, 2010, this Court dismissed those suits as moot and unripe due to DOE's issuance in November 2010 of a new assessment of fee adequacy. The Court noted, however, that petitioners may be

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[11/] The schedule for accomplishing this cleanup is set forth in a consent decree between DOE and Washington, approved October 25, 2010, by the court in *State of Washington v. Chu*, No. 08-5085-FVS (E.D. Wa.). The decree requires treatment of all high-level mixed waste from the tanks no later than 2047.

able to raise in a challenge to the new assessment their claim that fees should be suspended in light of the status of DOE's waste disposal program. The same analysis applies here.

Finally, Petitioners' attempt to assert *parens patriae* standing fails. Without alleging that it has any property interests near those facilities, South Carolina alleges that the state houses seven commercial reactors. Br. 21. Washington alleges that its interests arise in part as a regulator and sovereign. Br. 22. NARUC alleges that its interest arises in part of out of concern to "U.S. ratepayers" and the "general public." Br. 24. However, in this instance, it is the United States, not the Petitioners, that represents the public as *parens patriae*. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *see also Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990) (Nevada lacks *parens patriae* standing to challenge rights-of-ways to Yucca Mountain).

## II. Petitioners' Challenge To The Withdrawal Motion Is Premature

Petitioners purport to seek review of two separate DOE decisions: (a) the decision to file the motion to withdraw the license application; and (b) the decision allegedly made on or around January 29, 2010, "to irrevocably abandon the Yucca Mountain process and terminate the entire Yucca Mountain project, including the license withdrawal." Br. 42; Br. ii. To the extent these claims challenge DOE's

motion to withdraw, they should be dismissed under ripeness and primary jurisdiction doctrines. For reasons discussed below in Section III, the generalized claims regarding DOE's "abandonment" of the project should also be dismissed as improper and beyond the Court's jurisdiction.

### A. Petitioners' Challenge to the Withdrawal Motion Is Unripe

Petitioners' challenges to DOE's filing of the withdrawal motion are unripe. *See Public Citizen v. Office of U.S. Trade Representative*, 970 F.2d 916, 921 (D.C. Cir. 1992) (finality and ripeness are distinct requirements and both must be met). Ripeness principles are intended to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *Ohio Forestry Assoc. v. Sierra Club*, 523 U.S. 726, 737 (1998). "Determining whether administrative action is ripe for judicial review requires [courts] to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003).

A claim that involves uncertain or contingent future events that may not occur as anticipated or may not occur at all is not ripe for judicial review. *Texas v. United States*, 523 U.S. 296, 300 (1998). Here, Petitioners' claims regarding the withdrawal motion are contingent upon a speculative chain of events that assumes the termination of the license application process. Particularly at this time, however, these events are uncertain to occur because the NRC Licensing Board has denied DOE's motion to withdraw the license application and continued with its consideration of the merits of the license application. Although the Commission may review the Licensing Board's decision denying DOE's motion to withdraw, if the Commission either declines to review the Board's decision or upholds it, Petitioners will not be able to present any controversy for this Court to resolve. *See Toca Producers v. FERC*, 411 F.3d 262, 266-67 (D.C. Cir. 2005) (withholding review where further administrative action could cause controversy to disappear). Because Petitioners' claims are contingent upon NRC granting a motion that its Licensing Board has denied, the claims are unfit for review and should be dismissed.[12/]

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[12/] If the Commission issues a final decision that is adverse to Petitioners' interests, Petitioners must file a new lawsuit challenging NRC's final decision. *See Public Citizen v. NRC*, 845 F.2d 1105, 1109-10 (D.C. Cir. 1988) (prematurely-filed NWPA claim must be dismissed even though final decision issued after the filing

(continued...)

Nor is there any reason to entertain this matter before the Commission rules. Delaying review until NRC completes its internal processes will cause Petitioners no hardship. *See Sheet Metal Workers Intern. Ass'n, Local 270, AFL-CIO v. NLRB*, 561 F.3d 497, 502 (D.C. Cir. 2009) (lack of hardship supports withholding judicial review). The filing of the withdrawal motion has no effect on Petitioners' "day-to-day business," and does not require Petitioners "to engage in, or to refrain from, any conduct." *Texas*, 523 U.S. at 301. Petitioners are in no different position now than they were before DOE filed the withdrawal motion. NRC would not have reached a decision granting or denying DOE's license application by now. Furthermore, the possibility always existed that NRC would deny DOE's application to construct Yucca Mountain, an action that would have the same impact upon Petitioners as the relief DOE requests in the pending motion to withdraw.

In sum, Petitioners' challenge to the withdrawal motion is unfit for judicial review at this time. "Federal courts cannot – and should not – spend their scarce resources on what amounts to shadow boxing." *Devia v. NRC*, 492 F.3d 421, 425-26 (D.C. Cir. 2007) (internal quotations omitted).

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[12/](...continued)
of the suit and was presently ripe); *see also TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989).

### B. This Court Lacks Primary Jurisdiction

Assuming this Court has jurisdiction over the license withdrawal issue (which it does not for reasons explained in Section III.B.1 below), it nevertheless should abstain from exercising its jurisdiction pursuant to the primary jurisdiction doctrine. The NRC has primary jurisdiction over NWPA licensing matters and is considering DOE's motion to withdraw its license application. Under the primary jurisdiction doctrine, where an agency and a court have concurrent jurisdiction, the court should abstain from exercising its jurisdiction until the agency finally resolves it. *See Comcast v. FCC*, 600 F.3d 642, 647-48 (D.C. Cir. 2010).

## III. This Court Lacks Jurisdiction And Petitioners Fail To State A Claim Upon Which Relief Can Be Granted

For a series of reasons – related to, yet independent of, the justiciability barriers to review discussed above – this Court lacks jurisdiction over both of Petitioners' claims, and in any event, there is no APA cause of action.

### A. The APA Provides the Cause of Action for the NWPA Claims

Initially, Petitioners are wrong that (Br. 25-29) they need not challenge "final agency action" within the meaning of the APA because they are invoking this Court's jurisdiction under the NWPA. Petitioners misunderstand the interplay between the NWPA and the APA. NWPA § 119(a), 42 U.S.C. § 10139(a),

specifies the form of proceedings in the court of appeals, but it does not waive the United States' sovereign immunity or provide a private litigant with a cause of action. In this way, § 119(a) is similar, in both language and effect, to the Hobbs Act's jurisdictional provision, *see* 28 U.S.C. § 2344, that the Supreme Court addressed in *I.C.C. v. Brotherhood of Locomotive Engn'rs*, 482 U.S. 270 (1987). There, the Supreme Court noted that the Hobbs Act specified the form of proceedings in the court of appeals, but "it [was] the [APA] that codifie[d] the nature and attributes of judicial review." *Id.* at 282; 5 U.S.C. § 703 ("the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute").

Similar to the Hobbs Act, the NWPA specifies the form of the proceeding by conferring original jurisdiction upon the court of appeals, as opposed to the district courts, to review certain final decisions of certain federal officials. *See* 42 U.S.C. § 10139(a). The NWPA does not, however, waive the government's sovereign immunity or provide a private litigant with an independent cause of action. The APA typically provides the waiver and cause of action in NWPA cases. *See Nebraska Public Power Dist. v. United States*, 590 F.3d 1357, 1371 (Fed. Cir. 2010) (holding that the APA waives the government's immunity for judicial review under the NWPA and thus Court need not decide if NWPA § 119(a) itself

waives immunity); *Nevada v. DOE*, 133 F.3d 1201, 1204 (9th Cir. 1998) (reviewing NWPA claim under the APA); *County of Esmeralda, Nevada v. DOE*, 925 F.2d 1216, 1218-19 (9th Cir. 1991) (same); *cf. State of Nevada v. Watkins*, 939 F.2d 710, 712 (9th Cir. 1991) ("NWPA expressly provided [that issuance of an environmental assessment] would be 'a final agency action subject to judicial review' in accordance with the APA and the NWPA review provisions," citing 42 U.S.C. § 10132(b)(1)(E); preliminary activities are unreviewable). To maintain their challenges, Petitioners must demonstrate both that this Court has jurisdiction under the NWPA, and that they have properly invoked the APA. Petitioners cannot make either demonstration.

### B. This Court Lacks Jurisdiction Under the NWPA and Petitioners Fail to Establish That They Have A Valid APA Cause of Action

#### 1. The filing of the motion to withdraw the license application is not final agency action under the NWPA or APA

The NWPA and the APA authorize challenges only to *final* agency actions. 5 U.S.C. § 704; 42 U.S.C. § 10139(a). Petitioners purport to challenge DOE's decision to move to withdraw the license application. However, DOE's filing of that motion does not constitute final agency action under the NWPA or APA.[13/]

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[13/] Notably, three out of the four petitions were filed before DOE had even filed the motion to withdraw. As this Court held in *Public Citizen*, 845 F.2d at 1109, time

(continued...)

Two conditions must be satisfied for agency action to be considered final: (1) the action must mark the consummation of the agency's decision-making process and not be merely tentative or interlocutory in nature; and (2) the action must be one by which rights or obligations have been determined or from which legal consequences will flow. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997). Neither criterion is satisfied here.

The act of filing a motion to withdraw does not fix any legal relationship, deny a right, or impose an obligation on Petitioners. NRC retains discretion to deny the motion and to continue to consider DOE's licensing application. As the Supreme Court explained in *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992), in determining whether agency conduct is "final agency action," the "core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." Like the filing of a complaint in an administrative proceeding, the filing of a motion to withdraw does not complete the process and it does not directly affect Petitioners. *See Federal Trade Comm'n v. Standard Oil Co. of California*, 449 U.S. 232, 249 (1980) (FTS's issuance of complaint not final action and therefore unreviewable). Because no

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[13/](...continued)
cannot cure a NWPA claim filed prematurely.

legal consequences flow from the filing of a motion, that act does not represent a final decision of DOE sufficient to confer jurisdiction upon this Court under the NWPA or a cause of action upon Petitioners under the APA. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990). Indeed, the Board's recent denial of the motion conclusively demonstrates that the motion itself lacks legal consequence.

Moreover, if the decision to file a motion in ongoing administrative proceedings were a reviewable final decision for purposes of the NWPA and APA, then every agency decision made in the course of prosecuting a license application would be immediately reviewable by this Court. One could only imagine the disruption this would cause in NRC proceedings. The purpose of finality requirements is to prevent this potential mischief. *See DRG Funding Corp. v. Sec'y of Housing and Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996).

Nor is the filing of the withdrawal motion "tantamount" to a genuine failure to act, as Petitioners suggest (Br. 30). *See Ecology Center v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) (limited exception to the finality doctrine applies only when there has been a genuine failure to act). Petitioners simply oppose DOE's action of filing the motion to withdraw the license application. Courts repeatedly have refused to allow litigants 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*, 845 F.2d at 1108; *State of Nevada v. Watkins*, 939 F.2d at 714 n.11. Even if Petitioners' claims were properly characterized as "failure to act" claims, they would fail because such claims are available only to compel discrete, ministerial, or nondiscretionary actions. *See Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55, 62-65 (2004). They have not identified the kind of "specific, unequivocal command" necessary to sustain a "failure to act" claim. *Id*. at 63.

**2. Petitioners cannot challenge DOE's generalized policy toward Yucca Mountain**

Petitioners cannot challenge DOE's ongoing spent nuclear fuel and high-level nuclear program, including its policy toward Yucca Mountain, because the APA does not allow judicial review of ongoing agency programs or amorphous agency policies. And, even if it did, any such generalized challenge to DOE's current Yucca Mountain policy is time-barred.

The APA does not authorize the federal courts to entertain challenges to anything and everything that an agency may do, or fail to do, when conducting its business. *See SUWA*, 542 U.S. at 64; *Fund for Animals v. BLM*, 460 F.3d 13, 19-20 (D.C. Cir. 2006) ("Much of what an agency does is in anticipation of agency action."). The APA's limitations necessarily exclude broad attacks on agency

policies or how an agency implements a program assigned to it. *See Lujan*, 497 U.S. at 891; *Cobell v. Kempthorne*, 455 F.3d 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.") (internal quotations omitted). Such programmatic and policy attacks are to be made in the offices of the Executive branch or the halls of Congress, not by court decree. *See Lujan*, 497 U.S. at 891. The APA authorizes challenges only to discrete, circumscribed, and final agency actions, *see id*.; *SUWA*, 542 U.S. at 63-65, and then authorizes courts only to "hold unlawful and set aside" those discrete agency actions, *see* 5 U.S.C. § 706(2).

Here, Petitioners challenge DOE's policy to seek better alternatives to a deep geological repository at Yucca Mountain as a means to dispose of nuclear waste. The APA, however, does not provide a cause of action to challenge DOE's generalized policy. Petitioners instead must challenge a discrete circumscribed final agency action implementing that policy, which they have failed to do.[14/]

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[14/] It is true that, as a result of its policy, DOE has taken steps to close Yucca Mountain and to discover new and better ways to dispose of the Nation's spent nuclear fuel and high-level radioactive waste. However, as explained above, Petitioners' challenge to DOE's motion to withdraw the license application is premature. And, as discussed below, Petitioners present no other valid challenge to final agency action.

Even assuming *arguendo* that the Secretary's policy toward Yucca Mountain could be challenged, any such challenge would be time-barred. The NWPA provides that claims must be commenced within 180 days after the date of the final decision or action. S*ee* 42 U.S.C. § 10139(c); *Public Citizen*, 845 F.2d at 1107. DOE's policy to terminate the Yucca Mountain program was clearly stated as early as March 11, 2009, and at least by May 2009, when DOE publicly stated its "decision to terminate the Yucca Mountain program while developing nuclear waste disposal alternatives." AR 2, p. 9, 504; AR 5, p. 1. The first of the instant petitions was filed on February 19, 2010, well after 180 days had passed since DOE announced its policy to terminate the Yucca Mountain program. Petitioners' challenges to DOE's Yucca Mountain policy thus are time-barred.

**3. Petitioners fail to identify, and preserve a challenge to, any final agency action that they would have standing to challenge**

Petitioners identify (Br. 13-16) several statements made, or steps taken by, DOE with respect to its ongoing spent nuclear fuel and high-level nuclear waste program. These include various statements by the Secretary and DOE regarding Yucca Mountain, the FY 2011 budget request, the withdrawal of ground water permit applications relating to the building of a railroad for which congressional appropriations and planning ceased in 2009, the cessation of certain operational

activities at Yucca Mountain, and the taking of steps to close OCRWM. Because Petitioners do not purport to challenge these statements or actions separately, nor do they develop any argument in their opening brief preserving a challenge to them, as required by Fed. R. App. P. 28(a)(9)(A), the Court need not, and should not, address these items. *See Consolidated Edison Co. v. FERC*, 347 F.3d 964, 970 (D.C. Cir. 2003).

Even if Petitioners had developed these arguments, the identified statements and activities are not reviewable under the APA because they are not final agency actions and/or they are activities committed to DOE's discretion by law. The statements in press releases and newspaper articles, the budget request, the personnel decisions, and the other activities such as the cleaning of work areas that Petitioners identify cannot be challenged under the APA because they are not "agency actions," as defined by the APA. In other words, they do not constitute a "rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *See* 5 U.S.C. § 551(13) (defining "agency action"). As this Court explained when rejecting an APA challenge to a budget request:

> the term [agency action] is not so all-encompassing as to authorize us to exercise judicial review over everything done by an administrative agency. Much of what an agency does is in anticipation of agency action. Agencies prepare proposals, conduct studies, meet with members of Congress and interested groups, and engage in a wide variety of

> activities that comprise the common business of managing government programs.

*See Fund for Animals*, 460 F.3d at 19-20 (internal citations omitted). Here, the complained of statements, budget request, personnel decisions, and cleaning of work areas that Petitioners identify are the type of common everyday activities that fall outside the scope of APA judicial review. *Id.* at 20; *P & V Enterprises v. U.S. Army Corps of Engn'rs*, 516 F.3d 1021, 1025-27 (D.C. Cir. 2008) (press release not final agency action).

Moreover, even assuming the statements and activities are "agency actions," they still are not reviewable *final* agency actions. The statements and activities identified by the Petitioners have no direct and immediate impact on Petitioners,[15/] and this Court refuses to review, as non-final, agency activities "that do[] not [themselves] adversely affect complainant but only affect[] his rights adversely on the contingency of future administrative action." *Id.* at 22 (citation omitted).

Most, if not all, of the complained of statements and activities also are unreviewable under the APA because they are "committed to agency discretion by

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[15/] Petitioners also fail to demonstrate their standing to challenge these statements and activities. *See Summers*, 129 S. Ct. at 1149 (litigant "bears the burden of showing that he has standing for each type of relief sought"). Their affidavits are silent regarding these matters, and do not explain how Petitioners suffer particularized and redressable injury from internal agency personnel and housekeeping matters and budgeting decisions.

law." The APA explicitly excludes such activities from judicial review. *See* 5 U.S.C. § 701(a)(2). Agency action is committed to agency discretion by law when a statute provides "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, for example, 42 U.S.C. § 7253(a) commits to the Secretary of Energy the absolute discretion "to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary or appropriate."[16/] Because § 7253(a) provides no meaningful standards against which to judge the Secretary's discretionary decision to discontinue OCRWM and to provide OCRWM staff priority consideration for job openings in the Department and relocation assistance (or to terminate staff in a very few instances), the APA precludes judicial review of these personnel decisions. Petitioners similarly fail to identify any statute that provides meaningful standards against which to judge DOE's discretionary decisions to withdraw groundwater permit applications, to clean out work areas, or to make or do any of the identified statements or

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[16/] While the NWPA established OCRWM, *see* 42 U.S.C. § 10224(a), Congress did not exempt from the Secretary's broad discretionary authority under § 7253(a) the power to discontinue organizational units established by the NWPA or any other statute, except for those organizational units noted in § 7253(a).

activities.[17/] Thus, even if Petitioners had preserved a challenge to these statements and activities, they would be unreviewable.

## IV. The Claims Against NRC Should Be Summarily Dismissed

Three of the consolidated lawsuits name NRC, its Commissioners, and its administrative judges as respondents. These NRC Respondents should be summarily dismissed.

First, the claims against NRC's administrative judges are moot because they already have ruled in Petitioners' favor on DOE's motion to withdraw its Yucca Mountain application and because they continue to consider the merits of the application, as shown by a Board decision issued on December 14, 2010, deciding legal issues and waiver petitions. *See supra* at 5-6. Petitioners thus have no conceivable claim against the administrative judges, who, in any event, are not parties contemplated by the NWPA. *See* 42 U.S.C. § 10139(a).

As for NRC itself, the "merits" section of Petitioners' brief (Br. 35-59) is silent on any claims against NRC. The "remedies/relief" section (Br. 63) says only that the Court should "enjoin Respondents, including NRC" from violating the NWPA. Petitioners nowhere explain why any relief against NRC is warranted.

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[17/] Even if there were standards to apply, the scope of the Court's review would be limited to the propriety of the particular action.

Such cursory treatment amounts to a waiver of claims against NRC. *See, e.g., U.S. ex rel. Miller v. Bill Harbert Intern. Const.*, 608 F.3d 871, 885 (D.C. Cir. 2010); *United States v. West*, 392 F.3d 450, 459 (D.C. Cir. 2004). It is inappropriate, in any event, for this Court to declare NRC action unlawful when NRC is still engaged in adjudicatory decision-making. The Commission's deliberations on DOE's application, including its motion to withdraw, are not yet complete.

Because the Commission (as of this writing) has reached no final merits decision on DOE's motion to withdraw, NRC has not reviewed, and neither supports nor opposes, the merits-based arguments in this brief. NRC similarly takes no position on the portions of the Statement of the Case and Statement of the Facts bearing on the merits. Given its statutory responsibility to adjudicate the Yucca Mountain application, NRC must remain impartial on DOE-specific claims. NRC, however, does join the brief's justiciability and jurisdictional arguments set forth in Sections II, III.A, and III.B.1.[18/]

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[18/] In a supplement (filed October 25, 2010) to their motion to expedite this judicial review proceeding, Petitioners complained of the NRC Staff's recent move toward "orderly closure" of its technical safety review given budget constraints. It is questionable whether such NRC budget actions are reviewable at all. *See Fund for Animals*, 460 F.3d at 19-20. But it is certain that this Court lacks jurisdiction to decide the matter in the context of these NWPA suits filed months *before* the challenged agency action; a fresh lawsuit would be required. *See Public Citizen*, 845 F.2d at 1109-1110. Notably, the administrative record before this Court

(continued...)

## V. DOE's Decisions And Actions Do Not Violate the NWPA

Assuming *arguendo* the existence of standing, ripeness, jurisdiction, and a cause of action, Petitioners' NWPA claims should be rejected.

### A. Standard of Review

Petitioners' NWPA claims turn on issues of statutory interpretation. Because DOE is charged with administering the relevant statutes, *see infra* at 73-74, these issues are appropriately analyzed under the familiar two-part test of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

The specific questions presented by Petitioners' claims are (1) whether the NWPA by its plain language repeals DOE's pre-existing authority to withdraw the license application and to terminate the Yucca Mountain project; and (2) whether the NWPA clearly imposes a nondiscretionary duty on DOE to pursue the project, including licensure. Petitioners argue (Br. 34-35) that these issues are properly resolved by this Court's *de novo* review of the statute under *Chevron* step one because the plain language and legislative history of the NWPA demonstrate a clear congressional intent to prohibit DOE from terminating the project, including license withdrawal, and to require DOE to pursue licensure for the Yucca

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[18/](...continued)
contains nothing on NRC's budget-execution decisions.

Mountain repository. As demonstrated below, a proper interpretation of the relevant statutes demonstrates that Congress preserved DOE's pre-existing authority to withdraw the license application and to determine not to pursue the project. To the extent there is silence or ambiguity with respect to congressional intent on the precise issues presented, DOE's interpretation prevails because it is permissible and entitled to deference. *See infra* at 73-74.

### B. The Secretary Has Authority Under The AEA and DOE Organization Act, Preserved by the NWPA, to Move to Withdraw the License Application

In moving to withdraw its license application, DOE exercised its authority under the AEA and DOE Organization Act to manage nuclear waste, including establishment of facilities for storage, management, and disposal of nuclear wastes. *See supra* at 7-8; 42 U.S.C. § 7133(a)(8)(A). The statutory scheme that Congress established under the AEA 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).[19/] The Secretary's broad discretionary

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[19/] *See also Public Citizen v. NRC*, 573 F.3d 916, 927 (9th Cir. 2009) (where petitioners cited no authority expressly limiting NRC's discretion under the AEA, the court "decline[d] to imply any such limitation."); *Massachusetts v. NRC*, 878 F.2d 1516, 1523 (1st Cir. 1989) (under the AEA, the "scope of review of NRC

(continued...)

authority under the AEA and DOE Organization Act to make decisions respecting the management and disposition of nuclear waste necessarily encompasses the power to decide not to construct a repository at Yucca Mountain, to study other alternatives, and to withdraw the license application.

The NWPA preserves this pre-existing grant of power. The NWPA clearly contains no express repeal of the AEA and DOE Organization Act or affirmative prohibition of the actions at issue.[20/] Nor is there an implied repeal as to these actions. Repeals by implication are generally disfavored and will only be found where provisions in two statutes are in irreconcilable conflict or where the later Act covers the whole subject of the earlier one and is clearly intended as a substitute. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007); *Bullcreek v. NRC*, 359 F.3d 536, 542 (D.C. Cir. 2004) (NWPA does not expressly or impliedly repeal NRC's authority under AEA); *United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001) (RCRA does not impliedly repeal DOE's

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[19/](...continued)
actions is extremely limited").

[20/] To be sure, there are specific limitations in the NWPA that circumscribe DOE's authority. For example, there are specific limitations that serve to circumscribe DOE's authority to begin disposal services for commercial spent nuclear fuel covered by contracts under the NWPA, *see* 42 U.S.C. 10165(b), 10168(d). The NWPA contains, however, no particularized limitations on DOE's authority to seek license withdrawal.

AEA authority). The need for a clear expression of congressional intent to repeal the Secretary's pre-existing authority is pronounced in this circumstance because agency decisions not to pursue administrative proceedings or particular programs are generally committed to agency discretion and are presumptively unreviewable. See, e.g., *Heckler*, 470 U.S. at 831 (agency's decision not to prosecute is a decision generally committed to agency's absolute discretion and thus presumptively unreviewable); *Lincoln v. Vigil*, 508 U.S. 182, 192-94 (1993) (cancellation of health program not reviewable); 5 U.S.C. § 701(a)(2).

The NWPA is not a complete substitute for the AEA. *See Bullcreek*, 359 F.3d at 542; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), 56 N.R.C. 390, 405 (1992) ("Congress intended to supplement, rather than replace, existing law"). And there is no irreconcilable conflict between a statute setting up a process to select, site and *possibly* obtain a construction authorization from NRC (the NWPA) and another set of statutes that provides DOE the discretion *not* to move forward with the construction or operation of such a repository (the AEA and DOE Organization Act). The former must be read consistently with the latter, and therefore the authority under the latter is preserved. *See Bullcreek*, 359 F.3d at 543; *Vimar Seguras y Reasegures, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) ("'[W]hen two statutes are capable of co-

existence . . . it is the duty of the courts, *absent a clearly expressed congressional intention to the contrary*, to regard each as effective.") (emphasis added); *see also* 1A N. Singer, Sutherland Statutory Construction § 23:9 (6th ed. 2000).

Petitioners suggest (Br. 40, 43) that because no NWPA provision affirmatively authorizes DOE to exercise its pre-existing discretion to terminate the project and withdraw the application, the Secretary has no authority to take such action. This analysis, however, is backwards. The AEA and DOE Organization Act provide authority for the Secretary to terminate the project and to withdraw the license application, and thus Petitioners must show – and they cannot – that the NWPA repeals this authority.

To the contrary, the NWPA reiterates the Federal Government's responsibility to provide for the permanent disposal of high-level radioactive waste and spent nuclear fuel, 42 U.S.C. § 10131(a)(4), and retains in DOE "primary responsibility" for developing and administering the nuclear waste disposal program. *See NARUC v. DOE,* 851 F.2d 1424, 1425 (D.C. Cir. 1988) ("Congress delegated primary responsibility for developing and administering the waste disposal program to [DOE]"); *General Elec. Uranium Mgmt. Corp. v. DOE,* 764 F.2d 896, 905 (D.C. Cir. 1985) ("DOE is indubitably entrusted with the administration of the Waste Act"). Furthermore, the NWPA affirmatively

preserves DOE's pre-existing authority to withdraw a license application. NWPA § 114(d) provides that any license application for construction of a permanent geologic repository is subject to "laws applicable to such applications," 42 U.S.C. § 10134(d). Those laws include NRC's rules and precedent applicable to such applications, including its rule and practice allowing applicants to withdraw license applications.[21/] The right of applicants before NRC to withdraw their applications was well established when Congress enacted the NWPA in 1982: NRC's regulation, 10 C.F.R. § 2.107, was promulgated in 1963,[22/] and NRC had decided its seminal cases recognizing the right to withdraw before 1982.[23/]

In its June 29, 2010, Order at pp. 14-16, the NRC Licensing Board suggests, however, that the reference to "the laws applicable to such applications" was

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[21/] An unqualified reference to "laws" in a federal statute includes decisional law. *E.g.*, *Commissioner v. Estate of Bosch*, 387 U.S. 456, 464 (1967). Regulations also are laws. *E.g.*, *United States v. Nixon*, 418 U.S. 683, 695 (1974).

[22/] The regulation was originally promulgated in 1962 and amended in 1963 to address withdrawal of an application after a notice of hearing has issued. 27 Fed. Reg. 377, 379 (Jan. 13, 1962); 28 Fed. Reg. 10,151, 10,152 (Sept. 17, 1963). This rule and practice also derives from the broad authority conferred by the AEA, and the NRC is successor to the AEC's licensing responsibilities.

[23/] *See, e.g.*, *Duke Power Co.* (Perkins Nuclear Power Station, Units 1, 2, and 3), 16 N.R.C. 1128 (1982); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), 14 N.R.C. 1125 (1981); *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), 14 N.R.C. 967 (1981); *Boston Edison Co.* (Pilgrim Nuclear Generating Station, Units 2 and 3), 8 A.E.C. 324 (1974).

intended as a blanket reference to *substantive* standards that NRC applies in judging applications, and does not include *procedural* regulations and practice governing such license applications.[24/] That conclusion is inconsistent with the statutory text, which refers to "laws" without qualification. *See also supra* at 52 n.21. Furthermore, NWPA § 114(d)'s one exception to the blanket incorporation of existing NRC law is a *procedural* one – the adoption of a three-year time limit for any Commission decision. That exception demonstrates that the general reference to applicable laws in § 114(d) encompasses both substantive *and* procedural laws.[25/]

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[24/] The Licensing Board also suggests that 10 C.F.R. § 2.107 merely empowers licensing boards to attach conditions to withdrawal as opposed to authorizing the applicant to seek withdrawal. AR 36 (June 29, 2010, order, p.13). However, the regulation necessarily contemplates, and only makes sense if applicants have, the underlying right to withdraw. This is confirmed by the decisions interpreting and applying § 2.107. *See* cases cited *supra* n.23.

[25/] Amicus NEI acknowledges that withdrawal of an application is not uncommon in NRC proceedings and that NRC regulations specifically provide for withdrawal of an application and termination of associated proceedings. NEI Br. 7-8. NEI then asserts that licensing of private entities pursuant to the AEA "is in no way pertinent to the Yucca Mountain licensing proceeding." *Id*. at 8-9. To the contrary, Congress's incorporation of the ordinary rules from private license cases demonstrates that the rules applicable to licensing of private entities are pertinent and that Congress did not intend for DOE be treated differently in the licensing proceeding than private voluntary applicants.

The language in § 114(f)(5) reinforces that conclusion. It states: "Nothing in this Act shall be construed to amend or otherwise to detract from the licensing requirements of the [NRC] established in Title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 *et seq*.)." 42 U.S.C. § 10134(f)(5). The term "licensing requirements" in § 114(f)(5) refers to substantive standards. Had Congress intended to limit § 114(d) to substantive standards, it presumably would have used the same language it used in § 114(f)(5). But it did not. Instead, it used words of broader application.

The legislative history also confirms that Congress intended, and was satisfied with, the application of NRC's procedural rules to the Yucca Mountain license application. Congress considered, but rejected, language that would have superseded ordinary NRC rules of practice that govern licensing proceedings with specific procedural rules for the repository license application proceeding.[26/] Congress, however, eventually stripped all the special licensing procedures from the bill and substituted in their place § 114(d), which adopts NRC's rules. *See* 42 U.S.C. § 10134(d); H.R. Rep. 97-411(I) at 52 (statement of Rep. Lundine)

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[26/] *See* H.R. 97-5016, 97th Cong., 1st Sess. (Nov. 18, 1981), § 8(d)(2)-(9); H.R. Rep. No. 97-411(I), 97th Cong., 1st Sess., at 21 (1982). The proposed procedures were supposed to truncate the licensing process. *See* 128 Cong. Rec. 32,544 (1982) (Sen. Mitchell).

(objecting to inclusion in NWPA of special procedural rules and preferring use of NRC's rules of practice, noting that NRC's "procedural regulations have been carefully drawn after many months of careful consideration and debate.").

Thus, Congress deliberately incorporated all of NRC's rules. Those rules included 10 C.F.R. § 2.107. Congress is presumed to understand the regulatory scheme that it incorporates by reference. *See Bullcreek*, 359 F.3d at 542 (holding that Congress is presumed to have been familiar with, and taken into account, NRC regulations when it enacted NWPA). *Accord Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 575 (1993); *United States v. Wilson*, 290 F.3d 347, 356-57 (D.C. Cir. 2002).

In sum, the NWPA leaves intact DOE's pre-existing powers under the AEA and DOE Organization Act to terminate the project and to seek to withdraw a license application that the Secretary has concluded is unworkable and not in the public interest. The NWPA preserves this pre-existing authority by directing application of both substantive and procedural NRC rules.

### C. There Is No Merit to Petitioners' Contention that the NWPA Unambiguously Prohibits DOE From Withdrawing the License Application

Petitioners assert (Br. 36-37) that the plain language of NWPA §§ 114(b) and 114(d), 42 U.S.C. §§ 10134(b), 10134(d), prohibits DOE from withdrawing

the license application for any reason. To the contrary, there is no text in the NWPA that prevents withdrawal. Congress specified a number of other things that DOE must do (or could not do), but it did not prohibit withdrawal.

Petitioners' argument as to § 114(b) rests on an inference from the language stating that the Secretary "shall submit" a license application. 42 U.S.C. § 10134(b). This provision does not state, as Petitioners' interpretation assumes, that once submitted, the Secretary shall continue prosecuting the license application no matter the circumstances or changes as to his judgment of the public interest. And it certainly does not state that the Secretary "shall not" withdraw the license application or terminate the project.

In fact, all that § 114(b) states is that, after the site approval has taken effect, the Secretary shall submit to NRC an application for construction authorization within a short specified time period. It is thus a timing provision that states when the proceeding is to begin, but does not control actions taken after that point. The effect and purpose of the plain language of § 114(b) is two-fold: (1) to preclude DOE from going forward with a license application for Yucca Mountain until after the State disapproval and congressional review process set forth in § 115 is complete; and (2) consistent with other tight time periods in §§ 113 and 114, to promote the prompt filing of an application after congressional action. Thus,

§ 114(b) contains "directory" language aimed at ensuring the prompt submission of an application following site approval. *See* S. Conf. Rep. No. 107-159, at 9. The statute does not, however, by its plain language preclude the application's later withdrawal during the course of the licensing proceeding in an exercise of the Secretary's pre-existing discretionary authority to terminate the project.

If, as Petitioners argue, Congress intended to prevent DOE from later withdrawing a pending application over the following three or four years, Congress could have included in the NWPA a provision expressly saying that DOE "shall not" withdraw the license application.[27/] Or, Congress could have said in specific terms that DOE must take all actions necessary to build the Yucca Mountain repository. In fact, before passage of the NWPA, Congress had legislation including such a requirement before it, but rejected it.[28/]

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[27/] There are provisions throughout the NWPA in which Congress stated that DOE "shall not" do a particular act. *See, e.g.*, 42 U.S.C. §§ 10132(b)(3), 10156(a)(1), 10162(a).

[28/] Section 8(d)(7) of draft bill H.R. 97-5016 would have directed the Secretary to complete construction within 6 years after receiving construction authorization and to operate the repository at the earliest practical date after receiving a license from NRC. Congress omitted that and other comparable requirements from the NWPA, thereby leaving intact the Secretary's ultimate authority under the AEA to decide whether to construct and operate a particular repository.

Additionally, Petitioners' interpretation of § 114(b) is at odds with § 114(d)'s express adoption of NRC rules of practice for the license proceeding, *see supra* at 52-55. Under Petitioners' reading, one provision of § 114 implicitly requires DOE to take a license proceeding to completion on the merits, regardless of ordinary NRC practice or the Secretary's judgment as to sound policy, while another provision of § 114 explicitly incorporates standard NRC practices governing license applications, which authorize withdrawals. Petitioners' reading thus forces onto § 114(b) a meaning that Congress never expressed, and it overrides the explicit language of § 114(d).

Petitioners' contention that § 114(d) impliedly prohibits DOE from withdrawing an application fares no better. Their argument is based on statutory text that they quote out of context. Br. 36-37. Petitioners first rely (Br. 36) on the phrase in § 114(d) that the Commission "shall consider" the application. 42 U.S.C. § 10134(d). However, the text directs NRC to "consider" it "in accordance with the laws applicable to such applications," and, as discussed above, those laws allow withdrawal of the application. *Id*. Second, Petitioners rely (Br. 36-37) on the § 114(d) phrase "shall issue a final decision approving or disapproving the issuance of a construction authorization." 42 U.S.C. § 10134(d). But the pertinent text reads in full that the Commission "shall issue a final decision approving or

disapproving the issuance of a construction authorization *not later than the expiration of 3 years after the date of submission of such application*." *Id*. Read in full, this requirement is simply a time deadline for acting on a pending docketed application – a time limit that would not be violated if the application is withdrawn. As the legislative history makes plain, Congress was concerned that NRC would not act promptly on an application that DOE was continuing to pursue. *See* H.R. Rep. No. 97-411(I), at 47. There is no evidence, however, that Congress implicitly and indirectly sought to limit *DOE's* discretion through this provision.

Indeed, as NRC has previously concluded, the time limit applies only during the period when DOE's application is docketed before NRC. *See* 66 Fed. Reg. 29,453, 29453 n.1 (May 31, 2001). Once DOE's application is withdrawn, it is not docketed and, correspondingly, the Commission is not in violation of any duty to resolve the application within a certain amount of time. This provision is *not* fairly read as a substantive obligation placed on the impartial adjudicator to reach the merits of an application, even when DOE has determined not to proceed.

In any event, granting DOE's request to withdraw with prejudice would result in a final NRC judgment on DOE's application. Such a final judgment would satisfy NRC's obligations under § 114(d) by constituting a timely "disapprov[al]" under the statute, 42 U.S.C. § 10134(d).

There is also no merit to Petitioners' contention (Br. 38-39, 44-45) that the context and structure of the Act support their interpretation. Petitioners first rely on NWPA § 114(e). However, insofar as applicable to DOE, this provision merely requires preparation of a schedule and reports about the status of the repository. It does not impose any substantive obligation on DOE to develop the repository during or after the construction authorization proceeding and is easily reconciled with DOE's right to withdraw its application and to terminate the project. The provision indicates that Congress wanted to stay informed, perhaps even for the purpose of enacting subsequent legislation. Indeed, consistent with this understanding, Congress has funded the Blue Ribbon Commission with the explicit purpose of studying and recommending alternatives for the disposal of high-level waste and spent nuclear fuel based upon advances in science and engineering. The reports thus provide a means for DOE to inform Congress that it is no longer pursuing a license.

Second, Petitioners point (Br. 38-39) to NWPA § 113(c)(3)(A), 42 U.S.C. § 10133(c)(3)(A), which allows the Secretary to terminate site characterization activities if the Secretary, in his discretion, concludes that the site is unsuitable. Petitioners argue (Br. 38-39) that the presence of that language in § 113(c)(3)(A) and the absence of the same language in § 114 indicates that Congress did not

intend for DOE to have termination authority during the license application phase. Petitioners rely on the statutory construction principle that, where Congress includes particular language in one section and omits it in another section of the same Act, it is generally presumed Congress acted purposely in disparate inclusion and exclusion. However, Petitioners' reliance (Br. 38-39) on this principle is misplaced because Congress included language in both §§ 113(d) and 114(d) that preserves the Secretary's discretion to *end* the Yucca Mountain project throughout the process. The use of different wording in § 113(c)(3)(A) and 114(d) to express this intent is of no significance. Repetition of § 113(c)(3)(A)'s text in § 114 was not necessary to preserve the Secretary's termination authority because § 114(d) affirmatively incorporates NRC's usual licensing procedures. The inclusion of § 113's language in § 114 would have been redundant.[29/]

Section 113 also parallels § 114 to the extent that both provisions contain a reporting requirement to Congress. *See* 42 U.S.C. §§ 10133(c)(3)(F), 10134(c), 10134(e)(2). These requirements ensure that Congress is made aware of

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[29/] Petitioners also suggest (Br. 44) that § 114(b) precludes the Secretary from deciding to terminate the project. To the contrary, that provision says nothing about DOE's authority or obligations beyond submission of the license application.

a Secretarial termination decision and that recommendations are made for further legislative action.

The expression of DOE's termination authority in § 113(c)(3) therefore does not signify that DOE's pre-existing authority is somehow completely extinguished after submission of the application. Rather, it confirms that Congress intended to preserve the Secretary's discretion to *end* the Yucca Mountain process if he determines that is sound policy.

Thus, the NWPA does not by its plain language prohibit withdrawal of the license application on DOE's request. Nor does the Act impose a mandatory duty on DOE to prosecute the license application – certainly not with the clarity that would be required for Petitioners to prevail.[30/]

Finally, Petitioners suggest (Br. 43) that it makes no sense to allow DOE to withdraw the license application after Congress's 2002 joint resolution, which allowed the submission of the license application. Actually, that resolution was necessary to authorize the Secretary to proceed at all, and it does not preclude later judgments by the Secretary. And it makes good sense to allow the Secretary to act

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[30/] Petitioners characterize the pursuit of the license application as a mere ministerial act for DOE to perform. Br. 61. That is simply wrong. An NRC licensing proceeding entails innumerable discretionary decisions on the part of the applicant. There are literally hundreds of contested issues in this proceeding to which DOE must decide in its discretion how to respond.

if circumstances change or it becomes apparent to him that prior policies have failed, just as the Secretary had that discretion before making a recommendation to the President.

Petitioners' reading of the statute, on the other hand, is unreasonable. Under Petitioners' reading, one must assume that Congress intended for NRC to expend its time and resources reviewing and adjudicating an application for a facility that is not going to be built and that the NWPA currently does not permit, much less require, to be built absent further legislation and a series of discretionary actions that the Secretary is not required by statute to make. *See infra* at 65-68. Petitioners' position also assumes that Congress intended DOE to expend substantial public funds prosecuting a highly contentious license application despite the Secretary's judgment that continuing with the process is contrary to the public interest and his policy that DOE will not build the project if approved. Indeed, Petitioners acknowledge (Br. 42 n.15) that under their statutory interpretation, even in the event that a cataclysmic earthquake occurred at Yucca Mountain, DOE could not withdraw the license application or terminate the project; rather, NRC would have to complete the licensing process and render a decision on the merits. For all these reasons, Petitioners' position results in a futile

and wasteful process for a facility that need not be (and will not be) built. The NWPA should not be read to require such an unlikely result.

### D. Neither The Language Nor Structure of the NWPA Requires DOE to Maintain a Program to Develop and Construct a Repository at Yucca Mountain

Petitioners argue that the NWPA also precludes the Secretary from terminating the "entire Yucca Mountain project," although they do not define what falls within the scope of this supposed prohibition. Br. 42-46. While Petitioners include the withdrawal of the license application as an element of the project that allegedly cannot be terminated (Br. 42), this argument appears to go beyond the withdrawal motion to challenge the Secretary's authority to make decisions to terminate development and construction of the project outside of the licensing process.

There is no support for such a contention in the statute's language, structure, or legislative history. There is simply no statutory language that even arguably creates a duty to open a facility at Yucca Mountain or to continue the "entire Yucca Mountain project" through the development of such a facility. The statutory provisions and structure on which Petitioners rely (Br. 42-45) deal with the process leading up to and during licensing. Those provisions do not even mandate that the Secretary maintain an NRC construction license application, for the reasons

discussed above. Even more clearly, these provisions cannot colorably be read to impose any specific duties on the Secretary or to override the Secretary's pre-existing AEA authority *outside* of the NRC licensing process.

Congress made clear that its approval of the Yucca Mountain site in 2002 merely authorized the filing of an application for construction authority, and did not create a commitment to build a repository at Yucca Mountain. The Senate Report accompanying the adoption of the 2002 joint resolution states:

> 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.

S. Conf. Rep. No. 107-159, at 13 (emphasis added); *see also Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1304, 1310 (D.C. Cir. 2004).

Furthermore, there are many actions that would be required for the Secretary to open a repository that are not mandated by the NWPA. Indeed, DOE could not operate the repository absent further legislative action and other regulatory actions, as well as numerous other steps not mandated by the NWPA. An operational repository could not exist at Yucca Mountain even if NRC approved DOE's license application unless at least the following occurred:

- Congress must enact legislation permanently withdrawing lands necessary for the Yucca Mountain repository (*see* 10 C.F.R. § 63.121); such legislation was introduced in 2006 and 2007 but did not pass;[31/]
- DOE must apply for, and NRC must approve, an additional license to receive and possess spent nuclear fuel and high-level radioactive waste in the repository;
- DOE must obtain federal and state permits, including water permits from Nevada that Nevada has vigorously opposed granting;[32/] and
- Congress must fund the construction of the repository and the rail line to the repository (and in FY 2010 it eliminated funding for such activities, *see supra* at 16).[33/]

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[31/] Nuclear Fuel Management & Disposal Act, S. 2589, 109th Cong., 2d Sess. (April 6, 2006); Nuclear Fuel Management & Disposal Act, H.R. 5360,109th Cong., 2d Sess. (May 11, 2006); Nuclear Fuel Management & Disposal Act, S. 3962, 109th Cong., 2d Sess. (Sept. 27, 2006); Nuclear Waste Access to Yucca Act, S. 37, 110th Cong., 1st Sess. (May 23, 2007); Clean, Reliable, Efficient and Secure Energy Act of 2007, S. 1602, 110th Cong., 1st Sess. (June 12, 2007).

[32/] *See, e.g.*, *United States v. Morros*, 268 F.3d 695 (9th Cir. 2001).

[33/] The water permit application withdrawals mentioned by Petitioners (Br. 15) related to construction of a rail line. There is nothing in the NWPA that requires DOE to move forward with construction of a rail line at any time and especially now when there is no license approval for the repository.

Neither the NWPA nor the 2002 joint resolution commits Congress to enact the necessary legislation. In any event, they could not have that effect. *See, e.g.*, *Reichelder v. Quinn*, 287 U.S. 315, 318 (1932) ("T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years.")

The NWPA likewise does not direct DOE to apply for permits necessary for construction of a repository or to file an application with NRC to receive and possess spent nuclear fuel and high-level radioactive waste; and it certainly does not guarantee DOE success if it were to pursue them. Accordingly, there is nothing in the NWPA that prevents the Secretary from deciding that DOE will not build the repository and thus will not move forward with construction-related development.

Petitioners wrongly contend (Br. 43-44) that the NWPA approval process displaced the Secretary's pre-existing discretionary authority to terminate the Yucca Mountain project. Petitioners identify no specific statutory language to support this conclusion. Instead, Petitioners rely on the erroneous supposition that because Congress displaced the Secretary's authority "to *make*" a siting decision, it must be assumed that, in their words, Congress intended to disallow the Secretary "to *reverse*" a siting decision Congress had made. Br. 44 (emphasis in original).

But the Secretary's decision not to build the project is not "reversing" any congressional decision. The 2002 joint resolution merely allowed the process to proceed; it did not decide that a repository must be built at Yucca Mountain.

Petitioners' argument rests on a fundamental misconception as to the purpose and effect of the statutory approval process. Under the statutory scheme, the Secretary may *move forward* with selecting, siting, and obtaining a license to construct a repository at Yucca Mountain *only if* the President, Congress, and NRC permit him to do so. This ensures that the repository will not proceed without the approval of those other actors.[34/] At the same time, the NWPA leaves in place the Secretary's pre-existing discretion to halt a repository at Yucca Mountain without leave of the President, Congress, or NRC. Even the grant of an NRC construction authorization is merely a license that permits, but does not mandate, construction of the repository and leaves the Secretary with the discretion as to whether to go forward. *Cf. Shoreham-Wading River Central School Dist. v. NRC*, 931 F. 2d 102,

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[34/] The legislative history reveals that Congress was aware of, and sought to avoid, past errors involving DOE's predecessors *seeking to go forward* with a repository without adequate consultation with affected entities and, in one case, rushing development of a site that turned out to be technically infeasible. *See* H.R. Rep. No. 97-491 (I), 97th Cong., 2d Sess. at 26-28 (1982) (describing failure from AEC's "rush to develop" a pilot facility in Lyons, Kansas as a "landmark event" that continued to color repository siting activities and the ERDA's efforts to find a site in Michigan).

107 (D.C. Cir. 1991) (a "license to operate" is not "a sentence to do so"). The structure of the NWPA conditions the terms on which the Secretary may move forward with Yucca Mountain, but it leaves with the Secretary the ultimate decision whether to continue with the process up through the construction of a repository.

In sum, Petitioners' suggestion (Br. 43-45) that the statutory approval process and 2002 congressional joint resolution set DOE on a course of development and construction of Yucca Mountain that DOE has no discretion to halt without congressional approval has no basis in the statutory text or structure. It has always been the case – and with DOE's current actions remains so – that further congressional action would be required in order for the Yucca Mountain repository to be opened. Petitioners' recourse is, as it has always been, with Congress, and not through the instant petitions.[35/]

### E. The Legislative History Does Not Supply the Clear Expression of Congressional Intent That Is Required for Petitioners to Prevail Under *Chevron* Step One

Petitioners argue that the legislative history supports finding that NWPA prohibits DOE from terminating the project because it reveals that Congress

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[35/] Petitioners' repeated characterization of DOE's actions as "irrevocable" (Br. ii, 17, 42) overlooks that Congress has the power to take action to override the Secretary's decision to terminate the project.

intended that "the NWPA's process will lead to a repository being opened" at Yucca Mountain (Br. 45-46). To the contrary, the NWPA establishes a process that *could* lead to a repository at Yucca Mountain if, ultimately, the Secretary and other actors considered it appropriate to construct one there. That process, however, was not intended to – and did not– guarantee or mandate the construction or operation of a repository both before and after Congress's enactment of the joint resolution in 2002. Indeed, at the time Congress was considering enactment of the joint resolution, it acknowledged that there were many factors that might lead to a repository not opening and that Congress was "not committed forever to Yucca Mountain." 148 Cong. Rec. 7156 (2002) (Rep. Norwood).[36/]

Petitioners again wrongly rely on (Br. 40-41) legislative history accompanying Congress's 2002 joint resolution to argue that any authority to abandon Yucca Mountain is now solely vested in NRC based on technical merits of the application. The passages on which Petitioners rely indicate only that Congress chose for NRC, as opposed to Congress itself, to resolve disputed questions of geology, safety, and performance. That does not suggest that DOE

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[36/] *See also* 148 Cong. Rec. 7155 (2002) (Rep. Dingell) (stating that approval is just about a step in a process); *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.")

cannot request in the licensing proceeding that NRC end the proceeding through action on a motion to withdraw. Moreover, the 2002 legislative history confirms that Congress understood that, when it approved Yucca Mountain as the site of a potential repository, such approval simply authorized the Secretary to seek authority to construct and did not commit Congress (or DOE for that matter) beyond that step. *See*, *e.g.*, S. Conf. Rep. No. 107-159 at 13 (technical documents are sufficient to justify "*allowing* the Secretary to submit a license application" (emphasis added)). Accordingly, the 2002 legislative history supports DOE's interpretation, not Petitioners'.

Petitioners attempt to characterize (Br. 39-40) snippets of the 1982 history as indicating that Congress wanted to legislate a schedule. However, these snippets say nothing about the Secretary's discretion to end the process during the licensing stage. Indeed, the legislative history makes clear that Congress understood that there were many reasons that the process might not lead to a repository. *See* H.R. Rep. No. 97-491(I) at 44 ("[I]t is not possible to resolve all uncertainties or predict all obstacles" to a permanent geologic repository; [t]he potential for failure or serious delay in the program exists").

In sum, the NWPA's language, structure, purpose, and legislative history does not reveal a clear and unambiguous congressional intent to remove DOE's

pre-existing authority under the AEA and DOE Organization Act or to prohibit DOE from deciding to discontinue, and to withdraw the license application for, the Yucca Mountain project. Thus, Petitioners' interpretation fails under *Chevron* step one. Rather, DOE's interpretation that it retains authority to take such actions is compelled by the language and structure of the relevant statutes, as properly construed under the applicable traditional rules of statutory construction.

### F. To the Extent Congress's Intent Is Ambiguous, DOE's Interpretation Must Be Upheld

To the extent there is silence or ambiguity as to Congress's intent, DOE's interpretation must be upheld because DOE's interpretation is permissible and entitled to deference. DOE's authority to act comes from the AEA and the DOE Organization Act and DOE's interpretation of those statutes is entitled to *Chevron* deference. DOE is also the agency with primary responsibility under the NWPA and its interpretation of this statute too is entitled to *Chevron* deference. *See, e.g.*, *Indiana Michigan Power Co.*, 88 F.3d at 1274; *General Elec. Uranium Mgmt. Corp.*, 764 F.2d at 907; *Nevada v. DOE*, 993 F.2d 1442, 1444 (9th Cir. 1993); *Nevada ex rel. Loux v. Herrington*, 777 F.2d 529, 531 (9th Cir. 1985). *But see Bullcreek*, 359 F.3d at 541 (questioning, but not deciding, whether *Chevron* applies

since both NRC and DOE are responsible for implementing Subtitle B of the NWPA).

Should Petitioners argue that DOE's interpretation is not entitled to *Chevron* deference because it is not the product of notice and comment rulemaking, this argument should be rejected. The interpretation set forth in briefs filed in the NRC proceeding constitutes the official and deliberate determination by the agency and is entitled to *Chevron* deference. *See, e.g.*, *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156-57 (1991); *Auer v. Robbins*, 519 U.S. 452, 462 (1997). An agency's interpretation advanced in an administrative adjudication "*is* agency action, not a post hoc rationalization of it" and warrants deference. *Martin*, 499 U.S. at 157 (emphasis in original). And even where an administrative interpretation is not in a form that qualifies for *Chevron* deference, an agency's interpretation of a statute it administers nonetheless deserves deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and *Coeur Alaska v. Southeast Conserv. Council,* 129 S. Ct. 2458, 2473 (2009). *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008); *Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461, 487-88 (2004).

The result is the same whether *de novo* review, *Chevron, Coeur Alaska,* or *Skidmore* deference is applied. DOE's is the better interpretation.

## VI. DOE Has Not Violated NEPA

### A. Standard of Review

Petitioners' NEPA claim (Br. 46-48) is reviewed under the APA's arbitrary and capricious standard, 5 U.S.C. § 706(2)(A). *See, e.g.*, *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 763 (2004); *Nevada v. DOE*, 457 F.3d 78, 87 (D.C. Cir. 2006).

### B. Petitioners' Claim That DOE Violated NEPA Lacks Merit

There is no merit to Petitioners' contention (Br. 46-51) that Respondents have violated NEPA by deciding to abandon the Yucca Mountain project without first evaluating the impacts of that decision under NEPA. DOE has taken no major federal action that gives rise to an obligation to undertake NEPA analysis. Even if it had, DOE already has completed detailed NEPA analyses of not proceeding with a permanent geologic repository at Yucca Mountain and therefore has satisfied NEPA.

#### 1. No NEPA analysis was required

In order to prevail on their NEPA claim, Petitioners must demonstrate that DOE has undertaken an identifiable final agency action that is also a "major federal action" under NEPA, 42 U.S.C. § 4332(C), without undertaking requisite NEPA analysis. *See Karst Envlt. Educ. and Prot. v. EPA*, 475 F.3d 1291, 1295-96 (D.C.

Cir. 2007). As we demonstrated above, there is no final agency action. For similar reasons, there is no major federal action for purposes of NEPA.

Petitioners argue (Br. 47) that a decision to alter or terminate a major federal project is a major federal action. However, NEPA analysis is required only if such action effects a change in the physical environmental status quo.[37/] *E.g.*, *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 763, 772-775 (1983); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2001); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343-44 (9th Cir. 1995). It is undisputed that the proposed Yucca Mountain repository does not yet exist; it has

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[37/] The cases on which Petitioners rely (Br. 48) do not hold otherwise. Petitioners cite *Andrus v. Sierra Club*, 442 U.S. 347 (1979), for the proposition that a decision to terminate a major federal project is a major federal action. However, the Supreme Court held, consistent with the Council on Environmental Quality's regulation, 40 C.F.R. § 1508.17, that appropriation requests, even those declining to ask for funding so as to terminate a program, are not "proposals" for major federal actions and therefore the procedural requirements of NEPA have no application to such requests. *Id*. at 363-67. As part of its rationale, a footnote in *Andrus* contains *dicta* that an EIS might be required for an underlying formal programmatic proposal to terminate a program – but does not state, much less hold, that an EIS is required when the termination does not impact the environmental status quo. *Id* at 363, n. 22 (quoting 42 U.S.C. § 4332(C)). *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232 (9th Cir. 1990), simply points out that if an ongoing project undergoes changes which themselves amount to major federal actions, an EIS must be prepared. That is not this circumstance. *California ex rel Lockyer v. USDA*, 575 F.3d 999, 1014-15 (9th Cir. 2009) also addresses entirely different circumstances – a new rule that changed ongoing management of land. Here, there has been no alteration of the environmental status quo.

not been built and may never have been built, and a decision to forgo a license application results in no material changes on the ground. The decision not to move forward with development of the repository means that the environmental status quo at Yucca Mountain is not changed in any material way. Accordingly, NEPA analysis is not required.

Petitioners fail in their attempt to show that the decision changes the status quo in a manner that would require further NEPA analysis at this juncture. Citing the Dahl affidavit attached to Washington's motion for preliminary injunction, Petitioners suggest (Br. 48-49) that terminating the Yucca Mountain project will cause environmental effects at Hanford. They suggest that regulatory, administrative, and technical issues at Hanford will have to be revisited and this could delay the mission to retrieve waste from Hanford's tanks. Petitioners also suggest that terminating Yucca Mountain will prolong storage at Hanford. Dr. Triay's declaration thoroughly refutes this speculation. Addendum at 29-35; *supra* at 28-29. Furthermore, DOE is already taking into consideration potential impacts at Hanford from not proceeding with Yucca Mountain in a NEPA analysis specific to Hanford. AR 46, pp. S-13, S-118.

### 2. DOE satisfied NEPA as to an evaluation of the effects of not building Yucca Mountain

Even if the Secretary's actions required analysis of the environmental impacts of not proceeding with Yucca Mountain, Petitioners' claim fails because DOE already has extensively studied such impacts through its evaluation of the "no action alternative" for the Yucca Mountain project. NEPA does not require redundant analyses. *See* 40 C.F.R. §§ 1500.4, 1502.4, 1502.20, 1502.21. In its 2002 EIS and in its 2008 Supplemental EIS on the Yucca Mountain proposal, DOE included a detailed analysis of a no action alternative proposing that Yucca Mountain not be built, and analyzed all direct, indirect, and cumulative impacts stemming from this no action alternative. AR 42, pp. 1-78 to-88, 17-1 to -59, App. K; AR 43, pp. 7-8-7-7-10. These EISs directly address the very issues that Petitioners suggest (Br. 50) should be evaluated under NEPA, including long- and short-term safety, air and water quality, and community impacts. NEPA does not require DOE to duplicate its prior efforts.[38/]

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[38/] Assuming *arguendo* that DOE failed to adhere precisely with NEPA procedures, any violation would be harmless error because the environmental consequences of not building Yucca Mountain were evaluated in the Yucca Mountain FEIS. *See Nevada*, 457 F.3d at 90 (court need not decide plaintiffs' claim because DOE's failure to identify rail corridor selection as preferred alternative in FEIS was harmless error); *Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1257 (D.C. Cir. 1988) (agency's failure to prepare required NEPA environmental assessment

(continued...)

### 3. NEPA analysis of an alternative that has not yet been proposed is not required

Finally, Petitioners reason (Br. 50) that DOE's decision with respect to Yucca Mountain commits it to undertake an unknown and unidentified alternative the effects of which must be analyzed in an EIS *now* because the siting and operation of an alternative geologic repository will create land, air, water, and transportation impacts that require examination in an EIS. Br. 50. This argument is incorrect because an EIS "need not be prepared simply because a project is *contemplated*, but only when a project is proposed." *Weinberger v. Catholic Action of Hawaii/Peace Educ.*, 454 U.S. 139, 146 (1981) (emphasis in original). Petitioners' argument simply assumes that an alternative geologic repository to Yucca Mountain has been proposed. To the contrary, there is no alternative to Yucca Mountain proposed at this time. The Blue Ribbon Commission, although not a siting commission, has been tasked with studying alternatives for nuclear waste disposal. Such preliminary research and development efforts do not trigger NEPA, or constitute reviewable final agency action under the APA. *See*

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[38/](...continued)
harmless error because agency had considered environmental consequences). *Accord Save our Heritage v. FAA*, 269 F.3d 49, 59-62 (1st Cir. 2001); *Laguna Greenbelt v. U.S. DOT*, 42 F.3d 517, 527 (9th Cir. 1994).

*Northcoast Envtl. Center v. Glickman*, 136 F.3d 660, 669-70 (9th Cir. 1998); *Lujan*, 497 U.S. at 890-92; *Ohio Forestry*, 523 U.S. at 736-37.

At the appropriate time, DOE will conduct the requisite NEPA analysis of an alternative site for a new repository or other alternative action that has yet to be proposed. *See, e.g.,* AR 46, p. S-13. No more is required.

## VII. DOE Complied With The APA

Petitioners' challenge to DOE's compliance with the APA's procedural requirements lacks merit. Initially, Petitioners contend (Br. 52-53) that DOE must submit the documents in the record for public comment. But the cases upon which Petitioners rely make clear that this requirement applies only in the rulemaking context. *See Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 685 (D.C. Cir. 1984) (the requirement to submit materials for public comment "only applies in rulemaking and not in other informal agency action, since it derives not from the arbitrary or capricious test but from the command of 5 U.S.C. § 553(c)"). Because Petitioners do not challenge a DOE rulemaking (and there has been no such rulemaking), Petitioners' contention regarding the record is easily rejected.

Petitioners criticize (Br. 53-54) the record because, they allege, "it is impossible to determine whether the 'record' as provided fairly represents 'the

administrative record.'" Any difficulty Petitioners have in assessing the record, however, derives from their own failure to identify the circumscribed, discrete, and final agency action being challenged. In the earlier filings in these proceedings, DOE continually noted that Petitioners failed to identify the final agency action being challenged, despite being required to do so by Fed. R. App. P. 15(a)(2)(C) and then by the Clerk's March 3, 2010, order. Even now, Petitioners fail to identify the circumscribed, discrete, and final agency action that they challenge. In light of the lack of a focused challenge from Petitioners to final agency action, their criticism of the record rings hollow.

Petitioners further contend (Br. 54-57) that DOE failed to supply a detailed explanation. Once again, however, Petitioners improperly rely on APA rulemaking requirements. In the rulemaking context, the APA requires an agency to adopt "a concise general statement of [a rule's] basis and purpose" and also requires certain rules "to be made on the record after opportunity for an agency hearing." *See* 5 U.S.C. § 553(c). There are, however, no similar requirements for informal adjudications such as this one (assuming that such a reviewable adjudication has even occurred). *See Hudson v. FAA*, 192 F.3d 1031, 1036-37

(D.C. Cir. 1999). Nor is the Court at liberty to create any such requirements.[39] *Id.* In fact, on review of informal adjudications, this Court has said all that typically is needed for judicial review is an explanation in appellate briefs. *Id.* at 1036 n.4.

In any event, Petitioners are wrong that DOE provided no explanation. In addition to various statements made by Secretary Chu and others dating back to at least March 11, 2009, DOE's submissions before NRC provide detailed explanations of DOE's policy reasons for, and legal authority to, withdraw the license application and alter its policy toward the disposition of spent nuclear fuel and high-level nuclear waste. *See* AR 36 (DOE Motion to Withdraw filed March 3, 2010; DOE Reply, pp. 28-33); *see also supra* 12-18. In short, DOE believes that Yucca Mountain should not be pursued and that its long-term spent nuclear fuel and high-level nuclear waste program merits additional study based on advances in technical and scientific knowledge as well as the continuing public opposition to the permanent deep geologic repository at Yucca Mountain. While Petitioners may disagree with DOE's reasons, they have failed to show that DOE acted arbitrarily or capriciously within the meaning of the APA's narrow review strictures. *See*

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[39] Petitioners assert (Br. 55-56) that DOE did not consider the factors for making a site recommendation at 42 U.S.C. § 10134(a), but DOE had no obligation to consider those factors because it was not recommending a site under the NWPA.

*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

## VIII. Petitioners' Separation Of Powers Argument Is Irrelevant

Relying exclusively on *Youngstown Sheet & Tube Co.*, 343 U.S. at 587, 641, Petitioners contend (Br. 57-59) that Respondents violated the separation of powers principle. This, however, is not a *Youngstown*-type case. Respondents make no claim that the authority to change course on Yucca Mountain comes from inherent presidential authority. The authority comes the AEA and the DOE Organization Act, and is preserved by the NWPA. The issue here thus is one of statutory interpretation, not inherent authority. *Youngstown* is inapplicable.

## IX. The Court Should Not Issue A Writ of Mandamus Or An Injunction

### A. The Criteria For Mandamus Are Not Met

Petitioners Aiken County and State of South Carolina seek (Br. 60-63) a writ of mandamus to compel DOE to rescind its motion to withdraw the license application currently pending before NRC. As Mandamus Petitioners concede, however, "[m]andamus is a drastic remedy, to be invoked only in extraordinary circumstances." *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) (internal quotations omitted). "Mandamus is available only if: (1) the plaintiff has a clear

right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Id.* (internal quotations omitted).

Mandamus is inappropriate because Mandamus Petitioners have adequate and obvious non-mandamus remedies available to them. For instance, the NRC Licensing Board allowed the Mandamus Petitioners to intervene in the ongoing NRC administrative licensing proceeding and denied DOE's motion to withdraw the licensing application. If the Commission declines to review or upholds the Licensing Board's decision, then Mandamus Petitioners will have obtained the relief they desire without this Court resorting to the drastic and extraordinary remedy of mandamus.

If the Commission ultimately renders a final decision adverse to Mandamus Petitioners' interests, Petitioners may petition for review of that decision in the court of appeals. *See* 28 U.S.C. § 2342(4) (Hobbs Act). Where Mandamus Petitioners may obtain relief from the NRC's final adverse decision through the filing of petitions for review in the court of appeals, mandamus relief is precluded. *See In re GTE Serv. Corp.*, 672 F.2d 1024, 1026 (D.C. Cir. 1985) (denying petition for writ of mandamus where a petition for review was available).

Mandamus also is inappropriate because the mandamus Petitioners have not shown that they have a "clear and indisputable" right to relief. *See Gulfstream*

*Aerospace Corp. v. Maycamas Corp.*, 485 U.S. 271, 289 (1988). "A plaintiff seeking mandamus relief has the burden of showing that the defendant owes it a 'clear and compelling' duty, a duty 'so plainly prescribed as to be free from doubt and equivalent to a positive command." *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 334, (D.C. Cir. 2009). Contrary to Petitioners' contention (Br. 61), the language in § 114(b) does not clearly and compellingly prescribe a duty to continue to prosecute the license application. *See supra* Argument Section V. Petitioners have no right to the declaratory relief they seek, let alone the "clear and indisputable" right required for mandamus.

### B. Petitioners' Request for an Injunction Must Be Denied Because They Fail to Demonstrate That They Will Suffer Irreparable Harm in the Absence of an Injunction

If they should prevail on the merits, Petitioners request (Br. 63-64) a permanent injunction. "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto v. Geertson Seed Farms*,130 S. Ct. 2743, 2761 (2010). A party seeking a permanent injunction must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a

remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006).

Tellingly, Petitioners make no claim that they will suffer irreparable harm in the absence of an injunction. This is particularly revealing considering that this Court has already concluded that DOE's actions have not caused Petitioners any irreparable injury warranting a preliminary injunction. Order of May 3, 2010. This same lack of a demonstration of irreparable harm is also fatal to their current request because "[t]he basis of injunctive relief in the federal courts has always been irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). A movant's failure to show any irreparable harm is grounds for refusing to issue an injunction, even if the other three factors entering the calculus merit such relief. *Id.; see also Monsanto*, 130 S. Ct. at 2759-60. Where Petitioners have failed to brief, or even mention, the irreparable harm factor, they have waived their ability to seek permanent injunctive relief. *See Catawba County, N.C. v. EPA*, 571 F.3d 20, 38 (D.C. Cir. 2009).

## X. The Court Should Dismiss the President As A Named Defendant Or, Alternatively, It Should Decline To Direct Any Relief At The President

Petitioners Ferguson *et al.* and State of South Carolina name the President as a respondent, and the opening brief (Br. 65) asks this Court to direct relief at the President. However, although the NWPA provides this Court with original jurisdiction "over any civil action – for review of any final decision or action of . . . the President . . . under the part," 42 U.S.C. § 10139(a)(1), the NWPA itself is not the source of the civil action. Rather, as explained *supra* at Argument Section III.A, it is the APA that typically provides the cause of action in NWPA cases, and Petitioners identify no other potential source. But the APA does not provide a cause of action against the President, so the President is not a properly named respondent in this APA matter. *See Franklin*, 505 U.S. at 800-01 (plurality opinion); *see also id.* at 823 (Scalia, J., concurring in part and concurring in judgment); *Dalton v. Spector*, 511 U.S. 462, 469 (1994). This Court thus should dismiss the President as a named respondent.[40/]

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[40/] The APA aside, longstanding authority holds that judicial review of a President's exercise of discretion is unavailable. *See Dalton*, 511 U.S. at 475-76. Furthermore, even assuming *arguendo* that the NWPA provides a cause of action against the President and that Congress could waive the President's sovereign immunity, there is no such waiver for Petitioners' claims against the President. Waivers of federal sovereign immunity must be clearly stated and narrowly construed in favor of the sovereign. *United States v. Nordic Village, Inc.*, 503 U.S.

(continued...)

Even if Petitioners had a cause of action against the President under the APA, judicial relief rarely, if ever, is appropriately directed at the President in the performance of his official duties where relief may be obtained against his subordinates. *Id.* at 802-03 (plurality); *see also id.* at 824-826 (Scalia, J., concurring in part and concurring in judgment). *See also Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996). Because of the respect due the Presidency and the potential constitutional ramifications of exercising judicial power against the President, this Court should follow its normal course and decline to direct any relief at the President himself, even if this Court concludes that the President is a properly named respondent. *Id.* at 979-81.

## CONCLUSION

The petitions should be denied.

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[40/](...continued)
30, 33-34 (1992). This principle dictates that any sovereign immunity waiver be narrowly construed to encompass only claims challenging an action the Act expressly assigns to the President, *e.g.*, his site recommendation under 42 U.S.C. § 10134(a)(2). *Cf. Nuclear Energy Institute, Inc.*, 373 F.3d at 1309 (challenge to President's recommendation held moot). Petitioners' claims in this case are not of that nature.

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**CERTIFICATE OF COMPLIANCE WITH**
**TYPE VOLUME LIMITATION AND STYLE REQUIREMENTS**

I certify that this brief complies with the type volume limitation set forth in this Court's order of May 13, 2010, setting a limit of 23,000 words to be divided between Federal Respondents and the State of Nevada. Pursuant to an agreement between the Federal Respondents and the State of Nevada, Federal Respondents' brief is limited to 20,000 words. Excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 19,932 words.

This brief has been prepared using Word Perfect X3. It contains proportionally spaced 14 point, New Times Roman type style.

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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 May 15, 2009 Administrative Order, I hereby certify that on this date, January 3, 2011, I caused the foregoing brief to be filed upon the Court 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 counsel of record in the Service Preference Report. I have also served two copies by U.S. Mail to the following addresses:

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As required by the rules, I have also caused an original and eight paper copies of this brief to be filed with the Court.

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