

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)

Docket No. 63-001-HLW)

U.S. DEPARTMENT OF ENERGY)

ASLBP No. 09-892-HLW-CAB04)

(License Application for Geologic)
Repository at Yucca Mountain))
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)
)

July 19, 2010)

AIKEN COUNTY REPLY BRIEF TO COMMISSION

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ARGUMENT

If this Commission reviews the Licensing Board's order denying the Department of Energy's (DOE's) motion to withdraw its license application, the Licensing Board Order should be upheld. However, the Commission should use its discretion not to review the Order. As discussed below, no party convincingly demonstrates otherwise in its response brief before the Commission.

I. If the NRC Reviews the Licensing Board Order, the Order Should Be Upheld Based on the Clear Commands of the Nuclear Waste Policy Act.

This controversy, at bottom, is about whether the Department of Energy (DOE) can ignore an unmistakable command from Congress to apply for a license application for construction authorization for the Yucca Mountain geologic repository, and whether the Nuclear Regulatory Commission (NRC) may ignore its own NWPA-mandated obligation to complete its assessment of the submitted license application on its merits by allowing withdrawal. Aiken County argues that NRC should not grant DOE's motion to withdraw its application. To ignore the explicitly stated Congressional commands of the NWPA is to disregard our Constitutional form of government.

A. No Party Credibly Rebutts the Clear Fact that DOE's Withdrawal Would Be a Violation of Its Obligations Under NWPA Section 114(b).

Nevada and DOE ask this Commission to ignore the clear mandate to DOE in Section 114(b) of the NWPA,¹ which requires, upon site designation by Congress, that “the Secretary *shall submit* to the Commission an application for a construction authorization for a repository at such site....” 42 U.S.C. § 10134(b). Submission of the application by DOE then triggers the duty of NRC to consider and issue a final decision on the technical merits of the license application. 42 U.S.C. § 10134(d). “Congress's directives to the agencies were plainly intended to be complementary....” *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1293 (D.C. Cir. 2004).

These two provisions, read together, make clear that DOE does not have discretion to submit and then withdraw its license application, just as clearly as DOE had no discretion to decline to submit the license application to begin with. Arguments to the contrary all collide with these plain commands.

¹ Contrary to its arguments in this proceeding, DOE has previously readily acknowledged that the later-enacted, specific statutory scheme of the NWPA limits DOE's authority under the Atomic Energy Act (AEA). In a 2008 report to Congress regarding the interim storage of spent nuclear fuel (SNF), DOE properly observed that the NWPA applied to SNF storage unless there was a specific exception in the AEA itself:

[T]he later-enacted NWPA provided a detailed statutory scheme for SNF storage and disposal and limited the Department's authority to accept SNF under the AEA except in compelling circumstances such as acceptance of SNF to abate a public health risk in an emergency. For the Department to accept any commercial SNF under the AEA, the Department could do so only under certain circumstances determined to be identifiable exceptions in the AEA

With enactment of the NWPA, Congress provided a detailed statutory scheme for commercial SNF storage and disposal that, by its specificity, limits the Department's commercial SNF storage and disposal options....

Department of Energy, *Report to Congress on the Demonstration of the Interim Storage of Spent Nuclear Fuel* (Dec. 2008) at 7 (available at http://www.energy.gov/media/ES_Interim_Storage_Report_120108.pdf).

DOE makes much of the fact that there is no express provision saying “do not withdraw.”² Nevada also argues that the absence of an express “do not withdraw” provision creates a statutory gap that is ripe for interpretation.³ While both DOE and Nevada attempt mightily to create an illusion that something is missing, neither party is correct.

First, the use of the word “shall” is “a command that admits of no discretion on the part of the person instructed to carry out the directive.” *Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 22 F.3d 1150, 1153 (D.C. Cir. 1994); *see also Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 428 (D.C. Cir. 1983) (“use of the word ‘shall’ presumptively implies that Congress intended to impose a mandatory duty”).

Second, when Congress enacts a sequential, stepwise statutory scheme such as the NWPA – effectuated by the command “shall” – it need not expressly forbid undoing what it has already commanded done. In other words, Congress does not have to “spell out” in the negative what it already clearly directs affirmatively, any more than a parent who orders a child to “go to bed” needs to say “and stay in bed.” The command is clear. As one federal Court of Appeals has stated, “Congress is not required to draft statutes in ways that are precise to the point of pedantry.” *United States v. Meade*, 175 F.3d 215, 220 (1st Cir. 1999). Because Congress need not anticipate every imaginable attempt to thwart a statutory scheme, the absence of an express prohibition does not create a “gap” that admits of discretion or interpretation. Congress has spoken clearly on the matter, and DOE lacks discretion to withdraw its mandatory license application. Even the movant’s intellectual fog cannot obscure this clarity.

Finally, even if the statute were open to interpretation, any such interpretation would have to be reasonable. A statute cannot be interpreted in a manner that contravenes the statutory

² DOE Response Brief to Commission (July 9, 2010) at 17-18.

³ Nevada Response Brief to Commission (July 9, 2010) at 10-11.

scheme and purpose of the act. “It is an elementary rule of construction that ‘the act cannot be held to destroy itself.’” *Citizens Bank v. Strumpf*, 516 U.S. 16, 20 (1995) (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)); *see also Mullins v. Andrus*, 664 F.2d 297, 309 (D.C. Cir. 1980) (“We must reject a statutory interpretation ...when it flouts a legislative edict.”); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (“An agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.”). Thus, even if a statutory gap existed between the mandate for DOE to submit its application and the mandate for NRC to complete its review and issue a final decision approving or disapproving the license application, that gap cannot be filled in a manner that permits DOE to rescind its mandatory application.

DOE’s and Nevada’s attempt to create discretion where none exists, and to eviscerate the NWPA by way of interpretation, must be rejected as without statutory support.

B. No Party Credibly Rebutts the Fact that Allowing Withdrawal Would Contravene NRC’s Obligations Under NWPA Section 114(d).

These parties supporting withdrawal misconstrue Section 114(d) of the NWPA, which provides:

The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application [extendable up to 12 months with certain reporting requirements].

42 U.S.C. § 10134(d). This provision of the NWPA plainly assigns to NRC the duty to reach a merits decision on the license application in accordance with applicable law, except to the extent that “applicable law” jeopardizes this NWPA-created duty.

DOE contends that Congress' mandate that NRC "shall issue a final decision approving or disapproving the issuance of a construction authorization" is "*not* a substantive obligation" of the NRC, but "simply a time deadline."⁴ Nevada essentially argues the same.⁵ This incredibly strained reading of the statute is untenable. The statutory provision clearly is an obligation to complete a merits examination of the license application.

DOE and Nevada essentially ask the Commission to "read away" the text of statute that provides "except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization." However, as the Supreme Court has noted, statutes should be interpreted to give meaning to every word. *United States v. Menasche*, 348 U.S. 528, 539 (1955). As the *Commission* has already noted in a previous decision in this proceeding, the NRC indeed has a "statutory obligation *to complete its examination of the application* within three years of its filing." *In re United States DOE*, 63 N.R.C. 143, 146 (N.R.C. Feb. 2, 2006) (emphasis added). And *DOE itself*, prior to its withdrawal motion, noted that NRC had a "*statutory obligation to complete its licensing proceeding in three years.*"⁶

If DOE's and Nevada's new arguments are taken at face value, and this provision – "*except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years*" – is simply a deadline, it begs the question: a deadline for *what*? If no substantive obligation underlies this time provision, then it is really nothing more than an "expiration date," after which presumably the license

⁴ DOE Response Brief to Commission (July 9, 2010) at 13.

⁵ Nevada Response Brief to Commission (July 9, 2010) at 11-14.

⁶ *In re United States DOE*, 60 N.R.C. 300, 305 n.5 (N.R.C. Aug. 31, 2004) (quoting DOE Comments on Proposed Revisions to the 10 CFR Part 2 [LSN] Design Standards for Participating Websites (Oct. 6, 2000)) (emphasis added); *see also* U.S. Department of Energy, Transition 2008: Important Issues, Book 2, at 1-4. (http://management.energy.gov/documents/2008_Transition_Important_Issues_Book_Two.pdf) ("NRC is now required by statute to *make a decision on the construction authorization* no later than 2012.")

application can no longer be considered by NRC. Can this interpretation be correct? Did Congress really intend that NRC's *only obligation* upon receipt of the mandatory license application is to "mull it over" for three years until the clock expires? After the numerous failed efforts to develop a national repository, did Congress intentionally enact a licensing scheme that would allow opponents of the repository to "run out the clock" and thwart its licensure? Of course not. This proposed interpretation is manifestly incorrect. Congress intended its commands that NRC "shall consider" and "shall issue a final decision" regarding construction authorization to be just that – commands. NRC is required to complete its examination on the merits of the license application.

NRC Staff does not so much misconstrue, but rather it ignores, the fact that this section mandates that "the laws applicable to such applications" apply "except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization." Thus, NRC staff spends several pages arguing that "the Board erred in concluding that NWPA § 114 ... precludes the Commission from considering a motion to withdraw under 10 C.F.R. § 2.107."⁷

The NRC Staff mischaracterizes the Licensing Board's order. The Licensing Board actually held that, regardless of the application of NWPA §114(d), the regulation does not "authorize" withdrawals or give "any applicant presumptive permission to unilaterally withdraw its application."⁸ Rather, the regulation confirms a Licensing Board's ability to place conditions when granting an applicant's request to withdraw an application, and effectively "authorizes licensing boards to *deny* unconditioned withdrawals." The Licensing Board further held that the regulation, *if erroneously construed as carte blanche permission to withdraw an application*,

⁷ NRC Staff Response Brief to the Commission (July 9, 2010) at 5, 11-15.

⁸ Licensing Board Memorandum and Order (June 29, 2010) at 13.

cannot possibly apply, due to the plainly stated directive of Section 114(d) that applicable laws will not apply to the extent those laws jeopardize fulfillment of NRC's obligation to consider and reach a final decision on the merits of the license application.

C. NRC Should Deny DOE's Improper Motion to Withdraw.

NRC Staff has perhaps the most troubling response of all parties regarding DOE's duty to seek licensure under Section 114(b) of the NWPA. NRC Staff does not address the issue of whether DOE lacks authority, but argues that the Licensing Board Order "does not explain or identify NRC's authority to in effect enforce DOE's obligations under the NWPA."⁹

In other words, NRC argues that even if DOE clearly has an obligation under the NWPA which it is violating, what gives the Licensing Board or the NRC the right to say "no" to the motion rather than turning a blind eye?

As a preliminary matter, Aiken County has consistently argued that the Court of Appeals is the appropriate, Congressionally-sanctioned forum to resolve this dispute pursuant to the NWPA's grant of original and exclusive jurisdiction.¹⁰ Indeed, the Licensing Board originally suspended proceedings to await resolution of this matter,¹¹ but the Commission vacated the Licensing Board and directed it to rule on DOE's motion to withdraw.¹² However, if the NRC assumes for itself *jurisdiction* to resolve this issue, it must then deny DOE's improper motion. Since DOE has asked the NRC to withdraw its license application, the NRC's only possible response must be "denied."

⁹ *Id.* at 10.

¹⁰ 42 U.S.C. § 10139. *See* Petition of Aiken County, South Carolina to Intervene (Mar. 4, 2010) at 1, 3; Reply of Aiken County to Answer to Petition to Intervene (Apr. 5, 2010) at 1 n.1, 2 n.2; Aiken County's Response to Two Petitions for Interlocutory Review (Apr. 16, 2010) at 2; Aiken County Response in Opposition to DOE's Motion to Withdraw (May 6, 2010) at 1; Aiken County Response Brief to Commission (July 8, 2010) at 5-7.

¹¹ Licensing Board Memorandum and Order (Apr. 6, 2010).

¹² Commission Memorandum and Order CLI-10-13 (Apr. 23, 2010).

As discussed above, NRC is charged with the statutory duty to consider and issue a final decision approving or disapproving the license application on its merits. With that obligation, of course, Congress vested NRC with the power to deny an improper motion to withdraw. *See, e.g., Capital Cities Cable v. Crisp*, 467 U.S. 691, 700 (1984) (“the [Federal Communications] Commission's authority extends to all regulatory actions ‘necessary to ensure the achievement of the Commission's statutory responsibilities.’”) (internal citation omitted); *Fort Sumter Tours v. Babbitt*, 66 F.3d 1324, 1330 (4th Cir. 1995) (“a statutory provision calling for reconsideration of fees [by the National Park Service] would be rendered meaningless if it did not include authority for the adjustment of fees as well”). The NRC could not carry out its mandate if it permitted withdrawal.

While NRC’s authority has limits,¹³ its capacity in this proceeding certainly extends to the proper disposal of DOE’s improper motion to withdraw. DOE made the motion, and the Licensing Board has denied it. The NRC’s obligation to deny the motion cannot be shirked simply because another agency is involved. *City of Tacoma v. FERC*, 331 F.3d 106 (D.C. Cir. 2003).¹⁴ The Commission has already acknowledged as much in this proceeding, stating that “of

¹³ Indeed, the Licensing Board expressly noted that it was not compelling DOE to go forward, but relying on DOE itself to meet its obligations. *See* Licensing Board Memorandum and Order (June 29, 2010) at 19-20 (“The Board is confident that DOE can and will prosecute the Application before the NRC in good faith ...”).

¹⁴ In *City of Tacoma*, the Federal Energy Regulatory Commission (FERC) had been granted by Congress the exclusive responsibility under the Federal Power Act to fix the amount of “reasonable annual charges” assessed to regulated hydroelectric utilities for work performed by federal agencies in administering the Act. *City of Tacoma v. FERC*, 331 F.3d 106, 115 (D.C. Cir. 2003). FERC maintained that it was not obligated to review the charges assessed by eight other federal agencies under the Act because it “[did] not consider it to be in the ambit of this Commission's authority to purport to tell another agency what studies or other reviews it should or should not undertake in the exercise of its statutory obligations.” *Id.* at 110. The Court of Appeals rejected FERC’s assertion, holding that “[b]y delegating to other federal agencies the responsibility of ensuring that their cost reports are reasonable and within the scope of the Act, the Commission fails to discharge [its] duties. Its delegation of its responsibility means that the [other agencies], not the Commission, ‘fix’ the amounts of annual charges,” *Id.* at 115. The Court concluded that “the Commission, by failing to conduct [its required] review, has acted contrary to ‘the unambiguously expressed intent of Congress’ and therefore contrary to law.” *Id.* at 115-16.

course, the NRC retains the authority under the NWPA and the Energy Reorganization Act to take appropriate action to remedy DOE misconduct.”¹⁵

If review is taken, the Commission has the obligation to uphold the Licensing Board’s denial of DOE’s improper motion to withdraw. To do otherwise would be a violation of the law by NRC itself.

II. No Party Convincingly Argues that Review by the Commission is Appropriate.

No party persuasively makes the case that the NRC should review the Licensing Board Order, and indeed the Commission should not review the Order because of the lack of a quorum of Commissioners. However, even if the Commission has a quorum, it should use its discretion to decline review.

A. The Lack of a Quorum Compels the Commission to Decline Review.

As Aiken County has set forth in a joint Recusal Motion with other parties, three members of this five-member Commission should properly recuse themselves from all aspects of this decision, due to their responses to questions during recent confirmation hearings about the specific issue at hand – DOE’s recent decision to walk away from the NWPA as a matter of policy.¹⁶ The result of the proper recusal of these three Commissioners is that no quorum should exist for Commission review of the Licensing Board Order.¹⁷

¹⁵ *In re United States DOE*, 69 N.R.C. 580, 607 n.152 (N.R.C. June 30, 2009).

¹⁶ *See* Washington, South Carolina, Aiken County, and White Pine County’s Motion for Recusal/Disqualification (July 9, 2010).

¹⁷ One of the three Commissioners, Commissioner Apostolakis, has already recused himself from this matter, for reasons other than those put forth in the joint motion for Recusal/Disqualification. *See* Notice of Recusal of Commissioner Apostolakis (July 15, 2010).

Given the simultaneous, expedited nature of this briefing schedule before the Commission, it is uncertain what parties will argue regarding the existence of a quorum of Commissioners. Some may argue that the “Rule of Necessity” suspends the Commission’s quorum requirement. However, the Rule of Necessity cannot apply to waive the quorum requirement needed for review of the Licensing Board Order.

An agency cannot create its own quorum rule where one is specified by statute. *Falcon Trading Group v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996). A quorum of Commissioners is required by statute for the transaction of NRC business, including deciding whether to review the Licensing Board Order disposing of DOE’s motion to withdraw. 42 U.S.C. § 5841; 10 C.F.R. § 2.4.

The so-called “Rule of Necessity” does not apply to suspend this quorum requirement in this instance. The Rule of Necessity is “[a] rule requiring a judge or other official to hear a case, despite bias or conflict of interest, when disqualification would result in a lack of *any competent court or tribunal*.”¹⁸ The Rule of Necessity does not apply to this decision because the Court of Appeals is the proper, Congressionally-sanctioned forum to resolve this dispute.¹⁹ Direct actions specifically challenging DOE’s authority to withdraw its License Application, filed in the Courts of Appeals before DOE filed its motion to withdraw, are currently consolidated in the federal Court of Appeals for the District of Columbia Circuit. There is no lack of a competent court or tribunal to hear the matter, and the Rule of Necessity is not triggered.

¹⁸ See BLACK’S LAW DICTIONARY, 8th Ed. 2004, at 1359 (emphasis added).

¹⁹ See 42 U.S.C. § 10139.

The lack of a quorum properly compels the result that the Licensing Board's denial of DOE's motion to withdraw should stand as the NRC's decision regarding the motion under standard Commission procedures.²⁰

B. The Decision Whether To Review the Licensing Board is Solely at the Discretion of the Commission.

Aiken County argues that review cannot occur due to the lack of a quorum. However, even if a quorum existed – as a result of one or more of the Commissioners whose recusal has been requested failing to recuse themselves in this matter – review by this Commission is a matter of discretion. No party is entitled to an appeal as of right, and no regulatory “standard” applies to mandate review.

DOE incorrectly asserts that a regulatory “standard for certification” of review applies to the Licensing Board Order. DOE cites two NRC regulations²¹ for the proposition that a “standard for certification” applies.²² However, neither of these regulations are applicable to this proceeding if the *Presiding Officer* does not refer a ruling to the Commission.²³

Like DOE, Nevada contends that “review criteria” exist, citing two completely different regulations than those cited by DOE.²⁴ However, like DOE's asserted regulations, these rules only apply when the Presiding Officer, in *his* judgment, refers a ruling to the Commission.

The special NRC rules governing this high-level waste proceeding simply do not provide for the kind of interlocutory review currently being considered, as NRC Staff correctly points

²⁰ See Nuclear Regulatory Commission's *Internal Commission Procedures*, <http://www.nrc.gov/about-nrc/policy-making/internal.html>, at App'x 4.

²¹ 10 C.F.R. § 2.341(f)(1) and 10 C.F.R. § 2.319(l).

²² See DOE Response Brief to Commission (July 9, 2010) at 6.

²³ See 10 C.F.R. § 2.1005.

²⁴ 10 C.F.R. § 2.1015(d) and 10 C.F.R. § 2.323(f). See Nevada Brief at 7-8.

out.²⁵ Plainly, no party is entitled to a review “as of right” of the Licensing Board’s interlocutory order denying DOE’s motion to withdraw. Whether review is taken is in the *discretion* of the Commission. As discussed below, proper use of that discretion in this case is to decline review of the Licensing Board Order.

C. Sound Discretion Warrants the Commission Declining Review.

Discretion is synonymous with “individual judgment,” and indicates the “power of free decision-making.”²⁶ Aiken County submits that the proper judgment is not to review the Licensing Board Order, and that arguments in favor of Commission review fail to demonstrate otherwise.

Nevada asserts, as a basis for review, that Yucca Mountain is “a question of national importance,” and for that reason a “subordinate tribunal” should not be allowed to speak for the agency.²⁷ DOE points out that “[t]he issue here is a legal one,” and that it is “novel” and “significant.”²⁸ NRC Staff asserts that DOE’s motion raises “unique questions of law regarding the proper interpretation of NWPA § 114 and the applicability of 10 C.F.R. § 2.107 to the Commission’s consideration of an application under NWPA § 114(d).”²⁹ Aiken County agrees that the Licensing Board’s Order involves a nationally significant legal issue.³⁰

However, with all due respect to the Commission, letting the Licensing Board’s Order “speak for the agency” is exactly what should occur here. The Licensing Board’s approach to hearing DOE’s motion was thorough and clearly fashioned to arrive at proper conclusions of

²⁵ NRC Staff Response Brief to the Commission (July 9, 2010) at 5-6.

²⁶ See BLACK’S LAW DICTIONARY, 8th Ed. 2004, at 499.

²⁷ Nevada Response Brief to Commission (July 9, 2010) at 8.

²⁸ DOE Response Brief to Commission (July 9, 2010) at 5-7.

²⁹ NRC Staff Response Brief to the Commission (July 9, 2010) at 7.

³⁰ See Aiken County Brief at 5.

law. The proceedings were based on an adversarial legal process, among parties with varied and unique interests and perspectives. The hearing process was fair and inclusive, extending over several weeks and including over one hundred pages of legal briefing on each side of DOE's motion to withdraw, as well as hours of oral argument and questioning open to the public for viewing. The bench included three accomplished administrative law judges, two legal and one technical; the Chairman and senior judge was appointed to the Atomic Safety & Licensing Board Panel in 1991 after "a distinguished 10-year career as an administrative judge on the Commission's Atomic Safety and Licensing Appeal Board."³¹

The thorough and transparent process by which the Licensing Board arrived at its decision is appropriate as a way to reach an agency decision.³² The very foundation of public confidence in agency tribunals rests on fairness and thoroughness of the adjudication and the specialized knowledge and expertise of the adjudicators, neither of which is challenged by the proponents of review. The Commission should not assume review the Licensing Board Order.

CONCLUSION

Before filing its motion to withdraw in this proceeding, DOE observed that the "later-enacted NWSA provided a detailed statutory scheme" which "severely limits the Department's authority" under the AEA.³³ Now, DOE cites to "broad responsibility ... free of close prescription" found in the AEA as its legal basis for abandoning its NWSA-mandated license

³¹ U.S. Nuclear Regulatory Commission, Atomic Safety and Licensing Board Panel Members, <http://www.nrc.gov/about-nrc/organization/panel-members.html>.

³² Although, as Aiken County has consistently urged in this proceeding, the Court of Appeals is the proper forum for this dispute. See 42 U.S.C. § 10139. This is especially so where, as here, the question is a legal one.

³³ Department of Energy, *Report to Congress on the Demonstration of the Interim Storage of Spent Nuclear Fuel* (Dec. 2008) at 6-7 (available at http://www.energy.gov/media/ES_Interim_Storage_Report_120108.pdf).

application,³⁴ and reasons that “nowhere in [the] legislative history that has been cited did Congress say that it intended through the NWPA to take away DOE’s authority under the AEA”³⁵

Before filing its motion to withdraw, DOE recognized that the NWPA was authoritative as to matters within its scope, unless there are “identifiable exceptions in the AEA.”³⁶ Now, DOE argues that the AEA trumps the NWPA “[a]bsent an express provision in the NWPA affirmatively withdrawing authority under the AEA.”³⁷

Before DOE filed its motion to withdraw, the Secretary of Energy testified before Congress that DOE would “continue participation in the ... license application process, consistent *with the provisions of the Nuclear Waste Policy Act.*”³⁸ Now, DOE asserts that “the Secretary [has] discretion to determine not to proceed with an application for a particular repository.”³⁹

Before filing its motion to withdraw, DOE acknowledged that NRC had a “*statutory obligation to complete* its licensing proceeding in three years.”⁴⁰ Now, DOE incredibly argues that there “is *not* a substantive obligation on the NRC to reach the merits,” but “simply a time deadline.”⁴¹

³⁴ DOE Response Brief to Commission (July 9, 2010) at 8.

³⁵ *Id.* at 32

³⁶ Department of Energy, *Report to Congress on the Demonstration of the Interim Storage of Spent Nuclear Fuel* (Dec. 2008) at 6-7 (available at http://www.energy.gov/media/ES_Interim_Storage_Report_120108.pdf).

³⁷ DOE Response Brief to Commission (July 9, 2010) at 20.

³⁸ See Licensing Board Memorandum and Order (June 29, 2010) at 8 n.27.

³⁹ DOE Response Brief to Commission (July 9, 2010) at 1.

⁴⁰ *In re United States DOE*, 60 N.R.C. 300, 305 n.5 (N.R.C. Aug. 31, 2004) (quoting DOE Comments on Proposed Revisions to the 10 CFR Part 2 [LSN] Design Standards for Participating Websites (Oct. 6, 2000)) (emphasis added).

⁴¹ DOE Response Brief to Commission (July 9, 2010) at 4.

The stark difference between DOE's interpretation of the law before moving to withdraw, and its new interpretation of the law afterwards, is telling. So is the fact that the AEA, the linchpin of DOE's current argument, is relegated to a single footnote in DOE's nine-page motion to withdraw.⁴² The inconsistency demonstrates that the relevant legal issue implicated by DOE's motion to withdraw has nothing to do with "implied repeals"⁴³ or stripped authority,⁴⁴ or any other legal theory DOE has concocted after the fact to justify its attempt to withdraw its license application.

The legal issue here is simply whether the Nuclear Waste *Policy* Act, which *Congress* enacted as the Nation's policy for the permanent disposal of high-level nuclear waste, can be ignored outright by DOE, which seeks to walk away from its mandatory license application in favor of its own policy. The NWPA clearly deprives DOE of such authority, and requires NRC to reach a merits decision on the submitted license application.

DOE's duty as an executive agency to comply with the NWPA flows from nothing less than the Constitution itself, which commands the Executive to "take Care that the Laws be faithfully executed."⁴⁵ As our Supreme Court has stated:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). The Commission, of course, is sworn to bear true faith and allegiance to the Constitutional framework which DOE's

⁴² DOE Motion to Withdraw (Mar. 3, 2010) at 4 n.5. The "Blue Ribbon Commission," on the other hand, is mentioned four times. *See id.* at 1, 2, 3, 7.

⁴³ DOE Response Brief to Commission (July 9, 2010) at 19.

⁴⁴ *Id.* at 16.

⁴⁵ U.S. Const. Art. II § 4.

attempt to withdraw its license application undermines. In this case, it is clear what faithful execution of the law requires: a merits examination of the mandatory license application. The Commission must allow the Licensing Board Order denying DOE's motion to withdraw to stand for the reasons stated above.

Respectfully Submitted,

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Executed in accordance with
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July 19, 2010

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the **AIKEN COUNTY REPLY BRIEF TO COMMISSION** in the above-captioned proceeding have been served on the following persons this 19th day of July, 2010, by Electronic Information Exchange.

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