

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)	
)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY)	
)	ALSBP No. 09-892-HLW-CAB04
(High Level Waste Repository))	
_____)	July 9, 2010

**BRIEF OF PRAIRIE ISLAND INDIAN COMMUNITY
FOR AFFIRMANCE OF ATOMIC SAFETY AND LICENSING BOARD
MEMORANDUM AND ORDER DENYING DEPARTMENT OF
ENERGY'S MOTION TO WITHDRAW
CONSTRUCTION AUTHORIZATION APPLICATION**

PRAIRIE ISLAND INDIAN COMMUNITY

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INTRODUCTION

The Prairie Island Indian Community (PIIC) files this brief in support of Commission affirmance of the June 29, 2010 Memorandum and Order (Order) of the Atomic Safety and Licensing Board ("Board" or "ASLBP") denying the U.S. Department of Energy's (DOE's) Motion to Withdraw its Construction Authorization License Application (License Application) in this case.

The ASLBP, comprising three experienced veteran Administrative Law Judges (ALJs) of this agency, have presided over these proceedings commencing with the filing by DOE of its License Application. The Board has correctly ruled that the DOE lacks authority under the Nuclear Waste Policy Act (NWPA) of 1982, 42 U.S.C. § 10101, *et seq.*, to withdraw its License Application in the circumstances presented. The Board has also essentially ruled that this agency, the Nuclear Regulatory Commission (NRC or Commission) also does not have the authority under the NWPA and Atomic Energy Act (AEA), 42 U.S.C. § 2011, *et seq.*, to grant DOE's Motion to Withdraw its License Application.

The Board rendered its decision following receipt of briefs and oral arguments by several parties, including DOE and its "allies" supporting DOE's Motion and by several parties (including both existing parties and recently admitted intervening parties) which opposed DOE's Motion.¹

¹ The PIIC fully participated before the Board in briefing and oral argument on the issues presented, and was granted intervention by the Board; PIIC fully supports the Board's June 29, 2010 Order issued in this case. This brief on behalf of PIIC will include its arguments presented to the Board, including those ruled upon in PIIC's favor by the Board, and also those arguments "reserved" and not ruled upon by the Board (Order, p 47).

BACKGROUND REGARDING PIIC AND ITS COMPELLING INTERESTS

PIIC is a federally recognized Indian Tribe organized under the Indian Reorganization Act, 25 U.S.C. § 476.

PIIC is located immediately adjacent to the Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation (“PINGP ISFSI”) property, with the nearest Community residences situated approximately 600 yards from the PINGP ISFSI (see map attached to this Brief). The Prairie Island Reservation is approximately 40 miles southeast of the Twin Cities of Minneapolis - St. Paul and near the cities of Red Wing and Hastings, Minnesota. Approximately 250 Community Members reside on or near the Reservation in the vicinity of the PINGP ISFSI.

The PIIC has a direct and compelling interest in opposing DOE's motion. The PIIC is concerned that the long-term storage of SNF at the PINGP ISFSI may have a detrimental effect upon the health and safety of PIIC members and to visitors to the reservation, and upon the environment where the PIIC is situated.²

DOE's motion directly affects the PIIC's interests to act on behalf of its citizens, given PIIC's close proximity to the PINGP plant and ISFSI, and PIIC's role as the representative of its citizens having long-term enduring interests in the protection of public safety, the environment and natural resources, and to protect their long-term financial interests. *Massachusetts v Environmental Protection Agency*, 549 US 497, 518-19 (2007)

² The PIIC is also involved in another proceeding before this Commission; see *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 N.R.C. 905 (2008)(finding that the PIIC had met the requirements of Section 2.309(d) and had standing to intervene in the PINGP license renewal application).

ARGUMENT

I. THE BOARD HAS CORRECTLY AND PROPERLY RULED THAT THE DOE DOES NOT HAVE THE LAWFUL AUTHORITY UNDER THE NWPA TO WITHDRAW ITS YUCCA MOUNTAIN LICENSE APPLICATION IN THE CIRCUMSTANCES PRESENTED.

The PIIC asserts that the Board in its June 29, 2010 Order has correctly and properly ruled that the DOE does not possess the lawful authority under the NWPA (and in fact the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, AEA as discussed later) to withdraw its extensive and well-crafted License Application in this case. The Board's June 29, 2010 Order (p 3) correctly ruled that:

As detailed in Part II, we deny DOE's motion to withdraw the Application. We do so because the Nuclear Waste Policy Act of 1982, as amended (NWPA),⁷ does not permit the Secretary to withdraw the Application that the NWPA mandates the Secretary file. Specifically, the NWPA does not give the Secretary discretion to substitute his policy for the one established by Congress in the NWPA that, at this point, mandated progress toward a merits decision by the Nuclear Regulatory Commission on the construction permit. (fn omitted).

The Board (p 4) has pointed to DOE's own self-acknowledgement that its License Application does not suffer from some scientific or legal shortfall that justifies the withdrawal of the License Application without commencement or completion of any formal review of the vast application and the scientific studies and evidence that supports the License Application:

In moving to withdraw the Application with prejudice, DOE makes clear that "the Secretary's judgment here is not that Yucca Mountain is unsafe or that there are flaws in the [Application], but rather that it is not a workable option and that alternatives will better serve the public interest."¹⁰ DOE also acknowledges, however, that it cannot withdraw the Application if that would be contrary to the statutes passed by Congress.¹¹

The Board's well-reasoned Order relies heavily upon the plain language of the NWPA, the purposes and objectives of the NWPA as stated by Congress, and Congressional intent. The Board's reasoning merits quotation here at length (Order pp 5-10, fns omitted):

For the reasons explained below, we conclude that Congress directed both that DOE file the Application (as DOE concedes) and that the NRC consider the Application and issue a final, merits-based decision approving or disapproving the construction authorization application. Unless Congress directs otherwise, DOE may not single-handedly derail the legislated decision-making process by withdrawing the Application. DOE's motion must therefore be denied.¹³

We look first to the statute. Congress enacted the NWPA in 1982 for the purpose of establishing a “definite Federal policy” for the disposal of high-level radioactive waste and spent nuclear fuel.¹⁴ In section 111, entitled “Findings and Purposes,” Congress found that “[f]ederal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate.”¹⁵ Congress' solution was to establish, through the NWPA, “a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance” of safe disposal of these materials.¹⁶ To that end, the NWPA set out a detailed, specific procedure for site selection and review by the Secretary of Energy, the President, and the Congress, followed by submission of the Application for a construction permit, review, and final decision thereon by the NRC.¹⁷

In 1987, Congress adopted an amendment to the NWPA that directed DOE to limit its site selection efforts to Yucca Mountain and to “provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.”¹⁸ In February 2002, following a comprehensive site evaluation, the Secretary of Energy concluded that Yucca Mountain was “likely to meet applicable radiation protection standards”¹⁹ and recommended to the President that Yucca Mountain be developed as a nuclear waste repository.²⁰ The President then recommended the Yucca Mountain site to Congress.²¹ Pursuant to section 116, Nevada filed a notice of disapproval.²² Congress responded—pursuant to section 115 (a special expedited procedure that prevented delay and limited debate)—with a joint resolution in July 2002 approving the development of a repository at Yucca Mountain.²³

As DOE agrees,²⁴ this official site designation then required DOE to submit an application to construct a high-level waste geologic repository at Yucca Mountain pursuant to section 114(b) (“the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site”).²⁵ Likewise, submission of the Application triggered a duty on the NRC's part to consider and to render a decision on the Application pursuant to section 114(d) of the NWPA (“[t]he 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, except that the Commission may extend such deadlines by not more than 12 months”).²⁶

Given the stated purposes of the NWPA and the detailed structure of that legislation, it would be illogical to allow DOE to withdraw the Application without any examination of the merits. For instance, under the NWPA, ultimate authority to make a siting decision is not committed to the discretion of either the Secretary of Energy or the President, but instead rests with Congress. Why would Congress have

specified in detail the steps that the Secretary, the President, the State of Nevada, and even Congress itself had to take to permit the Yucca Mountain Application to be filed, and included provisions mandating that the Application be filed with and considered by the NRC, if DOE could simply withdraw it at a later time or in the same breath if the Secretary so desired?²⁷

Allowing withdrawal would also ignore the distinction that Congress drew between the site characterization phase and the Application phase. Congress expressly contemplated that, during site characterization, DOE might determine the Yucca Mountain site to be “unsuitable” for development as a repository.²⁸ In section 113 of the NWPA, Congress specified numerous steps that DOE must undertake in that event, such as reporting to Congress “the Secretary’s recommendations for further action,” including “the need for new legislative authority.”²⁹ Clearly, when Congress wished to permit DOE to terminate activities, it knew how to do so (while keeping control of what might happen next).³⁰ In contrast, the absence of any similar provision in section 114 of the NWPA, which spells out what is to transpire after DOE has submitted its Application to the NRC, strongly implies that Congress never contemplated that DOE could withdraw the Application before the NRC considered its merits in accordance with section 114(d). “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”³¹

Finally, allowing DOE to withdraw the Application at this stage in the process would be contrary to congressional intent, as reflected in the legislative history of the NWPA. Well aware of the failed efforts to address nuclear waste disposal prior to the NWPA, Congress believed it “necessary, therefore, to provide close Congressional control and public and state participation in the program to assure that the political and programmatic errors of our past experience will not be repeated.”³² In enacting the NWPA, Congress stated that “there is a solid consensus on major elements of the Federal program, and on the need for legislation to solidify a program and keep it on track.”³³

Did Congress, which so carefully preserved ultimate control over the multi-stage process that it crafted, intend—without ever saying so—that DOE could unilaterally withdraw the Application and prevent the NRC from considering it? We think not. When Congress selected the Yucca Mountain site over Nevada’s objection in 2002, it reinforced the expectation in the 1982 Act that the project would be removed from the political process and that the NRC would complete an evaluation of the technical merits:

If this resolution is approved, a license application will be submitted by the Department of Energy for Yucca Mountain and over the next several years, the Nuclear Regulatory Commission will go through all of the scientific and environmental data and look at the design of the repository to make sure that it can meet environmental and safety standards. This will be done by scientists and technical experts.³⁴ (all footnotes omitted).

The PIIC agrees with the Board's decision below that the DOE Secretary's action in seeking to withdraw the License Application is unlawful under the NWPA and is not consistent with the AEA. PIIC also asserts that DOE's action is also inconsistent with the Standard Contract DOE entered into with nuclear utilities as mandated by the NWPA.³

DOE's Motion, and the relief sought therein, is unlawful because it is contrary to the DOE Secretary's mandated duties under the NWPA and Standard Contract. The NWPA and Standard Contract assigned the DOE the mandated duty to develop a repository for SNF, pursuant to a timely designated schedule. *Indiana Michigan*, 88 F.3d at 1277; *Tennessee v. Herrington*, 806 F.2d 642, 648 (1986).

The DOE's action is contrary to the purposes and objectives of Congress as clearly stated in Section 111 of the NWPA, 42 U.S.C. § 10131. The DOE's action ignores the mandated steps to establish a repository as set forth in the original 1982 NWPA, as revisited in the 1987 Amendments. The DOE's action obstructs, rather than upholds, DOE's duties under its Standard Contract, a result that may incur additional monetary damages to the detriment of the nation's taxpayers.

DOE's Motion to Withdraw, even if it had sought withdrawal of the License Application without prejudice, would be contrary to its mandated duties assigned by Congress in the NWPA. However, its Motion to Withdraw the License Application with prejudice is particularly unnecessary and reckless, given both the requirements and obligations established by the NWPA and Standard Contract, and given the long history of steps undertaken thus far since the adoption of the NWPA. The DOE wholly ignores the long-term history and context that defines his

³ Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste, 10 C.F.R. § 961.11 *et seq.*

duties, as made clear by the NWPA, the Standard Contract, 1987 Amendments to the NWPA, the DOE Secretary's recommendation to select Yucca Mountain in 2002, the President's adoption of this recommendation, and Congress' ratification in 2002 of this selection (approval of Yucca Mountain site, Pub L No. 107-200, 116 Stat 735). The DOE Secretary has ignored the declaratory ruling of the Courts in *Indiana Michigan Power Co v United States Department of Energy*, 88 F.3d 1272, 1277 (1996), and the partial mandamus granted by the Court in *Northern States Power v. DOE*, 120 F.3d 753 (1997), and also the many damage suit award decisions rendered in recent years by the U.S. Court of Claims arising from DOE's breach in the Standard Contract. This history also includes billions of dollars expended by the federal government to study the Yucca Mountain site, DOE's effort to formulate the License Application filed in 2008, and the follow-up process to respond to information inquiries by the NRC Staff up until or through 2009. The sudden and unexplained DOE Motion to Withdraw with prejudice, if granted, would result in extreme prejudice to PIIC's interests, as it may forever foreclose siting a geological repository at Yucca Mountain, in contravention of the above history, including the unequivocal objectives, purposes, and policies established by Congress over a period of decades.

The NWPA, as augmented by this history and context, mandates the licensing procedure that both the DOE and the NRC must uphold. Under Section 114(b) of the NWPA, Congress has mandated that the Secretary "*shall submit* to the Commission an application for a construction authorization for a repository at [Yucca Mountain]. . . ." 42 U.S.C. § 10134(b) (emphasis added). Section 114(d) further provides that "[t]he 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" and "*shall issue a final decision approving or disapproving the issuance of*

a construction authorization" within a prescribed timeframe. 42 U.S.C. § 10134(d) (emphasis added).

Contrary to the above, DOE's Motion inexplicably proclaims that the DOE Secretary has discretion to announce a withdrawal of the filed License Application, and to *sua sponte* terminate the decades-long Yucca Mountain program, for which billions of dollars have been spent. The DOE Secretary presumes this authority and discretion without pointing to any applicable statutory and judicial authority, and without any semblance of a process or procedure to formulate a basis for this change in policy or interpretation, or to support this change with rational reasoning or facts, or to submit same to a formal notice proceeding to provide interested parties an opportunity to comment on the proposed action.⁴ Inexplicably, the DOE Secretary's Motion provides no explanation and no reason to justify the action or the relief requested.

The violation of the NWPAA by the DOE, as reflected in its Motion, cannot be underestimated. Exasperatingly, the DOE ignores all the Court decisions rendered against it years ago, in cases where DOE made arguments similar to that asserted in its May 3, 2010 Motion. DOE provides no rationale or explanation for seeking to withdraw its License Application, and for acting contrary to its duties under the NWPAA, mandates that were made unequivocally clear by the Courts in *Indiana Michigan Power v. DOE*, 88 F.3d 1272 (DC Cir 1996) and in *Northern States Power Company et al v DOE*, 120 F.3d 753 (1997).

In *Northern States Power Co, et al v DOE*, 128 F.3d 754 (1997), the Court granted a partial mandamus to enforce its holding in *Indiana Michigan*. The Court (p 756) noted Congress' intent in the NWPAA "whereby the federal government would have the responsibility to

⁴ In contrast, the DOE Secretary utilized a formal process prior to issuing the *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995), absolving DOE of any duty to dispose of SNF until it had access to a federal repository. DOE's Final Interpretation was reversed by the Court in *Indiana Michigan*, 88 F.3d at 1272.

provide for the permanent disposal of the SNF." The Court noted the 1998 deadline for commencement of SNF disposal under both the NWPA and the Standard Contract:

In the language of the statute, the "contracts entered into under this section shall provide that. . . in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter." 42 U.S.C. § 10222(a)(5)(B).

The Court in *Northern States Power* (pp 756-757) reiterated its reversal of DOE's Final Interpretation and DOE's *Chevron* analysis in *Indiana Michigan*:

Reviewing DOE's construction of the NWPA under the two-step analysis of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), we concluded that DOE's interpretation was contrary to the unambiguously expressed intent of Congress. We reached this conclusion after analyzing the plain language of the statute, which mandates that DOE assume a contractual obligation to start disposing of the SNF by January 31, 1998. We took special care to emphasize the reciprocal nature of the obligations. DOE's duty to dispose of the SNF in a timely manner is "in return for" the payment of fees into the Nuclear Waste Fund. 42 U.S.C. § 10222(a)(5)(B). We held that DOE's obligation to meet the 1998 deadline is "without qualification or condition," and identified DOE's duty to "perform its part of the contractual bargain." 88 F.3d at 1273. We therefore remanded the matter to DOE for "further proceedings consistent with" our opinion. *Id.* at 1277. DOE neither sought rehearing of that decision nor petitioned the Supreme Court for further review.

The Court in *Northern States* held that the petitioners qualified for mandamus relief against the DOE. Citing its holding in *Indiana Michigan*, the Court stated (p 758):

We held that DOE's interpretation was inconsistent with the text of the NWPA, which clearly demonstrates a congressional intent that the Department assume a contractual obligation to perform by the 1998 deadline, "without qualification or condition." 88 F.3d at 1276. DOE's duty to take the materials by the 1998 deadline is also an integral part of the Standard Contract, which provides that the Department "shall begin" disposing of the SNF by January 31, 1998. 10 C.F.R. § 961.11, Art. II.

The Court in *Northern States Power* (p 760) again rejected DOE's interpretation of both the NWPA and Standard Contract:

We held in *Indiana Michigan* that the NWPA imposes an unconditional duty on DOE to take the materials by 1998. Congress, in other words, directed DOE to assume an unqualified obligation to take the materials by the statutory deadline. Under the Department's interpretation of the governing contractual provisions, however, the government can always absolve itself from bearing the costs of its delay if the delay is caused by the government's own acts. This cannot be a valid interpretation, as it would allow the Executive Branch to void an unequivocal obligation imposed by Congress. DOE has no authority to adopt a contract that violates the directives of Congress, just as it cannot implement interpretations of the contract that contravene this court's prior ruling. We hold that this provision in the Standard Contract, insofar as it is applied to DOE's failure to perform by 1998, is inconsistent with DOE's statutory obligation to assume an unconditional duty.

The clear and unequivocal holdings of the court in *Indiana Michigan* and *Northern States Power* arose because of DOE's failure to meet its unconditional obligation to begin disposal of SNF by 1998. Given these holdings, how can DOE's decision and action in this proceeding to permanently withdraw its License Application and to terminate the repository for SNF disposal comport with the plain language and intent of Congress in the NWPA, the Standard Contract, or the judicial holdings in *Indiana Michigan* and *Northern States Power*?

The Petitioner PIIC asserts that the DOE Secretary's actions as reflected in DOE's Motion are unlawful under the NWPA and Standard Contract, and constitutes an unauthorized action concerning a matter where the DOE Secretary has no discretion. The discretion of the DOE Secretary was exercised in 2002 as noted above, and by the previous Secretary in completing and filing the License Application. The duty of the present DOE Secretary is to now conscientiously carry out the processing of the License Application in the 3-4 year time frame provided by the NWPA.

II. THE BOARD ALSO PROPERLY REJECTED DOE'S VARIOUS ARGUMENTS

A. The Board Properly Determined That There Exists No Remaining "Policy" Decisions for DOE to Make in the Current Context Except to Fruitfully Prosecute The License Application.

The Board Order (pp 10-11) properly determined that there exists no remaining "policy decision" for DOE to make in the current context (except to prosecute the already filed License Application in accordance with the NWPA), stating:

First, DOE contends that its conclusion that Yucca Mountain is not a "workable option" and that "alternatives will better serve the public interest" constitutes a policy judgment with which the NRC should not interfere.³⁵ Insofar as relevant, however, the pertinent policy—that DOE's Yucca Mountain Application should be decided on the merits by the NRC—is footed on controlling provisions of the Nuclear Waste Policy Act that DOE lacks authority to override. Regardless of whether DOE thinks the congressional scheme is wise, it is beyond dispute that DOE and the NRC are each bound to follow it. In section 115 Congress clearly stated that Congress itself was to decide the policy question as to whether the Yucca Mountain project was to move forward by reserving final review authority of site selection. By overruling Nevada's disapproval of the Yucca Mountain site, Congress was commanding, as a matter of policy, that Yucca Mountain was to move forward and its acceptability as a possible repository site was to be decided based on its technical merits.

Moreover, this congressional withdrawal of DOE authority is not unique within the NWPA, in which Congress undisputedly took numerous other policy determinations out of DOE's hands. For example, section 113(a) of the NWPA directed DOE to carry out site characterization activities only at Yucca Mountain, section 114(b) required DOE to submit an application for a construction authorization, and section 114(f)(6) directed that DOE's environmental impact statement not consider the "need for the repository, the time of initial availability of a repository, alternative sites to the Yucca Mountain site, or nongeologic alternatives to such site." Surely Congress did not contemplate that, by withdrawing the Application, DOE might unilaterally terminate the Yucca Mountain review process in favor of DOE's independent policy determination that "alternatives will better serve the public interest."³⁶ As the United States Court of Appeals for the District of Columbia Circuit has stated, "[i]t is not for this or any other court to examine the strength of the evidence upon which Congress based its judgment" to approve the Yucca Mountain site.³⁷ Nor, at this point in the process created by Congress, is it for DOE to do so. (fn omitted).

The Board's decision (pp 16-17) again properly determined that DOE's decision to withdraw the License Application is not entitled to any "deference," stating:

Fourth, DOE claims that its decision to seek to withdraw the Application is entitled to deference.⁵⁷ But where the statute is clear on its face, or is clear in light of its statutory scheme and legislative history, deference is inappropriate: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁵⁸ This is especially so where, as here, DOE's interpretation is reflected in nothing more formal than a motion before this Board—and not, for example in a formal agency adjudication or notice-and-comment rulemaking.⁵⁹ Moreover, as DOE's counsel appeared to concede at argument,⁶⁰ the NRC does not owe deference to DOE's understanding of the NRC's own responsibilities under section 114(d). Once DOE has applied for a construction authorization, the NRC—not DOE—is charged with granting or denying the construction permit application under the sequential process prescribed by the NWPA.⁶¹ (fns omitted).

A review of DOE's Motion highlights the correctness of the Board's order denying the Motion. DOE asserts that the decision to withdraw the License Application involves "the Secretary's underlying policy decisions" and that "the Secretary may fill this statutory 'gap.'" DOE's Motion (p 4) erroneously states:

The Board should defer to the Secretary's judgment that dismissal of the pending application with prejudice is appropriate here. Settled law in this area directs the NRC to defer to the judgment of policymakers within the Executive Branch. [fn omitted] And whether the public interest would be served by dismissing this application with prejudice is a matter within the purview of the Secretary. [fn omitted].

DOE's Motion (pgs 4-7) then cites further steps necessary before a repository could be opened (points which are irrelevant as discussed later), and then states (p 7):

Even if there were any ambiguity on these points, the Secretary's interpretation of the NWPA would be entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Gen. Elec. Uranium Mgmt. Corp. v. DOE*, 764 F.2d 896, 906 (D.C. Cir. 1985)(applying *Chevron* deference to uphold DOE's interpretation of the NWPA)....

DOE's assertions that the present DOE Secretary has a policy decision to make here is wholly unmeritorious. The License Application (including obtaining a decision on the License Application on the merits) is a step required by the NWPAs. Previous Administrations have already completed the prior NWPAs-mandated steps leading up to the filing of the License Application, and have progressed the repository program mandated by the NWPAs to the present situation wherein a License Application is filed, with most or all technical questions by the NRC Staff having been answered. The License Application is now ripe for the discovery and hearing process to be followed by a Commission decision on the License Application. The present DOE Secretary is really faced with no policy decision that is ripe or necessary at this time -- except to carryout its NWPAs-mandated duty to fully defend its License Application to a final decision by the NRC on the merits. The present DOE Secretary should cease interfering with and sabotaging the current NWPAs-mandated step of obtaining a Commission decision on the merits of the License Application. Moreover, unlike the process used by DOE to issue its Final Interpretation, the Secretary here has unlawfully decided to withdraw the License Application without any explanation, rationale, or prior formal process to gather input and views from all major national stakeholders impacted by the Secretary's precipitous "decision".⁵

DOE's assertion that there exists a "statutory gap" to fill (to thereby provide the Secretary the discretion to fill the gap by withdrawing the License Application) is extremely unmeritorious. No such statutory gap or discretion exists, as made clear by the Court decisions reversing DOE's similar "policy decisions" in the Final Interpretation, reversed by the Courts in *Indiana Michigan Power* and *Northern States Power*.

⁵ Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21793, *et seq* (1995). The DOE's Final Interpretation was issued following a process by which DOE issued a Notice of Inquiry on Waste Acceptance Issues requesting comments and input from the nation's stakeholders on these issues, 59 FR 27007, May 25, 1994.

DOE's motion referencing a "statutory gap" also does not explain what the statutory gap is. Certainly, the need for other efforts to secure water rights, transportation routes, or to consider a rail line, does not present a statutory gap under the NWPA, and comprised matters upon which DOE was making progress up to this point. None of these matters relate to the specific task involving the License Application, as mandated by the NWPA. Quite simply, there exists no statutory gap that affects the License Application or that justifies DOE's withdrawal motion.

DOE erroneously asserts the DOE Secretary's interpretation of the NWPA is entitled to "deference" under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) in that Congress implicitly delegated the agency to fill in the "gaps." Simply put, however, Congress did not delegate to the DOE any authority to "fill in the gaps" and, further, such "gaps" do not exist. Congress did not say that either the DOE or the NRC have authority or discretion to unilaterally declare without a substantial evidentiary basis that the Yucca Mountain repository is not an alternative, notwithstanding the clear mandates of the NWPA.

DOE's Motion fails the classic *Chevron* two-part test which begins with whether Congress's intent is "clear" and "unambiguously expressed" and then whether the agency's interpretation is "permissible," or reasonable in light of the law. First, as noted above, the NWPA clearly and unambiguously prescribes that the DOE is to complete construction of a SNF repository and that DOE should enter into a Standard Contract with nuclear facilities such that the long-term and safe storage of SNF is ensured. The DOE's Motion similarly ignores the clear declaratory judgments, writs of mandamus and damage awards granted by the courts, such judgments each providing clear and unambiguous judicial interpretations of the relevant portions of Congress' intent in the NWPA.

DOE's proposed elimination of the Yucca Mountain repository for SNF is clearly inconsistent with the NWPA's statutory scheme and equally at odds with DOE's own position for many years that the Yucca Mountain Repository is a desired SNF location. Now the DOE asserts jurisdiction to say as a matter of policy and without evidence that it can unilaterally reject Yucca Mountain. Its only alternative to this rejection is to offer a presidential Blue Ribbon Commission's study of so-called alternatives, an "interpretation" neither reasonably nor remotely connected to Congress's intent in the NWPA or to the massive national scope of the SNF situation. It is highly unlikely that Congress would leave the determination of such a major question to such a Blue Ribbon Commission without requiring that Yucca Mountain be one of the most significant alternatives considered and evaluated. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Congress has repeatedly considered and reaffirmed its commitment to the Yucca Mountain repository so that DOE's remedy of withdrawal, with prejudice, flies directly in the face of Congress's clear and unambiguous intent to support the Yucca Mountain alternative.

DOE's Motion (p 7-8) rehashes the same *Chevron* argument that has been rejected by the Courts -- that the new DOE Secretary's "interpretation of the NWPA would be entitled to deference". The DOE Secretary claims he therefore has legal authority and discretion to withdraw the License Application (and with prejudice) due to a "gap" in statutory policy that may be filled in by the agency, citing *Chevron*. The DOE's Motion (p 8) suggests that the DOE's motion, filed by counsel, without any process or rationale, somehow fills "this statutory 'gap'." This argument was soundly rejected by the Court in *Indiana Michigan* when the DOE raised the same *Chevron* argument in trying to defend its failure to commence disposal of SNF by January 31, 1998. The Court in *Indiana Michigan*, stated:

In reviewing an agency's construction of a statute entrusted to its administration, we follow the two-step statutory analysis established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

First, we ask whether Congress has spoken unambiguously to the question at hand. If it has, then our duty is clear: "We must follow that language and give it effect." *Wisconsin Elec. Power Co. v. DOE*, 250 U.S. App. D.C. 128, 778 F.2d 1, 4 (D.C. Cir. 1985). If not, we consider the agency's action under the second step of *Chevron*, deferring to the agency's interpretation if it is "reasonable and consistent with the statute's purpose." (cites omitted).

The Court wholly rejected DOE's argument that the language of Section 302(a)(5)(B) of the NWPA, 42 U.S.C. § 10222(a)(5)(B), ("in return for the payment of fees. . . [DOE], beginning not later than January 31, 1998, will dispose of the [SNF]...") did not require DOE to "begin to dispose of SNF by January 31, 1998" or "that this obligation is further conditioned on the availability of a repository or other facility authorized, constructed, and licensed in accordance with the NWPA." The Court in *Indiana Michigan* (pp 1276-1277) rejected DOE's *Chevron* assertion, stating:

The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress. It does not survive the first step of the *Chevron* analysis. 467 U.S. at 842-43.

* * *

Rather, these prerequisites evince a strong congressional intent that DOE's various obligations be performed in a timely manner. *See, e.g., Tennessee v. Herrington*, 806 F.2d 642, 648 (6th Cir. 1986) ("The overall structure of the Act does reveal a consistent concern for timely implementation of the disposal provisions."), *cert. denied*, 480 U.S. 946, 94 L. Ed. 2d 790, 107 S. Ct. 1604 (1987).

The Court's holding (p 1277) reemphasized that DOE's *Chevron* assertion simply does not comply with the NWPA:

In conclusion, we hold that the petitioners' reading of the statute comports with the plain language of the measure. In contrast, the agency's interpretation renders the phrase "not later than January 31, 1998" superfluous. Thus, we hold that section 392(1)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay,

to start disposing of the SNF no later than January 31, 1998. The decision of the Secretary is vacated, and the case is remanded for further proceedings consistent with this opinion.

A basic overriding question exists -- since the Court in *Indiana Michigan* rejected DOE's *Chevron* claim or defense in ruling against its anticipatory breach of not meeting the NWPA's January 31, 1998 deadline for disposing of SNF, how could such a *Chevron* defense exist in the more extreme circumstances here? DOE's outright claim that it may simply withdraw its License Application with prejudice and permanently terminate the disposal facility despite the NWPA's unambiguously expressed mandate to submit the License Application for the repository at Yucca Mountain cannot survive scrutiny under the well-settled Chevron analysis.

B. No Provision of the AEA Supports the Undercutting of the NWPA.

The Board also properly held that no provision of the AEA undercuts the specific directives of Congress in the NWPA. In fact, DOE's and the NRC's duties under the AEA and the NWPA are consistent and should be upheld by the Commission. The Board's Order (pp 11-13) states:

Second, DOE contends that, by enacting the NWPA, Congress did not expressly take away the broad powers that DOE otherwise enjoys under the Atomic Energy Act of 1954 (AEA).³⁸ The NWPA, however, is a subsequently-enacted, much more specific statute that directly addresses the matters at hand.³⁹ As the Supreme Court has stated, “a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.”⁴⁰

Although the NWPA does not expressly repeal the AEA—indeed, it specifically refers to it⁴¹—it would be erroneous to interpret the AEA in a manner that would contravene the statutory scheme that Congress specifically adopted in the NWPA. “An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.”⁴² As explained above, the language, structure, and legislative history of the NWPA all contravene the notion that Congress intended to allow DOE to terminate the NRC’s consideration of the Application.⁴³ The meaning—or absence—of statutory language cannot be considered in isolation. It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to

their place in the overall statutory scheme.”⁴⁴ As the Court of Appeals explained concerning the relationship between the NRC’s own authority before and after enactment of the NWPA: “That Congress may have authorized NRC to regulate DOE’s disposal of radioactive waste before it enacted the NWPA . . . hardly negates the fact that in the NWPA Congress specifically directed NRC to issue 'requirements and criteria' for evaluating repository-related applications and, not insignificantly, how to do so.”⁴⁵ (fns omitted).

The Commission should uphold the Board's well-reasoned decision.

C. The Board Properly Ruled That a Vague Provision of an NRC Procedural Rule Cannot Ascertain and Defeat the Plain Language and Intent of Congress in the NWPA.

The Board's decision also correctly ruled that an NRC procedural rule (10 C.F.R. § 2.107) cannot overturn and defeat the plain language and intent of Congress in the NWPA. The Board's decision (pp 13-16) states:

Third, DOE argues that, because the NWPA requires the NRC to consider the Application “in accordance with the laws applicable to such applications,” Congress necessarily intended to incorporate 10 C.F.R. § 2.107, an NRC regulation that DOE claims “authorizes” withdrawals.⁴⁶ This argument fails on several grounds. In the first place, section 2.107 does not “authorize” withdrawals. It states, in relevant part, that “[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.”⁴⁷ In the absence of section 2.107, most license applicants, whose applications are filed voluntarily, presumably might seek to abandon their applications at any time. Fairly characterized, section 2.107 does not “authorize” withdrawal here, but rather clarifies that licensing boards have authority to impose reasonable conditions upon voluntary withdrawals in appropriate circumstances.⁴⁸ In effect, section 2.107 authorizes licensing boards to deny unconditioned withdrawals. Nothing in section 2.107 gives any applicant the presumptive permission to unilaterally withdraw its application. Furthermore, the Commission’s case law is not helpful in this circumstance because no previous case involved an applicant that was mandated by statute to submit its application, as is the case here with DOE’s Application under the NWPA.

DOE’s reliance on section 2.107 is also misplaced for an entirely separate and independent reason. Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”⁴⁹ It would require a strained and tortured reading of the NWPA to conclude that Congress intended that its explicit mandate to the NRC—to consider and decide the merits of the Application—might be nullified by a nonspecific reference to an obscure NRC procedural regulation as being among the “laws” to be

applied.⁵⁰ As the Supreme Court has admonished, “we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”⁵¹ Here, “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁵²

The better reading of the language of the NWPA consistent with the content and detailed legislative scheme is to the contrary. The NRC is directed by section 114(d) to consider the Application in accordance with existing laws “except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization” within the prescribed time period.⁵³ Insofar as application of section 2.107 might possibly be construed to interfere with that prime directive, by the terms of the statute it cannot apply.

Additional support for this conclusion is found in the legislative history. During the floor debate on S. 1662—which contained a provision that was substantially identical to section 114(d) of the NWPA in its current form⁵⁴—the bill’s sponsor, Senator McClure, explained:

The Nuclear Regulatory Commission has been established as an independent body to check upon whether or not the administrative bodies are functioning according to the statutes and policies that have been already enacted. The Nuclear Regulatory Commission will have that same function with respect to determining whether this program is being administered correctly or not.⁵⁵

As this explanation plainly suggests, “the laws applicable to such applications” was primarily intended as a blanket reference to the substantive standards that the NRC applies in judging applications. There is no suggestion in the legislative history that Congress had in mind the relatively obscure procedural regulation that DOE seeks to invoke here to nullify the otherwise unambiguous command of Congress, in section 114(d) of the NWPA, that the NRC “shall consider” the Application and “shall issue a final decision approving or disapproving the issuance of a construction authorization.”⁵⁶ (fns omitted).

DOE's Motion attempts a reversal of law and roles, and suggests that DOE's proposed withdrawal is not to be based upon the NWPA, or prior Court decisions clarifying same, but, *de novo*, "on such terms as the Board may prescribe." DOE's Motion (pp 2-3) states:

That section provides in relevant part that "[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe." 10 C.F.R. § 2.107(a).

And then, in a true polyglot fashion, DOE states that:

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

The serious and insidious problem with these DOE statements is the suggestion that agency rulings in other contexts should somehow govern over this overarching issue presented here -- namely, how to properly carry out the nation's policy as stated in the NWPA and the Standard Contracts signed pursuant to the NWPA. DOE improperly seeks to rely on a rule to overrule a specific statutory mandate. DOE does not and cannot explain how a term or condition imposed by the Board or this Commission can specifically apply here to overturn the plain language and the objectives and purposes of Congress, as set forth in the NWPA, and in the Standard Contracts entered into between the DOE and nuclear utilities. The Commission should uphold the Board's decision rejecting DOE's flawed arguments.

D. The Board Properly Determined That Withdrawal of Applications By Private Parties in Other NRC Case Contexts Does Not Support DOE's Withdrawal of its License Application in This Case.

The Board also properly determined that DOE's attempted withdrawal of its statutorily mandated License Application in this case is not supported by the process or precedent used by private applicants in more pedestrian NRC cases dealing with plants or projects not mandated by the NWPA. The Board (p 17) stated:

Fifth, DOE claims that Congress intended that DOE be treated just like any private applicant, including the right to seek freely to withdraw its application.⁶² Under the framework of the NWPA, however, DOE's application is not like any other application, and DOE is not just "any litigant," because its policy discretion is clearly limited by the NWPA. The obvious difference is that Congress has never imposed a duty on private NRC applicants to pursue license applications, nor has Congress required that the Commission reach a decision on a private licensing application that the applicant chooses to withdraw. In contrast, Congress here required DOE to file the

Application. Statutes should not be interpreted so as to create internal inconsistencies, an absurd result, or an interpretation inconsistent with congressional intent.⁶³ DOE claims that the “law on withdrawal does not require a determination of whether [the applicant’s] decision [to withdraw] is sound,”⁶⁴ but neglects to note that the rationale for the decision from which it quotes was that the applicant’s filing was “wholly voluntary” in the first place.⁶⁵ (fns omitted).

E. The Board Properly Ruled As Irrelevant Claims That The License Application Review Process Does Not Guarantee the Establishment of a Yucca Mountain Repository.

The Board also properly ruled as irrelevant claims that the License Application process does not guarantee the ultimate establishment of Yucca Mountain as a repository. The Board (p 18) stated:

Sixth, DOE claims significance in the fact that the NWPA does not mandate construction and operation of the repository, even if the NRC should approve a construction authorization.⁶⁶ We find that fact insignificant. Congress crafted a multi-stage process for consideration of the Yucca Mountain repository, including the requirements that DOE file the Application and that the NRC consider it and issue a “final decision” approving or disapproving construction. That further steps must take place before a repository might actually be constructed and become operational does not entitle DOE to ignore the process that Congress created. The Board is mindful that the NWPA does not compel the NRC to grant a construction authorization for a repository at Yucca Mountain. But the possibility that the Application might not be granted—or, if granted, that the repository might ultimately not be constructed and become operational for any number of reasons—does not entitle DOE to terminate a statutorily prescribed review process. (fn omitted).

The irrelevance of DOE's (and others) claims in this regard are buttressed by their highly situational nature. The multi-step process required to establish a repository is nothing new -- it has been part of the NWPA requirements for decades. All parties recognize that this License Application decision process would take years, and that it was only one of several steps that would have to be completed before a repository at Yucca could be constructed and made operational. These pre-existing factors have been in place for many years and simply do not justify a withdrawal of the License Application, however. Also, the multi-step process provides added safeguards leading to the establishment of a repository to ensure its safety and

appropriateness. Contrary to the arguments of DOE and others, the fact that the License Application review process does not guarantee the establishment of Yucca Mountain as a repository (without meeting yet further requirements) provides all the more logic for concluding that DOE's withdrawal of the License Application at this stage is unlawful and also capriciously premature.

F. The Board Also Correctly Ruled That the Establishment of the Blue Ribbon Commission is Not Relevant to the Issues Here.

The Board (pp 18-19) also properly ruled that DOE's claims regarding the establishment of the Blue Ribbon Commission are irrelevant:

Seventh, DOE claims that Congress' funding of a Blue Ribbon Commission on America's Nuclear Future (Blue Ribbon Commission) to review federal policy on spent nuclear fuel management and disposal and to examine alternatives to Yucca Mountain is inconsistent with continuing to process the Yucca Mountain Application.⁶⁷ We disagree. In including funding for the Blue Ribbon Commission in the 2010 Appropriations Bill,⁶⁸ Congress did not repeal the NWPA or declare that the Yucca Mountain site is inappropriate, as DOE concedes in its reply.⁶⁹ Unless and until Congress does so, both DOE and the NRC are bound to following the existing law. (fns omitted).

The NWPA provides yet further support for the Board's ruling on this issue. DOE's Motion (p 3) refers to unspecified "technological advances" involving SNF and HLW, and to the appointment of the Blue Ribbon Commission, as support for the grant of its Motion:

That action will provide finality in ending the Yucca Mountain project for a permanent geologic repository and will enable the Blue Ribbon Commission, as established by the Department and funded by Congress, to focus on alternative methods of meeting the federal government's obligation to take high-level waste and spent nuclear fuel. It is the Secretary of Energy's judgment that scientific and engineering knowledge on issues relevant to disposition of high-level waste and spent nuclear fuel has advanced dramatically over the twenty years since the Yucca Mountain project was initiated. *See also* Presidential Memorandum at 1.

However, DOE cites no specific technical advance that has occurred since the adoption of the NWPA in 1982, and since subsequent Congressional amendments to, or affirmations of, the NWPA since its enactment.

Moreover, contrary to DOE's premise, the NWPA is replete with language throughout that establishes Congressional intent to deal not only with the storage or disposal of SNF and HLW, but also to provide for further research (i.e., technological advances) regarding the disposal of handling of SNF and HLW. The NWPA demonstrates full Congressional understanding that future research and potential reprocessing would occur, but nevertheless also found the need for a definite program to establish a geological repository (and specifically selecting Yucca Mountain for site characterization and the submission of a License Application). The NWPA also states in plain language that the needed geological repository could or would be used not only for SNF or HLW, but also for reprocessed fuel. In other words, Congress has repeatedly recognized that a repository is and will be necessary regardless whether reprocessing is undertaken and DOE has never stated that technological advances relative to SNF and HLW will render moot the need for a repository.

To illustrate the above point, Section 2(12) and (23) of the NWPA, 42 U.S.C. § 10101(12) and (23) state:

(12) The term "high-level radioactive waste" means --

(A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations...

* * *

(23) The term "spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

Section 111(a)(2), 42 U.S.C. § 10131(a)(2) of the NWPA includes as one of the "findings" of Congress that:

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources...

Section 122 of the NWPA, 42 U.S.C. § 10142, also states:

Notwithstanding any other provisions of this subtitle, any repository constructed on a site approved under this subtitle shall be designed and constructed to permit the retrieval of any spent nuclear fuel placed in such repository, during an appropriate period of operation of the facility, for any reason pertaining to the public health and safety, or the environment, or for the purpose of permitting the recovery of the economically valuable contents of such spent fuel. The Secretary shall specify the appropriate period of retrievability with respect to any repository at the time of design of such repository, and such aspect of such repository shall be subject to approval or disapproval by the Commission as part of the construction authorization process under subsections (b) through (d) of section 114.

Section 136(a)(1) of the NWPA, 42 U.S.C. § 10156(a)(1), dealing with interim storage contracts states that such contracts, could relate to facilities or functions including to... "(3) store such fuel in the facility pending further processing, storage, or disposal...." Section 141(b)(1)(C) of the NWPA, 42 U.S.C. § 10162(b)(1)(C), dealing with Monitored Retrievable Storage (MRS) facilities, required the DOE Secretary to provide a detailed study concerning the construction of one or more MRS's for high-level radioactive waste and spent nuclear fuel to be designed for several purposes, including "(C) to provide for the ready retrieval of such spent fuel and waste for further processing or disposal...."

Section 301(a)(4) of the NWPA, 42 U.S.C. § 10221(a)(9), also requires the DOE Secretary to prepare a comprehensive "mission plan" to focus on several objectives or activities, including that listed as item (9):

(9) an estimate of (A) the total repository capacity required to safely accommodate the disposal of all high-level radioactive waste and spent nuclear fuel

expected to be generated through December 31, 2020, in the event that no commercial reprocessing of spent nuclear fuel occurs, as well as the repository capacity that will be required if such reprocessing does occur; (B) the number and type of repositories required to be constructed to provide such disposal capacity; (C) a schedule for the construction of such repositories; and (D) an estimate of the period during which each repository listed in such schedule will be accepting high-level radioactive waste or spent nuclear fuel for disposal;

In short, the NWPA, while comprehensive and specific in its provisions to deal with SNF and HLW, was also visionary and flexible, and displayed Congressional intent to further research and development of various approaches and activities (now and in the future) to deal with SNF and HLW. Quite simply, the NWPA incorporated concepts for technological advances, including reprocessing, and has not been shown by DOE in this case to be inapplicable or obsolete in any manner so as to justify a "policy" that would lead to the withdrawal of the License Application in this case. There exists no explained inconsistency relative to the NWPA and the status of "technological" advance as of this date or as may be foreseen at this time.

G. The Board Also Properly Ruled that DOE's Own Secret Sua Sponte Decision to Seek Withdrawal of the License Application Does Not Overturn the Nation's Policy as Clearly Stated in the NWPA and AEA.

The Board also properly ruled (pp 19-20) that the most recent DOE Secretary's secret "decision" to seek withdrawal of the License Application simply cannot overturn the nation's policy regarding a repository for SNF and HLW as stated in the NWPA:

Finally, DOE says that it would be "absurd and unreasonable" to require DOE to proceed with an application that it no longer favors on policy grounds.⁷⁰ Where the law is declared to require it, however, DOE and other agencies within the Executive Branch are often required to implement legislative directives in a manner with which they do not necessarily agree.⁷¹ The Board is confident that DOE can and will prosecute the Application before the NRC in good faith,⁷² as we believe the NWPA requires. Moreover, DOE has acknowledged that its decision to seek to withdraw the Application is not based on a judgment that Yucca Mountain is unsafe or on flaws in the Application. It should be able to proceed with an evaluation of the technical merits, as directed by the NWPA, without undue discomfort.

If Congress does not wish to see the Yucca Mountain project go forward, it can of course change the law or decide not to fund the proposed repository. Likewise, this Board's decision does not in any way bear upon whether, after considering the merits, the NRC will ultimately authorize construction. As directed by the Commission, we merely decide whether DOE's motion to withdraw the Application from the NRC's consideration should be granted. We conclude that, under the statutory process Congress created in the NWPA, which remains in effect, DOE lacks authority to seek to withdraw the Application. DOE's motion must therefore be denied. (fns omitted).

The Board has properly denied DOE's Motion based upon a review of the mandates of the NWPA and Congressional intent thereunder. The Commission should similarly reject DOE's claims that the Commission may grant DOE's Motion on some other basis, such as speculation regarding present or future appropriations by Congress, or based upon the fact that DOE has suddenly reversed itself "politically" from a strong advocate for its License Application to a now "unwilling" applicant.

III. THE NRC (IN ADDITION TO THE DOE) DOES NOT HAVE THE AUTHORITY OR DISCRETION TO TERMINATE THE LICENSE PROCEEDING, OR TO TERMINATE THE LICENSING PROCESS WITH PREJUDICE.

The PIIC also asserts that this Commission (in addition to the DOE) does not have the lawful authority or discretion to terminate this licensing proceeding without a substantive decision on the merits, and certainly lacks such authority or discretion to terminate this licensing process at this stage, in the manner proposed, with prejudice, so as to terminate the entire Yucca Mountain project.

Congress set forth its findings, purposes, goals, and objectives in Section 111 (a) and (b) of the NWPA, 42 U.S.C. § 10131 (a) and (b), including the determination of the national policy that a deep geological repository is necessary and appropriate to dispose high level radioactive waste and spent nuclear fuel. This decision by Congress was buttressed by the 1987 amendments, the 2002 recommendations of Yucca Mountain as a repository site selection by the

then DOE Secretary, by President Bush's adoption of the DOE Secretary's recommendation, and by Congress' 2002 determination to designate Yucca Mountain as the nation's first repository site (Pub. L. No. 107-200, 116 Stat. 735).

The Yucca Mountain site selection has thus already been made by the DOE, the President, and Congress, pursuant to the process established by the NWPA [Sections 112, 113, and 114, 42 U.S.C. §§ 10132, 10133, and 10134]; See *Nuclear Energy Institute v Environmental Protection Agency*, 373 F3d 1251, 1302 (D.C. Cir, 2004). Under NWPA's mandated process, DOE was then to file its License Application (Section 114(b), 42 U.S.C. § 10134(b)), which DOE accomplished in 2008. Under NWPA Section 114(d), 42 U.S.C. § 10134(d), this Commission then has a specific timeline for processing and ruling upon the License Application on the merits. Given these statutory provisions, and the above "affirmatory" history, the Commission does not possess the authority or discretion to grant DOE's Motion. Quite simply, the NWPA places a mandatory duty upon the Commission to rule on the merits of the License Application. Section 114(d) of the NWPA, 42 U.S.C. § 10134(d), states in plain language that:

The Commission shall consider an application for a construction authorization for all or part of a repository [and] shall issue a final decision approving or disapproving the issuance of such application

And as the Court reiterated in *Indiana Michigan and Northern States Power*, Congress intended a definite and timely process. This Commission cannot simply "blue-pencil" this mandate out of the NWPA.⁶

DOE's motion suggesting that, while the NWPA requires the filing of the License Application, but not the furtherance thereof by the DOE and NRC to a decision on the merits, constitutes an absurd interpretation of the plain language of the NWPA and the Standard

⁶ The Court in *Indiana Michigan v DOE*, 88 F.3rd 1272 (1996) rejected a similar attempt to ignore plain language in the NWPA.

Contract, and violates the intent and purposes of Congress as stated in the NWPA. DOE's suggestion that this decades-long process, costing billions of dollars, and relied on so much by the nation's citizens, states, localities, and the industry, was only for the purpose of accomplishing a filing of the License Application, but nothing more, is exasperatingly illogical and situational.

DOE's Motion is not simply a pedestrian procedural motion that may arise in a routine NRC case. DOE's motion is a tactical step having immense national importance. DOE seeks by its motion to withdraw from and stop 30 years of efforts, after billions of dollars of expenditures, as required by the NWPA and Standard Contracts, and as funded by the nation's ratepayers, to address the proper disposal of toxic SNF. DOE seeks to violate its statutory and contractual mandate and duties, and to have this Commission participate in the same undertaking, despite the nation's long-term reliance on achieving the objectives of the NWPA and Standard Contract.

The bottom line is that the present DOE Secretary has no lawful authority or discretion to retroactively reverse all of the existing law and past milestones achieved thus far, and to *sua sponte* impose a unilateral decision, without any rationale or explanation, to withdraw and foreclose the required license processing, for the Yucca Mountain project. Moreover, this Commission has the lawful duty under the NWPA to process the License Application, and to refrain from being complicit in DOE's actions.

IV. DOE'S MOTION SEEKING TO IRREVOCABLY TERMINATE THE YUCCA MOUNTAIN REPOSITORY PROGRAM CONSTITUTES A VIOLATION OF NEPA

While not addressed by the Board, the PIIC also asserts that the DOE's Motion to Withdraw the License Application in this proceeding, with prejudice, constitutes DOE's decision to irrevocably terminate the Yucca Mountain repository program. This motion and decision fail

to comply with the prerequisite steps required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321.

DOE's decision and motion seeking to terminate the Yucca Mountain repository, if granted, would leave the nation bereft of any facility to dispose of high level radioactive waste or spent nuclear fuel on any foreseeable basis. The result is a default option -- to simply leave SNF and other HLW where it is -- adjacent to the PIIC and at scores of sites around the nation that were never studied or even intended to be long-term storage sites or disposal sites. The PIIC is unaware of appropriate environmental studies or other NEPA analysis undertaken by DOE prior to reaching its decision to terminate the Yucca Mountain repository project and to file the motion to withdraw its License Application with prejudice. Yet, DOE's decision and motion will have a significant effect upon the environment in numerous locations throughout the nation, including PIIC's reservation.

DOE's decision is unquestionably a major federal action that has a significant effect on environment within the meaning of NEPA, 42 U.S.C. § 4332(C); 40 C.F.R. §§1508.8, 1508.18, 1508.27; *Idaho Sporting Congress v Thomas*, 137 F3d 1146, 1149-50 (9th Cir, 1998), *overruled on other grounds* by 537 F3d 1146 (9th Cir, 2008); *Greenpeace Action v Franklin*, 14 F3d 1324, 1332 (9th Cir, 1992). DOE is therefore required to first evaluate its proposed decision under NEPA as a prerequisite to implementing the decision. 42 U.S.C. § 4332(C); 40 C.F.R. § 1501.2, 1501.3, 1501.4, 1502.3, 1506.1, 1507.1; 10 C.F.R. §§ 1021.210(b), 1021.211; *California, Exhibit rel. Lockyer v U.S. Dept of Agriculture*, 575 F.3d 999, 1012 (9th Cir, 2009).

The PIIC also asserts that the studies that DOE has undertaken thus far relative to Yucca Mountain, and in preparation for a DOE decision and License Application of that site (including

the general "no action" alternative discussed in the 2002 FEIS⁷ and in the 2008 SEIS⁸ cannot be retroactively applied on a post-hoc basis to support DOE's highly unforeseen and situational decision made here to now withdraw the subject License Application.

The discussion of the "No Action Alternative" in the FEIS and the SEIS also provides cold comfort to communities around the nation which are hosting or are located adjacent to nuclear plants and ISFSI's. First, the discussion includes relatively few pages and is supported by scant underlying studies compared to the many hundreds of pages focusing upon just one site -- the Yucca Mountain repository site. For example, the SEIS discussion of the No Action Alternative includes Chapters 2 and 7. The general approach of this alternative may be capsulized by language on page 7-4 of the SEIS:

In light of these types of uncertainties and DOE's conclusion that no action would not result in predictable actions by others, the Yucca Mountain FEIS considered the range of possibilities by focusing the analysis of the No-Action Alternative on the potential impacts of two scenarios.

In No-Action Scenario 1, DOE would continue to manage its spent nuclear fuel and high-level radioactive waste in above- or below-ground dry-storage facilities at DOE sites around the country. Commercial utilities would continue to manage their spent nuclear fuel at current locations. The commercial and DOE sites would remain under *institutional control*; that is, they would be maintained to ensure the protection of workers and the public in accordance with current federal regulations. The storage facilities would be replaced every 100 years. They would undergo one major repair during the first 100 years because this scenario assumes that the design of the first storage facilities at a site would include a facility life of less than 100 years. The facility replacement period of 100 years represents the assumed useful lifetime of the structures. Replacement facilities would be on land adjacent to the existing facilities.

In No-Action Scenario 2, spent nuclear fuel and high-level radioactive waste would remain in *dry storage* at commercial and DOE sites and would be under institutional control for approximately 100 years (the same as Scenario 1). Beyond that time, the scenario assumed no institutional control. Therefore, after about 100 years and up to

⁷ *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*

⁸ *Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada*

10,000 years, the analysis assumed that the spent nuclear fuel and high-level radioactive waste storage facilities at commercial and DOE sites would begin to deteriorate and would eventually release radioactive materials to the environment.

The "No Action Alternative" appears to constitute a non-plan that provides for the permanent stranding of HLW and SNF at current locations, by default. Yet, it was obviously beyond the scope of the FEIS or SEIS to prepare an environmental impact statement specific to any one default location, such as PIIC's location. DOE's "no action alternative" in its EIS is not adequate or even applicable on a post-hoc basis here to support the stranding of SNF or HLW at any location by default. The two conclusionary "options" quoted above reflect a range of thinking falling between pure unscientific "theorizing" devoid of specifics to outright reckless irresponsibility.

DOE's Motion in this case seeks to precipitously withdraw the Yucca Mountain repository License Application and to end the project after decades of effort, and the undisputed need for a repository for both HLW and SNF. The nation needs one or more SNF repositories for both commercial and military waste, irrespective of any other alternatives that may arise in future decades, or which may be studied by the recently appointed Blue Ribbon Committee. The clear and direct result of DOE's proposed course is to strand such waste indefinitely or permanently at present sites that are not suitable for such waste retention or disposal purposes, and which have never been studied for said purpose. This action creates major questions and unknowns and creates significant long-term environmental and safety risks, in addition to substantial financial risks and costs to the PIIC and similarly situated host communities and states. This result directly impacts PIIC, and the public health, safety, and environment where PIIC is located, and also destroys the objectives and purposes of the NWPA and its enforcement vehicle, the Standard Contracts between the DOE and the nation's nuclear utilities, and the

nation's reliance thereon. DOE's Motion thus represents a major change in the status quo -- from a definite and planned federal program to address this nation's most toxic substances under the NWPA, to the termination of such a program and the virtual destruction of the NWPA.

DOE's Motion attempts to moot out and make irrelevant the FEIS to support the Yucca Mountain license, and to abandon the License Application for the project in derogation of its duties under the NWPA. At the same time, DOE has no other plan for SNF or other HLW disposal, and no apparent environmental studies upon which to support its default option -- to leave SNF and HLW stranded indefinitely or forever at current locations that were never intended, studied, or designed for SNF and HLW "disposal."

The DOE's Motion also fails to provide any explanation of how its abandonment of the Yucca Mountain repository would comply with this Commission's Nuclear Waste Confidence (NWC) decision (Waste Confidence Decision, as amended, 10 C.F.R. Parts 50 and 51). Instead, DOE's Motion appears to presume that said NWC decision can or will be modified on a prejudgment basis, to accommodate DOE's everlasting delays and failures, or alternatively, that the NWC decision is meaningless.

In summary, PIIC asserts that DOE's Motion seeks to undertake action, and to effect a result, that violates NEPA.

V. DOE'S DECISION AND MOTION TO WITHDRAW THE LICENSE APPLICATION, AND ITS DECISION AND MOTION TO WITHDRAW THE LICENSE APPLICATION WITH PREJUDICE SO AS TO TERMINATE THE YUCCA MOUNTAIN PROJECT (AND BOARD OR NRC APPROVAL OF SAID DECISIONS AND MOTION) IS (OR WOULD BE) ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT.

While not addressed by the Board, the PIIC also asserts that DOE's decision and motion (to both withdraw and withdraw with prejudice) its License Application, and to terminate the

Yucca Mountain project (and any Commission grant of said motion) is (or would be) arbitrary and capricious in violation of the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A), for several reasons.

First, such decision and action violates the NWPA, the Standard Contracts, and NEPA, and thus also violates the APA on this basis.

Second, DOE's decision and motion represents a sudden and complete 180 degree reversal of agency effort that has included decades of work, billions of dollars, and has been the subject of massive reliance by states, localities, the military, and the nation's citizens and energy users. DOE's reversal is wholly unexplained. Not even a feigned attempt is made in DOE's motion to provide facts, reasons, rationale, or supporting evidence to justify such a decision or action. Given the statutory requirements, the goals, purposes, and objectives of Congress, and the decades-long odyssey of studies, documentation, filings, and achieved milestones, the DOE should be found to be estopped to even make such a decision, and to file such a motion, in the circumstances presented.

DOE's motion requests extraordinary and abusive relief -- the sudden and complete termination of the License Application process and of the entire decades-long Yucca Mountain project. Yet DOE has provided no process to formulate any rationale for this decision, to provide a fair process to gather input nationally on the implications or impacts of its "secret" decision, and has undertaken no environmental studies under NEPA on the impacts of this major decision.

DOE also undertook no deliberative process whatsoever to consider the views and interests of the nation's stakeholders before deciding to undertake the action and to file the Motion. DOE did not issue any Notice of Inquiry to set forth rational reasons and alternative proposals prior to

its decision, or to request comments from interested or affected parties, or to then render a decision based upon any process, let alone a deliberative process (in contrast to the Final Interpretation process, discussed *infra*). Instead, the DOE here has reversed course, in violation of law, without any stated rationale or reason, except for a hollow claim of limitless unbridled "discretion."

DOE's action here is also inconsistent with the Notices commencing this case. No process has been provided for major affected interests in the nation to be informed of DOE's rationale, to input thereupon, and to seek appropriate remedies to ensure compliance with the NWPA, the Standard Contract, NEPA, and the APA. The NRC has similarly not re-noticed this as a new case, or a case transformed to consider the reverse of the matters and issues presented in the original License Application.

DOE's Motion (p 1-2) refers to the establishment of the "Blue Ribbon Commission on America's Nuclear Future - which will conduct a comprehensive review and consider alternatives for such disposition" and that "Congress has already appropriated \$5 million for the Blue Ribbon Commission to evaluate and recommend such 'alternatives'" citing Energy and Water Development' and Related Agencies Appropriation Act, 2010, Pub L. No. 111-85, 123 Stat. 2845, 2864-65 (2009). With exasperating simplicity, DOE's Motion suggests that the Blue Ribbon Commission, with \$5 million dollars, will reach a miraculous and brilliant resolution to the indeterminable nuclear waste problem -- a problem that the nation has not resolved since the Manhattan project in World War II, the adoption of the NWPA in 1982, and to the present, after up to \$10 billion in program expenditures, environmental studies and endless effort. It is difficult to envision how the mere appointment of the Blue Ribbon Commission, with only a \$5 million appropriation, and 18-24 months, can provide a nuclear waste resolution when federal

promises, nearly \$10 billion of expenditures, and nearly 30 years of effort, has not yet done so.⁹

Contrary to DOE's motion, the mere appointment of a "Blue Ribbon Commission," with a \$5 million appropriation, simply does not justify DOE's decision "to discontinue the pending application" and "to withdraw that application with prejudice" . . . "and to avoid future expenditure of funds on a licensing proceeding for a project that is being terminated." These statements in DOE's motion are illogical and counterintuitive. First, the statements implying DOE's intent or interest "to avoid further expenditure of funds on a licensing proceeding" is outright silly given the billion of dollars and efforts to get to the point of filing the License Application, and the indeterminable billions more that federal taxpayers will likely have to pay out in additional damages as a result of DOE's sudden "policy" reversal. In contrast, the continuation of the License Application to a decision on the merits would justify these past efforts and expenditures, particularly if the License Application is granted (given that a repository is still needed, under any conceivable alternative that may be outlined by the Blue Ribbon Commission).

The scantness of DOE's motion confirms that a "secret decision" has been made that the "project...is being terminated." After 60 or more years of federal promises, and the plain language and intent of Congress in the NWPA and the Standard Contract (as clearly outlined in *Indiana Michigan and Northern States Power*), and the reliance thereon, how did we as a nation suddenly receive the unexplained edict that the repository "project is being terminated?" Quite simply, how can the DOE violate the NWPA and ignore the Court holdings in *Indiana Michigan Power* or *Northern States Power*, and the many U.S. Court of Claims decisions since, by simply announcing that the DOE has decided to now "terminate the project?"

⁹ This time and effort has led to the selection of Yucca Mountain as a potential repository site and has resulted in the License Application.

DOE's decision and motion has been arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A). Any grant by this Commission of DOE's Motion would also violate the APA on the same grounds. DOE's decision and motion (and any Commission's decision granting same) unquestionably would also constitute a "final agency action" within the meaning of the APA, 5 U.S.C. § 704.

VI. THE BOARD AND NRC SHOULD REJECT DOE'S MOTION, AND PLACE CONDITIONS ON ANY FUTURE CONSIDERATION OF DOE'S MOTION, TO ENSURE COMPLIANCE WITH APPLICABLE LAW.

The PIIC asserts that the Commission should affirm the Board's Order, and reject DOE's motion, and attach conditions in its ruling to ensure DOE's compliance with the NWPA, the Standard Contract, NEPA, and the APA.

DOE's Motion (p 2-3) erroneously suggests that the NWPA somehow authorizes the withdrawal of the License Application "on such terms as the Board may prescribe" or "on such terms as the presiding officer may prescribe." The gist of this incredible argument is that the DOE can unilaterally and whimsically reverse its position, ignore its lawful duties, and file the subject Motion; and secondly, that the entire nation's lawmaking and judicial process and decisions (discussed *supra*) can be made subservient to some *de novo, sua sponte*, terms or conditions (or non-terms or non-conditions) that the Commission may self-initiate in this case.

DOE's motion (p 3) asserts that the Board (or Commission) should "prescribe only one term of withdrawal -- that the pending application for a permanent geologic reporting at the Yucca Mountain site shall be dismissed with prejudice", noting in its fn3 that: "DOE seeks this form of dismissal because it does not intend ever to refile an application to construct a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain."

DOE's motion (p 3) then states:

"That action will provide finality in ending the Yucca Mountain project for a permanent geologic repository and will enable the Blue Ribbon Commission, as established by the Department and funded by Congress, to focus on alternative methods of meeting the federal government's obligation to take high-level waste and spent nuclear fuel."

These DOE statements demonstrate the overreaching, reckless, and precipitous nature of DOE's Motion and requested relief. Quite simply, the mandated processing of the mandated License Application does not and would not affect or complicate in any way the role or function of the new found "Blue Ribbon Commission." In other words, the continued processing of the pending License Application and the carrying out of the functions of the Blue Ribbon Commission are separate yet consistent functions. The processing of the License Application cannot conceivably disrupt, distract, or affect in any way the work of the Blue Ribbon Commission. There exists no inconsistency whatsoever if the license process continues while the Blue Ribbon Commission undertakes its studies (as all sources indicate that a repository is needed under any known scenario).

The Commission should affirm the Board's denial of DOE's motion outright. At minimum, the Commission should hold the motion in abeyance and require DOE to first conduct the required NEPA studies, and to issue a Notice of Inquiry to initiate a process, with notice in the Federal Register and provision for comments, to enable DOE to formulate a proper decision in compliance with the APA, NEPA and the NWPA (and Standard Contracts) and as a prerequisite to any consideration of its Motion by this Commission.

DOE's Motion (pp 8-9) asserts that "no conditions are necessary as to the licensing support network." DOE's motion on this point is revealing in what it does not say! This statement is contradicted by reports of information being communicated to interested parties. The DOE has already acted precipitously, contrary to its contractual and statutory authority, to

unilaterally withdraw water and other permit applications necessary for a repository. The DOE as an agency has not clearly articulated a formal published policy to ensure the long-term preservation of all records, studies, samples, that support a possible repository, all compiled at great public expense. In contrast to the DOE's Motion on this point, the Board has provided for some provisions to protect and preserve these records and studies which the Commission should adopt and enforce.

As noted, PIIC asserts that the Board's Order denying DOE's Motion should be affirmed outright, and that the Commission should order the restart of the discovery and hearing schedule in this case. The Board and Commission should then "follow through" to render decisions on the merits of the License Application.

If the Commission were to grant DOE any relief whatsoever, and as a deficient secondary option, PIIC would recommend that the Commission assure compliance with the NWPA as much as possible, so that the process on the License Application can be quickly restarted in the near future. One possible approach would be to temporarily suspend only the adjudicatory discovery and hearing process, pending resolution by the Commission of DOE's motion and any Court appeals therefrom. During such a suspension period, the report by the Blue Ribbon Commission may be received, and Congress will be provided an opportunity to reconfirm its policy as stated in the NWPA, or to adjust the policy if it so determines.

Under any scenario, the Commission should reject any requests for reversal of the Board decision and should reject DOE's request to withdraw the its License Application. Such an extreme relief request is totally at odds with the NWPA and Congress' selection of Yucca Mountain in its 2002 statute (Pub. L. No. 107-200, 42 U.S.C. § 10135). Also, such a draconian relief request is wholly unnecessary and is only designed to attempt to permanently bar any

future consideration of Yucca Mountain as a repository, a result which is directly contrary to the NWPA.

PIIC emphasizes that the back-up "suspension" option described above is far worse than outright rejection of DOE's Motion in its entirety. The rejection of DOE's Motion will permit the Commission to continue to fulfill its statutory role, duties, and functions under the NWPA to consider and rule upon the License Application. However, the suspension option is superior to DOE's unexplained, arbitrary, and unlawful action to withdraw the License Application (and with prejudice). PIIC prefers outright rejection of DOE's Motion as being compliant with the NWPA, and justified by DOE's failure to provide a process or rationale to support the withdrawal of the License Application. However, the suspension option provides some opportunity to save the goals, objectives, and purposes of the NWPA, and to provide the nation the opportunity to input on this momentous decision.

The Commission should also uphold and augment the Board's orders concerning the preservation of records and scientific studies or samples of any kind, and adopt mandates to make all DOE and NRC personnel responsible for ensuring the carrying out of this function. Of course, such an order would also be consistent with an NRC order denying DOE's Motion (or alternatively, to suspend the adjudicatory proceedings for a short time pending a restart of the proceedings).

CONCLUSION AND RELIEF

For the reasons stated in this Brief, and in its March 15, 2010 Petition to Intervene, its May 11, 2010 Reply to Answers thereto, and its May 17, 2010 Response in Opposition to DOE's Motion to Withdraw, the PIIC respectfully requests that the Commission affirm, in its entirety, the Board's June 29, 2010 Memorandum and Order Denying DOE's Motion to Withdraw its License Application.

Respectfully submitted,
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Dated this 9th day of July, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)	
)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY)	
)	ALSBP No. 09-892-HLW-CAB04
(High Level Waste Repository))	
_____)	July 9, 2010

ATTACHMENT

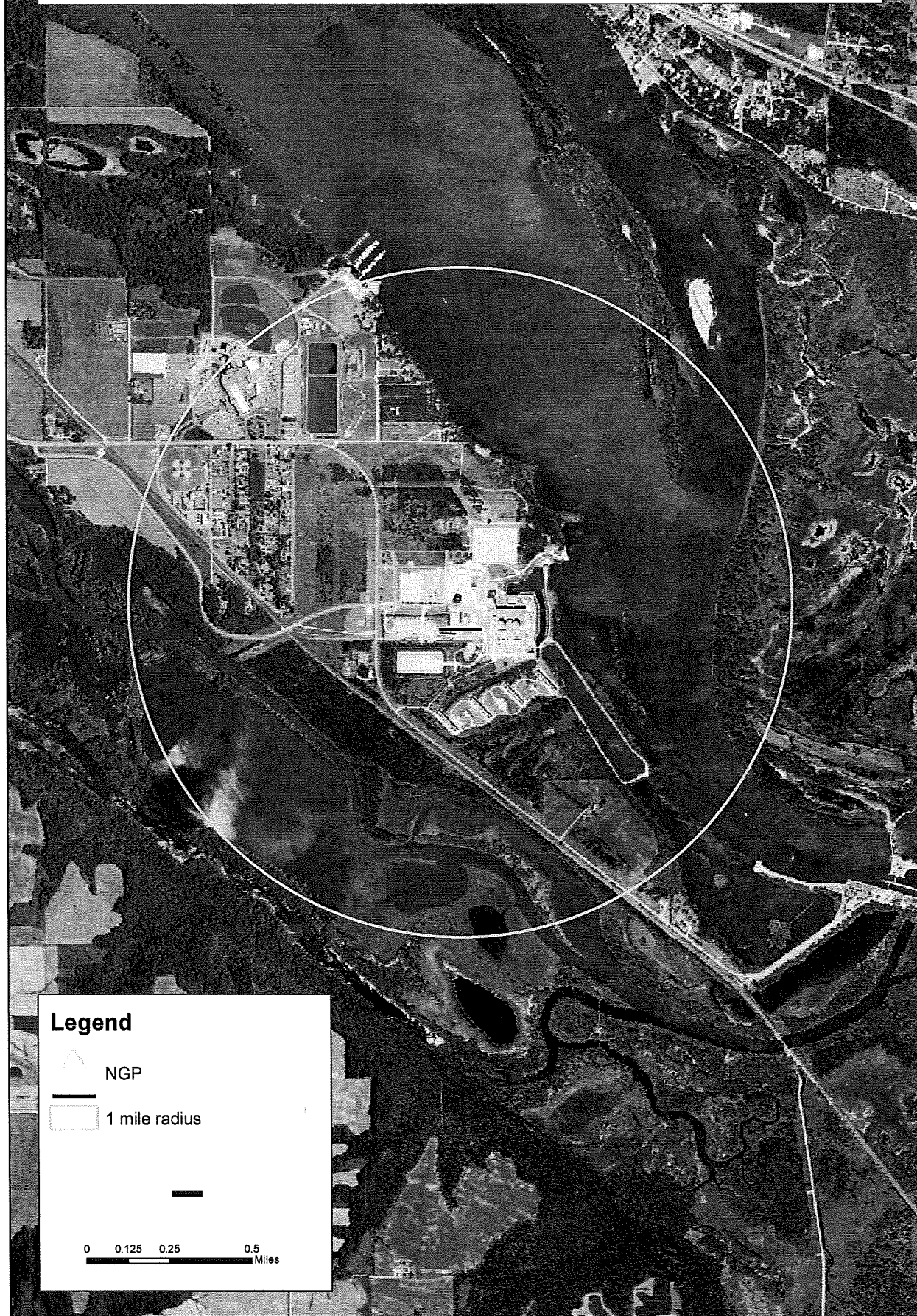
TO

**BRIEF OF PRAIRIE ISLAND INDIAN COMMUNITY
FOR AFFIRMANCE OF ATOMIC SAFETY AND LICENSING BOARD
MEMORANDUM AND ORDER DENYING DEPARTMENT OF
ENERGY'S MOTION TO WITHDRAW
CONSTRUCTION AUTHORIZATION APPLICATION**





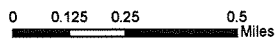
Prairie Island Indian Community

NGP 1 Mile Radius



Legend

-  NGP
-  1 mile radius



**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 foregoing Brief of Prairie Island Indian Community for Affirmance of Atomic Safety and Licensing Board Memorandum and Order Denying Department of Energy's Motion to Withdraw Construction Authorization Application, dated July 9, 2010, have been served upon the following persons by Electronic Information Exchange.

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