

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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)	)	May 17, 2010
	)	
	)	
	)	
	)	

RESPONSE OF THE STATE OF SOUTH CAROLINA
IN OPPOSITION TO DOE’S MOTION TO WITHDRAW

The State of South Carolina, proposed intervenor, submits the following response in opposition to the Motion to Withdraw filed by DOE.

FACTS

The facts and procedural posture of the DOE motion are well known to this Board, having been summarized in the Board’s April 6, 2010, Order. In addition, the Response of Aiken County, South Carolina, to the Motion to Withdraw contains certain details of the legislative history of the NWPA and subsequent statutes that need not be reiterated here. South Carolina would emphasize that Congress recognized nearly thirty years ago, when the NWPA was enacted, that “[i]t is necessary . . . to provide close Congressional control [over the repository development process] to assure that the political and programmatic errors of our past experience will not be repeated.” H.R. Rep. No. 97-491(1)(1982) at 29-30, 1982 U.S.C.C.A.N. (97 Stat.) 3796, 3797. (Emphasis added.)

Congress further noted in 1982 that an “essential element” of the repository development process was “a legislated schedule for federal decisions and actions for repository development.” H.R. Rep. No. 97-491(1)(1982) at 30, 1982 U.S.C.C.A.N. (97 Stat.) 3797. The latter part of that schedule was contemplated to be as follows:

When a site designation has become effective (i.e., has not been disapproved).	Within 90 days the Secretary of Energy shall submit to NRC a license application for development of the site.
Not later than January 1, 1989 or the expiration of 3 years after the submission of the license application (whichever is later).	NRC shall approve or disapprove a construction authorization for construction of a repository at the site.
Around 1995.	Operation of the first national high level nuclear waste repository.

Id. The portion of the legislative schedule referenced above does not make any provision for a subsequent exercise of discretion by the Secretary of Energy in deciding whether to pursue the project once a site designation has occurred. While the dates have been greatly delayed, the Congressional intent to maintain a legislated schedule has never wavered. In that regard, Congress in 1987 amended the NWPA by directing DOE to limit its site selection efforts to Yucca Mountain. *See* 42 U.S.C.A. §§ 10134(f)(6), 10172. After the President recommended the Yucca Mountain site to Congress, Congress in 2002 enacted a joint resolution approving the development of a repository at Yucca Mountain. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135).

Congress recognized long ago that in the early stages of the site study process, further scientific inquiry might disqualify a site:

The risk that a site which has been considered probably adequate for development could be abandoned after significant commitment has been made to the site is a technically unavoidable aspect of repository development. It is a result of the limit of our ability to know with certainty all the characteristics of a rock formation deep

underground until the rock site has actually been excavated and surveyed from the ‘horizon’, or level of the repository.

H.R. Rep. No. 97-491(1)(1982) at 30, 1982 U.S.C.C.A.N. (97 Stat.) 3799. However, the Yucca Mountain site has, since the above language was written in 1982, undergone another twenty years of scientific analysis, with two affirmative Congressional decisions advancing that site during the twenty years.

In 1987, Congress made specific allowance for the possibility that the Yucca site might be found scientifically lacking, noting that:

(3) DOE is authorized to site and construct, subject to existing licensing requirements, a deep geologic nuclear waste repository only at the Yucca Mountain site. In the event that the Yucca Mountain site proves unsuitable for use as a repository, DOE is required to terminate site-specific activities and report to the Congress.

House Conference Report No. 100-495 at 776, 1987 U.S.C.C.A.N. 2313-1521-22. In other words, at that stage of the process, DOE was to notify Congress if the site proved unsuitable.

By 2002, the site was deemed appropriate by Congress for submission of a license application. The Governor of Nevada protested, claiming among other things that the site was geologically unsuitable. However, after several days of Congressional hearings, the appropriate Senate committee concluded that

Whether the combination of natural and engineered barriers proposed by the Secretary will meet the licensing requirements of the NRC will ultimately be for the Commission, rather than this Committee, to decide.

Senate Report 107-159 at 8 (emphasis added). To the same effect, the Committee additionally stated:

The Governor raises serious questions about the geology of the Yucca Mountain site, the design of the repository, the credibility of DOE’s performance assessments, and the safety of nuclear waste transportation. These questions must be more fully examined and

resolved before the NRC can authorize construction of the repository. But they should be resolved by the Commission, rather than by the Committee or the Senate as a whole. We cannot find on the basis of the record before us that any of the objections raised by the Governor warrants termination of the repository program at this point.

Id. at 13 (emphasis added). In a section of the same Report entitled “The Case for Going Forward,” the Senate Committee noted that:

The Committee believes that the Secretary’s recommendation to the President, combined with his testimony before the Committee, and the voluminous technical documents supporting the recommendation meet the burden of going forward imposed by the Act and are sufficient to justify allowing the Secretary to submit a license application for the repository to the Nuclear Regulatory Commission for its review.

Id.

As can be seen, Congress thus continued its process of maintaining a “legislated schedule,” all the while leaving unaffected the initial mandatory requirement that a license application be filed by DOE, as well as the mandatory requirement that the Commission issue a decision on the merits of that application.

ARGUMENT

1. DOE May Not Withdraw The Application Absent Congressional Authorization. (SOC-MISC-01)

A. DOE has a mandatory duty to present the license application to the Commission.

The motion to withdraw the application is beyond the authority of the Secretary. It is contrary to the requirement of Section 114(b) of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10134(b), which requires that if the site designation is permitted to take effect (as has happened with the enactment of Public Law 107-200 (2002), then “the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site. . . .”

(Emphasis added.) The statute therefore prohibits the Secretary from unilaterally withdrawing the application in the absence of further Congressional action, and thus the motion to that effect by the Secretary should be denied as void and without authority.¹

To reiterate, the Act specifically provides that “the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site. . . .”

(Emphasis added.) Conversely, no provision of the Act suggests that the Secretary may withdraw the application. Contrary to the views of the Administration, which appear to be that the mere proposal of an Executive budget excuses noncompliance with a statutory duty, the Supreme Court has held that

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. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

* * *

The Constitution did not subject this law-making power of Congress to presidential or military supervision or control.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). The same case holds that the presidential order therein invalidated was beyond the power of the executive because it did “not direct that a congressional policy be executed in a manner prescribed by Congress--it directs that a presidential policy be executed in a manner prescribed by the President.” *Id.* The Court

¹ The Act imposes other related duties on the Secretary as well. For instance, it requires the Secretary to annually update Congress as to the status of such application, 42 U.S.C. § 10134(c), and to prepare and update a project decision schedule that “portrays the optimum way to attain the operation of the repository .” 42 U.S.C. § 10134(e)(1). These provisions cannot be harmonized with the announced intent of the Secretary to abandon the project.

then held that the presidential order in that case, like the executive actions in the present case, merely

sets out reasons why the President believes certain policies should be adopted, [and] proclaims these policies as rules of conduct to be followed. . . .

Id. Justice Jackson, concurring, noted that

The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.

Id. at 641.

Subsequently, the Court has reiterated these principles, holding, for instance, that “[w]e ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.” *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986). *See also, e.g., Clinton v. City of New York*, 524 U.S. 417, 444 (1998)(noting difference between permitted “executing the policy that Congress had embodied in the statute” and prohibited “rejecting the policy judgment made by Congress and relying on [President’s] own policy judgment”); *Olegario v. U.S.*, 629 F.2d 204, 224 (2d Cir. 1980)(“Constitution’s grant of executive authority does not include the right to nullify legislative acts or ignore statutory directives”).

The present case is precisely just such a case in which the Executive Branch has disobeyed the commands of Congress, and in which a court, or in this case, this tribunal, should grant relief from such refusal to carry Congressional policy into execution. As the D.C. Circuit has held, with specific reference to Congress’s decision that Yucca Mountain would be the repository site, “Congress has settled the matter, and we, no less than the parties, are bound by its

decision.” *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F.3d 1251, 1302 (D.C. Cir. 2004).²

B. No factual basis exists for the motion to withdraw.

DOE has provided virtually no factual or legal basis for its motion. The claimed factual basis is shockingly threadbare: The application should be dismissed, the agency claims, and over \$10 billion worth of work abandoned, for no reason other than the fact that “the Secretary of Energy has decided that a geologic repository at Yucca Mountain is not a workable option for long-term disposition of those material.” DOE Motion at 1. The rest of the motion, the pertinent part of which is less than eight pages long and unsupported by attachments, provides no additional factual basis for the Secretary’s decision other than to reiterate that it is the Secretary’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.” *Id.* at 3. No suggestion is offered as to what that “advanced” “scientific and engineering knowledge” might be. In other words, DOE argues that this \$10 billion dollar effort must be abandoned, not on the basis of any proffered scientific information, but rather on the basis of a bare assertion, a mere *ipse dixit*, on the part of the present Administration. (If DOE should seek to bolster its manifestly deficient factual showing with attachments to its reply brief, such arguments should be disregarded as having come too late; alternatively, the opponents of the motion should at least be given the opportunity to respond to any such late-filed evidence.)

² South Carolina adopts and incorporates by reference the argument of Aiken County at pp. 9-10 of its Response to the effect that neither the appointment of the Blue Ribbon Commission by the Administration, nor certain appropriations actions cited by DOE, can change the mandatory requirements of the NWPA.

The legislative history cited above leaves no doubt that Congress concluded in 2002 that enough study of the Yucca Mountain site had occurred over the previous twenty or more years to transfer any further decisions about suitability to the Commission, an independent regulatory agency, and away from other agencies of the Executive Branch. The evidence of suitability was ordered to be submitted to the Commission. *See, e.g.*, Sen. Rep. 107-159 at 13 (any further questions about geology, design, etc., “should be resolved by the Commission, rather than by the Committee or the Senate as a whole”); *Id.* at 8 (suitability of barriers is “ultimately be for the Commission, rather than this Committee, to decide”). DOE, however, has now claimed the authority to make the decision of suitability itself, relying on slim or no evidence. That action violates the Congressional command that the matter be submitted to the Commission, and likewise asks the Commission to violate the further Congressional determination that the Commission should be the forum in which any remaining arguments of unsuitability should be presented. Even if DOE had presented persuasive, or at least some, evidence of the unsuitability of the site, which it has dramatically failed to do, the decision of suitability still should be made by the Commission on the basis of that evidence, and not by the Department’s determination to declare by fiat that the application is no longer viable. Here, in contrast, DOE has not asked the Commission to weigh the evidence of suitability, but instead simply claims that it has unreviewable discretion to withdraw the application for whatever reasons it chooses.

C. No sound legal basis exists for the motion to withdraw.

1. The language of the NWPA is mandatory.

The legal basis for DOE’s motion contains no more substance than its claimed factual basis. The fundamental flaw in DOE’s argument is that it ignores the Congressional directive that the agency “shall submit to the Commission an application for a construction authorization

for a repository at [Yucca Mountain]. . . ,” as well as the corresponding Congressional directive that “[t]he 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. . . .” (Emphases added.) Instead, DOE would have the Commission review the present motion to withdraw in the same manner as the Commission would review such a motion by a private utility applicant. The obvious difference, however, is that Congress has never imposed a duty on private 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.

2. To the extent that NRC regulations applicable to normal cases conflict with the mandatory duties imposed by Congress, those regulations should not be applied in this matter.

DOE has contended that it should be permitted to withdraw the application because the Commission’s normal procedural regulations permit such withdrawals. DOE Motion at 2-3. However, because of the obvious differences between the duties imposed by Congress on DOE in this matter, and the absence of such duties in the case of typical private utility applicants, the reference in Section 114(d) of the NWPA to “the laws applicable to such applications” can only extend so far. As a result, existing statutes, or more specifically, existing NRC procedural regulations, should be given effect only to the extent that those statutes and regulations are in harmony with the NWPA and with the express purposes of Congress in enacting the NWPA. As the Supreme Court has held,

The “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” *United States v. Fausto*, 484 U.S., at 453. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the

topic at hand. As we recognized recently in *United States v. Estate of Romani*, “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.” 523 U.S., at 530-531.

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000). As applied here, this standard rule of statutory construction means that while many of the normal NRC procedural rules can apply to the present unique proceeding without offending Congressional intent, the ordinary NRC rules governing the withdrawal of a typical private license application should not be applied to this extraordinary instance in which Congress has mandated that DOE must institute, and the Commission must decide, a licensing proceeding. Moreover, as discussed below, an absurd result would obtain if the Commission were to accept the DOE contention that the NWPA’s requirements would be satisfied as long as DOE simply files the application.

3. The mandatory requirements of the NWPA are not satisfied by the mere filing of the licensing application.

DOE argues, although in a manner far from direct, that its duty with regard to the licensing application was satisfied once it filed the application. DOE Motion at 8 (“the text of the NWPA does not specify actions the Secretary can or must take once the application is filed”).³ This limited view of DOE’s statutory duty is not much different from arguing that a stop sign requires only that a driver stop, but not stay there, regardless of might be coming down the road. The argument proposes a result that would be not only absurd, but also at odds with other parts of the NWPA. As held in such cases as *E.E.O.C. v. Commercial Office Products Co.* 486 U.S.

³ A similar statement is made by DOE on p. 5 of its Motion to Withdraw (“The statute simply requires that the Secretary ‘shall submit. .. an application for a construction authorization.’ NWPA § 114(b), 42 U.S.C. § 10134(b). It neither directs nor circumscribes the Secretary’s actions on the application after that submission.”)

107, 120-121 (1988), a court should not countenance a reading of a statute that leads to “absurd or futile results . . . plainly at variance with the policy of the legislation as a whole. . . .” It would be absurd in the extreme to hold that after Congress had directed a fifteen-year program (1987-2002) of site study and development solely at Yucca Mountain, and costing in excess of ten billion dollars, the Department could then thwart any further action on the selected repository site simply by filing, and then later withdrawing, the license application. (Indeed, under DOE’s view, the application could be filed on one day, and withdrawn on the very next day, without contravening the statute.)

DOE’s interpretation is also at odds with the overall policy and purpose of the NWPA and with the 2002 Congressional selection of Yucca Mountain as the repository site. Congress anticipated that further action, both by the Commission and by Congress, would be necessary before the repository could open, but such further action was clearly to be the action of the Commission on the merits of the application and the subsequent action of Congress in providing further funding for the repository if the application were approved. *See, e.g.*, 42 U.S.C. § 10134(d). At p. 7 of its Motion to Withdraw, DOE cites several statements in the 2002 House Committee Report to the effect that the 2002 Joint Resolution did not authorize the construction of the repository. This, and similar arguments by DOE at pp. 5-7 of its Motion, are merely statements of the obvious: Clearly, Congress did not, and would not, authorize appropriations for the construction of the repository until the Commission approved the license. However, to state that much is not to state, as DOE claims, that the NWPA does not require DOE to continue with an application proceeding. To the contrary, Congress did not intend for the Department to abandon, or the Commission without considering the merits to dismiss, the license application.

Finally, the requirement to file the application implies a duty to prosecute it in good faith, and not merely to comply with the form of the NWPA by filing the application, while disregarding the Act's substantive implication the application be presented in good faith. In this regard, this case is similar to such cases as *NTEU v. Nixon*, 492 F.2d 587 (D.C.Cir.1974), which held that the President may not refrain from executing laws duly enacted by the Congress. *See also, e.g., Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible").

4. DOE's interpretation of the NWPA is not entitled to *Chevron* deference.

DOE argues that its decision to withdraw the application should be given deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), which held that weight should be given "to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 844. South Carolina incorporates Aiken County's arguments on this point, found at pp. 3-5 of its opposition to DOE's motion. South Carolina would add that there are several additional reasons why DOE's very recent, unsupported, administrative construction should be given no weight. As Justice Rutledge has noted, concurring in *Board of Governors of the Fed. Reserve Sys. v. Agnew*, 329 U.S. 441, 450 (1947), an agency's "specialized experience gives [it] an advantage judges cannot possibly have, not only in dealing with the problems raised for [its] discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which [the Board] should administer it." There is no suggestion of such specialized experience in this case. In addition, this is not a case where this tribunal is asked to validate a longstanding agency practice. The newly-arrived-at position of DOE in this litigation is not even an agency practice or regulation at all; nor is it a position of long standing.

Chevron accords deference to agency practices and regulations, as opposed to “appellate counsel's post hoc rationalizations for agency action. . . .” *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971). The same case holds that “It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.” *Id.*⁴ In a later case, *Jean v. Nelson*, 472 U.S. 846 (1985), the Supreme Court characterized *Camp* as involving a situation in which the agency “had offered no pre-litigation administrative interpretation of these statutes.” 472 U.S. at 856. That description applies equally here. *See also, e.g., Cathedral Candle Co. v. U.S. Intern. Trade Com’n*, 400 F.3d 1352, 1365 (Fed. Cir. 2005)(regulation or other formal process is normally required to invoke *Chevron* deference).

In addition to not being a policy or regulation of the agency, as opposed to a position taken during a contested proceeding, DOE’s position in this lawsuit has had little legal analysis cited on its behalf. By contrast, and as an illustration of the kinds of administrative actions that received the deference of courts, *see, e.g., Securities Industry Ass’n v. Board of Governors of Federal Reserve System*, 807 F.2d 1052, 1056 (D.C. Cir. 1986)(observing that the Federal Reserve Board had “comprehensively addressed the language, history, and purposes of the Act that bear on whether commercial banks should be able to place commercial paper”). The present case instead resembles several others cited in *Securities Industry Ass’n*, where the court noted that “the agency involved failed to present the Court with anything to which to defer.” *Id.*

Finally, the DOE position taken in this case on the interpretation of the NWPA is not one of long standing. It was first formally stated less than three months ago, when the Motion to

⁴ The fact that DOE counsel’s arguments are here presented at a “trial” level, rather than at the appellate level, is of no significance. The position of the agency is still a post hoc rationalization, rather than the implementation of a longstanding, consistent, agency policy.

Withdraw was filed. While the length of time of an agency construction is not the only factor considered in determining whether to accord deference to it, nevertheless, “longstanding agency interpretations generally receive greater deference than newly contrived ones.” *Strickland v. Commissioner, Maine Dept. of Human Services* 96 F.3d 542, 548 (1st Cir.1996).

2. The Withdrawal Of The Application Would Violate The Separation Of Powers (SOC-MISC-02).

DOE does not expressly argue that it has some sort of inherent executive authority to ignore Congress and act according to its own view of what should be done in this matter. Nevertheless, this is, in effect, the logical outgrowth of what the Department does argue. DOE’s position thus would have the Executive Branch determine matters that have already been determined by Congress, and thereby would constitute an executive encroachment on legislative power, as held in the authorities previously cited.

3. The Commission Lacks Authority Under The NWPA To Grant DOE’s Motion To Withdraw The Application. (SOC-MISC-03).

If the Commission were to grant the motion to withdraw the application, such a grant would exceed the powers of the Commission, just as much as the Department’s filing of the motion would exceed the powers of the Department. Section 114(d) of the Act, 42 U.S.C. § 10134(d), provides 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. . . .

The above-quoted provision of the statute does not vest the Commission with power to permit the abandonment of the application by the Department, in the absence of further authorization from Congress. In other words, Congress provided that the Department must apply for a license, and the Commission must render a decision that either approves or disapproves the

issuance of a license. Congress did not offer the Commission the option of merely nonsuiting the case with prejudice, as the Department would have the Commission do. The statute created a power and a duty in the Commission only to hear and determine the merits of the application. Indeed, as shown in particular in the 2002 legislative history discussed above, Congress intended for this Commission, rather than DOE, to make all future decisions about the merits of the Yucca Mountain site as a potential repository. That duty cannot be satisfied if the Commission avoids its Congressionally-mandated duty by dismissing this matter without deciding its merits.

As with the federal courts, the Commission has “a strict duty to exercise the jurisdiction that is conferred upon [it] by Congress.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). There is no suggestion that this duty can be avoided in this matter, in which Congress addressed this particular license application proceeding, specifically providing that the Commission must either approve or disapprove the application, as opposed to dismissing it. As a result, any dismissal of this matter pursuant to the motion of the Department would be an action beyond the statutory power of the Commission to take, in addition to being action upon a motion that itself would be filed in excess of the authority of the Department.

CONCLUSION

For the foregoing reasons, the State of South Carolina respectfully submits that the Motion to Withdraw should be denied, and that the Commission should direct the Department of Energy to prosecute the License Application in good faith.

Respectfully submitted,

Signed (electronically) by Kenneth P. Woodington

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

U.S. DEPARTMENT OF ENERGY)

(High-Level Waste Repository))

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the **RESPONSE OF THE STATE OF SOUTH CAROLINA IN OPPOSITION TO DOE'S MOTION TO WITHDRAW** dated May 17, 2010, have been served upon the following persons by Electronic Information Exchange.

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This 17th day of May, 2010