

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

Docket No. 63-001-HLW

July 9, 2010

**INITIAL BRIEF OF THE STATE OF WASHINGTON
PURSUANT TO THE JUNE 30, 2010, COMMISSION ORDER**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF THE CASE	1
III.	STATEMENT OF FACTS	3
	A. The Background and Structure of the NWPA	3
	B. NWPA Implementation to Date	8
IV.	ARGUMENT	10
	A. The Commission Should Not Take Discretionary Interlocutory Review Based on Grounds for the Recusal and Disqualification of Three Commission Members	10
	B. The ASLB’s Order Should be Upheld in All Respects	11
	1. The ASLB Correctly Denied DOE’s Motion to Withdraw its Application	11
	a. The ASLB correctly determined that the NWPA requires DOE and the NRC to carry forward this proceeding to a merits based determination approving or disapproving a construction authorization	12
	b. The ASLB correctly rejected DOE’s arguments that withdrawal is permitted	17
	2. The ASLB Established Appropriate Contingent Conditions on Withdrawal in the Event Withdrawal Were Permitted	22
	3. The ASLB Correctly Granted Washington’s Intervention	23
V.	CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Am. Fed’n of Gov’t Employees, Local 2782 v. Fed. Labor Relations Auth.</i> , 803 F.2d 737 (D.C. Cir. 1986).....	13
<i>Beach v. Ocwen Fed. Bank</i> , 523 U.S. 410 (1998).....	14
<i>Bowen v. Georgetown Univ. Hosp.</i> , 488 U.S. 204 (1988)	20
<i>Brinkley v. Hassig</i> , 83 F.2d 351 (10th Cir. 1936)	11
<i>Bryant v. Dollar Gen. Corp.</i> , 538 F.3d 394 (6th Cir. 2008)	18
<i>Calloway v. District of Columbia</i> , 216 F.3d 1 (D.C. Cir. 2000).....	21
<i>Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	12, 20
<i>Citizens Bank v. Strumpf</i> , 516 U.S. 16 (1995).....	20
<i>City of Portland, Or. v. EPA</i> , 507 F.3d 706 (D.C. Cir. 2007).....	14, 19
<i>Cuomo v. United States NRC</i> , 772 F.2d 972 (D.C. Cir. 1985).....	23
<i>Food & Drug Admin. v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	17, 19, 20
<i>Haggar Co. v. Helvering</i> , 308 U.S. 389 (1940).....	13
<i>In re Ross</i> , 656 P.2d 832 (Nev. 1983).....	11
<i>In re Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)</i> , CLI-99-24, 50 NRC 219 (1999).....	23
<i>March v. United States</i> , 506 F.2d 1306 (D.C. Cir. 1974).....	13
<i>Mass. v. Env’tl. Prot. Agency</i> , 549 U.S. 497 (2007).....	22

<i>Nevada v. Watkins</i> , 939 F.2d 710 (9th Cir. 1991)	8
<i>Nuclear Energy Inst., Inc. v. EPA</i> , 373 F.3d 1251 (D.C. Cir. 2004)	3, 5, 7, 16
<i>Puerto Rico Elec. Power Auth. (North Coast Nuclear Plant, Unit 1)</i> , ALAB-662, 14 NRC 1125 (1981)	22
<i>U.S. Dep't of Energy (High Level Waste Repository)</i> , CLI-10-13, 71 NRC __ (Apr. 23, 2010)	2
<i>United States v. Will</i> , 449 U.S. 200 (1980)	11
<i>Valley v. Rapides Parish School Bd.</i> , 118 F.3d 1047 (5th Cir. 1997)	11
<i>Wash. v. Chu</i> , 558 F.3d 1036 (2009)	20
<i>Whatley v. District of Columbia</i> , 447 F.3d 814 (D.C. Cir. 2006)	21
<i>Whitman v. Am. Trucking Ass'ns</i> , 531 U.S. 457 (2001)	19

Statutes

42 U.S.C. § 5841(a)(1)	11
Nuclear Waste Policy Act (NWPA), 42 U.S.C. §§ 10101-10270	3
42 U.S.C. § 10131(a)(3)	3
42 U.S.C. § 10131(b)(1)	3, 13
42 U.S.C. § 10131(b)(2)	3
42 U.S.C. § 10132(a)	5
42 U.S.C. § 10132(b)	5
42 U.S.C. § 10132(c)	5
42 U.S.C. § 10133(c)(3)	6, 14, 15
42 U.S.C. § 10133(d)	5
42 U.S.C. § 10134(a)	6

42 U.S.C. § 10134(a)(2)(A)	7
42 U.S.C. § 10134(b)	7, 12
42 U.S.C. § 10134(c).....	7, 14, 19
42 U.S.C. § 10134(d)	7, 8, 12, 18, 19
42 U.S.C. § 10134(e)(1).....	8, 13
42 U.S.C. § 10134(e)(2).....	8, 13
42 U.S.C. § 10135(b)	7
42 U.S.C. § 10135(c)-(g).....	7, 14
42 U.S.C. § 10139(a)(1)	11
42 U.S.C. § 10172	9

Regulations

10 C.F.R. § 2.107	18, 19
10 C.F.R. § 2.107(a).....	1
Department of Energy: Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, NV, 73 Fed. Reg. 53,284 (Sept. 15, 2008).....	10
Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008).....	10

Constitutional Provisions

U.S. Const. art. II, § 3, cl. 4	22
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Legislative History

H.R. Rep. No. 97-491(I) (1982).....	3, 4, 5, 15, 18
Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135 note (2006)).....	10

Other Authorities

2A Sutherland, <i>Statutes and Statutory Construction</i> § 46.05 (C. Sands rev. 4th ed. 1984).....	13
F. Pollack, <i>A First Book of Jurisprudence</i> 270 (6th ed. 1929)	11

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U.S. Dept. of Energy, *A Multiattribute Utility Analysis of Sites Nominated For Characterization For the First Radioactive Waste Repository—A Decision Aiding Methodology* 1-5-1-15 (1986), available at http://www.energy.gov/media/Multiattribute-Utility-Analysis_HQS-19880517-1167_pp1-250.pdf (last visited on July 9, 2010)..... 9

Yucca Mountain: The Most Studied Real Estate on the Planet, Report to the Chairman, U.S. Senate Committee on Environment and Public Works (Mar. 2006), available at <http://epw.senate.gov/repwhitepapers/YuccaMountainEPWReport.pdf> (last visited July 9, 2010)..... 9

I. INTRODUCTION

On June 30, 2010, the Commission invited participants to this proceeding to file briefs with the Commission “as to whether the Commission should review, and reverse or uphold” the June 29, 2010, decision (Order) of the Atomic Safety and Licensing Board (ASLB or Board) denying a motion by the Department of Energy (DOE) to withdraw with prejudice its application for an authorization to construct a geologic repository for high-level radioactive waste and spent nuclear fuel at Yucca Mountain, Nevada. The State of Washington (Washington) submits this brief to argue first that the Commission should not take review of the Board’s Order. Washington argues second that if the Commission reviews the Order, the Commission should uphold the Order in all respects.

II. STATEMENT OF THE CASE

On February 1, 2010, DOE filed a motion before the ASLB to stay this proceeding pending DOE’s anticipated filing of a motion to withdraw its application. U.S. Department of Energy’s Motion to Stay the Proceeding (Feb. 1, 2010). DOE indicated it intended to “withdraw its pending application with prejudice and to submit a separate motion, pursuant to 10 C.F.R. § 2.107(a), within the next 30 days, to determine the terms and conditions, if any, of that withdrawal.” *Id.* at 1-2. DOE indicated its motion was based upon the President’s direction in the proposed Fiscal Year 2011 budget that DOE “discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010. . .” *Id.* at 1. DOE’s motion for stay was conditionally granted by the ASLB on February 16, 2010.

On March 3, 2010, Washington filed a petition to intervene with the ASLB. State of Washington's Petition for Leave to Intervene and Request for Hearing (Mar. 3, 2010). Washington sought intervention for the purpose of opposing DOE's anticipated withdrawal motion. Briefing on Washington's petition was completed on April 5, 2010.

Also on March 3, 2010, DOE filed its motion to withdraw with the ASLB. U.S. Department of Energy's Motion to Withdraw (DOE Motion) (Mar. 3, 2010). The ASLB deferred briefing on DOE's motion until after the petitions to intervene had been addressed. Order (Concerning Scheduling) (Mar. 5, 2010). On April 6, 2010, the ASLB further deferred briefing on DOE's motion, as well as suspended briefing on other pending petitions to intervene on which briefing was not yet completed, on the basis that (at that time) three original actions had been filed in the United States Court of Appeals for the District of Columbia Circuit, each action in some part challenging DOE's decision to withdraw its license application.¹ Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010). The ASLB suspended its proceedings "pending guidance from the Court of Appeals on the relevant legal issues." *Id.* at 3.

On April 16, 2010, this Commission vacated the Board's suspension order and remanded the matter to the Board, directing it to rule on DOE's withdrawal motion. *U.S. Dep't of Energy (High Level Waste Repository)*, CLI-10-13, 71 NRC __ (Apr. 23, 2010). The ASLB established a briefing schedule on April 27, 2010, and heard oral argument in Las Vegas, Nevada on June 3, 2010.

¹ *In re: Aiken County*, D.C. Cir. No. 10-1050; *Ferguson, et al. v. Obama*, D.C. Cir. No. 10-1052; *South Carolina v. Dep't of Energy*, D.C. Cir. No. 10-1069; *Wash. v. Dep't of Energy*, D.C. Cir. No. 10-1082.

On June 29, 2010, the ASLB issued the Order now at issue. Memorandum and Order (Granting Intervention to Petitioners and Denying Withdrawal Motion) (June 29, 2010). In the Order, the Board: (1) denied DOE's motion to withdraw its construction authorization application as precluded by the terms of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. §§ 10101-10270, *see* Order at 3-20; (2) addressed conditions of withdrawal that should apply if DOE *were* permitted to withdraw its application (including that any withdrawal be without prejudice, and that certain conditions be placed to preserve in usable form the millions of documents on the Licensing Support Network), *see* Order at 20-24, Appendix A; and (3) granted the intervention petition of Washington, among other petitioners. *See* Order at 24-46. As noted above, the Commission has now requested briefing on this Order.

III. STATEMENT OF FACTS

A. The Background and Structure of the NWPA

Congress enacted the NWPA in 1982 to establish a “definite Federal policy” for the disposal of high-level radioactive waste and spent nuclear fuel. 42 U.S.C. § 10131(b)(2). The NWPA outlines a detailed, prescriptive, and stepwise process for the “siting, construction, and operation of repositories” to provide a “reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste” 42 U.S.C. § 10131(b)(1); *see also Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1259 (D.C. Cir. 2004).

The NWPA's legislative history reflects Congress' concern with the “unmitigated” failure of the federal government to have provided for a permanent waste disposal facility, even by the early 1980s. H.R. Rep. No. 97-491(I), at 28 (1982); *see generally*, H.R. Rep. No. 97-491(I), at 26-30; *see also*, 42 U.S.C. § 10131(a)(3) (“Federal efforts during the past

30 years to devise a permanent solution to the problems . . . have not been adequate”).

Congress sharply criticized prior agency confidence that a solution would simply work itself out:

An opiate of confidence that the technical issues effecting [sic] nuclear waste disposal were easily resolvable for decades rendered Federal officials responsible for providing the facilities apathetic towards addressing those technical issues, and unprepared for the immense social and political problems which would obstruct implementation of a serious repository development program. *“Paper” analyses and future plans were accepted as adequate assurance that disposal facilities would be available when needed*

H.R. Rep. No. 97-491(I), at 26 (emphasis added).

Congress also noted that earlier efforts to develop a repository had fallen victim to political pressure:

The Atomic Energy Commission, predecessor to the Department of Energy and the Nuclear Regulatory Commission, reacted with a rush to develop a pilot permanent high level waste disposal facility. *The rejection of a site for the facility in Lyons, Kansas in 1971 after an intense political attack on the program*, followed quickly by revelations of serious technical flaws in the site, are now widely recognized as the landmark event in nuclear waste management history which would color future repository siting activities through the present day.

. . . .

Increased pressure to resolve the problem sent the Federal nuclear establishment in 1976 . . . looking for a site in Michigan, *where political uproar quickly brought the program to defeat again*, this time even before enough drilling could be accomplished to determine whether technical flaws in the site existed.

H.R. Rep. No. 97-491(I), at 27 (emphasis added).

Congress concluded that although opening a repository was technically feasible, a prescriptive statutory process with Congressional control of certain critical decisions was necessary in order to actually realize that goal:

The status of our technical ability to provide these permanent disposal facilities, or “repositories”, is considered by the Committee to be technically advanced to a point which justifies implementation of the technology. . . . In practice, however, management of nuclear wastes has been inadequate to guarantee that the risks will be small in fact. *It is 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.*

H.R. Rep. No. 97-491(I), at 29-30 (emphasis added).

The NWPA’s resulting “multi-stage process” for developing a repository, *Nuclear Energy Inst.*, 373 F.3d at 1259, was based on a series of special commission and task force recommendations that “laid a foundation for a comprehensive, step-by-step approach to repository development” and agreed on the need for legislation to “solidify a program *and keep it on track.*” H.R. Rep. No. 97-491(I), at 28-29 (emphasis added). This step-by-step approach, as outlined in the statute, is summarized as follows:

Site Nomination. DOE is initially required to promulgate guidelines for and recommend “candidate sites” to the President for further investigation. 42 U.S.C. § 10132(a), (b). Upon such recommendation, the President has a prescribed timeline in which to review the recommendations and either approve, disapprove, or request further information. 42 U.S.C. § 10132(c). If the President concurs, or if no action is taken, the recommended sites are deemed approved and they proceed to the second stage: site characterization.

Site Characterization. The site investigation, or characterization, stage involves DOE investigating candidate sites to support potential recommendation of a site for “approval” as a repository. Site characterization actions are “a preliminary decisionmaking activity” under the statute. 42 U.S.C. § 10133(d).

Congress vested the Secretary of Energy (Secretary) with express termination authority while conducting these pre-decisional actions. 42 U.S.C. § 10133(c)(3). However, even during this pre-decisional phase of the process, the Secretary's termination discretion is limited. The statute requires a specific determination that a site is "unsuitable for development as a repository," and by its terms only allows the Secretary to terminate "site characterization activities." *Id.* The Secretary is required to notify Congress upon terminating such activities and, within six months, is required to report to Congress again with "recommendations for further action," including "the need for new legislative authority." *Id.*

Site Approval. The third step in the NWPA's repository process is the "approval" stage in which a siting decision is made. As outlined below, and consistent with Congressional concerns reflected in the design of the NWPA's siting process, the 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.

If, upon the completion of site characterization activities, the Secretary decides that a site is suitable as a repository, the Secretary recommends site approval to the President. 42 U.S.C. § 10134(a). Such recommendation must be based on the technical merits of the site as demonstrated by "the record of information developed by the Secretary" during site characterization. Specifically, the recommendation must include: (1) a description of the proposed repository specifications and waste forms; (2) a discussion of the data "relating to the safety of such site"; (3) a final environmental impact statement for the site; and (4) preliminary comments from the NRC concerning the extent to which DOE's characterization and waste form analysis is sufficient to support a licensing application.

If the President concurs with the Secretary's recommendation, the NWPA directs that the President "shall submit a recommendation of such site to Congress." 42 U.S.C. § 10134(a)(2)(A). The host state has an equal opportunity to "disapprove" the recommended site. 42 U.S.C. § 10135(b). However, Congress reserves the authority to override that veto and, thus, reserves to itself the ultimate authority to select the site to be submitted to the NRC for licensing. *See* 42 U.S.C. § 10135(c)-(g). Designation of a repository site under the NWPA is intended to end the site selection process. *Nuclear Energy Inst.*, 373 F.3d at 1302 ("Congress has settled the matter, and we, no less than the parties, are bound by its decision.").

Licensing: statutorily mandated duties. Repository site approval triggers the fourth and final stage under the NWPA's process: the licensing stage. Upon approval of a repository site, the Secretary "shall submit to the [NRC] an application for a construction authorization for a repository at such site" 42 U.S.C. § 10134(b). At the other end of the licensing process, the NRC "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 a construction authorization" within three years of DOE's submission. 42 U.S.C. § 10134(d). Congress requires the NRC to provide status reports to Congress on its consideration of DOE's application, with the reports to be provided annually "until the date on which such authorization is granted." 42 U.S.C. § 10134(c).

In addition, the NWPA has three related provisions associated with a "project decision schedule" during the licensing phase. First, the Secretary must prepare a project decision schedule "that portrays *the optimum way to attain the operation of the repository*,

within the time periods specified in this part.” 42 U.S.C. § 10134(e)(1) (emphasis added).

The project decision schedule must:

... include a description of objectives and a sequence of deadlines for all Federal agencies required to take action, including an identification of the activities in which a delay in the start, or completion, of such activities will cause a *delay in beginning repository operation*.

Id. (emphasis added). Second, any federal agency that cannot comply with the project decision schedule must report to Congress, specifying “the reason for its failure or expected failure,” the “estimated time for completion of the activity,” any “associated effect on its other deadlines in the project decision schedule,” and “any recommendations it may have or actions it intends to take . . . so that it will be able to mitigate the delay involved.” 42 U.S.C. § 10134(e)(2). The Secretary has a corresponding reporting obligation. *Id.* Finally, Congress has provided that the NRC may extend the three-year timeline imposed on it to reach its decision on DOE’s construction authorization application. 42 U.S.C. § 10134(d). The NRC, however, must timely comply with the project decision schedule reporting requirements outlined above. *Id.*

B. NWPA Implementation to Date

For almost 30 years and until DOE’s recent decision and actions, the process outlined in the NWPA has been followed. In 1986, DOE nominated five sites for characterization and recommended that three of them, including Yucca Mountain, be investigated further. *See Nevada v. Watkins*, 939 F.2d 710, 713 (9th Cir. 1991). The President approved this recommendation. *Id.*

That same year, DOE, using an “accepted, formal scientific method,” ranked the appropriateness of the various sites it had investigated.² Yucca Mountain was the highest-ranked site.³ In 1987, Congress amended the NWPA to focus DOE’s study exclusively on the Yucca Mountain site. 42 U.S.C. § 10172.

DOE’s subsequent analysis of the suitability of Yucca Mountain included completing numerous tunnels into the mountain to create “the world’s largest underground laboratory.”⁴ In all, DOE spent over fifteen years and billions of dollars analyzing the suitability of the Yucca Mountain site as a geologic repository.⁵

DOE’s investigation of Yucca Mountain led in February 2002 to the Secretary’s recommendation to the President that Yucca Mountain be approved as a geologic repository.⁶ Specifically, the Secretary concluded that:

[T]he amount and quality of research the [DOE] has invested into [determining Yucca Mountain’s suitability as a repository]—done by top flight people . . .—is nothing short of staggering. After careful evaluation, I am convinced that the product of over 20 years, millions of hours, and four billion dollars of this research provides a sound scientific basis for concluding that the site can perform safely during both the pre- and post-closure periods, and that it is indeed scientifically and technically suitable for development as a repository.⁷

² U.S. Dept. of Energy, *A Multiattribute Utility Analysis of Sites Nominated For Characterization For the First Radioactive Waste Repository—A Decision Aiding Methodology* 1-5-1-15 (1986), available at http://www.energy.gov/media/Multiattribute-Utility-Analysis_HQS-19880517-1167_pp1-250.pdf (last visited on July 9, 2010).

³ *Id.*

⁴ See Yucca Mountain: The Most Studied Real Estate on the Planet, Report to the Chairman, U.S. Senate Committee on Environment and Public Works (Mar. 2006), available at <http://epw.senate.gov/repwhitepapers/YuccaMountainEPWReport.pdf>, at 6 (last visited July 9, 2010).

⁵ Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982 at 1 (Feb. 2002), available at http://www.energy.gov/media/Secretary_s_Recomendation_Report.pdf (last visited July 9, 2010).

⁶ *Id.* at 6.

⁷ *Id.* at 45.

The President then recommended the Yucca Mountain site to Congress. Nevada filed a notice of disapproval, to which Congress responded with a joint resolution in July 2002 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 note (2006)).

In June 2008, DOE submitted its license application to the NRC. *See* Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008). In September 2008, the NRC staff found that the application contained sufficient information to begin its detailed technical review, and accordingly, the application was docketed for review by the ASLB.⁸

IV. ARGUMENT

As described below, the Commission should not take discretionary interlocutory review of the ASLB's Order based on a clear ground for the recusal or disqualification of three of the five Commission members. At a minimum, this compromises the appearance of impartiality of any review. If, however, the Commission reviews the Board's Order, the Order should be upheld in all respects.

A. **The Commission Should Not Take Discretionary Interlocutory Review Based on Grounds for the Recusal and Disqualification of Three Commission Members**

Concurrent with this filing, Washington (joined by the State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada) has filed a motion respectfully requesting that Commissioners Magwood, Apostolakis, and Ostendorff recuse themselves and be disqualified from any consideration of the Order at issue. If the

⁸ Department of Energy: Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, NV, 73 Fed. Reg. 53,284 (Sept. 15, 2008).

three members properly recuse themselves, the Commission will lack a quorum to act. 42 U.S.C. § 5841(a)(1) (“a quorum for the transaction of business shall consist of at least three members present.”).⁹ Based on the circumstances presented in the motion to recuse/disqualify, the Commission should not take discretionary review of this interlocutory Order.

B. The ASLB’s Order Should be Upheld in All Respects

Even if the Commission reviews the Board’s Order, the Order should be upheld in all respects.

1. The ASLB Correctly Denied DOE’s Motion to Withdraw its Application

The ASLB denied DOE’s motion to withdraw based on the fact it is precluded by the plain terms of the NWPA. As discussed below, the ASLB’s ruling is correct.

⁹ The rule of necessity will not apply in this circumstance. The rule of necessity provides that “an adjudicatory body (judges, boards, commissions, etc.) with *sole or exclusive* authority to hear a matter [must] do so even if the members of that body” would otherwise be disqualified from hearing the matter. *Valley v. Rapides Parish School Bd.*, 118 F.3d 1047, 1052 (5th Cir. 1997). A critical component that must be satisfied before this rule may permit otherwise disqualified Commissioners from hearing a matter is that there must exist no alternative forum in which the dispute can be heard and where the parties to the proceeding may obtain relief. *Id.*; *United States v. Will*, 449 U.S. 200, 213 (1980) (otherwise disqualified judge must hear the case only ““if the case cannot be heard otherwise”” (quoting F. Pollack, *A First Book of Jurisprudence* 270 (6th ed. 1929)); *Brinkley v. Hassig*, 83 F.2d 351, 357 (10th Cir. 1936) (disqualified board member may not hear case pursuant to rule of necessity “if another tribunal exists to which resort may be had.”).

This “no alternative forum” prerequisite was missing in *In re Ross*, 656 P.2d 832 (Nev. 1983). In that case, the Board of Governors of the Nevada Bar (the Board), after an extraordinarily expensive investigation, recommended that two licensed attorneys be disciplined. The attorneys argued the Board members should have been disqualified from sitting as adjudicators in the disciplinary proceeding “because the Board could only recoup its considerable expenses of the proceedings if charges of misconduct were sustained.” *Id.* at 835. In agreeing with the attorneys, the Nevada Supreme Court rejected the argument that the rule of necessity required that the Board hear the attorneys’ case. *Id.* at 837–38. The court did so for the simple reason that the disciplinary rules then in effect provided two alternative forums in which the disciplinary action against the attorneys could have been heard: the Nevada Supreme Court and a local administrative committee. *Id.*

In this case, resort to another tribunal may be had under the original jurisdiction vested with the United States Courts of Appeals under the NWPA, 42 U.S.C. § 10139(a)(1). As a result, the rule of necessity cannot apply.

- a. **The ASLB correctly determined that the NWPA requires DOE and the NRC to carry forward this proceeding to a merits based determination approving or disapproving a construction authorization**

The core conclusion of the ASLB's denial is based on Congress' direction to both DOE and the NRC through the terms of the NWPA:

[W]e 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.

Order at 5. This conclusion is supported by the plain language of Section 114(b) and 114(d) of the NWPA, the larger statutory framework of the NWPA, and the NWPA's legislative history.¹⁰

The plain language of Section 114(b) and 114(d) provides that upon Congressional approval of the Yucca Mountain site: (1) "the Secretary *shall submit* to the [Nuclear Regulatory] Commission an application for a construction authorization for a repository at such site"; (2) the Commission "*shall consider*" such application; and (3) the Commission "*shall issue a final decision approving or disapproving*" a construction authorization within a prescribed timeframe. 42 U.S.C. § 10134(b), (d) (emphasis added). These plain terms prohibit both DOE and the NRC from terminating the licensing phase short of a final determination on the merits of DOE's application. Section 114(b)'s command on DOE to submit an application must be read in conjunction with the corresponding Section 114(d) commands on the NRC to "consider" the application and issue a final decision "approving or

¹⁰ In determining what the NWPA requires, the Commission should employ the "traditional tools of statutory construction," including consideration of the statute's text, structure and legislative history. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, n.9 (1984).

disapproving” a construction authorization. *See Am. Fed’n of Gov’t Employees, Local 2782 v. Fed. Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1986) (“It is a generally accepted precept of interpretation that statutes or regulations are to be read as a whole, with ‘each part or section . . . construed in connection with every other part or section.’”) (quoting 2A Sutherland, *Statutes and Statutory Construction* § 46.05, at 90 (C. Sands rev. 4th ed. 1984)). In light of these commands, the NWPA cannot be interpreted such that DOE can withdraw its license application after submission, preventing an NRC final decision of approval or disapproval on the merits, and unilaterally derailing the NWPA’s statutory process for the “siting, construction, and operation of repositories.” 42 U.S.C. § 10131(b)(1). *March v. United States*, 506 F.2d 1306, 1316 (D.C. Cir. 1974) (“[J]udicial obeisance to administrative action cannot be pressed so far’ as to justify adoption of an administrative construction that ‘flies in the face of the purposes of the statute and the plain meaning of its words.’”) (quoting *Haggar Co. v. Helvering*, 308 U.S. 389, 398 (1940)).

The broader context of the NWPA supports this plain language reading. First, the NWPA’s other post-approval provisions confirm Congress’ expectation that the NRC will issue a final decision on the merits of DOE’s application, thus furthering Congress’ goal of opening a repository. The NWPA requires DOE to prepare a project decision schedule “that portrays *the optimum way to attain the operation of the repository*,” including identifying activities that, if delayed, will “*cause a delay in beginning repository operation*.” 42 U.S.C. § 10134(e)(1) (emphasis added). Any federal agency that cannot comply with the project decision schedule must report to Congress and specify its “estimated time *for completion of the activity*,” along with any actions it will take “to *mitigate the delay involved*.” 42 U.S.C.

§ 10134(e)(2) (emphasis added). And, independent of the project decision schedule, the NWPA requires the NRC to provide Congress with status reports on its consideration of DOE's application "until the date *on which such authorization is granted.*" 42 U.S.C. § 10134(c) (emphasis added). All of these provisions would be rendered nullities if the statute were construed to permit DOE's withdrawal. *See, e.g., City of Portland, Or. v. EPA*, 507 F.3d 706, 711 (D.C. Cir. 2007) (statute should be construed to give every word meaning).

Second, Congress defined express termination authority for the Secretary during the NWPA's pre-decisional site characterization phase. *See* 42 U.S.C. § 10133(c)(3). Nothing in the NWPA's approval or post-site-approval provisions, however, offers any hint of such authority or discretion. Under a cardinal rule of statutory construction, this indicates that Congress did not intend to grant the Secretary authority to terminate the NWPA's process outside of the specific pre-approval context of site characterization. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418-19 (1998) ("where 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") (citations and quotations omitted). Furthermore, once past the pre-decisional site characterization phase, neither DOE nor the President hold ultimate authority to *approve* a repository site. Instead, the host state holds a disapproval authority that can override the recommendation of the President, with Congress holding ultimate authority to approve a repository site through a detailed resolution process. *See* 42 U.S.C. § 10135(c)-(g). Because Congress has displaced the Secretary's authority to *make* a siting decision, there is no basis

to assume that Congress intended to allow the Secretary to *reverse* a siting decision Congress itself had made.

Finally, the legislative history of the NWPA also precludes an interpretation of the Act that would allow withdrawal of a license application by DOE after submission for review by the NRC. The legislative history reflects that Congress deliberately crafted the NWPA's process to "solidify a program *and keep it on track.*" H.R. Rep. No. 97-491(I), at 28-29 (emphasis added); *see also* H.R. Rep. No. 97-491(I), at 29-30 ("It is necessary . . . to provide close Congressional control . . . to assure that the political and programmatic errors of our past experience will not be repeated."). Congress took lessons from past failed attempts to site a repository, *see* H.R. Rep. No. 97-491(I), at 26-27, and stated that a "legislated schedule for Federal decisions and actions for repository development" is an "essential element" of the NWPA's program. *See* H.R. Rep. No. 97-491(I), at 30. There is no mention in the final bill report of any DOE authority to terminate repository activities outside of the specific "pre-approval" site characterization provision under Section 113(c)(3) (42 U.S.C. § 10133(c)(3)). *See* H.R. Rep. No. 97-491(I), at 52 and generally.

The legislative history accompanying Congress' 2002 joint resolution further confirms the intent that during the NWPA's licensing phase, any "disapproval" authority under the Act is now vested solely in the NRC, based on the technical merits of DOE's application, to be made in the form of a final merits-based approval or disapproval of DOE's application. Indeed, the D.C. Circuit Court of Appeals summarized the 2002 legislative history as follows:

The Senate Committee Report . . . referred back to the NWPA findings and reaffirmed the judgment that "[a] geologic repository is needed . . ." The Report concluded that the Administration had adequately demonstrated that the Yucca site was likely to be suitable for development, *subject to the*

outcome of future NRC licensing proceedings. Approval of the site and continuation of the repository-development process therefore was determined to be in the national interest.

Nuclear Energy Inst., 373 F.3d at 1304 (emphasis added).¹¹

The ASLB took all of the above into consideration. In light of the specific and mandatory commands on both DOE and the NRC in Section 114(b) and Section 114(d); the detailed process for approving a repository site prescribed by the NWPA; the expectations inherent in the project schedule and reporting requirements that accompany the NWPA's licensing phase; and the specific legislative history accompanying the Act, the ASLB concluded:

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?

Order at 7. This conclusion is wholly supported by law. The NWPA prohibits both DOE and the NRC from terminating the Act's licensing phase short of a determination on the merits of DOE's application.

¹¹ For further references from the 2002 legislative history, all of which demonstrate Congress' expectation that the NRC would evaluate DOE's license application on the merits, *see* Brief of the State of South Carolina Pursuant to Commission Order Dated July 9, 2010, at 4.

b. The ASLB correctly rejected DOE’s arguments that withdrawal is permitted

The ASLB’s Order addresses and disposes of eight contrary arguments raised by DOE and other withdrawal proponents. At every turn, the ASLB properly rejected those arguments.

First, the ASLB properly rejected the argument that the Energy Secretary’s judgment that Yucca Mountain is not a “workable option” is a policy judgment with which the NRC should not interfere. Order at 10-11. As the Board recognized, the entire structure of the NWPA—including the prescriptive approval process, with final authority reserved by Congress itself—displaced DOE’s policy discretion, with both DOE and the NRC compelled to move forward to a decision on the merits of a construction authorization application under the commands of Section 114(b) and Section 114(d). DOE’s argument requires turning a blind eye to the words of the NWPA.

Second, and related, the ASLB properly rejected the argument that the NWPA did nothing to repeal the discretion of the Secretary to make such policy decisions under the broad authority of the Atomic Energy Act. As the Board pointed out, the NWPA is a later-enacted and much more specific statutory scheme that controls over the more general AEA. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (more specific statute addressing the same subject controls). Again, DOE’s argument ignores the pervasive manner in which the NWPA’s structure channels, constrains, and commands the discretion of both DOE and the NRC. *See* Order at 10-11. It further ignores the fact that the NWPA’s structure was created in specific response to the past failures of DOE’s predecessor agencies to effectively exercise their discretion under the AEA. *See*

H.R. Rep. No. 97-491(I), at 26-30 (e.g., NWPA’s structure intended to “solidify a program and keep it on track.”). In light of these facts, it is illogical and absurd to conclude that Congress intended for DOE to retain unilateral and unfettered discretion under the AEA to abandon the NWPA’s process at the licensing stage. *Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 402 (6th Cir. 2008) (statutes should not be interpreted so as to “lead to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress.”).¹²

Third, the ASLB properly rejected the argument that because Section 114(d) requires the NRC to consider DOE’s application “in accordance with the laws applicable to such applications,” 42 U.S.C. § 10134(d), Congress intended to incorporate the NRC’s withdrawal regulation, 10 C.F.R. § 2.107, to provide a clear avenue for DOE to withdraw the application. The Board provides detail regarding the scope and intent of 10 C.F.R. § 2.107, *see* Order at 13 (including n.48), as well as the NWPA’s legislative history as it pertains to the “in accordance with the laws applicable to such applications” phrase. *See* Order at 15-16. Washington agrees with the Board’s discussion on these points as bases to reject DOE’s argument.

More fundamentally, however, the complete language of Section 114(d) defeats DOE’s argument. Section 114(d) provides in full:

The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, *except that* the Commission *shall issue a final decision*

¹² “Dollar General’s reading of the statute would essentially render the FMLA a nullity. Their interpretation would require us to believe that—despite including statutory provisions granting eligible employees the ‘rights’ to take up to twelve weeks of unpaid leave in a twelve-month period and to be restored to their prior positions or equivalent positions upon their return—Congress wished to erect no obstacle to prevent employers from terminating employees who exercise their newly granted ‘rights.’” *Bryant*, 538 F.3d at 402.

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.

42 U.S.C. § 10134(d) (emphasis added). Under this statutory structure, whatever opportunities that might be available to DOE under the generic “applicable laws” clause—including moving for withdrawal under 10 C.F.R. § 2.107—are conditioned by the express “except that” clause that follows. This exception clause provides that, among other matters, the NRC *must* issue a “final decision” that “*approv[es] or disapprov[es]*” the “issuance of a construction authorization.” 42 U.S.C. § 10134(d). Any reading that does not give full effect to these words must be rejected.¹³ *See, e.g., City of Portland*, 507 F.3d at 711 (statute should be construed to give every word meaning); *Brown & Williamson*, 529 U.S. at 133 (“A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole”) (quotations and citations omitted). Further, as observed by the Board, Section 114(d) should not be read such that an administrative practice regulation specified nowhere in the statute or its legislative history, and arguably incorporated only through a generic reference to “applicable laws,” may trump the NWPA’s explicit mandate that the NRC must issue a final, merits-based decision on DOE’s application. Order at 14, quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457,

¹³ This includes the argument made by DOE and NRC Staff that the obligation to issue a final decision is only triggered so long as an application is “docketed” before the NRC, *see* U.S. Department of Energy’s Reply to the Responses to the Motion to Withdraw (May 27, 2010) at 10-11, NRC Staff Answer to DOE’s Motion to Withdraw its Application with Prejudice (May 17, 2010) at 13, and the argument made by the State of Nevada that the “except that” clause is merely a scheduling provision. *See* State of Nevada’s Answer to the Department of Energy’s Motion with Respect to Withdrawal of the License Application (May 17, 2010) at 3. In each case, the arguments not only fail to give full effect to all the words of Section 114(d), but they would also render meaningless other provisions of the NWPA, including the requirement that the NRC provide Congress with status reports on its consideration of DOE’s application “until the date on which such authorization is granted.” 42 U.S.C. § 10134(c).

468 (2001) (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.”); *Brown & Williamson*, 529 U.S. at 160 (“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.”); *see also*, *Citizens Bank v. Strumpf*, 516 U.S. 16, 20 (1995) (“It is an elementary rule of construction that the act cannot be held to destroy itself.” (quotation omitted)).

Fourth, the ASLB properly rejected the argument that the NRC should defer to DOE’s interpretations in this matter. As concluded by the Board, the statute is clear in light of its plain language, structure, and legislative history. Under such circumstances, no deference is to be accorded to an administrative interpretation. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“If the intent of Congress is clear, that is the end of the matter”); *see also*, *Wash. v. Chu*, 558 F.3d 1036, 1043 n.15 (2009) (“We need not determine what level of deference to accord DOE’s interpretation . . . because we conclude that the section is unambiguous”).¹⁴

Fifth, the ASLB properly rejected the argument that DOE should be treated like any private applicant, including having the right to freely seek withdrawal. While DOE is following an adjudicative process similar to that followed by private applicants, the key difference is that DOE’s application is compelled by the NWPA. DOE’s application is not

¹⁴ The additional considerations addressed by the Board—that DOE advances its “interpretations” solely through a litigation motion, and that certain matters are committed to the NRC’s implementation, not DOE’s—do not need to be reached since administrative deference is not appropriate in the first instance. Regardless, the Board’s conclusions are correct. *See Wash. v. Chu*, 558 F.3d at 1043 n.15 (deference is given only to agency’s interpretation of statutes it is charged with administering; when agency interprets a statute outside its administration, interpretation is reviewed de novo); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (no deference to interpretation advanced for the first time as a litigation position).

voluntary, which renders inapplicable any NRC precedent based on the premise that an application has been voluntarily submitted. *See* Order at 17.

Sixth, the ASLB properly rejected the argument that because the NWPA does not mandate construction of the Yucca Mountain repository, and additional steps must be taken to open the repository even if a construction authorization is issued, the commands of Section 114(b) and (d) may somehow be ignored. The fact that additional steps must be taken after the statutory process is exhausted does not excuse the performance of those tasks the statute requires. By DOE's logic, the entire NWPA would be rendered superfluous, since every action required under the NWPA is but an "intermediate step" toward repository development.

Seventh, the ASLB properly rejected the argument that Congress' funding of the Blue Ribbon Commission on America's Nuclear Future has any legal bearing on this matter. Congress' appropriation did nothing to change the substance of the NWPA, making the appropriation legally irrelevant. *See, e.g., Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000); *Whatley v. District of Columbia*, 447 F.3d 814, 819 (D.C. Cir. 2006). Even if it were relevant, Congress through bill reports directed the Blue Ribbon Commission to "consider" Yucca Mountain in its review, so there is no conflict with the NWPA licensing process. Order at 18-19 n.69. And even if this were not the case, Congress in the same budget continued to fund DOE's prosecution of its Yucca Mountain license application, negating any inference DOE draws from the Blue Ribbon Commission appropriation. *Id.*

Finally, the ASLB properly rejected the argument that it is absurd and unreasonable to require DOE to pursue a license application it no longer favors on policy grounds. The executive branch is not to free to pick-and-choose what laws must be followed and what

laws may be disregarded based on whether it agrees with the policy dictated by Congress. U.S. Const. art. II, § 3, cl. 4 (requiring executive to faithfully execute the law); *see, e.g., Mass. v. Env'tl. Prot. Agency*, 549 U.S. 497 (2007) (requiring EPA to regulate greenhouse gas emissions under Clean Air Act, despite EPA's policy disagreement).

No argument presented by DOE or the other withdrawal proponents is sufficient to overcome the plain language of the NWPA. Under the NWPA, DOE and the NRC are compelled to reach a final decision on the merits of DOE's construction authorization application. The ASLB's decision to deny DOE's motion to withdraw should be upheld.

2. The ASLB Established Appropriate Contingent Conditions on Withdrawal in the Event Withdrawal Were Permitted

As indicated above, the ASLB's Order denying DOE's motion to withdraw is proper and should be upheld. In the event this ruling were to be reversed at any juncture, however, the contingent conditions the ASLB would place on DOE's withdrawal are also appropriate and should be applied. *See* Order at 20-24, Appendix A.

The Board's condition denying prejudicial withdrawal is justified by the lack of *any* evidentiary showing by DOE of legal harm that would justify such a sanction. *See* DOE Motion at 3, n.3 (basing request for prejudicial sanction solely on the statement 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*"). The condition is further supported by well-established Commission precedent that disfavors prejudicial withdrawal and dismissal. *See, e.g., Puerto Rico Elec. Power Auth. (North Coast Nuclear Plant, Unit 1)*, ALAB-662, 14 NRC 1125, 1133 (1981) (it is "highly unusual" to effectively dispose of a application on the merits—i.e.,

with prejudice—when the merits of the application have not actually been reached; given the limited number of potentially acceptable sites for a nuclear power plant, sites should not be eliminated without a “good and sufficient reason”); *In re Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)*, CLI-99-24, 50 NRC 219, 222 n.3 (1999) (prospect of a future application does not provide requisite quantum of harm to justify dismissal with prejudice). The judgment of the current Energy Secretary is not sufficient to justify precluding a future application for the only repository site to have been approved by Congress under the NWPA, with that approval remaining in full effect today. *See Cuomo v. United States NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985) (“the public interest should be gauged [by the decrees of] Congress, the elected representatives of the entire nation . . .”). This is particularly true given the billions of dollars of investment and countless hours of work that have gone into preparing Yucca Mountain for licensing.

Based on the same consideration, the Board’s conditions regarding the preservation of LSN documents, *see* Order at 23-24, Appendix A, are critical, justified, and almost entirely the product of agreement among the participants. These conditions should be affirmed by the Commission, to be applied in the event the Board’s withdrawal ruling is reversed at any juncture.

3. The ASLB Correctly Granted Washington’s Intervention

Finally, the ASLB correctly granted the intervention petition of Washington, among other petitioners, for the reasons summarized in the Order. *See* Order at 24-46. DOE itself did not contest Washington’s intervention. Washington will address any arguments against its intervention in its responsive briefing.

V. CONCLUSION

For the foregoing reasons, Washington respectfully requests that the Commission decline to take discretionary interlocutory review of the ASLB's June 29, 2010, Order. If the Commission chooses to review that Order, Washington respectfully requests that the Order be upheld in all respects.

DATED this 9th day of July, 2010.

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

Docket No. 63-001-HLW

July 9, 2010

CERTIFICATE OF SERVICE

I hereby certify that copies of the Initial Brief of the State of Washington Pursuant to the June 30, 2010, Commission Order have been served upon the following persons by Electronic Information Exchange.

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