UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
William D. Magwood, IV
William C. Ostendorff

In the Matter of	)	
U.S. DEPARTMENT OF ENERGY	)	
(High Level Waste Repository)	)	Docket No. 63-001-HLW

CLI-10-13

MEMORANDUM AND ORDER

The Department of Energy (DOE) has filed a motion to withdraw[1] its request for authorization to construct a permanent geologic spent fuel and high-level nuclear waste repository at Yucca Mountain, Nevada. Five new petitioners have sought to intervene in the proceeding, submitting proposed contentions that challenge the legality of DOE's proposed withdrawal.[2] After first scheduling briefing, the Construction Authorization Board issued a decision suspending briefing, suspending its consideration of the five

[1] *U.S. Department of Energy's Motion to Withdraw* (Mar. 3, 2010) (Motion to Withdraw).

[2] *See Petition of the State of South Carolina to Intervene* (Feb. 26, 2010), *Supplement/Amendment to Petition of the State of South Carolina to Intervene* (Mar. 26, 2010); *State of Washington's Petition for Leave to Intervene and Request for Hearing* (Mar. 3, 2010); *Petition of Aiken County, South Carolina, to Intervene* (Mar. 4, 2010); *National Association of Regulatory Utility Commissioners, Petition to Intervene* (Mar. 15, 2010); *Petition to Intervene of the Prairie Island Indian Community* (Mar. 15, 2010).

new intervention petitions and DOE's motion to withdraw, and extending the stay of the proceeding it had entered previously.[3] The Board based its suspension decision on its view that it was prudent and efficient to await guidance on the "motion to withdraw" issue from the U.S. Court of Appeals for the District of Columbia Circuit, which has before it several lawsuits challenging DOE's effort to halt the Yucca Mountain project.[4] DOE has petitioned for interlocutory review of the Board's decision.[5]

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[3] Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion) (Apr. 6, 2010), at 12-13 (unpublished) (Suspension Order). *See also* Order (Granting Stay of Proceeding) (Feb. 16, 2010) (unpublished).

[4] Suspension Order at 2-3 & 2 n.6. Four cases are pending in the U.S. Court of Appeals for the District of Columbia Circuit: *In re Aiken County*, No. 10-1050 (D.C. Cir. filed Feb. 19, 2010); *Ferguson v. U.S. Dep't of Energy*, No. 10-1052 (D.C. Cir. filed Feb. 25, 2010); *South Carolina v. U.S. Dep't of Energy*, No. 10-1069 (D.C. Cir. transferred Mar. 25, 2010). These cases were consolidated on April 8. The State of Washington also has filed a lawsuit, *Washington v. Dep't of Energy*, No. 10-1082 (D.C. Cir. filed Apr. 13, 2010), and asked that it be consolidated with the other three cases. All these lawsuits, except for *Ferguson*, include NRC and NRC officials among the respondents. Three of the petitioners in the court cases, South Carolina, Washington, and Aiken County (SC), also have sought intervention in the NRC proceeding.

[5] *U.S. Department of Energy's Petition for Interlocutory Review* (Apr. 12, 2010). The State of Nevada filed an answer in support of DOE's petition. *State of Nevada Answer in Support of the Department of Energy's Petition for Interlocutory Review* (Apr. 14, 2010). Nye County, Nevada, an admitted party in the proceeding, joined DOE's petition. *Nye County Nevada's Petition for Interlocutory Review of CAB04 April 6, 2010 Order* (Apr. 15, 2010). Aiken County, the NRC Staff, the State of Washington, the State of South Carolina, and Clark County, Nevada (also an admitted party in the proceeding), responded to DOE's and Nye County's petitions. *See Aiken County's Response to Two Petitions for Interlocutory Review* (Apr. 16, 2010); *NRC Staff Answer to U.S. Department of Energy Petition for Interlocutory Review* (Apr. 20, 2010); *NRC Staff Answer to Nye County Nevada's Petition for Interlocutory Review of CAB04 April 6, 2010 Order* (Apr. 20, 2010); *State of Washington's Response to Petitions for Interlocutory Review* (Apr. 21, 2010); *Answer of the State of South Carolina to Petitions for Interlocutory Review* (Apr. 22, 2010); *Answer of Clark County, Nevada in Support of the Department of Energy's Petition for Interlocutory Review* (Apr. 22, 2010).

Given the unique circumstances of this case, we review and vacate the Board's decision as an exercise of our inherent supervisory authority over adjudications.[6] DOE's motion to withdraw invokes § 2.107 of our rules[7] and statutes central to our mission — the Nuclear Waste Policy Act (NWPA) (particularly NWPA § 114(b), (d)) and the Atomic Energy Act of 1954, as amended (AEA).[8] Courts generally accord considerable weight to an agency's construction of the statutes it administers,[9] and defer to an agency's interpretation of its own regulations.[10] Fundamental questions have been raised, both

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[6] The special NRC rules governing this high-level waste proceeding do not provide for the kind of interlocutory review that DOE seeks. *See* 10 C.F.R. § 2.1015. DOE asks that we invoke our inherent supervisory authority over adjudications, but we generally do not entertain such requests. *See, e.g.*, *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009). Even so, were this an ordinary case, DOE's petition surely would qualify for interlocutory review because it challenges a Board decision that "[a]ffects the basic structure of the proceeding in a pervasive [and] unusual manner." *See* 10 C.F.R. § 2.341(f)(2); *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 62-63 (2009). Therefore, in these unique circumstances, we believe it appropriate to exercise our *sua sponte* review authority.

[7] *See* Motion to Withdraw at 1-3. Among other things, section 2.107(a) provides 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."

[8] NWPA, 42 U.S.C. §§ 10101 et seq. (*see* Motion to Withdraw at 2, 4-8); NWPA § 114(b), (d), 42 U.S.C. § 10134(b), (d) (*see* Motion to Withdraw at 2, 5-6); AEA, 42 U.S.C. §§ 2011 et seq. (*see* Motion to Withdraw at 4 n.5).

[9] *See, e.g., United States v. Eurodif S.A.,* 129 S.Ct. 878, 886-87 (2009); *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984). *See also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.").

[10] *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (an agency's interpretation of its own regulation is controlling provided it is not "plainly erroneous or inconsistent with the regulation." (citing *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410, 414 (1945)). *Accord Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007); *see also Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978).

before us and before the D.C. Circuit, regarding the terms of DOE's requested withdrawal, as well as DOE's authority to withdraw the application in the first instance. Interpretation of the statutes at issue and the regulations governing their implementation falls within our province. If judicial review is pursued after our final decision, the application of our expertise in the interpretation of the AEA, the NWPA, and our own regulations will, at a minimum, inform the court in its consideration of the issues raised by DOE's motion to withdraw.

The Board understandably has sought to manage this case with an eye toward the efficient use of NRC resources and in anticipation of an authoritative legal ruling from the D.C. Circuit on DOE's effort to withdraw its Yucca Mountain application. But we respectfully do not agree with the Board that freezing our consideration of DOE's motion to withdraw promotes respect for the courts or efficiency. As noted above, judicial review may well benefit from NRC's consideration of the issues surrounding DOE's motion. And, in any event, it is not clear when or if the D.C. Circuit will provide the guidance the Board expects on those issues. In the D.C. Circuit litigation, the government has raised substantial justiciability arguments that, if accepted, would block a judicial merits determination until after the NRC acts.[11]

Thus, rather than await a judicial decision, the timing and result of which is uncertain, and absent a contrary instruction from the court, we think the prudent course of action is to resolve the matters pending before our agency as expeditiously and responsibly as possible.

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[11] *See Respondents' Response in Opposition to the Petition*, *In re: Aiken County,* No. 10-1050 (D.C. Cir.) (filed Mar. 24, 2010).

For these reasons, we vacate the Board's Suspension Order and remand the matter to the Board for prompt resolution of DOE's motion to withdraw. We direct the Board to establish a briefing schedule on DOE's motion to withdraw and issue a decision on that motion no later than June 1, 2010. The Board should continue case management and resolve all remaining issues promptly.

IT IS SO ORDERED[12].

For the Commission

(NRC SEAL)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of April, 2010.

[12] Commissioner Apostolakis did not participate in this order because he had not yet taken the oath of office.