NLWJC- Kagan

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Nuclear waste bill

NUCLEAR WASTE POLICY ACT DECISION

I. DECISION

In Indiana Michigan Power Co. v. Department of Energy, various utilities, states, and public utility commissions sought a ruling from the United States Court of Appeals for the District of Columbia Circuit that DOE is obligated under the Nuclear Waste Policy Act (NWPA) to begin disposing of utilities' spent nuclear fuel (SNF) by January 31, 1998. In a decision issued on July 22, 1996, the court agreed with the utilities, holding that the NWPA creates an obligation in DOE, reciprocal to the utilities' obligation to pay fees under the NWPA, to start disposing of SNF no later than January 31, 1998. The court rejected DOE's position that it does not have an obligation to begin disposing of SNF in the absence of a repository or interim storage facility constructed under the NWPA.

The court remanded the case to DOE for further proceedings, stating that it would be premature for a court to attempt to fashion an appropriate remedy, since DOE is not currently in default on the obligation to begin disposing of SNF in 1998.

While this new court ruling may increase the momentum for Congressional action, the proposals pending in Congress would do little to solve the fundamental problem that there will be no disposal facility available January 31, 1998.

II. IMPLICATIONS OF DECISION

A. DOE's Ability to Comply in 1998

The court did not rule definitively on exactly what DOE must do to meet its 1998 obligation. The most plausible reading is that the Department must begin taking delivery of SNF for purposes of interim storage or ultimate disposition from the utilities in 1998. If that reading is correct, then, it should be recognized that in the absence of an operational permanent repository the Department has no practical ability to comply.

- Current law requires that SNF from commercial reactors licensed by the Nuclear Regulatory Commission be stored in facilities also licensed by the NRC. The Department has no such licensed facility.

- Before the Department could begin taking delivery of commercial SNF, it would be required by the National Environmental Policy Act to prepare an environmental impact statement. Because of the

broad national interest in such an EIS and the controversy surrounding any proposal for an SNF storage facility, that would likely be a time-consuming process that would have to precede the development of any storage facility.

- The Nuclear Waste Policy Act prohibits the Secretary from siting a monitored retrievable storage facility until a site has been approved for a repository, and prohibits the use of the Nuclear Waste Fund for the construction or expansion of a facility for SNF storage unless expressly authorized by Congress. These provisions would have to be changed, and perhaps another source of funds would have to be identified before any SNF facility could be developed.

B. Financial Impact on the Government

While the case holds that the Nuclear Waste Policy Act creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of spent nuclear fuel in 1998, it defers any consideration of the question of what remedy is available to utilities until such time as DOE is actually in default of its obligation to take SNF. DOE, working with OMB and the White House, will consider how to proceed on the remedy phase over the next several months; however, it is clear even now that there could be a significant range of financial outcomes for the Federal government -- ranging from zero to many billions of dollars.

As required by the statute, in the early 1980's DOE entered into what is known as the Standard Contract with each nuclear utility specifying a time and the terms and conditions under which DOE would accept the utility's SNF for disposal.

The Standard Contract includes a Delays Clause, which specifies different remedies depending on whether or not the delay in waste acceptance was "avoidable" or "unavoidable" by DOE. Under the contract, unavoidable delays trigger adjustments in the schedule under which DOE accepts waste from utilities, but they do not trigger monetary compensation. Avoidable delays, on the other hand, trigger equitable adjustments in the utility's nuclear waste fee to reflect estimated additional costs the utility incurs by reason of DOE delays.

The issue of what remedy is available for DOE's failure to meet the 1998 acceptance date is likely to ultimately be resolved by the courts. If the courts were to decide that the utilities' remedies for failure to accept SNF by the designated date are governed by the Delays Clause in the Standard Contract, the financial consequences for the government will vary from zero--if delay is determined to be unavoidable--to tens of millions (but not billions) of dollars per year if the delay is avoidable.

However, a court could determine that the remedy for failure to begin disposing of SNF in 1998 is not limited by the Standard Contract's Delays Clause. Were a court to conclude that the effect of such a failure is to release utilities from their "reciprocal" statutory obligation to pay fees, there would be a range of possible consequences to the Government.

Probably the most likely remedy under such a scenario would involve establishment of an escrow account, by the federal court itself, into which Nuclear Waste Fund fees henceforth would be paid. Diverting fee payments to an escrow would cost the Treasury approximately $600 million a year. Whether and to what effect the escrow fees would be made available to the Department to fulfill its responsibilities under the NWPA would be up to the court controlling the escrow.

At the extreme, a conclusion that a failure to meet the 1998 deadline releases utilities from their fee obligation could lead both to a cut-off of future fee payments and perhaps also a requirement to refund of past fees that the utilities have paid. Were the court to conclude such a refund is required, the Government's potential liability to utilities could be as much as $7.5 billion, plus interest. We believe a requirement that the Government refund past collections is unlikely.

C. Financial Impact on Utilities

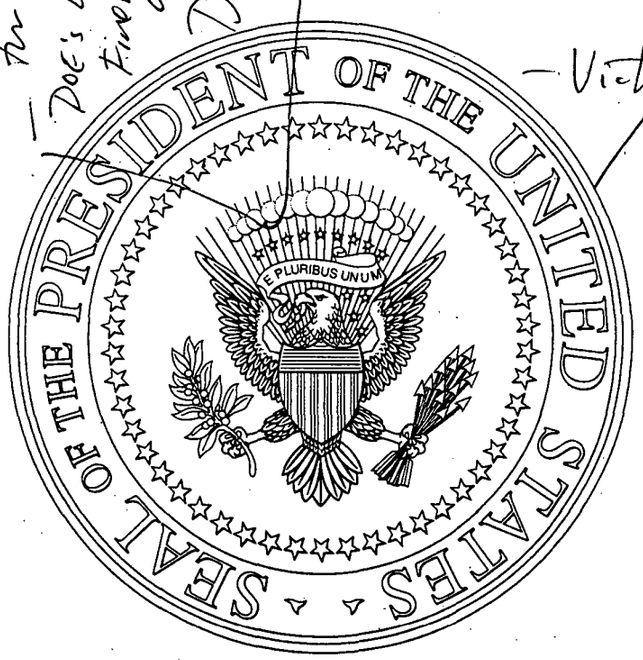
A number of state utility commissions are currently considering proposals to require utilities to escrow amounts collected from ratepayers to cover utility nuclear waste fees. The Indiana-Michigan decision may impel some States to put some form of escrow requirement in place even in advance of the 1998 deadline. The states would probably leave the utilities free to comply with their obligation to pay the nuclear waste fees with shareholder funds. Because of the risk that non-payment could pose to the utilities' NRC licenses, they may well choose that course. Thus, one near-term impact of the decision may be a significant annual reduction in utility net income.

III. ADMINISTRATION RESPONSE

Currently pending legislation would not provide a solution to the 1998 acceptance date issue. It calls for the establishment of an interim storage facility based on unrealistic targets for completing required actions and without regard to issues of public acceptance. It was disregard for such issues that contributed to the Department's present inability to meet the targets of the NWPA.

Any new legislative initiative must recognize the complexity and importance of the task and provide for adequate time and objective analysis to achieve public confidence in the process and acceptance of the outcome.

White House News Report



Elena Kagan
125 OEOB

Monday, July 29, 1996
Produced by the Office of News Analysis
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Lois -

1. Warner Creek

Negotiations - FRIDAY DAY.

TODAY -

2. Decision - Yucca Mtn

DOE - K w/ power cos
re storage of S.F.'s
DOE in 98 - take fuel rods
12:00 YM won't be ready

DC Cir decision:

gov - defense that not ready

DC Cir - have to take no risk
what -
no decision as to approp relief.

CS:
→ hold what was in decision.
have to get case cleared.

Quinn ought to go
to each of offices.

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each of
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 17, 1996 Decided July 23, 1996

No. 95-1279

INDIANA MICHIGAN POWER COMPANY, *ET AL.*,
PETITIONERS

v.

DEPARTMENT OF ENERGY AND
UNITED STATES OF AMERICA,
RESPONDENTS

NORTHERN STATES POWER COMPANY (MINNESOTA), *ET AL.*,
INTERVENORS

Consolidated with
95-1321, 95-1463

On Petitions for Review of an Order of the
Department of Energy

Jay E. Silberg argued the cause for utility petitioners/intervenors, with whom *Michael A. Carvin, Vincent J. Cola-*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

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triano, George L. Edgar and *Michael A. Bauser* were on the briefs. *Don L. Keskey* argued the cause for the state petitioners, with whom *Thomas L. Casey, Henry J. Boynton, Lester M. Bridgeman, Patricia M. French, Jocelyn F. Olson, Robert S. Golden, Jr., John W. Malley, Jr., Lawrence F. Barth, John F. Povilaitis, Edward W. O'Neill, Roger W. Steiner, Barbara E. James, Lawrence G. Malone, John S. Gillig, Robert D. Vandiver, Richard C. Bellak, Mary W. Cochran, Paul R. Hightower, John W. Campbell, L. Steven Grasz, Michael A. Gross, Judith S. Yogman, Bryan G. Moorhouse, Susan S. Miller, Kevin P. Maloney, Charles F. Walker, Diane Munns, Michael B. Hare, Charles L. Moulton, Wynn E. Arnold, Caroline Vachier, Helene S. Wallenstein, James E. Ryan, Jr., James R. Carroll* and *Ben Stead* were on the briefs. *Robert T. Stephan, Larry G. Watterworth, Jeffrey A. Keevil, James E. Weging, Robert W. Parnacott, Douglas E. Eidahl, Harvey Y. Morris* and *James R. Anderson* entered appearances.

John A. Bryson, Attorney, United States Department of Justice, argued the cause for respondent, with whom *Lois J. Schiffer*, Assistant Attorney General, *Martin W. Matzen*, Attorney, and *Marc Johnston*, Deputy General Counsel, United States Department of Energy, were on the brief.

Before: WILLIAMS, GINSBURG and SENTELLE, *Circuit Judges*.

SENTELLE, *Circuit Judge*: The Nuclear Waste Policy Act ("NWPA") of 1982 authorized the Secretary of Energy ("Secretary") to enter contracts with owners and generators of high-level radioactive waste and spent nuclear fuel ("SNF") under which the private parties were to pay the Secretary statutorily imposed fees in return for which the Secretary, "beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or [SNF] involved...." 42 U.S.C. § 10222(a)(5)(B) (1994). Petitioners are utilities and state commissions who paid fees to the Secretary under the statute. They seek review of the Department of Energy's ("DOE") final interpretation declaring that the Department has no obligation to perform its part of the contractual

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bargain. We conclude that the Department's interpretation is not valid and we therefore allow the petition for review.

Background

In the NWPA, Congress created a comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants. NWPA establishes that, in return for a payment of fees by the utilities, DOE will construct repositories for SNF, with the utilities generating the waste bearing the primary responsibility for interim storage of SNF until DOE accepts the SNF "in accordance with the provisions of this chapter." 42 U.S.C. § 10131(a)(5).

The NWPA requires the utilities to enter into standard contracts with DOE for the disposal of the waste. According to the statute, the contracts shall provide that:

> (A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and
>
> (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel as provided in this subchapter.

42 U.S.C. § 10222(a)(5). The final standard contract adopted by DOE, following notice and comment, states that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF ... from the civilian nuclear power reactors specified ... has been disposed of." 10 C.F.R. § 961.11, Art. II (1996).

In 1998, several states and utilities became concerned about DOE's ability to meet its obligations under the NWPA. Therefore, they requested DOE to address its responsibilities under the NWPA, particularly section 302(a)(5), 42 U.S.C. § 10222(a)(5), and the January 31, 1998 deadline. Daniel

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Dreyfuss, Director of DOE's Office of Civilian Radioactive Waste Management, responded in a letter that DOE "does not have a clear legal obligation under the [NWPA] to accept [SNF] absent an operational repository or other facility." In February 1994, DOE's Secretary, Hazel O'Leary, indicated that, while at the time NWPA was enacted DOE "envisioned that it would have a waste management facility in operation and prepared to begin acceptance of [SNF] in 1998," DOE subsequently concluded it did not have "a clear legal obligation under the [NWPA] to accept [SNF] absent an operational repository or other facility constructed under the [NWPA]."

To address this issue, on May 25, 1994, DOE published a Notice of Inquiry on Waste Acceptance Issues ("NOI"), requesting the views of affected parties on matters relating to the continued storage of SNF at reactor sites beyond 1998. 59 Fed. Reg. 27,007 (1994). DOE presented its preliminary finding that it had "no statutory obligation to accept [SNF] beginning in 1998 in the absence of an operational repository or other facility constructed under the [NWPA]." *Id.* at 27,008. DOE did note, however, that the terms of the Standard Contract may have created such an expectation. *Id.*

On June 20, 1994, utility petitioners ("utilities") and state petitioners ("states") filed petitions for review against DOE. This Court dismissed the petitions, finding that the NOI did not constitute final agency action. *Northern States Power Co. v. DOE*, Nos. 94-1457, 94-1458, 94-1574 (D.C. Cir. July 28, 1995) (order granting motion to dismiss case).

On April 28, 1995, DOE issued its Final Interpretation. *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995). In the Final Interpretation, DOE stated that it would not be able to begin taking SNF by January 31, 1998, the date established by the NWPA. *Id.* at 21,793-94. DOE concluded that it did not have an unconditional statutory or contractual obligation to accept high-level waste and spent fuel beginning January 31, 1998 in the absence of a repository or interim storage facility constructed under the NWPA. *Id.* The agency also determined that it

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had no authority under the NWPA to provide interim storage in the absence of a facility that has been authorized, constructed and licensed in accordance with the NWPA. *Id.* at 21,797. Finally, DOE declared that, even if it did have an unconditional obligation under the statute, the Delays Clause of the Standard Contract would provide an administrative remedy for DOE's failure to satisfy an obligation under the statute. *Id.*

Petitioners and intervenors then filed their petitions for review of the Final Interpretation.

Analysis

In reviewing an agency's construction of a statute entrusted to its administration, we follow the two-step statutory analysis established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). First, we ask whether Congress has spoken unambiguously to the question at hand. If it has, then our duty is clear: "We must follow that language and give it effect." *Wisconsin Elec. Power Co. v. DOE*, 778 F.2d 1, 4 (D.C. Cir. 1985). If not, we consider the agency's action under the second step of *Chevron*, deferring to the agency's interpretation if it is "reasonable and consistent with the statute's purpose." *Nuclear Info. Resource Serv. v. NRC*, 969 F.2d 1169, 1173 (D.C. Cir. 1992) (quoting *Chemical Mfrs. Ass'n v. EPA*, 919 F.2d 158, 162–63 (D.C. Cir. 1990)). We now apply that review to the Department's interpretation of section 302(a)(5)(B).

Section 302(a)(5)(B) states that "in return for the payment of fees ... [DOE], beginning not later than January 31, 1998, will dispose of the [SNF]...." The states and utilities contend that this provision means what it says: in return for the payment of fees to the utilities, DOE will begin accepting SNF not later than January 31, 1998. DOE argues that this language does not in fact require it to begin to dispose of SNF by January 31, 1998; rather, the agency contends that this obligation is further conditioned on the availability of a repository or other facility authorized, constructed, and licensed in accordance with the NWPA. DOE contends that

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this is the only interpretation possible when one examines the statute as a whole.

To support this interpretation, the Department first argues that Congress's use of the term "dispose" in section 302(a)(5)(B), which provides that DOE "will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter," presupposes the availability of a repository. Although conceding that the statute does not define "dispose," DOE notes that the statute does define "disposal" as "the emplacement in a repository of ... spent nuclear fuel ... with no foreseeable intent of recovery." 42 U.S.C. § 10101(9). DOE contends that "dispose" is simply a different grammatical form of "disposal," and that Congress must have intended the two terms be interpreted consistently. Thus, it argues, section 302 must require a repository be operational before DOE may begin accepting SNF.

We disagree. The phrase "dispose of" is a common term. It has a common meaning. For example, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 654 (1961) defines it as meaning, among other things, "to get rid of; throw away; discard." Admittedly, that and other dictionaries list other definitions. Each of those definitions, however, is consistent with the one set forth and not consistent with a limitation for placing the object of the phrase "in the disposal." There is no indication in the statute that Congress intended the words to be used in any but their common sense. *See McNally v. United States*, 483 U.S. 350, 358–59 (1987) (interpreting commonly used phrase according to "common understanding" where Congress had "not indicat[ed]" an intent to depart from it). Indeed, the very fact that Congress defined "disposal" restrictively and did not define "dispose" bears mute testimony to the strong possibility that Congress intended the former as a term of art, the latter as common English. Indeed, DOE itself has previously concluded that the statutory definition of "disposal" was not intended to define "dispose of." In an April 1, 1987 letter, DOE's general counsel, although responding to a different issue, wrote "we doubt that the[se] terms were intended to have identical meanings." Furthermore, if DOE's obligation to dispose of

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waste was linked exclusively to the Act's definition of "disposal" then that obligation would be conditioned only upon the availability of a *repository*. However, Article II of the Standard Contract provides that DOE will provide its services after commencement of "facility" operations, 10 C.F.R. 961.11, with "facility" being defined as including both a repository and "such other facilit[ies] to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility." *Id.* at Article I. It is difficult to see how that paragraph and the Department's interpretation of the statutory section can sensibly coexist.

Perhaps more importantly, we must interpret the section in light of the whole statutory scheme. *See Bailey v. United States*, 116 S. Ct. 501, 506 (1995) (observing that a court must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.") In the scheme before us, indeed in another subsection of the very section under review, Congress used even the elsewhere narrowly defined "disposal" to encompass more than "emplacement in a repository of ... spent nuclear fuel ... with no foreseeable intent of recovery." That is, in section 302(d), 42 U.S.C. § 10222(d), Congress authorizes the Secretary to make expenditures "for purposes of radioactive waste disposal activities," and expressly includes within the ambit of authorized "disposal" activities those conducted not only in connection with repositories, but also with "any ... monitored retrievable storage facility or test and evaluation facility constructed under this chapter." 42 U.S.C. § 10222(d)(1). Therefore, even if we look to Congress's use of "disposal" to enlighten our interpretation of "dispose of," we still find that Congress has not evidenced limited usage for which the Department argues.

DOE next argues that subsections (A) and (B) of 302(a)(5) are not independent provisions, but rather must be read together because taking title to the waste cannot be separated from the disposal activities. To support this proposition, DOE cites section 302(a)(1), which describes the Standard Contract as "for the acceptance of title, subsequent transpor-

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tation, and disposal of such waste or spent fuel" and section 123, which provides that "[d]elivery and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this part shall constitute a transfer to the Secretary of title to such waste and spent fuel." 42 U.S.C. § 10143. Respondent contends that these provisions evince Congress's intent that DOE take title to the waste before proceeding with disposal. According to DOE, any other interpretation of these sections would result in an anomaly in which one party would have ownership of the SNF while another party would have physical control of it.

We do not find this argument persuasive. Sections 302(a)(5)(A) and (B) clearly set forth two independent requirements. These separate obligations are independent of whether DOE holds title to SNF when it begins to dispose of the material. The duties imposed on DOE under subsections (A) and (B) are linked to different events and are triggered at different times. DOE's duty under subsection (A) to take title to the SNF is linked to the commencement of repository operations and is triggered when a generator or owner of SNF makes a request to DOE. DOE's duty under subsection (B) to dispose of the SNF is conditioned on the payment of fees by the owner and is triggered, at the latest, by the arrival of January 31, 1998. Nowhere, however, does the statute indicate that the obligation established in subsection (B) is somehow tied to the commencement of repository operations referred to in subsection (A).

This conclusion is reinforced by the placement of the two requirements in the Standard Contract. DOE's obligation *to dispose* of SNF under section 302(a)(5)(B) is set forth in Article II–Scope, 10 C.F.R. § 961.11, whereas DOE's obligation *to take title* to SNF under section 302(a)(5)(A) is set forth in Article VII–Title. *Id.* In addition, contrary to DOE's assertions, it is not illogical for DOE to begin to dispose of SNF by the 1998 deadline and yet not take title to the SNF until a later date. As the utilities point out, it is not unusual, particularly in the nuclear area, to recognize a division between ownership of materials and other obligations

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relating to such materials. For example, the Nuclear Regulatory Commission recognizes a distinction between the ownership of nuclear materials and the right to possess or use such materials. *See also* 10 C.F.R. § 70.20; 10 C.F.R. § 40.21.

In fact, a comparison of paragraphs (A) and (B) argues against the Department's position. In (A), Congress expressly conditioned the obligation of the Secretary on the commencement of the operation of a repository. In (B), Congress imposed no such condition, but rather directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition. The only limitation placed on the Secretary's duties under (B) is that that duty is "in return for the payment of fees established by this section." The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress. It does not survive the first step of the *Chevron* analysis. 467 U.S. at 842–43. Under the plain language of the statute, the utilities anticipated paying fees "in return for [which] the Secretary" had a commensurate duty. She was to begin disposing of the high-level radioactive waste or SNF by a day certain. The Secretary now contends that the payment of fees was for nothing. At oral argument, one of the panel compared the government's position to a Yiddish saying: "Here is air; give me money," and asked counsel for the Department to distinguish the Secretary's position. He found no way to do so, nor have we.

Finally, respondent asserts that reading subsection (B) as creating an unconditional obligation cannot be reconciled with other requirements of the statute, noting that the NWPA provides a complex scheme for the authorization, construction and licensing of a repository or monitored retrieval storage facility. DOE contends that "many contingencies facing the commencement of repository operations strongly undercut the assumption that Congress intended to require disposal by 1998 no matter what the outcome."

Although Congress anticipated the existence of a repository by 1998, the fact that such a repository does not exist does

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not make subsection (B) illogical; it simply affects the remedy we can provide. We agree with DOE that Congress contemplated a facility would be available by 1998; however, that Congress contemplated such a facility would be available does not mean that Congress conditioned DOE's obligation to begin acceptance of SNF on the availability of a facility. It does not make sense to assert that Congress would express an intent to exempt DOE from the January 31, 1998 deadline by including specific statutory procedures regarding the siting and development of a repository in the NWPA. Rather, these prerequisites evince a strong congressional intent that DOE's various obligations be performed in a timely manner. *See, e.g., Tennessee v. Herrington*, 806 F.2d 642, 648 (6th Cir. 1986) ("[T]he overall structure of the Act does reveal a consistent concern for timely implementation of the disposal provisions."), *cert. denied*, 480 U.S. 946 (1987). DOE's interpretation of the provisions does not harmonize them. Instead, its interpretation reads into section 302(a)(5)(B) language that appears only in section 302(a)(5)(A) and reads out of section 302(a)(5)(B) language that actually appears in that provision.

It is premature to determine the appropriate remedy, particularly as to the interaction between Article XI and Article XVI of the Standard Contracts, as DOE has not yet defaulted upon either its statutory or contractual obligation. We therefore will remand this matter for further proceedings consistent with this opinion.

Conclusion

In conclusion, we hold that the petitioners' reading of the statute comports with the plain language of the measure. In contrast, the agency's interpretation renders the phrase "not later than January 31, 1998" superfluous. Thus, we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998. The decision of the Secretary is vacated, and the case is remanded for further proceedings consistent with this opinion.

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Office of the Vice President

Domestic Policy
Old Executive Office Building
Washington, DC 20501
(202) 456-6222

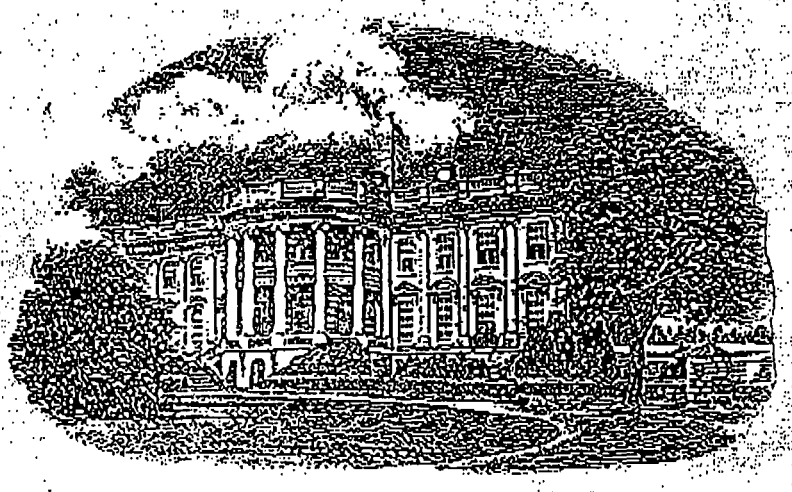
TO: Elena Kagan

FROM: Linda Lance

DATE: July 29 1996

number of pages including cover: 2

COMMENTS: Revised DPC draft - for your use. To go with Hilley letter to the Hill



WHAT IS WRONG WITH S. 1936?

It ignores sound science.
By locating an interim storage facility before completion of a site suitability determination for Yucca Mountain, it ignores the importance of sound science in site selection, undermines the credibility of the disposal program, and diverts resources from completing the suitability determination for permanent geologic storage.

It requires transporting nuclear waste prematurely which may mean transporting it at least twice.
We do no know whether high level radioactive waste can be permanently stored in Nevada. If we send waste to Nevada now, we might have to move it again in future years. We cannot justify unnecessarily exposing communities to the risks of moving the waste twice. In addition, as drafted the bill leaves open the possibility that the waste would be routed through the Air Force's Nellis Range complex. As Air Force Secretary Widnall has written to the Senate, that result "seriously impacts our National Security capabilities."

It potentially increases human health risks by preempting EPA's current role in setting environmental standards for radiation emission, and preliminarily establishing a standard at Yucca Mountain that is higher than existing standards at other sites.
The bill preempts EPA's current rulemaking responsibility for setting radiation emissions standards, and arbitrarily sets a standard of 100 millirems/year -- less protective than nuclear waste disposal standards set by EPA and NRC at other sites. The most recent version of the bill apparently would permit EPA to overrule that standard, but it still has Congress setting a standard in the first instance. This is a bad precedent that later could threaten other communities that face radiation risks from sites that are awaiting cleanup.

It preempts other environmental laws.
The bill preempts existing federal, state, and local environmental laws and replaces them with less protective provisions and standards. This includes changes to the National Environmental Policy Act (NEPA) that effectively eliminate its role in the siting of an interim storage facility.

It is unnecessary, and erroneously assumes that there is an emergency need to move this waste from its current sites.
The Technical Waste Review Board, an independent Board established by Congress, has found that there is no technical or safety reason to move spent fuel to an interim central storage facility prior to the decision on the suitability of Yucca Mountain as a permanent repository. There is no public health reason to ignore science and the environment in order to move this waste on an accelerated schedule.

It eliminates the focus on sound science and replaces it with unnecessary expediency.
Current law requires that we wait for a scientific decision on the safety of permanent storage in Nevada before opening an interim or permanent storage facility there. This recognizes the need for sound science to drive the process, and for limiting transportation of this waste. This focus on sound science and minimizing risk should be preserved.

Yucca

12pm Mtg

OFFICE OF MANAGEMENT AND BUDGET
ENERGY AND SCIENCE DIVISION

Transmission Number (202) 395-4817
Verification Number (202) 395-3404

Rm 246

Kathleen Peroff, Deputy Associate
Director for Energy & Science Division

Kathy Tyer, Administrative Assistant
Phone Number (202) 395-3404

Elena Kagan
OEOB 125

Date: 7/25/96

To: T.J.

Agency:

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From: Kathy Peroff

Total number of pages (including this cover sheet): 4.

Comments: Here is DOE's write-up on the Court Decision

NUCLEAR WASTE POLICY ACT DECISION

I. DECISION

In Indiana Michigan Power Co. v. Department of Energy, various utilities, states, and public utility commissions sought a ruling from the United States Court of Appeals for the District of Columbia Circuit that DOE is obligated under the Nuclear Waste Policy Act (NWPA) to begin disposing of utilities' spent nuclear fuel (SNF) by January 31, 1998. In a decision issued on July 22, 1996, the court agreed with the utilities, holding that the NWPA creates an obligation in DOE, reciprocal to the utilities' obligation to pay fees under the NWPA, to start disposing of SNF no later than January 31, 1998. The court rejected DOE's position that it does not have an obligation to begin disposing of SNF in the absence of a repository or interim storage facility constructed under the NWPA.

The court remanded the case to DOE for further proceedings, stating that it would be premature for a court to attempt to fashion an appropriate remedy, since DOE is not currently in default on the obligation to begin disposing of SNF in 1998.

While this new court ruling may increase the momentum for Congressional action, the proposals pending in Congress would do little to solve the fundamental problem that there will be no disposal facility available January 31, 1998.

II. IMPLICATIONS OF DECISION

A. DOE's Ability to Comply in 1998

The court did not rule definitively on exactly what DOE must do to meet its 1998 obligation. The most plausible reading is that the Department must begin taking delivery of SNF for purposes of interim storage or ultimate disposition from the utilities in 1998. If that reading is correct, then, it should be recognized that in the absence of an operational permanent repository the Department has no practical ability to comply.

- Current law requires that SNF from commercial reactors licensed by the Nuclear Regulatory Commission be stored in facilities also licensed by the NRC. The Department has no such licensed facility.

- Before the Department could begin taking delivery of commercial SNF, it would be required by the National Environmental Policy Act to prepare an environmental impact statement. Because of the

broad national interest in such an EIS and the controversy surrounding any proposal for an SNF storage facility, that would likely be a time-consuming process that would have to precede the development of any storage facility.

-- The Nuclear Waste Policy Act prohibits the Secretary from siting a monitored retrievable storage facility until a site has been approved for a repository, and prohibits the use of the Nuclear Waste Fund for the construction or expansion of a facility for SNF storage unless expressly authorized by Congress. These provisions would have to be changed, and perhaps another source of funds would have to be identified before any SNF facility could be developed.

B. Financial Impact on the Government.

While the case holds that the Nuclear Waste Policy Act creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of spent nuclear fuel in 1998, it defers any consideration of the question of what remedy is available to utilities until such time as DOE is actually in default of its obligation to take SNF. DOE, working with OMB and the White House, will consider how to proceed on the remedy phase over the next several months; however, it is clear even now that there could be a significant range of financial outcomes for the Federal government -- ranging from zero to many billions of dollars.

As required by the statute, in the early 1980's DOE entered into what is known as the Standard Contract with each nuclear utility specifying a time and the terms and conditions under which DOE would accept the utility's SNF for disposal.

The Standard Contract includes a Delays Clause, which specifies different remedies depending on whether or not the delay in waste acceptance was "avoidable" or "unavoidable" by DOE. Under the contract, unavoidable delays trigger adjustments in the schedule under which DOE accepts waste from utilities, but they do not trigger monetary compensation. Avoidable delays, on the other hand, trigger equitable adjustments in the utility's nuclear waste fee to reflect estimated additional costs the utility incurs by reason of DOE delays.

The issue of what remedy is available for DOE's failure to meet the 1998 acceptance date is likely to ultimately be resolved by the courts. If the courts were to decide that the utilities' remedies for failure to accept SNF by the designated date are governed by the Delays Clause in the Standard Contract, the financial consequences for the government will vary from zero--if delay is determined to be unavoidable--to tens of millions (but not billions) of dollars per year if the delay is avoidable.

However, a court could determine that the remedy for failure to begin disposing of SNF in 1998 is not limited by the Standard Contract's Delays Clause. Were a court to conclude that the effect of such a failure is to release utilities from their "reciprocal" statutory obligation to pay fees, there would be a range of possible consequences to the Government.

Probably the most likely remedy under such a scenario would involve establishment of an escrow account, by the federal court itself, into which Nuclear Waste Fund fees henceforth would be paid. Diverting fee payments to an escrow would cost the Treasury approximately $600 million a year. Whether and to what effect the escrow fees would be made available to the Department to fulfill its responsibilities under the NWPA would be up to the court controlling the escrow.

At the extreme, a conclusion that a failure to meet the 1998 deadline releases utilities from their fee obligation could lead both to a cut-off of future fee payments and perhaps also a requirement to refund of past fees that the utilities have paid. Were the court to conclude such a refund is required, the Government's potential liability to utilities could be as much as $7.5 billion, plus interest. We believe a requirement that the Government refund past collections is unlikely.

C. Financial Impact on Utilities

A number of state utility commissions are currently considering proposals to require utilities to escrow amounts collected from ratepayers to cover utility nuclear waste fees. The Indiana-Michigan decision may impel some States to put some form of escrow requirement in place even in advance of the 1998 deadline. The states would probably leave the utilities free to comply with their obligation to pay the nuclear waste fees with shareholder funds. Because of the risk that non-payment could pose to the utilities' NRC licenses, they may well choose that course. Thus, one near-term impact of the decision may be a significant annual reduction in utility net income.

III. ADMINISTRATION RESPONSE

Currently pending legislation would not provide a solution to the 1998 acceptance date issue. It calls for the establishment of an interim storage facility based on unrealistic targets for completing required actions and without regard to issues of public acceptance. It was disregard for such issues that contributed to the Department's present inability to meet the targets of the NWPA.

Any new legislative initiative must recognize the complexity and importance of the task and provide for adequate time and objective analysis to achieve public confidence in the process and acceptance of the outcome.

Date: _____

THE WHITE HOUSE

National Economic Council

TO: Gary Bennethum, TJ Glauthier

PHONE: _____

FAX: 5-1086, 5-4639

FROM: **Elgie Holstein**

PHONE: 202–456–2800

FAX: 202–456–2223

Number of pages, including this cover sheet: 3

DOE NEWS

NEWS MEDIA CONTACT:
Barbara Semedo, 202/586-5806

FOR IMMEDIATE RELEASE
July 23, 1996

STATEMENT OF

COURT RULES ON DOE'S OBLIGATION TO BEGIN DISPOSING OF SPENT NUCLEAR FUEL IN 1998

In Indiana, Michigan Power Company v. Department of Energy (D.C. Cir.), and consolidated cases, various utilities and a group of states and public utility commissions sought a ruling from the United States Court of Appeals for the District of Columbia Circuit that DOE is obligated under the Nuclear Waste Policy Act (NWPA) to begin disposing of utilities' spent nuclear fuel (SNF) by January 31, 1998. In a decision issued today, the Court agreed with the utilities, holding that Section 302(a)(5)(B) of the Act creates an obligation in DOE, reciprocal to the utilities' obligation to pay fees under the NWPA, to start disposing of SNF no later than January 31, 1998. The Court rejected DOE's position that it does not have an obligation to begin disposing of SNF in the absence of a repository or interim storage facility constructed under the NWPA.

The Court remanded the case to DOE for further proceedings, stating that it would be premature for a court to attempt to fashion an appropriate remedy, since DOE is not currently in default on the obligation to begin disposing of SNF in 1998. DOE is reviewing the Court's ruling to determine what steps it should now take.

- DOE -

N-96-029

Printed with soy ink on recycled paper

MEMORANDUM

TO: Elgie Holstein

FROM: Nancy Firestone

DATE: July 23, 1996

RE: Court of Appeals decision in Indiana Michigan Power Company v. Department of Energy, D.C. Cir. No. 95-1279

In this litigation, utility companies holding Standard Contracts for spent nuclear fuel disposal services under the Nuclear Waste Policy Act, challenged a Department of Energy interpretation of Section 302(a)(5)(B) of the statute, which provides that "in return for the payment of fees established by this section, the Secretary [of Energy], beginning not later than January 31, 1988, will dispose of high-level radioactive waste or spent nuclear fuel as provided in this subchapter." 42 U.S.C. 10222(a)(5). Under DOE's interpretation, the obligation to begin disposal services was conditioned on the availability of an appropriate facility for such material. The utilities, supported by several States and state public utility commissions, maintained the statutory obligation was unconditional. They sought an order setting aside DOE's interpretation, a court-supervised program for meeting the 1998 date, escrow of fees currently being paid into the Nuclear Waste Fund, and a declaration that the utilities need not continue to pay the fees if the 1998 deadline is not met by DOE.

In its decision today, the United States Court of Appeals for the District of Columbia Circuit rejected DOE's position, holding that DOE has an obligation to begin acceptance of spent nuclear fuel for disposal on January 31, 1998, regardless of whether DOE has an appropriate facility for such material. The court did not suggest, however, that DOE could be ordered to take the waste in the absence of an operating repository or other disposal facility. The court acknowledged the absence of such a facility would affect the appropriate remedy for the failure to meet the deadline. The court rejected, however, all of the other relief requested by the utilities, saying it was premature to determine any remedy because DOE was not yet in default. Thus, DOE is not subject to any supervision by the court, and there is no specific relief affecting the payment of fees into the Nuclear Waste Fund. The court set aside DOE's formal statutory interpretation and remanded the matter to the Secretary of Energy for any further proceedings.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 17, 1996 Decided July 23, 1996

No. 95-1279

INDIANA MICHIGAN POWER COMPANY, *ET AL.*,
PETITIONERS

v.

DEPARTMENT OF ENERGY AND
UNITED STATES OF AMERICA,
RESPONDENTS

NORTHERN STATES POWER COMPANY (MINNESOTA), *ET AL.*,
INTERVENORS

Consolidated with
95-1321, 95-1463

On Petitions for Review of an Order of the
Department of Energy

Jay E. Silberg argued the cause for utility petitioners/intervenors, with whom *Michael A. Carvin*, *Vincent J. Cola-*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

triano, George L. Edgar and *Michael A. Bauser* were on the briefs. *Dan L. Keskey* argued the cause for the state petitioners, with whom *Thomas L. Casey, Henry J. Boynton, Lester M. Bridgeman, Patricia M. French, Jocelyn F. Olson, Robert S. Golden, Jr., John W. Malley, Jr., Lawrence F. Barth, John F. Povilaitis, Edward W. O'Neill, Roger W. Steiner, Barbara E. James, Lawrence G. Malone, John S. Gillig, Robert D. Vandiver, Richard O. Bellak, Mary W. Cochran, Paul R. Hightower, John W. Campbell, L. Steven Grasz, Michael A. Gross, Judith S. Yogman, Bryan G. Moorhouse, Susan S. Miller, Kevin P. Maloney, Charles F. Walker, Diane Munns, Michael B. Hare, Charles L. Moulton, Wynn E. Arnold, Caroline Vachier, Helene S. Wallenstein, James E. Ryan, Jr., James R. Carroll* and *Ben Stead* were on the briefs. *Robert T. Stephan, Larry G. Wattenworth, Jeffrey A. Keevil, James E. Weging, Robert W. Parnacott, Douglas E. Eidahl, Harvey Y. Morris* and *James R. Anderson* entered appearances.

John A. Bryson, Attorney, United States Department of Justice, argued the cause for respondent, with whom *Lois J. Schiffer*, Assistant Attorney General, *Martin W. Matzen*, Attorney, and *Marc Johnston*, Deputy General Counsel, United States Department of Energy, were on the brief.

Before: WILLIAMS, GINSBURG and SENTELLE, *Circuit Judges*.

SENTELLE, *Circuit Judge*: The Nuclear Waste Policy Act ("NWPA") of 1982 authorized the Secretary of Energy ("Secretary") to enter contracts with owners and generators of high-level radioactive waste and spent nuclear fuel ("SNF") under which the private parties were to pay the Secretary statutorily imposed fees in return for which the Secretary, "beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or [SNF] involved...." 42 U.S.C. § 10222(a)(5)(B) (1994). Petitioners are utilities and state commissions who paid fees to the Secretary under the statute. They seek review of the Department of Energy's ("DOE") final interpretation declaring that the Department has no obligation to perform its part of the contractual

bargain. We conclude that the Department's interpretation is not valid and we therefore allow the petition for review.

Background

In the NWPA, Congress created a comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants. NWPA establishes that, in return for a payment of fees by the utilities, DOE will construct repositories for SNF, with the utilities generating the waste bearing the primary responsibility for interim storage of SNF until DOE accepts the SNF "in accordance with the provisions of this chapter." 42 U.S.C. § 10131(a)(5).

The NWPA requires the utilities to enter into standard contracts with DOE for the disposal of the waste. According to the statute, the contracts shall provide that:

> (A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and
>
> (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel as provided in this subchapter.

42 U.S.C. § 10222(a)(5). The final standard contract adopted by DOE, following notice and comment, states that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF . . . from the civilian nuclear power reactors specified . . . has been disposed of." 10 C.F.R. § 961.11, Art. II (1996).

In 1993, several states and utilities became concerned about DOE's ability to meet its obligations under the NWPA. Therefore, they requested DOE to address its responsibilities under the NWPA, particularly section 302(a)(5), 42 U.S.C. § 10222(a)(5), and the January 31, 1998 deadline. Daniel

Dreyfuss, Director of DOE's Office of Civilian Radioactive Waste Management, responded in a letter that DOE "does not have a clear legal obligation under the [NWPA] to accept [SNF] absent an operational repository or other facility." In February 1994, DOE's Secretary, Hazel O'Leary, indicated that, while at the time NWPA was enacted DOE "envisioned that it would have a waste management facility in operation and prepared to begin acceptance of [SNF] in 1998," DOE subsequently concluded it did not have "a clear legal obligation under the [NWPA] to accept [SNF] absent an operational repository or other facility constructed under the [NWPA]."

To address this issue, on May 25, 1994, DOE published a Notice of Inquiry on Waste Acceptance Issues ("NOI"), requesting the views of affected parties on matters relating to the continued storage of SNF at reactor sites beyond 1998. 59 Fed. Reg. 27,007 (1994). DOE presented its preliminary finding that it had "no statutory obligation to accept [SNF] beginning in 1998 in the absence of an operational repository or other facility constructed under the [NWPA]." *Id.* at 27,008. DOE did note, however, that the terms of the Standard Contract may have created such an expectation. *Id.*

On June 20, 1994, utility petitioners ("utilities") and state petitioners ("states") filed petitions for review against DOE. This Court dismissed the petitions, finding that the NOI did not constitute final agency action. *Northern States Power Co. v. DOE*, Nos. 94-1457, 94-1458, 94-1574 (D.C. Cir. July 28, 1995) (order granting motion to dismiss case).

On April 28, 1995, DOE issued its Final Interpretation. *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995). In the Final Interpretation, DOE stated that it would not be able to begin taking SNF by January 31, 1998, the date established by the NWPA. *Id.* at 21,793-94. DOE concluded that it did not have an unconditional statutory or contractual obligation to accept high-level waste and spent fuel beginning January 31, 1998 in the absence of a repository or interim storage facility constructed under the NWPA. *Id.* The agency also determined that it

had no authority under the NWPA to provide interim storage in the absence of a facility that has been authorized, constructed and licensed in accordance with the NWPA. *Id.* at 21,797. Finally, DOE declared that, even if it did have an unconditional obligation under the statute, the Delays Clause of the Standard Contract would provide an administrative remedy for DOE's failure to satisfy an obligation under the statute. *Id.*

Petitioners and intervenors then filed their petitions for review of the Final Interpretation.

Analysis

In reviewing an agency's construction of a statute entrusted to its administration, we follow the two-step statutory analysis established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). First, we ask whether Congress has spoken unambiguously to the question at hand. If it has, then our duty is clear: "We must follow that language and give it effect." *Wisconsin Elec. Power Co. v. DOE*, 778 F.2d 1, 4 (D.C. Cir. 1985). If not, we consider the agency's action under the second step of *Chevron*, deferring to the agency's interpretation if it is "reasonable and consistent with the statute's purpose." *Nuclear Info. Resource Serv. v. NRC*, 969 F.2d 1169, 1173 (D.C. Cir. 1992) (quoting *Chemical Mfrs. Ass'n v. EPA*, 919 F.2d 158, 162–63 (D.C. Cir. 1990)). We now apply that review to the Department's interpretation of section 302(a)(5)(B).

Section 302(a)(5)(B) states that "in return for the payment of fees . . . [DOE], beginning not later than January 31, 1998, will dispose of the [SNF]. . . ." The states and utilities contend that this provision means what it says: in return for the payment of fees to the utilities, DOE will begin accepting SNF not later than January 31, 1998. DOE argues that this language does not in fact require it to begin to dispose of SNF by January 31, 1998; rather, the agency contends that this obligation is further conditioned on the availability of a repository or other facility authorized, constructed, and licensed in accordance with the NWPA. DOE contends that

this is the only interpretation possible when one examines the statute as a whole.

To support this interpretation, the Department first argues that Congress's use of the term "dispose" in section 302(a)(5)(B), which provides that DOE "will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter," presupposes the availability of a repository. Although conceding that the statute does not define "dispose," DOE notes that the statute does define "disposal" as "the emplacement in a repository of ... spent nuclear fuel ... with no foreseeable intent of recovery." 42 U.S.C. § 10101(9). DOE contends that "dispose" is simply a different grammatical form of "disposal," and that Congress must have intended the two terms be interpreted consistently. Thus, it argues, section 302 must require a repository be operational before DOE may begin accepting SNF.

We disagree. The phrase "dispose of" is a common term. It has a common meaning. For example, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 654 (1961) defines it as meaning, among other things, "to get rid of; throw away; discard." Admittedly, that and other dictionaries list other definitions. Each of those definitions, however, is consistent with the one set forth and not consistent with a limitation for placing the object of the phrase "in the disposal." There is no indication in the statute that Congress intended the words to be used in any but their common sense. *See McNally v. United States*, 483 U.S. 350, 358-59 (1987) (interpreting commonly used phrase according to "common understanding" where Congress had "not indicat[ed]" an intent to depart from it). Indeed, the very fact that Congress defined "disposal" restrictively and did not define "dispose" bears mute testimony to the strong possibility that Congress intended the former as a term of art, the latter as common English. Indeed, DOE itself has previously concluded that the statutory definition of "disposal" was not intended to define "dispose of." In an April 1, 1987 letter, DOE's general counsel, although responding to a different issue, wrote "we doubt that the[se] terms were intended to have identical meanings." Furthermore, if DOE's obligation to dispose of

waste was linked exclusively to the Act's definition of "disposal" then that obligation would be conditioned only upon the availability of a *repository*. However, Article II of the Standard Contract provides that DOE will provide its services after commencement of "facility" operations, 10 C.F.R. 961.11, with "facility" being defined as including both a repository and "such other facilit[ies] to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility." *Id.* at Article I. It is difficult to see how that paragraph and the Department's interpretation of the statutory section can sensibly coexist.

Perhaps more importantly, we must interpret the section in light of the whole statutory scheme. *See Bailey v. United States*, 116 S. Ct. 501, 506 (1995) (observing that a court must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme.") In the scheme before us, indeed in another subsection of the very section under review, Congress used even the elsewhere narrowly defined "disposal" to encompass more than "emplacement in a repository of ... spent nuclear fuel ... with no foreseeable intent of recovery." That is, in section 302(d), 42 U.S.C. § 10222(d), Congress authorizes the Secretary to make expenditures "for purposes of radioactive waste disposal activities," and expressly includes within the ambit of authorized "disposal" activities those conducted not only in connection with repositories, but also with "any ... monitored retrievable storage facility or test and evaluation facility constructed under this chapter." 42 U.S.C. § 10222(d)(1). Therefore, even if we look to Congress's use of "disposal" to enlighten our interpretation of "dispose of," we still find that Congress has not evidenced limited usage for which the Department argues.

DOE next argues that subsections (A) and (B) of 302(a)(5) are not independent provisions, but rather must be read together because taking title to the waste cannot be separated from the disposal activities. To support this proposition, DOE cites section 302(a)(1), which describes the Standard Contract as "for the acceptance of title, subsequent transpor-

tation, and disposal of such waste or spent fuel" and section 123, which provides that "[d]elivery and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this part shall constitute a transfer to the Secretary of title to such waste and spent fuel." 42 U.S.C. § 10143. Respondent contends that these provisions evince Congress's intent that DOE take title to the waste before proceeding with disposal. According to DOE, any other interpretation of these sections would result in an anomaly in which one party would have ownership of the SNF while another party would have physical control of it.

We do not find this argument persuasive. Sections 302(a)(5)(A) and (B) clearly set forth two independent requirements. These separate obligations are independent of whether DOE holds title to SNF when it begins to dispose of the material. The duties imposed on DOE under subsections (A) and (B) are linked to different events and are triggered at different times. DOE's duty under subsection (A) to take title to the SNF is linked to the commencement of repository operations and is triggered when a generator or owner of SNF makes a request to DOE. DOE's duty under subsection (B) to dispose of the SNF is conditioned on the payment of fees by the owner and is triggered, at the latest, by the arrival of January 31, 1998. Nowhere, however, does the statute indicate that the obligation established in subsection (B) is somehow tied to the commencement of repository operations referred to in subsection (A).

This conclusion is reinforced by the placement of the two requirements in the Standard Contract. DOE's obligation *to dispose* of SNF under section 302(a)(5)(B) is set forth in Article II-Scope, 10 C.F.R. § 961.11, whereas DOE's obligation *to take title* to SNF under section 302(a)(5)(A) is set forth in Article VII-Title. *Id.* In addition, contrary to DOE's assertions, it is not illogical for DOE to begin to dispose of SNF by the 1998 deadline and yet not take title to the SNF until a later date. As the utilities point out, it is not unusual, particularly in the nuclear area, to recognize a division between ownership of materials and other obligations

relating to such materials. For example, the Nuclear Regulatory Commission recognizes a distinction between the ownership of nuclear materials and the right to possess or use such materials. *See also* 10 C.F.R. § 70.20; 10 C.F.R. § 40.21.

In fact, a comparison of paragraphs (A) and (B) argues against the Department's position. In (A), Congress expressly conditioned the obligation of the Secretary on the commencement of the operation of a repository. In (B), Congress imposed no such condition, but rather directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition. The only limitation placed on the Secretary's duties under (B) is that that duty is "in return for the payment of fees established by this section." The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress. It does not survive the first step of the *Chevron* analysis. 467 U.S. at 842–43. Under the plain language of the statute, the utilities anticipated paying fees "in return for [which] the Secretary" had a commensurate duty. She was to begin disposing of the high-level radioactive waste or SNF by a day certain. The Secretary now contends that the payment of fees was for nothing. At oral argument, one of the panel compared the government's position to a Yiddish saying: "Here is air; give me money," and asked counsel for the Department to distinguish the Secretary's position. He found no way to do so, nor have we.

Finally, respondent asserts that reading subsection (B) as creating an unconditional obligation cannot be reconciled with other requirements of the statute, noting that the NWPA provides a complex scheme for the authorization, construction and licensing of a repository or monitored retrieval storage facility. DOE contends that "many contingencies facing the commencement of repository operations strongly undercut the assumption that Congress intended to require disposal by 1998 no matter what the outcome."

Although Congress anticipated the existence of a repository by 1998, the fact that such a repository does not exist does

not make subsection (B) illogical; it simply affects the remedy we can provide. We agree with DOE that Congress contemplated a facility would be available by 1998; however, that Congress contemplated such a facility would be available does not mean that Congress conditioned DOE's obligation to begin acceptance of SNF on the availability of a facility. It does not make sense to assert that Congress would express an intent to exempt DOE from the January 31, 1998 deadline by including specific statutory procedures regarding the siting and development of a repository in the NWPA. Rather, these prerequisites evince a strong congressional intent that DOE's various obligations be performed in a timely manner. *See, e.g., Tennessee v. Herrington*, 806 F.2d 642, 648 (6th Cir. 1986) ("[T]he overall structure of the Act does reveal a consistent concern for timely implementation of the disposal provisions."), *cert. denied*, 480 U.S. 946 (1987). DOE's interpretation of the provisions does not harmonize them. Instead, its interpretation reads into section 302(a)(5)(B) language that appears only in section 302(a)(5)(A) and reads out of section 302(a)(5)(B) language that actually appears in that provision.

It is premature to determine the appropriate remedy, particularly as to the interaction between Article XI and Article XVI of the Standard Contracts, as DOE has not yet defaulted upon either its statutory or contractual obligation. We therefore will remand this matter for further proceedings consistent with this opinion.

Conclusion

In conclusion, we hold that the petitioners' reading of the statute comports with the plain language of the measure. In contrast, the agency's interpretation renders the phrase "not later than January 31, 1998" superfluous. Thus, we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998. The decision of the Secretary is vacated, and the case is remanded for further proceedings consistent with this opinion.

ENERGY & SCIENCE ID:202-395-1086 JUL 23'96 13:35 No.004 P.12

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

27-Jul-1996 09:03am

TO: (See Below)

FROM: T J Glauthier
Office of Mgmt and Budget, NRES

SUBJECT: Agenda for Monday's Nuclear Waste Meeting

I intended to call a couple of you re. the noon meeting on Monday, but did not get time to do it on Friday. I wanted to share my objectives for our meeting on the nuclear waste bill in order to get your views and to help us be as productive as possible in the meeting.

I'll convey my thoughts here via email. If you have suggestions, please call Monday am.

The focus of the meeting is this week's action in the Congress, especially Wednesday's vote in the Senate, but also potential House action to approve the same bill before the end of the week. (We can have a meeting in the future about exactly what we are going to do in response to the court action--that is another meeting).

I think we need to cover:

- the implications of the court decision on this week's action in Congress (but not the broader implications)
- a careful analysis of what the current version of the bill does, as amended by Murkowski's 2nd degree amendment, so we can agree on
- the substance of a clear, accurate statement of why the Administration opposes the current version of the bill
- information from DOE about what they know about key Senators' positions and likely actions
- an understanding of what the 8 amendments are likely to be in Wednesday's Senate debate
- what the key "environmental" amendment should be, on which we can focus swing Senators for a key environmental vote....do we need a new or revised amendment for this

purpose? (can one still be entered?)

- what is likely to happen in the House this week

- identifying what materials are already available and in use by the Administration on the Hill and with the media, and what additional materials are needed....including both formal position statements and talking points

- an action plan for the week...coordinated by WH Legislative Affairs

Any thoughts or suggestions?

(PS-- Kathy, please send a copy of this to the DOE attendees at the meeting. I didn't have their email addresses available.)

Distribution:

TO: Barbara C. Chow
TO: John C. Angell
TO: Elgie Holstein
TO: Linda L. Lance
TO: Kris Balderston
TO: Diane Regas
TO: Lisa Kountoupes
TO: Kathleen Peroff
TO: Gary L. Bennethum
TO: Robert L. Civiak

CC: Alecia Ward

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

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- information from DOE about what they know about key Senators' positions and likely actions
- an understanding of what the 8 amendments are likely to be in Wednesday's Senate debate
- what the key "environmental" amendment should be, on which we can focus swing Senators for a key environmental vote....do we need a new or revised amendment for this

purpose? (can one still be entered?)

- what is likely to happen in the House this week
- identifying what materials are already available and in use by the Administration on the Hill and with the media, and what additional materials are needed....including both formal position statements and talking points
- an action plan for the week...coordinated by WH Legislative Affairs

Any thoughts or suggestions?

(PS-- Kathy, please send a copy of this to the DOE attendees at the meeting. I didn't have their email addresses available.)

Distribution:

TO: Barbara C. Chow
TO: John C. Angell
TO: Elgie Holstein
TO: Linda L. Lance
TO: Kris Balderston
TO: Diane Regas
TO: Lisa Kountoupes
TO: Kathleen Peroff
TO: Gary L. Bennethum
TO: Robert L. Civiak

CC: Alecia Ward

Ck last page of DOJ analysis

7-27-96 Nuclear Waste issue

Members might want to know - what are we going to do in light of decision? - before they vote.

Prob w/ bill - (1) picks NEV prematurely - before viability assessment.
pre-judging science - singling out NEV
default option - always NV: There's the objection.
(2) Env. overrides (e.g. of NEPA) NOT there - but overall time limit makes approp env. assessments difficult.
Actually, NEPA may be the one env law truly overridden. Do letter from Katie?
(3) Radiation?
(4) Transportation - bill still regs some tracking

Under our policy -
if YM viable, when we can accept? 2006
As interim storage facility - 2003

Not planning to challenge 8 DC Cir decision -

Decision doesn't force us to take -
Just says - we have obligation / will have to be some remedy.

Bill doesn't solve problem or decision addresses
If we pass this law - we won't meet

Those deadlines either.
Will just divert us from our
sensible approach.

84-96 Nuclear Waste

Implications of Ind. Mi decision (stat oblig to pick up; recip. on states payment)

(consistent w/ statute?) K has delays clause - would limit our fina exposure.

- delay must be unavoidable. → (must give notice of this)
- avoidable: diff remedy

States will argue - not ltd to narrow Kual rem -

They can stop paying! (or escrow) 600m per yr.

and trigger refund obligation?! (so far collected 7.5b in nuc waste fees) (plus interest → 10b)

Unlikely for Ct to do all this, but...

Options

Cert petition - 60 days from 7/23

Our univ view - not certworthy.

No rehearing kind of case.

Cross-petition on remedy to be avoided

Poss settlement offer - give claims for avoidable delay.

Cmit to until 2010

Options

1. Wait to be sued. But - Kual oblig to give notice of delay at least.

2. Give notice of delay. They'd contest in Ct of Claims or DC Cir.

3. Could start admin proceeding - decide whether an or unav. OR convene ADR

Delay isn't acceptable

Legislative hunt?

Have to give delay notice around time of not seeking cert.
Scheduled pickups going out into next century.

NOTICE — Let's not do notice until after election!
How broad-based does notice have to be? Beyond 9th?!
Limit as much as we can, consistent w/ facts.

ORAL ARGUMENT SCHEDULED FOR JANUARY 17, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-1279, 95-1321, 95-1463

INDIANA MICHIGAN POWER COMPANY, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,

Respondents.

ON PETITIONS FOR REVIEW OF A FINAL DECISION
OF THE UNITED STATES DEPARTMENT OF ENERGY

FINAL BRIEF FOR THE RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the Department of Energy and in this Court are listed in the Brief for the State Petitioners and Intervenors in 95-1321, and in the Initial Joint Brief of Utility Petitioners/Utility Intervenors.

B. Ruling under Review

References to the ruling at issue appear in the Brief for the State Petitioners and Intervenors in 95-1321, and in the Initial Joint Brief of Utility Petitioners/Utility Intervenors.

C. Related Cases

The case on review has not previously been before this Court or any other court. Counsel for the respondents is not aware of any related cases pending in this Court or in any other court.

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MISCELLANEOUS:

H.R. Rep. No. 785, Part I, 97th Cong. 1st Sess. (1982) . 26,27
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GLOSSARY

DOE	United States Department of Energy
Final Interpretation	Department of Energy Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21793 (May 3, 1995) (J.A. 248-253)
MRS	A monitored retrievable storage facility for high-level radioactive waste and spent nuclear fuel as authorized by the Nuclear Waste Policy Act, 42 U.S.C. 10161-10169
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10101, et seq.
Stat. Add.	Statutory Addendum to Brief of State Petitioners and Intervenors in 95-1321

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ORAL ARGUMENT SCHEDULED FOR JANUARY 17, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 95-1279, 95-1321, 95-1463

INDIANA MICHIGAN POWER COMPANY, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,

Respondents.

ON PETITIONS FOR REVIEW OF A FINAL DECISION
OF THE UNITED STATES DEPARTMENT OF ENERGY

FINAL BRIEF FOR THE RESPONDENTS

JURISDICTION

A. Jurisdiction of the Department of Energy. -- The authority of the Department of Energy ("DOE") to administer the nuclear waste program is granted by the provisions of the Nuclear Waste Policy Act of 1982, as amended (NWPA), 42 U.S.C 10101 et seq.

B. Jurisdiction of the court of appeals. -- Jurisdiction to review the Final Interpretation is granted by Section 119(a)(1)(A) of the NWPA, which provides that the courts of appeals have original and exclusive jurisdiction over any

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action "for review of any final decision or action of the Secretary * * * under this part." 42 U.S.C. 10139(a)(1)(A).

C. Timeliness of the petitions for review. -- Section 119(c) of the NWPA requires that judicial review be sought within 180 days of the decision under review. 42 U.S.C. 10139(c). DOE issued its Final Interpretation on April 28, 1995 (Joint Appendix ("J.A.") 253). The petitions for review were filed on May 30, 1995 (No. 95-1279), June 21, 1995 (No. 95-1321), and September 7, 1995 (No. 95-1463), within the 180-day period.

STATUTES AND REGULATIONS

Excerpts from the Nuclear Waste Policy Act of 1982, as amended, and excerpts from Public Law 97-425, the Nuclear Waste Policy Act of 1982, as enacted, appear as an Addendum to this brief. All other applicable statutes and regulations are contained in the Brief for the State Petitioners and Intervenors in 95-1321, and in the Joint Brief of Utility Petitioners/Utility Intervenors.

STATEMENT OF THE ISSUES

1. Whether Section 302(a)(5)(B) of the NWPA imposes an unconditional obligation on DOE to begin on January 31, 1998, to dispose of high-level radioactive waste and spent nuclear fuel from commercial nuclear reactors even if there is no facility authorized, constructed and licensed under the NWPA to receive such waste by that date.

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2. Whether, if such an unconditional obligation exists, DOE has primary jurisdiction under the Delays Clause of the Standard Contract to determine the remedy for any default.

STATEMENT OF THE CASE

A. Nature of the case and the course of proceedings below. -- The petitioners, various utilities having contracts under the NWPA with DOE for the disposal of their high-level radioactive waste and spent nuclear fuel, as well as several States and state public regulatory commissions, seek review of a statutory interpretation issued by DOE on April 28, 1995 (J.A. 248-253). On May 25, 1994, DOE had published a "Notice of Inquiry" soliciting the views of affected parties and the public on various issues arising from the possibility that utilities would need to continue storage of nuclear waste at reactor sites after January 31, 1998. 59 Fed. Reg. 27,007 (J.A. 230-232). DOE stated in the notice that its preliminary view was that it had no statutory obligation to begin disposal under the NWPA on that date. 59 Fed. Reg. 27,008 (J.A. 231). After receipt and review of over 1,000 written responses, DOE issued its Final Interpretation, in which it concluded that it does not have an unconditional statutory or contractual obligation to begin disposal on that date in the absence of a facility constructed and licensed for such purposes as required by the NWPA (J.A.

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249). The petitioners then filed petitions for review of this decision in this Court.[1/]

B. Statutory and regulatory background. -- Congress enacted the NWPA to provide a statutory structure for the disposal of high-level radioactive waste and spent nuclear fuel ("nuclear waste"), primarily from commercial nuclear power plants. 42 U.S.C. 10131(a). The siting, construction and operation of a deep mined geologic repository is the major aim of the statute. As originally enacted, the NWPA directed the DOE to identify three potential sites for the first repository and conduct a multi-year evaluation of them, known as site characterization. 42 U.S.C. 10132(b) (1982 ed.). Following site characterization, DOE was to recommend one site for development as a repository and, if that recommendation was approved by the President and otherwise became effective, DOE could then proceed to apply to the Nuclear Regulatory Commission ("NRC") for a license to construct and operate the repository. 42 U.S.C. 10134 (1982 ed.). The statute also authorized DOE to locate a site for a second repository through a similar process. 42 U.S.C. 10132 (1982 ed.). In addition, the statute directed DOE to study the need for and feasibility of a monitored retrievable storage facility ("MRS") for the purpose of storing nuclear waste on an interim basis prior to disposing of it permanently in an

---

[1/] On July 28, 1995, this Court dismissed petitioners' attempt to obtain judicial review prior to the issuance of the Final Interpretation. Order, dated July 28, 1995, Northern States Power Co. et al. v. U.S. Department of Energy, No. 94-1457.

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underground repository, and to submit to Congress a site-specific proposal for such a facility. 42 U.S.C. 10161 (1982 ed.).

In 1986, DOE completed the process of selecting three sites for site characterization, one in Texas, one in the State of Washington, and one at Yucca Mountain, Nevada. DOE also had begun the process of identifying sites for a second repository. Furthermore, the agency had proposed to construct an MRS at Oak Ridge, Tennessee. See Tennessee v. Herrington, 806 F.2d 642 (6th Cir. 1986), cert. denied, 480 U.S. 46 (1987). On December 22, 1987, however, Congress amended the NWPA in several significant respects.

First, Congress directed DOE to characterize only one of the first three sites for a potential repository, Yucca Mountain, Nevada. 42 U.S.C. 10133(a). Second, the amended statute eliminated the authorization to identify and characterize a site for a second repository. Third, Congress nullified the Oak Ridge MRS facility proposal and directed that the matter of constructing an MRS be examined by a commission before DOE could proceed. 42 U.S.C. 10162, 10163.

In addition, while Congress authorized DOE to site and construct an MRS, the amendments barred DOE from selecting an MRS site until a site for a repository is recommended to the President, and further prohibited any construction of an MRS until the construction authorization for a repository is issued by the NRC. 42 U.S.C. 10165(b), 10168(d)(1). As an alternative method of selecting a repository or an MRS site, the 1987

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amendments established the Office of the Nuclear Waste Negotiator, which was authorized to seek agreement with a State or Indian Tribe to host either a MRS or a repository. 42 U.S.C. 10243.[2/]

In addition to providing for the development of a repository, the NWPA establishes the respective responsibilities of the Federal government and the owners and generators of nuclear waste. Congress concluded that the Federal government bears the responsibility for disposing of this waste in a manner that protects the public health and safety and the environment, but that "the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel * * *." 42 U.S.C. 10131(a)(4). Therefore, Section 302(c) of the statute establishes the Nuclear Waste Fund with contributions from the owners and generators to finance the cost of establishing and operating the disposal system. 42 U.S.C. 10222(c). Furthermore, Congress concluded that the "generators and owners of [nuclear waste] have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this chapter * * *." 42 U.S.C. 10131(a)(5).

Section 302(a) of the NWPA authorizes DOE to enter into contracts with the owners and generators for the disposal of

---

[2/] The Negotiator was unsuccessful in the effort to site a repository or MRS, and the authority for that office has since expired. See 42 U.S.C. 10250.

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owners and generators to the Nuclear Waste Fund (Statutory Addendum to Brief of State Petitioners and Intervenors in 95-1321 ("Stat. Add.") A31). This Article provides that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all [nuclear waste from the specified reactors] has been disposed of" (ibid.). Article V establishes the precise timing and rate at which individual utilities can deliver nuclear waste to DOE (id. at A32-A33). The contract prescribes the fees to be paid by the owners and generators of nuclear waste and provides that the contract will be in force until all of the waste of that particular owner or generator is disposed of. Arts. III, VIII (id. at A31, A34-A36). For electricity generated and sold on or after April 7, 1983, the owners and generators pay a flat fee of 1.0 mill per kilowatt hour of electricity generated and sold from a nuclear power plant. Art. VIII, ¶ A (id. at A34).

In addition, the Standard Contract anticipated the possibility that performance by any party to the contract could be delayed beyond the time periods specified in the agreement. In Article IX, entitled "DELAYS," the parties waived liability for damages in the case of unavoidable delay and agreed to "adjust their schedules, as appropriate, to accommodate such delay." Art. IX, ¶ A (Stat. Add. A36). In the case of avoidable delay, the parties agreed that the "charges and schedules specified in this contract will be equitably adjusted to reflect

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any estimated additional costs incurred by the party not responsible for or contributing to the delay." Art. IX, ¶ B (ibid.). Article XVI established a mechanism for resolving disputed questions of fact arising under the contract that provides for initial resolution by a designated Contracting Officer and appeal to the DOE Board of Contract Appeals (id. at A37). All of the utilities that are parties to these lawsuits have signed a standard contract with DOE applicable to the nuclear waste generated by their facilities.

D. Issuance of DOE's Final Interpretation of waste acceptance issues. -- When DOE and the utilities entered into the Standard Contract shortly after the statute was passed, the agency expected to have established a waste management facility (either a repository or an MRS) under the NWPA by January 31, 1998, and to be able to begin accepting waste for disposal by that date (J.A. 231). It now appears, however, that neither a repository nor an MRS will be available by that time. DOE has stated that if the Yucca Mountain site proves suitable and DOE successfully completes the approval and licensing process, waste could begin to be accepted there in the year 2010. 59 Fed. Reg. 27,007, 27,008 (May 25, 1994) (J.A. 231). DOE has also concluded that the revised statutory process for siting and developing an MRS would not result in having such a facility ready by January 31, 1998. Ibid.

To address the consequences of the expected lack of such a facility, DOE published in the Federal Register on May 25,

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1994, a Notice of Inquiry, soliciting the views of all interested parties on the legal and practical questions of waste acceptance. 59 Fed. Reg. 27,007 (J.A. 230-232). The agency sought comments in three general areas. First, DOE noted that many utilities have asserted that the agency has a statutory obligation to begin accepting waste on January 31, 1998, regardless of the availability of a repository or an MRS. The agency stated that its "preliminary view" was that there was no such statutory obligation but that the terms of the Standard Contract may have created such an expectation. Id. at 27,008 (J.A. 231). Accordingly, the agency requested comment on whether the "Department ha[s] a legal obligation under the Act or the Standard Contract to accept waste in 1998 in the absence of a repository or other facility under the Act?" Id. at 27,009 (J.A. 232).

Second, DOE asked the commenters to address the issue of providing interim storage at a central site away from the reactors. In particular, DOE sought comment on whether such storage is needed, whether the Federal government should establish interim storage at an existing Federal site, and whether to seek amendment of the statutory restrictions on siting and development of an MRS (J.A. 232). Finally, the agency solicited views on ameliorating the financial burden on the utilities of continued on-site storage.

Following the receipt and evaluation of the public comments, DOE published its Final Interpretation on May 3, 1995.

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60 Fed. Reg. 21,793 (J.A. 248-253). The agency concluded that the NWPA does not impose an obligation on DOE to begin waste disposal in 1998 in the absence of a facility constructed and licensed under the statute. Id. at 21,794-21,795 (J.A. 249-250). In DOE's view, Section 302(a)(5), when read in the context of the whole statute, conditioned any obligation to begin disposal on the availability of a repository or storage facility constructed under the terms of the NWPA. Id. at 21,795 (J.A. 250). DOE also concluded that its Standard Contract contains the same condition for the beginning of disposal services. 60 Fed. Reg. 21,797 (J.A. 252).

The agency also determined that it has no authority under the NWPA to provide interim storage in the absence of a facility that has been authorized, constructed and licensed in accordance with the NWPA's requirements (J.A. 252). Finally, DOE declared that if the statute were construed, contrary to its view, to require DOE to begin disposal unconditionally in 1998, the Delays Clause of the Standard Contract would provide an administrative remedy for failure to satisfy that obligation (J.A. 252).

SUMMARY OF ARGUMENT

A fundamental canon of statutory interpretation requires that the provision at issue be construed in the context of the whole statute and that all provisions be read in a harmonious and comprehensive manner. Petitioners' claim that DOE has an unconditional obligation to begin disposal in 1998

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violates this principle by resting exclusively on the appearance of that date in Section 302(a)(5)(B). Examination of the other provisions of the statute demonstrate that the obligation of this subsection is further conditioned on the availability of a repository or other facility authorized, constructed and licensed in accordance with the requirements of the NWPA.

First, subsection (B) itself directs DOE to "dispose" of the waste. This is an obvious reference to the defined term "disposal," which in turn refers to emplacement of waste in a repository. Therefore, what Congress prescribed in subsection (B) presupposes the availability of a disposal facility under the statute.

Second, subsection (B) must be read together with subsection (A), the "take title" provision, which concededly does not require DOE to take title to the waste before the availability of a repository. Contrary to petitioners' contention, these two provisions are not completely independent. Under Section 302, which describes the scope of the Standard Contract, and Section 123, which declares taking title to be delivery and acceptance by DOE of waste for a repository, taking title and disposal are two closely related steps in the process of relieving the owners and generators of waste of their responsibility for this material. Petitioners' assertion that subsections (A) and (B) have no relationship creates the potential that ownership would continue in the utilities while DOE proceeds with disposal. To avoid such an anomalous

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situation, both subsection (A) and (B) should be read to condition DOE's responsibilities on the availability of a disposal facility.

Third, petitioners' interpretation would require DOE to proceed with disposal in violation of the requirement of the NWPA that such activities occur in a facility constructed and licensed under the statute. The Nuclear Waste Fund may be used only for disposal facilities that are expressly authorized by the statute, which also must be licensed by the NRC. An interpretation that requires DOE to proceed with disposal contrary to such requirements is completely irreconcilable with these other provisions of the statute.

The only harmonious construction of the statute is that Congress meant for DOE to comply with all the requirements of the law. Contrary to petitioners' contention, this construction does not eliminate the deadline in subsection (B). The date for beginning disposal is not simply absolute, but conditional and capable of being satisfied if a facility were to be established prior to that time. This view is supported by the legislative history, which contains consistent recognition that DOE's responsibility under subsection (B) is to be consonant with the other requirements of the NWPA.

Any doubt as to Congress' intent should be resolved by deferring to the agency's interpretation. DOE's administrative construction is a carefully considered and reasoned interpretation of a statutory provision that it has the

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responsibility to administer. DOE's interpretation is not contradicted by prior constructions of the statute. Petitioners have failed to show that the deference normally accorded to such a determination should not be given here.

Finally, if the Court concludes that DOE does have an unconditional obligation to begin disposal, declaratory relief is all that should be provided petitioners by this Court. If Congress did require in Section 302(a)(5)(B) that DOE begin disposal in 1998 unconditionally, Congress plainly did not provide what would happen if DOE is unable to do so for lack of an appropriate facility. DOE has filled that gap with the Delays Clause of the Standard Contract. These remedial mechanisms should be allowed to proceed before any further judicial relief is provided. Furthermore, petitioners' request to have this Court monitor the agency's repository development program is not supported by any showing that such interference is warranted.

ARGUMENT

I

THE NUCLEAR WASTE POLICY ACT DOES NOT CREATE AN UNCONDITIONAL OBLIGATION TO BEGIN DISPOSAL OF SPENT NUCLEAR FUEL BY JANUARY 31, 1998

A. Standard of Review -- The interpretation of a statutory provision is reviewed de novo by the court. If, after application of the tools of statutory interpretation, the meaning of the provision remains ambiguous, the court will defer to the reasonable interpretations of the administrative agency implementing the statute. Chevron, U.S.A., Inc. v. NRDC, 467

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U.S. 837, 842-843 (1984); General Electric Uranium Management Corp. v. U.S.D.O.E., 764 F.2d 896, 903 (D.C. Cir. 1985) ("GEUMCO").

B. The Nuclear Waste Policy Act, when read as a whole, does not require DOE to begin disposal of spent nuclear fuel by January 31, 1998, in the absence of a facility constructed and licensed for such operations. -- Petitioners' argument that the Nuclear Waste Policy Act creates an unconditional obligation for DOE to begin waste disposal in January 1998 rests exclusively on the specific language of subsection (B) of Section 302(a)(5). This provision, however, cannot be viewed in isolation. A fundamental principle of statutory construction is that the provision under examination must be read in the context of the whole statute, and that interpretations creating irreconcilable conflicts should be avoided. Reno v. Koray, 115 S. Ct. 2021, 2025 (1995); NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957); Illinois Commerce Commission v. ICC, 879 F.2d 917, 927 (D.C. Cir. 1989); Love v. Thomas, 858 F.2d 1347, 1354 (9th Cir.1988), cert. denied sub nom. AFL-CIO v. Love, 490 U.S. 1035 (1989); Atwell v. Merit Systems Protection Board, 670 F.2d 272, 286 (D.C. Cir. 1981). In this case, there are several reasons why consideration of the statute as a whole requires the rejection of petitioners' contention.

1. The definition of "disposal" shows that Congress could not have intended that DOE begin disposal without a facility authorized, constructed and licensed under the statute. -- First,

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Section 302(a)(5)(B) itself requires examination of other parts of the statute in order to determine its meaning. That provision states that DOE "will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subtitle." 96 Stat. 2258 (emphasis supplied). "Disposal" is a defined term in the statute. Congress' use of the cognate term "dispose" in the statutory provision at issue here is a strong indication that any obligation imposed by Section 302(a)(5)(B) is to be consistent with the meaning assigned to the defined term. As DOE noted (60 Fed. Reg. 21,795) (J.A. 250), the statute defines "disposal" as "the emplacement in a repository of spent nuclear fuel with no intent of recovery." 42 U.S.C. 10101(9). Consequently, what Congress required DOE to do in Section 302(a)(5)(B) presupposes the availability of a repository.

This conclusion is reinforced by the inclusion of the phrase "as provided in this subtitle" in subsection (B). 96 Stat. 2258. This phrase modifies the term "dispose" and is clearly intended to limit DOE's obligation with respect to handling such waste to steps that are authorized by other provisions of the statute, in particular, the repository provisions.

This intent is clear even though the reference to "this subtitle" is not technically correct since Title III of the NWPA, where Section 302(a)(5)(B) appears, has no subtitles. 96 Stat. 2255-2263. As this Court has observed before, the separation during the legislative process of the provisions of Title III

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from the provisions of Title I created anomalies in the relationship of various titles of the NWPA. General Electric Uranium Management Corp. v. U.S.D.O.E., 764 F.2d 896, 901-903 (D.C. Cir. 1985) ("GEUMCO"). The provisions of Title III originated in H.R. 3809, as reported by the House Committee on Interior and Insular Affairs. At that time, these provisions were found in Section 124 of Subtitle A of Title I, which also contained the procedures for siting and licensing a repository. H.R. Rep. No. 491, Part I, 97th Cong., 2d Sess. 2, 15-18 (1982). Provisions relating to the Nuclear Waste Fund and the contracts with the utilities were later transferred to a new Title III without correcting the cross-reference and without explanation. GEUMCO, 964 F.2d at 903. Just as this Court concluded in GEUMCO, this "happenstance" should not prevent the Court from recognizing that the cross-reference evidences the intent of Congress to condition the obligation in Section 302(a)(5)(B) on the availability of a repository. Ibid.

Utility petitioners advocate a much broader construction of DOE's obligation, describing it frequently as a duty to "take" the spent nuclear fuel even if DOE has no facility for disposing of or storing the waste (Utilities Br. 1, 3, 7, 11, 14, 30). These petitioners' substitution of the word "take" for "dispose" exposes the flaw in their claim. The former term does not appear in the statute, and Congress' use of a term of art under the statute is evidence of a narrower intent with respect to any obligation created by Section 302(a)(5)(B).

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Petitioners attempt to deflect the significance of the term "dispose" by arguing (Utilities Br. 20; State Br.22-23) that DOE's construction is inconsistent with Article II of DOE's own Standard Contract. The latter provision states that DOE will provide its services under the contract "after commencement of facility operations." 10 C.F.R. 961.11, Article II (Stat. Add. A31). The term "DOE facility" is defined to include not only a repository but "such other facility(ies) to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility." Ibid., Article 1, No. 10 (Stat. Add. A30). DOE included such facilities in its definition in recognition of the fact that an interim storage facility or a monitored retrievable storage facility could be established under the NWPA. 48 Fed. Reg. 16,591 (Apr. 18, 1983) (J.A. 84). Thus DOE chose to expand the range of facilities at which it could offer contract services to be consistent with the statute as a whole.

Contrary to petitioners' claim, DOE's decision to do so is not inconsistent with the agency's position that Congress did not mandate that DOE to provide such services in the absence of any facility constructed and licensed under the NWPA. Moreover, such an inconsistency would not, in any event, provide any support for petitioners' much broader construction of Section 302(a)(5)(B).[4/]

[4/] The State petitioners also rely (Br. 22-23) on an April 1, 1987, letter from DOE's General Counsel to the House Subcommittee (continued...)

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2. Subsections (A) and (B) of Section 302(a)(5) must be read together because taking title to the waste cannot as a practical matter be divorced from disposal activities. -- A second reason that subsection (B) cannot be read in isolation arises from consideration of the "take title" provisions of Sections 123 and 302 of the statute. The authority to enter into disposal contracts with the waste generators is found in Section 302(a)(1), 42 U.S.C. 10222(a)(1). That provision describes the contracts as "for acceptance of title, subsequent transportation, and disposal of such waste or spent fuel." Ibid. Further, Section 123 provides that "[d]elivery, and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this subtitle shall constitute a transfer to the Secretary of title to such waste or spent fuel." 42 U.S.C. 10143. Thus, the statutory scheme creates a chronological paradigm for the handling and ultimate disposition of this waste: the Secretary, by accepting and taking delivery of the materials, first takes title to the waste and then proceeds with disposal.

[4/] (...continued)
on Energy and Power (J.A. 149-151) regarding whether acceptance of waste at an MRS would satisfy Section 302(a)(5(B). Although the General Counsel did suggest that the term "dispose" as used in that section should not limit DOE's authority to accept waste at an MRS, the letter nowhere suggests that DOE was obliged to accept waste in the absence of either a repository or an MRS. Indeed, the entire thrust of the letter was that Section 302(a)(5)(B) does not require a repository to be operational by January 31, 1998.

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Utility petitioners concede (Utilities Br. 31-32), as they must, that under subsection (A) of Section 302(a)(5) DOE is not required to take title until after a repository has begun operations. Yet their claim that under subsection (B) the agency must begin disposal even in the absence of a repository cannot be reconciled with the evident intent to have DOE take title before proceeding with disposal. Indeed, common sense strongly suggests that no person or agency would or should proceed to dispose of such toxic material without having title. Conversely, the person holding title would be reluctant to allow disposal to proceed without also being able to transfer title.

Thus, contrary to petitioners' arguments (Utilities Br. 32; State Br. 19-20), subsections (A) and (B) are not completely independent provisions. Under the statute, as demonstrated through the provisions of Sections 302(a)(1) and 123, as well as common sense, the actions of taking title and disposal go hand in hand. The petitioners' view would result in a glaring anomaly: the division between two parties of the ownership and physical control of spent nuclear fuel. One straightforward way to avoid such a discordant result is to conclude that Congress intended the precondition of the availability of a repository would apply not only to the agency's acquisition of title but also to the agency's disposal of the fuel.

3. <u>Construing Section 302(a)(5)(b) to create an unconditional obligation to begin disposal creates an irreconcilable conflict with the statutory requirement to have a</u>

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facility authorized, constructed and licensed under the NWPA for storage or permanent disposal. -- Petitioners' claim that DOE must unconditionally begin "taking" (more properly, "disposing") of the utilities' waste in 1998 is in even greater conflict with other provisions of the NWPA that require DOE to have a facility authorized, constructed and licensed under the statute for such activities. Petitioners make no attempt to reconcile the requirement they perceive in Section 302(a)(5)(B) to "take" the waste unconditionally with the other clear requirements of the statute.

Section 302(d) of the NWPA provides that the Nuclear Waste Fund may be used only for disposal activities under the statute, and further commands:

> [n]o amount may be expended by the Secretary under this subtitle for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

96 Stat. 2260. When the NWPA was enacted in 1982, Congress did not authorize construction of an MRS, but required DOE to present a proposal for such a facility. Pub. L. No. 97-425, Sections 141, 302(d), 96 Stat. 2241-2244, 2259-2260. Such an authorization was enacted as part of the 1987 amendments. 42 U.S.C. 10162(b).[5] Thus, DOE can accept the utilities' waste and

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[5] The "test and evaluation facility" referred to in Section 302(d) was strictly a research facility of very limited capacity, and not intended for, or capable of, use in a disposal system. See 42 U.S.C. 10191-10203.

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place it only in a repository or MRS, which are the only facilities authorized by Congress to receive such waste.

Furthermore, each of these types of facilities must have a license from the Nuclear Regulatory Commission. Section 114(b) of the statute requires DOE to submit an application to the NRC for a construction authorization for a repository, and Section 114(d) requires the NRC to decide whether the application satisfies applicable statutory and regulatory requirements. 42 U.S.C. 10134(b), (d). The NRC has also issued regulations requiring a license for DOE's receipt or possession of such material at a repository.[6] Hence, the very activity Congress prescribed in subsection (B) of Section 302(a)(5), disposing of the waste, must occur in a facility authorized by Congress and constructed and licensed in accordance with the NWPA.

The same is also true for the only other alternative under the statute to a repository, a monitored retrievable storage facility (MRS). As originally enacted, Section 141(d) expressly provided that when any MRS was authorized, it would be subject to licensing by the NRC under 42 U.S.C. 5842(3). See 42 U.S.C. 10161(d). This requirement was preserved when in 1987 Congress amended the statute to authorize such a facility. 42 U.S.C. 10161(d), 10162(b), 10168.[7]

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[6] The NRC based its regulations in part on the NWPA and on Section 202(3) of the Energy Reorganization Act of 1974, 42 U.S.C. 5842(3). See 46 Fed. Reg. 13,971 (Feb. 25, 1981).

[7] The only other authority under the NWPA that DOE had for storage was very limited, and expired unused in 1990. Under

(continued...)

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Thus, an unconditional obligation to dispose of the utilities' waste, regardless of whether a facility authorized, constructed and licensed is available, is completely inconsistent with a major requirement of the statute. An interpretation that creates such a significant conflict should not be adopted. To do so would be contrary to the Court's duty to construe the statute as a harmonious and comprehensive whole. See Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 631-632 (1973); Clark v. Uebersee Finanz-Korporation, 332 U.S. 480, 488 (1947).

Moreover, as DOE noted (60 Fed. Reg. 21,795) (J.A. 250), Congress not only required a licensed facility for disposal, but also erected a decision-making process for selecting a suitable site that requires several levels of approval. The actors that may have to review and make a decision on site suitability include not only DOE and the NRC, but also the President, the host state, and possibly Congress. 42 U.S.C. 10134, 10135. The many contingencies facing the commencement of

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2/ (...continued)
Section 136(a), DOE had authority until 1990 to establish an interim storage facility under special circumstances. 42 U.S.C. 10156. The facility was to be limited in capacity and was to be established only when a utility could not reasonably provide interim storage at the site of its reactors. 42 U.S.C. 10151. See State of Idaho v. U.S.D.O.E, 945 F.2d 295, 298-299 (9th Cir. 1991), cert. denied, 504 U.S. 956 (1992). In fact, no utility requested DOE to establish such a facility, and the authority accordingly expired unused. Thus, contrary to the apparent belief of the States (Br. 26), these provisions are no longer available to DOE to store waste. Furthermore, in view of the limited purpose of this provision, as well as automatic termination of the authority in 1990, it is not reasonable to suppose Congress viewed such storage as an alternative to commencement of disposal in a repository in 1998.

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repository operations strongly undercut the assumption that Congress intended to require disposal by 1998 no matter what the outcome. Indeed, in the 1987 amendments, Congress expressly recognized the possibility that the only site that it authorized DOE to consider for the repository would prove unsuitable. 42 U.S.C. 10133(c)(3). Accordingly, an unconditional obligation to begin disposal by 1998 cannot be reconciled with the statutory scheme as a whole.

The construction of the statute urged by petitioners has the single-minded object of requiring acceptance by DOE of spent fuel beginning no later than 1998, rendering superfluous the many critical requirements Congress created for disposal of such material. Their view of the statute must be rejected as inconsistent with the "elementary rule of construction that 'the act cannot be held to destroy itself.'" Citizens Bank of Maryland v. Strumpf, 64 U.S.L.W. 4001, 4002 (U.S. Oct. 31, 1995), quoting Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907).

4. The pertinent legislative history indicates that Congress understood that the obligation to dispose of waste was conditioned on the availability of an appropriate facility. -- We have shown that examination of the statute as a whole requires that any obligation under Section 302(a)(5)(B) to begin waste disposal in January 1998 must be further conditioned on the availability of an appropriate facility for such operations. The legislative history of the statute also contains evidence that

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Congress was not imposing an unconditional obligation for 1998, but requiring performance with the other requirements of the statute as well.

H.R. 3809, as reported by the House Interior Committee, contained in Section 124(a)(4) a provision virtually identical to Section 302(a)(5) as enacted by Congress. H.R. Rep. No. 97-491, Part I, 97th Cong., 2d Sess. 16 (1982). The report accompanying this bill described the provision corresponding to Section 302(a)(5)(B) as making

> the Secretary responsible for disposing of high level waste or spent fuel <u>as provided under this subtitle in permanent disposal facilities</u>, beginning not later than January 1998, in return for the payment of fees established by this section.

<u>Id</u>. at 59 (emphasis supplied). Thus, although the Committee Report acknowledged that the performance of the Secretary's responsibilities had a deadline, it recognized that such performance is supposed to occur in facilities properly established under the statute as well.

Moreover, remarks by Senator McClure, a principal sponsor of the legislation, provide an even stronger indication that Congress did not intend to create an inflexible, unconditional obligation to begin disposal by 1998. The Senate version of the legislation required DOE's contracts to provide that DOE would both take title and dispose of waste by December 31, 1996, without any reference at all to the availability of a repository. 128 Cong. Rec. 30191, 30208 (Dec. 13, 1982). In offering an amendment to conform this provision to

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that in the House version, Senator McClure explained the purpose as follows:

> Mr. President, this amendment amends section 302(a)(5) of the substitute amendment to provide that the Secretary of Energy take title to high-level waste or spent nuclear fuel as expeditiously as practicable upon the request of the generator of such waste. In addition, this amendment directs the Secretary to begin, not later than January 31, 1998, to begin [sic] to dispose of the high-level radioactive waste or spent nuclear fuel from those generating such waste. Under the substitute amendment, there was some concern that, in directing the Secretary <u>to take title to and dispose</u> of such wastes no later than December 31, 1996, we might not be giving the Secretary <u>enough flexibility to tailor his schedule for accepting such wastes to the availability of a repository</u>. This amendment simply directs the Secretary to take title to such wastes as expeditiously as practicable, upon the request of the generator of those wastes, after commencement of repository operations.

128 Cong. Rec. 32543 (Dec. 20, 1982) (emphasis supplied). The intent to preserve the Secretary's flexibility is a strong indication that any January 1998 deadline was further conditioned on the availability of a repository.

The Utility Petitioners (Br. 40-41) dismiss these remarks as irrelevant, claiming they only address the "take title" provision (subsection (A)) and not the disposal provision (subsection (B)), but the House Report and Senator McClure were clearly addressing both provisions. And, as we have discussed, as a practical matter the two provisions cannot be regarded as wholly separate, independent sections.

Utility Petitioners also quote (Br. 40) from H.R. Rep. No. 785, Part I, 97th Cong. 1st Sess. (1982), which reported H.R. 6598, a competing House bill that had a provision virtually

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identical to Section 302(a)(5) as enacted. Petitioners rely on the Report's introductory summary of the bill stating that in "January 1998 - Federal Government [becomes] statutorily and contractually obligated to begin to provide disposal capacity." Id. at 32. The detailed discussion of the provisions concerning DOE's contracts, however, provides that:

> Paragraph (4) requires that all contracts entered into by the Secretary for the disposal of spent fuel or high-level radioactive waste in facilities constructed under this Act contain certain conditions.
>
> * * * * *
>
> Paragraph (4)(B) provides that, in return for the payment of fees established by this section, the Secretary becomes responsible for disposing of high-level radioactive waste or civilian spent fuel as provided under this subtitle beginning not later than January 1998.

Id. at 78 (emphasis supplied). Thus, this Report recognizes, as did H.R. Rep. No. 491 discussed above, that the Secretary's responsibility included not only a deadline but also a requirement to proceed with disposal in accordance with the other provisions of the statute.[8/] Thus, petitioners have not cited any provision of the legislative history that unequivocally

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[8/] Utility Petitioners also quote (Br. 40) language from a Senate Report calling for a definite schedule with specific deadlines for development of a repository. S. Rep. No. 282, 97th Cong., 1st Sess. 7 (1981). This is general language, however, describing a need for such a schedule to allow Congress to monitor DOE's implementation of the statute. Ibid. Such a schedule was enacted in Sections 112-115 of the NWPA, 42 U.S.C. 10132-10135 (1982 ed.).

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requires DOE to ignore the other provisions of the statute and unconditionally "take" the utilities' waste in January 1998.[9]

Finally, contrary to petitioners' claims, DOE's interpretation does not disregard the date written into Section 302(a)(5)(B). That date is not eliminated under DOE's interpretation. While in petitioners' view the date is an absolute, the agency simply regards any deadline as conditional on the satisfaction of other obligations of the statute. Were an appropriate facility to become available prior to that date, the time requirement could function as petitioners would have it. Thus, to recognize the date as conditional does not eliminate it altogether; it simply assigns the date the function Congress intended.

5. Petitioners fail to show why deference should not be accorded DOE's reasonable interpretation of Section 302(a)(5). -- We have shown that application of the fundamental rule of statutory interpretation that the statute should be construed as a harmonious whole leads to a rejection of petitioners' claim of an unconditional obligation for DOE to begin disposal in 1998. Rather, as DOE concluded here, a reconciliation of the statutory provisions requires the conclusion that disposal is further

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[9] The petitioners' reliance (Utilities Br. 43-44; State Br. 30-32) on remarks made during the consideration of the 1987 amendments to the NWPA is not well placed. Interpretations announced in subsequent Congresses are given little weight in the construction of previously enacted provisions. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 114 S. Ct. 1439, 1452 (1994); Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989).

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conditioned on the availability of a facility authorized, constructed and licensed under the statute. Yet, if the Court were to conclude that Congress' intent was not so clear, then such doubt should be resolved in favor of the agency's interpretation under the deference doctrine of Chevron, U.S.A., Inc. v. NRDC, 467 U.S. at 842-843. Petitioners' lengthy attempts to forestall deference (Utilities' Br. 21-30; State Br. 32-44) must be rejected.

Petitioners fail to cite, and therefore fail to distinguish, General Electric Uranium Management Corp. v. U.S.D.O.E., 764 F.2d 896, 904-905 (D.C. Cir. 1985) ("GEUMCO"), where this Court accorded deference to DOE's interpretation of another provision of Section 302 of the NWPA. There the agency interpreted a provision in Section 302(a)(3), which required DOE to set the applicable fee, to be paid by the utilities into the Nuclear Waste Fund under the Standard Contract, for electricity generated prior to the passage of the statute. 764 F.2d at 898; 42 U.S.C. 10222(a)(3). DOE had construed this provision in the course of proposing and promulgating the Standard Contract. This Court found Chevron fully applicable and articulated guidelines for application of the deference doctrine that plainly apply here.

> In determining whether an agency's interpretation represents a reasonable accommodation of conflicting statutory purposes, a reviewing court must determine both whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether "the agency considered the matter in a detailed and reasoned fashion."

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764 F.2d at 905, quoting Rettig v. Pension Benefit Guaranty Corp., 744 F.2d 133, 151 (D.C. Cir. 1984), quoting Chevron, 467 U.S. at 865 (footnoted omitted).

Here, if the statute cannot be read on its face to reject petitioners' construction, it is at the very least ambiguous as to whether DOE has an unconditional obligation to dispose of waste in the absence of a facility constructed under the NWPA. DOE's resolution of this issue is "arguably consistent with the underlying statutory scheme in a substantive sense" and nothing in the statute or the legislative history indicates that DOE's " 'accommodation is not one that Congress would have sanctioned.' " 764 F.2d at 905, quoting Chevron, 467 U.S. at 845. Finally, DOE's publication of the Notice of Inquiry and its Final Interpretation shows that the agency fully and fairly considered the matter in a detailed and reasoned fashion. Ibid. Petitioners' various reasons for denying deference to DOE's construction are without merit.

First, the Utilities maintain (Br. 23-24) that DOE is not entitled to deference because the agency advocates an interpretation that advances its self-interest in avoiding an obligation to provide disposal services. The Utilities cite Transohio Savings Bank v. Director, OTS, 967 F.2d 598 (D.C. Cir. 1992), where the Court reviewed the Office of Thrift Supervision's determination that a new statute required abrogation of a contract between the agency and a savings bank. Although the Court sustained the interpretation as plainly

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correct, and accordingly did not need to defer to the agency, (967 F.2d at 615), the Court suggested in dicta that deference may not be appropriate where the agency is interpreting a statute affecting existing agreements to which the agency is a party. The Court cited National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1571 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987), which suggested, again in dicta, that deference should not be given to an agency's views of an agreement to which it was a party. The concern was that "deference might lead a court to endorse self-serving views that an agency might offer in a post-hoc reinterpretation of its contract." 811 F.2d at 1571.

The reasoning expressed in these cases has no application here principally because the Court has already held that DOE's interpretation of its agreement with the utilities is entitled to the same deference any agency receives when it construes its own regulations. In Commonwealth Edison v. U.S.D.O.E, 877 F.2d 1042 (D.C. Cir. 1989), the Court sustained DOE's interpretation of the phrase "Treasury bill rate" as it appeared in the Standard Contract. 877 F.2d at 1046. In doing so, the Court held that the Standard Contract should be regarded as a regulation because of the extensive regulation of nuclear waste and the fact that DOE promulgated the terms of the contract through notice and comment rulemaking. 877 F.2d 1045. Accordingly, the Court expressly rejected the application of the contract interpretation rule known as contra proferentum that requires contracts to be construed against the drafter, here,

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DOE. Ibid. Thus, the rationale for the reservations expressed in National Fuel Gas and Transohio has been expressly held inapplicable to DOE's implementation of Section 302 of the NWPA. Nor, contrary to the Utilities' contention (Br. 24 n.16), can Commonwealth Edison be confined to DOE's interpretations of the Standard Contract. If the agency's construction of this agreement is entitled to the normal degree of deference, surely DOE's interpretation of the statutory provisions governing the agreement are subject to no particular skepticism.

Second, petitioners claim that the Final Interpretation is inconsistent with prior agency constructions of the statute and therefore not entitled to deference (Utilities Br. 25-26, 36-37, 41-42; State Br. 32-42). The purported inconsistencies, however, do not bear out this claim. The Standard Contract, for example, is in fact consistent with the Final Interpretation. Article II expressly states that services by DOE "shall begin, after commencement of facility operations, not later than January 31, 1998 * * *." 10 C.F.R. 961.11 (Stat. Add. A31). This contemporaneous implementation of the statute plainly conditions the January 1998 deadline on the availability of a facility constructed under the statute, and thus is fully consistent with the Final Interpretation.[10/]

[10/] Petitioners also rely (Utilities Br. 8, 41) on a statement of DOE made in the promulgation of the Standard Contract that "[t]he 1998 date is called for in the Act, and we believe it to be a realistic date. Our performance will be judged by meeting this date." 48 Fed. Reg. 16,598 (Apr. 18, 1983) (J.A. 92). This statement does not, however, show that DOE undertook an

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Nor does the September 7, 1984, letter from Secretary Hodel to Senator Johnston put forth a contrary interpretation (J.A. 103-104). As DOE noted (60 Fed. Reg. 21,797) (J.A. 252), the Secretary's letter discusses contractual commitments that might be made through the Standard Contract. The letter does not purport to interpret Section 302(a)(5), and it does not say that section of the statute imposes an unconditional obligation on DOE. Similarly, the other documents relied on by the State Petitioners refer to contractual commitments and do not interpret this subsection (Br. 37-39). Thus, the petitioners have simply failed to show any inconsistent constructions of the statute by DOE.[11/]

Third, petitioners contend that because they filed premature lawsuits after the agency had launched the process of soliciting comments on waste acceptance issues, the agency's statutory interpretation should be dismissed as "nothing more than an agency's convenient litigating position" (Utilities Br.

[10/] (...continued)
unconditional obligation to begin disposal even if there was no available facility. This statement was a response to a suggestion that intermediate dates be set in the contract. Thus, DOE went on to state that "[i]f the intent of the Act was to have intermediate performance standards or dates, they could have been specified in the Act." Ibid. Consequently, this statement does not evidence an intent to create an unconditional disposal obligation.

[11/] Since an agency is free to change its interpretations, even if any of these prior statements of the agency were regarded as inconsistent, DOE's Final Interpretation is not automatically deprived of deference. See Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810, 817 (1995); Rust v. Sullivan, 500 U.S. 173, 186-187 (1991).

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27, quoting Bowen v. Georgetown University Hospital, 488 U.S. 204, 213 (1988)). Bowen, however, was an application of the well-established rule that positions asserted for the first time in pleadings and briefs, and not in a prior administrative proceeding, are not entitled to deference. Ibid. Here, there was an administrative proceeding culminating in the Final Interpretation issued by the agency. See Martin v. OSHRC, 499 U.S. 144, 156-157 (1991) (interpretation advanced in administrative proceeding "is agency action, not a post hoc rationalization of it."). The fact that petitioners had lawsuits pending, which this Court later ruled had no jurisdictional foundation, cannot change that fact.

The Utility petitioners also contend (Br. 27-29) that the Final Interpretation is not entitled to deference because the issue concerns a statutory interpretation as to which DOE had no policy making responsibility. This Court has expressly held, however, "that DOE is indubitably entrusted with the administration of the Waste Act." GEUMCO, 764 F.2d at 905. Accordingly, the Court accepted the agency's views on what another provision of Section 302 required the agency to do with respect to the assessment of fees in the Standard Contract. Ibid. DOE's acknowledged role in the administration of the statute and the Standard Contract entitles it to as full a measure of deference in this case as it received in GEUMCO.

Finally, the State petitioners also suggest (Br. 42) their reliance on their view of statutory obligation somehow

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eliminates deference to the Final Interpretation. They rely on a criminal case in which an agency had made an express representation that the statute involved did not require a permit for the activity for which the company had been charged. See United States v. Pennsylvania Industrial Chemical Corp., 461 F.2d 468, 477 (3d Cir. 1972). This authority is inapposite since petitioners have failed to show that DOE represented that it was obliged by the statute to dispose of spent nuclear fuel in the absence of a facility constructed under the NWPA. Consequently, the State petitioners' expectations to the contrary provide no reason to reject deference to DOE's Final Interpretation. [12/]

II

IF ARGUENDO DOE HAS A STATUTORY OBLIGATION TO BEGIN DISPOSAL IN JANUARY 1998, THE AGENCY HAS PRIMARY JURISDICTION TO ADMINISTER THE REMEDY FOR ANY DEFAULT IN ACCORDANCE WITH THE STANDARD CONTRACT

If the Court were to agree with petitioners that DOE has an unconditional obligation to begin disposal in January 1998, the Court must then consider what relief to grant. The

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[12/] Lastly, contrary to the State petitioners' contention (Br. 43), DOE's decision to receive relatively small amounts of weapons grade foreign research reactor spent fuel at DOE facilities does not mean the agency must forfeit deference to its Final Interpretation. As DOE explained (60 Fed. Reg. 21,797 n.7) (J.A. 252), the agency took this fuel not under any authority of the NWPA, but under the Atomic Energy Act and for the specific purpose of forestalling the proliferation of nuclear weapons (J.A. 234-235). Furthermore, the number of these fuel elements received by DOE is much smaller than the commercial reactors' spent fuel, and the foreign fuel can be stored by DOE at existing DOE facilities (J.A. 234-235). DOE has not yet made a final decision on the general receipt of such fuel. The shipments the State petitioners refer to were accepted on an emergency basis. See South Carolina v. O'Leary, 64 F.3d 892 (3d Cir. 1995).

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petitioners seek a declaration that DOE's anticipated failure to meet the 1998 deadline violates the statute, as well as an order requiring DOE to develop and implement a plan to satisfy this obligation. They also request that the Court permit them to escrow fees otherwise due to be paid into the Nuclear Waste Fund. Petitioners' relief, however, should be limited to setting aside that portion of the Final Interpretation that concludes there is no unconditional obligation, and to remanding the matter to DOE. Any further relief would be within the primary jurisdiction of the agency in the implementation of the Standard Contract.

Congress, when it created obligations for DOE in Section 302(a)(5)(B), was doing so only indirectly, choosing to require DOE to make those obligations a part of the agency's contract with the utilities. The introductory phrase to Section 302(a)(5) imposes the only direct obligation on DOE, and that is that the contracts shall have the provisions set out in subsections (A) and (B). Those provisions become part of the contract that DOE is authorized to enter into under Section 301(a)(1). DOE is obviously vested with considerable discretion to determine the other provisions of the contract where Congress has not spoken directly. And the agency's reasonable choices as these matters must be upheld on review. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. at 842-843; Commonwealth Edison, 877 F.2d at 1045-1047; GEUMCO, 764 F.2d at 905.

Even if petitioners were correct that Congress created in Section 302(a)(5)(B) an unconditional obligation to begin

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waste disposal in 1998, it is indisputable that Congress did not prescribe the consequences of a potential failure to satisfy that obligation. The Standard Contract, however, addresses these potential issues and provides an administrative remedy that requires the Contracting Officer to resolve these issues and to determine the consequences of a potential default.

Specifically, in Article IX, entitled "DELAYS," the parties waived liability for damages in the case of unavoidable delay and agreed to "adjust their schedules, as appropriate, to accommodate such delay." Art. IX, ¶ A (Stat. Add. A36). In the case of avoidable delay, the parties agreed that the "charges and schedules specified in this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay." Art. IX, ¶ B (ibid.). Article XVI requires that disputed questions of fact arising under the contract be submitted for resolution by the designated Contracting Officer (Stat. Add. A37). If a utility is dissatisfied with the decision of the Contracting Officer, it may appeal to the DOE Board of Contract Appeals (ibid.). See Commonwealth Edison, 877 F.2d at 1044 (disputed issue of meaning of term of the Standard Contract submitted to Contracting Officer and Board of Appeals).[13/]

[13/] Art. XVI, ¶ D (Stat. Add. A37) also provides that:

> This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph A above; *provided, however,* that nothing in

(continued...)

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As DOE recognized in its Final Interpretation, this remedy is applicable to any claim that DOE has not performed its obligation to accept spent fuel, and it establishes the relief that is appropriate in such an event. 60 Fed. Reg. 21,797 (J.A. 252). The agency, through its Contracting Officer, will have the specialized expertise to resolve the factual questions of whether any delay was avoidable or unavoidable, as well as what is an equitable adjustment of the charges assessed under the Standard Contract. Indeed, the Standard Contract makes it mandatory for the parties to submit such factual issues to the Contracting Officer for resolution (Stat. Add. A37). Thus, the agency has primary jurisdiction over the resolution of such questions, and the utilities are required to exhaust this administrative remedy before seeking relief in this Court. See McCarty v. Madigan, 503 U.S. 140, 144-145 (1992); McKart v. United States, 395 U.S. 185, 194 (1969); United States v. Western Pacific Railroad Co., 352 U.S. 59, 64 (1956); Far East Conference v. United States, 342 U.S. 570, 574-575 (1952); Allnet Communications Services, Inc. v. National Exchange Carrier Association, Inc., 965 F.2d 1118, 1120 (D.C. Cir. 1992).[14]

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[13] (...continued)

> this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

[14] The law of federal government contracts has a well-established rule that the resolution of factual disputes that are redressable by specific provisions of the contract are initially within the exclusive purview of the designated contracting officer, and (continued...)

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Consequently, the petitioners' claim for judicial review of DOE's Final Interpretation would be fully satisfied by relief from this Court declaring the Interpretation invalid. Petitioners complain generally that DOE has been unable, despite its best efforts, to complete development of a repository by 1998. The agency, however, is engaged in an unprecedented enterprise of vital significance to many interested parties. Whether the difficulties DOE has encountered in the course of the project were "avoidable" is a matter that this Court cannot resolve at this stage of the controversy. The petitioners' request for further relief to remediate the anticipated failure of DOE to begin waste disposal in 1998 are matters that must be presented to the agency first by the utilities under the procedures of the Standard Contract.[15/]

[14/] (...continued)
resort to a court remedy may only be had for review of the administrative determination. See United States v. Utah Construction & Mining Co., 384 U.S. 394, 401-403 (1966); Bethlehem Steel Corporation v. Grace Line, Inc., 416 F.2d 1096, 1105-1106 (D.C. Cir. 1969). Although this Court has declared that DOE's Standard Contract at issue here "should be viewed as a regulation," Commonwealth Edison Co. v. U.S. Dep't of Energy, 877 F.2d 1042, 1045 (D.C. Cir. 1989), the disputes clause of the Standard Contract is virtually identical to those commonly found in government contracts and construed in the case law to require resort to the administrative process before going to court.

[15/] Although the State petitioners are not parties to the Standard Contract and therefore cannot invoke its remedies, that fact should not entitle them to any greater relief in this Court. The statutory provision being construed concerns obligations Congress directed to be part of the contracts with the owners and generators of the waste, and consequently they are only directly enforceable by those parties and through the Standard Contract. The combination of the Administrative Procedure Act and Section 119 of the NWPA give the State petitioners a right of review in
(continued...)

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CONCLUSION

For the reasons set out above, the petitions for review should be denied. If the Court should grant the petitions, the relief should be limited to setting aside the Final Interpretation and remanding the matter to DOE.

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NOVEMBER 1995
90-1-4-4789

15/ (...continued)
this Court of the final decision of DOE in this case, and that is the Final Interpretation. Their relief is correspondingly limited to setting aside that decision.

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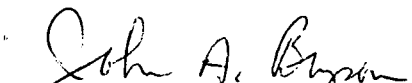
CERTIFICATE OF SERVICE AND COMPLIANCE WITH CIRCUIT RULE 28(d)(1)

I hereby certify that two copies of the foregoing Final Brief for the Respondents was served by December 5, 1995, by first-class mail, postage prepaid, on the counsel set out on the attached service list. I also certify that the Brief for the Respondents contains no more than the number of words allowed by Circuit Rule 28(d)(1).



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STATUTORY ADDENDUM

Excerpts from the Nuclear Waste Policy Act of 1982, as amended.

LIBRARY REFERENCES

American Digest System

Environmental protection and health regulations generally; disposition of nuclear waste, see Health and Environment ⟹25.5(5.5, 7).

Powers and duties of federal officers, agents, and employees generally, see United States ⟹40, 41.

Encyclopedias

Environmental protection and health regulations generally; disposition of nuclear waste, see C.J.S. Health and Environment §§ 61 et seq., 66.5.

Powers and duties of federal officers, agents, and employees generally, see C.J.S. United States § 38 et seq.

WESTLAW ELECTRONIC RESEARCH

Health and environment cases: 199k[add key number].

United States cases: 393k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

NOTES OF DECISIONS

State regulation or control 1

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1. **State regulation or control**

This part does not determine that there is a sufficient federal commitment to fuel storage and waste disposal to meet any requirements which state may have imposed as a condition for construction of additional nuclear power plants. Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Com'n, 1983, 103 S.Ct. 1713, 461 U.S. 190, 75 L.Ed.2d 752.

§ 10132. Recommendation of candidate sites for site characterization

(a) Guidelines

Not later than 180 days after January 7, 1983, the Secretary, following consultation with the Council on Environmental Quality, the Administrator of the Environmental Protection Agency, the Director of the United States Geological Survey, and interested Governors, and the concurrence of the Commission shall issue general guidelines for the recommendation of sites for repositories. Such guidelines shall specify detailed geologic considerations that shall be primary criteria for the selection of sites in various geologic media. Such guidelines shall specify factors that qualify or disqualify any site from development as a repository, including factors pertaining to the location of valuable natural resources, hydrology, geophysics, seismic activity, and atomic energy defense activities, proximity to water supplies, proximity to populations, the effect upon the rights of users of water, and proximity to components of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Lands. Such guidelines shall take into consideration the proximity to sites where high-level radioactive waste and spent nuclear fuel is generated or temporarily stored and the transporta-

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tion and safety factors involved in moving such waste to a repository. Such guidelines shall specify population factors that will disqualify any site from development as a repository if any surface facility of such repository would be located (1) in a highly populated area; or (2) adjacent to an area 1 mile by 1 mile having a population of not less than 1,000 individuals. Such guidelines also shall require the Secretary to consider the cost and impact of transporting to the repository site the solidified high-level radioactive waste and spent fuel to be disposed of in the repository and the advantages of regional distribution in the siting of repositories. Such guidelines shall require the Secretary to consider the various geologic media in which sites for repositories may be located and, to the extent practicable, to recommend sites in different geologic media. The Secretary shall use guidelines established under this subsection in considering candidate sites for recommendation under subsection (b) of this section. The Secretary may revise such guidelines from time to time, consistent with the provisions of this subsection.

(b) Recommendation by Secretary to President

(1)(A) Following the issuance of guidelines under subsection (a) of this section and consultation with the Governors of affected States, the Secretary shall nominate at least 5 sites that he determines suitable for site characterization for selection of the first repository site.

(B) Subsequent to such nomination, the Secretary shall recommend to the President 3 of the nominated sites not later than January 1, 1985 for characterization as candidate sites.

(C) Such recommendations under subparagraph (B) shall be consistent with the provisions of section 10225 of this title.

(D) Each nomination of a site under this subsection shall be accompanied by an environmental assessment, which shall include a detailed statement of the basis for such recommendation and of the probable impacts of the site characterization activities planned for such site, and a discussion of alternative activities relating to site characterization that may be undertaken to avoid such impacts. Such environmental assessment shall include—

(i) an evaluation by the Secretary as to whether such site is suitable for site characterization under the guidelines established under subsection (a) of this section;

(ii) an evaluation by the Secretary as to whether such site is suitable for development as a repository under each such guideline that does not require site characterization as a prerequisite for application of such guideline;

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(iii) an evaluation by the Secretary of the effects of the site characterization activities at such site on the public health and safety and the environment;

(iv) a reasonable comparative evaluation by the Secretary of such site with other sites and locations that have been considered;

(v) a description of the decision process by which such site was recommended; and

(vi) an assessment of the regional and local impacts of locating the proposed repository at such site.

(E) (i) [1] The issuance of any environmental assessment under this paragraph shall be considered to be a final agency action subject to judicial review in accordance with the provisions of chapter 7 of Title 5 and section 10139 of this title. Such judicial review shall be limited to the sufficiency of such environmental assessment with respect to the items described in clauses (i) through (vi) of subparagraph (E) [2].

(F) Each environmental assessment prepared under this paragraph shall be made available to the public.

(G) Before nominating a site, the Secretary shall notify the Governor and legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, of such nomination and the basis for such nomination.

(2) Before nominating any site the Secretary shall hold public hearings in the vicinity of such site to inform the residents of the area in which such site is located of the proposed nomination of such site and to receive their comments. At such hearings, the Secretary shall also solicit and receive any recommendations of such residents with respect to issues that should be addressed in the environmental assessment described in paragraph (1) and the site characterization plan described in section 10133(b)(1) of this title.

(3) In evaluating the sites nominated under this section prior to any decision to recommend a site as a candidate site, the Secretary shall use available geophysical, geologic, geochemical and hydrologic, and other information and shall not conduct any preliminary borings or excavations at a site unless (i) such preliminary boring or excavation activities were in progress on January 7, 1983, or (ii) the Secretary certifies that such available information from other sources, in the absence of preliminary borings or excavations, will not be adequate to satisfy applicable requirements of this chapter or any other law: *Provided*, That preliminary borings or excavations under this section shall not exceed a diameter of 6 inches.

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(c) Presidential review of recommended candidate sites

(1) The President shall review each candidate site recommendation made by the Secretary under subsection (b) of this section. Not later than 60 days after the submission by the Secretary of a recommendation of a candidate site, the President, in his discretion, may either approve or disapprove such candidate site, and shall transmit any such decision to the Secretary and to either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be. If, during such 60-day period, the President fails to approve or disapprove such candidate site, or fails to invoke his authority under paragraph (2) to delay his decision, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

(2) The President may delay for not more than 6 months his decision under paragraph (1) to approve or disapprove a candidate site, upon determining that the information provided with the recommendation of the Secretary is insufficient to permit a decision within the 60-day period referred to in paragraph (1). The President may invoke his authority under this paragraph by submitting written notice to the Congress, within such 60-day period, of his intent to invoke such authority. If the President invokes such authority, but fails to approve or disapprove the candidate site involved by the end of such 6-month period, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

(d) Preliminary activities

Except as otherwise provided in this section, each activity of the President or the Secretary under this section shall be considered to be a preliminary decisionmaking activity. No such activity shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act [42 U.S.C.A. § 4332(2)(E) or (F)].

(Pub.L. 97–425, Title I, § 112, Jan. 7, 1983, 96 Stat. 2208; Pub.L. 100–202, § 101(d) [Title III, § 300], Dec. 22, 1987, 101 Stat. 1329–104, 1329–121; Pub.L. 100–203, Title V, § 5011(b) to (d), Dec. 22, 1987, 101 Stat. 1330–228; Pub.L. 102–154, Title I, Nov. 13, 1991, 105 Stat. 1000.)

[1] So in original. There is no cl. (ii).

[2] So in original. Probably should be "(D)".

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§ 10143. Title to material

Delivery, and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this part shall constitute a transfer to the Secretary of title to such waste or spent fuel.

(Pub.L. 97–425, Title I, § 123, Jan. 7, 1983, 96 Stat. 2229.)

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Encyclopedias

Environmental protection and health regulations generally; disposition of nuclear waste, see C.J.S. Health and Environment §§ 61 et seq., 66.5.

Regulation of commerce in general; health and environmental regulation, see C.J.S. Commerce § 54 et seq.

Transportation of hazardous material by common carrier in general, see C.J.S. Carriers § 389.

WESTLAW ELECTRONIC RESEARCH

Carriers cases: 70k[add key number].
Commerce cases: 83k[add key number].
Health and environment cases: 199k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

PART C—MONITORED RETRIEVABLE STORAGE

§ 10161. Monitored retrievable storage

(a) Findings

The Congress finds that—

(1) long-term storage of high-level radioactive waste or spent nuclear fuel in monitored retrievable storage facilities is an option for providing safe and reliable management of such waste or spent fuel;

(2) the executive branch and the Congress should proceed as expeditiously as possible to consider fully a proposal for construction of one or more monitored retrievable storage facilities to provide such long-term storage;

(3) the Federal Government has the responsibility to ensure that site-specific designs for such facilities are available as provided in this section;

(4) the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities have the responsibility to pay the costs of the long-term storage of such waste and spent fuel; and

(5) disposal of high-level radioactive waste and spent nuclear fuel in a repository developed under this chapter should proceed regardless of any construction of a monitored retrievable storage facility pursuant to this section.

(b) Submission of proposal by Secretary

(1) On or before June 1, 1985, the Secretary shall complete a detailed study of the need for and feasibility of, and shall submit to the Congress a proposal for, the construction of one or more monitored retrievable storage facilities for high-level radioactive waste and spent nuclear fuel. Each such facility shall be designed—

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(A) to accommodate spent nuclear fuel and high-level radioactive waste resulting from civilian nuclear activities;

(B) to permit continuous monitoring, management, and maintenance of such spent fuel and waste for the foreseeable future;

(C) to provide for the ready retrieval of such spent fuel and waste for further processing or disposal; and

(D) to safely store such spent fuel and waste as long as may be necessary by maintaining such facility through appropriate means, including any required replacement of such facility.

(2) Such proposal shall include—

(A) the establishment of a Federal program for the siting, development, construction, and operation of facilities capable of safely storing high-level radioactive waste and spent nuclear fuel, which facilities are to be licensed by the Commission;

(B) a plan for the funding of the construction and operation of such facilities, which plan shall provide that the costs of such activities shall be borne by the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities;

(C) site-specific designs, specifications, and cost estimates sufficient to (i) solicit bids for the construction of the first such facility; (ii) support congressional authorization of the construction of such facility; and (iii) enable completion and operation of such facility as soon as practicable following congressional authorization of such facility; and

(D) a plan for integrating facilities constructed pursuant to this section with other storage and disposal facilities authorized in this chapter.

(3) In formulating such proposal, the Secretary shall consult with the Commission and the Administrator, and shall submit their comments on such proposal to the Congress at the time such proposal is submitted.

(4) The proposal shall include, for the first such facility, at least 3 alternative sites and at least 5 alternative combinations of such proposed sites and facility designs consistent with the criteria of paragraph (1). The Secretary shall recommend the combination among the alternatives that the Secretary deems preferable. The environmental assessment under subsection (c) of this section shall include a full analysis of the relative advantages and disadvantages of all 5 such alternative combinations of proposed sites and proposed facility designs.

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(c) Environmental impact statements

(1) Preparation and submission to the Congress of the proposal required in this section shall not require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Secretary shall prepare, in accordance with regulations issued by the Secretary implementing such Act [42 U.S.C.A. § 4321 et seq.], an environmental assessment with respect to such proposal. Such environmental assessment shall be based upon available information regarding alternative technologies for the storage of spent nuclear fuel and high-level radioactive waste. The Secretary shall submit such environmental assessment to the Congress at the time such proposal is submitted.

(2) If the Congress by law, after review of the proposal submitted by the Secretary under subsection (b) of this section, specifically authorizes construction of a monitored retrievable storage facility, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall apply with respect to construction of such facility, except that any environmental impact statement prepared with respect to such facility shall not be required to consider the need for such facility or any alternative to the design criteria for such facility set forth in subsection (b)(1) of this section.

(d) Licensing

Any facility authorized pursuant to this section shall be subject to licensing under section 5842(3) of this title. In reviewing the application filed by the Secretary for licensing of the first such facility, the Commission may not consider the need for such facility or any alternative to the design criteria for such facility set forth in subsection (b)(1) of this section.

(e) Clarification

Nothing in this section limits the consideration of alternative facility designs consistent with the criteria of subsection (b)(1) of this section in any environmental impact statement, or in any licensing procedure of the Commission, with respect to any monitored, retrievable facility authorized pursuant to this section.

(f) Impact assistance

(1) Upon receipt by the Secretary of congressional authorization to construct a facility described in subsection (b) of this section, the Secretary shall commence making annual impact aid payments to appropriate units of general local government in order to mitigate any social or economic impacts resulting from the construction and

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subsequent operation of any such facility within the jurisdictional boundaries of any such unit.

(2) Payments made available to units of general local government under this subsection shall be—

(A) allocated in a fair and equitable manner, with priority given to units of general local government determined by the Secretary to be most severely affected; and

(B) utilized by units of general local government only for planning, construction, maintenance, and provision of public services related to the siting of such facility.

(3) Such payments shall be subject to such terms and conditions as the Secretary determines are necessary to ensure achievement of the purposes of this subsection. The Secretary shall issue such regulations as may be necessary to carry out the provisions of this subsection.

(4) Such payments shall be made available entirely from funds held in the Nuclear Waste Fund established in section 10222(c) of this title and shall be available only to the extent provided in advance in appropriation Acts.

(5) The Secretary may consult with appropriate units of general local government in advance of commencement of construction of any such facility in an effort to determine the level of payments each such unit is eligible to receive under this subsection.

(g) Limitation

No monitored retrievable storage facility developed pursuant to this section may be constructed in any State in which there is located any site approved for site characterization under section 10132 of this title. The restriction in the preceding sentence shall only apply until such time as the Secretary decides that such candidate site is no longer a candidate site under consideration for development as a repository. Such restriction shall continue to apply to any site selected for construction as a repository.

(h) Participation of States and Indian tribes

Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility.

(Pub.L. 97–425, Title I, § 141, Jan. 7, 1983, 96 Stat. 2241.)

USCA T42 (9601-10,400)—27

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STATUTORY ADDENDUM

Excerpts from Public Law 97-425, the Nuclear Waste Policy Act of 1982, as enacted.

Public Law 97-425
97th Congress

An Act

To provide for the development of repositories for the disposal of high-level radioactive waste and spent nuclear fuel, to establish a program of research, development, and demonstration regarding the disposal of high-level radioactive waste and spent nuclear fuel, and for other purposes.

Jan. 7, 1983
[H.R. 3809]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Nuclear Waste Policy Act of 1982.
42 USC 10101 note.

SHORT TITLE AND TABLE OF CONTENTS

SECTION 1. This Act may be cited as the "Nuclear Waste Policy Act of 1982".

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DEFINITIONS

42 USC 10101.

SEC. 2. For purposes of this Act:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "affected Indian tribe" means any Indian tribe—

(A) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located;

(B) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: *Provided,* That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe;

(3) The term "atomic energy defense activity" means any activity of the Secretary performed in whole or in part in carrying out any of the following functions:

(A) naval reactors development;

(B) weapons activities including defense inertial confinement fusion;

(C) verification and control technology;

(D) defense nuclear materials production;

(E) defense nuclear waste and materials by-products management;

(F) defense nuclear materials security and safeguards and security investigations; and

(G) defense research and development.

(4) The term "candidate site" means an area, within a geologic and hydrologic system, that is recommended by the Secretary under section 112 for site characterization, approved by the President under section 112 for site characterization, or undergoing site characterization under section 113.

(5) The term "civilian nuclear activity" means any atomic energy activity other than an atomic energy defense activity.

(6) The term "civilian nuclear power reactor" means a civilian nuclear powerplant required to be licensed under section 103 or 104 b. of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134(b)).

(7) The term "Commission" means the Nuclear Regulatory Commission.

(8) The term "Department" means the Department of Energy.

(9) The term "disposal" means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material with no foreseeable intent of recovery, whether or not such emplacement permits the recovery of such waste.

(10) The terms "disposal package" and "package" mean the primary container that holds, and is in contact with, solidified high-level radioactive waste, spent nuclear fuel, or other radioactive materials, and any overpacks that are emplaced at a repository.

(11) The term "engineered barriers" means manmade components of a disposal system designed to prevent the release of radionuclides into the geologic medium involved. Such term includes the high-level radioactive waste form, high-level radioactive waste canisters, and other materials placed over and around such canisters.

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

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

(B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

(13) The term "Federal agency" means any Executive agency, as defined in section 105 of title 5, United States Code.

(14) The term "Governor" means the chief executive officer of a State.

(15) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village, as defined in section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(c)).

(16) The term "low-level radioactive waste" means radioactive material that—

(A) is not high-level radioactive waste, spent nuclear fuel, transuranic waste, or by-product material as defined in

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section 11e(2) of the Atomic Energy Act of 1954 (42 U.S.C. 2014(e)(2)); and

(B) the Commission, consistent with existing law, classifies as low-level radioactive waste.

(17) The term "Office" means the Office of Civilian Radioactive Waste Management established in section 305.

Post, p. 2262.

(18) The term "repository" means any system licensed by the Commission that is intended to be used for, or may be used for, the permanent deep geologic disposal of high-level radioactive waste and spent nuclear fuel, whether or not such system is designed to permit the recovery, for a limited period during initial operation, of any materials placed in such system. Such term includes both surface and subsurface areas at which high-level radioactive waste and spent nuclear fuel handling activities are conducted.

(19) The term "reservation" means—

(A) any Indian reservation or dependent Indian community referred to in clause (a) or (b) of section 1151 of title 18, United States Code; or

(B) any land selected by an Alaska Native village or regional corporation under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

(20) The term "Secretary" means the Secretary of Energy.

(21) The term "site characterization" means—

(A) siting research activities with respect to a test and evaluation facility at a candidate site; and

(B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

(22) The term "siting research" means activities, including borings, surface excavations, shaft excavations, subsurface lateral excavations and borings, and in situ testing, to determine the suitability of a site for a test and evaluation facility.

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

(24) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(25) The term "storage" means retention of high-level radioactive waste, spent nuclear fuel, or transuranic waste with the intent to recover such waste or fuel for subsequent use, processing, or disposal.

(26) The term "Storage Fund" means the Interim Storage Fund established in section 137(c).

Post. p. 2237.

(27) The term "test and evaluation facility" means an at-depth, prototypic, underground cavity with subsurface lateral

excavations extending from a central shaft that is used for research and development purposes, including the development of data and experience for the safe handling and disposal of solidified high-level radioactive waste, transuranic waste, or spent nuclear fuel.

(28) The term "unit of general local government" means any borough, city, county, parish, town, township, village, or other general purpose political subdivision of a State.

(29) The term "Waste Fund" means the Nuclear Waste Fund established in section 302(c). *Post*, p. 2257.

SEPARABILITY

SEC. 3. If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby. 42 USC 10102.

TERRITORIES AND POSSESSIONS

SEC. 4. Nothing in this Act shall be deemed to repeal, modify, or amend the provisions of section 605 of the Act of March 12, 1980 (48 U.S.C. 1491). 42 USC 10103.

OCEAN DISPOSAL

SEC. 5. Nothing in this Act shall be deemed to affect the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. 1401 et seq.). 42 USC 10104.

LIMITATION ON SPENDING AUTHORITY

SEC. 6. The authority under this Act to incur indebtedness, or enter into contracts, obligating amounts to be expended by the Federal Government shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts. 42 USC 10105.

PROTECTION OF CLASSIFIED NATIONAL SECURITY INFORMATION

SEC. 7. Nothing in this Act shall require the release or disclosure to any person or to the Commission of any classified national security information. 42 USC 10106.

APPLICABILITY

SEC. 8. (a) ATOMIC ENERGY DEFENSE ACTIVITIES.—Subject to the provisions of subsection (c), the provisions of this Act shall not apply with respect to any atomic energy defense activity or to any facility used in connection with any such activity. 42 USC 10107.

(b) EVALUATION BY PRESIDENT.—(1) Not later than 2 years after the date of the enactment of this Act, the President shall evaluate the use of disposal capacity at one or more repositories to be developed under subtitle A of title I for the disposal of high-level radioactive waste resulting from atomic energy defense activities. Such evaluation shall take into consideration factors relating to cost *Post*, p. 2207.

relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

RECOMMENDATION OF CANDIDATE SITES FOR SITE CHARACTERIZATION

42 USC 10132.

SEC. 112. (a) GUIDELINES.—Not later than 180 days after the date of the enactment of this Act, the Secretary, following consultation with the Council on Environmental Quality, the Administrator of the Environmental Protection Agency, the Director of the Geological Survey, and interested Governors, and the concurrence of the Commission shall issue general guidelines for the recommendation of sites for repositories. Such guidelines shall specify detailed geologic considerations that shall be primary criteria for the selection of sites in various geologic media. Such guidelines shall specify factors that qualify or disqualify any site from development as a repository, including factors pertaining to the location of valuable natural resources, hydrology, geophysics, seismic activity, and atomic energy defense activities, proximity to water supplies, proximity to populations, the effect upon the rights of users of water, and proximity to components of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Wilderness Preservation System, or National Forest Lands. Such guidelines shall take into consideration the proximity to sites where high-level radioactive waste and spent nuclear fuel is generated or temporarily stored and the transportation and safety factors involved in moving such waste to a repository. Such guidelines shall specify population factors that will disqualify any site from development as a repository if any surface facility of such repository would be located (1) in a highly populated area; or (2) adjacent to an area 1 mile by 1 mile having a population of not less than 1,000 individuals. Such guidelines also shall require the Secretary to consider the cost and impact of transporting to the repository site the solidified high-level radioactive waste and spent fuel to be disposed of in the repository and the advantages of regional distribution in the siting of repositories. Such guidelines shall require the Secretary to consider the various geologic media in which sites for repositories may be located and, to the extent practicable, to recommend sites in different geologic media. The Secretary shall use guidelines established under this subsection in considering candidate sites for recommendation under subsection (b). The Secretary may revise such guidelines from time to time, consistent with the provisions of this subsection.

(b) RECOMMENDATION BY SECRETARY TO THE PRESIDENT.—(1)(A) Following the issuance of guidelines under subsection (a) and consultation with the Governors of affected States, the Secretary shall nominate at least 5 sites that he determines suitable for site characterization for selection of the first repository site.

Recommendation date.

(B) Subsequent to such nomination, the Secretary shall recommend to the President 3 of the nominated sites not later than January 1, 1985 for characterization as candidate sites.

(C) Not later than July 1, 1989, the Secretary shall nominate 5 sites, which shall include at least 3 additional sites not nominated under subparagraph (A), and recommend by such date to the President from such 5 nominated sites 3 candidate sites the Secretary determines suitable for site characterization for selection of the second repository. The Secretary may not nominate any site previ-

ously nominated under subparagraph (A), that was not recommended as a candidate site under subparagraph (B).

(D) Such recommendations under subparagraphs (B) and (C) shall be consistent with the provisions of section 305.

Post, p. 2262.

Environmental assessment.

(E) Each nomination of a site under this subsection shall be accompanied by an environmental assessment, which shall include a detailed statement of the basis for such recommendation and of the probable impacts of the site characterization activities planned for such site, and a discussion of alternative activities relating to site characterization that may be undertaken to avoid such impacts. Such environmental assessment shall include—

(i) an evaluation by the Secretary as to whether such site is suitable for site characterization under the guidelines established under subsection (a);

(ii) an evaluation by the Secretary as to whether such site is suitable for development as a repository under each such guideline that does not require site characterization as a prerequisite for application of such guideline;

(iii) an evaluation by the Secretary of the effects of the site characterization activities at such site on the public health and safety and the environment;

(iv) a reasonable comparative evaluation by the Secretary of such site with other sites and locations that have been considered;

(v) a description of the decision process by which such site was recommended; and

(vi) an assessment of the regional and local impacts of locating the proposed repository at such site.

Judicial review.

(F)(i) The issuance of any environmental assessment under this paragraph shall be considered to be a final agency action subject to judicial review in accordance with the provisions of chapter 7 of title 5, United States Code, and section 119. Such judicial review shall be limited to the sufficiency of such environmental assessment with respect to the items described in clauses (i) through (vi) of subparagraph (E).

5 USC 701 *et seq.*

Public availability.

(G) Each environmental assessment prepared under this paragraph shall be made available to the public.

(H) Before nominating a site, the Secretary shall notify the Governor and legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, of such nomination and the basis for such nomination.

Hearings.

(2) Before nominating any site the Secretary shall hold public hearings in the vicinity of such site to inform the residents of the area in which such site is located of the proposed nomination of such site and to receive their comments. At such hearings, the Secretary shall also solicit and receive any recommendations of such residents with respect to issues that should be addressed in the environmental assessment described in paragraph (1) and the site characterization plan described in section 113(b)(1).

(3) In evaluating the sites nominated under this section prior to any decision to recommend a site as a candidate site, the Secretary shall use available geophysical, geologic, geochemical and hydrologic, and other information and shall not conduct any preliminary borings or excavations at a site unless (i) such preliminary boring or excavation activities were in progress upon the date of enactment of this Act or (ii) the Secretary certifies that such available informa-

tion from other sources, in the absence of preliminary borings or excavations, will not be adequate to satisfy applicable requirements of this Act or any other law: *Provided,* That preliminary borings or excavations under this section shall not exceed a diameter of 6 inches.

Decision transmittal or notification.

(c) PRESIDENTIAL REVIEW OF RECOMMENDED CANDIDATE SITES.—(1) The President shall review each candidate site recommendation made by the Secretary under subsection (b). Not later than 60 days after the submission by the Secretary of a recommendation of a candidate site, the President, in his discretion, may either approve or disapprove such candidate site, and shall transmit any such decision to the Secretary and to either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be. If, during such 60-day period, the President fails to approve or disapprove such candidate site, or fails to invoke his authority under paragraph (2) to delay his decision, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

(2) The President may delay for not more than 6 months his decision under paragraph (1) to approve or disapprove a candidate site, upon determining that the information provided with the recommendation of the Secretary is insufficient to permit a decision within the 60-day period referred to in paragraph (1). The President may invoke his authority under this paragraph by submitting written notice to the Congress, within such 60-day period, of his intent to invoke such authority. If the President invokes such authority, but fails to approve or disapprove the candidate site involved by the end of such 6-month period, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

(d) CONTINUATION OF CANDIDATE SITE SCREENING.—After the required recommendation of candidate sites under subsection (b), the Secretary may continue, as he determines necessary, to identify and study other sites to determine their suitability for recommendation for site characterization, in accordance with the procedures described in this section.

(e) PRELIMINARY ACTIVITIES.—Except as otherwise provided in this section, each activity of the President or the Secretary under this section shall be considered to be a preliminary decisionmaking activity. No such activity shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(f) TIMELY SITE CHARACTERIZATION.—Nothing in this section may be construed as prohibiting the Secretary from continuing ongoing or presently planned site characterization at any site on Department of Energy land for which the location of the principal borehole has been approved by the Secretary by August 1, 1982, except that (1) the environmental assessment described in subsection (b)(1) shall be prepared and made available to the public before proceeding to sink shafts at any such site; and (2) the Secretary shall not continue site characterization at any such site unless such site is among the

candidate sites recommended by the Secretary under the first sentence of subsection (b) for site characterization and approved by the President under subsection (c); and (3) the Secretary shall conduct public hearings under 113(b)(2) and comply with requirements under section 117 of this Act within one year of the date of enactment.

Hearings.

SITE CHARACTERIZATION

SEC. 113. (a) IN GENERAL.—The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization activities beginning with the candidate sites that have been approved under section 112 and are located in various geologic media. The Secretary shall consider fully the comments received under subsection (b)(2) and section 112(b)(2) and shall, to the maximum extent practicable and in consultation with the Governor of the State involved or the governing body of the affected Indian tribe involved, conduct site characterization activities in a manner that minimizes any significant adverse environmental impacts identified in such comments or in the environmental assessment submitted under subsection (b)(1).

42 USC 10133.

(b) COMMISSION AND STATES.—(1) Before proceeding to sink shafts at any candidate site, the Secretary shall submit for such candidate site to the Commission and to either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe on whose reservation such candidate site is located, as the case may be, for their review and comment—

Plan submittal, review and comment.

(A) a general plan for site characterization activities to be conducted at such candidate site, which plan shall include—

(i) a description of such candidate site;

(ii) a description of such site characterization activities, including the following: the extent of planned excavations, plans for any onsite testing with radioactive or nonradioactive material, plans for any investigation activities that may affect the capability of such candidate site to isolate high-level radioactive waste and spent nuclear fuel, and plans to control any adverse, safety-related impacts from such site characterization activities;

(iii) plans for the decontamination and decommissioning of such candidate site, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities if it is determined unsuitable for application for a construction authorization for a repository;

(iv) criteria to be used to determine the suitability of such candidate site for the location of a repository, developed pursuant to section 112(a); and

(v) any other information required by the Commission;

(B) a description of the possible form or packaging for the high-level radioactive waste and spent nuclear fuel to be emplaced in such repository, a description, to the extent practicable, of the relationship between such waste form or packaging and the geologic medium of such site, and a description of the activities being conducted by the Secretary with respect to such possible waste form or packaging or such relationship; and

(C) a conceptual repository design that takes into account likely site-specific requirements.

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

TITLE TO MATERIAL

SEC. 123. Delivery, and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this subtitle shall constitute a transfer to the Secretary of title to such waste or spent fuel. 42 USC 10143.

CONSIDERATION OF EFFECT OF ACQUISITION OF WATER RIGHTS

SEC. 124. The Secretary shall give full consideration to whether the development, construction, and operation of a repository may require any purchase or other acquisition of water rights that will have a significant adverse effect on the present or future development of the area in which such repository is located. The Secretary shall mitigate any such adverse effects to the maximum extent practicable. 42 USC 10144.

TERMINATION OF CERTAIN PROVISIONS

SEC. 125. Sections 119 and 120 shall cease to have effect at such time as a repository developed under this subtitle is licensed to receive and possess high-level radioactive waste and spent nuclear fuel. 42 USC 10145.

SUBTITLE B—INTERIM STORAGE PROGRAM

FINDINGS AND PURPOSES

SEC. 131. (a) FINDINGS.—The Congress finds that— 42 USC 10151.

(1) the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical;

(2) the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor; and

(3) the Federal Government has the responsibility to provide, in accordance with the provisions of this subtitle, not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such

title 31, United States Code, and the purposes for which securities may be issued under such Act are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

Ante, p. 937.

(6) Any appropriations made available to the Storage Fund for any purpose described in subsection (d) shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Storage Fund, less the average undisbursed cash balance in the Storage Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

Interest payments.

Deferral.

SEC. 137. (a) TRANSPORTATION.—(1) Transportation of spent nuclear fuel under section 136(a) shall be subject to licensing and regulation by the Commission and by the Secretary of Transportation as provided for transportation of commercial spent nuclear fuel under existing law.

42 USC 10157.

(2) The Secretary, in providing for the transportation of spent nuclear fuel under this Act, shall utilize by contract private industry to the fullest extent possible in each aspect of such transportation. The Secretary shall use direct Federal services for such transportation only upon a determination of the Secretary of Transportation, in consultation with the Secretary, that private industry is unable or unwilling to provide such transportation services at reasonable cost.

SUBTITLE C—MONITORED RETRIEVABLE STORAGE

MONITORED RETRIEVABLE STORAGE

SEC. 141. (a) FINDINGS.—The Congress finds that—

42 USC 10161.

(1) long-term storage of high-level radioactive waste or spent nuclear fuel in monitored retrievable storage facilities is an option for providing safe and reliable management of such waste or spent fuel;

(2) the executive branch and the Congress should proceed as expeditiously as possible to consider fully a proposal for construction of one or more monitored retrievable storage facilities to provide such long-term storage;

(3) the Federal Government has the responsibility to ensure that site-specific designs for such facilities are available as provided in this section;

(4) the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities have the responsibility to pay the costs of the long-term storage of such waste and spent fuel; and

(5) disposal of high-level radioactive waste and spent nuclear fuel in a repository developed under this Act should proceed

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regardless of any construction of a monitored retrievable storage facility pursuant to this section.

(b) SUBMISSION OF PROPOSAL BY SECRETARY.—(1) On or before June 1, 1985, the Secretary shall complete a detailed study of the need for and feasibility of, and shall submit to the Congress a proposal for, the construction of one or more monitored retrievable storage facilities for high-level radioactive waste and spent nuclear fuel. Each such facility shall be designed—

(A) to accommodate spent nuclear fuel and high-level radioactive waste resulting from civilian nuclear activities;

(B) to permit continuous monitoring, management, and maintenance of such spent fuel and waste for the foreseeable future;

(C) to provide for the ready retrieval of such spent fuel and waste for further processing or disposal; and

(D) to safely store such spent fuel and waste as long as may be necessary by maintaining such facility through appropriate means, including any required replacement of such facility.

(2) Such proposal shall include—

(A) the establishment of a Federal program for the siting, development, construction, and operation of facilities capable of safely storing high-level radioactive waste and spent nuclear fuel, which facilities are to be licensed by the Commission;

(B) a plan for the funding of the construction and operation of such facilities, which plan shall provide that the costs of such activities shall be borne by the generators and owners of the high-level radioactive waste and spent nuclear fuel to be stored in such facilities;

(C) site-specific designs, specifications, and cost estimates sufficient to (i) solicit bids for the construction of the first such facility; (ii) support congressional authorization of the construction of such facility; and (iii) enable completion and operation of such facility as soon as practicable following congressional authorization of such facility; and

(D) a plan for integrating facilities constructed pursuant to this section with other storage and disposal facilities authorized in this Act.

Consultations.

(3) In formulating such proposal, the Secretary shall consult with the Commission and the Administrator, and shall submit their comments on such proposal to the Congress at the time such proposal is submitted.

(4) The proposal shall include, for the first such facility, at least 3 alternative sites and at least 5 alternative combinations of such proposed sites and facility designs consistent with the criteria of paragraph (b)(1). The Secretary shall recommend the combination among the alternatives that the Secretary deems preferable. The environmental assessment under subsection (c) shall include a full analysis of the relative advantages and disadvantages of all 5 such alternative combinations of proposed sites and proposed facility designs.

(c) ENVIRONMENTAL IMPACT STATEMENTS.—(1) Preparation and submission to the Congress of the proposal required in this section shall not require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Secretary shall prepare, in accordance with regulations issued by the Secretary implementing such Act, an environmental assessment with respect to such proposal. Such environmental assessment shall be based upon available

Environmental assessment.

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information regarding alternative technologies for the storage of spent nuclear fuel and high-level radioactive waste. The Secretary shall submit such environmental assessment to the Congress at the time such proposal is submitted.

Submittal to Congress.

(2) If the Congress by law, after review of the proposal submitted by the Secretary under subsection (b), specifically authorizes construction of a monitored retrievable storage facility, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall apply with respect to construction of such facility, except that any environmental impact statement prepared with respect to such facility shall not be required to consider the need for such facility or any alternative to the design criteria for such facility set forth in subsection (b)(1).

(d) LICENSING.—Any facility authorized pursuant to this section shall be subject to licensing under section 202(3) of the Energy Reorganization Act of 1974 (42 U.S.C. 5842(3)). In reviewing the application filed by the Secretary for licensing of the first such facility, the Commission may not consider the need for such facility or any alternative to the design criteria for such facility set forth in subsection (b)(1).

(e) CLARIFICATION.—Nothing in this section limits the consideration of alternative facility designs consistent with the criteria of paragraph (b)(1) in any environmental impact statement, or in any licensing procedure of the Commission, with respect to any monitored, retrievable facility authorized pursuant to this section.

(f) IMPACT ASSISTANCE.—(1) Upon receipt by the Secretary of congressional authorization to construct a facility described in subsection (b), the Secretary shall commence making annual impact aid payments to appropriate units of general local government in order to mitigate any social or economic impacts resulting from the construction and subsequent operation of any such facility within the jurisdictional boundaries of any such unit.

Payments.

(2) Payments made available to units of general local government under this subsection shall be—

(A) allocated in a fair and equitable manner, with priority given to units of general local government determined by the Secretary to be most severely affected; and

(B) utilized by units of general local government only for planning, construction, maintenance, and provision of public services related to the siting of such facility.

(3) Such payments shall be subject to such terms and conditions as the Secretary determines are necessary to ensure achievement of the purposes of this subsection. The Secretary shall issue such regulations as may be necessary to carry out the provisions of this subsection.

Regulations.

(4) Such payments shall be made available entirely from funds held in the Nuclear Waste Fund established in section 302(c) and shall be available only to the extent provided in advance in appropriation Acts.

(5) The Secretary may consult with appropriate units of general local government in advance of commencement of construction of any such facility in an effort to determine the level of payments each such unit is eligible to receive under this subsection.

Consultations.

(g) LIMITATION.—No monitored retrievable storage facility developed pursuant to this section may be constructed in any State in which there is located any site approved for site characterization under section 112. The restriction in the preceding sentence shall

Ante, p. 2208.

only apply until such time as the Secretary decides that such candidate site is no longer a candidate site under consideration for development as a repository. Such restriction shall continue to apply to any site selected for construction as a repository.

(h) PARTICIPATION OF STATES AND INDIAN TRIBES.—Any facility authorized pursuant to this section shall be subject to the provisions of sections 115, 116(a), 116(b), 116(d), 117, and 118. For purposes of carrying out the provisions of this subsection, any reference in sections 115 through 118 to a repository shall be considered to refer to a monitored retrievable storage facility.

Ante, pp. 2217, 2220, 2222, 2225.

SUBTITLE D—LOW-LEVEL RADIOACTIVE WASTE

FINANCIAL ARRANGEMENTS FOR LOW-LEVEL RADIOACTIVE WASTE SITE CLOSURE

42 USC 10171.

SEC. 151. (a) FINANCIAL ARRANGEMENTS.—(1) The Commission shall establish by rule, regulation, or order, after public notice, and in accordance with section 181 of the Atomic Energy Act of 1954 (42 U.S.C. 2231), such standards and instructions as the Commission may deem necessary or desirable to ensure in the case of each license for the disposal of low-level radioactive waste that an adequate bond, surety, or other financial arrangement (as determined by the Commission) will be provided by a licensee to permit completion of all requirements established by the Commission for the decontamination, decommissioning, site closure, and reclamation of sites, structures, and equipment used in conjunction with such low-level radioactive waste. Such financial arrangements shall be provided and approved by the Commission, or, in the case of sites within the boundaries of any agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021), by the appropriate State or State entity, prior to issuance of licenses for low-level radioactive waste disposal or, in the case of licenses in effect on the date of the enactment of this Act, prior to termination of such licenses.

(2) If the Commission determines that any long-term maintenance or monitoring, or both, will be necessary at a site described in paragraph (1), the Commission shall ensure before termination of the license involved that the licensee has made available such bonding, surety, or other financial arrangements as may be necessary to ensure that any necessary long-term maintenance or monitoring needed for such site will be carried out by the person having title and custody for such site following license termination.

(b) TITLE AND CUSTODY.—(1) The Secretary shall have authority to assume title and custody of low-level radioactive waste and the land on which such waste is disposed of, upon request of the owner of such waste and land and following termination of the license issued by the Commission for such disposal, if the Commission determines that—

(A) the requirements of the Commission for site closure, decommissioning, and decontamination have been met by the licensee involved and that such licensee is in compliance with the provisions of subsection (a);

(B) such title and custody will be transferred to the Secretary without cost to the Federal Government; and

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of such activities. The notice shall summarize the resources that can be made available for international cooperation and assistance in these fields through existing programs of the Department and the Commission, including the availability of: (i) data from past or ongoing research and development projects; (ii) consultations with expert Department or Commission personnel or contractors; and (iii) liaison with private business entities and organizations working in these fields.

(2) The joint notice described in the preceding subparagraph shall be updated and reissued annually for 5 succeeding years. Joint notice, reissuance.

(c) Following publication of the annual joint notice referred to in paragraph (2), the Secretary of State shall inform the governments of non-nuclear weapon states and, as feasible, the organizations operating nuclear powerplants in such states, that the United States is prepared to cooperate with and provide technical assistance to non-nuclear weapon states in the fields of spent fuel storage and disposal, as set forth in the joint notice. The Secretary of State shall also solicit expressions of interest from non-nuclear weapon state governments and non-nuclear weapon state nuclear power reactor operators concerning their participation in expanded United States cooperation and technical assistance programs in these fields. The Secretary of State shall transmit any such expressions of interest to the Department and the Commission. Expressions of interest.

(d) With his budget presentation materials for the Department and the Commission for fiscal years 1984 through 1989, the President shall include funding requests for an expanded program of cooperation and technical assistance with non-nuclear weapon states in the fields of spent fuel storage and disposal as appropriate in light of expressions of interest in such cooperation and assistance on the part of non-nuclear weapon state governments and non-nuclear weapon state nuclear power reactor operators.

(e) For the purposes of this subsection, the term "non-nuclear weapon state" shall have the same meaning as that set forth in article IX of the Treaty on the Non-Proliferation of Nuclear Weapons (21 U.S.C. 438). "Non-nuclear weapon state."

(f) Nothing in this subsection shall authorize the Department or the Commission to take any action not authorized under existing law.

TITLE III—OTHER PROVISIONS RELATING TO RADIOACTIVE WASTE

MISSION PLAN

SEC. 301. (a) CONTENTS OF MISSION PLAN.—The Secretary shall prepare a comprehensive report, to be known as the mission plan, which shall provide an informational basis sufficient to permit informed decisions to be made in carrying out the repository program and the research, development, and demonstration programs required under this Act. The mission plan shall include— 42 USC 10221.

(1) an identification of the primary scientific, engineering, and technical information, including any necessary demonstration of engineering or systems integration, with respect to the siting and construction of a test and evaluation facility and repositories;

(2) an identification of any information described in paragraph (1) that is not available because of any unresolved scien-

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tific, engineering, or technical questions, or undemonstrated engineering or systems integration, a schedule including specific major milestones for the research, development, and technology demonstration program required under this Act and any additional activities to be undertaken to provide such information, a schedule for the activities necessary to achieve important programmatic milestones, and an estimate of the costs required to carry out such research, development, and demonstration programs;

(3) an evaluation of financial, political, legal, or institutional problems that may impede the implementation of this Act, the plans of the Secretary to resolve such problems, and recommendations for any necessary legislation to resolve such problems;

(4) any comments of the Secretary with respect to the purpose and program of the test and evaluation facility;

(5) a discussion of the significant results of research and development programs conducted and the implications for each of the different geologic media under consideration for the siting of repositories, and, on the basis of such information, a comparison of the advantages and disadvantages associated with the use of such media for repository sites;

Ante, p. 2208.

(6) the guidelines issued under section 112(a);

(7) a description of known sites at which site characterization activities should be undertaken, a description of such siting characterization activities, including the extent of planned excavations, plans for onsite testing with radioactive or nonradioactive material, plans for any investigations activities which may affect the capability of any such site to isolate high-level radioactive waste or spent nuclear fuel, plans to control any adverse, safety-related impacts from such site characterization activities, and plans for the decontamination and decommissioning of such site if it is determined unsuitable for licensing as a repository;

(8) an identification of the process for solidifying high-level radioactive waste or packaging spent nuclear fuel, including a summary and analysis of the data to support the selection of the solidification process and packaging techniques, an analysis of the requirements for the number of solidification packaging facilities needed, a description of the state of the art for the materials proposed to be used in packaging such waste or spent fuel and the availability of such materials including impacts on strategic supplies and any requirements for new or reactivated facilities to produce any such materials needed, and a description of a plan, and the schedule for implementing such plan, for an aggressive research and development program to provide when needed a high-integrity disposal package at a reasonable price;

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

be accepting high-level radioactive waste or spent nuclear fuel for disposal;

(10) an estimate, on an annual basis, of the costs required (A) to construct and operate the repositories anticipated to be needed under paragraph (9) based on each of the assumptions referred to in such paragraph; (B) to construct and operate a test and evaluation facility, or any other facilities, other than repositories described in subparagraph (A), determined to be necessary; and (C) to carry out any other activities under this Act; and

(11) an identification of the possible adverse economic and other impacts to the State or Indian tribe involved that may arise from the development of a test and evaluation facility or repository at a site.

(b) SUBMISSION OF MISSION PLAN.—(1) Not later than 15 months after the date of the enactment of this Act, the Secretary shall submit a draft mission plan to the States, the affected Indian tribes, the Commission, and other Government agencies as the Secretary deems appropriate for their comments.

(2) In preparing any comments on the mission plan, such agencies shall specify with precision any objections that they may have. Upon submission of the mission plan to such agencies, the Secretary shall publish a notice in the Federal Register of the submission of the mission plan and of its availability for public inspection, and, upon receipt of any comments of such agencies respecting the mission plan, the Secretary shall publish a notice in the Federal Register of the receipt of comments and of the availability of the comments for public inspection. If the Secretary does not revise the mission plan to meet objections specified in such comments, the Secretary shall publish in the Federal Register a detailed statement for not so revising the mission plan.

Publication in Federal Register. Public inspection and agency comments.

(3) The Secretary, after reviewing any other comments made by such agencies and revising the mission plan to the extent that the Secretary may consider to be appropriate, shall submit the mission plan to the appropriate committees of the Congress not later than 17 months after the date of the enactment of this Act. The mission plan shall be used by the Secretary at the end of the first period of 30 calendar days (not including any day on which either House of Congress is not in session because of adjournment of more than 3 calendar days to a day certain) following receipt of the mission plan by the Congress.

Plan submittal to congressional committees.

NUCLEAR WASTE FUND

SEC. 302. (a) CONTRACTS.—(1) In the performance of his functions under this Act, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d).

42 USC 10222.

Fees.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after the date of enactment of this Act, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

Fees.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after the date of enactment of this Act, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 123, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) 126(b). In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

Ante, p. 2229.

Collection and payment procedures. Review.

(4) Not later than 180 days after the date of enactment of this Act, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) herein. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d), the Secretary shall propose an adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 551 of the Energy Policy and Conservation Act.

Transmittal to Congress.

42 USC 6421.

(5) Contracts entered into under this section shall provide that—

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subtitle.

Disposal services, terms and conditions.

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

License renewal or issuance.

(b) ADVANCE CONTRACTING REQUIREMENT.—(1)(A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) unless—

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of title 5, United States Code) may be disposed of by the Secretary in any repository constructed under this Act unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than—

(A) June 30, 1983; or

(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

Disposal of radioactive waste or spent nuclear fuel.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of title 5, United States Code, may be disposed of by the Secretary in any repository constructed under this Act unless such department transfers to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) ESTABLISHMENT OF NUCLEAR WASTE FUND.—There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of—

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e), which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on the date of the enactment of this Act for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) USE OF WASTE FUND.—The Secretary may make expenditures from the Waste Fund, subject to subsection (e), only for purposes of radioactive waste disposal activities under titles I and II, including—

Ante, pp. 2206, 2245.

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored, retrievable storage facility or test and evaluation facility constructed under this Act;

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(2) the conducting of nongeneric research, development, and demonstration activities under this Act;

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, retrievable storage site or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored, retrievable storage site or a test and evaluation facility site and necessary or incident to such repository, monitored, retrievable storage facility or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 116, 118, and 219.

Ante, pp. 2220, 2225, 2253.

No amount may be expended by the Secretary under this subtitle for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

Report to Congress.

(e) ADMINISTRATION OF WASTE FUND.—(1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Waste Fund during the preceding fiscal year.

Budget submittal.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of title 31, United States Code. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

Ante, p. 907.

(3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States—

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of title 31, United States Code.

Ante, p. 927.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subtitle, the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, United States Code, and the purposes for which securities may be issued under such Act are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

Ante, p. 937.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

Interest payments.

Deferral.

ALTERNATIVE MEANS OF FINANCING

SEC. 303. The Secretary shall undertake a study with respect to alternative approaches to managing the construction and operation of all civilian radioactive waste management facilities, including the feasibility of establishing a private corporation for such purposes. In conducting such study, the Secretary shall consult with the Director of the Office of Management and Budget, the Chairman of the Commission, and such other Federal agency representatives as may be appropriate. Such study shall be completed, and a report containing the results of such study shall be submitted to the Congress, within 1 year after the date of the enactment of this Act.

Study.
42 USC 10223.

Report to Congress.

OFFICE OF CIVILIAN RADIOACTIVE WASTE MANAGEMENT

SEC. 304. (a) ESTABLISHMENT.—There hereby is established within the Department of Energy an Office of Civilian Radioactive Waste

42 USC 10224.

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Management. The Office shall be headed by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(b) FUNCTIONS OF DIRECTOR.—The Director of the Office shall be responsible for carrying out the functions of the Secretary under this Act, subject to the general supervision of the Secretary. The Director of the Office shall be directly responsible to the Secretary.

(c) ANNUAL REPORT TO CONGRESS.—The Director of the Office shall annually prepare and submit to the Congress a comprehensive report on the activities and expenditures of the Office.

(d) ANNUAL AUDIT BY COMPTROLLER GENERAL.—The Comptroller General of the United States shall annually make an audit of the Office, in accordance with such regulations as the Comptroller General may prescribe. The Comptroller General shall have access to such books, records, accounts, and other materials of the Office as the Comptroller General determines to be necessary for the preparation of such audit. The Comptroller General shall submit to the Congress a report on the results of each audit conducted under this section.

Report to Congress.

LOCATION OF TEST AND EVALUATION FACILITY

42 USC 10225.

SEC. 305. (a) REPORT TO CONGRESS.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall transmit to the Congress a report setting forth whether the Secretary plans to locate the test and evaluation facility at the site of a repository.

(b) PROCEDURES.—(1) If the test and evaluation facility is to be located at any candidate site or repository site (A) site selection and development of such facility shall be conducted in accordance with the procedures and requirements established in title I with respect to the site selection and development of repositories; and (B) the Secretary may not commence construction of any surface facility for such test and evaluation facility prior to issuance by the Commission of a construction authorization for a repository at the site involved.

Ante, p. 2206.

(2) No test and evaluation facility may be converted into a repository unless site selection and development of such facility was conducted in accordance with the procedures and requirements established in title I with respect to the site selection and development of respositories.

(3) The Secretary may not commence construction of a test and evaluation facility at a candidate site or site recommended as the location for a repository prior to the date on which the designation of such site is effective under section 115.

Ante, p. 2217.

NUCLEAR REGULATORY COMMISSION TRAINING AUTHORIZATION

Regulations or guidance.
42 USC 10226.

SEC. 306. NUCLEAR REGULATORY COMMISSION TRAINING AUTHORIZATION.—The Nuclear Regulatory Commission is authorized and directed to promulgate regulations, or other appropriate Commission regulatory guidance, for the training and qualifications of civilian nuclear powerplant operators, supervisors, technicians and other appropriate operating personnel. Such regulations or guidance shall establish simulator training requirements for applicants for civilian nuclear powerplant operator licenses and for operator re-

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qualification programs; requirements governing NRC administration of requalification examinations; requirements for operating tests at civilian nuclear powerplant simulators, and instructional requirements for civilian nuclear powerplant licensee personnel training programs. Such regulations or other regulatory guidance shall be promulgated by the Commission within the 12-month period following enactment of this Act, and the Commission within the 12-month period following enactment of this Act shall submit a report to Congress setting forth the actions the Commission has taken with respect to fulfilling its obligations under this section.

Report to Congress.

Approved January 7, 1983.

LEGISLATIVE HISTORY—H.R. 3809:

HOUSE REPORT No. 97-491 pt.1 (Comm. on Interior and Insular Affairs) and pt. 2 (Comm. on Armed Services).

CONGRESSIONAL RECORD, Vol. 128 (1982):
Sept. 30, Nov. 29, 30, Dec. 2, considered and passed House.
Dec. 20, considered and passed Senate, amended; House agreed to Senate amendments.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 19, No. 1 (1983):
Jan. 7, Presidential statement.

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