



**Overview of Existing Commitments and  
Obligations of the United States Government for  
Used Commercial Nuclear Fuel Storage**

**Blue Ribbon Commission on America's Nuclear  
Future, Subcommittee on Transportation and Storage**

**Washington Marriott Hotel, Washington, DC,  
August 19, 2010**

**Michael F. McBride**  
**Van Ness Feldman**  
**1050 Thomas Jefferson Street, NW, Suite 700**  
**Washington, DC 20007-3887**  
**(202) 298-1800**

---

# Overview

---

Statutory basis for DOE obligations for commercial fuel:

- Nuclear Waste Policy Act
- Nuclear Waste Fund
- Standard Contract
- Status of litigation re: NWPA obligations
- Appendix: Key statutory provisions & case notes

# Nuclear Waste Policy Act of 1982, as amended

---

- Section 111: Findings and Purpose
  - Permanent disposal = responsibility of Federal Government
  - Costs of permanent disposal = responsibility of generators, owners
  - Costs of interim storage = responsibility of generators, owners — “until such waste and spent fuel is accepted by the Secretary of Energy”
- Section 114: 70,000 MTHM capacity cap
- Section 302: Nuclear Waste Fund
  - Authorized DOE to enter into “standard contracts” with utilities
  - Authorized payment of fee set by Secretary
  - Set January 31, 1998 date
  - Precluded NRC from issuing or renewing operating license without a standard contract (or good-faith negotiations)

# Nuclear Waste Fund

---

- Since 1983, NWF has collected between \$17-18 billion in fees from the nuclear industry (Sources: CBO, DOE)
- NWF 2010 end-of-year balance = \$25.4 billion (Source: CBO)
- Government receives over \$750 million per year (Source: DOE)
- Use of Fund:
  - Expenditures limited to repository-related work
  - \$7.3 billion spent since 1983
- NARUC & NEI filed court petitions to suspend fee collection

# Standard Contracts

- **Standard Contracts** cover acceptance, title, transportation, and disposal (but no specific method or location), terms of payment (*see* 10 CFR 961.11)
- In return for fees, beginning no later than January 31, 1998, Secretary will dispose of used fuel
- Utilities seeking to build new reactors must sign new standard contracts

## **Pre-2008 Standard Contracts**

- DOE must take title to spent fuel following start of operation of a repository



## **New Standard Contracts**

- DOE states that the new standard contract does not require it to complete disposal of used fuel until 20 years after expiration of license and extensions

## **Acceptance Queue**

- Waste acceptance allocation developed on principle of “oldest fuel first” (OFF)
- In a 2008 interim storage report, DOE declined to grant priority to decommissioned reactors

# NWPA Implementation and Status

## 1983

- DOE entered into 76 standard contracts (mostly w/ utilities)
- DOE agreed by January 31, 1998 to dispose of used fuel
- Utilities began to pay in the Nuclear Waste Fund (1 mil/kWh)



## Today

- DOE has not yet commenced accepting used fuel
- In litigation, DOE committed to meeting its used fuel obligations

# Standard Contract Litigation

## STATUS OF LAWSUITS (as of June 2010)

<i>Case Status</i>	<i># of Cases</i>
Pending in Court of Federal Claims or Court of Appeals of Federal Circuit	50 cases <i>Note: In 17 of 50, trial court entered judgment</i>
Voluntarily Withdrawn	6 cases
Settled	11 cases
Final judgments (not appealable)	5 cases
<b><i>Total</i></b>	<b><i>72 cases</i></b>

# Outcome of Standard Contract Litigation to Date

---

- **\$13.1 billion** – DOE's estimated liability under current law IF it begins to accept used fuel in 2021
- **\$2 billion** – Government's liability for judgments entered (most not yet final) and settlements, to date
- **\$760 million** – Total amount Government has paid pursuant to settlements and one trial court judgment that was not appealed (TVA)
- **\$500 million** – DOE's estimated annual increase to the Government's liability IF used fuel is not accepted by 2021 and used fuel continues to accumulate at reactor sites



# Conclusions

---

- DOJ indicated most claims predictable
  - Potential for standard settlement
  - Administrative claims procedure?
- Private interim storage
  - Possible under NWPA
  - But questions raised re: DOE authority to provide interim storage
- Liability if Yucca Mountain application withdrawn
  - Liabilities likely to increase
  - Total amount of liability unknown

# Thank you. Questions?

---

## Contact information

Michael F. McBride	MFM@vnf.com
Robert R. Nordhaus	RRN@vnf.com
Lisa E. Epifani	LEE@vnf.com

Van Ness Feldman, PC  
1050 Thomas Jefferson Street, Northwest  
Washington, DC 20007-3877  
(202) 298-1800

## APPENDIX – Index of Key Provisions in NWPA

---

# Nuclear Waste Policy Act of 1982

*Pub. Law No. 97-425, 96 Stat. 2201*

- Section 111 – Findings & purposes
- Section 114 – Site approval and construction authorization
- Section 160 – Selection of Yucca Mountain site
- Section 302 – Nuclear Waste Fund

## APPENDIX – Index of Key Cases

---

- *Indiana-Michigan Power Co., et al. v. U.S. Dep't of Energy*,  
88 F.3d 1272 (D.C. Cir. 1996)
- *Northern States Power Co., et al. v. United States*,  
128 F.3d 754 (D.C. Cir. 1998)
- *Maine Yankee Atomic Power Co. v. United States*,  
225 F.3d 1336 (Fed. Cir. 2000)
- *Indiana-Michigan Power Co. v. United States*,  
422 F.3d 1369 (Fed. Cir. 2005)
- *Alabama Power Co. v. U.S. Dep't of Energy*,  
307 F.3d 1300 (11th Cir. 2002)

# APPENDIX - Key Provisions of NWPA

---

## ■ Section 111 – Findings and Purposes

- **111(a)(4)** made geological disposal a national policy and recognized the Federal Government's responsibility for the permanent disposal of high-level radioactive waste and spent fuel.
  - **111(a)(4)** also made clear that the cost of such disposal should be the responsibility of the generators and owners of such waste and spent fuel.
  - **111(a)(5)** provides that generators and owners of high-level radioactive waste and spent fuel have the primary responsibility to provide for, and pay the cost of, the interim storage until such waste and spent fuel is accepted by the Secretary of Energy.
- After Section 111, NWPA lays out process for selection, siting, licensing, and construction of a repository, which the 1987 amendments directed would be at Yucca Mountain. Section 160 precluded the further consideration of sites other than Yucca Mountain.

# APPENDIX - Key Provisions of NWPA (Cont'd)

---

- **Section 114(d) - Site approval and construction authorization**
  - “[P]rohibit[s] the emplacement in the first repository of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of such a quantity of spent fuel until such time as a second repository is in operation.”
  
- **Section 302(a)(5) – Nuclear Waste Fund.** “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.”

## APPENDIX - Key Provisions of NWPA (Cont'd)

---

- **Section 302(b) – Nuclear Waste Fund.** NRC may not issue or renew a commercial reactor license unless:
  - DOE has entered into a contract with the license applicant for acceptance and disposition of the used fuel, or
  - The Secretary certifies that the license applicant is negotiating in good faith with the Secretary for such a contract.
  
- **Section 302 has been construed, through various court decisions, to mean that:**
  - Reactor licensee or owner of the used fuel (for simplicity, “licensees”) would keep title to the duty to properly manage and secure the materials, until they were accepted by DOE at the reactor sites for storage or disposal;
  - But that, as Section 302 states, “following commencement of operation of a repository, the Secretary” is required to take title to the used fuel and high-level radioactive waste “as expeditiously as practicable upon the request of the” licensees in possession of such used fuel or waste.

## APPENDIX - Key Decisions in Standard Contract Litigation

---

- *Indiana-Michigan Power Co., et al. v. U.S. Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996)
  - Overturned DOE's determination that it did not have a contractual obligation to accept the used fuel by January 31, 1998.
  - Held that DOE obligations under sections 302(a)(5)(A) and (B) (see slides 3 and 14) are separate obligations.
  - Thus, it is not necessary for DOE to take title before proceeding with disposal-related obligations.



## APPENDIX – Key Decisions in Standard Contract Litigation (Cont'd)

---

- *Northern States Power Co., et al. v. United States*, 128 F.3d 754 (D.C. Cir. 1998)
  - Utilities and state agencies petitioned for a *writ of mandamus* to compel DOE to accept used fuel as of the January 31, 1998 deadline.
  - DOE argued *force majeure* provision of the Standard Contract relieved DOE of its obligation due to unavoidable delay.
  - Court rejected DOE's unavoidable-delay argument.
  - Court issued a limited *writ of mandamus* prohibiting DOE from using the defense of "unavoidable delay" in future litigation, but did not require that it accept the used fuel.

## APPENDIX – Key Decisions in Standard Contract Litigation (Cont'd)

---

- *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336 (Fed. Cir. 2000)
  - Federal Circuit held that the Standard Contract does not provide adequate relief for DOE's breach.
  - As a result, damage actions could be pursued with the U.S. Court of Federal Claims without first pursuing administrative remedies before the agency.

## APPENDIX – Key Decisions in Standard Contract Litigation (Cont'd)

---

- *Indiana-Michigan Power Co. v. United States*,  
422 F.3d 1369 (Fed. Cir. 2005)
  - Federal Circuit held that DOE's delay is a partial breach, rather than a total breach.
  - Consequently, utilities may collect damages for costs incurred through the date of the complaints that have been filed, but not for future costs.
  - Due to a six-year statute of limitations for claims brought in the U.S. Court of Federal Claims (the court of subject-matter jurisdiction for Standard Contract claims), utilities must file new cases at least every six years.

## APPENDIX – Key Decisions in Standard Contract Litigation (Cont'd)

---

### ■ *Alabama Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300 (11th Cir. 2002)

- Held that DOE could not use the Nuclear Waste Fund to pay damages incurred as a result of DOE's delay.
- NWF can only fund construction of the permanent repository and related licensing expenses.
- Damage awards and settlements resulting from DOE's breach must be paid from DOJ's Judgment Fund.
- According to DOJ, unlike other statutory schemes that govern the adjudication of contract and other monetary disputes with the U.S. government, no statute requires that DOE reimburse the Judgment Fund.