

SCHEDULED FOR ORAL ARGUMENT ON MAY 2, 2012

NO. 11-1271

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

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In Re: AIKEN COUNTY, SOUTH CAROLINA; ROBERT L. FERGUSON; WILLIAM LAMPSON; GARY PETERSEN; STATE OF SOUTH CAROLINA; STATE OF WASHINGTON; NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS; NYE COUNTY, NEVADA, Petitioners.

UNITED STATES NUCLEAR REGULATORY COMMISSION,  
and GREGORY B. JACZKO, Chairman of the United States Nuclear  
Regulatory Commission, Respondents.

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On Petition For Writ Of Mandamus (Agency Action Unreasonably Withheld)

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**REPLY BRIEF OF PETITIONERS**

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THOMAS R. GOTTSALL  
S. ROSS SHEALY  
Haynsworth Sinkler Boyd, P.A.  
Post Office Box 11889  
Columbia, SC 29211-1889

*Attorneys for Aiken County*

BARRY M. HARTMAN  
CHRISTOPHER R. NESTOR  
CHRISTINE JOCHIM BOOTE\*  
JOHN ENGLERT\*  
K&L Gates LLP  
1601 K Street, N.W.  
Washington, DC 20005-1600  
*\*not admitted*

*Attorneys for Robert L. Ferguson,  
William Lampson, and Gary Petersen*

ALAN WILSON\*  
Attorney General for the State of  
South Carolina  
JOHN W. MCINTOSH\*  
ROBERT D. COOK\*  
Post Office Box 11549  
Columbia, SC 29211  
*\*not admitted*

WILLIAM HENRY DAVIDSON, II  
KENNETH PAUL WOODINGTON  
Davidson & Lindemann, P.A.  
1611 Devonshire Dr., 2nd Floor  
Post Office Box 8568  
Columbia, SC 29202-8568

*Attorneys for the State of  
South Carolina*

JAMES BRADFORD RAMSAY  
ROBIN J. LUNT  
National Association of Regulatory  
Utility Commissioners  
1101 Vermont Ave. N.W., Suite 200  
Washington, DC 20005

*Attorneys for NARUC*

ROBERT M. MCKENNA\*  
Attorney General  
ANDREW A. FITZ  
TODD R. BOWERS  
State of Washington  
Office of the Attorney General  
Post Office Box 40117  
Olympia, WA 98504-0117  
*\*not admitted*

*Attorneys for State of Washington*

ROBERT M. ANDERSEN  
Clark Hill PLC  
1250 Eye Street NW  
Suite 900  
Washington, DC 20005

*Attorney for Nye County*

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## **GLOSSARY OF ABBREVIATIONS**

ASLB	Atomic Safety and Licensing Board
DOE	United States Department of Energy
NARUC	National Association of Regulatory Utility Commissioners
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act

## **I. PERTINENT STATUTES AND REGULATIONS**

Copies of pertinent statutes and regulations are included in the attached addendum.

## **II. SUMMARY OF REPLY ARGUMENT**

Respondents' standing arguments ignore the fundamental purpose of the NWPA and would eviscerate standing for judicial review under the statute. Petitioners' standing is based on a right to the stepwise *process* mandated by the NWPA to determine whether a repository at Yucca Mountain may be built. The Petitioners' injury is fairly traceable to the NRC's own unreasonable termination of that process, a matter that can be directly redressed by this Court.

On the merits of mandamus, Respondents concede they have duties to act under the NWPA and have not acted. Respondents' justifications for their failure to act, all of which center on alleged budget concerns, do not provide a reasonable basis for their violations. The reasonableness of the NRC's "orderly closure" must be judged not in relation to the current (FY2012) budget, but in relation to the circumstances under which the termination was effectuated. Neither the facts nor the law support Respondents' argument that "declining budget trends" and speculation as to future budget justify abdicating mandatory duties.

Finally, with respect to remedy, the law requires Respondents to comply with their duties to the extent available funds allow, in the anticipation of full

funding. Respondents admit they have approximately \$10 million in carry-over funds available to resume the licensing process. Neither the NWPA nor the FY2012 Appropriations Act prevent Respondents from utilizing general appropriated funds for the licensing process when, as in the current fiscal year, funds from the Nuclear Waste Fund have not been specifically appropriated. Respondents' argument that DOE might not be on hand to participate in the proceeding fails to reflect this Court's opinion in *Aiken I*, is contradicted by DOE's own representations to this Court and the NRC, and is unsupported by any evidence concerning the amount of DOE's carry-over funding.

### III. STANDING

#### A. **Petitioners' Standing is Based on a Right to the Stepwise Process Mandated by the NWPA**

In the NWPA, Congress established a *process* for addressing the threat posed by indefinitely stored nuclear waste. Congress included a judicial review provision expressly allowing claims for a failure to take action required by the statute. Petitioners are injured by deprivation of the process to which they are entitled. If the instant Petitioners do not have standing to enforce the NWPA's process, it is impossible to imagine any petitioner who would have standing.

The NRC might dismiss the threat posed by indefinitely stored high-level radioactive waste and spent nuclear fuel. *See* Resp.Br. at 29-31. Congress, however, has declared that this threat is *in and of itself* a harm to be abated.

See 42 U.S.C. § 10131(a)(1) (“radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal”), (2), (7). To address this harm, the NWPA outlines a stepwise repository siting and licensing process. See generally, 42 U.S.C. § 10131(b); 42 U.S.C. §§ 10132-10145; *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1259 (D.C. Cir. 2004). The statute indisputably compels the NRC to follow a process to determine whether Yucca Mountain can be licensed as a repository. *Id.* This is the only legal process for abating the threat posed by indefinite waste storage. Under the NWPA, the federal government is prohibited from pursuing any repository other than Yucca Mountain, see 42 U.S.C. §§ 10172(a), 10172a(a), and no construction of a centralized interim storage facility (which would allow waste to be moved from its current locations) can begin until after the NRC has approved construction of a repository. 42 U.S.C. § 10168(d).

The NWPA’s judicial review provision is intended to provide for “[e]xpedited judicial review of court challenges to the program *as it is implemented.*” H.R. Rep. No. 97-491(I) (1982) (emphasis added). The provision makes review expressly available for claims “alleging the failure of . . . *the Commission* to make any decision, or *take any action, required under this part* [42 U.S.C. §§ 10131-10145].” 42 U.S.C. § 10139(a)(1)(B) (emphasis added). Further, the provision terminates after the final license for Yucca Mountain is

issued, thus eliminating judicial review after the licensing process. *See* 42 U.S.C. § 10145 (“Sections 10139 . . . shall cease to have effect at such time as a repository developed under this part is licensed to receive and possess high-level radioactive waste and spent nuclear fuel.”).

The NRC’s redressability arguments, which focus on future contingencies that could stand in the way of Yucca Mountain even after it receives its final license, ignore the fundamental nature of the NWPA as a process statute and render null the provision that enforces the statute’s requirements. Under the NRC’s formulation, Petitioners could never establish standing to challenge the Commission’s failure to act, and it is impossible to imagine any petitioner who would. In the meantime, a process dictated by statute to license the facility can be ignored, a judicial review provision allowing for suit to compel the licensing process is rendered meaningless, and the ultimate harm specifically addressed by the statute—the risk posed by continued indefinite storage of high-level radioactive waste and spent nuclear fuel—will go unaddressed. *See, e.g., City of Portland v. EPA*, 507 F.3d 706, 711 (D.C. Cir. 2007) (statute should be construed to give every word meaning).

Procedural rights can be enforced “so long as the procedures in question are designed to protect some threatened concrete interest of [the petitioner] that is the ultimate basis of his standing.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

572 n.8 (1992). Washington, South Carolina, Aiken County, and the Ferguson Petitioners are each firmly within the zone of interests to be served by the NWPA's process.<sup>1</sup> Each is subject to the very threat—indefinite interim storage of nuclear waste—that the NWPA aims to remedy through its process. *See* Pet.Br. at 30-33. The process could result in waste disposal if it is followed, and if not followed the Petitioners will be deprived of the only process under law meant to abate the risk posed by interim waste storage. Petitioners have demonstrated procedural standing. *See e.g. Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004) (standing not defeated by fact petitioners cannot show with any certainty that interests will be damaged).<sup>2</sup>

With respect to Nye County, Respondents attempt to shift blame for Nye County's financial injury to Congress and altogether fail to address standing based on the County's oversight role as an "affected unit of local government" under the

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<sup>1</sup> Further, the NWPA expressly placed the state petitioners within the zone of interests with respect to siting issues. *See e.g.*, 42 U.S.C. §§ 10131(a)(6), 10134(a)(1)(F). The states have standing to prevent the reconsideration of an issue they had statutory standing to address when it was originally decided.

<sup>2</sup> The NWPA is parallel to NEPA, which Respondents concede is the "axiomatic" procedural rights situation. *See* Resp.Br. at 36 n.23. Under NEPA, it is enough to show that the disregard of the procedural requirement impairs a separate concrete interest of the person that NEPA compliance might abate. *See Lujan*, 504 U.S. at 572. Likewise, under the NWPA, "the procedural step [is] connected to the substantive result." *Sugar Cane Growers Co-op. v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002).

NWPA. *Compare* Pet.Br. at 28-30 *with* Resp.Br. at 34. Nye County has continually participated in the oversight of Yucca Mountain, funded in part by the federal government under the NWPA, ever since Congress made its decision to site the project in the County. Based upon its unique status as the host county for the repository under Sections 116 and 117 of the NWPA and 10 C.F.R. § 2.309(d)(2)(iii), Nye County: (1) is within the zone of interests protected by the NWPA; (2) possesses an indisputable financial stake in the proceeding continuing, *see* JA 132-33; and (3) has standing as a matter of right in the stalled licensing proceeding and any judicial appeal of NRC actions.

Acting on behalf of state utility commissioners, NARUC's representational standing has long been recognized in this Circuit. *See* JA 256. With respect to NARUC, Respondents reiterate flawed arguments rejected by the ASLB that mischaracterize the basis for NARUC's standing. NARUC's standing is not based on the mere fact that ratepayers have paid billions into the Nuclear Waste Fund and continue to pump additional funds into the program every year. Many NARUC members are located within 10-40 miles of operating nuclear reactors and face the same cognizable injuries faced by other Petitioners. In addition, NARUC members have multiple statutory *parens patriae* specific responsibilities to protect the *health, safety, and economic interests* of consumers directly impacted by the Respondents' decision to ignore the statutory mandate. As

NARUC's standing affidavit points out, JA 255-64, and the ASLB decision allowing NARUC's intervention before the NRC confirms:

DOE's withdrawal of the Application will delay indefinitely the federal government taking title to and disposing of HLW pursuant to the NWPA, which will increase the costs to regulated utilities of interim storage and security measures . . . We agree with NARUC that, because state utility commissioners are responsible for *protecting ratepayers' interests* and *overseeing the operations of regulated electric utilities*, these economic harms constitute its members' injury-in-fact.

JA 570 (emphasis added).<sup>3</sup>

**B. The Alleged Injury is Fairly Traceable to Respondents and is Redressable by Court**

The injury in this case—the Respondents' failure to follow the mandates in 42 U.S.C. § 10134(d)—is fairly traceable to the NRC's own unreasonable conduct. *See* Pet.Br. at 10-23. Respondents point fingers at DOE's "independent decision" not to pursue Yucca Mountain. *See* Resp.Br. at 37. This fails to square with this Court's decision in *In re Aiken Cnty.*, 645 F.3d 428 (D.C. Cir. 2011) (*Aiken I*), and with the ASLB decision that Respondents agree is law of the case. *See* Resp.Br. at 12. Both decisions point to the NRC's independent duties under

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<sup>3</sup> The Respondents note that the ASLB decision denying withdrawal to DOE also found that Washington, South Carolina, Aiken County, and NARUC had standing to participate before the ASLB. Resp.Br. at 29 n.15. The Respondents fail to acknowledge that the ASLB determined standing based on an Article III analysis. *See* JA 563-64 ("the NRC applies *judicial* standing concepts . . .") (emphasis added). Respondents thus argue inconsistent with law of the case.

42 U.S.C. § 10134(d). *See Aiken I*, 645 F.3d at 434-35, 438, 448 (Kavanaugh, J. concurring); JA 546, 553, 555.

Further, the NRC's derogation of its duties can be directly redressed by this Court. The Court has jurisdiction to order that the NRC's license review be resumed. 28 U.S.C. § 1651(a); 5 U.S.C. § 706(1). To the extent Respondents' standing argument is based on an alleged lack of current funding, their argument goes not to redressability as a prong of standing, but rather to remedy. Respondents fail to cite a single case holding that an alleged lack of current funding to meet a legal obligation means a party lacks standing to challenge whether the legal obligation exists, or standing to seek mandamus to compel agency action. Petitioners have met their burden to demonstrate standing.

#### IV. ARGUMENT

##### A. The Criteria for Mandamus are Met

The criteria for mandamus are met if: (1) an agency has a duty to act; and (2) it has unreasonably delayed in complying with that duty. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004). Here, Respondents concede they have duties to act under the NWPA and have not acted. Respondents' justifications for this failure—which all center on alleged budget concerns—do not provide a reasonable basis for the failure.

**1. Respondents Concede They Have Duties to Act and Have Not Acted**

Respondents nowhere dispute that they have mandatory duties under 42 U.S.C. § 10134(d) to “consider” DOE’s Yucca Mountain license application and issue a final decision approving or disapproving that application within a three-year timeline. *See generally*, Resp.Br. Respondents and intervenor Nevada further admit that the ASLB decision denying withdrawal to DOE, which was based in part on the NRC’s own mandatory duties under 42 U.S.C. § 10134(d), is law of case. Resp.Br. at 12; Nev.Br. at 13 n.8. Respondents do not dispute that they have failed to consider DOE’s application and failed to issue a final decision approving or disapproving the application within a now-expired timeline. Petitioners’ request for a determination that NRC violated its duties should thus be granted.

The only remaining issue is whether mandamus should issue to compel the NRC to perform its duties. Respondents argue that the factors established by this Court in *TRAC v. FCC*, 750 F.2d 70 (D.C. Cir. 1984), do not apply in situations where an agency allegedly “does not have sufficient funds appropriated to complete the tasks required.” Resp.Br. at 56. However, Respondents’ alleged defense simply falls within the Court’s “rule of reason” analysis under *TRAC*.

See Pet.Br. at 36 (citing *TRAC* factors).<sup>4</sup> In determining whether a writ should issue, this Court should consider whether the circumstances outlined in the Petitioners' Brief and the NRC's insufficient funding defense fall within the Court's "rule of reason." As established below, the answer is no.

**2. There is No Reasonable Basis for Respondents' Failure to Act**

**a. The Reasonableness of Respondents' Actions Must be Judged From the Time the Actions Were Taken**

Respondents attempt to cloak the reasonableness of their 2010 termination decision under the guise of a budget passed by Congress in December 2011, some nine (or at the least, six) months after the three-year deadline for action expired and some five months after the instant Petition was filed. See Resp.Br. at 28 ("NRC adopted a reasonable approach in response to Congress's current de-funding of NRC and DOE activities."); see also Nev.Br. at 21-22. However, the reasonableness of NRC's "orderly closure" must be judged from the time

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<sup>4</sup> *Sierra Club v. Thomas*, 828 F.2d 783, 794-95 and nn. 77-80 (D.C. Cir. 1987) has been cited for the proposition that the reasonableness of an agency's failure to act only applies to "unreasonable delay" cases and not in a challenge based on violation of a clear statutory deadline (an "unlawfully withheld" decision). See *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999). The NRC's inactions fail under both the unlawfully withheld and the unreasonable delay prongs of 5 U.S.C. § 706(1). Because the NRC violated its duty to issue a decision by a date certain, the APA requires that injunctive relief issue for action unlawfully withheld. *Forest Guardians*, 174 F.3d at 1190. However, if the *TRAC* rule of reason analysis is applied to determine whether action is unlawfully withheld, the NRC's basis for failure to act is still untenable.

when the actions were taken, *see Nat'l Coal. Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 882-83 (D.C. Cir. 1987) (rejecting *post hoc* rationalizations), a time when NRC's obligations under NWPA were clear, when appropriations were available, when it was known that the ASLB denial of DOE's motion to withdraw would stand based on a 2-2 Commission split, and when there was no certainty whatsoever as to what funding Congress would provide in FY2012. *See* Pet.Br. at 11-12; *see also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192 (10th Cir. 1999).

The FY2012 budget cannot make the NRC's actions retroactively reasonable. Only the circumstances at the time of the "orderly closure" matter in judging the reasonableness of Respondents' failure to comply with their mandates under *TRAC*. As argued below, neither "declining budget trends" nor anticipation of future defunding provided a reasonable basis for Respondents to ignore their mandatory duties.

**b. The NRC Cannot Rely on Alleged Current Budget Constraints, Because the Chairman Already Acted to Shut Down the Licensing Process in 2010**

The NRC Chairman shut down the NRC's review long before Congress made any budget decisions. For more than 14 months, beginning in 2010, the Commission stalled its review of the ASLB order denying license withdrawal to DOE, while at the same time the Chairman terminated NRC staff review of

DOE's application. Pet.Br. at 10-20. The "orderly closure" was initiated some three months after the ASLB had rejected DOE's withdrawal motion, in spite of the fact that the Commission had not yet rendered a decision on review of the ASLB's order. At the Chairman's direction, the NRC *chose* to shift available funds from licensing review to closure activity, and then defended the reprogramming to Congress as an allowable act of discretion in the absence of Congressional prohibition. *See* Pet.Br. at 16-17. While in 2010 the Chairman was fully aware that the votes necessary to reverse the ASLB decision did not exist, in 2011 the Chairman continued to justify the shut down decision in terms of DOE's policy stance on Yucca Mountain. *See* Pet.Br. at 19. Although the NRC eventually left the ASLB decision intact, it still completed shut down of the very process from which DOE cannot withdraw.<sup>5</sup> *See* Pet.Br. at 20-21.

Respondents never address these circumstances. Nor do Respondents address the Petitioners' argument that based on these circumstances, it was

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<sup>5</sup> Nevada's argument that no Petitioner sought reconsideration or asked the NRC to direct the ASLB to revive the proceeding after the ASLB's September 30, 2011 suspension ignores what the ASLB acknowledged: the NRC directed the ASLB to close-out the proceeding in accordance with its September 9, 2011 Memorandum and Order. Therefore, reconsideration or appeal to the NRC would have been futile. Moreover, Petitioners had already initiated this mandamus action and NRC filed a "Notice of Underlying Decision in Case" with this Court on September 9, 2011, admitting that the Commission had directed suspension of the ASLB proceeding.

unreasonable for the NRC to take no appreciable action on DOE's application for approximately half of the agency's three-year statutory timeline.<sup>6</sup> Respondents never address the fact that they failed to extend the NWPA's three-year timeline before it expired. And they never respond to the argument that it was unreasonable to terminate the NRC's review after the ASLB denied DOE's motion to withdraw. *Compare* Pet.Br. at 39-44 *with* Resp.Br. *generally*. Instead,

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<sup>6</sup> Nevada excuses NRC's delay by citing the complexity of the licensing proceeding and asserting that the proceeding actually continued after the ASLB decision. Nev.Br. at 8. Nevada avoids addressing the delaying actions taken by the Chairman in 2010 and fails to acknowledge its own role (and that of DOE) in the delay of discovery. After the discovery stay expired on June 29, 2010, DOE and Nevada failed to initiate meaningful action on factual contentions that were ripe for discovery, urging NRC to overturn the ASLB's decision on the Motion to Withdraw. Nevada attempts to justify its failure to engage in "expensive discovery" or other preparation notwithstanding expiration of the stay. Nev.Br. at 7. However, failure to initiate discovery on factual contentions could have resulted in dismissal of its contentions. The parties were admonished by the ASLB that they "could have been diligently pursuing deposition discovery in accordance with CAB Case Management Order #2" while the ASLB was deliberating on the legal contentions. JA \_\_\_.

Nevada also asserts that NRC's split vote regarding the ASLB's June 29, 2010 decision "effectively paralyzed" the NRC because the Energy Reorganization Act of 1974 prevented "any" Commission action. Nev.Br. at 13-14. The NRC itself makes no such argument, and Nevada is contradicted by the facts. The Commission, when faced with this mandamus action and the opinion in *Aiken I*, overcame its purported "paralysis" and took belated action. It revealed the 2-2 split on September 9, 2011, leaving the ASLB decision intact. Nothing in the 1974 Act prevented the NRC from releasing the same decision 11 months earlier and allowing the licensing proceeding to continue at that time. The Inspector General's report and Congressional testimony make it clear that the Chairman prevented earlier action. *See* Pet.Br. at 11-12.

Respondents solely argue budget justifications for violating their statutory duties. As outlined below, these justifications do not provide a reasonable basis for the NRC's failure to comply with the NWPA.

**c. Respondents' Budget Justifications Do Not Provide a Reasonable Basis for Violating the NWPA's Mandates**

**(1) "Declining budget trends" do not repeal a duty.**

Respondents claim that through recent appropriations bills, Congress has somehow evidenced an "intent" that diminishes the Respondents' duty to comply with the NWPA. *See* Resp.Br. at 39; *see also* Nev.Br. at 20-23. This argument is meritless.

Implicit repeal of a statute is disfavored. *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). This rule "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1980). Congress's own internal rules provide that an appropriations measure cannot alter substantive law. *Id.* In order to effectuate repeal through an appropriations measure, Congress's intent must be "clear and manifest." *Id.* at 189-90 (quoting *Posadas*, 296 U.S. at 503); *see also*, *Firebaugh Canal Co. v. U.S.*, 203 F.3d 568, 575 (9th Cir. 2000). In the absence of such evidence, repeal will be found only where there is an irreconcilable conflict between the substantive law and appropriations legislation. *Hill*, 437 U.S. at 190.

Respondents can satisfy neither test. First, there is no language in the subject appropriations bills indicating that Congress intended to shut down the Yucca Mountain project or terminate the licensing proceeding.<sup>7</sup> Indeed, to the contrary, the House Committee Report<sup>8</sup> reiterates that “[t]he Congress has been clear both through legislation and through repeated votes that the Yucca Mountain license application process should be completed.”<sup>9</sup> A reduction in funding, without more, is never enough to find repeal by implication. *U.S. v. Langston*, 118 U.S. 389, 394 (1886).

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<sup>7</sup> Both parties can cite to statements by members of Congress, House and Senate bill reports, etc. to support competing views of the meaning of reduced funding. However, “[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress. . . .” *Hill*, 437 U.S. at 191; *see also, Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) (statements by individual legislators represent only individual views). The instant appropriations bills make no mention of the NWPA, much less that portion of the NWPA requiring the NRC to issue within three years a decision on the merits of a license application. It is the statute that governs. *Hill*, 437 U.S. at 191-93; *see also, Am. Fed'n of Gov't Employees v. Campbell*, 659 F.2d 157, 160 (D.C. Cir. 1980); *Zedner v. U.S.*, 547 U.S. 489, 510-11 (2006) (Scalia, J., concurring in part and concurring in judgment).

<sup>8</sup> The Joint Conference Committee Report states that language in the House Committee Report not contradicted by the Joint Conference Committee Report, such as this, is “approved” by the conference committee. H.R. Rep. No. 112-331 at \_\_\_ (2011).

<sup>9</sup> H.R. Rep. No. 112-118 at 191 (2011). The final conference agreement also included language carried over from the House Committee Report prohibiting the NRC Chairman from using “administrative means” to terminate programs without a majority vote of the Commission. H.R. Rep. No. 112-118 at 191 (2011); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat 786, § 401(b) (2011).

Second, there is no irreconcilable conflict between the NWPA's requirement that the licensing proceeding continue to a merits decision and the appropriations bills that reduced funding for the proceeding. Where Congress has created a program through a substantive enactment, but failed in subsequent appropriations measures to fully fund the program, the agency is not given unfettered discretion to terminate the program or spend the funds as it sees fit. Rather, the agency's duty is to "effectuate the original statutory scheme as much as possible, within the limits of the added constraint." *City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977); *see also, Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1347-48 (D.C. Cir. 1996). The mandate of the NWPA and the appropriations measures can both be honored by using the funding provided by Congress to continue the licensing proceeding.

Respondents' view that Congress has "implicitly waived or tolled" the NRC's three-year deadline by failing to appropriate funds, Resp.Br. at 57, is unsupported by any act of Congress and is in direct contradiction to the Court's ruling in *Hill*. If Congress did not wish for the NRC to go forward with licensing, Congress could have enacted legislation explicitly stating so. *See Firebaugh*, 203 F.3d at 575-76 ("appropriations acts do not provide an 'affirmative showing of an intention to repeal'"). Congress appropriated \$29 million to the NRC from the Nuclear Waste Fund in FY2010. These levels were continued to April 2011.

Resp.Br. at 18-20. In April 2011, it appropriated another \$10 million. Resp.Br. at 20. Respondents have no cognizable legal basis on which to claim that Congress (as distinct from the Senate Majority Leader, representing Nevada) did not want them to go forward.

Finally, the facts do not support Respondents' contention that their actions were reasonable, purely protective shut-down measures motivated by declining budget concerns.<sup>10</sup> *See generally*, Pet.Br. at 13-23. In testifying before Congress concerning the "orderly closure," the NRC Chairman never testified as to budgetary concerns and never mentioned the need for continued funding so that the NRC could complete its statutory mandates. *See* Pet.Br. at 16-17, 19. This is not surprising: Respondents requested *no funds* in FY2012 to comply with their mandates. Resp.Br. at 21.

**(2) Speculation regarding future budget outcomes does not relieve the NRC of an NWPA mandate.**

Similarly, speculation that a mandated activity might not receive future funding does not provide a reasonable justification for abandoning the duty.<sup>11</sup>

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<sup>10</sup> For instance, the NRC took months to re-write Safety Evaluation Report Volume 3 to instead be a "Technical Evaluation Report" scrubbed of any conclusions as to whether or not DOE's application satisfied the NRC's regulations, JA 757, 767, 775-81, 835, 1352, and actively dismantled and rid itself of project infrastructure. JA 1000.

<sup>11</sup> NRC is essentially asking the Court to allow it to raise potential future appropriations limits as a legally cognizable defense to agency inaction. That is

Petitioners are unaware of any mandamus action where a court has concluded that the clear duty to act can be avoided based on a *potential* future lack of funding. That is the only basis offered by Respondents for the decision to stop proceeding from October 2010 through September 2011. Congress, however, has never appropriated in one year enough for the NRC to “complete the proceeding” from start to finish. As a result, the fact that appropriations in any single fiscal year might not, standing alone, be enough to finish a multi-year job cannot be a defense.

The NRC’s position is an extraordinary one: that an agency may ignore a mandatory duty simply because it thinks it might not get enough money in the future to complete the duty. Adopting such a position would give every agency free reign to ignore any Congressional enactment.

Here, the NRC’s own guidance dictates that when Congress has failed to enact timely appropriations or when a prolonged lapse in appropriations is anticipated, the agency is required to “reallocate to the extent legally permissible all available funds to forestall fund interruption date as long as possible” and only “begin shutdown activities *when all available funds are exhausted.*” JA \_\_\_

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inconsistent with the position taken by the NRC in *Aiken I* that budget proposals are not justiciable final agency action. JA \_\_\_-\_\_\_. If such actions are not justiciable as causes of action against agencies, they are not justiciable as defenses.

(NRC Manual Ch. 1302, “Shutdown Plan: Contingency Plan for Periods of Lapsed Appropriations,” App. 2 (eff. Apr. 12, 1987)) (emphasis added).<sup>12</sup> The Chairman’s action failed to follow the NRC’s own guidance and is therefore unreasonable. *Vietnam Veterans v. Sec’y of the Navy*, 843 F.2d 528, 538 (D.C. Cir. 1988) (“agencies must follow their own procedures”) (citing *Morton v. Ruiz*, 415 U.S. 199, 235 (1974)).

The NRC has unreasonably ignored its NWPA mandates. A writ of mandamus should issue.

**B. This Court Should Grant the Requested Relief**

Speculation as to future appropriations should also not affect whether mandamus relief is awarded. Again, Petitioners are unaware of any case in which a court denied mandatory relief based on an agency’s claim that future funding might be insufficient. If it were otherwise, mandamus would be an illusory remedy. Any agency could avoid mandamus by simply insisting it *might* not have enough money to complete the mandated task. The narrow question before the Court is whether mandamus relief can be fashioned that will further Congress’s clear mandate that the high-level waste repository license review process move forward under the NWPA’s time frame. For the reasons below, the answer is yes.

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<sup>12</sup> This document was updated subsequent to the actions at issue, but the substance relevant to this Court’s consideration was not changed. See JA \_\_\_\_.

**1. The NRC's Budgetary Assertions do Not Provide a Basis for Denying the Mandamus Remedy**

**a. The NRC has \$9.995 Million in Carryover Nuclear Waste Fund Appropriations**

The NRC admits it has \$9.995 million in carryover funds available for consideration of the Yucca Mountain license application. Resp.Br. at 45 n.28.<sup>13</sup> Presumably, this represents what remains of a \$10 million appropriation in the FY2011 budget, which was the operative appropriations bill from April 15, 2011, to December 23, 2011. Resp.Br. at 20, 22.

Even if this amount is insufficient to complete the licensing process, it is not a defense to mandamus. As this Court has noted, “an insufficient appropriation fails to excuse an agency from its obligation to follow as closely as possible the allocation plan Congress designed in anticipation of *full* funding.” *Ramah Navajo*, 87 F.3d at 1348.<sup>14</sup> In the NWPA, Congress devised an allocations plan with a dedicated appropriations source (the Nuclear Waste Fund), with the express goal of achieving a licensed repository within an established timeframe.

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<sup>13</sup>As the NRC notes, this money is appropriated from the Trust Fund and is commonly known as “any year money,” meaning it carries over from year to year rather than lapsing if not spent in the year appropriated. JA \_\_, \_\_.

<sup>14</sup> The NRC's reliance on *Cnty. of Vernon v. U.S.*, 933 F.2d 532 (7th Cir. 1991), and *Alabama v. North Carolina*, 130 S.Ct. 2295 (2010), to suggest that mandamus is inappropriate where an agency lacks sufficient funds to complete a project is misplaced. Neither case was a mandamus action and neither involved questions of nondiscretionary statutory duties.

Nothing in the NWPA suggests Congress intended the NRC to have all appropriations in hand in order to complete the three year licensing process. Indeed, the fact that Congress appropriates money from the Fund to the NRC on a periodic basis demonstrates the opposite; and the fact that the NRC is allowed to use carry-over funds to continue this process (rather than seeing the appropriations lapse and return to the Treasury, as is generally the case) further shows that it was expected to continue this process. The NRC can make use of the \$10 million at hand.

**b. The NRC is Not Limited to the Use of Nuclear Waste Fund Appropriations**

Further, the NRC erroneously argues that only its carry-over funds are available for consideration of the Yucca license application. No statute or principle of appropriations law prohibits the NRC from utilizing general appropriated funds for the licensing process if funds from the Nuclear Waste Fund have not been specifically appropriated.

**(1) Neither the NWPA nor principles of appropriations law prohibit the use of general appropriations.**

Respondents identify no provision of the NWPA that prohibits the use of general appropriated funds for nuclear waste disposal activities, including licensing. While the NRC correctly points out that the Nuclear Waste Fund may only be used for purposes of radioactive waste disposal activities, 42 U.S.C.

§ 10222(d), the inverse is not true. If Congress meant to restrict funds for the licensing process to only funds available in the Nuclear Waste Fund, it would have unambiguously stated so. *Cf. Adena Reg'l Med. Ctr. v. Leavitt*, 527 F.3d 176, 180 (D.C. Cir. 2008). *Compare* 42 U.S.C. § 401(h) (“benefit payments required to be made under this subchapter (other than section 426 of this title) shall be made *only from the Federal Old-Age and Survivors Insurance Trust Fund*”) with 42 U.S.C. § 10222(d) (“[t]he Secretary may make expenditures from the [Nuclear] Waste Fund, subject to subsection (e) of this section, only for purposes of radioactive waste disposal activities . . .”) (emphasis added).

Further, the use of general appropriations to fund the licensing process is not barred by the principles of appropriations law or Government Accountability Office guidance cited by Respondents. Resp.Br. at 7, 48-49. Admittedly, “if an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not have an option as to which to use. It must use the specific appropriation.” JA 1300. However, this rule is inapplicable where, as here, there is no specific appropriation in the FY2012 Appropriations Act for the repository licensing process. Because there is no specific appropriation for the licensing process, the NRC is not barred by appropriations law principles from using general appropriations to fulfill its mandatory duty to consider the Yucca Mountain application.

**(2) The FY2012 budget does not prohibit reprogramming or the use of general appropriations.**

The NRC asserts that the FY2012 Appropriations Act “appears to prevent NRC . . . from using . . . general appropriation funds” for the licensing process. The specific language relied upon states that “[n]one of the funds provided in this title . . . shall be available for obligation or expenditure through a reprogramming of funds that . . . increases funds or personnel for any program, project, or activity for which funds are *denied* or *restricted* by this Act.” Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat 786, § 401(a) (2011) (emphasis added). However, funding for the high-level waste repository licensing proceeding was neither *denied* nor *restricted* by the Act. The NRC requested no funds, so no request was “denied” by the Act. Resp.Br. 21. Nor did Congress “restrict” the funding of the licensing proceeding. Congress included several restrictions on funds in the Appropriations Act for statutorily-mandated projects, but the Yucca Mountain licensing proceeding is not among the restrictions.<sup>15</sup>

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<sup>15</sup> See, e.g., Pub. L. No. 112-74, § 315 (“None of the funds made available in this Act may be used—(1) to implement or enforce section 430.32(x) of title 10, Code of Federal Regulations . . . with respect to BPAR incandescent reflector lamps . . .”), § 426 (“Notwithstanding any other provision of law, none of the funds made available in this Act or any other Act may be used to promulgate or implement any regulation requiring the issuance of permits under title V of the Clean Air Act . . . for carbon dioxide . . . emissions resulting from biological processes associated with livestock production.”).

The FY2012 Appropriations Act is silent on any explicit restriction of funds for the licensing proceeding. Respondents thus ask the Court to find such a restriction by implication. Respondents argue in essence that because the House’s approach to funding Yucca Mountain was not adopted in conference committee, this should be treated as a “rejected amendment” signifying Congressional intent to deny or restrict funding. *See* Resp.Br. at 46-47. However, the conference report on the FY2012 Appropriations Act does not explain why the Senate version was adopted over the House version. (One reason might be that the NRC failed to spend \$9.995 million of its previous \$10 million appropriation for Yucca in FY2011.) The conference report simply states that “[th]e conference agreement provides \$0 for nuclear waste disposal, as proposed by the Senate, instead of \$25,000,000 as proposed by the House.” H.R. Rep. No. 112-331 at 855 (2011). In nearly identical circumstances—where neither the conference report nor the prevailing legislative chamber’s rationale is expressed in legislative history—this Court has held that “no light” is shed on the intent of Congress. *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 706 (D.C. Cir. 2011).

The FY2012 budget does not restrict the use of general funds for the repository proceeding, either explicitly or implicitly.

## 2. Ordering the NRC to Comply With the NWPA Does Not Reorder Agency Priorities

Respondents argue that Petitioners' requested relief would result in the Court inappropriately "re-ordering" the NRC's priorities. Resp.Br. at 51-56. Respondents overlook the fact that Congress itself set the agency's priorities by enacting the NWPA, which mandates consideration of the license application and sets forth a timeframe for a merits decision. 42 U.S.C. § 10134(d). This Court is merely enforcing an existing non-discretionary obligation placed on the NRC. It is up to the NRC to determine priorities consistent with its legal obligations. The NRC's situation is no different from that of any agency faced with a mandamus order. *See e.g. N. States Power Co. v. Dep't of Energy*, 128 F.3d 754, 759-60 (D.C. Cir. 1997).

The NWPA's mandate is also achievable. Respondents do not argue that the Petitioners' proposed timeline of 14 months<sup>16</sup> for completing its review of the license application is infeasible, but merely that such relief would require the NRC to expend "substantial funds." Resp.Br. at 38.<sup>17</sup> Notably, Respondents

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<sup>16</sup> Fourteen months represents the balance of the original three years provided for in the NWPA.

<sup>17</sup> Nevada exaggerates the gravitas, number, and the amount of time required for discovery and resolution of its contentions. Nev.Br. at 22-27. The ASLB had already either dismissed Nevada's overarching legal contentions, or deferred consideration following discovery, and noted that its ruling could have impact on other admitted contentions. JA \_\_, \_\_. Pursuant to the ASLB's Case

propose no alternative schedule, instead asserting that limited available appropriations make consideration of the license application futile.<sup>18</sup> However, as discussed above, Respondents cannot cloak their refusal to carry out a Congressional mandate as a discretionary “budget” prerogative to which this Court should defer. The NRC has funds in hand today and is not limited to carryover Nuclear Waste Fund appropriations to resume its mandatory consideration of the license application. Further, it is standard for agencies to seek funding from Congress on the premise that such funding is necessary to meet judicially imposed obligations.<sup>19</sup> Indeed, the NRC itself has noted that if “legitimate activities related to Yucca Mountain repository licensing are identified

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Management Orders, Nevada and DOE were in the process of consolidating contentions and scheduling witnesses for discovery purposes with an eye toward streamlining effort when the licensing proceeding was halted. At the appropriate time, Petitioner Nye County intended to seek summary dismissal of some Nevada contentions as having been fully adjudicated during previous litigation. Most importantly, Nevada’s description of the complexity of the case and remaining discovery, even assuming it is accurate, does not excuse the NRC from discharging its duties under the NWPA. *See infra* and *supra* at 10-28.

<sup>18</sup> Nevada suggests that existing ASLB Case Management Orders require 54 months for full resolution of issues. Nev.Br. at 26. Nye County agreed to the Case Management Order, as did all other parties, with the expectation that good faith efforts would be made to consolidate contentions and narrow the issues, and to complete the licensing proceeding, if necessary, after the NRC sought an extension.

<sup>19</sup> *See e.g.* JA \_\_ (DOE budget requests that identify legal compliance agreements, consent orders, and consent decrees mandating cleanup work at DOE’s Hanford Reservation, Idaho National Laboratory, Los Alamos National Laboratory, Savannah River Site, and Portsmouth Site.)

in FY2012, the staff will seek Commission approval to conduct these activities and request reprogramming of NWF prior year resources.” JA \_\_\_ (EDO/CFO Letter to NRC Commissioners, “Closeout of Yucca Mountain Repository Program,” (Jan. 3, 2012)).

### **3. Speculation Regarding Conduct by Third Parties Such as DOE Does Not Preclude Mandamus**

Respondents argue that “the NRC hearing process cannot go forward in a meaningful way without full participation by DOE, the license applicant and an indispensable party.” Resp. Br. at 42. However, as this Court held in *Aiken I*, at this point “DOE has no say in whether the Yucca Mountain license application will be reviewed and granted.” *Aiken I*, 645 F.3d at 434. Furthermore, DOE has represented to this Court that it will comply and go forward with the license application process if required. JA 100-01, 103; *see also* JA \_\_\_, \_\_\_ (“no action DOE has taken or is planning to take would prevent it from resuming licensing activities if required to do so by a court or agency”). DOE has made the same representation to the ASLB. JA 559. Indeed, the ASLB’s Order denying DOE’s license withdrawal rejected the notion that DOE would not be able to fully proceed with the licensing proceeding. *Id.* The NRC’s obligation to consider the license application cannot be shirked simply because another agency is involved. *Cf. City of Tacoma v. FERC*, 331 F.3d 106 (D.C. Cir. 2003).

DOE's budget constraints, whatever they might be, do not prevent this Court from ordering the NRC to resume its consideration of the license application. Respondents acknowledge that DOE has funding available, but cite a DOE motion in the underlying licensing proceeding that DOE's funds are "insufficient to *take this proceeding to completion.*" Resp.Br. at 41 (emphasis added); *see also* Nev.Br. at 19-27. The NRC provides no evidence to the Court as to what carryover funds are currently available to DOE. Further, as discussed above, the NWPA does not require that either agency have every dime necessary to complete the proceeding "in hand" in order to continue with the licensing proceeding. Respondents fail to demonstrate that DOE cannot continue with the licensing proceeding when it is resumed.

## V. CONCLUSION

For the foregoing reasons Petitioners request judgment in their favor—a determination that the NRC unreasonably delayed and breached its clear statutory duties to consider and decide the license application, and that the NRC be ordered to resume the licensing proceeding within 30 days, to provide a status report on the proceeding to the Court every 60 days until further order of the Court, and to complete the licensing process as required by law.

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RESPECTFULLY SUBMITTED this 30th day of January 2012.

s/ Thomas R. Gottshall  
THOMAS R. GOTTSHALL  
S. ROSS SHEALY  
Haynsworth Sinkler Boyd, P.A.  
Post Office Box 11889  
Columbia, SC 29211-1889  
*Attorneys for Aiken County*

ALAN WILSON\*  
Attorney General for the State of  
South Carolina  
JOHN W. MCINTOSH\*  
ROBERT D. COOK\*  
Post Office Box 11549  
Columbia, SC 29211  
*\*not admitted*

s/ Kenneth Paul Woodington  
WILLIAM HENRY DAVIDSON, II  
KENNETH PAUL WOODINGTON  
Davidson & Lindemann, P.A.  
1611 Devonshire Dr., 2nd Floor  
Post Office Box 8568  
Columbia, SC 29202-8568  
*Attorneys for the State of  
South Carolina*

s/ James Bradford Ramsay  
JAMES BRADFORD RAMSAY  
ROBIN J. LUNT  
National Assoc. of Regulatory Utility  
Commissioners  
1101 Vermont Ave. N.W., Suite 200  
Washington, DC 20005  
*Attorneys for NARUC*

s/ Barry M. Hartman  
BARRY M. HARTMAN  
CHRISTOPHER R. NESTOR  
CHRISTINE JOCHIM BOOTE\*  
JOHN ENGLERT\*  
K&L Gates LLP  
1601 K Street, N.W.  
Washington, DC 20005-1600  
*\*not admitted*  
*Attorneys for Robert L. Ferguson,  
William Lampson, and Gary Petersen*

ROBERT M. MCKENNA\*  
Attorney General

s/ Andrew A. Fitz  
ANDREW A. FITZ  
TODD R. BOWERS  
State of Washington  
Office of the Attorney General  
Post Office Box 40117  
Olympia, WA 98504-0117  
*\*not admitted*  
*Attorneys for State of Washington*

s/ Robert M. Andersen  
ROBERT M. ANDERSEN  
Clark Hill PLC  
1250 Eye Street, NW  
Suite 900  
Washington, DC 20005  
*Attorney for Nye County*

**CERTIFICATE OF COMPLIANCE WITH  
TYPE-VOLUME LIMITATION, TYPEFACE  
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This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) as it contains 6,999 words.

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*s/ Andrew A. Fitz*  
\_\_\_\_\_  
ANDREW A. FITZ  
TODD R. BOWERS  
State of Washington  
Office of the Attorney General  
Post Office Box 40117  
Olympia, WA 98504-0117

**ADDENDUM**

Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10270, relevant excerpts attached hereto are 42 U.S.C. §§ 10131-10145, 10168(d), 10172(a), 10172a(a), and 10222(d)

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1991—Subsec. (b). Pub. L. 102-54 substituted “The Secretary of Veterans Affairs, through the Chief Medical Director of the Department of Veterans Affairs, shall, to the maximum extent feasible consistent with the responsibilities of such Secretary and Chief Medical Director under title 38” for “(1) The Administrator of Veterans’ Affairs, through the Chief Medical Director of the Veterans’ Administration, shall, to the maximum extent feasible consistent with the responsibilities of such Administrator and Chief Medical Director under subtitle 38”, “over which that Secretary” for “over which the Administrator”, and “Secretary of Veterans Affairs” for “Administrator” wherever else appearing, and struck out pars. (2) and (3) which read as follows:

“(2) Not later than 180 days after standards are promulgated by the Secretary pursuant to this chapter, the Administrator of Veterans’ Affairs shall submit to the appropriate committees of Congress a full report with respect to the regulations (including guidelines, policies, and procedures thereunder) prescribed pursuant to paragraph (1) of this subsection. Such report shall include—

“(A) an explanation of any inconsistency between standards made applicable by such regulations and the standards promulgated by the Secretary pursuant to this chapter;

“(B) an account of the extent, substance, and results of consultations with the Secretary respecting the prescription and implementation of regulations by the Administrator; and

“(C) such recommendations for legislation and administrative action as the Administrator determines are necessary and desirable.

“(3) The Administrator of Veterans’ Affairs shall publish the report required by paragraph (2) in the Federal Register.”

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§ 10101. Definitions

For purposes of this chapter:

(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;<sup>1</sup>

(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 10132 of this title for site characterization, approved by the President under section 10132 of this title for site characterization, or undergoing site characterization under section 10133 of this title.

(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 2133 or 2134(b) of this title.

(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.

(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 section 2014(e)(2) of this title; and

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

<sup>1</sup> So in original. The semicolon probably should be a period.

waste from atomic energy defense activities shall be paid by the Federal Government, into the special account established under section 10222 of this title.

(3) Any repository for the disposal of high-level radioactive waste resulting from atomic energy defense activities only shall (A) be subject to licensing under section 5842 of this title; and (B) comply with all requirements of the Commission for the siting, development, construction, and operation of a repository.

**(c) Applicability to certain repositories**

The provisions of this chapter shall apply with respect to any repository not used exclusively for the disposal of high-level radioactive waste or spent nuclear fuel resulting from atomic energy defense activities, research and development activities of the Secretary, or both.

(Pub. L. 97-425, § 8, Jan. 7, 1983, 96 Stat. 2205.)

**§ 10108. Applicability to transportation**

Nothing in this chapter shall be construed to affect Federal, State, or local laws pertaining to the transportation of spent nuclear fuel or high-level radioactive waste.

(Pub. L. 97-425, § 9, Jan. 7, 1983, 96 Stat. 2206.)

**SUBCHAPTER I—DISPOSAL AND STORAGE OF HIGH-LEVEL RADIOACTIVE WASTE, SPENT NUCLEAR FUEL, AND LOW-LEVEL RADIOACTIVE WASTE**

**§ 10121. State and affected Indian tribe participation in development of proposed repositories for defense waste**

**(a) Notification to States and affected Indian tribes**

Notwithstanding the provisions of section 10107 of this title, upon any decision by the Secretary or the President to develop a repository for the disposal of high-level radioactive waste or spent nuclear fuel resulting exclusively from atomic energy defense activities, research and development activities of the Secretary, or both, and before proceeding with any site-specific investigations with respect to such repository, the Secretary shall notify the Governor and legislature of the State in which such repository is proposed to be located, or the governing body of the affected Indian tribe on whose reservation such repository is proposed to be located, as the case may be, of such decision.

**(b) Participation of States and affected Indian tribes**

Following the receipt of any notification under subsection (a) of this section, the State or Indian tribe involved shall be entitled, with respect to the proposed repository involved, to rights of participation and consultation identical to those provided in sections 10135 through 10138 of this title, except that any financial assistance authorized to be provided to such State or affected Indian tribe under section 10136(c) or 10138(b) of this title shall be made from amounts appropriated to the Secretary for purposes of carrying out this section.

(Pub. L. 97-425, title I, § 101, Jan. 7, 1983, 96 Stat. 2206.)

**PART A—REPOSITORIES FOR DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTE AND SPENT NUCLEAR FUEL**

**§ 10131. Findings and purposes**

(a) The Congress finds that—

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel 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;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

(b) The purposes of this part are—

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

(Pub. L. 97-425, title I, §111, Jan. 7, 1983, 96 Stat. 2207.)

**§ 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 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) 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;

(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)<sup>1</sup> 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).<sup>2</sup>

(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

<sup>1</sup> So in original. There is no cl. (ii).

<sup>2</sup> So in original. Probably should be "subparagraph (D)."

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.

**(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.

(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)-(d), Dec. 22, 1987, 101 Stat. 1330-228; Pub. L. 102-154, title I, Nov. 13, 1991, 105 Stat. 1000.)

AMENDMENTS

1987—Subsec. (b)(1)(C) to (H). Pub. L. 100-202 and Pub. L. 100-203, § 5011(b), amended par. (1) identically, redesignating subpars. (D) to (H) as (C) to (G), respectively, in subpar. (C) substituting “subparagraph (B)” for “subparagraphs (B) and (C)”, and striking out former subpar. (C) which read as follows: “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 previously nominated under subparagraph (A), that was not recommended as a candidate site under subparagraph (B).”

Subsec. (d). Pub. L. 100-202 and Pub. L. 100-203, § 5011(c), amended section identically, redesignating subsec. (e) as (d) and striking out former subsec. (d) which read as follows: “After the required recommendation of candidate sites under subsection (b) of this section, 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.”

Subsec. (e). Pub. L. 100-202 and Pub. L. 100-203, § 5011(d), which contained identical amendments directing that subsec. (f) be struck out and all subsequent subsections be redesignated accordingly, was executed by striking out subsec. (e) as the probable intent of Congress because of the redesignation of former subsec. (f) as (e) by Pub. L. 100-202 and Pub. L. 100-203, § 5011(c), and the absence of any subsections subsequent to former subsec. (f). Subsec. (e) read as follows: “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) of this section 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) of this section for site characterization and approved by the President under subsection (c) of this section; and (3) the Secretary shall conduct public hearings under section 10133(b)(2) of this title and comply with requirements under section 10137 of this title within one year of January 7, 1983.”

Pub. L. 100-202 and Pub. L. 100-203, § 5011(c), amended section identically, redesignating subsec. (f) as (e). Former subsec. (e) redesignated (d).

Subsec. (f). Pub. L. 100-202 and Pub. L. 100-203, § 5011(c), amended section identically, redesignating subsec. (f) as (e).

CHANGE OF NAME

“United States Geological Survey” substituted for “Geological Survey” in subsec. (a) pursuant to provision of title I of Pub. L. 102-154, set out as a note under section 31 of Title 43, Public Lands.

DELEGATION OF NOTIFICATION FUNCTION

Letter of the President of the United States, dated May 28, 1986, 51 F.R. 19531, provided:

Letter to the Honorable John S. Herrington, Secretary of Energy

*Dear Mr. Secretary:*

You are hereby authorized to perform the notification function vested in the President pursuant to Sec-

tion 112(c)(1) of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10132(c)(1).

This document shall be published in the Federal Register.

Sincerely,

RONALD REAGAN.

**§ 10133. Site characterization**

**(a) In general**

The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization activities at the Yucca Mountain site. The Secretary shall consider fully the comments received under subsection (b)(2) and section 10132(b)(2) of this title and shall, to the maximum extent practicable and in consultation with the Governor of the State of Nevada, 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).<sup>1</sup>

**(b) Commission and States**

(1) Before proceeding to sink shafts at the Yucca Mountain site, the Secretary shall submit for such candidate site to the Commission and to the Governor or legislature of the State of Nevada, for their 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 10132(a) of this title; 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.

<sup>1</sup> See References in Text note below.

(2) Before proceeding to sink shafts at the Yucca Mountain site, the Secretary shall (A) make available to the public the site characterization plan described in paragraph (1); and (B) hold public hearings in the vicinity of such candidate site to inform the residents of the area in which such candidate site is located of such plan, and to receive their comments.

(3) During the conduct of site characterization activities at the Yucca Mountain site, the Secretary shall report not less than once every 6 months to the Commission and to the Governor and legislature of the State of Nevada, on the nature and extent of such activities and the information developed from such activities.

**(c) Restrictions**

(1) The Secretary may conduct at the Yucca Mountain site only such site characterization activities as the Secretary considers necessary to provide the data required for evaluation of the suitability of such site for an application to be submitted to the Commission for a construction authorization for a repository at such site, and for compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) In conducting site characterization activities—

(A) the Secretary may not use any radioactive material at a site unless the Commission concurs that such use is necessary to provide data for the preparation of the required environmental reports and an application for a construction authorization for a repository at such site; and

(B) if any radioactive material is used at a site—

- (i) the Secretary shall use the minimum quantity necessary to determine the suitability of such site for a repository, but in no event more than the curie equivalent of 10 metric tons of spent nuclear fuel; and
- (ii) such radioactive material shall be fully retrievable.

(3) If the Secretary at any time determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall—

(A) terminate all site characterization activities at such site;

(B) notify the Congress, the<sup>2</sup> Governor and legislature of Nevada of such termination and the reasons for such termination;

(C) remove any high-level radioactive waste, spent nuclear fuel, or other radioactive materials at or in such site as promptly as practicable;

(D) take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities at such site;

(E) suspend all future benefits payments under part F of this subchapter with respect to such site; and

(F) report to Congress not later than 6 months after such determination the Secretary's recommendations for further action to assure the safe, permanent disposal of spent nuclear fuel and high-level radioactive waste, including the need for new legislative authority.

<sup>2</sup> So in original. Probably should read "Congress and the".

**(d) Preliminary activities**

Each activity of the Secretary under this section that is in compliance with the provisions of subsection (c) shall be considered 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<sup>3</sup> require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(Pub. L. 97-425, title I, § 113, Jan. 7, 1983, 96 Stat. 2211; 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(e)-(g), Dec. 22, 1987, 101 Stat. 1330-228.)

REFERENCES IN TEXT

Subsection (b)(1), referred to in subsec. (a), probably means subsec. (b)(1) of section 10132 of this title, which relates to nomination of repository sites for radioactive waste and submission of environmental assessments for those sites.

The National Environmental Policy Act of 1969, referred to in subsec. (c)(1), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

AMENDMENTS

1987—Subsec. (a). Pub. L. 100-202 and Pub. L. 100-203, § 5011(e)(2), which contained identical amendments directing that “at the Yucca Mountain site” be substituted for “beginning” and all that follows through “geological media”, were executed by substituting “at the Yucca Mountain site” for “beginning with the candidate sites that have been approved under section 10132 of this title and are located in various geologic media” as the probable intent of Congress.

Pub. L. 100-202 and Pub. L. 100-203, § 5011(e)(1), amended subsec. (a) identically, substituting “State of Nevada” for “State involved or the governing body of the affected Indian tribe involved”.

Subsec. (b)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(f)(1), amended par. (1) identically, substituting “the Yucca Mountain site” for “any candidate site” and “the Governor or legislature of the State of Nevada” for “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”.

Subsec. (b)(2). Pub. L. 100-202 and Pub. L. 100-203, § 5011(f)(2), amended par. (2) identically, substituting “the Yucca Mountain site” for “any candidate site”.

Subsec. (b)(3). Pub. L. 100-202 and Pub. L. 100-203, § 5011(f)(3), amended par. (3) identically, substituting “the Yucca Mountain site” for “a candidate site”, striking “either” before “the Governor”, and substituting “the State of Nevada” for “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”.

Subsec. (c)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(g)(1), amended par. (1) identically, substituting “the Yucca Mountain site” for “any candidate site”, “suitability of such site” for “suitability of such candidate site”, and “repository at such site” for “repository at such candidate site”.

Subsec. (c)(2). Pub. L. 100-202 and Pub. L. 100-203, § 5011(g)(2), amended par. (2) identically, striking out “candidate” before “site” in two places in subpar. (A) and in two places in subpar. (B).

Subsec. (c)(3), (4). Pub. L. 100-202 and Pub. L. 100-203, § 5011(g)(3), amended subsec. (c) identically, adding par. (3) and striking out former pars. (3) and (4) which read as follows:

“(3) If site characterization activities are terminated at a candidate site for any reason, the Secretary shall (A) notify the Congress, the Governors and legislatures of all States in which candidate sites are located, and the governing bodies of all affected Indian tribes where candidate sites are located, of such termination and the reasons for such termination; and (B) remove any high-level radioactive waste, spent nuclear fuel, or other radioactive materials at or in such candidate site as promptly as practicable.

“(4) If a site is determined to be unsuitable for application for a construction authorization for a repository, the Secretary shall take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities.”

**§ 10134. Site approval and construction authorization**

**(a) Hearings and Presidential recommendation**

(1) The Secretary shall hold public hearings in the vicinity of the Yucca Mountain site, for the purposes of informing the residents of the area of such consideration and receiving their comments regarding the possible recommendation of such site. If, upon completion of such hearings and completion of site characterization activities at the Yucca Mountain site, under section 10133 of this title, the Secretary decides to recommend approval of such site to the President, the Secretary shall notify the Governor and legislature of the State of Nevada, of such decision. No sooner than the expiration of the 30-day period following such notification, the Secretary shall submit to the President a recommendation that the President approve such site for the development of a repository. Any such recommendation by the Secretary shall be based on the record of information developed by the Secretary under section 10133 of this title and this section, including the information described in subparagraph (A) through subparagraph (G). Together with any recommendation of a site under this paragraph, the Secretary shall make available to the public, and submit to the President, a comprehensive statement of the basis of such recommendation, including the following:

(A) a description of the proposed repository, including preliminary engineering specifications for the facility;

(B) a description of the waste form or packaging proposed for use at such repository, and an explanation of the relationship between such waste form or packaging and the geologic medium of such site;

(C) a discussion of data, obtained in site characterization activities, relating to the safety of such site;

(D) a final environmental impact statement prepared for the Yucca Mountain site pursuant to subsection (f) of this section and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the Administrator, and the Commission, except that the Secretary shall not be required in any such environmental impact statement to con-

<sup>3</sup> So in original. The word “to” probably should not appear.

sider the need for a repository, the alternatives to geological disposal, or alternative sites to the Yucca Mountain site;

(E) preliminary comments of the Commission concerning the extent to which the at-depth site characterization analysis and the waste form proposal for such site seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing of such site as a repository;

(F) the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views;

(G) such other information as the Secretary considers appropriate; and

(H) any impact report submitted under section 10136(c)(2)(B) of this title by the State of Nevada.

(2)(A) If, after recommendation by the Secretary, the President considers the Yucca Mountain site qualified for application for a construction authorization for a repository, the President shall submit a recommendation of such site to Congress.

(B) The President shall submit with such recommendation a copy of the statement for such site prepared by the Secretary under paragraph (1).

(3)(A) The President may not recommend the approval of the Yucca Mountain site unless the Secretary has recommended to the President under paragraph (1) approval of such site and has submitted to the President a statement for such site as required under such paragraph.

(B) No recommendation of a site by the President under this subsection 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<sup>1</sup> require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

**(b) Submission of application**

If the President recommends to the Congress the Yucca Mountain site under subsection (a) of this section and the site designation is permitted to take effect under section 10135 of this title, the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the recommendation of the site designation is effective under such section and shall provide to the Governor and legislature of the State of Nevada a copy of such application.

**(c) Status report on application**

Not later than 1 year after the date on which an application for a construction authorization is submitted under subsection (b) of this section, and annually thereafter until the date on which such authorization is granted, the Commission shall submit a report to the Congress describing the proceedings undertaken through the date of such report with regard to such application, including a description of—

(1) any major unresolved safety issues, and the explanation of the Secretary with respect to design and operation plans for resolving such issues;

(2) any matters of contention regarding such application; and

(3) any Commission actions regarding the granting or denial of such authorization.

**(d) Commission action**

The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection (e)(2) of this section. The Commission decision approving the first such application shall prohibit 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. In the event that a monitored retrievable storage facility, approved pursuant to part C of this subchapter, shall be located, or is planned to be located, within 50 miles of the first repository, then the Commission decision approving the first such application shall prohibit the emplacement 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 spent fuel in both the repository and monitored retrievable storage facility until such time as a second repository is in operation.

**(e) Project decision schedule**

(1) The Secretary shall prepare and update, as appropriate, in cooperation with all affected Federal agencies, a project decision schedule that portrays the optimum way to attain the operation of the repository, within the time periods specified in this part. Such schedule shall include a description of objectives and a sequence of deadlines for all Federal agencies required to take action, including an identification of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning repository operation.

(2) Any Federal agency that determines that it cannot comply with any deadline in the project decision schedule, or fails to so comply, shall submit to the Secretary and to the Congress a written report explaining the reason for its failure or expected failure to meet such deadline, the reason why such agency could not reach an agreement with the Secretary, the estimated time for completion of the activity or activities involved, the associated effect on its other deadlines in the project decision schedule, and any recommendations it may have or actions it intends to take regarding any improvements in its operation or organization, or changes to its stat-

<sup>1</sup> So in original. The word "to" probably should not appear.

utory directives or authority, so that it will be able to mitigate the delay involved. The Secretary, within 30 days after receiving any such report, shall file with the Congress his response to such report, including the reasons why the Secretary could not amend the project decision schedule to accommodate the Federal agency involved.

**(f) Environmental impact statement**

(1) Any recommendation made by the Secretary under this section shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). A final environmental impact statement prepared by the Secretary under such Act shall accompany any recommendation to the President to approve a site for a repository.

(2) With respect to the requirements imposed by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), compliance with the procedures and requirements of this chapter shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository.

(3) For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and this section, the Secretary need not consider alternate sites to the Yucca Mountain site for the repository to be developed under this part.

(4) Any environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary under this part shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(5) Nothing in this chapter shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear Regulatory Commission established in title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 et seq.).

(6) In any such statement prepared with respect to the repository to be constructed under this part, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or non-geologic alternatives to such site.

(Pub. L. 97-425, title I, § 114, Jan. 7, 1983, 96 Stat. 2213; 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(h)-(l), Dec. 22, 1987, 101 Stat. 1330-229, 1330-230.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsecs. (a)(1)(D) and (f), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

The Atomic Energy Act of 1954, referred to in subsec. (f)(4), is act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 921, and amended, which is classified generally to chapter 23 (§ 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

The Energy Reorganization Act of 1974, referred to in subsec. (f)(5), is Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233, as amended. Title II of the Energy Reorganization Act of 1974 is classified generally to subchapter II (§ 5841 et seq.) of chapter 73 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5801 of this title and Tables.

AMENDMENTS

1987—Subsec. (a)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(1)(A)-(E), amended par. (1) identically, in introductory provisions substituting “vicinity of the Yucca Mountain site” for “vicinity of each site under consideration for recommendation to the President under this paragraph as a site for the development of a repository”, striking out “in which such site is located” after “residents of the area”, substituting “activities at the Yucca Mountain site” for “activities at not less than 3 candidate sites for the first proposed repository, or from all of the characterized sites for the development of subsequent repositories” [sic] and “of Nevada” for “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”, and struck out before last sentence “In making site recommendations and approvals subsequent to the first site recommendation, the Secretary and the President, respectively, shall also consider the need for regional distribution of repositories and the need to minimize, to the extent practicable, the impacts and cost of transporting spent fuel and solidified high-level radioactive waste.”

Subsec. (a)(1)(D). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(1)(F), generally amended subpar. (D) identically. Prior to amendment, subpar. (D) read as follows: “a final environmental impact statement prepared pursuant to subsection (f) of this section and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), including an analysis of the consideration given by the Secretary to not less than 3 candidate sites for the first proposed repository [sic] or to all of the characterized sites for the development of subsequent repositories, with respect to which site characterization is completed under section 10133 of this title, together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the Administrator, and the Commission, except that any such environmental impact statement concerning the first repository to be developed under this chapter shall not be required to consider the need for a repository or the alternatives to geologic disposal.”

Subsec. (a)(1)(H). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(1)(G), amended subpar. (H) identically, substituting “the State of Nevada” for “the State in which such site is located, or under section 10138(b)(3)(B) of this title by the affected Indian tribe where such site is located, as the case may be”.

Subsec. (a)(2). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(2), amended subsec. (a) identically, adding par. (2) and striking out former par. (2) which required submission of recommendation of one site for repository not later than Mar. 31, 1987, and recommendation of second site not later than Mar. 31, 1990, and permitted subsequent recommendations for other sites and extension of deadlines.

Subsec. (a)(3), (4). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(2), (3), amended subsec. (a) identically, redesignating par. (4) as (3), in subpar. (A), substituting “the Yucca Mountain site” for “any site under this subsection” and “statement” for “report”, and striking out former par. (3) which read as follows: “If approval of any such site recommendation does not take effect as a result of a disapproval by the Governor or legislature of a State under section 10136 of this title or the governing body of an affected Indian tribe under section 10138 of this title, the President shall submit to the Congress, not later than 1 year after the disapproval of such recommendation, a recommendation of another site for the first or subsequent repository.”

Subsec. (b). Pub. L. 100-202 and Pub. L. 100-203, § 5011(i), amended subsec. (b) identically, substituting “the Yucca Mountain site” for “a site for a repository” and “State of Nevada” for “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.”

Subsec. (d). Pub. L. 100-202 and Pub. L. 100-203, § 5011(j), amended subsec. (d) identically, substituting “than the expiration” for “than— (1) January 1, 1989, for the first such application, and January 1, 1992 for the second such application; or (2) the expiration” and “subsection (e)(2) of this section” for “subsection (e)(2) of this section; whichever occurs later”.

Subsec. (e)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(k), amended par. (1) identically, substituting “operation of the repository” for “operation of the repository involved”.

Subsec. (f). Pub. L. 100-202 and Pub. L. 100-203, § 5011(l), generally amended subsec. (f) identically, substituting provisions consisting of pars. (1) to (6) for former provisions consisting of single unnumbered par.

**TERMINATION OF REPORTING REQUIREMENTS**

For termination, effective May 15, 2000, of provisions of law requiring submittal to Congress of any annual, semiannual, or other regular periodic report listed in House Document No. 103-7 (in which a report required under subsec. (c) of this section is listed as the 17th item on page 186), see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.

**VIABILITY ASSESSMENT OF YUCCA MOUNTAIN SITE**

Pub. L. 104-206, title III, Sept. 30, 1996, 110 Stat. 2995, provided in part: “That no later than September 30, 1998, the Secretary shall provide to the President and to the Congress a viability assessment of the Yucca Mountain site. The viability assessment shall include:

- “(1) the preliminary design concept for the critical elements for the repository and waste package;
- “(2) a total system performance assessment, based upon the design concept and the scientific data and analysis available by September 30, 1998, describing the probable behavior of the repository in the Yucca Mountain geological setting relative to the overall system performance standards;
- “(3) a plan and cost estimate for the remaining work required to complete a license application; and
- “(4) an estimate of the costs to construct and operate the repository in accordance with the design concept.”

**§ 10135. Review of repository site selection**

**(a) “Resolution of repository siting approval” defined**

For purposes of this section, the term “resolution of repository siting approval” means a joint resolution of the Congress, the matter after the resolving clause of which is as follows: “That there hereby is approved the site at ..... for a repository, with respect to which a notice of disapproval was submitted by ..... on .....”. The first blank space in such resolution shall be

filled with the name of the geographic location of the proposed site of the repository to which such resolution pertains; the second blank space in such resolution shall be filled with the designation of the State Governor and legislature or Indian tribe governing body submitting the notice of disapproval to which such resolution pertains; and the last blank space in such resolution shall be filled with the date of such submission.

**(b) State or Indian tribe petitions**

The designation of a site as suitable for application for a construction authorization for a repository shall be effective at the end of the 60-day period beginning on the date that the President recommends such site to the Congress under section 10134 of this title, unless the Governor and legislature of the State in which such site is located, or the governing body of an Indian tribe on whose reservation such site is located, as the case may be, has submitted to the Congress a notice of disapproval under section 10136 or 10138 of this title. If any such notice of disapproval has been submitted, the designation of such site shall not be effective except as provided under subsection (c) of this section.

**(c) Congressional review of petitions**

If any notice of disapproval of a repository site designation has been submitted to the Congress under section 10136 or 10138 of this title after a recommendation for approval of such site is made by the President under section 10134 of this title, such site shall be disapproved unless, during the first period of 90 calendar days of continuous session of the Congress after the date of the receipt by the Congress of such notice of disapproval, the Congress passes a resolution of repository siting approval in accordance with this subsection approving such site, and such resolution thereafter becomes law.

**(d) Procedures applicable to Senate**

(1) The provisions of this subsection are enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate, and as such they are deemed a part of the rules of the Senate, but applicable only with respect to the procedure to be followed in the Senate in the case of resolutions of repository siting approval, and such provisions supersede other rules of the Senate only to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of the Senate to change the rules (so far as relating to the procedure of the Senate) at any time, in the same manner and to the same extent as in the case of any other rule of the Senate.

(2)(A) Not later than the first day of session following the day on which any notice of disapproval of a repository site selection is submitted to the Congress under section 10136 or 10138 of this title, a resolution of repository siting approval shall be introduced (by request) in the Senate by the chairman of the committee to which such notice of disapproval is referred, or by a Member or Members of the Senate designated by such chairman.

(B) Upon introduction, a resolution of repository siting approval shall be referred to the ap-

propriate committee or committees of the Senate by the President of the Senate, and all such resolutions with respect to the same repository site shall be referred to the same committee or committees. Upon the expiration of 60 calendar days of continuous session after the introduction of the first resolution of repository siting approval with respect to any site, each committee to which such resolution was referred shall make its recommendations to the Senate.

(3) If any committee to which is referred a resolution of siting approval introduced under paragraph (2)(A), or, in the absence of such a resolution, any other resolution of siting approval introduced with respect to the site involved, has not reported such resolution at the end of 60 days of continuous session of Congress after introduction of such resolution, such committee shall be deemed to be discharged from further consideration of such resolution, and such resolution shall be placed on the appropriate calendar of the Senate.

(4)(A) When each committee to which a resolution of siting approval has been referred has reported, or has been deemed to be discharged from further consideration of, a resolution described in paragraph (3), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) for any Member of the Senate to move to proceed to the consideration of such resolution. Such motion shall be highly privileged and shall not be debatable. Such motion shall not be subject to amendment, to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which such motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of such resolution is agreed to, such resolution shall remain the unfinished business of the Senate until disposed of.

(B) Debate on a resolution of siting approval, and on all debatable motions and appeals in connection with such resolution, shall be limited to not more than 10 hours, which shall be divided equally between Members favoring and Members opposing such resolution. A motion further to limit debate shall be in order and shall not be debatable. Such motion shall not be subject to amendment, to a motion to postpone, or to a motion to proceed to the consideration of other business, and a motion to recommit such resolution shall not be in order. A motion to reconsider the vote by which such resolution is agreed to or disagreed to shall not be in order.

(C) Immediately following the conclusion of the debate on a resolution of siting approval, and a single quorum call at the conclusion of such debate if requested in accordance with the rules of the Senate, the vote on final approval of such resolution shall occur.

(D) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a resolution of siting approval shall be decided without debate.

(5) If the Senate receives from the House a resolution of repository siting approval with respect to any site, then the following procedure shall apply:

(A) The resolution of the House with respect to such site shall not be referred to a committee.

(B) With respect to the resolution of the Senate with respect to such site—

(i) the procedure with respect to that or other resolutions of the Senate with respect to such site shall be the same as if no resolution from the House with respect to such site had been received; but

(ii) on any vote on final passage of a resolution of the Senate with respect to such site, a resolution from the House with respect to such site where the text is identical shall be automatically substituted for the resolution of the Senate.

**(e) Procedures applicable to House of Representatives**

(1) The provisions of this section<sup>1</sup> are enacted by the Congress—

(A) as an exercise of the rulemaking power of the House of Representatives, and as such they are deemed a part of the rules of the House, but applicable only with respect to the procedure to be followed in the House in the case of resolutions of repository siting approval, and such provisions supersede other rules of the House only to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of the House to change the rules (so far as relating to the procedure of the House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.

(2) Resolutions of repository siting approval shall upon introduction, be immediately referred by the Speaker of the House to the appropriate committee or committees of the House. Any such resolution received from the Senate shall be held at the Speaker's table.

(3) Upon the expiration of 60 days of continuous session after the introduction of the first resolution of repository siting approval with respect to any site, each committee to which such resolution was referred shall be discharged from further consideration of such resolution, and such resolution shall be referred to the appropriate calendar, unless such resolution or an identical resolution was previously reported by each committee to which it was referred.

(4) It shall be in order for the Speaker to recognize a Member favoring a resolution to call up a resolution of repository siting approval after it has been on the appropriate calendar for 5 legislative days. When any such resolution is called up, the House shall proceed to its immediate consideration and the Speaker shall recognize the Member calling up such resolution and a Member opposed to such resolution for 2 hours of debate in the House, to be equally divided and controlled by such Members. When such time has expired, the previous question shall be considered as ordered on the resolution to adoption without intervening motion. No amendment to any such resolution shall be in order, nor shall it be in order to move to reconsider the vote by which such resolution is agreed to or disagreed to.

(5) If the House receives from the Senate a resolution of repository siting approval with re-

<sup>1</sup> So in original. Probably should be "subsection".

spect to any site, then the following procedure shall apply:

(A) The resolution of the Senate with respect to such site shall not be referred to a committee.

(B) With respect to the resolution of the House with respect to such site—

(i) the procedure with respect to that or other resolutions of the House with respect to such site shall be the same as if no resolution from the Senate with respect to such site had been received; but

(ii) on any vote on final passage of a resolution of the House with respect to such site, a resolution from the Senate with respect to such site where the text is identical shall be automatically substituted for the resolution of the House.

**(f) Computation of days**

For purposes of this section—

(1) continuity of session of Congress is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 90-day period referred to in subsection (c) of this section and the 60-day period referred to in subsections (d) and (e) of this section.

**(g) Information provided to Congress**

In considering any notice of disapproval submitted to the Congress under section 10136 or 10138 of this title, the Congress may obtain any comments of the Commission with respect to such notice of disapproval. The provision of such comments by the Commission shall not be construed as binding the Commission with respect to any licensing or authorization action concerning the repository involved.

(Pub. L. 97-425, title I, § 115, Jan. 7, 1983, 96 Stat. 2217.)

**YUCCA MOUNTAIN, NEVADA REPOSITORY SITE**

Pub. L. 107-200, July 23, 2002, 116 Stat. 735, provided: "That there hereby is approved the site at Yucca Mountain, Nevada, for a repository, with respect to which a notice of disapproval was submitted by the Governor of the State of Nevada on April 8, 2002."

**§ 10136. Participation of States**

**(a) Notification of States and affected tribes**

The Secretary shall identify the States with one or more potentially acceptable sites for a repository within 90 days after January 7, 1983. Within 90 days of such identification, the Secretary shall notify the Governor, the State legislature, and the tribal council of any affected Indian tribe in any State of the potentially acceptable sites within such State. For the purposes of this subchapter, the term "potentially acceptable site" means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the Department undertakes preliminary drilling and geophysical testing for the definition of site location.

**(b) State participation in repository siting decisions**

(1) Unless otherwise provided by State law, the Governor or legislature of each State shall have

authority to submit a notice of disapproval to the Congress under paragraph (2). In any case in which State law provides for submission of any such notice of disapproval by any other person or entity, any reference in this part to the Governor or legislature of such State shall be considered to refer instead to such other person or entity.

(2) Upon the submission by the President to the Congress of a recommendation of a site for a repository, the Governor or legislature of the State in which such site is located may disapprove the site designation and submit to the Congress a notice of disapproval. Such Governor or legislature may submit such a notice of disapproval to the Congress not later than the 60 days after the date that the President recommends such site to the Congress under section 10134 of this title. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why such Governor or legislature disapproved the recommended repository site involved.

(3) The authority of the Governor or legislature of each State under this subsection shall not be applicable with respect to any site located on a reservation.

**(c) Financial assistance**

(1)(A) The Secretary shall make grants to the State of Nevada and any affected unit of local government for the purpose of participating in activities required by this section and section 10137 of this title or authorized by written agreement entered into pursuant to section 10137(c) of this title. Any salary or travel expense that would ordinarily be incurred by such State or affected unit of local government, may not be considered eligible for funding under this paragraph.

(B) The Secretary shall make grants to the State of Nevada and any affected unit of local government for purposes of enabling such State or affected unit of local government—

(i) to review activities taken under this part with respect to the Yucca Mountain site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of a repository on such State, or affected unit of local government and its residents;

(ii) to develop a request for impact assistance under paragraph (2);

(iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;

(iv) to provide information to Nevada residents regarding any activities of such State, the Secretary, or the Commission with respect to such site; and

(v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this part with respect to such site.

(C) Any salary or travel expense that would ordinarily be incurred by the State of Nevada or

any affected unit of local government may not be considered eligible for funding under this paragraph.

(2)(A)(i) The Secretary shall provide financial and technical assistance to the State of Nevada, and any affected unit of local government requesting such assistance.

(ii) Such assistance shall be designed to mitigate the impact on such State or affected unit of local government of the development of such repository and the characterization of such site.

(iii) Such assistance to such State or affected unit of local government of such State shall commence upon the initiation of site characterization activities.

(B) The State of Nevada and any affected unit of local government may request assistance under this subsection by preparing and submitting to the Secretary a report on the economic, social, public health and safety, and environmental impacts that are likely to result from site characterization activities at the Yucca Mountain site. Such report shall be submitted to the Secretary after the Secretary has submitted to the State a general plan for site characterization activities under section 10133(b) of this title.

(C) As soon as practicable after the Secretary has submitted such site characterization plan, the Secretary shall seek to enter into a binding agreement with the State of Nevada setting forth—

(i) the amount of assistance to be provided under this subsection to such State or affected unit of local government; and

(ii) the procedures to be followed in providing such assistance.

(3)(A) In addition to financial assistance provided under paragraphs (1) and (2), the Secretary shall grant to the State of Nevada and any affected unit of local government an amount each fiscal year equal to the amount such State or affected unit of local government, respectively, would receive if authorized to tax site characterization activities at such site, and the development and operation of such repository, as such State or affected unit of local government taxes the non-Federal real property and industrial activities occurring within such State or affected unit of local government.

(B) Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

(4)(A) The State of Nevada or any affected unit of local government may not receive any grant under paragraph (1) after the expiration of the 1-year period following—

(i) the date on which the Secretary notifies the Governor and legislature of the State of Nevada of the termination of site characterization activities at the site in such State;

(ii) the date on which the Yucca Mountain site is disapproved under section 10135 of this title; or

(iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site;

whichever occurs first.

(B) The State of Nevada or any affected unit of local government may not receive any further

assistance under paragraph (2) with respect to a site if repository construction activities or site characterization activities at such site are terminated by the Secretary or if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any license to receive and possess for a repository in a State, no Federal funds, shall be made available to such State or affected unit of local government under paragraph (1) or (2), except for—

(i) such funds as may be necessary to support activities related to any other repository located in, or proposed to be located in, such State, and for which a license to receive and possess has not been in effect for more than 1 year;

(ii) such funds as may be necessary to support State activities pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such State with the Secretary during such 2-year period; and

(iii) such funds as may be provided under an agreement entered into under subchapter IV of this chapter.

(5) Financial assistance authorized in this subsection shall be made out of amounts held in the Waste Fund.

(6) No State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987.

#### **(d) Additional notification and consultation**

Whenever the Secretary is required under any provision of this chapter to notify or consult with the governing body of an affected Indian tribe where a site is located, the Secretary shall also notify or consult with, as the case may be, the Governor of the State in which such reservation is located.

(Pub. L. 97-425, title I, § 116, Jan. 7, 1983, 96 Stat. 2220; Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5032(a), Dec. 22, 1987, 101 Stat. 1330-241.)

#### AMENDMENTS

1987—Subsec. (c). Pub. L. 100-202 and Pub. L. 100-203 generally amended subsec. (c) identically, substituting provisions consisting of pars. (1) to (6) for former provisions consisting of pars. (1) to (5).

#### **§ 10137. Consultation with States and affected Indian tribes**

##### **(a) Provision of information**

(1) The Secretary, the Commission, and other agencies involved in the construction, operation, or regulation of any aspect of a repository in a State shall provide to the Governor and legislature of such State, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made with respect to the site characterization siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository.

(2) Upon written request for such information by the Governor or legislature of such State, or by the governing body of any affected Indian tribe, as the case may be, the Secretary shall

provide a written response to such request within 30 days of the receipt of such request. Such response shall provide the information requested or, in the alternative, the reasons why the information cannot be so provided. If the Secretary fails to so respond within such 30 days, the Governor or legislature of such State, or the governing body of any affected Indian tribe, as the case may be, may transmit a formal written objection to such failure to respond to the President. If the President or Secretary fails to respond to such written request within 30 days of the receipt by the President of such formal written objection, the Secretary shall immediately suspend all activities in such State authorized by this part, and shall not renew such activities until the Governor or legislature of such State, or the governing body of any affected Indian tribe, as the case may be, has received the written response to such written request required by this subsection.

**(b) Consultation and cooperation**

In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c) of this title, and in subsequently developing and loading<sup>1</sup> any repository within such State, the Secretary shall consult and cooperate with the Governor and legislature of such State and the governing body of any affected Indian tribe in an effort to resolve the concerns of such State and any affected Indian tribe regarding the public health and safety, environmental, and economic impacts of any such repository. In carrying out his duties under this part, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c) of this section.

**(c) Written agreement**

Not later than 60 days after (1) the approval of a site for site characterization for such a repository under section 10132(c) of this title, or (2) the written request of the State or Indian tribe in any affected State notified under section 10136(a) of this title to the Secretary, whichever<sup>2</sup> first occurs, the Secretary shall seek to enter into a binding written agreement, and shall begin negotiations, with such State and, where appropriate, to enter into a separate binding agreement with the governing body of any affected Indian tribe, setting forth (but not limited to) the procedures under which the requirements of subsections (a) and (b) of this section, and the provisions of such written agreement, shall be carried out. Any such written agreement shall not affect the authority of the Commission under existing law. Each such written agreement shall, to the maximum extent feasible, be completed not later than 6 months after such notification. Such written agreement shall specify procedures—

(1) by which such State or governing body of an affected Indian tribe, as the case may be, may study, determine, comment on, and make recommendations with regard to the possible public health and safety, environmental, so-

cial, and economic impacts of any such repository;

(2) by which the Secretary shall consider and respond to comments and recommendations made by such State or governing body of an affected Indian tribe, including the period in which the Secretary shall so respond;

(3) by which the Secretary and such State or governing body of an affected Indian tribe may review or modify the agreement periodically;

(4) by which such State or governing body of an affected Indian tribe is to submit an impact report and request for impact assistance under section 10136(c) of this title or section 10138(b) of this title, as the case may be;

(5) by which the Secretary shall assist such State, and the units of general local government in the vicinity of the repository site, in resolving the offsite concerns of such State and units of general local government, including, but not limited to, questions of State liability arising from accidents, necessary road upgrading and access to the site, ongoing emergency preparedness and emergency response, monitoring of transportation of high-level radioactive waste and spent nuclear fuel through such State, conduct of baseline health studies of inhabitants in neighboring communities near the repository site and reasonable periodic monitoring thereafter, and monitoring of the repository site upon any decommissioning and decontamination;

(6) by which the Secretary shall consult and cooperate with such State on a regular, ongoing basis and provide for an orderly process and timely schedule for State review and evaluation, including identification in the agreement of key events, milestones, and decision points in the activities of the Secretary at the potential repository site;

(7) by which the Secretary shall notify such State prior to the transportation of any high-level radioactive waste and spent nuclear fuel into such State for disposal at the repository site;

(8) by which such State may conduct reasonable independent monitoring and testing of activities on the repository site, except that such monitoring and testing shall not unreasonably interfere with or delay onsite activities;

(9) for sharing, in accordance with applicable law, of all technical and licensing information, the utilization of available expertise, the facilitating of permit procedures, joint project review, and the formulation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws;

(10) for public notification of the procedures specified under the preceding paragraphs; and

(11) for resolving objections of a State and affected Indian tribes at any stage of the planning, siting, development, construction, operation, or closure of such a facility within such State through negotiation, arbitration, or other appropriate mechanisms.

**(d) On-site representative**

The Secretary shall offer to any State, Indian tribe or unit of local government within whose jurisdiction a site for a repository or monitored

<sup>1</sup> So in original. Probably should be "locating".

<sup>2</sup> So in original. The comma probably should not appear.

retrievable storage facility is located under this subchapter an opportunity to designate a representative to conduct on-site oversight activities at such site. Reasonable expenses of such representatives shall be paid out of the Waste Fund.

(Pub. L. 97-425, title I, § 117, Jan. 7, 1983, 96 Stat. 2222; 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(m), Dec. 22, 1987, 101 Stat. 1330-231; Pub. L. 104-66, title I, § 1051(i), Dec. 21, 1995, 109 Stat. 716.)

AMENDMENTS

1995—Subsec. (c). Pub. L. 104-66 struck out after third sentence “If such written agreement is not completed within such period, the Secretary shall report to the Congress in writing within 30 days on the status of negotiations to develop such agreement and the reasons why such agreement has not been completed. Prior to submission of such report to the Congress, the Secretary shall transmit such report to the Governor of such State or the governing body of such affected Indian tribe, as the case may be, for their review and comments. Such comments shall be included in such report prior to submission to the Congress.”

1987—Subsec. (d). Pub. L. 100-202 and Pub. L. 100-203 amended section identically, adding subsec. (d).

**§ 10138. Participation of Indian tribes**

**(a) Participation of Indian tribes in repository siting decisions**

Upon the submission by the President to the Congress of a recommendation of a site for a repository located on the reservation of an affected Indian tribe, the governing body of such Indian tribe may disapprove the site designation and submit to the Congress a notice of disapproval. The governing body of such Indian tribe may submit such a notice of disapproval to the Congress not later than the 60 days after the date that the President recommends such site to the Congress under section 10134 of this title. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why the governing body of such Indian tribe disapproved the recommended repository site involved.

**(b) Financial assistance**

(1) The Secretary shall make grants to each affected tribe notified under section 10136(a) of this title for the purpose of participating in activities required by section 10137 of this title or authorized by written agreement entered into pursuant to section 10137(c) of this title. Any salary or travel expense that would ordinarily be incurred by such tribe, may not be considered eligible for funding under this paragraph.

(2)(A) The Secretary shall make grants to each affected Indian tribe where a candidate site for a repository is approved under section 10132(c) of this title. Such grants may be made to each such Indian tribe only for purposes of enabling such Indian tribe—

(i) to review activities taken under this part with respect to such site for purposes of determining any potential economic, social, public

health and safety, and environmental impacts of such repository on the reservation and its residents;

(ii) to develop a request for impact assistance under paragraph (2);

(iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;

(iv) to provide information to the residents of its reservation regarding any activities of such Indian tribe, the Secretary, or the Commission with respect to such site; and

(v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this part with respect to such site.

(B) The amount of funds provided to any affected Indian tribe under this paragraph in any fiscal year may not exceed 100 percent of the costs incurred by such Indian tribe with respect to the activities described in clauses (i) through (v) of subparagraph (A). Any salary or travel expense that would ordinarily be incurred by such Indian tribe may not be considered eligible for funding under this paragraph.

(3)(A) The Secretary shall provide financial and technical assistance to any affected Indian tribe requesting such assistance and where there is a site with respect to which the Commission has authorized construction of a repository. Such assistance shall be designed to mitigate the impact on such Indian tribe of the development of such repository. Such assistance to such Indian tribe shall commence within 6 months following the granting by the Commission of a construction authorization for such repository and following the initiation of construction activities at such site.

(B) Any affected Indian tribe desiring assistance under this paragraph shall prepare and submit to the Secretary a report on any economic, social, public health and safety, and environmental impacts that are likely as a result of the development of a repository at a site on the reservation of such Indian tribe. Such report shall be submitted to the Secretary following the completion of site characterization activities at such site and before the recommendation of such site to the President by the Secretary for application for a construction authorization for a repository. As soon as practicable following the granting of a construction authorization for such repository, the Secretary shall seek to enter into a binding agreement with the Indian tribe involved setting forth the amount of assistance to be provided to such Indian tribe under this paragraph and the procedures to be followed in providing such assistance.

(4) The Secretary shall grant to each affected Indian tribe where a site for a repository is approved under section 10132(c) of this title an amount each fiscal year equal to the amount such Indian tribe would receive were it authorized to tax site characterization activities at such site, and the development and operation of such repository, as such Indian tribe taxes the other commercial activities occurring on such reservation. Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

(5)<sup>1</sup> An affected Indian tribe may not receive any grant under paragraph (1) after the expiration of the 1-year period following—

- (i) the date on which the Secretary notifies such Indian tribe of the termination of site characterization activities at the candidate site involved on the reservation of such Indian tribe;
- (ii) the date on which such site is disapproved under section 10135 of this title;
- (iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site;<sup>2</sup>
- (iv) December 22, 1987;

whichever occurs first, unless there is another candidate site on the reservation of such Indian tribe that is approved under section 10132(c) of this title and with respect to which the actions described in clauses (i), (ii), and (iii) have not been taken.

(B) An affected Indian tribe may not receive any further assistance under paragraph (2) with respect to a site if repository construction activities at such site are terminated by the Secretary or if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any license to receive and possess for a repository at a site on the reservation of an affected Indian tribe, no Federal funds shall be made available under paragraph (1) or (2) to such Indian tribe, except for—

- (i) such funds as may be necessary to support activities of such Indian tribe related to any other repository where a license to receive and possess has not been in effect for more than 1 year; and
- (ii) such funds as may be necessary to support activities of such Indian tribe pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such Indian tribe with the Secretary during such 2-year period.

(6) Financial assistance authorized in this subsection shall be made out of amounts held in the Nuclear Waste Fund established in section 10222 of this title.

(Pub. L. 97-425, title I, § 118, Jan. 7, 1983, 96 Stat. 2225; Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5033, Dec. 22, 1987, 101 Stat. 1330-243.)

AMENDMENTS

1987—Subsec. (b)(5)(iv). Pub. L. 100-202 and Pub. L. 100-203 amended par. (5) identically, adding cl. (iv).

**§ 10139. Judicial review of agency actions**

**(a) Jurisdiction of United States courts of appeals**

(1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action—

- (A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;

(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;

(C) challenging the constitutionality of any decision made, or action taken, under any provision of this part;

(D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to any action under this part, or as required under section 10155(c)(1) of this title, or alleging a failure to prepare such statement with respect to any such action;

(E) for review of any environmental assessment prepared under section 10132(b)(1) or 10155(c)(2) of this title; or

(F) for review of any research and development activity under subchapter II of this chapter.

(2) The venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.

**(c)<sup>1</sup> Deadline for commencing action**

A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

(Pub. L. 97-425, title I, § 119, Jan. 7, 1983, 96 Stat. 2227.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a)(1)(D), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

**§ 10140. Expedited authorizations**

**(a) Issuance of authorizations**

(1) To the extent that the taking of any action related to the site characterization of a site or the construction or initial operation of a repository under this part requires a certificate, right-of-way, permit, lease, or other authorization from a Federal agency or officer, such agency or officer shall issue or grant any such authorization at the earliest practicable date, to the extent permitted by the applicable provisions of law administered by such agency or officer. All actions of a Federal agency or officer with respect to consideration of applications or requests for the issuance or grant of any such au-

<sup>1</sup> So in original. Probably should be designated “(5)(A)”.

<sup>2</sup> So in original. Probably should be followed by “or”.

<sup>1</sup> So in original. No subsec. (b) has been enacted.

thorization shall be expedited, and any such application or request shall take precedence over any similar applications or requests not related to such repositories.

(2) The provisions of paragraph (1) shall not apply to any certificate, right-of-way, permit, lease, or other authorization issued or granted by, or requested from, the Commission.

**(b) Terms of authorizations**

Any authorization issued or granted pursuant to subsection (a) of this section shall include such terms and conditions as may be required by law, and may include terms and conditions permitted by law.

(Pub. L. 97-425, title I, § 120, Jan. 7, 1983, 96 Stat. 2227.)

**§ 10141. Certain standards and criteria**

**(a) Environmental Protection Agency standards**

Not later than 1 year after January 7, 1983, the Administrator, pursuant to authority under other provisions of law, shall, by rule, promulgate generally applicable standards for protection of the general environment from offsite releases from radioactive material in repositories.

**(b) Commission requirements and criteria**

(1)(A) Not later than January 1, 1984, the Commission, pursuant to authority under other provisions of law, shall, by rule, promulgate technical requirements and criteria that it will apply, under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) and the Energy Reorganization Act of 1974 (42 U.S.C. 5801 et seq.), in approving or disapproving—

- (i) applications for authorization to construct repositories;
- (ii) applications for licenses to receive and possess spent nuclear fuel and high-level radioactive waste in such repositories; and
- (iii) applications for authorization for closure and decommissioning of such repositories.

(B) Such criteria shall provide for the use of a system of multiple barriers in the design of the repository and shall include such restrictions on the retrievability of the solidified high-level radioactive waste and spent fuel emplaced in the repository as the Commission deems appropriate.

(C) Such requirements and criteria shall not be inconsistent with any comparable standards promulgated by the Administrator under subsection (a) of this section.

(2) For purposes of this chapter, nothing in this section shall be construed to prohibit the Commission from promulgating requirements and criteria under paragraph (1) before the Administrator promulgates standards under subsection (a) of this section. If the Administrator promulgates standards under subsection (a) of this section after requirements and criteria are promulgated by the Commission under paragraph (1), such requirements and criteria shall be revised by the Commission if necessary to comply with paragraph (1)(C).

**(c) Environmental impact statement**

The promulgation of standards or criteria in accordance with the provisions of 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)), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(Pub. L. 97-425, title I, § 121, Jan. 7, 1983, 96 Stat. 2228.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in subsec. (b)(1)(A), is act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 921, and amended, which is classified generally to chapter 23 (§ 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

The Energy Reorganization Act of 1974, referred to in subsec. (b)(1)(A), is Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233, as amended, which is classified principally to chapter 73 (§ 5801 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5801 of this title and Tables.

NUCLEAR WASTE STORAGE AND DISPOSAL AT YUCCA MOUNTAIN SITE

Pub. L. 102-486, title VIII, § 801, Oct. 24, 1992, 106 Stat. 2921, provided that:

“(a) ENVIRONMENTAL PROTECTION AGENCY STANDARDS.—

“(1) PROMULGATION.—Notwithstanding the provisions of section 121(a) of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10141(a)), section 161 b. of the Atomic Energy Act of 1954 (42 U.S.C. 2201(b)), and any other authority of the Administrator of the Environmental Protection Agency to set generally applicable standards for the Yucca Mountain site, the Administrator shall, based upon and consistent with the findings and recommendations of the National Academy of Sciences, promulgate, by rule, public health and safety standards for protection of the public from releases from radioactive materials stored or disposed of in the repository at the Yucca Mountain site. Such standards shall prescribe the maximum annual effective dose equivalent to individual members of the public from releases to the accessible environment from radioactive materials stored or disposed of in the repository. The standards shall be promulgated not later than 1 year after the Administrator receives the findings and recommendations of the National Academy of Sciences under paragraph (2) and shall be the only such standards applicable to the Yucca Mountain site.

“(2) STUDY BY NATIONAL ACADEMY OF SCIENCES.—Within 90 days after the date of the enactment of this Act [Oct. 24, 1992], the Administrator shall contract with the National Academy of Sciences to conduct a study to provide, by not later than December 31, 1993, findings and recommendations on reasonable standards for protection of the public health and safety, including—

“(A) whether a health-based standard based upon doses to individual members of the public from releases to the accessible environment (as that term is defined in the regulations contained in subpart B of part 191 of title 40, Code of Federal Regulations, as in effect on November 18, 1985) will provide a reasonable standard for protection of the health and safety of the general public;

“(B) whether it is reasonable to assume that a system for post-closure oversight of the repository can be developed, based upon active institutional controls, that will prevent an unreasonable risk of breaching the repository's engineered or geologic barriers or increasing the exposure of individual members of the public to radiation beyond allowable limits; and

“(C) whether it is possible to make scientifically supportable predictions of the probability that the

repository's engineered or geologic barriers will be breached as a result of human intrusion over a period of 10,000 years.

“(3) APPLICABILITY.—The provisions of this section shall apply to the Yucca Mountain site, rather than any other authority of the Administrator to set generally applicable standards for radiation protection.

“(b) NUCLEAR REGULATORY COMMISSION REQUIREMENTS AND CRITERIA.—

“(1) MODIFICATIONS.—Not later than 1 year after the Administrator promulgates standards under subsection (a), the Nuclear Regulatory Commission shall, by rule, modify its technical requirements and criteria under section 121(b) of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10141(b)), as necessary, to be consistent with the Administrator's standards promulgated under subsection (a).

“(2) REQUIRED ASSUMPTIONS.—The Commission's requirements and criteria shall assume, to the extent consistent with the findings and recommendations of the National Academy of Sciences, that, following repository closure, the inclusion of engineered barriers and the Secretary's post-closure oversight of the Yucca Mountain site, in accordance with subsection (c), shall be sufficient to—

“(A) prevent any activity at the site that poses an unreasonable risk of breaching the repository's engineered or geologic barriers; and

“(B) prevent any increase in the exposure of individual members of the public to radiation beyond allowable limits.

“(c) POST-CLOSURE OVERSIGHT.—Following repository closure, the Secretary of Energy shall continue to oversee the Yucca Mountain site to prevent any activity at the site that poses an unreasonable risk of—

“(1) breaching the repository's engineered or geologic barriers; or

“(2) increasing the exposure of individual members of the public to radiation beyond allowable limits.”

**§ 10142. Disposal of spent nuclear fuel**

Notwithstanding any other provision of this part, any repository constructed on a site approved under this part shall be designed and constructed to permit the retrieval of any spent 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 10134 of this title.

(Pub. L. 97-425, title I, § 122, Jan. 7, 1983, 96 Stat. 2228.)

**§ 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.)

**§ 10144. Consideration of effect of acquisition of water rights**

The Secretary shall give full consideration to whether the development, construction, and op-

eration 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.

(Pub. L. 97-425, title I, § 124, Jan. 7, 1983, 96 Stat. 2229.)

**§ 10145. Termination of certain provisions**

Sections 10139 and 10140 of this title shall cease to have effect at such time as a repository developed under this part is licensed to receive and possess high-level radioactive waste and spent nuclear fuel.

(Pub. L. 97-425, title I, § 125, Jan. 7, 1983, 96 Stat. 2229.)

PART B—INTERIM STORAGE PROGRAM

**§ 10151. Findings and purposes**

(a) The Congress finds that—

(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 part, 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 reactors when needed to assure the continued, orderly operation of such reactors.

(b) The purposes of this part are—

(1) to provide for the utilization of available spent nuclear fuel pools at the site of each civilian nuclear power reactor to the extent practical and the addition of new spent nuclear fuel storage capacity where practical at the site of such reactor; and

(2) to provide, in accordance with the provisions of this part, for the establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity to prevent disruptions in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor when needed.

(Pub. L. 97-425, title I, § 131, Jan. 7, 1983, 96 Stat. 2229.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

**§ 10168. Construction authorization**

**(a) Environmental impact statement**

(1) Once the selection of a site is effective under section 10166 of this title, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall apply with respect to construction of a monitored retrievable storage 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 section 10161(b)(1) of this title.

(2) Nothing in this section shall be construed to limit the consideration of alternative facility designs consistent with the criteria described in section 10161(b)(1) of this title in any environmental impact statement, or in any licensing procedure of the Commission, with respect to any monitored retrievable storage facility authorized under section 10162(b) of this title.

**(b) Application for construction license**

Once the selection of a site for a monitored retrievable storage facility is effective under section 10166 of this title, the Secretary may submit an application to the Commission for a license to construct such a facility as part of an integrated nuclear waste management system and in accordance with the provisions of this section and applicable agreements under this chapter affecting such facility.

**(c) Licensing**

Any monitored retrievable storage facility authorized pursuant to section 10162(b) of this title shall be subject to licensing under section 5842(3) of this title. In reviewing the application filed by the Secretary for licensing of 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 section 10161(b)(1) of this title.

**(d) Licensing conditions**

Any license issued by the Commission for a monitored retrievable storage facility under this section shall provide that—

(1) construction of such facility may not begin until the Commission has issued a license for the construction of a repository under section 10135(d)<sup>1</sup> of this title;

(2) construction of such facility or acceptance of spent nuclear fuel or high-level radioactive waste shall be prohibited during such time as the repository license is revoked by the Commission or construction of the repository ceases;

(3) the quantity of spent nuclear fuel or high-level radioactive waste at the site of such facility at any one time may not exceed 10,000 metric tons of heavy metal until a repository under this chapter first accepts spent nuclear fuel or solidified high-level radioactive waste; and

<sup>1</sup> So in original. Section 10135(d) of this title does not relate to Commission issuance of license.

(4) the quantity of spent nuclear fuel or high-level radioactive waste at the site of such facility at any one time may not exceed 15,000 metric tons of heavy metal.

(Pub. L. 97-425, title I, §148, as added Pub. L. 100-202, §101(d) [title III, §300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, §5021, Dec. 22, 1987, 101 Stat. 1330-235.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a)(1), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

**§ 10169. Financial assistance**

The provisions of section 10136(c) or 10138(b) of this title with respect to grants, technical assistance, and other financial assistance shall apply to the State, to affected Indian tribes and to affected units of local government in the case of a monitored retrievable storage facility in the same manner as for a repository.

(Pub. L. 97-425, title I, §149, as added Pub. L. 100-202, §101(d) [title III, §300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, §5021, Dec. 22, 1987, 101 Stat. 1330-236.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

PART D—LOW-LEVEL RADIOACTIVE WASTE

**§ 10171. Financial arrangements for low-level radioactive waste site closure**

**(a) Financial arrangements**

(1) The Commission shall establish by rule, regulation, or order, after public notice, and in accordance with section 2231 of this title, 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 2021 of this title, 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 January 7, 1983, 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) of this section;

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

(C) Federal ownership and management of such site is necessary or desirable in order to protect the public health and safety, and the environment.

(2) If the Secretary assumes title and custody of any such waste and land under this subsection, the Secretary shall maintain such waste and land in a manner that will protect the public health and safety, and the environment.

**(c) Special sites**

If the low-level radioactive waste involved is the result of a licensed activity to recover zirconium, hafnium, and rare earths from source material, the Secretary, upon request of the owner of the site involved, shall assume title and custody of such waste and the land on which it is disposed when such site has been decontaminated and stabilized in accordance with the requirements established by the Commission and when such owner has made adequate financial arrangements approved by the Commission for the long-term maintenance and monitoring of such site.

(Pub. L. 97-425, title I, §151, Jan. 7, 1983, 96 Stat. 2244.)

PART E—REDIRECTION OF NUCLEAR WASTE PROGRAM

**§ 10172. Selection of Yucca Mountain site**

**(a) In general**

(1) The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.

(2) The Secretary shall terminate all site specific activities (other than reclamation activities) at all candidate sites, other than the Yucca Mountain site, within 90 days after December 22, 1987.

**(b) Eligibility to enter into benefits agreement**

Effective on December 22, 1987, the State of Nevada shall be eligible to enter into a benefits agreement with the Secretary under section 10173 of this title.

(Pub. L. 97-425, title I, §160, as added 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(a), Dec. 22, 1987, 101 Stat. 1330-227.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

**§ 10172a. Siting a second repository**

**(a) Congressional action required**

The Secretary may not conduct site-specific activities with respect to a second repository unless Congress has specifically authorized and appropriated funds for such activities.

**(b) Report**

The Secretary shall report to the President and to Congress on or after January 1, 2007, but not later than January 1, 2010, on the need for a second repository.

**(c) Termination of granite research**

Not later than 6 months after December 22, 1987, the Secretary shall phase out in an orderly manner funding for all research programs in existence on December 22, 1987, designed to evaluate the suitability of crystalline rock as a potential repository host medium.

**(d) Additional siting criteria**

In the event that the Secretary at any time after December 22, 1987, considers any sites in crystalline rock for characterization or selection as a repository, the Secretary shall consider (as a supplement to the siting guidelines under section 10132 of this title) such potentially disqualifying factors as—

- (1) seasonal increases in population;
- (2) proximity to public drinking water supplies, including those of metropolitan areas; and
- (3) the impact that characterization or siting decisions would have on lands owned or placed in trust by the United States for Indian tribes.

(Pub. L. 97-425, title I, §161, as added Pub. L. 100-202, §101(d) [title III, §300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, §5012, Dec. 22, 1987, 101 Stat. 1330-231.)

CODIFICATION

Pub. L. 100-202 and Pub. L. 100-203 added identical sections.

PART F—BENEFITS

**§ 10173. Benefits agreements**

**(a) In general**

(1) The Secretary may enter into a benefits agreement with the State of Nevada concerning a repository or with a State or an Indian tribe concerning a monitored retrievable storage facility for the acceptance of high-level radioactive waste or spent nuclear fuel in that State or on the reservation of that tribe, as appropriate.

(2) The State or Indian tribe may enter into such an agreement only if the State Attorney General or the appropriate governing authority of the Indian tribe or the Secretary of the Inte-

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.

(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 January 7, 1983. 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.

(Pub. L. 97-425, title III, §301, Jan. 7, 1983, 96 Stat. 2255.)

### § 10222. Nuclear Waste Fund

#### (a) Contracts

(1) In the performance of his functions under this chapter, 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) of this section.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(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 January 7, 1983, 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 10143 of this title, 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) of this section.<sup>1</sup> 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 obliga-

tion 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.

(4) Not later than 180 days after January 7, 1983, 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) of this section. 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) of this section, 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 6421 of this title.

(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 subchapter.<sup>1</sup>

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

#### (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 2133 or 2134 of this title 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 2133 or 2134 of this title 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.

<sup>1</sup> See References in Text note below.

(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) may be disposed of by the Secretary in any repository constructed under this chapter 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.

(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 may be disposed of by the Secretary in any repository constructed under this chapter 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) of this section, 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 January 7, 1983, 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) of this section, only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter, including—

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored,<sup>2</sup> retrievable storage facility<sup>3</sup> or test and evaluation facility constructed under this chapter;

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

(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,<sup>2</sup> retrievable storage site<sup>3</sup> 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,<sup>2</sup> retrievable storage site<sup>3</sup> or a test and evaluation facility site and necessary or incident to such repository, monitored,<sup>2</sup> retrievable storage facility<sup>3</sup> or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter<sup>4</sup> 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.

**(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.

(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. 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.

(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 expend-

<sup>2</sup> So in original. The comma probably should not appear.

<sup>3</sup> So in original. Probably should be followed by a comma.

<sup>4</sup> See References in Text note below.

tion] shall take effect October 1, 1950, except that the exclusion of money payments to needy individuals described in clause (a) or (b) of section 6 of the Social Security Act as so amended [clauses (a) or (b) of this section] shall, in the case of any of such individuals who are not patients in a public institution, be effective July 1, 1952.”

**SUBCHAPTER II—FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE BENEFITS**

AMENDMENTS

1956—Act Aug. 1, 1956, ch. 836, title I, §103(i), 70 Stat. 824, included disability insurance benefits in subchapter heading.

**§ 401. Trust Funds**

**(a) Federal Old-Age and Survivors Insurance Trust Fund**

There is hereby created on the books of the Treasury of the United States a trust fund to be known as the “Federal Old-Age and Survivors Insurance Trust Fund”. The Federal Old-Age and Survivors Insurance Trust Fund shall consist of the securities held by the Secretary of the Treasury for the Old-Age Reserve Account and the amount standing to the credit of the Old-Age Reserve Account on the books of the Treasury on January 1, 1940, which securities and amount the Secretary of the Treasury is authorized and directed to transfer to the Federal Old-Age and Survivors Insurance Trust Fund, and, in addition, such gifts and bequests as may be made as provided in subsection (i)(1) of this section, and such amounts as may be appropriated to, or deposited in, the Federal Old-Age and Survivors Insurance Trust Fund as herein-after provided. There is hereby appropriated to the Federal Old-Age and Survivors Insurance Trust Fund for the fiscal year ending June 30, 1941, and for each fiscal year thereafter, out of any moneys in the Treasury not otherwise appropriated, amounts equivalent to 100 per centum of—

(1) the taxes (including interest, penalties, and additions to the taxes) received under subchapter A of chapter 9 of the Internal Revenue Code of 1939 (and covered into the Treasury) which are deposited into the Treasury by collectors of internal revenue before January 1, 1951; and

(2) the taxes certified each month by the Commissioner of Internal Revenue as taxes received under subchapter A of chapter 9 of such Code which are deposited into the Treasury by collectors of internal revenue after December 31, 1950, and before January 1, 1953, with respect to assessments of such taxes made before January 1, 1951; and

(3) the taxes imposed by subchapter A of chapter 9 of such Code with respect to wages (as defined in section 1426 of such Code), and by chapter 21 (other than sections 3101(b) and 3111(b)) of the Internal Revenue Code of 1954 with respect to wages (as defined in section 3121 of such Code) reported to the Commissioner of Internal Revenue pursuant to section 1420(c) of the Internal Revenue Code of 1939 after December 31, 1950, or to the Secretary of the Treasury or his delegates pursuant to subtitle F of the Internal Revenue Code of 1954

after December 31, 1954, as determined by the Secretary of the Treasury by applying the applicable rates of tax under such subchapter or chapter 21 (other than sections 3101(b) and 3111(b)) to such wages, which wages shall be certified by the Commissioner of Social Security on the basis of the records of wages established and maintained by such Commissioner in accordance with such reports, less the amounts specified in clause (1) of subsection (b) of this section; and

(4) the taxes imposed by subchapter E of chapter 1 of the Internal Revenue Code of 1939, with respect to self-employment income (as defined in section 481 of such Code), and by chapter 2 (other than section 1401(b)) of the Internal Revenue Code of 1954 with respect to self-employment income (as defined in section 1402 of such Code) reported to the Commissioner of Internal Revenue on tax returns under such subchapter or to the Secretary of the Treasury or his delegate on tax returns under subtitle F of such Code, as determined by the Secretary of the Treasury by applying the applicable rate of tax under such subchapter or chapter (other than section 1401(b)) to such self-employment income, which self-employment income shall be certified by the Commissioner of Social Security on the basis of the records of self-employment income established and maintained by the Commissioner of Social Security in accordance with such returns, less the amounts specified in clause (2) of subsection (b) of this section.

The amounts appropriated by clauses (3) and (4) of this subsection shall be transferred from time to time from the general fund in the Treasury to the Federal Old-Age and Survivors Insurance Trust Fund, and the amounts appropriated by clauses (1) and (2) of subsection (b) of this section shall be transferred from time to time from the general fund in the Treasury to the Federal Disability Insurance Trust Fund, such amounts to be determined on the basis of estimates by the Secretary of the Treasury of the taxes, specified in clauses (3) and (4) of this subsection, paid to or deposited into the Treasury; and proper adjustments shall be made in amounts subsequently transferred to the extent prior estimates were in excess of or were less than the taxes specified in such clauses (3) and (4) of this subsection. All amounts transferred to either Trust Fund under the preceding sentence shall be invested by the Managing Trustee in the same manner and to the same extent as the other assets of such Trust Fund. Notwithstanding the preceding sentence, in any case in which the Secretary of the Treasury determines that the assets of either such Trust Fund would otherwise be inadequate to meet such Fund’s obligations for any month, the Secretary of the Treasury shall transfer to such Trust Fund on the first day of such month the amount which would have been transferred to such Fund under this section as in effect on October 1, 1990; and such Trust Fund shall pay interest to the general fund on the amount so transferred on the first day of any month at a rate (calculated on a daily basis, and applied against the difference between the amount so transferred on such first day and the amount which would have been

that the estimates under either such paragraph in any particular period were too high or too low, appropriate adjustments shall be made by the Managing Trustee in future payments.

(4) The Commissioner of Social Security shall utilize the method prescribed pursuant to this paragraph, as in effect immediately before August 15, 1994, for determining the costs which should be borne by the general fund of the Treasury of carrying out the functions of the Commissioner, specified in section 432 of this title, which relate to the administration of provisions of the Internal Revenue Code of 1986 (other than those referred to in clause (i) of the first sentence of paragraph (1)(A)). The Board of Trustees of such Trust Funds shall prescribe the method of determining the costs which should be borne by the general fund in the Treasury of carrying out the functions of the Social Security Administration in connection with the withholding of taxes from benefits, as described in section 407(c) of this title, pursuant to requests by persons entitled to such benefits or such persons' representative payee. If at any time or times thereafter the Boards of Trustees of such Trust Funds consider such action advisable, they may modify the method of determining such costs.

**(h) Benefit payments**

Benefit payments required to be made under section 423 of this title, and benefit payments required to be made under subsection (b), (c), or (d) of section 402 of this title to individuals entitled to benefits on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits, shall be made only from the Federal Disability Insurance Trust Fund. All other benefit payments required to be made under this subchapter (other than section 426 of this title) shall be made only from the Federal Old-Age and Survivors Insurance Trust Fund.

**(i) Gifts and bequests**

(1) The Managing Trustee may accept on behalf of the United States money gifts and bequests made unconditionally to the Federal Old-Age and Survivors Insurance Trust Fund, the Federal Disability Insurance Trust Fund, the Federal Hospital Insurance Trust Fund, or the Federal Supplementary Medical Insurance Trust Fund (and for the Medicare Prescription Drug Account and the Transitional Assistance Account in such Trust Fund) or to the Social Security Administration, the Department of Health and Human Services, or any part or officer thereof, for the benefit of any of such Funds or any activity financed through such Funds.

(2) Any such gift accepted pursuant to the authority granted in paragraph (1) of this subsection shall be deposited in—

(A) the specific trust fund designated by the donor or

(B) if the donor has not so designated, the Federal Old-Age and Survivors Insurance Trust Fund.

**(j) Travel expenses**

There are authorized to be made available for expenditure, out of the Federal Old-Age and Survivors Insurance Trust Fund, or the Federal Dis-

ability Insurance Trust Fund (as determined appropriate by the Commissioner of Social Security), such amounts as are required to pay travel expenses, either on an actual cost or commuted basis, to individuals for travel incident to medical examinations requested by the Commissioner of Social Security in connection with disability determinations under this subchapter, and to parties, their representatives, and all reasonably necessary witnesses for travel within the United States (as defined in section 410(i) of this title) to attend reconsideration interviews and proceedings before administrative law judges with respect to any determination under this subchapter. The amount available under the preceding sentence for payment for air travel by any person shall not exceed the coach fare for air travel between the points involved unless the use of first-class accommodations is required (as determined under regulations of the Commissioner of Social Security) because of such person's health condition or the unavailability of alternative accommodations; and the amount available for payment for other travel by any person shall not exceed the cost of travel (between the points involved) by the most economical and expeditious means of transportation appropriate to such person's health condition, as specified in such regulations. The amount available for payment under this subsection for travel by a representative to attend an administrative proceeding before an administrative law judge or other adjudicator shall not exceed the maximum amount allowable under this subsection for such travel originating within the geographic area of the office having jurisdiction over such proceeding.

**(k) Experiment and demonstration project expenditures**

Expenditures made for experiments and demonstration projects under section 434 of this title shall be made from the Federal Disability Insurance Trust Fund and the Federal Old-Age and Survivors Insurance Trust Fund, as determined appropriate by the Commissioner of Social Security.

**(l) Interfund borrowing**

(1) If at any time prior to January 1988 the Managing Trustee determines that borrowing authorized under this subsection is appropriate in order to best meet the need for financing the benefit payments from the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, the Managing Trustee may borrow such amounts as he determines to be appropriate from the other such Trust Fund, or, subject to paragraph (5), from the Federal Hospital Insurance Trust Fund established under section 1395i of this title, for transfer to and deposit in the Trust Fund whose need for financing is involved.

(2) In any case where a loan has been made to a Trust Fund under paragraph (1), there shall be transferred on the last day of each month after such loan is made, from the borrowing Trust Fund to the lending Trust Fund, the total interest accrued to such day with respect to the unrepaid balance of such loan at a rate equal to the rate which the lending Trust Fund would earn on the amount involved if the loan were an

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the service method used to deliver the entire document, excluding courtesy copies, to all of the other participants in the proceeding. The presiding officer may determine the calculation of additional days when a participant is not entitled to receive an entire filing served by multiple methods.

(4) In mixed service proceedings when all participants are not using the same filing and service method, the number of days for service will be determined by the presiding officer based on considerations of fairness and efficiency.

(c) To be considered timely, a document must be served:

(1) By 5 p.m. Eastern Time for a document served in person or by expedited service; and

(2) By 11:59 p.m. Eastern Time for a document served by the E-Filing system.

[72 FR 49151, Aug. 28, 2007]

**§2.307 Extension and reduction of time limits; delegated authority to order use of procedures for access by potential parties to certain sensitive unclassified information.**

(a) Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or the presiding officer.

(b) If this part does not prescribe a time limit for an action to be taken in the proceeding, the Commission or the presiding officer may set a time limit for the action.

(c) In circumstances where, in order to meet Commission requirements for intervention, potential parties may deem it necessary to obtain access to safeguards information (as defined in §73.2 of this chapter) or to sensitive unclassified non-safeguards information, the Secretary is delegated authority to issue orders establishing procedures and timelines for submitting and resolving requests for this information.

[69 FR 2236, Jan. 14, 2004, as amended at 73 FR 10980, Feb. 29, 2008]

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**§2.308 Treatment of requests for hearing or petitions for leave to intervene by the Secretary.**

Upon receipt of a request for hearing or a petition to intervene, the Secretary will forward the request or petition and/or proffered contentions and any answers and replies either to the Commission for a ruling on the request/petition and/or proffered contentions or to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for the designation of a presiding officer under §2.313(a) to rule on the matter.

**§2.309 Hearing requests, petitions to intervene, requirements for standing, and contentions.**

(a) *General requirements.* Any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing. In a proceeding under 10 CFR 52.103, the Commission, acting as the presiding officer, will grant the request if it determines that the requestor has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. For all other proceedings, except as provided in paragraph (e) of this section, the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of paragraph (d) of this section and has proposed at least one admissible contention that meets the requirements of paragraph (f) of this section. In ruling on the request for hearing/petition to intervene submitted by petitioners seeking to intervene in the proceeding on the HLW repository, the Commission, the presiding officer, or the Atomic Safety and Licensing Board shall also consider any failure of the petitioner to participate as a potential party in the pre-license application phase under subpart J of this part in addition to the factors

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in paragraph (d) of this section. If a request for hearing or petition to intervene is filed in response to any notice of hearing or opportunity for hearing, the applicant/licensee shall be deemed to be a party.

(b) *Timing.* Unless otherwise provided by the Commission, the request and/or petition and the list of contentions must be filed as follows:

(1) In proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statute, or pursuant to a license condition, twenty (20) days from the date of publication of the notice in the FEDERAL REGISTER.

(2) In proceedings for the initial authorization to construct a high-level radioactive waste geologic repository, and the initial licensee to receive and process high level radioactive waste at a geological repository operations area, thirty (30) days from the date of publication of the notice in the FEDERAL REGISTER.

(3) In proceedings for which a FEDERAL REGISTER notice of agency action is published (other than a proceeding covered by paragraphs (b)(1) or (b)(2) of this section), not later than:

(i) The time specified in any notice of hearing or notice of proposed action or as provided by the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition, which may not be less than sixty (60) days from the date of publication of the notice in the FEDERAL REGISTER; or

(ii) If no period is specified, sixty (60) days from the date of publication of the notice.

(4) In proceedings for which a FEDERAL REGISTER notice of agency action is not published, not later than the latest of:

(i) Sixty (60) days after publication of notice on the NRC Web site at <http://www.nrc.gov/public-involve/major-actions.html>, or

(ii) Sixty (60) days after the requestor receives actual notice of a pending application, but not more than sixty (60) days after agency action on the application.

(5) For orders issued under § 2.202 the time period provided therein.

(c) *Nontimely filings.* (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

(2) The requestor/petitioner shall address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.

(d) *Standing.* (1) General requirements. A request for hearing or petition for leave to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and

(iv) The possible effect of any decision or order that may be issued in the

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proceeding on the requestor's/petitioner's interest.

(2) State, local governmental body, and affected, Federally-recognized Indian Tribe. (i) A State, local governmental body (county, municipality or other subdivision), and any affected Federally-recognized Indian Tribe that desires to participate as a party in the proceeding shall submit a request for hearing/petition to intervene. The request/petition must meet the requirements of this section (including the contention requirements in paragraph (f) of this section), except that a State, local governmental body or affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements under this paragraph. The State, local governmental body, and affected Federally-recognized Indian Tribe shall, in its request/petition, each designate a single representative for the hearing.

(ii) The Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene will admit as a party to a proceeding a single designated representative of the State, a single designated representative for each local governmental body (county, municipality or other subdivision), and a single designated representative for each affected Federally-recognized Indian Tribe. In determining the request/petition of a State, local governmental body, and any affected Federally-recognized Indian Tribe that wishes to be a party in a proceeding for a facility located within its boundaries, the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene shall not require a further demonstration of standing.

(iii) In any proceeding on an application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area under parts 60 or 63 of this chapter, or an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area under parts 60 or 63 of

this chapter, the Commission shall permit intervention by the State and local governmental body (county, municipality or other subdivision) in which such an area is located and by any affected Federally-recognized Indian Tribe as defined in parts 60 or 63 of this chapter if the requirements of paragraph (f) of this section are satisfied with respect to at least one contention. All other petitions for intervention in any such proceeding must be reviewed under the provisions of paragraphs (a) through (f) of this section.

(3) The Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearing and/or petitions for leave to intervene will determine whether the petitioner has an interest affected by the proceeding considering the factors enumerated in § 2.309(d)(1)–(2), among other things. In enforcement proceedings, the licensee or other person against whom the action is taken shall have standing.

(e) *Discretionary Intervention.* The presiding officer may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held. A requestor/petitioner may request that his or her petition be granted as a matter of discretion in the event that the petitioner is determined to lack standing to intervene as a matter of right under paragraph (d)(1) of this section. Accordingly, in addition to addressing the factors in paragraph (d)(1) of this section, a petitioner who wishes to seek intervention as a matter of discretion in the event it is determined that standing as a matter of right is not demonstrated shall address the following factors in his/her initial petition, which the Commission, the presiding officer or the Atomic Safety and Licensing Board will consider and balance:

(1) Factors weighing in favor of allowing intervention—

(i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;

**Nuclear Regulatory Commission****§ 2.309**

(ii) The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and

(iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention—

(i) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and

(iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

(f) *Contentions.* (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further*, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends

to rely to support its position on the issue;

(vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief; and

(vii) In a proceeding under 10 CFR 52.103(b), the information must be sufficient, and include supporting information showing, *prima facie*, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety. This information must include the specific portion of the report required by 10 CFR 52.99(c) which the requestor believes is inaccurate, incorrect, and/or incomplete (i.e., fails to contain the necessary information required by § 52.99(c)). If the requestor identifies a specific portion of the § 52.99(c) report as incomplete and the requestor contends that the incomplete portion prevents the requestor from making the necessary *prima facie* showing, then the requestor must explain why this deficiency prevents the requestor from making the *prima facie* showing.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are

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data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that—

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

(3) If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

(g) *Selection of hearing procedures.* A request for hearing and/or petition for leave to intervene may, except in a proceeding under 10 CFR 52.103, also address the selection of hearing procedures, taking into account the provisions of §2.310. If a request/petition relies upon §2.310(d), the request/petition must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.

(h) *Answers to requests for hearing and petitions to intervene.* Unless otherwise specified by the Commission, the pre-

siding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene—

(1) The applicant/licensee, the NRC staff, and any other party to a proceeding may file an answer to a request for a hearing, a petition to intervene and/or proffered contentions within twenty-five (25) days after service of the request for hearing, petition and/or contentions. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (g) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under 10 CFR 52.103, the requestor/petitioner may file a reply to any answer. The reply must be filed within 7 days after service of that answer.

(3) No other written answers or replies will be entertained.

(i) *Decision on request/petition.* In all proceedings other than a proceeding under 10 CFR 52.103, the presiding officer shall, within 45 days after the filing of answers and replies under paragraph (h) of this section, issue a decision on each request for hearing/petition to intervene, absent an extension from the Commission. The Commission, acting as the presiding officer, shall expeditiously grant or deny the request for hearing in a proceeding under 10 CFR 52.103. The Commission's decision may not be the subject of any appeal under 10 CFR 2.311.

[69 FR 2236, Jan. 14, 2004, as amended at 72 FR 49474, Aug. 28, 2007; 73 FR 44620, July 31, 2008]

**§2.310 Selection of hearing procedures.**

Upon a determination that a request for hearing/petition to intervene should be granted and a hearing held, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request/petition will determine and identify the specific hearing procedures to be used for the proceeding as follows—

(a) Except as determined through the application of paragraphs (b) through (h) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses

H.R. REP. 97-491(I), H.R. REP. 97-491, H.R. Rep. No. 491(I), 97TH Cong., 2ND Sess. 1982, 1982 U.S.C.C.A.N. 3792, 1982 WL 25134 (Leg.Hist.)

**\*\*1 P.L. 97-425**, NUCLEAR WASTE POLICY ACT OF 1982  
SEE PAGE 96 STAT. 2201  
INTERIOR AND INSULAR AFFAIRS NO. 97-4911(I), APR. 27, 1982  
(TO ACCOMPANY H.R. 3809)  
HOUSE REPORT (ARMED SERVICES COMMITTEE) NO. 97-491(II),  
JULY 16, 1982 (TO ACCOMPANY H.R. 3809)  
SENATE REPORT (ENERGY AND NATURAL RESOURCES ENVIRONMENT AND  
PUBLIC WORKS COMMITTEE) NO. 97-282, NOV. 30, 1981 (TO  
ACCOMPANY S. 1662)  
SENATE REPORT (ARMED SERVICES COMMITTEE) NO. 97-327,  
MAR. 25, 1982 (TO ACCOMPANY S. 1662)  
CONG. RECORD VOL. 127 (1981)  
CONG. RECORD VOL. 128 (1982)  
DATES OF CONSIDERATION AND PASSAGE  
HOUSE DECEMBER 2, 1982  
SENATE APRIL 29, DECEMBER 20, 1982  
THE HOUSE BILL WAS PASSED IN LIEU OF THE SENATE BILL.  
THE HOUSE REPORT (PARTS I AND II) IS SET OUT.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

HOUSE REPORT NO. 97-491(I)  
APR. 27, 1982

**\*3792** THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, TO WHOM WAS REFERRED THE BILL (H.R. 3809) TO PROVIDE FOR REPOSITORIES FOR THE DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTE, TRANSURANIC WASTE, AND SPENT NUCLEAR FUEL, TO AMEND PROVISIONS OF THE ATOMIC ENERGY ACT OF 1954 RELATING TO LOW-LEVEL WASTE, TO MODIFY THE PRICE-ANDERSON PROVISIONS OF THE ATOMIC ENERGY ACT OF 1954 AND CERTAIN OTHER PROVISIONS PERTAINING TO FACILITY LICENSING AND SAFETY, AND FOR OTHER PURPOSES, HAVING CONSIDERED THE SAME, REPORT FAVORABLY THEREON WITH AN AMENDMENT AND RECOMMEND THAT THE BILL AS AMENDED DO PASS.

\* \* \* \*

#### PURPOSE

THE PURPOSE OF H.R. 3809<sup>1</sup> AS AMENDED BY THE COMMITTEE IS TO ESTABLISH PROGRAMS FOR THE DEVELOPMENT OF REPOSITORIES FOR THE SAFE PERMANENT DISPOSAL OF HIGH LEVEL NUCLEAR WASTE AND SPENT FUEL, AND TO PROVIDE FOR THE SAFE STABILIZATION

THE PROGRAM.

FINANCIAL ASSISTANCE THROUGH PROGRAM FUNDING OF STATES AND TRIBES PARTICIPATING IN THE REPOSITORY SITE INVESTIGATION PROGRAM, AND FULL IMPACT ASSISTANCE FOR STATES OR TRIBES WHERE REPOSITORIES ARE DEVELOPED.

A CLEAR 'ROADMAP' OF REGULATORY REQUIREMENTS AND REQUIREMENTS FOR ENVIRONMENTAL IMPACT STATEMENTS AND OTHER PUBLIC INFORMATION TO PROVIDE A PREDICTABLE FLOW OF INFORMATION AND OPPORTUNITY FOR PUBLIC PARTICIPATION THROUGH THE DECADES OF REPOSITORY DEVELOPMENT ACTIVITY.

EXPEDITED JUDICIAL REVIEW OF COURT CHALLENGES TO THE PROGRAM AS IT IS IMPLEMENTED.

**\*3797** A LEGISLATED SCHEDULE FOR FEDERAL DECISIONS AND ACTIONS FOR REPOSITORY DEVELOPMENT.

THE MAJOR STEPS IN THE PROPOSED REPOSITORY DEVELOPMENT PROGRAM AND THE PROPOSED SCHEDULE FOR IMPLEMENTATION OF THE PROGRAM REPRESENTED IN THE COMMITTEE AMENDMENT TO H.R. 3809 IS AS FOLLOWS:

CHRONOLOGY

180 DAYS AFTER DATE OF ENACTMENT. . . . SECRETARY OF ENERGY ISSUES GUIDELINES FOR RECOMMENDATION OF SITES PROPOSED TO BE STUDIED INDEPTH FOR POSSIBLE LICENSING AS REPOSITORIES.

NOT LATER THAN 1 YEAR AFTER DATE OF ENACTMENT . . . . SECRETARY OF ENERGY RECOMMENDS TO PRESIDENT AT LEAST 3 SITES IN NOT LESS THAN 3 GEOLOGIC MEDIA TO BE STUDIED FOR POSSIBLE DEVELOPMENT AND NOTIFIES STATES AND INDIAN TRIBES OF THE RECOMMENDATION.

NOT LATER THAN FEBRUARY 1, 1985 . . . . SECRETARY RECOMMENDS AT LEAST 2 ADDITIONAL SITES TO PRESIDENT FOR STUDY.

CHRONOLOGY-- CONTINUED

NOT LATER THAN 60 DAYS AFTER THE SECRETARY'S RECOMMENDATIONS . . . . PRESIDENT APPROVES OR DISAPPROVES SITES FOR STUDY AND NOTIFIES STATES AND INDIAN TRIBES OF HIS DECISION.

**\*\*6** AFTER PRESIDENT APPROVES A SITE FOR STUDY . . . . SECRETARY OF ENERGY HOLDS PUBLIC HEARINGS NEAR EACH SITE AND SUBMITS ENVIRONMENTAL ASSESSMENT TO STATES OR INDIAN TRIBES.

AFTER SECRETARY SUBMITS ENVIRONMENT ASSESSMENT TO STATES AND INDIAN TRIBES . . . . SECRETARY OF ENERGY SINKS STUDY SHAFTS AT EACH SITE AND CARRIES OUT OTHER SITE CHARACTERIZATION ACTIVITIES.

AFTER COMPLETION OF SITE CHARACTERIZATION, PUBLIC HEARINGS AND AN EIS . . . . SECRETARY OF ENERGY NOTIFIES STATES AND INDIAN TRIBES OF HIS DECISION TO RECOMMEND TO PRESIDENT APPROVAL OF AT LEAST ONE SITE FOR LICENSING AND DEVELOPMENT AS A REPOSITORY.

NO SOONER THAN 30 DAYS AFTER NOTIFICATION OF STATES BY SECRETARY OF ENERGY OF HIS DECISION TO RECOMMEND A SITE TO PRESIDENT . . . . SECRETARY OF ENERGY MAY RECOMMEND THE SITE TO THE PRESIDENT FOR APPROVAL FOR LICENSING AND DEVELOPMENT.

NOT LATER THAN MARCH 30, 1987, BUT NOT BEFORE SECRETARY OF ENERGY RECOMMENDS A SITE FOR APPROVAL AS A REPOSITORY . . . . PRESIDENT SUBMITS TO CONGRESS THE RECOMMENDATION OF A SITE QUALIFIED FOR APPLICATION FOR LICENSING AS A REPOSITORY.

H. R. 2055

One Hundred Twelfth Congress  
of the  
United States of America

AT THE FIRST SESSION

*Begun and held at the City of Washington on Wednesday,  
the fifth day of January, two thousand and eleven*

An Act

Making appropriations for military construction, the Department of Veterans Affairs, and related agencies for the fiscal year ending September 30, 2012, and for other purposes.

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

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Consolidated Appropriations Act, 2012”.

**SEC. 2. TABLE OF CONTENTS.**

The table of contents of this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.
- Sec. 3. References.
- Sec. 4. Statement of appropriations.
- Sec. 5. Availability of funds.

**DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2012**

- Title I—Military Personnel
- Title II—Operation and Maintenance
- Title III—Procurement
- Title IV—Research, Development, Test and Evaluation
- Title V—Revolving and Management Funds
- Title VI—Other Department of Defense Programs
- Title VII—Related agencies
- Title VIII—General provisions
- Title IX—Overseas contingency operations

**DIVISION B—ENERGY AND WATER DEVELOPMENT APPROPRIATIONS ACT,  
2012**

- Title I—Corps of Engineers—Civil
- Title II—Department of the Interior
- Title III—Department of Energy
- Title IV—Independent agencies
- Title V—General provisions

**DIVISION C—FINANCIAL SERVICES AND GENERAL GOVERNMENT  
APPROPRIATIONS ACT, 2012**

- Title I—Department of the Treasury
- Title II—Executive Office of the President and Funds Appropriated to the President
- Title III—The Judiciary
- Title IV—District of Columbia
- Title V—Independent agencies
- Title VI—General provisions—This Act
- Title VII—General provisions—Government-wide
- Title VIII—General provisions—District of Columbia

**DIVISION D—DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS  
ACT, 2012**

- Title I—Departmental management and operations

(b) Not less than 30 days prior to the transfer, sale, barter, distribution, or other provision of uranium in any form for the purpose of accelerating cleanup at a Federal site, the Secretary shall notify the House and Senate Committees on Appropriations of the following:

(1) the amount of uranium to be transferred, sold, bartered, distributed, or otherwise provided;

(2) an estimate by the Secretary of the gross market value of the uranium on the expected date of the transfer, sale, barter, distribution, or other provision of the uranium;

(3) the expected date of transfer, sale, barter, distribution, or other provision of the uranium;

(4) the recipient of the uranium; and

(5) the value of the services the Secretary expects to receive in exchange for the uranium, including any reductions to the gross value of the uranium by the recipient.

(c) Not later than June 30, 2012, the Secretary shall submit to the House and Senate Committees on Appropriations a revised excess uranium inventory management plan for fiscal years 2013 through 2018.

(d) Not later than December 31, 2011 the Secretary shall submit to the House and Senate Committees on Appropriations a report evaluating the economic feasibility of re-enriching depleted uranium located at Federal sites.

SEC. 313. None of the funds made available by this Act may be used to pay the salaries of Department of Energy employees to carry out section 407 of division A of the American Recovery and Reinvestment Act of 2009.

SEC. 314. (a) The Secretary of Energy may openly compete and issue an award to allow a third party, on a fee-for-service basis, to operate and maintain a metering station of the Strategic Petroleum Reserve that is underutilized (as defined in section 102-75.50 of title 41, Code of Federal Regulations (or successor regulations)) and related equipment.

(b) Not later than 30 days before the issuance of such award, the Secretary of Energy shall certify to the Committees on Appropriations of the House of Representatives and the Senate that the award will not reduce the reliability or accessibility of the Strategic Petroleum Reserve, raise costs of oil in the local market, or negatively impact the supply of oil to current users.

(c) Funds collected under subsection (a) shall be deposited in the general fund of the Treasury.

SEC. 315. None of the funds made available in this Act may be used—

(1) to implement or enforce section 430.32(x) of title 10, Code of Federal Regulations; or

(2) to implement or enforce the standards established by the tables contained in section 325(i)(1)(B) of the Energy Policy and Conservation Act (42 U.S.C. 6295(i)(1)(B)) with respect to BPAR incandescent reflector lamps, BR incandescent reflector lamps, and ER incandescent reflector lamps.

SEC. 316. Recipients of grants awarded by the Department in excess of \$1,000,000 shall certify that they will, by the end of the fiscal year, upgrade the efficiency of their facilities by replacing any lighting that does not meet or exceed the energy efficiency standard

*NUCLEAR WASTE TECHNICAL REVIEW BOARD*

*SALARIES AND EXPENSES*

*For necessary expenses of the Nuclear Waste Technical Review Board, as authorized by Public Law 100-203, section 5051, \$3,400,000 to be derived from the Nuclear Waste Fund, and to remain available until expended.*

*OFFICE OF THE FEDERAL COORDINATOR FOR ALASKA NATURAL GAS  
TRANSPORTATION PROJECTS*

*For necessary expenses for the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects pursuant to the Alaska Natural Gas Pipeline Act of 2004, \$1,000,000.*

*GENERAL PROVISIONS—INDEPENDENT AGENCIES*

*SEC. 401. (a) None of the funds provided in this title for “Nuclear Regulatory Commission—Salaries and Expenses” shall be available for obligation or expenditure through a reprogramming of funds that—*

*(1) increases funds or personnel for any program, project, or activity for which funds are denied or restricted by this Act;*  
*or*

*(2) reduces funds that are directed to be used for a specific program, project, or activity by this Act.*

*(b) The Chairman of the Nuclear Regulatory Commission may not terminate any program, project, or activity without the approval of a majority vote of the Commissioners of the Nuclear Regulatory Commission approving such action.*

*(c) The Nuclear Regulatory Commission may waive the restriction on reprogramming under subsection (a) on a case-by-case basis by certifying to the Committees on Appropriations of the House of Representatives and the Senate that such action is required to address national security or imminent risks to public safety. Each such waiver certification shall include a letter from the Chairman of the Commission that a majority of Commissioners of the Nuclear Regulatory Commission have voted and approved the reprogramming waiver certification.*

*SEC. 402. The Nuclear Regulatory Commission shall require reactor licensees to re-evaluate the seismic, tsunami, flooding, and other external hazards at their sites against current applicable Commission requirements and guidance for such licenses as expeditiously as possible, and thereafter when appropriate, as determined by the Commission, and require each licensee to respond to the Commission that the design basis for each reactor meets the requirements of its license, current applicable Commission requirements and guidance for such license. Based upon the evaluations conducted pursuant to this section and other information it deems relevant, the Commission shall require licensees to update the design basis for each reactor, if necessary.*

## H. R. 2055—261

2011, including an accounting of funding by agency with each agency identifying climate change programs, projects and activities and associated costs by line item as presented in the President's Budget Appendix, and including citations and linkages where practicable to each strategic plan that is driving funding within each climate change program, project and activity listed in the report.

## PROHIBITION ON USE OF FUNDS

SEC. 426. Notwithstanding any other provision of law, none of the funds made available in this Act or any other Act may be used to promulgate or implement any regulation requiring the issuance of permits under title V of the Clean Air Act (42 U.S.C. 7661 et seq.) for carbon dioxide, nitrous oxide, water vapor, or methane emissions resulting from biological processes associated with livestock production.

## GREENHOUSE GAS REPORTING RESTRICTIONS

SEC. 427. Notwithstanding any other provision of law, none of the funds made available in this or any other Act may be used to implement any provision in a rule, if that provision requires mandatory reporting of greenhouse gas emissions from manure management systems.

## FOREST SERVICE PRE-DECISIONAL OBJECTION PROCESS

SEC. 428. Hereafter, upon issuance of final regulations, the Secretary of Agriculture, acting through the Chief of the Forest Service, shall apply section 105(a) of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6515(a)), providing for a pre-decisional objection process, to proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1600 et seq.), and documented with a Record of Decision or Decision Notice, in lieu of subsections (c), (d), and (e) of section 322 of Public Law 102-381 (16 U.S.C. 1612 note), providing for an administrative appeal process: *Provided*, That if the Chief of the Forest Service determines an emergency situation exists for which immediate implementation of a proposed action is necessary, the proposed action shall not be subject to the pre-decisional objection process, and implementation shall begin immediately after the Forest Service gives notice of the final decision for the proposed action: *Provided further*, That this section shall not apply to an authorized hazardous fuel reduction project under title I of the Healthy Forests Restoration Act of 2003 (16 U.S.C. 6501 et seq.).

## SILVICULTURAL ACTIVITIES

SEC. 429. From the date of enactment of this Act until September 30, 2012, the Administrator of the Environmental Protection Agency shall not require a permit under section 402 of the Federal Water Pollution Control Act (33 U.S.C. 1342), nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from roads, the construction,

112TH CONGRESS }  
 1st Session } HOUSE OF REPRESENTATIVES { REPORT  
 112-118

ENERGY AND WATER DEVELOPMENT APPROPRIATIONS  
BILL, 2012

JUNE 24, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. FRELINGHUYSEN, from the Committee on Appropriations,  
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 2354]

The Committee on Appropriations submits the following report in explanation of the accompanying bill making appropriations for energy and water development for the fiscal year ending September 30, 2012, and for other purposes.

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consistency across accounts the Committee has established the salaries and other support costs of the Commissioners in legislative language. Further, the Committee carries language limiting the circumstances under which the NRC may reprogram funds.

In order to improve transparency and accountability to the taxpayer, the Committee has determined that the NRC's program lines will serve as control points for reprogramming notifications, as shown in the following table.

The Committee recommendation will support the following activities:

Nuclear Reactor Safety .....	\$796,800,000
Operating Reactors .....	521,300,000
New Reactors .....	275,500,000
Nuclear Materials & Waste Safety .....	230,440,000
Fuel Facilities .....	55,200,000
Nuclear Materials Users .....	92,100,000
Spent Fuel Storage and Transportation .....	35,240,000
Decommissioning and Low-Level Waste .....	37,900,000
High-Level Waste Repository .....	10,000,000

The United States has relied on the NRC to ensure the protection of the health, safety and security of the public and the environment. Throughout its history, the agency has conducted this work in an independent and professional manner and has thus enjoyed the strong and consistent support of the Congress and the trust of the general public. At no time has the need for such an agency, with such a reputation, been more important. The NRC must be able to continue to work effectively, and apolitically, to provide the public assurance that our nuclear plants, current and future, are safe and effective.

However, in recent months, the Committee has become aware of issues that may be impacting the ability of the agency to function as intended by the Congress. By law, the Commission, headed by the Chairman, is charged with leading the agency on a collegial basis. Recent reports suggest that significant issues are not being decided by the Commission in the manner expected by the Congress and required by law—in some cases because the agency's technical staff have been impeded from presenting issues for Commission review. There have also been suggestions that the work of the agency may have been influenced inappropriately by political considerations.

Given the heavy workload of the agency and the need to assure its proper functioning in the face of the nation's continuing and growing need for safe and reliable nuclear energy, the Committee finds these reports very troubling. As the head of the Commission, the Chairman has the responsibility to take whatever actions are necessary to remedy any appearance of partisanship or political interference in regulatory matters.

The Yucca Mountain license application, and the Chairman's unilateral use of "administrative means" to halt its consideration, are at the heart of this debate. The Congress has been clear both through legislation and through repeated votes that the Yucca Mountain license application process should be completed. The bill includes language to curb the use of "administrative means" to terminate programs.

*Small Modular Reactors.*—The Committee expects the NRC to engage the Department of Energy on small modular reactors as the

112TH CONGRESS }  
*1st Session* }

HOUSE OF REPRESENTATIVES

{ REPORT  
{ 112-331

MILITARY CONSTRUCTION AND VETERANS  
AFFAIRS AND RELATED AGENCIES APPRO-  
PRIATIONS ACT, 2012

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CONFERENCE REPORT

TO ACCOMPANY

H.R. 2055



DECEMBER 15, 2011.—Ordered to be printed

## DIVISION B—ENERGY AND WATER DEVELOPMENT APPROPRIATIONS ACT, 2012 JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The language and allocations set forth in House Report 112–118 and Senate Report 112–75 should be complied with unless specifically addressed to the contrary in the conference report and statement of managers. Report language included by the House which is not contradicted by the report of the Senate or the conference, and Senate report language which is not contradicted by the report of the House or the conference is approved by the committee of conference. The statement of managers, while repeating some report language for emphasis, does not intend to negate the language referred to above unless expressly provided herein. In cases where both the House report and Senate report address a particular issue not specifically addressed in the conference report or joint statement of managers, the conferees have determined that the House report and Senate report are not inconsistent and are to be interpreted accordingly. In cases in which the House or Senate have directed the submission of a report, such report is to be submitted to both the House and Senate Committees on Appropriations.

Funds for the individual programs and activities within the accounts in this Act are displayed in the detailed table at the end of the explanatory statement for this Act. Funding levels that are not displayed in the detailed table are identified in this explanatory statement.

## TITLE I

## CORPS OF ENGINEERS—CIVIL

## DEPARTMENT OF THE ARMY

## CORPS OF ENGINEERS—CIVIL

The summary tables included in this title set forth the dispositions with respect to the individual appropriations, projects, and activities of the Corps of Engineers. The conference agreement includes no new starts as proposed by the House and Senate. Additional items of the Act are discussed below.

## INVESTIGATIONS

The conference agreement provides \$125,000,000 for Investigations as proposed by the Senate, instead of \$104,000,000 as proposed by the House. The Act does not include language regarding expenditure of funds as proposed by the House.

The allocation for projects and activities within the Investigations account is shown in the following table:

*Fusion Energy Sciences.*—The conference agreement provides \$402,177,000 for Fusion Energy Sciences, of which not more than \$105,000,000 is for U.S. Contributions to ITER. The conference agreement includes \$24,741,000 for the High Energy Density Laboratory Plasma program, of which \$12,000,000 is to be evenly distributed among heavy-ion fusion, laser-driven fusion, and magneto-inertial fusion. The conference agreement includes direction for the submission of a 10-year fusion plan as provided by both the House and Senate.

*High Energy Physics.*—The conference agreement provides \$791,700,000 for High Energy Physics research.

The conferees understand that the United States has unique capabilities to develop a world-leading neutrino science program. To begin the transition to the intensity frontier, the conferees provide \$21,000,000 for the Long Baseline Neutrino Experiment, which includes \$17,000,000 for research and development and \$4,000,000 for project engineering and design. The conferees provide no funding for long-lead procurements or construction activities. The conferees are concerned that this project is not mature enough for construction because a location and technology for the underground detectors has not been selected. Before consideration of congressional approval of construction, the Department is directed to provide to the House and Senate Committees on Appropriations a detailed project plan and refined total cost estimate for construction, not later than April 1, 2012.

Within available funds, the conferees provide \$15,000,000 as requested, \$10,000,000 within High Energy Physics and \$5,000,000 within Nuclear Physics, to support minimal, sustaining operations at the Homestake Mine in South Dakota.

*Nuclear Physics.*—The conference agreement provides \$550,000,000 for Nuclear Physics. Within available funds, the conference agreement includes \$22,000,000 for the Facility for Rare Isotope Beams, and \$50,000,000 for the 12 GeV upgrade of the Continuous Electron Beam Accelerator Facility.

*Workforce Development for Teachers and Scientists.*—The conference agreement provides \$18,500,000 for Science Workforce Development. Within available funds, up to \$5,000,000 is for the graduate fellowship program to fund the existing cohort established in fiscal year 2010.

*Science Laboratories Infrastructure.*—The conference agreement provides \$111,800,000 for Science Laboratories Infrastructure.

*Safeguards and Security.*—The conference agreement provides \$82,000,000 for Safeguards and Security.

*Science Program Direction.*—The conference agreement provides \$185,000,000 for Science Program Direction. No funds shall be used to hire new site office personnel, except for field staff at the Integrated Support Centers in Chicago and Oak Ridge.

#### NUCLEAR WASTE DISPOSAL

The conference agreement provides \$0 for nuclear waste disposal, as proposed by the Senate, instead of \$25,000,000 as proposed by the House.

## CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January 2012, a copy of the foregoing was filed using the CM/ECF system which will serve the same on all parties of record as follows:

Mullins, Charles	charles.mullins@nrc.gov
Nestor, Christopher R.	christopher.nestor@klgates.com, dottie.messimer@klgates.com, klgateseservice@klgates.com
Andersen, Robert Michael	randersen@clarkhill.com
Cordes, John F., Jr.	John.Cordes@nrc.gov
Ramsay, James Bradford	jramsay@naruc.org
Hartman, Barry M.	barry.hartman@klgates.com, klgateseservice@klgates.com
Lunt, Robin Kimlin Jensen	rlunt@naruc.org
Gottshall, Thomas Rush	tgottshall@hsblawfirm.com, lgantt@hsblawfirm.com, bvaldes@hsblawfirm.com
Woodington, Kenneth Paul	kwoodington@dml-law.com, sstafford@dml-law.com, jangus@dml-law.com, nbouknight@dml-law.com
Bowers, Todd R.	toddb@atg.wa.gov, TORSeaEF@atg.wa.gov, aaronw@atg.wa.gov, taliaz@atg.wa.gov, jenniferd4@atg.wa.gov
Fitz, Andrew Arthur	andyf@atg.wa.gov, ecyolyef@atg.wa.gov, dianam@atg.wa.gov

Suttenberg, Jeremy	jeremy.suttenberg@nrc.gov
Shealy, Samuel Ross	rshealy@hsblawfirm.com
Cottingham, Anne W.	awc@nei.org
Stouck, Jerry	stouckj@gtlaw.com; sklarm@gtlaw.com; gogganst@gtlaw.com
Fitzpatrick, Charles J.	cfitzpatrick@nuclearlawyer.com; smontesi@nuclearlawyer.com
Lawrence, John W.	jlawrence@nuclearlawyer.com; lborski@nuclearlawyer.com
Malsch, Martin Guilbert	mmalsch@nuclearlawyer.com

I further certify that, a copy of the foregoing was served on the following  
via first class U.S. Mail:

Mr. Burns, Stephen Gilbert  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
One White Flint North  
Rockville, MD 20852

DATED this 30<sup>th</sup> day of January, 2012, in Olympia, Washington.

*s/ Andrew A. Fitz*  
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ANDREW A. FITZ  
Senior Counsel  
(360) 586-6752