

**ACTION:** Issuing a directive to the Commissioner of Customs charging transshipments to 1995 limits.

**EFFECTIVE DATE:** May 4, 1995.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Aldrich, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

In a notice published in the **Federal Register** on June 28, 1993 (58 FR 34568), CITA announced that Customs would be conducting other investigations of transshipments of textiles produced in China and exported to the United States. Based on these investigations, the U.S. Customs Service has determined that textile products in Categories 338, 339, 347 and 352, produced or manufactured in China and entered into the United States with the incorrect country of origin and as non-textile products, were transshipped in circumvention of the Memorandum of Understanding dated January 17, 1994 between the Governments of the United States and the People's Republic of China. Consultations were held between the Governments of the United States and the People's Republic of China on this matter December 6 through December 8, 1994 and March 6 through March 8, 1995. Accordingly, in the letter published below, the Chairman of CITA directs the Commissioner of Customs to charge the following amounts to the 1995 quota levels for the categories listed below:

Category	Amounts to be charged
338 .....	162,000 dozen.
339 .....	147,492 dozen.
347 .....	173,669 dozen.
352 .....	632,114 dozen.

As a result of the charges, the current limit for Category 352 will be highly filled.

U.S. Customs continues to conduct other investigations of such transshipments of textiles produced in China and exported to the United States. The charges resulting from these investigations will be published in the **Federal Register**.

The U.S. Government is taking this action pursuant to U.S. letters dated October 5, 1994 and April 17, 1995, and the Memorandum of Understanding dated January 17, 1994 between the

Governments of the United States and the People's Republic of China.

A description of the textile and apparel categories in terms of HTS numbers is available in the **CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States** (see **Federal Register** notice 59 FR 65531, published on December 20, 1994). Also see 59 FR 65760, published on December 21, 1994.

**Rita D. Hayes,**  
*Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**

April 27, 1995.  
Commissioner of Customs,  
*Department of the Treasury, Washington, DC 20229.*

Dear Commissioner: To facilitate implementation of the Memorandum of Understanding dated January 17, 1994, between the Governments of the United States and the People's Republic of China, I request that, effective on May 4, 1995, you charge the following amounts to the following categories for the 1995 restraint period (see directive dated December 16, 1994):

Category	Amount to be charged to 1995 limit
338 .....	162,000 dozen.
339 .....	147,492 dozen.
347 .....	173,669 dozen.
352 .....	632,114 dozen.

This letter will be published in the **Federal Register**.

Sincerely,  
Rita D. Hayes,  
*Chairman, Committee for the Implementation of Textile Agreements.*  
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BILLING CODE 3510-DR-F

**DEPARTMENT OF DEFENSE**

**Department of the Air Force**

**Finding of No Significant Impact (FONSI) for the Joint Primary Aircraft Training System**

Pursuant to the Council on Environmental Quality regulations (40 CFR 1500-1508) implementing the procedural provisions of the National Environmental Policy Act (NEPA) and Department of Defense Instruction 5000.2, Defense Acquisition Management Policy and Procedures, the U.S. Air Force gives notice that an Environmental Assessment (EA) and draft FONSI has been prepared to support the decision to proceed to Manufacturing Development of the Joint

Primary Aircraft Training System (JPATS) and is available for review.

The JPATS is proposed to replace the two primary training aircraft and ground-based training systems used by the U.S. Air Force (USAF) and the U.S. Navy (USN) with one commercial-derivative aircraft. The proposed action includes the missionization, testing, and low-rate production of 55 aircraft meeting the technical requirements of the USAF and the USN over the next four years. The aircraft procured would more closely resemble the more advanced training and fighter aircraft used by the USAF and the USN with respect to design and equipment. The aircraft would also offer better performance and improvements in safety, reliability, and maintainability compared to the current aircraft over a 20-year life of the program.

This assessment analyzes the potential environmental impacts of the decision to proceed with JPATS into the Manufacturing Development phase. Additionally, the EA provides an initial overview of impacts associated with future decisions which could lead to the production of 656 additional aircraft, beddown and operations at 9 Air Force Bases and Naval Air Stations, and eventual system disposal.

For further information and/or a copy of the EA and draft FONSI, please contact: Lt Col Frank Szalejko, JPATS Program Manager, ASC/YT, Wright Patterson AFB, OH 45430, Phone: 513-225-9223.

**Patsy J. Conner,**  
*Air Force Federal Register Liaison Officer.*  
[FR Doc. 95-10893 Filed 5-2-95; 8:45 am]  
BILLING CODE 3910-01-M

**DEPARTMENT OF ENERGY**

**Office of Civilian Radioactive Waste Management; Nuclear Waste Acceptance Issues**

**AGENCY:** Office of Civilian Radioactive Waste Management, Department of Energy.

**ACTION:** Department of Energy final interpretation of nuclear waste acceptance issues.

**SUMMARY:** This Notice responds to public comments on the Department of Energy (DOE) Notice of Inquiry on Waste Acceptance Issues published on May 25, 1994 (59 FR 27007). After analyzing public comments received in response to the Notice, DOE has concluded that it does not have an unconditional statutory or contractual obligation to accept high level waste and spent nuclear fuel beginning

January 31, 1998 in the absence of a repository or interim storage facility constructed under the Nuclear Waste Policy Act of 1982, as amended. In addition, DOE has concluded that it lacks statutory authority under the Act to provide interim storage.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Waxman of the Department of Energy Office of General Counsel at (202) 586-6975.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Nuclear Waste Policy Act of 1982, as amended (Act or NWPA), 42 U.S.C. 10101 *et seq.*, provides a comprehensive framework for disposing of high level radioactive waste and spent nuclear fuel (SNF) generated by civilian nuclear power reactors. In general, the Act sets forth procedures for selecting a repository site and developing a repository for disposal of high-level radioactive waste and SNF and for financing the cost of such disposal. Section 302(a) of the Act authorizes the Secretary to enter into contracts with the owners and generators of SNF of domestic origin (utilities) for the acceptance and disposal of SNF,<sup>1</sup> and stipulates that the contracts provide that the Secretary shall take title to the SNF as expeditiously as practicable following commencement of operation of a repository. In return for the payment of fees, section 302(a) also stipulates that the contracts provide that the Secretary, beginning not later than January 31, 1998 will dispose of such SNF.

DOE implemented the provisions of section 302(a) through rulemaking. Following notice and comment, DOE promulgated the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Nuclear Waste (Standard Contract), which set forth the contractual terms under which the Department would make its disposal services available. 48 FR 16590 (April 18, 1983), codified at 10 CFR part 961. Under the terms of the final rule promulgating the Standard Contract, all civilian nuclear utilities desiring to dispose of SNF signed individual versions of the Standard Contract.

Although the Act originally envisioned that a geologic repository would be in operation, and DOE would be prepared to begin acceptance of SNF by January 31, 1998, it since has become apparent that neither a repository nor an interim storage facility constructed

under the Act will be available by 1998. DOE currently projects that the earliest possible date for acceptance of waste for disposal at a repository is 2010.

Accordingly, DOE published the Notice of Inquiry on Waste Acceptance Issues (NOI) to elicit the views of interested parties on: (1) DOE's preliminary view that it does not have an obligation to accept SNF in the absence of an operational repository or interim storage facility constructed under the Act; (2) the need for interim storage prior to repository operation; and (3) use of the Nuclear Waste Fund to offset a portion of the financial burdens that may be incurred by utilities in continuing to store SNF at reactor sites beyond 1998. Written comments were initially due on or before September 22, 1994. 59 FR 27007 (May 25, 1994). DOE extended the comment period on the NOI until December 19, 1994 to permit additional public comment. 59 FR 52524 (October 18, 1994).

##### II. Written Comments

DOE received 1,111 written responses to the NOI, representing 1,476 signatories, including utilities (38 responses), public utility commissions and utility regulators (26 responses), Federal, state, and local governments, agencies, and representatives (23 responses), industry representatives and companies (30 responses), public interest groups and other organizations (19 responses), and members of the general public (975 responses). All written comments received by DOE in response to the NOI were carefully reviewed and fully considered. The majority of the responses to the NOI addressed the issue of DOE's legal obligation to accept SNF beginning in 1998 and asserted that DOE has an unconditional obligation to begin accepting SNF from the utilities by January 31, 1998.

DOE previously published a notice of the availability of DOE/RW-0462, "Summary of Responses to the Notice of Inquiry on Waste Acceptance Issues" (March 1995). 60 FR 14739 (March 20, 1995). That report contains a summary of all the comments received in response to the NOI.

This Notice sets forth DOE's conclusions with respect to the legal issues involved in the NOI. Section III below discusses DOE's final interpretation of its obligations with respect to the 1998 waste acceptance issue, addresses the issue of DOE's authority under the Act to provide interim storage, and also contains DOE's conclusions on the legal availability of the Nuclear Waste Fund to offset the

potential financial burdens that may be incurred by utilities in storing SNF on-site beyond 1998.

##### III. Final Interpretation of Agency Obligations and Authorities Under the Act

Most of the commenters on the NOI expressed the view that the language in section 302(a)(5)(B) of the Act, which provides that "in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel as provided in this subtitle," 42 U.S.C. 10222(a)(5)(B), creates an unconditional legal obligation, beginning January 31, 1998, for DOE to initiate acceptance of SNF from utilities under the Standard Contract. According to these commenters, DOE's obligation is clear, non-discretionary, and not inconsistent with DOE's duty to take title to SNF under section 302(a)(5)(A) of the Act following commencement of repository operations. 42 U.S.C. 10222(a)(5)(A).

However, some commenters contended that DOE does not have an unconditional duty to dispose of SNF beginning in 1998 in the absence of an operational repository. They asserted that the obligations to take title and dispose of SNF established in subsections (5)(A) and (B) of section 302(a) of the Act must be read together and ultimately are dependent upon the existence of an operational repository. Based upon the entire statutory scheme and the legislative history of the Act, these commenters suggested that the January 31, 1998 date does not create an obligation to initiate SNF disposal regardless of the availability of a repository, but rather indicates the "sense of Congress" concerning an appropriate target date for arriving at a solution to the problem of accumulating high level nuclear waste and spent nuclear fuel.

After considering the views of the commenters, the provisions of the Act and its legislative history, and the terms and conditions of the Standard Contract, DOE has concluded that it does not have a legal obligation under either the Act or the Standard Contract to begin disposal of SNF by January 31, 1998, in the absence of a repository or interim storage facility constructed under the Act.

##### A. DOE's Final Interpretation of Its Obligations Under Section 302(a)(5)

1. The Act does not impose a statutory obligation on DOE to begin nuclear waste disposal in 1998 in the absence of

<sup>1</sup> In this notice, we limit our discussion to SNF, because that is the primary concern of the utilities with whom DOE has executed the Standard Contract.

a disposal or interim storage facility constructed under the Act.

Section 302(a)(1) of the Act authorizes the Secretary of Energy to enter into contracts for acceptance of title, transportation, and disposal of SNF with any person who generates or holds title to spent fuel of domestic origin. 42 U.S.C. 10222(a)(1). Section 302(a)(5) states that such contracts shall provide that:

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

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

42 U.S.C. 10222(a)(5). DOE's Standard Contract contains a provision that reflects this statutory mandate. See 10 CFR 961.11.

a. Section 302(a)(5)(A), the so-called "take title" provision of the Act, requires that each contract executed by DOE under the Act provide that "the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon request of the generator or owner of such waste or spent fuel," but specifically provides that the obligation to take title applies only "following commencement of operation of a repository." 42 U.S.C. 10222 (a)(5)(A). Thus, the Act is clear that DOE is required to take title "expeditiously," but only "following commencement of operation of a repository." 42 U.S.C. 10222 (a)(5)(A).

Section 302(a)(5)(B), the so-called "dispose" provision of the Act, requires that each contract shall also provide that "in return for 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 fuel involved as provided in this subtitle." 42 U.S.C. 10222 (a)(5)(B). While the Act does not define the word "dispose," it does define "disposal." DOE believes that the words "dispose" and "disposal" are merely different grammatical forms of the same word, and that the Act's definition of "disposal" also defines DOE's obligation to "dispose" under section 302(a)(5)(B) of the Act. The Act defines "disposal" to mean "the emplacement *in a repository* of spent nuclear fuel with no foreseeable intent of recovery." 42 U.S.C. 10101(9). Thus, the mandate to dispose of SNF beginning January 31,

1998, like the duty to take title to SNF, requires the existence of an operating repository. See H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. at 59 (1982).<sup>2</sup>

The logic, language, and structure of section 302(a) require that the mandate to dispose and the duty to take title must be read together. Section 302(a)(1) of the Act, which authorizes the Secretary to enter in contracts with utilities "for acceptance of title, subsequent transportation, and disposal of \* \* \* (SNF)", indicates that the duty to accept title and the mandate to dispose are part of a sequential process: The Act contemplates that "taking title" is a predicate to "disposal". Similarly, section 123 of the Act provides that "[d]elivery, and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this subtitle (42 U.S.C. 10131 et seq., the repository subtitle) shall constitute a transfer to the Secretary of title to such waste or spent fuel." 42 U.S.C. 10143. The "delivery and acceptance" provision of section 123 implements the "take title" provision of section 302(a)(5)(A), and again contemplates that DOE "take title" prior to disposal in a repository.

b. Sections 302(a)(5) (A) and (B) of the Act must not only be read together, but also must be read in the context of the entire Act. When read in conjunction with other provisions in the Act, these provisions clearly do not contemplate nuclear waste disposal by DOE beginning January 31, 1998, in the absence of an operational repository.

The findings and purposes section of the Act states that "the Federal Government has the responsibility to provide for the *permanent disposal* of nuclear waste," 42 U.S.C. 10131(a)(4), and that the purpose of the Act is "to establish a schedule for the siting, construction, and operation of *repositories* that will provide a reasonable assurance that the public will be adequately protected from the hazards posed by high-level waste and such spent nuclear fuel as *may be disposed of in a repository*." 42 U.S.C. 10131 (b)(1). As noted above, the term "disposal" is defined in the Act to mean "emplacement of nuclear waste *in a*

<sup>2</sup> DOE notes that the statutory language on disposal quoted above uses "will" rather than the term "shall" in setting forth the Secretary's duty to dispose of nuclear waste. DOE believes the use of the predictive term "will" in the disposal provision of the Act, rather than the mandatory term "shall" which is used in the take-title provision, indicates that the January 31, 1998 date expresses the sense of Congress as to when the Department should strive to have a repository in operation, rather than an unconditional legal obligation to initiate acceptance of SNF by a date certain.

*repository* with no foreseeable intent of recovery." 42 U.S.C. 10101 (9).

However, the Act imposes numerous prerequisites on the Department's ability to develop a repository and dispose of SNF that demonstrate that the Act did not contemplate that DOE would have an unconditional duty to begin disposing of SNF in 1998. For instance, the Act provides that only Yucca Mountain, in Nevada, is to be characterized as a potential repository site, 42 U.S.C 10172, and that DOE may not commence construction of a repository at Yucca Mountain unless and until the site been found suitable for a repository through the site characterization process, 42 U.S.C. 10134. The Act specifically recognizes that the Yucca Mountain site may be found *unsuitable* for development of a repository, and states that "if the Secretary at any time determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall terminate all site characterization activities at such site \* \* \* (and) reclaim the site to mitigate any significant adverse environmental impacts caused by site characterization at such site." 42 U.S.C. 10133(c)(3). Moreover, even if Yucca Mountain proves suitable, the Act imposes additional conditions on the actual development of the site as a repository. For example, the Act provides that the Secretary must decide whether to recommend approval of the site to the President; the President must determine whether he considers the site qualified; and if the President ultimately recommends development of the site to Congress, the host state may disapprove that recommendation for any reason at all, in which case an entirely new law must be enacted by Congress to override the host state's disapproval. 42 U.S.C. 10134 and 10135. Assuming site suitability, a favorable Presidential recommendation, and enactment of a new law to override any state notice of disapproval, the Act further requires DOE to obtain an NRC license to construct and operate a repository. 42 U.S.C. 10134(b).

Each of these statutory conditions for construction and operation of a repository represents a Congressionally-created contingency that could prevent or delay construction and operation of a repository. Given the number of these contingencies, Congress could not have intended to impose an unconditional obligation on DOE to take and dispose of SNF by a date certain.<sup>3</sup>

<sup>3</sup> In addition, as discussed *infra*, beginning at page 19, the Act contained only very limited

2. The legislative history of the Act confirms that both the "take title" and the "dispose" provisions of section 302(a)(5) require an operating repository before their obligations attach.

Subparagraphs (A) and (B) of Section 302(a)(5) were originally part of section 124 of H.R. 3809. The House Report on H.R. 3809 stated that "Section 124 authorizes the Secretary to contract with utilities or other agents *requiring use of repositories* constructed under this Act to *provide repository services* in exchange for payments by *repository users* to cover program costs." H.R. Rep. No. 491, Part 1, 97th Cong., 2nd Sess. at 58 (1982). The House Report further stated that "[a]ll persons desiring to dispose of high level waste or spent fuel *in repositories constructed under this subtitle* are required to pay a ratable portion of the costs of such disposal." H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. at 58 (April 27, 1982). As the quoted language indicates, the focus of section 124 was on contracting for the disposal of spent nuclear fuel in a repository.

With regard to what emerged as subparagraph (A) of section 302(a)(5), the House Committee Report on section 124 of H.R. 3809 stated:

Paragraph 4(A) requires that under such contracts the Secretary will be required to take title to high level waste or spent fuel, at the request of the generator, as expeditiously as practicable *following the commencement of operation of a repository*.

H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. at 59 (1982). Thus, subparagraph (A) in H.R. 3809, like subparagraph (A) in the Act, clearly made commencement of operation of a repository a condition precedent to taking title.

Significantly, the House Committee Report on H.R. 3809 also described the source of the current Act's subparagraph (B) in terms of the existence of a permanent disposal facility:

Paragraph 4(B) makes the Secretary responsible for *disposing* of high level waste or spent fuel as *provided under this subtitle in permanent disposal facilities*, beginning not later than January 1998, in return for the payment of fees established by this section.

*Id.* at 59. "This subtitle" referred to Subtitle A, "Repositories for Disposal of High-Level Radioactive Waste and Spent Nuclear Fuel," of which section 124 was then a part. Here too, as the underscored language and reference to Subtitle A make clear, the obligation contemplated depended upon the successful development of a repository.

authority for DOE to provide interim storage in the event that a repository is not in operation.

The conclusion that section 302(a)(5) of the Act was not intended to create an obligation to dispose of SNF unless and until a repository had been developed is also supported by a floor statement made during the Senate's debate on the Act by the then Chairman of the Senate Energy and Natural Resources Committee, a primary sponsor of the Act, Senator James McClure. On December 13, 1982, Senators McClure, Simpson, Jackson, Johnston and Domenici offered amendment number 4983, which struck all the language after the enacting clause of H.R. 3809, and replaced it with a Senate version of the proposed legislation. Section 302 of the Senate amendment would have required DOE to take title and store or dispose of nuclear waste no later than December 31, 1996. Unlike the House version of H.R. 3809, the Senate amendment made no mention of an operating repository. See 128 *Cong. Rec.* S14,484, S14,501 (daily ed. Dec. 13, 1982). However, after proposing the Senate amendment, Senator McClure then offered—and the Senate accepted—an amendment to section 302(a)(5) of the substitute amendment which brought the Senate version of that provision into conformity with the House version contained in H.R. 3809. Senator McClure described the effect of this amendment as follows:

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

128 *Cong. Rec.* S15,657 (daily ed. Dec. 20, 1982). This summary of what section 302(a)(5) "directs" indicates that Congress did not intend to establish an inflexible schedule and that it intended to "tailor" DOE's obligation for accepting SNF to the availability of a repository, albeit that it intended for DOE to proceed "as expeditiously as practicable."<sup>4</sup>

<sup>4</sup> A few commenters claimed that certain statements from the legislative history of the

3. The Standard Contract, which was promulgated through notice and comment rulemaking, implements the provisions of section 302(a)(5) of the Act.<sup>5</sup> Article II of the Standard Contract, entitled "Scope," states that "[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all (nuclear waste from the contracting utilities) has been disposed of." 10 CFR 961.11, Art. II.

Some commenters asserted that the language in Article II of the Standard Contract that "(t)he services to be provided by DOE under this contract shall begin \* \* \* not later than January 31, 1998," either represents DOE's recognition of, or itself creates, an unconditional legal obligation to begin accepting nuclear waste by 1998. However, the Standard Contract contains the specific condition that the services to be provided by DOE "shall begin *after commencement of facility operations*." 10 CFR 961.11, Art. II.<sup>6</sup> One of the recitals in the preamble to

monitored retrievable storage provisions of the Act support their assertion that DOE has an unconditional duty to accept SNF for disposal beginning in 1998. They cited the following statement of Senator Bennett Johnston, made during the floor debate on the 1987 amendments, as evidence of Congress' intent that the Department has an unconditional obligation to begin accepting waste in 1998:

The MRS is not an alternative to at-reactor storage, and it is not a substitute for a repository. Utilities are required to take care of their own storage until 1998, but the Federal Government has a contractual commitment to take title to spent fuel beginning in 1998. An MRS will better ensure that the Department is able to meet this contractual commitment to accept spent fuel beginning in 1998.

133 *Cong. Rec.* S16,045 (daily ed. Nov. 10, 1987). The following statement of Senator James McClure from the same debate was also relied upon by a commenter:

Furthermore, we have an option to proceed with the construction of a monitored retrievable storage (MRS) facility for receipt and temporary storage of fuel by 1998 and thereby meet the Government's statutory obligation to begin taking spent fuel by that date.

133 *Cong. Rec.* S15,795 (daily ed. Nov. 10, 1987). DOE believes that these 1987 statements do not supplant the foregoing analysis of what Congress intended when it enacted Section 302(a)(5), because they were not contemporaneous with passage of the Act in 1982. Post-enactment views by individual legislators are entitled to little weight in construing a statute enacted by a prior Congress.

<sup>5</sup>The U.S. Court of Appeals for the District of Columbia Circuit has held that the Standard Contract should be treated as more akin to a regulation, rather than a traditional contract, since its terms were established by rulemaking following notice and comment. *Commonwealth Edison Co. v. United States Department of Energy*, 877 F.2d 1042, 1045 (D.C. Cir. 1989).

<sup>6</sup> Under the Standard Contract, the term "DOE facility" is defined to mean either a disposal or interim storage facility operated by or on behalf of DOE. See 10 CFR 961.11, Art. I.

the Standard Contract similarly indicates that the Department's obligations are conditioned upon the existence of an operational storage or disposal facility constructed under the Act:

Whereas, the DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel.

10 CFR 961.11, Preamble. The Standard Contract, like the Act, thus predicated DOE's obligation on the development of a facility under the Act.

This reading of the Standard Contract was confirmed by a statement of former Secretary Donald Hodel in 1984, the year following the promulgation of the Standard Contract. In a written response to a question posed in a letter from Senator Bennett Johnston, Secretary Hodel stated:

The Department is authorized to implement the Act through contractual commitments. To this end, the Department plans to incorporate into its contracts provisions which specify the minimum amount of spent fuel and waste which the Department will be obligated to accept, not later than January 31, 1998. Since these contracts have not yet been modified, it would be premature for the Department to speculate on particulars that might ultimately be incorporated in any or all of the contracts. However, it is my intention that this commitment in the Contracts, together with the overall thrust of the Act, will create an obligation for the Department to accept spent fuel in 1998 whether or not a repository is in operation.

Although former Secretary Hodel stated that he intended for DOE to assume an unconditional obligation to begin accepting SNF in 1998, he also recognized that the terms of the Standard Contract would have to be changed in order to create such an unconditional obligation. However, the Department never undertook a rulemaking to modify the Standard Contract. Thus, this essentially contemporaneous construction of the Standard Contract reinforces the conclusion that the Contract did not and does not create, or recognize, an unconditional obligation.<sup>7</sup>

<sup>7</sup>One commenter on the NOI criticized DOE's denial of an obligation to begin accepting SNF from domestic utilities on the ground that DOE has accepted "foreign SNF" for storage at its own facilities. However, the authority for acceptance of foreign SNF arises under the Atomic Energy Act, as amended, not under the Nuclear Waste Policy Act. The foreign fuel in question, which is not commercial SNF from domestic utilities but much smaller fuel elements from research reactors, contains highly enriched uranium that must be controlled for nuclear nonproliferation purposes. It

### B. Interim Storage Authority

The Department recognizes that some utilities are running out of on-site storage capacity and will have to provide additional storage capacity until a repository or interim storage facility is available. In response to the NOI, a number of comments stated that DOE should provide interim storage. However, DOE has concluded that it has no authority under the Act to provide interim storage in present circumstances.<sup>8</sup>

Interim storage by DOE was contemplated by the Act in only two situations, neither of which currently applies. Under the Act, DOE had authority to offer a limited interim storage option. See 42 U.S.C. 10156. However, that authority has, by its express terms, expired. Under the Act, DOE also has authority to provide for interim storage in an MRS. That authority also is inapplicable, however, because the Act ties construction of an MRS to the schedule for development of a repository. See 42 U.S.C. 10165, 10168. Because these are the only interim storage authorities provided by the Act, and because the Act expressly forbids use of the Nuclear Waste Fund to construct or expand any facility without express congressional authorization (42 U.S.C. 10222(d)), DOE lacks authority under the Act to provide interim storage services under present circumstances.

### C. Use of Nuclear Waste Funds to Offset Financial Burdens to Utilities of Storing Nuclear Waste Beyond 1998

Section 302(d) of the Act states that the Nuclear Waste Fund may be used only for radioactive waste disposal activities under titles I and II of the Act, including a number of enumerated activities.<sup>9</sup> 42 U.S.C. 10222(d). Paying for the costs of on-site storage is not enumerated in that provision.

Although the Act thus does not provide for use of the Nuclear Waste Fund to help utilities defray costs of on-site storage, if the Act were construed

is because of these nonproliferation concerns that the United States government has in some circumstances received foreign SNF under the Atomic Energy Act in order to remove it from international commerce. No Nuclear Waste Fund monies are (or could be) used for this storage activity.

<sup>8</sup>DOE's multi-purpose canister program is part of DOE's overall transportation strategy for disposal of SNF, and the use of Nuclear Waste Fund monies to support this work is authorized by Section 302(d)(4) of the Act, which provides that the Secretary may make expenditures from the Nuclear Waste Fund for any costs incurred in connection with the transportation of SNF.

<sup>9</sup>Section 302(d) further provides that no funds may be spent on construction or expansion of any facility unless expressly authorized.

unconditionally to require DOE to begin providing disposal services in January of 1998 notwithstanding DOE's inability to do so, utilities might be entitled to financial relief under the terms of the Standard Contract. Since the Act itself does not address the consequences of a failure by DOE to perform its obligations under the Act, it has fallen to DOE as the administering agency to fill the gap left by Congress. DOE has done so through the Standard Contract, which expressly addresses the situation in which performance by either party to the contract is delayed.

Under Article IX, entitled "DELAYS," the Standard Contract provides that neither party shall be liable for damages in the case of unavoidable delay and that the parties will adjust their schedules, as appropriate, to accommodate such delay. Art. IX, ¶A. In the case of an avoidable delay, however, the Standard Contract provides that the "charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay." Art. IX, ¶B. Were DOE deemed to have an unconditional obligation to begin providing disposal services in 1998, we have concluded that the Delays Clause would be applicable in the event of a failure to perform. Were the Delays Clause to be invoked, Article XVI of the Standard Contract establishes the process for resolving disputed questions of fact (e.g., whether a delay has occurred and, if so, whether it was avoidable or unavoidable). Article XVI provides for initial resolution of disputed facts by the designated Contracting Officer, with a right of appeal to the DOE Board of Contract Appeals. In sum, it is the Department's view that, were the Act to be construed to impose an unconditional obligation to begin to provide disposal services in 1998, the appropriate remedy would be the contractual remedy under the Delays Clause and Article XVI.

### D. Availability of Alternative Dispute Resolution Procedures

The Department believes that important public and private interests are implicated by the need for orderly financial and technical planning with respect to the Department's inability to accept SNF in 1998. There are also equitable considerations that may argue for some form of relief to help offset costs incurred as a result of the Department's inability to begin acceptance of SNF in 1998. The Department recognizes that these equitable and public interest considerations may be better addressed

and resolved through settlement discussions than through litigation or through the process established by Article XVI of the Standard Contract. Therefore, in accordance with the Department's commitment to increased use of alternative dispute resolution procedures, the Department is prepared to discuss with utilities and other parties to the pending litigation (*Northern States Power Company v. U.S. Department of Energy*, Nos. 94-1457, 94-1458, 94-1574 (D.C. Cir., 1994)) financial or other assistance that may be appropriate in light of the Department's inability to begin providing disposal services in 1998.

Issued in Washington, D.C., April 28, 1995.

**Daniel A. Dreyfus,**

*Director, Office of Civilian Radioactive Waste Management.*

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**The Office of Hearings and Appeals**

**Notice of Issuance of Decisions and Orders; Week of January 23 Through January 27, 1995**

During the week of January 23 through January 27, 1995, the decisions and orders summarized below were issued with respect to appeals and applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

**Appeal**

*The National Security Archive, 1/23/95, VFA-0015*

The National Security Archive (NSA) filed an Appeal from a determination issued to it on December 5, 1994, by the Director, Office of Arms Control and

Nonproliferation of the Department of Energy (Arms Control) which denied a request for information it had filed under the Freedom of Information Act (FOIA). The request sought records relating to negotiations with Japan, and the transfer of plutonium to Japan between 1980 and 1983. Arms Control stated that it did not possess any responsive documents, and the Appeal challenged the adequacy of the search. In considering the Appeal, the DOE found that Arms Control conducted a reasonable search for responsive documents located in its files. However, the DOE found that other offices that were not searched might have responsive documents. Accordingly, NSA's Appeal was granted and the matter was remanded to the FOIA Office for a search of all of the offices or their successors originally named in NSA's request or its Appeal.

**Implementation of Special Refund Procedures**

*Ed's Exxon, Ron's Shell, 1/27/95, LEF-0078, LEF-0084*

The DOE issued a Decision and Order implementing special refund procedures to distribute \$3,657.84, plus accrued interest, which Ed's Exxon and Ron's Shell (the remedial order firms) remitted to the DOE pursuant to Remedial Orders issued on September 30, 1981, and April 27, 1982, respectively. The DOE determined that it would distribute the fund in two stages. In the first stage, the DOE will accept applications for refund from those claiming injury as a result of the remedial order firms' violations of Federal petroleum pricing regulations. If any funds remain after meritorious claims are paid in the first stage, they will be used for indirect restitution through the States in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986.

**Refund Applications**

*Rochdale Village, Inc., 1/27/95, RF272-66448, RD272-66448*

The DOE issued a Decision and Order granting a refund to Rochdale Village, Inc., in the crude oil overcharge refund proceeding. Rochdale Village operates an apartment complex in New York City. In granting a refund, the DOE rejected an argument from a group of states and territories that certain increases in New York City's rent control guidelines adequately compensated Rochdale Village for crude oil overcharges. The DOE also denied a Motion for Discovery submitted by the group of states and territories.

*Standard Oil Co. (Indiana)/Oklahoma, Belridge/Oklahoma, Palo Pinto/Oklahoma, OKC/Oklahoma, Vickers/Oklahoma, Standard Oil Co. (Indiana)/Oklahoma, 1/25/95, RM21-282, RM8-283, RM5-284, RM13-285, RM1-286, RM251-287*

The DOE issued a Decision and Order granting Motions for Modification of previously-approved refund plans filed by the State of Oklahoma in the Standard Oil Co. (Indiana) (Amoco I and II), Belridge Oil, Palo Pinto Oil & Gas, OKC Corp., and Vickers Energy Corp. refund proceedings. Oklahoma requested permission to use \$45,000 in interest from funds which the State originally received or other second-stage refund proposals to install a compressed natural gas line between Kingston, Oklahoma, and Lake Texoma State Park. The project will supply natural gas service to residents and businesses in the surrounding area as well as to the state park, and it is to serve as a pilot program for other sites within the state. In accordance with prior Decisions that have noted the benefits of encouraging the use of alternative fuels, the DOE approved Oklahoma's Motions.