

**Secretarial Determination of the  
Adequacy of the Nuclear Waste Fund Fee**

The Nuclear Waste Policy Act (NWPAct) establishes a Nuclear Waste Fund to be used to pay for the disposition of commercial spent nuclear fuel (SNF) and high-level radioactive waste (HLW). Section 302(a)(2) of the NWPAct establishes a fee of 1 mill (1/10-cent) per kilowatt-hour of electricity generated and sold that must be paid by nuclear utilities and deposited in the Fund. The NWPAct also requires the Secretary to review the adequacy of this fee annually and, upon a determination that either insufficient or excess funds are being collected, to propose an adjustment to the fee to ensure that the full costs of the Federal Government's disposal program will be recovered from generators and owners of high-level radioactive waste or spent nuclear fuel. The Secretary must transmit any proposed fee adjustment to Congress for a review period of 90 days of continuous session, after which time the adjustment becomes effective unless contrary legislation is enacted into law.

I adopt and approve the attached annual determination of the Director, Office of Standard Contract Management, that there is no reasonable basis at this time to conclude that either excess or insufficient funds are being collected and thus will not propose an adjustment to the fee to Congress; the fee will therefore remain at the amount specified in the Nuclear Waste Policy Act pending the next annual review.



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Steven Chu

DEC 16 2011

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Date

Attachment



## Department of Energy

Washington, DC 20585

December 12, 2011

MEMORANDUM FOR SEAN LEV

ACTING GENERAL COUNSEL

FROM:

DAVID K. ZABRANSKY, DIRECTOR  
OFFICE OF STANDARD CONTRACT MANAGEMENT

SUBJECT:

Annual Determination of the Adequacy of the Nuclear Waste Fund Fee

The Nuclear Waste Policy Act (NWPA) establishes a Nuclear Waste Fund to be used to pay for the disposition of commercial spent nuclear fuel (SNF) and high-level radioactive waste (HLW). Section 302(a)(2) of the NWPA establishes a fee of 1 mill (1/10-cent) per kilowatt-hour of electricity generated and sold. That fee must be paid by nuclear utilities and deposited in the Fund. The NWPA also requires the Secretary to review the adequacy of this fee annually and, upon a determination that either insufficient or excess funds are being collected, to propose an adjustment to the fee to ensure that the full costs of the Federal Government's disposal program will be fully recovered from generators and owners of HLW or SNF. The Secretary must transmit any proposed fee adjustment to Congress for a review period of 90 days of continuous session, after which time the adjustment becomes effective unless contrary legislation is enacted into law. Since the enactment of the NWPA in January 1983, the Secretary has never proposed a fee adjustment. The most recent assessment of the adequacy of the fee, completed in 2010, concluded that there was no reasonable basis at that time to propose any adjustment of the fee to Congress.

The Office of Standard Contract Management (OSCM) has conducted an annual review of the adequacy of the Nuclear Waste Fund fee. A copy of this "Annual Review of the Adequacy of the Nuclear Waste Fund Fee" is attached. In this review, OSCM considered developments that have occurred during the past year, including the recommendations contained in the draft report issued by the Blue Ribbon Commission on America's Nuclear Future. This annual review concludes that there is no reasonable evidentiary basis to conclude that the current fee is generating either insufficient or excess funds to cover the costs of DOE's obligation to manage and dispose of SNF and HLW. Accordingly, I have determined that there is no basis to propose an adjustment to the fee to Congress and, therefore, the fee should remain at the amount specified in the NWPA.

Attachment



## **Annual Review of the Adequacy of the Nuclear Waste Fund Fee**

**INTRODUCTION:** The Nuclear Waste Policy Act (NWPAct) establishes a Nuclear Waste Fund to be used to pay for the disposition of commercial spent nuclear fuel (SNF) and high-level radioactive waste (HLW). Section 302(a)(2) of the NWPAct establishes a fee, of 1 mill (1/10-cent) per kilowatt-hour of electricity generated and sold on or after April 7, 1983, that must be paid by nuclear utilities with standard contracts and deposited in the Fund. The NWPAct also requires the Secretary to review the adequacy of this fee annually and, upon a determination that either insufficient or excess funds are being collected, to propose an adjustment to the fee to ensure that the full costs of the Federal Government's disposal program will be recovered from generators and owners of HLW or SNF. The Secretary must transmit any proposed fee adjustment to Congress for a review period of 90 days of continuous session, after which time the adjustment becomes effective unless contrary legislation is enacted into law. Since the enactment of the NWPAct in January 1983, the Secretary has never proposed a fee adjustment. The most recent assessment of the adequacy of the fee, completed in 2010, concluded that there was no reasonable evidentiary basis to conclude that the current fee of 1 mill per kilowatt-hour was generating either insufficient or excess funds.<sup>1</sup> As a result, the fee remains at the amount specified in the NWPAct.

Similarly, this annual review completed in 2011 concludes that there is no reasonable evidentiary basis to conclude that the current fee is generating either insufficient or excess funds. In such circumstances, the statutory framework and legislative intent support maintenance of the fee at the current amount, which is the amount specified in the NWPAct.

**BACKGROUND:** Section 111(b)(4) of the NWPAct states that one of the purposes of the NWPAct is "to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of [high-level radioactive] 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." The legislative history of the NWPAct confirms that Congress intended those who benefit from electricity supplied through nuclear power to pay for the disposal of nuclear waste and spent fuel created during the generation of that electricity.<sup>2</sup>

Section 302(a)(1) of the NWPAct authorizes the Secretary of Energy to enter into contracts with generators or owners of HLW or SNF. Section 302(a)(5) requires that these contracts contain a provision under which the Secretary agrees to dispose of SNF and HLW in return for payment of

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<sup>1</sup> DOE, Secretarial Determination of the Adequacy of the Nuclear Waste Fund Fee (November 1, 2010) ("2010 Determination").

<sup>2</sup> *Commonwealth Edison Co. v. U.S. Dept. of Energy*, 877 F.2d 1042, 1047 (D.C. Cir. 1989) ("Congress, in passing the Nuclear Waste Policy Act, expressed its intention that 'the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel.'" (citing NWPAct, sec. 111(a)(4)); Congressional Record – Senate at S 15655 (December 20, 1982) ("The bill includes several new or modified concepts from the bill passed by the Senate in the last Congress. One of the most noteworthy of those is the proposal for an assured full-cost recovery by the Federal Government from nuclear power-supplied ratepayers for the nuclear waste programs included in the bill. By establishing a 1 mill-per-kilowatt-hour users fee on nuclear generated electricity, this bill for the first time would provide a direct financial linkage between the beneficiaries of nuclear power and the cost for interim management and ultimate disposal for nuclear wastes.").

the fees established by section 302. Thus, payment of the fee is the consideration for the Secretary's contractual obligations related to the disposal of HLW and SNF. Section 302(a)(2) sets the fee at 1.0 mill per kilowatt-hour of electricity generated by a civilian nuclear power reactor and sold on or after April 7, 1983 (this is, the date 90 days after the enactment date of the NWSA (January 7, 1983)). This fee results in the deposit of approximately \$750 million of receipts annually into the Waste Fund. The Waste Fund's balance accrues annual interest of approximately \$1 billion, producing total annual income into the Waste Fund of approximately \$1.750 billion. The current value of the Waste Fund is approximately \$26.7 billion.

Section 302(a)(4) of the NWSA provides for the Secretary annually to review the amount of the fee to "evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d)" of Section 302. Subsection (d) defines such costs in terms of expenditures from the Waste Fund "for purposes of radioactive waste disposal activities under Titles I and II" of the NWSA. Section 302(a)(4) further provides that, if the Secretary "determines that either insufficient or excess revenues are being collected," the Secretary "shall propose an adjustment to the fee to insure full cost recovery." The NWSA provides Congress with 90 days in which to act before the adjustment can take effect.<sup>3</sup>

The Secretary of Energy has determined that a Yucca Mountain Repository is not a workable option for permanent disposal of SNF and HLW. Consistent with that determination, on March 11, 2009, Secretary Chu announced that "the [Fiscal Year (FY) 2010] Budget begins to eliminate funding for Yucca Mountain as a repository for our nation's nuclear waste."<sup>4</sup> The Secretary stated that DOE "will begin a thoughtful dialogue on a better solution for our nuclear waste storage needs."<sup>5</sup> In its May 2009 budget request for FY 2010, DOE requested no funding for development of a Yucca Mountain repository.<sup>6</sup> Congress approved DOE's budget request in October 2009.<sup>7</sup>

In its February 2010 budget request for FY 2011, DOE stated that it "has been evaluating a range of options for bringing the [Yucca Mountain] project to an orderly close. In FY 2010, the Department of Energy will withdraw from consideration by the Nuclear Regulatory Commission the license application for construction of a geologic repository at Yucca Mountain, Nevada, in

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<sup>3</sup> The Eleventh Circuit in *Alabama Power* struck the "unless" clause from the fee adjustment statutory provision as violative of the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983). *Alabama Power Co. v. U.S. Dept. of Energy*, 307 F.3d 1300, 1308 (2002). As a result, the statute that remains reads "[t]he 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 [to Congress]," while the clause "unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment . . ." was invalidated.

<sup>4</sup> Statement of Steven Chu, Secretary of Energy, Before the Comm. on the Budget, United States Senate. at 3, available at <http://energy.gov/congressional/downloads/microsoft-word-budget-testimony-3-11-09chu-final-4doc>.

<sup>5</sup> *Id.*

<sup>6</sup> DOE, FY 2010 Cong. Budget Request, Budget Highlights. at 9, available at <http://www.cfo.doe.gov/budget/10budget/Content/Highlights/FY2010Highlights.pdf>. In addition, the request included minimal funding to continue participation in the NRC license application process for Yucca Mountain. *Id.*

<sup>7</sup> Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009); Energy and Water Development and Related Agencies Appropriations Act, 2010, Conference Report, H.R. Rep. No. 111-278 at 20-21 (2009), reprinted in 2009 U.S.C.C.A.N. 1003.

accordance with applicable regulatory requirements.”<sup>8</sup> The Administration’s FY 2011 Budget similarly stated that “[i]n 2010 the Department [of Energy] will discontinue its application to the Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geologic repository at Yucca Mountain, Nevada.”<sup>9</sup> It further stated that “all funding for development of the [Yucca Mountain] facility will be eliminated” for FY 2011.<sup>10</sup> Congress approved this budget request by providing no funding in FY 2011 for the development of the Yucca facility.<sup>11</sup>

Consistent with those determinations, on March 3, 2010, the Department filed a motion with the NRC to withdraw the license application for Yucca Mountain.<sup>12</sup> An NRC Board denied that motion on June 29, 2010, but the next day the NRC itself invited briefing as to whether it should review and reverse or affirm that determination.<sup>13</sup> On September 9, 2011, the NRC issued a Memorandum and Order stating that “the Commission finds itself evenly divided on whether to take the affirmative action of overturning or upholding the Board’s decision.” The Memorandum and Order then noted “budgetary limitations” and “direct[ed] the Board to, by the close of the current fiscal year, complete all necessary and appropriate case management activities, including disposal of all matters currently pending before it and comprehensively documenting the full history of the adjudicatory proceeding.” On September 30, 2011, consistent with the NRC’s September 9, 2011 Memorandum and Order, the Board suspended the Yucca license application proceeding.<sup>14</sup>

Although, as noted above, the Secretary has determined that a geologic repository at Yucca Mountain is not a workable option, the Secretary has repeatedly affirmed the Department’s commitment to meeting its obligation to manage and dispose of the nation’s SNF and HLW.<sup>15</sup> To explore options to meet this commitment, the Secretary, acting at the direction of the President, has established the Blue Ribbon Commission on America’s Nuclear Future (BRC).<sup>16</sup> The BRC is directed by its charter to consider, among other things, (1) “[o]ptions for safe storage of used nuclear fuel while final disposition pathways are selected and deployed,” (2) “fuel cycle technologies and R&D programs,” and (3) “[o]ptions for permanent disposal of used fuel and/or high-level nuclear waste, including deep geological disposal.”<sup>17</sup> Congress has provided \$5

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<sup>8</sup> DOE, FY 2011 Cong. Budget Request, Budget Highlights, at 44, *available at* <http://www.mbe.doe.gov/budget/11budget/Content/FY2011Highlights.pdf>.

<sup>9</sup> Office of Management and Budget, Terminations, Reductions, and Savings, Budget of the U.S. Government, FY 2011, at 62, *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/trs.pdf>.

<sup>10</sup> *Id.*

<sup>11</sup> Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat 38.

<sup>12</sup> DOE’s Motion to Withdraw, In the Matter of U.S. Dep’t of Energy, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04.

<sup>13</sup> In the Matter of U.S. Dep’t of Energy, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW.

<sup>14</sup> Memorandum and Order (Suspending Adjudicatory Proceeding), In the Matter of U.S. Dep’t of Energy, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04.

<sup>15</sup> See, e.g., DOE, FY 2012 Congressional Budget Request at 139, *available at* <http://www.cfo.doe.gov/budget/12budget/Content/Volume7.pdf> (“The Administration remains committed to fulfilling its obligations under the Nuclear Waste Policy Act.”); DOE’s Motion to Withdraw at 1, In the Matter of U.S. Dep’t of Energy, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04 (“DOE reaffirms its obligation to take possession and dispose of the nation’s spent nuclear fuel and high-level nuclear waste . . .”).

<sup>16</sup> DOE, Secretary Chu Announces Blue Ribbon Commission on America’s Nuclear Future (Jan. 29, 2010), *available at* <http://www.energy.gov/news/8584.htm>.

<sup>17</sup> Charter, Blue Ribbon Commission on America’s Nuclear Future (filed March 1, 2010), *available at* <http://www.brc.gov/index.php?q=page/charter> (“BRC Charter”).

million to fund the BRC so that it may consider “alternatives” for disposal of SNF and HLW.<sup>18</sup> The BRC issued a draft report in July 2011 and is required to issue a final report by January 2012.<sup>19</sup> The BRC’s final report will inform the Department’s policies toward fulfilling its obligation to manage and dispose of SNF and HLW.

## DISCUSSION:

### The Framework Established by the NWPA and the Standard Contracts

As explained above, Section 302(a)(1) of the NWPA provides that DOE’s disposal contracts with generators or owners of HLW or SNF must contain a provision that requires the payment of a fee. Section 302(a)(5) provides that payment of the fee is the consideration for the Secretary’s obligation under the contract to take and dispose of HLW and SNF. Nothing in the NWPA, or in the contracts entered into pursuant to Section 302 (standard contracts),<sup>20</sup> ties either of these obligations to progress on the Yucca Mountain repository or the use of the Yucca Mountain repository for the disposal of HLW or SNF. On the contrary, consistent with the statute, the standard contracts provide that “DOE shall accept title to all SNF and/or HLW, of domestic origin, generated by the civilian nuclear power reactor(s) specified in appendix A, provide subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract” without specifying a particular disposal site or method.<sup>21</sup> Thus, the statutory and contractual language is clear that the obligations to collect and to pay the waste fee are ongoing and tied to DOE’s obligation to take and dispose of SNF and HLW, but not to the Yucca Mountain project. Those statutory and contractual obligations remain in place today.

Under the statutory and contractual scheme, payment of the fees continues to provide the consideration for DOE’s performance of its obligations to dispose of these materials.<sup>22</sup> DOE, moreover, has clearly stated that termination of the Yucca Mountain project does not affect its commitment to fulfill its contractual obligations to take and dispose of HLW and SNF.<sup>23</sup> Accordingly, that DOE will not pursue the Yucca Mountain repository does not provide a basis to stop the collection and payment of the consideration for DOE’s obligation to accept and dispose of HLW and SNF.

DOE’s conclusion that its obligation to dispose of these materials – and thus the need to collect a fee to recover the costs of such disposal – is independent of the status of the Yucca Mountain repository, or any other repository, has been affirmed by the courts. As explained by the D.C. Circuit in *Indiana Michigan*:

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<sup>18</sup> Energy and Water Development and Related Agencies Appropriations Act, 2010 Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (Oct. 2009).

<sup>19</sup> BRC Charter, ¶ 4.

<sup>20</sup> 10 C.F.R. § 961.11 (text of the standard contract).

<sup>21</sup> *Id.*, Art. IV.B.1.

<sup>22</sup> NWPA, sec. 302(a)(5) (“Contracts entered into under this section shall provide that ... (B) in return for the payment of fees ... the Secretary ... will dispose of the [HLW] or [SNF] ...”).

<sup>23</sup> See *supra* note 15.

DOE's duty ... to dispose of the SNF is conditioned on the payment of fees by the owner ... *Nowhere, however, does the statute indicate that the obligation ... is somehow tied to the commencement of repository operations ...* The only limitation placed on the Secretary's duties ... is that that duty is "in return for the payment of fees established by this section."<sup>24</sup>

Similarly, courts have made clear that the waste fee is intended to defray the costs of a wide set of activities relating to permanent disposal. In *State of Nev. ex rel. Loux*, the court concluded that the NWPAA requires the Waste Fund to cover the costs of a broad array of activities that relate to the ultimate disposal of waste, including pre-site characterization activities conducted by a state in which a repository may potentially be sited.<sup>25</sup> Significantly, moreover, in *Alabama Power*, which was decided after the Joint Resolution of Congress approving the Yucca Mountain site (i.e., the Yucca Mountain Development Act) became law, the court did not limit Section 302(d) to activities associated with Yucca Mountain; instead, the court noted that Section 302(d) permits expenditures for activities that "entail some sort of advancement or step toward permanent disposal, or else an incidental cost of maintaining a repository."<sup>26</sup> These cases are consistent with Congress's intent that the Waste Fund be used to pay the costs of DOE's entire disposal program, rather than only the costs of a particular repository.<sup>27</sup>

#### Basis for Any Adjustment to the Fee

The remaining question for decision is whether there is, at this time, a basis for the Secretary to propose to Congress an adjustment of the fee. As stated above, the NWPAA prescribes that the fee "shall be equal to 1.0 mil" per kilowatt-hour of electricity generated and sold by nuclear utilities. The fee can be altered under the NWPAA only through the adjustment provision of Section 302(a)(4), which requires the Secretary to propose an adjustment to the fee "[i]n 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)" and further provides Congress an opportunity to either allow the proposal to become law or enact contrary legislation. In other words, the NWPAA requires the fee to remain at the

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<sup>24</sup> *Indiana Michigan Power Co. v. Dept. of Energy*, 88 F.3d 1272, 1276 (D. C. Cir. 1996) (quoting NWPAA, sec. 302(a)(5)(B)) (emphasis added).

<sup>25</sup> *State of Nev. ex rel. Loux v. Herrington*, 777 F.2d 529, 532 (9<sup>th</sup> Cir. 1985). The issue in that case was whether Nevada was entitled to access the Waste Fund to pay for its pre-site characterization monitoring and testing activities at Yucca Mountain. Despite the fact that the NWPAA – in sections 116(c)(1)(A) and 117(c)(8) – expressly authorizes funding of only *post*-site characterization monitoring and testing activities, the court liberally construed other NWPAA provisions as also authorizing funding of *pre*-site characterization monitoring and testing activities. *Id.* at 532-35. The court indicated that a liberal construction of the NWPAA's funding provisions is necessary to effectuate the statutory purpose of ensuring that generators and owners of HLW and SNF bear the full costs of the disposal of their HLW and SNF. *Id.* at 532. See also *Indiana Michigan*, 88 F.3d at 1275 (indicating that Congress intended Section 302(d) of the NWPAA, which governs Waste Fund expenditures, to be interpreted more liberally than other sections of the NWPAA).

<sup>26</sup> *Alabama Power*, 307 F.3d at 1313.

<sup>27</sup> See S. Rep. No. 100-517 at 1-2 (1988) ("The Nuclear Waste Policy Act of 1982 (NWPAA) establishes a national policy and program for safely storing, transporting, and disposing of spent nuclear fuel and high-level radioactive waste. ... The NWPAA also establishes a nuclear waste fund, to be composed of payments made by generators of spent fuel and high-level waste, from which the costs of the program are paid.") (emphases added).

statutorily-prescribed rate of 1.0 mill unless and until the Secretary determines an adjustment is necessary because excess or insufficient revenues are being collected. If the Secretary makes such a determination, the Secretary must report that determination to Congress, and wait 90 days to see whether Congress acts to disturb that judgment.<sup>28</sup>

The NWPA does not prescribe a methodology for how the Secretary must carry out the fee adequacy review provision of Section 302(a)(4). Rather, the NWPA gives the Secretary discretion in how he administers that provision each year. Congress chose to allow the Secretary to utilize his expertise with respect to nuclear waste disposal and cost issues in determining the manner of conducting the review and whether the fee should be altered.<sup>29</sup> The Secretary's fee review is predictive in nature and, as the Eleventh Circuit has recognized, involves "nebulous calculations that must be made in order to assess the costs of waste storage that will be incurred in the distant future."<sup>30</sup> The Eleventh Circuit opined that, if nuclear utilities were to challenge the merits of the Secretary's review, "[t]hey would face an insurmountable burden of proof."<sup>31</sup>

Over the years, the Secretary has exercised his discretion to implement varying approaches to evaluate the adequacy of the waste fee.<sup>32</sup> These approaches reflected the evolving nature of the disposal program, including changes in the direction of the program and changes in expectations concerning what activities would be undertaken in the future, what costs would be incurred, and what future market conditions would be. None of these annual evaluations has led to a determination by the Secretary that either insufficient or excessive fees were being collected such that an adjustment of the fee of 1.0 mill per kilowatt hour of electricity was necessary to ensure full cost recovery. The fee has, thus, remained unchanged since it was first established in the NWPA.

In this instance, we are aware of no evidence that would provide a reasoned and sound basis for determining that excess or insufficient revenues are being collected for the costs for which DOE is responsible under the NWPA's statutory scheme (and under its contractual obligations entered into pursuant to that scheme). The Department has determined that a repository at Yucca Mountain is not a workable option for meeting these obligations but is committed to meeting them. At the direction of the President and with funding provided by Congress, the Secretary has

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<sup>28</sup> NWPA, sec. 302(a)(4); *Alabama Power*, 307 F.3d at 1308.

<sup>29</sup> See *Alabama Power*, 307 F.3d at 1307 (finding that Congress entrusted the Secretary "full discretion to alter the fee" following his fee review if Congress did not itself timely act to modify it); *General Elec. Uranium Mgt. Corp. v. Dep't of Energy*, 764 F.2d 896, 905 (D.C. Cir. 1985) (applying Chevron deference to DOE interpretation of NWPA provision after finding that "DOE is indubitably entrusted with the administration of the Waste Act").

<sup>30</sup> *Alabama Power*, 307 F.3d at 1309.

<sup>31</sup> *Id.*

<sup>32</sup> For example, in the 1987 assessment, the number of cases (involving different host rock and locations among two repositories) was reduced from 10 to 5, as a result of the President's decision in May 1986 to approve only 3 candidate sites for characterization. In 1989, the number of cases was reduced to 1, as a result of the Nuclear Waste Policy Amendments Act's designation of Yucca Mountain as the only site to be characterized for the first repository. Program changes in other years were similarly reflected in fee adequacy assessments for those years. Notably, all fee adequacy assessments since 1995 have assumed that the NWPA's 70,000 MTHM emplacement limit would be repealed by Congress so that only one repository would be constructed to receive all the SNF produced by existing reactors. See Bechtel SAIC Company, LLC, History of Total System Life Cycle Cost and Fee Adequacy Assessments for the Civilian Radioactive Waste Management System, MIS-CRW-SE-000007 REV 00, at 10, 12, and 14-33 (Sep. 2008).



established the Blue Ribbon Commission to analyze alternatives and to provide recommendations for disposal of these materials. Future decisions as to these matters will be informed by the final recommendations of the BRC which are expected to be reported in January 2012. Although the BRC issued a draft report in July 2011, that draft merely “articulates a preliminary set of consensus recommendations for public review and input.”<sup>33</sup> Thus no action has been or should be taken in light of the BRC’s preliminary recommendations. The Department will carefully consider the final recommendations of the BRC in determining how to proceed to meet its obligations to safely manage and dispose of spent nuclear fuel and high-level radioactive waste. Until these recommendations have been issued and a determination made as to how to proceed, there remains no basis to conclude that the Department’s means of meeting its statutory and regulatory obligations will require more or less money than would be collected through continued assessment of the fee at the level it has been set at for several decades and the accumulation of interest on the amounts in the Nuclear Waste Fund. In such a situation, the relevant language of the NWPA requires (or, at the least, permits) the amount of the waste fee to remain at the amount set by the NWPA itself. In particular, because the Secretary cannot make an affirmative “determin[ation]” that “insufficient or excess revenues are being collected,” the Secretary cannot propose a change to the fee. Such an approach is consistent with DOE’s past annual reviews, which have stated that DOE’s policy is to propose a change to the fee only “when there is a compelling case for the change.”<sup>34</sup>

Additionally, to the extent that there is information bearing on the total cost of alternative means of disposing of the materials at issue, that information supports retaining the fee at its current level. Over more than two decades, both before and after Yucca Mountain was designated as the site for which an application should be filed, the Secretary’s fee reviews have uniformly determined that the fee should remain at the present rate. Before Yucca Mountain was designated as the sole site for characterization by the 1987 amendments, the Secretary consistently decided against proposing a fee adjustment, in part because DOE’s disposal program had not yet matured to the point where program costs could be defined with sufficient certainty to justify an adjustment. For example, according to the Secretarial memo accompanying the 1984 annual review, “[s]ince substantial uncertainty surrounds both program cost and revenue projections at this time, it is prudent to delay a decision to adjust the fee structure until the program is more clearly defined.”<sup>35</sup> Similarly, in both the 1986 and 1987 annual reviews, DOE concluded that “[f]ee revisions may be recommended within a few years, when more accurate program cost estimates will be developed as the program matures from its present conceptual design phase to the engineering design phase.”<sup>36</sup>

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<sup>33</sup> Blue Ribbon Commission on America’s Nuclear Future, Draft Report to the Secretary of Energy at ii (July 29, 2011) (“BRC Draft Report”), *available at*:

[http://brc.gov/sites/default/files/documents/brc\\_draft\\_report\\_29jul2011\\_0.pdf](http://brc.gov/sites/default/files/documents/brc_draft_report_29jul2011_0.pdf).

<sup>34</sup> DOE, Nuclear Waste Fund Fee Adequacy: An Assessment, DOE/RW-0291P, at 5 (November 1990); *see also* DOE, Fiscal Year 2007 Civilian Radioactive Waste Management Fee Adequacy Assessment Report, DOE/RW 0593, at 12 (July 2008) (“It is understood that any adjustment to the fee would require compelling evidence that such an adjustment is necessary to ensure future full cost recovery.”); DOE, Memorandum for the Secretary, “INFORMATION: The 2008 Determination of the Adequacy of the Nuclear Waste Fund Fee.” EXEC-2009 012439, Attachment, at 10 (September 29, 2009) (same).

<sup>35</sup> DOE, Memorandum to the Secretary, “Submittal of Annual Fee Adequacy Evaluation Report for the Office of Civilian Radioactive Waste Management Program.” HQZ.870307.8942, at 2 (July 16, 1984).

<sup>36</sup> DOE, Nuclear Waste Fund Fee Adequacy: An Assessment, DOE/RW-0020, at 1-2 (March 1986); DOE, Nuclear Waste Fund Fee Adequacy: An Assessment, HQS.880517.227, at 2 (June 1987).

Even more to the point, as recently as 2009, the analysis done by DOE determined that the fee amount was appropriate to meet the anticipated costs of the proposed Yucca Mountain repository. The 2009 analysis concluded that the fee was adequate based on the most recent life cycle cost estimate of the Yucca Mountain repository of \$97 billion in constant 2007 dollars – nearly four times the current Waste Fund balance. One cannot determine with any confidence at this time precisely how much the yet-to-be-selected disposal alternative will cost, but the closest proxy – albeit an imperfect one – is the costs of the proposed Yucca facility. Thus, the fact that the Department in 2009 concluded that the fee should not be varied in order to meet the costs of the Yucca repository provides additional support for the conclusion that the fee should not be altered at this time (and, in particular, should not be lowered).<sup>37</sup>

At the same time, it is important to note that the Department is committed to continuing to review the fee annually. If the Department, informed by the recommendations of the BRC, moves toward a means of disposal that will require a different level of fee than has been charged over the past several decades, and there is compelling evidence that the current revenues are inadequate or excessive, the Department will promptly propose an adjustment of the fee.

In sum, absent a basis for concluding that disposition will not require fees at the current level, the statute does not contemplate – and certainly does not mandate – that the Secretary raise, lower, or suspend the fee. Indeed, if the Secretary were to stop collecting the fee (i.e., by adjusting the fee to zero), that action would contravene the principle of generator responsibility embodied in Section 111(b)(4) and would be inequitable to future ratepayers. Such an adjustment would allow utilities that generate SNF during the time the fee is zero to avoid paying the costs of their SNF disposal, and would effectively shift those costs onto future ratepayers after a disposal solution is identified and the fee is adjusted back to a positive amount.<sup>38</sup> This type of cost-shifting was not what Congress intended when it set up the Nuclear Waste Fund.<sup>39</sup> It is clear from the plain language of the NWPFA that Congress intended utilities to pay the full costs of disposing of the SNF they generate.<sup>40</sup>

**CONCLUSION:** The NWPFA provides that the standard contract requires generators or owners of HLW or SNF to pay fees in return for DOE's obligation to accept HLW and SNF and be responsible for its final disposition. DOE has clearly stated that termination of the Yucca

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<sup>37</sup> Additionally, there is nothing in the BRC's draft report that suggests the yet-to-be-selected disposal alternative will cost any less than the costs of a repository at Yucca Mountain. The draft report recommends that the nation's nuclear waste management system should include at least one permanent deep geological facility. BRC Draft Report at xv. Therefore, to the extent the BRC's draft report has any impact on fee adequacy, it further supports the conclusion that the fee should not be altered at this time (and, in particular, should not be lowered).

<sup>38</sup> In such a scenario, attempting to collect the fee from the original generators of SNF would not be an option because neither the NWPFA nor the standard contract permits retroactive adjustment of the fee. See 10 C.F.R. 961.11, Article VIII.A.4 ("Any adjustment to the ... fee ... shall be prospective.").

<sup>39</sup> See, e.g. *Consolidated Edison Co. of New York, Inc. v. U.S. Dept. of Energy*, 870 F.2d 694, 698 (D.C. Cir. 1989) (recognizing that Congress intended to avoid "unfairly burdening future ratepayers.").

<sup>40</sup> NWPFA, sec. 111 ("Findings and Purposes ... (a) FINDINGS–THE Congress finds that ... (4) ... the costs of [HLW and SNF] disposal should be the responsibility of the generators and owners of such waste and spent fuel ... (b) PURPOSES–The purposes of this subtitle are ... (4) to establish a Nuclear Waste Fund ... 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.").

Mountain project will not affect its commitment to fulfill its obligations under the NWPA and the standard contracts. DOE must continue to collect the fees to have sufficient revenues to carry out its obligations to accept and dispose of HLW and SNF. Presently, there is no reasonable basis, and certainly no compelling evidence, that justifies any proposed adjustment of the fee, either upwards or downwards, to achieve full cost recovery. Moreover, the best available proxy (though imperfect) indicates that the fee should be retained at the current level. Additionally, adjustment of the fee to zero would be inequitable to past and future ratepayers who pay utility bills for electricity that reflect payment of the fees. In such circumstances, the NWPA requires the fee to remain at its current amount of 1 mill per kilowatt-hour as established in the NWPA.