



**COMPILATION OF OFFICE
OF GENERAL COUNSEL
MATERIALS
PROVIDED TO THE
PRESIDENT-ELECT'S
DOE TRANSITION TEAM**

2008-2009


1	November 25, 2008, Memorandum to Cynthia Quarterman from Janet Barys – Office of General [GAO Report; Other Congressional Matters; FY 2008 DOE AFR
2	December 1, 2008, Memorandum to Cynthia Quarterman from Janet Barys – Requested Information [List of Pending Litigation Cases; Federal Facility Agreements]
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Department of Energy
Washington, DC 20585

NOTE TO: Cynthia L. Quarterman
Department of Energy Agency Review Team

FROM: Janet Z. Barsy 
Special Assistant
Office of the General Counsel

SUBJECT: Office of General Counsel Information

DATE: November 25, 2008

Pursuant to our conversation yesterday, attached is material that you indicated would be useful to your review of certain legal issues.

Government Accountability Office (GAO) Report

DOE response to GAO contentions that DOE violated the Antideficiency Act when it engaged in preparatory activities to implement the Loan Guarantee Program authorized by Title XVII of the Energy Policy Act of 2005 prior to enactment of the Revised Continuing Appropriations Resolution, 2007.

Other Congressional Matters

Memorandum for the Secretary from the General Counsel prepared to address Congressional concerns regarding the purported transfer of the Mixed Oxide (MOX) Fuel Fabrication Facility Construction Project from the National Nuclear Security Administration to the Office of Nuclear Energy.

FY 2008 Department of Energy Agency Financial Report

Regarding your question about Department liabilities, the Independent Auditors' Report by KPMG LLP of DOE's consolidated balance sheets (page 88). It is an unqualified opinion in that it concludes that these statements "as of and for the years ended September 30, 2008 and 2007, are presented fairly, in all material respects, in conformity with U.S. generally accepted accounting principles." This report also contains useful information about the Department's activities.



Copies of Transition Papers

For your convenience, attached are copies of the information on DOE Rulemakings due before and after January 20, 2009, and the paper entitled "Pending Significant Litigation Matters."

Please let us know if you have any questions about this material or other issues concerning OGC responsibilities.

cc: Ingrid Kolb
Director, Office of Management

**Department of Energy's Response to the Government Accountability Office Review
of the Loan Guarantee Program under Title XVII of the Energy Policy Act of 2005
December 31, 2007**

The Department of Energy's Office of the General Counsel was asked to review a letter opinion issued by the General Counsel of the Government Accountability Office (GAO) on April 20, 2007 (B-308715) (GAO Letter) on the Loan Guarantee Program (LGP) authorized by Title XVII of the Energy Policy Act of 2005, Pub. L. No. 109-58 (EPAAct). In the letter, GAO concludes that the Department of Energy (DOE or Department) has authority to issue loan guarantees notwithstanding certain requirements specified in the Federal Credit Reform Act of 1990 (FCRA), and that the Department violated the Antideficiency Act when it engaged in preparatory activities to implement the LGP prior to enactment of the Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5 (Revised CR). The purpose of this memorandum is to respond to the conclusion in the GAO Letter regarding an alleged violation of the Antideficiency Act, as is called for by Office of Management and Budget Circular A-11, § 145.8 (2007).

Background

Title XVII of EPAAct allows for either direct appropriations for the cost (as defined by FCRA) of a loan guarantee,¹ or receipt of payment in full from the borrower for the cost of a loan guarantee.² It also requires the Department to charge fees to the borrowers in order to cover the administrative costs of the LGP,³ but makes availability of those funds dependent on further action in an appropriations act.⁴ There also exists an earlier general limitation on the Department's use of funds appropriated in an Energy and Water Development Appropriations Act to "implement or finance" any price support or loan guarantee program.⁵ The Department in early 2006, following enactment of EPAAct late in FY 2005 and in anticipation of receiving appropriations for the administrative costs of the LGP, detailed a small number of employees to the Office of the Chief Financial Officer and began work reviewing the operational requirements of other federal loan guarantee programs and work on guidelines necessary to begin preparations for later implementation of the LGP. Additionally, the Department carried out planning activities related to the structure of the actual LGP office.

¹ EPAAct § 1702(b)(1).

² EPAAct § 1702(b)(2).

³ EPAAct § 1702(h)(1).

⁴ EPAAct § 1702(h)(2)(B).

⁵ See Energy and Water Development Appropriations Act, 1993, Pub. L. No. 102-377, tit. III, § 301, 106 Stat. 1315, 1338-39 (1992). While this particular section was enacted as permanent law by the inclusion of words of futurity, the provision had been carried in Energy and Water Development Appropriations Acts as an annual provision starting in FY1980. See Energy and Water Development Appropriations Act, 1980, Pub. L. No. 96-69, tit. I, § 101, 93 Stat. 437, 441 (1979). Similar provisions also appeared in prior Department of the Interior and Related Agencies Appropriations Acts that funded certain activities of the Energy Research and Development Administration. See, e.g., Department of the Interior and Related Agencies Appropriation Act, 1978, Pub. L. No. 95-74, 91 Stat. 285, 300 (1977); Department of the Interior and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-465, 92 Stat. 1279, 1296 (1978).

In late 2006, after the Department had finalized guidelines for the LGP and had issued a solicitation thereunder, the GAO conducted a review of the activities carried out in anticipation of implementation of the LGP. GAO's positions arising from its review have been contradictory. While noting that a GAO legal review was underway, GAO in its February 28, 2007 letter to Chairman Visclosky of the House Committee on Appropriations, Subcommittee on Energy and Water Development, took the Department to task for not having gone far enough to implement the LGP – in particular, for not having adopted regulations and not having taken other actions to implement the Title XVII LGP. In fact, GAO issued five recommendations for further action in carrying out the Title XVII LGP.⁶ GAO testimony developed in conjunction with the February 28, 2007 letter similarly criticized as excessively tentative the steps the Department had taken up to that time,⁷ stating that “DOE has not completed key steps to ensure that the program will be well managed and accomplish its objectives[.]”⁸ Statements offered by the GAO, even after the GAO Letter of April 20, 2007 (which asserted that DOE already had done too much and thus had violated the Antideficiency Act), continued in this vein, reemphasizing GAO's recommendation that the Department do more to carry out the program,⁹ but, paradoxically, then proceeding also to restate the GAO Letter's conclusion that the Department lacked the authority to carry out the program in the first place, and should not have begun work at all.¹⁰ In short, GAO has opined that DOE had been legally derelict by both doing too much and too little at the same time on the same matter. We find GAO's contradictory pronouncements on the LGP confusing at best.

GAO's Legal Arguments

In brief, the GAO Letter advances two arguments. First, the GAO Letter asserts that, as a later enactment of law Section 1702(b)(2) of EPAct is “clearly inconsistent with FCRA.” Therefore, section 1702(b)(2) of EPAct constituted authority for the Department to issue loan guarantees without regard to the provisions of FCRA, which require prior authorization in an appropriations act before an agency may make otherwise authorized loan guarantees. The second argument is that the Department violated the Antideficiency Act because it expended funds prematurely in violation of the prohibition contained in section 301 of the Energy and Water Development Appropriations Act, 1993, that forbids using funds appropriated in an Energy and Water Development Appropriations Act to “implement or finance” a loan guarantee program before “specific provision” has been made for the program in an appropriations act.¹¹ The particular expenditures faulted by the GAO Letter were those associated with preliminary organizational activities and preparation of guidelines done by the Department to enable implementation of the LGP

⁶ Letter from James C. Cosgrove and Robert E. Martin, U.S. Gov't Accountability Office, to Peter J. Visclosky, Chairman, Subcommittee on Energy and Water Development, House Committee on Appropriations, GAO-07-339R (Washington, D.C., Feb. 28, 2007), at 5.

⁷ *Id.* at 18, 26, 27, 29, 30.

⁸ *Id.* at 18.

⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 07-798T, OBSERVATIONS ON ACTIONS TO IMPLEMENT THE NEW LOAN GUARANTEE PROGRAM FOR INNOVATIVE TECHNOLOGIES (2007), AT 2-5.

¹⁰ *Id.* at 5.

¹¹ Codified at 42 U.S.C. § 7278 (hereinafter referred to as “section 301”).

during the period after enactment of Title XVII and before the enactment of the Revised CR on February 15, 2007, which specifically provided for, and specifically made appropriations for, implementation of the Title XVII LGP. Absent the prohibition in section 301, the GAO Letter does not contest the propriety of the Department's having used prior appropriation balances to prepare to implement a new statutory program such as that authorized by Title XVII of EPAct. Nonetheless, GAO concluded that the Department's preparatory actions regarding the Title XVII LGP violated the constraint of section 301, and thereby violated the Antideficiency Act, because those actions constituted a forbidden "implementation" of a loan guarantee program.

Title XVII and the Federal Credit Reform Act of 1990

The GAO Letter posits that the loan guarantee authority provided by Title XVII of EPAct trumped the constraints imposed on issuance of loan guarantees contained in FCRA. Under this view, apparently, DOE was enabled to issue guarantees in the absence of the requisite authorization contained in an appropriations act which is the normal requirement under FCRA.¹² GAO's basic reason for this conclusion was a perceived conflict between the loan guarantee authority provided to DOE in Title XVII and FCRA's requirement for legislative action in an appropriations act before issuing loan guarantees otherwise authorized by law. The GAO analysis relied heavily on the observation that EPAct was enacted well after the adoption of FCRA in 1990.

In the preamble to the final rule implementing the Title XVII LGP, the Department explained its understanding of the correct relationship between the Title XVII LGP and the requirements of FCRA:

DOE reads [Title XVII of EPAct] and FCRA in harmony, which means that while Title XVII authorizes DOE to carry out the loan guarantee program, the Department may not issue any loan guarantees until it has received budget authority or is otherwise provided authority to make guarantees in an appropriations act.

* * *

In enacting Public Law 110-5 [the Revised CR], Congress acted consistently with the Administration's view that authority in appropriations acts is required in advance before a loan guarantee can be issued.¹³

The Department's approach to implementing Title XVII has demonstrated its compatibility with FCRA. The GAO analysis points to no textual antagonism between

¹² Federal Credit Reform Act of 1990, Pub. L. No. 101-508, tit. XIII, subtitle B, § 13201, 104 Stat. 1388-609, 1388-612 (codified as amended at 2 U.S.C. § 661c)(1997)).

¹³ 72 Fed. Reg. 60,116, 60,131 (Oct. 23, 2007). Congress again acted consistently with the Administration's view in the Consolidated Appropriations Act, 2008, which was signed into law on December 26, 2007. See H.R. 2764, Division C, Title III (no public law number yet assigned).

the requirements of FCRA and Title XVII. The analysis begins with the correct observation that “[t]he language of section 1702(b) makes clear that Congress contemplated two possible paths for making loan guarantees under title XVII.”¹⁴ However, the analysis then confuses alternatives for the source of the payment for the cost of the guarantee (either the taxpayer or the borrower) with a statutory exception (that Title XVII does not contain) from FCRA’s explicit requirement that an authorization to make guarantees be contained in an appropriations act. It is not incompatible with FCRA for Title XVII to provide that a borrower, rather than the taxpayers, may pay the cost of a loan guarantee because the respective provisions of both FCRA and EPCA can readily co-exist. Nor does complying with FCRA’s requirement of prior authorization in an appropriations act before using the borrower’s payment to secure a guarantee “read subsection [1702](b)(2) out of the law[.]”¹⁵

Accordingly, the Department must read the two statutes in harmony, which is what it has done here. The executive is not in a position to pick and choose among the statutes that guide and authorize its actions. It is a “cardinal rule * * * that repeals by implication are not favored.”¹⁶ The Department therefore is and was obliged to comply with both statutes, and the view contained in the GAO Letter that the Department could have issued loan guarantees without observing the requirements of FCRA is in error.

Title XVII and Section 301

Section 301 of the Energy and Water Development Appropriations Act, 1993, provides in relevant part:

None of the funds made available to the Department of Energy under this Act or subsequent Energy and Water Development Appropriations Acts shall be used to implement or finance authorized price support or loan guarantee programs unless specific provision is made for such programs in an appropriation Act.

The analysis in the GAO Letter centers on section 301’s prohibition of premature agency actions to “implement” a loan guarantee program. As the GAO Letter put it, DOE’s “preparatory activities fall squarely within this [cited] definition of ‘implement’” because they involved “concrete measures” by which the Department would “ensure the actual fulfillment” of the LGP.¹⁷ The GAO Letter observes that statutory words are to be understood as having their meaning in ordinary usage, and thus it posits that the

¹⁴ GAO Letter, at 6.

¹⁵ *Id.*

¹⁶ *Morton v. Mancari*, 417 U.S. 535, 549-550 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)(alteration in original); also citing *Wood v. United States*, 41 U.S. (16 Pet.) 342-343 [sic], 363 (1842), *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm’n*, 393 U.S. 186, 193 (1968).

¹⁷ GAO Letter, at 7.

prohibition of section 301 is to be gauged by certain of the dictionary definitions of the word "implement."¹⁸

It is the case, though, that the term "implement," even in ordinary usage, itself can convey a range of meanings. Other common dictionary definitions include "to fulfill,"¹⁹ "to complete,"²⁰ and to "pursue to a conclusion or bring to a successful issue,"²¹ as well as part of the definition the GAO Letter itself cites but does not quote, "accomplish."²²

Section 301 does not, however, employ the word "implement" in isolation. Instead, it describes the actions subject to its prohibition as: "[T]o implement or finance authorized price support or loan guarantee programs[.]" Thus, the word "implement" has been used in a context that includes "finance" and "price support" in addition to "loan guarantee." Therefore, in interpreting the word "implement" as it appears in section 301, we are guided by the Supreme Court's admonition that words may have different shades of meaning and should be read in the context in which they appear.²³ Taken in their aggregate, the terms in section 301 are suggestive of financial commitments by the Government to others as the object of section 301's prohibition, even though in isolation the word "implement" is subject to various meanings, even in ordinary usage.

If we read the term "implement" as being linked for meaning in the context of section 301 to "finance," the further question arises whether doing so would deprive the term "implement" of independent meaning within the statute. That is so because of the corollary principle that "[a] statute is to be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous[.]"²⁴ Understanding whether elements of section 301 might be deemed superfluous under some understandings of its intended reach requires examination of the origins of the particular textual formulation contained in section 301 and the state of the law as it then existed.

In the years before adoption of FCRA in 1990, when an agency was authorized by ordinary legislation to issue loan guarantees, there was no requirement to obtain an appropriation in advance to secure the contingent liability in the event of default. As the Attorney General put it in 1971:

¹⁸ *Id.* at 6-7.

¹⁹ Implement. Dictionary.com. Dictionary.com Unabridged (v 1.1). Random House, Inc., at <http://dictionary.reference.com/browse/implement> (last visited Dec. 31, 2007).

²⁰ Oxford English Dictionary, 2nd ed. (1989).

²¹ Implement. Dictionary.com. *WordNet 3.0*, Princeton University, at <http://www.dictionary.reference.com/browse/implement> (last visited Dec. 31, 2007).

²² See GAO Letter, at 6.

²³ See, e.g., *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) ("Discovery" is a word usable in many contexts and with various shades of meaning. Here, however, it does not stand alone, but gathers meaning from the words around it. . . . The maxim . . . that a word is known by the company it keeps . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.").

²⁴ *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06, at 181-186 (rev. 6th ed. 2000)).

A series of opinions of the Attorneys General beginning in 1953 has established that a guaranty by an agency of the United States or by a Government corporation contracted pursuant to a congressional grant of authority for constitutional purposes is an obligation fully binding on the United States despite the absence of statutory language expressly pledging “faith” or “credit” to the redemption of the guaranty and despite the possibility that a future appropriation might be necessary to carry out such redemption.²⁵

So the federal fisc was implicated by issuance of a loan guarantee under authorizing legislation irrespective of whether future appropriations might be needed to redeem the commitment in the event of a default. Appropriations were not necessary to issue a loan guarantee commitment, and thus “implement” the agency’s authorized loan guarantee program. There was no role in the federal budget and appropriations processes to present and obtain approval of the contingent liabilities of loan guarantees.²⁶

The other factor that sheds light on the conjunction of “implement” and “finance” in section 301’s original antecedent was establishment in 1973 of the Federal Financing Bank.²⁷ The Bank, a government corporation supervised generally by the Treasury Department, was established to harmonize the terms and conditions of the variety of U.S. Government debt obligations with the array of other agency guarantees and debt obligations regarding their economic terms and the timing of their issuance. The evident object was to create a single market of Federal debt obligations, whether they were Treasury obligations, agency debt issuances, or Federally-guaranteed debt obligations.

The structure authorized by creation of the Federal Financing Bank therefore enabled agencies having loan guarantee authority effectively to “finance” federally-authorized programs by their commitments to extend guarantees. These guarantees could be packaged in a transaction in which, in substance, the guarantee-issuing agency (by committing to guarantee a loan that on issuance immediately could be made or financed by the Federal Financing Bank) was conducting the financing of the obligation that was being incurred by the borrower – again without available appropriations.²⁸ In the context of Federal Financing Bank and agency transactions therefore, the words “implement” and “finance” regarding a loan guarantee program would have related, but distinct, meanings. Thus, understanding the word “implement” as being directed to transactions that implicate the federal fisc would not render the word “finance” superfluous in a statutory formulation like section 301.

²⁵ 42 Op Att’y Gen. 429 (1971) (principal internal quotation omitted).

²⁶ See generally OFFICE OF THE GENERAL COUNSEL, U.S. GOV’T ACCOUNTABILITY OFFICE, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, at 11-12 to 11-13 (3d ed. 2006)(hereinafter “Principles of Federal Appropriations Law”).

²⁷ Pub. L. No. 93-224, 87 Stat. 937 (1973)(codified as amended at 12 U.S.C. §§ 2281–2296)(1981).

²⁸ As noted above regarding general loan guarantee authority prior to adoption of FCRA in 1990, similarly before the 1985 budget amendments Federal Financing Bank transactions were not subject to the conventional budget and appropriations process. See generally PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, at 11-40 to 11-41.

The prohibition containing the precise formulation ultimately adopted in section 301 first appeared in the Department of the Interior and Related Agencies Appropriation Act, 1977,²⁹ under the head “Energy Research and Development Administration – Operating Expenses, Fossil Fuels.” In its entirety that prohibition read as follows:

Provided further, That none of the funds herein appropriated for expenses related to fossil fuels shall be used to implement or finance authorized price support or loan guarantee programs unless specific provision is made for such programs in future appropriation acts.³⁰

The House Appropriations Committee explained the intended reach of the new provision as follows:

The Committee has included language in the bill that prohibits the Energy Research and Development Administration from entering into loan guarantees or price support commitments. Several proposals pending in the Congress would authorize such programs. Because there is a potential for “backdoor spending” in these proposals, the Committee wants to assure that no commitments are made for such programs until provision is made for them in a subsequent appropriation act.³¹

This explanation in the House Report – which is uncontradicted by any other element of the legislative history – indicates clearly that, as to loan guarantees, the prohibition was directed to “entering into” them because of their “potential for ‘backdoor spending.’” And even though the same history indicated the Appropriations Committees’ awareness of pending legislation that would authorize new loan guarantee programs, there is no hint in the committee reports that the prohibition was intended to foreclose internal agency preparatory activities that did not themselves obligate the federal fisc to others. Those preparatory activities could only have been conducted pursuant to previously enacted agency appropriations and thus could not have constituted the “backdoor spending” sought by the prohibition to be made subject to the discipline of the appropriations process.

The identically phrased prohibition was included annually in Interior and then Energy and Water appropriation acts from 1977 to 1992, when it was modified by adding words of futurity that obviated the need for annual reenactment. In none of the reports accompanying these reenactments was there any additional description of the provision’s intended effect; instead, those reports simply stated that the prohibition was being carried over from prior appropriations acts.³²

²⁹ Pub. L. No. 94-373, 90 Stat. 1043 (1976).

³⁰ *Id.* at 90 Stat. 1058.

³¹ H.R. REP. NO. 94-1218, at 43 (1976) (emphasis supplied).

³² See, e.g., H.R. REP. NO. 95-392, at 95, 98 (1977); H.R. REP. NO. 96-1093, at 157 (1980); H.R. REP. NO. 102-555, at 147 (1992).

There is no indication in the succession of enactments leading to and including section 301 that Congress intended to alter the scope of the prohibited activity that had been described in connection with the provision's original adoption in 1976. When Congress employs identical distinctive terms in the same or related legislation, there is a strong presumption that Congress intended the term to have the same meaning in each related enactment. As the Supreme Court put it:

[If] Congress ha[s] * * * defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? * * * [I]t will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary contention.³³

Given the relationship and operative textual identity between the successive prohibitions leading to and including section 301, we must be guided by the intended scope of its 1976 ancestor in applying section 301's prohibition today. Thus, section 301 forbids only the act of prematurely "entering into loan guarantees," as the 1976 House Report put it; section 301 does not forbid use of previously appropriated balances otherwise available for an agency to conduct preparatory activities for implementing a newly-authorized loan guarantee program, as was done by the Department of Energy here. The preparatory activities described in the GAO Letter did not violate section 301's prohibition regarding the use of appropriations.

GAO's Antideficiency Act analysis hinged solely on an erroneous understanding of the reach of section 301, and in particular what the word "implement" means in that context. Without a violation of the prohibition in section 301, there is no violation of the purpose statute, 31 U.S.C. § 1301(a), in light of the broad statutory objects of the lump sum appropriation accounts for Energy Supply and Conservation, Science, and Departmental Administration that were implicated here.³⁴ Similarly, without a violation of either the prohibition of section 301 or the purpose statute, there is no violation of the Antideficiency Act, 31 U.S.C. § 1341(a).

For the foregoing reasons, the contention made in the GAO Letter that the Department's activities to prepare for implementation of the LGP authorized by Title XVII of EPA Act violated the Antideficiency Act is in error. Moreover, this examination confirms the correctness of the prior advice provided by the Department of Energy's General Counsel

³³ *Reiche v. Smythe*, 80 U.S. (13 Wall.) 162, 165 (1871). *Accord Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion).

³⁴ See Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, tit. III, "Energy Supply and Conservation," "Science," and "Departmental Administration," 119 Stat. 2247, 2270, 2272-2274 (2005). The GAO Letter describes these as six appropriation accounts because the preparatory activities occurred during portions of two succeeding years (FY 2006 and FY 2007) which involved the same three non-fiscal year limited accounts.

to the GAO on February 9, 2007, which stated that the constraints of section 301 “apply to ‘implement[ing]’ of those authorized loan guarantees by making them,” and not to “conducting preparatory activities reasonably necessary . . . to make guarantees authorized by Title XVII, because none of those Departmental activities obligate the federal fisc to third parties[.]”³⁵

Office of the General Counsel
U.S. Department of Energy
December 31, 2007

³⁵ Letter from David R. Hill, General Counsel, Department of Energy, to Susan A. Poling, Managing Associate General Counsel, U.S. Gov’t Accountability Office (Feb. 9, 2007), at 3.



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Accountability • Integrity • Reliability

United States Government Accountability Office
Washington, DC 20548

B-308715

November 13, 2007

The Honorable Richard B. Cheney
President of the Senate

The Honorable Nancy Pelosi
Speaker of the House of Representatives

Subject: *Department of Energy—Report of Antideficiency Act Violation*

The Antideficiency Act requires agencies to report violations of the Act to Congress and the President and transmit copies of those reports to the Comptroller General at the same time. 31 U.S.C. §§ 1351, 1517(b). The purpose of this letter is to advise you that the Department of Energy (DOE) violated the Antideficiency Act in fiscal years 2006 and 2007 but has not reported the violations as required by the Act and by Office of Management and Budget (OMB) Circular No. A-11.¹

In an April 20, 2007, opinion to the Subcommittee on Energy and Water Development, House Committee on Appropriations, GAO concluded that DOE violated the Act when it incurred obligations to implement its title XVII loan guarantee program before Congress enacted appropriations for that program. B-308715, Apr. 20, 2007 (enclosed). By law, DOE may not use funds to implement or finance a loan guarantee program unless Congress specifically appropriates funds for the program. 42 U.S.C. § 7278. During fiscal years 2006 and 2007, DOE, without an appropriation for the program, incurred obligations of more than \$503,000 for developing and publishing policies and guidance, drafting regulations, issuing a solicitation announcement for pre-applications, staffing and operating a program office, preparing a notice of proposed rulemaking, drafting a charter for the program's Credit Review Board, reviewing pre-applications, and procuring support services.

¹ OMB has advised executive agencies to report violations found by GAO and "[i]f the agency does not agree that a violation has occurred, the report to the President, Congress, and the Comptroller General will explain the agency's position." OMB Cir. No. A-11, *Preparation, Submission, and Execution of the Budget*, § 145.8 (July 2, 2007).

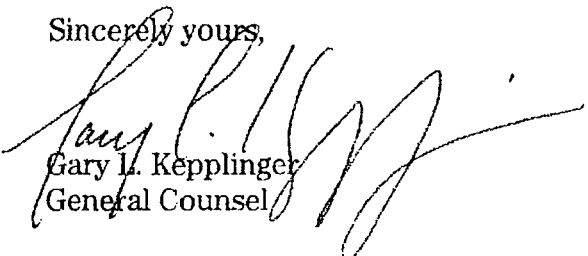
DOE charged those obligations to six different appropriations: its fiscal years 2006 and 2007 appropriations for "Departmental Administration," "Science," and "Energy Supply and Conservation." These appropriations were not available for those purposes. The Antideficiency Act prohibits making or authorizing an expenditure or obligation that exceeds or is in advance of an appropriation. 31 U.S.C. § 1341(a). *See, e.g.*, B-303495, Jan. 4, 2005. In fiscal years 2006 and 2007, when DOE incurred obligations for its title XVII loan guarantee program, it had no appropriations available for this purpose,² and hence violated the Antideficiency Act.

On September 21, 2007, we wrote to DOE noting that we had not yet received a copy of the department's Antideficiency Act report. Letter from Gary L. Kepplinger, General Counsel, GAO, to David R. Hill, General Counsel, DOE, *Department of Energy—Failure to Report Antideficiency Act Violation*, Sept. 21, 2007 (enclosed). We reminded the department of its reporting responsibility under the Act.

While DOE has indicated to us that it plans to report to Congress in accordance with the OMB Circular, more than 6 months have passed and it has not yet done so. For these reasons, we are writing to advise you of DOE's violation of the Antideficiency Act and its failure to report its violation to Congress and transmit a copy of its report to this Office as required by the Act.

If you have any questions regarding this letter, please contact Managing Associate General Counsel Susan A. Poling, at 202-512-2667, or Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, at 202-512-8257.

Sincerely yours,


Gary L. Kepplinger
General Counsel

Enclosures

cc: David R. Hill
General Counsel
Department of Energy

Gregory H. Friedman
Inspector General
Department of Energy

² In February 2007, in the Revised Continuing Appropriations Resolution, 2007, Congress appropriated amounts to cover the costs of title XVII loan guarantees. Pub. L. No. 110-5, §§ 20315, 20320, 121 Stat. 8, 20, 21 (Feb. 15, 2007). This appropriation was not available at the time DOE incurred these obligations.



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Accountability • Integrity • Reliability

United States Government Accountability Office
Washington, DC 20548

B-308715

April 20, 2007

The Honorable Peter J. Visclosky
Chairman
Subcommittee on Energy and Water Development
Committee on Appropriations
House of Representatives

The Honorable David L. Hobson
Ranking Minority Member
Subcommittee on Energy and Water Development
Committee on Appropriations
House of Representatives

Subject: *Department of Energy—Title XVII Loan Guarantee Program*

In February 2007, GAO responded to a number of questions you asked concerning the Department of Energy's (DOE) loan guarantee authority under title XVII (Incentives for Innovative Technologies) of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1117-22 (Aug. 8, 2005) (EPACT). See GAO, *DOE: Key Steps Needed to Help Ensure the Success of the New Loan Guarantee Program for Innovative Technologies by Better Managing Its Financial Risk*, GAO-07-339R (Washington, D.C.: Feb. 28, 2007). During that engagement, you asked us to issue a separate legal opinion addressing the following related questions:

- 1) Does the loan guarantee authority in EPACT section 1702(b)(2) constitute authority for DOE to make loan guarantees notwithstanding the requirements of the Federal Credit Reform Act of 1990¹ (FCRA)? Or does section 1702(b)(2) constitute new budget authority for FCRA purposes?
- 2) Was DOE authorized to engage in activities such as issuing and publishing in the Federal Register program guidelines and a solicitation announcement inviting pre-application proposals for guaranteed loans

¹ Pub. L. No. 101-508, title XIII, subtitle B, § 13201, 104 Stat 1388, 1388-610 (Nov. 5, 1990), *codified at* 2 U.S.C. § 661c.

in advance of the enactment of appropriations to make loans under EPACT's title XVII program?²

As explained further below, we conclude as follows:

- 1) EPACT section 1702(b)(2) confers upon DOE independent authority to make loan guarantees, notwithstanding the FCRA requirements. Given our answer to the first part of this question, we did not address the second part concerning whether, in the alternative, section 1702(b)(2) constitutes new budget authority for the purposes of FCRA.
- 2) DOE engaged in preparatory activities to implement the granting of guaranteed loans under EPACT title XVII during a period when DOE was affirmatively prohibited from implementing that title by 42 U.S.C. § 7278, a statutory prohibition applicable to DOE guaranteed loan programs.³ These activities violated section 7278; the purpose statute, 31 U.S.C. § 1301(a); and the Antideficiency Act, 31 U.S.C. § 1341(a).

Consistent with our practice in rendering opinions, we contacted DOE to establish the factual record and elicit the agency's legal position on the subject matter of the

² You also asked whether EPACT section 1702(h), which authorizes DOE to collect fees for administrative expenses, appropriates those fees for use in the title XVII program. In the course of this opinion, we learned that DOE believes section 1702(h) does not appropriate those fees, and that DOE has not yet assessed any fees under it. Letter from David R. Hill, General Counsel, DOE, to Susan A. Poling, Managing Associate General Counsel, GAO, Feb. 9, 2007, at 2; DOE, *Loan Guarantees for Projects that Employ Innovative Technologies; Guidelines for Proposals Submitted in Response to the First Solicitation*, 71 Fed. Reg. 46,451, 46,452-53 (Aug. 14, 2006). Moreover, the Revised Continuing Appropriations Resolution, 2007, explicitly appropriated for DOE's use (as offsetting collections) any fees that DOE does collect under section 1702(h) during fiscal year 2007. Pub. L. No. 110-5, title II, ch. 3, § 20320(a), 121 Stat. 8, 21 (Feb. 15, 2007). For these reasons, there is no longer a need to address this question.

³ In pertinent part, section 7278 states: "None of the funds made available to the Department of Energy under . . . Energy and Water Development Appropriations Acts shall be used to implement or finance authorized . . . loan guarantee programs unless specific provision is made for such programs in an appropriation Act." This provision was originally enacted as section 301 of the Energy and Water Development Appropriations Act, 1993, Pub. L. No. 102-377, title III, 106 Stat. 1315, 1338 (Oct. 2, 1992).

request.⁴ Letter from Susan A. Poling, Managing Associate General Counsel, GAO, to David R. Hill, General Counsel, DOE, Jan. 12, 2007. In this instance, we received the views of DOE's General Counsel. Letter from David R. Hill, General Counsel, DOE, to Susan A. Poling, Managing Associate General Counsel, GAO, Feb. 9, 2007 (Hill Letter).

BACKGROUND

Congress enacted title XVII (Incentives for Innovative Technologies) as part of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, 1117-22 (Aug. 8, 2005) (EPACT), codified at 22 U.S.C. §§ 16511-16514. This title directs DOE to make loan guarantees for projects that employ new or significantly improved technologies to address air pollution or anthropogenic emissions of greenhouse gases. EPACT, § 1703(a). The title identifies both categories of projects and some specific projects that are eligible for these loan guarantees. *Id.* §§ 1703(b), 1703(c). Title XVII provides, among other things, that no loan guarantee may be made unless "an appropriation for the cost"⁵ of the loan guarantee has been made, or DOE has received from the borrower and deposited into the Treasury "payment in full for the cost of the obligation." *Id.* § 1702(b). Title XVII also authorizes DOE to "charge and collect fees for guarantees in amounts the Secretary determines are sufficient to cover applicable administrative expenses." *Id.* § 1702(h)(1). Fees collected under this authority must be deposited into the Treasury, but "remain available until expended, subject to such other conditions as are contained in annual appropriations Acts." *Id.* § 1702(h)(2). While title XVII authorizes the appropriation of "such sums as are necessary to provide the cost of guarantees under this title," *id.* § 1704, no funds were specifically appropriated for this purpose at the time of EPACT's enactment.

Since the enactment of title XVII, DOE has undertaken what it describes as "preparatory activities reasonably necessary for [DOE] to be in a position to make guarantees authorized by Title XVII." Hill Letter, at 3. DOE informed us that these activities included establishing and maintaining a Web site for the program;⁶ developing policies and "guidelines" for the program and publishing them in the *Federal Register*;⁷ and issuing a solicitation announcement inviting interested parties

⁴ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/congress.html (last visited Apr. 16, 2007).

⁵ Section 1702(b) requires an appropriation for the "cost," which section 1701(2) defines as "the cost of a loan guarantee." EPACT, §§ 1701(2), 1702(b).

⁶ See DOE, *Loan Guarantee Program*, available at www.lgprogram.energy.gov/index.html (last visited Apr. 16, 2007).

⁷ DOE, *Loan Guarantees for Projects That Employ Innovative Technologies; Guidelines for Proposals Submitted in Response to the First Solicitation*, 71 Fed. Reg. 46,451 (Aug. 14, 2006).

to submit “pre-applications” for title XVII guaranteed loans.⁸ See GAO-07-339R, at 13, 20. In response to its solicitation, DOE received over 100 pre-applications. *Id.* at 43.

To facilitate work on these and other activities, DOE established the Loan Guarantee Program Office. *Implementation of the Provisions of the Energy Policy Act of 2005: Hearing before the Senate Committee on Energy and Natural Resources*, 109th Cong. 50 (2006) (statement by DOE Under Secretary David K. Garman), available at www.ne.doe.gov/pdfFiles/garmanTestimony050106.pdf (last visited Apr. 16, 2007). See also GAO-07-339R, at 2. From March through October 2006, DOE staffed that office with three employees detailed from different DOE organizations. *Id.* at 16, 19, 21. Total salaries, benefits, and travel expenses for the detailed employees amounted to about \$309,000 during fiscal year 2006 and about \$38,000 from October 1 through October 31, 2006. *Id.* at 19. These amounts were paid from fiscal year 2006 and 2007 DOE appropriations for Departmental Administration⁹ and Science.¹⁰ *Id.* DOE also issued task orders to obtain private contractor support services for various tasks. *Id.* These orders cost an additional \$121,194 in fiscal year 2006, and \$34,829 in October of fiscal year 2007, which were paid from DOE’s fiscal year 2006 and 2007 appropriations for Energy Supply and Conservation¹¹ and Science.¹² *Id.* As of October 31, 2006, DOE had spent a total of about \$503,000 to prepare for the awarding of title XVII guaranteed loans. *Id.* at 16.

On October 31, 2006, DOE terminated the details of the three employees assigned to the Loan Guarantee Program Office and returned those employees to their home organizations. GAO-07-339R, at 21. However, DOE continued to perform preparatory activities. As of January 2007, DOE, using its fiscal year 2007 appropriation for

⁸ DOE, Solicitation No. DE-PS01-06LG00001, *Federal Loan Guarantees for Projects that Employ Innovative Technologies in Support of the Advanced Energy Initiative*, (Aug. 8, 2006), available at www.lgprogram.energy.gov/Solicitationfinal.pdf (last visited Apr. 16, 2007).

⁹ Energy and Water Development Appropriations Act, 2006, Pub. L. No. 109-103, title III, 119 Stat. 2247, 2273–74 (Nov. 19, 2005) (“For salaries and expenses of the Department of Energy necessary for departmental administration”); Pub. L. No. 110-5, §§ 101(a)(2), 20315.

¹⁰ Pub. L. No. 109-103, title III (“For Department of Energy expenses . . . necessary for science activities”); Pub. L. No. 110-5, §§ 101(a)(2), 20313.

¹¹ Pub. L. No. 109-103, title III (“For Department of Energy expenses . . . necessary for energy supply and energy conservation activities”); Pub. L. No. 110-5, §§ 101(a)(2), 20314.

¹² See note 10, *supra*.

Departmental Administration,¹³ assigned staff in its Office of General Counsel to perform various title XVII tasks, including preparing a notice of proposed rulemaking, drafting and perfecting a charter for a departmental Credit Review Board, drafting program regulations, and evaluating pre-applications for loan guarantees. *Id.* at 2, 21, 43. With the same appropriation, DOE used staff from its Office of the Chief Financial Officer to maintain the title XVII Web site. *Id.* DOE used its fiscal year 2007 Energy Supply and Conservation appropriation¹⁴ to pay for task order support services, such as responding to program inquiries. *Id.* We do not know what amounts DOE spent on these activities after October 31, 2006.

DISCUSSION

This opinion addresses two questions. We answer them below.

FCRA and Section 1702(b)(2)

First, we address whether the loan guarantee authority in EPACT section 1702(b)(2) constitutes authority for DOE to make loan guarantees notwithstanding the requirements of FCRA, or whether section 1702(b)(2) constitutes new budget authority for FCRA purposes. FCRA provides, with certain exceptions not relevant here, that notwithstanding any other provision of law, new loan guarantee commitments may be made “*only to the extent that—*

“(1) new budget authority to cover their costs is *provided in advance in an appropriations Act*;

“(2) a limitation on the use of funds otherwise available for the cost of a direct loan or loan guarantee program has been *provided in advance in an appropriations Act*; or

“(3) authority is otherwise *provided in appropriation Acts.*”

2 U.S.C. § 661c(b) (emphasis added). EPACT section 1702(b) says that no loan guarantees shall be made unless—

“(1) an appropriation for the cost has been made, *or*

“(2) the Secretary has received from the borrower a payment in full for the cost of the obligation and deposited the payment into the Treasury.”

EPACT, § 1702(b) (emphasis added). In February 2007, Congress appropriated amounts to cover the costs of loan guarantees. Pub. L. No. 110-5, §§ 20315, 20320.

¹³ See note 9, *supra*.

¹⁴ See note 11, *supra*.

At the time of your request, however, DOE did not have an appropriation for this purpose, raising the question of whether subsection (b)(2) provides DOE authority independent of FCRA and subsection (b)(1) to make loan guarantees. We think it does.

The language of section 1702(b) makes clear that Congress contemplated two possible paths for making loan guarantees under title XVII. DOE, consistent with FCRA (2 U.S.C. § 661c(b)), could issue loan guarantees pursuant to appropriations for that purpose (EPACT, § 1702(b)(1)); or DOE could issue loan guarantees if it receives payments by borrowers of the “full cost of the obligation” (EPACT, § 1702(b)(2)). To read section 1702(b) as subjecting title XVII loan guarantees to the requirements of FCRA would read subsection (b)(2) out of the law, and we cannot do that; we have to give meaning to all of the enacted language. *E.g.*, 70 Comp. Gen. 351, 354 (1991); 29 Comp. Gen. 124, 126 (1949). *See also* 2A Sutherland, *Statutory Construction*, § 46:06 at 193–94 (6th ed. 2000). Section 1702(b)(2) is clearly inconsistent with FCRA, and it is a later enacted, more specific law. It is well established that a later enacted, specific statute will typically supersede a conflicting previously enacted, general statute to the extent of the inconsistency. *E.g.*, *Smith v. Robinson*, 468 U.S. 992, 1024 (1984); B-255979, Oct. 30, 1995. For these reasons, we conclude that EPACT section 1702(b)(2) allows DOE to issue loan guarantees if the borrowers pay the “full cost of the obligation.” The alternative path clearly represents authority to make loan guarantees independent of and notwithstanding the earlier, more general FCRA requirements.

Given our answer to the first part of this question, we need not address the second part which asks whether, in the alternative, section 1702(b)(2) constitutes new budget authority for the purposes of FCRA. Suffice it to say that section 1702(b)(2) provides DOE authority to make loan guarantees independent of FCRA.

DOE's Title XVII Activities and Statutory Restrictions

The second question to be addressed is whether DOE was authorized to engage in activities such as issuing and publishing in the Federal Register program guidelines and a solicitation announcement inviting pre-application proposals for guaranteed loans in advance of the enactment of appropriations to make loans under EPACT's title XVII program. By law, “[n]one of the funds made available to the Department of Energy under . . . Energy and Water Development Appropriations Acts shall be used to *implement or finance* authorized . . . loan guarantee programs unless specific provision is made for such programs in an appropriation Act.” 42 U.S.C. § 7278 (emphasis added). The crux of this question is the meaning of the phrase, “implement or finance,” as used in section 7278. In the absence of indications to the contrary, Congress is deemed to use words in their common, ordinary sense. *E.g.*, *Mallard v. United States District Court for Southern District of Iowa*, 490 U.S. 296, 300–01 (1989). “One measure of the common, ordinary meaning of words is a standard dictionary.” B-303495, Jan. 4, 2005. The Merriam-Webster Dictionary defines the verb “implement” to mean, “carry out, accomplish; *especially*: to give

practical effect to and ensure of actual fulfillment by concrete measures.” *Merriam-Webster’s Collegiate Dictionary* 624 (11th ed. 2004) (emphasis in original).

We think DOE’s preparatory activities fall squarely within this definition of “implement.” In support of the title XVII loan guarantee program, DOE established and maintained a Web site, developed and published policies and “guidelines,” issued a solicitation announcement inviting pre-applications, staffed and operated a program office, prepared a notice of proposed rulemaking, drafted and perfected a charter for the Credit Review Board, drafted regulations, reviewed pre-applications for completeness, and procured task order support services. DOE spent more than \$503,000 on these preparatory activities. These activities constituted concrete measures designed to give practical effect to and ensure the actual fulfillment of the title XVII loan guarantee program (*i.e.*, awarding of loan guarantees) once appropriations were made available for that purpose. DOE acknowledged undertaking these actions in preparation for making loan guarantees. Hill Letter, at 3 (quoted above). To fund these activities, DOE used appropriations provided by Energy and Water Development Appropriation Acts for fiscal years 2006 and 2007.

DOE defends these activities by noting that none of them actually obligated the federal government to guarantee any loans. Hill Letter, at 3. DOE told us that it “understands the [section 7278] constraint to apply to ‘implement[ing]’ . . . those authorized loan guarantees by making them, . . . [not] conducting preparatory activities reasonably necessary for the Department to be in a position to make guarantees.” *Id.* Preparatory activities, DOE reasons, are not barred by this provision because they do not “obligate the federal fisc to third parties pursuant to Title XVII.” *Id.* DOE has confused implementation with financing. Merriam-Webster defines the verb “finance” to mean, “provide funds . . . for.” *Merriam-Webster’s Collegiate Dictionary*, at 469. See also *Black’s Law Dictionary* 662 (8th ed. 2004) (“finance, vb. To raise or provide funds”). Thus, financing something is commonly understood to mean taking actions which provide funds for that something. This, DOE did not do. Section 7272, however, prohibits not just “financing” loan guarantees, but also “implementing” loan guarantee programs.

In the past, this Office has agreed in a number of cases that when Congress assigns new duties to an agency, the agency, under certain circumstances, may use an existing appropriation to defray the expenses of carrying out the new duties. *E.g.*, B-290011, Mar. 25, 2002; 46 Comp. Gen. 604 (1967); B-211306, June 6, 1983. However, that is not the case here. Section 7278 specifically prohibits the use of any funds made available to DOE by an Energy and Water Development Appropriations Act to implement or finance a loan guarantee program unless specific provision has been made for that program in an appropriations act. In other words, as a result of section 7278, no DOE appropriations under any Energy and Water Development Appropriations Act are legally available to fund any guaranteed loan program before the requisite appropriations act provisions are made. 42 U.S.C. § 7278. *Cf., e.g.*, B-211306, June 6, 1983 (BLM could use an existing appropriation to pay expenses of a new program because the law “did not prohibit” use of the existing appropriation for those expenses). DOE’s use of appropriations enacted by Energy and Water

Development Appropriations Acts for other purposes to support the title XVII loan guarantee program violated the prohibitions of section 7278.

In addition, DOE's actions violated two fundamental appropriations laws: the so-called purpose statute and the Antideficiency Act. Under the purpose statute (31 U.S.C. § 1301(a)), appropriations "shall be applied only to the objects for which the appropriations were made." *See* B-302973, Oct. 6, 2004. Where Congress has specifically prohibited a use of appropriated funds for a particular purpose, any obligation of funds for that purpose is in excess of the amount available for that purpose. *E.g.*, B-300192, Nov. 13, 2002; 60 Comp. Gen. 440 (1981). DOE expended fiscal year 2006 Energy and Water Development Appropriations Act funds to implement title XVII despite the fact that, under section 7278, no funds were available for this purpose. This violated the purpose statute. The Antideficiency Act (31 U.S.C. § 1341(a)) prohibits making or authorizing an expenditure or obligation that exceeds or is in advance of available budget authority. *E.g.*, B-303495, Jan 4, 2005. In fiscal year 2006, DOE expended fiscal year 2006 Energy and Water Development Appropriations Act funds to implement title XVII even though it had no funds available for this purpose, and did so again using fiscal year 2007 funds. Since DOE had no funds available to implement the title XVII prior to the 2007 Continuing Resolution, those uses of fiscal year 2006 and 2007 appropriations violated the Antideficiency Act. *Cf., e.g.*, B-300192, Nov. 13, 2002; B-302710, May 19, 2004.

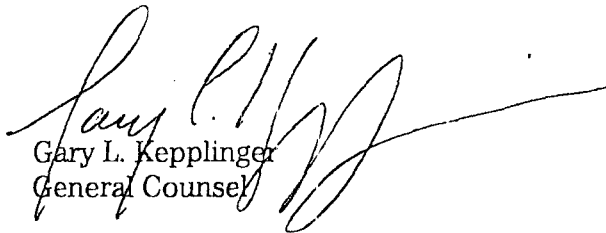
CONCLUSIONS

This opinion addresses two questions. First, we conclude that EPACT section 1702(b)(2) confers upon DOE independent authority to make loan guarantees, notwithstanding the FCRA requirements. In view of this conclusion, we did not address the second part of your question concerning whether, in the alternative, section 1702(b)(2) constitutes new budget authority for the purposes of FCRA.

Second, we conclude that DOE engaged in activities to implement a loan guarantee program under EPACT title XVII during a period when DOE was affirmatively prohibited from implementing that title by 42 U.S.C. § 7278. These activities violated section 7278; the purpose statute, 31 U.S.C. § 1301(a); and the Antideficiency Act, 31 U.S.C. § 1341(a). DOE must report the violations of the Antideficiency Act to the Congress and the President, and submit a copy of that report to the Comptroller General under 31 U.S.C. § 1351 as amended.¹⁶ B-304335, Mar. 8, 2005.

¹⁶ Office of Management and Budget Circular No. A-11 provides guidance on the information to include in Antideficiency Act reports. Agencies must report violations found by GAO, even if they disagree with the finding. OMB advises agencies, "If the agency does not agree that a violation has occurred, the report to the President, Congress, and the Comptroller General will explain the agency's position." OMB Cir. No. A-11, *Preparation, Submission, and Execution of the Budget*, § 145.8 (June 2006).

If you have any questions regarding this matter, please contact Susan A. Poling, Managing Associate General Counsel, at 202-512-2667, or Thomas H. Armstrong, Assistant General Counsel, at 202-512-8257.



Gary L. Kepplinger
General Counsel



Department of Energy
Washington, DC 20585

November 13, 2008

MEMORANDUM FOR THE SECRETARY

FROM: DAVID R. HILL
GENERAL COUNSEL

A handwritten signature in black ink, appearing to read "D. Hill", is written over the printed name "DAVID R. HILL".

SUBJECT: Transfer of the Mixed Oxide Fuel Fabrication Facility Construction Project from the National Nuclear Security Administration to the Office of Nuclear Energy

In my memorandum of February 22, 2008, the Office of the General Counsel indicated that it had substantial legal doubt whether the transfer of the Mixed Oxide (MOX) fuel fabrication facility construction project (MOX Project) called for in the committee report accompanying the Consolidated Appropriations Act, 2008, (Pub. L. No. 110-161) could legally be effectuated in view of the provisions of the National Nuclear Security Administration (NNSA) Act that (1) explicitly placed the entire MOX program in the NNSA and (2) limited the Secretary of Energy's prior internal reorganization authority to remove such transferred functions from the NNSA and place them elsewhere within the Department of Energy (Department or DOE). Accordingly, we recommended that, for the time being, the MOX Project program funds appropriated in the nuclear energy activities account in the Consolidated Appropriations Act, 2008, and that were allotted internally to the Office of Nuclear Energy (NE), be managed under an Economy Act agreement between the NNSA and NE under which the NNSA organization and personnel would continue to manage the MOX Project, pending completion of the legal review and preparation of a legal memorandum necessary to conclude and document with certainty: (1) whether the transfer of the MOX Project itself did or did not legally occur by virtue of the Consolidated Appropriations Act, 2008, and its accompanying committee report; and if not, (2) whether the Secretary had the legal authority to effectuate such a transfer even though the committee report language describing the transfer of responsibility for the MOX Project itself did not have the force of law.

We have completed our review, and that review confirms:

- (a) The relevant text of the Consolidated Appropriations Act, 2008, was unambiguous in providing for continuation of the MOX Project, but also imposed a condition on its continuation, which condition did not address any transfer of responsibility from the NNSA.
- (b) In 1994, the responsibility for fissile materials disposition, including surplus plutonium, was placed in a new Office of Fissile Materials Disposition established within the Department by the National Defense Authorization Act for Fiscal Year 1995. In 1998,



the Congress explicitly authorized the MOX Project as an indentified construction project under the topic “Fissile Materials Control and Disposition.”

- (c) The functions of the Office of Fissile Materials Disposition were thereafter, in 1999, transferred to the NNSA by the NNSA Act. The NNSA Act also explicitly placed the function of fissile materials disposition within the NNSA under the Deputy Administrator for Defense Nuclear Nonproliferation, a position established by that statute.
- (d) The NNSA Act explicitly removed from the Secretary his previously plenary authority to conduct internal transfers of functions and reorganizations with respect to functions placed by the NNSA Act in the NNSA, with the exceptions of (1) placing additional functions in the NNSA, and (2) removing from the NNSA functions relating to waste management. The latter authority does not seem plausibly implicated here even though ultimate disposal of the irradiated MOX fuel discharged from power reactors would be the planned geologic repository at Yucca Mountain.
- (e) The statement in the committee report regarding transfer of the MOX Project has no legal effect because it is not a new law that would supplant or repeal the explicit provisions of existing permanent law contained in the NNSA Act, which placed responsibility for the MOX program in the NNSA.
- (f) For the same reason, the committee report provision regarding transfer of the MOX Project does not legally surmount the statutory restrictions on the Secretary’s internal reorganization authority contained in the NNSA Act. As a result, the Secretary does not have the legal authority to effect the reorganization called for by the committee report even as a matter of comity.

To understand our conclusions, it is first necessary to examine what the relevant provisions of the Consolidated Appropriations Act, 2008, actually said. The full text of the two relevant statutory provisions reads:

NUCLEAR ENERGY

For Department of Energy expenses * * * necessary for nuclear energy activities in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.) * * * for plant or facility acquisition, construction, or expansion * * * \$970,525,000, to remain available until expended: Provided, That \$233,849,000 is authorized to be appropriated for Project 99-D-143 Mixed Oxide (MOX) Fuel Fabrication Facility, Savannah River Site, South Carolina: Provided further, That the Department of Energy adhere strictly to Department of Energy Order 413.3A for Project 99-D-143.¹

* * *

DEFENSE NUCLEAR NONPROLIFERATION

¹ Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. C, tit. III, “Nuclear Energy” (Dec. 26, 2007) (emphasis supplied).

For Department of Energy expenses * * * necessary for atomic energy defense, defense nuclear nonproliferation activities, in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.) * * *for plant or facility acquisition, construction, or expansion, \$1,673,275,000, to remain available until expended: * * * Provided further, That of the funds made available under this heading in appropriation Acts for fiscal year 2007 and prior fiscal years for Project 99-D-143 Mixed Oxide (MOX) Fuel Fabrication Facility, Savannah River Site, South Carolina, \$115,000,000 are rescinded.²

As was pointed out in our memorandum of February 22, the text of neither statutory provision addresses at all the subject of transfer of responsibility for managing the MOX Project from where it previously was placed in the NNSA by the NNSA Act. The only statutory provisions actually enacted by the Congress in the Consolidated Appropriations Act, 2008, that at all suggest uncertainty involve the outer bound of the amounts in the nuclear energy activities appropriation for MOX Project activities; specifically, whether the apparently clear earmark for the MOX Project also draws into the objects of the large lump-sum appropriation for “nuclear energy activities” the additional amounts for the entire MOX program. We were able to discern an answer to that question by consulting elements of the legislative history – its committee report tables – which was appropriate in understanding the statutory reach of the appropriations act provision that explicitly indicated that continuity of the MOX Project was within the broad statutory objects of the nuclear energy activities lump-sum appropriation. So understood, the appropriations act text embraced funding for the entire MOX program. In essence, the MOX Project reference in the nuclear energy appropriation was a statutory earmark for a specified program within an otherwise broader lump-sum statutory appropriation.

Statutory Placement of the MOX Program in the NNSA

The MOX Project and its related program have their statutory roots in a provision of the 1995 Defense Authorization Act. That provision stated in full relevant part:

Sec. 3158 Office of Fissile Materials Disposition.

(a) Establishment. - - Title II of the Department of Energy Organization Act (42 U.S.C. 7131 et seq.) is amended by adding at the end the following:

“Office of Fissile Materials Disposition.

“Sec. 212. (a) There shall be within the Department an Office of Fissile Materials Disposition.

“(b) The Secretary shall designate the head of the Office. The head of the Office shall report to the Under Secretary.

“(c) The head of the Office shall be responsible for all activities of the Department relating to the management, storage, and disposition of fissile materials from

² Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. C, tit. III, “Defense Nuclear Nonproliferation” (Dec. 26, 2007) (emphasis supplied).

weapons and weapons systems that are excess to the national security needs of the United States.”³

The NNSA Act then, in 1999, transferred the functions that had been placed by section 212 of the Department of Energy Organization Act into the NNSA, as follows:

SEC. 3291. FUNCTIONS TRANSFERRED.

TRANSFERS.—There are hereby transferred to the Administrator all national security functions and activities performed immediately before the date of the enactment of this Act by the following elements of the Department of Energy: * * * The Office of Fissile Materials Disposition.⁴

The NNSA Act also repealed the prior statutory placement of fissile materials disposition responsibilities within the Department directly under the Under Secretary, as follows:

SEC. 3294. CONFORMING AMENDMENTS.

* * *

(d) OFFICE OF FISSILE MATERIALS DISPOSITION.—

(1) Section 212 of the Department of Energy Organization Act (42 U.S.C. 7143) is repealed.

(2) The table of contents at the beginning of such Act is amended by striking the item relating to section 212.⁵

Then, within the NNSA, the NNSA Act made the statutory assignment of fissile materials disposition responsibilities, as follows:

SEC. 3215. DEPUTY ADMINISTRATOR FOR DEFENSE NUCLEAR NONPROLIFERATION.

(a) IN GENERAL.—There is in the Administration a Deputy Administrator for Defense Nuclear Nonproliferation, who is appointed by the President, by and with the advice and consent of the Senate.

(b) DUTIES.—Subject to the authority, direction, and control of the Administrator, the Deputy Administrator for Defense Nuclear Nonproliferation shall perform such duties and exercise such powers as the Administrator may prescribe, including the following: * * * Eliminating inventories of surplus fissile material usable for nuclear weapons.⁶

³ Department of Energy Organization Act, sec. 212 (42 U.S.C. § 7143) (repealed 1999), as added by the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, tit. XXXI, sec. 3158(a) (1994).

⁴ 50 U.S.C. § 2481.

⁵ 42 U.S.C. § 7143 note.

⁶ 50 U.S.C. § 2405.

Thus it is clear that all programs and functions that were resident in the Office of Fissile Materials Disposition on the October, 1999, date of enactment of the NNSA Act were transferred to the newly-established NNSA, and were specified to be carried out by the NNSA Deputy Administrator for Defense Nuclear Nonproliferation. What remains to be examined is whether the MOX program in general, and the MOX Project in particular, were among the activities that were so transferred in 1999.

In January of 1994, the National Academy of Sciences issued a report positing that the risk of theft or diversion of excess weapons-usable plutonium in Russia was a "clear and present danger" and recommending that such plutonium be made inaccessible through immobilization or MOX fuel fabrication.⁷ In response to this report and actions by the Secretary of Energy establishing a Department-wide project regarding the disposition and control of fissile materials,⁸ Congress enacted legislation that established the Office of Fissile Materials Disposition within DOE to be responsible for safe disposition of surplus U.S. plutonium. Specifically, that office was responsible for "all activities of the Department relating to the management, storage, and disposition of fissile materials from weapons and weapons systems that are excess to the national security needs of the United States."⁹ Thus, this new office's mandate was directed expressly to excess inventories of U.S. fissile materials.

In January 1997, following issuance of the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement (PEIS), DOE issued a Record of Decision (ROD) reducing the number of sites where surplus weapons-usable plutonium was stored, and allowing a hybrid strategy for disposition involving both MOX fuel fabrication and immobilization, depending on analysis and decisions in a tiered (follow-on) PEIS and ROD.¹⁰

With this background and the evaluations then done by DOE, the Congress in 1998 specifically authorized the MOX Project, as follows:

SEC. 3103. OTHER DEFENSE ACTIVITIES.

* * *

(3) FISSILE MATERIALS CONTROL AND DISPOSITION

⁷ See Committee on International Security and Arms Control, National Academy of Sciences, Management and Disposition of Excess Weapons Plutonium at 1-2, 13-16 (National Academy Press 1994).

⁸ Memorandum from Hazel R. O'Leary, Secretary of Energy, to Department of Energy Secretarial Officers and Operations Office Managers (Jan. 24, 1994); see also Press Release, Department of Energy, "Energy Secretary Praises NAS Report" (Jan. 24, 1994); S. Rep. No. 103-282, at 277 (1994).

⁹ Department of Energy Organization Act, sec. 212, supra n. 3.

¹⁰ See 62 Fed. Reg. 3014-30 (Jan. 21, 1997) (issued by Hazel R. O'Leary, Secretary of Energy, and specifying that management of disposition of the surplus plutonium was the responsibility of the Office of Fissile Materials Disposition).

* * *

- (C) For plant projects (including maintenance, restoration, planning, construction, acquisition, modification of facilities, and the continuation of projects authorized in prior years, and land acquisition related thereto), \$53,000,000, to be allocated as follows:

* * *

Project 99-D-143, mixed oxide fuel fabrication facility, various locations, \$28,000,000.¹¹

This survey reveals that the statutory MOX program established in 1998 was perceived as a solution for inventories of surplus Russian plutonium, but was equally directed to disposition of inventories of surplus U.S. plutonium. It also reveals that by October 1999 the MOX Project itself had become a specifically-authorized undertaking, having been authorized in 1998. Thus the subject matters of this program and construction of the MOX Project itself clearly were among the functions resident in the Office of Fissile Materials Disposition at the time that office's functions were transferred to the NNSA by the 1999 NNSA Act. Therefore management of the MOX Project itself was an existing function that was placed by the NNSA Act in the NNSA.¹² The following analysis of the effect of the Consolidated Appropriations Act, 2008, must then proceed from this conclusion.

Secretarial Transfer Authority

The Secretary of Energy was provided broad internal reorganization authority under section 643 of the Department of Energy Organization Act, as it was originally enacted.¹³ When creating the NNSA, however, the Congress specifically restricted the Secretary's authority to transfer NNSA functions out of the NNSA to elsewhere in DOE. Specifically, section 643 now reads:

- (a) Subject to subsection (b), the Secretary is authorized to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary or appropriate.

* * *

¹¹ Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, sec. 3103, 112 Stat. 1920, 2240-41 (1998).

¹² Succeeding RODs concerning the disposition of surplus weapons-usable plutonium and the MOX program's construction of the MCX Project accordingly were executed by the Administrators of the NNSA. 67 Fed. Reg. 19432-35 (Apr. 19, 2002) (issued by John A. Gordon, Administrator, NNSA); 68 Fed. Reg. 20134-37 (Apr. 24, 2003) (issued by Linton Brooks, Administrator, NNSA).

¹³ Department of Energy Organization Act, sec. 643 (codified at 42 U.S.C. § 7253 (Supp. I 1977)).

(b) The authority of the Secretary to establish, abolish, alter, consolidate, or discontinue any organizational unit or component of the National Nuclear Security Administration is governed by the provisions of section 3219 of the National Nuclear Security Administration Act (title XXXII of Public Law 106-65).

[(c)]¹⁴ The authority of the Secretary under subsection (a) of this section does not apply to the National Nuclear Security Administration. The corresponding authority that applies to the Administration is set forth in section 3212[(f)]¹⁵ of the National Nuclear Security Administration Act.¹⁶

Lest there be any doubt of the limits of the Secretary's authority, section 3219 of the NNSA Act stated:

Notwithstanding the authority granted by section 643 of the Department of Energy Organization Act (42 U.S.C. 7253) or any other provision of law, the Secretary of Energy may not establish, abolish, alter, consolidate, or discontinue any organizational unit or component, or transfer any function, of the Administration, except as authorized by subsection (b) or (c) of section 3291.¹⁷

Subsections (b) and (c) of section 3291 of the NNSA Act then also provided the Secretary a much-truncated transfer authority:

(b) Authority to Transfer Additional Functions.—The Secretary of Energy may transfer to the Administrator any other facility, mission, or function that the Secretary, in consultation with the Administrator and Congress, determines to be consistent with the mission of the Administration.

¹⁴ In error, it appears that Congress passed legislation in the same Congress that enacted two subsections (b) instead of a subsection (b) and a subsection (c). Pub. L. No. 106-377, sec. 314(b)(2), added the first subsection (b), and Pub. L. No. 106-398, sec. 3159(b)(2), added a second subsection (b) that is designated here as subsection [(c)] for ease of reference.

¹⁵ In the original, the statute reads "3212(e)." Subsection (e) was subsequently redesignated as subsection (f) by section 1048(i)(12) of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, but the reference in section 643 was left unchanged. Section 3212(f) of the NNSA Act (50 U.S.C. § 2402(f)), currently provides:

(f) REORGANIZATION AUTHORITY.—Except as provided by subsections (b) and (c) of section 3291:

(1) The Administrator may establish, abolish, alter, consolidate, or discontinue any organizational unit or component of the Administration, or transfer any function of the Administration.

(2) Such authority does not apply to the abolition of organizational units or components established by law or the transfer of functions vested by law in any organizational unit or component.

¹⁶ Department of Energy Organization Act, sec. 643, as amended, 42 U.S.C. § 7253.

¹⁷ 50 U.S.C. § 2409 (emphasis supplied).

(c) Environmental Remediation and Waste Management Activities.--In the case of any environmental remediation and waste management activity of any element specified in subsection (a), the Secretary of Energy may determine to transfer responsibility for that activity to another element of the Department.¹⁸

Consistent with the plain language of the provisions set forth above, the Department has consistently understood section 643 of the Department of Energy Organization Act and sections 3219 and 3291 of the NNSA Act to specify that, absent clear new statutory authority authorizing or directing him to do so, the Secretary does not have the authority to transfer out of the NNSA any function that was placed into it by the NNSA Act. For example, in 2006 Secretary Bodman submitted to Congress a legislative proposal seeking an amendment to the NNSA Act to abolish the NNSA's Office of Defense Nuclear Counterintelligence and consolidate its functions under the Secretary within DOE.¹⁹ In this request, the Secretary acknowledged that this type of reorganization could "only be accomplished through legislation."²⁰ In response to this proposal, the Congress enacted legislation for the reorganization of DOE counterintelligence functions by providing explicit statutory authority for the disestablishment of the Office of Defense Nuclear Counterintelligence within the NNSA and the transfer of the "functions, personnel, funds, assets, and other resources" of that office to the Secretary, for administration by the Director of the Office of Counterintelligence of DOE.²¹

Section 643 of the Department of Energy Organization Act and sections 3219 and 3291 of the NNSA Act indicate with clarity that the Secretary enjoys no discretionary authority to transfer the MOX program functions, including the MOX Project, absent enactment of new post-1999 statutory authority to do so. The question then presented is whether the pertinent statutory provisions of the Consolidated Appropriations Act, 2008, constituted the new statutory authority necessary to accomplish the transfer by operation of law or to authorize the Secretary to make the transfer.

As was described in detail above, the relevant provisions of the Consolidated Appropriations Act, 2008, expressly appropriated funds for the MOX Project from the larger lump-sum appropriation for nuclear energy activities, required observance of a DOE Order regarding that Project, and rescinded certain balances that previously had been appropriated for nuclear

¹⁸ 50 U.S.C. § 2481 (b) and (c). Subsection (a) listed the offices in the Department that were being transferred to the NNSA, among them the Office of Fissile Materials Disposition. See 50 U.S.C. § 2481(a)(3).

¹⁹ See Letters from Secretary Samuel W. Bodman to J. Dennis Hastert, Speaker of the House of Representatives (Hastert Letter), and Richard B. Cheney, President of the Senate (Cheney Letter) (Washington, D.C., Apr. 6, 2006) submitting proposed legislation to consolidate the Department's counterintelligence functions.

²⁰ Hastert Letter at 2; Cheney Letter at 2. A similar request by Secretary Abraham in 2004 also indicated the need for legislation to consolidate the NNSA counterintelligence office within the non-NNSA element of the Department. See letters from Secretary Spencer Abraham to J. Dennis Hastert, Speaker of the House of Representatives, and Richard B. Cheney, President of the Senate (Washington, D.C., Feb. 12, 2004).

²¹ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, tit. XXXI, sec. 3117, codified at 50 U.S.C. § 2422 note.

nonproliferation activities. Nowhere did the text of the Consolidated Appropriations Act, 2008, address the organizational responsibility for the MOX Project.

Despite the absence of any statutory text making a transfer of the MOX program (or any other activity) from the NNSA to NE, the legislative history contained in the accompanying committee report indicated the expectation that such a transfer had been accomplished.²² Presumably this expectation was based on the placement of the appropriation for the MOX Project in the nuclear energy activities account and the statutory rescission of prior balances previously appropriated for nuclear nonproliferation.

In essence, then, the question is whether a statutory lump-sum appropriation for a variety of objects (including in this case continued funding for the MOX Project) that is accompanied by only committee report text indicating the intention thereby to displace provisions of prior permanent law (placing that Project in the NNSA) is to be understood as having that legal effect. There is no express conflict between the respective statutory texts at issue here – in the Consolidated Appropriations Act, 2008, and the NNSA Act. Specifically, there is no conflict between continuing the MOX Project under a statutory appropriation account that did not address its organizational location, and the Project’s continued execution by the NNSA, where the Project was placed by the NNSA Act. Therefore, what must be considered is whether the lump-sum appropriation itself impliedly repealed or amended the provisions of permanent law that are incompatible with the transfer provisions of the committee report, even though the provisions of permanent law are not incompatible with the text of the Consolidated Appropriations Act, 2008, itself.

Effect of an Appropriation on Permanent Law

The Supreme Court’s guidance provides:

[It is argued that] an exception to the rule against implied repealers [should apply] where, as here, Appropriations Committees have expressly stated their “understanding” that the earlier legislation would not prohibit the proposed expenditure. We cannot accept such a proposition. Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress.²³

The Court explained that:

The doctrine disfavoring repeals by implication “applies with full vigor when . . . the subsequent legislation is an appropriations measure.” * * * This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are “Acts of

²² The committee report states in full relevant part: “Program activities and functions for the Mixed Oxide (MOX) Fuel Fabrication Facility construction project are transferred to the Office of Nuclear Energy[.]” STAFF OF H. COMM. ON APPROPRIATIONS, 110TH CONG., REPORT ON THE CONSOLIDATED APPROPRIATIONS ACT, 2008, at 591 (COMM. PRINT 2008).

²³ TVA v. Hill, 437 U.S. 153, 191 (1978).

Congress,” but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure.²⁴

That repeals by implication are disfavored was not a novel proposition. As the Court previously had stated, “the intention of the legislature to repeal must be clear and manifest.”²⁵ The Court further held that “[a]n implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter act covers the whole subject matter of the earlier one and is clearly intended as a substitute.”²⁶ But the measure of incompatibility or a clearly manifested intent to supplant a former statute must be found in the statutory text of the later-enacted measure. As the Court put it, “the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it.”²⁷ The Congress may, of course, unambiguously choose to supplant existing permanent law, as it did in 1989 by including in an appropriations act provisions that clearly spoke prospectively and with textual precision to specify alternative procedures in the Pacific Northwest to those of permanent law bearing on preservation of the spotted owl.²⁸

The same analysis disfavoring repeals by implication and centering analysis on the presence or absence of statutory text applies equally to amendments by implication. This analysis would

²⁴ *Id.* at 190 (internal citations omitted, emphasis in original). *Accord*, Robertson v. Seattle Audubon Society, 503 U.S. 428, 440 (1992) (“repeals by implication are especially disfavored in the appropriations context”); United States v. Will, 449 U.S. 200, 221-22 (1980) (rule “applies with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill”).

²⁵ Posadas v. National City Bank, 296 U.S. 497, 503 (1936); *accord*, Morton v. Mancari, 417 U.S. 535, 549-51 (1974).

²⁶ Branch v. Smith, 538 U.S. 254, 273 (2003) (citations and internal quotations omitted).

²⁷ Henderson Tobacco, 78 U.S. (11 Wall.) 652, 657 (1870) (emphasis supplied and original italics omitted) (quoted with approval in Posadas, *supra* n. 25). The principle disfavoring repeals by implication operates even where, unlike here, the substance of the subsequently-enacted appropriations act withholds appropriations. *See* United States v. Will, 449 U.S. 200 (1980) (analyzing sequence of enactments regarding suspension of pay increases for Article III judges); United States v. Dickerson, 310 U.S. 554, 555 (1940) (appropriation denying payment of veterans bonus upheld because of inclusion of a “notwithstanding” authorizing law provision). *Compare* United States v. Langston, 118 U.S. 389 (1886) (salary entitlement for particular position specified in Revised Statutes not extinguished by subsequent legislation appropriating lesser amount for that position in future fiscal year) with Belknap v. United States, 150 U.S. 588, 594 (1893) (harmonizing cases to find statutory repeals of Revised Statutes salary entitlements, aided by a whiff of estoppel).

²⁸ Robertson v. Seattle Audubon Society, 503 U.S. 429, 439-40 (1992) (explicit statutory substitute for compliance with several environmental laws, including the Migratory Bird Treaty Act).

seem most directly relevant to the NNSA Act's explicit limitations on the Secretary's internal organizational transfer authority. Yet the legal standards for evaluating whether a subsequent statute has amended an earlier one by implication are the same as with respect to repeals by implication. As the Court has stated:

While a later enacted statute (such as the [Endangered Species Act]) can sometimes operate to amend or even repeal an earlier statutory provision (such as the [Clean Water Act]), repeals by implication are not favored and will not be presumed unless the intention of the legislation to repeal [is] clear and manifest. We will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.²⁹

As was pointed out above, there is no legal incompatibility between the appropriation for the MOX Project in the nuclear energy activities account, and the provisions of the NNSA Act that placed the MOX program within the NNSA. The remaining question involves determining the legal effect of the provision of the committee report, the text of which seems unambiguously to state that the MOX Project was to be transferred from the NNSA.

Legal Status of the Committee Report

The February 22 memorandum from DOE's Office of the General Counsel stated that the committee report statement that the MOX Project's program activities and functions "are transferred to the Office of Nuclear Energy" itself is not law. The basis for that conclusion is described below.

The Supreme Court has stated:

For this reason, a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency. LTV Aerospace Corp., 55 Comp. Gen. 307, 319 (1975); cf. American Hospital Assn. v. NLRB, 499 U.S. 606, 616 (1991) (statements in committee reports do not have the force of law); TVA v. Hill, 437 U.S. 153, 191 (1978) ("Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress").³⁰

²⁹ National Ass'n of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518, 2532 (2007) (internal quotations and citations omitted) (subsequently-enacted criterion of the Endangered Species Act did not add a new criterion for evaluating permits under the prior Clean Water Act).

³⁰ Lincoln v. Vigil, 508 U.S. 182, 192-93 (1993) (internal quotation omitted). Accord Hein v. Freedom From Religion Foundation, 127 S. Ct. 2553, 2568 (2007) (expenditures from a lump-sum appropriation not judicially reviewable because they are committed by law to agency discretion); Cherokee Nation v. Leavitt, 543 U.S. 631, 646 (2005) ("The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding.").

In its decision in Lincoln, the Court adopted the central element of the exhaustive analysis rendered by the Comptroller General some 18 years earlier. There the Comptroller General was confronted by a bid protest grounded on the contention that the contract award was unlawful because it contravened limitations contained in the relevant committee report. In his decision, the Comptroller General pointed out:

We have recognized that, with respect to appropriations, there is a clear distinction between the imposition of statutory restrictions or conditions which are intended to be legally binding and the technique of specifying restrictions or conditions in a non-statutory text. * * * We think it follows from the above discussion that, as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there.³¹

The statutory text of the Consolidated Appropriations Act, 2008, says nothing about transferring responsibility for the MOX program. Instead, it specified in the nuclear energy activities account simply that funds were provided “for [the] Mixed Oxide (MOX) Fuel Fabrication Facility,” and the Act “rescinded” funds previously “made available under [the] heading [Defense Nuclear Nonproliferation] * * * for [the] Mixed Oxide (MOX) Fuel Fabrication Facility[.]”³² Therefore, and because the statutory text is silent with respect to the MOX Project’s organizational placement, the only conclusion that can be drawn is that the committee report text falls into the category of “resorting to the legislative history for the purpose of writing into the law that which is not there.”³³

Lincoln and its predecessors³⁴ were grounded on a well-established rule of construction of lump-sum appropriation acts based on understanding such statutes as allowing flexibility in their administration. This approach also permits post-enactment “reprogramming” adjustments that customarily involve the relevant congressional committees in order to meet contingencies arising during a fiscal year.

There is an additional factor bearing on the legal status of a committee report, standing alone, involving separation of powers and the constitutional prerequisites for making a law. The Supreme Court, when confronted by a claim that the combination of an undispositive statutory amendment and an admonition in the relevant committee report cabined the administering agency’s discretion, observed simply: “Petitioner does not – and obviously could not – contend that this statement in the Committee Report has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating.”³⁵

³¹ LTV Aerospace Corp., 55 Comp. Gen. 307, 318 and 325 (1975).

³² See text accompanying nn. 1 & 2, supra.

³³ LTV Aerospace, supra n. 31, at 325.

³⁴ Its predecessors included UAW v. Donovan, 746 F. 2d 855, 860-61 (D.C. Cir. 1984) (Scalia, J.).

³⁵ American Hospital Ass’n v. NLRB, 499 U.S. 606, 616 (1991) (Stevens, J., for a unanimous Court).

In similar fashion one court of appeals was confronted by a challenge to agency action terminating a type of contract relationship when it did so based solely on an admonition in a committee report that was not mirrored in any command set forth in the statutory text. The court stated:

The case law of the Supreme Court and our court establishes that legislative history, untethered to text in an enacted statute, has no compulsive legal effect. It was thus contrary to law for [the Bonneville Power Administration] to conclude, from committee report language alone, that it was bound to transfer the functions of the [Fish Passage Center].

* * *

The principle that committee report language has no binding legal effect is grounded in the text of the Constitution and in the structure of separated powers the Constitution created. Article 1, section 7, clause 2 of the Constitution is explicit about the manner in which Congress can take legally binding action. * * * If Congress wishes to alter the legal duties of persons outside the legislative branch, including administrative agencies, it must use the process outlined in Article 1. See INS v. Chadha, 462 U.S. 919, 952 (1983); see also Clinton v. City of New York, 524 U.S. 417, 439-40 (1998).³⁶

In its analysis the court of appeals gave substantial weight to its observation that committee reports themselves are not subjected to bicameral floor consideration and presentment to the President. These considerations, of course, were central to Justice Stevens's categorical rejection of the proposition that a "statement in the Committee Report has the force of law[.]"³⁷

Conclusion

The foregoing analysis reveals that the Consolidated Appropriations Act, 2008, together with its associated committee report did not displace the various provisions of law placing responsibility for the MOX Project in the NNSA. The Consolidated Appropriations Act, 2008, and its related committee report also did not authorize the Secretary of Energy to transfer the MOX Project to the Office of Nuclear Energy. Because the Department is obligated to act in conformity with the law that was not displaced by the Consolidated Appropriations Act, 2008, the Secretary may not transfer the MOX Project or its ancillary program from the National Nuclear Security Administration to the Office of Nuclear Energy.

³⁶ Northwest Environmental Defense Center v. BPA, 477 F. 3d 668, 682, 684 (9th Cir. 2007) (parallel citations omitted).

³⁷ American Hospital Ass'n, *supra* n. 35.

DEPARTMENT OF ENERGY RULEMAKINGS

The majority of rules in the lists below are mandated by Title III of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. 6291 – 6317.

EPCA authorizes the Department of Energy to establish energy efficiency standards for certain consumer products and certain types of commercial and industrial equipment (covered equipment). Regulations implementing this authority appear in Title 10 of the Code of Federal Regulations. EPCA provides that any new or amended energy efficiency standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified and precludes DOE from adopting any standard that would not result in significant conservation of energy. Moreover, DOE may not prescribe a standard for certain equipment if no test procedure has been established for that equipment. EPCA also provides that, in deciding whether a standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens after receiving comments on the proposed standard. Furthermore, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States of any equipment type (or class) with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. Finally, Federal energy conservation requirements for commercial equipment generally supersede State laws or regulations concerning energy conservation testing, labeling, and standards for such equipment. DOE can grant waivers of preemption to any State laws or regulations that are superseded in accordance with the procedures and other provisions of EPCA.

I. Department of Energy Rulemakings With Final Action by January 20, 2009

Notes: (1) An asterisk indicates a significant or potentially significant regulatory action. (2) Under "Deadline," a "CD" after "Judicial" means the consent decree in State of New York v. Bodman (2006); (3) The term "NOPR" means notice of proposed rulemaking.

A. Energy Efficiency Rulemakings

Technical amendment to codify energy conservation standards prescribed in the Energy Independence and Security Act of 2007 (RIN 1904-AB74)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
OFR reviewing Incorp by Reference	Final rule: 10/00/08	None

Test procedures for battery chargers and external power supplies (RIN 1904-AB75)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Comment period on NOPR	Final rule: 12/00/08	Statutory

Test procedures for metal halide ballasts (RIN 1904-AB87)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 12/00/08	Statutory

Establish definition of "household," which is required before DOE may administratively designate additional product categories for energy efficiency standards under EPCA (RIN 1904-AB52)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Final rule being prepared	Final rule: 12/00/08	None

Energy conservation standards for commercial refrigerators and freezers (RIN 1904-AB59)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
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Comment period on NOPR Final rule: 12/31/08 Statutory

B. Other Energy

Federal Procurement of Energy Efficient Products (RIN 1904-AB68)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Final rule under review	Final rule: 12/00/08	Statutory

Regulations to implement the Advanced Technology Vehicle Manufacturing Incentive Program*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Interim Final Rule being prepared	Interim Final Rule: 60 days after CR, 2009	Statutory

C. Health, Safety, and Security

Revision of DOE Acquisition Regulation security clause to require DOE contractors and subcontractors to conduct background checks on, and drug testing of, prospective employees who will require security clearances to perform duties for DOE (RIN 1991-AB71)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Final rule under review by DOE	Final rule: 11/00/08	None

Amendment of DOE regulation pertaining to the assessment of civil penalties against certain nonprofit educational institutions; this rulemaking is required to conform DOE's regulation to changes made by section 610 of EPA Act 2005 (RIN 1990-AA30)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Final rule under review by DOE	Final rule: 11/00/08	None

D. Procurement and Financial Assistance

Technical amendments to DEAR to correct errors and update organizational references (RIN 1991-AB79)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Final rule being prepared	Final rule: 11/00/03	None

Amendment of financial assistance rules and procedures for financial assistance appeals (RIN 1991-AB77)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Final rule being prepared	Final rule: 12/00/08	None

II. Energy Efficiency and Other Energy Rulemakings With Final Action After January 20, 2009

A. Energy Efficiency Rulemakings

Energy conservation standards for residential ranges and ovens; commercial clothes washers (RIN 1904-AB49)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	NOPR: 10/00/08 Final rule: 03/31/09	Judicial (CD)

Test procedures for clothes dryers and room air conditioners (standby and off mode) (RIN 1904-AB76)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 03/00/09	Statutory

Test procedures for fluorescent lamp ballasts (standby and off mode) (RIN 1904-AB77)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 03/00/09	Statutory

Test procedures for microwave ovens (standby and off mode) (RIN 1904-AB78)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 04/00/09	Statutory

Test procedure waiver and anti-circumvention rule for manufacturers of consumer and industrial or commercial products (RIN 1904-AB65)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 05/00/09	None

Inclusion of electric drive vehicles in the Alternative Fuel Transportation Program (RIN 1904-AB81)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 05/00/09	Statutory

Amendments to weatherization assistance program for low-income persons (RIN 1904-AB84)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 05/00/09	None

Energy conservation standards for fluorescent and incandescent reflector lamps (RIN 1904-AA92)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	NOPR 11/00/08 Final rule: 06/30/09	Judicial (CD)

Test procedures for electric motors (RIN 1904-AB71)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 06/00/09	Judicial (CD)

Test procedures for general services fluorescent lamps, general service incandescent lamps, and incandescent reflector lamps (RIN 1904-AB72)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Final rule being prepared	Final rule: 06/00/09	None

Test procedures for residential clothes washers (RIN 1904-AB88)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	06/00/09	Statutory

Production incentives for cellulosic biofuels (RIN 1904-AB73)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR approved for publication	Final action: 06/00/09	Statutory

Requirements for efficiency certification, compliance and enforcement for commercial heating, air-conditioning, and water heating equipment (RIN 1904-AB64)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Comments received on SNOPR	Final rule: 07/00/09	None

Energy efficiency standards for commercial heating, air conditioning, and water heating equipment (RIN 1904-AB83)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	NOPR 01/00/09 Final action: 07/00/09	Statutory

Energy conservation standards for refrigerated bottled or canned beverage vending machines (RIN 1904-AB58)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 08/00/09	None

Energy conservation standards for new federal buildings (RIN 1904-AB82)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final action: 08/00/09	Statutory

Determination for external power supplies (non-Class A) (RIN 1904-AB80)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Pre-rulemaking	Determination: 12/00/09	Statutory

Test procedures for walk-in coolers and walk-in freezers (RIN 1904-AB85)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 12/00/09	Statutory

Energy conservation standards for small electric motors (RIN 1904-AB70)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Pre-rulemaking	Final rule: 02/00/10	Judicial (CD)

Energy conservation standards for pool heaters, direct heating equipment and water heaters (RIN 1904-AA90)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Pre-rulemaking	Final rule: 03/31/10	Judicial (CD)

Determination preceding establishment of energy conservation standards for high-intensity discharge lamps (RIN 1904-AA86)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Pre-rulemaking	Determination: 06/30/10	Judicial (CD)

Energy efficiency standards for residential refrigerators and freezers (RIN 1904-AB79)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
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Pre-rulemaking	Final rule: 12/00/10	Statutory
Energy conservation standards for clothes dryers and room air conditioners (RIN 1904-AA-89)*		
<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Pre-rulemaking	Final rule: 06/30/11	Judicial (CD)
Energy conservation standards for residential central air conditioners and heat pumps (RIN 1904-AB47)*		
<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Pre-rulemaking	Final rule: 06/30/11	Judicial (CD)
Energy conservation standards for fluorescent lamp ballasts (RIN 1904-AB50)*		
<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Pre-rulemaking	Final rule: 06/30/11	Judicial (CD)
Energy conservation standards for 1-200 HP electric motors (RIN 1904-AA91)*		
<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Pre-rulemaking	Final rule: 06/30/11	Judicial (CD)
Energy efficiency standards for battery chargers and external power supplies (RIN 1904-AB57)*		
<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Pre-rulemaking	Final rule: 06/00/11	Statutory
Energy conservation standards for walk-in coolers and walk-in freezers (RIN 1904-AB86)*		
<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Pre-rulemaking	Final rule: 12/00/11	Statutory

B. Other DOE Rulemakings With Final Action After January 20, 2009

Revision of DOE's Freedom of Information Regulations (RIN 1901-AA32)		
<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	Final rule: 03/00/09	None
Procedures for the sale or lease of real property at defense nuclear facilities for the purpose of economic development (RIN 1901-AA82)		
<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Comments received on interim final rule	Final rule: 05/00/09	None.
Policies and procedures for handling research misconduct allegations (RIN 1901-AA89)		
<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Comments received on interim final rule	Final rule: 12/00/09	None
Radiation protection of the public and environment in connection with DOE nuclear activities (RIN 1901-AA38)		
<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
Comments received on NOPR; awaiting related EPA action.	Final rule: 00/00/00	None
Investment policy required for qualified defined benefit pension plans (RIN 1991-AB80)		

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	NOPR: 10/00/08	None

Amend DOE Acquisition Regulation clause dealing with indemnification under the Price Anderson Act (PAA) to incorporate changes to the PAA concerning civil penalties that were made by EPA Act 2005 (RIN 1991-AB75)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR drafted, but awaiting issuance of final rule to amend 10 CFR 820.20 (see RIN 1990-AA30).	NOPR: 11/00/08	None

Rescission of obsolete property management regulations (RIN 1991-AB73)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	NOPR: 11/00/08	None

Chronic beryllium disease prevention program amendments (RIN 1992-AA39)*

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	NOPR: 02/00/09	None

Revision of DOE regulations dealing with criteria and procedures for determining eligibility for access to classified matter or special nuclear material; would update regulations to include the substance of adjudicative guidelines in E.O. 12968 (RIN 1992-AA36)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	NOPR: 05/00/09	None

Standards of ethical conduct for employees; exemption from post-employment restrictions for communications furnishing scientific or technological information (RIN 1990-AA31)

<u>Current Stage</u>	<u>Action</u>	<u>Deadline</u>
NOPR being prepared	00/00/00	None

III. Rulemakings Completed Since April, 2007

Revision of the DOE Acquisition Regulation provisions dealing with audit procedures (RIN 1991-AB67)

<u>Action</u>	<u>Deadline</u>
Final rule: 05/24/07	None

Revision of the DOE Acquisition Regulation clause dealing with work authorization by contractors (RIN 1991-AB62) (Merged with RIN 1991-AB65)

<u>Action</u>	<u>Deadline</u>
Final rule: 05/29/07	None

Revision of DOE regulations dealing with occupational radiation protection; rule would adopt newer dosimetric models, dose terms and concentration values, and also clarify requirements for radioactive material transportation (RIN 1901-AA95)

<u>Action</u>	<u>Deadline</u>
Final rule: 06/08/07	None

Energy conservation standards for electric distribution transformers (RIN 1904-AB08)*

<u>Action</u>	<u>Deadline</u>
Final rule: 9/28/07 (issued) 10/12/07 (published)	Judicial (CD)

Test procedures for residential air conditioners and heat pumps (RIN 1904-AB55)

<u>Action</u>	<u>Deadline</u>
Final rule: 10/22/07	None

Loan guarantees for projects employing innovative technologies (RIN 1901-AB21)*

<u>Action</u>	<u>Deadline</u>
Final rule: 10/23/07	Statutory

Energy conservation standards for residential furnaces and boilers (RIN 1904-AA78)*

<u>Action</u>	<u>Deadline</u>
Final rule: 11/08/07 (issued)	Judicial (CD)
11/19/07 (published)	

Federal building energy standards (RIN 1904-AB13)

<u>Action</u>	<u>Deadline</u>
Final rule: 12/21/07	Statutory (08/08/06)

Conform DOE regulations to amendments of the Defense Production Act of 1950; the regulations would be used if DOE exercised its delegated authority to establish priorities for the acceptance and performance of contracts and orders to promote the national defense and maximize domestic energy supplies (RIN 1991-AB69)

<u>Action</u>	<u>Deadline</u>
Direct final rule: 02/29/08	None

Determination on need for mandate to require private/local government fleets to acquire alternative fueled vehicles (follow-on to rulemaking on a modified replacement fuel goal under EPA Act 1992) (RIN 1904-AB69)

<u>Action</u>	<u>Deadline</u>
Final rule: 03/06/08 (issued)	Judicial
03/14/08 (published)	

Update of DOE regulations on marking and handling unclassified controlled nuclear information under section 148 of the Atomic Energy Act of 1954 (RIN 1992-AA35)

<u>Action</u>	<u>Deadline</u>
Final rule: 06/10/08	None

Energy Planning and Management Program: Integrated Resources Planning (RIN 1901-AB24)

<u>Action</u>	<u>Deadline</u>
Final rule: 06/20/08	None

National Nuclear Security Administration regulations to supplement the DOE Acquisition Regulation to address topics unique to NNSA (RIN 1991-AB76)

<u>Action</u>	<u>Deadline</u>
Withdrawn: 08/26/08	None

Department of Energy Acquisition Regulation: Amendment to implement Executive Order 13423 (RIN 1991-AB78)

<u>Action</u>	<u>Deadline</u>
Withdrawn: 08/26/08	

November 3, 2008

Pending Significant Litigation Matters

DOE is involved in a number of litigation matters arising out of its diverse activities and programs

Summary: DOE currently has three significant pending litigation matters:

- Spent Fuel Litigation
- Alleged Exposures to Radioactive and/or Toxic Substances
- National Interest Electric Transmission Corridor Litigation.

Issue

DOE is involved in a number of litigation matters arising out of the Department's diverse activities and programs. Below is a summary of significant pending litigation matters.

Status

Spent Nuclear Fuel Litigation

As specified by the Nuclear Waste Policy Act of 1982 (NWPA), DOE entered into contracts with more than 45 utilities in which, in return for payment of fees into the Nuclear Waste Fund, the Department was required to begin disposal of spent nuclear fuel (SNF) by January 31, 1998. Because DOE has no facility available to receive SNF under the NWPA, DOE has been unable to begin disposal of the utilities' SNF as required by the contracts. Significant litigation claiming damages for partial breach of contract has ensued as a result of this delay.

To date, eight suits have been settled involving utilities that collectively produce about 29.7 percent of the nuclear-generated electricity in the United States. Under the terms of the settlements, the Judgment Fund, 31 U.S.C. 1304, paid approximately \$353.4 million to the settling utilities for delay damages they have incurred through September 30, 2008 and will make annual payments to them for future costs as they are incurred. In addition, two cases have been resolved by final judgments: a judgment of \$35 million that was not appealed and paid by the Judgment Fund; and a final judgment awarding no damages affirmed by the appellate court.

Fifty-seven cases remain pending either in the Court of Federal Claims or in the Court of Appeals for the Federal Circuit. Liability is probable in these cases, and in many of these cases orders have already been entered establishing the Government's liability and the only outstanding issue to be litigated is ascertaining the amount of damages to be awarded. However, it should be noted that the courts have not resolved the significant issue as to whether the Government can assert the unavoidable delays defense, under which, if applicable, the Government would not be liable for any damages.

Under current law, the Department will not be required to reimburse any damages or settlements in this litigation that have been paid out or will be paid out of the Judgment Fund.

Alleged Exposures to Radioactive and/or Toxic Substances

A number of class action and/or multiple plaintiff tort suits have been filed against current and former DOE contractors in which the plaintiffs seek damages for alleged injuries or diminution of property values caused by exposure to radioactive and/or toxic substances as a result of the historic operations of DOE nuclear facilities. The most significant of these cases arise out of operations of the facilities at Rocky Flats, Colorado; Hanford, Washington; Paducah, Kentucky; Portsmouth (Piketon), Ohio; Mound, Ohio; and Brookhaven, New York. Collectively, in these cases, damages in excess of \$109 billion are sought.

These cases are being vigorously defended. Two cases have gone to trial. In the Rocky Flats litigation, the jury returned a substantial verdict in favor of the plaintiffs. The court has entered judgment on the verdict, and the defendants have filed appeals. In the Hanford litigation, following rulings by the court of appeals, seven of twelve "bellwether" plaintiffs' claims were resolved in favor of the defendants, relatively small judgments in favor of two "bellwether" plaintiffs were affirmed, and three "bellwether" plaintiffs' claims were remanded to the district court for further proceedings. The defendants have filed a petition for a writ of certiorari in the U. S. Supreme Court. Proceedings on the remaining Hanford plaintiffs' claims have been suspended while appeals are prosecuted. In addition to the Rocky Flats and Hanford cases, some cases have been dismissed by trial courts based on legal rulings, and some of those rulings have been appealed to the courts of appeals. Final resolution of these issues has not been determined.

Based on the resolution of prior similar litigation, and the favorable results obtained to date in most of the pending cases, the Department believes that the likelihood of liability in many of these cases is remote, and that in those cases where liability is reasonably possible, if any liability is ultimately imposed, it would be significantly less than what the plaintiffs seek.

National Interest Electric Transmission Corridor Litigation

Section 1221(a) of the Energy Policy Act of 2005 (Pub. L. 109-58) (EPA) added a new section 216 to the Federal Power Act (FPA), 16 U.S.C. § 824p. FPA section 216(a) requires the Secretary of Energy to conduct a nationwide study of electric transmission congestion within one year from the date of enactment of that section and every three years thereafter. Following consideration of alternatives and recommendations from interested parties, the Secretary is required to issue a report based on the study "which may designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor [(NIETC)]." 16 U.S.C. § 824p(a)(2). The effect of a National Corridor designation is to delineate geographic areas within which, under certain circumstances, the Federal Energy Regulatory Commission (FERC) may authorize "the construction or modification of electric transmission facilities." 16 U.S.C. § 824p(b). However, FERC jurisdiction is triggered only when either: the State does not have authority to site the project; the State lacks the authority to consider the interstate benefits of the project; the applicant does not qualify for a State permit because it does not serve end-use customers in the State; the State has withheld approval for more than one year; or the State has

conditioned its approval in such a manner that the project will not significantly reduce congestion or is not economically feasible. 16 U.S.C. § 824p(b)(1).

DOE published a National Electric Transmission Congestion Study in August 2006, which was followed by a notice and comment period, a draft NIETC designation, and further opportunity for comment. On October 5, 2007, DOE designated two NIETCs, the Mid-Atlantic Corridor (DOE Docket No. 2007-OE-01) and the Southwest Corridor (DOE Docket No. 2007-OE-02), in a National Electric Transmission Congestion Report and Order. 72 Fed. Reg. 56992. After considering requests for rehearing, DOE issued an Order Denying Rehearing, effective March 11, 2008, which affirmed the NIETC designations. 73 Fed. Reg. 12959.

Various states, state utility commissions, and environmental groups have filed a total of 18 lawsuits, in both district and courts of appeals, challenging DOE's NIETC designations. The cases currently pending in district court are awaiting the court's ruling on the Government's motion to dismiss for lack of subject matter jurisdiction. For the circuit court cases, which represent the majority of the litigation, the Judicial Panel on Multidistrict Litigation randomly selected the Ninth Circuit Court of Appeals as the circuit in which all petitions for review of DOE's NIETC designations are to be heard. The Ninth Circuit has issued an order consolidating the individual petitions for review, and has set the following briefing schedule: the petitioner's brief is due December 29, 2008, and the Government's brief is due March 30, 2009. Unless a party was to file a motion for expedited oral argument, oral argument will likely not be held until late 2009 or early 2010.

Paper is as of 11/3/08.



Department of Energy

Washington, DC 20585

NOTE TO: Cynthia L. Quarterman
Department of Energy Agency Review Team

FROM: Janet Z. Barys *JZB*
Special Assistant, Office of the General Counsel

SUBJECT: Requested Information

DATE: December 1, 2008

Below is information that you orally requested on November 25, 2008.

List of Pending Litigation Cases

On November 26, 2008, I e-mailed you a list of pending litigation cases as of November 7, 2008.

Federal Facility Agreements and Consent Orders, Consent Decrees, and other Compliance Agreements

DOE is subject to the attached list of Federal Facility Agreements and Consent Orders, Consent Decrees, and other Compliance Agreements.

Legislative Proposals

There are no proposals pending before Congress that have been cleared by the Office and Management and Budget that would affect DOE.

The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. No. 110-417, "NDAA") was enacted on October 14, 2008. This Act authorizes a variety of defense-related programs including NNSA activities and defense-related cleanup within Office of Environmental Management (EM). Unlike the non-defense side of the Department, defense authorization acts are generally passed each fiscal year (the last major authorization act for DOE non-defense programs was the Energy Independence and Security Act of 2007 (EISA)).

Currently, DOE is operating under a Continuing Resolution (Consolidated Security, Disaster Assistance and Continuing Appropriations Act, 2009, Pub.L. No.110-329), as is most of the Federal government. To date, only defense, military construction and Homeland Security activities have been funded with regular appropriation acts.



Staff of the appropriations subcommittees have indicated to DOE's Office of the Chief Financial Officer that they expect to be working on a conference report for an omnibus appropriation to fund the remainder of the Federal government for the balance of FY 2009. DOE has prepared "conference appeals" -- statements about the particular details of the House and Senate appropriation bills -- which will form the basis of the conferencing effort by the appropriations committees. As soon as the appeals are finalized, they will be provided to the appropriations committees for their review. It is expected that if Congress does go to conference the process will be completed before the end of the current Congress. If the House and Senate do not come to agreement, or if the resulting bill is vetoed, the Continuing Resolution will continue in effect until March 6, 2009.

Pending Bid Protests before the Government Accountability Office (GAO)

As of November 26, 2008, DOE had two procurements under protest at GAO.

Hanford Mission Support Company, LLC, consisting of Computer Science Corp. and Battelle Memorial Institute, protested DOE's award of the "Mission Support Contract" for infrastructure and site services support at the Hanford (Washington) Site. The awardee is Mission Support Alliance, LLC, consisting of Lockheed Martin Integrated Technology, Jacobs Engineering Group, Inc., and Wackenhut Services, Inc. This cost-type contract is valued at approximately \$3.2 billion, over a ten year total possible contract term. The five primary mission support functions are: (1) Safety, Security and Environment, e.g., fire and emergency response, radiological assistance, environmental regulatory management; (2) Site Infrastructure and Services, e.g., crane & rigging, motor carrier services, maintenance of roads & grounds, utilities; (3) Site Business Management, e.g., real property asset management, sponsorship management & administration of employee pension & other benefit plans; (4) Information Resources, e.g., telecommunications and information systems, and records management; and (5) Portfolio Management, e.g., project acquisition & support, independent analysis and assessments. The protest is being conducted under a protective order under which the protester's counsel, from Arnold & Porter, and awardee's counsel, from McKenna, Long & Aldridge, have access to the complete record. The original protest was submitted on September 22, and a supplemental protest was filed on October 16. On November 4, DOE submitted a comprehensive agency report addressing all protest allegations; on November 14, the protester and awardee submitted their comments. GAO has not indicated that any other briefing or proceedings will be necessary. A decision on the protests is due by December 31, 2008.

4D Security Solutions, Inc. (4D) has protested the award of a \$1,129,000 contract to Next Wave Systems, LLC by the National Nuclear Security Administration (NNSA). 4D, through its counsel Brown Rudnick LLP, filed the protest on September 22, 2008 and filed a supplemental protest on October 14. The purpose of the procurement is for the purchase and installation of a Mesh Wireless Broadband System at the Nevada Test Site. On October 27, 2008, the Department filed a consolidated agency report responding to both protests. 4D submitted its comments on November 6, 2008. The protest is being

conducted under a protective order under which 4D's counsel has access to the complete record. GAO has not indicated that any other briefing or proceedings will be necessary. A decision on the protests is also due by December 31, 2008.

Although DOE's protest volume was up in fiscal year 2008, there were no decisions going against DOE in GAO protests in FY2008 or 2007. In FY 2008, DOE (including NNSA) awarded over \$34 billion in major procurements without a successful challenge.

Pending Federal Tort Claim Act Claims

There are two real property damages cases; one automobile damage case; three personal injury cases; and one multi-agency claim - a claimant filed identical FTCA claims with approximately 19 Federal agencies (including DOE, DOJ and the Army), alleging that the Government poisoned her and forced her to have an abortion, among other things (DOJ is coordinating the Government's response and considering which agency will be the lead agency for responding to this claim).

GC's Relationship with the Office of Hearings and Appeals (OHA)

GC serves as program counsel for OHA as it does for other DOE program offices, and consults with OHA on a variety of issues that may include reviewing some OHA decisions for legal sufficiency. These include: DOE denials of requests for information through the FOIA process; petitions for Secretarial review of contractor employee protection decisions (10 CFR Part 708); requests for exceptions from DOE regulations (most frequently from Energy Information Administration reporting requirements); and, serving as program counsel in adjudicative proceedings before OHA on appeals by DOE federal and contractor personnel challenging the denial or suspension of a security clearance (10 CFR Part 710) and resolution of security concerns involving Human Reliability Program (HRP) candidates or members (10 CFR Part 712). GC also is involved in representing the Department under a 1997 agreement between Chevron and DOE under which OHA hears Chevron's appeals of the Department's decisions in the determination of Chevron and the Government's equity shares in the Elk Hills oil field, an oil producing property that was sold in 1998 pursuant to the 1996 Defense Authorization Act.

Spent Nuclear Fuel Litigation Payments

It has been DOE's consistent understanding since 2000 that any payments made to settle or litigate to judgment claims against the Department concerning DOE's inability to meet its contractual requirements to dispose of spent nuclear waste from operators of nuclear power plants should be paid from the Judgment Fund because such payments are "not otherwise provided for" under the Judgment Fund. (31 U.S.C. 1304(a)(1)). Attached is a decision in Ala. Power Co. v. United States Department of Energy, 307 F.3d 1300 (11th Cir. 2002), which invalidated a particular settlement technique on the ground that it impermissibly relied on the workings of the Nuclear Waste Fund.

Please let us know if you have questions about this material.

cc: Ingrid Kolb
Director, Office of Management

Federal Facility Agreements and Consent Orders, Consent Decrees, and other Compliance Agreements

Idaho National Laboratory

Public Service Company of Colorado v. Batt Agreement, October 17, 1995

Idaho National Engineering & Environmental Laboratory Consent Order, January 25, 2001

Idaho National Engineering & Environmental Laboratory Consent Order, April 19, 1999

Idaho National Engineering & Environmental Laboratory Consent Order, April 3, 1992

Idaho National Engineering Laboratory Federal Facility Agreement and Consent Order, December 9, 1991

Idaho National Engineering Laboratory Consent Order, June 14, 2000

Idaho National Engineering Laboratory Site Treatment Plan/Consent Order, November 1, 1995

Oak Ridge

Oak Ridge Reservation Compliance Order, September 26, 1995 and Site Treatment Plan for Mixed Wastes on the DOE Oak Ridge Reservation, September 26, 1995

Federal Facility Agreement for the Oak Ridge Reservation, January 1, 1992

The Oak Ridge Reservation PCB Federal Facilities Compliance Agreement, October 28, 1996

Consent Order, December 2, 1999 (Perpetual Care Trust Fund)

Oak Ridge Accelerated Cleanup Plan Agreement, June 18, 2002

Legacy Low-Level Waste Management Agreement, April 13, 2003

Paducah

Federal Facility Agreement for the Paducah Gaseous Diffusion Plant, February 13, 1998

Toxic Substances Control Act Uranium Enrichment Federal Facilities Compliance Agreement, February 20, 1992

Paducah Gaseous Diffusion Plant Site Treatment Plan/Compliance Order, September 10, 1997

Paducah Gaseous Diffusion Plant Agreed Order, October 3, 2003

Paducah Gaseous Diffusion Plant Agreed Order, October, 2007

Portsmouth

Portsmouth Gaseous Diffusion Plant Director's Final Findings and Orders, October 4, 1995 (includes site treatment plan)

Portsmouth Gaseous Diffusion Plant Director's Final Findings and Orders, February 24, 1998, as amended 2008

Portsmouth Gaseous Diffusion Plant Director's Final Findings and Orders, March 18, 1999

Portsmouth Ohio v. DOE Consent Decree, September 1, 1989

Portsmouth RCRA/CERCLA Consent Order, 1997

Portsmouth Consent Order (U.S. EPA and Ohio EPA), September, 1989

Toxic Substances Control Act Uranium Enrichment Federal Facilities Compliance Agreement, February 20, 1992

Richland/Office of River Protection

Settlement Agreement re: Washington v. Bodman, January 6, 2006

Administrative Order, June 13, 2000

Federal Facility Compliance Agreement on Storage of Polychlorinated Biphenyls, August 8, 1996

Hanford Federal Facility Tri-Party Agreement and Consent Order, as amended October, 2008

RCRA Consent Decree on Tank Interim Stabilization, September 30, 1999

U.S. Federal Facility Compliance Agreement for the Hanford Site, February 7, 1994

Savannah River

Natural Resources Defense Council Consent Decree, May 26, 1988

Savannah River Site Consent Order 99-155-W, October 11, 1999

Savannah River Site Consent Order 85-70-SW, November 7, 1985

Savannah River Site Treatment Plan/Consent Order 95-22-HW, September 29, 1995

Savannah River Site Consent Order 99-21-HW, July 13, 1999

Savannah River Site Consent Order 99-41-HW, September 28, 1999

Savannah River Site Federal Facility Agreement, January 15, 1993 (First Half)

Savannah River Site Federal Facility Agreement, January 15, 1993 (Second Half)

Savannah River Site Settlement Agreement, May 1, 1987

Savannah River Site Settlement Agreement, November 10, 1987

Savannah River Site Settlement Agreement, August 26, 1991

Savannah River Site Settlement Agreement Amendment, June 15, 1989

Savannah River Site Consent Order of Dismissal, August 7, 2007

Statement of Dispute Resolution under the Federal Facility Agreement, November 19, 2007

Closure Sites

Weldon Spring Site Post Closure Federal Facility Agreement, 2007

NNSA Sites

Los Alamos National Laboratory Consent Agreement, December 10, 1993

Los Alamos National Laboratory Site Treatment Plan/Compliance Order, October 4, 1995

Los Alamos FFCA February 3, 2005

Los Alamos Order on Consent March 1, 2005

Sandia Order on Consent April 29, 2004

Sandia National Laboratories Federal Facility Compliance Order, October 4, 1995

Mutual Consent Agreement for Storage of LDR, January 6, 1994

Nevada Test Site FFCa Site Treatment Plan/Consent Order, March 27, 1996

Nevada Test Site FFCa Consent Order, May 10, 1996

Nevada Test Site Federal Facility Agreement – 1996

Settlement Agreement on TRU Mixed Waste Storage at Nevada Test Site, October 1992

Lawrence Livermore National Laboratory Federal Facility Agreement, June 29, 1992

Lawrence Livermore National Laboratory Federal Facility Compliance Order, February 24, 1997

Lawrence Livermore National Laboratory Main Site FFA Under CERCLA Section 120, November 1, 1988

Pantex FFA, February 22, 2007

West Valley Demonstration Project

West Valley Demonstration Project Site Treatment Plan/Administrative Consent Order. August 27, 1996

West Valley Demonstration Project Administrative Consent Order, March 5, 1992

WVDP Site Treatment Plan for Federal Facilities Compliance Act (submitted March 1996)

All Other Sites

Brookhaven National Laboratory Federal Facility Agreement. February 28, 1992

Energy Technology and Engineering Center Compliance Order, October 6, 1995

Energy Technology and Engineering Center/Santa Susanna Field Laboratory RCRA Compliance Order, August, 2007

General Atomics Compliance Order, October 6, 1995

Lawrence Berkeley National Laboratory Compliance Order, October 6, 1995

Lawrence Berkeley National Laboratory Consent Order (with California Department of Toxic Substances Control), March 13, 2007

Lawrence Berkeley National Laboratory Site Treatment Plan

Laboratory for Energy-Related Health Research Compliance Order, October 6, 1995

Federal Facility Agreement for the Laboratory for Energy-Related Health Research, December 02, 1999

Stanford Linear Accelerator Center, Order R2-2005-0022, May 18, 2005

Note: Many of the sites have Federal Facility Compliance Act site treatment plans with the regulators, some of which are incorporated into some of the above documents as indicated.

FOCUS - 3 of 6 DOCUMENTS

ALABAMA POWER COMPANY, CAROLINA POWER & LIGHT COMPANY, et al., Petitioners, versus UNITED STATES DEPARTMENT OF ENERGY, THE UNITED STATES OF AMERICA, Respondents, EXELON GENERATION COMPANY, LLC, Intervenor.

No. 00-16138

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

307 F.3d 1300; 2002 U.S. App. LEXIS 20199; 55 ERC (BNA) 1001; 33 ELR 20055; 15 Fla. L. Weekly Fed. C 1087

**September 24, 2002, Decided
September 24, 2002, Filed**

PRIOR HISTORY: [**1] Petition for Review of a Final Order of the United States Department of Energy. D E Docket No. CR-01-83NE-44405.

For Georgia Power Company, Southern Nuclear Operating Company, Appellant: Boyd, David R., Balch & Bingham, Montgomery, AL.

For TXU Electric Company, Appellant: Tomaszczuk, Alex D., Shaw Pittman, Washington, DC. Silberg, Jay E., Shaw Pittman, Washington, DC. Blanton, M. Stanford, Balch & Bingham, Birmingham, AL. Beshany, Yvonne Norris, Balch & Bingham, Birmingham, AL.

For United States Department of Energy, Appellee: Lester, Harold D. Jr., U.S. Dept. of Justice, Civil Division, Washington, DC.

DISPOSITION: On review of Final Order of United States Department of Energy, Department held not authorized to spend Nuclear Waste Fund monies on settlement agreements aimed at compensating utilities for on-site storage costs as a result of Department's breach of contract. Legislative veto provision of Nuclear Waste Policy Act held unconstitutional in part.

COUNSEL: For Alabama Power Company, Appellant: Cynamon, David J., Shaw Pittman, Washington, DC.

For Carolina Power & Light Company, Duke Power, Florida Power and Light Company, Northern States Power Company, Appellants: Tomaszczuk, Alex D., Shaw Pittman, Washington, DC.

For United States of America, Appellee: Lester, Harold D. Jr., U.S. Dept. of Justice, Civil Division, Washington, DC. Cohen, David M., U.S. Department of Justice, Civil Division, Washington, DC. Olsen, William H., U.S. Dept. of Justice, Washington, DC.

For Exelon Generation Company LLC, Intervenor: Fagg, Brad, Morgan, Lewis & Bockius, LLP, Washington, DC.

JUDGES: Before TJOFLAT and BIRCH, Circuit Judges, and GOLDBERG¹, Judge.

* Honorable George W. Goldberg, Judge, U.S. Court of International Trade, sitting by designation.

OPINION BY: TJOFLAT

OPINION

[*1302] TJOFLAT, Circuit Judge:

Pursuant to the Nuclear Waste Policy Act of 1982 ("NWPA"), 42 U.S.C. § 10101 *et seq.*, the Department of Energy ("Department") contracted with operators of nuclear power plants to begin disposal of spent nuclear fuel ("SNF") "not later than January 31, 1998." 42 U.S.C. § 10222(a)(5)(B). It failed to do so. Hoping to stem the tide of litigation arising out of this massive breach, the Department entered into a settlement agreement with one utility, Exelon Generation Company ("Exelon"), in which the Department amended its contract with Exelon by giving it an "equitable adjustment" - in effect, an offset against future payments that Exelon (like all other utilities that produce nuclear waste) is obligated to pay into the Nuclear Waste Fund ("NWF").¹ The petitioners challenge this final agency action [**2] pursuant to the NWPA's judicial review provision, 42 U.S.C. § 10139. They contend that this "offset" is indistinguishable from a direct payment of NWF monies, and that such payments are unauthorized by law. We agree.

1 This amendment to the Standard Contract is hereinafter called "the Amendment."

I.

What should be done with nuclear waste? Who should pay for its disposal? These were the central questions animating the NWPA. The legislation took a large step toward answering

these questions: the U.S. Government would take responsibility for disposing of the waste, and the utilities that produced the waste would bear the cost. The NWPA thus established a *quid pro quo*; the Government would provide a valuable service and utilities would pay money for this service. Rather than promulgating top-down legislation that would cover all of the intricacies of this arrangement, Congress authorized the Department to enter into contracts with energy firms. These contracts were to contain only a few [**3] statutorily required provisions, with the remainder to be established by the Department. The Department promulgated a "Standard Contract" through a notice-and-comment rulemaking proceeding. See 10 C.F.R. § 961.11. Important terms include the obligations of the Department and the reciprocal obligations of energy firms under the statute, both of which are discussed below. Also important are the remedial terms - an issue left untouched by the statute. Specifically, Article IX.A of the Standard Contract covers "unavoidable [*1303] delays"; it provides that a party will not be liable under the contract if its failure to perform is not due to its fault. *Id.* If a delay is caused by something within the "reasonable control" of either party, then Article IX.B provides that "the charges and schedules specified by this contract will be equitably adjusted to reflect any additional estimated costs incurred by the party not responsible for or contributing to the delay." *Id.* Article XI, governing remedies, states that "nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law." *Id.* Finally, [**4] Article XVI, entitled "Disputes," requires an internal dispute resolution procedure for "any dispute concerning a question of fact" under the contract. *Id.*

The NWPA provides that the entities owning and operating nuclear power plants, as generators and owners of nuclear waste, will pay the full cost of disposing of the waste. Under both the statute and the Standard Contract,

holders of SNF must pay into the NWF, which serves as the financing vehicle for the nuclear waste disposal program. 42 U.S.C. § 10222; 10 C.F.R. § 961.11, art. VIII. "In paying such a fee, the person delivering spent fuel . . . to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel." 42 U.S.C. § 10222(a)(3). The NWF is the only source of funding that Congress identified in the NWPA for matters relating to the programs and policies established pursuant to the Act. The initial amount of the fee was set by both the statute and Standard Contract at 1.0 mil per kilowatt-hour. 42 U.S.C. § 10222(a)(2); 10 C.F.R. § 961.11 art. VII. [**5] To date, total payments into the NWF exceed \$ 10.5 billion. See Department of Energy, Summary of Program and Budget Information as of December 31, 2000, tbl. 1-3.

Although the NWPA allows Congress to make appropriations to the NWF beyond those monies that the Standard Contract holders deposit into it, 42 U.S.C. § 10222(c)(2), the Act provides that the fees charged to the generators of SNF for permanent disposal should fully offset the costs of developing and operating such facilities, 42 U.S.C. § 10222(a)(4). As previously noted, the original fee amount was set by statute (and the Standard Contract) at 1.0 mil per kilowatt-hour. This initial assessment was to be only a starting point. Because the NWPA expressly established the nuclear waste program on a full cost recovery basis, the Act requires that the NWF have neither too much nor too little to pay for the program costs. Specifically, the Act requires the Secretary annually to review the ongoing fee amount to determine whether fee collections will result in either insufficient or excess revenues to cover the costs of the program. *Id.* If the Secretary determines [**6] that there will be either insufficient or excess revenues, the Secretary is required to propose to Congress "an adjustment to the fee to insure full cost recovery." *Id.* The Act, par-

tially unconstitutional under *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), states that "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." *Id.* No such change has ever been proposed by the Secretary, prompting the D.C. Circuit to observe that the Secretary, "not unlike Goldilocks, [always finds] that the statutory fee is not too high, and not too low, but just right." *National Ass'n of Reg. Util. Commissioners ("NARUC") v. U.S. Dep't [1304] of Energy*, 271 U.S. App. D.C. 197, 851 F.2d 1424, 1426 (D.C. Cir. 1988).

There is one statutorily required contractual provision that has been the source of much litigation: the Department's commitment to dispose of SNF beginning not later than January 31, 1998. Enacted [**7] in 1982, the NWPA gave the Department over fifteen years to select a repository site and begin permanent disposal - a much needed lead time in light of the arduous regulatory processes mandated by the NWPA in the name of science, safety, and cooperative federalism. After this date, the Department was obligated to begin its reciprocal obligation to dispose of the waste. See 42 U.S.C. § 10222(a)(5); 10 C.F.R. § 961.11. By 1995, the Department became certain that it could not meet its obligation. It announced that it had "become apparent that neither a repository nor an interim storage facility constructed under the Act will be available by 1998" and that the Department would not begin disposing of the SNF until 2010 at the earliest. *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 *Fed. Reg.* 21,793, 21,794 (May 3, 1995). What to do with all of that waste in the mean time? The Department denied having any contractual or statutory obligation to dispose of SNF pending the construction and licensing of a permanent repository. *Id.* The Department further asserted that it was not authorized to accept, store,

[**8] or dispose of SNF absent the existence of a permanent repository. *Id. at 21,797*. This interpretation of the NWPA was challenged in the D.C. Circuit, which found the Department's interpretation unreasonable and therefore not entitled to Chevron deference. *Indiana Michigan Power Co. v. U.S. Dep't of Energy*, 319 U.S. App. D.C. 209, 88 F.3d 1272 (D.C. Cir. 1996). The Department argued that the use of the word "dispose" in the statute presupposed the availability of a repository.² This is because the statutory definition of "disposal"--a form of the word "dispose" - was defined by the Act as "the emplacement in a repository of . . . spent nuclear fuel . . . with no foreseeable intent of recovery." 42 U.S.C. § 10101(9). Therefore, the Department argued, the Act contemplates that a repository be operational before the it becomes contractually obligated. The D.C. Circuit rejected this argument, holding that the ordinary meaning of the phrase "dispose of" does not presuppose the availability of a permanent repository. *Indiana Michigan*, 88 F.3d at 1275. The court concluded that the Department had an unconditional [**9] obligation to begin disposing of the utilities' SNF by January 31, 1998. 88 F.3d at 1277.

2 The Act obligates the Department to "dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter." 42 U.S.C. § 10222(a)(4)(B).

After the D.C. Circuit vacated the Department's Final Interpretation, the Department responded by announcing yet again that it would be unable to begin acceptance of SNF and asserted that it had no financial responsibility for its failure to meet the deadline - this time contending that its delay was "unavoidable" within the meaning of Article IX.A of the Standard Contract. Several utilities sought a writ of mandamus from the D.C. Circuit compelling the Department to comply with *Indiana Michigan*. The D.C. Circuit, though sympathetic with the utilities, denied the requested relief, holding

that the remedial scheme of the Standard Contract provided a "potentially adequate remedy" and therefore mandamus was inappropriate. [**10] *Northern States Power Co. v. U.S. Dep't of Energy*, 327 U.S. App. D.C. 20, 128 F.3d 754, 761 (D.C. Cir. 1997). It neither ordered the Department to begin disposal nor relieved the utilities of their continued obligation to remit the 1.0 mil fee in accordance with the NWPA. It did, however, issue a writ [*1305] prohibiting the Department from characterizing its failure to meet the statutory deadline as an "unavoidable delay," characterizing the Department's use of Article IX.A as a recycled form of the "same argument . . . that it does not have responsibility for the costs resulting from its failure to perform" rejected by the *Indiana Michigan* court. *Id.*

The Department continued to refrain from removing the SNF. Standard Contract holders filed suit in the U.S. Court of Federal Claims, alleging breach of contract, breach of a duty of good faith, and a taking in violation of the *Fifth Amendment*. The Department responded that a suit for money damages in claims court could not lie because the Standard Contract triggered an exclusive remedy for utilities - namely, equitable adjustment of the 1.0 mil fee as established under the agency's internal dispute resolution scheme. [**11] The Federal Circuit rejected this argument. See *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336 (Fed. Cir. 2000). The court reasoned:

The provision is not a general one covering all delays, but a more limited one dealing with specified kinds of delays, namely, those "in the delivery, acceptance or transport" of nuclear waste. These involve particular delays involving individual contractors. They are not the kind of delays that routinely may arise during the performance of the contract. For them to arise, however, the parties must

have begun performance of their obligations relating to disposal of nuclear waste.

Id. at 1341.

3 At first blush, it appears that the Department's defense was only procedural; it argued that the dispute should be resolved according to the dispute resolution procedures set out in Article XVI of the Standard Contract. It is clear from reading the Federal Circuit's opinion, however, that the court thought Article XVI and Article IX.B were inextricably linked. That is, the court interpreted the equitable adjustment provision as existing in unison with the procedural mechanism. Indeed, it was the equitable adjustment provision that was held to be inadequate, leaving the utilities free to sue in the claims court rather than resorting to the internal dispute resolution scheme of the Standard Contract.

[**12] Since the clause was inapplicable, this meant that the contract did not provide for the complete "relief necessary adequately to compensate Yankee for the damages it alleges it suffered from the government's breach of the contract." *Id.* at 1342. This left the utilities free to seek ordinary money damages in the claims court. Query: how could the Federal Circuit jettison the equitable adjustment remedy of Article IX.B when the D.C. Circuit pointed directly to that remedy as a "potentially adequate" alternative sufficient to make mandamus improper? To this the Federal Circuit responded:

The [D.C. Circuit's] statements were all made in explaining why mandamus would not be appropriate, because the petitioners had "another potentially adequate remedy," namely, the scheme the

Standard Contract provided "for dealing with delayed performance." The [D.C. Circuit] twice characterized that remedy as "potentially adequate," and that was sufficient to deny mandamus.

The court did not focus on or address the issue presented here - whether the presence of the contractual administrative dispute resolution provisions precludes the present suit for breach of contract. The [**13] court's concern was whether there was an alternative potential remedy available that made mandamus inappropriate; it held that there was. It was not required to, and did not determine the precise scope of that remedy. [*1306] As the Court of Federal Claims stated in rejecting the government's similar argument, "it was simply the existence of those remedies as opposed to any determination regarding the completeness of the relief they afforded that explains the D.C. Circuit's decision."

Northern States Power Co. v. United States, 224 F.3d 1361, 1366 (Fed. Cir. 2000) (internal citations omitted).

Just before the Federal Circuit rendered its decisions in *Maine Yankee* and *Northern States Power*, the Department sought to negotiate settlement agreements that would allow those Standard Contract holders willing to give up their breach of contract claims to recoup from the NWF some of the costs incurred as a result of the Department's default. On July 19, 2000, the Department and Exelon entered into an agreement in which Exelon agreed to forfeit its contract claim in exchange for credits against the on-going 1.0 mil per kilowatt-hour pay-

ments that Exelon would otherwise [**14] be obligated to pay into the NWF. This credit arrangement came in the form of an amendment to Exelon's original Standard Contract. ⁴ The Department has announced that it will use the Amendment as a settlement model on an industry-wide basis. Hoping to prevent the widespread use of this sort of agreement, various energy firms have challenged the Amendment's validity by arguing that it is not an authorized use of NWF monies.

4 Because the agreement was entered into after the D.C. Circuit decisions but before the Federal Circuit decisions were rendered, the parties were perhaps misled into believing that the "avoidable delays" provision of Article IX was the appropriate starting point for settlement negotiations. The "recitals" section of the Amendment states in pertinent part:

Whereas, the U.S. Court of Appeals for the District of Columbia Circuit held in *Northern States Power Co. v. United States Department of Energy*, 327 U.S. App. D.C. 20, 128 F.3d 754 (D.C. Cir. 1997), cert. denied, 525 U.S. 1016, 119 S. Ct. 540, 142 L. Ed. 2d 449 (1998), that DOE's delay was avoidable, and therefore, [Exelon] would be entitled to pursue a request for equitable adjustment against the United States pursuant to Article IX.B of the [Standard] Contract, which expressly allows DOE to adjust charges and schedules to address issues arising from avoidable delays.

As discussed in the text, the Federal Circuit foreclosed the equitable adjustment remedy of Article IX.B as an option, holding that the clause did not apply to the Department's large-scale breach. This holding does not, of itself, make the settlement agreement void; the parties are free to enter into any agreement that is legally authorized. Whether the agreement is, in fact, authorized by law is the question raised in this petition.

[**15] II.

A.

Before we analyze the standing and ripeness issues in this case, we must first determine the Secretary's fee-adjustment duties under the statute ⁵ in light of the [*1307] Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983). Two options are presented. First, we could strike down the section in its entirety. This would leave in place the 1.0 mil per kilowatt-hour fee as the statutory requirement, totally immune from administrative alteration. Second, we could strike down only the word "unless" and all of the language following that word. Our inquiry boils down to the likely legislative intent. See *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S. Ct. 612, 677, 46 L. Ed. 2d 659 (1976) (holding that invalid portions of a statute are to be severed "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not"). If we were to conclude that Congress would rather set the fee itself rather than give the Secretary unfettered administrative discretion to alter it, we would take the first option. ⁶ If we were to conclude that Congress [**16] would rather give the Secretary full discretion to alter the fee in the event that the legislative veto provision is invalidated, we would take the second option. We think the second option is best. ⁷

5 The relevant part of the NWPA provides:

energy action under section 6421 of this title.

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*

42 U.S.C. § 10222(a)(4) (emphasis added).

[**17]

6 This option would preclude the petitioners from having standing in this case, because there would be no nexus between the allegedly unauthorized expenditure of NWF monies and a subsequent increase or decrease in the fee. The fee would remain at 1.0 per kilowatt-hour absent a change by Congress via ordinary legislation.

7 This means that after the appropriate language is invalidated, the statute creates a "report and wait" requirement, approved by the court in *Chadha and Sibbach v. Wilson*, 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed. 479 (1941). The Secretary has a duty to submit a proposal to Congress, and this proposal becomes effective after 90 days of continuous session have elapsed following the submission unless Congress trumps the Secretary's proposal by ordinary legislation meeting the requirements of presentment and bicameralism. This result mirrors precisely that result reached in *Chadha*.

The *Chadha* Court considered an almost identical provision in the Immigration and Nationality Act, 8 U.S.C. § 1252, which allowed the Attorney General [**18] to suspend the deportation orders of immigration judges. Upon such suspension, the Attorney General was required to make a "complete and detailed statement of the facts and pertinent provisions of law in the case" to Congress. Congress then had the power under section 244(c)(2) of the Act, 8 U.S.C. § 1254(c)(2), to veto the Attorney General's determination that the immigrant should not be deported. Like the decision of the Secretary of Energy in the present case, the decision of the Attorney General served as the

default rule after a certain period of time elapsed, trumped only by a one-House veto by either chamber of Congress within the relevant time period.

Pointing to the severability clause in the Act, the Court held that the provision was "unambiguous" and "gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon whether the veto clause of § 244(c)(2) was invalid." *Chadha*, 462 U.S. at 932, 103 S. Ct. at 2774 (emphasis added). The presumption raised by a severability clause, then, is that Congress desires to save as much of the Act as possible. Our task in this [**19] case is therefore greatly eased by the existence of a severability clause. See 42 U.S.C. § 10102 ("If any provision of this chapter, or the application of such provision to any person or circumstance, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected [*1308] thereby."). Even absent a severability clause, the Court has asserted that "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S. Ct. 1476, 1479, 94 L. Ed. 2d 661 (1987) (citations omitted).

A provision is further presumed severable if what remains after severance "is fully operative as a law." *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234, 52 S. Ct. 559, 565, 76 L. Ed. 1062 (1932). In *Chadha*, the Court observed that

Congress' oversight of the exercise of this delegated authority is preserved since all such suspensions will continue to be reported to it Clearly, § 244 survives as a workable administrative mechanism without the one-House veto.

Chadha, 462 U.S. at 934-35, 103 S. Ct. at 2775-76. The same thing can be said in the present case. Through the reporting requirement, Congress will still have the ability to keep tabs on the Secretary's use of administrative discretion. The statutory scheme will continue to function if that singular clause in the sentence is struck down.

These presumptions lead us to the conclusion that only the "unless" clause should be invalidated. This is so even if the existence of the one-House veto evinces some hesitation on the part of Congress to grant unfettered authority to the Secretary. The Supreme Court made a similar conclusion in *Chadha*: "Although it may be that Congress was reluctant to delegate final authority over cancellation of deportations, such reluctance is not sufficient to overcome the presumption of severability raised by § 406." *Chadha*, 462 U.S. at 932, 103 S. Ct. at 2774. [**21] Indeed, administrative flexibility best comports with the overall statutory scheme. Because Congress wanted to ensure that the NWPA would be funded on a cost-recovery basis, it probably wanted fees to be adjusted in the most responsive way. If the political inertia required for full blown bicameralism and presentment were required, the resulting lag might be large enough to make the NWF grossly over- or under-funded.

B.

Before Article III authorizes a court to decide a case, there must be a justiciable case or controversy. "Perhaps the most important of the Article III doctrines grounded in the case-or-controversy requirement is that of standing."

the administrative process enacted by Congress authorizes the Attorney General to suspend [**20] an alien's deportation under § 244(a).

Wooden v. Bd. of Regents of the Univ. Sys. of Ga., 247 F.3d 1262, 1273 (11th Cir. 2001). The courts have an independent obligation to examine their own jurisdiction before proceeding to the merits of a claim. *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 807 n.9 (11th Cir. 1993). "Standing doctrines are employed to refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct, the litigant advancing it is not properly situated to be [**22] entitled to its judicial determination." 13 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3531, at 338-39 (1984). In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992), the Court held that to satisfy Article III's standing requirements, a plaintiff must show that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to [conduct] of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a [*1309] favorable decision. See also *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000).

The Department contends that the petitioners are not "injured." Noting the petitioners' precarious position as non-parties to the settlement agreement, the Department argues that any downward or upward adjustment of the fee is speculative at best. Instead of challenging its allegedly unauthorized expenditures, it says, the utilities should await [**23] a final decision by the Department that alters the ongoing fee requirements. We disagree. Because the NWF is designed to collect all of the costs for disposing of SNF, any shortfall in the Nuclear Waste Fund caused by the Amendment would have to be made up by fees paid by other Standard Contract holders. The net effect of the settlement is that the petitioners will have to pay more fees into the NWF to compensate for the

allegedly unauthorized expenditures that the Department has given Exelon. Alternatively, if there were to be excess dollars in the NWF, the petitioners would be deprived of the reductions in the one mil fee that would otherwise ensue. In either circumstance, they will be forced to pay for the damages resulting from the Department's breach of its contract with Exelon. The Department points out that no adjustment of the ongoing fees is automatic, even if the Secretary were to propose one. After all, the statute still requires the Secretary to report to Congress, which might alter the fee adjustment through ordinary legislation. But this argument proves too much: Congress could always alter an agency's statutory requirement through ordinary legislation. If the Department's [**24] argument were correct, nobody would ever have standing to challenge an agency's actions. We do not think it is significant that the NFWA requires a report to Congress.

We can understand the Department's attempt to force petitioners to bring a suit challenging the inevitable fee increase (or failure to decrease) directly rather than challenging particular unauthorized expenditures. Given the nebulous calculations that must be made in order to assess the costs of waste storage that will be incurred in the distant future, it is not surprising that the statutory fee has never been challenged by the utilities. They would face an insurmountable burden of proof. By shifting particular challenges to its expenditures into the rubric of a larger challenge to the fee, the Department could effectively insulate its expenditures from challenge. It could, for example, get away with purchasing a fleet of yachts for its staff out of NWF monies with virtual impunity. The standing doctrine does not countenance such a result.

Given the zero-sum nature of the Fund and our reading of the statute in light of *Chadha*, we are confident that any unauthorized expenditures would automatically raid the Fund [**25] of monies that would otherwise be used to fund

authorized expenditures (which must be paid for with yet more fees) or reimburse the utilities. * The [*1310] Amendment will cause an injury, injury is imminent, and the injury will be redressed by precluding the Department from expending NWF monies in this way.

8 This is so even if Congress decides to appropriate more money into the NWF. In the event that an unauthorized expenditure injures the utilities by raiding the NWF of money that would otherwise be used to reimburse them, additional money appropriated by Congress would only make the reimbursement that much larger. It would, in short, leave unaffected the conclusion that some sort of reimbursement is required. In the event that an unauthorized expenditure causes injury by raiding the NWF of money that would otherwise be used to pay for authorized expenditures (thus creating a shortfall and subsequent requirement that the Secretary raise the fee to make up for the shortfall), additional money appropriated by Congress would not change the fact that fewer expenditures would require still smaller fees.

[**26] C.

Exelon and the Department argue that the petitioners' claim is not ripe for review. The purpose of the ripeness doctrine is summarized in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967):

[The] basic rationale [of the doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been

formalized and its effects felt in a concrete way by the challenging parties.

Id. at 148-49, 87 S. Ct. at 1515. Exelon and the Department basically recycle their standing arguments under the heading of "ripeness," so we will not restate them here. In deciding whether a case is ripe, we look primarily at two considerations: "the hardship to the parties of withholding court consideration" and "the fitness of the issues for judicial decision." *Id. at 149, 87 S. Ct. at 1515.* As we discussed in part II.A, the future harm is certain, not speculative. If we force the petitioners to postpone [**27] review until the Secretary increases (or fails to increase) the fee, the parties will face a much more difficult burden in establishing the extent of their injury. We think this unattractive alternative creates a hardship sufficient to enjoin any unauthorized expenditures now rather than in the context of litigation over the fee. The issue is also fit for judicial resolution. The question is "purely legal," and we do not fear that a decision will be tantamount to "entangling [ourselves] in abstract disagreements over administrative policies." *Id. at 148, 87 S. Ct. at 1515.* In short, this case falls squarely within that range of cases normally found to be ripe - namely, cases that "present either or both of two features: significant present injuries . . . or legal questions that do not depend for their resolution on an extensive factual background." Laurence Tribe, *American Constitutional Law* 80 (2d ed. 1987).

9 This is understandable given the affinity between the two doctrines. As one commentator explains:

While standing is concerned with who is a proper party to litigate a particular matter, ripeness and mootness determine when that

litigation may occur. Specifically, the ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and never may occur, from those cases that are appropriate for federal court action.

Although the phrasing makes the questions of who may sue and when may they sue seem distinct, in practice there is an obvious overlap between the doctrines of standing and ripeness. If no injury has occurred, the plaintiff might be denied standing or the case might be dismissed as not ripe.

Erwin Chemerinsky, *Federal Jurisdiction* § 2.4.1 (3d ed. 1999) (internal footnote omitted)

[**28] We find *National Association of Regulatory Utility Commissioners v. Department of Energy* ("NARUC"), 271 U.S. App. D.C. 197, 851 F.2d 1424 (D.C. Cir. 1988), distinguishable. In that case, the petitioners challenged a "Notice" published in the Federal Register in which the Department of Energy tentatively established a method for allocating the costs of developing, constructing, and operating nuclear waste repositories between the government and commercial producers of such waste. First, the court held that the methodology had yet to be applied to anybody, leaving the court to conclude that its "deliberations might benefit from letting the question arise in some [*1311] more concrete and final form." NARUC, 851 F.2d at 1429 (citations omitted). In this case, by contrast, the settlement agreement has already been made. We would scarcely benefit from additional facts. Second,

the court found that the claims "may well prove to be no more than theoretical when petitioners revisit them in the context of a concrete application." 851 F.2d at 1429. It is clear that judicial intervention will be required to save the petitioners from injury in this case. Finally, [**29] the court held that there was no hardship to the parties: "Any injury they allege is a hypothetical future injury owing to the Department's expected use of the methodology in its 1988 Report, not a present hardship resulting from the Notice itself." *Id.* In the present case, the Department has already done the damage by entering into the unlawful settlement agreement.¹⁰

10 One can see how ripeness doctrine overlaps with yet another doctrine: finality. See 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3942 (2d ed. 1996).

D.

Exelon argues that in light of the Northern States Power's holding that the utilities must pursue the remedies provided in the Standard Contract, and as a general proposition of administrative law, the availability of a potential suit in the Court of Federal Claims under the Tucker Act precludes an administrative challenge to the Department's action. See, e.g., *Brazos Electric Power Coop., Inc. v. United States*, 144 F.3d 784, 788 (Fed. Cir. 1998) [**30] (holding that suit under the APA is precluded where "[a] suit in the Court of Federal Claims pursuant to the Tucker Act provides [plaintiff] with an adequate remedy for its grievance"). If and when any particular petitioner suffers the complained-of harm (e.g., an increase in fees), the Department argues, there is nothing to preclude that petitioner from asserting in the court of claims that the Secretary has breached the "full cost recovery" contractual provision by improperly adjusting the fees. As we stated in the standing context, we think that a subsequent suit challenging the Secre-

tary's nebulous predictions of future costs would be extremely difficult to maintain, and therefore provides an inadequate alternative remedy. Both justice and judicial economy dictate that we stop any unauthorized expenditures at this stage.

E.

The Department argues that any challenge to its right to make equitable adjustments is untimely, because the real "final decision" being challenged is the equitable adjustment provision (Article IX.B) itself - a provision that became subject to judicial review in 1983 when it became part of the Standard Contract and was published in the Federal Register. [**31] Accordingly, the petitioners should have brought a challenge within 180 days after that action pursuant to 42 U.S.C. § 10139(c). The petitioners, however, do not challenge the facial validity of the equitable adjustments provision. Rather, they challenge a particular settlement agreement that allegedly embodies an unlawful expenditure of NWF monies. It is that agency action, not the 1983 Standard Contract, that is being challenged. Although this case does not raise ripeness or standing concerns, a hypothetical challenge brought in 1983 - completely lacking in factual context and devoid of any real harm to the petitioners - certainly would.

III.

A.

When the Department granted Exelon an offset against the fees it would otherwise be required to pay into the NWF, this [*1312] action was tantamount to an expenditure of NWF dollars on what the offset was effectively funding - namely, Exelon's continued interim storage costs incurred as a result of the Department's breach. Put differently, one option was for the Department to settle its breach of contract liabilities by paying money out of the NWF and continue charging all utilities the same fee as it always had. Another [**32] op-

tion was to make this exchange in a single transaction by giving any settling utility an offset against its fees as they become due. The Department has taken the latter option, but it should be examined no differently from an expenditure of NWF monies. See, e.g., *Harrold v. Comm'r of Internal Revenue*, 232 F.2d 527, 529 (9th Cir. 1956) ("In law, payment may just as effectively be made by offset or credit."). This common sense intuition is confirmed by the language the Department has used in describing the Amendment. In the Amendment itself, for example, the Department characterizes the credits awarded to Exelon as "reimbursement by DOE" of Exelon's on-site SNF storage costs resulting from the Department's breach of contract. Moreover, Exelon is obligated to "reimburse the Nuclear Waste Fund" in the event that it receives reimbursement for its storage expenses from an alternative funding source, indicating that the credits were seen as a substitute for a direct expenditure of NWF monies. The question, then, is whether such a payment is authorized by the NWPA.

The level of deference we are to give to the Department's legal interpretation is unclear. Our starting [**33] point in reviewing an administrative agency's interpretation of a statute that it administers is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The Court held:

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation In such a case, a

court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44, 104 S. Ct. at 2781-82 (internal footnote omitted).

The Chevron doctrine has been complicated in recent years by the Court's decision in *United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001), which held that only certain embodiments of agency interpretations are to be given Chevron [**34] deference-i.e., those interpretations found in an "administrative action with the effect of law." *Id.* at 230, 121 S. Ct. at 2172. Such interpretations are typically pronouncements with "a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* Although the Court has granted Chevron deference even when no administrative formality was required, *id.* at 230-31, 121 S. Ct. at 2173, the settlement agreement in this case, like the "classification rulings" in *Mead*, "present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought [there should be deference]." *Id.*

Using traditional tools of statutory construction, we find that the NWPAs clearly do not allow the Department to utilize NWF monies to pay for the interim storage costs of the Department's contract creditors. Thus, even if Chevron deference does apply, the Department's interpretation [*1313] is not saved. We therefore do not have to reach the thorny question as to whether the challenged interpretation of [**35] the NWPAs is embodied by Article IX.B of the Standard Contract (which became effective pursuant to the APA's notice-and-comment rulemaking procedures) or the Amendment (which is "far removed" from any

circumstances suggesting that Congress thought such settlement agreements deserve deference). Whether or not the agency is entitled to Chevron deference, its interpretation cannot be the law.

We arrive at our conclusion for several reasons. First, the statute provides that the Secretary "may make expenditures from the Waste Fund . . . only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter." 42 U.S.C. § 10222(d) (emphasis added). An expenditure on interim storage is not an act of "disposal." Rather, payments the Department makes for on-site storage is the opposite of "disposing" of the waste.

The Act makes a list of things that might be considered acts of "disposal." " Although the list is not exhaustive, " it is instructive of the kinds of activities that might be characterized as "disposal." The items in the list all have one thing in common: they entail some sort of advancement or step toward permanent [**36] disposal, or else an incidental cost of maintaining a repository. None of them encompass the maintenance of the status quo. To be sure, the D.C. Circuit did give broad meaning to the term "dispose" in *Indiana Michigan, construing the term to mean more than "the emplacement in a repository of spent nuclear fuel with no foreseeable intent of recovery" as the statutory definition of "disposal", 42 U.S.C. § 10101(9), might have one believe. Indiana Michigan Power Co. v. Dep't of Energy*, 319 U.S. App. D.C. 209, 88 F.3d 1272, 1275 (D.C. Cir. 1996). But the court adhered to the ordinary meaning of that term. *Id.* ("Webster's Third New International Dictionary Unabridged 654 (1961) defines [dispose] as meaning, among other things, 'to get rid of; throw away; discard.'"). Payments for the purpose of interim storage costs simply are not payments for "disposal." Indeed, the Department itself once disavowed any authority to utilize the NWF to [*1314] compensate plant owners for additional storage costs at reactor sites caused by the Department's delay.

See Final Interpretation of Nuclear Waste Acceptance Issues, *60 Fed. Reg.* 21,793, 21,797 [**37] (May 3, 1995).

11 These activities include:

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

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

repository, monitored, retrievable storage facility or test and evaluation facility; and

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

42 U.S.C. § 10222(d).

[**38]

12 The petitioners rely too heavily on *Nevada v. Herrington*, 777 F.2d 529 (9th Cir. 1985), and the statutory list. They argue that since on-site storage is not found in the list, it is an unlawful expenditure per se. The list is not exhaustive, and so this argument must be rejected. The list in *Herrington*, by contrast, was exhaustive. As we discuss in the text, however, the items in the list do inform our understanding of what "disposal" means.

Our interpretation is confirmed by the Interim Storage Fund provisions in the Act. See *42 U.S.C. § 10156*. The NWPA expressly requires additional storage capacity provided by the Department at reactor sites to be funded from a separate Interim Storage Fund, financed by those utilities receiving the benefits of the additional storage capacity. Congress clearly contemplated interim storage costs when it enacted this provision. Therefore, the NWF cannot be used as a separate source of funding for interim storage costs. This conclusion is not unlike that reached by the Department in its Final Interpretation [**39]. See *60 Fed. Reg. at 21,797* ("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 authori-

zation . . . , DOE lacks authority under the Act to provide interim storage services under present circumstances.").

Our conclusion is further reinforced by common sense and a practical understanding of the regulatory scheme Congress envisioned. If the Department could pay for its breach out of a fund paid for by the utilities, the government would never be liable. Instead, the Department would keep adding these liabilities as "costs" that would justify future fee increases, indirectly forcing the utilities to bear the costs of the Department's breach. This is certainly not what Congress had in mind when it decided to empower the Department to negotiate contracts rather than imposing top-down regulations. Moreover, those utilities who neither settle nor litigate their claims would end up paying greater fees to cover the costs of other utilities. This thwarts the quid pro quo arrangement in which each utility roughly pays [**40] the costs of disposing of its waste and no more (using kilowatt-hours as a proxy for waste production). By establishing a contract and a quid pro quo arrangement, the regulatory scheme contemplates that the ultimate burden of the government's breach to fall on the government, not other utilities.

The Department's response is that a judgment cannot be paid out of the general **Judgment Fund**, see *31 U.S.C. § 1304*. Since the NWF is the only source of funding for the NWPA, it argues, surely the NWF can be used to satisfy court judgments and pay settlements. This argument is mistaken. First, if the Department is right that the **Judgment Fund** cannot be used to satisfy a judgment, this does not mean that the NWF a priori becomes available. Rather, the claimants or the Department would have to look to Congress to appropriate money for that purpose. Second, we are skeptical that the **Judgment Fund** is unavailable. The **Judgment Fund** provision states that "Necessary amounts are appropriated to pay final judgments, awards, [and] compromise settle-

ments . . . when . . . payment is not otherwise provided for . . . and the judgment is payable under [a variety of other statutes, [**41] including *28 U.S.C. § 2517*]." *31 U.S.C. § 1304(a)*. *Section 2517*, in turn, provides that "except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor." *28 U.S.C. § 2517*. As the language of these statutes indicates, most every judgment under the Tucker Act is payable under either the **Judgment Fund** or some other specific appropriation. It is, of course, hornbook law that Tucker Act jurisdiction [*1315] can only be exercised over cases in which appropriated funds can be obligated. See, e.g., *L'Enfant Plaza Properties, Inc. v. United States*, 229 Ct. Cl. 278, 668 F.2d 1211, 1212 (Ct. Cl. 1982). This rule creates a pocket of cases in which the claims court lacks jurisdiction because the defendant is a "non-appropriated fund agency." *Id.* The U.S. Court of Claims held:

There must be a clear expression by Congress that the agency was to be separated from general federal revenues. Congress must have intended the activity resulting in the claim was [**42] not to receive or be funded from appropriated funds. To sustain jurisdiction here, the requirement is not that appropriated funds have been used for the activity but that under the agency's authorizing legislation Congress could appropriate funds if necessary. Jurisdiction under the Tucker Act must be exercised absent a firm indication by Congress that it intended to absolve the appropriated funds of the United States from liability for acts of the Comptroller.

Id. (citations omitted) (emphasis added). The Federal Circuit recently reasserted the same point in *Furash & Co. v. United States*, 252 F.3d 1336 (Fed. Cir. 2001): "Under the test set forth in *L'Enfant Plaza*, what matters is whether the agency's authorizing legislation makes clear that Congress intends for the agency - or the particular activity that gave rise to the dispute in question - to be separated from general federal revenues." *Id.* at 1340. There is no such clear statement in the NWPA. To the contrary, the Act specifically contemplates appropriations by Congress. See 42 U.S.C. § 10222(c)(2).

If we were to accept the Department's argument, [**43] we would be forced to flout the series of decisions giving rise to the present litigation. Assume that, as the Department contends, a power plant cannot obtain satisfaction of a claims court money judgment for breach of contract or an unconstitutional taking from funds appropriated by Congress for the satisfaction of a claims court judgment. If that is so, the Department can defy with impunity the D.C. Circuit's decision in *Northern States Power* in that it could forever delay the implementation of the program. It could simply require utilities to store the waste forever - all at the utilities' expense.

The Department's response to this ridiculous result is that, yes, the utilities can obtain a claims court judgment, because it can be satisfied out of the NWF. This is pure sophistry. Since the utilities have to fund "the Fund," they, not the government, would have to satisfy the judgments they obtain. One can imagine what the Federal Circuit would have said in response to the Department's argument. Had the court accepted the argument (while at the same time telling the utilities they could sue in the court of claims and obtain a money judgment), the court itself would have become [**44] the fool.

We do not think a proper reading of Federal Circuit's decisions in *Maine Yankee* and *Northern States Power* will permit such a result. The court held that the remedial scheme in the contract was inadequate and so the suit in claims court could be brought. *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1342 (Fed. Cir. 2000). The implication is that since an equitable adjustment was not adequate, a more adequate remedy must be available. What remedy? It must have been money damages and not a mere equitable adjustment. Assuming that money damages from the NWF and a reduction in the required future contributions to the NWF are the same thing, the court must have assumed that there was another appropriation for this money - likely out of the **Judgment Fund**.

[*1316] B.

The Amendment not only violates the statute by permitting an unauthorized expenditure, it also exceeds the Department's statutory authority to adjust the fee. This is because the statute requires a universal fee, and that adjustments be reported to Congress before taking effect. 42 U.S.C. § 10222(a)(2)-(4). There is no other mechanism for changing [**45] the 1.0 mil per kilowatt-hour fee. The Amendment is thus an attempt by the Secretary to (a) adjust the fee with regard to a particular utility (not universally) and (b) make this adjustment without reporting to Congress. This it cannot do.

C.

Both parties point to potential constitutional issues lurking in the background - issues they argue could be avoided if we construe the NWPA one way or the other. Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504, 99 S. Ct. 1313, 1318-19, 1320-21, 59 L.

Ed. 2d 533 (1979). This canon trumps Chevron deference when the two are in tension. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-76, 108 S. Ct. 1392, 1397-98, 99 L. Ed. 2d 645 (1988). We agree that if the statute were construed to make utilities contribute to a fund that disproportionately pays the storage costs of other utilities - a cost incurred because [**46] of the Department's breach - this would raise a serious *Fifth Amendment* takings question. Exelon counters with a constitutional issue of its own. It contends that by prohibiting the Amendment, we will necessarily have to reach the serious constitutional issue of how much of the statute remains after *Chadha*. We think, however, that any "question" raised by *Chadha* is in no sense "serious"; all agree that the legislative veto is unconstitutional, and the severability question reached in part I.A. was not a close one. Moreover, we would have had to reach the question in any event because it was an integral part of the standing and ripeness issues.¹³ Finally, the Department's construction is plainly contrary to the intent of Congress.

¹³ The *Chadha* Court similarly had to address the severability issue before

reaching the standing issue. *INS v. Chadha*, 462 U.S. 919, 931-36, 103 S. Ct. 2764, 2774-76, 77 L. Ed. 2d 317 (1982).

IV.


In conclusion, we first hold that the legislative veto [**47] provision of 42 U.S.C. § 10222(a)(4) is unconstitutional and that the entire provision is saved except the clause in the last sentence beginning with the word "unless." We also hold that the Department of Energy is not authorized by law to spend NWF monies on settlement agreements aimed at compensating utilities for their on-site storage costs as a result of the Department's massive breach. Even if we were forced to grant Chevron deference to the Department - an unlikely scenario in light of *Mead* and *DeBartolo* - we find the Department's interpretation unreasonable and the statute unambiguous. The Department cannot circumvent the statutory limitation on eligible sources of NWF expenditures indirectly by reducing Exelon's NWF contributions in order to "offset" Exelon's storage costs. Accordingly, we declare the fee adjustment provided by the Amendment null and void.

SO ORDERED.



Department of Energy
Washington, DC 20585

NOTE TO: Cynthia L. Quarterman
Department of Energy Agency Review Team

FROM: Janet Z. Barsy 
Special Assistant, Office of the General Counsel

SUBJECT: Paper on "Other Major Litigation of Direct Interest to DOE"

DATE: December 5, 2008

At our meeting on November 24, 2008, you expressed an interest in major litigation of direct interest to the Department where DOE has an interest in the outcome of the suit although it is not a party to the litigation.

Attached is a paper prepared by the Office of the Deputy General Counsel for Litigation that summarizes such cases. The claims in one of the cases, *E.I. DuPont de Nemours & Co. v. Stanton*, are briefly discussed in the Transition Paper entitled Pending Significant Litigation Matters under the section "Alleged Exposures to Radioactive and/or Toxic Substances."

Please let us know if you have any questions about this material.

cc: Ingrid Kolb
Director, Office of Management



December 5, 2008

Other Major Litigation of Direct Interest to DOE

Entergy Corporation v. EPA; PSEG Fossil LLC v. Riverkeeper, Inc.; Utility Water Group v. Riverkeeper, Inc., S. Ct. Nos. 07-588, 07-589, and 07-597. The question presented in this litigation is whether Section 316(b) of the Clean Water Act, 33 U.S.C. 1326(b), authorizes EPA to compare costs and benefits in determining the “best technology available for minimizing adverse environmental impact” at cooling water intake structures. The Second Circuit held that EPA may not engage in cost-benefit analysis in determining the “best technology available,” and that consideration of cost is limited to choosing “a less expensive technology that achieves essentially the same results” as the best technology that industry can reasonably bear. EPA did not seek certiorari from the Second Circuit’s ruling, but, after the Court granted the petitions filed by the industrial parties, EPA took the position that the Second Circuit’s decision should be reversed because the relevant statutory text does not unambiguously prohibit consideration of the relationship between costs and benefits. DOE is not a party to this litigation, but has a direct interest in its outcome because the cooling water intake structures at issue are primarily associated with electric power plants. The Court heard oral argument in this matter on December 2, 2007.

* * *

United States of America v. Eurodif, S.A., S. Ct. No. 07-1059. The question presented in this case is whether the Federal Circuit erred in rejecting the Department of Commerce’s conclusion that low-enriched uranium (“LEU”) imported pursuant to separative work unit (“SWU”) transactions—in which the purchaser provides unenriched uranium feedstock to an enricher, and pays the enricher for the SWU used to convert feedstock into LEU—is subject to the antidumping duty laws, 19 U.S.C. 1673. The Federal Circuit concluded that, because of the way such transactions are structured, they do not result in “foreign merchandise * * * being * * * sold in the United States,” a predicate of the antidumping laws. Commerce argues that that conclusion failed to accord appropriate deference to its reasonable interpretation of the statute it administers. DOE joined several other agencies in signing on to Commerce’s briefs because of the energy policy, foreign policy, and national security interests that the Federal Circuit’s decision threatens. In brief, the decision has the potential to undermine an important nonproliferation agreement between the U.S. and Russia; threatens the ongoing economic viability of the United States Enrichment Corporation, the only domestic entity that enriches uranium, and the only facility in the world that produces nuclear materials for U.S. military use; and could result in increasing U.S. dependence on foreign energy sources. The Court heard oral argument in this matter on November 4, 2007.

* * *

E.I. DuPont de Nemours & Co. v. Stanton, S. Ct. No. 08-210. Approximately 2500 individual tort claims are pending against former Hanford contractors (DuPont, General Electric, and UNC Nuclear Industries) in the Eastern District of Washington. The plaintiffs bringing these claims

allege a wide variety of maladies supposedly caused by radioactive emissions from Hanford operations, but the core claims are for thyroid diseases that allegedly were caused by emissions of 2radioactive iodine (I-131) in the late 1940s and early 1950s. Although DOE is not a party to this litigation, it has a contractual right to direct the defense, and is obligated to reimburse the contractors for the costs they incur in defending and for any liability imposed upon them.

The district court elected to use a “bellwether” plaintiffs approach to try to dispose of these claims. Twelve “bellwether” plaintiffs were selected. One plaintiff voluntarily dismissed her claims; the claims of five plaintiffs were dismissed by the court on summary judgment; and the remaining six plaintiffs’ claims were tried. The only issue at trial was whether the plaintiffs could establish that their illnesses were caused by radioactive emissions from Hanford—because in a series of pretrial rulings the district court concluded that the defendants could not claim immunity under the Government Contractor Defense, could not claim that their actions were non-negligent because they complied with applicable federal nuclear safety standards, and indeed that the defendants were strictly liable. Verdicts in favor of the defendants were returned as to four “bellwether” plaintiffs, and relatively small (\$200,000 and \$300,000) verdicts were given for two plaintiffs.

The Ninth Circuit reversed the judgments entered against three plaintiffs based on its disagreement with certain evidentiary rulings that the district court had made, but otherwise essentially affirmed all of the lower court’s decisions.

The defendants have filed a petition for certiorari presenting three questions: Whether the Ninth Circuit erred by holding that the federal common law government-contractor defense does not apply as a matter of law to claims under the Price-Anderson Act, which provides the exclusive cause of action for all injuries allegedly caused by nuclear emissions? Whether the Ninth Circuit erred by holding that petitioners may be held strictly liable under the Price-Anderson Act for federally authorized nuclear emissions? And whether the Ninth Circuit erred, and deepened an acknowledged circuit split, by holding that a putative class member who files an individual lawsuit while a motion for class certification is pending is nonetheless entitled to class action tolling?

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Cook v. Rockwell International Corporation, 10th Cir. Nos. 08-1224, 08-1226, and 08-1239. This class action lawsuit was filed in 1990 against Rockwell International and Dow Chemical, former operating contractors at DOE’s Rocky Flats Plant in Colorado, seeking damages for alleged diminution in the value of real estate in the vicinity of Rocky Flats caused by emissions of plutonium. Because this case arises under the Price-Anderson Act, 42 U.S.C. 2210, DOE is obligated, by statute and by contract, to fully indemnify the defendants for any liability imposed upon them, and reimburses the costs they incur in defending themselves.

The plaintiffs make a nuisance claim predicated on allegations that past plutonium releases from

Rocky Flats created some health risk to class members and, consequently, interfered with the use and enjoyment of their properties. They also make a trespass claim based upon the alleged deposition of plutonium, regardless of whether the material was detectable, on class members' properties. In a series of pretrial rulings, the district court held, *inter alia*, that state-law standards of care are not preempted by federal nuclear regulations, and, therefore, in Price-Anderson actions, such as this case, plaintiffs do not have to prove as an element of their tort claims that any contamination exceeded federal regulatory limits.

Trial commenced on October 3, 2005, and the jury returned a verdict in favor of the plaintiffs on both the nuisance and trespass claims on February 14, 2006. On May 20, 2008, the district court denied the defendants' post-trial motions, and a Rule 54(b) judgment was entered on June 3, 2008. In accordance with the jury's verdict and the court's post-trial rulings, the judgment assesses \$725,904,087 in compensatory damages (including pre-judgment interest) against the defendants, \$110,800,000 in exemplary damages against Dow, and \$89,400,000 in exemplary damages against Rockwell. Post-judgment interest will also be assessed until the judgment is paid.

The defendants have appealed to the Tenth Circuit. By stipulation and order in the district court, execution on the judgment has been stayed pending appeal without requiring the defendants to post a bond. By stipulation and order in the court of appeals, the length of the briefs that the parties may file on appeal has been considerably enlarged, and so has the schedule for filing briefs. The time within which the defendants' opening brief must be filed has not yet begun to run, however, because of unresolved issues in the district court about the completeness of the record. A Tenth Circuit oral argument almost certainly will not occur until 2010.

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