



The Yucca Mountain Litigation: Breach of Contract Under the Nuclear Waste Policy Act of 1982

Todd Garvey
Legislative Attorney

December 22, 2009

Congressional Research Service

7-5700

www.crs.gov

R40996

CRS Report for Congress
Prepared for Members and Committees of Congress

c11173008

Summary

Over 25 years ago, Congress addressed growing concerns regarding nuclear waste management by calling for federal collection of spent nuclear fuel (SNF) for safe, permanent disposal. To this end, the Department of Energy (DOE) was authorized by statute to enter into contracts with nuclear power providers that required the DOE to gather and dispose of spent nuclear fuel in exchange for payments by the providers into the newly established Nuclear Waste Fund (NWF). Congress subsequently named Yucca Mountain in the State of Nevada as the sole candidate site for the underground geological storage of collected SNF. Congress also mandated that federal disposal begin no later than January 31, 1998. Over 10 years ago, DOE breached these contracts by failing to begin the acceptance and disposal of SNF by the statutory deadline established in the Nuclear Waste Policy Act (NWPA). As a result, nuclear utilities have been forced to spend hundreds of millions of dollars for on-site temporary storage of toxic SNF that was expected to be transferred to the federal government for storage and disposal.

Seventy-one breach of contract claims have been filed against the DOE since 1998, resulting in approximately \$1.2 billion in damages awarded thus far. Most of these awards, however, remain in appeals as the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Appeals for the District of Columbia Circuit engage in a dispute over each other's jurisdictional authority. Estimates for the total potential liability incurred by the DOE as a result of the Yucca Mountain litigation range as high as \$50 billion. Moreover, after decades of political, legal, administrative, and environmental delays, the Obama Administration, with the support of Congress, defunded the Yucca Mountain project for FY2010, and announced an intention to pursue other alternatives for the disposal of SNF. Accordingly, contract damages will continue to build as there seems to be no prospect for a completed facility capable of storing SNF anywhere on the horizon.

DOE's liability for breach of contract was first established in 1996 by the U.S. Court of Appeals for the District of Columbia in *Indiana Michigan Power Co. v. U.S.* After DOE hesitated to act on its legal obligations, citing the absence of a completed SNF storage facility, the court issued a writ of mandamus mandating that DOE "proceed with contractual remedies in a manner consistent with NWPA's command that it undertake an unconditional obligation to begin disposal of SNF by January 31, 1998." The mandamus, issued in *Northern States Power Co. v. U.S.*, essentially prohibited the DOE from deflecting liability by arguing that the lack of an existing storage facility constituted an "unavoidable delay."

In 2006, the U.S. Court of Federal Claims (CFC) held that the D.C. Circuit mandamus order in *Northern States* was void for lack of jurisdiction and could not preclude the DOE from raising the "unavoidable delay" defense in the former's court. The case was appealed to the Federal Circuit, where the court recently granted an *en banc* hearing to resolve the jurisdictional question. If the Federal Circuit affirms the CFC, and voids the D.C. Circuit mandamus, DOE liability under the NWPA could be drastically reduced if the department can successfully show that the lack of an operational storage facility constitutes an "unavoidable delay."

This report will present a brief overview of the NWPA and its subsequent amendments, provide a survey of key issues that have emerged from the protracted waste storage litigation, describe the ongoing jurisdictional conflict between the D.C. Circuit and the U.S. Court of Federal Claims, and consider the potential for future liability arising from delays relating to the storage and disposal of nuclear waste.

Contents

Introduction	1
Part I: The Road to Litigation.....	2
The Nuclear Waste Policy Act of 1982	2
Breach of the Standard Contract.....	3
Part II: Litigation	4
DOE's Statutory Obligation to Begin Accepting SNF	4
Prohibiting the "Unavoidable Delay" Defense.....	5
Litigation Continues: Remedies, Offsets, and Damages	7
Remedies Under Standard Contract Inadequate	7
NWF Offset Invalid	8
Calculating Damages	8
Jurisdictional Dispute Develops	9
Court of Federal Claims Overturns a Decade of Precedent.....	10
Defining the Jurisdiction of the CFC and U.S. Appellate Courts	11
The Scope of Section 119 of the NWPA	11
Waiver of Sovereign Immunity Under Section 702 of the APA	12
Federal Circuit Grants En Banc Hearing.....	13
Part III: Future Prospects.....	15
Yucca Mountain and the Obama Administration	15
Future Liability	16
Conclusion.....	17

Figures

Figure 1. Litigation Timeline.....	14
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Contacts

Author Contact Information	18
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Introduction

Over 25 years ago, Congress addressed growing concerns regarding nuclear waste management by calling for federal collection of spent nuclear fuel (SNF) for safe, permanent disposal. To this end, the Department of Energy (DOE) was authorized by statute to enter into contracts with nuclear power providers that required the DOE to gather and dispose of spent nuclear fuel¹ in exchange for payments by the providers into the statutorily established Nuclear Waste Fund (NWF). Congress subsequently named Yucca Mountain in the State of Nevada as the sole candidate site for the underground geological storage of collected SNF. Congress also mandated that federal disposal begin no later than January 31, 1998. Over 10 years ago, DOE breached these contracts by failing to begin the acceptance and disposal of SNF by the statutory deadline established in the Nuclear Waste Policy Act (NWPA). As a result, nuclear utilities have been forced to spend hundreds of millions of dollars on temporary storage for toxic SNF that was expected to be transferred to the federal government for storage and disposal.² The breach has triggered a prolonged series of suits by nuclear power providers, most of which continue unresolved to this day.

Seventy-one breach of contract³ claims have been filed against the DOE since 1998, resulting in approximately \$1.2 billion in damages and settlements thus far.⁴ Most of these awards, however, remain in appeals as the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Appeals for the District of Columbia Circuit engage in a dispute over each other's jurisdictional authority. Estimates for the total potential liability incurred by the DOE as a result of the Yucca Mountain litigation range as high as \$50 billion.⁵ Moreover, after decades of political, legal, administrative, and environmental delays, the Obama Administration, with the support of Congress, has defunded the further development of the Yucca Mountain project for FY2010, and announced an intention to pursue other alternatives for the disposal of SNF. Accordingly, contract damages will continue to build as there seems to be no prospect for a completed facility capable of storing SNF anywhere on the horizon.⁶

¹ Spent nuclear fuel consists of radioactive fuel rods, containing uranium and plutonium, that have been permanently withdrawn from a nuclear reactor because they can no longer efficiently sustain a nuclear chain reaction. See, CRS Report RL 33461, *Civilian Nuclear Waste Disposal*, by Mark Holt, at 8.

² U.S. nuclear power plants spend hundreds of millions of dollars a year to store radioactive SNF at the bottom of 40-foot deep pools or in "dry casks" located outside of the facility. Steve Hargreaves, *Nuclear Waste: Coming to a Town Near You?*, CNNMoney.com, November 4, 2009, available at: <http://www.money.cnn.com>.

³ Each one of these claims included a Fifth Amendment takings claim in addition to the breach of contract claim. The takings claims, however, were dismissed early in the litigation. See *e.g.*, *Consumers Energy Co. v. U.S.*, 84 Fed. Cl. 152 (2008).

⁴ The \$1.2 billion consists of approximately \$400 million in out-of-court settlements and approximately \$800 million in damages awarded by the Court of Federal Claims. Of the \$1.2 billion, the federal government has paid only \$565 million in settlements and damages. The remaining judgments are in the appeals process and are not yet final. See, *Compilation of Office of General Counsel Materials Provided to the President-Elect's DOE Transition Team*, at 46, available at: <http://www.management.energy.gov/documents>; Statement of Kim Cawley, Chief, Natural and Physical Resources Costs Estimates Unit, Congressional Budget Office Before the House Committee on the Budget, July 16, 2009 (hereinafter *CBO Testimony*).

⁵ Marcia Coyle, *Nuclear Dispute Fallout*, *The National Law Journal*, September 14, 2009.

⁶ See, *CBO Testimony*, at 1 ("The Department of Energy has not yet disposed of any civilian nuclear waste and currently has no identifiable plan for handling that responsibility.").

This report analyzes the more than 13 years of ongoing litigation over the government's obligations to collect and dispose of SNF under the Nuclear Waste Policy Act of 1982.⁷ Part I will provide a brief overview of the NWPA and its subsequent amendments. Part II will provide a survey of key issues that have emerged from the protracted litigation and describe the ongoing jurisdictional conflict between the D.C. Circuit on the one hand, and the Federal Circuit and U.S. Court of Federal Claims on the other. Part III will describe the current Administration's plan to develop alternatives to nuclear waste storage at Yucca Mountain and consider the potential costs of the Yucca Mountain project.

Part I: The Road to Litigation

The Nuclear Waste Policy Act of 1982

Identifying the serious hazards of nuclear waste, Congress passed the Nuclear Waste Policy Act of 1982 (NWPA) in an effort to centralize the long-term management of nuclear waste by making the federal government responsible for collecting, transporting, storing and disposing of the nation's SNF.⁸ In order to achieve this goal, the NWPA established a statutory system for selecting a site for a geologic repository for the permanent disposal of nuclear waste.⁹ The DOE was authorized by the statute to carry out the disposal program¹⁰ and develop the permanent nuclear waste repository. Commercial nuclear power owners and operators would fund a large portion of the program through significant annual contributions, or fees, to the newly established Nuclear Waste Fund (NWF).¹¹

To carry out the statutory scheme created by the NWPA, the DOE was also authorized to enter into contracts with nuclear facilities to allow the department to take possession of nuclear waste and ensure its storage and disposal in the prospective permanent repository.¹² Section 302 of the NWPA sets out the critical statutory deadline established in the NWPA and forms the main basis for litigation. This provision explicitly mandates:

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

(B) In return for payment of fees established by this section, the Secretary, *beginning not later than January 31, 1998*, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subtitle.¹³

⁷ This report does not discuss the significant amount of environmental litigation relating to the licensing of the Yucca Mountain facility by the Nuclear Regulatory Commission.

⁸ P.L. 97-425, *codified at* 42 U.S.C. §§ 10101 *et seq.*

⁹ *Id.* at §§ 111-125.

¹⁰ The NWPA created the Office of Civilian and Radioactive Waste Management to carry out the DOE's obligations under the act. *Id.* at § 304.

¹¹ *Id.* at § 302.

¹² *Id.* at § 302(a).

¹³ *Id.* at §302(a)(5) (emphasis added).

In an effort to streamline the collection and disposal process, the DOE elected to create a single “Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste” (Standard Contract) for use with all nuclear power providers. DOE chose to develop the Standard Contract through the formal notice-and-comment rulemaking process. The final contract, published in the Federal Register, somewhat modified the language of the NWPAA and provides:

The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF ... has been disposed of.¹⁴

Although the NWPAA did not expressly mandate that all nuclear utility providers enter into an agreement with the DOE for the disposal of nuclear waste, the utilities were required to enter into the Standard Contract as a condition of renewing or obtaining the required operating license from the Nuclear Regulatory Commission.¹⁵ All operating nuclear facilities, therefore, became parties to the Standard Contract.

By 1987, pursuant to its obligations under the NWPAA, DOE had identified three potential sites for the permanent repository: Yucca Mountain; Hanford, Washington; and Deaf Smith County, Texas. In 1987, Congress amended the NWPAA to name Yucca Mountain as the sole candidate site for the permanent repository.¹⁶ The amendments, strongly lobbied for by the congressional delegations from Washington and Texas, did not, however, end the DOE selection and approval process which continued as outlined under the NWPAA.

Breach of the Standard Contract

By 1993, the DOE had made little progress in preparing to take possession of SNF, and the Yucca Mountain facility was at least a decade or more away from completion. Concerned as to whether DOE would be able to meet its contractual obligations by the end of January 1998, the utilities, which had been paying into the NWF for 11 years,¹⁷ requested in writing that the DOE address its responsibilities under the NWPAA and update the signatories of the Standard Contract on DOE’s overall preparedness. DOE initially responded to this request with an informal letter, stating that DOE’s interpretation of the contract was that the department had no obligations under the contract until the permanent repository at Yucca Mountain was complete.¹⁸

In response to this interpretive dispute, DOE sought comments from the public on the department’s statutory obligations under the NWPAA and the Standard Contract. After further review, DOE issued a “Final Interpretation of Nuclear Waste Acceptance Issues” which formally pronounced the department’s position that it had no “legal obligation under either the [NWPAA] or the Standard Contract to begin disposal of SNF by January 31, 1998, in the absence of a repository or interim storage facility.”¹⁹ Pursuant to this interpretation, the department added that it would not begin accepting nuclear waste from nuclear utilities by the date specified in the act,

¹⁴ 10 C.F.R. § 961.11.

¹⁵ 42 U.S.C. § 10222(b)(1)(A).

¹⁶ 42 U.S.C. § 10172.

¹⁷ Fees by nuclear providers into the NWF have been estimated at \$750 million annually. *CBO Testimony*, at 3.

¹⁸ *See, Indiana Michigan Power Co. v. U.S.*, 88 F.3d 1272, 1274 (D.C. Cir. 1996).

¹⁹ 60 Fed. Reg. 21,793-94

nor did it have authority under the NWPA to provide interim storage for spent nuclear fuel.²⁰ In the alternative, were section 302 to create an unconditional obligation on the part of DOE to begin disposing of nuclear waste by January 31, 1998, redress should be governed by the “unavoidable delay” provisions of the Standard Contract which expressly states that “no party shall be liable for damages in the case of unavoidable delay ...”²¹

Nuclear utility companies, having paid billions into the NWF since 1982²² in addition to the millions spent for on-site temporary storage, turned to the federal courts to review DOE’s interpretation of its own obligations under the NWPA and the Standard Contract.

Part II: Litigation

As of May 2009, 71 lawsuits had been filed against the DOE related to the department’s failure to commence the collection and disposal of SNF. Of the 71 filed lawsuits, 10 have been settled, 6 were withdrawn, 4 reached final judgment, and 51 remain pending.²³ According to the Congressional Budget Office, the government’s current liability—based on settlements, final judgments, and entered judgments under appeal—stands at \$1.3 billion.²⁴ The following section will highlight key court decisions that have emerged from the ongoing contractual dispute between DOE and the nuclear power utilities.

DOE’s Statutory Obligation to Begin Accepting SNF

The first NWPA-related claim against the DOE was filed in the U.S. Court of Appeals for the District of Columbia Circuit in 1996.²⁵ Although the DOE had not yet breached the contract, as performance was not required before January 31, 1998, Indiana Michigan Power Company sought a preemptive judicial review of the department’s determination that it had no obligation to begin accepting SNF until the completion of the Yucca Mountain facility.

In *Indiana Michigan Power Co. v. Department of Energy*, the D.C. Circuit, applying the *Chevron*²⁶ analysis for reviewing an agency’s statutory interpretation, invalidated DOE’s interpretation as contrary to the plain meaning of the NWPA.²⁷ The court reasoned that section 302(A) and section 302(B) represented independent statutory obligations. While the obligation to “take title to” nuclear waste in section 302(A) may have been conditioned on the construction of a repository, the obligation to “dispose” of nuclear waste under section 302(B) contained no such

²⁰ *Id.* at 21,794.

²¹ *Id.* at 21,797.

²² As of July 1, 2009, fees paid into the NWF totaled \$16.3 billion. The NWF has also received \$12.8 billion in intergovernmental transfers. The Congressional Budget Office predicted the NWF’s balance at the end of FY2009 would be \$23.8 billion. *CBO Testimony*, at 3.

²³ *Id.* at 6-7.

²⁴ *Id.*

²⁵ *Indiana Michigan Power*, 88 F.3d 1272.

²⁶ Under the *Chevron* doctrine, a court will defer to an agency’s interpretation of an ambiguous statute where the agency’s “answer is based on a permissible construction of the statute.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

²⁷ *Id.* at 1274.

limitation.²⁸ Indeed, DOE's duty to commence disposal of nuclear waste, held the court, was to begin "not later than January 31, 1998 without qualification or condition."²⁹ The argument put forth by DOE, and rejected by the court, was that section 302(A) and section 302(B) "must be read together," since taking title to SNF cannot be separated from disposing of SNF.³⁰ In construing the DOE's "disposal" obligation broadly, the court noted that "it is not unusual, particularly in the nuclear area, to recognize a division between ownership of materials and other obligations relating to such materials."³¹ The court concluded that the NWPA and Standard Contract had created a "reciprocal" and binding contractual relationship between the DOE and the nuclear utilities, whereby DOE would dispose of the utilities' nuclear waste in return for the payment of fees into the NWF.³²

The DOE did not immediately take action in response to the D.C. Circuit's holding in *Indiana Michigan*. Instead, the department informed the nuclear utilities involved that it would be unable to comply with the January 31, 1998, deadline and was not prepared to begin accepting spent nuclear fuel for disposal.³³ DOE asserted that it was waiting for the results of the Yucca Mountain Project Viability Assessment before proceeding, but predicted that the Yucca Mountain facility could potentially be opened by 2010.³⁴

Prohibiting the "Unavoidable Delay" Defense

In addition to informing the nuclear utilities that it would be unable to comply with the January 31, 1998, deadline, the DOE also asserted that the department was not responsible for any monetary damages incurred by the utilities as a result of DOE's delay.³⁵ The department had determined that the lack of a permanent repository at Yucca Mountain constituted an "unavoidable delay" under article IX of the Standard Contract.³⁶ The "unavoidable delay" provision of the Standard Contract provides:

Neither the Government nor the purchaser shall be liable under this contract for damages caused by failure to perform its obligations hereunder, if such failure arises out of the causes beyond the control and without the fault or negligence of the party failing to perform.³⁷

As such, argued DOE, the terms of the Standard Contract relieved the department from any obligation to "provide a financial remedy for the delay."³⁸

²⁸ *Id.* at 1276.

²⁹ *Id.*

³⁰ *Id.* ("DOE next argues that subsections (A) and (B) of 302(a)(5) are not independent provisions, but rather must be read together.").

³¹ *Id.*

³² *Id.* at 1277 ("Thus we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998.").

³³ *See, Northern States Power Co. v. U.S.*, 128 F.3d 754, 757 (D.C. Cir. 1997).

³⁴ *Id.*

³⁵ *Id.*

³⁶ 10 C.F.R. § 961.11.

³⁷ *Id.* The provision continues: "In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions ... cause delay in scheduled delivery acceptance or transport of SNF ... the parties will readjust their schedules, as appropriate, to accommodate such delay."

The nuclear utilities responded to DOE's communications in 1997 by asking the D.C. Circuit to issue a writ of mandamus, compelling DOE to adhere to the court's earlier decision in *Indiana Michigan* and begin accepting nuclear waste for disposal. In *Northern States Power Co. v. U.S.*, the court refused to grant the "drastic" and broad relief the utilities asked for, holding that the terms of the Standard Contract provided for another "potentially adequate remedy."³⁹ Before the court would consider compelling DOE to act, the utilities would first have to pursue the administrative remedies available under the Standard Contract for delayed performance.⁴⁰

However, the court was unwilling to accept DOE's interpretation of its own delays as "unavoidable" under the Standard Contract. The court reiterated, in rejecting DOE's argument that a lack of an operational repository qualified as an unavoidable delay, that DOE's obligation to begin disposal of SNF by January 31, 1998, existed regardless of the existence of an operational storage facility.⁴¹ DOE's "unavoidable delay" defense, noted the court, represented a simple "recycling [of] the arguments [previously] rejected by this court."⁴² Based on the DOE's "repeated attempts to excuse its delay on the grounds that it lacks an operational repository," the D.C. Circuit, in a significant exercise of authority, issued a writ of mandamus prohibiting the DOE from concluding that the lack of an operational permanent repository constituted an "unavoidable delay" under the Standard Contract.⁴³ The court ordered DOE to "proceed with contractual remedies in a manner consistent with NWPAs command that it undertake an unconditional obligation to begin disposal of the SNF by January 31, 1998."⁴⁴

In a preview of the jurisdictional dispute that would develop a decade later, DOE filed a petition for rehearing in response to the *Northern States* mandamus. DOE challenged the D.C. Circuit's exercise of authority by asserting that the court "lacked jurisdiction to construe the unavoidable delays clause of the Standard Contract," as such an interpretation of a government contract was squarely within the jurisdiction of the Court of Federal Claims under the Tucker Act.⁴⁵ The D.C. Circuit denied the motion for rehearing, holding that the court had not adjudicated a contractual dispute, but rather issued the mandamus in an effort to enforce a statutory duty.⁴⁶ Accepting the D.C. Circuit's reasoning, DOE interpreted the *Northern States* mandamus as prohibiting the department from raising the unavoidable delay clause as a defense in any future litigation.⁴⁷

(...continued)

³⁸ *Northern States*, 128 F.3d at 757.

³⁹ *Id.* at 758,761. The remedy that was considered "potentially adequate" in *Northern States* was later deemed "inadequate" in *Maine Yankee Atomic Power Co. v. U.S.* 225 F.3d 1336 (Fed. Cir. 2000).

⁴⁰ The remedy available under the contract allows for an equitable adjustment of charges and schedules. 10 C.F.R. 961.11.

⁴¹ *Northern States*, 128 F.3d at 760.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Northern States Power Co. v. United States*, 1998 U.S. App. LEXIS 12919 (D.C. Cir. May 5, 1998); Tucker Act, 28 U.S.C. § 1491(a).

⁴⁶ *Id.* ("The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWPAs").

⁴⁷ See, e.g., *Yankee Atomic Electric Company v. U.S.*, 42 Fed. Cl. 223 (1998) ("As a result, DOE maintains that it is prohibited from arguing that its failure to begin SNF disposal services is an unavoidable, non-compensable delay under Article IX.A of the Standard Contract.").

Litigation Continues: Remedies, Offsets, and Damages

After establishing the DOE's statutory obligations under the NWP in the D.C. Circuit, many nuclear utilities awaited the expiration of the January 31, 1998, deadline before seeking monetary damages by filing their breach of contract claims in the U.S. Court of Federal Claims (CFC).⁴⁸ Under the Tucker Act, the CFC has jurisdiction over monetary claims against the United States "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States."⁴⁹ Decisions of the CFC are appealed to the Federal Circuit.

In considering the cases, the CFC initially had to answer the threshold question of whether the nuclear utilities were required to exhaust available administrative remedies under the Standard Contract prior to seeking judicial relief. Generally, if administrative remedies can provide adequate relief for a breach of contract claim, the plaintiff must first exhaust those remedies before seeking redress in another court.⁵⁰ Judges on the CFC came to opposite conclusions as to whether the Standard Contract could provide adequate relief to the nuclear utilities, and the issue was left for the Federal Circuit to settle on appeal.⁵¹

Remedies Under Standard Contract Inadequate

In an important 2000 case, entitled *Maine Yankee Atomic Power Co. v. U.S.*, the Federal Circuit concluded that adequate relief was not available to the nuclear utilities under the Standard Contract, a conclusion that would allow breach of contract claims against the DOE to go forward in the CFC.⁵² DOE, with the "unavoidable delay" clause unavailable, argued that the "avoidable delays" clause of the contract provided the plaintiffs with an avenue for adequate administrative relief.⁵³ The "avoidable delay" provision of the Standard Contract requires that:

in the event of any in the delivery, acceptance, or transport ... caused by circumstances within the reasonable control of either [party] ... the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.⁵⁴

The court disagreed, holding that the "avoidable delay" provision applied only to routine delays occurring after the parties had begun performance of their obligations under the contract, not to breaches of a "critical and central obligation of the contract," such as a failure to begin

⁴⁸ The D.C. Circuit, though retaining jurisdiction over review of final agency actions, rejected the notion that the U.S. Courts of Appeals had jurisdiction over breach of contract claims under the NWP, holding that the "Court of Federal Claims, not this court, is the proper forum for adjudicating contract disputes." *Wisconsin Elec. Power v. U.S. Dep't of Energy*, 211 F.3d 646, 647 (D.C. Cir. 2000).

⁴⁹ 28 U.S.C. § 1491.

⁵⁰ *See*, *McKart v. U.S.* 395 U.S. 185, 193 (1969) ("No one is entitled to judicial relief ... until the prescribed administrative remedy has been exhausted.").

⁵¹ *See*, *Yankee Atomic Elec. Co. v. U.S.*, 42 Fed. Cl. 223 (1998) (holding available administrative relief was not adequate); *Northern States Power Co. v. U.S.* 224 F.3d 1361 (Fed. Cl. 2000) (holding available administrative relief was adequate).

⁵² 225 F.3d 1336 (Fed. Cir. 2000).

⁵³ *Id.* at 1341-1342.

⁵⁴ Standard Contract, 10 C.F.R. § 961.11.

performance by the statutory deadline.⁵⁵ The court added that relief in the form of a “charge or schedule adjustment,” as provided under the Standard Contract, was wholly inadequate to compensate the nuclear utilities for damages they had sustained in storing spent nuclear fuel that had been covered by the contract.⁵⁶ As a result of the *Maine Yankee* decision, signatories to the Standard Contract were now free to seek monetary damages against the DOE, by filing their breach of contract claims in the CFC, without first exhausting the DOE administrative process.

NWF Offset Invalid

Following the *Indiana Michigan Power* and *Maine Yankee* decisions, and the realization that a slew of breach of contract claims were being filed in the CFC, the DOE attempted to curtail its potential contract liability by modifying contract terms with individual nuclear utilities. Under the proposed modification, DOE was willing to return a portion of payments made by a utility into the NWF and suspend any future payments, if the utility was willing to relinquish all future claims against the DOE.⁵⁷ The department entered into one such agreement with Exelon Generation Company in 2002. Other utilities that had also contributed to the NWF, however, challenged this arrangement as an invalid use of NWF funds.

The 11th Circuit, in *Alabama Power Co. v. U.S.*, invalidated the contractual modification reached between DOE and Exelon Generation Company.⁵⁸ The agreed upon “offset,” the court held, was “tantamount to an expenditure of funds” from the NWF.⁵⁹ Under the NWPA, NWF funds were to be used only for the “disposal” of nuclear waste.⁶⁰ DOE could not, therefore, allocate NWF funds to individual nuclear utilities to pay for what the court classified as on-site “interim storage.” Were DOE allowed to use NWF funds to offset the costs of the department’s failure to dispose of SNF, it would be analogous to allowing the DOE to “pay for its own breach out of a fund paid for by the utilities.”⁶¹ Any arrangement in which the utilities were made to “bear the costs of the [department’s] breach” was invalid.⁶²

Calculating Damages

Although the DOE had acknowledged its partial breach of the Standard Contract by 2005, the department was still intent on limiting its overall liability.⁶³ In *System Fuels Inc. v. U.S.*, DOE

⁵⁵ *Maine Yankee Atomic Power Co. v. U.S.*, 225 F.3d 1336, 1341-42 (Fed. Cir. 2000). The Federal Circuit considered another case on the same day, citing the *Maine Yankee* decision, and dealing with the “avoidable delay” clause. *Northern States Power Co. v. U.S.*, 224 F.3d 1361 (Fed. Cir. 2000). The language of the opinion however, referred to the “unavoidable delay” provision as not inapplicable. Although DOE argues the court’s reference to “unavoidable delays” was “inadvertent,” the CFC has stated that “pending any precedential ruling to the contrary, the court is bound by the Federal Circuit’s language.” *S. Nuclear Operating Co. v. U.S.*, 77 Fed. Cl. 396 (2007).

⁵⁶ *Id.* at 1342.

⁵⁷ *See*, *Alabama Power Co. v. U.S.*, 307 F.3d 1300, 1306 (11th Cir. 2002).

⁵⁸ *Id.* at 1315. The case was brought in the Eleventh Circuit, rather than the CFC, because the issue was a statutory question on the permissible use of NWF funds under the NWPA and not a breach of contract claim.

⁵⁹ *Id.* at 1312.

⁶⁰ *Id.* at 1313 (“An expenditure on interim storage is not an act of ‘disposal.’”).

⁶¹ *Id.* at 1314.

⁶² *Id.*

⁶³ *System Fuels Inc. v. U.S.*, 66 Fed. Cl. 722, 730 (2005) (“The government admitted on February 10, 2005 that ‘DOE’s delay in beginning acceptance of SNF ... constitutes a partial breach of the Standard Contract.’”)

argued that the date of breach, the date from which damages would be calculated, was not January 31, 1998. Rather, the department argued the date should be determined by the scheduling provisions of the contract that were to be used in determining when pick-up and delivery of SNF was to occur.⁶⁴ Under the Standard Contract, DOE was to publish Annual Capacity Reports through which individual utilities could submit Delivery Commitment Schedules (DCS) to notify DOE of the amount of SNF that required DOE disposal and to schedule SNF pick-ups.⁶⁵ According to the DOE, most utilities had not yet submitted a DCS to schedule an initial pick-up date. The CFC dismissed the argument on summary judgment, holding that the scheduling provisions were “only created for planning purposes” and not binding on either party.⁶⁶ Additionally, DOE had consistently delayed or refused to accept DCSs submitted by nuclear utilities, an action that itself would have constituted a breach of contract were the scheduling provisions binding.⁶⁷ A party’s failure to submit a DCS was therefore “irrelevant” and damages would be calculated from the statutory deadline of January 31, 1998.⁶⁸

In August of 2008, the Federal Circuit further clarified the method for calculating damages in NWPB breach of contract suits by establishing the rate at which the DOE was expected to accept SNF under the Standard Contract.⁶⁹ The anticipated rate of acceptance was essential to calculating the total amount of SNF DOE was contractually obligated to accept from the nuclear utilities from the 1998 deadline forward. DOE argued for a lower rate established under a report issued in 1991, as opposed to the initial rate of acceptance established in a 1987 DOE scheduling report.⁷⁰ The Federal Circuit, however, rejected this argument, holding instead that damages would be calculated in relation to the higher 1987 acceptance rate, as that rate most closely reflected the intent and expectations of the parties at the time of the contract.⁷¹ The 1991 rate, held the court, was most likely the result of a “litigation strategy,” put forth to “minimize DOE’s exposure for its impending breach, rather than as a realistic, good faith projection for waste acceptance.”⁷²

Damages for the failure to accept SNF would thus be calculated from January 31, 1998, at the initial expected rate of acceptance established in 1987.

Jurisdictional Dispute Develops

From 1998 forward, the CFC had been entertaining breach of contract suits filed by the nuclear utilities against DOE without any significant discussion of jurisdiction. Then, in 2005, the court, for the first time, dismissed an NWPB breach of contract suit for lack of subject matter jurisdiction.⁷³ The court reasoned that the Standard Contract, created through the formal

⁶⁴ 66 Fed. Cl. 722 (2005).

⁶⁵ *Id.* at 730.

⁶⁶ *Id.* at 732.

⁶⁷ *Id.* at 731.

⁶⁸ *Id.* at 732.

⁶⁹ *Pacific Gas & Elec. Co. v. U.S.*, 536 F.3d 1282 (Fed. Cir. 2008).

⁷⁰ The initial predicted rate of acceptance was 1200 MTU/year in 1998, 2000 MTU/year by 2003, and 2650 MTU/year by 2004. The proposed 1991 rate of acceptance schedule reduced those numbers to 300 MTU/year in 1998, 875 MTU/year in 2001, and 1800 MTU/year by 2010. *Id.*

⁷¹ *Id.* at 1291-92.

⁷² *Id.*

⁷³ *Florida Power and Light Co. v. U.S.*, 64 Fed. Cl. 37 (2005).

administrative process, qualified as a final agency action under the jurisdiction of the U.S. Court of Appeals as established pursuant to section 119 of the NWP. Section 119 of the NWP grants the U.S. courts of appeals:

original and exclusive jurisdiction over any civil action ... for review of any final decision or action of the Secretary, the President, or the Commission under this subtitle.⁷⁴

The dismissal was appealed to the Federal Circuit for review of the jurisdictional question.

In *PSEG Nuclear v. U.S.*, the Federal Circuit reversed the lower court's decision, holding that the NWP had not stripped the CFC of jurisdiction over contract disputes.⁷⁵ The court based its holding on the fact that section 119 was limited to official agency action taken under Title I of the NWP. Title I relates only to the development of a nuclear waste repository. The breach of contract suits filed by the utilities, on the other hand, were based on the expiration of the statutory deadline found in Title III of the NWP.⁷⁶ The jurisdictional grant found in Title I of the NWP was, therefore, determined to be inapplicable to a breach of contract claim arising under Title III of the NWP.⁷⁷ After *PSEG*, it was clear that the CFC had the authority to exercise jurisdiction over an NWP-related breach of contract claim. However, because the court in *PSEG* limited itself only to whether the exercise of jurisdiction by the CFC was proper,⁷⁸ the larger question of whether the D.C. Circuit's previous exercise of jurisdiction over similar contract-related claims impermissibly infringed on the CFC's jurisdiction remained unresolved.

Court of Federal Claims Overturns a Decade of Precedent

Shortly after the *PSEG* decision, which ensured the CFC's jurisdiction over contract disputes arising under the NWP, the DOE asked the CFC to invalidate the D.C. Circuit's initial exercise of jurisdiction in *Indiana Michigan*. At oral argument in *Nebraska Public Power Dist. v. U.S.*, DOE expressed a desire to raise the "unavoidable delay" defense that the D.C. Circuit had specifically prohibited through the writ of mandamus in *Northern States*.⁷⁹ The CFC decided to entertain the question and asked the parties to brief the issue of whether the D.C. Circuit mandamus precluded DOE's assertion of the "unavoidable delay" defense in the CFC. On October 31, 2006, the court handed down a sweeping decision that voided the longstanding mandamus issued by the D.C. Circuit for lack of jurisdiction.⁸⁰

In *Nebraska Public Power*, the CFC held that the D.C. Circuit had exceeded its jurisdiction in issuing the *Indiana Michigan* decision.⁸¹ Since the mandamus prohibiting the DOE's use of the "unavoidable delay" defense issued in *Northern States* was issued as a means of enforcing the

⁷⁴ P.L. 97-425 § 119.

⁷⁵ 465 F.3d 1343 (Fed. Cir. 2006).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1348 ("Therefore, section 119 of the NWP confers jurisdiction over agency actions taken during development of a repository for SNF disposal.").

⁷⁸ *Id.* ("The difference in the parties' positions amounts to whether the courts of appeals continue to have jurisdiction to decide the propriety of agency actions ... because this issue need not be resolved in this appeal, we merely agree ... that the NWP does not strip the court of its Tucker Act jurisdiction.").

⁷⁹ 73 Fed. Cl. 650 (2006).

⁸⁰ *Id.*

⁸¹ *Id.*

ruling in *Indiana Michigan*, the mandamus, therefore, was also void and had no preclusive effects in the CFC. The court based its decision on the jurisdictional conclusions underlying *PSEG*, the limited scope of section 119 of the NWPB, and the absence of an effective waiver of sovereign immunity.

Defining the Jurisdiction of the CFC and U.S. Appellate Courts

Nebraska Public Power focused on whether the string of claims filed under the NWPB and the Standard Contract should be classified as a review of formal agency action within the direct purview of the U.S. Appellate Courts, or as a straightforward breach of contract claim within the exclusive jurisdiction of the CFC (subject to appeal to the Federal Circuit). The opinion made clear the CFC's position that the claims relating to the January 31, 1998, statutory deadline qualified as contract claims within the CFC's exclusive jurisdiction.⁸² In considering the jurisdictional role of the two courts, the CFC adopted and applied much of the reasoning behind *PSEG*, asserting that the case had "rejected many of the key jurisdictional concepts that underlie the relevant D.C. Circuit cases."⁸³ Although *PSEG* focused only on whether the CFC could exercise jurisdiction over the contract claims, the court in *Nebraska Public Power* went further to establish that jurisdiction as exclusive in an attempt to resolve the two competing claims to jurisdiction over cases related to the Standard Contract.⁸⁴

The Scope of Section 119 of the NWPB

In issuing the *Northern States* mandamus, the D.C. Circuit had invoked section 119, which granted the U.S. Appellate Courts exclusive jurisdiction over final agency action under Title I of the NWPB, as the basis for its exercise of jurisdiction. However, the Federal Circuit, reviewing the exercise of jurisdiction by the CFC, had limited the scope of section 119, based on the provision's plain language, to only those claims relating to the establishment of a permanent repository for spent nuclear fuel.⁸⁵ In *Nebraska Public Power*, the CFC adopted the reasoning in *PSEG*, and applied it to the D.C. Circuit's initial exercise of jurisdiction in *Indiana Michigan*. The resulting conclusion was that *Indiana Michigan* involved "interpretations of contract provisions that have nothing to do with the creation of repositories of spent nuclear fuel," and therefore "plainly exceeded" the grant of jurisdiction to the D.C. Circuit under section 119.⁸⁶

Contrary to the D.C. Circuit's argument that the *Northern States* mandamus was issued pursuant to a breach of a statutory and regulatory obligation, the court added that the "essential character" of the actions brought by the nuclear utilities was contractual and therefore exclusively within the jurisdiction of the CFC.⁸⁷ The mere fact that DOE developed the Standard Contract through formal administrative rulemaking procedures was not sufficient to alter the nature of the claim

⁸² *Id.* at 664 ("in describing where the [Federal Circuit's] jurisdiction begins, the federal circuit *sub silentio* described where the D.C. Circuit's jurisdiction ends, *to wit*, that the latter court's jurisdiction does not extend beyond reviewing agency actions under Title III that relate to the creation of the repository.").

⁸³ *Id.* at 662.

⁸⁴ *Id.* at 665 ("The decisions in *Indiana Michigan* and *Northern states* bounded across the [jurisdictional] line, thereby intruding on this court's jurisdiction.").

⁸⁵ *Id.* at 664-666.

⁸⁶ *Id.* at 664.

⁸⁷ *Id.* at 665.

from an action based on contract to an action based on statutory or regulatory interpretation.⁸⁸ In classifying the claims in *Indiana Michigan* and *Northern States* as contractual, the court emphasized the utilities' reliance on the Standard Contract, the asserted claim for breach of contract, and the request for monetary damages.⁸⁹ As the "mandamus dispute in *Northern States* could be conceived as entirely contained within the terms of the contract" rather than a "regulation asserted to be in conflict with the NWP," the D.C. Circuit had engaged in an interpretation of the Standard Contract that intruded on the CFC's exclusive jurisdiction.⁹⁰

Waiver of Sovereign Immunity Under Section 702 of the APA

The CFC also held that the D.C. Circuit's decisions in *Indiana Michigan* and *Northern States* were not supported by a waiver of sovereign immunity.⁹¹ Even if section 119 had granted the D.C. Circuit jurisdiction over the NWP contract claims, the grant of jurisdiction was not accompanied by any waiver of sovereign immunity that would allow the case to go forward. Federal courts do not infer waivers of sovereign immunity lightly, requiring that any such waiver be "unequivocally expressed" by Congress.⁹² The mere grant of jurisdiction to a court, such as the grant found in section 119, is not sufficient to constitute a waiver of sovereign immunity.⁹³ The required express waiver is generally characterized by a "specification of the remedy or relief that may be awarded against the U.S."⁹⁴ The court could find no express waiver anywhere in the NWP.

With no express waiver in the NWP, the D.C. Circuit had proceeded in *Indiana Michigan* as if the waiver derived from section 702 of the Administrative Procedure Act (APA). Section 702 acts as a general waiver of sovereign immunity for claims against the U.S. that are based on agency action.⁹⁵ The CFC determined that any reliance on section 702 was misplaced, as the APA general waiver applies only where there is "no other adequate remedy in a court."⁹⁶ Although the D.C. Circuit had taken the position that the CFC was unable to accord adequate relief to a plaintiff seeking equitable relief,⁹⁷ the Federal Circuit concluded that the section 702 waiver was inapplicable under these circumstances because the nuclear utilities had an adequate remedy in the CFC under the Tucker Act.⁹⁸ The Federal Circuit, citing the U.S. Supreme Court, rejected the

⁸⁸ *Id.* at 662-663 ("The fact that DOE chose to use 'administrative rulemaking' in developing the Standard Contract and in putting forth its interpretations thereof did not confer jurisdiction on the D.C. Circuit to resolve what are, in effect, contract claims.").

⁸⁹ *Id.* at 665.

⁹⁰ *Id.* at 666.

⁹¹ Under doctrine of sovereign immunity, "the United States is immune from suit save to the extent it consents to be sued." *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 283-84 (1855).

⁹² *Nebraska Power*, 73 Fed. Cl. at 666.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . . The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.").

⁹⁶ *Nebraska Power*, 73 Fed. Cl. at 666 (citing 5 U.S.C. § 704).

⁹⁷ Courts have construed the Tucker Act as waiving sovereign immunity only for claims for damages. The CFC, therefore, cannot grant a plaintiff equitable relief in these circumstances. *See, e.g., Richardson v. Morris*, 409 U.S. 464-65 (1973).

⁹⁸ *Nebraska Power*, at 672 ("[A]n adequate remedy was and is available in this court.").

notion that the limitation on the available remedies made relief in the CFC “inadequate.”⁹⁹ Any other conclusion, reasoned the court, would allow plaintiffs to circumvent the jurisdiction of the CFC simply by attaching a prayer for equitable relief to what was essentially a damages suit. With an alternate and adequate remedy available in the CFC, the necessary trigger for section 702 had not been met. The court held, therefore, that absent a waiver of sovereign immunity under either section 119 of the NWPA or section 702 of the APA, the D.C. Circuit had improperly granted relief against the United States in *Indiana Michigan*.¹⁰⁰

The court concluded by holding that the D.C. Circuit’s decision in *Indiana Michigan* exceeded the court’s jurisdiction without the support of a valid waiver of sovereign immunity and was therefore void.¹⁰¹ The mandamus issued in *Northern States*, which was predicated on the decision in *Indiana Michigan*, was, therefore, also void and could not preclude the DOE from raising the unavoidable delay defense.¹⁰² The court closed by ordering the parties to brief the issue of whether the DOE’s failure to commence disposal of SNF by the established deadline was excused by the “unavoidable delay” clause of the Standard Contract.¹⁰³

Federal Circuit Grants En Banc Hearing

Nebraska Power appealed the CFC’s decision to the Federal Circuit and the case was argued in December of 2007. It was not until June 4, 2009, that the Federal Circuit answered, not with an opinion, but with an order for *en banc* re-hearing before the entire Federal Circuit.¹⁰⁴ The order for *en banc* hearing included a request that the parties file supplemental briefs addressing whether the mandamus issued by the D.C. Circuit in *Northern States* precludes the DOE from pleading the “unavoidable delay” defense to breach of contract claims currently pending before the CFC.¹⁰⁵ “If so,” asked the court, “does the order exceed the jurisdiction of the District of Columbia Circuit?”¹⁰⁶

⁹⁹ *Id.* at 669. The Federal Circuit has held that the U.S. Supreme Court did “not enunciate a broad rule that the Court of Federal Claims cannot supply an adequate remedy in any case seeking injunctive relief.” *Consol. Edison Co. of N.Y. v. U.S.*, 247 F.3d 1378, 1383 (Fed. Cir. 2001).

¹⁰⁰ *Id.* at 672-73.

¹⁰¹ *Id.* at 673 (“[T]he court is left with the firm conviction that, in issuing the subject mandamus, the D.C. Circuit operated in excess of its jurisdiction and, specifically, without an appropriate waiver of sovereign immunity.”).

¹⁰² *Id.*

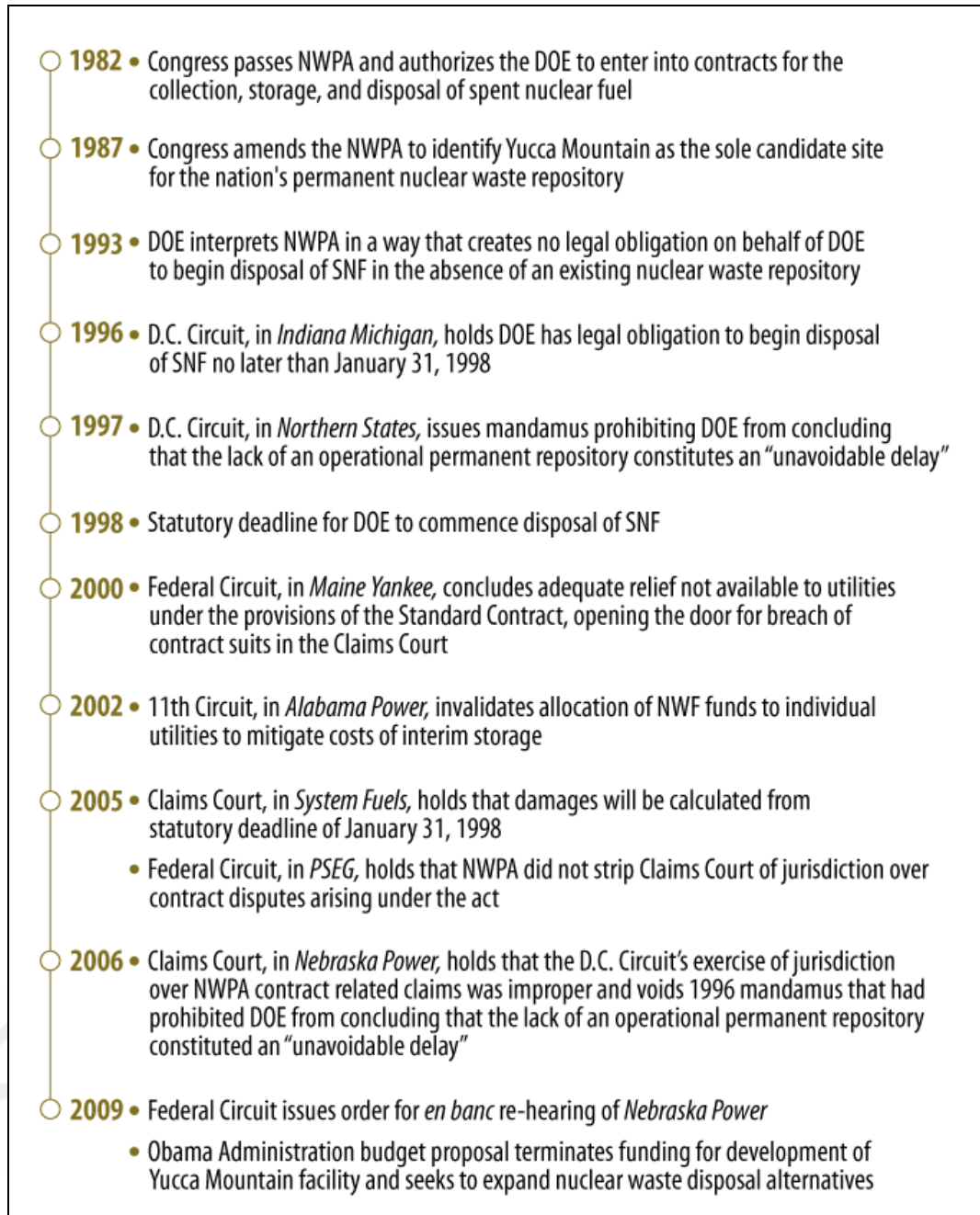
¹⁰³ *Id.* at 674.

¹⁰⁴ *Nebraska Public Power Dist. v. U.S.*, 2009 U.S. App. LEXIS 12668 (Fed. Cir 2009).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Figure 1. Litigation Timeline



Source: Congressional Research Service.

Part III: Future Prospects

Yucca Mountain and the Obama Administration

Following years of decreases in funding for the Yucca Mountain project, the Obama Administration recently decided to “terminate the Yucca Mountain program while developing nuclear waste disposal alternatives.”¹⁰⁷ The Administration’s FY2010 budget eliminates all funding for the actual Yucca Mountain facility, leaving only enough funds, approximately \$197 million, to finance the ongoing Nuclear Regulatory Commission licensing process and to “explore alternatives for nuclear waste disposal.”¹⁰⁸ The budget proposal also calls for the creation of a “blue ribbon panel” to explore, study, and evaluate alternatives to the Yucca Mountain facility for the permanent storage of SNF.¹⁰⁹

Both the President and the Secretary of Energy have publicly stated that Yucca Mountain does not represent a viable option for the permanent storage of SNF.¹¹⁰ Senate Majority Leader Harry Reid, who has led the fight against the Yucca Mountain facility, announced in July of 2009 that the Administration intends to terminate the remaining funding for the Yucca Mountain licensing process in the budget for FY2011.¹¹¹ Although the initial House-passed bill approving the Administration’s proposed budget included language mandating that any review of nuclear waste disposal alternatives include Yucca Mountain as a potential option, the recently passed DOE appropriations bill only contains language mandating that DOE “consider all alternatives for nuclear waste disposal.”¹¹²

Regardless of whether the Administration chooses to completely defund the Yucca Mountain project, new legislative action will be required to establish a permanent repository capable of storing the nation’s SNF. Under the 1987 amendments to the NWA, Yucca Mountain is the only authorized location for a permanent SNF repository.¹¹³ Therefore, if Congress or the President chooses to pursue an alternative site, the NWA will have to be amended to allow for such a selection. If, on the other hand, the choice is made to proceed with the Yucca Mountain project, Congress would need to amend the NWA to lift the statutory limit on the facility’s nuclear waste

¹⁰⁷ Statement of Steven Chu, Secretary, Department of Energy, Before the Senate Committee on Appropriations Subcommittee on Energy and Water Development, and Related Agencies, May 19, 2009.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Statement of Steven Chu, Secretary, Department of Energy, Before the Senate Committee on the Budget, March 11, 2009 (“[B]oth the President and I have made clear that Yucca Mountain is not a workable option.”).

¹¹¹ Lisa Mascaro, *Reid: White House to Cut Off Yucca Funding*, Las Vegas Sun, July 30, 2009. Although an internal DOE draft Program Decision Memorandum referencing a revised FY2011 budget request states that “[a]ll license defense activities will be terminated in December 2009,” DOE recently met a December filing deadline for continuing the licensing process and spokesman Allen Benson confirmed that the DOE would continue to utilize the funds appropriated to the department to acquire a NRC license for the Yucca Mountain facility. *See*, Letter from House Committee on Energy and Commerce to Steven Chu, Secretary, Department of Energy, November 18, 2009; Keith Rogers, *Energy Department Keeping Nuclear Repository Options Open*, Las Vegas Review, December 14, 2009.

¹¹² P.L. 111-85 (2009).

¹¹³ 42 U.S.C. § 10172 (“The Secretary shall terminate all site specific activities ... at all candidate sites, other than the Yucca Mountain site, within 90 days after December 22, 1987.”); 42 U.S.C. § 10172(a) (“The Secretary may not conduct site-specific activities with respect to a second repository unless Congress has specifically authorized and appropriated funds for such activities.”).

storage capacity. The current statutory cap of 70,000 metric tons is insufficient to hold existing amounts of SNF.¹¹⁴

Future Liability

The *Nebraska Power* decision has the potential to add many more years of litigation to the more than 13 years of litigation that the DOE and nuclear utilities have already undertaken on damage claims. Based on the question presented in the *en banc* order, which focuses solely on whether the D.C. Circuit properly exercised jurisdiction, even if the court rules that the *Northern States* mandamus is void, it is unlikely that the Federal Circuit will answer whether the lack of a permanent SNF repository constitutes an “unavoidable delay.” At least one attorney involved in the proceedings predicts that five more years of litigation will be required to determine whether the delay was “unavoidable.” Such an extension would add to the litigation costs already suffered by both sides.¹¹⁵ To date, the Department of Justice, which has handled the DOE defense, has spent over \$150 million on litigation costs. The nuclear utilities reportedly spend \$5 million to \$7 million in litigation costs on each individual case.¹¹⁶

In an attempt to curtail damages, DOE has sought to reach settlement agreements with a number of nuclear utilities. As of September 2009, the government has entered into agreements with nuclear utilities that operate 36 of the 118 nuclear facilities covered by the Standard Contract.¹¹⁷ Under the settlements, contract parties submit annual reimbursement claims to DOE for any delay-related nuclear waste storage costs that they incurred during that year. As the settlement agreements cover continuing damages, the affected nuclear utilities are able to submit annual claims directly to the DOE rather than re-litigating ongoing damages in the federal courts. As of the end of 2008, DOE had paid over \$400 million pursuant to these settlements.¹¹⁸

However, if the Federal Circuit affirms the CFC and “voids”¹¹⁹ the D.C. Circuit mandamus, DOE liability under the Standard Contract could be drastically reduced. With the D.C. Circuit mandamus removed, DOE is free to pursue the previously barred “unavoidable delay” defense. Accordingly, if DOE is able to prove that the department’s breach occurred as a result of an “unavoidable delay,” then the terms of the Standard Contract direct that DOE shall not be liable for any damages.¹²⁰ In this respect, receiving a favorable decision from the Federal Circuit that acts to void the D.C. Circuit mandamus is only the first step toward limiting damages under the “unavoidable delays” provision of the Standard Contract. DOE will still have to convince the CFC that the lack of an existing facility actually qualifies as an “unavoidable delay” under the Standard Contract, an argument previously, and resoundingly, rejected by the D.C. Circuit.¹²¹

¹¹⁴ 42 U.S.C. § 10134(d). See, *Report to the President and the Congress By the Secretary of Energy on the Need for a Second Repository*, Dec. 2008, available at: <http://www.ocrwm.doe.gov>.

¹¹⁵ Marcia Coyle, *Nuclear Dispute Fallout*, The National Law Journal, Sept. 14, 2009 at 14.

¹¹⁶ *Id.* With 71 lawsuits filed against DOE, one could estimate that the nuclear utilities as a whole have expended over \$400 million in litigation costs.

¹¹⁷ See, CRS Report RL 33461, *Civilian Nuclear Waste Disposal*, by Mark Holt, at 3.

¹¹⁸ *Id.*

¹¹⁹ Such an order may raise questions as to whether one U.S. circuit court has the authority to void the decision of a sister circuit.

¹²⁰ Standard Contract, 10 C.F.R. § 961.11.

¹²¹ *Northern States*, 128 F.3d at 760. (“The most glaring problem with DOE’s position is that it is answering the wrong (continued...)”)

Even with a favorable decision from the Federal Circuit, DOE may be blocked from now asserting the “unavoidable delay” defense in some pending¹²² NWPB breach of contract suits. In the one opinion in a breach of contract suit released by the CFC since the *Nebraska Power* decision, the court rejected DOE’s attempt to raise the unavoidable delay defense by holding that DOE had waived any such defense by not raising the issue at trial.¹²³ In *S. Nuclear Operating Co. v. U.S.*, the court characterized the “unavoidable delay” provision as an affirmative defense that is waived if not raised at trial and preserved for appeal.¹²⁴ The court noted that, in the instant case, DOE had not raised the “unavoidable delays” clause of the Standard Contract nor challenged the D.C. Circuit’s jurisdiction in issuing the *Northern States* mandamus as it had in previous cases.¹²⁵ Accordingly, it is arguable that DOE will have waived the “unavoidable delays” defense in cases in which it did not raise the issue in some form during trial.

Conclusion

The total costs to taxpayers for delays associated with the Yucca Mountain project are difficult to project, especially given the uncertainty relating to the viability of the “unavoidable delays” defense under the Standard Contract. However, absent a significant change in the direction of NWPB-related litigation, DOE predicts that damages stemming from breach of contract claims will measure close to \$12.3 billion if the department is able to begin accepting SNF by 2020—an unlikely occurrence given that all construction on the partially completed Yucca Mountain facility has ceased.¹²⁶ Approximately \$500 million in additional legal damages will continue to build with each year that DOE is unable to begin accepting SNF.¹²⁷ The nuclear utilities, on the other hand, estimate DOE’s total potential liability at approximately \$50 billion.¹²⁸ With \$150 million in litigation expenses incurred by the Department of Justice, and possibly \$50 billion in liability for breach of contract, the cost of delays in the Yucca Mountain project could potentially range between \$12.5 billion to \$51 billion.

(...continued)

question ... DOE cannot now render its obligation contingent, and free itself of the costs caused by its delay, by advancing the same failed position that we rejected before.”).

¹²² DOE may be able to argue that the few final rulings that have already been paid should be re-opened under Rule 60 of the Federal Rules of Civil Procedure. Rule 60 authorizes a court to relieve a party of a final judgment where “a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.” Fed. R. Civ. P. 60.

¹²³ *S. Nuclear Operating Co., v. U.S.*, 77 Fed. Cl. 396 (2007).

¹²⁴ *Id.*

¹²⁵ *Id.* at 456 (“Questions of the validity or applicability of the D.C. Circuit’s mandamus in this court in this breach of contract suit could have been raised but were not. Defendant raised the absence of a repository as a defense in other SNF cases.”).

¹²⁶ *CBO Testimony*, at 7.

¹²⁷ *Id.*

¹²⁸ *Id.*

Author Contact Information

Todd Garvey
Legislative Attorney
tgarvey@crs.loc.gov, 7-0174



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