

Case Nos. 11-1066 and 11-1068

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

NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS; NUCLEAR ENERGY INSTITUTE, ET AL.,

Petitioners,

v.

U.S. DEPARTMENT OF ENERGY AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF FINAL ACTIONS OR FAILURES TO ACT
BY THE UNITED STATES DEPARTMENT OF ENERGY

REPLY BRIEF OF CONSOLIDATED PETITIONERS

James Bradford Ramsay
Robin Lunt
NATIONAL ASSOCIATION OF
REGULATORY UTILITY
COMMISSIONERS
1101 Vermont Ave., NW, Suite 200
Washington, DC 20005
(202) 898-2207

Jay E. Silberg
Timothy J. V. Walsh
PILLSBURY WINTHROP SHAW
PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000

Ellen C. Ginsberg
Anne W. Cottingham
NUCLEAR ENERGY INSTITUTE
1776 I St., NW, Suite 400
Washington, DC 20006
(202) 739-8000

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
GLOSSARY	iv
STATUTES AND REGULATIONS	1
COUNTER STATEMENT OF FACTS	2
I. DOE All But Ignores the Current Size and Continuing Growth of the NWF	2
II. DOE Has Inexplicably Reversed Its 2009 Rationale for Continued Fee Collection	3
III. DOE Mischaracterizes Prior Fee Adequacy Reports	5
IV. DOE’s Straw-man Factual Arguments Mischaracterize Petitioners’ Positions	8
ARGUMENT SUMMARY	12
ARGUMENT	14
I. DOE’s Determination Fails to Meet the NWPA’s Explicit Statutory Requirements and Deserves No Deference	14
A. Congress Explicitly Directed How DOE Shall Conduct the Annual Fee Evaluation	14
B. Even If the NWPA Were Not Explicit, DOE’s “Evaluation” Violates the NWPA	16
C. The Determination Should Be Accorded No Weight and is Arbitrary and Capricious	22
II. DOE’s Standard Contract Claims and Fairness Concerns are Without Merit	26
III. Remand to DOE for Further Analysis is Not Appropriate	28
CONCLUSION	32

TABLE OF AUTHORITIES

Authorities upon which Petitioner chiefly relies are marked with an asterisk.

<u>Cases</u>	<u>Page</u>
* <i>Alabama Power Co. v. DOE</i> , 307 F.3d 1300 (11th Cir. 2002)	20,24
<i>Am. Train Dispatchers Ass’n v. ICC</i> , 26 F.3d 1157 (D.C. Cir. 1994).....	31
<i>BizCapital Bus. & Indus. Dev. Corp. v. Comptroller of the Currency</i> , 467 F.3d 871 (5th Cir. 2006)	29,30-31
* <i>Chevron, U.S.A., Inc. v. NRDC</i> , 467 U.S. 837 (1984).....	14,16,18,19,20,21,22,26
* <i>Consol. Edison Co. of N.Y. v. DOE</i> , 870 F.2d 694 (D.C. Cir. 1989) (“ <i>ConEd</i> ”).....	16,18,28
<i>Fl. Power & Light Co. v. Lorion</i> , 470 U.S. 729 (1985).....	29
<i>FPC v. Id. Power Co.</i> , 344 U.S. 17 (1952).....	31
<i>Gen. Elec. Uranium Mgmt. Corp. v. DOE</i> , 764 F.2d 896 (D.C. Cir. 1985) (“ <i>GEUMCO</i> ”)	18,19
<i>Gonzales v. Oregon</i> , 546 U.S. 243 (2006).....	20
<i>Ind. Mich. Power Co. v. DOE</i> , 88 F.3d 1272 (D.C. Cir. 1996).....	18
<i>Ind. Mich. Power Co. v. U.S.</i> , 422 F.3d 1369 (Fed. Cir. 2005).....	11,27
<i>INS v. Orlando Ventura</i> , 537 U.S. 12 (2002)	31
<i>Metro. Stevedore Co. v. Rambo</i> , 521 U.S. 121 (1997)	26
<i>NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.</i> , 513 U.S. 251 (1995).....	21
* <i>Northern States Power Co. v. DOE</i> , 128 F.3d 754 (D.C. Cir. 1997), <i>cert. denied</i> , 525 U.S. 1015 (1998)(“ <i>NSP</i> ”).....	18,23
* <i>Skidmore v. Swift & Co.</i> , 323 U.S. 134 (1944).....	19-20,22
<i>Tripoli Rocketry Ass’n, Inc. v. ATFE</i> , 437 F.3d 83 (D.C. Cir. 2006).....	25

* *U.S. v. Mead Corp.*, 533 U.S. 218 (2001).....19,22

Village of Barrington v. Surface Transp. Bd., 636 F.3d 650
(D.C. Cir. 2011)21,25

* *Wis. Elec. Power Co. v. U.S.*, 778 F.2d 1 (D.C. Cir. 1985)
 (“WEPCO”)16,23,28

Statutes, Regulations & Other Documents

5 U.S.C. § 706(1) (2006)29

* *Nuclear Waste Policy Act of 1982*, § 302,
42 U.S.C. § 1022226

* *Nuclear Waste Policy Act of 1982*, § 302(a)(4),
42 U.S.C. § 10222(a)(4).....3,6,14,15,23

* *Nuclear Waste Policy Act of 1982*, § 302(d),
42 U.S.C. § 10222(d)6,14,15,21,22,33

10 C.F.R. § 961.11 (2010)27

GLOSSARY

Act	Nuclear Waste Policy Act
BRC	Blue Ribbon Commission on America's Nuclear Future
DOE	Department of Energy
FY	Fiscal Year
FOIA	Freedom of Information Act
HLW	High-Level Radioactive Waste
NARUC	National Association of Regulatory Utility Commissioners
NEI	Nuclear Energy Institute
NWF	Nuclear Waste Fund
NWPA	Nuclear Waste Policy Act
OCRWM	Office of Civilian Radioactive Waste Management
SNF	Spent Nuclear Fuel

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the addenda to Petitioners' and Respondents' initial briefs.

COUNTER STATEMENT OF FACTS

The Department of Energy (“DOE” or the “Department”), in its Brief (“DOE Br.”), ignores or distorts material facts crucial to this litigation. The required DOE evaluation of the Nuclear Waste Fund (“NWF”) fee adequacy must necessarily consider both the costs for which the fund is supposed to pay and the revenues and funds already collected to pay those costs. DOE’s Statement of Facts ignores the former and glosses over the latter.

I. DOE All But Ignores the Current Size and Continuing Growth of the NWF

When DOE issued the November 1, 2010 *Determination* (R1, JA___), the corpus of the NWF totaled approximately \$24 billion. *Determination* at 2, JA___. DOE more recently predicted that the NWF would reach \$26 billion at the start of Fiscal Year (“FY”) 2012.¹ Even without additional contributions from utility ratepayers, customers, and the nuclear utilities, the NWF accrues interest by over \$1 billion each year; \$1.5 billion is expected to be added in FY 2012. *Id.* Collection of the NWF fee adds over \$750 million annually to the NWF; \$778 million is expected to be added by ratepayers in 2012. *Id.* DOE expects that the NWF corpus will increase to \$28.3 billion by the end of FY 2012. *See id.*

¹ Budget of the U.S. Government, Fiscal Year 2012, Appendix at 415 (“FY 2012 Budget”), *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/doe.pdf> (last visited Oct. 19, 2011).

DOE would all but ignore these key facts. Not until page 38 does one find the Brief's single reference to the \$24 billion NWF balance (as of November 2010), and nowhere does DOE acknowledge that the Fund has grown by another \$2 billion since then. DOE fails to mention in its Brief the over \$1 billion in interest annually added to the NWF absent ratepayer fees. DOE fails to mention in its Brief that it would continue to collect over \$750 million each year. The annual fee assessment must evaluate projected costs and revenues. The *Determination* (and DOE) cannot evade these facts simply by ignoring them. These facts must be considered when assessing whether the *Determination* "evaluate[s] whether collection of the fee will provide sufficient revenues" to offset the costs of the (currently nonexistent) waste disposal program as required under 42 U.S.C. § 10222(a)(4).

II. DOE Has Inexplicably Reversed Its 2009 Rationale for Continued Fee Collection

Without explanation, DOE's November 2010 *Determination* adopts a totally new and different justification for continuing to collect the 1.0 mil fee than that DOE put forward in October 2009. In July 2009, Petitioners requested that DOE's required annual fee adequacy review fully account for the Department's unilateral termination of the Yucca Mountain program by temporarily suspending collection of the NWF fee. These requests were based on (1) the absence of any program

costs against which to assess the adequacy of the fee; (2) the NWF's (then) \$23 billion balance; and (3) the NWF's expected annual interest accruals over \$1 billion.²

In October 2009, DOE rejected these fee suspension requests³ based on the July 27, 2009 Statement of Administration Policy (R40, JA__), which asserted (without explanation) that all of the NWF fees are "essential" to meet the Federal Government's high-level waste ("HLW") and spent nuclear fuel ("SNF") disposal obligations. DOE Letters at 2, JA__.

DOE's November 2010 *Determination* asserts a radically different rationale. The Secretary found "no reasonable basis . . . to conclude that either excess or insufficient funds are being collected," based on the lack of "evidence that would provide a reasoned and sound basis for determining that excess or insufficient revenues are being collected for the costs for which DOE is responsible under the NWPA[]." *Determination* at 1, 6, JA__.

² R37, Letter from Marvin S. Fertel, NEI, to the Honorable Steven Chu, DOE, Re: Performance of Annual Fee Adequacy Analysis and Suspension of Payments to Nuclear Waste Fund (July 8, 2009), JA__; R38, Letter from Frederick F. Butler, *et al.*, NARUC, to the Honorable Steven Chu, DOE (July 8, 2009), JA__.

³ R43, Letter from Christopher A. Kouts, DOE OCRWM, to Marvin S. Fertel, NEI (Oct. 8, 2009) at 1, JA__; R44, Letter from Christopher A. Kouts, DOE OCRWM, to Frederick F. Butler, NARUC (Oct. 8, 2009) at 1, JA__ (collectively, the "DOE Letters").

In other words, in 2009, DOE asserted without qualification that all of the fees were essential to meet its future disposal obligations. In 2010, DOE asserted – in the midst of litigation before this Court – that it could not say whether it was collecting too much or too little. Nowhere does DOE explain its change in rationale.

III. DOE Mischaracterizes Prior Fee Adequacy Reports

DOE's November 2010 *Determination* asserts that its decision to maintain the 1.0 mil fee, notwithstanding the cancellation of the waste disposal program, is no different than the situation prior to Yucca Mountain's designation in 1987 as the only disposal site to be characterized. DOE Br. at 21-22, 27, 49.

The flaws in this argument are clear. Contrary to DOE's theory, DOE had a waste disposal program that pre-existed the 1987 amendments to the Nuclear Waste Policy Act ("NWPA") by decades. The first fee adequacy reports were not based on a blank slate, but on years of siting and technical studies and cost evaluations. DOE repeatedly attempts to justify its continued fee collection because it collected fees starting in 1983 when there was no "defined 'program' in which a particular repository site had been identified and the scale of the repository had not been defined," or "expectation of any definitive plans for SNF disposal for many years." DOE Br. at 49; *See also id.* at 21-22, 27, 36. But even a cursory

review of DOE's pre-1987 fee adequacy evaluations demonstrates that DOE's assertions have no basis in fact.

Take, for example, the 1983 Fee Report.⁴ That Report describes a clearly defined DOE waste disposal program and evaluates its costs. The 1983 Fee Report “present[ed] the results of extensive analyses that explored the costs of implementing a waste disposal program,” using a “reference case” that “presuppose[d] the construction of two geologic repositories which would be ready to accept emplacement of either [SNF] or reprocessing waste in 1998 and 2002.” 1983 Fee Report at 1, JA___. Consistent with the express requirements of NWPA §§ 302(a)(4) and (d), and despite DOE's not having yet designated a specific repository location, the 1983 Fee Report considered and evaluated numerous program assumptions, including a design capacity of 72,000 metric tons of SNF/HLW for each of the two repositories, anticipated SNF/HLW receipt rates, the age of the waste to be disposed, waste packaging, the manner of waste emplacement, retrievability of the waste, and transportation of the waste from a reprocessing plant and/or reactor sites. *Id.* at 9, JA___. *See also id.* at 12-22 (providing specific dollar estimates for the evaluated program costs).

⁴ R3, DOE, Nuclear Waste Policy Act Project Office, Report on Financing the Disposal of Commercial Spent Nuclear Fuel and Processed High-Level Radioactive Waste, DOE/S-0020/1 (July 1983) (the “1983 Fee Report”), JA___.

Recognizing that the program was bound to change over time, the 1983 Fee Report also evaluated “sensitivity cases relating to the key elements of the system” to better “understand waste management as a system” by analyzing variables in many of the program assumptions. *Id.* at 23-26, JA___. Nor was the 1983 Fee Report the first DOE study to evaluate the costs of a waste disposal program. It references studies DOE prepared in 1978⁵ and 1980⁶ “to develop a method which allows the Federal government to recover relevant waste management program costs” based on “the principle of full cost recovery.” *Id.* at 4, JA___.

Nor does the November 2010 *Determination* include a revenue analysis. In stark contrast, the 1983 Fee Report assessed the adequacy of the 1.0 mil fee by calculating anticipated revenues and expected interest accrual based on defined assumptions. 1983 Fee Report at 30, JA___. That Report assumes “nuclear capacity and energy generation forecasts” prepared by the Energy Information Administration, and concluded that “[r]evenues generated from the 1.0 mil[] per kwhr fee, including interest earnings, provide reasonable assurance that sufficient

⁵ U.S. Department of Energy, Preliminary Estimates of the Charge for Spent Fuel Storage and Disposal Services. Document DOE/ET-0055. Washington D.C., July 1978, cited at 1983 Fee Report at 40, JA.

⁶ U.S. Department of Energy, Report on the Fee for Spent Nuclear Fuel Storage and Disposal Services. Document DOE/SR-0006/UC-85. Washington, D.C., October 1980, cited at 1983 Fee Report at 40, JA.

funds will be available to meet reference case program costs, assuming 3 percent annual inflation.” *Id.* at 30-31, JA__.

A similar review of the 1984, 1985, 1986, and 1987 fee adequacy reports shows that, notwithstanding the absence of a specific designated site, DOE estimated the costs for a waste disposal program and compared those costs to the anticipated fee and interest revenues as the basis for determining that the 1.0 mil fee remained adequate. *See* R4-R7, JA__.

In short, DOE now attempts to bootstrap its inadequate 2010 *Determination* by incorrectly claiming that the earlier reports reflected a “disposal program not yet mature enough for an accurate estimate of costs.” *E.g.*, DOE Br. at 36. This is simply not true.

IV. DOE’s Straw-man Factual Arguments Mischaracterize Petitioners’ Positions

DOE attempts to distract this Court with assertions in its Brief that are not in dispute, are not the basis for Petitioners’ claims, or are otherwise irrelevant to this litigation.

For example, DOE repeatedly asserts that SNF generators (and their ratepayers and customers) are obligated to pay the costs of the waste disposal program, DOE Br. at 7, 12, 48, 49, 50-51, erroneously suggesting that Petitioners

seek to evade paying the costs for such disposal. Petitioners have never made such an argument. Given the NWF \$26 billion balance, which annually increases by more than \$1 billion, the issue is not the SNF generators' and their ratepayers' and customers' obligation to pay for disposal, but how much more they should pay until DOE conducts a program cost analysis justifying additional collection.

DOE also asserts that the utilities' and DOE's contractual obligations are "not depend[ent] upon development of a repository at Yucca Mountain." DOE Br. at 17; *id.* at 19. Petitioners have never claimed that they were. Though precipitated by DOE's termination of the purportedly "unworkable" Yucca Mountain program, this lawsuit is about DOE's failure to perform a fee adequacy assessment that takes into account the Department's unilateral abandonment of the waste disposal program; the current absence of a program to take its place (whose costs can be assessed); the absence of any schedule for enacting and implementing a replacement program; the \$26 billion NWF balance and its \$1.5 billion annual interest accruals; and DOE's failure to prepare an appropriate fee adequacy assessment.

DOE also asserts that the waste disposal program's costs must include not only current costs, but also future program costs, DOE Br. at 19, 20, 26, 49, erroneously implying that Petitioners demand that the fee evaluation be based only

on current program costs. DOE also claims that Petitioners unreasonably demand that DOE identify with specificity all costs that DOE will incur in the future (*id.* at 25), and that Petitioners appear to suggest that ratepayers should only pay the fee when DOE is constructing or using a repository. *Id.* at 51. These claims are groundless. DOE's fee evaluation must be based on current and future program costs and fee revenue projections, and the waste disposal program will require the expenditure of funds long before the construction and operation of disposal facilities. The problem here is that the *Determination* (unlike all prior annual fee evaluations) is not based on, and nowhere mentions any, program costs or revenue projections. When DOE establishes a waste disposal program and sets a schedule for implementing that program, it can evaluate the future costs of that program against future revenue projections to determine the appropriate fee.

Another straw-man argument is DOE's assertion that "not a single nuclear utility plaintiff in the Court of Federal Claims has ever argued that DOE has no nuclear waste program or will never dispose of their waste." DOE Br. at 24. This assertion is a complete *non sequitur* and irrelevant to this litigation. The utility plaintiffs sued DOE in the Court of Federal Claims for breach of contract in failing to meet the statutorily and contractually obligated deadline to dispose of SNF/HLW beginning January 31, 1998. That litigation concerns damages that the utilities suffered as a result of DOE's failure to meet the deadline, including the

costs of constructing onsite storage capability to mitigate DOE's breach. The existence of a waste disposal program and whether DOE will ever dispose of the waste are simply not part of that litigation.⁷

⁷ Plaintiffs in those cases are limited to damages through the date of trial. *Ind. Mich. Power Co. v. U.S.*, 422 F.3d 1369 (Fed. Cir. 2005), Future damages, for which the nature of DOE's future performance might be relevant, are simply irrelevant in those cases.

ARGUMENT SUMMARY

Rather than complying with the NWPA requirement to annually evaluate the costs of the nuclear waste disposal program and determine whether the fees that have been and are being collected from ratepayers and utilities offset those costs, DOE has concluded that it must continue collecting the same fee it has been collecting since 1983 because it cannot determine that too much or little revenue is being collected. This conclusion ignores the explicit NWPA requirements. It is inconsistent with DOE's own explanation for its action in 2009. DOE's November 2010 *Determination* continues to require utility customers, ratepayers and utilities to pay upwards of \$750 million each year notwithstanding an existing fund of \$26 billion, growing by more than \$1 billion each year.

DOE's claimed inability to determine whether the fee is too high is of its own making and wholly inconsistent with the Congressional mandate established by the NWPA. DOE, without explanation or any technical or other articulated basis, declared that the planned repository at Yucca Mountain is "unworkable," and thereby unilaterally terminated the nuclear waste program. This termination clearly bears on the determination of whether the NWF is sufficient to offset program costs, as no program currently exists, and it is unclear what disposal program will be established in the future and whether that program will cost more, less, or the same as the Yucca Mountain program. DOE's reliance on the Yucca

Mountain program as a proxy, and one that DOE admits is “imperfect” at that, is misplaced and should not be permitted to stand.

By not following NWPA’s explicit commands, by changing positions without explanation, and by relying on an “imperfect proxy” which DOE itself will not consider, DOE’s *Determination* is unworthy of deference and is arbitrary, capricious and not in accordance with the law. This Court should order DOE to promptly take the steps necessary to suspend the fee, and not give DOE yet another opportunity to deprive the nuclear utilities, their ratepayers and customers of the statutory protection that would result from a proper fee adequacy review.

ARGUMENT

I. DOE's Determination Fails to Meet the NWPA's Explicit Statutory Requirements and Deserves No Deference

The NWPA explicitly prescribes how DOE shall conduct the annual fee adequacy evaluation. The November 2010 *Determination* fails to comply with these explicit statutory requirements and is therefore entitled to no deference. Even if the NWPA did not provide explicit direction for the fee adequacy evaluation, the *Determination* is so lacking in logic and support that it is arbitrary and capricious and thus entitled to no deference.

A. Congress Explicitly Directed How DOE Shall Conduct the Annual Fee Evaluation

Under the first step of the Supreme Court's *Chevron* analysis, "[i]f 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." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (footnote omitted). Here, Congress unambiguously expressed how DOE is to conduct the annual fee review:

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.

42 U.S.C. § 10222(a)(4) (emphasis added). Thus, twice within two sequential sentences, Congress explicitly tied the annual fee evaluation to a determination of the program costs defined in Section 302(d). DOE has to determine revenues and costs, then whether revenues will offset costs.

Congress' language cannot be ignored. But this is exactly what DOE asks this Court to do. Both the *Determination* and DOE's Brief assert that "Congress did not specify the manner in which the Secretary had to conduct this [fee] review or make his determination." DOE Br. at 9; *See also id.* at 49-50; *Determination* at 7, JA___. Rather, DOE contends that "the NWPA simply requires the Secretary to review the fee amount 'annually,'" no more and no less. DOE Br. at 24-25. DOE claims that the statute "leaves all other aspects of the review, including the manner in which he identifies and evaluates costs, to the Secretary's discretion." *Id.* at 28 (emphasis added); *see Determination* at 7.

DOE interprets Section 302(a)(4) as if a significant portion of that provision does not exist. The statutory requirement for a fee assessment does not end after the words "annually review," nor does it leave open what the Secretary is to determine. DOE would blue-pencil out of the statute the phrase "sufficient revenues to offset the costs as defined in subsection (d) of this section." It would

similarly ignore the phrase “the costs incurred by the Federal Government that are specified in subsection (d) of this section.” Congress carefully articulated the basis of the calculation that must support and accompany the fee review, and “in our system of government, an agency is not at liberty to override the clearly expressed intent of Congress.” *Wis. Elec. Power Co. v. U.S.*, 778 F.2d 1, 8 (D.C. Cir. 1985) (“*WEPCO*”). DOE’s interpretation would eviscerate what Congress prescribed not once but twice in Section 302(a)(4). As this Court held in overturning an earlier DOE attempt to ignore Congress’s explicit direction in the NWPA, “deference is not accorded to any agency interpretation that overrides the clearly expressed intent of Congress.” *Consol. Edison Co. of N.Y. v. DOE*, 870 F.2d 694, 696 (D.C. Cir. 1989) (“*ConEd*”).

B. Even If the NWPA Were Not Explicit, DOE’s “Evaluation” Violates the NWPA

Even if it were true that the NWPA leaves to DOE’s discretion how to evaluate the adequacy of the fee, DOE’s evaluation nevertheless deserves no *Chevron* deference. Under the second step in the *Chevron* analysis, if Congress’ intent is unclear, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron*, 467 U.S. at 843 (emphasis added) (footnote omitted). Here, DOE attempts to paper over ignoring the statutory mandate by asserting that, “to the extent there is information bearing

on the total cost of alternative means of disposing of the materials at issue, that information supports retaining the fee at its current level.” *Determination* at 8. DOE seeks to credit the previous cost estimate for the now terminated Yucca Mountain repository, and the prior fee adequacy evaluations that consistently found the fee to be adequate to pay for that program. *Id.* But, nothing in the NWPA remotely suggests that DOE may substitute the costs of a “proxy” waste disposal program in its annual review. Even more inventive and inconsistent with the statutory directive is DOE’s reliance on the “imperfect” Yucca Mountain proxy that DOE terminated because it deemed the program “unworkable.” There would be no point in requiring DOE to conduct an annual fee review if all it had to do was point to the costs of an “unworkable” and now terminated program to justify continued fee collection.⁸

DOE would excuse its failure to comply with the statute by asserting that Petitioners “offer no competing proxy or cost estimate,” DOE Br. at 38, and “have not identified any better method of analyzing future potential disposal costs for the purpose of determining the most appropriate fee amount.” *Id.* at 56. But that is not

⁸ The Blue Ribbon Commission on America’s Nuclear Future (“BRC”), cited by DOE numerous times (*e.g.*, Br. at 19-20, 38, 54, 56 n.10) may make any number of recommendations concerning a replacement waste disposal program and the schedule for implementing such program. Whatever recommendations BRC makes, DOE adopts, and Congress enacts, some may be less costly than DOE’s proxy, and/or may not require additional fees to offset their costs.

a burden placed upon Petitioners. The NWPA obligates the DOE Secretary to conduct the fee review. Further, the issue here is not finding a “better” method of “determining an appropriate fee.” Nor is it a dispute over fine-tuning the details of the cost calculations for a particular program (which DOE has never performed). The issue is DOE’s wholesale failure to conduct a fee review according to the method specified in the statute.

DOE relies on *General Electric Uranium Management Corp. v. DOE*, 764 F.2d 896 (D.C. Cir. 1985) (“*GEUMCO*”), for the proposition that *Chevron* deference applies generally to DOE interpretations of NWPA provisions. DOE Br. at 39. But this Court has twice rejected DOE interpretations of the NWPA fee where those interpretations (just like the *Determination*) read out of existence explicit NWPA requirements. *WEPCO*, 778 F.2d at 4 (“The Secretary’s interpretation would thus have the unhappy result of obliterating express language from the subsection [302](a)(2) provision”); *ConEd*, 870 F.2d at 697-98. This Court has also rejected DOE’s interpretation of other NWPA provisions, *see Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272 (D.C. Cir. 1996), and subsequently issued a writ of mandamus barring DOE actions inconsistent with this Court’s NWPA interpretation. *Northern States Power Co. v. DOE*, 128 F.3d 754, 759 (D.C. Cir. 1997) (“*NSP*”). While the *GEUMCO* decision found deference supported by an administrative record which illustrated that “DOE fully and fairly

considered the matter in issue “in a detailed and reasoned fashion,” 764 F.2d at 905, the *Determination* contains no such detailed or reasoned consideration. Further, unlike the *Determination*, the *GEUMCO* decision concerned a DOE rulemaking. *Id.* at 907.

Beyond the fact that DOE’s arguments are impermissible constructions of the NWPA, no *Chevron* deference is due here where, as explained in Petitioners’ opening Brief, the *Determination* is the result of no formal administrative procedure at all. *Chevron* deference is warranted only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” *U.S. v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Such delegation may be shown by “an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent,” *id.* at 227, or inferred when Congress “provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.” *Id.* at 230. The *Determination*, however, resulted from neither rulemaking, adjudication, nor other formal administrative procedure. In such circumstances, *Mead* holds that the standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), applies: “The weight accorded to [the *Determination*] ‘will depend

upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade” *Mead*, 533 U.S. at 228 (emphasis added) (quoting *Skidmore*, 323 U.S. at 140); *see also Gonzales v. Oregon*, 546 U.S. 243, 256 (2006).

DOE contends that, despite the lack of formal administrative procedure, *Mead* does not preclude *Chevron* deference because Congress explicitly delegated to DOE the authority to conduct an annual fee evaluation. DOE Br. at 40. Although Congress’s delegation directed that the Secretary perform the annual fee evaluation, that delegation does not give him free rein to ignore the methodology that the NWPA specifies. Furthermore, nowhere in the *Determination* or in DOE’s Brief does DOE attempt to explain what processes it employed to “foster the fairness and deliberation that should underlie the pronouncement of such force.” *Mead*, 533 U.S. at 230.⁹

DOE attempts to compare the *Determination* to cases where *Chevron* deference was accorded to administrative determinations that were not the result of

⁹ DOE also suggests that the Secretary’s fee determination is entitled to deference because it has the force and effect of law subject only to legislative veto by both houses of Congress. DOE Br. at 40 (citing *Al. Power Co. v. DOE*, 307 F.3d 1300 (11th Cir. 2002)). DOE’s position, however, would impermissibly insulate not only the fee evaluation but almost every other agency decision carrying the force and effect of law from any judicial review.

notice and comment rulemaking or adjudications. DOE Br. at 39-45. None of these comparisons help DOE. For example, in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995), under the second step in the *Chevron* analysis the Court accorded deference to an agency letter ruling in response to an individual licensing application. DOE Brief at 41. However, *NationsBank* preceded *Mead*. Moreover, the Court found the agency's determination "in accord with the legislature's intent" and otherwise "reasonabl[e]" where the agency provided detailed factual determinations and reasoning in the letter ruling. 513 U.S. at 259, 264. Here, the *Determination* is devoid of any reasoned analysis of Section 302(d) program activity costs and fee revenues, and the arguments advanced in the *Determination* and DOE's Brief for its failure to perform such analysis contradict the NWPA.

DOE also cites *Village of Barrington v. Surface Transportation Board*, 636 F.3d 650 (D.C. Cir. 2011), DOE Br. at 42-43, but in that case the Court accorded *Chevron* deference where the agency engaged in a multitude of formal administrative processes prior to its ruling, including several Federal Register notices, media and community outreach, 22 public hearings, environmental impact statements, and a reasoned opinion directly construing the statute. 636 F.3d at 659. The *Determination* involved none of this.

C. The Determination Should Be Accorded No Weight and is Arbitrary and Capricious

Because the *Determination* does not qualify for *Chevron* deference, the *Skidmore* analysis applies. *Mead*, 533 U.S. at 228. Under that analysis, the *Determination* should be accorded no weight because it evidences neither thorough nor valid reasoning, and because it is inconsistent with the manner in which prior fee evaluations were conducted. *Skidmore*, 323 U.S. at 140. For the same reasons, the *Determination* is arbitrary and capricious.

The *Determination* is supported by no record nor any reasoned explanation. The *Determination* lacks any analysis of the anticipated Section 302(d) costs, and any calculation of the fees expected to be collected.¹⁰ The only consideration of costs advanced by DOE are statements of counsel in DOE's Brief that the costs for a waste disposal program will not be zero, DOE Br. at 26, and will be "massive." DOE Br. at 52. These bare assertions hardly suggest any detailed or reasoned consideration. Nor is there any explanation (let alone a reasoned one) in the *Determination* or the Brief of why the "massive" \$26 billion NWF balance growing at well over \$1 billion annually is not sufficient to meet the Department's obligations.

¹⁰ Because DOE disclosed no such analysis and no such calculations in response to a Freedom of Information Act request from Petitioners' counsel, it is fair to conclude that none exists.

Also unreasonable is DOE's claim that, in the absence of evidence showing that insufficient or excess revenues are being collected, "the NWPA requires (or, at the least, permits) the amount of the waste fee to remain at the amount set by the NWPA itself." *Determination* at 8. The NWPA contains no such language. Further, this rationale is radically different than the one advanced by DOE in 2009 to justify continued collection of the fee (that all of the fees are essential to meet the costs of its waste disposal obligations), *see* p. 4, *supra*, and thus appears to be mere *post hoc* rationalization of its actions or failures to act, which longstanding precedent holds it may not do. *WEPCO*, 778 F.2d at 5.

Moreover, DOE's rationale is even more unreasonable because its failure to come up with any "evidence" (*Determination* at 8) justifying continued fee collection results from its own actions. DOE unilaterally terminated the statutorily mandated waste disposal program without any basis other than a vague claim that it was "unworkable," and without any program to take its place. DOE's own deliberate actions cannot excuse its failure to comply with the explicit terms of Section 302(a)(4).¹¹

¹¹ *See NSP*, 128 F.3d at 756, 761 ("precluding DOE from advancing any construction of the Standard Contract that would excuse its delinquency" to begin SNF disposal by the statutorily mandated deadline "on the ground that it has not yet established a permanent repository or an interim storage program" because such ground would absolve it of its own failure to act).

The *Determination* also lacks persuasive force because, without explanation or justification, it markedly departs from the manner in which prior annual fee evaluations were performed. The earliest fee adequacy reports show that, notwithstanding the absence of a specific designated site, DOE evaluated a waste disposal program whose costs it could assess, then compared those costs to the anticipated revenues. See discussion at pp. 5-8, *supra*.

The *Determination* contains no such analyses. There are no “nebulous calculations” in the *Determination*, indeed no calculations of any sort, thus DOE’s reliance on the Eleventh Circuit’s discussion of an “insurmountable burden of proof” in *Alabama Power* (DOE Br. at 36-37) is inapplicable here. While the Eleventh Circuit suggested that it might be difficult to successfully challenge a fee evaluation that actually assessed the costs of a program and the revenues collected, DOE undertook no such evaluation here.

Despite DOE’s suggestion that its expertise warrants deference to the *Determination*, DOE Br. at 42, there is no evidence that DOE has applied any expertise in this case. Whatever DOE’s current expertise,¹² it has not applied that

¹²It is worth noting that the “Office of Standard Contract Management” whose Director issued the *Determination*, is a part of the DOE’s Office of General Counsel. The Office of Civilian Radioactive Waste Management, created by the NWPA to carry out the nuclear waste program, was unilaterally abolished by DOE prior to the issuance of the *Determination*.

expertise in a reasoned or transparent fashion, but instead “seeks to invoke its institutional expertise as a license for making unarticulated findings.” *Tripoli Rocketry Ass’n, Inc. v. ATFE*, 437 F.3d 75, 83 (D.C. Cir. 2006) (declining to defer to an agency’s technical determination that “articulated no reasoned basis for its decision,” which was “founded on unsupported assertions or unstated inferences”). The Court will not defer to “whatever conclusion an agency proffers merely because the conclusion reflects the agency’s judgment.” *Id.*, 437 F.3d at 77; *see also Village of Barrington*, 636 F.3d at 660 (“If an agency fails or refuses to deploy [its] expertise – for example, by simply picking a permissible interpretation out of a hat – it deserves no deference.”). There is no evidence of expertise on the face of the *Determination*. Other than stating that the “Office of Standard Contract Management” prepared the annual review, no authors are listed and the evaluation contains no citations to any actual analysis of the adequacy of the fee. The Administrative Record contains no expert analysis supporting the *Determination*. In addition, the September 29, 2009 internal memorandum to Energy Secretary Chu from then OCRWM Acting Director Christopher A. Kouts admitted that DOE would not be able to perform the fee adequacy review absent a determination on a replacement waste disposal program.¹³

¹³ R41, Memorandum for the Secretary, from Christopher A. Kouts, Acting Director, OCRWM, Subject: Information: The 2008 Determination of the

DOE cites *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 (1997) for support, DOE Br. at 44, where the Court found that its own interpretation of a statute received “some added persuasive force” because it was consistent with the agency’s “reasonable interpretation” of the statute it administered, even though *Chevron* deference was inapplicable. 521 U.S. at 136. The case here, however, is more like *WEPCO* and *ConEd* because DOE simply ignored the clear statutory language of NWPA Section 302.

In summary, the *Determination* contradicts the Congress’ explicit instructions on how to conduct the annual fee review and is due no deference. All of the arguments DOE offers to excuse its flawed *Determination* are themselves reasonable interpretations of the statute. The *Determination* should be accorded no persuasive force because it contains neither a detailed nor reasoned basis for continuing to collect the fee, and the manner in which it was performed nowhere resembles the manner in which DOE performed prior fee evaluations. Simply put, DOE’s *Determination* is arbitrary, capricious, and not in accordance with law.

II. DOE’s Standard Contract Claims and Fairness Concerns are Without Merit

DOE claims that a court order compelling it to act in accordance with its NWPA fee adequacy obligations will intrude upon litigation pending in the Court

Adequacy of the Nuclear Waste Fund Fee, EXEC-2009-012439 (Sept. 29, 2009) (“Kouts Memorandum”) at 2-3, JA__.

of Federal Claims or otherwise interfere with the Standard Contract by “effectively excusing the utility contract holders of their contractual obligations” and by providing the utilities with a “double...recovery.” DOE Br. at 45-47. It will do no such thing. The Standard Contract itself provides for adjusting the fees. *See* 10 C.F.R. § 961.11 (Standard Contract, Article VIII, § A.4.). DOE can hardly claim interference with the Standard Contract as a result of an adjustment to the fee when the Standard Contract itself provides for such adjustment. In any case, this litigation is about enforcing a statutory obligation imposed on DOE by Congress, not a contractual obligation between the United States and nuclear utilities.

There would be no double recovery for the contract holders. A temporary fee suspension, applied prospectively under the terms of the Standard Contract, will not relieve ratepayers (via the utilities) of their obligation to pay for the costs of a waste disposal program (whatever those costs might be). In contrast, the pending Court of Federal Claims litigation concerns retrospective damages claims only. *See, e.g., Ind. Mich.*, 422 F.3d at 1376-78 (recovery limited to costs incurred prior to date of suit; future damages recoverable as they are incurred).

Nor is the relief Petitioners seek unfair to future generations of ratepayers. Twice before, DOE raised this intergenerational equity objection when utilities claimed that DOE had violated the NWPA in setting the 1.0 mil fee. In both cases,

this Court rejected DOE's argument. *ConEd*, 870 F.2d at 697-98; *WEPCO*, 778 F.2d at 6-8;¹⁴ Just as in *ConEd* and *WEPCO*, the clear wording of the NWPA requires a fee adjustment if excess revenues are being collected to ensure full cost recovery. DOE cannot depart from that clearly expressed direction. *ConEd*, 870 F.2d at 698.

The NWPA requirement for an annual evaluation of the fee, and an appropriate adjustment of the fee based on that evaluation, means that the "fee level is not carved in stone," and thus the statute expressly anticipates that ratepayers will pay more during some periods of time than during others. *WEPCO*, 778 F.2d at 6-7. DOE's assertion that the request relief would result in ratepayers not paying for disposal of the waste generated while the fee is suspended is also contrary to the statute. The NWPA requires payment of fees based on the costs of a waste disposal program, not on a fuel-assembly-by-fuel-assembly basis.

III. Remand to DOE for Further Analysis is Not Appropriate

An order directing DOE to propose a temporary fee suspension until DOE has a new waste disposal program and can evaluate its costs, and the size of the fee

¹⁴This Court found its primary holding in *ConEd* "buttressed" by the fact that NWPA's "review-and-adjustment" procedure for the NWF fee provided "a means to correct the problem which DOE anticipates." 870 F.2d at 698. Applied here, when DOE establishes a new waste disposal program (or reestablishes an old one), DOE must then propose an appropriate fee to ensure full cost recovery for that program.

necessary to offset those costs, is the appropriate remedy and consistent with the NWPA. Such a remedy is also consistent with the Administrative Procedure Act, which vests a reviewing court with explicit authority to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). DOE has a long history of failing to comply with the express terms of the NWPA, and sending the issue back to DOE for yet another evaluation without specific direction will only allow for more of the same conduct.

It may be the case that, where a court has found that an agency decision was contrary to statute or otherwise arbitrary and capricious, remand to the agency for “additional investigation or explanation” typically is the normal course. *BizCapital Bus. & Indus. Dev. Corp. v. Comptroller of the Currency*, 467 F.3d 871, 873 (5th Cir. 2006) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Here, however, there is nothing further for DOE to explain or investigate. It has no current waste disposal program whose costs it can evaluate, and DOE has admitted that it lacks any basis on which it can conduct such review.

Determination at 8; Kouts Memorandum at 2-3.

Further, DOE has already had multiple bites at the apple. In 2009, it claimed that continued fee collection without any adjustment was essential for it to meet its waste disposal obligations. DOE Letters at 1, JA___. In the previous litigation on

this issue, DOE argued that the Kouts Memorandum was the 2009 annual fee review. DOE now contends that the Memorandum simply expressed the view that a total system life cycle cost analysis could not be conducted prior to a decision on waste disposal options. DOE Br. at 55. The November 2010 *Determination* contains no evaluation of any waste disposal program costs versus fee revenues.

These prior attempts by DOE to justify continued collection of the fee absent a valid fee adequacy evaluation have resulted in DOE continuing to collect over \$750 million in each of 2009, 2010, and 2011. Remand back to DOE would only allow it a fourth opportunity to attempt to justify continued fee collection in the absence of any program whose costs could be assessed. In the meantime, Petitioners would be forced to continue paying the fee – with no end in sight – and without any adequate justification from DOE or any remedy.

The authorities that DOE cites to support its assertion that remand is the appropriate remedy are inapplicable here. In *BizCapital*, remand was ordered because the agency “never applied the facts pertinent to [petitioner’s] request against the factors in the [agency’s] regulations.” 467 F.3d 873. Here, however, DOE has admitted (*Determination* at 8) that it has “no evidence” – i.e., a waste disposal program whose costs can be assessed – and therefore there is nothing for DOE to evaluate. In *INS v. Orlando Ventura*, 537 U.S. 12 (2002), the Ninth

Circuit had reversed a Board of Immigration Appeals (“BIA”) rejection of an alien’s asylum claim based in part on an alternative argument that the BIA had not considered or addressed. 537 U.S. at 13. The Supreme Court reversed, holding that the Court of Appeals should have remanded the case to the BIA so that it could rule on the alternative argument in the first instance. *Id.* at 14. Here, there is no alternative argument (or waste disposal program) that DOE has failed to consider.

In *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952), the Supreme Court ruled that the Court of Appeals overstepped its bounds in ruling that conditions placed on a Federal Power Commission license were contrary to law, without first remanding the license back to the Commission. 344 U.S. at 20. The Supreme Court found that, absent the conditions, the Commission’s licensing determination was not pre-ordained. The Commission might have withheld its consent to any license without the specified conditions and thus remand was appropriate. *Id.* Here, “[a] remand is unnecessary where, as here, the outcome of a new administrative proceeding is preordained.” *Am. Train Dispatchers Ass’n v. ICC*, 26 F.3d 1157, 1163 (D.C. Cir. 1994). There is no program whose costs can be evaluated on remand, and therefore no justification for continuing to collect the fee. Therefore, a remand to DOE for further analysis would be futile.

CONCLUSION

The legal framework underlying the Petitions is clear. DOE must annually evaluate the NWF fee to assure that it is generating the funds necessary to offset the waste disposal program costs specified in NWPA 302(d), and propose the fee's adjustment as appropriate.

The facts underlying the Petitions are equally clear. DOE terminated the NWPA-mandated nuclear waste program without any replacement. There is thus no way to determine the Section 302(d) costs, and, therefore, no way to determine a NWF fee sufficient to offset those costs. DOE did not evaluate future revenues and ignored the \$26 billion NWF corpus, increasing by approximately \$1.5 billion each year.

Petitioners respectfully submit that the appropriate relief is also clear. Until such time as there is a waste program whose costs can be assessed, the Court should direct DOE to comply with the NWPA by submitting to Congress a proposal to suspend further fee collection.

Respectfully submitted,

/s/ James Bradford Ramsay*

/s/ Jay E. Silberg

James Bradford Ramsay
General Counsel
Robin Lunt
Assistant General Counsel

Jay E. Silberg
Timothy J. V. Walsh
PILLSBURY WINTHROP SHAW
PITTMAN LLP

NATIONAL ASSOCIATION OF
REGULATORY UTILITY
COMMISSIONERS
1101 Vermont Ave., NW, Suite 200
Washington, DC 20005
(202) 898-2207

Ellen C. Ginsberg
Vice President, General Counsel, and
Secretary
Anne W. Cottingham
Associate General Counsel
NUCLEAR ENERGY INSTITUTE
1776 I St., NW, Suite 400
Washington, DC 20006
202-739-8000

2300 N Street, NW
Washington, DC 20037
(202) 663-8000
Counsel for Nuclear Energy Institute,
Florida Power & Light Company,
NextEra Energy Seabrook, LLC,
NextEra Energy Duane Arnold, LLC,
NextEra Energy Point Beach, LLC,
Omaha Public Power District, PSEG
Nuclear LLC, Indiana Michigan Power
Company, Energy Northwest, PPL
Susquehanna LLC, Northern States
Power Company d/b/a Xcel Energy, The
Detroit Edison Company, Wolf Creek
Nuclear Operating Corporation, Kansas
Gas and Electric Company d/b/a Westar
Energy, Kansas City Power & Light
Company, Kansas Electric Power
Cooperative, Inc., and Nebraska Public
Power District

Dated: October 20, 2011

*James Bradford Ramsay consents to Jay E. Silberg's filing of this document.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that this brief contains 6,969 words. In making this certification, Petitioners' counsel has relied on the word count function of Microsoft Word, the word processing system used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 pt. font Times New Roman type style.

/s/ Jay E. Silberg

Jay E. Silberg
Pillsbury Winthrop Shaw Pittman, LLP
2300 N St., NW
Washington, DC 20037
Tel: (202) 663-8063
Fax: (202) 663-8007
E-mail: jay.silberg@pillsburylaw.com

CERTIFICATE OF SERVICE

I hereby certify that the electronic original of the foregoing “Reply Brief of Consolidated Petitioners” was filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit on this 20th day of October, 2011 through the CM/ECF electronic filing system, and thus also served on counsel of record.

/s/ Jay E. Silberg

Jay E. Silberg
Pillsbury Winthrop Shaw Pittman, LLP
2300 N St., NW
Washington, DC 20037
Tel: (202) 663-8063
Fax: (202) 663-8007
E-mail: jay.silberg@pillsburylaw.com