

SCHEDULED FOR ORAL ARGUMENT ON MARCH 22, 2011

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

No. 10-1050

Consolidated With Nos. 10-1052, 10-1069, 10-1082

IN RE AIKEN COUNTY,
PETITIONER

ON PETITIONS FOR MANDAMUS AND PETITIONS FOR REVIEW
AND INJUNCTIVE RELIEF

FINAL BRIEF FOR RESPONDENTS

JOHN F. CORDES, JR.
Solicitor
Mail Stop 15 D21
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852-2738
(301) 415-1956

CHARLES E. MULLINS
JEREMY M. SUTTENBERG
Office of General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555
(202) 415-2842

ROBERT DREHER
Principal Deputy Assistant Attorney General
Environment & Natural Resources Division

LISA E. JONES
AARON P. AVILA
ALLEN BRABENDER
ELLEN J. DURKEE
Appellate Section, Environment &
Natural Resources Division
Department of Justice
P.O. Box 23795, L'Enfant Plaza Sta.
Washington, D.C. 20026
(202) 514-4426

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici: In addition to the parties, intervenors, and amici listed in Petitioners' Rule 28 certificate, Paul Ryerson, a Judge on the Atomic Safety and Licensing Board, is named as a respondent in No. 10-1050. D.C. Cir. R. 28(a)(1)(A).

(B) Ruling Under Review: Petitioners' brief states that Petitioners seek review of two decisions: (1) a determination allegedly made on or about January 29, 2010, by President Obama, Secretary Chu, and the Department of Energy ("DOE") to withdraw with prejudice a license application for construction of a permanent geologic repository at Yucca Mountain, Nevada, for high-level nuclear waste and spent nuclear fuel; and (2) a determination allegedly made on or about January 29, 2010, by President Obama, Secretary Chu and DOE to "unilaterally and irrevocably terminate the Yucca Mountain repository process." Br. ii. As explained in the Argument Below, there are no rulings properly subject to review by this Court.

Petitioners state that they have claims and seek relief against the Nuclear Regulatory Commission ("NRC"), *see* Br. ii, 66, but do not identify a specific NRC ruling under review.

(C) Related Cases: These cases have not been before this Court previously and there are no related cases.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

GLOSSARY. xviii

STATEMENT OF JURISDICTION. 1

STATUTES AND REGULATIONS. 1

STATEMENT OF ISSUES. 1

STATEMENT OF THE CASE. 2

 A. Nature of the Petitions. 4

 B. Related Proceedings Before NRC. 6

STATEMENT OF FACTS. 7

 A. Statutory and Regulatory Background. 7

 1. Atomic Energy Act and DOE Organization Act. 7

 2. Nuclear Waste Policy Act. 8

 B. Factual Background. 12

SUMMARY OF ARGUMENT. 19

ARGUMENT. 23

 I. Petitioners Lack Article III Standing. 23

 II. Petitioners’ Challenge To The Withdrawal Motion Is Premature. . . 31

 A. Petitioners’ Challenge to the Withdrawal Motion Is Unripe. 31

- ii -

B.	This Court Lacks Primary Jurisdiction.	34
III.	This Court Lacks Jurisdiction And Petitioners Fail To State A Claim Upon Which Relief Can Be Granted.	34
A.	The APA Provides the Cause of Action for the NWPA Claims.	35
B.	This Court Lacks Jurisdiction Under the NWPA and Petitioners Fail to Establish That They Have a Valid APA Cause of Action.	37
1.	The filing of the motion to withdraw the license application is not final agency action under the NWPA or APA.	37
2.	Petitioners cannot challenge DOE’s generalized policy toward Yucca Mountain.	39
3.	Petitioners fail to identify, and preserve a challenge to, any final agency action that they would have standing to challenge.	42
IV.	The Claims Against NRC Should Be Summarily Dismissed.	45
V.	DOE’s Decisions And Actions Do Not Violate the NWPA	47
A.	Standard of Review.	47
B.	The Secretary Has Authority Under the AEA and DOE Organization Act, Preserved by the NWPA, to Move to Withdraw the License Application.	48
C.	There Is No Merit to Petitioners’ Contention That the NWPA Unambiguously Prohibits DOE from Withdrawing the License Application.	56

- iii -

D.	Neither the Language Nor Structure of the NWPA Requires DOE to Maintain a Program to Develop and Construct a Repository at Yucca Mountain.....	64
E.	The Legislative History Does Not Supply the Clear Expression of Congressional Intent That Is Required for Petitioners to Prevail Under <i>Chevron</i> Step One	70
F.	To the Extent Congress’s Intent Is Ambiguous, DOE’s Interpretation Must Be Upheld.....	73
VI.	DOE Has Not Violated NEPA.	74
A.	Standard of Review	74
B.	Petitioners’ Claim That DOE Violated NEPA Lacks Merit.	75
1.	No NEPA analysis was required.	75
2.	DOE satisfied NEPA as to an evaluation of the effects of not building Yucca Mountain.	78
3.	NEPA analysis of an alternative that has not yet been proposed is not required.....	79
VII.	DOE Complied With The APA.	80
VIII.	Petitioners’ Separation Of Powers Argument Is Irrelevant.	83
IX.	The Court Should Not Issue A Writ of Mandamus Or An Injunction.	83
A.	The Criteria For Mandamus Are Not Met.	83

- iv -

B.	Petitioners' Request for an Injunctive Must Be Denied Because They Fail to Demonstrate That They Will Suffer Irreparable Harm in the Absence of an Injunction.	85
X.	The Court Should Dismiss The President As A Named Defendant Or, Alternatively, It Should Decline To Direct Any Relief At The President	87
	CONCLUSION.	88
	CERTIFICATE OF COMPLIANCE	90
	CERTIFICATE OF SERVICE.	91

TABLE OF AUTHORITIES

Cases:

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967). 32

Alaska Dep't of Env'tl. Conserv. v. EPA,
540 U.S. 461 (2004). 74

Andrus v. Sierra Club,
442 U.S. 347 (1979). 76

*Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed.
Reserve Sys.*, 745 F.2d 677 (D.C. Cir. 1984). 80

Auer v. Robbins,
519 U.S. 452 (1997). 74

Bennett v. Spear,
520 U.S. 154 (1997). 37

Boston Edison Co. (Pilgrim Nuclear Generating Station, Units 2 and 3),
8 A.E.C. 324 (1974).. 53

****Bullcreek v. NRC**,
359 F.3d 536 (D.C. Cir. 2004). 50,51,55,73

California ex rel Lockyer v. USDA,
575 F.3d 999 (9th Cir. 2009). 76

Catawba County, N.C. v. EPA,
571 F.3d 20 (D.C. Cir. 2009). 86

** Authorities upon which we chiefly rely are marked with asterisks.

- vi -

<i>Center for Law and Educ. v. Dep't of Educ.</i> , 396 F.3d 1152 (D.C. Cir. 2005).	27
<i>Chaplaincy of Full Gospel Churches v. England</i> , 454 F.3d 290 (D.C. Cir. 2006).	86
<i>**Chevron U.S.A. Inc. v. NRDC</i> , 467 U.S. 837 (1984).	47
<i>City of Dania Beach, Fla. v. FAA</i> , 485 F.3d 1181 (D.C. Cir. 2007).	28
<i>City of Olmstead Falls v. FAA</i> , 292 F.3d 261 (D.C. Cir. 2002).	23
<i>Cmty for Creative Non-Violence v. Pierce</i> , 814 F.2d 663 (D.C. Cir. 1987).	26
<i>Cobell v. Kempthorne</i> , 455 F.3d 301 (D.C. Cir. 2006).	40
<i>Coeur Alaska v. Southeast Conserv. Council</i> , 129 S. Ct. 2458 (2009).	74
<i>Comcast v. FCC</i> , 600 F.3d 642 (D.C. Cir. 2010).	34
<i>Commissioner v. Estate of Bosch</i> , 387 U.S. 456 (1967).	52
<i>Consolidated Edison Co. v. FERC</i> , 347 F.3d 964 (D.C. Cir. 2003).	42
<i>County of Esmeralda, Nevada v. DOE</i> , 925 F.2d 1216 (9th Cir. 1991).	36

- vii -

<i>Dalton v. Spector</i> , 511 U.S. 462 (1994).	87
<i>Dep't of Transp. v. Public Citizen</i> , 541 U.S. 752 (2004).	74
<i>Devia v. NRC</i> , 492 F.3d 421 (D.C. Cir. 2007).	34
<i>DRG Funding Corp. v. Sec'y of Housing and Urban Dev.</i> , 76 F.3d 1212 (D.C. Cir. 1996).	39
<i>Duke Power Co. (Perkins Nuclear Power Station, Units 1, 2, and 3)</i> , 16 N.R.C. 1128 (1982).	53
<i>eBay Inc. v. MercExchange</i> , 547 U.S. 388 (2006).	86
<i>Ecology Center v. U.S. Forest Serv.</i> , 192 F.3d 922 (9th Cir. 1999).	39
<i>Federal Exp. Corp. v. Holowecki</i> , 552 U.S. 389 (2008).	74
<i>Federal Trade Comm'n v. Standard Oil Co. of California</i> , 449 U.S. 232 (1980).	38
<i>Foretich v. United States</i> , 351 F.3d 1198 (D.C. Cir. 2003).	24
**Franklin v. Massachusetts , 505 U.S. 788 (1992).	38,87,88
<i>Friends of the Earth v. Laidlaw Envtl. Servs.</i> , 528 U.S. 167 (2000).	23

- viii -

<i>**Fund for Animals v. BLM,</i> 460 F.3d 13 (D.C. Cir. 2006).	40,43,47
<i>General Elec. Uranium Mgmt. Corp. v. DOE,</i> 764 F.2d 896 (D.C. Cir. 1985).	52,73
<i>Gulfstream Aerospace Corp. v. Maycamas Corp.,</i> 485 U.S. 271 (1988).	84
<i>Heckler v. Chaney,</i> 470 U.S. 821 (1985).	44,50
<i>Hudson v. FAA,</i> 192 F.3d 1031 (D.C. Cir. 1999).	81,82
<i>I.C.C. v. Brotherhood of Locomotive Engn's,</i> 482 U.S. 270 (1987).	35
<i>Illinois Commerce Comm'n v. ICC,</i> 848 F.2d 1246 (D.C. Cir. 1988).	78
<i>In re GTE Serv. Corp.,</i> 672 F.2d 1024 (D.C. Cir. 1985).	84
<i>Indiana Michigan Power Co. v. DOE,</i> 88 F.3d 1272 (D.C. Cir. 1996).	19,73
<i>Karst Envl't. Educ. and Prot. v. EPA,</i> 475 F.3d 1291 (D.C. Cir. 2007).	75
<i>Kootenai Tribe of Idaho v. Veneman,</i> 313 F.3d 1094 (9th Cir. 2001).	76
<i>Laguna Greenbelt v. U.S. DOT,</i> 42 F.3d 517 (9th Cir. 1994).	79

<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993).	50
** <i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).	23,24,26,28
** <i>Lujan v. Nat'l Wildlife Fed'n</i> , 497 U.S. 871 (1990).	38,40,79
<i>Martin v. Occupational Safety & Health Review Comm'n</i> 499 U.S. 144 (1991).	73,74
<i>Massachusetts v. Mellon</i> , 262 U.S. 447 (1923).	30
<i>Massachusetts v. NRC</i> , 878 F.2d 1516 (1st Cir. 1989).	49
** <i>Metropolitan Edison Co. v. People Against Nuclear Energy</i> , 460 U.S. 763 (1983).	76
** <i>Monsanto v. Geertson Seed Farms</i> , 130 S. Ct. 2743 (2010).	85,86
<i>Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).	82
<i>NARUC v. DOE</i> , 851 F.2d 1424 (D.C. Cir. 1988).	9,52
<i>National Ass'n of Home Builders v. Defenders of Wildlife</i> , 551 U.S. 644 (2007).	50
<i>Nat'l Park Hospitality Ass'n v. Dep't of Interior</i> , 538 U.S. 803 (2003).	32

- x -

<i>Nat'l Wildlife Fed'n v. Espy</i> , 45 F.3d 1337 (9th Cir. 1995).	76
<i>Nebraska Public Power Dist. v. United States</i> , 590 F.3d 1357 (Fed. Cir. 2010).. . . .	36
<i>Nevada ex rel. Loux v. Herrington</i> , 777 F.2d 529 (9th Cir. 1985).	73
<i>Nevada v. Burford</i> , 918 F.2d 854 (9th Cir. 1990).	30
<i>Nevada v. DOE</i> , 133 F.3d 1201 (9th Cir. 1998).	36
<i>Nevada v. DOE</i> , 457 F.3d 78 (D.C. Cir. 2006).	74,78
<i>Nevada v. DOE</i> , 993 F.2d 1442 (9th Cir. 1993).	73
<i>Newark Morning Ledger Co. v. United States</i> , 507 U.S. 546 (1993).	55
<i>Northcoast Env'tl. Center v. Glickman</i> , 136 F.3d 660 (9th Cir. 1998).	79
<i>**Norton v. S. Utah Wilderness Alliance ("SUWA")</i> , 542 U.S. 55 (2004).	39,40
<i>Nuclear Energy Institute, Inc. v. EPA</i> , 373 F.3d 1251 (D.C. Cir. 2004).	66,88
<i>Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs</i> , 570 F.3d 327 (D.C. Cir. 2009).	85

- xi -

<i>Ohio Forestry Assoc. v. Sierra Club</i> , 523 U.S. 726 (1998).	32,79
<i>Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2)</i> , 14 N.R.C. 967 (1981).	53
<i>Public Citizen v. NRC</i> , 573 F.3d 916 (9th Cir. 2009).	49
**Public Citizen v. NRC , 845 F.2d 1105 (D.C. Cir. 1988).	33,37,39,41,47
<i>Public Citizen v. Office of U.S. Trade Representative</i> , 970 F.2d 916 (D.C. Cir. 1992).	31
<i>Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1)</i> , 14 N.R.C. 1125 (1981).	53
<i>Reichelder v. Quinn</i> , 287 U.S. 315 (1932).	67
<i>Salmon Spawning & Recovery Alliance v. Gutierrez</i> , 545 F.3d 1220 (9th Cir. 2008).	27
<i>Save our Heritage v. FAA</i> , 269 F.3d 49 (1st Cir. 2001).	79
<i>Sheet Metal Workers Intern. Ass'n, Local 270, AFL-CIO v. NLRB</i> , 561 F.3d 497 (D.C. Cir. 2009).	33
<i>Shoreham-Wading River Central School Dist. v. NRC</i> , 931F. 2d 102 (D.C. Cir. 1991)	69
<i>Siegel v. Atomic Energy Comm'n</i> , 400 F.2d 778 (D.C. Cir. 1968).	49

<i>Sierra Club v. EPA</i> , 292 F.3d 895 (D.C. Cir. 2002).	23,24,29
<i>Skidmore v. Swift & Co.</i> , 323 U.S. 134 (1944).	74
<i>State of Nevada v. Watkins</i> , 939 F.2d 710 (9 th Cir. 1991)	36,39
<i>State of Washington v. Chu</i> , No. 08-5085-FVS (E.D. Wa.).	29
<i>**Summers v. Earth Island Inst.</i> , 129 S. Ct. 1142 (2009).	27,44
<i>Swan v. Clinton</i> , 100 F.3d 973 (D.C. Cir. 1996).	88
<i>TeleSTAR, Inc. v. FCC</i> , 888 F.2d 132 (D.C. Cir. 1989).	33
<i>Texas v. United States</i> , 523 U.S. 296 (1998).	32,33
<i>The Wilderness Society v. Norton</i> , 434 F.3d 584 (D.C. Cir. 2006).	27,28
<i>Toca Producers v. FERC</i> , 411 F.3d 262 (D.C. Cir. 2005).	32
<i>U.S. ex rel. Miller v. Bill Harbert Intern. Const.</i> , 608 F.3d 871 (D.C. Cir. 2010).	46
<i>United States v. Kentucky</i> , 252 F.3d 816 (6 th Cir. 2001).	50

- xiii -

<i>United States v. Morros</i> , 268 F.3d 695 (9th Cir. 2001).	67
<i>United States v. Nixon</i> , 418 U.S. 683 (1974).	52
<i>United States v. Nordic Village, Inc.</i> , 503 U.S. 30 (1992).	87
<i>United States v. West</i> , 392 F.3d 450 (D.C. Cir. 2004).	46
<i>United States v. Wilson</i> , 290 F.3d 347 (D.C. Cir. 2002).	55
<i>Upper Snake River Chapter of Trout Unlimited v. Hodel</i> , 921 F.2d 232 (9th Cir. 1990).	76
<i>Vimar Seguras y Reasegures, S.A. v. M/V Sky Reefer</i> , 515 U.S. 528 (1995).	51
<i>Weinberger v. Catholic Action of Hawaii/Peace Educ.</i> , 454 U.S. 139 (1981).	79
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990).	25
<i>Youngstown Sheet & Tube Co v. Sawyer</i> , 343 U.S. 579 (1952).	22,83

STATUTES:

Administrative Procedure Act	
5 U.S.C. § 551(13).	1,43
5 U.S.C. § 553(c)..	1,80,81
5 U.S.C. § 701(a)(2).	44,50
5 U.S.C. § 703.	35

5 U.S.C. § 704.....	37
5 U.S.C. § 706(2).	40
5 U.S.C. § 706(2)(A).....	74
Atomic Energy Act	
42 U.S.C. § 2011 <i>et seq.</i>	7
** 42 U.S.C. § 2013.....	1,8
** 42 U.S.C. § 2201.....	7
42 U.S.C. § 2201(b).	7
42 U.S.C. § 2201(i)(3).....	7
Department of Energy Organization Act	
Pub. L. No. 95-91, 91 Stat. 567 (1977)	7
42 U.S.C. § 7101 <i>et seq.</i>	7
** 42 U.S.C. § 7133.....	7
** 42 U.S.C. § 7133(a).....	1
42 U.S.C. § 7133(a)(8)(A).	48
42 U.S.C. § 7133(a)(8)(C).....	8
42 U.S.C. § 7133(a)(8)(G).	8
42 U.S.C. § 7151(a).....	7
42 U.S.C. § 7253.....	18
42 U.S.C. § 7253(a).....	1,44,46
Energy Reorganization Act	
Pub. L. No. 93-438, 88 Stat. 1233 (1974).....	7
42 U.S.C. § 5801 <i>et seq.</i>	7
42 U.S.C. § 5814 (a)-(c).	7
42 U.S.C. § 5841(f).....	7
Hobbs Act	
28 U.S.C. § 2342(4).	84
28 U.S.C. § 2344.....	35
National Environmental Policy Act	
42 U.S.C. § 4332(C).	2,10,75,76

Nuclear Waste Policy Act

Pub. L. No. 100-203, 100th Cong., 1st Sess., §§ 5011(e), (f), and (g) (1987).....	9
42 U.S.C. § 10101 <i>et seq.</i>	8
42 U.S.C. § 10101(12).	8
42 U.S.C. § 10101(23).	8
42 U.S.C. § 10131(a)(2).	13
42 U.S.C. § 10131(a)(4).	52
42 U.S.C. § 10132(b).	9
42 U.S.C. § 10132(b)(1)(E).	36
42 U.S.C. § 10132(b)(3).	58
42 U.S.C. § 10133(a)..	9
** 42 U.S.C. § 10133(c)(3)(A).	9,61,62
42 U.S.C. § 10133(c)(3)(F)..	62
42 U.S.C. § 10134(a)..	9,10,81
** 42 U.S.C. § 10134(b).	11,20,56,57,58,62,85
** 42 U.S.C. § 10134(d).	11,20,52,53,54,55,56,58,59,60,61,62
42 U.S.C. § 10134(e)(2).	62
42 U.S.C. § 10134(f)(5).	54,55
42 U.S.C. § 10135.....	9
42 U.S.C. § 10135(b).	10
42 U.S.C. § 10136(b)(2).	10
42 U.S.C. § 10135(c)..	11
42 U.S.C. § 10139(a)..	1,34,35,37,41,46
42 U.S.C. § 10139(a)(1).	87
42 U.S.C. § 10139(c)..	41
42 U.S.C. § 10156(a)(1).	58
42 U.S.C. § 10162(a)..	58
42 U.S.C. § 10165(b).	49
42 U.S.C. § 10168(d).	49
42 U.S.C. § 10224(a)..	16,44
 Pub. L. No. 111-85, 123 Stat. 2845, 2864-65(2009).	 1,17

RULES and REGULATIONS:

**10 C.F.R. § 2.107..	1,11,12,53,54,55
10 C.F.R. § 63.121..	1,66
40 C.F.R. § 1500.4..	1,78
40 C.F.R. § 1502.4..	1,78
40 C.F.R. § 1502.20..	1,78
40 C.F.R. § 1502.21..	1,78
40 C.F.R. § 1508.12..	1,10
40 C.F.R. § 1508.17..	1,10,76
27 Fed. Reg. 377 (Jan. 13, 1962).	53
28 Fed. Reg. 10,151 (Sept. 17, 1963)..	53
64 Fed. Reg. 68,005 (Dec. 6, 1999).	13
66 Fed. Reg. 29,453 (May 31, 2001).	60
75 Fed. Reg. 5,485 (Jan. 29, 2010).	17
75 Fed. Reg. 81,037 (Dec. 23, 2010).	14
Fed. R. App. P. 15(a)(2)(c).	80
Fed. R. App. P. 28(a)(9)(A)..	42

- xvii -

LEGISLATIVE HISTORY:

H.R. 97-5016, 97 th Cong., 1 st Sess. (Nov. 18, 1981).....	55,58
H.R. 5360,109th Cong., 2d Sess. (May 11, 2006).	66
H.R. Rep. No. 97-411(I), 97 th Cong., 1 st Sess. (1982).....	55,59
H.R. Rep. No. 97-491 (I), 97th Cong. 2d Sess. (1982)	69,72
H.R. Rep. No. 111-278 111 th Cong., 1 st Sess. (2009), <i>reprinted in</i> 2010 U.S.C.C.A.N. 1003.....	17
S. 2589, 109th Cong., 2d Sess. (April 6, 2006).....	66
S. 3962, 109th Cong., 2d Sess. (Sept. 27, 2006).....	66
S. 1602, 110th Cong., 1st Sess. (June 12, 2007).....	66
S. 3635, 111th Cong., 2d Sess (July 22, 2010)..	18
S. Conf. Rep. No. 107-159, 107th Cong., 2d Sess (2002).....	11,57,66,71
S. Rep. No. 111-228, 111th Cong., 2d Sess (2010).....	18
128 Cong. Rec. 32,544 (1982).	55
148 Cong. Rec: 7,155 (2002).	71
148 Cong. Rec. 7,166 (2002).	71

MISCELLANEOUS:

1A N. Singer, Sutherland Statutory Construction § 23:9 (6th ed. 2000).	51
--	----

GLOSSARY

AEA	Atomic Energy Act
AEC	Atomic Energy Commission
APA	Administrative Procedure Act
AR	Administrative Record
ASLB	Atomic Safety and Licensing Board
Br.	Petitioners' Brief filed June 18, 2010
DOE	Department of Energy
EIS	Environmental Impact Statement
ERDA	Energy Research and Development Administration
FEIS	Final Environmental Impact Statement
FY	Fiscal Year
JA	Joint Appendix
NARUC	National Association of Regulatory Utility Commissioners
NEI	Nuclear Energy Institute
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act
OCRWM	Office of Civilian Radioactive Waste Management
WIPP	Waste Isolation Pilot Plan

STATEMENT OF JURISDICTION

Petitioners invoke § 119(a) of the Nuclear Waste Policy Act (“NWPA”), 42 U.S.C. § 10139(a), as the basis for this Court’s jurisdiction. For the reasons set forth in Argument Sections I, II, and III, the Court lacks jurisdiction to consider the petitions.

STATUTES AND REGULATIONS

Except for the following, which are reproduced in the Addendum to this brief at 1-35, all applicable statutes and regulations are contained in the Addendum to Petitioners’ brief (“Br.”): 5 U.S.C. §§ 551(13), 553(c); 42 U.S.C. §§ 2013, 2201, 7133(a), 7253(a); 123 Stat. 2845, 2864-65; 10 C.F.R. §§ 2.107, 63.121; 40 C.F.R. §§ 1500.4, 1502.4, 1502.20, 1502.21, 1508.21, 1508.17.

STATEMENT OF ISSUES

1. Have Petitioners demonstrated standing to bring these petitions?
2. Should Petitioners’ challenge to DOE’s authority to withdraw the license application be dismissed under the principles of ripeness and primary jurisdiction given the absence of any final decision by NRC granting DOE’s motion to withdraw the license application?
3. Does the Court have jurisdiction and have Petitioners stated a claim on which relief may be granted?

- 2 -

4. Should the claims against NRC be summarily dismissed?

5. Does the plain language of the NWPA repeal DOE's discretionary authority under the Atomic Energy Act ("AEA") and DOE Organization Act to withdraw the license application and to discontinue the Yucca Mountain project while exploring other alternatives?

6. Have DOE's decisions or actions violated the National Environmental Policy Act ("NEPA")?

7. Have DOE's decisions or actions violated the Administrative Procedure Act ("APA")?

8. Have Respondents violated the separation of powers principle?

9. Are Petitioners entitled to mandamus or permanent injunctive relief?

10. Should this Court dismiss the President as a named defendant or refuse to direct any relief at the President himself?

STATEMENT OF THE CASE

These consolidated petitions purport to challenge the Secretary of Energy's exercise of his broad authority conferred by the AEA and DOE Organization Act and preserved by the NWPA. Those statutes authorize the Secretary to make discretionary policy decisions regarding disposal of nuclear waste and spent nuclear fuel. In an exercise of this authority, the Secretary has concluded that

- 3 -

developing a permanent geologic repository at Yucca Mountain, Nevada, is not a workable option and that, in light of advances in the scientific and engineering knowledge since Congress enacted the NWPA in 1982, a better solution is to develop alternatives to Yucca Mountain. To that end, the Secretary – at the direction of the President and with funds appropriated for this purpose by Congress – has established a Blue Ribbon Commission to evaluate alternatives to the proposed repository at Yucca Mountain and to make recommendations for a new plan for the back end of the nuclear fuel cycle; that Commission must issue draft recommendations by July 2011. The Secretary also determined that, as a policy matter, DOE will not move forward to construct and operate a permanent geologic repository at Yucca Mountain.

Given these events, DOE moved to withdraw with prejudice its pending application before NRC^{1/} for construction authorization for a repository at Yucca Mountain. However, NRC has not granted DOE's motion to withdraw the license application, and, in fact, at this time an interlocutory body within NRC has denied it. The NRC itself is currently considering whether it should review, and reverse

^{1/} *In the Matter of U.S. Dep't of Energy*, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04; see Administrative Record ("AR") 36; Joint Appendix ("JA") 21-253 (hearing docket).

- 4 -

or uphold, that decision and thus there does not yet exist any final agency action that adversely affects Petitioners.

A. Nature of the Petitions

Rather than awaiting a final decision in the NRC proceeding on DOE's motion to withdraw the license application, on February 19, 2010, Petitioner Aiken County, South Carolina filed a "Petition for Declaratory and Injunctive Relief and Writ of Mandamus," seeking relief against DOE, NRC, and certain agency officials. D.C. Cir. No. 10-1050. JA 254-317. A group of individuals residing in the State of Washington ("*Ferguson*") (10-1052), the State of South Carolina (10-1069), and the State of Washington (10-1082) also filed petitions for review in the court of appeals seeking relief against DOE, NRC, certain agency officials, and the President on February 25 and 26, and April 13, 2010, respectively. JA 318-459.²

² On May 3, 2010, this Court denied Washington's motion for a preliminary injunction because Petitioners failed to show that they will suffer irreparable harm absent a preliminary injunction.

- 5 -

Petitioners' brief, filed June 18, 2010,^{3/} purports to bring two types of challenges: (1) for purposes of the mandamus writs sought by South Carolina and Aiken County, Petitioners assert that Respondents failed to comply with an alleged nondiscretionary duty to pursue a license construction application for the Yucca Mountain repository; and (2) for purposes of the petitions for review filed by Washington, the *Ferguson* petitioners, and South Carolina, Petitioners purport to challenge "Respondents' decision and actions to unilaterally and irrevocably terminate the Yucca Mountain repository development process." Br. 17.

Petitioners allege that DOE's decisions and actions violate the NWPA, NEPA, the APA, and the separation of powers principle. Br. 35-59. Petitioners seek various declarations from this Court regarding the Respondents' obligations under the NWPA and NEPA, mandamus relief ordering DOE to pursue the application, an order vacating DOE's policy to abandon Yucca Mountain, and a permanent injunction preventing Respondents from taking additional action to abandon the Yucca Mountain process. Br. 65.

^{3/} On July 28, 2010, this Court issued an order holding the cases in abeyance to await the Commission's final decision on DOE's motion to withdraw. Although the Commission has not yet issued a decision, on December 10, 2010, this Court granted Petitioners' motion to lift the stay.

- 6 -

B. Related Proceedings Before NRC

At about the same time they filed the instant petitions, all Petitioners except those in *Ferguson* petitioned to intervene in the ongoing NRC proceeding to oppose DOE's motion to withdraw. Petitioners make largely the same arguments in the NRC proceeding as they make here. On June 29, 2010, NRC's hearing tribunal, the Atomic Safety and Licensing Board ("Licensing Board" or "Board"), issued an order that both granted the petitions to intervene (which DOE did not oppose) and denied DOE's motion to withdraw the license application. AR 36 [JA 785-837]. On June 30, 2010, the Commission, the body with final authority over NRC decisionmaking, invited briefing (now completed) on whether it should review, and reverse or uphold, the Board's decision. AR 36 [JA 838]. As of this writing, the Commission has made no final decision on DOE's motion to withdraw. As reflected in Respondents' November 24, 2010 Status Report, it is a matter of public record that all four Commissioners participating in the case (one Commissioner has recused himself) have voted on the matter, but the Commissioners have yet to agree on a final order. Meanwhile, the NRC's Licensing Board continues to consider and decide various adjudicatory issues related to DOE's Yucca Mountain application. See AR 36 (Dec. 14, 2010, Order Deciding Phase 1 Legal Issues and Denying Rule Waiver Petitions) [JA 852-888].

- 7 -

Because the Commission has not reached a decision on the motion to withdraw, NRC does not join the merits-based arguments set forth in this brief on behalf of DOE and portions of both Statements bearing on the merits. NRC does join the arguments set forth in Sections II, III.A, III.B.1, and IV.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. Atomic Energy Act and DOE Organization Act

The AEA, enacted in 1954, established a comprehensive regulatory regime for defense and civilian nuclear energy and vested in the Atomic Energy Commission (“AEC”) the exclusive, plenary responsibility to regulate nuclear materials covered by the Act. 42 U.S.C. § 2011 *et seq.*; *see, e.g., id.* §§ 2201(b), 2201(i)(3). The Secretary, as successor to the AEC,⁴ has authority and power to direct “the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the

⁴ In 1974, the Energy Reorganization Act, Pub. L. No. 93-438, 88 Stat. 1233 (1974), 42 U.S.C. § 5801 *et seq.*, abolished the AEC and assigned its “licensing and related regulatory” authority to the NRC. 42 U.S.C. § 5841(f). All of the AEC’s other powers, including those over nuclear waste, were assigned to another new agency, the Energy Research and Development Administration (“ERDA”). 42 U.S.C. § 5814(a)-(c). Three years later, in 1977, Congress established DOE in the DOE Organization Act, Pub. L. No. 95-91, 91 Stat. 567 (1977), 42 U.S.C. § 7101, *et seq.* Among other actions, the statute merged ERDA, and all of its legal authorities and powers, into DOE. 42 U.S.C. § 7151(a).

- 8 -

maximum contribution to the common defense and security and the national welfare.” 42 U.S.C. § 2013; *see also id.* §§ 2201, 7133. As made clear by the DOE Organization Act, that discretion encompasses “nuclear waste management responsibilities,” including control over existing government facilities for the treatment and disposal of nuclear wastes and “the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes.” 42 U.S.C. § 7133(a)(8)(C). The DOE Organization Act declared that these nuclear waste management responsibilities were “already conferred by law” and were not “within the Nuclear Regulatory Commission.” *Id.* § 7133(a)(8)(G).

2. Nuclear Waste Policy Act

In 1982, Congress enacted the NWPA, 42 U.S.C. § 10101 *et seq.*, to address further the disposal of the Nation’s high-level radioactive waste and spent nuclear fuel.⁵¹ Subtitle A of the NWPA establishes a process for siting a permanent geologic repository and continues to delegate to DOE “primary responsibility for developing and administering the waste disposal program,” including selection

⁵¹ “Spent nuclear fuel” refers to irradiated nuclear fuel that has been withdrawn from a nuclear reactor, but has not been reprocessed to separate and remove the uranium and plutonium from the waste products. *See* 42 U.S.C. § 10101(23). “High-level radioactive waste” generally refers to highly radioactive waste left after spent nuclear fuel has been reprocessed and other highly radioactive material that NRC determines requires permanent isolation. *Id.* § 10101(12).

- 9 -

and development of a repository. *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988). The NWPA specifies approvals the Secretary must obtain from other entities, including the President, Congress and NRC, to *proceed* with the Yucca Mountain repository, but the statute requires no such approvals if the Secretary decides to *end* the project. *See* 42 U.S.C. §§ 10134(a), 10135.

As originally enacted, NWPA § 113 required the Secretary of Energy to search for potentially suitable sites for a repository and to conduct site characterization, a period of intensive on-site investigation, at sites approved by the President. 42 U.S.C. § 10132(b). Pursuant to the § 113 process, in 1986, the Secretary recommended three sites for site characterization, and the President approved that recommendation. However, before the Secretary could characterize any of the three sites, Congress amended the NWPA in 1987 to designate Yucca Mountain as the only site to be characterized by DOE for possible development as a permanent geologic repository. Pub. L. No. 100-203, 100th Cong., 1st Sess., §§ 5011(e), (f), and (g) (1987), codified at 42 U.S.C. § 10133(a).

NWPA § 113(c)(3) provides that the Secretary may terminate the project at any time during site characterization if he determines Yucca Mountain is unsuitable for a repository. 42 U.S.C. § 10133(c)(3). Upon completion of site characterization, the Secretary could decide in his discretion to recommend (or not

- 10 -

to recommend) to the President approval of Yucca Mountain site. 42 U.S.C. § 10134(a). If the Secretary chose not to pursue the Yucca Mountain site, his decision would have become effective without approval by the President, Congress, or any other entity. *Id.* Any recommendation to the President to approve the site must be accompanied by a Final Environmental Impact Statement (“FEIS”) prepared in accordance with NWPA § 114(f) and NEPA, with exceptions that narrow the scope of alternatives that must be evaluated.⁹ 42 U.S.C. § 10134(a).

In February 2002, the Secretary transmitted to the President a recommendation to approve the Yucca Mountain site and the President recommended the site to Congress pursuant to NWPA § 114(a)(2). As permitted by NWPA §§ 115(b) and 116(b)(2), the State of Nevada submitted a notice of disapproval to Congress. 42 U.S.C. §§ 10135(b), 10136(b)(2). Nevada’s disapproval had the effect of ending further consideration of the site for the repository unless Congress passed a joint resolution approving the site

⁹ NEPA requires federal agencies to prepare an Environmental Impact Statement (“EIS”) for “recommendation[s] or report[s] on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). The President is not a federal agency and thus is not subject to NEPA. *See* 40 C.F.R. § 1508.12. For purposes of NEPA, legislation “does not include requests for appropriations.” 40 C.F.R. § 1508.17.

- 11 -

designation. 42 U.S.C. § 10135(c). On July 9, 2002, Congress passed a joint resolution that “approved the site at Yucca Mountain for a repository.” Pub. L. 107-200, 116 Stat. 735 (2002); *see also* S. Conf. Rep. No. 107-159, 107th Cong., 2d Sess., at 13 (2002) (“joint resolution will only allow DOE to take the next step in the process . . . and apply to the NRC for authorization to construct the repository at Yucca Mountain”).

NWPA § 114(b) states that the Secretary “shall submit to the [Nuclear Regulatory] Commission an application for a construction authorization for a repository not later than 90 days” after a site designation becomes effective. 42 U.S.C. § 10134(b). In 2008, DOE submitted to NRC its application for construction authorization for the repository at Yucca Mountain.

NWPA § 114(d) provides that NRC shall “consider an application for . . . a repository in accordance with the laws applicable to such applications and shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of three years after the date of submission of such application.” *Id.* § 10134(d). The three-year time period can be extended if reporting conditions are met. *Id.* The “laws applicable to such applications” include a long-standing NRC regulation, 10 C.F.R. § 2.107, and substantial NRC precedent allowing an applicant to request withdrawal of a

- 12 -

license application and empowering NRC to regulate the withdrawal's terms and conditions.⁷

DOE cannot construct a repository at Yucca Mountain absent construction authorization from the NRC. By the same token, no provision of the NWPA compels DOE to construct a repository at Yucca Mountain if NRC does approve a construction license. *See infra* at 65-69. In fact, even if NRC were to approve a construction license and DOE wanted to proceed, DOE could not construct and operate a Yucca Mountain repository absent further congressional action, as well as numerous other steps not mandated by the NWPA. *Id.*

B. Factual Background

In an exercise of the authority accorded him by the AEA, DOE Organization Act, and NWPA, Secretary of Energy Chu is steering DOE in a new policy direction with respect to nuclear waste disposal. Secretary Chu concluded that

⁷ In relevant part, 10 C.F.R. § 2.107 provides:

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

- 13 -

developing a permanent geologic repository for high-level waste and spent nuclear fuel at Yucca Mountain has not proven to be a workable option. *See, e.g.*, AR 1, p.3 [JA 638]; AR 21, p. 18 [JA 674]. He also concluded that the technical and scientific context is significantly different today than when the NWPA was enacted, and that advances in scientific and engineering knowledge provide an opportunity to develop better alternatives to Yucca Mountain. *See, e.g.*, AR 1, p. 3 [JA 638]; AR 15, p. 38 [JA 634]; AR 16, p. 18 [JA 640]; AR 19, p. 14 [JA 729]; AR 20, pp. 7-8 [JA 655-56]; AR 21, pp. 14-15, 17-18 [JA 670-71, 673-74]. The Secretary accordingly decided that it is appropriate to study and consider other options and that DOE will not move forward to construct and operate a permanent repository for high-level waste and spent nuclear fuel at Yucca Mountain.

A number of factors led to the Secretary's conclusions and policy judgment. In the years leading up to 1982, nuclear utilities had only one storage option for spent fuel – onsite pool storage – and were rapidly running out of pool storage space. *See* 42 U.S.C. § 10131(a)(2); AR 36 (DOE Reply, filed May 27, 2010 (hereafter cited as “DOE Reply”), p. 29 [JA 769]. Since 1982, dry storage of spent nuclear fuel has evolved into an option capable of providing safe and environmentally acceptable storage for at least 100 years. *See, e.g.*, AR 36 (DOE Reply), p. 29 [JA 769]; AR 29, p. 59557 [JA 627]; AR 55, pp. 11-12 [JA 465-66];

- 14 -

AR 65, p. 5-6 [JA 597-98]; 64 Fed. Reg. 68,005, 68,006 (Dec. 6, 1999); 75 Fed. Reg. 81,037, 81,071-73 (Dec. 23, 2010). The emergence of dry storage technology provides the Nation with time to develop an alternative approach to permanent disposal. AR 36 (DOE Reply, p. 29) [JA 769]. The scientific community's knowledge of advanced recycling technology that avoids proliferation risks has also progressed considerably in the past decades.⁸⁷ AR 36 (DOE Reply), pp. 29-30 [JA 769-70]; AR 16, p. 18 [JA 640]. Although advanced recycling technology is still in its early stages, it has the potential to "greatly reduce the long-lived, high-level actinides in nuclear waste, and to improve the waste forms for disposal of high-level nuclear waste." AR 78, p. 57 [JA 615]; AR 36 (DOE Reply, p. 30) [JA 770].

Moreover, since the NWPA's enactment, DOE has successfully constructed and operated the Nation's first deep geologic repository for the disposal of transuranic radioactive waste, the Waste Isolation Pilot Plan ("WIPP"), located in New Mexico. AR 36 (DOE Reply, p. 30) [JA 770]; AR 79 [JA 610-12]. (WIPP does not accept high-level waste.) The State of New Mexico has cooperated with

⁸⁷ "Advanced recycling" refers to technologies currently under development that enable spent nuclear fuel to be reused with less of the waste problems associated with older technologies and without providing separated plutonium that could be used by rogue states or terrorists for nuclear weapons. *See* AR 47, pp. 1-2.

- 15 -

DOE by granting necessary environmental permits and the local host community has been a strong supporter of the WIPP repository. AR 36 (DOE Reply, pp. 30-31) [JA 770-71]; AR 79 [JA 610-12]. Thus, WIPP represents an example of successful federal, state, and local cooperation in the development of a repository. By contrast, the State of Nevada and much of the Nevada citizenry vigorously oppose the Yucca Mountain repository. AR 36 (DOE Reply, p. 32) [JA 772]; AR 73, p. 3 [JA 601]; AR 74 [JA 460-63].

Based on these factors, the Secretary determined that the Nation needs a better solution for nuclear waste disposal than the proposed permanent geologic repository at Yucca Mountain and that a comprehensive study of alternative approaches to disposition of the Nation's spent nuclear fuel and high-level nuclear waste should be undertaken. Thus, as long ago as March 11, 2009, Secretary Chu announced this policy before the Senate Budget Committee, stating that "the [Fiscal Year ("FY") 2010] Budget begins to eliminate funding for Yucca Mountain as a repository for our nation's nuclear waste" because "Yucca Mountain is not a workable option." AR 1 at 3 [JA 638]. The Secretary stated that it would be DOE's policy to "begin a thoughtful dialogue on a better solution for our nuclear waste storage needs." *Id.* Six days later, in response to questions from members of the House of Representatives Committee on Science and

- 16 -

Technology, the Secretary reiterated DOE's new policy, explaining that the landscape had changed since the Yucca Mountain project commenced. The Secretary explained further that there is time to take a fresh look at storage and disposal of nuclear waste and develop a more comprehensive plan, and announced that a blue ribbon panel would take a "fresh look at how we can store nuclear waste." AR 16, p. 18 [JA 640].

In its May 2009 budget request for FY 2010, DOE reiterated its policy "decision to terminate the Yucca Mountain program while developing nuclear waste disposal alternatives" and proposed elimination of all funding for development of the Yucca Mountain facility, such as transportation access, and funding for a Blue Ribbon Commission to evaluate alternative approaches. AR 2, p. 9 [JA 643]; *see also* AR 1, p. 3 [JA 638]; AR 3, p. 504 [JA 651]; AR 4 [JA 628-31]; AR 5 [JA 675-76]. In testimony before the relevant congressional appropriations subcommittees in May and June 2009, Secretary Chu further explained DOE's new policy, and the purpose of the Blue Ribbon Commission, and made clear that "Yucca Mountain as a long-term repository is definitely off the table." AR 21, pp. 17-18 [JA 673-74]; *see also* AR 20, p. 7 [JA 655-56]. In October 2009, Congress appropriated funds consistent with DOE's request, specifically appropriating \$5 million for the Blue Ribbon Commission to evaluate

- 17 -

alternatives for nuclear waste disposal. *See* Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009); H.R. Rep. No. 111-278, 111th Cong., 1st Sess., at 21 (2009), *reprinted in* 2010 U.S.C.C.A.N. 1003.

On January 29, 2010, at the direction of the President, the Secretary announced the formation of the Blue Ribbon Commission, chaired by former National Security Advisor Brent Scowcroft and former Congressman Lee Hamilton, to evaluate alternatives to a permanent geologic repository at Yucca Mountain and to make recommendations for a new plan for the back end of the fuel cycle. AR 22 [JA 683-84]; AR 23 [JA 685-87]; 75 Fed. Reg. 5,485 (Jan. 29, 2010). The Blue Ribbon Commission's charter directs it to consider, among other things: (1) "[o]ptions for safe storage of used nuclear fuel while final disposition pathways are selected and deployed," (2) "fuel cycle technologies and R&D programs," and (3) "[o]ptions for permanent disposal of used fuel and/or high-level nuclear waste, including deep geological disposal." AR 24 ¶ 3 [JA 714-15].

The Commission must issue draft recommendations by the summer of 2011, and a final report six months later. AR 24 ¶ 10 [JA 716]. Future proposals for the disposition of high-level waste and spent nuclear fuel will be informed by the Blue Ribbon Commission's analysis. AR 7, p. 176 [JA 694].

- 18 -

In its February 2010 budget request for FY 2011, DOE stated that it “has been evaluating a range of options for bringing the [Yucca Mountain] project to an orderly close. In FY 2010, [DOE] will withdraw from consideration by [NRC] the license application for construction of a geologic repository at Yucca Mountain, Nevada, in accordance with applicable regulatory requirements.” AR 7, p. 176 [JA 694]. It further stated that “all funding for development of the [Yucca Mountain] facility will be eliminated” for FY 2011.⁹ *Id.*; *see also* AR 6 [JA 688-89]; AR 8 [JA 696-97]; AR 9 [JA 712-13].

DOE remains committed, however, to fulfilling the federal responsibility to provide for the permanent disposal of the Nation’s spent nuclear fuel and high-level radioactive waste and to meet its contractual obligations under the Standard Contract with nuclear utilities. AR 5 [JA 675-76]; AR 7 [JA 694]; AR 8 [JA 696-97]. Meeting this commitment does not depend on development of a repository at

⁹ Although Congress has not yet enacted an appropriations bill for DOE for FY 2011, the draft appropriations bill for FY 2011 reported out of the Senate Committee on Appropriations contained no funding for Yucca Mountain. S. 3635, 111th Cong., 2d Sess., reported out of committee on July 22, 2010; *see also* S. Rep. No. 111-228, 111th Cong., 2d Sess. (2010). In anticipation that Congress would appropriate zero funding for the Yucca Mountain project for FY 2011 and pursuant to authority conferred by 42 U.S.C. § 7253 (*see infra* at 44 n.16), DOE’s Office of Civilian Radioactive Waste Management (“OCRWM”) ceased operation on September 30, 2010. Remaining Yucca Mountain-related responsibilities, such as site closure and litigation, were assigned to other offices within DOE.

Yucca Mountain. *See Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272, 1277 (D.C. Cir. 1996).

SUMMARY OF ARGUMENT

These consolidated petitions are non-justiciable and suffer from other jurisdictional infirmities that preclude judicial review. First, Petitioners lack standing to bring these petitions because they have failed to demonstrate that they have or will suffer an imminent injury from the challenged decisions or actions that this Court can redress. Beyond that, the petitions should be dismissed under the principles of ripeness and primary jurisdiction because the NRC has not reached a final decision on DOE's motion to withdraw the license application.

Even if Petitioners were found to have standing and the petitions otherwise were justiciable, this Court lacks subject matter jurisdiction. The NWPA provides jurisdiction in the courts of appeals to review timely challenges to final decisions or actions, and the APA provides the cause of action. DOE's filing of the motion to withdraw the license application is not a final decision or action. By the same token, DOE's general policy toward Yucca Mountain is not a final action, nor are any of the specific actions that Petitioners mention (such as filing of a budget request). Petitioners thus fail to present any valid cause of action under the APA to challenge circumscribed, discrete, and final agency action. In any event,

- 20 -

Petitioners filed suit well more than 180 days after DOE announced that it would not build a permanent repository at Yucca Mountain and thus a challenge to that decision is untimely under the NWPA.

Respondent NRC agrees Petitioners' lawsuits are premature, given the ongoing NRC adjudicatory process. But because that process is ongoing, NRC does not join DOE-specific portions of this brief, including standing, reviewability and merits arguments (and associated discussions in the Statement of the Case and Statement of Facts). Regardless, Petitioners' opening brief makes no specific claims against NRC.

As for the other Respondents, assuming justiciability and the existence of jurisdiction and a valid and timely cause of action, the petitions should be rejected on the merits. The Secretary of Energy's broad discretionary authority under the AEA and the DOE Organization Act encompasses the power to withdraw a DOE license application and to rethink a project that in the Secretary's reasoned judgment is not in the public interest. That authority is not repealed by the NWPA. The language of NWPA § 114(b) and 114(d) does not bar the Secretary from withdrawing the license application, nor does it impose a nondiscretionary duty, enforceable by mandamus, to pursue licensing of the Yucca Mountain repository when the Secretary has decided this course is not in the public interest

- 21 -

and that the repository will not be constructed. On the contrary, the language specifically adopts existing NRC rules, including the rule that has for many decades authorized applicants such as DOE to withdraw a pending application. Beyond that, the structure of the NWPA supports withdrawal authority because it requires approval for DOE to *proceed* with the filing of a license application for Yucca Mountain, but the NWPA does not require approval from Congress or any other entity for DOE to *end* the project. And it would be particularly awkward to construe the NWPA to require DOE to maintain a license application when the statute plainly does not mandate – or, without further legislation, even permit – DOE actually to construct a repository at Yucca Mountain. In such circumstance, maintaining the application would be an enormous waste of limited resources. Finally, there is no support in the statute’s language, structure, or legislative history for Petitioners’ suggestion that the Secretary lacks authority to terminate development and construction of the project outside of the licensing process.

Petitioners’ NEPA argument fares no better. The policy to terminate the Yucca Mountain program and actions implementing it do not constitute “major federal actions” for NEPA purposes and do not change the environmental status quo. They therefore do not give rise to an obligation to undertake NEPA analysis.

- 22 -

In any event, DOE already has completed detailed NEPA analyses of a potential decision *not* to proceed with Yucca Mountain.

DOE's decisions and actions are supported by the administrative record, to the extent one is required. Any issues Petitioners have with the record stem largely from their own failure to identify the circumscribed, discrete, and final agency action being challenged. Their arguments concerning the record also fail because they mistakenly rely on inapposite requirements for agency rulemaking under the APA.

Nor did Respondents violate the separation of powers principle. *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579 (1952), is inapplicable here because Respondents do not claim to rely on inherent Presidential authority to disregard statutory law.

Finally, should Petitioners prevail on their claims, they are still not entitled to certain relief they request. Petitioners are not entitled to mandamus because, among other reasons, they have other adequate remedies available to them. Petitioners are not entitled to a permanent injunction because they have failed to show that they will suffer irreparable harm without one; indeed, this Court already denied a preliminary injunction because of the lack of irreparable injury. Petitioners also are not entitled to relief against the President because the President

- 23 -

is not a properly named defendant in these proceedings. And, in any event, this Court typically declines to direct relief at the President where, as here, relief can be directed instead at his subordinates.

ARGUMENT

I. Petitioners Lack Article III Standing

Petitioners are (1) State and local governments where DOE's Hanford Site or Savannah River Site are located and (2) individuals who live, work, or recreate near these sites. Their geographic proximity to these sites, however, does not alone confer standing. *See City of Olmstead Falls v. FAA*, 292 F.3d 261, 267 (D.C. Cir. 2002). To establish standing,¹⁹ Petitioners must demonstrate by affidavit or other evidence that they have suffered: (1) a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical;" that is (2) fairly traceable to the challenged action; and that is (3) likely to be redressed by the relief requested, if that relief is granted. *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders*

¹⁹ Petitioners assert (Br. 19) that "the Court construes the complaint in favor of the Petitioner." At this stage of the proceeding, however, which is equivalent to the summary judgment stage in district court, Petitioners cannot rest on mere allegations in the complaint/petition, but must conclusively prove their standing. *See Sierra Club v. EPA*, 292 F.3d 895, 898-900 (D.C. Cir. 2002).

- 24 -

of Wildlife, 504 U.S. 555, 560 (1992)). “The party invoking federal jurisdiction bears the burden of establishing these elements.” *Lujan*, 504 U.S. at 561.

Circumstances unfolding since the filing of the opening brief, lead to the conclusion that, even assuming Petitioners at one time had standing to challenge the motion to withdraw the license application, they no longer do. On June 29, 2010, the NRC Licensing Board denied DOE’s motion to withdraw. Although the Commission may review the Board’s decision, at this time Petitioners are not injured by the motion and thus lack standing. Because “[a] plaintiff must maintain standing throughout the course of litigation,” *Foretich v. United States*, 351 F.3d 1198, 1210 (D.C. Cir. 2003), this case must be dismissed.

Petitioners also lack standing for other, independent reasons. Petitioners have uniformly failed to explain in any detail what particular actual or imminent injury they have or will suffer from a withdrawal of the license application or from DOE’s policy to terminate the Yucca Mountain project while exploring different alternatives to long-term disposal of spent fuel and high-level waste. Such an explanation is particularly necessary here because Petitioners were not the object of DOE’s alleged decisions. *See Sierra Club*, 292 F.3d at 900.

To the extent a particularized allegation of injury can be gleaned from their submissions, Petitioners seemingly allege an injury stemming from the retention of

- 25 -

spent nuclear fuel or high-level nuclear waste at the Hanford or Savannah River facilities that might otherwise eventually go to Yucca Mountain. Br. 20-22. Such injury is not, however, imminent because even under the most optimistic scenarios, Yucca Mountain would not open until at least 2020.

Furthermore, Petitioners' theory of injury necessarily is predicated on the false assumption that, absent the decisions that DOE has allegedly made, there would necessarily be an operating Yucca Mountain repository at some presently unidentifiable future date. Any claim predicated on the opening of a Yucca Mountain repository is inherently speculative, distant, and contingent, and therefore insufficient to confer Article III standing. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) ("allegations of possible future injury do not satisfy the requirements of Article III"). Before a Yucca Mountain repository may open, a number of significant, independent contingencies would have to be resolved, including the passage of legislation. *See infra* at 66-67; Addendum at 40-41 (Zabransky Decl. (originally filed in opposition to Washington's motion for preliminary injunction)). The failure to fulfill any one of these prerequisites could derail the Yucca Mountain repository.

Contrary to Petitioners' contention (Br. 23), they have not demonstrated that every day of delay in opening a Yucca Mountain repository injures them. They

- 26 -

cannot make this demonstration both because there is no assurance that Yucca Mountain would ever open and because it is possible that alternative strategies analyzed by the Blue Ribbon Commission could lead to taking waste *more* quickly from Hanford or Savannah River than would pursuing the Yucca Mountain alternative.

For similar reasons, a favorable judgment is unlikely to redress Petitioners' alleged injuries. To satisfy the redressability aspect of standing, there must be a "substantial likelihood" that the spent nuclear fuel and high-level nuclear waste at the Hanford and Savannah River facilities would be transported away from those sites sooner than it would be without the requested judicial relief. *See Cmty for Creative Non-Violence v. Pierce*, 814 F.2d 663, 670 (D.C. Cir. 1987). Speculation is insufficient. *See Lujan*, 504 U.S. at 561. Petitioners failed to provide any evidence that transport would occur sooner. Moreover, in the NRC proceeding, most of the Petitioners conceded that nothing in federal law requires Yucca Mountain to be built at all, even if this Court were to require DOE to proceed with the license application. AR 36 (June 3, 2010, hearing transcript, pp. 187, 191, 240) [JA 781-84]. Whether the repository is built depends on NRC granting the license, and on Yucca Mountain's proponents gathering enough support for it in Congress to pass additional legislation, among other things. *See infra* at 66-69.

- 27 -

Where the ultimate redress of Petitioners' alleged harm rests within Congress's discretion, the possibility of redress here is too attenuated to confer Article III standing. *See The Wilderness Society v. Norton*, 434 F.3d 584, 591-94 (D.C. Cir. 2006) (likelihood of redress too attenuated to confer Article III standing where congressional action is required to redress plaintiff's harm).

Apparently recognizing the deficiencies in their standing, Petitioners contend (Br. 19) that the imminence and redressability requirements for standing are relaxed when the alleged injury results from a violation of a procedural right. They thus claim that they "need not show that Yucca Mountain repository would ultimately ever be opened in order to have standing." As the Supreme Court recently reiterated, however, alleging the deprivation of a procedural right without also alleging, as Petitioners fail to do here, the deprivation of some concrete interest affected by that right is insufficient to confer Article III standing. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). Moreover, even if the imminence and redressability requirements could be relaxed for procedural rights, even pre-*Summers* cases made clear that those requirements do not vanish altogether and that the injury-in-fact requirement is not relaxed. *See Center for Law and Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005); *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226-27 (9th Cir.

- 28 -

2008). Here, Petitioners have failed to make even a minimal showing of imminence and redressability, and have identified no particularized injury-in-fact.

Furthermore, to the extent courts relax the imminence and redressability requirements, they do so only with respect to procedural rights. *See Lujan*, 504 U.S. at 573 & n.7; *City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181, 1187 n.1 (D.C. Cir. 2007). Petitioners' primary claims are founded on the NWPA and based on an alleged substantive right to have material taken to a Yucca Mountain repository. The imminence and redressability requirements apply with full force to Petitioners' NWPA claims. *See Lujan*, 504 U.S. at 573; *The Wilderness Society*, 434 F.3d at 591.

Contrary to its suggestion (Br. 22), Washington is not in a materially stronger position as to standing than other Petitioners because of the need to address tank waste at Hanford. As detailed in the Declaration of Dr. Ines Triay, DOE's Assistant Secretary for Environmental Management, high-level waste at Hanford already is being addressed by DOE's ongoing long-term cleanup, and that process is going on independently of whether Yucca Mountain is delayed or ever constructed. Addendum at 45-48 (originally filed in opposition to Washington's motion for preliminary injunction). That cleanup includes the retrieval of highly radioactive waste stored in underground storage tanks, the construction of a

- 29 -

massive waste treatment plant to treat that waste, and ultimately the treatment of that waste at the plant, by converting it to glass through vitrification, which is a prerequisite to transportation and disposal at any repository. The vitrification process for all liquid waste will take several decades to accomplish; thus, Petitioner has long known that such waste would remain on site for a lengthy period of time. *Id.* Sufficient capacity exists or will be constructed at Hanford to store the vitrified wastes with no adverse impacts on the environment. AR 46 at 4-213, 4-218 [JA 681-82]. In sum, the notion that the Hanford cleanup is dependent on opening Yucca Mountain is simply incorrect.¹¹⁷ Addendum at 45-48.

Intervenor National Association of Regulatory Utility Commissioners (“NARUC”) submits no affidavit attesting to its standing and, for that reason alone, it fails to demonstrate standing. *See Sierra Club*, 292 F.3d at 900 (citing *Lujan*, 504 U.S. at 562). NARUC states (Br. 23) that it represents the interests of State utility commissioners. NARUC contends (Br. 24) that utilities “have paid more than \$17 billion into the Nuclear Waste Fund, in part, to support the process of reviewing a permanent repository” and these costs have been passed through to

¹¹⁷ The schedule for accomplishing this cleanup is set forth in a consent decree between DOE and Washington, approved October 25, 2010, by the court in *State of Washington v. Chu*, No. 08-5085-FVS (E.D. Wa.). The decree requires treatment of all high-level mixed waste from the tanks no later than 2047.

- 30 -

ratepayers. The injury to NARUC itself is not explained nor is it self-evident. And any claims NARUC has with respect to fee assessments for the Nuclear Waste Fund are beyond the scope of these petitions. NARUC and amicus Nuclear Energy Institute (“NEI”) filed separate suits in this Court regarding fee assessments. *See* D.C. Circuit Nos. 10-1074, 10-1076. On December 13, 2010, this Court dismissed those suits as moot and unripe due to DOE’s issuance in November 2010 of a new assessment of fee adequacy. The Court noted, however, that petitioners may be able to raise in a challenge to the new assessment their claim that fees should be suspended in light of the status of DOE’s waste disposal program. The same analysis applies here.

Finally, Petitioners’ attempt to assert *parens patriae* standing fails. Without alleging that it has any property interests near those facilities, South Carolina alleges that the state houses seven commercial reactors. Br. 21. Washington alleges that its interests arise in part as a regulator and sovereign. Br. 22. NARUC alleges that its interest arises in part out of concern to “U.S. ratepayers” and the “general public.” Br. 24. However, in this instance, it is the United States, not the Petitioners, that represents the public as *parens patriae*. *See Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923); *see also Nevada v.*

- 31 -

Burford, 918 F.2d 854, 858 (9th Cir. 1990) (Nevada lacks *parens patriae* standing to challenge rights-of-ways to Yucca Mountain).

II. Petitioners' Challenge To The Withdrawal Motion Is Premature

Petitioners purport to seek review of two separate DOE decisions: (a) the decision to file the motion to withdraw the license application; and (b) the decision allegedly made on or around January 29, 2010, “to irrevocably abandon the Yucca Mountain process and terminate the entire Yucca Mountain project, including the license withdrawal.” Br. 42; Br. ii. To the extent these claims challenge DOE’s motion to withdraw, they should be dismissed under ripeness and primary jurisdiction doctrines. For reasons discussed below in Section III, the generalized claims regarding DOE’s “abandonment” of the project should also be dismissed as improper and beyond the Court’s jurisdiction.

A. Petitioners' Challenge to the Withdrawal Motion Is Unripe

Petitioners’ challenges to DOE’s filing of the withdrawal motion are unripe. *See Public Citizen v. Office of U.S. Trade Representative*, 970 F.2d 916, 921 (D.C. Cir. 1992) (finality and ripeness are distinct requirements and both must be met). Ripeness principles are intended to “prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until

- 32 -

an administrative decision has been formalized and its effects felt in a concrete way.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *Ohio Forestry Assoc. v. Sierra Club*, 523 U.S. 726, 737 (1998). “Determining whether administrative action is ripe for judicial review requires [courts] to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.” *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 808 (2003).

A claim that involves uncertain or contingent future events that may not occur as anticipated or may not occur at all is not ripe for judicial review. *Texas v. United States*, 523 U.S. 296, 300 (1998). Here, Petitioners’ claims regarding the withdrawal motion are contingent upon a speculative chain of events that assumes the termination of the license application process. Particularly at this time, however, these events are uncertain to occur because the NRC Licensing Board has denied DOE’s motion to withdraw the license application and continued with its consideration of the merits of the license application. Although the Commission may review the Licensing Board’s decision denying DOE’s motion to withdraw, if the Commission either declines to review the Board’s decision or upholds it, Petitioners will not be able to present any controversy for this Court to resolve. *See Toca Producers v. FERC*, 411 F.3d 262, 266-67 (D.C. Cir. 2005)

- 33 -

(withholding review where further administrative action could cause controversy to disappear). Because Petitioners' claims are contingent upon NRC granting a motion that its Licensing Board has denied, the claims are unfit for review and should be dismissed.¹²⁷

Nor is there any reason to entertain this matter before the Commission rules. Delaying review until NRC completes its internal processes will cause Petitioners no hardship. *See Sheet Metal Workers Intern. Ass'n, Local 270, AFL-CIO v. NLRB*, 561 F.3d 497, 502 (D.C. Cir. 2009) (lack of hardship supports withholding judicial review). The filing of the withdrawal motion has no effect on Petitioners' "day-to-day business," and does not require Petitioners "to engage in, or to refrain from, any conduct." *Texas*, 523 U.S. at 301. Petitioners are in no different position now than they were before DOE filed the withdrawal motion. NRC would not have reached a decision granting or denying DOE's license application by now. Furthermore, the possibility always existed that NRC would deny DOE's application to construct Yucca Mountain, an action that would have the same

¹²⁷ If the Commission issues a final decision that is adverse to Petitioners' interests, Petitioners must file a new lawsuit challenging NRC's final decision. *See Public Citizen v. NRC*, 845 F.2d 1105, 1109-10 (D.C. Cir. 1988) (prematurely-filed NWPA claim must be dismissed even though final decision issued after the filing of the suit and was presently ripe); *see also TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989).

- 34 -

impact upon Petitioners as the relief DOE requests in the pending motion to withdraw.

In sum, Petitioners' challenge to the withdrawal motion is unfit for judicial review at this time. "Federal courts cannot – and should not – spend their scarce resources on what amounts to shadow boxing." *Devia v. NRC*, 492 F.3d 421, 425-26 (D.C. Cir. 2007) (internal quotations omitted).

B. This Court Lacks Primary Jurisdiction

Assuming this Court has jurisdiction over the license withdrawal issue (which it does not for reasons explained in Section III.B.1 below), it nevertheless should abstain from exercising its jurisdiction pursuant to the primary jurisdiction doctrine. The NRC has primary jurisdiction over NWPA licensing matters and is considering DOE's motion to withdraw its license application. Under the primary jurisdiction doctrine, where an agency and a court have concurrent jurisdiction, the court should abstain from exercising its jurisdiction until the agency finally resolves it. *See Comcast v. FCC*, 600 F.3d 642, 647-48 (D.C. Cir. 2010).

III. This Court Lacks Jurisdiction And Petitioners Fail To State A Claim Upon Which Relief Can Be Granted

For a series of reasons – related to, yet independent of, the justiciability barriers to review discussed above – this Court lacks jurisdiction over both of Petitioners' claims, and in any event, there is no APA cause of action.

- 35 -

A. The APA Provides the Cause of Action for the NWPA Claims

Initially, Petitioners are wrong that (Br. 25-29) they need not challenge “final agency action” within the meaning of the APA because they are invoking this Court’s jurisdiction under the NWPA. Petitioners misunderstand the interplay between the NWPA and the APA. NWPA § 119(a), 42 U.S.C. § 10139(a), specifies the form of proceedings in the court of appeals, but it does not waive the United States’ sovereign immunity or provide a private litigant with a cause of action. In this way, § 119(a) is similar, in both language and effect, to the Hobbs Act’s jurisdictional provision, *see* 28 U.S.C. § 2344, that the Supreme Court addressed in *I.C.C. v. Brotherhood of Locomotive Engn’rs*, 482 U.S. 270 (1987). There, the Supreme Court noted that the Hobbs Act specified the form of proceedings in the court of appeals, but “it [was] the [APA] that codifie[d] the nature and attributes of judicial review.” *Id.* at 282; 5 U.S.C. § 703 (“the form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute”).

Similar to the Hobbs Act, the NWPA specifies the form of the proceeding by conferring original jurisdiction upon the court of appeals, as opposed to the district courts, to review certain final decisions of certain federal officials. *See* 42 U.S.C. § 10139(a). The NWPA does not, however, waive the government’s

- 36 -

sovereign immunity or provide a private litigant with an independent cause of action. The APA typically provides the waiver and cause of action in NWPA cases. *See Nebraska Public Power Dist. v. United States*, 590 F.3d 1357, 1371 (Fed. Cir. 2010) (holding that the APA waives the government's immunity for judicial review under the NWPA and thus Court need not decide if NWPA § 119(a) itself waives immunity); *Nevada v. DOE*, 133 F.3d 1201, 1204 (9th Cir. 1998) (reviewing NWPA claim under the APA); *County of Esmeralda, Nevada v. DOE*, 925 F.2d 1216, 1218-19 (9th Cir. 1991) (same); *cf. State of Nevada v. Watkins*, 939 F.2d 710, 712 (9th Cir. 1991) ("NWPA expressly provided [that issuance of an environmental assessment] would be 'a final agency action subject to judicial review' in accordance with the APA and the NWPA review provisions," citing 42 U.S.C. § 10132(b)(1)(E); preliminary activities are unreviewable). To maintain their challenges, Petitioners must demonstrate both that this Court has jurisdiction under the NWPA, and that they have properly invoked the APA. Petitioners cannot make either demonstration.

- 37 -

B. This Court Lacks Jurisdiction Under the NWPA and Petitioners Fail to Establish That They Have a Valid APA Cause of Action

1. The filing of the motion to withdraw the license application is not final agency action under the NWPA or APA

The NWPA and the APA authorize challenges only to *final* agency actions.

5 U.S.C. § 704; 42 U.S.C. § 10139(a). Petitioners purport to challenge DOE's decision to move to withdraw the license application. However, DOE's filing of that motion does not constitute final agency action under the NWPA or APA.^{13/}

Two conditions must be satisfied for agency action to be considered final: (1) the action must mark the consummation of the agency's decision-making process and not be merely tentative or interlocutory in nature; and (2) the action must be one by which rights or obligations have been determined or from which legal consequences will flow. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997). Neither criterion is satisfied here.

The act of filing a motion to withdraw does not fix any legal relationship, deny a right, or impose an obligation on Petitioners. NRC retains discretion to deny the motion and to continue to consider DOE's licensing application. As the

^{13/} Notably, three out of the four petitions were filed before DOE had even filed the motion to withdraw. As this Court held in *Public Citizen*, 845 F.2d at 1109, time cannot cure a NWPA claim filed prematurely.

- 38 -

Supreme Court explained in *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992), in determining whether agency conduct is “final agency action,” the “core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties.” Like the filing of a complaint in an administrative proceeding, the filing of a motion to withdraw does not complete the process and it does not directly affect Petitioners. *See Federal Trade Comm’n v. Standard Oil Co. of California*, 449 U.S. 232, 249 (1980) (FTS’s issuance of complaint not final action and therefore unreviewable). Because no legal consequences flow from the filing of a motion, that act does not represent a final decision of DOE sufficient to confer jurisdiction upon this Court under the NWPA or a cause of action upon Petitioners under the APA. *See Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 894 (1990). Indeed, the Board’s recent denial of the motion conclusively demonstrates that the motion itself lacks legal consequence.

Moreover, if the decision to file a motion in ongoing administrative proceedings were a reviewable final decision for purposes of the NWPA and APA, then every agency decision made in the course of prosecuting a license application would be immediately reviewable by this Court. One could only imagine the disruption this would cause in NRC proceedings. The purpose of finality

- 39 -

requirements is to prevent this potential mischief. *See DRG Funding Corp. v. Sec'y of Housing and Urban Dev.*, 76 F.3d 1212, 1214 (D.C. Cir. 1996).

Nor is the filing of the withdrawal motion “tantamount” to a genuine failure to act, as Petitioners suggest (Br. 30). *See Ecology Center v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) (limited exception to the finality doctrine applies only when there has been a genuine failure to act). Petitioners simply oppose DOE’s action of filing the motion to withdraw the license application. Courts repeatedly have refused to allow litigants to evade a finality requirement by dressing up complaints about the sufficiency or substance of an agency action as an agency’s supposed “failure” to act. *See e.g., Public Citizen*, 845 F.2d at 1108; *State of Nevada v. Watkins*, 939 F.2d at 714 n.11. Even if Petitioners’ claims were properly characterized as “failure to act” claims, they would fail because such claims are available only to compel discrete, ministerial, or nondiscretionary actions. *See Norton v. S. Utah Wilderness Alliance (“SUWA”)*, 542 U.S. 55, 62-65 (2004). They have not identified the kind of “specific, unequivocal command” necessary to sustain a “failure to act” claim. *Id.* at 63.

2. Petitioners cannot challenge DOE’s generalized policy toward Yucca Mountain

Petitioners cannot challenge DOE’s ongoing spent nuclear fuel and high-level nuclear program, including its policy toward Yucca Mountain, because the

- 40 -

APA does not allow judicial review of ongoing agency programs or amorphous agency policies. And, even if it did, any such generalized challenge to DOE's current Yucca Mountain policy is time-barred.

The APA does not authorize the federal courts to entertain challenges to anything and everything that an agency may do, or fail to do, when conducting its business. *See SUWA*, 542 U.S. at 64; *Fund for Animals v. BLM*, 460 F.3d 13, 19-20 (D.C. Cir. 2006) ("Much of what an agency does is in anticipation of agency action."). The APA's limitations necessarily exclude broad attacks on agency policies or how an agency implements a program assigned to it. *See Lujan*, 497 U.S. at 891; *Cobell v. Kempthorne*, 455 F.3d 301, 307 (D.C. Cir. 2006) ("Because an on-going program or policy is not, in itself, a final agency action under the APA, our jurisdiction does not extend to reviewing generalized complaints about agency behavior.") (internal quotations omitted). Such programmatic and policy attacks are to be made in the offices of the Executive branch or the halls of Congress, not by court decree. *See Lujan*, 497 U.S. at 891. The APA authorizes challenges only to discrete, circumscribed, and final agency actions, *see id.*; *SUWA*, 542 U.S. at 63-65, and then authorizes courts only to "hold unlawful and set aside" those discrete agency actions, *see* 5 U.S.C. § 706(2).

- 41 -

Here, Petitioners challenge DOE's policy to seek better alternatives to a deep geological repository at Yucca Mountain as a means to dispose of nuclear waste. The APA, however, does not provide a cause of action to challenge DOE's generalized policy. Petitioners instead must challenge a discrete circumscribed final agency action implementing that policy, which they have failed to do.¹⁴

Even assuming *arguendo* that the Secretary's policy toward Yucca Mountain could be challenged, any such challenge would be time-barred. The NWPA provides that claims must be commenced within 180 days after the date of the final decision or action. See 42 U.S.C. § 10139(c); *Public Citizen*, 845 F.2d at 1107. DOE's policy to terminate the Yucca Mountain program was clearly stated as early as March 11, 2009, and at least by May 2009, when DOE publicly stated its "decision to terminate the Yucca Mountain program while developing nuclear waste disposal alternatives." AR 2, p. 9, 504 [JA 643]; AR 1, p. 3 [JA 638]; AR 5, p. 1 [JA 675]. The first of the instant petitions was filed on February 19, 2010, well after 180 days had passed since DOE announced its policy to terminate the

¹⁴ It is true that, as a result of its policy, DOE has taken steps to close Yucca Mountain and to discover new and better ways to dispose of the Nation's spent nuclear fuel and high-level radioactive waste. However, as explained above, Petitioners' challenge to DOE's motion to withdraw the license application is premature. And, as discussed below, Petitioners present no other valid challenge to final agency action.

- 42 -

Yucca Mountain program. Petitioners' challenges to DOE's Yucca Mountain policy thus are time-barred.

3. Petitioners fail to identify, and preserve a challenge to, any final agency action that they would have standing to challenge

Petitioners identify (Br. 13-16) several statements made, or steps taken by, DOE with respect to its ongoing spent nuclear fuel and high-level nuclear waste program. These include various statements by the Secretary and DOE regarding Yucca Mountain, the FY 2011 budget request, the withdrawal of ground water permit applications relating to the building of a railroad for which congressional appropriations and planning ceased in 2009, the cessation of certain operational activities at Yucca Mountain, and the taking of steps to close OCRWM. Because Petitioners do not purport to challenge these statements or actions separately, nor do they develop any argument in their opening brief preserving a challenge to them, as required by Fed. R. App. P. 28(a)(9)(A), the Court need not, and should not, address these items. *See Consolidated Edison Co. v. FERC*, 347 F.3d 964, 970 (D.C. Cir. 2003).

Even if Petitioners had developed these arguments, the identified statements and activities are not reviewable under the APA because they are not final agency actions and/or they are activities committed to DOE's discretion by law. The statements in press releases and newspaper articles, the budget request, the

- 43 -

personnel decisions, and the other activities such as the cleaning of work areas that Petitioners identify cannot be challenged under the APA because they are not “agency actions,” as defined by the APA. In other words, they do not constitute a “rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” *See* 5 U.S.C. § 551(13) (defining “agency action”). As this Court explained when rejecting an APA challenge to a budget request:

the term [agency action] is not so all-encompassing as to authorize us to exercise judicial review over everything done by an administrative agency. Much of what an agency does is in anticipation of agency action. Agencies prepare proposals, conduct studies, meet with members of Congress and interested groups, and engage in a wide variety of activities that comprise the common business of managing government programs.

See Fund for Animals, 460 F.3d at 19-20 (internal citations omitted). Here, the complained of statements, budget request, personnel decisions, and cleaning of work areas that Petitioners identify are the type of common everyday activities that fall outside the scope of APA judicial review. *Id.* at 20; *P & V Enterprises v. U.S. Army Corps of Engn'rs*, 516 F.3d 1021, 1025-27 (D.C. Cir. 2008) (press release not final agency action).

Moreover, even assuming the statements and activities are “agency actions,” they still are not reviewable *final* agency actions. The statements and activities

identified by the Petitioners have no direct and immediate impact on Petitioners,^{15/} and this Court refuses to review, as non-final, agency activities “that do[] not [themselves] adversely affect complainant but only affect[] his rights adversely on the contingency of future administrative action.” *Id.* at 22 (citation omitted).

Most, if not all, of the complained of statements and activities also are unreviewable under the APA because they are “committed to agency discretion by law.” The APA explicitly excludes such activities from judicial review. *See* 5 U.S.C. § 701(a)(2). Agency action is committed to agency discretion by law when a statute provides “no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, for example, 42 U.S.C. § 7253(a) commits to the Secretary of Energy the absolute discretion “to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary or appropriate.”^{16/} Because § 7253(a) provides no meaningful standards against

^{15/} Petitioners also fail to demonstrate their standing to challenge these statements and activities. *See Summers*, 129 S. Ct. at 1149 (litigant “bears the burden of showing that he has standing for each type of relief sought”). Their affidavits are silent regarding these matters, and do not explain how Petitioners suffer particularized and redressable injury from internal agency personnel and housekeeping matters and budgeting decisions.

^{16/} While the NWPA established OCRWM, *see* 42 U.S.C. § 10224(a), Congress did not exempt from the Secretary’s broad discretionary authority under § 7253(a)

- 45 -

which to judge the Secretary's discretionary decision to discontinue OCRWM and to provide OCRWM staff priority consideration for job openings in the Department and relocation assistance (or to terminate staff in a very few instances), the APA precludes judicial review of these personnel decisions. Petitioners similarly fail to identify any statute that provides meaningful standards against which to judge DOE's discretionary decisions to withdraw groundwater permit applications, to clean out work areas, or to make or do any of the identified statements or activities.^{17/} Thus, even if Petitioners had preserved a challenge to these statements and activities, they would be unreviewable.

IV. The Claims Against NRC Should Be Summarily Dismissed

Three of the consolidated lawsuits name NRC, its Commissioners, and its administrative judges as respondents. These NRC Respondents should be summarily dismissed.

First, the claims against NRC's administrative judges are moot because they already have ruled in Petitioners' favor on DOE's motion to withdraw its Yucca Mountain application and because they continue to consider the merits of the

the power to discontinue organizational units established by the NWPA or any other statute, except for those organizational units noted in § 7253(a).

^{17/} Even if there were standards to apply, the scope of the Court's review would be limited to the propriety of the particular action.

- 46 -

application, as shown by a Board decision issued on December 14, 2010, deciding legal issues and waiver petitions. *See supra* at 5-6. Petitioners thus have no conceivable claim against the administrative judges, who, in any event, are not parties contemplated by the NWPA. *See* 42 U.S.C. § 10139(a).

As for NRC itself, the “merits” section of Petitioners’ brief (Br. 35-59) is silent on any claims against NRC. The “remedies/relief” section (Br. 63) says only that the Court should “enjoin Respondents, including NRC” from violating the NWPA. Petitioners nowhere explain why any relief against NRC is warranted. Such cursory treatment amounts to a waiver of claims against NRC. *See, e.g., U.S. ex rel. Miller v. Bill Harbert Intern. Const.*, 608 F.3d 871, 885 (D.C. Cir. 2010); *United States v. West*, 392 F.3d 450, 459 (D.C. Cir. 2004). It is inappropriate, in any event, for this Court to declare NRC action unlawful when NRC is still engaged in adjudicatory decision-making. The Commission’s deliberations on DOE’s application, including its motion to withdraw, are not yet complete.

Because the Commission (as of this writing) has reached no final merits decision on DOE’s motion to withdraw, NRC has not reviewed, and neither supports nor opposes, the merits-based arguments in this brief. NRC similarly takes no position on the portions of the Statement of the Case and Statement of the Facts bearing on the merits. Given its statutory responsibility to adjudicate the

- 47 -

Yucca Mountain application, NRC must remain impartial on DOE-specific claims. NRC, however, does join the brief's justiciability and jurisdictional arguments set forth in Sections II, III.A, and III.B.1.^{18/}

V. DOE's Decisions And Actions Do Not Violate the NWPA

Assuming *arguendo* the existence of standing, ripeness, jurisdiction, and a cause of action, Petitioners' NWPA claims should be rejected.

A. Standard of Review

Petitioners' NWPA claims turn on issues of statutory interpretation.

Because DOE is charged with administering the relevant statutes, *see infra* at 73-74, these issues are appropriately analyzed under the familiar two-part test of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

The specific questions presented by Petitioners' claims are (1) whether the NWPA by its plain language repeals DOE's pre-existing authority to withdraw the license application and to terminate the Yucca Mountain project; and (2) whether

^{18/} In a supplement (filed October 25, 2010) to their motion to expedite this judicial review proceeding, Petitioners complained of the NRC Staff's recent move toward "orderly closure" of its technical safety review given budget constraints. It is questionable whether such NRC budget actions are reviewable at all. *See Fund for Animals*, 460 F.3d at 19-20. But it is certain that this Court lacks jurisdiction to decide the matter in the context of these NWPA suits filed months *before* the challenged agency action; a fresh lawsuit would be required. *See Public Citizen*, 845 F.2d at 1109-1110. Notably, the administrative record before this Court contains nothing on NRC's budget-execution decisions.

- 48 -

the NWPA clearly imposes a nondiscretionary duty on DOE to pursue the project, including licensure. Petitioners argue (Br. 34-35) that these issues are properly resolved by this Court's *de novo* review of the statute under *Chevron* step one because the plain language and legislative history of the NWPA demonstrate a clear congressional intent to prohibit DOE from terminating the project, including license withdrawal, and to require DOE to pursue licensure for the Yucca Mountain repository. As demonstrated below, a proper interpretation of the relevant statutes demonstrates that Congress preserved DOE's pre-existing authority to withdraw the license application and to determine not to pursue the project. To the extent there is silence or ambiguity with respect to congressional intent on the precise issues presented, DOE's interpretation prevails because it is permissible and entitled to deference. *See infra* at 73-74.

B. The Secretary Has Authority Under the AEA and DOE Organization Act, Preserved by the NWPA, to Move to Withdraw the License Application

In moving to withdraw its license application, DOE exercised its authority under the AEA and DOE Organization Act to manage nuclear waste, including establishment of facilities for storage, management, and disposal of nuclear wastes. *See supra* at 7-8; 42 U.S.C. § 7133(a)(8)(A). The statutory scheme that Congress established under the AEA is "virtually unique in the degree to which

- 49 -

broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.” *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).^{19/} The Secretary’s broad discretionary authority under the AEA and DOE Organization Act to make decisions respecting the management and disposition of nuclear waste necessarily encompasses the power to decide not to construct a repository at Yucca Mountain, to study other alternatives, and to withdraw the license application.

The NWPA preserves this pre-existing grant of power. The NWPA clearly contains no express repeal of the AEA and DOE Organization Act or affirmative prohibition of the actions at issue.^{20/} Nor is there an implied repeal as to these actions. Repeals by implication are generally disfavored and will only be found where provisions in two statutes are in irreconcilable conflict or where the later

^{19/} See also *Public Citizen v. NRC*, 573 F.3d 916, 927 (9th Cir. 2009) (where petitioners cited no authority expressly limiting NRC’s discretion under the AEA, the court “decline[d] to imply any such limitation.”); *Massachusetts v. NRC*, 878 F.2d 1516, 1523 (1st Cir. 1989) (under the AEA, the “scope of review of NRC actions is extremely limited”).

^{20/} To be sure, there are specific limitations in the NWPA that circumscribe DOE’s authority. For example, there are specific limitations that serve to circumscribe DOE’s authority to begin disposal services for commercial spent nuclear fuel covered by contracts under the NWPA, see 42 U.S.C. 10165(b), 10168(d). The NWPA contains, however, no particularized limitations on DOE’s authority to seek license withdrawal.

- 50 -

Act covers the whole subject of the earlier one and is clearly intended as a substitute. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-63 (2007); *Bullcreek v. NRC*, 359 F.3d 536, 542 (D.C. Cir. 2004) (NWPA does not expressly or impliedly repeal NRC's authority under AEA); *United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001) (RCRA does not impliedly repeal DOE's AEA authority). The need for a clear expression of congressional intent to repeal the Secretary's pre-existing authority is pronounced in this circumstance because agency decisions not to pursue administrative proceedings or particular programs are generally committed to agency discretion and are presumptively unreviewable. See, e.g., *Heckler*, 470 U.S. at 831 (agency's decision not to prosecute is a decision generally committed to agency's absolute discretion and thus presumptively unreviewable); *Lincoln v. Vigil*, 508 U.S. 182, 192-94 (1993) (cancellation of health program not reviewable); 5 U.S.C. § 701(a)(2).

The NWPA is not a complete substitute for the AEA. See *Bullcreek*, 359 F.3d at 542; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), 56 N.R.C. 390, 405 (1992) ("Congress intended to supplement, rather than replace, existing law"). And there is no irreconcilable conflict between a statute setting up a process to select, site and *possibly* obtain a construction

- 51 -

authorization from NRC (the NWPA) and another set of statutes that provides DOE the discretion *not* to move forward with the construction or operation of such a repository (the AEA and DOE Organization Act). The former must be read consistently with the latter, and therefore the authority under the latter is preserved. *See Bullcreek*, 359 F.3d at 543; *Vimar Seguras y Reasegures, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (“[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, *absent a clearly expressed congressional intention to the contrary*, to regard each as effective.”) (emphasis added); *see also* 1A N. Singer, *Sutherland Statutory Construction* § 23:9 (6th ed. 2000).

Petitioners suggest (Br. 40, 43) that because no NWPA provision affirmatively authorizes DOE to exercise its pre-existing discretion to terminate the project and withdraw the application, the Secretary has no authority to take such action. This analysis, however, is backwards. The AEA and DOE Organization Act provide authority for the Secretary to terminate the project and to withdraw the license application, and thus Petitioners must show – and they cannot – that the NWPA repeals this authority.

To the contrary, the NWPA reiterates the Federal Government’s responsibility to provide for the permanent disposal of high-level radioactive

- 52 -

waste and spent nuclear fuel, 42 U.S.C. § 10131(a)(4), and retains in DOE “primary responsibility” for developing and administering the nuclear waste disposal program. *See NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988) (“Congress delegated primary responsibility for developing and administering the waste disposal program to [DOE]”); *General Elec. Uranium Mgmt. Corp. v. DOE*, 764 F.2d 896, 905 (D.C. Cir. 1985) (“DOE is indubitably entrusted with the administration of the Waste Act”). Furthermore, the NWPA affirmatively preserves DOE’s pre-existing authority to withdraw a license application. NWPA § 114(d) provides that any license application for construction of a permanent geologic repository is subject to “laws applicable to such applications,” 42 U.S.C. § 10134(d). Those laws include NRC’s rules and precedent applicable to such applications, including its rule and practice allowing applicants to withdraw license applications.^{21/} The right of applicants before NRC to withdraw their applications was well established when Congress enacted the NWPA in 1982:

^{21/} An unqualified reference to “laws” in a federal statute includes decisional law. *E.g., Commissioner v. Estate of Bosch*, 387 U.S. 456, 464 (1967). Regulations also are laws. *E.g., United States v. Nixon*, 418 U.S. 683, 695 (1974).

- 53 -

NRC's regulation, 10 C.F.R. § 2.107, was promulgated in 1963,^{22/} and NRC had decided its seminal cases recognizing the right to withdraw before 1982.^{23/}

In its June 29, 2010, Order, the NRC Licensing Board suggests, however, that the reference to “the laws applicable to such applications” was intended as a blanket reference to *substantive* standards that NRC applies in judging applications, and does not include *procedural* regulations and practice governing such license applications.^{24/} JA 798-99. That conclusion is inconsistent with the statutory text, which refers to “laws” without qualification. *See also supra* at 52 n.21. Furthermore, NWPA § 114(d)'s one exception to the blanket incorporation of existing NRC law is a *procedural* one – the adoption of a three-year time limit

^{22/} The regulation was originally promulgated in 1962 and amended in 1963 to address withdrawal of an application after a notice of hearing has issued. 27 Fed. Reg. 377, 379 (Jan. 13, 1962); 28 Fed. Reg. 10,151, 10,152 (Sept. 17, 1963). This rule and practice also derives from the broad authority conferred by the AEA, and the NRC is successor to the AEC's licensing responsibilities.

^{23/} *See, e.g., Duke Power Co.* (Perkins Nuclear Power Station, Units 1, 2, and 3), 16 N.R.C. 1128 (1982); *Puerto Rico Electric Power Authority* (North Coast Nuclear Plant, Unit 1), 14 N.R.C. 1125 (1981); *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 and 2), 14 N.R.C. 967 (1981); *Boston Edison Co.* (Pilgrim Nuclear Generating Station, Units 2 and 3), 8 A.E.C. 324 (1974).

^{24/} The Licensing Board also suggests that 10 C.F.R. § 2.107 merely empowers licensing boards to attach conditions to withdrawal as opposed to authorizing the applicant to seek withdrawal. JA 797. However, the regulation necessarily contemplates, and only makes sense if applicants have, the underlying right to withdraw. This is confirmed by the decisions interpreting and applying § 2.107. *See cases cited supra* n.23.

- 54 -

for any Commission decision. That exception demonstrates that the general reference to applicable laws in § 114(d) encompasses both substantive *and* procedural laws.^{25/}

The language in § 114(f)(5) reinforces that conclusion. It states: “Nothing in this Act shall be construed to amend or otherwise to detract from the licensing requirements of the [NRC] established in Title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 *et seq.*)” 42 U.S.C. § 10134(f)(5). The term “licensing requirements” in § 114(f)(5) refers to substantive standards. Had Congress intended to limit § 114(d) to substantive standards, it presumably would have used the same language it used in § 114(f)(5). But it did not. Instead, it used words of broader application.

The legislative history also confirms that Congress intended, and was satisfied with, the application of NRC’s procedural rules to the Yucca Mountain license application. Congress considered, but rejected, language that would have

^{25/} Amicus NEI acknowledges that withdrawal of an application is not uncommon in NRC proceedings and that NRC regulations specifically provide for withdrawal of an application and termination of associated proceedings. NEI Br. 7-8. NEI then asserts that licensing of private entities pursuant to the AEA “is in no way pertinent to the Yucca Mountain licensing proceeding.” *Id.* at 8-9. To the contrary, Congress’s incorporation of the ordinary rules from private license cases demonstrates that the rules applicable to licensing of private entities are pertinent and that Congress did not intend for DOE be treated differently in the licensing proceeding than private voluntary applicants.

- 55 -

superseded ordinary NRC rules of practice that govern licensing proceedings with specific procedural rules for the repository license application proceeding.²⁶

Congress, however, eventually stripped all the special licensing procedures from the bill and substituted in their place § 114(d), which adopts NRC's rules. *See* 42 U.S.C. § 10134(d); H.R. Rep. 97-411(I) at 52 (statement of Rep. Lundine) (objecting to inclusion in NWPA of special procedural rules and preferring use of NRC's rules of practice, noting that NRC's "procedural regulations have been carefully drawn after many months of careful consideration and debate.").

Thus, Congress deliberately incorporated all of NRC's rules. Those rules included 10 C.F.R. § 2.107. Congress is presumed to understand the regulatory scheme that it incorporates by reference. *See Bullcreek*, 359 F.3d at 542 (holding that Congress is presumed to have been familiar with, and taken into account, NRC regulations when it enacted NWPA). *Accord Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 575 (1993); *United States v. Wilson*, 290 F.3d 347, 356-57 (D.C. Cir. 2002).

²⁶ *See* H.R. 97-5016, 97th Cong., 1st Sess. (Nov. 18, 1981), § 8(d)(2)-(9); H.R. Rep. No. 97-411(I), 97th Cong., 1st Sess., at 21 (1982). The proposed procedures were supposed to truncate the licensing process. *See* 128 Cong. Rec. 32,544 (1982) (Sen. Mitchell).

- 56 -

In sum, the NWPA leaves intact DOE's pre-existing powers under the AEA and DOE Organization Act to terminate the project and to seek to withdraw a license application that the Secretary has concluded is unworkable and not in the public interest. The NWPA preserves this pre-existing authority by directing application of both substantive and procedural NRC rules.

C. There Is No Merit to Petitioners' Contention That the NWPA Unambiguously Prohibits DOE from Withdrawing the License Application

Petitioners assert (Br. 36-37) that the plain language of NWPA §§ 114(b) and 114(d), 42 U.S.C. §§ 10134(b), 10134(d), prohibits DOE from withdrawing the license application for any reason. To the contrary, there is no text in the NWPA that prevents withdrawal. Congress specified a number of other things that DOE must do (or could not do), but it did not prohibit withdrawal.

Petitioners' argument as to § 114(b) rests on an inference from the language stating that the Secretary "shall submit" a license application. 42 U.S.C. § 10134(b). This provision does not state, as Petitioners' interpretation assumes, that once submitted, the Secretary shall continue prosecuting the license application no matter the circumstances or changes as to his judgment of the public interest. And it certainly does not state that the Secretary "shall not" withdraw the license application or terminate the project.

- 57 -

In fact, all that § 114(b) states is that, after the site approval has taken effect, the Secretary shall submit to NRC an application for construction authorization within a short specified time period. It is thus a timing provision that states when the proceeding is to begin, but does not control actions taken after that point. The effect and purpose of the plain language of § 114(b) is two-fold: (1) to preclude DOE from going forward with a license application for Yucca Mountain until after the State disapproval and congressional review process set forth in § 115 is complete; and (2) consistent with other tight time periods in §§ 113 and 114, to promote the prompt filing of an application after congressional action. Thus, § 114(b) contains “directory” language aimed at ensuring the prompt submission of an application following site approval. *See* S. Conf. Rep. No. 107-159, at 9. The statute does not, however, by its plain language preclude the application’s later withdrawal during the course of the licensing proceeding in an exercise of the Secretary’s pre-existing discretionary authority to terminate the project.

If, as Petitioners argue, Congress intended to prevent DOE from later withdrawing a pending application over the following three or four years, Congress could have included in the NWPA a provision expressly saying that

- 58 -

DOE “shall not” withdraw the license application.^{27/} Or, Congress could have said in specific terms that DOE must take all actions necessary to build the Yucca Mountain repository. In fact, before passage of the NWPA, Congress had legislation including such a requirement before it, but rejected it.^{28/}

Additionally, Petitioners’ interpretation of § 114(b) is at odds with § 114(d)’s express adoption of NRC rules of practice for the license proceeding, *see supra* at 53-55. Under Petitioners’ reading, one provision of § 114 implicitly requires DOE to take a license proceeding to completion on the merits, regardless of ordinary NRC practice or the Secretary’s judgment as to sound policy, while another provision of § 114 explicitly incorporates standard NRC practices governing license applications, which authorize withdrawals. Petitioners’ reading thus forces onto § 114(b) a meaning that Congress never expressed, and it overrides the explicit language of § 114(d).

^{27/} There are provisions throughout the NWPA in which Congress stated that DOE “shall not” do a particular act. *See, e.g.*, 42 U.S.C. §§ 10132(b)(3), 10156(a)(1), 10162(a).

^{28/} Section 8(d)(7) of draft bill H.R. 97-5016 would have directed the Secretary to complete construction within 6 years after receiving construction authorization and to operate the repository at the earliest practical date after receiving a license from NRC. Congress omitted that and other comparable requirements from the NWPA, thereby leaving intact the Secretary’s ultimate authority under the AEA to decide whether to construct and operate a particular repository.

- 59 -

Petitioners' contention that § 114(d) impliedly prohibits DOE from withdrawing an application fares no better. Their argument is based on statutory text that they quote out of context. Br. 36-37. Petitioners first rely (Br. 36) on the phrase in § 114(d) that the Commission "shall consider" the application. 42 U.S.C. § 10134(d). However, the text directs NRC to "consider" it "in accordance with the laws applicable to such applications," and, as discussed above, those laws allow withdrawal of the application. *Id.* Second, Petitioners rely (Br. 36-37) on the § 114(d) phrase "shall issue a final decision approving or disapproving the issuance of a construction authorization." 42 U.S.C. § 10134(d). But the pertinent text reads in full that the Commission "shall issue a final decision approving or disapproving the issuance of a construction authorization *not later than the expiration of 3 years after the date of submission of such application.*" *Id.* Read in full, this requirement is simply a time deadline for acting on a pending docketed application – a time limit that would not be violated if the application is withdrawn. As the legislative history makes plain, Congress was concerned that NRC would not act promptly on an application that DOE was continuing to pursue. *See* H.R. Rep. No. 97-411(I), at 47. There is no evidence, however, that Congress implicitly and indirectly sought to limit *DOE's* discretion through this provision.

- 60 -

Indeed, as NRC has previously concluded, the time limit applies only during the period when DOE's application is docketed before NRC. *See* 66 Fed. Reg. 29,453, 29,453 n.1 (May 31, 2001). Once DOE's application is withdrawn, it is not docketed and, correspondingly, the Commission is not in violation of any duty to resolve the application within a certain amount of time. This provision is *not* fairly read as a substantive obligation placed on the impartial adjudicator to reach the merits of an application, even when DOE has determined not to proceed.

In any event, granting DOE's request to withdraw with prejudice would result in a final NRC judgment on DOE's application. Such a final judgment would satisfy NRC's obligations under § 114(d) by constituting a timely "disapprov[al]" under the statute, 42 U.S.C. § 10134(d).

There is also no merit to Petitioners' contention (Br. 38-39, 44-45) that the context and structure of the Act support their interpretation. Petitioners first rely on NWPA § 114(e). However, insofar as applicable to DOE, this provision merely requires preparation of a schedule and reports about the status of the repository. It does not impose any substantive obligation on DOE to develop the repository during or after the construction authorization proceeding and is easily reconciled with DOE's right to withdraw its application and to terminate the project. The provision indicates that Congress wanted to stay informed, perhaps even for the

- 61 -

purpose of enacting subsequent legislation. Indeed, consistent with this understanding, Congress has funded the Blue Ribbon Commission with the explicit purpose of studying and recommending alternatives for the disposal of high-level waste and spent nuclear fuel based upon advances in science and engineering. The reports thus provide a means for DOE to inform Congress that it is no longer pursuing a license.

Second, Petitioners point (Br. 38-39) to NWPA § 113(c)(3)(A), 42 U.S.C. § 10133(c)(3)(A), which allows the Secretary to terminate site characterization activities if the Secretary, in his discretion, concludes that the site is unsuitable. Petitioners argue (Br. 38-39) that the presence of that language in § 113(c)(3)(A) and the absence of the same language in § 114 indicates that Congress did not intend for DOE to have termination authority during the license application phase. Petitioners rely on the statutory construction principle that, where Congress includes particular language in one section and omits it in another section of the same Act, it is generally presumed Congress acted purposely in disparate inclusion and exclusion. However, Petitioners' reliance (Br. 38-39) on this principle is misplaced because Congress included language in both §§ 113(d) and 114(d) that preserves the Secretary's discretion to *end* the Yucca Mountain project throughout the process. The use of different wording in § 113(c)(3)(A) and 114(d) to express

- 62 -

this intent is of no significance. Repetition of § 113(c)(3)(A)'s text in § 114 was not necessary to preserve the Secretary's termination authority because § 114(d) affirmatively incorporates NRC's usual licensing procedures. The inclusion of § 113's language in § 114 would have been redundant.^{29/}

Section 113 also parallels § 114 to the extent that both provisions contain a reporting requirement to Congress. *See* 42 U.S.C. §§ 10133(c)(3)(F), 10134(c), 10134(e)(2). These requirements ensure that Congress is made aware of a Secretarial termination decision and that recommendations are made for further legislative action.

The expression of DOE's termination authority in § 113(c)(3) therefore does not signify that DOE's pre-existing authority is somehow completely extinguished after submission of the application. Rather, it confirms that Congress intended to preserve the Secretary's discretion to *end* the Yucca Mountain process if he determines that is sound policy.

Thus, the NWPA does not by its plain language prohibit withdrawal of the license application on DOE's request. Nor does the Act impose a mandatory duty

^{29/} Petitioners also suggest (Br. 44) that § 114(b) precludes the Secretary from deciding to terminate the project. To the contrary, that provision says nothing about DOE's authority or obligations beyond submission of the license application.

- 63 -

on DOE to prosecute the license application – certainly not with the clarity that would be required for Petitioners to prevail.³⁰

Finally, Petitioners suggest (Br. 43) that it makes no sense to allow DOE to withdraw the license application after Congress's 2002 joint resolution, which allowed the submission of the license application. Actually, that resolution was necessary to authorize the Secretary to proceed at all, and it does not preclude later judgments by the Secretary. And it makes good sense to allow the Secretary to act if circumstances change or it becomes apparent to him that prior policies have failed, just as the Secretary had that discretion before making a recommendation to the President.

Petitioners' reading of the statute, on the other hand, is unreasonable. Under Petitioners' reading, one must assume that Congress intended for NRC to expend its time and resources reviewing and adjudicating an application for a facility that is not going to be built and that the NWPA currently does not permit, much less require, to be built absent further legislation and a series of discretionary actions that the Secretary is not required by statute to make. *See*

³⁰ Petitioners characterize the pursuit of the license application as a mere ministerial act for DOE to perform. Br. 61. That is simply wrong. An NRC licensing proceeding entails innumerable discretionary decisions on the part of the applicant. There are literally hundreds of contested issues in this proceeding to which DOE must decide in its discretion how to respond.

- 64 -

infra at 66-69. Petitioners' position also assumes that Congress intended DOE to expend substantial public funds prosecuting a highly contentious license application despite the Secretary's judgment that continuing with the process is contrary to the public interest and his policy that DOE will not build the project if approved. Indeed, Petitioners acknowledge (Br. 42 n.15) that under their statutory interpretation, even in the event that a cataclysmic earthquake occurred at Yucca Mountain, DOE could not withdraw the license application or terminate the project; rather, NRC would have to complete the licensing process and render a decision on the merits. For all these reasons, Petitioners' position results in a futile and wasteful process for a facility that need not be (and will not be) built. The NWPA should not be read to require such an unlikely result.

D. Neither The Language Nor Structure of the NWPA Requires DOE to Maintain a Program to Develop and Construct a Repository at Yucca Mountain

Petitioners argue that the NWPA also precludes the Secretary from terminating the "entire Yucca Mountain project," although they do not define what falls within the scope of this supposed prohibition. Br. 42-46. While Petitioners include the withdrawal of the license application as an element of the project that allegedly cannot be terminated (Br. 42), this argument appears to go beyond the withdrawal motion to challenge the Secretary's authority to make decisions to

- 65 -

terminate development and construction of the project outside of the licensing process.

There is no support for such a contention in the statute's language, structure, or legislative history. There is simply no statutory language that even arguably creates a duty to open a facility at Yucca Mountain or to continue the "entire Yucca Mountain project" through the development of such a facility. The statutory provisions and structure on which Petitioners rely (Br. 42-45) deal with the process leading up to and during licensing. Those provisions do not even mandate that the Secretary maintain an NRC construction license application, for the reasons discussed above. Even more clearly, these provisions cannot colorably be read to impose any specific duties on the Secretary or to override the Secretary's pre-existing AEA authority *outside* of the NRC licensing process.

Congress made clear that its approval of the Yucca Mountain site in 2002 merely authorized the filing of an application for construction authority, and did not create a commitment to build a repository at Yucca Mountain. The Senate Report accompanying the adoption of the 2002 joint resolution states:

It bears repeating that enactment of the joint resolution will *not* authorize construction of the repository or allow DOE to put any radioactive waste or spent nuclear fuel in it or even allow DOE to begin transporting waste to it. Enactment of the joint resolution *will only allow DOE to take the next step* in the process laid out by the Nuclear Waste Policy Act and *apply* to the NRC for authorization to construct the repository at Yucca Mountain.

- 66 -

S. Conf. Rep. No. 107-159, at 13 (emphasis added); *see also Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1304, 1310 (D.C. Cir. 2004).

Furthermore, there are many actions that would be required for the Secretary to open a repository that are not mandated by the NWPA. Indeed, DOE could not operate the repository absent further legislative action and other regulatory actions, as well as numerous other steps not mandated by the NWPA. An operational repository could not exist at Yucca Mountain even if NRC approved DOE's license application unless at least the following occurred:

- Congress must enact legislation permanently withdrawing lands necessary for the Yucca Mountain repository (*see* 10 C.F.R. § 63.121); such legislation was introduced in 2006 and 2007 but did not pass;^{31/}
- DOE must apply for, and NRC must approve, an additional license to receive and possess spent nuclear fuel and high-level radioactive waste in the repository;

^{31/} Nuclear Fuel Management & Disposal Act, S. 2589, 109th Cong., 2d Sess. (April 6, 2006); Nuclear Fuel Management & Disposal Act, H.R. 5360, 109th Cong., 2d Sess. (May 11, 2006); Nuclear Fuel Management & Disposal Act, S. 3962, 109th Cong., 2d Sess. (Sept. 27, 2006); Nuclear Waste Access to Yucca Act, S. 37, 110th Cong., 1st Sess. (May 23, 2007); Clean, Reliable, Efficient and Secure Energy Act of 2007, S. 1602, 110th Cong., 1st Sess. (June 12, 2007).

- 67 -

- DOE must obtain federal and state permits, including water permits from Nevada that Nevada has vigorously opposed granting;^{32/} and
- Congress must fund the construction of the repository and the rail line to the repository (and in FY 2010 it eliminated funding for such activities, *see supra* at 16).^{33/}

Neither the NWPA nor the 2002 joint resolution commits Congress to enact the necessary legislation. In any event, they could not have that effect. *See, e.g., Reichelder v. Quinn*, 287 U.S. 315, 318 (1932) (“[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years.”)

The NWPA likewise does not direct DOE to apply for permits necessary for construction of a repository or to file an application with NRC to receive and possess spent nuclear fuel and high-level radioactive waste; and it certainly does not guarantee DOE success if it were to pursue them. Accordingly, there is nothing in the NWPA that prevents the Secretary from deciding that DOE will not

^{32/} *See, e.g., United States v. Morros*, 268 F.3d 695 (9th Cir. 2001).

^{33/} The water permit application withdrawals mentioned by Petitioners (Br. 15) related to construction of a rail line. There is nothing in the NWPA that requires DOE to move forward with construction of a rail line at any time and especially now when there is no license approval for the repository.

- 68 -

build the repository and thus will not move forward with construction-related development.

Petitioners wrongly contend (Br. 43-44) that the NWPA approval process displaced the Secretary's pre-existing discretionary authority to terminate the Yucca Mountain project. Petitioners identify no specific statutory language to support this conclusion. Instead, Petitioners rely on the erroneous supposition that because Congress displaced the Secretary's authority "to *make*" a siting decision, it must be assumed that, in their words, Congress intended to disallow the Secretary "to *reverse*" a siting decision Congress had made. Br. 44 (emphasis in original).

But the Secretary's decision not to build the project is not "reversing" any congressional decision. The 2002 joint resolution merely allowed the process to proceed; it did not decide that a repository must be built at Yucca Mountain.

Petitioners' argument rests on a fundamental misconception as to the purpose and effect of the statutory approval process. Under the statutory scheme, the Secretary may *move forward* with selecting, siting, and obtaining a license to construct a repository at Yucca Mountain *only if* the President, Congress, and NRC permit him to do so. This ensures that the repository will not proceed

- 69 -

without the approval of those other actors.^{34/} At the same time, the NWPA leaves in place the Secretary's pre-existing discretion to halt a repository at Yucca Mountain without leave of the President, Congress, or NRC. Even the grant of an NRC construction authorization is merely a license that permits, but does not mandate, construction of the repository and leaves the Secretary with the discretion as to whether to go forward. *Cf. Shoreham-Wading River Central School Dist. v. NRC*, 931 F. 2d 102, 107 (D.C. Cir. 1991) (a "license to operate" is not "a sentence to do so"). The structure of the NWPA conditions the terms on which the Secretary may move forward with Yucca Mountain, but it leaves with the Secretary the ultimate decision whether to continue with the process up through the construction of a repository.

In sum, Petitioners' suggestion (Br. 43-45) that the statutory approval process and 2002 congressional joint resolution set DOE on a course of development and construction of Yucca Mountain that DOE has no discretion to

^{34/} The legislative history reveals that Congress was aware of, and sought to avoid, past errors involving DOE's predecessors *seeking to go forward* with a repository without adequate consultation with affected entities and, in one case, rushing development of a site that turned out to be technically infeasible. *See* H.R. Rep. No. 97-491 (I), 97th Cong., 2d Sess. at 26-28 (1982) (describing failure from AEC's "rush to develop" a pilot facility in Lyons, Kansas as a "landmark event" that continued to color repository siting activities and the ERDA's efforts to find a site in Michigan).

- 70 -

halt without congressional approval has no basis in the statutory text or structure. It has always been the case – and with DOE’s current actions remains so – that further congressional action would be required in order for the Yucca Mountain repository to be opened. Petitioners’ recourse is, as it has always been, with Congress, and not through the instant petitions.^{35/}

E. The Legislative History Does Not Supply the Clear Expression of Congressional Intent That Is Required for Petitioners to Prevail Under *Chevron* Step One

Petitioners argue that the legislative history supports finding that NWPA prohibits DOE from terminating the project because it reveals that Congress intended that “the NWPA’s process will lead to a repository being opened” at Yucca Mountain (Br. 45-46). To the contrary, the NWPA establishes a process that *could* lead to a repository at Yucca Mountain if, ultimately, the Secretary and other actors considered it appropriate to construct one there. That process, however, was not intended to – and did not – guarantee or mandate the construction or operation of a repository both before and after Congress’s enactment of the joint resolution in 2002. Indeed, at the time Congress was considering enactment of the joint resolution, it acknowledged that there were

^{35/} Petitioners’ repeated characterization of DOE’s actions as “irrevocable” (Br. ii, 17, 42) overlooks that Congress has the power to take action to override the Secretary’s decision to terminate the project.

- 71 -

many factors that might lead to a repository not opening and that Congress was “not committed forever to Yucca Mountain.” 148 Cong. Rec. 7156 (2002) (Rep. Norwood).^{36/}

Petitioners again wrongly rely on (Br. 40-41) legislative history accompanying Congress’s 2002 joint resolution to argue that any authority to abandon Yucca Mountain is now solely vested in NRC based on technical merits of the application. The passages on which Petitioners rely indicate only that Congress chose for NRC, as opposed to Congress itself, to resolve disputed questions of geology, safety, and performance. That does not suggest that DOE cannot request in the licensing proceeding that NRC end the proceeding through action on a motion to withdraw. Moreover, the 2002 legislative history confirms that Congress understood that, when it approved Yucca Mountain as the site of a potential repository, such approval simply authorized the Secretary to seek authority to construct and did not commit Congress (or DOE for that matter) beyond that step. *See, e.g.*, S. Conf. Rep. No. 107-159 at 13 (technical documents are sufficient to justify “*allowing* the Secretary to submit a license application”

^{36/} *See also* 148 Cong. Rec. 7155 (2002) (Rep. Dingell) (stating that approval is just about a step in a process); *id.* at 12340 (Sen. Crapo) (“[T]his debate is not about whether to open the Yucca Mountain facility so much as it is about allowing the process of permitting to begin to take place.”)

- 72 -

(emphasis added)). Accordingly, the 2002 legislative history supports DOE's interpretation, not Petitioners'.

Petitioners attempt to characterize (Br. 39-40) snippets of the 1982 history as indicating that Congress wanted to legislate a schedule. However, these snippets say nothing about the Secretary's discretion to end the process during the licensing stage. Indeed, the legislative history makes clear that Congress understood that there were many reasons that the process might not lead to a repository. *See* H.R. Rep. No. 97-491(I) at 44 (“[I]t is not possible to resolve all uncertainties or predict all obstacles” to a permanent geologic repository; [t]he potential for failure or serious delay in the program exists”).

In sum, the NWPA's language, structure, purpose, and legislative history does not reveal a clear and unambiguous congressional intent to remove DOE's pre-existing authority under the AEA and DOE Organization Act or to prohibit DOE from deciding to discontinue, and to withdraw the license application for, the Yucca Mountain project. Thus, Petitioners' interpretation fails under *Chevron* step one. Rather, DOE's interpretation that it retains authority to take such actions is compelled by the language and structure of the relevant statutes, as properly construed under the applicable traditional rules of statutory construction.

- 73 -

F. To the Extent Congress's Intent Is Ambiguous, DOE's Interpretation Must Be Upheld

To the extent there is silence or ambiguity as to Congress's intent, DOE's interpretation must be upheld because DOE's interpretation is permissible and entitled to deference. DOE's authority to act comes from the AEA and the DOE Organization Act and DOE's interpretation of those statutes is entitled to *Chevron* deference. DOE is also the agency with primary responsibility under the NWPA and its interpretation of this statute too is entitled to *Chevron* deference. *See, e.g., Indiana Michigan Power Co.*, 88 F.3d at 1274; *General Elec. Uranium Mgmt. Corp.*, 764 F.2d at 907; *Nevada v. DOE*, 993 F.2d 1442, 1444 (9th Cir. 1993); *Nevada ex rel. Loux v. Herrington*, 777 F.2d 529, 531 (9th Cir. 1985). *But see Bullcreek*, 359 F.3d at 541 (questioning, but not deciding, whether *Chevron* applies since both NRC and DOE are responsible for implementing Subtitle B of the NWPA).

Should Petitioners argue that DOE's interpretation is not entitled to *Chevron* deference because it is not the product of notice and comment rulemaking, this argument should be rejected. The interpretation set forth in briefs filed in the NRC proceeding constitutes the official and deliberate determination by the agency and is entitled to *Chevron* deference. *See, e.g., Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156-57 (1991);

- 74 -

Auer v. Robbins, 519 U.S. 452, 462 (1997). An agency's interpretation advanced in an administrative adjudication "is agency action, not a post hoc rationalization of it" and warrants deference. *Martin*, 499 U.S. at 157 (emphasis in original). And even where an administrative interpretation is not in a form that qualifies for *Chevron* deference, an agency's interpretation of a statute it administers nonetheless deserves deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and *Coeur Alaska v. Southeast Conserv. Council*, 129 S. Ct. 2458, 2473 (2009). *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008); *Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461, 487-88 (2004).

The result is the same whether *de novo* review, *Chevron*, *Coeur Alaska*, or *Skidmore* deference is applied. DOE's is the better interpretation.

VI. DOE Has Not Violated NEPA

A. Standard of Review

Petitioners' NEPA claim (Br. 46-48) is reviewed under the APA's arbitrary and capricious standard, 5 U.S.C. § 706(2)(A). *See, e.g., Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 763 (2004); *Nevada v. DOE*, 457 F.3d 78, 87 (D.C. Cir. 2006).

- 75 -

B. Petitioners' Claim That DOE Violated NEPA Lacks Merit

There is no merit to Petitioners' contention (Br. 46-51) that Respondents have violated NEPA by deciding to abandon the Yucca Mountain project without first evaluating the impacts of that decision under NEPA. DOE has taken no major federal action that gives rise to an obligation to undertake NEPA analysis. Even if it had, DOE already has completed detailed NEPA analyses of not proceeding with a permanent geologic repository at Yucca Mountain and therefore has satisfied NEPA.

1. No NEPA analysis was required

In order to prevail on their NEPA claim, Petitioners must demonstrate that DOE has undertaken an identifiable final agency action that is also a "major federal action" under NEPA, 42 U.S.C. § 4332(C), without undertaking requisite NEPA analysis. *See Karst Envtl. Educ. and Prot. v. EPA*, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007). As we demonstrated above, there is no final agency action. For similar reasons, there is no major federal action for purposes of NEPA.

Petitioners argue (Br. 47) that a decision to alter or terminate a major federal project is a major federal action. However, NEPA analysis is required only if such

- 76 -

action effects a change in the physical environmental status quo.³⁷ *E.g.*, *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 763, 772-775 (1983); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2001); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343-44 (9th Cir. 1995). It is undisputed that the proposed Yucca Mountain repository does not yet exist; it has not been built and may never have been built, and a decision to forgo a license application results in no material changes on the ground. The decision not to move forward with development of the repository means that the environmental

³⁷ The cases on which Petitioners rely (Br. 48) do not hold otherwise. Petitioners cite *Andrus v. Sierra Club*, 442 U.S. 347 (1979), for the proposition that a decision to terminate a major federal project is a major federal action. However, the Supreme Court held, consistent with the Council on Environmental Quality's regulation, 40 C.F.R. § 1508.17, that appropriation requests, even those declining to ask for funding so as to terminate a program, are not "proposals" for major federal actions and therefore the procedural requirements of NEPA have no application to such requests. *Id.* at 363-67. As part of its rationale, a footnote in *Andrus* contains *dicta* that an EIS might be required for an underlying formal programmatic proposal to terminate a program – but does not state, much less hold, that an EIS is required when the termination does not impact the environmental status quo. *Id.* at 363, n. 22 (quoting 42 U.S.C. § 4332(C)). *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232 (9th Cir. 1990), simply points out that if an ongoing project undergoes changes which themselves amount to major federal actions, an EIS must be prepared. That is not this circumstance. *California ex rel Lockyer v. USDA*, 575 F.3d 999, 1014-15 (9th Cir. 2009) also addresses entirely different circumstances – a new rule that changed ongoing management of land. Here, there has been no alteration of the environmental status quo.

- 77 -

status quo at Yucca Mountain is not changed in any material way. Accordingly, NEPA analysis is not required.

Petitioners fail in their attempt to show that the decision changes the status quo in a manner that would require further NEPA analysis at this juncture. Citing the Dahl affidavit attached to Washington's motion for preliminary injunction, Petitioners suggest (Br. 48-49) that terminating the Yucca Mountain project will cause environmental effects at Hanford. They suggest that regulatory, administrative, and technical issues at Hanford will have to be revisited and this could delay the mission to retrieve waste from Hanford's tanks. Petitioners also suggest that terminating Yucca Mountain will prolong storage at Hanford. Dr. Triay's declaration thoroughly refutes this speculation. Addendum at 45-49; *supra* at 28-29. Furthermore, DOE is already taking into consideration potential impacts at Hanford from not proceeding with Yucca Mountain in a NEPA analysis specific to Hanford. AR 46, pp. S-13, S-118 [JA 678-79].

- 78 -

2. DOE satisfied NEPA as to an evaluation of the effects of not building Yucca Mountain

Even if the Secretary's actions required analysis of the environmental impacts of not proceeding with Yucca Mountain, Petitioners' claim fails because DOE already has extensively studied such impacts through its evaluation of the "no action alternative" for the Yucca Mountain project. NEPA does not require redundant analyses. *See* 40 C.F.R. §§ 1500.4, 1502.4, 1502.20, 1502.21. In its 2002 EIS and in its 2008 Supplemental EIS on the Yucca Mountain proposal, DOE included a detailed analysis of a no action alternative proposing that Yucca Mountain not be built, and analyzed all direct, indirect, and cumulative impacts stemming from this no action alternative. JA 467-595, 616, 623-24. These EISs directly address the very issues that Petitioners suggest (Br. 50) should be evaluated under NEPA, including long- and short-term safety, air and water quality, and community impacts. NEPA does not require DOE to duplicate its prior efforts.^{38/}

^{38/} Assuming *arguendo* that DOE failed to adhere precisely with NEPA procedures, any violation would be harmless error because the environmental consequences of not building Yucca Mountain were evaluated in the Yucca Mountain FEIS. *See Nevada*, 457 F.3d at 90 (court need not decide plaintiffs' claim because DOE's failure to identify rail corridor selection as preferred alternative in FEIS was harmless error); *Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1257 (D.C. Cir. 1988) (agency's failure to prepare required NEPA environmental assessment harmless error because agency had considered environmental consequences).

- 79 -

3. NEPA analysis of an alternative that has not yet been proposed is not required

Finally, Petitioners reason (Br. 50) that DOE's decision with respect to Yucca Mountain commits it to undertake an unknown and unidentified alternative the effects of which must be analyzed in an EIS *now* because the siting and operation of an alternative geologic repository will create land, air, water, and transportation impacts that require examination in an EIS. Br. 50. This argument is incorrect because an EIS "need not be prepared simply because a project is *contemplated*, but only when a project is proposed." *Weinberger v. Catholic Action of Hawaii/Peace Educ.*, 454 U.S. 139, 146 (1981) (emphasis in original). Petitioners' argument simply assumes that an alternative geologic repository to Yucca Mountain has been proposed. To the contrary, there is no alternative to Yucca Mountain proposed at this time. The Blue Ribbon Commission, although not a siting commission, has been tasked with studying alternatives for nuclear waste disposal. Such preliminary research and development efforts do not trigger NEPA, or constitute reviewable final agency action under the APA. *See Northcoast Env'tl. Center v. Glickman*, 136 F.3d 660, 669-70 (9th Cir. 1998); *Lujan*, 497 U.S. at 890-92; *Ohio Forestry*, 523 U.S. at 736-37.

Accord Save our Heritage v. FAA, 269 F.3d 49, 59-62 (1st Cir. 2001); *Laguna Greenbelt v. U.S. DOT*, 42 F.3d 517, 527 (9th Cir. 1994).

- 80 -

At the appropriate time, DOE will conduct the requisite NEPA analysis of an alternative site for a new repository or other alternative action that has yet to be proposed. *See, e.g.*, AR 46, p. S-13. No more is required.

VII. DOE Complied With The APA

Petitioners' challenge to DOE's compliance with the APA's procedural requirements lacks merit. Initially, Petitioners contend (Br. 52-53) that DOE must submit the documents in the record for public comment. But the cases upon which Petitioners rely make clear that this requirement applies only in the rulemaking context. *See Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 685 (D.C. Cir. 1984) (the requirement to submit materials for public comment "only applies in rulemaking and not in other informal agency action, since it derives not from the arbitrary or capricious test but from the command of 5 U.S.C. § 553(c)"). Because Petitioners do not challenge a DOE rulemaking (and there has been no such rulemaking), Petitioners' contention regarding the record is easily rejected.

Petitioners criticize (Br. 53-54) the record because, they allege, "it is impossible to determine whether the 'record' as provided fairly represents 'the administrative record.'" Any difficulty Petitioners have in assessing the record, however, derives from their own failure to identify the circumscribed, discrete,

- 81 -

and final agency action being challenged. In the earlier filings in these proceedings, DOE continually noted that Petitioners failed to identify the final agency action being challenged, despite being required to do so by Fed. R. App. P. 15(a)(2)(C) and then by the Clerk's March 3, 2010, order. Even now, Petitioners fail to identify the circumscribed, discrete, and final agency action that they challenge. In light of the lack of a focused challenge from Petitioners to final agency action, their criticism of the record rings hollow.

Petitioners further contend (Br. 54-57) that DOE failed to supply a detailed explanation. Once again, however, Petitioners improperly rely on APA rulemaking requirements. In the rulemaking context, the APA requires an agency to adopt "a concise general statement of [a rule's] basis and purpose" and also requires certain rules "to be made on the record after opportunity for an agency hearing." *See* 5 U.S.C. § 553(c). There are, however, no similar requirements for informal adjudications such as this one (assuming that such a reviewable adjudication has even occurred). *See Hudson v. FAA*, 192 F.3d 1031, 1036-37 (D.C. Cir. 1999). Nor is the Court at liberty to create any such requirements.³⁹ *Id.*

³⁹ Petitioners assert (Br. 55-56) that DOE did not consider the factors for making a site recommendation at 42 U.S.C. § 10134(a), but DOE had no obligation to consider those factors because it was not recommending a site under the NWPA.

- 82 -

In fact, on review of informal adjudications, this Court has said all that typically is needed for judicial review is an explanation in appellate briefs. *Id.* at 1036 n.4.

In any event, Petitioners are wrong that DOE provided no explanation. In addition to various statements made by Secretary Chu and others dating back to at least March 11, 2009, DOE's submissions before NRC provide detailed explanations of DOE's policy reasons for, and legal authority to, withdraw the license application and alter its policy toward the disposition of spent nuclear fuel and high-level nuclear waste. *See* AR 36 (DOE Motion to Withdraw filed March 3, 2010; DOE Reply, pp. 28-33) [JA 718-26, 730, 768-773]; *see also supra* at 12-18. In short, DOE believes that Yucca Mountain should not be pursued and that its long-term spent nuclear fuel and high-level nuclear waste program merits additional study based on advances in technical and scientific knowledge as well as the continuing public opposition to the permanent deep geologic repository at Yucca Mountain. While Petitioners may disagree with DOE's reasons, they have failed to show that DOE acted arbitrarily or capriciously within the meaning of the APA's narrow review strictures. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

VIII. Petitioners' Separation Of Powers Argument Is Irrelevant

Relying exclusively on *Youngstown Sheet & Tube Co.*, 343 U.S. at 587, 641, Petitioners contend (Br. 57-59) that Respondents violated the separation of powers principle. This, however, is not a *Youngstown*-type case. Respondents make no claim that the authority to change course on Yucca Mountain comes from inherent presidential authority. The authority comes the AEA and the DOE Organization Act, and is preserved by the NWPA. The issue here thus is one of statutory interpretation, not inherent authority. *Youngstown* is inapplicable.

IX. The Court Should Not Issue A Writ of Mandamus Or An Injunction

A. The Criteria For Mandamus Are Not Met

Petitioners Aiken County and State of South Carolina seek (Br. 60-63) a writ of mandamus to compel DOE to rescind its motion to withdraw the license application currently pending before NRC. As Mandamus Petitioners concede, however, “[m]andamus is a drastic remedy, to be invoked only in extraordinary circumstances.” *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) (internal quotations omitted). “Mandamus is available only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.” *Id.* (internal quotations omitted).

- 84 -

Mandamus is inappropriate because Mandamus Petitioners have adequate and obvious non-mandamus remedies available to them. For instance, the NRC Licensing Board allowed the Mandamus Petitioners to intervene in the ongoing NRC administrative licensing proceeding and denied DOE's motion to withdraw the licensing application. If the Commission declines to review or upholds the Licensing Board's decision, then Mandamus Petitioners will have obtained the relief they desire without this Court resorting to the drastic and extraordinary remedy of mandamus.

If the Commission ultimately renders a final decision adverse to Mandamus Petitioners' interests, Petitioners may petition for review of that decision in the court of appeals. *See* 28 U.S.C. § 2342(4) (Hobbs Act). Where Mandamus Petitioners may obtain relief from the NRC's final adverse decision through the filing of petitions for review in the court of appeals, mandamus relief is precluded. *See In re GTE Serv. Corp.*, 672 F.2d 1024, 1026 (D.C. Cir. 1985) (denying petition for writ of mandamus where a petition for review was available).

Mandamus also is inappropriate because the mandamus Petitioners have not shown that they have a "clear and indisputable" right to relief. *See Gulfstream Aerospace Corp. v. Maycamas Corp.*, 485 U.S. 271, 289 (1988). "A plaintiff seeking mandamus relief has the burden of showing that the defendant owes it a

- 85 -

‘clear and compelling’ duty, a duty ‘so plainly prescribed as to be free from doubt and equivalent to a positive command.’ *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng’rs*, 570 F.3d 327, 334, (D.C. Cir. 2009). Contrary to Petitioners’ contention (Br. 61), the language in § 114(b) does not clearly and compellingly prescribe a duty to continue to prosecute the license application. *See supra* Argument Section V. Petitioners have no right to the declaratory relief they seek, let alone the “clear and indisputable” right required for mandamus.

B. Petitioners’ Request for an Injunction Must Be Denied Because They Fail to Demonstrate That They Will Suffer Irreparable Harm in the Absence of an Injunction

If they should prevail on the merits, Petitioners request (Br. 63-64) a permanent injunction. “An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course.” *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2761 (2010). A party seeking a permanent injunction must show: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would

- 86 -

not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006).

Tellingly, Petitioners make no claim that they will suffer irreparable harm in the absence of an injunction. This is particularly revealing considering that this Court has already concluded that DOE’s actions have not caused Petitioners any irreparable injury warranting a preliminary injunction. Order of May 3, 2010. This same lack of a demonstration of irreparable harm is also fatal to their current request because “[t]he basis of injunctive relief in the federal courts has always been irreparable harm.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). A movant’s failure to show any irreparable harm is grounds for refusing to issue an injunction, even if the other three factors entering the calculus merit such relief. *Id.*; *see also Monsanto*, 130 S. Ct. at 2759-60. Where Petitioners have failed to brief, or even mention, the irreparable harm factor, they have waived their ability to seek permanent injunctive relief. *See Catawba County, N.C. v. EPA*, 571 F.3d 20, 38 (D.C. Cir. 2009).

- 87 -

X. The Court Should Dismiss The President As A Named Defendant Or, Alternatively, It Should Decline To Direct Any Relief At The President

Petitioners Ferguson *et al.* and State of South Carolina name the President as a respondent, and the opening brief (Br. 65) asks this Court to direct relief at the President. However, although the NWPA provides this Court with original jurisdiction “over any civil action – for review of any final decision or action of . . . the President . . . under the part,” 42 U.S.C. § 10139(a)(1), the NWPA itself is not the source of the civil action. Rather, as explained *supra* at Argument Section III.A, it is the APA that typically provides the cause of action in NWPA cases, and Petitioners identify no other potential source. But the APA does not provide a cause of action against the President, so the President is not a properly named respondent in this APA matter. *See Franklin*, 505 U.S. at 800-01 (plurality opinion); *see also id.* at 823 (Scalia, J., concurring in part and concurring in judgment); *Dalton v. Spector*, 511 U.S. 462, 469 (1994). This Court thus should dismiss the President as a named respondent.⁴⁰

⁴⁰ The APA aside, longstanding authority holds that judicial review of a President’s exercise of discretion is unavailable. *See Dalton*, 511 U.S. at 475-76. Furthermore, even assuming *arguendo* that the NWPA provides a cause of action against the President and that Congress could waive the President’s sovereign immunity, there is no such waiver for Petitioners’ claims against the President. Waivers of federal sovereign immunity must be clearly stated and narrowly construed in favor of the sovereign. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). This principle dictates that any sovereign immunity waiver

- 88 -

Even if Petitioners had a cause of action against the President under the APA, judicial relief rarely, if ever, is appropriately directed at the President in the performance of his official duties where relief may be obtained against his subordinates. *Franklin*, 505 U.S. at 802-03 (plurality); *see also id.* at 824-826 (Scalia, J., concurring in part and concurring in judgment). *See also Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996). Because of the respect due the Presidency and the potential constitutional ramifications of exercising judicial power against the President, this Court should follow its normal course and decline to direct any relief at the President himself, even if this Court concludes that the President is a properly named respondent. *Id.* at 979-81.

CONCLUSION

The petitions should be denied.

be narrowly construed to encompass only claims challenging an action the Act expressly assigns to the President, *e.g.*, his site recommendation under 42 U.S.C. § 10134(a)(2). *Cf. Nuclear Energy Institute, Inc.*, 373 F.3d at 1309 (challenge to President's recommendation held moot). Petitioners' claims in this case are not of that nature.

- 89 -

Respectfully submitted,

JOHN F. CORDES, JR.
Solicitor
Mail Stop 15 D21
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852-2738
(301) 415-1956

CHARLES E. MULLINS
JEREMY M. SUTTENBERG
Office of General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555
(202) 415-2842

For Respondent NRC

ROBERT DREHER
Principal Deputy Assistant Attorney General
Environment & Natural Resources Division

LISA E. JONES
AARON P. AVILA
ALLEN BRABENDER
ELLEN J. DURKEE
Appellate Section, Environment &
Natural Resources Division
Department of Justice
P.O. Box 23795, L'Enfant Plaza Sta.
Washington, D.C. 20026
(202) 514-4426

*For Respondents President Obama and
DOE*

OF COUNSEL:

SCOTT BLAKE HARRIS
General Counsel
SEAN A. LEV
TIMOTHY G. LYNCH
JANE K. TAYLOR
Office of General Counsel
U.S. Department of Energy
Washington, D.C.

DJ # 90-13-5-13056
February 8, 2011

- 90 -

**CERTIFICATE OF COMPLIANCE WITH
TYPE VOLUME LIMITATION AND STYLE REQUIREMENTS**

I certify that this brief complies with the type volume limitation set forth in this Court's order of May 13, 2010, setting a limit of 23,000 words to be divided between Federal Respondents and the State of Nevada. Pursuant to an agreement between the Federal Respondents and the State of Nevada, Federal Respondents' brief is limited to 20,000 words. Excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 19,956 words.

This brief has been prepared using Word Perfect X3. It contains proportionally spaced 14 point, New Times Roman type style.

/s/ Ellen J. Durkee
U.S. Dep't of Justice
Env't & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026-3795
(202) 514-4426
ellen.durkee@usdoj.gov

- 91 -

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's May 15, 2009 Administrative Order, I hereby certify that on this date, February 8, 2011, I caused the foregoing brief to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service by e-mail is consistent with the preferences articulated by counsel of record in the Service Preference Report. I have also served two copies by U.S. Mail to the following addresses:

Mr. William Henry Davidson III
Davidson, Morrison & Lindemann
1611 Devonshire Drive, Second Floor
P.O. Box 8568
Columbia, SC 29202-8568

Ms. Anne Williams Cottingham
Nuclear Energy Institute
1776 Eye Street N.W.
Washington, DC 20006-3708

As required by the rules, I have also caused an original and eight paper copies of this brief to be filed with the Court.

/s/ Ellen J. Durkee
U.S. Dep't of Justice
Env't & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026-3795
(202) 514-4426
ellen.durkee@usdoj.gov

ADDENDUM TO RESPONDENTS' BRIEF

Table of Contents

5 U.S.C. § 5512

5 U.S.C. § 5535

42 U.S.C. § 20137

42 U.S.C. § 22019

42 U.S.C. § 713317

42 U.S.C. § 725320

123 Stat. 284521

123 Stat. 2864-6522

10 C.F.R. § 2.10725

10 C.F.R. § 63.12126

40 C.F.R. § 1500.429

40 C.F.R. § 1502.430

40 C.F.R. § 1502.2032

40 C.F.R. § 1502.2132

40 C.F.R. § 1508.1734

40 C.F.R. § 1508.2135

Declaration of David K. Zabransky36

Declaration of Dr. Ines Triay43

UNITED STATES CODE

2006 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES ENACTED THROUGH THE
109TH CONGRESS

(ending January 3, 2007, the last law of which was signed on January 15, 2007)

Prepared and published under authority of Title 2, U.S. Code, Section 285b,
by the Office of the Law Revision Counsel of the House of Representatives



VOLUME ONE

ORGANIC LAWS

TITLE 1—GENERAL PROVISIONS

TO

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

§§ 101–5949

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 2008

"(b) APPLICABILITY OF AMENDMENTS TO CERTAIN PRIOR CASES.—The amendments made by this Act shall apply to any case commenced on or after October 1, 1984, and finally disposed of before the date of the enactment of this Act [Aug. 5, 1985], except that in any such case, the 30-day period referred to in section 504(a)(2) of title 5, United States Code, or section 2412(d)(1)(B) of title 28, United States Code, as the case may be, shall be deemed to commence on the date of the enactment of this Act.

"(c) APPLICABILITY OF AMENDMENTS TO PRIOR BOARD OF CONTRACTS APPEALS CASES.—Section 504(b)(1)(C)(ii) of title 5, United States Code, as added by section 1(c)(2) of this Act, and section 2412(d)(2)(E) of title 28, United States Code, as added by section 2(c)(2) of this Act, shall apply to any adversary adjudication pending on or commenced on or after October 1, 1981, in which applications for fees and other expenses were timely filed and were dismissed for lack of jurisdiction."

EFFECTIVE DATE

Section 208 of title II of Pub. L. 96-481, as amended by Pub. L. 99-80, § 5, Aug. 5, 1985, 99 Stat. 186, provided that: "This title and the amendments made by this title [see Short Title note below] shall take effect of [on] October 1, 1981, and shall apply to any adversary adjudication, as defined in section 504(b)(1)(C) of title 5, United States Code, and any civil action or adversary adjudication described in section 2412 of title 28, United States Code, which is pending on, or commenced on or after, such date. Awards may be made for fees and other expenses incurred before October 1, 1981, in any such adversary adjudication or civil action."

Section 203(c) of Pub. L. 96-481 which provided that effective Oct. 1, 1984, this section is repealed, except that the provisions of this section shall continue to apply through final disposition of any adversary adjudication initiated before the date of repeal, was itself repealed by Pub. L. 99-80, § 6(b)(1), Aug. 5, 1985, 99 Stat. 186.

SHORT TITLE

Section 201 of title II of Pub. L. 96-481 provided that: "This title [enacting this section, amending section 634 of Title 15, Commerce and Trade, section 2412 of Title 28, Judiciary and Judicial Procedure, Rule 37 of the Federal Rules of Civil Procedure, set out in Title 28 Appendix, and section 1988 of Title 42, The Public Health and Welfare, and enacting provisions set out as notes under this section and section 2412 of Title 28] may be cited as the 'Equal Access to Justice Act'."

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e) of this section relating to annual report to Congress on the amount of fees and other expenses, see section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 153 of House Document No. 103-7.

TERMINATION OF ADMINISTRATIVE CONFERENCE OF UNITED STATES

For termination of Administrative Conference of United States, see provision of title IV of Pub. L. 104-52, set out as a note preceding section 591 of this title.

PROHIBITION ON USE OF ENERGY AND WATER DEVELOPMENT APPROPRIATIONS TO PAY INTERVENING PARTIES IN REGULATORY OR ADJUDICATORY PROCEEDINGS

Pub. L. 102-377, title V, § 502, Oct. 2, 1992, 106 Stat. 1342, provided that: "None of the funds in this Act or subsequent Energy and Water Development Appropriations Acts shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in such Acts."

REVIVAL OF PREVIOUSLY REPEALED PROVISIONS

Section 6 of Pub. L. 99-80 provided that:

"(a) REVIVAL OF CERTAIN EXPIRED PROVISIONS.—Section 504 of title 5, United States Code, and the item relating to that section in the table of sections of chapter 5 of title 5, United States Code, and subsection (d) of section 2412 of title 28, United States Code, shall be effective on or after the date of the enactment of this Act [Aug. 5, 1985] as if they had not been repealed by sections 203(c) and 204(c) of the Equal Access to Justice Act [Pub. L. 96-481].

"(b) REPEALS.—

"(1) Section 203(c) of the Equal Access to Justice Act [which repealed this section] is hereby repealed.

"(2) Section 204(c) of the Equal Access to Justice Act [which repealed section 2412(d) of title 28] is hereby repealed."

CONGRESSIONAL FINDINGS AND PURPOSES

Section 202 of title II of Pub. L. 96-481 provided that:

"(a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

"(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

"(c) It is the purpose of this title [see Short Title note above]—

"(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

"(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the 'American rule' respecting the award of attorney fees."

LIMITATION ON PAYMENTS

Section 207 of title II of Pub. L. 96-481, which provided that the payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act [probably should be "this title", see Short Title note above] would be effective only to the extent and in such amounts as are provided in advance in appropriation Acts, was repealed by Pub. L. 99-80, § 4, Aug. 5, 1985, 99 Stat. 186.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

SHORT TITLE

The provisions of this subchapter and chapter 7 of this title were originally enacted by act June 11, 1946, ch. 324, 60 Stat. 237, popularly known as the "Administrative Procedure Act". That Act was repealed as part of the general revision of this title by Pub. L. 89-554 and its provisions incorporated into this subchapter and chapter 7 hereof.

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub. L. 94-409, §4(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 103-272, §5(a), July 5, 1994, 108 Stat. 1373.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
(1)	5 U.S.C. 1001(a).	June 11, 1946, ch. 324, §2(a), 60 Stat. 237. Aug. 8, 1946, ch. 870, §302, 60 Stat. 918. Aug. 10, 1946, ch. 951, §601, 60 Stat. 993. Mar. 31, 1947, ch. 30, §6(a), 61 Stat. 37. June 30, 1947, ch. 163, §210, 61 Stat. 201. Mar. 30, 1948, ch. 161, §301, 62 Stat. 99. June 11, 1946, ch. 324, §2 (less (a)), 60 Stat. 237.
(2)-(13)	5 U.S.C. 1001 (less (a)).	

In paragraph (1), the sentence "Nothing in this Act shall be construed to repeal delegations of authority as provided by law," is omitted as surplusage since there is nothing in the Act which could reasonably be so construed.

In paragraph (1)(G), the words "or naval" are omitted as included in "military".

In paragraph (1)(H), the words "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947" are omitted as executed. Reference to the "Selective Training and Service Act of 1940" is omitted as that Act expired Mar. 31, 1947. Reference to the "Sugar Control Extension Act of 1947" is omitted as that Act expired on Mar. 31, 1948. References to the "Housing and Rent Act of 1947, as amended" and the "Veterans' Emergency Housing Act of 1946" have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by §111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87-256, 75 Stat. 538, since §111(c) of the Act provides that a reference in other Acts to a provision of law repealed by §111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87-256.

In paragraph (2), the words "of any character" are omitted as surplusage.

In paragraph (3), the words "and a person or agency admitted by an agency as a party for limited purposes" are substituted for "but nothing herein shall be con-

strued to prevent an agency from admitting any person or agency as a party for limited purposes".

In paragraph (9), a comma is supplied between the words "limitation" and "amendment" to correct an editorial error of omission.

In paragraph (10)(C), the words "of any form" are omitted as surplusage.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 551 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2242 of Title 7, Agriculture.

AMENDMENTS

1994—Par. (1)(H). Pub. L. 103-272 substituted "subchapter II of chapter 471 of title 49; or sections" for "or sections 1622."

1976—Par. (14). Pub. L. 94-409 added par. (14).

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94-409 effective 180 days after Sept. 13, 1976, see section 6 of Pub. L. 94-409, set out as an Effective Date note under section 552b of this title.

STUDY AND REPORTS ON ADMINISTRATIVE SUBPOENAS

Pub. L. 106-544, § 7, Dec. 19, 2000, 114 Stat. 2719, provided that:

"(a) **STUDY ON USE OF ADMINISTRATIVE SUBPOENAS.**—Not later than December 31, 2001, the Attorney General, in consultation with the Secretary of the Treasury, shall complete a study on the use of administrative subpoena power by executive branch agencies or entities and shall report the findings to the Committees on the Judiciary of the Senate and the House of Representatives. Such report shall include—

"(1) a description of the sources of administrative subpoena power and the scope of such subpoena power within executive branch agencies;

"(2) a description of applicable subpoena enforcement mechanisms;

"(3) a description of any notification provisions and any other provisions relating to safeguarding privacy interests;

"(4) a description of the standards governing the issuance of administrative subpoenas; and

"(5) recommendations from the Attorney General regarding necessary steps to ensure that administrative subpoena power is used and enforced consistently and fairly by executive branch agencies.

"(b) **REPORT ON FREQUENCY OF USE OF ADMINISTRATIVE SUBPOENAS.**—

"(1) **IN GENERAL.**—The Attorney General and the Secretary of the Treasury shall report in January of each year to the Committees on the Judiciary of the Senate and the House of Representatives on the number of administrative subpoenas issued by them under this section and the identity of the agency or component of the Department of Justice or the Department of the Treasury issuing the subpoena and imposing the charges.

"(2) **EXPIRATION.**—The reporting requirement of this subsection shall terminate in 3 years after the date of the enactment of this section [Dec. 19, 2000]."

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed

service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

- (1) a military or foreign affairs function of the United States; or
- (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1003.	June 11, 1946, ch. 324, § 4, 60 Stat. 238.

In subsection (a)(1), the words "or naval" are omitted as included in "military".

In subsection (b), the word "when" is substituted for "in any situation in which".

In subsection (c), the words "for oral presentation" are substituted for "to present the same orally in any manner". The words "sections 556 and 557 of this title apply instead of this subsection" are substituted for "the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection".

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

CODIFICATION

Section 553 of former Title 5, Executive Departments and Government Officers and Employees, was transferred to section 2245 of Title 7, Agriculture.

EXECUTIVE ORDER NO. 12044

Ex. Ord. No. 12044, Mar. 23, 1978, 43 F.R. 12661, as amended by Ex. Ord. No. 12221, June 27, 1980, 45 F.R. 44249, which related to the improvement of Federal regulations, was revoked by Ex. Ord. No. 12291, Feb. 17, 1981, 46 F.R. 13193, formerly set out as a note under section 601 of this title.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
- (2) the selection or tenure of an employee, except a¹ administrative law judge appointed under section 3105 of this title;
- (3) proceedings in which decisions rest solely on inspections, tests, or elections;
- (4) the conduct of military or foreign affairs functions;
- (5) cases in which an agency is acting as an agent for a court; or
- (6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
- (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this

¹ So in original.

UNITED STATES CODE

2006 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES ENACTED THROUGH THE
109TH CONGRESS

(ending January 3, 2007, the last law of which was signed on January 15, 2007)

Prepared and published under authority of Title 2, U.S. Code, Section 285b,
by the Office of the Law Revision Counsel of the House of Representatives



VOLUME TWENTY-FIVE

TITLE 42—THE PUBLIC HEALTH AND WELFARE

§§ 1441–4395

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 2008

Add. 6

and enacting provisions set out as notes under sections 2014 and 2210 of this title) may be cited as the 'Price-Anderson Amendments Act of 1988'."

SHORT TITLE OF 1964 AMENDMENT

Pub. L. 88-489, §21, Aug. 26, 1964, 78 Stat. 607, provided that: "This Act [amending sections 2012, 2013, 2073 to 2078, 2135, 2153, 2201, 2221, 2233, and 2234 of this title, repealing section 2072 of this title, and enacting provisions set out as notes under sections 2012 and 2072 of this title] may be cited as the 'Private Ownership of Special Nuclear Materials Act'."

SHORT TITLE OF 1958 AMENDMENT

Pub. L. 85-846, §1, Aug. 28, 1958, 72 Stat. 1084, provided: "That this Act [enacting sections 2291 to 2296 of this title] may be cited as the 'EURATOM Cooperation Act of 1958'."

SHORT TITLE

Section 291 of title I of act Aug. 1, 1946, as added by act Aug. 30, 1954, §1; renumbered title I, Oct. 24, 1992, Pub. L. 102-486, title IX, §902(a)(8), 106 Stat. 2944, provided that: "This Act [enacting this chapter and amending sections 1031(d) and 1032 of former Title 5, Executive Departments and Government Officers and Employees, and enacting provision set out as a note under section 2221 of this title] may be cited as the 'Atomic Energy Act of 1954'."

SEPARABILITY

Section 281 of title I of act Aug. 1, 1946, as added by act Aug. 30, 1954, §1; renumbered title I, Oct. 24, 1992, Pub. L. 102-486, title IX, §902(a)(8), 106 Stat. 2944, provided that: "If any provision of this Act [enacting this chapter] or the application of such provision to any person or circumstances, is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby."

TRANSFER OF FUNCTIONS

Atomic Energy Commission abolished and functions transferred by sections 5814 and 5841 of this title. See also Transfer of Functions notes set out under those sections.

§ 2012. Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Pub. L. 88-489, §1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) Repealed. Pub. L. 88-489, §2, Aug. 26, 1964, 78 Stat. 602.

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

(Aug. 1, 1946, ch. 724, title I, §2, as added Aug. 30, 1954, ch. 1073, §1, 68 Stat. 921; amended Pub. L. 85-256, §1, Sept. 2, 1957, 71 Stat. 576; Pub. L. 88-489, §§1, 2, Aug. 26, 1964, 78 Stat. 602; renumbered title I, Pub. L. 102-486, title IX, §902(a)(8), Oct. 24, 1992, 106 Stat. 2944.)

PRIOR PROVISIONS

Provisions similar to those comprising this section were contained in section 1 of act Aug. 1, 1946, ch. 724, 60 Stat. 755, which was classified to section 1801 of this title, prior to the general amendment and renumbering of act Aug. 1, 1946, by act Aug. 30, 1954.

AMENDMENTS

1964—Subsec. (b). Pub. L. 88-489, §1, struck out subsec. (b) which found that use of United States property by others must be regulated in national interest and in order to provide for common defense and security and to protect health and safety of public.

Subsec. (h). Pub. L. 88-489, §2, struck out subsec. (h) which found it essential to common defense and security that title to all special nuclear material be in United States while such special nuclear material is within United States.

1957—Subsec. (i). Pub. L. 85-256 added subsec. (i).

CONTROL AND REGULATION POWERS OF UNITED STATES AND OF ATOMIC ENERGY COMMISSION UNAFFECTED BY PRIVATE OWNERSHIP OF SPECIAL NUCLEAR MATERIALS

Section 20 of Pub. L. 88-489 provided that: "Nothing in this Act [amending this section and sections 2013, 2073 to 2078, 2135, 2153, 2201, 2233 and 2234 of this title, repealing section 2072 of this title, and enacting provisions set out as notes under this section and section 2072 of this title] shall be deemed to diminish existing authority of the United States, or of the Atomic Energy Commission under the Atomic Energy Act of 1954, as amended [this chapter], to regulate source, byproduct, and special nuclear material and production and utilization facilities, or to control such materials and facilities exported from the United States by imposition of governmental guarantees and security safeguards with respect thereto, in order to assure the common defense and security and to protect the health and safety of the public, or to reduce the responsibility of the Atomic Energy Commission to achieve such objectives."

§ 2013. Purpose of chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for—

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

(Aug. 1, 1946, ch. 724, title I, § 3, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 922; amended Pub. L. 88-489, § 3, Aug. 26, 1964, 78 Stat. 602; renumbered title I, Pub. L. 102-486, title IX, § 902(a)(8), Oct. 24, 1992, 106 Stat. 2944.)

PRIOR PROVISIONS

Provisions similar to those comprising this section were contained in section 1 of act Aug. 1, 1946, ch. 724, 60 Stat. 755, which was classified to section 1801 of this title, prior to the general amendment and renumbering of act Aug. 1, 1946, by act Aug. 30, 1954.

AMENDMENTS

1964—Subsec. (c). Pub. L. 88-489 inserted "whether owned by the Government or others" and "and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons".

§ 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

(a) The term "agency of the United States" means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agen-

cy, committee, commission, office, or other establishment in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission, or other establishment in the judicial branch.

(b) The term "agreement for cooperation" means any agreement with another nation or regional defense organization authorized or permitted by sections 2074, 2077, 2094, 2112, 2121(c), 2133, 2134, or 2164 of this title, and made pursuant to section 2153 of this title.

(c) The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

(d) The term "atomic weapon" means any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device), the principal purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device.

(e) The term "byproduct material" means—

(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material;

(2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content;

(3)(A) any discrete source of radium-226 that is produced, extracted, or converted after extraction, before, on, or after August 8, 2005, for use for a commercial, medical, or research activity; or

(B) any material that—

(i) has been made radioactive by use of a particle accelerator; and

(ii) is produced, extracted, or converted after extraction, before, on, or after August 8, 2005, for use for a commercial, medical, or research activity; and

(4) any discrete source of naturally occurring radioactive material, other than source material, that—

(A) the Commission, in consultation with the Administrator of the Environmental Protection Agency, the Secretary of Energy, the Secretary of Homeland Security, and the head of any other appropriate Federal agency, determines would pose a threat similar to the threat posed by a discrete source of radium-226 to the public health and safety or the common defense and security; and

(B) before, on, or after August 8, 2005, is extracted or converted after extraction for use in a commercial, medical, or research activity.

(f) The term "Commission" means the Atomic Energy Commission.

(g) The term "common defense and security" means the common defense and security of the United States.

(h) The term "defense information" means any information in any category determined by any Government agency authorized to classify information, as being information respecting, relating to, or affecting the national defense.

mission who demonstrates a need therefor. If the court, at its discretion, deems that such licensee shall pay a reasonable royalty to the owner of the patent, the reasonable royalty shall be determined in accordance with section 2187 of this title.

(Aug. 1, 1946, ch. 724, title I, § 158, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 947; amended Pub. L. 87-206, § 12, Sept. 6, 1961, 75 Stat. 478; renumbered title I, Pub. L. 102-486, title IX, § 902(a)(8), Oct. 24, 1992, 106 Stat. 2944.)

AMENDMENTS

1961—Pub. L. 87-206 made it discretionary, rather than mandatory, for the court to require payment of royalties by a licensee to the owner of a patent.

§ 2189. Federally financed research

Nothing in this chapter shall affect the right of the Commission to require that patents granted on inventions, made or conceived during the course of federally financed research or operations, be assigned to the United States.

(Aug. 1, 1946, ch. 724, title I, § 159, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 948; renumbered title I, Pub. L. 102-486, title IX, § 902(a)(8), Oct. 24, 1992, 106 Stat. 2944.)

§ 2190. Saving clause for prior patent applications

Any patent application on which a patent was denied by the United States Patent and Trademark Office under sections 1811(a)(1), 1811(a)(2), or 1811(b)¹ of this title, and which is not prohibited by section 2181 or 2185 of this title may be reinstated upon application to the Commissioner of Patents and Trademarks within one year after August 30, 1954 and shall then be deemed to have been continuously pending since its original filing date: *Provided, however*, That no patent issued upon any patent application so reinstated shall in any way furnish a basis of claim against the Government of the United States.

(Aug. 1, 1946, ch. 724, title I, § 160, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 948; amended Pub. L. 93-596, § 3, Jan. 2, 1975, 88 Stat. 1949; renumbered title I, Pub. L. 102-486, title IX, § 902(a)(8), Oct. 24, 1992, 106 Stat. 2944.)

REFERENCES IN TEXT

Sections 1811(a)(1), 1811(a)(2), and 1811(b) of this title, referred to in text, were omitted from the Code in the general amendment and renumbering of act Aug. 1, 1946 (which was classified to section 1801 et seq. of this title) by act Aug. 30, 1954, ch. 1073, 68 Stat. 919.

CHANGE OF NAME

Patent Office and Commissioner of Patents changed to Patent and Trademark Office and Commissioner of Patents and Trademarks, respectively, pursuant to Pub. L. 93-596, § 3, Jan. 2, 1975, 88 Stat. 1949, set out as a note under section 1 of Title 35, Patents.

SUBCHAPTER XIII—GENERAL AUTHORITY OF COMMISSION

§ 2201. General duties of Commission

In the performance of its functions the Commission is authorized to—

¹ See References in Text note below.

(a) Establishment of advisory boards

establish advisory boards to advise with and make recommendations to the Commission on legislation, policies, administration, research, and other matters, provided that the Commission issues regulations setting forth the scope, procedure, and limitations of the authority of each such board;

(b) Standards governing use and possession of material

establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property; in addition, the Commission shall prescribe such regulations or orders as may be necessary or desirable to promote the Nation's common defense and security with regard to control, ownership, or possession of any equipment or device, or important component part especially designed for such equipment or device, capable of separating the isotopes of uranium or enriching uranium in the isotope 235;

(c) Studies and investigations

make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. Witnesses subpoenaed under this subsection shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States;

(d) Employment of personnel

appoint and fix the compensation of such officers and employees as may be necessary to carry out the functions of the Commission. Such officers and employees shall be appointed in accordance with the civil-service laws and their compensation fixed in accordance with chapter 51 and subchapter III of chapter 53 of title 5, except that, to the extent the Commission deems such action necessary to the discharge of its responsibilities, personnel may be employed and their compensation fixed without regard to such laws: *Provided, however*, That no officer or employee (except such officers and employees whose compensation is fixed by law, and scientific and technical personnel up to a limit of the highest rate of grade 18 of the General Schedule) whose position would be subject to chapter 51 and subchapter III of chapter 53 of title 5, if such provisions were applicable to such position, shall be paid a salary at a rate in excess of the rate payable under such provisions for positions of equivalent difficulty or responsibility. Such rates of compensation may be adopted by the

Commission as may be authorized by chapter 51 and subchapter III of chapter 53 of title 5, as of the same date such rates are authorized for positions subject to such provisions. The Commission shall make adequate provision for administrative review of any determination to dismiss any employee;

(e) Acquisition of material, property, etc.; negotiation of commercial leases

acquire such material, property, equipment, and facilities, establish or construct such buildings and facilities, and modify such buildings and facilities from time to time, as it may deem necessary, and construct, acquire, provide, or arrange for such facilities and services (at project sites where such facilities and services are not available) for the housing, health, safety, welfare, and recreation of personnel employed by the Commission as it may deem necessary, subject to the provisions of section 2224 of this title: *Provided, however,* That in the communities owned by the Commission, the Commission is authorized to grant privileges, leases and permits upon adjusted terms which (at the time of the initial grant of any privilege grant, lease, or permit, or renewal thereof, or in order to avoid inequities or undue hardship prior to the sale by the United States of property affected by such grant) are fair and reasonable to responsible persons to operate commercial businesses without advertising and without advertising¹ and without securing competitive bids, but taking into consideration, in addition to the price, and among other things (1) the quality and type of services required by the residents of the community, (2) the experience of each concession applicant in the community and its surrounding area, (3) the ability of the concession applicant to meet the needs of the community, and (4) the contribution the concession applicant has made or will make to the other activities and general welfare of the community;

(f) Utilization of other Federal agencies

with the consent of the agency concerned, utilize or employ the services or personnel of any Government agency or any State or local government, or voluntary or uncompensated personnel, to perform such functions on its behalf as may appear desirable;

(g) Acquisition of real and personal property

acquire, purchase, lease, and hold real and personal property, including patents, as agent of and on behalf of the United States, subject to the provisions of section 2224 of this title, and to sell, lease, grant, and dispose of such real and personal property as provided in this chapter;

(h) Consideration of license applications

consider in a single application one or more of the activities for which a license is required by this chapter, combine in a single license one or more of such activities, and permit the applicant or licensee to incorporate by reference pertinent information already filed with the Commission;

(i) Regulations governing Restricted Data

prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this chapter, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 2073 of this title or produced by any person in connection with any activity authorized pursuant to this chapter, to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, including regulations or orders designating activities, involving quantities of special nuclear material which in the opinion of the Commission are important to the common defense and security, that may be conducted only by persons whose character, associations, and loyalty shall have been investigated under standards and specifications established by the Commission and as to whom the Commission shall have determined that permitting each such person to conduct the activity will not be inimical to the common defense and security, (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property, and (4) to ensure that sufficient funds will be available for the decommissioning of any production or utilization facility licensed under section 2133 or 2134(b) of this title, including standards and restrictions governing the control, maintenance, use, and disbursement by any former licensee under this chapter that has control over any fund for the decommissioning of the facility;

(j) Disposition of surplus materials

without regard to the provisions of the Federal Property and Administrative Services Act of 1949, as amended,² except section 207 of that Act,² or any other law, make such disposition as it may deem desirable of (1) radioactive materials, and (2) any other property, the special disposition of which is, in the opinion of the Commission, in the interest of the national security: *Provided, however,* That the property furnished to licensees in accordance with the provisions of subsection (m) of this section shall not be deemed to be property disposed of by the Commission pursuant to this subsection;

(k) Carrying of firearms; authority to make arrests without warrant

authorize such of its members, officers, and employees as it deems necessary in the interest of the common defense and security to carry firearms while in the discharge of their official duties. The Commission may also authorize such of those employees of its contractors and subcontractors (at any tier) engaged in the protection of property under the jurisdiction of the United States located at facilities owned by or contracted to the United

¹ So in original.

² See References in Text note below.

States or being transported to or from such facilities as it deems necessary in the interests of the common defense and security to carry firearms while in the discharge of their official duties. A person authorized to carry firearms under this subsection may, while in the performance of, and in connection with, official duties, make arrests without warrant for any offense against the United States committed in that person's presence or for any felony cognizable under the laws of the United States if that person has reasonable ground to believe that the individual to be arrested has committed or is committing such felony. An employee of a contractor or subcontractor authorized to carry firearms under this subsection may make such arrests only when the individual to be arrested is within, or in direct flight from, the area of such offense. A person granted authority to make arrests by this subsection may exercise that authority only in the enforcement of (1) laws regarding the property of the United States in the custody of the Department of Energy, the Nuclear Regulatory Commission, or a contractor of the Department of Energy or Nuclear Regulatory Commission, or (2) any provision of this chapter that may subject an offender to a fine, imprisonment, or both. The arrest authority conferred by this subsection is in addition to any arrest authority under other laws. The Secretary, with the approval of the Attorney General, shall issue guidelines to implement this subsection;

(l) **Repealed.** Pub. L. 87-456, title III, § 303(c), May 24, 1962, 76 Stat. 78

(m) Agreements regarding production

enter into agreements with persons licensed under section 2133, 2134, 2073(a)(4), or 2093(a)(4) of this title for such periods of time as the Commission may deem necessary or desirable (1) to provide for the processing, fabricating, separating, or refining in facilities owned by the Commission of source, byproduct, or other material or special nuclear material owned by or made available to such licensees and which is utilized or produced in the conduct of the licensed activity, and (2) to sell, lease, or otherwise make available to such licensees such quantities of source or byproduct material, and other material not defined as special nuclear material pursuant to this chapter, as may be necessary for the conduct of the licensed activity: *Provided, however,* That any such agreement may be canceled by the licensee at any time upon payment of such reasonable cancellation charges as may be agreed upon by the licensee and the Commission: *And provided further,* That the Commission shall establish prices to be paid by licensees for material or services to be furnished by the Commission pursuant to this subsection, which prices shall be established on such a nondiscriminatory basis as, in the opinion of the Commission, will provide reasonable compensation to the Government for such material or services and will not discourage the development of sources of supply independent of the Commission;

(n) Delegation of functions

delegate to the General Manager or other officers of the Commission any of those functions assigned to it under this chapter except those specified in sections 2071, 2077(b), 2091, 2138, 2153, 2165(b) of this title (with respect to the determination of those persons to whom the Commission may reveal Restricted Data in the national interest), 2165(f) of this title and subsection (a) of this section;

(o) Reports

require by rule, regulation, or order, such reports, and the keeping of such records with respect to, and to provide for such inspections of, activities and studies of types specified in section 2051 of this title and of activities under licenses issued pursuant to sections 2073, 2093, 2111, 2133, and 2134 of this title, as may be necessary to effectuate the purposes of this chapter, including section 2135 of this title; and

(p) Rules and regulations

make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this chapter.

(q) Easements for rights-of-way

The Commission is authorized and empowered, under such terms and conditions as are deemed advisable by it, to grant easements for rights-of-way over, across, in, and upon acquired lands under its jurisdiction and control, and public lands permanently withdrawn or reserved for the use of the Commission, to any State, political subdivision thereof, or municipality, or to any individual, partnership, or corporation of any State, Territory, or possession of the United States, for (a) railroad tracks; (b) oil pipe lines; (c) substations for electric power transmission lines, telephone lines, and telegraph lines, and pumping stations for gas, water, sewer, and oil pipe lines; (d) canals; (e) ditches; (f) flumes; (g) tunnels; (h) dams and reservoirs in connection with fish and wildlife programs, fish hatcheries, and other fish-cultural improvements; (i) roads and streets; and (j) for any other purpose or purposes deemed advisable by the Commission: *Provided,* That such rights-of-way shall be granted only upon a finding by the Commission that the same will not be incompatible with the public interest: *Provided further,* That such rights-of-way shall not include any more land than is reasonably necessary for the purpose for which granted: *And provided further,* That all or any part of such rights-of-way may be annulled and forfeited by the Commission for failure to comply with the terms and conditions of any grant hereunder or for nonuse for a period of two consecutive years or abandonment of rights granted under authority hereof. Copies of all instruments granting easements over public lands pursuant to this section shall be furnished to the Secretary of the Interior.

(r) Sale of utilities and related services

Under such regulations and for such periods and at such prices the Commission may prescribe, the Commission may sell or contract to

sell to purchasers within Commission-owned communities or in the immediate vicinity of the Commission community, as the case may be, any of the following utilities and related services, if it is determined that they are not available from another local source and that the sale is in the interest of the national defense or in the public interest:

- (1) Electric power.
- (2) Steam.
- (3) Compressed air.
- (4) Water.
- (5) Sewage and garbage disposal.
- (6) Natural, manufactured, or mixed gas.
- (7) Ice.
- (8) Mechanical refrigeration.
- (9) Telephone service.

Proceeds of sales under this subsection shall be credited to the appropriation currently available for the supply of that utility or service. To meet local needs the Commission may make minor expansions and extensions of any distributing system or facility within or in the immediate vicinity of a Commission-owned community through which a utility or service is furnished under this subsection.

(s) Succession of authority

establish a plan for a succession of authority which will assure the continuity of direction of the Commission's operations in the event of a national disaster due to enemy activity. Notwithstanding any other provision of this chapter, the person or persons succeeding to command in the event of disaster in accordance with the plan established pursuant to this subsection shall be vested with all of the authority of the Commission: *Provided*, That any such succession to authority, and vesting of authority shall be effective only in the event and as long as a quorum of three or more members of the Commission is unable to convene and exercise direction during the disaster period: *Provided further*, That the disaster period includes the period when attack on the United States is imminent and the post-attack period necessary to reestablish normal lines of command;

(t) Contracts

enter into contracts for the processing, fabricating, separating, or refining in facilities owned by the Commission of source, byproduct or other material, or special nuclear material, in accordance with and within the period of an agreement for cooperation while comparable services are available to persons licensed under section 2133 or 2134 of this title: *Provided*, That the prices for services under such contracts shall be no less than the prices currently charged by the Commission pursuant to subsection (m) of this section;

(u) Additional contracts; guiding principles; appropriations

(1) enter into contracts for such periods of time as the Commission may deem necessary or desirable, but not to exceed five years from the date of execution of the contract, for the purchase or acquisition of reactor services or services related to or required by the operation of reactors;

(2)(A) enter into contracts for such periods of time as the Commission may deem necessary or desirable for the purchase or acquisition of any supplies, equipment, materials, or services required by the Commission whenever the Commission determines that: (i) it is advantageous to the Government to make such purchase or acquisition from commercial sources; (ii) the furnishing of such supplies, equipment, materials, or services will require the construction or acquisition of special facilities by the vendors or suppliers thereof; (iii) the amortization chargeable to the Commission constitutes an appreciable portion of the cost of contract performance, excluding cost of materials; and (iv) the contract for such period is more advantageous to the Government than a similar contract not executed under the authority of this subsection. Such contracts shall be entered into for periods not to exceed five years each from the date of initial delivery of such supplies, equipment, materials, or services or ten years from the date of execution of the contracts excluding periods of renewal under option.

(B) In entering into such contracts the Commission shall be guided by the following principles: (i) the percentage of the total cost of special facilities devoted to contract performance and chargeable to the Commission should not exceed the ratio between the period of contract deliveries and the anticipated useful life of such special facilities; (ii) the desirability of obtaining options to renew the contract for reasonable periods at prices not to include charges for special facilities already amortized; and (iii) the desirability of reserving in the Commission the right to take title to the special facilities under appropriate circumstances; and

(3) include in contracts made under this subsection provisions which limit the obligation of funds to estimated annual deliveries and services and the unamortized balance of such amounts due for special facilities as the parties shall agree is chargeable to the performance of the contract. Any appropriation available at the time of termination or thereafter made available to the Commission for operating expenses shall be available for payment of such costs which may arise from termination as the contract may provide. The term "special facilities" as used in this subsection means any land and any depreciable buildings, structures, utilities, machinery, equipment, and fixtures necessary for the production or furnishing of such supplies, equipment, materials, or services and not available to the vendors or suppliers for the performance of the contract.

(v) Support of United States Enrichment Corporation

provide services in support of the United States Enrichment Corporation, except that the Secretary of Energy shall annually collect payments and other charges from the Corporation sufficient to ensure recovery of the costs (excluding depreciation and imputed interest on original plant investments in the Department's gaseous diffusion plants and costs

under section 2297c-2(d)³ of this title) incurred by the Department of Energy after October 24, 1992, in performing such services;

(w) License fees for nuclear power reactors

prescribe and collect from any other Government agency, which applies to the Commission for, or is issued by the Commission, a license or certificate, any fee, charge, or price which it may require, in accordance with the provisions of section 9701 of title 31 or any other law.

(x) Standards and instructions for bonding, surety, or other financial arrangements, including performance bonds

Establish by rule, regulation, or order, after public notice, and in accordance with the requirements of section 2231 of this title, such standards and instructions as the Commission may deem necessary or desirable to ensure—

(1) that an adequate bond, surety, or other financial arrangement (as determined by the Commission) will be provided, before termination of any license for byproduct material as defined in section 2014(e)(2) of this title, by a licensee to permit the completion of all requirements established by the Commission for the decontamination, decommissioning, and reclamation of sites, structures, and equipment used in conjunction with byproduct material as so defined, and

(2) that—

(A) in the case of any such license issued or renewed after November 8, 1978, the need for long-term maintenance and monitoring of such sites, structures and equipment after termination of such license will be minimized and, to the maximum extent practicable, eliminated; and

(B) in the case of each license for such material (whether in effect on November 8, 1978, or issued or renewed thereafter), if the Commission determines that any such long-term maintenance and monitoring is necessary, the licensee, before termination of any license for byproduct material as defined in section 2014(e)(2) of this title, will make available such bonding, surety, or other financial arrangements as may be necessary to assure such long-term maintenance and monitoring.

Such standards and instructions promulgated by the Commission pursuant to this subsection shall take into account, as determined by the Commission, so as to avoid unnecessary duplication and expense, performance bonds or other financial arrangements which are required by other Federal agencies or State agencies and/or other local governing bodies for such decommissioning, decontamination, and reclamation and long-term maintenance and monitoring except that nothing in this paragraph shall be construed to require that the Commission accept such bonds or arrangements if the Commission determines that such bonds or arrangements are not adequate to carry out subparagraphs (1) and (2) of this subsection.

³See References in Text note below.

(Aug. 1, 1946, ch. 724, title I, § 161, as added Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 948; amended July 14, 1956, ch. 608, 70 Stat. 553; Aug. 6, 1956, ch. 1015, § 4, 70 Stat. 1069; Pub. L. 85-162, title II, §§ 201, 204, Aug. 21, 1957, 71 Stat. 410; Pub. L. 85-287, § 4, Sept. 4, 1957, 71 Stat. 613; Pub. L. 85-507, § 21(b)(1), July 7, 1958, 72 Stat. 337; Pub. L. 85-681, §§ 6, 7, Aug. 19, 1958, 72 Stat. 633; Pub. L. 86-300, § 1, Sept. 21, 1959, 73 Stat. 574; Pub. L. 87-206, § 13, Sept. 6, 1961, 75 Stat. 478; Pub. L. 87-456, title III, § 303(c), May 24, 1962, 76 Stat. 78; Pub. L. 87-615, § 12, Aug. 29, 1962, 76 Stat. 411; Pub. L. 87-793, § 1001(g), Oct. 11, 1962, 76 Stat. 864; Pub. L. 88-489, § 16, Aug. 26, 1964, 78 Stat. 606; Pub. L. 90-190, § 11, Dec. 14, 1967, 81 Stat. 578; Pub. L. 91-452, title II, § 237, Oct. 15, 1970, 84 Stat. 930; Pub. L. 91-560, §§ 7, 8, Dec. 19, 1970, 84 Stat. 1474; Pub. L. 92-314, title III, § 301, June 16, 1972, 86 Stat. 227; Pub. L. 93-377, § 7, Aug. 17, 1974, 88 Stat. 475; Pub. L. 95-604, title II, § 203, Nov. 8, 1978, 92 Stat. 3036; Pub. L. 97-90, title II, § 211, Dec. 4, 1981, 95 Stat. 1170; Pub. L. 99-661, div. C, title I, § 3134, Nov. 14, 1986, 100 Stat. 4064; Pub. L. 100-449, title III, § 305(b), Sept. 28, 1988, 102 Stat. 1876; Pub. L. 101-575, § 5(b), Nov. 15, 1990, 104 Stat. 2835; renumbered title I and amended Pub. L. 102-486, title IX, § 902(a)(4), (5), (8), Oct. 24, 1992, 106 Stat. 2944; Pub. L. 109-58, title VI, §§ 623, 626, Aug. 8, 2005, 119 Stat. 783, 784.)

REFERENCES IN TEXT

The civil service laws, referred to in subsec. (d), are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5.

The Federal Property and Administrative Services Act of 1949, as amended, referred to in subsec. (j), is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. Except for title III of the Act, which is classified generally to subchapter IV (§ 251 et seq.) of chapter 4 of Title 41, Public Contracts, the Act was repealed and reenacted by Pub. L. 107-217, § 1, 6(b), Aug. 21, 2002, 116 Stat. 1062, 1304, as chapters 1 to 11 of Title 40, Public Buildings, Property, and Works. Section 207 of the Act was repealed and reenacted by Pub. L. 107-217 as section 559 of Title 40.

Section 2297c-2 of this title, referred to in subsec. (v), was repealed by Pub. L. 104-134, title III, § 3116(a)(1), Apr. 26, 1996, 110 Stat. 1321-349.

CODIFICATION

In subsec. (d), "chapter 51 and subchapter III of chapter 53 of title 5" and "such provisions" substituted for "the Classification Act of 1949, as amended" and "such Act", respectively, on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

In subsec. (x)(2)(B), "November 8, 1978" was in the original "the date of the enactment of this section", which has been translated as the date of the enactment of this subsection to reflect the probable intent of Congress.

PRIOR PROVISIONS

Provisions similar to this section were contained in section 1812(a) of this title, prior to the general amendment and renumbering of act Aug. 1, 1946, by act Aug. 30, 1954.

AMENDMENTS

2005—Subsec. (i)(4). Pub. L. 109-58, § 626, added cl. (4).
Subsec. (w). Pub. L. 109-58, § 623, substituted "to the Commission for, or is issued by the Commission, a license or certificate" for "for or is issued a license for

a utilization facility designed to produce electrical or heat energy pursuant to section 2133 or 2134(b) of this title, or which operates any facility regulated or certified under section 2297f or 2297f-1 of this title" and "section 9701" for "section 483a" and struck out ", of applicants for, or holders of, such licenses or certificates" before period at end.

1992—Subsec. (v). Pub. L. 102-486, §902(a)(4), amended subsec. (v) generally, substituting provisions relating to duty to provide services in support of United States Energy Enrichment Corporation for provisions relating to duty to enter into contracts for production or enrichment of special nuclear material.

Subsec. (w). Pub. L. 102-486, §902(a)(5), inserted "or which operates any facility regulated or certified under section 2297f or 2297f-1 of this title," after "2134(b) of this title," and "or certificates" after "holders of, such licenses".

1990—Subsec. (b). Pub. L. 101-575, which directed amendment of subsec. (b) by striking the period at the end and inserting "; in addition, the Commission shall prescribe such regulations or orders as may be necessary or desirable to promote the Nation's common defense and security with regard to control, ownership, or possession of any equipment or device, or important component part especially designed for such equipment or device, capable of separating the isotopes of uranium or enriching uranium in the isotope 235;" was executed by striking the semicolon at end of subsec. (b) and making insertion to reflect probable intent of Congress.

1988—Subsec. (v). Pub. L. 100-449 inserted in closing provisions "For purposes of this subsection and of section 305 of Public Law 99-591 (100 Stat. 3341-209, 210), 'foreign origin' excludes source or special nuclear material originating in Canada."

1986—Subsec. (k). Pub. L. 99-661 inserted "and subcontractors (at any tier)" after "employees of its contractors", substituted "under the jurisdiction of the United States" for "owned by the United States and", inserted "or being transported to or from such facilities" after "contracted to the United States", inserted after third sentence "An employee of a contractor or subcontractor authorized to carry firearms under this subsection may make such arrests only when the individual to be arrested is within, or in direct flight from, the area of such offense.", and inserted before the semicolon at end ". The Secretary, with the approval of the Attorney General, shall issue guidelines to implement this subsection".

1981—Subsec. (k). Pub. L. 97-90 inserted provision that a person authorized to carry firearms under this subsection may, while in the performance of, and in connection with, official duties, make arrests without warrant for any offense against the United States committed in that person's presence or for any felony cognizable under the laws of the United States if that person has reasonable grounds to believe that the individual to be arrested has committed or is committing such felony, that a person granted authority to make arrests by this subsection may exercise that authority only in the enforcement of (1) laws regarding the property of the United States in the custody of the Department of Energy, the Nuclear Regulatory Commission, or a contractor of the Department of Energy or Nuclear Regulatory Commission, or (2) any provision of this chapter that may subject an offender to a fine, imprisonment, or both, and that the arrest authority conferred by this subsection is in addition to any arrest authority under other laws.

1978—Subsec. (x). Pub. L. 95-604 added subsec. (x).

1974—Subsec. (i). Pub. L. 93-377 inserted provision in cl. (2) relating to regulations or orders designating activities, involving quantities of special nuclear material important to the common defense and security, that may be conducted by persons whose character, etc., have been established so that if they are permitted to conduct such activities it would not be inimical to the common defense and security.

1972—Subsec. (w). Pub. L. 92-314 added subsec. (w).

1970—Subsec. (c). Pub. L. 91-452 struck out provisions that no person be excused from complying with any requirements under this paragraph because of his privilege against self-incrimination, but that the immunity provisions of the Compulsory Testimony Act of Feb. 11, 1893, apply with respect to any individual who specifically claims such privilege.

Subsec. (n). Pub. L. 91-560, §7, struck out references to section 2132 of this title and the finding of practical value.

Subsec. (v). Pub. L. 91-560, §8, substituted provisions for the establishment of prices on a basis of recovery of the Government's costs over a reasonable period of time for provisions for the establishment of prices on a basis which will provide reasonable compensation to the Government.

1967—Subsec. (n). Pub. L. 90-190 substituted "2077(b)" for "2077(a)(3)".

1964—Subsec. (v). Pub. L. 88-469 added subsec. (v).

1962—Subsec. (d). Pub. L. 87-793 substituted "up to a limit of the highest rate of grade 18 of the General Schedule of the Classification Act of 1949, as amended" for "up to a limit of \$19,000".

Subsec. (l). Pub. L. 87-456 repealed subsec. (l) which authorized the admittance free of duty into the United States of purchases made abroad of source materials.

Subsec. (n). Pub. L. 87-615 substituted "2165(f) of this title" for "2165(e) of this title".

1961—Subsecs. (s) to (v). Pub. L. 87-206 redesignated subsecs. (t) to (v) as (s) to (u), respectively.

1959—Subsec. (m). Pub. L. 86-300 inserted references to sections 2073(a)(4) and 2093(a)(4) of this title.

1958—Subsec. (d). Pub. L. 85-681, §6, authorized the Commission to adopt compensation rates on a retroactive basis as may be authorized by the Classification Act for other Government employees.

Subsecs. (n) to (s). Pub. L. 85-507 redesignated subsecs. (o) to (s) as (n) to (r), respectively. Former subsec. (n), which authorized the Commission to assign employees for instruction, education, or training by public or private agencies, institutions of learning, laboratories, or industrial or commercial organizations, was repealed by Pub. L. 85-507, see section 4101 et seq. of Title 5, Government Organizations and Employees.

Subsecs. (t) to (v). Pub. L. 85-681, §7, added subsecs. (t) to (v).

1957—Subsec. (d). Pub. L. 85-287 inserted "up to a limit of \$19,000" after "scientific and technical personnel".

Subsec. (e). Pub. L. 85-162, §201, inserted "(at the time of the initial grant of any privilege grant, lease, or permit, or renewal thereof, or in order to avoid inequities or undue hardship prior to the sale by the United States of property affected by such grant)" after "adjusted terms which".

Subsec. (s). Pub. L. 85-162, §204, added subsec. (s).

1956—Subsec. (e). Act July 14, 1956, inserted proviso relating to negotiation of commercial leases without advertising by the Commission.

Subsec. (r). Act Aug. 6, 1956, added subsec. (r).

EFFECTIVE AND TERMINATION DATES OF 1988 AMENDMENT

Amendment by Pub. L. 100-449 effective on the date the United States-Canada Free-Trade Agreement enters into force (Jan. 1, 1989), and to cease to have effect on the date the Agreement ceases to be in force, see section 501(a), (c) of Pub. L. 100-449, set out in a note under section 2112 of Title 19, Customs Duties.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-452 effective on sixtieth day following Oct. 15, 1970, and not to affect any immunity to which any individual is entitled under this section by reason of any testimony given before sixtieth day following Oct. 15, 1970, see section 260 of Pub. L. 91-452, set out as an Effective Date; Savings Provision note under section 6001 of Title 18, Crimes and Criminal Procedure.

EFFECTIVE DATE OF 1962 AMENDMENTS

Amendment by Pub. L. 87-793 effective on first day of first pay period which begins on or after Oct. 11, 1962, see section 1008 of Pub. L. 87-793.

Repeal of subsec. (f) effective with respect to articles entered, or withdrawn from warehouse, for consumption on or after Aug. 31, 1963, see section 501(a) of Pub. L. 87-456.

EFFECTIVE DATE OF 1958 AMENDMENT

For effective date of amendment by Pub. L. 85-507, see section 21(a) of Pub. L. 85-507.

REFERENCES TO UNITED STATES ENRICHMENT CORPORATION

References to the United States Enrichment Corporation deemed, as of the privatization date (July 28, 1998), to be references to the private corporation, see section 3116(e) of Pub. L. 104-134, set out as a note under former section 2297 of this title.

REFERENCES IN OTHER LAWS TO GS-16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, §101(c)(1)] of Pub. L. 101-509, set out in a note under section 5376 of Title 5.

ORGANIZATIONAL CONFLICTS OF INTEREST

Pub. L. 95-209, §7, Dec. 13, 1977, 91 Stat. 1483, provided that: "The Commission shall by December 31, 1977, promulgate guidelines to be applied by the Commission in determining whether an organization proposing to enter into a contractual arrangement with the Commission has a conflict of interest which might impair the contractor's judgment or otherwise give the contractor an unfair competitive advantage."

APPLICABILITY TO FUNCTIONS TRANSFERRED BY DEPARTMENT OF ENERGY ORGANIZATION ACT

Pub. L. 95-91, title VII, §709(c)(2), Aug. 4, 1977, 91 Stat. 608, provided that: "Section 161(d) of the Atomic Energy Act of 1954 [subsec. (d) of this section] shall not apply to functions transferred by this Act [see Short Title note set out under section 7101 of this title]."

TERMINATION OF ADVISORY BOARDS

Advisory boards in existence on Jan. 5, 1973, to terminate not later than the expiration of the 2-year period following Jan. 5, 1973, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a board established by the Congress, its duration is otherwise provided by law. Advisory boards established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a board established by the President or an officer of the Federal Government, such board is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a board established by the Congress, its duration is otherwise provided by law. See sections 3(2) and 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, 776, set out in the Appendix to Title 5, Government Organization and Employees.

EMERGENCY PREPAREDNESS FUNCTIONS

For assignment of certain emergency preparedness functions to Members of the Nuclear Regulatory Commission, see Parts 1, 2, and 21 of Ex. Ord. No. 12656, Nov. 18, 1988, 53 F.R. 47491, set out as a note under section 5195 of this title.

PRINCIPAL OFFICE BUILDING FOR ATOMIC ENERGY COMMISSION

Act May 6, 1955, ch. 34, 69 Stat. 47, as amended by Pub. L. 85-107, July 17, 1957, 71 Stat. 307, authorized Atomic Energy Commission to acquire a suitable site in or near District of Columbia and, notwithstanding any other provision of law, to provide for construction on such site, in accordance with plans and specifications prepared by or under direction of Commission, of a modern office building to serve as principal office of Commission at a total cost of not to exceed \$13,300,000 and authorized to be appropriated such sums as were necessary.

REPORT WITH RESPECT TO RENEGOTIATIONS, REAPPRAISALS, AND SALES PROCEEDINGS

Section 203 of Pub. L. 85-162 directed Atomic Energy Commission, Federal Housing Administration, and Housing and Home Finance Agency to report to Joint Committee by Jan. 31, 1958, with respect to renegotiations, reappraisals, and sales proceedings authorized under sections 201 and 202 of Pub. L. 85-162 [amending subsec. (e) of this section and enacting section 2325(c) of this title].

§ 2201a. Use of firearms by security personnel

(a) Definitions

In this section, the terms "handgun", "rifle", "shotgun", "firearm", "ammunition", "machinegun", "short-barreled shotgun", and "short-barreled rifle" have the meanings given the terms in section 921(a) of title 18.

(b) Authorization

Notwithstanding subsections (a)(4), (a)(5), (b)(2), (b)(4), and (c) of section 922 of title 18, section 925(d)(3) of title 18, section 5844 of title 26, and any law (including regulations) of a State or a political subdivision of a State that prohibits the transfer, receipt, possession, transportation, importation, or use of a handgun, a rifle, a shotgun, a short-barreled shotgun, a short-barreled rifle, a machinegun, a semiautomatic assault weapon, ammunition for any such gun or weapon, or a large capacity ammunition feeding device, in carrying out the duties of the Commission, the Commission may authorize the security personnel of any licensee or certificate holder of the Commission (including an employee of a contractor of such a licensee or certificate holder) to transfer, receive, possess, transport, import, and use 1 or more such guns, weapons, ammunition, or devices, if the Commission determines that—

(1) the authorization is necessary to the discharge of the official duties of the security personnel; and

(2) the security personnel—

(A) are not otherwise prohibited from possessing or receiving a firearm under Federal or State laws relating to possession of firearms by a certain category of persons;

(B) have successfully completed any requirement under this section for training in the use of firearms and tactical maneuvers;

(C) are engaged in the protection of—

(i) a facility owned or operated by a licensee or certificate holder of the Commission that is designated by the Commission; or

(ii) radioactive material or other property owned or possessed by a licensee or certificate holder of the Commission, or

UNITED STATES CODE

2006 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES ENACTED THROUGH THE
109TH CONGRESS

(ending January 3, 2007, the last law of which was signed on January 15, 2007)

Prepared and published under authority of Title 2, U.S. Code, Section 285b,
by the Office of the Law Revision Counsel of the House of Representatives



VOLUME TWENTY-SIX

TITLE 42—THE PUBLIC HEALTH AND WELFARE

§§ 4401–8146

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 2008

Add. 16

dent, by and with the advice and consent of the Senate, and who shall perform such functions and duties as the Secretary shall prescribe, consistent with this section.

(2) The Under Secretary shall be compensated at the rate provided for level III of the Executive Schedule under section 5314 of title 5.

(e) General Counsel

(1) There shall be in the Department a General Counsel, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall perform such functions and duties as the Secretary shall prescribe.

(2) The General Counsel shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of title 5.

(Pub. L. 95-91, title II, § 202, Aug. 4, 1977, 91 Stat. 569; Pub. L. 106-65, div. C, title XXXII, § 3202, Oct. 5, 1999, 113 Stat. 954; Pub. L. 109-58, title X, § 1006(a), (c)(1), Aug. 8, 2005, 119 Stat. 930, 931.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109-58, § 1006(a), added subsec. (b) and struck out former subsec. (b) which read as follows: "There shall be in the Department an Under Secretary and a General Counsel, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall perform such functions and duties as the Secretary shall prescribe. The Under Secretary shall bear primary responsibility for energy conservation. The Under Secretary shall be compensated at the rate provided for level III of the Executive Schedule under section 5314 of title 5, and the General Counsel shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of title 5."

Subsecs. (d), (e). Pub. L. 109-58, § 1006(c)(1), added subsecs. (d) and (e).

1999—Subsec. (c). Pub. L. 106-65 added subsec. (c).

TERM OF OFFICE OF PERSON FIRST APPOINTED AS UNDER SECRETARY FOR NUCLEAR SECURITY OF THE DEPARTMENT OF ENERGY

Pub. L. 106-398, § 1 [div. C, title XXXI, § 3151], Oct. 30, 2000, 114 Stat. 1654, 1654A-464, provided that:

"(a) LENGTH OF TERM.—The term of office as Under Secretary for Nuclear Security of the Department of Energy of the person first appointed to that position shall be three years.

"(b) EXCLUSIVE REASONS FOR REMOVAL.—The exclusive reasons for removal from office as Under Secretary for Nuclear Security of the person described in subsection (a) shall be inefficiency, neglect of duty, or malfeasance in office.

"(c) POSITION DESCRIBED.—The position of Under Secretary for Nuclear Security of the Department of Energy referred to in this section is the position established by subsection (c) of section 202 of the Department of Energy Organization Act (42 U.S.C. 7132), as added by section 3202 of the National Nuclear Security Administration Act (title XXXII of Public Law 106-65; 113 Stat. 954)."

Substantially identical provisions were contained in Pub. L. 106-377, § 1(a)(2) [title III, § 313], Oct. 27, 2000, 114 Stat. 1441, 1441A-81.

§ 7133. Assistant Secretaries; appointment and confirmation; identification of responsibilities

(a) There shall be in the Department 7 Assistant Secretaries, each of whom shall be appointed by the President, by and with the advice and consent of the Senate; who shall be compensated at the rate provided for at level IV of

the Executive Schedule under section 5315 of title 5; and who shall perform, in accordance with applicable law, such of the functions transferred or delegated to, or vested in, the Secretary as he shall prescribe in accordance with the provisions of this chapter. The functions which the Secretary shall assign to the Assistant Secretaries include, but are not limited to, the following:

(1) Energy resource applications, including functions dealing with management of all forms of energy production and utilization, including fuel supply, electric power supply, enriched uranium production, energy technology programs, and the management of energy resource leasing procedures on Federal lands.

(2) Energy research and development functions, including the responsibility for policy and management of research and development for all aspects of—

(A) solar energy resources;

(B) geothermal energy resources;

(C) recycling energy resources;

(D) the fuel cycle for fossil energy resources; and

(E) the fuel cycle for nuclear energy resources.

(3) Environmental responsibilities and functions, including advising the Secretary with respect to the conformance of the Department's activities to environmental protection laws and principles, and conducting a comprehensive program of research and development on the environmental effects of energy technologies and programs.

(4) International programs and international policy functions, including those functions which assist in carrying out the international energy purposes described in section 7112 of this title.

(5) Repealed. Pub. L. 106-65, div. C, title XXXII, § 3294(b), Oct. 5, 1999, 113 Stat. 970.

(6) Intergovernmental policies and relations, including responsibilities for assuring that national energy policies are reflective of and responsible to the needs of State and local governments, and for assuring that other components of the Department coordinate their activities with State and local governments, where appropriate, and develop intergovernmental communications with State and local governments.

(7) Competition and consumer affairs, including responsibilities for the promotion of competition in the energy industry and for the protection of the consuming public in the energy policymaking processes, and assisting the Secretary in the formulation and analysis of policies, rules, and regulations relating to competition and consumer affairs.

(8) Nuclear waste management responsibilities, including—

(A) the establishment of control over existing Government facilities for the treatment and storage of nuclear wastes, including all containers, casks, buildings, vehicles, equipment, and all other materials associated with such facilities;

(B) the establishment of control over all existing nuclear waste in the possession or control of the Government and all commer-

cial nuclear waste presently stored on other than the site of a licensed nuclear power electric generating facility, except that nothing in this paragraph shall alter or effect title to such waste;

(C) the establishment of temporary and permanent facilities for storage, management, and ultimate disposal of nuclear wastes;

(D) the establishment of facilities for the treatment of nuclear wastes;

(E) the establishment of programs for the treatment, management, storage, and disposal of nuclear wastes;

(F) the establishment of fees or user charges for nuclear waste treatment or storage facilities, including fees to be charged Government agencies; and

(G) the promulgation of such rules and regulations to implement the authority described in this paragraph,

except that nothing in this section shall be construed as granting to the Department regulatory functions presently within the Nuclear Regulatory Commission, or any additional functions than those already conferred by law.

(9) Energy conservation functions, including the development of comprehensive energy conservation strategies for the Nation, the planning and implementation of major research and demonstration programs for the development of technologies and processes to reduce total energy consumption, the administration of voluntary and mandatory energy conservation programs, and the dissemination to the public of all available information on energy conservation programs and measures.

(10) Power marketing functions, including responsibility for marketing and transmission of Federal power.

(11) Public and congressional relations functions, including responsibilities for providing a continuing liaison between the Department and the Congress and the Department and the public.

(b) At the time the name of any individual is submitted for confirmation to the position of Assistant Secretary, the President shall identify with particularity the function or functions described in subsection (a) of this section (or any portion thereof) for which such individual will be responsible.

(Pub. L. 95-91, title II, §203, Aug. 4, 1977, 91 Stat. 570; Pub. L. 106-65, div. C, title XXXII, §3294(a)(2), (b), Oct. 5, 1999, 113 Stat. 970; Pub. L. 109-58, title X, §1006(b)(1), Aug. 8, 2005, 119 Stat. 931.)

AMENDMENTS

2005—Subsec. (a). Pub. L. 109-58 substituted "7" for "six" in introductory provisions.

1999—Subsec. (a). Pub. L. 106-65, §3294(a)(2), substituted "six" for "eight" in introductory provisions.

Subsec. (a)(5). Pub. L. 106-65, §3294(b), struck out par. (5) which read as follows: "National security functions, including those transferred to the Department from the Energy Research and Development Administration which relate to management and implementation of the nuclear weapons program and other national security functions involving nuclear weapons research and development."

EFFECTIVE DATE OF 1999 AMENDMENT

Amendment by Pub. L. 106-65 effective Mar. 1, 2000, see section 3299 of Pub. L. 106-65, set out as an Effective Date note under section 2401 of Title 50, War and National Defense.

FEDERAL POWER MARKETING ADMINISTRATION EMPLOYMENT LEVELS

Pub. L. 101-514, title V, §510, Nov. 5, 1990, 104 Stat. 2098, provided that no funds appropriated or made available were to be used by the executive branch to change employment levels determined by Administrators of the Federal Power Marketing Administrations to be necessary to carry out their responsibilities under this chapter and related laws, or to change employment levels of other Department of Energy programs to compensate for employment levels of the Federal Power Marketing Administrations, prior to repeal by Pub. L. 104-46, title V, §501, Nov. 13, 1995, 109 Stat. 419.

MARKETING AND EXCHANGE OF SURPLUS ELECTRICITY FROM NAVAJO GENERATING STATION

Pub. L. 98-381, title I, §107, Aug. 17, 1984, 98 Stat. 1339, provided that:

"(a) Subject to the provisions of any existing layoff contracts, electrical capacity and energy associated with the United States' interest in the Navajo generating station which is in excess of the pumping requirements of the Central Arizona project and any such needs for desalting and protective pumping facilities as may be required under section 101(b)(2)(B) of the Colorado River Basin Salinity Control Act of 1974, as amended [43 U.S.C. 1571(b)(2)(B)] (hereinafter in this Act referred to as 'Navajo surplus') shall be marketed and exchanged by the Secretary of Energy pursuant to this section.

"(b) Navajo surplus shall be marketed by the Secretary of Energy pursuant to the plan adopted under subsection (c) of this section, directly to, with or through the Arizona Power Authority and/or other entities having the status of preference entities under the reclamation law in accordance with the preference provisions of section 9(c) of the Reclamation Project Act of 1939 [43 U.S.C. 485h(c)] and as provided in part IV, section A of the Criteria.

"(c) In the marketing and exchanging of Navajo surplus, the Secretary of the Interior shall adopt the plan deemed most acceptable, after consultation with the Secretary of Energy, the Governor of Arizona, and the Central Arizona Water Conservation District (or its successor in interest to the repayment obligation for the Central Arizona project), for the purposes of optimizing the availability of Navajo surplus and providing financial assistance in the timely construction and repayment of construction costs of authorized features of the Central Arizona project. The Secretary of the Interior, in concert with the Secretary of Energy, in accordance with section 14 of the Reclamation Project Act of 1939 [43 U.S.C. 389], shall grant electrical power and energy exchange rights with Arizona entities as necessary to implement the adopted plan: *Provided, however,* That if exchange rights with Arizona entities are not required to implement the adopted plan, exchange rights may be offered to other entities.

"(d) For the purposes provided in subsection (c) of this section, the Secretary of Energy, or the marketing entity or entities under the adopted plan, are authorized to establish and collect or cause to be established and collected, rate components, in addition to those currently authorized, and to deposit the revenues received in the Lower Colorado River Basin Development Fund to be available for such purposes and if required under the adopted plan, to credit, utilize, pay over directly or assign revenues from such additional rate components to make repayment and establish reserves for repayment of funds, including interest incurred, to entities which have advanced funds for the purposes of subsection (c) of this section: *Provided, however,* That rates shall not exceed levels that allow for an appropriate saving for the contractor.

"(e) To the extent that this section may be in conflict with any other provision of law relating to the marketing and exchange of Navajo surplus, or to the disposition of any revenues therefrom, this section shall control."

§ 7134. Federal Energy Regulatory Commission; compensation of Chairman and members

There shall be within the Department, a Federal Energy Regulatory Commission established by subchapter IV of this chapter (hereinafter referred to in this chapter as the "Commission"). The Chairman shall be compensated at the rate provided for level III of the Executive Schedule under section 5314 of title 5. The other members of the Commission shall be compensated at the rate provided for level IV of the Executive Schedule under section 5315 of title 5. The Chairman and members of the Commission shall be individuals who, by demonstrated ability, background, training, or experience, are specially qualified to assess fairly the needs and concerns of all interests affected by Federal energy policy.

(Pub. L. 95-91, title II, § 204, Aug. 4, 1977, 91 Stat. 571.)

§ 7135. Energy Information Administration

(a) Establishment; appointment of Administrator; compensation; qualifications; duties

(1) There shall be within the Department an Energy Information Administration to be headed by an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate provided for in level IV of the Executive Schedule under section 5315 of title 5. The Administrator shall be a person who, by reason of professional background and experience, is specially qualified to manage an energy information system.

(2) The Administrator shall be responsible for carrying out a central, comprehensive, and unified energy data and information program which will collect, evaluate, assemble, analyze, and disseminate data and information which is relevant to energy resource reserves, energy production, demand, and technology, and related economic and statistical information, or which is relevant to the adequacy of energy resources to meet demands in the near and longer term future for the Nation's economic and social needs.

(b) Delegation of functions

The Secretary shall delegate to the Administrator (which delegation may be on a nonexclusive basis as the Secretary may determine may be necessary to assure the faithful execution of his authorities and responsibilities under law) the functions vested in him by law relating to gathering, analysis, and dissemination of energy information (as defined in section 796 of title 15) and the Administrator may act in the name of the Secretary for the purpose of obtaining enforcement of such delegated functions.

(c) Functions of Director of Office of Energy Information and Analysis

In addition to, and not in limitation of the functions delegated to the Administrator pursuant to other subsections of this section, there

shall be vested in the Administrator, and he shall perform, the functions assigned to the Director of the Office of Energy Information and Analysis under part B of the Federal Energy Administration Act of 1974 [15 U.S.C. 790 et seq.], and the provisions of sections 53(d) and 59 thereof [15 U.S.C. 790b(d), 790h] shall be applicable to the Administrator in the performance of any function under this chapter.

(d) Collection or analysis of information and preparation of reports without approval

The Administrator shall not be required to obtain the approval of any other officer or employee of the Department in connection with the collection or analysis of any information; nor shall the Administrator be required, prior to publication, to obtain the approval of any other officer or employee of the United States with respect to the substance of any statistical or forecasting technical reports which he has prepared in accordance with law.

(e) Annual audit

The Energy Information Administration shall be subject to an annual professional audit review of performance as described in section 55¹ of part B of the Federal Energy Administration Act of 1974.

(f) Furnishing information or analysis to any other administration, commission, or office within Department

The Administrator shall, upon request, promptly provide any information or analysis in his possession pursuant to this section to any other administration, commission, or office within the Department which such administration, commission, or office determines relates to the functions of such administration, commission, or office.

(g) Availability of information to public

Information collected by the Energy Information Administration shall be cataloged and, upon request, any such information shall be promptly made available to the public in a form and manner easily adaptable for public use, except that this subsection shall not require disclosure of matters exempted from mandatory disclosure by section 552(b) of title 5. The provisions of section 796(d) of title 15, and section 5916 of this title, shall continue to apply to any information obtained by the Administrator under such provisions.

(h) Identification and designation of "major energy producing companies"; format for financial report; accounting practices; filing of financial report; annual report of Department; definitions; confidentiality

(1)(A) In addition to the acquisition, collection, analysis, and dissemination of energy information pursuant to this section, the Administrator shall identify and designate "major energy-producing companies" which alone or with their affiliates are involved in one or more lines of commerce in the energy industry so that the energy information collected from such major energy-producing companies shall provide a statistically accurate profile of each line of com-

¹ See References in Text note below.

the Secretary or any officer or employee of the Department may exercise, in carrying out the function so transferred, any authority or part thereof available by law, including appropriation Acts, to the official or agency from which such function was transferred.

(Pub. L. 95-91, title VI, § 641, Aug. 4, 1977, 91 Stat. 598.)

DEPARTMENT OF ENERGY SECURITY MANAGEMENT
BOARD

Pub. L. 105-85, div. C, title XXXI, § 3161, Nov. 18, 1997, 111 Stat. 2048, required the Secretary of Energy to establish the Department of Energy Security Management Board, and provided for its duties which related to the security functions of the Department, and its membership, appointments, personnel, compensation, expenses, and termination on Oct. 31, 2000, prior to repeal by Pub. L. 106-65, div. C, title XXXI, § 3142(h)(1), Oct. 5, 1999, 113 Stat. 933.

§ 7252. Delegation

Except as otherwise expressly prohibited by law, and except as otherwise provided in this chapter, the Secretary may delegate any of his functions to such officers and employees of the Department as he may designate, and may authorize such successive redelegations of such functions within the Department as he may deem to be necessary or appropriate.

(Pub. L. 95-91, title VI, § 642, Aug. 4, 1977, 91 Stat. 599.)

REORGANIZATION OF FIELD ACTIVITIES AND
MANAGEMENT OF NATIONAL SECURITY FUNCTIONS

Pub. L. 104-206, title III, § 302, Sept. 30, 1996, 110 Stat. 2999, provided that: "None of the funds appropriated by this or any other Act may be used to implement section 3140 of H.R. 3230 as reported by the Committee of Conference on July 30, 1996 [Pub. L. 104-201, set out below]. The Secretary of Energy shall develop a plan to reorganize the field activities and management of the national security functions of the Department of Energy and shall submit such plan to the Congress not later than 120 days after the date of enactment of this Act [Sept. 30, 1996]. The plan will specifically identify all significant functions performed by the Department's national security operations and area offices and make recommendations as to where those functions should be performed."

Pub. L. 104-201, div. C, title XXXI, § 3140, Sept. 23, 1996, 110 Stat. 2833, which was formerly set out as a note under this section, was renumbered section 4102 of Pub. L. 107-314, the Bob Stump National Defense Authorization Act for Fiscal Year 2003, by Pub. L. 108-136, div. C, title XXXI, § 3141(d)(3)(A)-(C), Nov. 24, 2003, 117 Stat. 1757, and is classified to section 2512 of Title 50, War and National Defense.

§ 7253. Reorganization

(a) Subject to subsection (b) of this section, the Secretary is authorized to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary or appropriate. Such authority shall not extend to the abolition of organizational units or components established by this chapter, or to the transfer of functions vested by this chapter in any organizational unit or component.

(b)¹ The authority of the Secretary to establish, abolish, alter, consolidate, or discontinue

any organizational unit or component of the National Nuclear Security Administration is governed by the provisions of section 2409 of title 50.

(b)¹ The authority of the Secretary under subsection (a) of this section does not apply to the National Nuclear Security Administration. The corresponding authority that applies to the Administration is set forth in section 2402(e)² of title 50.

(Pub. L. 95-91, title VI, § 643, Aug. 4, 1977, 91 Stat. 599; Pub. L. 106-377, § 1(a)(2) [title III, § 314(b)], Oct. 27, 2000, 114 Stat. 1441, 1441A-81; Pub. L. 106-398, § 1 [div. C, title XXXI, § 3159(b)], Oct. 30, 2000, 114 Stat. 1654, 1654A-470.)

REFERENCES IN TEXT

Section 2402(e) of title 50, referred to in subsec. (b) set out second, probably means the subsec. (e) of section 2402 which relates to reorganization authority and was added by Pub. L. 106-398, § 1 [div. C, title XXXI, § 3159(a)] Oct. 30, 2000, 114 Stat. 1654, 1654A-469 and redesignated section 2402(f) of title 50 by Pub. L. 107-107, div. A, title X, § 1048(1)(12), Dec. 28, 2001, 115 Stat. 1230.

AMENDMENTS

2000—Subsec. (a). Pub. L. 106-398, § 1 [div. C, title XXXI, § 3159(b)(1)], which directed amendment of section by substituting "(a) Except as provided in subsection (b) of this section, the Secretary" for "The Secretary", could not be executed because the words "The Secretary" did not appear after execution of the amendment by Pub. L. 106-377, § 1(a)(2) [title III, § 314(b)(1)]. See below.

Pub. L. 106-377, § 1(a)(2) [title III, § 314(b)(1)], designated existing provisions as subsec. (a) and substituted "Subject to subsection (b) of this section, the Secretary" for "The Secretary".

Subsec. (b). Pub. L. 106-398, § 1 [div. C, title XXXI, § 3159(b)(2)], added subsec. (b) relating to nonapplicability of authority of Secretary under subsec. (a) of this section to National Nuclear Security Administration.

Pub. L. 106-377, § 1(a)(2) [title III, § 314(b)(2)], added subsec. (b) relating to authority of Secretary as to National Nuclear Security Administration.

§ 7254. Rules and regulations

The Secretary is authorized to prescribe such procedural and administrative rules and regulations as he may deem necessary or appropriate to administer and manage the functions now or hereafter vested in him.

(Pub. L. 95-91, title VI, § 644, Aug. 4, 1977, 91 Stat. 599.)

§ 7255. Subpoena

For the purpose of carrying out the provisions of this chapter, the Secretary, or his duly authorized agent or agents, shall have the same powers and authorities as the Federal Trade Commission under section 49 of title 15 with respect to all functions vested in, or transferred or delegated to, the Secretary or such agents by this chapter. For purposes of carrying out its responsibilities under the Natural Gas Policy Act of 1978 [15 U.S.C. 3301 et seq.], the Commission shall have the same powers and authority as the Secretary has under this section.

(Pub. L. 95-91, title VI, § 645, Aug. 4, 1977, 91 Stat. 599; Pub. L. 95-621, title V, § 508(a), Nov. 9, 1978, 92 Stat. 3408.)

¹So in original. Two subsecs. (b) have been enacted.

²See References in Text note below.

PUBLIC LAW 111-85—OCT. 28, 2009

123 STAT. 2845

Public Law 111-85
111th Congress

An Act

Making appropriations for energy and water development and related agencies for the fiscal year ending September 30, 2010, and for other purposes.

Oct. 28, 2009

[H.R. 3183]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for energy and water development and related agencies for the fiscal year ending September 30, 2010, and for other purposes, namely:

Energy and
Water
Development and
Related Agencies
Appropriations
Act, 2010.

TITLE I

CORPS OF ENGINEERS—CIVIL

DEPARTMENT OF THE ARMY

CORPS OF ENGINEERS—CIVIL

The following appropriations shall be expended under the direction of the Secretary of the Army and the supervision of the Chief of Engineers for authorized civil functions of the Department of the Army pertaining to rivers and harbors, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related efforts.

INVESTIGATIONS

For expenses necessary where authorized by law for the collection and study of basic information pertaining to river and harbor, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related needs; for surveys and detailed studies, and plans and specifications of proposed river and harbor, flood and storm damage reduction, shore protection, and aquatic ecosystem restoration projects and related efforts prior to construction; for restudy of authorized projects; and for miscellaneous investigations and, when authorized by law, surveys and detailed studies, and plans and specifications of projects prior to construction, \$160,000,000, to remain available until expended.

CONSTRUCTION

(INCLUDING TRANSFER OF FUNDS)

For expenses necessary for the construction of river and harbor, flood and storm damage reduction, shore protection, aquatic ecosystem restoration, and related projects authorized by law; for

123 STAT. 2864

PUBLIC LAW 111-85—OCT. 28, 2009

that appears under the heading “Congressionally Directed Science Projects” in the joint explanatory statement accompanying the conference report on this Act.

NUCLEAR WASTE DISPOSAL

For nuclear waste disposal activities to carry out the purposes of the Nuclear Waste Policy Act of 1982, Public Law 97-425, as amended (the “NWPA”), \$98,400,000, to remain available until expended, and to be derived from the Nuclear Waste Fund: *Provided*, That of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities, 2.54 percent shall be provided to the Office of the Attorney General of the State of Nevada solely for expenditures, other than salaries and expenses of State employees, to conduct scientific oversight responsibilities and participate in licensing activities pursuant to the NWPA: *Provided further*, That notwithstanding the lack of a written agreement with the State of Nevada under section 117(c) of the NWPA, 0.51 percent shall be provided to Nye County, Nevada, for on-site oversight activities under section 117(d) of the NWPA: *Provided further*, That of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities, 4.57 percent shall be provided to affected units of local government, as defined in the NWPA, to conduct appropriate activities and participate in licensing activities under Section 116(c) of the NWPA: *Provided further*, That of the amounts provided to affected units of local government, 7.5 percent of the funds provided for the affected units of local government shall be made available to affected units of local government in California with the balance made available to affected units of local government in Nevada for distribution as determined by the Nevada affected units of local government: *Provided further*, That of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities, 0.25 percent shall be provided to the affected federally-recognized Indian tribes, as defined in the NWPA, solely for expenditures, other than salaries and expenses of tribal employees, to conduct appropriate activities and participate in licensing activities under section 118(b) of the NWPA: *Provided further*, That notwithstanding the provisions of chapters 65 and 75 of title 31, United States Code, the Department shall have no monitoring, auditing or other oversight rights or responsibilities over amounts provided to affected units of local government: *Provided further*, That the funds for the State of Nevada shall be made available solely to the Office of the Attorney General by direct payment and to units of local government by direct payment: *Provided further*, That 4.57 percent of the funds made available in this Act for nuclear waste disposal and defense nuclear waste disposal activities shall be provided to Nye County, Nevada, as payment equal to taxes under section 116(c)(3) of the NWPA: *Provided further*, That within 90 days of the completion of each Federal fiscal year, the Office of the Attorney General of the State of Nevada, each affected federally-recognized Indian tribe, and each of the affected units of local government shall provide certification to the Department of Energy that all funds expended from such payments have been expended for activities authorized by the NWPA and this Act: *Provided further*, That failure to provide such

Nevada.

Nevada.

California.
Nevada.

Native
Americans.

Nevada.

Nevada.

Deadline.
Nevada.
Certification.

Penalty.

PUBLIC LAW 111-85—OCT. 28, 2009

123 STAT. 2865

certification shall cause such entity to be prohibited from any further funding provided for similar activities: *Provided further*, That none of the funds herein appropriated may be: (1) used directly or indirectly to influence legislative action, except for normal and recognized executive-legislative communications, on any matter pending before Congress or a State legislature or for lobbying activity as provided in 18 U.S.C. 1913; (2) used for litigation expenses; or (3) used to support multi-State efforts or other coalition building activities inconsistent with the restrictions contained in this Act: *Provided further*, That all proceeds and recoveries realized by the Secretary in carrying out activities authorized by the NWPA, including but not limited to, any proceeds from the sale of assets, shall be available without further appropriation and shall remain available until expended: *Provided further*, That of the funds made available in this Act for Nuclear Waste Disposal, \$5,000,000 shall be provided to create a Blue Ribbon Commission to consider all alternatives for nuclear waste disposal: *Provided further*, That no funds provided in this Act or any previous Act may be used to pursue repayment or collection of funds provided in any fiscal year to affected units of local government for oversight activities that had been previously approved by the Department of Energy, or to withhold payment of any such funds.

Lobbying.

TITLE 17 INNOVATIVE TECHNOLOGY LOAN GUARANTEE PROGRAM

Such sums as are derived from amounts received from borrowers pursuant to section 1702(b)(2) of the Energy Policy Act of 2005 under this heading in prior Acts, shall be collected in accordance with section 502(7) of the Congressional Budget Act of 1974: *Provided*, That for necessary administrative expenses to carry out this Loan Guarantee program, \$43,000,000 is appropriated, to remain available until expended: *Provided further*, That \$43,000,000 of the fees collected pursuant to section 1702(h) of the Energy Policy Act of 2005 shall be credited as offsetting collections to this account to cover administrative expenses and shall remain available until expended, so as to result in a final fiscal year 2010 appropriations from the general fund estimated at not more than \$0: *Provided further*, That fees collected under section 1702(h) in excess of the amount appropriated for administrative expenses shall not be available until appropriated.

ADVANCED TECHNOLOGY VEHICLES MANUFACTURING LOAN PROGRAM

For administrative expenses in carrying out the Advanced Technology Vehicles Manufacturing Loan Program, \$20,000,000, to remain available until expended.

DEPARTMENTAL ADMINISTRATION

For salaries and expenses of the Department of Energy necessary for departmental administration in carrying out the purposes of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), including the hire of passenger motor vehicles and official reception and representation expenses not to exceed \$30,000, \$288,684,000, to remain available until expended, plus such additional amounts as necessary to cover increases in the estimated amount of cost of work for others notwithstanding the provisions

Code of Federal Regulations

10

Parts 1 to 50

Revised as of January 1, 2010

Energy

Containing a codification of documents
of general applicability and future effect

As of January 1, 2010

With Ancillaries

Published by
Office of the Federal Register
National Archives and Records
Administration

A Special Edition of the Federal Register

Add. 24

HeinOnline -- CFR i 2010

§2.107

10 CFR Ch. I (1-1-10 Edition)

(ii) The manner in which copies of the safety analysis, if any, may be obtained and examined; and

(iii) A finding that the application for the license or amendment complies with the requirements of the Act and this chapter.

(2) In the case of a finding under §2.103(g) of this chapter:

(i) The manner in which copies of the safety analysis, if any, may be obtained and examined; and

(ii) A finding that the prescribed inspections, tests, and analyses have been performed, the prescribed acceptance criteria have been met, and that the license complies with the requirements of the Act and this chapter.

(c) The Director of Nuclear Material Safety and Safeguards will also cause to be published in the FEDERAL REGISTER notice of, and will inform the State, local, and Tribal officials specified in §2.104(e) of any action with respect to an application for construction authorization for a high-level radioactive waste repository at a geologic repository operations area, a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, or an amendment to such license for which a notice of proposed action has been previously published.

(d) The Director of Nuclear Material Safety and Safeguards will also cause to be published in the FEDERAL REGISTER notice of, and will inform the State and local officials or tribal governing body specified in §2.104(e) of any licensing action with respect to a license to receive radioactive waste from other persons for disposal under part 61 of this chapter or the amendment of such a license for which a notice of proposed action has been previously published.

[37 FR 15131, July 28, 1972, as amended at 38 FR 9586, Apr. 18, 1973; 46 FR 13978, Feb. 25, 1981; 47 FR 57478, Dec. 27, 1982; 66 FR 55787, Nov. 2, 2001; 69 FR 2235, Jan. 14, 2004; 72 FR 49473, Aug. 28, 2007; 73 FR 5716, Jan. 31, 2008]

§2.107 Withdrawal of application.

(a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions

as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. If the application is withdrawn prior to issuance of a notice of hearing, the Commission shall dismiss the proceeding. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

(b) The withdrawal of an application does not authorize the removal of any document from the files of the Commission.

(c) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the FEDERAL REGISTER a notice of the withdrawal of an application if notice of receipt of the application has been previously published.

[27 FR 377, Jan. 13, 1962, as amended at 28 FR 10152, Sept. 17, 1963; 69 FR 2236, Jan. 14, 2004; 73 FR 5716, Jan. 31, 2008]

§2.108 Denial of application for failure to supply information.

(a) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, may deny an application if an applicant fails to respond to a request for additional information within thirty (30) days from the date of the request, or within such other time as may be specified.

(b) The Director, Office of Nuclear Reactor Regulation, Director, Office of New Reactors, or Director, Office of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the FEDERAL REGISTER a notice of denial when notice of receipt of the application has previously been published, but notice of hearing has not yet been published. The notice of denial will provide that, within thirty (30) days after the date of publication in the FEDERAL REGISTER.

(1) The applicant may demand a hearing, and

(2) Any person whose interest may be affected by the proceeding may file a petition for leave to intervene.

Nuclear Regulatory Commission

§ 63.121

(3) Consider alternative conceptual models of features and processes, for 10,000 years after disposal, that are consistent with available data and current scientific understanding and evaluate the effects that alternative conceptual models have on the performance of the geologic repository.

(4) Consider only features, events, and processes consistent with the limits on performance assessment specified at § 63.342.

(5) Provide the technical basis for either inclusion or exclusion of specific features, events, and processes in the performance assessment. Specific features, events, and processes must be evaluated in detail if the magnitude and time of the resulting radiological exposures to the reasonably maximally exposed individual, or radionuclide releases to the accessible environment, for 10,000 years after disposal, would be significantly changed by their omission.

(6) Provide the technical basis for either inclusion or exclusion of degradation, deterioration, or alteration processes of engineered barriers in the performance assessment, including those processes that would adversely affect the performance of natural barriers. Degradation, deterioration, or alteration processes of engineered barriers must be evaluated in detail if the magnitude and time of the resulting radiological exposures to the reasonably maximally exposed individual, or radionuclide releases to the accessible environment, for 10,000 years after disposal, would be significantly changed by their omission.

(7) Provide the technical basis for models used to represent the 10,000 years after disposal in the performance assessment, such as comparisons made with outputs of detailed process-level models and/or empirical observations (e.g., laboratory testing, field investigations, and natural analogs).

(b) The performance assessment methods used to satisfy the requirements of paragraph (a) of this section are considered sufficient for the performance assessment for the period of time after 10,000 years and through the period of geologic stability.

[74 FR 10828, Mar. 13, 2009]

§ 63.115 Requirements for multiple barriers.

Demonstration of compliance with § 63.113(a) must:

(a) Identify those design features of the engineered barrier system, and natural features of the geologic setting, that are considered barriers important to waste isolation.

(b) Describe the capability of barriers, identified as important to waste isolation, to isolate waste, taking into account uncertainties in characterizing and modeling the behavior of the barriers.

(c) Provide the technical basis for the description of the capability of barriers, identified as important to waste isolation, to isolate waste. The technical basis for each barrier's capability shall be based on and consistent with the technical basis for the performance assessments used to demonstrate compliance with § 63.113(b) and (c).

LAND OWNERSHIP AND CONTROL

§ 63.121 Requirements for ownership and control of interests in land.

(a) *Ownership of land.* (1) The geologic repository operations area must be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use.

(2) These lands must be held free and clear of all encumbrances, if significant, such as:

(i) Rights arising under the general mining laws;

(ii) Easements for right-of-way; and

(iii) All other rights arising under lease, rights of entry, deed, patent, mortgage, appropriation, prescription, or otherwise.

(b) *Additional controls for permanent closure.* Appropriate controls must be established outside of the geologic repository operations area. DOE shall exercise any jurisdiction and control over surface and subsurface estates necessary to prevent adverse human actions that could significantly reduce the geologic repository's ability to achieve isolation. The rights of DOE may take the form of appropriate possessory interests, servitudes, or

§ 63.131

withdrawals from location or patent under the general mining laws.

(c) *Additional controls through permanent closure.* Appropriate controls must be established outside the geologic repository operations area. DOE shall exercise any jurisdiction or control of activities necessary to ensure the requirements at §63.111(a) and (b) are met. Control includes the authority to exclude members of the public, if necessary.

(d) *Water rights.* (1) DOE shall also have obtained such water rights as may be needed to accomplish the purpose of the geologic repository operations area.

(2) Water rights are included in the additional controls to be established under paragraph (b) of this section.

Subpart F—Performance Confirmation Program

§ 63.131 General requirements.

(a) The performance confirmation program must provide data that indicate, where practicable, whether:

(1) Actual subsurface conditions encountered and changes in those conditions during construction and waste emplacement operations are within the limits assumed in the licensing review; and

(2) Natural and engineered systems and components required for repository operation, and that are designed or assumed to operate as barriers after permanent closure, are functioning as intended and anticipated.

(b) The program must have been started during site characterization, and it will continue until permanent closure.

(c) The program must include in situ monitoring, laboratory and field testing, and in situ experiments, as may be appropriate to provide the data required by paragraph (a) of this section.

(d) The program must be implemented so that:

(1) It does not adversely affect the ability of the geologic and engineered elements of the geologic repository to meet the performance objectives.

(2) It provides baseline information and analysis of that information on those parameters and natural processes pertaining to the geologic setting that

10 CFR Ch. I (1-1-10 Edition)

may be changed by site characterization, construction, and operational activities.

(3) It monitors and analyzes changes from the baseline condition of parameters that could affect the performance of a geologic repository.

§ 63.132 Confirmation of geotechnical and design parameters.

(a) During repository construction and operation, a continuing program of surveillance, measurement, testing, and geologic mapping must be conducted to ensure that geotechnical and design parameters are confirmed and to ensure that appropriate action is taken to inform the Commission of design changes needed to accommodate actual field conditions encountered.

(b) Subsurface conditions must be monitored and evaluated against design assumptions.

(c) Specific geotechnical and design parameters to be measured or observed, including any interactions between natural and engineered systems and components, must be identified in the performance confirmation plan.

(d) These measurements and observations must be compared with the original design bases and assumptions. If significant differences exist between the measurements and observations and the original design bases and assumptions, the need for modifications to the design or in construction methods must be determined and these differences, their significance to repository performance, and the recommended changes reported to the Commission.

(e) In situ monitoring of the thermomechanical response of the underground facility must be conducted until permanent closure, to ensure that the performance of the geologic and engineering features is within design limits.

§ 63.133 Design testing.

(a) During the early or developmental stages of construction, a program for testing of engineered systems and components used in the design, such as, for example, borehole and shaft seals, backfill, and drip shields, as well as the thermal interaction effects of the waste packages, backfill,

Code of Federal Regulations

40

Part 1000 to End

Revised as of July 1, 2010

**Protection of
Environment**

Containing a codification of documents
of general applicability and future effect

As of July 1, 2010

With Ancillaries

Published by
Office of the Federal Register
National Archives and Records
Administration

A Special Edition of the Federal Register

Add. 28

HeinOnline -- CFR i 2010

except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

- (a) Reducing the length of environmental impact statements (§1502.2(c)), by means such as setting appropriate page limits (§§1501.7(b)(1) and 1502.7).
- (b) Preparing analytic rather than encyclopedic environmental impact statements (§1502.2(a)).
- (c) Discussing only briefly issues other than significant ones (§1502.2(b)).
- (d) Writing environmental impact statements in plain language (§1502.8).
- (e) Following a clear format for environmental impact statements (§1502.10).
- (f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§1502.14 and 1502.15) and reducing emphasis on background material (§1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§1501.7).

(h) Summarizing the environmental impact statement (§1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§1502.4 and 1502.20).

(j) Incorporating by reference (§1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§1502.25).

(l) Requiring comments to be as specific as possible (§1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§1506.3).

(o) Combining environmental documents with other documents (§1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alter-

natives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such

as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§1501.7), tiering (§1502.20), and other methods listed in §§1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the

public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of §1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in §1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§ 1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in § 1502.18(d) and unchanged statements as provided in § 1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise

with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material

may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

repeat any of the discussion in the assessment but may incorporate it by reference.

§ 1508.14 Human environment.

Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

§ 1508.15 Jurisdiction by law.

Jurisdiction by law means agency authority to approve, veto, or finance all or part of the proposal.

§ 1508.16 Lead agency.

Lead agency means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

§ 1508.17 Legislation.

Legislation includes a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting does not by itself constitute significant cooperation. Proposals for legislation include requests for ratification of treaties. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

§ 1508.18 Major Federal action.

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§1508.27). Actions include the circumstance

where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

§ 1508.19 Matter.

Matter includes for purposes of part 1504:

(a) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(b) With respect to all other agencies, any proposed major federal action to which section 102(2)(C) of NEPA applies.

§ 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

§ 1508.21 NEPA process.

NEPA process means all measures necessary for compliance with the requirements of section 2 and title I of NEPA.

§ 1508.22 Notice of intent.

Notice of intent means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

(a) Describe the proposed action and possible alternatives.

(b) Describe the agency's proposed scoping process including whether, when, and where any scoping meeting will be held.

(c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

§ 1508.23 Proposal.

Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative

means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

§ 1508.24 Referring agency.

Referring agency means the federal agency which has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental

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

No. 10-1082

STATE OF WASHINGTON,
Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,

DECLARATION OF DAVID K. ZABRANSKY

I, DAVID K. ZABRANSKY declare as follows:

1. I am the Acting Principal Deputy Director of the Office of Civilian Radioactive Waste Management (“OCRWM”) for the Department of Energy (“DOE”). I assumed this position in January of 2010 and report directly to the Under Secretary of Energy. I am responsible for all aspects of DOE’s Civilian Radioactive Waste Management Program, and am personally responsible for the day-to-day operations of OCRWM. My present duties include closing down OCRWM in a responsible and orderly manner to ensure scientific data and program records are properly preserved or dispositioned.
2. OCRWM was established by Section 302 of the Nuclear Waste Policy Act of 1982 (NWPAA) to carry out the functions of the DOE under the Act. OCRWM’s mission is to fulfill the federal responsibility to provide for the permanent disposal of high-level radioactive waste and spent nuclear fuel in order to protect public health, safety, and the environment. OCRWM’s duties include developing, licensing,

constructing and operating disposal and related facilities including transportation systems, performing relevant research and development activities, entering into contracts to take high-level radioactive waste and spent nuclear fuel for disposal, and collecting and managing fees to pay for these activities. OCRWM currently works on: (1) issues relating to the Yucca Mountain repository; (2) collecting and managing the waste fee; (3) managing the standard contracts with nuclear utilities; (4) supporting the Department of Justice with respect to the Standard Contract litigation and settlements resulting from DOE's failure to begin taking spent nuclear fuel by 1998; and (5) performing the administrative tasks to support the preceding activities.

3. In 2009 DOE ceased activities related to the planning for transportation of materials to Yucca Mountain. Those activities included developing a railroad to the site and transportation outreach. All activities related to completing the design and planning for construction and repository site upgrades were terminated. Ongoing science at the site was reduced to the minimal amount to support only the licensing process.
4. Two years ago there were approximately 2,700 employees working for OCRWM. This number decreased dramatically after submittal of the license application to the Nuclear Regulatory Commission and the redirection of work to only licensing activities. Today, there are approximately 620 employees working for OCRWM. Of this number, approximately 230 are federal employees, of whom approximately 175 are employed directly by OCRWM (OCRWM employees), approximately 35 are employed by other offices within the DOE, and approximately 20 are employed

by the U.S. Geological Survey. The remainder (approximately 400) are contractor employees.

5. On February 1, 2010, the Administration's Fiscal Year 2011 Budget was announced and stated that "[i]n 2010, the Department [of Energy] will discontinue its application to the Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geological repository at Yucca Mountain, Nevada."
6. Given the fact that no money has been requested for OCRWM in FY 2011, DOE has taken several actions to prepare for the orderly shutdown of OCRWM by the end of Fiscal Year (FY) 2010 (September 30, 2010). These include actions to assist OCRWM employees such as: (1) priority consideration for any positions open within DOE; (2) approval from Office of Personnel Management for voluntary early retirement and voluntary separation incentive payments; (3) relocation allowances for OCRWM employees; (4) training for job interviews and the USAJOBS application process; and retirement training. In addition, while not yet finalized or approved, DOE has been developing a plan to terminate OCRWM in an orderly manner by the end of FY 2010. An orderly termination is important so that materials, databases, and documents can be stored properly and thus be available for later use as appropriate. Further delays in engaging in shutdown activities are contrary to the interest in ensuring an orderly shutdown. Additionally, assisting Yucca Mountain employees to remain with the DOE, to the extent successful, can facilitate efforts to reconstitute the Yucca Mountain work force, should the need arise.

7. With respect to the non-federal work force, approximately 141 individuals work for Sandia National Laboratory and other National Laboratories. DOE's National Laboratories have been developed and supported by DOE and its predecessors to provide world class research and development on issues that are important to the public and national interest. OCRWM has used the National Laboratories to provide scientific and modeling support for the license application and has designated Sandia National Laboratory as the Lead Lab to coordinate these efforts. DOE's expectation is that, when funding is no longer provided to the National Laboratories to support the license application for Yucca Mountain, many of the scientists who have been performing work on Yucca Mountain will continue to be employed by the National Laboratories and perform work on other projects. The continued employment of those scientists by the National Laboratories could facilitate establishment of a National Laboratories' support team if DOE were required to continue with the licensing proceeding.
8. DOE uses a special Management and Operating (M&O) Contract for many of its sites and facilities. OCRWM has an M&O contractor to manage the Yucca Mountain site, including the tunnel and related infrastructure as well as to develop the design for the repository and related facilities and coordinate licensing activities. The present M&O contractor for the Yucca Mountain Project is U.S.A. Repository Services, LLC ("USA-RS"), a subsidiary of Washington Group International, Inc., an Ohio Corporation doing business as the Washington Division of the construction and engineering design firm URS Corporation. Shaw Environmental and Infrastructure Inc. and Areva Federal Services, LLC are fee sharing subcontractors

to USA-RS. There are 101 employees under the M&O contract for OCRWM.

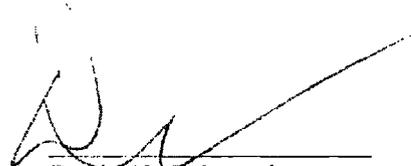
There currently are no plans to terminate this M&O contract although there will be a descopeing of all work related to repository licensing when OCRWM closes in September, with only a few administrative tasks remaining. Because the contract would remain in effect, there would be no need to go through the government competitive process to hire a new M&O contractor if DOE were required to resume the licensing proceeding. Thus, DOE could add tasks to the contract to support licensing and other repository related tasks.

9. There are an additional 155 contractor or laboratory employees that are neither M&O contractors nor laboratory employees that will need to be terminated prior to September 30, 2010 for an orderly closure of OCRWM.
10. Even with the full complement of staff, the Yucca Mountain Repository could open no earlier than 2020. Even that date depends on a number of actions, all of which are beyond the control of DOE and could cause significant delays. For example, the U.S. Nuclear Regulatory Commission's ("NRC") Licensing Board, has stated in regard to its independent technical review of the license application, that the Staff estimates that review of the five volumes of the Safety Evaluation Report would be completed no earlier than February 2012. Hearings in the proceeding on contested factual issues usually do not occur until after the NRC Staff has completed its review of pertinent sections of the Safety Evaluation Report. Additionally, these hearings must be concluded before the NRC could consider issuing a license for construction of a repository. To open a facility, moreover, DOE would be required to obtain water rights, rights of way from the Bureau of Land Management for utilities and

access roads, and Clean Water Act § 404 permits for repository construction, as well as all the state and federal approvals necessary for an approximately 300-mile rail line, among many other actions. Moreover, Congress would need to take several actions including permanent land withdrawal of the repository site. Absent such congressional action, it is my understanding that no repository could open at Yucca Mountain, regardless of DOE's decisions.

11. DOE estimates that each month of delay in moving toward descopeing the M&O contractor and other shutdown activities in FY 2010 limits the funds in FY 2010 for shutdown activities by about \$9 million a month.

I declare under penalty of perjury, this 22 day of April 2010, that the foregoing is true and correct to the best of my knowledge and belief.



David K. Zabransky
Acting Principal Deputy Director
Office of Civilian Radioactive Waste
Management

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

No. 10-1082

STATE OF WASHINGTON,
Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,

DECLARATION OF DR. INES TRIAY

INES TRIAY declares as follows:

1. I was appointed by President Obama as DOE Assistant Secretary for Environmental Management and, after confirmation by the Senate, sworn into office in May 2009. In this position I am responsible for all aspects of DOE's Office of Environmental Management, and am personally responsible for the day-to-day operations of this Office. In particular, I have primary responsibility within the Department for the cleanup, management, and storage of DOE radioactive waste, including the radioactive waste currently located at the Hanford and Savannah River Sites. Prior to my appointment to be Assistant Secretary, I served as the cleanup program's Principal Deputy Assistant Secretary, Chief Operations Officer, and Deputy Chief Operations Officer. Prior to these positions in Washington D.C., I served as Manager of the Department's Carlsbad Field Office in New Mexico. During my tenure as the Manager, the number of shipments of contact-handled transuranic

2

waste accepted at the Waste Isolation Pilot Plant (WIPP) increased from 1-2 per week to 25 per week. In order to sustain these shipments, I implemented a complete re-invention of the United States' national transuranic waste program.

2. I began my career as a postdoctoral staff member in the Isotope and Nuclear Chemistry Division at Los Alamos National Laboratory, New Mexico. I progressed through many positions to acting deputy director of the Chemical Science and Technology Division and group leader for the Environmental Science and Waste Technology Group. There, I directed multidisciplinary research on decontamination, transuranic waste characterization and treatment, environmental chemistry, contaminant transport and remediation, and isotope chemistry for environmental and nuclear problems. I led the team that was responsible for the first transuranic waste shipment to WIPP, which began operations in March 1999.
3. I have 25 years of professional experience in the field of radioactive waste handling and disposition.
4. My honors include the 2007 Wendell D. Weart Lifetime Achievement Award for my work in radioactive waste management, 2007 Presidential Rank Award, 2004 National Award for Nuclear Science from the Einstein Society of the National Atomic Museum, the American Society of Mechanical Engineers 2003 Dixy Lee Ray Award for environmental protection, the 2003 Woman of Achievement award from the Radiochemistry Society, and two distinguished performance awards from Los Alamos National Laboratory.
5. On February 1, 2010, the Administration's Fiscal Year 2011 Budget was announced and stated that "[i]n 2010, the Department [of Energy] will discontinue its

3

application to the Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geological repository at Yucca Mountain, Nevada.” One of my responsibilities is to address the potential effects, if any, of the unavailability of the proposed Yucca Mountain repository on DOE cleanup activities, including those at the Hanford and Savannah River Sites.

6. The Department is committed to cleaning up its sites where highly radioactive waste is located by removing the waste from underground tanks in which it is currently stored, followed by the processing and treatment of that waste. These processes will result in the generation of very robust waste forms for high-level waste that are protective of human health and the environment. At Hanford and Savannah River, this is a glass waste form.
7. The licensing, construction, and operation of a repository at Yucca Mountain is not on the critical path of events that are necessary for the Department to move forward with the cleanup of DOE sites, including Hanford and Savannah River. For Hanford, these events include the Waste Treatment Plant becoming operational, which is scheduled in 2022. Once operational, the Waste Treatment Plant will process liquid waste currently stored in tanks into a robust glass waste form. At Savannah River, activities include retrieving 36 million gallons of liquid radioactive waste from 49 underground storage tanks and processing the waste destined for a geological repository through the Defense Waste Processing Facility, a plant that vitrifies waste (that is, puts it into a robust glass form that is protective of human health and the environment) and that is currently operating. In other words, the

4

Administration's decision to pursue alternatives to the disposal of high-level waste located at those sites will not affect current plans or schedules for cleaning up those sites.

8. As noted above, with respect to Hanford, the decision to withdraw the license application for a repository at Yucca Mountain will have no effect on current plans and schedules to retrieve highly radioactive liquid waste from the waste storage tanks and construct and operate the Waste Treatment Plant. This course of action was decided in a Record of Decision (published at 62 FR 8693), which followed issuance of the Hanford Tank Waste Remediation System Environmental Impact Statement. Likewise, the decision to withdraw will have no effect on the quality of the waste form because the Tri-Party Agreement, which is an enforceable Administrative Order on Consent between the Washington State Department of Ecology, the United States Environmental Protection Agency, and DOE setting forth milestones for the cleanup of the Hanford site, requires DOE to put the waste into the borosilicate glass waste form identified in the current plans. A proposed settlement with the State of Washington would convert this obligation into a judicial consent decree.
9. With respect to Savannah River, the decision to withdraw the license application for a repository at Yucca Mountain will have no effect on current plans to complete removal of highly radioactive waste from the tanks and convert the high-level waste portion into a similar glass waste form.
10. The completion of the process of converting liquid high level waste into glass waste forms will take several decades to accomplish, and DOE and the host states have

5

long known that such waste forms would remain on site for a lengthy period of time. At the Hanford site, the Tank Closure and Waste Management Draft EIS (DOE/EIS-0391, October 2009) anticipated the February budget announcement and included analysis of the impacts on Hanford cleanup. As stated in the document summary, “The analyses in this EIS are not affected by recent DOE plans to study alternatives for the disposition of the Nation’s SNF [spent nuclear fuel] and HLW [high level waste] because the EIS analysis shows that vitrified HLW can be stored safely at Hanford for many years until disposition decisions are made and implemented.” (Draft EIS at S-39, n.1.). This EIS also evaluates the potential need for more high level waste storage facilities at Hanford and “expects the impacts to be similar” to those previously found for high level waste storage. *Id.* at S-118. Finally, the EIS also anticipates the issue of disposition of cesium and strontium and assumes that this material will be added to the treatment process and create the need for additional waste canisters whose storage is also evaluated. Cesium and strontium are radionuclides that were previously removed from the liquid waste and are now stored in capsules.

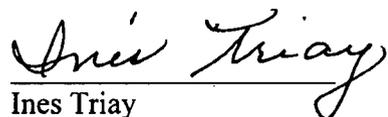
11. The Dahl-Crumpler Affidavit speculates that termination of the Yucca Mountain project could cause “construction tear-down and rebuild of the [Waste Treatment Plant]” at Hanford that will vitrify the liquid waste. That is incorrect. The Dahl-Crumpler Affidavit is premised on a fundamental misunderstanding of the basic Hanford high level waste treatment process (vitrification). Vitrification of high level waste into borosilicate glass is not a Yucca-specific process. The use of vitrification is currently the international standard and is being pursued or in use by

6

several nations such as the United Kingdom, France, Germany, Belgium, Japan, Russia, and China.

12. Moreover, the choice of borosilicate glass was the culmination of an intense scientific effort which long predated the choice of the Yucca Mountain site. For example, An “Environmental Assessment: Waste Form Selection for SRP High-Level Waste” (July 1982) finds that borosilicate glass was a better choice than various other waste forms considered, in part because, “*It is compatible with a full range of repository geologies. . . .*” (page 1-1, emphasis added). Thus, material vitrified at Hanford will be suitable for disposal in a permanent repository regardless of the future of the Yucca site.
13. In sum, although it is true that DOE has paid careful attention to the Yucca Mountain waste acceptance criteria, termination of the Yucca Mountain project presents no valid reason to rebuild the Hanford Waste Treatment Plant, and I see no likelihood whatever that this would occur.

I declare under penalty of perjury, this ⁷23 day of April 2010, that the foregoing is true and correct to the best of my knowledge and belief.



Ines Triay
Assistant Secretary
Office of Environmental Management