



**The Current Status of Nuclear Waste Issues,  
Policy, and Legislative Developments**

**Tribal Radioactive Materials Transportation  
Committee  
Omaha, NE  
January 24, 2018**

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## Introduction and Overview

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- As common carriers, railroads are required to transport spent nuclear fuel and high-level radioactive waste.
- The Blue Ribbon Commission on America's Nuclear Future proposed a way forward on nuclear waste issues, but without addressing the fate of the Yucca Mountain Project.
- Little Congressional action since - YM Project impasse.
- House Appropriators adopt \$120 million for DOE, \$30 million for NRC, for YM Project.
- Senate Appropriators – money for storage, not YM Project.
- While Senator Reid was holding up action on YM Project in the past, it seems Senator McConnell is now doing so (and Senator Alexander is following McConnell's lead) to attempt to help Senator Heller (R. NV) get reelected.

## Introduction and Overview (Cont'd)

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- In “continued storage rule,” NRC’s action on remand was challenged, but only under NEPA, not AEA. NRC prevailed.
- NWF fee is suspended due to Court of Appeals’ decision.
- YM Project -- NRC acts only as appropriations available. SER, SEIS issued, document storage/search facility created, little money remaining to be used for LSN, information-gathering in preparation for licensing process.
- “Consent-based siting” process, boreholes have been dropped by DOE.
- Industry supports YM Project and storage – will Congress?
- Standard Contract litigation: liabilities continue to grow. \$6.1 billion paid to date, grows by \$500 billion/year, could reach \$50 billion.

## Common-Carrier Obligations

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- In the 1970s, railroads disputed obligation to carry spent nuclear fuel, high-level waste, or argued that they should only be required to do so in so-called “special trains.”
- Courts upheld ICC rulings that railroads must carry all such materials if tendered in conformance with all applicable government regulations, and that they may not compel shippers to use special trains. *Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162 (6<sup>th</sup> Cir. 1979), *cert. denied*, 449 U.S. 830 (1980); *Consolidated Rail Corp. v. United States*, 646 F.2d 642 (D.C. Cir.), *cert. denied*, 454 U.S. 1047 (1981).
- Today, special trains are used, due to 9/11, agreements.

## Background - Blue Ribbon Commission on America's Nuclear Future, Bipartisan Policy Center

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- The BRC was created in 2010 as an advisory committee to the Secretary of Energy.
- Final Report issued in 2012: [www.brc.gov](http://www.brc.gov).
- In 2014, Bipartisan Policy Center, started by Republican and Democratic Senate Majority Leaders, took up issue.
- The BPC finished Phases 1 and 2 of its "Nuclear Waste Initiative," but did not issue a Report for Phase 1 – it was not possible to find consensus then.
- Instead, as part of Phase 1, the BPC issued a series of papers on contentious topics:

## Background -- Continued

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- <http://bipartisanpolicy.org/library/nuclear-waste-primer-series/>: Options for Consolidated Storage of Spent Nuclear Fuel; States Regulatory Authorities over Nuclear Waste Facilities; Restarting the Yucca Mountain Project – the Case for and Against; Ten Things You Need to Know About Nuclear Waste; Transporting Spent Nuclear Fuel in the United States – An Assessment of Current Capabilities and Future Challenges; Options for Near-Term Federal Action.

## BPC Nuclear Waste Initiative – Phase 2

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- In late 2015, BPC inaugurated Phase 2 of the Nuclear Waste Initiative, Advisory Council held its first meeting.
- Final Report for Phase 2 mostly about consent-based siting. One dispute – whether to repeal/amend AEA's preemption provisions. Environmental groups support repeal/amendment, others oppose.
- BPC's Phase 2 Final Report issued Sept. 27, 2016:  
<http://bipartisanpolicy.org/wp-content/uploads/2016/10/Nuclear-Consent-Based-Siting.pdf>
- Co-Chairs: former Democratic Congressman Norm Dicks, former Republican Governor Sonny Perdue of Georgia (now Secretary of Agriculture). One member was David Wright, now an NRC nominee.

## Status of YM Project

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- Current belief in Washington is that YM Project licensing proceeding will not be funded by Congress until after Nevada decides Dean Heller's race for Senate in 2018.
- Will the new Administration actively promote the Project, including in the NRC licensing proceedings? The belief is that it will, if Congress appropriates the necessary money.
- Never a reluctant applicant for any NRC license, so crucial that Administration supports if appropriations are made.
- If NRC receives YM Project appropriations, NRC presumably will allow some time for DOE to get (re)organized, rule on some legal issues in the interim, but everyone involved getting older, so the pressure will be on.

## Storage Facilities?

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- WCS filed an application at NRC in April for spent fuel storage in western TX, at its existing low-level waste site.
- Various anti-nuclear groups have challenged the sufficiency of the application, even for docketing, raising the legal title issue, and whether, because the NWPA allegedly does not permit DOE to take title, the application cannot proceed.
- Legal issue did not prevent docketing. But application now suspended, due to financial problems, failed merger. May resume with new owner (apparently in the works).
- Holtec filed NRC application for Eddy-Lea site (near WIPP).
- Other States – including perhaps Wyoming, are considering hosting interim storage facilities.

## Storage Facilities (Cont'd)

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- NM also could end up being considered for a repository, at least for defense-only waste. (President Obama reversed President Reagan's determination that a defense-only repository was not necessary. Might President Trump reverse President Obama's determination?)
- Is there support for a defense-only repository, especially if it delays transfer of nuclear waste?
- Politically, that may become a tricky question; industry is likely opposed because it does not solve commercial repository issue and may dilute support for it on the Hill.
- Requiring NRC reactor licensees to "mitigate their damages" may allow financing of interim storage facilities.

## "Continued Storage Rule" Litigation

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- Arguments were based only on NEPA. See Harnett, *New York v. NRC*, 37 Harv. Ent'l Law Rev. 589 (2013).
- NRC prevailed, getting the usual deference on technical matters. Rehearing and rehearing *en banc* denied.
- If AEA arguments had been made, the outcome might have been different.
- The Court clearly looks at all of these cases in a larger context, even as it decides them one-by-one.

## Fee Assessment Litigation (NARUC and NEI v. DOE, 680 F.3d 819 (DC Cir. 2012))

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- In the past, the Court deferred to DOE's determinations of the amount of the fee, but finally would not defer to DOE's fee determination, lacking repository program.
- The Court ordered DOE to notify Congress that it intended to suspend the fee. DOE suspended fee in May 2014.
- This does not seem to be the first-best outcome for any party. The industry and State regulators wanted litigation to force action on a repository.
- Now, the 1982 Congressional intent that those who generate radioactive waste should bear the cost of its storage and disposal is not being followed.
- How will a repository ultimately be paid for?

Yucca Mountain Mandamus Case (In re: Aiken County, SC, *et al.*, DC Cir. No. 11-1271, interim order issued Aug. 3, 2012 (2012 WL 3140360)); Final Decision issued Aug. 13, 2013, 725 F.3d 255

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- Cases brought to “compel agency action unreasonably delayed” under the APA, *i.e.*, mandamus, in July 2011.
- Petition followed the DC Circuit’s 2011 decision (645 F.3d 428) denying mandamus relief against the Secretary, the President, and the NRC, but holding that NRC had a statutory duty under the NWPA to complete action on the Application within three years, and inviting such a petition if NRC did not act in a timely manner. *Id.* at 436.
- Petitioners’ case was based on the NWPA as construed by the Court, and the Court’s suggestion as to proper cause of action.

## Yucca Mountain Case (Cont'd)

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- NRC argued that it does not have sufficient appropriations to make significant progress on the Application. (It conceded that, if it had sufficient funds, it would have to act.) It had more than \$13.5 million in obligated funds, but argued that not much could be done for that.
- Petitioners conceded insufficient funds to complete action on the Application. DOE had \$16 million in unobligated, \$30 million in obligated funds, but those amounts apparently did not affect decision.
- Petitioners argued that the NRC should have to do what it can with the available money, such as complete and issue the SER, proceed with discovery, and make whatever other progress can be made with available funds.

## Yucca Mountain Case (Cont'd)

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- Since the Court's prior opinions, Congress neither (1) appropriated more funds for the YM Project, nor (2) rescinded carryover funds, so Court felt obliged to issue the writ, compel resumption of proceedings, but only so long as funding lasts. The Court cannot appropriate funds.
- Court majority stated that it had explored every other alternative, but NRC's clear refusal to comply with NWPA left no alternative but to issue writ.
- Also held that NRC could only act with appropriations, leaving Congress to decide policy and appropriations.
- Case, opinions discussed at 127 Harvard Law Review 1033.
- Will Congress appropriate funds for YM Project?

## Yucca Mountain Case/Administrative Proceedings (Cont'd)

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- NRC (1) completed the SER and the SEIS and (2) made documents available on public LSN relied on by NRC Staff.
- Court will not micro-manage the NRC proceedings.
- NRC spending most of the remaining funds on LSN, information-gathering in preparation for licensing.
- Commissioners previously split 2-2 on whether Congress should appropriate additional funds; 2 Democrats attribute position to DOE being a reluctant applicant.
- Never has been a reluctant applicant in NRC licensing.
- Assumed that a majority of the NRC will be pro-YM Project, IF Annie Caputo and David Wright confirmed (Chairman Svinicki was re-confirmed), but when will they get a vote?

## DOE Actions/Policy

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- Obama DOE set up process to work on “consent-based” siting. Trump DOE has abandoned that.
- Secretary Moniz made nuclear waste announcement at BPC on March 24, 2015, which put BPC in the center of the discussions about nuclear waste issues.
- President Obama changed Reagan policy on “de-commingling” so as to permit a second repository. Might President Trump reverse that action?

## DOE's Actions/Policy (Cont'd)

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- Separately, DOE had proposed moving on boreholes. The effort in ND did not go well. The effort was terminated, apparently.
- Here is some information about boreholes, from the Nuclear Waste Technical Review Board:
- **International Technical Workshop on Deep Borehole Disposal of High-Level Radioactive Waste**
- In June 2015, Board issued report "*Evaluation of Technical Issues Associated with the Development of a Separate Repository for U.S. Department of Energy-Managed High-Level Radioactive Waste and Spent Nuclear Fuel.*"

## DOE Actions/Policy (Cont'd)

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- In its report, the Board reviewed DOE reports (released in Oct. 2014 and March 2015).
- DOE reports recommended strategy for disposal of some DOE-managed high-level radioactive waste (HLW), and possibly some DOE-managed spent nuclear fuel (SNF), in a separate geologic repository rather than “commingling” in a single repository with commercial HLW and SNF. The Oct. 2014 report also recommended that DOE retain the flexibility to consider options for disposal of smaller DOE-managed waste forms (Cesium and Strontium capsules) in deep boreholes rather than a mined, geologic repository.
- There does not seem to be a legislative push for boreholes.

## Legislative Possibilities

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- Old “Gang of 4” bill (S. 854) BRC-based (in part). New gov’t agency (not Fed Corp), fee resumes, storage and disposal, YM Project application “grandfathered” from consent-based siting. No new bill yet, but in the works.
- Sponsors: Lamar Alexander (R. TN), Ranking Member Feinstein (D., CA), Energy Chairman Lisa Murkowski (I., Alaska), Ranking Member Maria Cantwell (D., WA).
- Majority Leader is Mitch McConnell (R. KY), Chuck Schumer (D. NY) is Minority Leader.
- Leader McConnell blocking YM Project funding to assist Senator Heller’s reelection.
- Sen. Feinstein tried to fund pilot interim storage site.

## Legislative Issues

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- S. 854 was identical to prior bills. Issues:
- Include YM Project in consent-based process? S. 95, “the Nuclear Waste Informed Consent Act,” introduced by Sen. Heller. Would require Nevada’s consent to YM Project.
- Interim storage and disposal – ongoing dispute between House and Senate, despite Senator Reid’s departure.
- More than one repository?
- More than one interim storage facility?
- Utilities’ right to continue to pursue damage claims?
- Who negotiates candidate sites? DOE? Others (such as WCS/Texas, New Mexico entities)?

## H. 3053 (the Shimkus bill)

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- H. 3053 is bipartisan (49-4 in Committee) legislation, introduced by Cong. Shimkus, would fund the YM Project out of the Nuclear Waste Fund (which has a \$30 billion balance, on paper) – but that would require appropriations and would count as a budgetary expenditure.
- So, he is seeking an exemption from budget rules.
- Bill would also fund interim storage (under “Monitored Retrievable Storage” provisions of NWPA), for “one or more” storage facilities, an approach more in line with the Senate “storage-only” approach.
- DOE, private parties could enter into storage agreements for “Department-owned waste” (commercial spent fuel).

## H. 3053 (Cont'd)

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- Priority is to be given to private storage of commercial spent fuel unless it would be faster to license, construct, and operate an MRS.
- DOE may not enter into an MRS agreement with a private entity unless the entity has an AEA storage license from the NRC and has the consent of (a) the Governor, (b) “any unit of general local government with jurisdiction over the area in which the facility is located,” and (c) any affected Indian tribe, and
- The NRC has approved or disapproved issuance of a license for a repository.

## H. 3053 (Cont'd)

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- With respect to the YM Project, the bill provides for land withdrawal for the YM Project and management by DOE.
- It also preempts States for air permits, and under Section 6001 of the Solid Waste Disposal Act.
- The bill also would permit the Secretary to acquire water rights without discrimination.
- The bill would require the NRC to expedite consideration of an amended application for the YM Project.
- Infrastructure work permitted before NRC decides whether to issue a license, including safety upgrades, site prep, rail line, electric grids or facilities, communications, access roads, and other non-nuclear-related activities.

## H.R. 3053 (Cont'd)

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- Infrastructure work by DOE could not be cited as a basis for disapproval.
- FEIS need not consider alternatives/a “no-action” scenario.
- Would prohibit planning, development or construction work by DOE on a defense repository until after the NRC completes action on the YMP application.
- Would provide “sense of Congress” that transportation routes to YM site avoid Las Vegas to the extent practicable.
- The bill would explicitly authorize new YMP contracts.
- The bill would lift the “cap” on spent fuel of 70,000 metric tons, and make it 110,000 tons. There is now 76,430 tons, enough to cover a football field 8 feet deep.

## H. 3053 (Cont'd)

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- The bill would provide for enhanced host-community benefits to Nevada without that constituting “consent.”
- The bill also contains a number of other detailed benefit-related provisions, including with respect to institutions of higher learning.
- Also, the bill would restore the fee to be paid by utilities, but only after the NRC reaches a decision on the YM Project.
- The bill would allow expenditures from the NWF of up to 1 percent per/year, and benefits up to 0.1 percent/year, without appropriations.

## Legislative and Administrative Scenarios

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- What happens if or when:
- With Senator Reid having left the Senate, it appears a Republican Senate will not fund the YM Project, at least before Heller elections (June or November 2018).
- But the House hasn't acquiesced yet. Will it again? Presumably.
- But if NRC gets more money, will it resume proceeding? Yes.
- And what would DOE do? Participate, but would need time to reconstitute OCRWM, re-engage contractors, probably revise or at least update the application filed in 2008, etc.

## Key Provisions of Nuclear Energy Institute's "Legislative Principles for Nuclear Waste Management Reform"

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- **NEI's "Legislative Principles for Nuclear Waste Management Reform (July 2015):"**
- Completion of the Nuclear Regulatory Commission's review of the YM Project repository license application, followed by construction and operation of the repository.
- A consolidated storage facility for used nuclear fuel and DOE high-level radioactive waste in a willing host community and state made available only after the NRC has issued a final decision on the YM Project repository license application. Reasonable expenditures from the Nuclear Waste Fund may be made to develop, construct and operate the facility.

## NEI's "Legislative Principles" (Cont'd)

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- NEI later modified its Legislative Principles to contend that storage and Yucca Mountain should be pursued simultaneously. Senator Reid blasted NEI for that.
- Communities and states hosting the YM Project repository and/or consolidated storage facilities shall be eligible for benefits. The Nuclear Waste Fund can be used for these benefits if they are reasonable and do not result in an excessive increase in overall program costs.
- Standard contract holders should not be required to waive right to damages or settle claims from DOE's breach of contract as condition of federal gov't accepting used fuel for consolidated storage or permanent disposal.

## Legislative, Administration Picture

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- House is leading for now.
- Sen. Feinstein said she will not support nuclear appropriations for new projects w/o action on waste.
- Senator Feinstein presumably will maintain that position; she and Cong. Simpson need to deal.
- Trump Administration pro-nuclear energy, Secretary Perry has said completion of YM Project is a “moral imperative,” testified that 49-4 vote sends a pretty clear message.
- Some Democrats may support nuclear as part of climate change approach, Republicans likely to support as before.
- But electricity markets causing nuclear (and other base-load) plant retirements (Palisades next?). Will FERC act?

## Status of Standard Contract Litigation

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- At end of FY 1'6, NWF balance was \$36 billion (Agency Financial Report, FY '16, p. 38).
- Through FY '16, DOE payments were \$6.1 billion (*id.*).
- End of FY '14, total liability estimated to be \$27.1 billion, so liability approaching \$30 billion, could reach \$50 billion.
- However, required acceptance rate (per Fed. Cir.) is 2,650 MTHM/year, higher than basis for settlement estimates.
- Liabilities increases by (est.) \$500 million/year.
- NWF balance increasing \$2b/year w/ fees, \$1.25b/y w/o.
- Before fee suspension, cash flow of \$250 million/year (\$750 million fees - \$500 million liabilities) impeded resolution. Different now?

# Status of Standard Contract Litigation (Cont'd)

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- Settlements in 33 lawsuits as of end of FY '14, representing 82% of nuclear-generated electricity; another 19 cases were pending.
- Cases increasingly are settling, on similar terms.
- Settlement terms do not require re-filing every six years to stop the running of the Statute of Limitations; instead, utilities submit damage claims to DOE for any delay-related storage costs. If amounts disputed, arbitration to resolve.
- But resolution of the cases does not keep the government's liability from growing, which concerns Congress, and is a factor in pushing legislation.

**Thank you. Questions?**

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