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Report for Congress

Nuclear Waste Repository Siting: Expedited Procedures for Congressional Approval

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Summary

The Nuclear Waste Policy Act of 1982 (NWPA), as amended, establishes a process for the federal government to designate a site for a permanent repository for civilian nuclear waste. In February 2002, this process culminated in a presidential recommendation for a repository at Yucca Mountain, Nevada. On April 8, the State of Nevada exercised its authority under NWPA to disapprove the site. As a result of this state disapproval, the site may be approved only if a joint resolution of repository siting approval becomes law after being passed by Congress during the first period of 90 days of continuous session after the disapproval. This period appears likely to terminate just after the August recess.

The Act establishes an expedited procedure for congressional consideration of this approval resolution. Pursuant to this expedited procedure, approval resolutions were introduced in both houses and referred to the respective committees of jurisdiction, which had until the 60th day of continuous session after the state disapproval to report or be discharged. The House committee reported on May 1, and the Senate committee on June 10.

In the House, once an approval resolution has been on the calendar for 5 legislative days, a supporter may call it up if the Speaker recognizes him or her for the purpose. After 2 hours of debate, the House then votes on the resolution without amendment or other intervening motion. The House passed its resolution on May 8. In the Senate, once such a resolution is on the calendar, any Senator may make a nondebatable motion to proceed to consider it. Normally, such a motion would be offered by the majority leader. If rejected, the motion may be repeated. If adopted, the Senate debates the resolution for 10 hours (which may be reduced by nondebatable motion), after which a final vote occurs. The statutory procedure forestalls filibusters against the resolution by prohibiting most intervening motions or other actions, but does not on its face preclude amendment of the resolution. An attempt to consider the measure in the Senate was expected in early July.

After one house passes an approval resolution, the other takes up and debates its own measure, but takes a final vote on the measure received from the first house. This procedure facilitates clearing the resolution for presidential action. The Act provides for this action to occur only if the two measures are identical, as the present House and Senate measures are. If the Senate resolution were to be amended, however, the terms of the Act would apparently make this clearance procedure unavailable. An amended measure also would cease to have the form prescribed by the NWPA for an approval resolution, and accordingly might fail to qualify for further action under the expedited procedure.

Either house might overcome such difficulties by using its constitutional power over its own rules to alter the procedure by which it considered an approval resolution. If an approval resolution were enacted in a different form from that prescribed by the NWPA, however, it might arguably fail to meet the requirements of the Act for permitting construction of the repository.

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Background

Process for Approving a Nuclear Waste Repository Site

The Nuclear Waste Policy Act of 1982 (NWPA)[1] enacted a system for the federal government to establish a deep underground "geologic repository" for permanent storage of radioactive waste from civilian nuclear power plants. Pursuant to the NWPA and subsequent amendments, consideration of a location for this repository focused on a site at Yucca Mountain, Nevada. The Department of Energy issued a preliminary recommendation of suitability for the Yucca Mountain site on September 21, 2001, and on February 15, 2002, President Bush recommended the site to Congress.[2] These actions culminated a series of recent developments that have led to current congressional action on the subject.[3]

The NWPA provides that when the President recommends a repository site, the state in which it is located may within 60 days submit to Congress a notice of disapproval.[4] The State of Nevada exercised this disapproval authority on April 8. Once this action occurs, the Act provides that the designation cannot become effective unless a "resolution of repository siting approval," in effect overriding the state disapproval, is enacted into law within a specified period of time.[5] As detailed below, it appears that in the present instance this period will probably terminate just after Congress reconvenes from its August recess.

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[1] P.L. 97-425, 96 Stat. 2201, codified at 42 U.S.C. sec. 10101 *et seq*.

[2] For further detail on current action on the Yucca Mountain proposal, see CRS Issue Brief IB92059, *Civilian Nuclear Waste Disposal*, by Mark E. Holt.

[3] Present process is set forth chiefly at 42 U.S.C. sec. 10131-10136. Pertinent amendments were enacted by P.L. 100-203 (budget reconciliation), title V, subtitle A, part A ("Redirection of the Nuclear Waste Program"), 101 Stat. 1330 at 1330-227 through 1330-255. The same provisions were also enacted by reference in P.L. 100-202 (omnibus appropriations, FY1997), 101 Stat. 1329 at 1329-121. Amendments were also made by legislative provisions of P.L. 104-206 (energy and water development appropriations, FY1997), title III ("Department of Energy"), under "Nuclear Waste Disposal Fund," 110 Stat. 2984 at 2995.

[4] 42 U.S.C. sec. 10136(b).

[5] 42 U.S.C. sec. 10135(b) and 10135(c).

The Act establishes an expedited procedure for congressional consideration of this joint resolution. This report describes salient features of this expedited procedure and discusses some questions that may become significant in the course of its implementation. It also notes actions so far taken in Congress, pursuant to this statutory procedure, in relation to the Yucca Mountain site.

General Purposes of Statutory Expedited Procedures

In purpose and general form, the expedited procedure of the NWPA resembles the several dozen other expedited procedures contained in existing law relating to various policy areas.[6] Each of these expedited procedures is a set of statutory provisions governing congressional consideration of a specified kind of measure. Most regulate consideration of joint resolutions either (1) to disapprove some action that the statute authorizes the President, or an agency of the executive branch, to take only if Congress does not disapprove, or (2) to approve some action that a statute authorizes to be taken only if Congress approves a specific request to do so.

The purpose of an expedited procedure is to facilitate the ability of Congress to dispose of the matter specified in a timely and definitive way. To this end, it establishes means for Congress to take up, and complete action on, the resolution of approval or disapproval within a limited period of time. For this reason, expedited procedures are also known as "fast track" procedures. They often include provisions for automatic introduction of the resolution, fixed time periods for committee and floor action, automatic or privileged discharge of committees if they do not report, automatic or privileged floor consideration, prohibitions on amendment, and automatic or expedited final action to send a measure to the President. The expedited procedure of the NWPA incorporates most of these elements.

Elements of the Expedited Procedure

The expedited procedure for resolutions of repository siting approval, which appears at 42 U.S.C. 10135, generally conforms to the model just sketched. The Act sets forth procedures for the House and Senate separately, but the following discussion treats both together at each stage of the legislative process. This treatment permits emphasis on possible relations between actions in each chamber. The only exception is the floor consideration stage, where the procedures prescribed by statute for House and Senate are adapted to the divergent general rules of the two chambers.

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[6] On the rationale and provisions of expedited procedures generally, see CRS Report 98-888 GOV, *"Fast-Track" or Expedited Procedures: Their Purposes, Elements, and Implications*, by (name redacted), and CRS Report RL30599, *Expedited Procedures in the House: Variations Enacted into Law*, by (name redacted). For other expedited procedures, see U.S. Congress, House, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, One Hundred Seventh Congress*, H.Doc. 106-320, 106th Cong., 2nd sess., [prepared by] Charles W. Johnson, Parliamentarian (Washington: GPO, 2001), sec. 1130.

Overall Schedule for Action

The Act permits Congress to override a state notice of disapproval only if it passes a joint resolution of repository siting approval "during the first period of 90 days of continuous session" after receiving the notice.[7] The notice is deemed received by Congress on the day the state transmits it to the Speaker of the House and President pro tempore of the Senate, and the 90-day period begins on that day.[8]

Days of Continuous Session. "Days of continuous session" include all calendar days except those on which either house is adjourned for more than three days.[9] Under this definition, the 90-day period will be the same for both chambers, even if the days on which each is in recess differ. The Constitution mandates that neither house adjourn for more than 3 days without the consent of the other.[10] Pursuant to this mandate, each house recesses its session for more than 3 days only under authority of an adjournment resolution, which is a concurrent resolution adopted by both houses. As a result, the days not counted in the 90-day period will be only and exactly those included in any session recess of either house that is authorized by an adjournment resolution.

It is evident from this definition that actual days of continuous session can be counted with certainty only after the fact. Prospectively, the count can be only an estimate. Based on the recess periods that have occurred so far in 2002, and the announced congressional schedule for the remainder of the year, however, it currently appears that 90 days of continuous session after April 8 will expire on or about Wednesday, September 4. The Senate is scheduled to return from its August recess the preceding Tuesday, and the House on the Wednesday.

Continuing Action in a New Session. If Congress adjourns its session *sine die* before the 90-day period expires, continuity of session is "broken," meaning that a new period of continuous session begins with the convening of the next session.[11] As a result, if a state notice of disapproval were to be received less than 90 days of continuous session before a *sine die* adjournment, Congress would have until the 90th day of continuous session in the following session to complete action under the statute. Because Congress is not scheduled to conclude its current session within 90 days of session from the April 8 notice, these provisions are unlikely to come into play in the present instance.

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[7] 42 U.S.C. sec. 10135(c).

[8] 42 U.S.C. sec. 10136(b)(2).

[9] 42 U.S.C. sec. 10135(f)

[10] Constitution, Article I, sec. 5. In U.S. Congress, Senate, *The Constitution of the United States of America: Analysis and Interpretation*, S.Doc. 103-6, 103rd Cong., 1st sess., prepared by the Congressional Research Service, (name redacted) [and] George A. Costello, Co-Editors (Washington: GPO, 1996), pp. 121-122. Hereafter cited as *Constitution Annotated*.

[11] 42 U.S.C. sec. 10135(f).

These provisions could come into play if Congress were to receive a disapproval notice late in a session of a Congress. If the notice were received late in a first session, and if Congress did not complete action on an approval resolution during that session, the same resolution would remain available for further action during the full renewed 90-day period in the second session. By contrast, if the notice were received late in a second session, the following session would be the first session of the next Congress. For this reason, if Congress did not complete action on an approval resolution during the earlier session, the legislation would have to be introduced anew in the new Congress, and proceed through the full legislative process *de novo* during the first 90 days of continuous session of that new Congress.

Enactment. To become effective, the joint resolution of approval must become law after Congress passes it. In other words, the site is approved only if either (1) the President signs the approval resolution (or allows it to become law without his signature), or (2) Congress overrides his veto. These actions, however, do not have to occur within the 90-day period, but can be completed after its expiration.[12]

Form of Approval Resolution

The NWPA narrowly specifies the form a resolution of repository siting approval must take. The measure must be a joint resolution, and the statute prescribes all the wording except for (1) the identification of the site, (2) the name of the disapproving state, and (3) the date of disapproval.[13] These requirements doubtless suffice to ensure that any companion House and Senate measures relating to the same site would be substantially similar, though not necessarily entirely identical. Any resolution that did not meet these statutory requirements would not be eligible for the expedited consideration prescribed by the Act. In the present instance, only one resolution was introduced in each house (H.J.Res. 87 and S.J.Res. 34), and the two are identical in wording.

The terms of the NWPA also specify that a state disapproval of a site designation can be overridden only by enactment of a resolution of repository siting approval, having the form prescribed by the Act and considered under the expedited procedure.[14] (In principle, of course, Congress could also enact legislation superseding the NWPA and directing construction of the repository, under its regular legislative procedures.)

Introduction and Referral

Introduction. The statutory procedures for introduction of resolutions of repository siting approval differ between the House and Senate. For the Senate, the Act mandates that the chair of the committee of jurisdiction, or his designee, introduce an approval resolution by the next day of session after Congress receives

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[12] 42 U.S.C. sec. 10135(c).

[13] 42 U.S.C. sec. 10135(a).

[14] 42 U.S.C. sec. 10135(b) and 10135(c).

the disapproval notice.[15] The corresponding House provision contains no requirement that an approval resolution be introduced (although other provisions assume that one will be).[16] As a result, it is possible for an approval resolution not to be introduced in the House at all, or to be introduced only at a later date.

The current process realizes this last possibility. In the Senate, the Chair of the Committee on Energy and Natural Resources introduced S.J.Res. 34 by request on April 9, consistent with the statutory directive. In the House, the Chair of the Subcommittee on Energy and Air Quality of the Committee on Energy and Commerce introduced H.J.Res. 87 on April 11.

For each chamber, the language of the Act presupposes that several approval resolutions might be introduced in relation to a single site disapproval, even though all such measures would have to be either identical, or substantially so. No such additional resolutions have been introduced in relation to the Yucca Mountain site.

Referral. For each chamber, the Act requires approval resolutions to be referred "upon introduction" to "the appropriate committee or committees."[17] S.J.Res. 34 was referred to the Senate Committee on Energy and Natural Resources, and H.J.Res. 87 to the Committee on Energy and Commerce. Like most, if not all, expedited procedure statutes, the Act leaves the question of subcommittee referral to the practices of the respective committees. H.J.Res. 87 was referred to the Subcommittee on Energy and Air Quality; S.J.Res. 34 received no subcommittee referral.

Committee Action

Requirement for Report or Discharge. Although the language governing committee consideration of resolutions of repository siting approval differs between the House and Senate, the effects are similar. The committee (or committees) of referral have 60 days of continuous session (defined in the same way as for the 90-day period) to report an approval resolution. If a committee did not report by the end of the 60-day period, it would automatically be discharged and the resolution placed on the appropriate calendar of its house.[18]

The statutory 60-day period, by the end of which the committee must report or be discharged, begins, in each chamber, with the introduction of the first approval resolution. In the House, this point would have been reached on or about June 18, but the Committee on Energy and Commerce reported H.J.Res. 87 on April 25. In the Senate, the automatic discharge date would have been reached on or about June

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[15] 42 U.S.C. sec. 10135(d)(2)(A).

[16] 42 U.S.C. sec. 10135(e)(2).

[17] 42 U.S.C. sec. 10135(d)(2)(B) and 10135(e)(2). The Senate language additionally specifies that all "resolutions with respect to the same ... site ... be referred to the same" committee(s); the House language makes explicit that the referral is to occur "immediately."

[18] 42 U.S.C. sec. 10135(e)(3) (House); 42 U.S.C. sec. 10135(d)(2)(B) and 10135(d)(3) (Senate).

16, but the Committee on Energy and Natural Resources reported S.J.Res. 34 on June 10.

Although the House committee reported the measure favorably, the statute does not require a favorable report. Under contemporary practice, a measure (in the Senate) or privileged measure (in the House) reported adversely or without recommendation is still placed on the calendar as eligible for consideration.[19] A resolution of repository siting approval is a privileged measure in the House, in that it is to be considered under an expedited procedure.

Action May Be Limited to One Resolution. For each chamber, the expedited procedure includes a mechanism to ensure that even if more than one repository siting resolution is introduced, only one will reach the calendar. Inasmuch as only one resolution relative to the Yucca Mountain site appeared in each house, these procedures have not come into play during the present process.

For the House, the statute specifies that the committee may be discharged only from the first approval resolution introduced, and the committee can avoid this occurrence by reporting either that resolution "or an identical resolution."[20] If several identical resolutions are submitted, and the committee reports any one of them, it is not discharged from any of the others.[21] If several resolutions are introduced approving the same site, and the committee reports none of them, it is apparently discharged from only the first one introduced, even if the others are not "identical." On the other hand, if the committee reports a resolution that is not identical to the first one introduced, it apparently will also be discharged from that first one, so that in this case both measures would reach the calendar.

For the Senate, the statute specifies that the resolution from which the committee is to be discharged is the one that was automatically introduced when notice of the state disapproval was received. However, the Act also provides for discharge to occur "in the absence of" the automatically introduced resolution.[22] This provision might come into play only in a renewed 90-day period in a new Congress, when the automatically introduced resolution would have died with the *sine die* adjournment of the old Congress. In that situation, if a committee does not report an approval resolution by the 60th day of continuous session in the new Congress, it will be discharged from all approval resolutions introduced in that house in the new Congress.

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[19] For the House, see sec. 2 of "Calendars" in W[illia]m. Holmes Brown, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* (Washington: GPO, 1996), p. 208. For the Senate, see "Reports" in Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices* (Washington: GPO, 1992), p. 1183.

[20] 42 U.S.C. sec. 10135(e)(3).

[21] As noted earlier, it is possible that resolutions approving the same site may not be completely identical in text. The wording of the Act does not explicitly preclude discharge of an approval resolution that is substantively equivalent, but not identical, to one that has been reported.

[22] 42 U.S.C. sec. 10135(d)(3).

In a new Congress, discharge (and other components of the expedited procedure) presumably could occur in each chamber only if a new approval resolution has been introduced.

Floor Action Under the Expedited Procedure and Its Alternatives

The expedited procedure of the NWPA establishes terms for floor consideration of resolutions of repository siting approval in each chamber. Like other statutes establishing expedited procedures, however, the Act also reserves the right of each house to alter or amend those procedures through the application of its general power under the constitution over its own rules. As a result, it always remains possible that either house could consider any particular siting approval resolution under other terms than those provided by the statute.

The ways in which each house may make such alterations, and some possible implications and alternatives of its doing so, are discussed in a later section of this report. The House, in particular, has not infrequently taken up measures eligible for expedited consideration not under the statutory procedures, but instead pursuant to a special rule or a motion to suspend the rules. In the present instance, however, the House took up and passed H.J.Res. 87 pursuant to the statutory procedure on May 8.

House Floor Action

Discretion of Speaker. Many expedited procedure statutes protect the ability of Members to call up the measures whose consideration they govern once they reach the calendar. The expedited procedure of the NWPA, by contrast, leaves control over when and whether the House will consider an approval resolution in the hands of the majority party leadership. This situation is more in harmony with House scheduling practices generally.

Once the resolution has been on the calendar for 5 legislative days, the Speaker may recognize a Member to call it up.[23] Because the Act accords the Speaker discretion over whether to recognize for this purpose, he would be able to keep a siting approval resolution from the floor by declining to do so. Conversely, the Act provides that when an approval resolution is called up, the House proceeds immediately to consider it. This provision tends to ensure that, as long as the Speaker does choose to recognize a Member to call the resolution up, consideration will occur.

Terms of Debate. When the House takes up an approval resolution, the Speaker recognizes the Member calling it up and an opponent for 2 hours of debate,

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[23] 42 U.S.C. sec. 10135(e)(4). A legislative day begins each time the House convenes after adjourning. Because the House normally adjourns at the end of each day's session, legislative days are normally equal to days of session.

equally divided and controlled.[24] The Act requires the Member calling up the resolution to be a supporter of it, and the opposing manager to be an opponent. Under the general practice of the House, the managers of a measure would typically be the chair and ranking minority member of the reporting committee (or their designees). These Members would normally be the ones recognized to manage an approval resolution, as long as they qualified as supporting and opposing it, respectively.

It would be consistent with the customary practice of the House for the Speaker to ask each prospective manager, at the outset of consideration, if he or she supported or opposed the resolution. If either could not answer appropriately, the Speaker would most likely recognize another senior member of the reporting committee who did take the appropriate position. For example, if the resolution was not reported, but reached the calendar by discharge, the committee chair might well oppose it. The chair then would not be entitled to recognition to call the measure up, but would most likely be accorded the time in opposition if he sought it.

In the present instance, the Chair of the Committee on Energy and Commerce managed H.J.Res. 87, and the ranking minority member of one of its subcommittees managed the measure for opponents.

Prohibition on Amendment and Motions. The Act directs that at the end of the 2 hours' debate in the House, the previous question be automatically ordered, and the House proceed to vote on adopting the resolution. It also prohibits the intervention of any motion between the conclusion of debate and the vote on adoption. Finally, it explicitly prohibits amendment of an approval resolution.[25]

These procedures are clearly designed to insure that the House vote on adoption will be on the resolution in its original form, without amendment. In their absence, an amendment might be offered (1) during the two hours' debate, but only if one of the managers yielded for the purpose; (2) if the House voted not to order the previous question; or (3) through amendatory instructions in a motion to recommit.[26] A motion to recommit is normally in order at the conclusion of consideration, but under the expedited procedure of the NWPA, as just mentioned, an intervening motion at that point is prohibited.

Finally, the Act also prohibits a motion to reconsider the vote on an approval resolution. Like the provisions to bring about the report or discharge of only one approval resolution, this prohibition helps to ensure that the expedited procedure will

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[24] 42 U.S.C. sec. 10135(e)(4).

[25] 42 U.S.C. sec. 10135(e)(4).

[26] Although the prohibition on amendment appears among the provisions on floor procedure, it also implies that the committee would report no amendment, because any such committee amendment would not be in order on the floor anyway.

normally give the House one, and only one, opportunity to act on a resolution to approve any given repository site.[27]

Senate Floor Action

Control of Motion to Proceed. In the Senate, the expedited procedure provides that once an approval resolution is on the calendar, any Senator may move to proceed to its consideration.[28] If the Senate disagrees to this motion, the Act provides that it may be repeated (and if more than one approval resolution reaches the calendar, the motion also might be offered with respect to each).

By early July, it was expected that supporters of S.J.Res. 34 might offer a motion to proceed to its consideration before the middle of the month, in the absence of earlier action by the majority leader. Some discussion has occurred over whether it would be inappropriate for any Senator other than the majority leader or his designee to offer a motion to proceed to consider the resolution pursuant to the statute. In practice, the Senate normally concedes to its majority leader the prerogative of making motions to proceed to consider pursuant to the Standing Rules. Although the Standing Rules in principle permit any Senator to offer this motion, the Senate accords the majority leader the function of managing the floor agenda, and considers control of the motion to proceed a key tool in the discharge of that function. Some accordingly argue that the same prerogative should be extended to a motion to proceed to consider offered pursuant to the statute. Others contend that the statutory provision is evidently intended to insure that the measure can reach the floor whether or not the leadership determines to call it up.[29]

Regulation of Motion to Proceed. Normally, a motion to proceed to consider in the Senate is debatable, but the Act provides that on a resolution of repository siting approval it is nondebatable. The Act provides as well that this motion may neither be amended, nor superseded by a motion to consider something else, and its consideration may not be postponed.[30] These provisions help ensure that an attempt to take up an approval resolution could not be blocked by filibustering (that is, protracted debate or other actions with dilatory or obstructive intent).

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[27] 42 U.S.C. sec. 10135(e)(4).If more than one approval resolution were to reach the calendar, however, the Speaker would apparently retain the discretion to secure consideration of each. This authority might become significant if an approval resolution were to be rejected by the House, or otherwise blocked at some later stage of proceedings.

[28] 42 U.S.C. sec. 10135(d)(4)(A).

[29] For further information, see CRS report RS21255, *Motions to Proceed to Consider in the Senate: Who Offers Them?* by (name redacted), and congressional distribution memoranda, *Statutory Provisions for Calling Up Measures Subject to Expedited Procedures in the Senate* and *Measures Subject to Statutory Expedited Procedures that Became Available for Senate Floor Consideration, 1987-2000*, by (name redacted).

[30] 42 U.S.C. sec. 10135(d)(4)(A).

Also, if the Senate votes to consider the resolution, it is to "remain the unfinished business until disposed of."[31] This provision is designed to help ensure that once the Senate takes up an approval resolution, it will be able to reach a final vote. All of these provisions are common features of expedited procedures governing Senate floor consideration.

Terms of Debate and Regulation of Motions. Provisions for floor consideration also include many features, common among Senate expedited procedures, designed to prevent the approval resolution from being blocked by filibuster. In particular, total debate on the resolution is limited to 10 hours.[32] Such a time limitation is requisite for precluding filibusters, for Senate rules establish neither a general time limit on debate nor any procedure, other than cloture, to impose such a limit. The time is to be equally divided between supporters and opponents; normally, the Senate accomplishes this end by placing the equally divided time under the control of managers. The managers would typically be the chair and ranking minority member of the committee of jurisdiction, if they take opposed positions on the resolution. At the conclusion of debate, the vote on the resolution must occur. A quorum call, but no other action, may intervene.[33] As with the House, the expedited procedure also prohibits a motion to reconsider the vote.[34]

The Act specifies that the 10-hour limit includes any debate on debatable motions offered during consideration of the resolution. It also specifies that any appeal of a ruling of the chair in connection with consideration shall not be debatable.[35] The Act permits as well a nondebatable motion to reduce the time available for debate, and this motion, like the motion to proceed to consider, may neither be superseded by a motion to consider something else nor amended, nor may its consideration be postponed.[36]

Potential for Amendment. Although the statutory procedure prohibits amendment of the motion to proceed to consider an approval resolution, and of the motion to reduce the time for debating one, it contains no provision precluding amendment of the approval resolution itself. The Act does forbid a motion to recommit the resolution, which might have included amendatory instructions,[37] but does not explicitly prohibit the offering of an amendment by other means, either from the floor or by recommendation of the reporting committee. It is unclear whether this omission was deliberate, though it may be noteworthy that Congress found it appropriate to include an explicit prohibition against amendment for the House, but not for the Senate.

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[31] 42 U.S.C. sec. 10135(d)(4)(A).

[32] 42 U.S.C. sec. 10135(d)(4)(B).

[33] 42 U.S.C. sec. 10135(d)(4)(C).

[34] 42 U.S.C. sec. 10135(d)(4)(B).

[35] 42 U.S.C. sec. 10135(d)(4)(B) and 10135(d)(4)(D).

[36] 42 U.S.C. sec. 10135(d)(4)(B).

[37] 42 U.S.C. sec. 10135(d)(4)(B).

On the other hand, it can be argued that the legislative history of the NWPA, as well as the overall purposes of expedited procedures generally, imply that the approval resolution was intended not to be subject to amendment in either house. The close specification made by the Act for the language of a resolution of repository siting approval might be cited in support of the same conclusion. If the Senate took such a view, many of the questions raised in this section would not arise.[38]

If the Senate took the view that a siting approval resolution could be amended, the potential consequences of adopting an amendment to the resolution are also unclear. It might be argued that if the resolution were amended, it would cease to meet the description required by 42 U.S.C. sec. 10135(a) for a resolution of repository siting approval. It might thereby become ineligible for further consideration under the expedited procedure. For example, if the Senate adopted an amendment to an approval resolution, it might be possible for a Senator to raise a point of order that the amended measure was no longer subject to the limits on debate that the Act establishes as part of the expedited procedures for considering an approval resolution. If the chair sustained such a point of order, further consideration would presumably have to occur under the general rules of the Senate, potentially making the resolution subject to dilatory action.

Final Action

Resolution Received from Other House. The expedited procedure for each house contains a provision, identical except for reversing the names of the chambers, to ensure that both will take final action on the same measure, and a single approval resolution will be cleared for Presidential action. These provisions together direct that when either house passes an approval resolution, the other house is not to refer it to committee, but is to hold it at the desk. This action maintains the resolution passed by the other house in a convenient status for the receiving house to act on it. Floor consideration in the receiving house is to occur on its own approval resolution with respect to the same site, but the final vote is to occur on the one received from the other house.[39] In the present instance, after the Senate finishes considering S.J.Res. 34, it will presumably vote on the House-passed H.J.Res. 87, which it has already received (unless, perhaps, S.J.Res. 34 has by then been amended).

A mechanism like this is part of many expedited procedure statutes that provide for the resolutions considered by each house to be substantively similar in effect. Under these conditions it is appropriate to substitute one for the other as a convenient means to expedite final action.

Each House Must First Consider Own Measure. Unlike some other expedited procedures, that of the NWPA provides for floor consideration in each

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[38] For further analysis, see CRS Congressional Distribution Memoranda, *Legislative History of Provision Permitting Senate Amendment to Approval Resolution Under Expedited Procedure of Nuclear Waste Policy Act* and *How the Nuclear Waste Policy Act and Other Expedited Procedures Regulate Amendment in the Senate*, by (name redacted).

[39] 42 U.S.C. sec. 10135(d)(5) (Senate) and 10135(e)(5) (House).

house to occur only on a resolution of that house. It affords no means by which either house might, instead, initially take up and consider an approval resolution received from the other. Yet it does not require that any separate approval resolution be introduced in the House (or in either chamber during a renewed 90-day period in a new Congress). The consequence is that no approval resolution can be enacted under the expedited procedure unless some Member of the House (or, in a renewed 90-day period in a new Congress, Members of both houses) chooses to introduce one.

Requirement for Identity. The provision for final action contains two different phrases whose language seems create a conflict. The first phrase states that the provision applies to any situation in which both houses pass approval resolutions "with respect to the same site." The second phrase, however, permits the automatic substitution of one resolution for the other only "where the text is identical." The second phrase, unlike the first, appears to afford an automatic mechanism for final congressional action only if the approval resolutions of both houses are identical in text. The language includes no provision for automatic final action if the two resolutions are merely substantively similar in effect.

A strict interpretation of this language might be used to raise a point of order, in whichever house acts second, at the time of a final vote, if the text of its approval resolution differed in any way from the one received from the other house. Such a point of order could assert that the Act did not permit the approval resolution originating in that house to be automatically laid aside after debate, and final action to be taken on the one received, because the Act authorizes this proceeding only if the two are "identical." If the chair sustained this interpretation, the house in question would presumably have to take its final vote instead on its own resolution. The Act, however, establishes no further procedure by which either house could then clear for presidential action an approval resolution received from the other. Instead, this final clearing action might have to occur under the general rules of each house, so that it might become possible for opponents to subject this action to dilatory or obstructive tactics.

In the present situation, the texts of the only two resolutions of repository siting approval that have been introduced are identical. As long as that identity persists, the difference in language between the two phrases in the expedited procedure would presumably generate no difficulties. A difference in text between the House and Senate measures might still arise, however, if the Senate amended its measure in the course of its proceedings, or possibly if an additional measure with slightly different wording were to be introduced, reported in lieu of S.J.Res. 34, called up for consideration, and adopted in that form.

If the Senate were ultimately to adopt a repository siting resolution measure with a text different from that of H.J.Res. 87 as passed by the House, a Senator might conceivably be able to raise a point of order against invoking the statutory procedure for clearing the measure for presidential action. If this point of order were sustained, action to clear the measure would have to take place under the general rules of the Senate, which could entail debatable motions considered without statutory time limitations. These proceedings could delay final action.

Congressional Power to Alter Statutory Procedures

The preceding discussion identifies a number of difficulties that might arise in the course of consideration of a resolution of repository siting approval under the expedited procedure of the NWPA. In particular, the Senate might amend its approval resolution in such a way that its text no longer met the statutory requirements for a resolution of repository siting approval. The amended measure might accordingly be held ineligible for further consideration under the expedited procedure. Also, because of such amendment or for other reasons, the texts of the approval resolutions originating in the House and the Senate might differ. This situation might make the automatic procedure to clear an approval resolution for the President unavailable in either chamber.

The Congressional Rulemaking Power

The constitutional power of each house to make its own rules could afford means for dealing with such complications. It is well established that this power extends to procedural provisions contained in statute as well as to the procedural rules each chamber establishes for itself. Further, the expedited procedure of the NWPA, like most, explicitly declares that the procedural provisions applicable to each house are enacted as an exercise of that constitutional power, and are subject to change by action of that house alone as a further exercise of the same power.[40]

It is also well established in each house that this constitutional rulemaking power may be exercised in various ways. Rules may be adopted or altered on a permanent basis. They may also be waived, suspended, or modified in their application to a specific situation. Finally, the power to make rules is implicitly understood to include the power to interpret them, or to decide what they mean in a specific situation.

By its own action pursuant to the rulemaking power, accordingly, either house could modify or alter provisions of the expedited procedure, either permanently and generally with respect to consideration of any future approval resolution, or for the purpose of considering a specific approval resolution. Presumably, either house could provide either (1) that a resolution of siting approval, as defined by the Act, be considered other than under the expedited procedure, or that (2) some other form of measure to authorize construction of the repository be considered under procedures equivalent to the statutory expedited procedure.

Ways of Applying the Rulemaking Power

Amendment of Rules. Each house establishes and amends its general rules by adopting resolutions. Because each house retains authority over its own respective rules, such resolutions require adoption only in the house affected. In principle,

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[40] 42 U.S.C. sec. 10135(d)(1) (Senate) and 10135(e)(1) (House). Constitution, Article I, section 5, in *Constitution Annotated*, p. 123.

either house could use such a resolution to effect a permanent change in a statutory expedited procedure as well. For example, the Senate could supplement the statutory procedure of the NWPA by adopting a resolution explicitly prohibiting amendment of a siting approval resolution. In the same way, either house could extend the mechanism for automatic final action on an approval resolution received from the other chamber to all cases in which both resolutions address the same site, even if their texts are not identical.

In practice, this approach would likely be more feasible in the House than in the Senate. In the House, a resolution to change the rules would normally be reported by the Committee on Rules, which typically operates in cooperation with the majority party leadership on such matters. Such resolutions are considered under procedures that permit the House, by vote, to terminate debate after one hour, and to prohibit amendment. In the Senate, such a resolution either would be reported by the Committee on Rules and Administration or, in the absence of objection, could be brought directly to the floor by the majority leader. However, it would be considered under the general rules of the Senate, meaning that it could be subjected to extended debate, amendment, and other potentially dilatory actions.

Modification, Suspension or Waiver of Rules. Each house possesses various established procedures permitting it to alter the application of its rules to a specific measure or in a specific situation. The House often does so by adopting a "special rule" for consideration of a specified measure just before consideration begins. Like a permanent change in rules, a special rule takes the form of a resolution that the Committee on Rules has jurisdiction to report, and is considered under procedures that permit the House to vote to terminate debate, and preclude amendment, after one hour. In the past, the majority party leadership and Committee on Rules have often preferred that measures eligible for expedited procedures be considered instead under special rules. This form of consideration preserves to a greater degree the normal control of the leadership over floor action.

A special rule for consideration of a siting approval resolution could provide that after consideration of the House measure, an automatic final vote occur on any Senate measure approving the same site that the House might already have received, or even on one that it might later receive. Alternatively, it also would be within the scope of normal practice for a special rule to provide that the approval resolution be considered under an entirely different procedure from that specified in the Act. A special rule might, for example, provide that the resolution be called up immediately or in the discretion of the Speaker, provide for or prohibit amendment, shorten or lengthen the time for debate, alter the division and control of that time, or permit or waive the application of certain points of order, as the leadership and the Committee found appropriate.

The House also often supersedes the procedures otherwise applicable to the consideration of a specific measure by considering the measure pursuant to a motion to suspend the rules. A motion to suspend the rules and pass a measure is subject to 40 minutes' debate, precludes floor amendment, and requires a two-thirds' vote. Finally, the House could consider an approval resolution by unanimous consent, and the unanimous consent request might include a specification of terms of consideration.

The Senate normally establishes modified or altered procedures for the consideration of a specific measure only by unanimous consent. It is normally considered the prerogative of the majority leader to propound requests for unanimous consent for such purposes. The Senate often uses unanimous consent agreements of this kind to restrict or even prohibit amendments to a specified measure, and sometimes to provide that final action on a companion measure received from the House occur automatically. In contentious situations, such as may likely accompany consideration of a siting approval resolution, however, unanimous consent to an agreement regulating consideration in such ways may be difficult to obtain.

Senate rules also include a procedure, little known today, for suspending specified rules in relation to action on a given measure. Although such a motion could presumably be used in relation to statutory provisions operating as rules, it appears ill adapted for this purpose. Senate rules impose no time limit on consideration of a motion to suspend the rules, so that it could be subjected to filibuster, delaying or blocking the attempt to establish any modified procedure for acting on the approval resolution. As in the House, suspension of the rules in the Senate requires a two-thirds' vote.[41]

Interpreting Rules Through Application. In recent times, the Senate has more often exercised its power to determine the intent and effect of its rules by voting on procedural questions either submitted to it by the chair, or arising through appeals of rulings of the chair. If a floor amendment were offered to an approval resolution, for example, the Senate might decide, on appeal, that the statute implicitly forbade such amendments. If an amendment to the resolution were adopted, the Senate might in the same way decide that the amended statute still qualified for further consideration under the expedited procedure.

This course of action would presumably not be subject to filibuster, because the statute requires that all appeals on questions raised during consideration of an approval resolution be settled without debate. Action of the Senate in this form, however, would not merely determine the application of the rule in the particular situation in which the question was raised. Because the Senate possesses ultimate authority to determine its own rules, its decision on a question such as this would establish precedent. It would conclusively establish the general meaning of the statutory provision, subject to revision only by subsequent action of the Senate itself.

In principle, the House might engage in similar proceedings, but in practice that chamber has a strong tradition of deferring to the rulings of its Speaker on procedural questions. A point of order might be raised, for example, that the statutory procedure for automatic final action on an approval resolution was intended to apply whenever a received Senate companion would approve the same repository site as the House measure, even if the text is not identical. If the Speaker sustained the point of order, the House would in all probability accept such a ruling, or at least sustain it if it were appealed. Subsequently, the House would no doubt accept this ruling as precedent

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[41] The Senate also permits a motion to waive certain procedural requirements by majority (or, in some cases, three-fifths) vote, but this mechanism is applicable only to requirements imposed by specified provisions of the Congressional Budget Act.

controlling the meaning of the provision for any future uses of the expedited procedure.

Additional Statutory Requirements for Site Approval

The previous section addresses whether, if an approval resolution were to be amended into a form other than that prescribed by the NWPA, it would continue to be eligible for consideration under the expedited procedure of the Act. Certain provisions of the Act, however, suggest that if the measure were enacted in such a form, it might raise additional questions as well. Pursuant to this language, it might be argued that unless a measure had the form prescribed for an approval resolution, it might not suffice to authorize construction of the repository. Related passages could be used to argue that even if the measure had the prescribed form, it might not achieve its purpose if Congress did not pass it during the prescribed 90-day period.

Requirements of Form and Timing

Expedited procedure statutes commonly permit Congress to approve (or disapprove) a specified action by using the expedited procedure to enact the measure for which the statute provides. They do not purport to require Congress to use, for this purpose, the means of approval (or disapproval) they provide. The language of the NWPA appears to reflect an intent to go farther, and prohibit construction of a civilian nuclear waste repository *unless* Congress enacts the resolution of approval in the prescribed form within the specified 90-day period.

Specifically, subsection (b) of 42 U.S.C. section 10135 states that once a state "notice of disapproval has been submitted, the designation of such site *shall not be effective except* as provided under subsection (c) ...." Subsection (c) provides that under these conditions, the "site *shall be disapproved unless*, during the ... [prescribed 90-day] period ... the Congress passes a resolution of repository siting approval *in accordance with this subsection* approving this site ...." (Italics added throughout). The text that a resolution of repository siting approval must possess is prescribed, as already noted, by subsection (a).

By no statutory language, of course, could Congress vitiate its own capacity subsequently to pass any legislation within its constitutional power. It could hardly be questioned that if, independent of the provisions of the NWPA, legislation were enacted specifically providing that a repository be constructed at a given site, the enactment would legally suffice for the purpose. Any conceivable uncertainty could be removed if the enabling statute explicitly superseded or repealed pertinent provisions of the NWPA.

An argument might be raised, however, that outside the context of the statutory procedure, a measure containing the language prescribed for an approval resolution would not suffice for this purpose. A resolution of repository siting approval is to state only that "there hereby is approved the site" specified. The Act requires this approval in order for the site designation to become "effective." It gives meaning to

this term by directing that when the site designation is effective, the Secretary of Energy is to apply to the Nuclear Regulatory Commission for authorization to construct the site.[42] On this basis, it might be argued that only in context of the Act does "approval" have specific meaning in relation to establishment of the repository.

By this argument, if a resolution was couched in the terms required by the Act, but also had been amended to include other language, or was not passed within the required 90-day period, it might not constitute statutory authorization to proceed with establishment of the repository. Instead, it might be contended, the process of establishing the repository cannot go forward unless Congress passes either (1) the approval resolution in the form and within the time required by the NWPA, or (2) legislation independent of the requirements of the Act and explicitly directing that the repository be constructed (or, for example, that the Secretary apply for the construction authorization).

A contrary interpretation of the language of the statute might hold that congressional "approval" of a site designation entails authorization to proceed with the repository, even independently of the statutory mechanism of the NWPA. To preclude such contentions altogether, however, any approval resolution passed either in amended form, or outside the statutory time frame (or both), might have to be amended also to contain language explicitly authorizing construction (or application for authorization to construct), and perhaps explicitly superseding the statutory process of the NWPA as well.

Relation of Statutory Requirements to Expedited Procedure

These questions of the potential force and effect of an approval resolution under the NWPA are separate from those that might be raised about the eligibility of the resolution for consideration under the expedited procedure of the Act. The NWPA attempts to require that an approval resolution must be passed in a specified form, and within specified time constraints, in order to permit establishment of the repository to go forward. It does not require that the approval resolution be enacted in accordance with the expedited procedure itself. The provisions of section 10135 quoted earlier require action in accordance with subsections (b) and (c), but not with subsections (d) and (e), which set forth the expedited procedure.

It accordingly appears that, for example, the Senate might amend its approval resolution, then continue considering the measure without regard to the constraints of the expedited procedure on debate and other procedural actions, and ultimately pass in lieu thereof an unamended companion previously received from the House. This process would result in an approval resolution becoming law in the form prescribed by statute, but not in accordance with the expedited procedure. The language of the Act would not seem to cast any doubt on the force and effect of a resolution of siting approval enacted under those conditions. Similarly, as long as Congress passed an approval resolution having the prescribed form within the required 90 days of continuous session, the measure would apparently suffice to

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[42] 42 U.S.C. sec. 10134(b).

approve the site designation even if Congress did not consider it in accordance with the expedited procedure.

It is, in any case, most doubtful that a statute could effectively require action pursuant to a specified expedited procedure as a condition of the effectiveness of an approval resolution. If either house departed from the prescribed procedures in its consideration of the resolution, its action presumably would amount to an implicit exercise of the chamber's power to alter the expedited procedure in its application to the specific instance. Such alterations in statutory procedures are implicitly understood as authorized by the rulemaking clause of the Constitution, even where not explicitly authorized by the rulemaking language of the statute itself.

Conversely, however, it does not appear that Congress could in any way use the rulemaking power to establish the effectiveness of an approval resolution that did not meet the statutory requirements of form and timing. The Act gives the status of congressional rules only to the provisions of subsections (d) and (e) that govern congressional action on an approval resolution from introduction through final action. The provisions of subsections (a) through (c), which specify the required wording and timing of an approval resolution and establish its effects, are not declared to have this status. Nor is it clear that they could be appropriately construed as having this status, for their effects go beyond procedural implications internal to Congress. Accordingly, if an approval resolution did not meet the statutory requirements of form and timing, then Congress might prefer to include in the resolution an explicit statement of its intended force and effect, in order to ensure that it would have that force and effect.

Finally, if Congress determined to authorize construction of a nuclear waste repository by means of legislation that did not meet the requirements of form and timing provided by the NWPA, that legislation would presumably be ineligible, under the statute, for consideration under the expedited procedure. The Act makes that procedure available only for measures meeting the statutory requirements of form for a resolution of repository siting approval. Presumably, as a result, approval legislation of any alternate kind would not be subject to the restrictions imposed by the statute on committee action, calling up, debate, amendment, and other procedural actions. It would instead have to be considered under the general procedures of each house. It could, accordingly, be considered under procedures equivalent to the expedited procedure, but only if each house, using its general practices of making procedural decisions, so determined.