Contract Liability Arising from the Nuclear Waste Policy Act (NWPA) of 1982

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Summary

Almost 30 years ago, Congress addressed growing concerns regarding nuclear waste management by calling for the federal collection of spent nuclear fuel (SNF) and high-level waste for safe, permanent disposal. To this end, the Department of Energy (DOE) was authorized by the Nuclear Waste Policy Act (NWPA) to enter into contracts with nuclear power providers to gather and dispose of the provider's SNF in exchange for payments into the statutorily established Nuclear Waste Fund (NWF). Under the terms of the NWPA, these contracts were to require that the federal government begin disposal of the nation's nuclear waste no later than January 31, 1998. Over 10 years ago, DOE breached these nuclear waste contracts by failing to begin the acceptance and disposal of SNF by the statutory deadline established in the NWPA. As a result, nuclear utilities have spent billions of dollars on temporary storage for toxic SNF that DOE was contractually and statutorily required to collect for disposal. The breach has triggered a prolonged series of suits by nuclear power providers, many of which continue unresolved to this day.

Approximately 78 breach of contract claims have been filed against DOE since 1998, resulting in over $2 billion in damage awards and settlements thus far. In 2010 alone, the U.S. Court of Federal Claims awarded nuclear utilities approximately $507 million in contract damages. DOE predicts that damages stemming from partial breach of contract claims will measure close to $20.8 billion if the government is able to begin accepting SNF by 2020. Approximately $500 million in additional legal damages will continue to build with each year beyond 2020 that DOE is unable to begin accepting SNF. All paid legal damages are drawn from the DOJ Judgment Fund rather than the DOE budget.

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

This report will present a brief overview of the NWPA and its subsequent amendments; provide a survey of key issues that have emerged during the protracted waste storage litigation; and consider the potential for future liability arising from further delays in the storage and disposal of nuclear waste.

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Introduction

Almost 30 years ago, Congress addressed growing concerns regarding nuclear waste management by calling for the federal collection of spent nuclear fuel (SNF) and high-level waste for safe, permanent disposal. To this end, the Department of Energy (DOE) was authorized by the Nuclear Waste Policy Act (NWPA) to enter into contracts with nuclear power providers to gather and dispose of the provider's SNF[1] in exchange for payments into the statutorily established Nuclear Waste Fund (NWF). Under the terms of the NWPA, these contracts were to require that the federal government begin disposal of the nation's nuclear waste no later than January 31, 1998. Over 10 years ago, DOE breached these nuclear waste contracts by failing to begin the acceptance and disposal of SNF by the statutory deadline established in the NWPA. As a result, nuclear utilities have spent billions of dollars on temporary storage for toxic SNF that DOE was contractually and statutorily required to collect for disposal.[2] The breach has triggered a prolonged series of suits by nuclear power providers, many of which continue unresolved to this day.

Approximately 78 breach of contract[3] claims have been filed against DOE since 1998, resulting in over $2 billion in damage awards and settlements thus far.[4] In 2010 alone, the U.S. Court of Federal Claims awarded nuclear utilities approximately $507 million in contract damages.[5] Many of these awards, however, remain on appeal with the U.S. Court of Appeals for the Federal Circuit and are not yet final.[6] Estimates for the total potential liability incurred by DOE as a result

[1] Spent nuclear fuel consists of radioactive fuel rods, containing uranium and plutonium, that have been permanently withdrawn from a nuclear reactor because they can no longer efficiently sustain a nuclear chain reaction. See CRS Report RL33461, *Civilian Nuclear Waste Disposal*, by (name redacted).

[2] U.S. nuclear power providers each individually incur substantial costs to store radioactive SNF in large pools or in "dry casks" located outside of the facility. Steve Hargreaves, *Nuclear Waste: Coming to a Town Near You?*, CNNMoney.com, November 4, 2009, available at http://www.money.cnn.com. *See also*, CRS Report R40202, *Nuclear Waste Disposal: Alternatives to Yucca Mountain*, by (name redacted).

[3] Most of these claims included a Fifth Amendment takings claim in addition to the breach of contract claim. The takings claims, however, were dismissed early in the litigation. *See e.g.,* Consumers Energy Co. v. U.S., 84 Fed. Cl. 152 (2008); Niagara Mohawk Power Corp. v. U.S., 2011 U.S. Claims LEXIS 616 (Fed. Cl. 2011) ("Plaintiffs' right to have the DOE dispose of SNF clearly arises from and was created by the contracts. Absent the contracts, the DOE would have no obligation to dispose of plaintiffs' SNF. Plaintiffs' proper remedies therefore lie in breach of contract claims, not takings claims." (citations omitted)).

[4] See, Final Report to the Secretary of Energy, Blue Ribbon Commission on America's Nuclear Future, at 80 (January 26, 2012) *available at* http://brc.gov/sites/default/files/documents/brc_finalreport_jan2012.pdf. According to the Congressional Budget Office, as of July 27, 2010 DOE's contract liability amounted to $1.8 billion—approximately $725 million of which was paid pursuant to settlements. *See*, Statement of Kim Cawley, Chief, Natural and Physical Resources Costs Estimates Unit, Congressional Budget Office, Before the House Committee on the Budget, July 27, 2010 (hereinafter *CBO Testimony*). The Department of Justice has measured the government's existing liability, through settlements and entered judgments, at $2 billion. *See*, Statement of Michael F. Hertz, Deputy Assistant Attorney General, Civil Division, Department of Justice, Before the House Committee on the Budget, July 27, 2010. Since July 27, 2010, the U.S. Court of Federal Claims has awarded nuclear utilities approximately $198 million.

[5] *See*, Energy Northwest v. U.S., 91 Fed. Cl. 531 (2010)(awarding $59,859,345 in damages), *rev'd in part by* Energy Northwest v. U.S., 641 F.3d 1300 (Fed. Cir. 2011)(reducing award by approximately $7 million); Consol. Edison Co. of N.Y., Inc. v. U.S. 92 Fed. Cl. 466 (2010)(awarding $106,572,386 in damages); Boston Edison Co. v. U.S., 93 Fed. Cl. 105 (2010)(awarding $4,224,696 in damages), *rev'd in part by* Boston Edison Co. v. U.S., 658 F.3d 1361 (Fed. Cir. 2011); Southern Cal. Edison Co. v. U.S. 93 Fed. Cl. 337 (2010)(awarding $142,394,294 in damages); Yankee Atomic Power Co. v. U.S., 94 Fed. Cl. 678 (September 7, 2010)(awarding approximately $141 million in damages); Entergy Nuclear Vt. Yankee, LLC v. U.S., 95 Fed. Cl. 160 (September 29 2010)(awarding $46,645,454 in damages); Kansas Gas & Elec. Co. v. U.S., 95 Fed. Cl. 257 (November 30, 2010)(awarding $10,632,454 in damages).

[6] Of the 78 cases filed as of February 2011, only 13 reached a final unappealable verdict. Twenty-four remain pending, (continued...)

of the nuclear waste contract litigation exceed $20 billion.[7] Moreover, after decades of political, legal, administrative, and environmental delays, the Obama Administration has eliminated all funding for the Yucca Mountain repository project, closed the Office of Civilian Radioactive Waste Management,[8] and reemphasized an intention to pursue other alternatives for the disposal of SNF by establishing the Blue Ribbon Commission on America's Nuclear Future. In addition, DOE has attempted to permanently withdraw the Yucca Mountain construction authorization license from consideration before the Nuclear Regulatory Commission (NRC)—an action that triggered two separate lines of litigation before the NRC and the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).[9] Accordingly, contract damages will continue to build as delays in the disposal of SNF continue.[10]

This report analyzes more than 15 years of ongoing litigation over the government's obligations to collect and dispose of SNF under the NWPA.[11] First, the report will provide a brief overview of the NWPA, the statute's subsequent amendments, and its relationship to nuclear waste disposal. Second, the report will provide a survey of key legal issues that have emerged during the protracted waste storage contract litigation, including a discussion of a significant jurisdictional dispute between the D.C. Circuit and the U.S. Court of Federal Claims. Finally, the report will consider the prospects for future liability arising as a result of further delays in the disposal of the nation's high-level nuclear waste.

The NWPA and the Standard Contract

The Nuclear Waste Policy Act of 1982

Responding to the serious hazards of nuclear waste, Congress passed the Nuclear Waste Policy Act of 1982 in an effort to centralize the long-term management of nuclear waste by making the federal government responsible for collecting, transporting, storing, and disposing of the nation's SNF.[12] In order to achieve this goal, the NWPA established a statutory system for selecting a site for a geologic repository for the permanent disposal of nuclear waste.[13] DOE was authorized by the statute to carry out the disposal program and develop the permanent nuclear waste repository. Commercial nuclear power owners and operators would fund a large portion of the program

(...continued)

23 were settled, and seven were voluntarily withdrawn. Final Report to the Secretary of Energy, Blue Ribbon Commission on America's Nuclear Future, at 80 (January 26, 2012).

[7] *Id*. at 79.

[8] The NWPA created the Office of Civilian and Radioactive Waste Management to carry out the DOE's obligations to manage and dispose of high-level radioactive waste and SNF. 42 U.S.C. §10224.

[9] For more detailed information on the proposed Yucca Mountain shutdown see CRS Report R41675, *Closing Yucca Mountain: Litigation Associated with Attempts to Abandon the Planned Nuclear Waste Repository*, by (name redacted).

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

[11] This report does not discuss the significant amount of environmental litigation relating to the standards for licensing the Yucca Mountain facility to be applied by the Nuclear Regulatory Commission.

[12] P.L. 97-425, The Nuclear Waste Policy Act, *codified at* 42 U.S.C. §§10101 *et seq*.

[13] *Id*. at §§111-125.

through significant annual contributions, or fees, to the newly established Nuclear Waste Fund (NWF).[14]

To carry out the statutory scheme created by the NWPA, DOE was also authorized to enter into contracts with private nuclear facilities to allow the federal government to take possession of nuclear waste and ensure its storage and disposal in the prospective permanent repository.[15] Section 302 of the NWPA sets out the critical statutory deadline established in the NWPA and forms the main basis for litigation. This provision mandates:

> (A) Following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and
>
> (B) In return for payment of fees established by this section, the Secretary, *beginning not later than January 31, 1998,* will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subtitle.[16]

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

> The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF ... has been disposed of.[17]

Although the NWPA did not expressly mandate that all nuclear utility providers enter into an agreement with DOE for the disposal of nuclear waste, the utilities were required to enter into the Standard Contract as a condition of renewing or obtaining the required operating license from the Nuclear Regulatory Commission (NRC).[18] All operating nuclear facilities, therefore, became parties to the Standard Contract.

By 1987, pursuant to its obligations under the NWPA, DOE had identified three potential sites for the permanent repository: Yucca Mountain, Nevada; Hanford, Washington; and Deaf Smith County, Texas. In 1987, Congress amended the NWPA to name Yucca Mountain as the sole candidate site for the permanent repository.[19] The amendments, strongly lobbied for by the congressional delegations from Washington and Texas, did not, however, end the DOE selection and approval process which continued as outlined under the NWPA.

[14] *Id*. at §302.

[15] *Id*. at §302(a).

[16] *Id*. at §302(a)(5) (emphasis added).

[17] 10 C.F.R. §961.11.

[18] 42 U.S.C. §10222(b)(1)(A).

[19] 42 U.S.C. §10172.

Breach of the Standard Contract

By 1993, DOE had made little progress in preparing to take possession of SNF, and the Yucca Mountain facility was at least a decade or more away from completion. Concerned as to whether DOE would be able to meet its contractual obligations by the end of January 1998, the nuclear utilities, which had been paying into the NWF for 11 years,[20] requested in writing that DOE address its responsibilities under the NWPA and update the signatories of the Standard Contract on DOE's overall preparedness. DOE initially responded to this request with an informal letter, stating that DOE's interpretation of the Standard Contract was that the department's contractual obligations were not triggered until the nation's permanent repository was complete.[21]

In response to this interpretive dispute, DOE sought comments from the public on the department's statutory obligations under the NWPA and the Standard Contract. After further review, DOE issued a "Final Interpretation of Nuclear Waste Acceptance Issues" which formally pronounced the department's position that it had no "legal obligation under either the [NWPA] or the Standard Contract to begin disposal of SNF by January 31, 1998, in the absence of a repository or interim storage facility."[22] Pursuant to this interpretation, the department added that it would not begin accepting nuclear waste from nuclear utilities by the date specified in the act, nor did it have authority under the NWPA to provide interim storage for spent nuclear fuel.[23] In the alternative, the DOE notice stated that were Section 302 to create an unconditional obligation on the part of DOE to begin disposing of nuclear waste by January 31, 1998, redress should be governed by the "unavoidable delay" provisions of the Standard Contract which expressly states that "no party shall be liable for damages in the case of unavoidable delay."[24]

Nuclear utility companies, having paid billions into the NWF since 1982[25] in addition to the millions spent for on-site temporary storage, turned to the federal courts to review DOE's interpretation of its own obligations under the NWPA and the Standard Contract.

Waste Disposal Contract Litigation

Issues relating to the NWPA have been consistently litigated for the last 15 years, and will continue to be litigated into the immediate future. Many difficult legal questions have arisen during this time period due to the somewhat peculiar relationship between the NWPA and the Standard Contract and the courts' attempts to distinguish between statutory and contractual duties. Although DOE argued early on that the department had no obligations absent a completed permanent repository, the courts have ruled that DOE had a statutory obligation to begin

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

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

[22] 60 *Federal Register* 21,793-94 (May 3, 1995).

[23] *Id*. at 21,794.

[24] *Id*. at 21,797.

[25] As of the end of FY2009, the NWF had an existing balance of $23.6 billion. Utilities have contributed approximately $17.1 billion in fees which have accumulated $13.8 billion in interest. Yucca Mountain related expenditures from the fund amount to approximately $7.3 billion. *CBO Testimony*, at 2. The Office of Civilian Radioactive Waste Management estimated that the NWF balance at the end of FY2010 would be $25.4 billion. Office of Civilian Radioactive Waste Management, Office of Business Management, Summary of Program Financial & Budget Information, January 31, 2010.

collecting SNF by no later than January 31, 1998.[26] As that statutory obligation was also converted into a contractual obligation through the Standard Contract, the courts have also determined that DOE's delay in collecting the nuclear utilities' SNF has placed the federal government in partial breach of contract.[27] Additionally, overturning a divergent decision by the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has affirmed a D.C. Circuit order that prohibits DOE from concluding that the lack of a permanent repository excuses DOE from liability for the delay in acceptance of SNF.

Approximately 78 lawsuits have been filed against DOE related to the department's failure to commence the collection and disposal of SNF. Of the lawsuits, a large majority remain pending.[28] As of the end of 2011, the government's liability—based on settlements, final judgments, and entered judgments under appeal—stands at over $2 billion.[29] The following section will highlight key court decisions that have emerged from the ongoing contractual dispute between DOE and the nuclear power utilities.

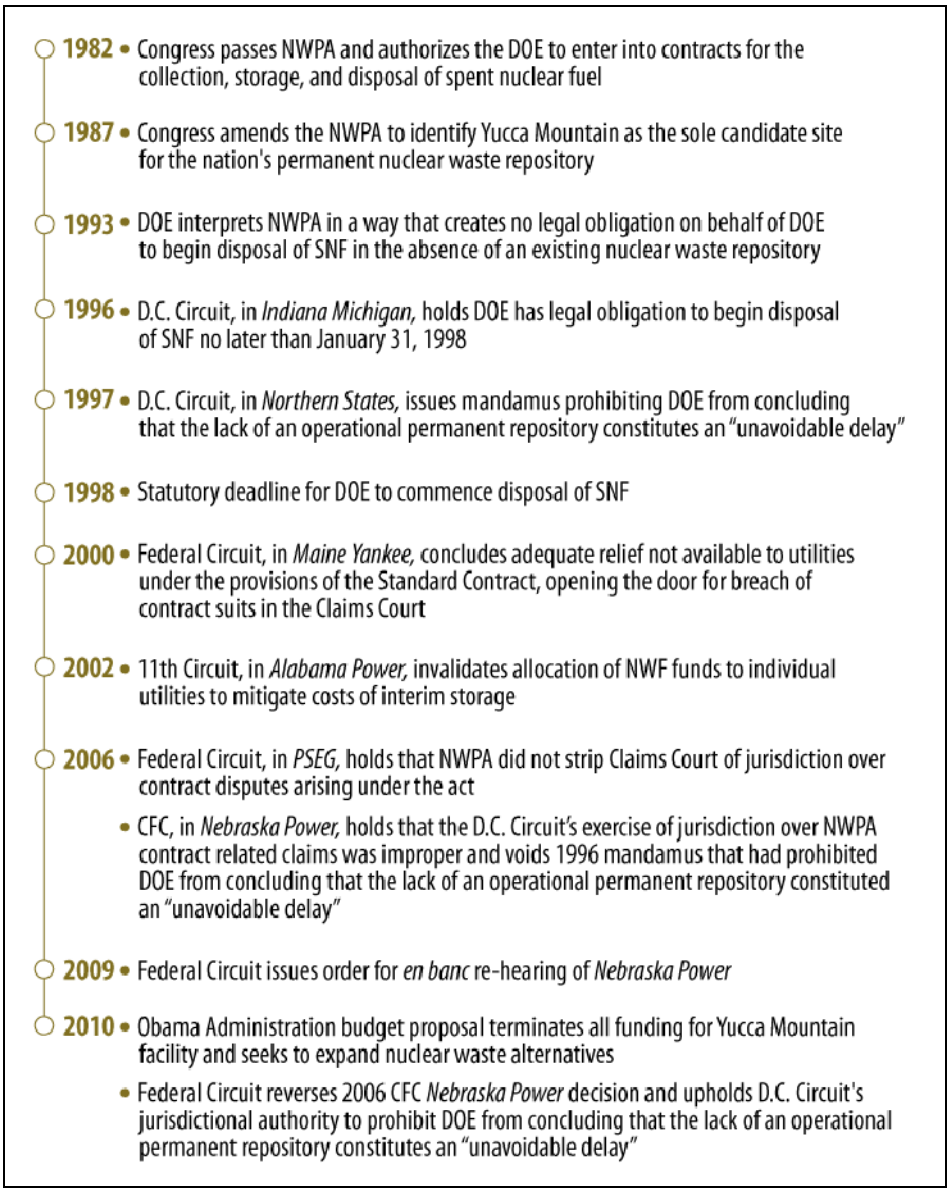
[26] Indiana Michigan Power Co. v. U.S., 88 F.3d 1272, 1277 (D.C. Cir. 1996).

[27] *See, e.g.*, Pacific Gas & Elec. Co. v. U.S., 536 F.3d 1282, 1289 (Fed. Cir. 2008).

[28] Final Report to the Secretary of Energy, Blue Ribbon Commission on America's Nuclear Future, at 80 (January 26, 2012) *available at* http://brc.gov/sites/default/files/documents/brc_finalreport_jan2012.pdf.

[29] *Id*. *See also, supra* note 4.

Figure 1. Litigation Timeline



Source: Congressional Research Service.

DOE's Statutory Obligation to Begin Accepting SNF

The first NWPA-related claim against DOE was filed in the D.C. Circuit in 1996.[30] Although DOE had not yet breached the contract, as performance was not required before January 31, 1998, Indiana Michigan Power Company sought a preemptive judicial review of the department's determination that it had no obligation to begin accepting SNF until the completion of the Yucca Mountain facility.

[30] *Indiana Michigan Power*, 88 F.3d 1272.

In *Indiana Michigan Power Co. v. Department of Energy*, the D.C. Circuit, applying the *Chevron*[31] analysis for reviewing an agency's statutory interpretation, invalidated DOE's interpretation as contrary to the plain meaning of the NWPA.[32] The court reasoned that Section 302(A) and Section 302(B) represented independent statutory obligations. While the obligation to "take title to" nuclear waste in section 302(A) may have been conditioned on the construction of a repository, the obligation to "dispose" of nuclear waste under Section 302(B) contained no such limitation.[33] Indeed, DOE's duty to commence disposal of nuclear waste, held the court, was to begin "not later than January 31, 1998 without qualification or condition."[34] The argument put forth by DOE, and rejected by the court, was that Section 302(A) and Section 302(B) "must be read together," since taking title to SNF cannot be separated from disposing of SNF.[35] In construing DOE's "disposal" obligation broadly, the court noted that "it is not unusual, particularly in the nuclear area, to recognize a division between ownership of materials and other obligations relating to such materials."[36] The court concluded that the NWPA and Standard Contract had created a "reciprocal" and binding contractual relationship between DOE and the nuclear utilities, whereby DOE would dispose of the utilities' nuclear waste in return for the payment of fees into the NWF.[37]

DOE did not immediately take action in response to the D.C. Circuit's holding in *Indiana Michigan*. Instead, the department informed the nuclear utilities involved that it would be unable to comply with the January 31, 1998, deadline and was not prepared to begin accepting spent nuclear fuel for disposal.[38] DOE asserted that it was waiting for the results of the Yucca Mountain Project Viability Assessment before proceeding, but predicted that the Yucca Mountain facility could potentially be opened by 2010.[39]

Prohibiting the "Unavoidable Delay" Defense

In addition to informing the nuclear utilities that it would be unable to comply with the January 31, 1998, deadline, DOE also asserted that the department was not responsible for any monetary damages incurred by the utilities as a result of DOE's delay.[40] The department had determined that the lack of a permanent repository at Yucca Mountain constituted an "unavoidable delay" under article IX of the Standard Contract.[41] The "unavoidable delay" provision of the Standard Contract provides:

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

[32] *Id*. at 1274.

[33] *Id*. at 1276.

[34] *Id.*

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

[36] *Id*.

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

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

[39] *Id*.

[40] *Id*.

[41] 10 C.F.R. §961.11.

> Neither the Government nor the purchaser shall be liable under this contract for damages caused by failure to perform its obligations hereunder, if such failure arises out of the causes beyond the control and without the fault or negligence of the party failing to perform.[42]

As such, argued DOE, the terms of the Standard Contract relieved the department from any obligation to "provide a financial remedy for the delay."[43]

The nuclear utilities responded to DOE's communications in 1997 by asking the D.C. Circuit to issue a writ of mandamus, compelling DOE to adhere to the court's earlier decision in *Indiana Michigan* and begin accepting nuclear waste for disposal. In *Northern States Power Co. v. U.S.*, the court refused to grant the "drastic" and broad relief the utilities asked for, holding that the terms of the Standard Contract provided for another "potentially adequate remedy."[44] Before the court would consider compelling DOE to act, the utilities would first have to pursue the administrative remedies available under the Standard Contract for delayed performance.[45]

However, the court was unwilling to accept DOE's interpretation of its own delays as "unavoidable" under the Standard Contract. The court reiterated, in rejecting DOE's argument that a lack of an operational repository qualified as an unavoidable delay, that DOE's obligation to begin disposal of SNF by January 31, 1998, existed regardless of the existence of an operational storage facility.[46] DOE's "unavoidable delay" defense, noted the court, represented a simple "recycling [of] the arguments [previously] rejected by this court."[47] Based on DOE's "repeated attempts to excuse its delay on the grounds that it lacks an operational repository," the D.C. Circuit, in a significant exercise of authority, issued a writ of mandamus prohibiting DOE from concluding that the lack of an operational permanent repository constituted an "unavoidable delay" under the Standard Contract.[48] The court ordered DOE to "proceed with contractual remedies in a manner consistent with NWPA's command that it undertake an unconditional obligation to begin disposal of the SNF by January 31, 1998."[49]

In a preview of the jurisdictional dispute that would develop a decade later, DOE filed a petition for rehearing in response to the *Northern States* mandamus. DOE challenged the D.C. Circuit's exercise of authority by asserting that the court "lacked jurisdiction to construe the unavoidable delays clause of the Standard Contract," as such an interpretation of a government contract was squarely within the jurisdiction of the U.S. Court of Federal Claims under the Tucker Act.[50] The D.C. Circuit denied the motion for rehearing, holding that the court had not adjudicated a

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

[43] *Northern States*, 128 F.3d at 757.

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

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

[46] *Northern States*, 128 F.3d at 760.

[47] *Id*.

[48] *Id*.

[49] *Id*.

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

contractual dispute, but rather issued the mandamus in an effort to enforce a statutory duty.[51] Accepting the D.C. Circuit's reasoning, DOE interpreted the *Northern States* mandamus as prohibiting the department from raising the unavoidable delay clause as a defense in future litigation.[52]

Litigation Continues: Remedies, Offsets, and Damages

After establishing DOE's statutory obligations under the NWPA in the D.C. Circuit, many nuclear utilities awaited the expiration of the January 31, 1998, deadline before seeking monetary damages by filing their claims in the U.S. Court of Federal Claims (CFC).[53] Under the Tucker Act, the CFC has jurisdiction over monetary claims against the United States "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States."[54] Decisions of the CFC are appealed to the Federal Circuit.

In considering the cases, the CFC initially had to answer the threshold question of whether the nuclear utilities were required to exhaust available administrative remedies under the Standard Contract prior to seeking judicial relief. Generally, if administrative remedies can provide adequate relief for a claim, the plaintiff must first exhaust those remedies before seeking redress in another court.[55] Judges on the CFC came to opposite conclusions as to whether the Standard Contract could provide adequate relief to the nuclear utilities, and the issue was left for the Federal Circuit to settle on appeal.[56]

Remedies Under Standard Contract Inadequate

In an important 2000 case, *Maine Yankee Atomic Power Co. v. U.S.,* the Federal Circuit concluded that adequate relief was not available to the nuclear utilities under the Standard Contract, a conclusion that would allow breach of contract claims against DOE to go forward in the CFC.[57] DOE, with the "unavoidable delay" clause unavailable, argued that the "avoidable delays" clause of the contract provided the plaintiffs with an avenue for adequate administrative relief.[58] The "avoidable delay" provision of the Standard Contract requires that

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

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

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

[54] 28 U.S.C. §1491.

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

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

[57] 225 F.3d 1336 (Fed. Cir. 2000).

[58] *Id*. at 1341-1342.

> In the event of any delay in the delivery, acceptance, or transport ... caused by circumstances within the reasonable control of either [party] ... the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.[59]

The court disagreed, holding that the "avoidable delay" provision applied only to routine delays occurring after the parties had begun performance of their obligations under the contract, not to breaches of a "critical and central obligation of the contract," such as a failure to begin performance by the statutory deadline.[60] The court added that relief in the form of a "charge or schedule adjustment," as provided under the Standard Contract, was wholly inadequate to compensate the nuclear utilities for damages they had sustained in storing spent nuclear fuel that had been covered by the contract.[61] As a result of the *Maine Yankee* decision, signatories to the Standard Contract were now free to seek monetary damages against DOE, by filing their breach of contract claims in the CFC, without first exhausting the DOE administrative process.

NWF Offset Invalid

Following the *Indiana Michigan Power* and *Maine Yankee* decisions, and the realization that a large number of breach of contract claims were being filed in the CFC, DOE attempted to curtail its potential contract liability by modifying contract terms with individual nuclear utilities. Under the proposed modification, DOE was willing to return a portion of payments made by a utility into the NWF, and suspend any future payments if the utility was willing to relinquish all future claims against DOE.[62] The department entered into one such agreement with Exelon Generation Company in 2002. Other utilities that had also contributed to the NWF, however, challenged this arrangement as an invalid use of NWF funds.

The U.S. Court of Appeals for the Eleventh Circuit, in *Alabama Power Co. v. U.S.*, invalidated the contractual modification reached between DOE and Exelon Generation Company.[63] The agreed upon "offset," the court held, was "tantamount to an expenditure of funds" from the NWF.[64] Under the NWPA, NWF funds were to be used only for the "permanent disposal" of nuclear waste.[65] DOE could not, therefore, allocate NWF funds to individual nuclear utilities to pay for what the court classified as on-site "interim storage." Were DOE allowed to use NWF funds to offset the costs of the department's failure to dispose of SNF, it would be analogous to allowing DOE to "pay for its own breach out of a fund paid for by the utilities."[66] Any arrangement in which the utilities were made to "bear the costs of the [department's] breach" was invalid.[67] Pursuant to the court's stringent interpretation of the statutory purposes of the NWF,

[59] Standard Contract, 10 C.F.R. §961.11.

[60] Maine Yankee Atomic Power Co. v. U.S., 225 F.3d 1336, 1341-42 (Fed. Cir. 2000).

[61] *Id*. at 1342.

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

[63] *Id*. at 1315. The case was brought in the U.S. Court of Appeals for the Eleventh Circuit, rather than the CFC, because the issue was a statutory question on the permissible use of NWF funds under the NWPA and not a breach of contract claim.

[64] *Id*. at 1312.

[65] *Id*. at 1313 ("An expenditure on interim storage is not an act of 'disposal.'").

[66] *Id*. at 1314.

[67] *Id*.

DOE is likely prohibited from using NWF funds for any use other than the development and construction of a permanent repository.[68]

Calculating Damages

Although DOE had acknowledged by 2005 its partial breach of the Standard Contract in most cases,[69] significant litigation has been required to determine the level of damages individual nuclear utilities may legally recover as a result of DOE's breach. Generally speaking, when one party to a contract materially breaches the contract, the non-breaching party has the option to sue for damages under either a "full breach" or "partial breach" theory.[70] A successful claim for full breach discharges the contractual obligations of both parties and allows the non-breaching party to sue for all past, present, and future damages.[71] A claim for partial breach, on the other hand, preserves the ongoing contractual relationship between the parties—meaning both parties are still obligated to perform under the terms of the contract.[72] Additionally, a party suing for partial breach may only recover the costs of mitigating the other party's breach that were incurred between the time the party became aware of a potential breach and the date of trial.[73] A party suing for partial breach may not, therefore, recover future damages. Fundamentally, in electing to pursue a claim under a partial or full breach theory, the non-breaching party is choosing between continuing the contract, in the hope that the breaching party will eventually perform, or ending the contract in its entirety.

The nuclear utilities have pursued their breach of contract claims under a partial breach theory.[74] Although a party may typically elect whether to sue for partial or full breach in response to a material breach, the CFC and the Federal Circuit have repeatedly and consistently expressed doubt as to whether a full breach claim seeking to discharge the existing contractual obligations would even be available to the nuclear utilities, noting that the utilities have been "compelled" to sue for partial breach by the statutory obligations underlying the Standard Contract.[75] In *Indiana Michigan Power Co. v. U.S.*, the court stated in dicta that were a nuclear utility to bring an action for total breach "DOE would [be] discharged from further responsibility under the [Standard] contract, a situation apparently not desired by [the utilities] *and foreclosed by statute*."[76] The

[68] This prohibition would arguably include utilizing NWF funds as part of any alternative solution to a permanent repository or any judicial order for restitution of NWF fees.

[69] *See, e.g.*, System Fuels Inc. v. U.S., 66 Fed. Cl. 722, 730 (2005) ("The government admitted on February 10, 2005 that 'DOE's delay in beginning acceptance of SNF … constitutes a partial breach of the Standard Contract.'")

[70] Restatement (Second) of Contracts §236 cmt. b ("If the injured party elects to or is required to await the balance of the other party's performance under the contract, his claim is said instead to be one for damages for partial breach."); Restatement (Second) of Contracts §243 cmt. a.

[71] Restatement (Second) of Contracts §236.

[72] *Id*. *See also,* E. Alan, Farnsworth, Contracts §8.15 (3d ed. 1999) ("Damages are calculated on the assumption that both parties will continue to perform in spite of the breach.").

[73] Indiana Michigan Power Co. v. U.S., 422 F.3d 1369, 1374 (Fed. Cir. 2005) (holding that a partial breach plaintiff can recover damages incurred from the point at which the "party has reason to know that performance by the other party will not be forthcoming" to the date of trial.).

[74] *See, e.g*. Pacific Gas & Elec. Co. v. U.S., 536 F.3d 1282 (Fed. Cir. 2008) ("A series of cases has established that DOE has partially breached the contract by failing to begin its performance.")

[75] *Indiana Michigan Power*, 422 F.3d 1369, 1374 (Fed. Cir. 2005).

[76] *Id*. (emphasis added); Niagara Mohawk Power Corp. v. U.S., 2011 U.S. Claims LEXIS 616 (Fed. Cl. 2011) ("Plaintiffs are precluded from claiming total breach because the NWPA prevents plaintiffs from rescinding the contract and disposing of their SNF other than through the DOE.").

courts have noted three incongruous consequences that could result from a court's decision to discharge the parties' obligation to perform under the Standard Contract. First, Nuclear Regulatory Commission operating permits for all nuclear utilities are currently contingent on entering into the Standard Contract with DOE.[77] As a result, if the contract is discharged, the utility may lose its operating license. Second, the NWPA makes DOE the exclusive collector of SNF, meaning the utilities may not seek alternative means of disposing of their SNF.[78] Third, the NWPA places a statutory duty on the utilities that generate SNF to pay for the waste's disposal. Discharging the utilities contractual obligation to make payments into the NWF would run counter to this statutory duty.[79] Accordingly, the Federal Circuit has repeatedly affirmed the notion that nuclear utilities are foreclosed from suing for a full breach.[80]

Even if permitted, it is not clear that the nuclear utilities would wish to pursue a claim for full breach. In 2006, in response to an order by the court to show why the CFC should not simply void the Standard Contract, more than 30 nuclear utilities, through amicus briefs, voiced opposition to the court's proposal.[81] Absent a contract, the utilities would be exposed to "substantial regulatory risks," and likely bear the burden and responsibility of permanently disposing of their own SNF.[82] Although available damages could potentially be higher than what the utilities have been recovering through their numerous claims for partial breach, under a claim for full breach, the utilities would lose the benefit, no matter how remote, of the government collecting and disposing of their SNF.[83]

For these reasons, the nuclear utilities have sought to pursue, and courts have been hesitant to depart from, a partial breach scenario.[84] As a result, the nuclear utilities continue to have the obligation to pay into the NWF and DOE continues to have the obligation to collect and dispose of SNF. As the Federal Circuit has stated, the utilities have had "no choice but to hold the government to the terms of the Standard Contract while suing for partial breach."[85]

In August of 2008, the Federal Circuit further clarified the method for calculating damages in NWPA breach of contract suits by establishing a rate at which DOE was expected to accept SNF under the Standard Contract.[86] The anticipated rate of acceptance was essential to calculating the

[77] *Id*.

[78] *Id*.

[79] Roedler v. DOE, 255 F.3d 1347, 1353 (Fed. Cir. 2001).

[80] Pacific Gas & Elec. Co. v. U.S., 70 Fed. Cl. 766, 774 (2006) ("[I]n the circumstances of this case, where the regulatory framework of the NWPA … precludes plaintiff from suing for total breach of the contract …"); Yankee Atomic Elec. Co. v. U.S., 536 F.3d 1268, 1280 (Fed. Cir. 2008) ("As this court has already acknowledged, the NWPA and the terms of the Standard Contract foreclose any claim for total breach.").

[81] Brief for Florida Power and Light Co. et al. as Amici Curiae, Sacramento Mun. Util. Dist. v. U.S. 65 Fed. Cl. 180 (2005).

[82] *Id*. at 11.

[83] "[T]he amici do not seek to be restored to their pre-Standard Contract position. Rather, their consistent position throughout the SNF litigation has been that they want—and need—DOE to perform its obligations under the Standard Contract." *Id*. at 9.

[84] At least one CFC judge has expressed concern over the manner in which the litigation has been progressing. Sacramento Mun. Util. Dist. v. U.S. 70 Fed. Cl. 332, 357 (2006) ("The prospect of continuing to issue rolling damage awards ad infinitum for interim storage costs, however, falls far short of resolving the 'national problem' that Congress identified in 1982 …").

[85] *Indiana Michigan Power*, 422 F.3d at 1374.

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

total amount of SNF DOE was contractually obligated to accept from the nuclear utilities from the 1998 deadline forward. DOE argued for a lower rate established under a report issued in 1991, as opposed to the initial rate of acceptance established in a 1987 DOE scheduling report.[87] The Federal Circuit, however, rejected this argument, holding instead that damages would be calculated in relation to the higher 1987 acceptance rate, as that rate most closely reflected the intent and expectations of the parties at the time of the contract.[88] The 1991 rate, held the court, was most likely the result of a "litigation strategy," put forth to "minimize DOE's exposure for its impending breach, rather than as a realistic, good faith projection for waste acceptance."[89]

Nuclear utilities have thus been successful in recovering all reasonable and foreseeable expenses incurred in mitigation of DOE's breach.[90] Generally, these damages consist of costs associated with developing, implementing, and maintaining on-site interim SNF storage.[91] Damages are limited, however, to the costs incurred from the date at which the utility became aware of DOE's potential breach, a realization often occurring well before the January 31, 1998, deadline, to the date of trial. As damages are limited to those expenses actually incurred at the time of trial, utilities may not recover additional future, or prospective, damages.[92] Nuclear utilities are free, however, to re-file future claims as new damages are incurred.[93]

Jurisdictional Dispute Develops in *Nebraska Public Power District v. United States*

From 1998 forward, the CFC had been entertaining breach of contract suits filed by the nuclear utilities against DOE without any significant discussion of jurisdiction. Then, in 2005, the court, for the first time, dismissed a NWPA breach of contract suit for lack of subject matter jurisdiction.[94] The court reasoned that the Standard Contract, created through the formal administrative process, qualified as a final agency action under the jurisdiction of the U.S. courts of appeals as established pursuant to Section 119 of the NWPA. Section 119 of the NWPA grants the U.S. courts of appeals:

> original and exclusive jurisdiction over any civil action ... for review of any final decision or action of the Secretary, the President, or the Commission under this subtitle.[95]

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[87] The initial predicted rate of acceptance was 1200 metric tons of uranium (MTU) per year in 1998, 2000 MTU/year by 2003, and 2650 MTU/year by 2004. The proposed 1991 rate of acceptance schedule reduced those numbers to 300 MTU/year in 1998, 875 MTU/year in 2001, and 1800 MTU/year by 2010. *Id.*

[88] *Id.* at 1291-92.

[89] *Id.*

[90] As a general rule, to recover damages the utilities must show that "(1) the damages were reasonably foreseeable … at the time of contracting; (2) the breach is a substantial causal factor in the damages; and (3) the damages are shown with reasonable certainty." *Indiana Michigan Power*, 422 F.3d at 1373.

[91] On-site interim storage commonly requires "re-racking" or the construction of "dry casks." For further information on interim storage see CRS Report R40202, *Nuclear Waste Disposal: Alternatives to Yucca Mountain*, by (name redacted).

[92] *See, e.g.* Boston Edison Co. v. U.S., 658 F.3d 1361 (Fed. Cir. 2011) ("Prospective damages for anticipated future nonperformance are not recoverable in a partial breach case.").

[93] *Indiana Michigan Power*, 422 F.3d at 1377 ("When a party sues for partial breach, it retains its rights to sue for damages for its remaining rights to performance."). New claims must be filed at least every six years in order to comply with the statute of limitations.

[94] Florida Power and Light Co. v. U.S., 64 Fed. Cl. 37 (2005).

[95] P.L. 97-425 §119.

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

In *PSEG Nuclear v. U.S.*, the Federal Circuit reversed the lower court's decision, holding that the NWPA had not stripped the CFC of jurisdiction over contract disputes.[96] The court based its holding on the fact that Section 119 only acted to preclude CFC jurisdiction in instances of official agency action taken under the NWPA.[97] The utilities' claims were for breach of contract and did not challenge any "agency action taken under the agency's statutory mandate," but rather were concerned with "whether DOE breached its contractual obligations, and if so, to what damages, if any, PSEG is entitled for the breach."[98] After *PSEG*, it was clear that the CFC had the authority to exercise jurisdiction over an NWPA-related breach of contract claim. However, because the court in *PSEG* limited itself only to whether the exercise of jurisdiction by the CFC was proper,[99] the larger question of whether the D.C. Circuit's previous exercise of jurisdiction over similar contract-related claims impermissibly infringed on the CFC's jurisdiction remained unresolved.

The Court of Federal Claims

Shortly after the *PSEG* decision, which ensured the CFC's jurisdiction over contract disputes arising under the NWPA, DOE asked the CFC to invalidate the D.C. Circuit's initial exercise of jurisdiction in *Indiana Michigan*. At oral argument in *Nebraska Public Power Dist. v. U.S.*, DOE expressed a desire to raise the "unavoidable delay" defense that the D.C. Circuit had specifically prohibited through the writ of mandamus in *Northern States*.[100] The CFC decided to entertain the question and asked the parties to brief the issue of whether the D.C. Circuit mandamus precluded DOE's assertion of the "unavoidable delay" defense in the CFC. On October 31, 2006, the court handed down a sweeping decision that voided for lack of jurisdiction the longstanding mandamus issued by the D.C. Circuit.[101]

In *Nebraska Public Power*, the CFC held that the D.C. Circuit had exceeded its jurisdiction in issuing the *Indiana Michigan* decision.[102] Since the mandamus prohibiting DOE's use of the "unavoidable delay" defense issued in *Northern States* was issued as a means of enforcing the ruling in *Indiana Michigan*, the mandamus, therefore, was also void and had no preclusive effects in the CFC. The court based its decision on the jurisdictional conclusions underlying *PSEG*, the limited scope of Section 119 of the NWPA, and the absence of an effective waiver of sovereign immunity.

[96] 465 F.3d 1343 (Fed. Cir. 2006).

[97] *Id*. at 1349-1351.

[98] *Id*. at 1350.

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

[100] 73 Fed. Cl. 650 (2006).

[101] *Id*.

[102] *Id*.

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

Nebraska Public Power focused on whether the string of claims filed under the NWPA and the Standard Contract should be classified as a review of formal agency action within the direct purview of the U.S. courts of appeals, or as a straightforward breach of contract claim within the exclusive jurisdiction of the CFC (subject to appeal to the Federal Circuit). The opinion made clear the CFC's position that the claims relating to the January 31, 1998, statutory deadline qualified as contract claims within the CFC's exclusive jurisdiction.[103] In considering the jurisdictional role of the two courts, the CFC adopted and applied much of the reasoning behind *PSEG*, asserting that the case had "rejected many of the key jurisdictional concepts that underlie the relevant D.C. Circuit cases."[104] Although *PSEG* focused only on whether the CFC could exercise jurisdiction over the contract claims, the CFC in *Nebraska Public Power* went further to establish that jurisdiction as exclusive in an attempt to resolve the two competing claims to jurisdiction over cases related to the Standard Contract.[105]

The Scope of Section 119 of the NWPA

In issuing the *Northern States* mandamus, the D.C. Circuit had invoked Section 119, which granted the U.S. courts of appeals exclusive jurisdiction over final agency action under Title I of the NWPA, as the basis for its exercise of jurisdiction. However, the Federal Circuit, reviewing the exercise of jurisdiction by the CFC, had limited the scope of Section 119, based on the provision's plain language, to only those claims relating to the establishment of a permanent repository for spent nuclear fuel.[106] In *Nebraska Public Power,* the CFC adopted the reasoning in *PSEG*, and applied it to the D.C. Circuit's initial exercise of jurisdiction in *Indiana Michigan*. The resulting conclusion was that *Indiana Michigan* involved "interpretations of contract provisions that have nothing to do with the creation of repositories of spent nuclear fuel," and therefore "plainly exceeded" the grant of jurisdiction to the D.C. Circuit under Section 119.[107]

Contrary to the D.C. Circuit's argument that the *Northern States* mandamus was issued pursuant to a breach of a statutory and regulatory obligation, the court added that the "essential character" of the actions brought by the nuclear utilities was contractual and therefore exclusively within the jurisdiction of the CFC.[108] The mere fact that DOE developed the Standard Contract through formal administrative rulemaking procedures was not sufficient to alter the nature of the claim from an action based on contract to an action based on statutory or regulatory interpretation.[109] In classifying the claims in *Indiana Michigan* and *Northern States* as contractual, the court emphasized the utilities' reliance on the Standard Contract, the asserted claim for breach of

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

[104] *Id*. at 662.

[105] *Id.* at 664-665 ("The decisions in *Indiana Michigan* and *Northern States* bounded across the [jurisdictional] line, thereby intruding on this court's jurisdiction.").

[106] *Id*. at 664-666.

[107] *Id*. at 664.

[108] *Id*. at 665.

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

contract, and the request for monetary damages.[110] As the "mandamus dispute in *Northern States* could be conceived as entirely contained within the terms of the contract" rather than a "regulation asserted to be in conflict with the NWPA," the D.C. Circuit had engaged in an interpretation of the Standard Contract that intruded on the CFC's exclusive jurisdiction.[111]

Waiver of Sovereign Immunity Under Section 702 of the APA

The CFC also held that the D.C. Circuit's decisions in *Indiana Michigan* and *Northern States* were not supported by a waiver of sovereign immunity.[112] Even if Section 119 had granted the D.C. Circuit jurisdiction over the NWPA contract claims, the grant of jurisdiction was not accompanied by any waiver of sovereign immunity that would allow the case to go forward. Federal courts do not infer waivers of sovereign immunity lightly, requiring that any such waiver be "unequivocally expressed" by Congress.[113] The mere grant of jurisdiction to a court, such as the grant found in Section 119, is not sufficient to constitute a waiver of sovereign immunity.[114] The required express waiver is generally characterized by a "specification of the remedy or relief that may be awarded against the U.S."[115] The court could find no express waiver anywhere in the NWPA.

With no express waiver in the NWPA, the D.C. Circuit had proceeded in *Indiana Michigan* as if the waiver derived from Section 702 of the Administrative Procedure Act (APA). Section 702 acts as a general waiver of sovereign immunity for claims against the U.S. that are based on agency action.[116] The CFC determined that any reliance on Section 702 was misplaced, as the APA general waiver applies only where there is "no other adequate remedy in a court."[117] Although the D.C. Circuit had taken the position that the CFC was unable to accord adequate relief to a plaintiff seeking equitable relief,[118] the Federal Circuit concluded that the Section 702 waiver was inapplicable under these circumstances because the nuclear utilities had an adequate remedy in the CFC under the Tucker Act.[119] The Federal Circuit, citing the U.S. Supreme Court, rejected the notion that the limitation on the available remedies made relief in the CFC "inadequate."[120] Any other conclusion, reasoned the court, would allow plaintiffs to circumvent the jurisdiction of the CFC simply by attaching a prayer for equitable relief to what was essentially a damages suit.

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[110] *Id*. at 665.

[111] *Id*. at 666.

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

[113] *Nebraska Power*, 73 Fed. Cl. at 666.

[114] *Id*.

[115] *Id*.

[116] 5 U.S.C. §702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof … The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.").

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

[118] Courts have construed the Tucker Act as waiving sovereign immunity only for claims for damages. The CFC, therefore, cannot grant a plaintiff equitable relief in these circumstances. *See, e.g*., Richardson v. Morris, 409 U.S. 464-65 (1973). Equitable relief includes non-monetary remedies such as a writ of mandamus.

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

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

With an alternate and adequate remedy available in the CFC, the necessary trigger for Section 702 had not been met. The court held, therefore, that absent a waiver of sovereign immunity under either Section 119 of the NWPA or Section 702 of the APA, the D.C. Circuit had improperly granted relief against the United States in *Indiana Michigan*.[121]

The court concluded that since the D.C. Circuit in *Indiana Michigan* had exceeded its jurisdiction without the support of a valid waiver of sovereign immunity, its decision was therefore void.[122] The mandamus issued in *Northern States*, which was predicated on the decision in *Indiana Michigan*, was, therefore, also void and could not preclude DOE from raising the unavoidable delay defense.[123] The court closed by ordering the parties to brief the issue of whether DOE's failure to commence disposal of SNF by the established deadline was excused by the "unavoidable delay" clause of the Standard Contract.[124]

The Federal Circuit

Nebraska Power appealed the CFC's decision to the Federal Circuit and the case was argued in December 2007. It was not until June 4, 2009, that the Federal Circuit answered, not with an opinion, but with an order for *en banc* rehearing before the entire Federal Circuit.[125] The order for *en banc* hearing included a request that the parties file supplemental briefs addressing whether the mandamus issued by the D.C. Circuit in *Northern States* precludes DOE from pleading the "unavoidable delay" defense to breach of contract claims currently pending before the CFC.[126] "If so," asked the court, "does the order exceed the jurisdiction of the District of Columbia Circuit?"[127]

On January 17, 2010, the Federal Circuit issued an 11-1 decision upholding the D.C. Circuit's exercise of jurisdiction in *Indiana Michigan* and *Northern States*, thereby affirming the D.C. Circuit mandamus prohibiting DOE's use of the "unavoidable delay" defense.[128] The *Nebraska Public Power* decision rejected all of the CFC's major jurisdictional determinations. The court held that (1) Section 119 of the NWPA had properly granted the D.C. Circuit jurisdiction over statutory claims arising under the act; (2) sovereign immunity was validly waived under the APA; and (3) the D.C. Circuit had not "improperly intruded" on the CFC's exclusive jurisdiction over contract interpretation.[129]

Jurisdiction Under Section 119

On appeal, the Federal Circuit interpreted the scope of Section 119 of the NWPA more broadly than had the CFC. Whereas the CFC determined that the provision only granted the federal

[121] *Id*. at 672-73.

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

[123] *Id*.

[124] *Id*. at 674.

[125] Nebraska Public Power Dist. v. U.S., 2009 U.S. App. LEXIS 12668 (Fed. Cir 2009).

[126] *Id*.

[127] *Id*.

[128] Nebraska Public Power Dist. v. U.S., 2010 U.S. App. LEXIS 643 (Fed. Cir 2010).

[129] *Id*. at 18-19.

appellate courts review of claims arising from Title I of the act—the title pertaining to the siting of a permanent repository—the Federal Circuit held that Section 119 also granted federal appellate courts jurisdiction over claims arising from the statutory deadline found in Title III.[130] The court looked to the legislative history of the NWPA to support its conclusion, noting that it was clear that the statutory deadline's "physical separation from the judicial review provision in section 119 [was] pure happenstance and in no way indicate[d] a congressional intent that review under the different subchapters be governed by different standards."[131] Accordingly, claims relating to DOE's failure to begin the acceptance of SNF by the statutory deadline of January 31, 1998, were included within the D.C. Circuit's jurisdiction under Section 119 of the NWPA.

Waiver of Sovereign Immunity Under the APA

The Federal Circuit further held that the APA did indeed constitute a valid waiver of sovereign immunity for claims arising from the statutory deadline of the NWPA.[132] In disagreeing with the CFC's interpretation of Section 704 of the APA, the court noted that the provision created two distinct categories of agency action that were subject to judicial review. The APA waived sovereign immunity and granted judicial review only to "agency action made reviewable by statute" *and* "final agency action for which there is no other adequate remedy in a court."[133] The court referred to the first category of action as "special statutory review," or agency action made reviewable by a "specific review-authorizing statute."[134] The court referred to the second category of action as "nonstatutory review."[135] There the APA acts as a waiver of sovereign immunity for a limited class of cases where no review of agency action has been granted by statute, but where absent review, the plaintiff can find "no other adequate remedy at law." The court, distinguishing between the two categories, reasoned that the limitation that there be "no other adequate remedy" applied only to nonstatutory review of agency action.[136] The court concluded that because Section 119 of the NWPA made DOE action specifically reviewable by the federal appellate courts, the fact that another adequate remedy may have been available in the CFC did not make the waiver of sovereign immunity invalid.[137]

CFC Exclusive Jurisdiction over Contract Interpretation

Finally, the Federal Circuit held that the D.C. Circuit's mandamus in *Northern States* did not encroach upon the CFC's exclusive jurisdiction over the adjudication and interpretation of contract rights. The court characterized the D.C. Circuit's action as an implementation of DOE's statutory duties under the NWPA rather than an interpretation of the language of the Standard

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[130] *Id*. at 20-31. The court added, that even were the scope of §119 ambiguous, "[w]here there is a question whether judicial review was meant to be in district courts or courts of appeals, that ambiguity is resolved in favor of court of appeals review." *Id*. at 24.

[131] *Id*. at 22 (citing General Electric Uranium Mgmt. Corp. v. U.S., 764 F.2d 896, 903 (D.C. Cir. 1985)).

[132] *Id.* at 31-41.

[133] 5 U.S.C. §704.

[134] *Nebraska Public Power*, 2010 U.S. App. Lexis at 33 ("the most natural reading of [§704] is that it relates to two categories of agency action.").

[135] *Id*.

[136] *Id*. ("[T]he 'adequate remedy at law' proviso applies only to nonstatutory review and not to special statutory review, such as the review at issue in this case.").

[137] *Id*.

Contract.[138] By prohibiting DOE's use of the "unavoidable delay" defense, the D.C. Circuit was utilizing the mandamus as a means to enforce DOE's statutory obligations as established in *Indiana Michigan*. The Federal Circuit concurred with the D.C. Circuit's view that it had "merely prohibited DOE from implementing an interpretation that would place it in violation of its duty under the NWPA to assume an unconditional obligation to begin disposal by January 31, 1998. The statutory duty ... is independent of any rights under the contract."[139] In short, the Federal Circuit concluded that in issuing its mandamus, the D.C. Circuit had been interpreting the NWPA and not the Standard Contract.

In overturning the CFC's decision, the Federal Circuit all but extinguished DOE's attempt to escape liability through the "unavoidable delay" clause of the Standard Contract.[140] In applying the Federal Circuit's decision, the CFC has generally abided by the *Northern States* mandamus and barred the government from asserting the "unavoidable delay" clause as an affirmative defense to liability.[141] As a result, litigation under the Standard Contract will continue, as it had prior to the CFC's decision in *Nebraska Public Power,* with a focus on measuring recoverable damages rather than establishing liability

Confusion as to the Scope of the Northern States *Mandamus*

The Federal Circuit recently attempted to clarify—while arguably narrowing—the scope of the *Northern States* mandamus in *Southern Nuclear Operating Co. v. U.S.*[142] In doing so, however, the court has triggered confusion and contradictory opinions in the CFC. The Federal Circuit held in *Southern Nuclear* that while the government continues to be prohibited from concluding that the lack of a repository represents an affirmative defense to liability under the Standard Contract, the mandamus *does not* preclude the government from raising the unavoidable delay clause before the CFC in the damages context.[143] In reaching this conclusion, the court noted that the *Nebraska Public Power* case "did not suggest that the District of Columbia Circuit's decision in any way foreclosed arguing in favor of the [unavoidable delay] defense in the Claims Court. Indeed, we considered the government's argument and held that … [the mandamus] was entitled to res judicata effect on the issue of liability but that it did not 'direct the implementation of any remedy.'"[144]

The *Southern Nuclear* decision appears to hold that the *Northern States* mandamus acts only to prevent the government from interpreting the Standard Contract and the unavoidable delay clause in a manner contrary to the agency's clear and unconditional statutory duty to collect nuclear

[138] *Id*. at 53 ("The mandamus order was issued pursuant to the D.C. Circuit's authority to construe the NWPA and to direct DOE to comply with its obligations under the statute. The order did not address any issue of contract breach.").

[139] *Id*. at 43.

[140] Although subject to appeal, the federal government did not petition the Supreme Court for review of the Federal Circuit's decision.

[141] *See, e.g.,* Entergy Nuclear Fitzpatrick v. U.S., 93 Fed Cl. 739 (2010) (granting a motion to strike the "unavoidable delays" defense); Portland General Elec. v. U.S., 100 Fed. Cl. 46 (2011)(granting a motion to strike the "unavoidable delays" defense).

[142] 637 F.3d 1297 (Fed. Cir 2011).

[143] *Id*. at 1306 ("The court's concern was that the agency itself would 'implement [an interpretation of the Standard Contract that excuse[d] its failure to perform,' not that the agency might make arguments in the Claims Court." (citing *Northern States*, 128 F.3d at 760)).

[144] *Id*.

waste as established by the D.C. Circuit. The mandamus does not, however, necessarily prevent the government from raising the unavoidable delay clause as a defense to the imposition of damages or a demand for a specific remedy.[145] This line of reasoning—which attempts to draw a distinction between liability and damages—was drawn from the concurrence in the Federal Circuit's *Nebraska Public Power* opinion in which the concurring judge stated: "Although I read the majority as establishing government liability, it remains open for the government to argue that the Unavoidable Delays clause bars a damage award (as opposed to some other contractual remedy such as restitution)."[146] While holding that the government could *argue* unavoidable delay in defense to damages, *Southern Nuclear* did not establish whether such a defense had merit. The effect of the ruling has been to reopen the debate over unavoidable delays.

Application of the Federal Circuit's *Southern Nuclear* opinion has not been uniform in the CFC. Indeed, various judges have reached contradictory opinions on the government's use of the unavoidable delay clause in defense to damages, and one judge rejected the *Southern Nuclear* opinion as inconsistent with the Federal Circuit's decision in *Nebraska Public Power*. In *Rochester Gas and Elec. Corp. v. U.S.*, for example, the CFC adopted the *Southern Nuclear* reasoning and held that although the government is "precluded from asserting the unavoidable delays clause as a defense to liability for breach of the standard contract," the government "may, however, assert the unavoidable delays clause in opposition to a demand for damages."[147] Although permitting the argument to be raised, the court did not reach the merits of the defense. In the subsequent case of *Portland General Elec. Co. v. U.S.*, the CFC appeared to impliedly accept the proposition set forth in *Southern Nuclear* that the government was not prohibited from raising the unavoidable delay argument in defense to damages, but the opinion ultimately determined that such an argument was without merit as the clause had no "independent application" to the "determination of damages."[148]

To the contrary, in *Entergy Nuclear Fitzpatrick v. U.S.*, Judge Edward Damich rejected the *Southern Nuclear* decision—determining that the Federal Circuit's decisions in *Southern Nuclear* and *Nebraska Public Power* were contradictory.[149] Whereas *Nebraska Public Power* had foreclosed the use of the unavoidable delay clause "not merely as a defense to liability but as a defense to damages for failing to meet its unconditional obligation," *Southern Nuclear* had "implicitly held that the government could have raised the unavoidable delays defense."[150] Accordingly, the two decisions could be reconciled only if *Southern Nuclear* was read "extremely narrowly."[151] The court then concluded that *Southern Nuclear* could not be read in such a manner, and thus found the "two decisions to be at odds."[152] Although noting its "unenviable position," the court determined *Nebraska Public Power* to be the "controlling precedent of the Federal Circuit" and held that the *Northern States* mandamus barred the use of the unavoidable delay clause as a defense to damages.[153] Recognizing the significance of the CFC's inability to reconcile *Nebraska*

[145] *Id*.

[146] *Nebraska Public Power*, 590 F.3d at 1377.

[147] 99 Fed. Cl. 369, 372 (2011).

[148] 100 Fed. Cl. 46, 51 (2011)(noting that "[t]he ruling of the Federal Circuit in *Southern Nuclear* is not to the contrary.").

[149] 2011 U.S. Claims LEXIS 2131 (Fed. Cl. 2011).

[150] *Id*. at 14, 26.

[151] *Id*. at 28.

[152] *Id*.

[153] *Id*. at 31.

Public Power and *Southern Nuclear*, Judge Damich certified the question for direct appeal to the Federal Circuit.[154]

Were the Federal Circuit to affirm the *Southern Nuclear* court's interpretation of the scope of the *Northern States* mandamus, it appears the government would be permitted to raise the unavoidable delay clause as a defense to certain damages. However, whether such a defense would be successful in actually deflecting damages remains unclear. The only court to actually consider the merits of the unavoidable delay clause as a defense to damages, rather than merely whether such a defense was barred by the *Northern States* mandamus and *Nebraska Public Power*, found the argument to be unsatisfactory.[155]

Future Contract Liability

The total costs to taxpayers for delays associated with performing on the Standard Contract are difficult to project, especially given the uncertainty regarding the future of the Yucca Mountain facility or any alternative permanent repository for SNF. However, absent a significant change in the direction of NWPA-related litigation, DOE predicts that damages stemming from partial breach of contract claims will measure close to $20.8 billion if the government is able to begin accepting SNF by 2020—an unlikely occurrence given the Administration's decision to terminate the Yucca Mountain project.[156] Approximately $500 million in additional legal damages will continue to build with each year beyond 2020 that DOE is unable to begin accepting SNF.[157] It is important to note that all paid legal damages are drawn from the DOJ Judgment Fund rather than the DOE budget. In addition, the Department of Justice, which has litigated the contract cases on behalf of DOE, has spent over $192 million on litigation-related expenses.[158] The nuclear utilities reportedly incur $5 million to $7 million in litigation costs in each individual case.[159]

In an attempt to curtail damages, DOE and DOJ have sought to reach settlement agreements with a number of individual nuclear utilities. As of December 2011, agreements have been entered into with nuclear utilities that operate 65 of the 118 nuclear facilities covered by the Standard Contract.[160] Under the settlements, contract parties submit annual reimbursement claims to DOE for any delay-related nuclear waste storage costs that they incurred during that year. As the

[154] *Id*. at 33-4.

[155] *See*, Portland General Elec. Co. v. U.S., 100 Fed. Cl. 46 (2011).

[156] Final Report to the Secretary of Energy, Blue Ribbon Commission on America's Nuclear Future, at 79 (January 26, 2012) *available at* http://brc.gov/sites/default/files/documents/brc_finalreport_jan2012.pdf. *See also*, *CBO Testimony*, at 7; Department of Energy, Agency Financial Report, FY2010, available at http://www.energy.gov/media/2010parAFR.pdf. This is not to say that the Yucca Mountain facility would have been completed by 2020 had the administration not sought to terminate the program. In 2008, DOE took the position that the facility could potentially be ready by 2020 if adequate funding was provided, which it was not, and if the Nuclear Regulatory Commission had granted the Construction Authorization "in the next three to four years." Statement of Edward Sproat, Director, Office of Civilian Radioactive Waste Management, Before the Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce, July 15, 2008.

[157] *CBO Testimony,* at 7.

[158] *See*, Statement of Michael F. Hertz, Deputy Assistant Attorney General, Civil Division, Department of Justice, Before the House Committee on the Budget, July 27, 2010.

[159] *CBO Testimony,* at 7. With at least 72 lawsuits filed against DOE, one could estimate that the nuclear utilities as a whole have expended over $400 million in litigation costs.

[160] *See*, CRS Report RL33461, *Civilian Nuclear Waste Disposal*, by (name redacted).

settlement agreements cover continuing damages, the affected nuclear utilities are able to submit annual claims directly to DOE rather than re-litigating ongoing damages in the federal courts. As of July 27, 2010, DOE had paid approximately $725 million pursuant to these settlements.[161]

The Department of Justice has also entered into broader discussions with the nuclear industry "to explore the possibility of reaching a standard settlement with a larger segment of the utilities whose claims are currently pending."[162] As most of the contentious legal questions involved with the Standard Contract have been resolved over the last decade, "the ultimate success of many types of claims is now more predictable to both the government and the utilities."[163] Rather than continue to re-litigate substantially similar claims, DOJ has suggested that establishing an administrative claims process would likely lead to a less expensive and more efficient resolution of the ongoing nuclear waste litigation. An administrative claims process would presumably decrease litigation related expenses for both DOJ and the nuclear utilities by allowing qualified plaintiffs to submit claims to an administrative tribunal for approval, rather than force the parties to litigate damages in federal court. The Blue Ribbon Commission on America's Nuclear Future recommended that the government continue to conclude these lawsuits both fairly and quickly "through settlement agreements or through another process, such as mediation or arbitration."[164]

Although problems related to the storage of SNF remain unresolved, the Obama Administration has pronounced a commitment to invest in domestic nuclear power. In his 2010 State of the Union address, the President advocated for creating new "clean energy jobs" by "building a new generation of safe, clean nuclear power plants in this country."[165] In a step toward implementing that vision, President Obama announced on February 16, 2010, the government approval of an $8.3 billion conditional loan guarantee to help finance the construction of two new nuclear reactors in the state of Georgia.[166] The proposed reactors would be the first to begin construction in the United States in more than 30 years. Reaffirming his commitment to nuclear power in his 2011 State of the Union address, President Obama called for nuclear power to be included in a national goal of generating 80% of U.S. electricity from "clean energy sources" by 2035.[167] In preparation for any new reactors, DOE has developed a new contract to govern waste disposal. Under the new provisions, DOE "would not be required to complete disposal of [SNF] until 20 years after the expiration of the [new reactor's] operating license and any extension thereto."[168] DOE predicts that any a contractual obligation to collect SNF under the new contracts would not "come into effect until the end of this century."[169]

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[161] *Id*.

[162] Statement of Michael F. Hertz, Deputy Assistant Attorney General, Civil Division, Department of Justice, Before the House Committee on the Budget, July 27, 2010 at 6.

[163] *Id*.

[164] Final Report to the Secretary of Energy, Blue Ribbon Commission on America's Nuclear Future, at 80 (January 26, 2012).

[165] Remarks by the President in State of the Union Address, January 27, 2010. Available at http://www.whitehouse.gov. The President again advocated for the continued development of nuclear power in his 2011 State of the Union address. Remarks by the President in State of the Union Address, January 25, 2011 ("By 2035, 80 percent of America's electricity will from clean energy sources. Some folks want wind and solar. Others want nuclear, clean coal and natural gas. To meet this goal, we will need them all…").

[166] Matthew Wald, *In bid to Revive Nuclear Power, U.S. Is Backing New Reactors*, N.Y. Times, February 17, 2010.

[167] The President made no specific reference to nuclear power in his 2012 State of the Union address.

[168] Statement of Dr. Kristina M. Johnson, Under Secretary of Energy, Department of Energy, Before the House Committee on the Budget, July 27, 2010 at 2.

[169] *Id*.

Defense Waste

In addition to the projected $20.8 billion in damages as a result of delays in collecting and disposing of commercial nuclear waste, the federal government also faces the prospect of additional liabilities[170] stemming from delays in collecting and disposing of defense-related nuclear waste. The Yucca Mountain facility was envisioned not only as the permanent home for SNF produced by commercial nuclear power plants, but also high-level waste produced as a result of weapons development activities and SNF produced as a result of the operation of nuclear powered submarines.[171] The majority of the nation's defense waste, including high level liquid waste produced by the original Manhattan Project, is currently stored at federal facilities located in the states of Washington, South Carolina, and Idaho. These states have entered into regulatory agreements with DOE detailing requirements for the eventual removal of this defense waste.[172] The Idaho Settlement Agreement, for example, mandates a transition to dry storage by 2023 and a waste removal deadline of 2035.[173] Under the current terms of the court-ordered agreement, if DOE fails to comply with the 2035 deadline, the state may impose penalties of up to $60,000 a day.[174] Accordingly, the federal government faces the prospect of significant future financial penalties, in addition to the estimated $16.2 billion in damages the government will incur as a result of the Standard Contract litigation.

Conclusion

Litigation related to the NWPA will undoubtedly continue. Whether defending breach of contract claims brought pursuant to the Standard Contract, or actions seeking equitable relief pursuant to the NWPA, the federal government will continue to encounter substantial legal costs in connection with its delay in disposing of the nation's SNF. In response to the impending litigation, the Department of Justice (DOJ) requested $11.4 million in its FY2011 budget specifically for the purpose of defending against NWPA related suits.[175] DOJ is seeking to add 10 new attorneys to its Civil Division in preparation for an anticipated 12 trials before the end of 2012.[176] As the government makes preparations for future legal disputes, both litigation expenses

[170] It should be noted that liabilities associated with the collection and storage of defense waste do not arise as a result of a breach of the Standard Contract. The tri-party regulatory agreements at issue create separate obligations.

[171] NWPA §8 ("[T]he President shall evaluate the use of disposal capacity at one or more repositories to be developed…for the disposal of high-level radioactive waste resulting from atomic energy defense activities.") President Reagan determined in 1985 that the repository would be used for both civilian and defense waste. Memorandum from President Ronald Reagan to John S. Harrington, Secretary of Energy (April 30, 1985).

[172] For example, the tri-party agreement with Washington State, known as the Hanford Federal Facility Agreement and Consent Order was entered into by DOE, EPA, and the Washington Department of Ecology. Available at http://www.hanford.gov/?page=81.

[173] The Idaho Agreement and Consent Order was entered into by DOE, the State of Idaho and the U.S. Navy. The Idaho National Laboratory is home to waste generated by the Naval Nuclear Propulsion Program. Settlement Agreement available at https://idahocleanupproject.com/Portals/0/documents/1995SettlementAgreement.pdf

[174] *Id.*

[175] Department of Justice FY2011 Budget Request for General Legal Activities, Civil Division. Available at http://www.justice.gov.

[176] *Id. See also*, Statement of Michael F. Hertz, Deputy Assistant Attorney General, Department of Justice, Before the Blue Ribbon Commission on America's Nuclear Future, February 2, 2011.

and damages awards will continue to build as there seems to be no prospect for a completed facility capable of storing SNF anywhere on the horizon.[177]

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[177] For a summary of proposed legislation relating to the nuclear waste disposal see CRS Report RL33461, *Civilian Nuclear Waste Disposal*, by (name redacted).