

the Standard Contract similarly indicates that the Department's obligations are conditioned upon the existence of an operational storage or disposal facility constructed under the Act:

Whereas, the DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel.

10 CFR 961.11, Preamble. The Standard Contract, like the Act, thus predicated DOE's obligation on the development of a facility under the Act.

This reading of the Standard Contract was confirmed by a statement of former Secretary Donald Hodel in 1984, the year following the promulgation of the Standard Contract. In a written response to a question posed in a letter from Senator Bennett Johnston, Secretary Hodel stated:

The Department is authorized to implement the Act through contractual commitments. To this end, the Department plans to incorporate into its contracts provisions which specify the minimum amount of spent fuel and waste which the Department will be obligated to accept, not later than January 31, 1998. Since these contracts have not yet been modified, it would be premature for the Department to speculate on particulars that might ultimately be incorporated in any or all of the contracts. However, it is my intention that this commitment in the Contracts, together with the overall thrust of the Act, will create an obligation for the Department to accept spent fuel in 1998 whether or not a repository is in operation.

Although former Secretary Hodel stated that he intended for DOE to assume an unconditional obligation to begin accepting SNF in 1998, he also recognized that the terms of the Standard Contract would have to be changed in order to create such an unconditional obligation. However, the Department never undertook a rulemaking to modify the Standard Contract. Thus, this essentially contemporaneous construction of the Standard Contract reinforces the conclusion that the Contract did not and does not create, or recognize, an unconditional obligation.⁷

⁷One commenter on the NOI criticized DOE's denial of an obligation to begin accepting SNF from domestic utilities on the ground that DOE has accepted "foreign SNF" for storage at its own facilities. However, the authority for acceptance of foreign SNF arises under the Atomic Energy Act, as amended, not under the Nuclear Waste Policy Act. The foreign fuel in question, which is not commercial SNF from domestic utilities but much smaller fuel elements from research reactors, contains highly enriched uranium that must be controlled for nuclear nonproliferation purposes. It

B. Interim Storage Authority

The Department recognizes that some utilities are running out of on-site storage capacity and will have to provide additional storage capacity until a repository or interim storage facility is available. In response to the NOI, a number of comments stated that DOE should provide interim storage. However, DOE has concluded that it has no authority under the Act to provide interim storage in present circumstances.⁸

Interim storage by DOE was contemplated by the Act in only two situations, neither of which currently applies. Under the Act, DOE had authority to offer a limited interim storage option. See 42 U.S.C. 10156. However, that authority has, by its express terms, expired. Under the Act, DOE also has authority to provide for interim storage in an MRS. That authority also is inapplicable, however, because the Act ties construction of an MRS to the schedule for development of a repository. See 42 U.S.C. 10165, 10168. Because these are the only interim storage authorities provided by the Act, and because the Act expressly forbids use of the Nuclear Waste Fund to construct or expand any facility without express congressional authorization (42 U.S.C. 10222(d)), DOE lacks authority under the Act to provide interim storage services under present circumstances.

C. Use of Nuclear Waste Funds to Offset Financial Burdens to Utilities of Storing Nuclear Waste Beyond 1998

Section 302(d) of the Act states that the Nuclear Waste Fund may be used only for radioactive waste disposal activities under titles I and II of the Act, including a number of enumerated activities.⁹ 42 U.S.C. 10222(d). Paying for the costs of on-site storage is not enumerated in that provision.

Although the Act thus does not provide for use of the Nuclear Waste Fund to help utilities defray costs of on-site storage, if the Act were construed

is because of these nonproliferation concerns that the United States government has in some circumstances received foreign SNF under the Atomic Energy Act in order to remove it from international commerce. No Nuclear Waste Fund monies are (or could be) used for this storage activity.

⁸DOE's multi-purpose canister program is part of DOE's overall transportation strategy for disposal of SNF, and the use of Nuclear Waste Fund monies to support this work is authorized by Section 302(d)(4) of the Act, which provides that the Secretary may make expenditures from the Nuclear Waste Fund for any costs incurred in connection with the transportation of SNF.

⁹Section 302(d) further provides that no funds may be spent on construction or expansion of any facility unless expressly authorized.

unconditionally to require DOE to begin providing disposal services in January of 1998 notwithstanding DOE's inability to do so, utilities might be entitled to financial relief under the terms of the Standard Contract. Since the Act itself does not address the consequences of a failure by DOE to perform its obligations under the Act, it has fallen to DOE as the administering agency to fill the gap left by Congress. DOE has done so through the Standard Contract, which expressly addresses the situation in which performance by either party to the contract is delayed.

Under Article IX, entitled "DELAYS," the Standard Contract provides that neither party shall be liable for damages in the case of unavoidable delay and that the parties will adjust their schedules, as appropriate, to accommodate such delay. Art. IX, ¶A. In the case of an avoidable delay, however, the Standard Contract provides that 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." Art. IX, ¶B. Were DOE deemed to have an unconditional obligation to begin providing disposal services in 1998, we have concluded that the Delays Clause would be applicable in the event of a failure to perform. Were the Delays Clause to be invoked, Article XVI of the Standard Contract establishes the process for resolving disputed questions of fact (e.g., whether a delay has occurred and, if so, whether it was avoidable or unavoidable). Article XVI provides for initial resolution of disputed facts by the designated Contracting Officer, with a right of appeal to the DOE Board of Contract Appeals. In sum, it is the Department's view that, were the Act to be construed to impose an unconditional obligation to begin to provide disposal services in 1998, the appropriate remedy would be the contractual remedy under the Delays Clause and Article XVI.

D. Availability of Alternative Dispute Resolution Procedures

The Department believes that important public and private interests are implicated by the need for orderly financial and technical planning with respect to the Department's inability to accept SNF in 1998. There are also equitable considerations that may argue for some form of relief to help offset costs incurred as a result of the Department's inability to begin acceptance of SNF in 1998. The Department recognizes that these equitable and public interest considerations may be better addressed