

## Nuclear Waste Fee to Be Suspended Indefinitely

*Robert Nordhaus, Michael McBride and Athena Kennedy*

On November 19, 2013, the U.S. Court of Appeals for the D.C. Circuit (“D.C. Circuit” or “Court”) ordered the Secretary of the Department of Energy (“Secretary”) to suspend collecting annual fees for nuclear waste disposal from nuclear power plant operators until the Department of Energy (“DOE”) has conducted a legally adequate fee assessment. *Nat’l Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy*, No. 11-1066 (D.C. Cir. Nov. 19, 2013). This is just the latest development in the drawn-out saga of Yucca Mountain-related litigation, but one that has important implications for the nuclear waste program.

### BACKGROUND

In the Nuclear Waste Policy Act of 1982 (“NWPA”), Congress made DOE responsible for constructing and operating a permanent repository for spent nuclear fuel, and made the Nuclear Regulatory Commission (“NRC”) responsible for licensing and supervising its construction. Congress subsequently chose Yucca Mountain as the site for the repository. To fund the development, licensing, construction, and operation of the repository, DOE was given the authority to collect annual fees from nuclear power plant operators. Initially, that fee was set at one mill (one-tenth of one cent) for each kilowatt hour generated and sold from nuclear power plants. Section 302 of the NWPA requires DOE to annually review the fee to determine whether it will provide sufficient revenues to offset the projected cost of the disposal program (each an annual “Determination”). To date, DOE has never proposed a change to the fee.

In 2011, the National Association of Regulatory Utility Commissioners (“NARUC”) challenged the adequacy of DOE’s 2010 Determination before the D.C. Circuit. In June 2012, the Court held that DOE failed to conduct a sufficient statutory analysis in making the 2010 Determination, in part because it relied on the 2008 Determination’s cost calculations for the Yucca Mountain Project, even though DOE had since determined the Yucca Mountain Project to be “unworkable” and effectively terminated its program to obtain a license for the repository. The Court remanded the 2010 Determination to the Secretary with instructions to conduct a new fee Determination within six months. *Nat’l Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy*, 680 F.3d 819 (D.C. Cir. 2012). Upon completion of DOE’s revised Determination, the Panel reopened the proceedings in February of this year, at the request of Petitioner NARUC.

### NOVEMBER 19<sup>TH</sup> DECISION

The D.C. Circuit held that once again DOE failed to conduct a sufficient analysis to permit it to conclude that the annual fee imposed on power plant operators is adequate. The Court found a multitude of problems with the Secretary’s defenses of the nuclear waste fee at its current levels, and it did not hold back in showing its disapproval.



The Court first took issue with what it termed the Secretary’s “non determination.” In the revised Determination, the Secretary estimated that the cost for disposal could range anywhere between a \$2 trillion deficit to a \$4.9 trillion surplus based on the 1 mill fee, and then claimed that the range was so great DOE could not determine whether the level of the fee was inadequate or excessive. The D.C. Circuit found this enormous range to be “absolutely useless as an analytical technique” and called it “razzle dazzle.”

The Court further rejected DOE’s revised Determination because it is based on assumptions that are directly contrary to law. “Most glaring is the conflict between the statutory requirement that sites other than Yucca Mountain cannot even be considered as an alternative to Yucca Mountain..., and the ‘strategy’s’ assumption that whatever site is chosen, it will not be Yucca Mountain.” The Court held that “to proceed on the premise of a wholesale reversal of a statutory scheme” is “flatly unreasonable.”

Unlike the prior decision in this case, the Court denied DOE’s request to remand the decision for additional analysis. The Court stated that “the Secretary’s position is so obviously disingenuous that we have no confidence that another remand would serve any purpose.” The Court ordered the Secretary to notify Congress (in accordance with the NWPA procedure) that the fee will be set at zero. Once the Court’s order takes effect (after any rehearing petitions are disposed of) and a 90-day continuous session notice period has expired, the suspension will go into effect, and will remain in effect until the Secretary is able to conduct a legally adequate fee assessment or Congress revives the Yucca Mountain Project or enacts an alternative waste management plan.

### RELATED CONGRESSIONAL ACTIONS

S. 1240, the nuclear waste storage and disposal legislation that has been introduced by Senators Wyden, Murkowski, Feinstein, and Alexander to implement in substantial part the various recommendations in the 2012 Final Report of the Blue Ribbon Commission on America’s Nuclear Future (to which Van Ness Feldman served as outside counsel), has not been the subject of a Senate Energy Committee “markup” to date. Because of the Court’s ruling, however, there is now a greater likelihood of such a markup, and it appears possible that the Committee will mark up the bill in the next few months to get it reported to the Senate floor. The House, on the other hand, continues to press forward with the revival of the Yucca Mountain Project.

### RECENT NRC ACTIONS

The NRC decided on Monday, November 18, 2013 to direct its Staff to complete the long-delayed Safety Evaluation Report (“SER”) for the Yucca Mountain Project, which is required for further NRC licensing proceedings, discovery, and eventual hearings. DOE was “requested” to complete a Supplemental Environmental Impact Statement (“SEIS”) for the Project. The SER should be done in about 12 months; it is not clear what the timeline would be at DOE for completion of the SEIS. Once the SER and SEIS are completed, the NRC licensing proceeding will be able to move to the discovery, contention disposition, and hearing stages, but only if there are appropriations available to fund those stages.

Meanwhile, the Court’s decision may make it even more difficult for the NRC to conclude that there is a basis for



the NRC’s “waste confidence” policy, or for the D.C. Circuit to uphold whatever waste confidence policy the NRC adopts following the remand by the D.C. Circuit in June 2012. The waste confidence policy is a rulemaking that embodies the NRC’s conclusion that it has sufficient confidence that spent nuclear fuel generated by commercial nuclear reactors can be stored on-site and eventually be disposed of safely. The policy is necessary for the continued licensing of commercial reactors, including, ultimately, the renewal of existing reactor licenses. The Court’s suspension of the nuclear waste fee on grounds that there is no national nuclear-waste policy or disposal program at the present time has serious implications for the certain judicial review of the NRC’s revised waste confidence policy once it is adopted by the NRC, probably in late 2014.

### IMPLICATIONS

It would appear exceedingly difficult for Congress to take either action mentioned by the Court as justifying continuing to collect the fee – to fund the Yucca Mountain Project or to fund an alternative approach for disposal of nuclear waste. Congress has been at an impasse for years over the funding the Yucca Mountain Project. That continuing impasse means that the fee likely will be suspended sometime in the first half of 2014 and remain suspended indefinitely, absent further action by the courts or Congress.

The D.C. Circuit’s latest decision makes it crystal clear that the Court’s view is that the federal government has no substantial nuclear waste storage and disposal program at the present time. At the same time, the federal government continues to accrue liability for nuclear waste storage costs being incurred by reactor operators at the rate of approximately \$500 million/year, with a cumulative amount of liability of approximately \$20 billion by 2020. Therefore, the D.C. Circuit’s nuclear waste-related decisions, including this most recent decision involving collection of NWPA fees, reinforce the need for the Administration, Congress, and the NRC to take action to resolve the impasse over the Yucca Mountain Project and other issues concerning nuclear waste. If, however, substantial progress is not made, the D.C. Circuit’s decisions could have negative implications for future licensing of commercial nuclear reactors.

### FOR MORE INFORMATION

Van Ness Feldman, which served as outside counsel to the Blue Ribbon Commission on America’s Nuclear Future, closely monitors Yucca Mountain-related litigation, DOE and NRC actions on nuclear matters, and Congressional activities related to nuclear policy. If you have any questions, please contact [Robert Nordhaus \(rrn@vnf.com\)](mailto:rrn@vnf.com), [Michael McBride \(mfm@vnf.com\)](mailto:mfm@vnf.com), or [Lisa Epifani \(lee@vnf.com\)](mailto:lee@vnf.com).

---

© 2013 Van Ness Feldman, LLP. All Rights Reserved.

This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.