



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

**INMM-NIC 32<sup>nd</sup> Spent Fuel Management Seminar  
Washington, DC  
January 11, 2017**

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# Introduction and Overview

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- The Blue Ribbon Commission on America's Nuclear Future proposed a way forward on nuclear waste issues, but without addressing the fate of the Yucca Mountain Project.
- No Congressional action since - YM Project impasse.
- House – no Shimkus bill now – but will he bend on storage? Conaway storage bill (H.R. 3643) introduced. Senate “Gang of 4” bill – S. 854 – but was something of a “placeholder,” in that Senator sponsors may not have been in agreement on all aspects. S. 1825 introduced by NV Senators, re: YM Project.
- So, Congressional action on consolidated storage, new entity, resumption of fee, and funding for YM Project, all could be on the table in 2017-18.

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

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

## Background -- Continued

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

## BPC Nuclear Waste Initiative – Phase 2

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- In late 2015, BPC inaugurated Phase 2 of the Nuclear Waste Initiative, Advisory Council held its first meeting.
- Final Report for Phase 2 mostly about consent-based siting. One dispute – whether to repeal/amend AEA’s preemption provisions. Environmental groups support repeal/amendment, others oppose.
- BPC’s second Phase now complete, Final Report issued Sept. 27.
- Co-Chairs of Advisory Council, which is broad-based in membership, were former Democratic Congressman Norm Dicks (my colleague) and former Republican Governor Sonny Perdue of Georgia.

## Status of YM Project

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- Current belief in Washington is that YM Project licensing proceeding will be funded by Congress in 2017.
- Will the new Administration actively promote the Project, including in the NRC licensing proceedings? The belief is that it will.
- But – regardless -- Administration must appear at the NRC if proceeding resumes.
- Never been a reluctant applicant for any NRC license, so it will be crucial if Administration supports YM Project.
- NRC may allow some time for DOE to get (re)organized, rule on some legal issues in the interim, but everyone involved is getting older, so the pressure will be on.

## Storage Facilities?

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- WCS filed an application at NRC in April for spent fuel storage in western TX, at its existing low-level waste site.
- Various anti-nuclear groups have challenged the sufficiency of the application, even for docketing, raising the legal title issue, and whether, because the NWPA allegedly does not permit DOE to take title, the application cannot proceed.
- Legal issue not likely to prevent docketing.
- Holtec to file NRC application for NM/Eddy-Lea site (near WIPP) in 2017, apparently.
- Other States – including perhaps Wyoming, are considering hosting interim storage facilities.

## Storage Facilities (Cont'd)

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- NM also could end up being considered for a repository, at least for defense-only waste. (President Obama reversed President Reagan's determination that a defense-only repository was not necessary. Might President Trump reverse President Obama's determination?)
- Is there support for a defense-only repository, especially if it delays transfer of nuclear waste?
- Politically, that may become a tricky question.

## ”Continued Storage Rule” Litigation

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

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

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

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

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

## Yucca Mountain Case (Cont'd)

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

## Yucca Mountain Case (Cont'd)

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

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

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- NRC (1) completed the SER and the SEIS and (2) made documents available on public LSN relied on by NRC Staff.
- Court will not micro-manage the NRC proceedings.
- Not clear what NRC will now do after SER and SEIS are completed, LSN documents made public. May continue one or two rulemaking proceedings with remaining money.
- Could have a preliminary ASLB hearing with parties with very limited funds.
- Commissioners previously split 2-2 on whether Congress should appropriate additional funds; 2 Democrats attribute position to DOE being a reluctant applicant.
- Never has been a reluctant applicant in NRC licensing.

## DOE Actions/Policy

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- In Jan, 2015, BRC's John Kotek replaced retiring Pete Lyons as Ass't Secretary for Nuclear Energy; John hired Tim Frazier and Mary Woollen of the BRC Staff, among others. John has a team working on storage issues.
- Among them are work on consent-based siting processes and discussions with stakeholders.
- Secretary Moniz made nuclear waste announcement at BPC on March 24, 2015, which put BPC in the center of the discussions about nuclear waste issues.
- President Obama changed Reagan policy on "de-commingling" so as to permit a second repository.

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

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

## DOE Actions/Policy (Cont'd)

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

## Legislative Possibilities

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- S. 854 BRC-based (in part). New gov't agency (not Fed Corp), fee resumes, storage and disposal, YM Project application “grandfathered” from consent-based siting.
- Lead sponsor is Lamar Alexander (R. TN). Also, Energy Chairman Lisa Murkowski (I., Alaska), Ranking Member is Maria Cantwell (D., WA), and key Appropriations Ranking Member Diane Feinstein (D., CA).
- Harry Reid (D. NV) has retired, so he will not be able to block YM funding. Majority Leader is still Mitch McConnell (R. KY), Chuck Schumer (D. NY) is Minority Leader.
- Senator Heller may not be able to block YM funding.
- Sen. Feinstein tried to fund pilot interim storage site.

## Legislative Issues

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- S. 854 is identical to prior bills. Issues:
- Include Yucca Mountain in consent-based process? S. 1825 may be re-introduced by Sen. Heller.
- Interim storage and disposal – dispute between House and Senate. Draft House bill -- storage or just disposal?
- More than one repository?
- More than one interim storage facility?
- Utilities' right to continue to pursue damage claims?
- Who negotiates candidate sites? DOE? Others (such as WCS/Texas, New Mexico entities)?
- Meanwhile, H. 3643 introduced by to promote (WCS) consolidated storage facility in Texas.

## Legislative Scenarios

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- What happens if or when:
- With Senator Reid having left the Senate, will a Republican Senate pass a bill with Yucca Mountain funding? Presumably (but concerned about Sen. Heller).
- In the past, NRC Commissioners split 2-2 on YM Project funding – if NRC gets more money, will it resume? (Yes.)
- And what would DOE do? Now, or next Administration?
- Sens. Murkowski, Alexander remain as Chairmen in 2017?
- Yucca Mountain may go through, in appropriations for “infrastructure” or otherwise.
- Meanwhile, might the House opt to negotiate with Senate on something other than “Yucca Mountain or else”?

## Nuclear Energy Institute’s “Legislative Principles for Nuclear Waste Management Reform (July 2015)”

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- **NEI’s “Legislative Principles for Nuclear Waste Management Reform (July 2015):”**
- The Nuclear Energy Institute advocates for legislative reform to create a sustainable, integrated program for federal government management of the Department of Energy’s (DOE) high-level radioactive waste and used nuclear fuel from nuclear power plants. The industry supports an integrated strategy consisting of the following elements:
  - A new management and disposal organization dedicated solely to executing a high-level radioactive waste management program with the authority and resources to succeed.

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

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- Access to the Nuclear Waste Fund (NWF) for the intended purpose, without reliance on the appropriations process, but with appropriate congressional oversight.
- The Nuclear Waste Fund fee shall not be reinstated unless (1) the annual expenses for the program's ongoing projects exceed the annual investment income on the NWF and (2) the projected life-cycle cost demonstrates that the fee must be reinstated to achieve full cost recovery over the life of the program.
- Completion of the Nuclear Regulatory Commission's (NRC) review of the Yucca Mountain repository license application, followed by construction and operation of the repository.

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

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- A consolidated storage facility for used nuclear fuel and DOE high-level radioactive waste in a willing host community and state made available only after the NRC has issued a final decision on the Yucca Mountain repository license application. Reasonable expenditures from the Nuclear Waste Fund may be made to develop, construct and operate the facility.
- Used fuel from shutdown commercial reactor sites without an operating reactor should have priority when shipping commercial used fuel to either a storage facility or Yucca Mountain.

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

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- Communities and states hosting the Yucca Mountain repository and/or consolidated storage facilities shall be eligible for benefits. The Nuclear Waste Fund can be used for these benefits if they are reasonable and do not result in an excessive increase in overall program costs.
- Standard contract holders should not be required to waive their right to recover damages or settle claims resulting from DOE's breach of contract as a condition of the federal government accepting used nuclear fuel for consolidated storage or permanent disposal.
- The industry will fulfill its one-time fee obligations consistent with the provisions in the Nuclear Waste Policy Act.

## NEI's "Legislative Principles" (Cont'd) and Reactions Thereto

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- A legislative determination that, for the period after the licensed term for reactor operation until removal for disposal, no consideration of environmental impacts of used nuclear fuel storage shall be required by the NRC in connection with any reactor licensing.
- When Principles were released, Sens. Murkowski, Feinstein, and Alexander were not pleased, and cancelled the Committee hearing on nuclear waste scheduled.
- NEI later modified its legislative principles to contend that storage and Yucca Mountain should be pursued simultaneously. Senator Reid blasted NEI for that.

## Legislative, Administration Picture

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- Not clear whether Senate or House has the lead now.
- Sen. Feinstein said she will not support nuclear appropriations for new projects w/o action on waste.
- Senator Feinstein presumably will maintain that position.
- It is not clear where new Administration will be on nuclear energy. Republican platform was “all of the above” but not particularly focused on nuclear energy.
- Democrats may support nuclear as part of climate change approach, Republicans likely to support as they have historically.
- But electricity markets are causing nuclear (and other baseload) plant retirements.

## Status of Standard Contract Litigation

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- At the end of FY 2014, NWF balance was \$32.9 billion (“Civilian Nuclear Waste Disposal,” CRS 7-5700, 8/5/15).
- Through FY 2014, DOE payments were \$4.5 billion; total liability estimated to be \$27.1 billion (incl. \$4.5 billion).
- However, required acceptance rate (per Fed. Cir.) is 2,650 MTHM/year, which was (is?) higher than the basis for the DOE settlement estimates.
- Liabilities increase by (est.) \$500 million/year.
- NWF balance was growing approx. \$2 billion/year with fees collected, \$1.25 billion without fees collected.
- Before suspension of fee, net government cash flow of \$250 million/year impeded resolution. Different now?

# Status of Standard Contract Litigation (Cont'd)

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- Settlements in 33 lawsuits as of end of FY2014, representing 82% of nuclear-generated electricity; another 19 cases were pending.
- Cases increasingly are settling, on similar terms.
- Settlement terms do not require re-filing every six years to stop the running of the Statute of Limitations; instead, utilities submit damage claims to DOE for any delay-related storage costs. If amounts disputed, arbitration to resolve.
- But resolution of the cases does not keep the government's liability from growing, which concerns Congress, and is a factor in pushing legislation.



Thank you! For more information please contact:

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