

TO: Blue Ribbon Commission on America's Nuclear Future

FROM: Van Ness Feldman, P.C.

DATE: July 29, 2011
REVISED October 11, 2011

RE: Legal Analysis of Commission Recommendations for Near-Term Actions

At the request of the staff to the Blue Ribbon Commission on America's Nuclear Future ("BRC"), we have reviewed whether certain recommendations in the BRC's July 29, 2011 Draft Report respecting near-term actions by the Department of Energy ("DOE") or other officers or agencies in the Executive Branch can be implemented under existing law. These recommendations relate to:

- (1) Initial steps to site, license and construct consolidated interim storage facilities for spent nuclear fuel ("spent fuel");
- (2) Changing the order in which DOE accepts spent fuel from commercial nuclear reactor licenses (the "queue") under DOE's Standard Contract;¹ and
- (3) Changing the timing and method of payment of the nuclear waste fee by licensees.

We conclude in Sections I-III of this memorandum that these recommendations can be implemented under the existing provisions of the Nuclear Waste Policy Act of 1982 ("NWPA"). We also conclude that the BRC's recommendation respecting modifying the queue for spent fuel from decommissioned reactors is consistent with the provisions of the Standard Contract.²

Section IV of this memorandum examines the list of near-term action recommendations provided in Chapter 12 of the Draft Report. The recommendations that are directed at DOE can be implemented using funds from the Nuclear Waste Fund ("NWF"), as long as the recommendation fits within the scope of Section 302(d) of the NWPA and the requisite appropriation is provided by Congress.

¹ Standard Contract for Disposal of Spent Nuclear Fuel and for High Level Radioactive Waste, 10 C.F.R. § 961.11 (2011) ("Standard Contract").

² Most of the provisions of the NWPA and Standard Contract we discuss apply to high-level radioactive waste ("HLW") as well as spent fuel. For simplicity of presentation, we discuss only spent fuel but our conclusions respecting spent fuel in general apply to HLW also.

Section V of this memorandum reviews the federal government's authority to accept spent fuel from foreign commercial reactors. This concept was raised in Chapter 11 of the Draft Report under the subsection on multilateral / multi-national fuel cycle options.

I. CONSOLIDATED INTERIM STORAGE

A. Introduction

The BRC staff has asked us to address the statutory authority of DOE to provide consolidated interim storage of commercial spent fuel. In this section of our memorandum, we address the extent of DOE's authority under the NWPA³ to investigate, site, develop, license, construct, fund, and operate one or more consolidated interim storage facilities, and whether the BRC's recommendations for near-term action respecting consolidated interim storage can be implemented under existing law.

B. Recommendations of Draft Report

The BRC makes the following recommendations respecting near-term actions to initiate work on consolidated interim storage:

- “Work toward a consolidated storage facility can begin immediately under the existing provisions of the Nuclear Waste Policy Act, which authorize the federal government to site and design a monitored retrievable storage (MRS) facility and obtain construction authorization. Further legislative action would not be required until prior to designation of a MRS facility site (and potentially not until the construction phase), at which time Congress would need to amend the NWPA to allow DOE to go forward independent of the status of a permanent repository.”⁴
- “[I]t is important to reiterate an earlier point: that sufficient authority already exists under the NWPA to begin laying the groundwork for consolidated storage without further delay, assuming Congress makes appropriations available for this purpose. Specific steps that DOE could take in the near term include performing the systems analyses and design studies needed to develop a conceptual design for a highly flexible, initial federal interim spent fuel storage facility, assembling information that would be helpful to the siting process for such a facility, and working with nuclear utilities, the nuclear industry, and other stakeholders to promote the standardization of dry cask storage systems with an eye to facilitating later transport and consolidation in centralized storage and/or permanent disposal facilities.”⁵

³ 42 U.S.C. § 10101, *et seq.* (2006).

⁴ Draft Report, Sec. 5.2.2, pp. 41-42.

⁵ Draft Report, Sec. 5.3, p. 48.

C. *Authorities Under Existing Law*

In 1982, Congress enacted the NWSA to address the issue of nuclear waste. The NWSA created the current structure for nuclear waste disposal in the United States by directing DOE to create a permanent repository for spent fuel and high-level waste (“HLW”) using funds derived from a 1 mil/kWh fee on civilian nuclear power generation, to be paid into the NWF. In addition to authorizing a permanent geologic repository at a site that was later identified as Yucca Mountain, the NWSA provided two main avenues for DOE to provide temporary interim storage for spent fuel.

Subtitle B of Title I of the NWSA established a limited interim storage program. Section 135 authorized DOE to provide up to 1,900 metric tons of interim storage of commercial spent fuel under certain restricted conditions.⁶ Section 136, however, limited DOE’s authority to enter into contracts for such interim storage to the period between January 7, 1983, and January 1, 1990.⁷ Accordingly, this authority expired in 1990.

Under Subtitle C of Title I of the NWSA, DOE has the authority to site, construct and operate a Monitored Retrievable Storage (“MRS”) facility.⁸ The MRS facility could serve as the kind of consolidated interim storage facility contemplated by the BRC. It would accommodate spent fuel and HLW from civilian activities, but, in contrast to a permanent repository, the MRS facility would be designed to allow for continuous monitoring, management and retrieval of the materials pending further processing or disposal.⁹ Authority to proceed with construction and expansion of the MRS facility is linked to progress on licensing and construction of a permanent repository.¹⁰

Pursuant to the 1987 amendments to the NWSA, following issuance of the Report of the MRS Review Commission described in the statute, DOE was authorized (but not required) to begin a site selection process for one MRS facility by conducting “a survey and evaluation of potentially suitable sites. . .”¹¹ As the BRC has noted, there are many activities that DOE could pursue in advance of site selection, including “performing the systems analyses and design studies needed to develop a conceptual design for a highly flexible, initial federal interim spent fuel storage facility, assembling information that would be helpful to the siting process for such a facility, and working with nuclear utilities, the nuclear industry, and other stakeholders to promote the standardization of dry cask storage systems. . .”¹²

However, there may be questions as to whether DOE can formally designate an MRS site without further legislation.¹³ Under Subtitle C, DOE is barred from selecting a site for an MRS

⁶ NWSA § 135, 42 U.S.C. § 10155.

⁷ NWSA § 136, 42 U.S.C. § 10156.

⁸ Authority to site, construct and operate a MRS facility under Section 141 of the NWSA expired when, by June 1, 1985, the Secretary of Energy had not submitted a proposal to Congress. However, DOE still has authority to site an MRS facility under Sections 142-149 of the NWSA, 42 U.S.C. §§ 10162-69.

⁹ NWSA § 141(b)(1)(A)-(D), 42 U.S.C. § 10161(b)(1)(A)-(D).

¹⁰ NWSA § 148(d), 42 U.S.C. § 10168(d).

¹¹ NWSA § 144, 42 U.S.C. § 10164. The MRS Review Commission Report was issued on November 1, 1989.

¹² Draft Report, Sec. 5.3, p. 48.

¹³ Draft Report, Sec. 5.2.2, p. 43-44.

facility until the Secretary of Energy (“Secretary”) has made a recommendation to the President for a site for a permanent geologic repository.¹⁴ Secretary Abraham recommended Yucca Mountain as the site to President Bush in 2002, and President Bush approved. However, in 2010, Secretary Chu announced the termination of the Yucca Mountain Project, and sought leave from the NRC to withdraw the Yucca Mountain Project license application. While DOE has been careful to insist its decision to stop work on the Yucca Mountain Project is not based on a finding that the site is not suitable, DOE’s termination of the Yucca Mountain Project raises the question of whether the Secretary’s 2002 recommendation that the President approved the Yucca Mountain site for development as a repository is still in effect. That question is likely to be litigated by opponents of whatever MRS site may be selected.

If DOE asserts, and the courts agree, that the 2002 DOE recommendation is still in effect, the Secretary could recommend to the President a site for one MRS facility. State and affected Tribes’ role in the siting and development the MRS facility is similar to that for siting and development of a permanent geologic repository.¹⁵ Under Sections 143-149 of the NWPA, DOE is required to provide notice of at least six months to the Governor and legislature of a State in which an MRS facility is planned, or to the governing body of an affected Tribe where an MRS facility is planned and promptly notifying the appropriate State or Tribe when the site has been selected. The State or affected Tribe may submit a notice of disapproval to Congress regarding site selection, which Congress may override by Joint Resolution, as provided in Section 115(c) of the NWPA. In addition, the State or Tribe may enter into a benefits agreement with DOE pursuant to Section 170 of the NWPA.¹⁶ If an MRS facility is selected by the President and the selection becomes effective, DOE is directed to apply to the Nuclear Regulatory Commission (“NRC”) for an MRS license.¹⁷ However, any license issued by the NRC for a centralized interim storage facility under the MRS provisions must specify that construction of the facility cannot begin until after the NRC has issued a license for construction of a geologic repository.¹⁸

Thus, DOE has clear legislative authority under existing law to take initial steps in selecting a site for an MRS. Depending on the outcome of the current dispute over termination of the Yucca Mountain Project and judicial interpretation of the effect of the Secretary’s termination action, DOE could also be authorized to proceed to site selection and to take a number of further steps short of commencement of construction. Commencement of construction clearly requires further authorization.¹⁹

¹⁴ NWPA § 145(b), 42 U.S.C. § 10165(b).

¹⁵ NWPA § 142, 42 U.S.C. § 10162.

¹⁶ NWPA §§ 145-47, 42 U.S.C. §§ 10165-67.

¹⁷ NWPA § 148(c), 42 U.S.C. § 10168(c).

¹⁸ The NWPA also limits the MRS facility in several other ways, some of which might warrant amendment prior to the construction phase. These include limits on number (only one MRS facility), location (specifically not allowed to be located in Nevada), size (maximum capacity of 15,000 MTHM), and site selection process (prescribed by the NWPA) for the MRS facility. *See* Sections 142-48 of the NWPA, 42 U.S.C. §§ 10162-68.

¹⁹ Although the Commission does not refer to DOE’s authority under the Atomic Energy Act (“AEA”), Sections 53 and 55 of the AEA arguably provide authority for DOE to develop a consolidated interim storage facility, independent of the provisions of the NWPA. *See* Van Ness Feldman Memorandum to the BRC, “Authority for Interim and Monitored Retrievable Storage of Spent Nuclear Fuel” (Nov. 11, 2010). However, as explained in that memorandum, DOE has taken the position that the NWPA cabins DOE’s authority under the AEA to undertake storage of commercial used fuel. *See, e.g.,* DOE, Report to Congress on the Demonstration of the Interim Storage of

Finally, it is important to note that while the NWF is available to fund specific MRS activities,²⁰ use of the NWF for this or other purposes is subject to appropriations.

II. MODIFICATION OF STANDARD CONTRACT QUEUE

A. Introduction

This section addresses issues relating to the acceptance priority ranking (known as the “queue”) established by the Standard Contract between DOE and commercial nuclear reactor operators—in particular, whether DOE may deviate from the general principal under the Standard Contract that DOE accept the oldest fuel first (“OFF”) so as to give priority to: (1) spent fuel located at decommissioned reactors, and (2) spent fuel that has certain thermal characteristics.

B. Priority for Spent Fuel at Decommissioned Reactor Sites

1. Recommendations of Draft Report

The BRC makes the following recommendations respecting to giving priority to acceptance of spent fuel at decommissioned nuclear reactors:

- “[T]he Commission recommends that spent fuel currently being stored at shutdown reactor sites be ‘first in line’ for transfer to a consolidated interim storage facility.”²¹
- “The magnitude of the cost savings that could be achieved by giving priority to shutdown sites appears to be large enough (i.e., in the billions of dollars) to warrant DOE exercising its right under the Standard Contract to move this fuel first. Although this action would disrupt the queue specified in the Standard Contract, as utilities continue to merge and a growing number of reactors reach the end of their operating licenses, every utility (or nearly every utility) will have one or more shutdown plants. In that context, giving priority to moving fuel from decommissioned sites is likely to be seen by all parties involved as being in everyone’s best interest.”²²

2. DOE Authority Under Standard Contract

The BRC recommends in Section 5.2.1 of the Draft Report that spent fuel located at decommissioned reactor sites receive first priority for disposal. A more detailed discussion in Section 5.4 makes similar statements regarding a change in priority for acceptance of fuel under the queue and notes that such a change is allowed by the Standard Contract. These statements

Spent Nuclear Fuel, DOE/RW-0596, at 6-7 (Dec. 2008).

²⁰ NWSA § 302(d), 42 U.S.C. § 10222(d).

²¹ Draft Report, Sec. 5.2.1, p. 47 (emphasis in original).

²² Draft Report, Sec. 5.4, p. 47; *see also* Draft Report, Sec. 5.4, p. 46-48.

are clearly consistent with the provisions of the Standard Contract. The Standard Contract requires DOE to determine the acceptance priority based on the OFF principle. However, Art. VI.B.1(b) of the Standard Contract provides an exception from the OFF priority for “[spent fuel] and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.”

The BRC’s recommendation to give priority to fuel from decommissioned reactors is consistent with the provisions of the Standard Contract that incorporate the OFF principle while allowing DOE to deviate from the OFF acceptance priority in cases of emergencies or decommissioned reactors.²³

C. Priority Acceptance Based on Thermal Characteristics

1. Recommendations of Draft Report

The BRC makes the following recommendations respecting modification of acceptance priorities to take into account thermal characteristics of the spent fuel:

- “Consolidated storage also offers opportunities to simplify repository operations. For example, by accumulating a substantial inventory of spent fuel in one place, the storage facility could take over some of the thermal management activities that might be required for efficient repository operation (e.g. blending hot and cool fuel assemblies to create a uniform thermal load for waste packages). A consolidated storage facility could even offer the option of packaging the waste for disposal before it is shipped to the repository, further simplifying operations at the repository site.”²⁴
- “[A] consolidated storage facility could provide flexible, safe, and cost-effective waste handling services (i.e., repackaging or sorting of fuel for final disposal) and could facilitate the standardization of cask systems.”²⁵
- “The Commission recognizes that existing contracts have created a ‘queue’ in terms of federal commitments to accept spent fuel from specific utilities. Unfortunately, the existing queue was not set up to maximize efficiencies or to minimize the risks of fuel handling and transportation. Hence, we believe it would be appropriate for DOE to re-visit the current schedule as it is already authorized to do under certain circumstances, recognizing that any changes to the current queue may require the Department and utility contract holders to re-negotiate some existing commitments. There may also be circumstances where expedited removal of fuel from an operating reactor is warranted. The Commission believes a more flexible approach would benefit all parties involved.

²³ Standard Contract, Arts. V.D, VI.B.1.

²⁴ Draft Report, Sec. 5.2.4, p. 43.

²⁵ Draft Report, Sec. 5.2.6, p. 44.

Under DOE’s Standard Contract with utilities, priority for the acceptance of spent fuel is allocated to utilities according to the ‘oldest fuel first’ or ‘OFF’ principle. This does not mean that utilities would necessarily choose to ship their oldest fuel first since they would have a contractual right to decide each year (subject to DOE’s approval) which fuel to ship from which reactor (with the overall amount being determined by the OFF allocation).”²⁶

- “[T]he current approach may limit the ability to use at-reactor storage as part of an integrated thermal management strategy. . . . The ability to select which spent fuel is delivered for disposal at a permanent repository each year may avoid the need for additional storage to hold fuel that is too hot for immediate emplacement. However, since utilities can choose which fuel to deliver, they may prefer to send the hottest eligible fuel in their pools, assuming that the plants are still operating when waste acceptance begins. This may require more complex thermal management activities at the consolidated storage or disposal facility.”²⁷
- “As part of this effort the new organization should seek to renegotiate contracts as necessary to implement cost-saving and risk-reducing measures, while also recognizing the contractual rights of current waste owners as originally established under existing statutes, and as subsequently interpreted by the courts.”²⁸

2. DOE Authority Under Standard Contract

In Sections 5.2 and 5.4, the Draft Report discusses changing the acceptance priority for the queue to prioritize spent fuel based on its thermal characteristics. The discussion in Section 5.2 addresses the issue as a potential option for simplifying and streamlining the waste handling process, but does not address whether such a proposal is consistent with the Standard Contract. Section 5.4, however, recognizes “that any changes to the current queue may require the Department and utility contract holders to re-negotiate some existing commitments.” With this qualification, the Draft Report’s ensuing discussion regarding a possible change to the queue properly characterizes the legal requirements imposed on DOE by the Standard Contract.

III. MODIFICATION OF TIMING AND METHOD OF PAYMENT OF NUCLEAR WASTE FEE

A. Introduction

This section addresses the question of whether DOE has authority to alter the current payment and collection process used to fund the Nuclear Waste Fund. We conclude that through administrative action and amendment to the Standard Contracts, the Secretary has the authority

²⁶ Draft Report, Sec. 5.4, pp. 46-47.

²⁷ *Id.* at p. 50.

²⁸ *Id.* at p. 51.

to alter the current collection process of the NWF.

B. Recommendations of Draft Report

- “In the near term, the Administration should offer to amend DOE’s standard contract with nuclear utilities so that utilities remit only the portion of the annual fee that is appropriated for waste management each year and place the rest in a trust account, held by a qualified third-party institution, to be available when needed.”²⁹
- “The modified approach proposed here would require each utility to place the unused fee receipts in an irrevocable trust account at an approved, third-party financial institution, allowing the money to be withdrawn only for the purpose for which the trust account was created.”³⁰

C. Applicable Statutory and Regulatory Text

Section 302(a)(1) of the NWPA authorizes the Secretary to enter into contracts for disposal of spent fuel and provides that such contracts “shall provide payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d).” Paragraph (2) provides that for civilian nuclear power sold after April 7, 1983, the licensee shall pay a fee equal to 1.0 mil per kw/h. The Secretary has the authority to adjust this, pursuant to paragraph (4). Paragraph (3) addresses spent fuel derived from nuclear power sold on or before April 7, 1983. Paragraph (3) sets a fee of 1 mil per kw/h and provides that “[s]uch fee shall be paid to the Treasury of the United States and shall be deposited in a separate fund ...” Section 302(a)(4) provides that the Secretary “shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3).” Section 302(c)(1) provides that the Nuclear Waste Fund shall consist of “all receipts, proceeds, and recoveries realized by the Secretary ... which shall be deposited in the Waste Fund immediately upon their realization.”

Based on Section 302(a)(4)’s direction to establish procedures for the collection and payment of fees, DOE issued regulations on fees and terms of payment in 10 C.F.R. § 961.11 (Article VIII of the Standard Contract). Pursuant to Article VIII, DOE required that for nuclear electricity sold after April 7, 1983, the utility pay the fee on a quarterly basis. For spent fuel discharged prior to April 7, 1983, DOE provided three payment options. Under Option 1, the fee payments were prorated evenly over 40 quarters. Licensees were allowed to accelerate the fee payments, which included interest on the outstanding fee balance, by making full or partial lump sum payments. Option 2 enabled licensees to make a single payment consisting of the fee and interest on the outstanding balance at anytime prior to the date of first delivery to DOE of the spent fuel. Option 3 provided for a single payment that consisted of all outstanding fees without interest. The payment was required to be made prior to June 30, 1985, or two years after the execution of the contract, whichever was later.

²⁹ Draft Report, Exec. Summ., Sec. 3, p. ix.

³⁰ Draft Report, Section 8.3.1, p. 90.

D. Analysis

Section 302(a) does not prescribe a specific method of collection of the nuclear waste fee. Rather, it gives the Secretary authority “to establish procedures for the collection and the payment of the fees.”³¹ This section gives the DOE broad discretion to select the method of collection and payment of the fee and a clear legal basis for prescribing a method that differs from the current methods, if DOE chooses to do so. There is nothing elsewhere in the NWPA that prohibits the Secretary from changing the current process of fee collection and payment, so long as contract-holders agree to the change. Moreover, there is long-standing administrative precedent under the Standard Contract for providing various options for structuring payment and collection of the fee.

As noted above, in its original Standard Contract regulations (adopted in 1983, a year after enactment of the NWPA), the DOE offered utilities three options for payment regarding pre-1983 spent fuel, including an option that permitted licensees to delay payment of the fee until delivery of the spent fuel to DOE. It is clear that the current quarterly payment requirement thus has never been regarded as the only method for payment of the nuclear waste fee.³²

Thus, the broad statutory authority to set procedures for the collection and payment of fees and administrative precedent both support the argument that the Secretary could, through administrative action, amend the current regulations to change the timing of payments. However, any changes to future payments that modify the Standard Contract would be subject to the Standard Contract regulations codified at 10 C.F.R. Part 961. Art. XV of the Standard Contract provides that:

[T]he parties will negotiate and, to the extent mutually agreed, amend this contract as the parties may deem to be necessary or proper to reflect their respective interests; *provided, however*, that any such amendment shall be consistent with the DOE final rule published in the FEDERAL REGISTER on April 18, 1983 entitled, “Standard Contract for Disposal or SNF and/or HLW”, as the same may be amended from time to time.”

The legal effect of this provision is not entirely clear. It would appear that the changes to implement the proposed modifications are not consistent with the fee payment provisions of the final rule. However, the Standard Contract rule permits “deviations” from the Standard Contract, and through this procedure it may be possible to amend the Standard Contract without amending the rule.³³ In any case, the changes to individual standard contracts would be subject to negotiation and mutual agreement with the affected nuclear utilities.

Assuming the Secretary has authority under the NWPA to delay the date of payment of

³¹ NWPA, § 302(a)(4).

³² In addition to the precedent for alternative payment terms for fees associated with Section 302(a)(3), it can be argued that the language in Section 302(a)(2) is even more flexible than Section 302(a)(3). Unlike paragraph (3), paragraph (2) does not provide that the fee “shall be paid to the Treasury . . .” 31 C.F.R. § 380 (2011), 31 U.S.C. § 3302(c)(1) (2006).

³³ 10 C.F.R. § 961.4 (2011).

some portion of the nuclear waste fee, a further question arises as to whether DOE has the authority to direct the nuclear waste fee (or some portion thereof) to an irrevocable trust account to ensure the monies are actually paid into the Treasury when needed. Under the provisions of Section 3302 of Title 31, United States Code (the “Miscellaneous Receipts Act” or “MRA”), public funds received by an official or agent of the U.S. Government must be deposited in the Treasury as soon as practicable, except as provided by another law. We are of the view that if the Secretary has authority to delay receipt of the nuclear waste fee, as was done for the pre-April 1983 fuel, the Secretary also has authority to require safeguards, such as a trust account, to ensure the delayed payments are in fact collected and eventually paid into the Fund. Specifically, the Secretary’s broad authority to specify the method of payment and collection of the nuclear waste fee constitutes authority “provided by another law,”³⁴ making the MRA restrictions inapplicable in this case.

Moreover, the NWPA provides specific direction respecting deposit of nuclear waste fees in the NWF. The Secretary is required to deposit funds in the NWF only upon **realization** of those funds. “Realize” is not defined in the NWPA, and the definition under other laws varies. In the securities law context, “realization” has been held to mean “to convert an intangible right or property into real (tangible) property: hence to convert any kind of property into money. . . .”³⁵ The Internal Revenue Code (“Code”) defines “realized” as the “money received plus the fair market value of property (other than money) received.”³⁶ The Code’s constructive receipt rules amplify this concept to include income credited to, set apart for, or otherwise made available to the taxpayer, unless the taxpayer’s control is “subject to substantial limitations or restrictions.”³⁷ Black’s Law Dictionary defines “realize” as “conversion of non-cash assets into cash assets.”³⁸ Under any of these concepts, payment of nuclear waste fees into a third party trust account would not appear to constitute a “realization” by the Secretary. The Secretary has not received or taken possession of the funds, and the funds in the trust account are subject to a restriction that precludes their disbursement except for specified purposes. For these reasons, fees deposited directly into an irrevocable trust account under this proposal are not “realized” by the federal government unless and until they are drawn down in accordance with the trust instrument.

Accordingly, we believe that there is a sound legal basis for concluding that the Secretary’s broad statutory authority under the NWPA to prescribe procedures for the payment and collection of the nuclear waste fee permits him to postpone the time of collection of a portion of the fee. That authority, together with the Act’s specific direction respecting timing of deposit of fees in the Treasury, permits the Secretary to require use of an irrevocable trust account to safeguard the government’s interest in ultimately receiving the fees.³⁹

³⁴ 42 U.S.C. § 3302 (a).

³⁵ *Heli-Coil Corp. v. Webster*, 352 F.2d 156, 167 n.14 (3d Cir. 1965) (citing *McAvoy v. Schramme*, 264 N.Y.S. 181 238 App. Div. 225 (1933)).

³⁶ Internal Revenue Code of 1986, § 1001(b), 42 U.S.C. § 1001(b).

³⁷ 26 C.F.R. § 1.451.2(a) (2010).

³⁸ BLACK’S LAW DICTIONARY 1379 (9th ed. 2009).

³⁹ We would recommend that the Standard Contract amendments make clear that monies in the trust accounts are the property of the trustee until paid to or required to be paid to the NWF, and that the trustee acts as fiduciary, not as agent of the United States. The Standard Contract should also have to carefully set forth the terms and conditions of this trust account as well as the qualifications of the institutions holding the account.

IV. USE OF THE NUCEAR WASTE FUND

A. *Introduction*

Chapter 12 of the Draft Report recommends various near-term actions DOE could undertake to help fulfill its nuclear waste management responsibilities. Those recommendations that fit within the specified list of “Use of the Waste Fund” provided in Section 302(d) of the NWPA arguably can be implemented with the use of the NWF (subject to Congressional appropriations). In 2002, the Eleventh Circuit confirmed that DOE may make expenditures from the NWF only for disposal activities. The Court held:

First, the statute provides that the Secretary “may make expenditures from the Waste Fund . . . only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter.” 42 U.S.C. § 10222(d). . . . The Act makes a list of things that might be considered acts of “disposal.” [footnote omitted] Although the list is not exhaustive, it is instructive of the kinds of activities that might be characterized as “disposal.” The items in the list all have one thing in common: they entail some sort of advancement or step toward permanent disposal, or else an incidental cost of maintaining a repository. None of them encompass the maintenance of the status quo.⁴⁰

Section 302(d) of the NWPA provides:

(d) USE OF WASTE FUND.—The Secretary may make expenditures from the Waste Fund, subject to subsection (e), only for purposes of radioactive waste disposal activities under titles I and II, including—

- (1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored, retrievable storage facility or test and evaluation facility constructed under this Act;
- (2) the conducting of nongeneric research, development, and demonstration activities under this Act;
- (3) the administrative cost of the radioactive waste disposal program;
- (4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, retrievable storage site or to be used in a test and evaluation facility;
- (5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored, retrievable storage site or a test and evaluation facility site and necessary or incident to such repository, monitored, retrievable storage facility or test and evaluation facility; and
- (6) the provision of assistance to States, units of general local government, and Indian tribes under sections 116, 118, and 219.

⁴⁰ *Ala. Power Co. v. U.S. Dep’t of Energy*, 307 F.3d 1300, 1313-14 (11th Cir. 2002).

No amount may be expended by the Secretary under this subtitle for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.⁴¹

It is important to note that the “Secretary,” meaning the Secretary of Energy, is the only person authorized to expend funds in the NWF under the NWPA. Further, all such expenditures of the NWF can be made only after Congress has appropriated the funds in the NWF for such specific uses. Further, the NWPA provides that funds cannot be expended for the construction of facilities unless their construction is specifically authorized by Congress in the NWPA or elsewhere.

B. Analysis

An examination of the Chapter 12 recommendations for near-term action by DOE, as well as Congress and other agencies, and how those recommendations fit or do not fit within the scope of Section 302(d) of the NWPA is provided in the following table:

<u>Recommendation</u>	<u>Availability of NWF</u>
<p>Financing the Waste Program DOE should initiate a rulemaking to revise the Standard Contract to offer a new fee payment option in which payments to the Waste Fund each year would be based on actual appropriations from the Waste Fund, with the remainder of the one mil fee being placed in a third-party escrow account by the contract holder until needed. The rulemaking should also address other potential revisions discussed in this report, e.g. to allow reprioritization of spent fuel receipt to increase transportation efficiency and facilitate closure of shutdown reactor sites, and to incentivize actions by contract holders (e.g. use of standardized storage systems) that would reduce overall waste management system costs. When the rulemaking is complete, DOE should then offer to enter into negotiations with contract holders to revise current contracts to include the new provisions.</p>	<p>The NWF is available to DOE for these activities under Section 302(d)(3), as they could be considered an administrative cost of the waste disposal program.</p>
<p>Financing the Waste Program The Administration should work with the</p>	<p>This recommendation is outside the scope of Section 302(d).</p>

⁴¹ NWPA § 302(d), 42 U.S.C. § 10222(d).

<u>Recommendation</u>	<u>Availability of NWF</u>
<p>appropriate Congressional committees and the Congressional Budget Office to reclassify receipts from the nuclear waste fee as discretionary offsetting collections and allow them to be used to offset appropriations for the waste program.</p>	
<p>Financing the Waste Program The Administration, DOE, and DOJ should work with nuclear utilities and other stakeholders toward a fair and expeditious resolution of outstanding litigation and damage claims.</p>	<p>The NWF is arguably not available to DOE for these activities because DOE’s partial breach of its Standard Contract is not the kind of activity that advances disposal of the radioactive waste disposal program within the scope of Section 302(d).</p> <p>Courts have found that these judgments against DOE may not be paid out of the NWF but instead should be paid from the Treasury’s Judgment Fund.⁴²</p>
<p>Establishment of a New Organization The appropriate Congressional committees should begin hearings on establishment of an independent waste management organization as soon as practicable. The Commission recognizes that there are many details that need to be worked out in creating a new institution, and believes that the sooner the process of obtaining the views of interested parties and developing a detailed legislative proposal can begin, the better.</p>	<p>This recommendation is outside the scope of Section 302(d).</p>
<p>Storage Using existing authority in the NWSA, DOE should begin laying the groundwork for implementing consolidated storage and for improving the overall integration of storage as a planned part of the waste management system without further delay. Specific steps that DOE could take in the near term include:</p> <ul style="list-style-type: none"> • Performing the systems analyses and design studies needed to develop a conceptual design for a highly flexible, initial federal interim spent fuel storage 	<p>The NWF is available to DOE for these activities under Sections 302(d)(1) and 302(d)(5).</p>

⁴² *Ala. Power Co. v. U.S. Dep’t of Energy*, 307 F.3d 1300 (11th Cir. 2002).

<u>Recommendation</u>	<u>Availability of NWF</u>
<p>facility.</p> <ul style="list-style-type: none"> • Preparing to respond to requests for information from communities, states, or tribes that might be interested in learning more about hosting a consolidated storage facility. • Working with nuclear utilities, the nuclear industry, and other stakeholders to promote the better integration of storage into the waste management system, including standardization of dry cask storage systems. This effort should include development of the systems analyses needed to provide quantitative estimates of the system benefits of utility actions such as the use of standardized storage systems or agreements to deliver fuel outside the current OFF priority ranking. (These analyses would be needed to support the provision of incentives to utilities to undertake actions such as using standardized storage systems or renegotiating fuel acceptance contracts.) 	
<p>Storage The Administration should request, and Congress should provide funding for, the National Academy of Sciences to conduct an independent investigation of the events at Fukushima and their implications for safety and security requirements at spent nuclear fuel and high-level waste storage sites in the United States.</p>	<p>This recommendation is outside the scope of Section 302(d).</p>
<p>Transportation DOE should complete the development of procedures and regulations for providing technical assistance and funds (pursuant to Section 180 (c) of the NWPA) for training local and tribal officials in areas traversed by spent fuel shipments, in preparation for movement of spent fuel from shutdown reactor sites to consolidated storage.</p>	<p>The NWF is available to DOE for these activities under Section 302(d)(4).</p>
<p>Transportation</p>	<p>The NWF is arguably limited to expenditures</p>

<u>Recommendation</u>	<u>Availability of NWF</u>
<p>NRC should reassess its plans for the Package Performance without regard to the status of the Yucca Mountain project, and if it is found to have independent value, funding should be provided from the Nuclear Waste Fund so that the NRC can update these plans and proceed with those tests.</p>	<p>of funds by the Secretary of Energy, not the NRC.</p>
<p>Disposal DOE should keep a repository program moving forward through valuable, non-site specific activities, including R&D on geological media, work to design improved engineered barriers, and work on the disposal requirements for advanced fuel cycles. The work of the Used Fuel Disposition Campaign of DOE’s Office of Used Nuclear Fuel Disposition Research & Development in this area should be continued.</p>	<p>The NWF is available to DOE for these activities under Sections 302(d)(1) and 302(d)(2).</p>
<p>Disposal DOE should develop an RD&D plan and roadmap for taking the borehole disposal concept to the point of a licensed demonstration.</p>	<p>The NWF is available to DOE for these activities under Section 302(d)(2).</p>
<p>Facility Siting To ensure that future siting efforts are informed by past experience, DOE should build a data base of the experience that has been gained and relevant documentation produced in efforts to site nuclear waste facilities, in the United States and abroad. This would include the storage facility and repository siting efforts under the NWPA by both DOE and the Nuclear Waste Negotiator.</p>	<p>The NWF is arguably available to DOE for these activities under Section 302(d)(3), as they could be considered an administrative cost of the program.</p>
<p>Regulatory Actions The Administration should identify an agency to take the lead in defining an appropriate process (with opportunity for public input) for developing a generic safety standard for geologic disposal sites. The same lead agency should coordinate the implementation of this standard-setting process with the aim of developing draft regulations for mined</p>	<p>This recommendation is outside the scope of Section 302(d).</p>

<u>Recommendation</u>	<u>Availability of NWF</u>
repositories and deep borehole facilities.	
<p>Regulatory Actions The NRC should continue efforts to review and potentially revise the existing waste classification system.</p>	This recommendation is outside the scope of Section 302(d).
<p>Nuclear Workforce Development DOE, in cooperation with the U.S. Department of Labor and the Bureau of Labor Statistics, should lead a public–private initiative to develop ongoing labor demand projections and forecast capacity for the nuclear workforce, including the workforce for science, technology, engineering and mathematics (STEM); crafts; and emergency response and HAZMAT. This capacity will help inform expanded federal, joint labor–management, and university-based support for critical high-skill, high-performance nuclear workforce development needs, including special attention to the expansion of the emergency response and HAZMAT-trained workforce.</p>	These recommendations are outside the scope of Section 302(d) because they do not directly relate to DOE’s administrative obligations under the waste disposal program.
<p>International DOE should identify any legislative changes needed to authorize and direct the U.S. waste management program to support countries that pursue nuclear technologies in developing capacity for the safe management of the associated radioactive wastes and to encourage broad adherence to strengthened international norms for safety, security, and non-proliferation for all nuclear infrastructure and materials.</p>	The NWF is arguably not available to DOE for these activities because it is not clear that international safety, security, and non-proliferation for all nuclear infrastructure and materials are within the scope of DOE’s administrative obligations under the waste disposal program.

V. IMPORTS FROM FOREIGN COMMERCIAL REACTORS

A. Introduction

This section addresses the issue of the ability of the federal government to accept spent fuel from foreign commercial reactors. Specifically, the section focuses on the authority of DOE to import foreign commercial spent fuel, as limited by Section 131(f) of the AEA, a provision

added to the AEA as part of the Nuclear Non-Proliferation Act of 1978 (“NNPA”).⁴³

B. Recommendations of Draft Report

In the Draft Report, the BRC recommends the following respecting the import of spent fuel from foreign commercial reactors:

- “A similar capability to accept spent fuel from foreign commercial reactors, in cases where the President would choose to authorize such imports for reasons of U.S. national security, would be desirable within a larger policy framework that creates a clear path for the safe and permanent disposition of U.S. spent fuel.”⁴⁴

C. Applicable Statutory and Regulatory Text

The AEA, first enacted in 1946 and significantly amended in 1954, was enacted for general purposes related to international cooperation and nuclear nonproliferation; encouragement of the development and utilization of atomic energy for peaceful purposes; support of research and development in nuclear power and medical uses; and management of the U.S. nuclear defense programs.⁴⁵ To promote these purposes, the AEA regulates civilian ownership and use of “special nuclear material.” Special nuclear material is defined as “plutonium, uranium enriched in the isotope 233 or in the isotope 235,” but does not include source material.⁴⁶ Commercial spent fuel is regulated under the AEA as a special nuclear material because of its uranium-233, uranium-235, or plutonium-239 content. The AEA authorizes DOE to acquire special nuclear material, which includes foreign and domestic spent fuel if DOE deems such action “necessary to effectuate the provisions of [the AEA].”⁴⁷ The NRC is authorized to issue a license to DOE to hold spent fuel from NRC-licensed reactors,⁴⁸ but foreign fuel held by DOE does not appear to be subject to a licensing requirement.⁴⁹

The AEA authorizes DOE to enter into cooperation agreements (known as “Section 123 Agreements”) with other nations or groups of nations.⁵⁰ These agreements can be for a variety of purposes and can cover a range of materials.⁵¹ Section 131 of the AEA provides for “subsequent agreements” with these nations or groups of nations that can provide for the import of the irradiated fuel into the United States.

⁴³ Atomic Energy Act of 1954, Pub. L. 83-703, as amended, § 131(f), 42 U.S.C. § 2160(f) (added by Section 303(a) of the Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (22 U.S.C.A. § 3201) (1978)).

⁴⁴ Draft Report, Section 11.2.2, p. 131.

⁴⁵ AEA § 3, 42 U.S.C. § 2013. For additional statements of purpose within the statute, *see, e.g.*, AEA §§ 31(a), 81-82, 122, 42 U.S.C. §§ 2051(a), 2111-12, 2152.

⁴⁶ AEA § 11(aa), 42 U.S.C. § 2014(aa).

⁴⁷ AEA § 55, 42 U.S.C. § 2075.

⁴⁸ Energy Reorganization Act of 1974 § 202, as amended, Pub. L. 93-438, 88 Stat. 1232 (42 U.S.C. § 5801) (1974).

⁴⁹ *Id.*

⁵⁰ AEA § 123, 42 U.S.C. § 2153.

⁵¹ *See, e.g.*, AEA §§ 53, 54a, 57, 64, 82, 91, 103, 104, or 144.

Subsequent arrangements can be for a variety of purposes, including “arrangements for the storage or disposition of irradiated fuel elements” or “any other arrangement which the President finds to be important from the standpoint of preventing proliferation.”⁵² For subsequent arrangements involving the direct or indirect commitment of the United States for storage or other disposition, interim or permanent, of any foreign spent nuclear fuel in the United States, Section 131(f)(1) imposes three conditions, described below.

For purposes of Section 131(f), “[f]oreign spent nuclear fuel” is “any nuclear fuel irradiated in any nuclear power reactor located outside of the United States and operated by any foreign legal entity, government or nongovernment, regardless of the legal ownership or other control of the fuel or the reactor and regardless of the origin or licensing of the fuel or reactor, but not including fuel irradiated in a research reactor.”⁵³

The first condition imposed by Section 131(f)(1)(A)(i) states that DOE may not enter into such an arrangement unless the commitment “has been submitted to the Congress for a period of sixty days of continuous session and been referred to the Committee on Foreign Affairs of the House of representatives and the Committee on Foreign Relations of the Senate;” or the plan is subject to the terms of an approved “detailed generic plan for disposition or storage in the United States” that has already been subject to Congressional review. The statutory text provides that the Congress may prevent the agreement from becoming effective if it passes during the sixty-day period a concurrent resolution “stating in substance that it does not favor the commitment” This disapproval authority is, however, ineffective under *Consumers Union v. FTC*, which held that provisions permitting the two Houses to disapprove Executive action by concurrent resolution violate the Presentment Clause of the Constitution.⁵⁴ However, based on section 281 of the AEA, which addresses separability, and precedent in *INS v. Chadha*,⁵⁵ it appears that the legislative veto provision could be successfully severed from the rest of Section 131(f)(1)(a).⁵⁶ Accordingly, DOE can go forward with an arrangement to which Section 131(f)(1) applies after the requisite 60-day notice to the relevant Committees.

The second condition, provided in Section 131(f)(1)(B), requires the Secretary to comply with Section 131(a). This requirement mandates that the Secretary “obtain the concurrence of the Secretary of State, and consult with the Nuclear Regulatory Commission, and the Secretary of Defense.”⁵⁷

The third condition, provided in Section 131(f)(1)(C), requires the Secretary to comply with “all other statutory requirements of th[e AEA], under sections 54 and 55 and any other applicable sections, and any other requirements of law.”⁵⁸ Section 54 generally authorizes the Secretary to distribute special nuclear materials to foreign nations or groups of nations pursuant

⁵² AEA § 131(a)(2)(e), 42 U.S.C. § 2160(a)(2)(e) and (g).

⁵³ AEA § 131(f)(4), 42 U.S.C. § 2160(f)(4).

⁵⁴ *Consumers Union of U.S., Inc., et al v. FTC, et al*, 691 F.2d 575 (D.C. Cir. 1982) *aff’d sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983).

⁵⁵ 462 U.S. 919, 932 (1983).

⁵⁶ See Appendix A for further analysis regarding the severability of the Congressional concurrent resolution requirement.

⁵⁷ AEA § 131(f)(1)(B), 42 U.S.C. § 2160(f)(1)(B).

⁵⁸ AEA § 131(f)(1)(C), 42 U.S.C. § 2160(f)(1)(C).

to the terms of a cooperation agreement and subject to certain restrictions related to compensation, and to license others to make similar distributions. Section 54 also provides that DOE may sign an agreement to repurchase any of the special nuclear material distributed under a sale arrangement under Section 54, or uranium remaining after irradiation of such special nuclear material, or nuclear material produced in a nuclear reactor located outside the United States through the use of special nuclear material which was leased or sold pursuant to Section 54.

Section 55 of the AEA provides that DOE is authorized “to the extent it deems necessary to effectuate the provisions of [the AEA]” to “take, requisition, condemn or otherwise acquire any special nuclear material or interest therein.”⁵⁹ This authority could arguably be read broadly in light of the stated purposes of the AEA, which include development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with common defense and security and public health and safety. Sections 161 and 171 of the AEA authorize DOE to enter into contracts to acquire materials, to lease or purchase real property, and to pay just compensation for any property or interests taken by DOE. These three sections—Sections 55, 161, and 171—could be read to provide authority for DOE to take title to or custody of commercial spent fuel.⁶⁰

The part of the third condition that requires the Secretary to comply with “any other requirements of law” would make any arrangement for the import of the spent fuel from foreign commercial reactors subject to statutory and regulatory requirements governing issues such as, but not limited to, the packaging and transportation of spent fuel, public health and safety, and the environmental impacts of the program. For example, any subsequent arrangement entered into by DOE would be required to comply with the National Environmental Policy Act.⁶¹ To the extent that a subsequent arrangement is inconsistent with other applicable laws, further legislation may be necessary to carry it out.⁶²

In emergency situations, Section 131(f)(2) provides an exemption from the conditions in Section 131(f)(1).⁶³ This exemption applies where the President determines that a commitment under AEA Sections 54 or 55 for storage or other disposition is required by “an emergency situation,” that such an action is in the national interest, and notifies certain Congressional committees of the determination and action.

⁵⁹ AEA § 55, 42 U.S.C. § 2075. Section 55 further provides that any contract of purchase may be made without regard to general government contracting laws upon certification by the Secretary that such action is necessary for the common defense or otherwise not practical.

⁶⁰ AEA §§ 161(e), (g), 171, 42 U.S.C. §§ 2201(e), (g), 2221.

⁶¹ 42 U.S.C. § 4321, *et seq.*

⁶² Several other provisions of Federal law specifically relate to import and storage of commercial reactor spent fuel, but in our opinion they do not impose substantive limitations on DOE’s authority under Section 131 of the AEA. The provisions are described in Appendix B.

⁶³ AEA § 131(f)(2), 42 U.S.C. § 2160(f)(2).

Scenario Example

In a scenario where the Secretary seeks to implement a program to import spent fuel from foreign commercial reactors under Section 131(a)(2)(E), the Secretary would need to ensure that the program complies with the three conditions imposed by Section 131(f)(1). As discussed above, these conditions incorporate by reference Sections 131(a), 54, and 55, as well as any additional requirements of relevant sections of the AEA or other law. Thus, before entering into a proposed subsequent arrangement, the Secretary must: (i) obtain the concurrence of the Secretary of State and consult with the NRC and Secretary of Defense; (ii) publish in the Federal Register at least 15 days before the proposed arrangement is to go into effect a notice of the proposed arrangement, together with a written determination by the Secretary that the arrangement “will not be inimical to the common defense and security;”⁶⁴ and (iii) submit the proposed arrangement to the Congress for a period of 60 days of continuous session. The Secretary must also ensure compliance with any other requirements of the AEA and other law.

During the consultation process required by (i) above, if “in the view” of the Secretary, the Secretary of State, the Secretary of Defense or the NRC the proposed arrangement “might significantly contribute to proliferation,” the Secretary of State must prepare a Nuclear Proliferation Assessment Statement (“NPAS”).⁶⁵ The NPAS describes the safeguards, mechanisms, and peaceful use assurances that will ensure that the assistance provided pursuant to the arrangement will not be used to further any military or nuclear explosive purpose.⁶⁶ When a NPAS is required, the Secretary may not publish the notice and determination (see (ii) above) in the Federal Register until either the Secretary receives the NPAS from the Secretary of State or the time authorized under Section 131(c) for the Secretary of State’s preparation of the NPAS expires.⁶⁷ Under Section 131(c), the Secretary of State has 60 days to prepare the NPAS. However, that 60 day time period may be extended if, upon request by the Secretary of State, the President waives the time restriction and provides notice and justification to certain Congressional committees.

D. Analysis

Based on the definition provided in Section 131(f)(4), any foreign spent fuel (other than from research reactors, which is specifically excluded) under consideration for disposal in the U.S. would require an arrangement with DOE that was reviewed by Congress and that met the other requirements of Section 131 of the AEA. These requirements apply to spent fuel irradiated abroad, regardless of who holds title to the spent fuel. If Congress takes no action during its review period, the arrangement becomes effective. However, the two-House disapproval procedure provided in the statute is ineffective and severable from the AEA, as explained above.

To the extent the Draft Report’s recommendation about the import of spent fuel from foreign commercial reactors anticipates an emergency situation where such imports were

⁶⁴ AEA § 131(a)(1), 42 U.S.C. § 2160(a)(1).

⁶⁵ AEA § 131(a)(2), 42 U.S.C. § 2160(a)(2).

⁶⁶ AEA § 131(a)(1)-(2), 42 U.S.C. § 2160(a)(1)-(2). Additional requirements related to the preparation of a NPAS are provided in Section 123(a).

⁶⁷ AEA § 131(a)(1), 42 U.S.C. § 2160(a)(1).

required for national security reasons, the exemption in Section 131(f)(2) would authorize the storage or other disposal of limited quantities of foreign spent fuel in emergency situations without Congressional review.⁶⁸

VI. CONCLUSION

Based on our analysis of the NWPA, AEA and other relevant statutory and regulatory authorities, we conclude that the BRC's near-term recommendations addressed in this Memorandum respecting consolidated interim storage, the Standard Contract queue, and program funding can be implemented under the existing provisions of the NWPA. We also conclude that the BRC's recommendation respecting modifying the queue for spent fuel from decommissioned reactors is consistent with the provisions of the Standard Contract.

We conclude that the near-term action recommendations that are directed at DOE can be implemented with the use of funds from the NWF, as long as the recommendations fit within the scope of Section 302(d) of the NWPA and there is a requisite appropriation from Congress. Those near-term actions outside the scope of NWPA Section 302(d) would require legislative changes.

We conclude that the DOE has authority under the AEA to accept spent fuel from foreign commercial reactors, as long as the procedures and criteria set forth in Section 131 of the AEA are met, including requirements to comply with other provisions of the AEA and other Federal statutes.

⁶⁸ AEA § 131(f)(2), 42 U.S.C. § 2160(f)(2).

Appendix A

Severability of Legislative Veto Provision in the Atomic Energy Act

Section 131(f)(1)(a) of the Atomic Energy Act,⁶⁹ which may be employed to bring spent nuclear fuel into the United States, contains a legislative veto that is almost certainly unconstitutional according to current Supreme Court jurisprudence.⁷⁰ The question presented is whether such legislative veto could be successfully severed from the rest of section 131(f)(1)(a), and thus whether the executive agency is able to employ the rest of the process outlined in section 131(f)(1)(a) to import spent nuclear fuel. If such a process were followed, the Secretary of Energy would provide notice to Congress, wait the requisite 60 days, and then begin to import the spent nuclear fuel, even though the House and Senate would be barred from stopping this process through a legislative veto.

Several tenets of statutory construction affect severability. The first is the rule which holds that statutes should be construed to maintain their constitutionality whenever possible.⁷¹ Further, there is a presumption in favor of severability because the legislature is assumed not to have intended to pass an invalid act⁷² and a broader than necessarily invalidation of a statute due to unconstitutionality frustrates the intent of elected representatives.⁷³ Thus, courts have an obligation to uphold parts of a statute that can be separated from the unconstitutional provisions,⁷⁴ especially when Congressional intent to allow such severability is clear.

It appears that the unconstitutional legislative veto clause in the Atomic Energy Act could be successfully severed from the rest of the Act because the legislative intent to allow such severability is made explicit in the Act. Section 281 “Separability,” states: “If any provision of this Act or the application of such provision to any person or circumstances, is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.” In *INS v. Chadha*,⁷⁵ the Court upheld the severability of a legislative veto provision from the rest of the statute under similar circumstances. There the Court states:

Only recently this Court reaffirmed that the invalid portions of a statute are to be severed “[unless] it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.” *Buckley v. Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co. v. Corporation Comm’n of Oklahoma*, 286 U.S. 210, 234 (1932). Here, however, we need not embark on that elusive inquiry since Congress itself has provided the answer to the question of severability in § 406 of the Immigration and Nationality Act, note following 8 U. S. C. § 1101, which provides: “If any particular

⁶⁹ Atomic Energy Act of 1954, P.L. 83-703.

⁷⁰ See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) and *Consumers Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff’d sub. nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983).

⁷¹ See, e.g. *El Paso & N.e. Ry. Co. v. Gutierrez*, 215 U.S. 87 (1909).

⁷² See, e.g. *Lidas, Inc. v. U.S.*, 238 F.3d 1076 (9th Cir. 2001).

⁷³ *U.S. v. Ameline*, 376 F.3d 967 (9th Cir. 2004).

⁷⁴ See, e.g. *El Paso & N.e. Ry Co.*, 215 U.S. at 87.

⁷⁵ *Chadha*, 462 U.S. at 931-32.

provision of this Act, or the application thereof to *any* person or circumstance, is held invalid, *the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.*” (Emphasis added.)

This language is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the veto clause of § 244(c)(2) was invalid. The one-House veto provision in § 244(c)(2) is clearly a “particular provision” of the Act as that language is used in the severability clause. Congress clearly intended “the remainder of the Act” to stand if “any particular provision” were held invalid. Congress could not have more plainly authorized the presumption that the provision for a one-House veto in § 244(c)(2) is severable from the remainder of § 244 and the Act of which it is a part. See *Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938).

The presumption as to the severability of the one-House veto provision in § 244(c)(2) is supported by the legislative history of § 244. That section and its precursors supplanted the long-established pattern of dealing with deportations like Chadha’s on a case-by-case basis through private bills. Although it may be that Congress was reluctant to delegate final authority over cancellation of deportations, such reluctance is not sufficient to overcome the presumption of severability raised by § 406.

Later in *INS v. Chadha* the Court also stated:

A provision is further presumed severable if what remains after severance “is fully operative as a law.” *Champlin Refining Co. v. Corp. Comm’n*, *supra*, at 234. There can be no doubt that § 244 is “fully operative” and workable administrative machinery without the veto provision in § 244(c)(2). Entirely independent of the one-House veto, the administrative process enacted by Congress authorizes the Attorney General to suspend an alien’s deportation under § 244(a). Congress’ oversight of the exercise of this delegated authority is preserved since all such suspensions will continue to be reported to it under § 244(c)(1). Absent the passage of a bill to the contrary, deportation proceedings will be canceled when the period specified in § 244(c)(2) has expired. Clearly, § 244 survives as a workable administrative mechanism without the one-House veto.⁷⁶

As can be seen from the way the court addressed the issue in *Chadha*, issues of statutory severability are usually fact-specific undertakings that include asking whether Congress would have passed the section of a bill without the unconstitutional provision or section of a provision. This is largely a matter of the text of the act, legislative intent,⁷⁷ and legislative history. When there is a severability clause in the statute itself, as in the case of the Atomic Energy Act, the legislative intent is clear. Therefore, the provision allowing for a legislative veto will very likely be able to be successfully severed from the rest of the Act based on the intent of Congress.

⁷⁶ *Id.* at 934-35.

⁷⁷ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

Appendix B

Ancillary Provisions Relating to Foreign Commercial SNF

1. Section 107 of the Department Energy Act of 1978—Civilian Applications.

This section, enacted prior to the NNPA, imposes limitations on use of appropriated funds to store foreign spent nuclear fuel unless the use is “expressly authorized by legislation hereafter enacted” or the President submits a plan for such storage and neither House disapproves within 30 days of continuous session.⁷⁸ The relationship between Section 107 and AEA Section 131 is unclear. There is some question regarding the continued applicability of Section 107 to the storage of foreign commercial fuel to which Section 131 of the AEA applies; however, there is no question that the one-House veto provisions in both statutes are unconstitutional under *Chadha*.⁷⁹

2. Section 104(a) of the NNPA.

Section 104(a) of the NNPA authorizes the President to “negotiate . . . binding international undertakings providing for” *inter alia*, “the establishment of repositories for the storage of spent nuclear reactor fuel under effective international auspices and inspection.”⁸⁰ In addition, Section 104(f)(1) of the NNPA prohibits the President from entering into any binding international undertaking (other than a treaty) negotiated under Section 104(a) until the President submits the undertaking to Congress and Congress approves it by concurrent resolution. The two-House veto is unconstitutional under *Chadha* and following cases, but because the NNPA lacks a severability clause, it is unclear what the President’s authority would be in this case. However, since the limitation in Section 104(f)(1) applies only to “undertakings” under NNPA Section 104(a), DOE’s authority under Section 131 of the AEA respecting foreign commercial SNF would appear to be unaffected.

⁷⁸ Pub. L. No. 95-238, § 107 (22 U.S.C. § 3224a) (Feb. 25, 1978).

⁷⁹ 462 U.S. at 932.

⁸⁰ 22 U.S.C. § 3223(a)(4) (2006).