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BUDGETING FOR NUCLEAR WASTE MANAGEMENT

HEARING

BEFORE THE

COMMITTEE ON THE BUDGET
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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BUDGETING FOR NUCLEAR WASTE MANAGEMENT

THURSDAY, JULY 16, 2009

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE BUDGET,
Washington, DC.

The Committee met, pursuant to call, at 10:04 a.m., in room 210, Cannon House Office Building, Hon. John M. Spratt, Jr. [Chairman of the Committee] presiding.

Present: Representatives Spratt, McCollum, Edwards, Langevin, Diaz-Balart, Simpson, Mack, Jordan, Aderholt, Harper, and Latta.

Chairman SPRATT. I call the hearing to order, and explain first of all to everyone, and particularly to our witnesses, that we have as we speak three different markups going, Energy and Commerce, Ways and Means, and as a consequence we will probably be lightly staffed today, lightly attended today. But you have two people here today who have a substantial interest in this subject matter and I am sure there will be others arriving later. In any event, we very much appreciate your coming and your being willing to testify.

We have an excellent panel. I want to thank you once again for coming. First, from the Department of Energy we have Christopher Kouts. Mr. Kouts is the Acting Director of the Office of Civilian Radioactive Waste Management. Director Kouts, thank you for joining us today. Second, from the Department of Justice we have Michael Hertz. Mr. Hertz is the Deputy Assistant Attorney General in the Civil Division of the Commercial Litigation Branch. Mr. Hertz, we thank you also for coming. And third, from the Congressional Budget Office we are joined by Kim Cawley. Mr. Cawley is Chief of CBO's Natural and Physical Resources Cost Estimates Unit. Mr. Cawley, thank you for joining us.

Our goal for this hearing is to gain a better understanding of the federal government's liabilities for everything, but particularly this morning for managing nuclear waste and the budget implications that are our responsibility. We first held a hearing on this topic two years ago and we would like to know what progress the federal government has made in addressing the problem over the last two years. Nuclear waste results from both civilian and defense activities. Nuclear energy supplies approximately 20 percent of our nation's electricity. Nuclear fuel and weapons are, obviously, an important part of our natural security and our economy. During this hearing we will focus on waste that comes from commercial nuclear energy production.

Under the Nuclear Waste Policy Act of 1982 the United States government was to have begun in 1998, some years ago, to remove

nuclear waste from commercial reactors and to dispose of it in a central national repository. Yucca Mountain in Nevada was chosen as the site for this repository. Since 1983 commercial utilities have paid the federal government a fee for this service. These fee collections, which range from $750 million to $800 million a year, are placed in a Nuclear Waste Trust Fund.

After more than a decade, the federal government has now begun to take this waste from these sites. Nuclear waste and spent nuclear fuel is being stored currently at 121 sites in thirty-nine states. Even under the most optimistic time frame by the time the federal government opens a repository it is likely to face at least a twenty-year backlog of waste.

Federal delays have resulted in additional cost. In addition to direct lifetime project costs for Yucca Mountain that are now estimated at $100 billion, many utilities have sued the federal government for breach of its responsibilities. They have been winning their lawsuits. Present estimates of the eventual total costs of the awards and settlements related to this litigation range from $12 billion to $50 billion. Each year of delay in meeting the federal responsibility has been estimated to add another $500 million to the federal government's liability. As I was explaining to our witnesses earlier, we are looking for things where we book an asset, the Nuclear Waste Trust Fund, with the receipt of funds coming into it. But because we run a big cash budget we do not necessarily book the liability that we accrue for waste disposal.

I would readily acknowledge that we are the Budget Committee, not the Energy Committee. It is not our job or domain to write energy bills. But it is our job to develop fiscally responsible policies addressing significant cost drivers in the federal budget. And we are concerned that the federal government's failure so far to resolve the problem of nuclear waste disposal is costing the American people and the federal government large sums of money. For this reason, the issue merits our Committee's very careful attention this morning.

We appreciate once again your coming today. We look forward to your testimony. But before I turn to you, let me turn to our Ranking Member, Mr. Simpson, for any statement he cares to make. Mr. Simpson?

[The prepared statement of Mr. Spratt follows:]

PREPARED STATEMENT OF HON. JOHN M. SPRATT, JR., CHAIRMAN, COMMITTEE ON THE BUDGET

Good morning and welcome to the House Budget Committee's hearing on Budgeting for Nuclear Waste Management.

We have an excellent panel of government witnesses before us, and I want to thank them for their participation in this hearing today. First, from the Department of Energy, we have Christopher Kouts (say "Coots "). Mr. Kouts is Acting Director of the Office of Civilian Radioactive Waste Management. Director Kouts, thank you for joining us today. Second, from the Department of Justice, we have Michael Hertz. Mr. Hertz is Deputy Assistant Attorney General in the Civil Division, Commercial Litigation Branch. Mr. Hertz, we thank you for being here today as well. Third, from the Congressional Budget Office, we are joined by Kim Cawley. Mr. Cawley is Chief of CBO's Natural and Physical Resources Cost Estimates Unit. Mr. Cawley, thank you for joining us.

Our goal for this hearing is to gain a better understanding of the federal government's responsibilities and liabilities for managing nuclear waste and the budget implications of that responsibility. We first held a hearing on this topic two years

ago, and we would like to know what progress the federal government has made addressing the problem in the past two years.

Nuclear waste results from both civilian and defense activities. Nuclear energy supplies approximately 20 percent of our nation's electricity, and nuclear fuel and weapons are an important part of national security. During this hearing, we will focus on waste that comes from commercial nuclear energy production.

Under the Nuclear Waste Policy Act of 1982, the U.S. government was to have begun in 1998 to remove nuclear waste from commercial nuclear reactors and to dispose of it in a central national repository. Yucca Mountain in Nevada was chosen as the site for this repository. Since 1983, commercial utilities have paid the federal government a fee for this service. These fee collections, which average from $750 to 800 million a year, are placed in a Nuclear Waste Fund.

More than a decade later, however, the federal government has not begun to take this waste from these sites. Nuclear waste and spent nuclear fuel is currently being stored at 121 sites in 39 states. Even under the most optimistic timeframe, by the time the federal government opens a repository, it is likely to face at least a 20-year waste backlog.

Federal delays have resulted in additional costs. In addition to direct lifetime project costs for Yucca Mountain that are now estimated at about $100 billion, many utilities have sued the federal government for breach of its responsibilities. They have been winning their lawsuits. Present estimates of the eventual total costs of the awards and settlements related to this litigation range from $12 billion to $50 billion. Each year of delay in meeting the federal responsibility has been estimated to add another $500 million to the federal liability.

We are the Budget Committee, not the Energy Committee, and it is not our job to draft energy bills. But it is our job to develop fiscally responsible policies addressing significant cost drivers to the federal budget. We are concerned that the federal government's failure so far to resolve the problem of nuclear waste disposal is costing the American people large sums. For that reason, this issue merits our committee's careful examination.

We very much appreciate your joining us today. Before turning to you for your testimony, let me turn to our Ranking Member, Mr. Ryan, for any statement he cares to make.

Mr. SIMPSON. Thank you, Mr. Chairman, and thanks for holding this hearing today. And thank you to the witnesses for being here today. First, Mr. Chairman, let me make a unanimous consent request to allow members one week to submit statements for the record.

Chairman SPRATT. Without objection, so ordered.

Mr. SIMPSON. As you mentioned, both Mr. Edwards and I have an interest in this in that we sit on the Energy and Water Appropriations Committee and deal with how we are going to appropriate the funds for permanent disposal of this waste at some point in time, and it concerns us both greatly.

Permanent disposal of high level nuclear waste has been an ongoing issue of this nation ever since World War II. Both Republican and Democratic administrations and Congresses have sought a solution to this vexing problem for over sixty years. We have conducted hundreds if not thousands of studies, and have spent billions of taxpayer dollars in the process. During this time scientific consensus and collective wisdom of every session of Congress since 1980 has been that, one, geological storage of nuclear waste is the safest, most economic, and most effective means of permanent nuclear waste storage. And two, Yucca Mountain is suitable, if not the best, location for geological storage.

We have spent nearly $10 billion studying Yucca Mountain as a permanent site for nuclear waste storage. This is easily the most comprehensive and expensive environmental study ever undertaken by this country or any other. There are over 1.5 million documents of evidence that have been prepared in analyzing Yucca Mountain. Yet, after only six weeks in office the Obama adminis-

tration somehow came to the judgment that Yucca Mountain is not a workable option for the storage of nuclear waste. The administration's only alternative solution is "we need more studies."

Abandoning Yucca Mountain is not a solution to nuclear waste disposal. It will only serve to delay a real permanent solution and will likely slow new growth in the nuclear power industry. Abandoning Yucca Mountain will also add to the government's bleak fiscal outlook due to the large liabilities it has already incurred by not accepting nuclear waste as promised. Already courts have awarded nearly $1 billion in damages to utility companies that have been forced to pay fees to the government for nuclear waste disposal. DOE currently estimates this liability to reach $12.3 billion and that is only if Yucca Mountain opens by 2020, which is optimistic. Every year that Yucca Mountain delays adds another $500 million to that liability, an estimated $500 million.

My home State of Idaho has nearly 5,000 tons of nuclear waste related to Cold War defense activities for which the federal government has agreed to dispose of by 2035. Canceling the Yucca Mountain project seriously jeopardizes this time frame. And Idaho is not alone in this dilemma; over thirty other states face similar problems, including the Chairman's State of South Carolina. Abandoning Yucca Mountain would also seriously damage any effort to realistically control greenhouse gases as nuclear power currently accounts for 72 percent of all carbon-free energy production in this country. So without a permanent nuclear waste solution we will not be able to cut emissions to the level, as the administration has requested and this Congress has requested.

Finding a permanent solution to disposal of our nuclear waste has to be a critical part of our long term energy strategy. Without it, we cannot expect to achieve a green energy economy because we simply cannot build enough windmills or solar panels to get there without nuclear power. And simply proposing to study the issue after years of similar studies, and billions of taxpayer dollars already spent, will not get us any closer to a final solution.

I thank you, Mr. Chairman, and I yield back.

Chairman SPRATT. Thank you, Mr. Simpson. And in addition to our Republican members who have just joined us we have Chet Edwards who is the Chairman of the Energy and Water Subcommittee, and we are glad to have you here this morning.

Gentlemen, the floor is yours and for purposes of moving along we will make, without objection, your statements part of the record. You can summarize as you see fit, but we encourage you to take all the time you need to get your statements fully before the Committee. And secondly, we will put questions to you as a panel when the three of you have completed all of your testimony. So thank you for coming and let me add as one further housekeeping detail that all members will be allowed to submit an opening statement for the record at this point unless there is objection. Hearing none, so ordered.

Let us begin with Mr. Hertz. Or we will take it in whatever order you would like to take it. Is there any preference? Mr. Kouts?

Mr. KOUTS. Whatever is your pleasure, Mr. Chairman. I would be happy to start.

Chairman SPRATT. Why do you not lead off, then?

STATEMENTS OF CHRISTOPHER A. KOUTS, ACTING DIRECTOR, OFFICE OF CIVILIAN RADIOACTIVE WASTE MANAGEMENT, DEPARTMENT OF ENERGY; MICHAEL F. HERTZ, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE; AND KIM P. CAWLEY, UNIT CHIEF, NATURAL AND PHYSICAL RESOURCES COST ESTIMATES UNIT, CONGRESSIONAL BUDGET OFFICE

STATEMENT OF CHRISTOPHER A. KOUTS

Mr. KOUTS. All right, thank you. Thank you, Mr. Chairman, and members of the Committee. I am Christopher Kouts, Principal Deputy Director and currently Acting Director of the Office of Civilian Radioactive Waste Management within the Department of Energy. I appreciate the invitation to appear before the Committee to provide a brief status of our program and to discuss the government's liability due to the delay in meeting its obligation to begin the acceptance of commercial spent nuclear fuel by January 31, 1998.

The Nuclear Waste Policy Act of 1982 as amended directs the Office of Civilian Radioactive Waste Management to undertake numerous activities. Among those are to provide for the development of one authorized geologic repository for the permanent disposal of waste. The Act also authorizes one commercial spent nuclear fuel interim storage facility under certain conditions.

The Department's fiscal year 2010 budget request announced the administration's intended termination of the Yucca Mountain Repository Project and includes the funding needed to explore alternatives for nuclear waste disposal and to continue participation in the Nuclear Regulatory Commission license application process. However, the Department remains committed to meeting its obligations for managing and ultimately disposing of spent nuclear fuel and high level waste. To that end, the Secretary of Energy is convening a blue ribbon panel of experts to evaluate alternative approaches for meeting the federal government's responsibility.

Regarding federal government liability, the Nuclear Waste Policy Act authorizes the Secretary of Energy to enter into contracts with commercial nuclear utilities and commercial research reactor operators that own and generate spent nuclear fuel. Under the terms of these contracts, in return for the payment of a fee of one mill per kilowatt hour, that is a tenth of a cent per kilowatt hour, the government was to begin disposing of the spent nuclear fuel starting in 1998. The fees collected under these contracts are deposited in the Nuclear Waste Fund. The Fund currently has a balance of approximately $23 billion, which is invested in U.S. Treasury instruments. The government receives over $750 million per year in revenues from ongoing nuclear generation and the Fund averages approximately $1 billion in annual return on its investments. To date, utility contract holders have paid approximately $17 billion into the Fund.

Beginning in 1998 most contract holders initiated lawsuits against the government due to the delay in beginning the acceptance of spent nuclear fuel as required by the contracts. Courts have determined the delay was a partial breach of contract by the government and numerous trials have been held to determine the amount of damages to be awarded. The Department of Justice,

with the Department of Energy's assistance, has been able to settle several lawsuits representing approximately 36 percent of commercial nuclear power reactors that are covered by waste disposal contracts. To date, close to $600 billion in claims has been paid under these settlements. Payments are made from the Treasury Department's Judgment Fund.

Of the remaining pending cases, judgments subject to post-trial motions, appeals, or remands total approximately $800 million. As the damages in each trial are limited to those costs incurred prior to the beginning of the trial, future lawsuits may be brought by utilities to recover alleged additional damages until the government has accepted their spent nuclear fuel. And I would like to state for the record with Mr. Hertz at my left here that having spent countless hours in depositions and in trial testimony that the Department of Justice does an outstanding job in defending the United States of America against plaintiffs' lawsuits and my kudos go to Mr. Hertz and his staff for their efforts in that regard.

Last year the Department estimated the liabilities under current law resulting from delaying the beginning of waste acceptance from 1998 to 2020, which was the last date we had for the opening of Yucca Mountain, at $12.3 billion. We have not attempted to further update that estimate.

In summary, the Department remains committed to meeting its obligations for managing and ultimately disposing of spent nuclear fuel and high level waste. The Secretary's blue ribbon panel will provide the opportunity for a dialogue on how best to address this challenging issue. And the panel's recommendations will provide a basis for working with Congress to revise the national policy. The Department looks forward to an ongoing dialogue with members of Congress, interested stakeholders, and others as alternative waste management approaches are reviewed. I want to thank you for the opportunity to discuss these issues and I would be pleased to answer any questions that the Chairman or the Committee members have.

[The prepared statement of Mr. Kouts follows:]

PREPARED STATEMENT OF CHRISTOPHER A. KOUTS, ACTING DIRECTOR OF THE OFFICE OF CIVILIAN RADIOACTIVE WASTE MANAGEMENT, U.S. DEPARTMENT OF ENERGY

Mr. Chairman and Members of the Committee, I am Christopher A. Kouts, Acting Director of the Department of Energy's (DOE) Office of Civilian Radioactive Waste Management (OCRWM). I appreciate the invitation to appear before the Committee to provide a brief status of the Civilian Radioactive Waste Management Program and to discuss the Government's liability due to the delay in meeting its obligation to begin the acceptance of commercial spent nuclear fuel by January 31, 1998.

The mission of the Department of Energy's Office of Civilian Radioactive Waste Management is to manage and dispose of the Nation's commercial and defense high-level waste and spent nuclear fuel in a manner that protects public health, safety, and the environment. The Nuclear Waste Policy Act of 1982, as amended, directs the Office of Civilian Radioactive Waste Management to provide for the development of one authorized repository for the permanent disposal of waste through site characterization activities, a specific site approval process, and submittal of a license application, among other things. The Act authorizes one commercial spent nuclear fuel interim storage facility under certain conditions.

The Department's FY 2010 budget request announces the Administration's intended termination of the Yucca Mountain repository project and includes the funding needed to explore alternatives for nuclear waste disposal and to continue participation in the Nuclear Regulatory Commission license application process. All funding for the development of the Yucca Mountain facility and related infrastructure—

such as further land acquisition, transportation access, and additional engineering—has been eliminated.

The Department remains committed to meeting its obligations for managing and ultimately disposing of spent nuclear fuel and high-level radioactive waste. To that end, the Secretary is convening a Blue-Ribbon Panel of experts to evaluate alternative approaches for meeting the Federal Government's responsibility.

GOVERNMENT LIABILITY

The Nuclear Waste Policy Act authorizes the Secretary to enter into contracts with commercial nuclear utilities and commercial research reactor operators that own and generate spent nuclear fuel. Under the terms of these contracts, in return for the payment of a fee of 1 mill per kilowatt-hour, the Government was to begin disposing of the spent nuclear fuel starting in 1998. The fees collected under these contracts are deposited in the Nuclear Waste Fund. The Fund currently has a balance of approximately $23 billion which is invested in U.S. Treasury instruments. The Government receives over $750 million per year in revenues from on-going nuclear generation and the Fund averages approximately $1 billion annual return on its investments. To date, utility contract holders have paid approximately $17 billion in fees.

Beginning in 1998, most contract holders initiated lawsuits against the Government due to the delay in beginning the acceptance of spent nuclear fuel as required by the contracts. Courts have determined the delay was a partial breach of contract by the Government, and numerous trials have been held to determine the amount of damages to be awarded.

As of May 2009, 71 lawsuits have been filed by utilities to recover damages resulting from the delay. The Department of Justice, with the Department of Energy's assistance, has been able to settle ten of the lawsuits. This represents approximately 36 percent of the commercial nuclear power reactors that are covered by waste disposal contracts. To date, close to $600 million in claims have been paid under these settlements. Payments are made from the Treasury Department's Judgment Fund. Under these settlements, contract holders will continue to submit annual claims for additional costs, and additional annual payments will be made until the Government "catches up" with its spent fuel acceptance obligations, as they are defined in the settlement agreements.

Of the remaining 61 lawsuits, four judgments were affirmed resulting in $35 million paid. Six of the cases were dismissed. The other 51 cases remain pending. Of the 51 pending cases, 17 were tried with judgments subject to post-trial motions, appeals, or remands for a combined total of $790 million. As the damages in each trial are limited to those costs incurred prior to the beginning of trial, future lawsuits may be brought by the utilities to recover alleged additional damages until the Government has accepted their spent nuclear fuel.

Last year, the Department estimated the liabilities under current law resulting from delaying the beginning of waste acceptance from 1998 to 2020 at $12.3 billion. We have not attempted to further update that estimate.

CONCLUSION

The Department remains committed to meeting its obligations for managing and ultimately disposing of spent nuclear fuel and high-level radioactive waste. The Secretary's Blue-Ribbon Panel will provide the opportunity for a dialogue on how best to address this challenging issue, and the Panel's recommendations will provide a basis for working with Congress to revise the national policy. The Department looks forward to an ongoing dialogue with members of Congress, interested stakeholders, and others as alternative waste management approaches are reviewed.

Thank you for this opportunity to discuss these issues, and I would be pleased to answer any questions the Committee may have at this time.

Chairman SPRATT. Before going to Mr. Hertz, the $12.3 billion? I missed what that represents.

Mr. KOUTS. That was the latest estimate that we had, assuming that the government was going to start performing beginning in the year 2020. And that assumed that Yucca Mountain was going to be operational in the year 2020.

Chairman SPRATT. Well is there any prospect of that happening at this point in time?

Mr. KOUTS. Well, I believe the administration has made it clear that its intention is not to proceed with the deployment of the repository, sir.

Chairman SPRATT. Well, we will come back to that. Thank you, sir. Mr. Hertz?

STATEMENT OF MICHAEL F. HERTZ

Mr. HERTZ. Thank you, Mr. Chairman. Mr. Chairman and members of the Committee, I am Michael Hertz, Deputy Assistant Attorney General, Civil Division, Department of Justice. I would like to touch on three points this morning. First, the origins of the litigation that we are defending. Second, the current status of that litigation. And third, the liabilities that we are facing in that litigation and the funding of that litigation.

Pursuant to the Nuclear Waste Policy Act DOE entered into seventy-six standard contracts with commercial utilities to pick up spent nuclear fuel. In return, the commercial utilities pay a fee on a quarterly basis. In May 1995 the Department of Energy announced that it would be unable to begin acceptance of spent nuclear fuel in January 1998 as was called for by those contracts. A number of utilities went to the United States Court of Appeals for the District of Columbia Circuit to seek an order that the Department of Energy was required to pick up that spent nuclear fuel notwithstanding that fact that a repository had not been built by 1998, and the Court agreed with them. But the Court ultimately decided not to order the Department of Energy to pick up that spent nuclear fuel because it determined that the utilities had an adequate remedy at law in the United States Court of Federal Claims to seek breach of contract damages. And as part of that ruling the United States Court of Appeals for the District of Columbia Circuit announced that the Department of Energy would not be allowed to rely on the unavoidable delay clause in the standard contracts as a defense to liability.

Therefore, beginning after January 1998, after the breach occurred because spent nuclear fuel was not begun to be picked up, utilities began to file cases. They filed seventy-one cases in the Court of Federal Claims. To date, that is the number that has been filed. Collectively, those cases currently seek $5.7 billion in damages. The United States Court of Appeals for the Federal Circuit, which is the appeals court that the cases go to from the United States Court of Federal Claims, has determined that the Department of Energy is in breach of its obligations. But it has determined that it is only a partial breach. That is, the Department of Energy is still required to perform under the contracts, that is to eventually pick up the spent nuclear fuel, and the utilities can only seek damages up until the point of time that they file a complaint. So what that means is that at least every six years the utilities will have to go back to court to seek whatever increased damages they have for the preceding six-year period. And that means we are obviously facing litigation for many years to come.

As was noted, the estimates of potential liability, the Department of Energy estimates it eventually at $12.3 billion assuming performance by 2020. The utility industry has estimated damages of up to $50 billion. Both of those estimates obviously were done be-

fore the administration announced that Yucca Mountain was not going to go forward.

With regard to the current status of the litigation, of the seventy-one lawsuits filed fifty-one cases remain pending either in the Court of Federal Claims or in the Court of Appeals for the Federal Circuit. Ten cases have been settled, and as noted that represents about 36 percent of the reactors that are covered by standard contracts. Six have been voluntarily withdrawn, and four have been litigated through final, unappealable judgments.

While the Department of Justice has asserted legitimate defenses to these cases, we also have made concerted efforts to settle these cases. As I noted, we have settled approximately ten cases. The settlement payments so far have been $565 million. Of the fifty-one pending cases, the trial court has entered judgment in thirteen cases. Six of those cases are currently on remand to the trial court after appeals and seven are pending on appeal. Between judgments, most of which are not final because of appeals and remands, and settlements, the government's total liability currently stands at $1.3 billion. As I noted, this only covers a relatively short period of time, in some cases as short as from 1998 to 2001, depending on when the utility filed its case. Or in the case of some settlements it may go all the way from 1998 to 2006 or 2007. So, current liability stands at $1.3 billion.

There are two significant issues that are still pending potentially on appeal that could affect the government's overall liability. One is the unavoidable delay clause that I mentioned earlier. Although the D.C. Circuit determined that the United States could not rely on the unavoidable delay clause, the judge of the Court of Federal Claims determined in his view the D.C. Circuit lacked jurisdiction to make that ruling. That ruling from the Court of Federal Claims is now pending in the Federal Circuit. And the case was actually argued some time ago, but more recently the Court decided it wanted to hear that case en banc. That is, rather than the normal three-judge panel all the judges of the Court would hear the case. And it has ordered a supplemental briefing which will be completed in August.

The second major issue pending on appeal is the scope of the government's obligations under the contract, and principally at what rate did the government need to accept spent nuclear fuel? And the rate is a very significant issue because it actually is the driving force between what the government's damages are. Last summer the Federal Circuit entered a number of decisions setting a rate. This rate was lower than what the utilities had wanted, higher than what the government had asked for, and higher than the rate the government has used in the settlements it has entered to date. That decision is not necessarily final. The government still has options to ask the entire Federal Circuit to rehear the case, either those cases or subsequent cases coming to the Court, to set a definitive rate of acceptance.

To date, all payments have been made out of the Judgment Fund that has been mentioned. The government's original position was that payments should be made out of the Nuclear Waste Fund. But the United States Court of Appeals for the Eleventh Circuit back

in 2002 rejected that argument. And therefore, the only available funds to pay these judgments is the Judgment Fund.

Now, a word about litigation costs. These costs to the government to litigate these cases are quite significant and they represent a significant burden on the Department of Justice, implicating our ability to defend other cases. I would note that the unit of the Justice Department that defends these cases spends anywhere from twelve to fifteen attorney hours per year defending cases, just the attorneys. And the total resources that are spent on the spent nuclear fuel cases represent 45 percent of that unit's budget, notwithstanding the fact that they are defending billions of dollars in cases in other fields. To date, the Department has expended $24 million in attorneys' costs, $91 million in expert funds, and $39 million in litigation support costs and defenses, for a total of approximately $150 million. To date, the Department has funded these expenses exclusively. The Department of Energy has not provided funds but they have provided cooperation in other respects and as Mr. Kouts notes we have a very good working relationship in handling these cases.

To give you some idea of what we face, so far this year we have had trials in four cases involving five utilities where the total amount of money claimed was $543 million. This month alone two more cases are going to trial with the total amount of claims of $64 million. In August another case is going to go to trial where the claim is $174 million. In the summer and the fall two more cases are going to go to trial where the amount requested is $100 million. And then in December another case is going to go to trial where the amount requested is $30 million. So far, there are already three cases set for trial in 2010 where the total amount expected to be claimed is $335 million. And we are predicting that the total number of cases that will go to trial in fiscal year 2010 will be twelve, and fiscal year 2011 thirteen cases.

As I noted, these cases will continue to be filed and litigated into the foreseeable future because of the partial breach ruling. I would note recently, in addition to the contracts in which DOE has already been found to be in breach, DOE has entered into some new contracts with utilities who want to build some new nuclear power plants. We worked closely with DOE to try to come up with provisions and that that would ultimately, if DOE is unable to accept spent nuclear fuel, that would limit the government's potential liability.

We understand that the administration is going to convene a blue ribbon panel of experts to make recommendations going forward and that might provide a basis for revising the statutory framework to govern the existing obligations. We would suggest that any legislative solution to these issues also include provisions to address the government's outstanding liability. A legislative solution would be preferable to the current drain on the resources of the courts and the Department of Justice caused by this seemingly endless litigation.

In summary, the spent nuclear fuel litigation has already cost the government significant sums in terms of liability and litigation costs, likely to continue to do so into the foreseeable future. Thank

you for your patience and I look forward to responding to your questions.

[The prepared statement of Mr. Hertz follows:]

PREPARED STATEMENT OF HON. MICHAEL F. HERTZ, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman, and members of the Committee, I am Michael F. Hertz, and I am a Deputy Assistant Attorney General of the Department of Justice, Civil Division. I am pleased to testify today regarding the status of litigation concerning the Department of Energy's (DOE) obligations under the Nuclear Waste Policy Act (NWPA) of 1982.

Let me note at the outset that much of the litigation about which you have asked the Department of Justice to provide testimony is still pending in the Federal courts. As a result, the Department's pending matter policy applies to any discussion of those cases. Pursuant to that policy, I will be happy to discuss matters that are in the public record.

BACKGROUND

In 1983, pursuant to the NWPA, the DOE entered into 76 standard contracts with entities, mostly commercial utilities,that were producing nuclear power. Through the standard contracts, DOE agreed that by January 31, 1998, it would begin accepting spent nuclear fuel and high-level radioactive waste (collectively, SNF) created by the utilities. In return, the utilities agreed to make quarterly payments into the Nuclear Waste Fund (NWF) created by the statute. The utilities began making payments into the NWF in 1983. In 1987, Congress designated Yucca Mountain in Nevada as the sole potential site for a Federal repository for disposal of the SNF. In May 1995, DOE published a notice in the Federal Register advising the utilities that held standard contracts and others that DOE would be unable to begin acceptance of SNF on January 31, 1998. The notice also explained that DOE's acceptance beginning on that date was conditioned upon the existence of an operational repository. 60 Fed. Reg. 21793 (May 3, 1995).

In response to this notice, several nuclear utilities filed suit in the United States Court of Appeals for the District of Columbia challenging DOE's understanding. The District of Columbia Circuit held that DOE was required to begin SNF acceptance in some type of facility by January 31, 1998. See Indiana Michigan Power Co. v. Department of Energy, 88 F.3d 1272, 1277 (D.C. Cir. 1996). After DOE continued to inform utilities that it would be unable to begin accepting SNF by January 31, 1998, the utilities again requested an order directing that DOE perform under the standard contracts. The District of Columbia Circuit denied the utilities' request and instead found that the utilities' remedy could be addressed through breach of contract claims. Northern States Power Co. v. United States, 128 F.3d 754, 759 (D.C. Cir. 1997), cert. denied, 525 U.S. 1015 & 1016 (1998). The court did, however, issue a mandamus order [added to accord with later reference to DC Cir mandamus writ] that barred DOE from asserting that its delays in performing the standard contract were "unavoidable" and, therefore, excused pursuant to the "unavoidable delays" provision of the standard contracts.

STATUS OF COURT OF FEDERAL CLAIMS LITIGATION

To date, utility companies have filed 71 cases in the United States Court of Federal Claims, alleging that DOE's delay in beginning SNF acceptance constituted a breach of contract. The Court of Appeals for the Federal Circuit, in Maine Yankee Atomic Power Co. v. United States, 225 F.3d 1336 (Fed. Cir. 2000), has ruled that the delay constitutes such a breach.

The utilities' damages claims largely are for the costs incurred to store SNF that they allege DOE would have accepted from them absent the breach—specifically, storage costs that utilities allege they would not have expended had DOE begun timely performance under the standard contracts. In addition, several utilities have alleged damages arising from the "diminution-in-value" of their plants as the result of DOE's delay, claiming that they realized these damages when they sold their plants to other utilities.

Utility industry reports have estimated that the claims will total about $50 billion, which far exceeds the amount the utilities have paid into the NWF pursuant to the standard contracts. DOE's most recent estimate of potential liability is $12.3 billion, based upon a projected start date of 2020. These estimates do not fully take into account the Government's defenses or the possibility that plaintiffs will not be able to prove the full extent of their claims, and they were developed before the Ad-

ministration's recent announcement about the general cessation of Yucca Mountain activities.

In the first case to proceed to trial on the merits in March 2004, the trial court found that the utility had not incurred any damages as a result of the partial breach of contract through the date of trial and denied any monetary recovery, although it ruled that the utility may return to court if and when it incurs damage because of the delay in spent fuel acceptance. Indiana Michigan Power Co. v. United States, 60 Fed. Cl. 639 (2004). In affirming this ruling on appeal, the appellate court held that all claims for breach of the standard contracts may only run through the date of the complaint and that utilities must file new complaints with the trial court seeking damages as they are incurred. Indiana Michigan Power Co. v. United States, 422 F.3d 1369 (Fed. Cir. 2005).

As a result of this ruling, utilities must file new cases with the trial court at least every six years to recover any costs incurred as the result of DOE's delay, and we expect to continue to litigate these claims until after DOE begins performance of the standard contracts. We have received a total of five complaints filed by utilities while their first claims were still pending before the trial or appellate courts.

Of the 71 lawsuits filed, 51 cases remain pending either in the Court of Federal Claims or in the Court of Appeals for the Federal Circuit, 10 have been settled, six were voluntarily withdrawn, and four have been litigated through final unappealable judgment.

While asserting legitimate defenses to plaintiffs' claims in litigation, we also have made concerted efforts to settle claims. The settlements resolving claims on 12 of the standard contracts in 10 of the cases involve five companies: Exelon Generation, LLC; South Carolina Electric & Gas Company; Omaha Public Power District; Duke Power Company; and, Florida Power & Light Company. These settlements provide for the periodic submission of claims to the contracting officer for costs incurred since the date of the last submission. In total, the Government has paid $565 million pursuant to these settlements and one trial court judgment that was not appealed.

Of those 51 pending cases, the trial court has entered judgment in 13 cases. Six of those cases are currently on remand to the trial court and seven are pending on appeal. Between judgments (most of which are not final because of appeals or remands) and settlements, the Government's liability currently stands at $1.3 billion. The time periods covered by these judgments vary, from as short a period as 1998-2001 to as long a period as 1998-2006. The time period for the amounts paid in settlement is 1998-2007.

The following chart summarizes the status of the 71 cases that have been filed:

Number of cases	Status/Comments
6	Voluntarily withdrawn
10	Settled
4	Final unappealable judgments
7	Final judgments on appeal
44	Pending before the trial court
71	Total

SIGNIFICANT ISSUES ON APPEAL

There are two major issues that should be decided in the pending appeals which will have a significant effect upon the Government's continuing liability in these cases. The first issue concerns the Government's ability to present a defense based upon the "unavoidable delays" clause in the contracts. As noted, the District of Columbia Circuit, in Northern States, mandated that the Government could not rely upon such a defense in its litigation of delay claims arising from its breach. One of the trial court judges at the Court of Federal Claims found the District of Columbia Circuit's writ of mandamus to be void and that DOE is entitled to raise the "unavoidable delays" defense. Nebraska Public Power District v. United States, 73 Fed. Cl. 650 (2006). On appeal, the Federal Circuit recently announced sua sponte that it would accept the case for en banc review. Supplemental briefing is due August 5, 2009. If the trial court ruling is affirmed, the Government may be able to pursue an absolute defense to the utilities' damages claims.

The second major issue to be decided in the cases on appeal is the scope of the Government's obligation to utilities regarding the amount of SNF to be accepted. In decisions issued in August 2008, the Federal Circuit ruled that DOE's performance

obligation is set forth in a document issued in 1987, prior to the passage of the 1987 amendments to the NWPA. Yankee Atomic Electric Co. v. United States, 536 F.3d 1268 (Fed. Cir. 2008); Pacific Gas & Electric Co. v. United States, 536 F.3d 1282 (Fed. Cir. 2008); Sacramento Municipal Utility District v. United States, Nos. 2007-5052, -5097, 2008 WL 3539880 (Fed. Cir. Aug. 7, 2008). The rates set forth in this document are higher than the rates that the Government has sought to have the trial court apply in determining damages. These cases are currently on remand to the trial court. We may seek rehearing en banc of the appellate decisions if these cases are appealed again or may seek review in another spent nuclear fuel case.

PAYMENT OF JUDGMENTS AND SETTLEMENTS

To date, all payments to the utilities have come from the Judgment Fund. In Alabama Power Co. v. United States Department of Energy, 307 F.3d 1300 (11th Cir. 2002), the Court of Appeals for the Eleventh Circuit ruled that the Government could not use the NWF to pay for any of the damages that the utilities incur as a result of DOE's delay. The only other available funding source that has been identified to date is the Judgment Fund. There is no statutory requirement that DOE be required to reimburse the Judgment Fund.

LITIGATION COSTS

The costs to the Government to litigate these cases are significant. The Department of Justice has expended approximately $24 million in attorney costs, $91 million in expert funds, and $39 million in litigation support costs in defense of these suits. In addition, DOE and the Nuclear Regulatory Commission have expended thousands of hours to support this effort. To date, DOE has not provided any funding for the litigation effort. There is every reason to believe that these cases will continue to be filed and litigated into the foreseeable future, and these costs will continue to be incurred.

Unless we are successful in being permitted to mount an "unavoidable delays" defense in the near future, or there is some other resolution to the current and potential litigation, the liability associated with delays in DOE's ability to accept SNF will only increase.. Further, in addition to the contracts under which DOE is already in breach, we understand that, in Fall 2008, DOE executed several new contracts with entities that hope to open new commercial nuclear reactors in the future and that, in those new contracts, DOE agreed to accept and dispose of SNF from those new nuclear reactors at a certain point after they open. If DOE is unable to accept SNF, the United States may incur additional liabilities under these recently executed contracts unless a method of resolving utility delay claims can be developed through some type of legislative action.

We understand that the Administration intends to convene a "blue ribbon" panel of experts to make recommendations for alternative options for the long-term storage and disposal of SNF that could provide a basis for revising the statutory framework that now governs these obligations. Any legislative solution to these issues should also consider provisions to address the Government's outstanding liability. A legislative solution would be preferable to the current drain on the resources of the courts and the Department of Justice caused by the seemingly endless litigation.

In summary, the SNF litigation has already cost the Government significant sums in terms of liability and litigation costs and will most likely continue to do so into the foreseeable future.

Chairman SPRATT. Thank you, Mr. Hertz. Mr. Cawley?

STATEMENT OF KIM P. CAWLEY

Mr. CAWLEY. Good morning, Mr. Chairman, members of the Committee. Thanks for the opportunity to be here this morning to talk about the nuclear waste program with you. Since CBO last testified on this subject in 2007 there have been some important developments that I would like to briefly summarize from my prepared statement.

First, the administration has announced that it intends to terminate the Yucca Mountain project and explore other alternatives for disposing of nuclear waste. Despite that change in policy, the government remains responsible for handling this waste from nuclear power plants. And regardless of how we meet that responsibility

this job will require some significant federal spending over many decades.

Over the past twenty-five years or so nuclear utilities have paid nearly $17 billion to the Department of Energy for waste disposal services that they have not yet begun to receive. Currently the Department has no identifiable plan for handling the waste. Meanwhile, operators of nuclear utilities continue to pay $750 million to $800 million a year to cover the cost of the waste that they are generating.

The government is now more than ten years behind in its schedule to fulfill its contractual obligation to dispose of waste. So far the U.S. government from the Claims and Judgments Fund has paid utilities $565 million in compensation because it has failed to meet that schedule. The Department has estimated that if it could begin disposing of waste ten years from now, in 2020, it would still need to continue making these compensation payments of around $12 billion before it could catch up and start disposing of waste on schedule. How the administration's decision to terminate the Yucca Mountain project will affect these liabilities is unclear. But if the schedule slips beyond 2020 compensation payments from the Treasury's Judgment Fund can be expected to increase beyond $12 billion.

Finally, I would like to mention that nuclear waste remains a growing issue. The amount of civilian and defense waste waiting for disposal at Yucca Mountain is now about equal to the legal capacity, 70,000 metric tons, of the repository that was authorized in the Nuclear Waste Policy Act. The Nuclear Regulatory Commission has extended the licenses of many of the nation's nuclear power plants and has received applications to build twenty-six more new plants. Of course, we do not know how many of these plants will be built, or how long any of these plants will continue to operate, but all of them could add to the growing stockpile of waste that must be handled. And without a change in law to expand the capacity of the nuclear waste system taxpayers will continue to compensate utilities to store substantial amounts of waste in the future.

Thanks again for the opportunity to be here and I would be happy to answer any of your questions about the budgetary aspects of the program.

[The prepared statement of Mr. Cawley follows:]

PREPARED STATEMENT OF KIM CAWLEY, CHIEF, NATURAL AND PHYSICAL RESOURCES, COST ESTIMATES UNIT, CONGRESSIONAL BUDGET OFFICE

Mr. Chairman, Congressman Ryan, and Members of the Committee, I am pleased to appear before you today to discuss the federal government's responsibilities and liabilities under the Nuclear Waste Policy Act of 1982 (NWPA). Since I last testified on this subject in 2007, there have been a number of important developments that I would like to highlight in my testimony:

- The Administration has announced that it intends to terminate the Yucca Mountain project and explore other alternatives for disposing of nuclear waste. Despite that change in policy, however, the federal government remains responsible for permanently disposing of spent nuclear fuel generated by civilian facilities, which pay fees for that service. Regardless of how the government meets that responsibility, discharging those liabilities will require significant federal spending over many decades.
- The Department of Energy (DOE) has not yet disposed of any civilian nuclear waste and currently has no identifiable plan for handling that responsibility. Never-

theless, the operators of nuclear utilities continue to pay fees—of about $750 million annually—to cover the costs of disposing of the nuclear waste they generate. Over the past 25 years, those firms have paid a total of $16.3 billion for waste disposal services that they have not yet begun to receive.

• The federal government is more than 10 years behind schedule in its contractual obligations to remove and dispose of such waste, and the government has paid nuclear utilities $565 million in compensation for costs incurred because of its failure to meet that schedule. DOE currently estimates that liabilities to electric utilities for such damages will total more than $12 billion if the department begins to accept nuclear waste by 2020. How the Administration's decision to terminate the Yucca Mountain project will affect the federal government's liabilities is unclear, but the estimate will climb if the department's schedule slips beyond 2020. Regardless of whether or when the government opens a repository, such payments (which come from the Department of the Treasury's Judgment Fund) will probably continue for several decades.

• The Nuclear Regulatory Commission (NRC) has now extended the operating licenses of more than half of the nation's nuclear power plants for another 20 years beyond the span of their initial operating licenses. Meanwhile, the amount of existing waste may already exceed the amount authorized to be disposed of at the repository envisioned under NWPA. Ultimately, a change in law will be required to authorize DOE to permanently dispose of all of the waste anticipated to be generated by existing nuclear power plants at a site other than Yucca Mountain. Without such a change and steps toward that end, taxpayers will continue to pay utilities—through settlements and claims awards—to keep storing substantial amounts of waste.

THE FEDERAL GOVERNMENT'S RESPONSIBILITIES UNDER THE NUCLEAR WASTE POLICY ACT

The Nuclear Waste Policy Act established statutory responsibility for federal actions to take possession of and permanently dispose of spent nuclear fuel generated at civilian nuclear reactors, as well as to dispose of radioactive waste resulting from federal activities in manufacturing nuclear weapons. Under current law, the only solution that the government is authorized to pursue involves permanent disposal of waste at a geologic repository, and Yucca Mountain in Nevada is the only place where such a repository may be located.

Under NWPA, the federal government, through DOE, faces substantial costs to establish a repository for the nation's nuclear waste. It has also incurred contractual obligations to remove waste from civilian nuclear facilities. Under the legislation, the federal government will have to spend tens of billions of dollars over many decades to fulfill its obligations to dispose of waste from the current generation of civilian nuclear reactors. The government will also be responsible for waste from any new facilities built in the future. However, because of statutory constraints on the amount of waste that the repository envisioned under NWPA can store, waste from any such new facilities cannot be accommodated without a change to the law.

NWPA authorized DOE to build a geologic repository to permanently store up to 70,000 metric tons of spent nuclear fuel generated by civilian nuclear power plants and high-level radioactive waste generated by federal facilities. The total amount of commercial and defense-related waste that has already been generated may exceed that capacity.

FINANCING THE COSTS OF DISPOSING OF NUCLEAR WASTE

The Nuclear Waste Policy Act also addressed how the disposal of spent nuclear fuel and defense-related waste was to be paid for. Under NWPA, the costs are to be borne by the parties that generate it, and the law authorizes DOE to levy fees on the nuclear power industry to cover the costs for the waste it generates. The law also authorizes appropriations from the Treasury's general fund to pay for disposing of high-level radioactive waste generated by the nation's defense programs.

FINANCING THE COSTS ASSOCIATED WITH CIVILIAN NUCLEAR WASTE

Starting in 1983, NWPA authorized DOE to charge electric utilities fees to cover the costs of disposing of the nuclear waste they generate. Utilities today pay annual fees at a rate of 1 mil (0.1 cent) per kilowatt-hour of electricity generated and sold by nuclear power plants. The fees, which are recorded in the budget as offsetting receipts (a credit against direct spending), are deposited into the Treasury's Nuclear Waste Fund. Amounts in that fund are available for spending only to the extent provided in annual appropriation acts. Under NWPA, DOE is required to periodically review and, if necessary, adjust the level of fees to ensure that the fund has suffi-

cient resources to pay for disposing of the utility industry's nuclear waste. The department has not increased that annual charge since 1983.

In addition to the ongoing yearly fees, NWPA established one-time fees to cover the costs of disposing of waste that was generated before the law was enacted. DOE provided utilities with several options for paying that one-time charge, but several utilities have not yet paid the fee, and a significant amount remains uncollected.

NWPA authorized appropriations from the Nuclear Waste Fund to cover the costs of the civilian nuclear waste program and also permitted DOE to borrow from the Treasury (subject to approval in advance in appropriation acts) if balances in the fund were insufficient to cover the program's immediate costs. (The law stipulated that amounts borrowed from the Treasury be repaid from future fee collections.) In addition, the law authorized the Secretary of the Treasury to invest the fund's unspent balances in nonmarketable Treasury securities, which are credited with interest.

From 1983 through the end of fiscal year 2008, $29.1 billion was credited to the fund (see Table 1). That amount includes fees paid by the nuclear industry totaling $16.3 billion, as well as $12.8 billion from intragovernmental transfers of interest earnings. Cumulative expenditures from the fund during that period totaled about $7.1 billion, mostly for analyses related to the waste disposal program and for appropriations to DOE for initial design work on the Yucca Mountain facility. The NRC and other federal entities also received modest appropriations from the fund for work related to the program, leaving an unspent balance of $22.0 billion at the end of fiscal year 2008. The Congressional Budget Office (CBO) estimates that in 2009, another $2.0 billion will be credited to the fund—nearly $800 million from fees and the rest from interest. Expenditures in 2009 will total $0.2 billion, bringing the fund's end-ofyear balance to $23.8 billion, CBO estimates.

If all of today's 104 licensed nuclear reactors continue to generate electricity, future annual receipts from industry fees are likely to average between $750 million and $800 million for at least the next decade. Most U.S. nuclear power plants began operating in the mid-1970s or during the 1980s under 40-year licenses. The NRC has approved 20-year extensions to the licenses of more than half of the plants in operation today, and it anticipates that many of the others will apply for such extensions. When those plants reach the end of their license extensions (or their economically useful lives) and cease operations—probably in the 2030s and 2040s—they will no longer pay fees to the Nuclear Waste Fund to dispose of their waste.

TABLE 1.—FEDERAL CASH FLOWS FOR NUCLEAR WASTE DISPOSAL

[Billions of dollars]

	Cumulative totals, 1983 through 2008	CBO's estimates, 2009
Nuclear Waste Fund (for civilian nuclear waste):		
Deposits:		
Annual fees	14.8	0.8
One-time fees	1.5	0
Subtotal	16.3	0.8
Interest credited[a]	12.8	1.2
Total	29.1	2.0
Disbursements	7.1	0.2
End-of-Year Balance	22.0	23.8
General Fund (for defense-related activities):		
Appropriations	3.6	0.1

Sources: Congressional Budget Office and Department of Energy.
Note: Amounts are in nominal dollars.
a. Components may not add up to totals because of rounding.

Receipts from the one-time fees that remain unpaid and become due once the federal repository is opened currently amount to about $3.2 billion, DOE estimates.[1] Interest accrues on the balances due from those one-time fees until the utilities pay them to the government; therefore, eventual deposits of such fees will probably be significantly greater than the current balances due. Also accruing and adding significantly to the fund's balances are credits of interest on the fund's unspent dollars. Those amounts are intragovernmental transfers and do not create net receipts to the federal government, but they do add to the resources that are authorized to be used for the waste disposal program.

FINANCING THE COSTS ASSOCIATED WITH DEFENSE-RELATED NUCLEAR WASTE

In addition to the amounts appropriated from the fees and interest credited to the Nuclear Waste Fund, the Congress has made annual appropriations to the nuclear waste program to cover the costs that DOE estimates are related to the disposal of nuclear waste generated by federal defense programs. In 2008, DOE determined that about one-fifth of the total costs of the waste disposal program was attributable to that endeavor and that this share of the program's total costs should be paid for with appropriations from the general fund of the Treasury.[2] Since 1993, the Congress has provided about $3.7 billion from the general fund for such costs.

ESTIMATES OF TOTAL LIFE-CYCLE COSTS

In 2008, DOE published an estimate of the total costs—including those for transportation and project management—associated with the planned underground nuclear waste disposal facility. In DOE's estimation, the project would cost about $96 billion in 2007 dollars over an operating period of more than 100 years.[3]

DOE also reported on the adequacy of the annual fee charged for nuclear waste disposal.[4] In its study, DOE evaluated several scenarios in which the costs attributable to civilian nuclear waste ranged from 70 percent to 85 percent of total costs. In nearly all cases, DOE determined that the annual fee, along with accrued interest, was likely to generate sufficient balances to cover the estimated costs. The agency also noted, however, that under certain conditions, a future increase in the fee might become necessary.

Judgments about whether the fee is adequate are highly sensitive to estimates of certain key variables, such as the costs for the envisioned method of disposal and inflation. Such determinations are also sensitive to estimates of the interest credited to the fund—estimates that are a function of interest rates and fund balances, which in turn depend on projections of appropriated spending from the fund. In light of the Administration's policy to terminate the Yucca Mountain project and pursue an alternative means of waste disposal, there is no current basis to judge the adequacy of the fee to cover future costs because the method of disposal and its life-cycle costs are unknown.

FEDERAL CONTRACTUAL OBLIGATIONS AND LIABILITIES FOR NUCLEAR WASTE

Under contracts signed with electric utilities pursuant to the Nuclear Waste Policy Act, DOE was scheduled to start removing waste from storage sites at individual power plants for transport to a federal storage or disposal facility by 1998. After the federal government missed its 1998 contractual deadline to start collecting waste, electric utilities began—successfully—to sue the government for resulting damages. In seeking to resolve the initial lawsuits, DOE anticipated that it would pay court-awarded damages to individual utilities from amounts appropriated from the Nuclear Waste Fund or by issuing credits to those utilities (to reduce their future payments to the fund) in the amount of the damages that had been awarded.

In 2002, however, the U.S. Court of Appeals for the Eleventh Circuit held that DOE could not use the Nuclear Waste Fund to pay the damages resulting from the government's partial breach of its contracts.[5] According to the court, payment of the costs of interim storage incurred by the utilities because of the partial breach was not within the uses of the fund that were permitted under NWPA. Also, the court pointed out, because the department would inevitably raise future fees to compensate for any such payments, the injured utilities would be the ones to ultimately bear the costs of the partial breach of the contracts if they were paid from the fund. In addition, utilities that did not litigate their claims would end up paying larger fees to cover the costs of damage claims made by other utilities. Agreeing with the parties that brought the lawsuit, the court stated that making utilities contribute to a fund that disproportionately paid the storage costs of other utilities would raise a serious constitutional question about whether the action constituted a "taking." Following the court's decision, the government subsequently paid damages to the utilities from the Treasury's Judgment Fund.

THE JUDGMENT FUND

The Judgment Fund is a permanent, indefinite appropriation from the Treasury that is available to pay final judgments and awards against the United States that cannot legally be paid from any other existing appropriation.[6] (The fund has no fiscal year limitations, and there is no need for the Congress to appropriate money to replenish it.) The fund provides the authority for the government to pay for most court judgments and settlement agreements entered into by the Department of Justice to resolve actual or imminent lawsuits against the federal government. Gen-

erally, agencies are not required to reimburse the Judgment Fund for payments made on their behalf unless the Congress appropriates money specifically for that purpose.

JUDGMENTS AWARDED AND PAID TO UTILITIES UNDER THE NUCLEAR WASTE POLICY ACT

Under the Department of Justice's settlements with electric utilities, utilities have been reimbursed for the actual costs they incurred because of DOE's partial breach of its contracts. Such costs are unique to each nuclear power plant and depend partly on the age and operating status of the plant and the size and configuration of the plant's available space for nuclear waste storage.

According to the Department of Justice, as of May 2009 electric utilities had filed 71 lawsuits seeking compensation for costs they incurred because the federal government could not begin to accept nuclear waste for disposal in 1998. Of those lawsuits, 10 have been settled, 6 were voluntarily withdrawn, and 4 have been litigated to a final judgment that cannot be appealed. Of the 51 pending cases, 13 have been decided, but some are under appeal. In total, if those decisions stand, the federal government's liabilities under judgments and settlements currently total $1.3 billion. That amount includes $565 million that has already been paid to five electric utilities pursuant to settlements (including a payment of $35 million to the federally owned Tennessee Valley Authority.)[7] Because judicial claims for damages are made retrospectively, many more cases can be expected in the coming decades as utilities seek to recover their ongoing costs for storing nuclear waste long after they expected it to be removed and sent to a permanent disposal site.

FUTURE SETTLEMENTS UNDER THE NUCLEAR WASTE POLICY ACT

Litigation is ongoing regarding how to calculate damages for DOE's partial breach of its contractual commitments. The department currently estimates that if it begins to accept waste in 2020, taxpayers' total liabilities to electric utilities will total $12.3 billion (in today's dollars).[8] Further, DOE anticipates that payments from the Judgment Fund will span a number of decades after 2020.

DOE's estimate of future damages is uncertain and is predicated on the department's views of the types of additional business and storage expenses that the courts will determine are appropriate and reasonable and should be paid by the department. Those determinations will depend on such factors as the estimated rate at which DOE would have removed waste from a particular facility if the department had been able to accept waste in 1998. If utilities successfully argue that the waste-acceptance rate used for the purpose of calculating damages should exceed the rate used in DOE's projections of liabilities, costs will probably surpass $12.3 billion.

Similarly, costs may be greater if the courts take a broader view of the expenses for which utilities should be compensated. Although the federal government is responsible for the permanent disposal of nuclear waste, individual utilities are responsible for storing the waste until it can be delivered to a permanent storage facility. Because the characteristics of utilities' sites vary, the determination of incremental expenses incurred at particular sites must be made on a case-by-case basis and will ultimately depend on the courts' views, which could differ from DOE's.

DOE has previously estimated that liabilities will increase—by roughly $500 million annually—if the schedule for completing the planned repository slips further and waste continues to accumulate at utilities' storage sites.[9] And even once the department begins to accept waste, it will face a backlog that, at best, will take more than 20 years to eliminate. As long as the department remains behind schedule, taxpayers will continue to incur liabilities.

Finally, it is not clear how the Administration's decision to terminate the Yucca Mountain repository will affect the federal government's liabilities to electric utilities. If DOE is found at some point to have fully breached its contractual commitments, the federal government's liabilities could increase considerably.

THE OUTLOOK FOR THE FEDERAL GOVERNMENT'S LIABILITIES

Ultimately, a change in law will be required to authorize DOE to permanently dispose of all of the waste anticipated to be generated by existing nuclear facilities at a site other than Yucca Mountain. Otherwise, taxpayers will continue to pay utilities, through settlements and claims awards, to keep storing substantial amounts of waste.

The Nuclear Waste Policy Act sets the storage capacity of the Yucca Mountain site at no more than 70,000 metric tons. DOE estimates that it is responsible for disposing of nearly that many tons of existing spent nuclear fuel and high-level

waste. The nation's existing nuclear power plants are producing another 2,000 metric tons of waste per year. In other words, the total volume of waste may already exceed the statutory capacity of the repository envisioned under NWPA.

Moreover, the NRC has received 26 applications for licenses to build new nuclear power plants in the next few years. If constructed, each of those plants would produce around 20 metric tons of waste per year, or about 1,000 metric tons over a 40- to 60-year operating period. Such plants would also pay fees to the Nuclear Waste Fund, and their waste would become a federal liability because, under NWPA, nuclear plants are required to sign waste disposal agreements with DOE. Without additional storage capacity, the cost of storing that waste would probably become an additional liability of the Judgment Fund.

In any case, even if legislation is enacted to authorize DOE to pursue a repository at an alternative site with sufficient capacity to store all anticipated nuclear waste, federal liabilities will remain substantial, and payments from the Judgment Fund to compensate utilities for storing waste will continue for many years.

ENDNOTES

[1] Data supplied to the Congressional Budget Office in July 2009 by the Department of Energy's Office of Civilian Radioactive Waste Management.

[2] Department of Energy, Office of Civilian Radioactive Waste Management, Analysis of the Total System Life Cycle Cost of the Civilian Radioactive Waste Management Program, DOE/RW-0591 (July 2008).

[3] Ibid.

[4] Department of Energy, Office of Civilian Radioactive Waste Management, Fiscal Year 2007 Civilian Radioactive Waste Management Fee Adequacy Assessment Report, DOE-RW-0593 (July 2008).

[5] Alabama Power Co. v. United States, 307 F.3d 1300 (2002).

[6] In 2008, several thousand individual payments from the Judgment Fund amounted to nearly $0.8 billion; over the past 10 years, such payments have averaged around $1.2 billion annually. Most of the payments are made to settle claims related to federal employment, torts, property loss, discrimination, medical malpractice, and contract disputes.

[7] Information supplied to CBO in July 2009 by the Department of Justice.

[8] Information provided to CBO in July 2009 by the Department of Energy's Office of Civilian Radioactive Waste Management.

[9] Statement of Edward F. Sproat III, Director, Office of Civilian Radioactive Waste Management, Department of Energy, before the Subcommittee on Energy and Water Development of the House Committee on Appropriations (March 28, 2007).

Chairman SPRATT. Let me get something clear. There are a hundred and three operating nuclear reactors, commercial reactors in operation generating spent fuel waste. Is that a correct number? A correct approximation?

Mr. KOUTS. I have 104 operating reactors, sir.

Chairman SPRATT. All of these have contracts for ultimate waste disposal with the federal government?

Mr. KOUTS. Yes, they do, sir.

Chairman SPRATT. And the numbers you are speaking of encompass only a limited number of those, I take it? What percentage of the 104 have contracts that have been declared in breach?

Mr. KOUTS. Virtually all of them, sir.

Chairman SPRATT. Virtually all of them?

Mr. KOUTS. Yes. And in addition to the operating reactors there are also fourteen shut down reactors. And those shut downs are also covered by the standard contracts. So all the operating and shut down reactors, the 104 operating and the fourteen shut downs, are covered by the standard contracts that were signed back in the 1980's.

Chairman SPRATT. We have a fund of about $20 billion at this point in time for——

Mr. KOUTS. The latest estimate we have, sir—and we keep a running total of it—it is approximately $23 billion. Yes, sir.

Chairman SPRATT. It takes in about $1 billion to $1.5 billion annually?

Mr. KOUTS. Approximately between $750 million to $1 billion, and we make about $1 billion in interest every year based on the Treasury instruments that we invest in.

Chairman SPRATT. So this fund, based on the numbers you gave us, is still growing then? You have settled about $500 million or $600 million worth of cases. And by the way, do these settlements, does the number you gave us in settlement amounts reflect the government's liability through a certain date but not through the completion of the full performance of full waste disposal? In other words, are they saying that we can establish as of this point in time we are entitled to, and you are liable for, waste clean up, waste disposal, but beyond this date in time you have still got further responsibilities to go?

Mr. KOUTS. Well, let me start and then maybe Mr. Hertz can fill in. The settlement agreements, sir, basically, set up a continuous process whereas a utility who has a settlement with the government incurs costs that are covered by the settlement. They come in——

Chairman SPRATT. Those actual costs, are you settling cases prospectively based upon the likelihood that the breach will be continuing? Or you simply take it to a date certain where they can demonstrate that the actual cost has been incurred and they sue for that judgment?

Mr. KOUTS. The settlements are essentially open ended. And they will continue to come to the government with the costs that they have incurred due to the government's delay. And those payments will stop when the government has performed, and caught up, and picked up all the backlog that we have incurred due to the fact that we didn't start to begin waste acceptance in 1998. So basically under the settlement agreements they come in every year with whatever costs, or every two years depending on when they incurred them, it is evaluated, the Department of Justice makes a judgment, and then there is a payment made from the Judgment Fund.

Chairman SPRATT. Mr. Cawley, you had in your report an estimate that in 2007 dollars the cost of meeting all of the liabilities of the federal government would be about $98 billion, to do all of the waste acceptance and disposal?

Mr. CAWLEY. I think the most recent life cycle cost estimate that was prepared by the Department for the entire waste facility over its lifetime was about $98 billion, nearly $100 billion, to pay for everything in the waste project.

Mr. KOUTS. If I could just supplement that comment? The $96 billion figure are the total costs of the program that we issued last year with the assumption that Yucca Mountain was going to be built, and all the costs to move the fuel there and dispose of it are incorporated into that number. That number also includes past costs of the program. So roughly, it is about $85 billion more to complete Yucca Mountain.

Chairman SPRATT. But that assumes that you start accepting waste in 2020, does it not?

Mr. KOUTS. Yes it does, sir.

Chairman SPRATT. And if it is later it will be more? The liability, the costs will be greater?

Mr. KOUTS. Potentially yes, sir.

Chairman SPRATT. What is the plan of DOE for Yucca Mountain while it explores other alternatives?

Mr. KOUTS. My guidance, sir, is to continue the licensing process through fiscal year 2010 and to support the Secretary's blue ribbon panel which is going to be looking at those issues in terms of what the new policy alternatives are going to be. So that is the, we will continue the licensing process and provide support to that panel.

Chairman SPRATT. And for that purpose your budget request this year was about $34 million for 2010?

Mr. KOUTS. The administration's request was approximately $197 million to fund the continuation of the licensing proceeding and also to support the blue ribbon panel.

Chairman SPRATT. Why does the licensing procedure cost that much money, close to $200 million? Is there a lot of R and D, or experimentation, science, engineering connected with it?

Mr. KOUTS. There are a lot of people, a lot of scientists, a lot of engineers that we need in order to answer the questions of the Nuclear Regulatory Commission and to prepare for the adjudicatory hearings that the NRC will hold in that process. So we need that core support, our federal support and our contractor support, in order to be an active participant in that proceeding.

Chairman SPRATT. And does this keep your basic core competencies, your basic team, together for Yucca Mountain?

Mr. KOUTS. Yes, it does, sir.

Chairman SPRATT. Are there any significant job terminations because of the limited amount you are seeking for next year?

Mr. KOUTS. No, sir. We have gone through substantial reductions in the past but into fiscal year 2010 we do not anticipate a substantial reduction. There may be some minor reductions but no substantial reductions, sir.

Chairman SPRATT. Thank you very much. Mr. Simpson?

Mr. SIMPSON. Thank you, Mr. Chairman. Let me start off by saying I am not here advocating for Yucca Mountain. What I am advocating for is a permanent geological repository. The decision to do Yucca Mountain was made years before I came into Congress. And what I am frustrated by is the amount of money we continue to spend on a project, get it to a license application point, and then in a matter of six weeks decide, "Ah, we will focus on something else." It seems rather like it is made on the political decision rather than based on science. Can you tell me what the science was behind the decision, the science, to not proceed with Yucca Mountain?

Mr. KOUTS. I will take that question for the record, sir. I was not involved in that decision. I do not make policy, I implement it. But if you like, I will take that question for the record and get an answer for you.

Mr. SIMPSON. I would love to have an answer for it because so far nobody has given one. The, I think all three of you have mentioned the administration's decision to terminate Yucca Mountain. What does the law require? The 2002 law passed by Congress? What does that require? Because I do not know that this is just the administration's decision. I think Congress has a role to play in this also. Can anybody tell me what that 2002 law requires?

Mr. KOUTS. Well, I can tell you that the process that the Department went through, since I was intimately involved with it. There was a, in Section 114 of the Nuclear Waste Policy Act the Secretary of Energy made a recommendation to the President, and the President forwarded that recommendation to Congress in terms of siting Yucca Mountain for proceeding with the license, and to develop a license, and to develop the site. Under the statute there was an opportunity for the Governor of Nevada to submit a notice of disapproval, which he did. And that subsequently required a congressional resolution by both houses to be signed by the President to override that objection. That all occurred in the 2002 time frame.

In terms of the legal issue about abandoning the site, again, although I have spent a lot of time with attorneys, I am not an attorney. You can see from my background I am an engineer. I will take that question for the record and get you an answer as to what, you know, whether a statute is required for that decision.

Mr. SIMPSON. I would think—and I do not know this. I am not an attorney either, thank God. But I would think that it would be more than just a presidential decision not to do it. Which brings up the question of if we are terminating, if the administration says, "Let us terminate Yucca Mountain," why the heck should I spend $197 million to proceed with a license application for something we are going to terminate? This seems just a little bit bass ackwards, especially when a lot of people, in fact almost everyone I have talked to, says the $197 million is insufficient to meet the demands of the NRC and the request that they are going to be asked for to proceed with the license. It was down last year, the Yucca Mountain budget was down $100 million or so last year. They laid off 500 people. Down $100 million again this year to $197 million, it makes me wonder, and I do not want to be a cynic as you can tell by my questions, is the reason the administration is pursuing the license application is so that we will not fall into full breach? Could you answer that, Mr. Hertz?

Mr. HERTZ. The question of full breach is really, in part, up to the parties. None of the plaintiffs to date have argued that the government is in full breach and have asked the Court for the relief. And the government's position is that in fact it intends to fully perform its obligations under the contract and the statute to ultimately take the nuclear waste. So I am not sure the question of the licensing going forward or not, you know, it might affect the plaintiffs' decision about whether to seek a full breach. But in theory it is really up to the parties to present that to the Court and none of them have done that to date.

Mr. SIMPSON. That is because we have not, we are still funding it. If we zero funded the license application I suspect that would be one of the first things, because it would appear, and would in fact be a reality, that we were not proceeding with this.

Mr. HERTZ. The Department of Energy still has the obligation under the contract to accept spent nuclear fuel. The contract does not say it has to be Yucca Mountain.

Mr. SIMPSON. But we have no alternative out there. The alternative is more studies. And let me also say that if more studies are the answer——

Mr. HERTZ. Right. And the government has already been found in breach because it has not accepted, starting in 1998, any spent nuclear fuel. And damages, damages are basically the costs that the utilities incur over and above what they would have incurred had the government performed under the contract.

Mr. SIMPSON. Right.

Mr. HERTZ. And as long as we do not perform under the contract, and they can demonstrate that they are incurring costs that they would not have incurred, they are entitled to that payment from the government. And that will be true whether the Energy Department goes through the licensing proceeding or not, and it will be true until the government accepts the spent nuclear fuel that we are required to accept under the contract barring some other legislative change, you know, some other way to deal with this, you know, the parameters are essentially set for the litigation.

Mr. SIMPSON. Could Congress, let me just——

Chairman SPRATT. I want one question just for clarification.

Mr. SIMPSON. Okay, sure. Go ahead.

Chairman SPRATT. Does that mean if a nuclear utility reactor site has a pool of water on the premises built as part of the reactor, is there any attribution of cost of that? Does it have to be over and above that cost, or is any cost assigned to that?

Mr. HERTZ. Well, I mean, that is what the litigation is essentially about. That is, even if the government had fully performed under the contract, in many cases utilities would have had to build some sort of storage because not all the spent nuclear fuel was going to be picked up from day one. There was always going to be some rate that the government was going to accept it. And so what the litigation is about is what are the expenses over and above what the utility would have had to expend even if the government had performed under the contract.

Chairman SPRATT. Thank you. Excuse me.

Mr. HERTZ. And the question often turns on the rate. So if you have a lower rate, then the utilities arguably would have had to build more storage because the government, you know, lawfully could have picked up at a lower rate. If you come up with a larger rate utilities can then argue, "We did not need as much storage but we had to build it because you did not pick up at the rate you were required to.

Mr. SIMPSON. Is DOE paying currently for the storage in those pools at those sites?

Mr. KOUTS. No sir, we are not.

Mr. SIMPSON. At none of the sites? Even those that would suit us?

Mr. HERTZ. Correct.

Mr. KOUTS. That is correct. The Nuclear Waste Policy Act basically directs that the owners of the waste will essentially pay for the cost of its storage until the government comes. The assumption was that we were going to be there on January 31, 1998. We were not. The lawsuits are about the difference between what they were paying already to what the government should have done. So we are looking at the difference.

Mr. SIMPSON. So we are paying some storage cost, essentially. What they figure we would have picked up?

Mr. HERTZ. The Judgment Fund is paying for it.

Mr. KOUTS. The Judgment Fund.

Mr. SIMPSON. The Judgment Fund is paying? Excuse me.

Mr. HERTZ. Correct.

Mr. SIMPSON. Should DOE be paying that instead of the Judgment Fund?

Mr. HERTZ. Well, as I said, the government's initial position was that those, it had come up in the context of a settlement, one of the early settlements, whether the settlement could be paid out of the Nuclear Waste Fund. And the theory being, one way to look at it is the Nuclear Waste fund is in part to build the facility to deal with the storage. If you are paying for the storage in another way, could you pay it out of the Nuclear Waste Fund? The utilities went to court and say, "No, you cannot use the Nuclear Waste Fund for that purpose." And the United States Court of Appeals for the Eleventh Circuit agreed. They could not pay the settlement out of the Fund and that meant only the Judgment Fund was available. And that is based on an interpretation of the Nuclear Waste Fund.

Mr. SIMPSON. Okay. The blue ribbon panel. The Secretary said in our hearing in Energy and Water Committee that a permanent geological repository will still be necessary?

Mr. KOUTS. Yes, sir.

Mr. SIMPSON. And that we will look at other sites. The commission will look at other sites. The one site the commission will not look at is Yucca Mountain, the most studied piece of earth on the planet?

Mr. KOUTS. That is correct, sir.

Mr. SIMPSON. Are you aware that Congress has in their appropriation bill on Energy and Water, it has not become law yet, but it is in the appropriation bill language which says the $5 million to the blue ribbon commission only goes to the blue ribbon commission if Yucca Mountain is also an alternative in that location?

Mr. KOUTS. Yes, sir. I am aware of that language.

Mr. SIMPSON. Does that mean every site that had, that was considered for a permanent repository prior to the decision to select Yucca Mountain will now be reconsidered? Could you put up that slide? Number two, I think it is?

[Slide]

Mr. SIMPSON. All the sites in those states will now be considered?

Mr. KOUTS. Potentially yes, sir.

Mr. SIMPSON. Except Yucca Mountain.

Mr. KOUTS. That is correct, sir.

Mr. SIMPSON. Is any site in Nevada to be considered?

Mr. KOUTS. I really cannot answer that. That would be, again, you are speculating as to where the panel may come out.

Mr. SIMPSON. I am speculating on where they might be able to look.

Mr. KOUTS. I really cannot say.

Mr. SIMPSON. Because I find it strange that we have taken just one state—and again, I am not advocating for Yucca Mountain. I am advocating for a solution.

Mr. KOUTS. I understand, sir.

Mr. SIMPSON. And it just seems that that decision was made a long time ago. I am going to hold off on the rest of my questions

for a minute, and let everybody else get a round. But I will have a second round.

Chairman SPRATT. Thank you, Mr. Simpson. Mr. Edwards?

Mr. EDWARDS. Thank you, Mr. Chairman. Mr. Kouts—is that the correct pronunciation?

Mr. KOUTS. It is Kouts, sir.

Mr. EDWARDS. Mr. Kouts, okay.

Mr. KOUTS. Thank you.

Mr. EDWARDS. Thank you. I am concerned about the speed with which the Obama administration made the decision to rule out Yucca as a repository. You said in response to Mr. Simpson's question that you did not make that decision, your responsibility is to implement the decisions. But as your position as Deputy Director of DOE's Office of Civilian Radioactive Waste Management, I assume you have some knowledge as to who was involved in making that decision. Who were the two or three principal players in making that decision in such a short period of time?

Mr. KOUTS. I would, basically it was a secretarial decision. It was his decision. And——

Mr. EDWARDS. The Secretary of Energy?

Mr. KOUTS. Yes, sir.

Mr. EDWARDS. Who would he have depended on for information?

Mr. KOUTS. I think that is a question for the Secretary, sir.

Mr. EDWARDS. Are there other offices other than yours that have responsibility for Civilian Radioactive Waste Management in the Department of Energy?

Mr. KOUTS. No sir, there are not.

Mr. EDWARDS. So your, it is your office that has the responsibility for overseeing that program? Did the Secretary come to you or your office to ask for information to help him make that decision?

Mr. KOUTS. I did have several meetings with the Secretary. However, I was not involved in his decision-making process in that regard.

Mr. EDWARDS. Okay. My goal here is not to put you on the spot but to get the facts on the table. What has the administration said publicly in the press as to why it made the decision so quickly to end Yucca as a repository?

Mr. KOUTS. Well, the Secretary has stated on many occasions that he believes that there is a better solution, that technology can provide a better solution, that there are alternatives. And that is why he is setting up a blue ribbon panel to look at those alternatives.

Mr. EDWARDS. He said there are better solutions. He also told me before our Energy and Water appropriations hearing several weeks ago that he believes the United States needs more nuclear power plants. Did he say publicly what was wrong with the present solution? Was it cost? Was it a particular safety question that he had? Has he said publicly there was a safety issue involved at Yucca?

Mr. KOUTS. Not to my knowledge, sir.

Mr. EDWARDS. Okay. Did he ask you any information about the safety of Yucca?

Mr. KOUTS. We had wide-ranging discussions, sir. I, you know, most of them were policy related but, you know, and budget related

and so forth. But again, that was a secretarial decision. I think the person to really answer that question is the Secretary, sir, not me.

Mr. EDWARDS. Okay. There are principled people in Congress and the country who believe we should not build any more nuclear power plants. I respect their principled position. I happen to disagree with it. We just passed a bill to try to address global warming. I am one of those who believes that building more nuclear power plants is a safe way to provide energy and power for our country without contributing to global warming. For those of us who believe, as the Secretary said in answer to my question a few weeks ago, that we do need more nuclear power plants given, I guess at present it is about 20 percent of our utility power supply. Is that correct?

Mr. KOUTS. That is correct, sir.

Mr. EDWARDS. Those of us who believe we need more nuclear power plants, and I assume the Secretary, I take him on his word in his answer to my question, at what point do we have a train wreck here in terms of the Yucca problem, the repository problem, causing the commercial sector to just say, "We have got to shut down our plants, new nuclear power plants." Does the train wreck occur this year? Next year? Five years from now? At what point do the companies start canceling their requests, or applications, for permitting?

Mr. KOUTS. Well, that is an interesting question. Eventually you need a nuclear waste repository of some type in order to take these materials. The timing of that, does it have to be next year or the year after? No. My sense is there needs to be clearly a path to getting the nation there. The time frame in which that is absolutely needed, the materials that are at the utility sites right now, they are handled safely. The NRC, Nuclear Regulatory Commission, makes sure that it is safe and it is safe. The question is, when are we going to fulfill the government's obligation to take these materials away? And that is really the purpose of this hearing. The Secretary has indicated that he wants to go on a different policy path than the one the nation has been on. The blue ribbon panel is going to review that and we will look for those policy alternatives as that body is formed and as those deliberations——

Mr. EDWARDS. In your extensive experience in this arena, if the present sites at the nuclear power plants are safe why is it necessary to have a central repository? At what point does it not become safe to keep the spent rods, and the radioactive material, at the site of the plants?

Mr. KOUTS. Well, they can be kept there indefinitely. The question is, none of those plants were designed to be a repository, to protect these materials for hundreds of thousands of years into the future and make sure that the radionuclides do not get into the environment. So, yes, near term, next hundred years, even beyond, they can stay at the sites where they are. But eventually there has to be a facility that takes these materials and puts them away to protect them from the environment. And that facility has to be, you know, historically the National Academy of Sciences, and internationally, the best solution that people have come up with is a geologic repository. And that takes a long time to develop, and study, and to satisfy all the safety issues. So the simple answer to

your question is, there is no real time frame. We need one eventually but certainly the materials are safe where they are now.

Mr. EDWARDS. Okay. Thank you, Mr. Kouts.

Ms. MCCOLLUM. Mr. Chair? Mr. Chair? A point of personal privilege. Could we ask the engineer here to describe the difference between reracking—because when you are talking about this for members who have not been involved in it, and you are lumping all the storage together, it is not a very clear picture. So Mr. Chair, for the Committee's information, could you describe reracking versus temporary storage?

Mr. KOUTS. Sure. When a, basically nuclear reactors are, to put a simple word on it, kind of a teakettle. It produces steam, and the steam is produced by the heat from the nuclear reaction that occurs in the reactor core. And fuel assemblies reside in the core for several years and then they have to be taken out because their fissile materials basically get depleted and they are not effective in sustaining a change reaction. So those materials, those assemblies, have to be taken out. And they are cooled in a spent fuel pool that the reactors have. Those pools were never designed to take the waste over the life of the reactor. It was an expectation that the government was going to come and take these materials. Or, back in the days when many of these reactors were built, there was a reprocessing concept. And you would take these materials out and remove the uranium that can be reused, and so forth.

Nonetheless, since we are not in that world what happens is as the pools begin to fill up what the utilities have done is they have reracked and basically put these together as closely as they can be in the pool. But still, we have now reached a point where those pools can no longer hold any more fuel. And what has to happen is those assemblies have to be taken out and put in dry storage on the reactor sites, in the back forty, if you will. And there are roughly forty-four sites in thirty states where we currently have dry storage. There is approximately 12,000 tons in dry storage. Overall, there are about 60,000 tons of commercial spent nuclear fuel that reside at commercial reactors, about 12,000 of which is sitting in dry storage. So as the pools become full basically the utilities have to take that fuel out and put it in dry storage.

So the reracking that the Congresswoman was talking about is basically the reracking of the pool to maximize the capacity of the pool. And that has pretty much been done throughout the industry. And now basically what has to happen is the fuel has to be put in dry storage. And many of the costs that Mr. Hertz talks about are the costs the utilities are incurring for putting the fuel in dry storage in these large, massive storage devices. And those are the costs that are basically part of the litigation settlements and also part of the trials that the Department of Justice is so ably defending us in.

Does that explain the issue? Okay.

Chairman SPRATT. I believe Mr. Latta has left. Mr. Aderholt is also not here. Mr. Harper?

Mr. HARPER. Thank you, Mr. Chair. Mr. Kouts, I would like to follow up on something that Congressman Edwards mentioned a minute ago and just take that a little further. What impact do you

think that the decision to terminate Yucca Mountain will have on future expansion of additional commercial nuclear power plants?

Mr. KOUTS. The simple answer to your question, sir, is until we have clarity, what the blue ribbon panel comes up with, and what new policy path the Department and the nation is on. And of course, the Congress has to participate in that discussion. I am unable to assess, and I do not think anybody is able to assess, what the impact of this decision is. So until we have more clarity, until the blue ribbon panel meets, we have a new policy path, and we know what the implications of that policy path are, again, we just cannot evaluate that.

Mr. HARPER. And obviously I do not want to put you in a box. But it is not good, is it? I mean, you cannot say that this is a good decision for the expansion of safe nuclear power.

Mr. KOUTS. Let me go back to my earlier statement. Which is, we really do not know. Perhaps the blue ribbon panel will come up with a policy recommendation, and maybe we will begin to move fuel and take it away from sites faster than maybe 2020. And in that case it would have been good for reducing the obligation and also been good for moving on with the management of these materials. Without knowing the recommendations of the commission there is really no way of commenting on that.

Mr. HARPER. Can you tell me how your Department determined that $196 million was an adequate amount to continue the Yucca Mountain licensing process?

Mr. KOUTS. Well let me first of all tell you over the past several years we have had a much larger budget and that larger budget was to continue with the design of the repository, it was to continue with the design of the 300-mile rail spur that was to be built to take the materials to Yucca Mountain within the State of Nevada. It was also to prepare the site for construction. All those activities have been terminated. So as a result the needs of the program to simply sustain the licensing process are substantially reduced. So on that basis the administration's request is certainly adequate for us to continue participating in the licensing process.

Mr. HARPER. Thank you. Mr. Hertz, when the Obama administration announced the decision to terminate the Yucca Mountain program, was the Civil Division consulted prior to that decision?

Mr. HERTZ. I do not believe so.

Mr. HARPER. Okay. Can you tell me what the probable impact will be on the potential liability of the federal government for damages to the standard contract litigation resulting from the administration's decision to terminate the program?

Mr. HERTZ. Well, I think as Mr. Kouts suggested, we know what the parameters of the litigation look like now. And we know what the, in other words, how damages are going to be calculated. And so, and we know the settlements that we have entered into. And, you know, I think the simple answer is, if the decision pushes the date beyond 2020 then our liability is going to be more. And if the decision, as he suggests, you know, that we can start taking nuclear fuel before 2020 then our liabilities may be less. In other words, it is really, as far as the litigation is concerned, it is the timing.

Mr. HARPER. Okay. Mr. Hertz, can you tell me what advice you have given DOE or the administration concerning steps it needs to take to mitigate the potential impacts of the delays in accepting the used nuclear fuel?

Mr. HERTZ. Well, I mean, one of the things that we did do during the last administration is when a number of utilities wanted to make applications for potentially new reactors, the question became, the utilities need to have a contract to deal with spent nuclear fuel as part of the process to get a license. And we consulted very closely with the Department of Energy based on the experience that we had in this litigation to try to come up with contract terms that would make sense recognizing, you know, that there could be delays in accepting spent nuclear fuel. And so the new contract has substantially different terms than the contracts that we have been litigating in the courts so far. And that is not to say, you know, there still comes a time when the government is responsible for picking up spent nuclear fuel. But it is laid out much more clearly in these contracts. And the utilities know what their responsibilities are going to be to store spent nuclear fuel for periods of time before the government is obligated to do it under the new contracts.

Mr. HARPER. It sounds like it would be appropriate to suspend payments into the waste fund until there is a decision made on a place to put the fuel.

Mr. HERTZ. Well, I mean, that is really a policy call. It does not really affect the litigation one way or another.

Mr. HARPER. Thank you, Mr. Hertz. I appreciate it. Mr. Chairman, I would ask for unanimous consent to insert into the record letters from the Nuclear Energy Institute dated July 8, 2009, and from the National Association of Regulatory Utility Commissioners dated the same day, calling for the suspension of those annual fees.

Chairman SPRATT. Is there objection? Hearing none, so ordered.

[The information follows:]

NUCLEAR ENERGY INSTITUTE

Marvin S. Fertel
PRESIDENT AND CHIEF EXECUTIVE OFFICER

July 8, 2009

The Honorable Steven Chu
Secretary of Energy
U.S. Department of Energy
Forrestal Building 7A-257
1000 Independence Avenue, S.W.
Washington, DC 20585

Re: Performance of Annual Fee Adequacy Analysis and Suspension of Payments to Nuclear Waste Fund

Dear Dr. Chu:

The Nuclear Energy Institute (NEI)[1], on behalf of the commercial nuclear energy industry, is writing to express its deep concern about the federal government's failure to fully carry out the statutory obligation to implement the nuclear waste policy established almost three decades ago in the Nuclear Waste Policy Act of 1982 (NWPA or Act). In light of the Department of Energy's recent decision to terminate the Yucca Mountain repository project, the industry requests that your required annual fee adequacy review fully account for the impact of that termination on program costs, and that you suspend collection of payments to the Nuclear Waste Fund (Fund).

For several years, the industry has advocated that the government and industry implement an integrated strategy for used fuel management and disposal. That strategy includes on-site storage and private or government-sponsored centralized interim storage; research and development leading to the deployment of recycling technology that is safe, environmentally sound, economic, and enhances worldwide nonproliferation efforts; and ultimate disposal of spent nuclear fuel and high-level radioactive waste in a geologic repository. This strategy represents sound public policy and is wholly consistent with principles espoused by the Administration.

DOE has announced its intention to devise a new used nuclear fuel management strategy by convening a national commission to study and recommend alternative approaches—a laudable and potentially productive undertaking that the nuclear industry supports. However, the NWPA remains the law and it is incumbent on the Department to comply with its mandates. Indeed, you explicitly acknowledged the government's responsibility in your June 1, 2009 response to Senator Inhofe:

[1] NEI is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

1776 I Street, NW | Suite 400 | Washington, DC | 20006-3708 | P: 202.739.8125 | F: 202.785.1498 | msf@nei.org | www.nei.org

"[W]e remain committed to meeting our obligations for managing and ultimately disposing of spent nuclear fuel and high-level radioactive waste."

As discussed in greater detail below, the NWPA requires the Secretary of Energy annually to review whether the one mill per kilowatt-hour fee collected from utilities will provide revenue sufficient to offset the costs of the DOE used nuclear fuel management program. If the annual review reveals that the Fund's balance is either insufficient or in excess of that needed for the program, a fee adjustment is required. Cessation of the Yucca Mountain repository project activities, other than those limited to licensing, compels precisely that action. And, as the fees ultimately are borne by consumers of electricity from the nation's 104 reactors, equitable considerations also compel such an adjustment.

The NWPA established "a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository . . . ." (NWPA § 111(b)(1).) The original legislation provided a process for the nomination of at least five sites, and subsequent selection of three of those sites for characterization as candidates for a repository. Under the 1987 amendments to the NWPA, however, DOE was instructed to "provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site." (NWPA § 160(a)(1).) DOE was further directed to carry out "appropriate site characterization activities at the Yucca Mountain site," and "only such site characterization activities as the Secretary considers necessary to provide the data required for evaluation of such site for an application to be submitted to the [Nuclear Regulatory] Commission [NRC] for a construction authorization for a repository at such site, and for compliance with the National Environmental Policy Act of 1969." (NWPA §§ 113(a), (c)(1).) Enactment of the 2002 Yucca Mountain Development Act (P. L. No. 107-200, 116 Stat. 735) gave effect to the Presidential recommendation to Congress of Yucca Mountain as the location of the repository and that a license application be submitted to the NRC.

In addition to the direction Congress provided with respect to the programmatic aspects of repository development, the NWPA provides "that the costs of carrying out activities relating to the disposal of...[high level radioactive] waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel." NWPA § 111(b)(4). Payment by the owners and operators of the nation's nuclear power plants for the disposal program is obtained through a one mill per kilowatt-hour fee paid to the federal government and is held in the Nuclear Waste Fund. To date, nuclear utilities, through collections from consumers, have paid or obligated more than $30 billion to the Fund. The Fund has a current balance of $22 billion and generates annual interest of just over $1 billion that is added to the corpus.

The Nuclear Waste Fund fee was established to recoup the government's costs for the program. The statute requires the Secretary to adjust the fee, either upwards or downwards, to achieve full cost recovery of the high level waste repository program. To implement this requirement, the NWPA directs the Secretary annually to review whether collection of the fee will provide sufficient revenues to offset the program costs. (NWPA § 302(a)(4).) That review, the results of which DOE has published in some years in an annual Fee Adequacy Report, necessarily must begin with a determination of the cost of the repository program then in place. Once the comparison between the revenue generated by the fee and the cost of the program has been made, the Secretary is obligated to adjust the fee to ensure the Fund accumulates only the amount necessary to ensure full

cost recovery, and the fee charged utilities covers only that portion of the program costs attributable to disposal of used nuclear fuel from commercial reactors.

Until recently, the cost of the program reviewed for fee adequacy included the cost of constructing and operating the Yucca Mountain geologic repository. With the passage of the Omnibus Appropriations Act earlier this year, however, funding for Yucca Mountain repository program activities was essentially eliminated, with the exception of that directed to NRC licensing proceedings. More recently, DOE's fiscal 2010 budget request for the Office of Civilian Radioactive Waste Management was submitted to Congress explicitly to implement the Administration's decision to terminate the Yucca Mountain program while developing disposal alternatives.

Although the Department has ceased all of the Yucca Mountain repository program activities except NRC licensing, DOE continues to collect NWF fees at the one mill per kilowatt-hour rate last evaluated in the *Fiscal Year 2007 Civilian Radioactive Waste Management Fee Adequacy Report, July 2008 (DOE/RW-0593)*. This fee continues to be charged to consumers despite the fact that fundamental assumptions underlying that report concerning the repository program no longer apply. Thus, in the absence of the Yucca Mountain repository program, and given that the interest that the NWF accrues is more than enough money to cover the $196.8 million provided for in fiscal 2010 budget proposal, payments into the Fund should be suspended.

In conclusion, because the assumptions previously used in the Department's fee adequacy analysis are no longer valid, the Nuclear Energy Institute, on behalf of the commercial nuclear energy industry, hereby requests that: (1) you promptly perform the annual review of the adequacy of the Nuclear Waste Fund fee to account for the present status and cost of the program; and (2) because the interest on the corpus of the NWF is more than sufficient to cover current Yucca Mountain program activities, you immediately suspend collection of payments to the NWF.

Thank you for your attention to this important matter. I would appreciate the opportunity to meet with you to discuss DOE's timely resolution of the industry's requests.

Sincerely,

Marvin S. Fertel

cc: The Honorable Dan Poneman
The Honorable Kristina Johnson
The Honorable Scott Blake Harris
Mr. Rod O'Connor
Mr. Dan Utech

N A R U C

National Association of Regulatory Utility Commissioners

Frederick F. Butler, *President*
New Jersey Board of Public Utilities

David C. Coen, *First Vice President*
Vermont Public Service Board

Tony Clark, *Second Vice President*
North Dakota Public Service Commission

Charles E. Box, *Treasurer*
Illinois Commerce Commission

Charles D. Gray, *Executive Director*
Washington, DC Office

July 8, 2009

The Honorable Steven Chu
Secretary of Energy
U. S. Department of Energy
Forrestal Building 7A-257
1000 Independence Ave. S.W.
Washington, D.C. 20585

Dear Secretary Chu:

The National Association of Regulatory Utility Commissioners (NARUC) supports the request by the Nuclear Energy Institute (NEI) to suspend the fees paid by nuclear utilities to the Nuclear Waste Fund. With the declared intention of the President to terminate the Yucca Mountain repository, despite the 2002 Joint Resolution (P.L. 107-200) approving that site subject to successfully obtaining a license from the Nuclear Regulatory Commission, there is no clearly defined program for disposal of spent nuclear fuel and high-level radioactive waste. Therefore, there is no basis to assess the adequacy of fees that continue to be paid into the Nuclear Waste Fund.

The Department of Energy forecasts that $769 million in fees will be paid into the Fund during the present FY 2009 and Congress appropriated $145.4 million to the civilian radioactive waste management program. With another $1,172 million in investment returns being projected to be credited to the Fund in the same period, DOE reports forecast a balance in the Fund at the end of FY 2009 of $23.7 billion. In light of the Fund investment returns of over a billion dollars being forecast, it is more than sufficient to use the Fund balance to fund the $98.4 million request in the FY 2010 Budget.

Our public utility commissioners find it extremely difficult to explain to ratepayers in States where their utilities provide nuclear-generated electricity that their electric bill includes pass-through of the Nuclear Waste Fund fees being paid to the Government for nuclear waste disposal that was to have begun in 1998. Now the fee payments continue to be paid even though no one can say for certain what the money will eventually be used for. If we are going to pause to reconsider disposal options, we feel it is also appropriate to pause the fee payments.

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On a related matter, NARUC is preparing to provide our views to the blue-ribbon commission on developing a disposal strategy. We will emphasize the need for fundamental reform of the management of the Nuclear Waste Fund. We believe that financing nuclear waste disposal is as necessary to a successful nuclear waste disposal strategy as the technical and policy considerations. The Nuclear Waste Fund that was envisioned in the Nuclear Waste Policy Act has not functioned as intended and may be better protected if it were managed in a substantially different way. There needs to be much more transparency on the management of the Fund. In the meantime, we see no reason to collect fees when only 12 percent of the amount collected will be put to its intended use and no one knows how or when the spent fuel will be disposed of or perhaps be reprocessed at some distant time for unknown costs.

Thank you for attention to this matter. We would be pleased to discuss the industry proposal with you or your staff.

Frederick F. Butler President	Garry A. Brown Chairman Committee on Electricity	David A. Wright Chairman Subcommittee on Nuclear Issues-Waste Disposal

Chairman SPRATT. Ms. McCollum?

Ms. MCCOLLUM. Thank you, Mr. Chairman. And thank you so much for holding this hearing. This Budget Committee's job is to think about the long term. But the time frame we are talking about with nuclear waste is tens of thousands of years. And I do not believe it is within the capacity of this Budget Committee. We have great staff on both sides of the aisle. But I do not think it is within the capacity of this Budget Committee, even with our very able Chairman and staff, to make a ten thousand-year budget projection on what it is going to cost to store this waste when we do not even know if we are going to be able to store it in the near future. Measuring the financial, legal, and environmental costs of creating a permanent storage solution over this length of time is not just difficult, it is impossible.

My concern, Mr. Chairman, is that the federal government is not serious about creating a long term solution to the nuclear waste storage problem. After spending twenty years and billions of dollars on Yucca Mountain, and the transportation plans that take it from, for example, Minnesota to Yucca Mountain, the federal government is about to walk away and start from scratch. And there is a real cost to that decision. While we wait, temporary solutions are becoming unacceptable permanent solutions.

In my State, Minnesota has two nuclear power plants. Both plants have recently been relicensed. Both are storing their waste inside in reracked pools, something the utility company, when I was in the Minnesota House, said that they could never do, but they managed to do it somehow. And outside, in dry cask storage. And I think the word cask has a lot to say about how I feel about the storage. It is dead, dry storage.

Now, it is unacceptable and these plants are continuing to produce more waste. Prairie Island Nuclear Facility, for example, in Southwestern Minnesota, has twenty-four of these temporary storage casks. They look like thermoses. Large, four or five, six-story thermoses with concrete over the top of them. And guess what folks? It is on the banks of the Mississippi River in a flood plain.

While people in Nevada talk about not wanting their constituents living within 100 miles of Yucca, where nuclear waste would be buried under a mountain, families in Red Wing, Minnesota, and as the gentleman pointed out where there is other dry cask storage, and especially the Prairie Island Tribal Community, live with it right next to them, within clear view of swing sets. And now, because the State of Minnesota has budget cuts the city near the nuclear power plant is cutting back on its first responder preparedness. The city of Red Wing can no longer guarantee public safety in the event of a nuclear incident at or near the power plant. And I have an article, Mr. Chair, I would like to submit for the record from the Star Tribune.

[The information follows:]

AID CUTS SPARK DEBATE OVER PRAIRIE ISLAND NUCLEAR PLANT

By MIKE KASZUBA, *Star Tribune,* July 13, 2009

As Xcel Energy pushes plans to extend the life of the Prairie Island nuclear plant, Red Wing officials say that Gov. Tim Pawlenty's state aid cuts have made them less confident in their longterm ability to protect it.

City officials, in an unusual step, have intervened in Xcel's proposal before the state public utilities commission—a sign that Pawlenty's budget cuts may have unintended consequences.

In a newsletter to residents, Red Wing officials said they have "concerns regarding [the city's] diminishing ability to adequately address the unique obligations we have as a host city to a nuclear power plant."

Red Wing's capacity to provide emergency response staffing and training has been lessened, they said, by "significant" reductions in state aid—including an estimated $898,590 next year—along with state law changes that allowed Xcel to reduce its property tax payments.

The city's stance has drawn Red Wing into the political debate surrounding Pawlenty's use of the unallotment process to make state budget reductions, after the Republican governor resisted the DFL-controlled Legislature's push during the session for tax increases to help erase a $4.6 billion deficit.

Pawlenty has cited cities and counties in defending his actions, arguing that they often complain about state aid cuts even though some harbor large budget reserves and are unwilling to slash spending. Many have responded, as Red Wing has, that their budget reserves ebb and flow as the money is used to run the city.

Pawlenty spokeman Alex Carey said that tying state aid cuts to the city's ability to provide adequate public safety "seemingly blurs the issue, given [that] the power plant hires and pays for its own security."

He added: "I still don't see where public safety comes in, nor is it clear to us what those 'unique obligations' are [that] the city cites."

'THE GAME IS CHANGING'

Red Wing is one of two Minnesota cities with a nuclear power plant. The Prairie Island plant, which opened in the early 1970s, has two 538-megawatt nuclear reactors.

Xcel Energy officials said the company has spent more than $20 million to show that the plant can "perform safely" should its life be extended by 20 years beyond 2014, and that "Our [proposal] will have little to no incremental impact on emergency services beyond what is currently provided," said Mary Sandok, an Xcel spokesperson.

Red Wing officials disagree.

"It's going to be extremely difficult to provide these public safety services that I think are critical and necessary," said Marshall Hallock, the city's finance director.

Although officials said that no one funding cut was responsible for the city's predicament, they said the combined effect of the state cuts and Xcel's reduced property tax payments had left the city with 15 percent less revenue since 2002.

Hallock said the drop in Xcel's annual city property tax payments, which stood at $5.9 million in 1995, would by itself leave the city with an estimated $2.3 million less next year.

By next year, he added, state aid payments to the city will have dropped by $1.07 million annually since 2006.

"The game is changing," said City Council Member Lisa Bayley. She joined her colleagues in signing an open letter to Red Wing's residents that, while generally supportive of the company's proposal, asked that Xcel provide "some type of additional assurance to protect the community's interests."

In making its case before the state public utilities commission, Xcel has asked that the generating capacity of each reactor be increased by 80 megawatts. More important, it is also seeking to have the number of spent nuclear fuel casks at an adjacent 5.5-acre storage facility increased to about 60 casks from a current total of 24. The city says that Xcel's proposed expansion would ultimately result in even more.

With the case scheduled to come before the commission this fall, Bob Cupit, the manager of the commission's permitting unit, said Red Wing's request that its budgetary issues be formally considered has raised eyebrows.

"This is a unique argument that's being made," he said.

A LEGITIMATE ISSUE?

Red Wing officials, in pressing their case, said the city remains the first responder to an incident at the nuclear plant.

While Xcel Energy has its own Prairie Island fire brigade, the city is responsible for helping control incidents and responding to anything that extends beyond the plant's physical boundaries—a role that could include evacuation, decontaminating emergency workers and sealing off roadways.

"[Xcel's] fire brigade is nothing more than a stop-gap measure," said Roger Hand, Red Wing's emergency management director.

Hand said city officials did not alert the governor's office regarding the issue because Pawlenty "went through the unallotment process and, really, he wasn't looking for any input from anybody at that point."

Although Red Wing officials are stressing that the city's ability to provide adequate public safety isn't now being jeopardized, they have drawn criticism even from DFLers.

Sen. Steve Murphy, DFL-Red Wing, a retired Xcel employee who once worked at the plant, said city officials had not proven that their ability to provide public safety for the Prairie Island plant might be jeopardized. He added that the city had adopted an anti-nuclear strategy that was troubling.

The public utilities commission "is not the body—they don't have jurisdiction over [a city's] economic concerns," said Murphy, who added that his history with Xcel had not colored his views.

But Wadena Mayor Wayne Wolden, the president of the Coalition of Greater Minnesota Cities—a group that has been critical of Pawlenty's state aid cuts to local governments—said Red Wing was raising a legitimate issue.

"How can Minnesota ask a city to host a nuclear power plant and then cut the critical aid that helps protect that city in the event of a nuclear incident?" Wolden asked.

Xcel's Sandok said that, should its request to extend the plant's life be approved, its property tax payments to Red Wing will actually begin rising and will reach $9.2 million by 2017.

In addition, she said, Xcel continues to pay Red Wing an estimated $60,000 annually to recover funds spent on emergency preparedness. She said that the city also will get $750,000 this year from the state through a special utility valuation transition aid program to help offset Xcel's property tax reductions.

"Xcel Energy supports the changes in the law and [in state] rules" that led to the company's reduced property tax payments, Sandok said. "But we were not the primary proponent of either."

Chairman SPRATT. So ordered.

Ms. MCCOLLUM. So I want to talk about permanent storage solutions because finding a real solution is the federal government's responsibility and I believe that is part of my responsibility here. So

I have some questions and you can, as time permits, take a stab at them or get back to us.

How long do you really think it is going to take the blue ribbon commission to produce these recommendations? And if it does not recommend moving ahead with Yucca Mountain, and we start all over again, how long is it really going to take to select a new waste site, prepare that site, get a new transportation plan, and then transfer the existing material? So my question in a nutshell is, are we looking at 2020? 2025? 2030? Are we looking out further, in your best guesstimate?

In the meantime, and this has been discussed, is there a plan to compensate not only ratepayers but local property taxpayers for the storage of this waste? And at the end of all that work, why would we not expect a different political result than the one we saw in the current Yucca Mountain debate? Would the reprocessing—so my question is, how long do you think it is going to take this power storage to happen? And then why are we not seriously looking as a nation on how to safely reprocess and cut the half-life of this material? Thank you, Mr. Chair.

Mr. KOUTS. If I could, could I take those questions for the record?

Chairman SPRATT. If the panel would, you may as well. And particularly I was going to ask you about reprocessing also, if you wanted to address that.

Mr. KOUTS. Certainly reprocessing has been looked at for many, many years. And basically the Secretary is committed to funding research to essentially make sure that any reprocessing technologies that are deployed are proliferation resistant.

Chairman SPRATT. The reprocessing would still require ultimately a geological disposal?

Mr. KOUTS. Absolutely, sir. It will somewhat reduce the volume of the materials that need to be permanently disposed of. But it does not obviate the need for——

Chairman SPRATT. Is not size also a function of heat, in that the heat emitted is still the same as the radioactive——

Mr. KOUTS. Heat is less of a concern for us. Volume is a bigger issue with us in the repository world. But yes, heat is an issue but not as driving an issue as the volume of the material that you have to dispose of.

Chairman SPRATT. Do you have further observations about reprocessing?

Mr. KOUTS. Again, the Secretary is committed to doing that. I think that from personal experience you have to have a good business case for going to reprocessing. And, you know, that certainly needs to be developed along with the technology associated with making sure it is proliferation resistant.

Chairman SPRATT. The capital cost is substantial.

Mr. KOUTS. It is very expensive, sir.

Chairman SPRATT. Mr. Mack?

Mr. MACK. Thank you, Mr. Chairman. And I also want to thank the panel for being here today. As we all know, the Nuclear Waste Policy Act of 1982 required the federal government to implement a policy to deal with the disposal of nuclear waste. In addition to incorporating a disposal policy a Nuclear Waste Fund was created to pay for research and for carrying out future projects. In 2002

Congress approved President Bush's recommendation of the Yucca Mountain site and since then Congress has continued to fund its research. However, the current administration has said the Yucca Mountain project, "is not a workable option," for nuclear waste storage and has halted all Yucca Mountain activities.

In light of the administration's decision to terminate this project I asked the administration to stop forcing our taxpayers to pay into a Nuclear Waste Fund until the Department of Energy devises a new nuclear management strategy. We should not be asking our constituents to contribute to a fund that is not being utilized. To date, our constituents have paid or are obligated more than $30 billion into the Fund. Floridians alone have contributed over $766 million into the Fund, and the government has no plan for long term storage which, by law, is its responsibility. In addition, the Fund has a current balance of $22 billion and it generates an annual interest of over $1 billion.

In 2009 Congress appropriated only $145 million to the Civilian Radioactive Waste Management program. Clearly, there is enough money generated in interest alone from this Fund to finance these current programs.

As members of the Budget Committee we deal with figures and numbers all the time, Mr. Chairman. These tax figures tell a frustrating story. A story about taxpayers once again footing the bill for an expensive government program. It is time that we stand up for the taxpayers and demand better.

I have just got a few questions. Does the Secretary say why we need a new policy direction?

Mr. KOUTS. The Secretary has made numerous statements. He feels that there is a better path, that technology can provide us a better answer. And basically I will let the Secretary's statements stand on——

Mr. MACK. But does the Secretary have any evidence of that? Or is this just something that he has created on his own, you know, that he just does not like the direction we are heading so, "I need a new policy direction."

I mean this is, if you think about it, it is pretty and, you know, it must be a horrible position to be in, to defend something that is pretty much indefensible. Because we are so far along down the path. And to now decide we want a new policy direction, without giving any reasons why we need a new policy direction, I think it is—Mr. Chairman, with all due respect to everyone, I think it is a bit irresponsible to at least articulate to the American people, to the Congress, why you think we need a new policy direction. Has the Secretary said why?

Mr. KOUTS. He has made certain statements on it. Again, he believes that there are, that technology can give us a better path. I really think your question is better asked to the Secretary than myself.

Mr. MACK. Yes, and I recognize it must be a very difficult position for you to have to try to answer for a decision that someone has made that is not defensible.

Mr. KOUTS. Well, I am sure it is defensible, sir. I just do not know——

Mr. MACK. Well, I do not know that it is. I mean, I do not know that it is. You know, I know we are here, and it is, we are kind of chuckling because you are having to defend something that you cannot really defend because for a long time this Congress has worked on a policy on how to store this nuclear waste. We have taxed people in a Fund to generate the revenue, and the ability to do this. And now all of a sudden we want a new policy direction? I mean, could we continue with the current policy direction and then let the Secretary build a case for why the Secretary believes that we need a new direction? I mean, does that not seem more responsible?

Mr. KOUTS. Well, again, that is a question for the Secretary, sir. And he is the senior policy maker in the Department. And I will certainly take that for the record if you want me to have that answered.

Mr. MACK. Yes, please. And do you think it is good policy to continue to tax the American people for a program that, I guess, will not continue to exist?

Mr. KOUTS. I——

Mr. MACK. Do you think they should continue to pay into that Fund?

Mr. KOUTS. I will also that take that for the record.

Mr. MACK. Thank you.

Chairman SPRATT. Thank you, Mr. Mack. Mr. Langevin?

Mr. LANGEVIN. Thank you, Mr. Chairman. I want to first of all thank you for holding this hearing, and I want to thank our witnesses for their testimony today. My question, first one, is since obviously the United States is not the only country that has nuclear power plants and has to deal with this issue of spent nuclear fuel and storage, which nation in the world could be looked at as the gold standard of how they deal with spent nuclear fuel and storage? And what are their costs compared to the alternatives that we are considering? And I would assume that the blue ribbon panel will consider this in their analysis of alternatives. But I think that is an important question for us to talk about. Which nation in the world would be considered the gold standard, and what is that method?

Mr. KOUTS. Well, I think there is international consensus, sir, that the best disposition path for these materials is in a geologic repository. And internationally there are programs, and there is actually an international group that meets on a regular basis, that talks about their individual programs. Many of them have storage, most of them have long term repository programs, and up until recently, you know, this nation was looked at as a leader in the development of repositories. So, but the simple answer to your question is that there is international consensus that a repository needs to be developed. The size of the repositories and the scale of them are much less. We have more operating reactors than anybody else in the world. We have more spent fuel than anybody else in the world. So the geologic repositories that need to be built by other countries are much smaller and deal with much different geologic media than we do.

Mr. LANGEVIN. Well I know for example that France gets much of its power, I guess 75 percent to 80 percent of its power from nu-

clear power plants. What does France do with its spent nuclear fuel?

Mr. KOUTS. Well, they have a reprocessing system in place where they reprocess the fuel from their reactors. And they have had a repository, a long term repository program, but they have not identified a site yet for that repository. So the long term plan of the French is to have a repository but, again, they are reprocessing their fuel, they are storing the residual components that need to be permanently disposed of in storage facilities.

Mr. LANGEVIN. Okay. And let me ask this. While we are clearly focusing on the civilian aspects of this issue, I also chair the Strategic Forces Subcommittee on the Armed Services Committee. And I feel it is important to underscore the challenges associated with nuclear waste management having important implications, both the civilian public safety and our national defense. So my question is, can you please clarify the distinction between the requirements for storage and disposal of civilian nuclear waste versus defense nuclear waste? And are these sites dual purpose? Are any of these sites dual purpose?

Mr. KOUTS. Well, the high level waste from the defense complex that the Department manages is substantially different than spent fuel. The materials that sit in tanks at Savannah River, at Hanford Reservations, and so forth, that will be solidified into a vitrified material, into a glass that will be put into a repository in the long term. And until a repository is available those will have to be stored where they are until, again, we have a facility to move those materials to for permanent disposition.

Mr. LANGEVIN. All right. Now, defense related nuclear waste management is not subject to the same fee charged to commercial entities. So then can you please explain how that affects the process in terms of budgeting and federal liability?

Mr. KOUTS. Thank you for that question. And the answer to it is, essentially, that there are two components of the budget for this program. One is the Nuclear Waste Fund and the other is we have a Defense 050 account which pays the defense portion for the disposition of those materials. So actually, and there was a presidential decision made back in President Reagan's administration, where he made a decision to co-locate defense materials with civilian materials so we did not have a defense repository and a civilian repository. So there is a component of our budget that is dedicated, that comes out of the defense appropriations, that essentially pays for the disposal of those materials.

Mr. LANGEVIN. What is that amount of money?

Mr. KOUTS. That varies from year to year. I think it has been pretty much a fifty-fifty split over the past several years. But the defense materials make up a smaller component of the overall amount of materials that have to go into a repository.

Mr. LANGEVIN. Okay. Thank you. Mr. Cawley?

Mr. CAWLEY. Cumulatively, I was going to say, there has been about $11 billion in spending. Just over $7 billion on the civilian side and $3 billion, $3.5 billion on the defense side.

Mr. KOUTS. That is correct.

Mr. CAWLEY. Since the beginning of the program.

Mr. LANGEVIN. Okay. Thank you. Well, I see my time is expired. I will have perhaps some questions for the record. But gentlemen, thank you for your testimony today and I yield back.

Chairman SPRATT. I would just add to the gentleman's questions and the answer that Savannah River stores nuclear waste before processing it in the K-Reactor, a place which was not intended for this kind of storage. So the sooner out the better.

Mr. KOUTS. Yes, sir.

Chairman SPRATT. Secondly, while there is a procedure at the defense waste processing facility called vitrifying this waste, and there is also interim storage provided in anticipation that there would be some back up like this, but it too has limits. So if taking up the output is not adequate then you have to slow down the input. And you have got waste storage in many cases in places for which it was not specifically designed, like the K-Reactor. So that has to be a concern for Savannah River. And I think generally speaking Hanford is behind Savannah River when it comes to waste processing.

Mr. KOUTS. Yes, it is. That is correct.

Mr. MACK. Mr. Chairman?

Chairman SPRATT. Mr. Mack?

Mr. MACK. May I real quick just ask unanimous consent to insert two letters into the record? I forgot to do that during my time.

Chairman SPRATT. Could you identify the letters?

Mr. MACK. Yes. One is from the NEI and the other one is from the National Association of Regulatory Utilities.

Chairman SPRATT. I think the NEI letter was put in the record.

Mr. MACK. I think they may be different.

Chairman SPRATT. Okay. Without objection, we will put it in the record.

Mr. MACK. Thank you.

Chairman SPRATT. Mrs. Lummis?

Mrs. LUMMIS. Thank you, Mr. Chairman. Mr. Kouts, first of all, I feel for you. You are between a rock and a hard place. I think you were asked today to go throw yourself under the bus in front of a congressional committee that is frustrated with the approach that the new administration is taking with regard to addressing nuclear waste issues.

Let me first ask, do you personally believe the administration's climate and emission reduction goals can be met without nuclear power being part of the solution?

Mr. KOUTS. Well, first of all, it is not my judgment. But the Secretary has been very forthright on this, that he feels that the nuclear option is very critical to meeting climate change goals. And he has stated that publicly on numerous occasions. So I think the Secretary has been very clear on that.

Mrs. LUMMIS. Okay, thank you. Setting aside for a moment the non-meritorious decision to abandon Yucca Mountain, even if the blue ribbon panel is able to find an alternative to Yucca Mountain that can absorb its statutory 70,000 metric ton capacity, is this tonnage sufficient for our long term disposal needs at the current rate at which waste is being produced?

Mr. KOUTS. No, it is not. And if I can just add a little bit to that, early on in the program we had a second repository program. And

we were identifying a site for a second repository. And Congress in the 1987 amendments terminated that second repository program and required the Secretary of Energy to submit to Congress a report on the need for a second repository. And that report was submitted to Congress last December. And basically what that report indicates is that unless—at that point we had Yucca Mountain on the table. Unless you raise the statutory limit then you needed a second repository. And it also made some judgments about how much Yucca Mountain could hold. And basically, Yucca Mountain's capability is probably three to four times the statutory limit. So all that information is contained in that report and I would commend that to you if you have a, you know, substantial interest in that subject.

Mrs. LUMMIS. Thank you.

Mr. KOUTS. It also identifies the second repository sites that we looked at, and all the different repository sites that we looked at early in the year, and the states in which those sites reside.

Mrs. LUMMIS. Okay. And this report was dated December?

Mr. KOUTS. 2008.

Mrs. LUMMIS. 2008, thank you very much. Will the blue ribbon panel consider spent fuel recycling to limit the volume of nuclear waste as part of a long term solution?

Mr. KOUTS. Again, that panel has not been charted. But my expectation would be that they would look at all different alternatives, including reprocessing and reduction of volume, yes.

Mrs. LUMMIS. And don't the advantages of fuel recycling warrant further study, including ways to make it more cost effective and proliferation resistant?

Mr. KOUTS. I think the Secretary is committed to that and I think, you know, we will see what the blue ribbon panel thinks about that.

Mrs. LUMMIS. Why do other countries use recycling more than we do? Why has it been our nation's policy to limit that option?

Mr. KOUTS. I think that has been, there has been a flip-flop of policy over the years. I think ultimately the driver has been economics. I think if there was a strong business case for it I think it would be implemented, and I think the challenge here is not so much the technology, although that is somewhat of a challenge, to make it as proliferation resistant as possible, but also making it as, you know, and a reasonable cost standpoint is certainly something that needs to be looked at.

Mrs. LUMMIS. So you are telling me it is exponentially more cost, more expensive than storage?

Mr. KOUTS. Well again, you have to look at the different scenarios. Most of the scenarios that I have seen with recycling in them, basically the cost to the overall system goes up but it does have other advantages. You get to reuse the uranium, you do not have to do as much mining of uranium, it extends the use of our uranium resources, and so forth. So there are pluses and minuses and that has to be evaluated.

Mrs. LUMMIS. And are you aware of any effective studies that makes those kind of cost comparisons now?

Mr. KOUTS. Well, I know our Office of Nuclear Energy is looking into that issue, and doing those kinds of analyses and that is really

a question for them to look at. They have the expertise in the Department in that regard.

Mrs. LUMMIS. Thank you. Mr. Cawley, can you estimate the amount of additional financial liability that may be incurred by the administration's decision to eliminate all funding except for that needed to continue licensing processes?

Mr. CAWLEY. I think it has been stated that until we know where the policy is going it is pretty hard to say if we will be disposing of waste at 2020, or after 2020, or before 2020. So no, we do not have a good estimate of that.

Mrs. LUMMIS. Okay, thanks. And Mr. Hertz, in your testimony you stated that because of the government's failure to live up to its contractual nuclear waste disposal obligations seventy-one lawsuits have been filed. And of those, ten have been settled and fifty-one remain pending. Of the cases that are settled, how often can the claimant resubmit claims for ongoing liabilities as the government continues to fail to live up to its obligations? And you may have answered this already, but I——

Mr. HERTZ. No. Under the settlements they, I think they can come back every year with regard to the costs that they have incurred. The settlement sets out a scheme and a rate, and sets out what costs they can claim. So we initially settled the original lawsuit and we set out a formula going forward. And on a yearly basis they can go to the contracting officer at the Department of Energy and make a claim. That is reviewed, and then sent over to the Department for approval.

Mrs. LUMMIS. Okay. And one more quick question, Mr. Chairman? Thank you so much. Do settlements have set formulas for determining new damages for the same claimant? Or could additional damages be incurred?

Mr. HERTZ. The settlements have a formula for what damages can be claimed.

Mrs. LUMMIS. Okay. Mr. Chairman, thank you so much for holding this hearing.

Chairman SPRATT. Thank you. Mr. Diaz-Balart?

Mr. DIAZ-BALART. Thank you, Mr. Chairman. Thank you, gentlemen, for being here. I am a little bit, let me just make sure that I understood the question to my colleague's, the answer to my colleague's question when she just asked, in essence I am going to paraphrase what you asked but I kind of wrote down, about the estimated amount of additional financial liability because of the administration's decision to delay or end Yucca. And the answer was, "No, we do not know."

Mr. CAWLEY. Yes——

Mr. DIAZ-BALART. Let me just make sure, am I hearing then that this decision was made with no consideration of what the price to the taxpayer could be?

Mr. CAWLEY. The only estimate I am aware of is the one prepared by the Department of the $12.3 billion in liabilities, assuming they could handle waste starting in 2020. I think under the new policy there is uncertainty about when waste handling could commence. So there are no new estimates that I am aware of of how much the liability could be.

Mr. DIAZ-BALART. Do you not understand that that could be a little troubling? That a decision is made that could have potentially a serious financial implication? And that does not seem to be a priority? Is that not a little troubling to you? I mean, I tell you what, I just got, that was not my question. I was just flabbergasted that a decision that could mean, potentially, serious implications to the taxpayers and that is not something that has been, obviously it is not on the front burner? So these decisions are being made in a vacuum, in theory, without even, I guess as a, it is not a big priority, it is not a real important issue, how much it could cost to the taxpayer? Is that not a little troubling?

Mr. CAWLEY. I imagine the blue ribbon panel that examines alternatives will be looking at costs.

Mr. DIAZ-BALART. Is that in the charge? Is that one of the main charges of the blue ribbon panel, to look at the cost? Could you let us know if it is? And if it is not, why not? If you would? I mean, I do not expect you to know exactly what necessarily is in the charge of that blue ribbon panel, even though you might. Is that part of the charge, to determine, to know how much it could cost potentially to the taxpayer, short term, long term? And where that is weighted in their decision?

Mr. KOUTS. If I could——

Mr. CAWLEY. Once they have a charter we will certainly try to help you with——

Mr. DIAZ-BALART. All right.

Mr. KOUTS. The charter for the panel has not been——

Mr. DIAZ-BALART. Has not been established?

Mr. KOUTS [continuing]. Has not been established.

Mr. DIAZ-BALART. All right. Well I would just hope then that that is part of the charge.

Mr. KOUTS. I understand, sir.

Mr. DIAZ-BALART. Great, thank you. Now, so my question is, I learned recently that, I did not know this, that I guess those whose utility companies use nuclear, I guess there is a small surcharge charged and it is, let me see, it is one-tenth of 1 percent per kilowatt hour. Now I know that does not seem like a lot of money, but it is $22 billion out of which $766 million comes from Floridians alone. Now here is the question. If in fact it looks like, you know, Yucca Mountain is going to be closed, and nuclear power does not seem to be a huge priority, is the administration going to come forward with a proposal to eliminate that fee that people are paying? Or at least to lower it?

Mr. KOUTS. Well, the Fund was set up to provide a fund for the Department to use to implement the disposal of these materials. The Department is still committed to meeting its obligations, it is just going to take a different policy path. And the Fund would be used to fund that policy path. And until we know what that policy path is, you know, we will not know exactly what the needs from the Fund will be.

Mr. DIAZ-BALART. Right. But we do know that, again, that obviously we do not know how much the new policy path may cost, just from what I am hearing. That is obviously not a big priority for this administration, how much the taxpayer might be hit again. But in the meantime, would it not make sense, as opposed to just

continue to charge this surcharge, to at least postpone it until you have an idea of how much that is going to cost? In other words, this issue of just charging people regardless of knowing how much it is going to cost, maybe it will be more, maybe it will be less, should there not be some consideration to those who are paying for something that is not happening before you just continue to charge them?

Mr. KOUTS. If I could answer that, Mr. Mack I think submitted into the record two letters that the Department recently received from the Nuclear Energy Institute and also the National Association of Regulatory Utility Commissioners addressing that same issue. And the Department is in receipt of those letters, and I really cannot comment on what the response to the letters will be. But we are certainly aware of the issue and those letters have made the same request that you have made, sir.

Mr. DIAZ-BALART. And again, I do not mean to be harsh on you, but again, it is a little bit hard to hear when we are now at $1 trillion deficit and climbing. I think there has got to be a realization that this is not our money, this is taxpayers' money. And that should always be in the forefront of any discussion of any decision made. And I know that you would agree with that. Sometimes it looks like that is not the case. Thank you, Mr. Chairman.

Chairman SPRATT. Mr. Simpson, I think you have a couple of questions?

Mr. SIMPSON. Yes. Just a couple of things. One is that, you know, if the charge of this blue ribbon commission is to find a state or a tribe willing to accept interim storage of this stuff, you know, we have done that, we have had that before. We have had a commission, or not a commission, but a nuclear waste negotiator. In fact, a couple of them that have gone around and, you know, they found a tribe in Utah that was interested in it. And the State of Utah said, "I do not think so." I do not think they are going to have very good luck in trying to find a state. Consequently, I understand where Nevada is coming from. And I am not critical of them. You know, as I have said before, it is not that it is Yucca Mountain, it is that we need a waste repository and everyone here has said even today that ultimately we are going to need a waste repository. And I admire all of your testimony and the Secretary's also. I know that you are implementing a policy. And the elephant in the back of the room that nobody is willing to say is that a promise was made during the campaign to Senator Reid by then candidate Obama, now President Obama, and you know, the President is following through on his promise. That is the reality. It has nothing to do with science. It has nothing to do with whether this is an appropriate repository or not.

But again, I would state that Congress has a role to play in this also. Given that we have potential liabilities out there, and we are paying for some of them now, and there are liabilities also to states that is not civilian nuclear waste, but states like South Carolina, states like Idaho, where we have defense nuclear waste, Navy waste, etcetera, etcetera. There are penalties imposed through agreements with those states that if the waste is not removed by a certain date, penalties follow. I think in South Carolina it is like $1 million a day, or something, after a certain date that the federal

government will theoretically start paying a fee. In Idaho I am not sure what it is. I do not think we were as good of negotiators as South Carolina was.

But if I am the federal government and I am looking at trying to get out from under the potential penalties to the civilian reactors, or those companies that have reactors that are now currently storing the civilian waste, my first thought would be to start looking at current DOE sites to start moving some of this waste to. Is anyone in the Department, or is the Department considering, current DOE sites as a location for interim storage of civilian waste currently held at reactor sites?

Mr. KOUTS. No sir, we are not. We are going to wait for the recommendations of the blue ribbon panel in terms of what policy path we want to proceed. That may be one of their recommendations. I have no idea what they are going to come up with. But, you know, certain that is one siting option. It has been looked at in the past. But no, the Department is not actively looking at those sites, or any sites at this point, for either an interim storage facility or a repository.

Mr. SIMPSON. Okay.

Chairman SPRATT. Monitored retrievable storage comes up from time to time at Savannah River and other places. It has been proposed and never implemented, of course, for various reasons, but it has been reported. But we are receiving waste at the Savannah River site and putting it through the system, for example, and things are happening there. They will diminish the amount of waste that ultimately has to be disposed of.

Mr. SIMPSON. You know, the same reaction that we have in Nevada was experienced in New Mexico for the WIPP site. Very strong opposition to that. Since it has been opened you do not find that kind of reaction down there. It seems to be proceeding very well and we are moving a lot of the transuranic waste down there, moving it out of Idaho. When they say they cleaned up Rocky Flats they did not really clean up Rocky Flats they just moved it to Idaho. And now we are moving it to New Mexico, to a permanent repository. But the 70,000 metric tons at Yucca Mountain is a statutory limit, correct?

Mr. KOUTS. That is correct, sir.

Mr. SIMPSON. Mr. Hertz, you mentioned that if federal policy needed to be changed as a result of the blue ribbon commission you hope that it dealt with the central liabilities and so forth out there. What exactly could Congress do in terms of that? I mean, we cannot just say we were just kidding, can we?

Mr. HERTZ. No. I mean, the way I have thought about it is, contracts that exist now, both parties have both future rights and future obligations and presumably some of those could be adjusted. I am not saying there is unfettered discretion but there may be things that Congress could consider, coming up with different proposals to deal with the waste that would deal with future liabilities even under the existing contracts. So I think one of the things that we would do as the Department of Justice is make the recommendation to the blue ribbon commission that one of the things they consider is the government's litigation liability going forward as part of their overall method.

Mr. SIMPSON. Okay.

Chairman SPRATT. Would the gentleman yield?

Mr. SIMPSON. Sure.

Chairman SPRATT. For clarification, do you leave the case open, the suit open, and render a judgment periodically? Or do you render a judgment, close it, and then if the prospect for a particular facility does not appear to be forthcoming, the utility is then allowed to bring another suit?

Mr. HERTZ. Correct. I mean, the way it has worked so far is, once the Federal Circuit ruled these were partial breaches, and that they could basically seek their damages up until the time they filed their complaint, then whatever damage is incurred after that would have to be filed in a new complaint. And in fact, I think we already have sort of five——

Chairman SPRATT. So you have to relitigate?

Mr. HERTZ. I am sorry?

Chairman SPRATT. You have to bring a new suit?

Mr. HERTZ. You have to bring a new suit. And I think we already have five of the second generation suits. In other words, people that had lawsuits, either had judgments or cases that were still pending, but now they want to seek the next few years. So they file the next——

Chairman SPRATT. Why would not every utility with a contract bring suit for the alleged breach?

Mr. HERTZ. I think, well——

Chairman SPRATT. Why would not every reactor, electric utility with nuclear reactors as generating sources, why would not every utility to bring a suit to claim these damages?

Mr. HERTZ. I think the vast majority have. And I think one of the things they have to do is be able to establish damages. But we have had a number of cases that were withdrawn because whatever the circumstances were in those——

Chairman SPRATT. Is that because just sitting in the pools there minimizes damages?

Mr. HERTZ. Or, you know, given what our likely rate was, and the priority of their pick up, that they would not have been able to establish damages.

Mr. SIMPSON. Let me just say in conclusion, Mr. Chairman and Mr. Kouts, I am very concerned about the administration's budget for proceeding with the licensing proposal, and whether the Department can aggressively answer the questions that are going to be proposed by the NRC. And we will be watching that. And if it looks like we are slow walking this process I am going to have some concern, as is the Energy and Water Appropriations Committee I am certain. So just be aware that we are going to have our eyes on that. I appreciate it.

Mr. KOUTS. Yes, sir.

Mr. SIMPSON. And thank you all for being here today. I really do appreciate it, even though I know it is sometimes a tough assignment.

Chairman SPRATT. I echo what my Ranking Member said. We very much appreciate your coming, the effort you put into this, and the forthright answers we were given. We may be calling upon you in the future, but we do indeed appreciate your coming today. I

would ask unanimous consent that all members who did not have the opportunity to ask questions be allowed seven days to submit questions for the record. At this point in the record I would like to submit a study by Frank von Hippel as to the cost and implications of reprocessing as an alternative. Without objection, so ordered.

[The report, "Managing Spent Fuel in the United States: The Illogic of Reprocessing," by Frank von Hippel, dated January 2007, may be accessed at the following Internet address:]

http://www.fas.org/programs/ssp/__docs/IllogicReproJan07.pdf

Chairman SPRATT. This concludes our hearing. Thank you again for your participation.

Mr. SIMPSON. Thank you.

Mr. KOUTS. Thank you, Mr. Chairman.

Mr. HERTZ. Thank you.

Mr. CAWLEY. Thank you.

[The prepared statement of Mr. Ryan follows:]

PREPARED STATEMENT OF HON. PAUL RYAN, RANKING MINORITY MEMBER, COMMITTEE ON THE BUDGET

Mr. Chairman, safe and permanent storage of high-level and spent nuclear fuel waste is a critical element to our long-term energy strategy. It also has important budgetary implications that, if not addressed, will only serve to worsen our already bleak fiscal picture.

Over the past 25 years, we have already spent $10 billion in taxpayer and ratepayer funds studying Yucca Mountain as a suitable site for nuclear waste storage. Those studies show that Yucca is, in fact, suitable for nuclear waste storage, and the Congress has confirmed this conclusion.

Yet, the Administration has—for I think political reasons—determined that Yucca is not a workable option and is proposing millions more to be spent on further studies. It clearly is a delaying tactic. I don't believe we can learn more about nuclear waste storage that we don't already know, and more studies will only serve to delay a final solution and waste more money in the process.

It would also expose taxpayers to large liabilities for the government's broken promise to store nuclear waste. Courts have already awarded utility companies nearly $1 billion in damages, and DOE estimates the government's total liability related to lawsuits is $12.3 billion—that is, if Yucca opens in 2020, which is optimistic by all accounts. Abandoning Yucca—or even further delay—will only serve to add billions more to this already unacceptable liability.

It appears that the vast majority of Congress agrees with this assessment, having rejected 388-30 a motion to recommit the Fiscal Year 2010 Energy and Water Development and Related Agencies Appropriation Act with instructions to strike funding for Yucca Mountain.

Abandoning Yucca without any clear path forward is irresponsible from both a budgetary and policy standpoint. It breaks the Administration's promise to let science guide our decision making process, and instead puts provincial politics rule ahead of the national interest.

Mr. Chairman, we don't need further studies on Yucca. The time to move forward is now.

[Whereupon, at 11:45 a.m., the Committee was adjourned.]

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