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NUCLEAR ENERGY INSTITUTE

May 24, 2013

The Honorable Ron Wyden
Chairman
Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Building
Washington, D.C. 20510

The Honorable Lisa Murkowski
Ranking Member
Committee on Energy and Natural Resources
United States Senate
304 Dirksen Senate Building
Washington, D.C. 20510

The Honorable Dianne Feinstein
Chairman
Subcommittee on Energy and Water Development
Committee on Appropriations
United States Senate
184 Dirksen Senate Building
Washington, D.C. 20510

The Honorable Lamar Alexander
Ranking Member
Subcommittee on Energy and Water Development
Committee on Appropriations
United States Senate
184 Dirksen Senate Building
Washington, D.C. 20510

Dear Senators Wyden, Murkowski, Feinstein and Alexander:

The Nuclear Energy Institute,[1] on behalf of the nuclear energy industry, is pleased to provide comments on the discussion draft of the Nuclear Waste Administration Act of 2013 and the associated documents that were released on April 25.

Despite current law, the Nuclear Waste Policy Act, and the thoughtful recommendations of the Blue Ribbon Commission (BRC) on America's Nuclear Future, the federal government lacks a sustainable high-level waste management program for commercial used nuclear fuel and defense-related materials. We appreciate your efforts to remedy this situation and reform the federal government's program. The current situation continues to place undue burden upon stakeholders, many of whom had the expectation that their used nuclear fuel would begin leaving their sites in 1998 for ultimate disposal in the Yucca Mountain repository.

[1] The Nuclear Energy Institute (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 cycle facilities, nuclear materials licensees, and other organizations and entities involved in the nuclear energy industry.

After the Administration suspended the Yucca Mountain program, stakeholders waited while the bipartisan BRC developed its recommendations, and again while the Administration developed its strategy. Now is the time for Congress to exercise its leadership and reshape the federal government's high-level waste management program. The industry fully supports the resumption of the Yucca Mountain licensing process, but this alone is not sufficient to create a sustainable, integrated program. A multi-pronged strategy, which includes the following elements, is necessary:

- A new management and disposal organization outside of the Department of Energy (DOE).
- Access to the Nuclear Waste Fund and annual fees for their intended purpose.
- Completion of the Yucca Mountain repository license review.
- A consolidated storage facility for used nuclear fuel and DOE's high-level radioactive waste in a willing host community and state. Used fuel from decommissioned commercial reactor sites without an operating reactor should have priority when shipping commercial used fuel to the storage facility.
- Research, development and demonstration on improved or advanced fuel-cycle technologies to close the nuclear fuel cycle.
- NRC's promulgation of a temporary storage rule and an eventual legislative determination of waste confidence supported by a sustainable federal program founded on the elements above.

The industry is pleased that the discussion draft incorporates many, but not all, of the elements identified above.

Attachment 1 provides our responses to the questions posed in the discussion draft as well as specific comments on various sections in the draft. The responses and comments were informed by our initial thinking on legislative principles for nuclear waste management reform. These principles, which address all aspects of an integrated used nuclear fuel program including RD&D, are included in Attachment 2 for your consideration.

The success of future high-level waste management efforts, including the Yucca Mountain project, will depend heavily on the management organization. For this reason, we support the creation of a new management and disposal organization outside of DOE. This organization must have a clearly defined mission and be empowered with the authority and resources to succeed. Congress and the Administration should retain an oversight authority, but this role should be carefully structured to enhance the efficient, apolitical operation of the new management organization with minimal burden.

Rather than the single Administrator, as proposed in the discussion draft, the industry recommends that the new management and disposal organization be governed by a board of directors with a chief executive officer (CEO) hired by the board. The industry believes that this structure will achieve greater separation from the presidential election cycles than has been the case with the Department of Energy's program. It is imperative that the CEO not be subjected to the political uncertainties associated with presidential

appointments so that he or she can focus entirely on performing the task at hand with the requisite attention to nuclear safety and security that is expected from all employees of a nuclear industrial organization.

Ensured access to the Nuclear Waste Fund and the Nuclear Waste Fees will be essential to providing the new management and disposal organization with the financial stability and independence necessary for success. Payments into the Nuclear Waste Fund were made by the nuclear power generators for the sole purpose of covering the cost of the eventual disposal of their used nuclear fuel. The discussion draft recognizes this and the need to ensure access to the funds and makes substantial progress in this area by transferring future Nuclear Waste Fee payments directly to the new management entity. The industry, though, believes that the corpus of the Nuclear Waste Fund, in addition to the Nuclear Waste Fees, should be made available to the new management and disposal organization for its intended purpose without being subject to appropriations. This, however, could be accomplished with transfers over a reasonable schedule defined within the legislation.

The industry is committed to the establishment of a program that will begin to reduce the liability for the taxpayers. The BRC reported that the damage awards from the taxpayer-funded Judgment Fund will total $20.8 billion dollars if the federal government begins accepting used fuel in 2020, based on a DOE estimate. Further, the BRC estimated that the damage awards associated with the DOE's breach may increase by as much as $500 million for each year after 2020 that DOE does not begin to accept used fuel. Given the absence of any federal program, it has become virtually impossible for the DOE to begin to meet its obligation to move used fuel before 2020. The goal of all involved should be to reduce this liability as quickly as possible. The legislation that accomplishes this goal, however, should not include a mandatory requirement that the industry and the government settle all claims as a precedent for the new management and disposal organization taking title to and transporting used nuclear fuel from our reactor sites. Additional information on this topic is provided in Attachment 1.

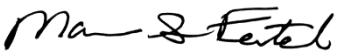
Industry is advocating that efforts to develop a geologic repository and efforts to develop a storage facility proceed simultaneously, not sequentially. But the industry believes that states, affected local communities and/or tribes should determine what linkage, if any, between repository and storage programs is necessary as they negotiate a consent agreement. The industry does not believe that it is necessary to establish multiple additional criteria that, in essence, are intended to "protect" the state, affected local community and/or tribe from being forced to host an unwanted facility. The additional criteria provided in the discussion draft (e.g., unduly burdening a state) are unnecessary if the consent-based process is followed. An effective consent-based process not only will permit the state, affected local community and/or tribe to protect their financial interests, but also makes those entities responsible for agreeing to the terms of any consent agreement in which they may enter.

Lastly, the discussion draft does not attempt to address the fact that states, affected local communities and/or tribes may not be knowledgeable about the implications, benefits and challenges associated with

hosting either a consolidated storage facility or a second repository when the new management and disposal organization begins the process of siting facilities. The new management entity must be prepared to support states, affected local communities and/or tribes in efforts to educate themselves and develop sufficient support to identify potential sites for further consideration in the ongoing consent-based process.

The nuclear industry is committed to the development of a sustainable, integrated high-level waste program and the discussion draft of the Nuclear Waste Administration Act of 2013 is a significant step forward in this effort. We welcome the opportunity to work with Congress and the Administration on this and other legislative proposals. Please do not hesitate to contact me or Everett Redmond of my staff, elr@nei.org, 202.739.8122, if we can be of further assistance or answer any questions.

Sincerely,



Marvin S. Fertel

Attachments:

(1) Responses to Questions on the Nuclear Waste Administration Act of 2013 Discussion Draft, with Additional Comments
(2) Legislative Principles for Nuclear Waste Management Reform

Nuclear Energy Institute Responses to Questions on the Nuclear Waste Administration Act of 2013 Discussion Draft, with Additional Comments

Question 1: Considerations for locating storage facility sites

Should the Administrator take into account, when considering candidate storage facility sites, the extent to which a storage facility would: (a) unduly burden a State in which significant volumes of defense wastes are stored or transuranic wastes are disposed of; or (b) conflict with a compliance agreement requiring the removal of nuclear waste from a site or a statutory prohibition on the storage or disposal of nuclear waste at a site? Alternatively, should the State and other non-federal parties seeking to site a candidate storage facility be allowed to determine whether they are unduly burdened? Should the final consent agreement, which would be sent to Congress for ratification, contain an authorizing provision to amend any conflicting compliance agreement or statutory prohibition?

There are two primary considerations when siting a facility. One is whether the state, affected local community and/or tribe are willing to permit the facility to be developed and the second is whether the features of the site will permit it to meet safety and security requirements and obtain Nuclear Regulatory Commission (NRC) approval. It is not necessary to establish multiple additional criteria that, in essence, are intended to "protect" the state, affected local community and/or tribe from being forced to host an unwanted facility. The additional criteria provided in the proposed legislation (e.g., unduly burdening a state) are unnecessary if the consensus process is followed. An effective consensus process allows the state, affected local community and/or tribe to protect their financial interests, and makes those entities responsible for agreeing to the terms of any consent agreement into which they may enter. If, during the siting process, it becomes apparent that the new consent agreement would conflict with other agreements or statutory prohibitions, those conflicts should be addressed in a manner that is agreed to by the parties.

Question 2: Linkage between storage and repository

Should the bill establish a linkage between progress on development of a repository and progress on development of a storage facility? If so, is the linkage proposed in section 306 of the bill appropriate, too strong, or too loose? If a linkage is needed, should it be determined as part of the negotiations between the State and federal governments and included in the consent agreement rather than in the bill?

The industry has advocated that efforts to develop a geologic repository and efforts to develop a storage facility must proceed simultaneously, not sequentially. This principle is well stated in Section 306(a) of the discussion draft. But the industry believes that states, affected local communities and/or tribes should determine what linkage, if any, is necessary as they negotiate a consent agreement. Rigid legislative restrictions established at the federal level have the potential to limit the rights of a state, affected local community and/or tribe and hamper negotiations during the consent-based siting process.

The linkage as currently proposed would require the Administrator of the new agency and the Oversight Board to certify that "substantial progress" is being made toward siting, constructing and operating a repository to justify continued development or operation of a storage facility. This requirement should be removed.

Rather that prescribing a linkage approach in the bill, it should be addressed in the consent agreement in a manner agreed to by all parties. Section 304(f) of the current bill already provides the flexibility for the parties to address linkage. The language states that a consent agreement "shall contain the terms and conditions on which each State, local government, and Indian tribe consents to host the repository or storage facility." The bill states further that these terms and conditions may include "operational limitations or requirements" and "an enforceable deadline for removing nuclear waste from the storage facility" in the case of a storage facility. This is as far as federal legislation should go on the matter of linkage.

Question 3: Separate process for storage facility siting – Alternative Section 305

Should the bill establish separate storage and disposal programs with clearly defined requirements for each, with any linkage negotiated in the consent agreement between the federal and non-federal parties, to allow the two programs to run on separate, but parallel tracks, as proposed in the alternative section 305 (which would replace section 304(b)-(g) of the draft bill)?

A geologic repository program and a consolidated storage program must be pursued simultaneously. The industry continues to support the completion of the Yucca Mountain licensing process while concurrently pursuing a consolidated storage program and possibly a search for a second repository location. The significant difference in the complexity of disposal and storage facilities, the structure of the regulatory regime, and the level of funding necessary will naturally result in separate programs with different lengths of time to perform site characterization, development of the necessary applications, licensing, and construction. Despite these differences, the bill does not necessarily need to establish separate requirements and processes by which sites are identified and selected for hosting storage facilities and a repository. Rather, the bill should define a simple structure that is applicable to both consolidated storage and a repository while maximizing the flexibility of the new management entity, the state, affected local communities and/or tribes to define specific requirements for each program as they wish.

None of the siting processes outlined in the discussion draft or alternative language attempt to address the fact that states, affected local communities and/or tribes may not be knowledgeable about the implications, benefits, and challenges associated with hosting either a consolidated storage facility or a second repository. The new management entity must be prepared to support states, affected local communities and/or tribes in efforts to educate themselves and develop sufficient support to identify potential sites for further consideration in the siting process.

The following basic requirements could be specified in legislation recognizing that the timeframes associated with fulfilling these requirements will be substantially longer for a repository program than for a consolidated storage program. The specifics of program implementation should be left to the new management entity, states, affected local communities and/or tribes.

- Separate general guidelines for siting consolidated storage facilities and a second repository must be issued based on the regulatory requirements. The response to Question 4 provides additional information on the current regulatory regime for storage facilities and repositories.
- Financial and technical assistance must be provided to states, affected local communities and/or tribes, or other organizations interested in considering hosting consolidated storage facilities or a second repository.
- Potential sites, with consent of the state, affected local community and/or tribe, must be identified for site characterization. A consultation and cooperative agreement for site characterization should be developed if desired by one or more of the parties involved.
- Sites must be characterized to determine if they are likely to be acceptable for hosting an NRC-licensed, consolidated storage facility or a second repository.
- One or more sites (preferably) must be selected and a consent agreement with the state, affected local community and/or tribe must be developed. The consent agreement must be binding on all parties.

With regard to the specific language proposed in Section 304 of the draft bill, the exception stated in Section 304(b)(2)(B) is appropriate. As discussed in the response to Question 1, the additional factors defined in Section 304(b)(2)(C) should be removed. NEI also recommends that the Section 304(d)(2) preference for co-locating a repository and storage facility be reviewed. We believe that the timelines for determining if a site is suitable for hosting a repository will be considerably longer than for a storage facility. As a result, we question whether attempting to comply with this preference may create unforeseen challenges in siting a facility.

With regard to the specific language in the alternative proposal, it should be stated explicitly that the consent agreement for the consolidated storage facility is binding on all parties as it is for the repository in Section 306(e)(5). In addition, NEI questions why a program plan for consolidated storage would be required to be submitted to Congress, per Section 305(b)(5), but would not be required for a repository. NEI suggests that the program plan requirements for a storage facility and a repository be reconciled.

Question 4: Separate Process for Storage Facility Siting – General streamlining for storage only

To what extent should the siting and consensus approval process for spent fuel storage facilities differ from that for the repository? Should the Administrator be required to conduct sufficient site-specific research (referred to as "characterization" in the bill) on candidate storage sites to determine if they are suitable for storing nuclear waste or only on candidate repository sites to determine if they are suitable for geologic disposal of nuclear waste? Should the Administrator be required to hold public hearings both before and after site characterization (as required by current law in the case of the Yucca Mountain site) or only before site characterization?

Existing federal regulations specify that sites that are considered for either a consolidated storage facility or a repository must be characterized sufficiently to support a license application to the NRC in accordance with the appropriate safety and environmental protection requirements. The NRC regulations for a consolidated storage facility, 10 CFR Part 72, are well known and numerous facilities have been licensed in accordance with these regulations.

If the search for a second repository other than Yucca Mountain is undertaken, it will be necessary for the NRC to develop new generic repository regulations before a potential site could be characterized. The existing generic regulation, 10 CFR Part 60, is considered by many to be inadequate and the regulation used in the Yucca Mountain review, 10 CFR Part 63, was specific to Yucca Mountain and therefore not directly applicable to other repository locations. In addition to the NRC, the Environmental Protection Agency (EPA) will also need to develop new regulations for a generic repository. NEI's legislative principles, attached, address both Yucca Mountain and the need for updated regulations.

Because of the relative simplicity of a consolidated storage facility compared to a repository, the length of time to characterize a site for storage will be significantly shorter than for a second repository. Regardless, the consent-based siting process for a consolidated storage facility can be conceptually the same as the process used to site a second repository in a willing host state, affected local community and/or tribe as discussed in the response to Question 3.

Public hearings, as opposed to public meetings, are typically part of an adjudicatory process addressing compliance with safety requirements and environmental impacts as part of a regulatory licensing process. Public hearing requirements in advance of NRC's making a license determination are currently well established in federal regulations, and do not need to be addressed separately in statute. It is appropriate for the new management entity to hold local public meetings for the purpose of gathering public comments regarding the different project phases for either a spent fuel storage or disposal facility. The number and frequency of such meetings should be left to the state, affected local community and/or tribe, and new management entity to determine.

Question 5: Complexity of repository and storage facility siting processes

Should the siting process in section 304 of the draft bill be streamlined? If so, how?

Please see the response to Question 3. It also addresses this question.

Question 6: Governance of the Nuclear Waste Administration – Administrator vs. Board of Directors

Should the new entity be governed by a single administrator or by a board of directors?

(a) If by a single administrator, should the administrator serve for a fixed term? If so, how long should the term of service be? Should the legislation prescribe qualifications for the administrator? If so, what should be the selection criteria?

(b) If by a board of directors, how many people should comprise the board and how should they be selected?

The new management entity should be governed by a board of directors with a chief executive officer (CEO) hired by the board. The industry believes that this structure will achieve greater separation from the presidential election cycles than has been the case with the Department of Energy as the program manager. The instability that can be created as a result of the political appointment process is well illustrated by the now-defunct Office of Civilian Radioactive Waste Management (OCRWM). This office, whose director was appointed by the President and confirmed by the Senate, never realized stable long-term leadership because of the turnover of directors associated with changes at the White House. From 1983 to 2010, OCWRM had six appointed and confirmed directors and nine acting directors. The incumbent director was replaced with every new administration. For this reason, the new management entity should be governed by a board of directors rather than a single administrator appointed by the President. An entity with a board structure and a CEO, hired by the board, enhances management and political stability more than a single administrator structure. As General Brent Scowcroft and Dr. Richard Meserve noted in their testimony to the Senate Energy and Natural Resources Committee in September 2012, "a new waste management organization will need the leadership of a strong chief executive with exceptional management, political, and technical skills and experience and tenure that extends longer than the political cycle."

The industry recommends that the board be composed of no more than 9 members and that those members be appointed by the President with the advice and consent of the Senate. Board members should be appointed for a minimum of 7-year staggered terms to ensure political stability and continuity. This follows the logic of other board structures, like the Federal Reserve Board. According to the Federal Reserve website, "the lengthy terms [14 years for board members] and staggered appointments are intended to contribute to the insulation of the Board—and the Federal Reserve System as a whole—from day-to-day political pressures to which it might otherwise be subject."

Further, to address the potential for delays in replacement of directors, a board quorum should be defined as simply more than one-half of the standing directors.

Selection of board members for the new entity should include representation from stakeholders both inside and outside of government. The board should include at least three members from entities that contribute or have contributed to the Nuclear Waste Fund. Another two members of the board should be appointed from state public utility commissions or representatives thereof. NEI recommends that to be eligible for appointment to the board, an individual must be a citizen of the United States and have management, financial, technical or other appropriate expertise.

Regarding selection of a CEO, the CEO must have, at a minimum, senior executive management experience in large complex organizations with expertise in the nuclear industry and strong financial management skills. It is imperative that the day-to-day operation of the new management entity be shielded from political pressures and that the senior leadership within the new management entity be held accountable for their actions. The organizational structure of the new management entity must facilitate the removal of a CEO or other senior managers who are ineffective or not performing their duties. Therefore, the chief executive in the organization should not be appointed by the President but rather hired by the board.

Question 7: Governance of the Nuclear Waste Administration – Role of advisory committees

The Blue Ribbon Commission recommended establishment of both a board of directors for management oversight (whose "primary role … is not to represent all stakeholder views, but rather to carry out fiduciary responsibilities for management oversight") and "a larger and more widely representative stakeholder advisory committee." The draft bill responds to these recommendations, first, by establishing a Nuclear Waste Oversight Board of senior federal officials and, second, by authorizing the Administrator to establish advisory committees. Should the Oversight Board and advisory committee be combined into a single body to perform both management oversight and stakeholder representation functions? Should the focus and membership of any advisory committees be established in the legislation or left to the Administrator?

The industry believes that the new management entity must have effective oversight and governance but that this should be achieved primarily through a board of directors, not the oversight board outlined in the discussion draft. The oversight board as structured in the discussion draft is unnecessary, duplicative and possibly susceptible to "day-to-day political pressure." The industry believes that Congress and the Administration have a vital role in ensuring proper oversight and the long-term success and of a new management entity as outlined in the attached legislative principles.

The BRC's recommendation for the establishment of a stakeholder advisory committee, in addition to a board of directors, deserves serious consideration. However, the industry would prefer that

establishment of such an advisory committee be the responsibility of the new management entity in consultation with the state, affected local community and/or tribe. If a stakeholder advisory committee is to be legislated, NEI recommends that the Nuclear Waste Technical Review Board (NWTRB) be restructured to serve this function rather than creating a second advisory committee in addition to the NWTRB. This committee should serve in an advisory capacity to the board of directors of the new management entity, for the CEO should be receiving his or her sole direction from the board.

Question 8: Governance of the Nuclear Waste Administration – Membership of the Oversight Board

Dr. Meserve testified in 2012 that representatives of stakeholders and public utility commissioners should be added to the Nuclear Waste Oversight Board. Would these additions make the Board better able to carry out its fiduciary oversight mission effectively?

The oversight board, as currently structured, will not be shielded from political pressure and members will likely be replaced with each new Administration. As discussed in the response to Question 6, the industry believes that the new management entity should be governed not by an oversight board, but rather by a board of directors that includes representation from public utility commissioners and entities that contribute or have contributed to the Nuclear Waste Fund. Industry and public utility commission members are key financial stakeholders and have valuable perspectives to provide, including technical expertise and business acumen. Inclusion of these perspectives would bolster public confidence in the new governance structure. By not including these key stakeholders, the governance structure does not include those that have a vested interest in the success of the used nuclear fuel management program.

* * *

Additional Comments on the Discussion Draft

General Comments

- The phrase "above-ground" is used throughout the discussion draft as a modifier for storage facilities. This modifier should be removed because it is overly restrictive and could be interpreted as prohibiting the use of in-ground dry cask storage systems or in-ground spent fuel pools.
- The new management entity should be instructed explicitly to make all reasonable efforts to accept commercial used fuel that is loaded in dry storage containers that can be transported without repackaging.
- The new management entity should be authorized explicitly to accept Greater-Than-Class C waste.
- The Nuclear Regulatory Commission and the Environmental Protection Agency must develop new generic repository regulations before a search for a second repository can occur.

Section 103(4)

The definition of "affected unit of general local government" should be reviewed with the recognition that the federal government will likely obtain jurisdiction over the site at some point during the program. In the case of the Yucca Mountain, the federal government already has jurisdiction over the site.

Section 103(16)

The word "and" should be replaced by "or" after "fuel" in the definition of a "nuclear waste."

Section 103(18)

The word "and" should be replaced by "or" after "repository" in the definition of a "nuclear waste facility."

Section 103(22)

As stated in the attached legislative principles, the industry supports prioritizing commercial used fuel from decommissioned nuclear power reactors located on a site without an operating reactor ahead of other commercial used nuclear fuel. The industry's position is slightly more restrictive than the definition specified in the discussion draft by limiting priority to a subset of the decommissioned reactors, those that are not co-located with an operating reactor.

Section 103(30)

This section includes the phrase "pending the disposal of the spent nuclear fuel in a repository." This is overly restrictive compared to the definition of "storage" in Section 103(29) and could prohibit the disposal of high-level waste from future recycling if the United States so chooses. The industry

believes that options for the future recycling of material should be maintained, as described in the attached legislative principles. Therefore it is suggested that the phrase be modified to read "pending the disposal of the nuclear waste in a repository" consistent with Section 103(29).

Section 201(a)

This subsection refers to the establishment of an "independent agency." In order for the new Nuclear Waste Administration to be recognized as an executive agency, it needs to fit one of the categories in 5 U.S.C. §§ 101-105, "executive department," "government corporation," or "independent establishment." There is no such legal entity known as "independent agency."

Sections 202(a) and 202(b)

As discussed in the answers to the specific questions, the industry believes that the new management entity should be governed not by a single Administrator, but rather by a board of directors appointed by the President with the advice and consent of the Senate and with a chief executive officer hired by the board.

Section 203(a)(3)

The chief executive of the new management entity should have the authority to determine the appropriate number of senior managers and/or assistant administrators. This should not be specified in legislation.

Section 203(b)(3)

The linkage to Section 161d of the Atomic Energy Act will unduly limit the ability of the Administrator to hire and compensate qualified individuals and would create a mismatch in CEO compensation relative to the management/employees. Therefore, it is suggested (consistent with legislative principles attached) that this subsection be modified to be similar to the Tennessee Valley Authority legislation which authorizes the TVA CEO to appoint such managers, assistant managers, officers, employees, attorneys, and agents as necessary and without regard to the provisions of the civil service laws applicable to officers and employees of the United States.

Section 304(a)(1)

The industry recommends that states and tribes be mentioned in this subsection since they may also be parties to the consent agreement.

Section 304(a)(3)

The industry supports the implementation of a flexible process for siting new facilities. Legislating flexibility in the manner specified in this subsection, however, could challenge the ability of the new management entity and a state, affected local community and/or tribe, to reach a binding consent agreement. Therefore, it is recommended that this subsection be removed.

Section 304(b)(2)(C)(iii)

As discussed in the response to the specific questions, the additional criteria in this subsection are inappropriate and should be removed.

Section 304(c)(4)(A)

It is suggested that the phrase "including a safety case that provides the basis for confidence in the safety of the proposed nuclear waste facility at the proposed site" be removed. The demonstration of the safety of the facility will be accomplished through the licensing process. The siting process should only determine if a site is likely to be licensable with the NRC. Further, a "safety case" is not defined within the U.S. regulatory structure.

Section 304(c)(4)(C),(D), and (E)

NEI believes that in a consent-based process, a site should be determined to be suitable for characterization based on its own merits without a comparison to other sites being considered or to sites that were considered historically. In addition, neither a description of the process nor an assessment of the regional and local impacts should be used to determine if a site is suitable for characterization. Therefore, it is suggested that these subsections be removed.

Section 304(d)(3)

It is suggested that "public hearing" be changed to "public meeting" in this subsection. Public hearings are typically part of an adjudicatory process associated with a formal licensing proceeding. The public interactions referred to in this section are more accurately described as public meetings rather than public hearings.

Section 304(d)(4)

This subsection should be modified to recognize that different consultation and cooperation agreements may be desirable between the different parties.

Section 304(e)(2)(A)(ii)

This subsection should be clarified to identify which EPA regulations are applicable to storage facilities and which are applicable to a repository.

Section 304(f)

It is appropriate that a consent agreement include financial compensation and incentives. However, other than Congressional ratification, the consent agreement, as described in the discussion draft, does not have input from stakeholders that contribute to the Nuclear Waste Fund or represent the ratepayers. Those stakeholders also do not have the right to approve any agreement. The board structure, as suggested by NEI, would provide the needed stakeholder input during the development of the consent agreement.

Section 306

As discussed in the response to the questions, the industry recommends removing this section on the linkage between storage and disposal.

Section 307(d)

It is suggested that this section be modified by removing the phrases "by contract holders" and "if such nuclear waste were generated by a contract holder." These phrases are unnecessary given the language in Section 302 of the Nuclear Waste Policy Act (NWPA).

Section 308(c)

This subsection addresses notification prior to transportation and is unnecessary because the NRC regulations address notification. All shipments should be conducted in accordance with then-existing laws and regulations.

Section 308(d)

Section 180(c) of the NWPA addresses technical assistance for transportation. The new subsection should be reconciled with Section 180(c) of the NWPA.

Section 401(b)

The creation of the Working Capital Fund is a good first step in establishing financial stability that is necessary for the new management entity to succeed. The industry, however, believes that the new management entity must also have full access to the Nuclear Waste Fund without relying on appropriations as outlined in the attached legislative principles.

To enhance the Working Capital Fund further, the legislation should specify that future, one-time fee payments under the NWPA shall be paid into the Working Capital Fund. Consideration should also be given to depositing the interest paid on the Nuclear Waste Fund directly into the Working Capital Fund rather than back into the Nuclear Waste Fund.

Section 401(c)(1)

Experience with the development of the Yucca Mountain project has demonstrated that the annual appropriations process can be used to circumvent the requirements of the Nuclear Waste Policy Act. Therefore, the Working Capital Fund should be available to the new management entity without reliance on the annual appropriations process and without fiscal year limitation. To ensure this occurs, the phrase "to the extent limited in annual authorization or appropriations Acts" should be replaced with "without fiscal year limitation."

Section 401(e)

The industry supports the inclusion of this subsection that would suspend waste fee payments if a disposal or storage facility is not open by the end of 2025. It is suggested that the language be modified to address the conditions under which the waste fee payments would be restarted.

Section 402(a)

As outlined in the attached legislative principles, the industry supports the ability of Congress to disallow adjustments to the Waste Fee. Therefore, industry recommends that this section be modified accordingly.

Section 403(1)

The reference to the Nuclear Waste Fund in this subsection appears to be incorrect and should probably be changed to the Working Capital Fund.

Section 406(b)

This subsection should be removed. It contains two provisions that would result in a Congressionally-imposed modification of the Standard Contract for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste and the contract rights of the utilities who are parties to the Standard Contract. The consequence of such a provision under Supreme Court case law, including the landmark decision in *United States v. Winstar*, would be to create further breach of contract claims by the utilities against the government.

Section 406(b)(1) would establish a "condition precedent" before the Administrator of the new Nuclear Waste Administration could take title to and store a utility's spent fuel. The condition precedent would be that the Justice Department settle all the utility's breach of contract claims under the Standard Contract. (Although this "condition precedent" applies only to storage and not to disposal, as discussed below, this limitation does not cure the problems with this provision.) Section 406(b)(2) provides that "the Administrator and contract holders shall modify" their Standard Contracts "in accordance with the settlement under" Sec. 406(b)(1).

The effect of these provisions would be that the government could deny a utility's right under the Standard Contract for DOE to take its spent fuel unless the utility agreed to accept a settlement of its breach of contract claims on whatever terms the government wanted to impose. This would effectively deprive the utilities of their contractual rights, under which the government is supposed to take their spent fuel in exchange for millions of dollars in Nuclear Waste Fees paid to the government.

As established by decisions of the U.S. Court of Appeals for the Federal Circuit, the DOE has breached the Standard Contracts of all nuclear utilities by failing to begin accepting the utilities' spent fuel beginning January 31, 1998. *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1342 (Fed. Cir. 2000) ("The breach involved all the utilities that had signed the contract – the

entire nuclear electric industry."); *Northern States Power Co. v. United States*, 224 F.3d 1361 (Fed. Cir. 2000). As a result, all the nuclear utilities have the right to sue (and have sued) the United States to recover the damages they have incurred as a result of that contract breach. Some utilities have recovered judgments through litigation; others have settled their breach of contract claims and are being reimbursed for the costs of the government's breach; still others are continuing to litigate these claims. Because the government's breach is only a partial (rather than a total) breach of its contractual obligation, the government's obligation to take the utilities' spent fuel continues, as does the government's responsibility for damages.

If section 406(b) becomes law and obligates each utility to settle its breach of contract claims as a condition to the Nuclear Waste Administration taking any of that utility's spent fuel for storage, the Congress would be interfering with a contract between the government and a private party. Although the precondition is only to settle the utility's breach of contract claims, the fact that the "Justice Department, in consultation with the Administrator" would have an unfettered right to insist on a settlement on its terms, effectively deprives the utility of deciding to pursue litigation or to settle on terms that it finds acceptable. Because the proposed legislation includes no criteria for the terms of the required settlement, the government would have the absolute right to refuse to accept the utility's spent fuel under the Standard Contract until the utility agreed to the government's settlement terms, regardless of what they might be.

If the terms of settlement the government seeks to impose are not acceptable to a utility, the utility either will be forced to accept unpalatable terms in order to have its spent fuel taken by DOE or will have to give up its right to have the Nuclear Waste Administration accept its spent fuel in accordance with the Standard Contract. In either case, Congress will be interfering with a contract between the utility and the government. Under well-established Supreme Court precedent, Congressional action can have the effect of breaching a contract. In the circumstances described above, the government will have breached the Standard Contract and will be liable for damages. See, for example, *United States v. Winstar*, 518 US 839 (1996); *Mobile Oil Exploration & Producing Southeast, Inc. v. United States*, 530 US 604, 620 (2000) ("[T]he fact that [the government's] repudiation [of the contract] rested upon the enactment of a new statute makes no significant difference."); *Franconia Assocs. v. United States*, 536 US 129, 147-148 (2002) ("We comprehend no reason why an Act of Congress may not constitute a repudiation of a contract to which the United States is a party. Congress may renounce the Government's contractual duties…").

As noted above, the condition precedent would apply to the Nuclear Waste Administration's obligation to accept spent fuel for storage, but not for disposal. Limiting the condition precedent to acceptance for storage (and excluding disposal) would not alleviate the government from liability for forcing utilities into unpalatable settlements. The obligation imposed by section 302(a)(5)(B) of the NWPA to dispose of the utilities' spent fuel beginning by 1998 is not tied to permanent disposal. The DOE unsuccessfully tried to make this argument in the lawsuit which established DOE's 1998 obligation. *Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272, 1276 (D.C. Cir. 1996) ("DOE's duty under subsection (B) [of NWPA sec. 302(a)(5)] to dispose of the SNF is conditioned on the payment

of fees by the owner and is triggered, at the latest, by the arrival of January 31, 1998. *Nowhere, however, does the statute indicate that the obligation established in subsection (B) is somehow tied to the commencement of repository operations referred to in subsection (A) [of NWPA sec. 302(a)(5)]".)*

Similarly, DOE's performance under the Standard Contract is not linked to permanent disposal. Article II of the Standard Contract states that DOE will provide its services "after commencement of **facility** operations, not later than January 31, 1998" (emphasis added). Article I in turn specifically defines "DOE facility" to include not only a permanent repository, but also storage facilities, i.e., "such other facility[ies] to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility."

Section 406(d)

This subsection prohibits the Administrator from entering into a contract that obligates the Administrator to perform by a date that is before a repository or storage facility is licensed. The description in the section-by-section summary, however, incorrectly describes this subsection by stating that it "[p]rohibits the Administrator from entering into new waste disposal contracts before licensing a repository or storage facility." If the legislation had been written consistent with the description, it would prohibit the licensing of new reactors with the NRC (because a contract must be in place prior to issuance of a license) until a repository or storage facility is licensed. NEI suggests changing the section-by-section summary to accurately reflect the bill language.

Section 504(b)

The industry believes that a pilot facility could be operational by 2021 and supports the inclusion of target dates for the opening of facilities.

Section 504(c)

The mission plan should be required to be provided to contract holders for their comments in addition to the other stakeholders listed in this subsection.

Section 509

The title of this section should be modified to more accurately read "Repeal of Mass Limitation."

NUCLEAR ENERGY INSTITUTE

Legislative Principles for Nuclear Waste Management Reform

The Nuclear Energy Institute is advocating for legislative reform to create a sustainable, integrated program for federal government management of the Department of Energy's (DOE) high-level radioactive waste and commercial used nuclear fuel. NEI is committed to working with both houses of Congress and the Administration on proposed legislation that addresses the federal government's high-level radioactive waste management responsibilities.

The industry supports an integrated used nuclear fuel management strategy, which consists of six basic elements.

- A new management and disposal organization dedicated solely to executing a high-level radioactive waste program and empowered with the authority and resources to succeed.
- Access to the annual collections and corpus of the Nuclear Waste Fund for their intended purpose, without reliance on the annual appropriations process but with appropriate Congressional oversight.
- Completion of the Yucca Mountain repository license review. Nuclear electric consumers deserve to know whether Yucca Mountain is a safe site for the permanent disposal of high-level waste, as billions of dollars and years of independent scientific research suggest.
- A consolidated storage facility for used nuclear fuel and DOE high-level radioactive waste in a willing host community and state while making substantial progress toward developing the Yucca Mountain site and/or a second geologic repository. A consolidated storage facility would enable the DOE or a new management entity to move used nuclear fuel from decommissioned plants and operating plants long before a repository or recycling facilities begin operating. Used fuel from decommissioned commercial reactor sites without an operating reactor should have priority when shipping commercial used fuel to the storage facility.
- Research, development and demonstration on improved or advanced fuel cycle technologies to close the nuclear fuel cycle, thereby potentially reducing the volume, heat and toxicity of byproducts placed in a repository, recognizing that a geologic repository will be required for all fuel cycles. All funds for this RD&D must come from DOE's budget and not the Nuclear Waste Fund. In addition to RD&D, the Nuclear Regulatory Commission (NRC) should develop a regulatory framework for the licensing of recycling facilities.
- Supporting NRC's promulgation of a temporary storage rule and an eventual legislative determination of waste confidence supported by a sustainable federal program founded on the elements above.

The following legislative principles address these program elements and will guide the industry's ongoing engagement in the legislative process.

New Management Entity

Structure

A new self-sustaining federal management organization, hereafter referred to as the Management and Disposal Organization (MDO), should be established to discharge the responsibilities of the federal government to manage and dispose of used nuclear fuel and DOE high-level waste.

The MDO should be configured to ensure programmatic effectiveness and its financial and political independence.

- The MDO should be independent of all government agencies and departments.
- The MDO should be advised by a bipartisan Board of Directors composed of no more than 9 members.
  - Board members should be appointed by the President with the advice and consent of the Senate.
  - Board members should be appointed for a minimum of 7-year staggered terms.
  - At least three members of the Board should be appointed from entities that contribute or have contributed to the Nuclear Waste Fund.
  - At least two members of the Board should be appointed from state public utility commissions or representatives thereof.
  - To be eligible to be appointed to the Board, an individual must be a citizen of the United States and have management, financial, technical or other appropriate expertise.
  - A quorum for the Board should be defined as simply more than one-half of the standing directors.
  - The Board should approve the annual budget for the MDO.
- The MDO should have a CEO, who is hired by the Board.
  - The CEO must have, at a minimum, senior executive management experience in large complex organizations with expertise in the nuclear industry and strong financial management skills.
- The CEO, in consultation with the Board, should have the authority to appoint and terminate officers, lawyers, and other employees as necessary to carry out the duties of the MDO without regard to civil service laws applicable to employees of the U.S. government.

  - The MDO's authority to hire and set compensation for officers and employees should be exempt from the provisions of Title 5 of the U.S. Code.
  - The CEO, in consultation with the Board, should be responsible for establishing the duties and compensation for officers and employees of the MDO.
  - Compensation for leadership and employees of the MDO should be comparable with industry peers to enable the MDO to recruit and retain officers and employees with demonstrated leadership, management and technical abilities.

- The Board should be established and operating within 180 days of enactment.
  - The specific DOE responsibilities that will be transferred to the MDO should be defined, and DOE should be instructed to transfer all appropriate materials and infrastructure to the MDO efficiently.

Authority

The MDO should be given authority to implement the elements of an integrated used nuclear fuel management program – transportation, consolidated storage, recycling if warranted, and disposal – efficiently and cost-effectively.

The MDO should have additional authority to:

- acquire private land and facilities, to enter into leases, and to administer contracts necessary for the efficient execution of its used nuclear fuel management responsibilities;
- negotiate legally binding agreements with states, affected local communities and/or tribes interested in hosting consolidated storage and/or disposal facilities;
- issue bonds;
- enter into new spent fuel disposal contracts consistent with the provisions in section 302(a) of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10222(a)) and 10 CFR Part 961 for a commercial nuclear power reactor to be licensed by the NRC and to amend (with the agreement of the contract holder) existing contracts;
- propose an adjustment to the Nuclear Waste Fee to ensure full cost recovery. The proposal should be presented to Congress and deemed effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period a law is enacted disapproving the proposed adjustment. No adjustment of the fee should become effective until 24 months after the 90-day period.

The MDO should not be subject to the following antitrust legislation: (1) the Sherman Act (15 U.S.C. 1 et seq.); (2) the Clayton Act (15 U.S.C. 12 et seq.); or (3) section 73 or 74 of the Wilson Tariff Act (15 U.S.C. 8, 9).

The MDO should be exempt from taxation in any manner or form by any state, county or other entity of local government, including state, county, or local sales tax. The MDO should be authorized to make payments in lieu of taxes.

Operations

- The MDO should maintain an office in the District of Columbia; and for purposes of venue in civil actions, should be considered a resident of the District of Columbia. The MDO may establish other offices in other locations as deemed appropriate by the Board.
- The MDO should be required to obtain Board approval if it seeks to engage in recycling. The Board decision should be based on the availability of readily deployable technologies and financial benefits to the disposal program.
- The NRC should have regulatory oversight authority over all MDO nuclear storage, disposal and recycling facilities.
- The MDO should be instructed explicitly to make all reasonable efforts to accept commercial used nuclear fuel that is loaded in dry storage containers that can be transported without repackaging.
- The new management entity should be authorized explicitly to accept Greater-Than-Class C waste.
- The MDO should conduct transportation activities in accordance with then-existing laws and regulations.
- The MDO should conduct non-generic research, development, and demonstration in direct support of the licensing and operation of consolidated storage and disposal facilities with the approval of the Board.
- The MDO should have full access to the Nuclear Waste Fee payments and the Nuclear Waste Fund without being subject to annual appropriations for activities related to the management of commercial used nuclear fuel.
- The MDO should review annually the amount of the Nuclear Waste Fee payments to evaluate whether collection of the Fee, together with the corpus of the Nuclear Waste Fund and interest, will provide sufficient revenues to offset the costs of the waste management program. Results of this evaluation should be presented to Congress and entities that pay into the Nuclear Waste Fund. The results should also be made available to the public.

Accountability

- Performance milestones should be established by the Board, in consultation with the CEO, and reports on the progress on those milestones should be presented to Congress annually.

- The MDO should be required to maintain transparent controls on administrative spending to promote accountability and ensure public confidence.
- The MDO should be required to have an independent audit conducted biennially with results presented to Congress and entities that pay into the Nuclear Waste Fund. The results should also be made available to the public.

Nuclear Waste Fund Reform

The MDO must have access to long-term and stable funding and be held accountable to the ratepayers and Congress for using these monies for actions that directly support the ability of the government to meets its statutory and contractual obligations.

Access to the corpus of the Nuclear Waste Fund and future fee payments will be essential to funding an integrated storage and disposal program.

- The MDO should be given access to the full balance of the Nuclear Waste Fund, including interest. Transfer of such funds to the MDO should be on a reasonable schedule defined in the enacting legislation and not subject to annual appropriations.
- Fees paid into the Nuclear Waste Fund, including future one-time fee payments under the NWPA, after the date of enactment should be made available to the MDO within 30 days of payment to the Treasury. Such fees should not be subject to annual appropriations.
- Interest earned on the balance of the Nuclear Waste Fund should be made available to the MDO without being subject to appropriations.
- Funds collected or escrowed for the purpose of used nuclear fuel management should receive the same tax treatment as payments to the Nuclear Waste Fund.

Government Liabilities

The full cost of the estimated liability payments to be made by the federal government from the U.S. taxpayer-funded Judgment Fund should be included in all future U.S. government budget estimates.

Payments for damages arising from DOE's failures to begin to take title of used nuclear fuel by 1998 should only be paid from the Judgment Fund; no payments for DOE's partial breach of contract should be made from the Nuclear Waste Fund.

Utilities should not be required to waive their right to recover damages or required to reach a settlement with the federal government as a condition of future action on the part of the MDO.

Yucca Mountain

The Yucca Mountain licensing process should be completed.

- The DOE or MDO should attempt to negotiate an agreement with the state of Nevada and the host counties to address state and local issues and provide benefits to the state and host counties.
- Permanent land withdrawal, necessary before construction can begin, should be legislated.

The Nuclear Waste Policy Act should be amended to remove the 70,000 metric ton limit on heavy metal in spent nuclear fuel to be emplaced at Yucca Mountain. Any limit on the amount of used nuclear fuel emplaced in a repository should be based on public health and safety considerations.

The Nuclear Regulatory Commission should be instructed to consider the application to receive and possess, or any other application after the construction authorization is approved, using expedited procedures and to issue a final decision on whether to grant permission to receive and possess, or on any other application, within one year of submission of the application. The NRC should be permitted to extend that deadline by no more than six months.

Geologic Disposal

- Geologic disposal is an essential element of a sustainable, integrated used nuclear fuel management program.
- Development of consolidated storage and disposal facilities should be pursued in parallel without limitation. Achievement of milestones associated with one facility should not be a pre-requisite for continued development of other facilities.
- The target date for the opening of Yucca Mountain or an alternative geologic repository should be no later than 20 years after a consolidated storage site is opened.
- The NRC and EPA should be instructed to develop new regulations for a generic repository within 36 months of enactment.
- Notwithstanding any further advancement of the Yucca Mountain repository project, the MDO should be authorized to site a second repository in a willing host community and state using a consent-based siting process.

Consolidated Storage

- The Nuclear Waste Fees and the Nuclear Waste Fund should be used for the development and operation of a consolidated storage facility.
- The DOE or MDO should be authorized to design, construct and operate a consolidated storage facility for commercial used nuclear fuel and DOE high-level radioactive waste.

- For commercial used nuclear fuel shipments to the consolidated storage facility, priority should be given to the decommissioned commercial reactor sites that no longer have an operating reactor.

- The MDO should be authorized to site consolidated storage facilities in a willing host community and state using a consent-based siting process. The MDO, the state, and relevant localities or tribes should enter into a binding agreement to host the consolidated facility. The agreement should be presented to Congress and deemed effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period a law is enacted disapproving the proposed agreement.

- Any agreement with a state, affected community and/or tribe may include restrictions on the capacity of the subject consolidated storage facility, the duration of operation of that facility, and the relationship of operation of that facility to the operation of a repository.

- The limitations imposed on a monitored retrievable storage facility under section 141(g) of that Nuclear Waste Policy Act (42 U.S.C. 10161(g)) should not apply to a consolidated storage facility developed by the MDO or DOE.

- The NRC should be instructed to issue a final decision approving or disapproving a license for a consolidated storage facility no later than two years after the date of the submission of such application. The NRC should be permitted to extend that deadline by no more than one year.

Commingling of DOE High-level Radioactive Waste (HLW) and Commercial Used Nuclear Fuel

The MDO should be required to provide for the permanent disposal of both commercial used nuclear fuel and DOE high-level radioactive waste (HLW).

- The MDO should address disposal pathways for both DOE HLW and commercial used nuclear fuel simultaneously, not sequentially.

- The MDO should have the authority to determine whether DOE HLW should be stored and disposed of in common or separate facilities.

- The MDO must receive payment for the storage and disposal of DOE HLW from appropriated or other funds, but in no case should such payment for storage and disposal of HLW be taken from the Nuclear Waste Fund or Nuclear Waste Fees paid by contract holders.

DOE responsibilities that should remain with DOE after the MDO becomes operational

DOE should be instructed to maintain a comprehensive research and development program to evaluate the aging characteristics of existing used nuclear fuel storage systems over extended time periods.

- DOE may choose to contract with the MDO to manage and carry out this program, however, because the need for extended storage is a direct result of the Department's failure to meet its obligation to begin removing used nuclear fuel from reactor sites beginning in 1998. All funding for this program must come from the Department's budget and not the Nuclear Waste Fund.

DOE should be instructed to maintain a comprehensive research, development and demonstration program for improved or advanced fuel cycles in close coordination with industry.

- All funds for this program must come from the Department's budget and not the Nuclear Waste Fund.
- The NRC should be instructed to develop a regulatory framework for the licensing of recycling facilities.

Waste Confidence

The environmental impacts of used nuclear fuel storage for the period between NRC license termination and removal for disposal should be exempted from NRC consideration (under NEPA) in connection with the development, construction, and operation of, or any permit, license, license amendment, or siting approval for, a civilian nuclear power reactor or any facility for the treatment or storage of spent nuclear fuel or high-level radioactive waste based on a legislative determination of reasonable assurance that:

- safe disposal of high-level radioactive waste and spent nuclear fuel in a mined geologic repository is technically feasible and one or more mined geologic repositories for commercial high-level radioactive waste and spent nuclear fuel will be available when needed; and
- high-level radioactive waste and spent nuclear fuel generated in reactors licensed by the NRC is and will continue to be managed and stored in a safe manner without significant environmental impact until sufficient repository capacity is available to assure the safe disposal of such high-level radioactive waste and spent nuclear fuel.

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