

No End In Sight To Cases Over Lack Of Nuke Waste Storage

By **Daniel Wilson**

Law360 (February 10, 2021, 10:45 PM EST) -- The federal government's continued failure to meet contractual obligations to dispose of spent nuclear fuel has cost it billions of dollars, and the Biden administration's opposition to the Yucca Mountain repository means the issue could linger for years to come, experts say.

Litigation over the government's inability to live up to its mandated agreements to dispose of spent fuel has continued for decades and resulted in billions in payouts to utilities. The U.S. Department of Energy is currently hamstrung by significant political headwinds against establishing the Yucca Mountain repository in Nevada, the only legally authorized site for high-level waste disposal.

The Biden administration doesn't support moving forward with Yucca Mountain, and with a lack of current specified alternatives, a timeline for resolving those cases isn't any clearer than it was when they started, said Anthony O'Donnell, a member of the Maryland Public Service Commission.

"I'm not sure we've made any progress ... and we need an answer. If the answer is no, [Yucca Mountain's] not the right spot, fine, and let's get about finding another spot. But we're not any further along," said O'Donnell, who is also chairman of the National Association of Regulatory Utility Commissioners' Subcommittee on Nuclear Issues-Waste Disposal.

The 1982 Nuclear Waste Policy Act authorized the DOE to establish a repository for permanently storing high-level waste, which is highly radioactive, long-lasting waste created as a byproduct of operating a nuclear reactor.

Under the law, nuclear power stations began entering into mandated contracts with the DOE to begin moving their spent nuclear fuel to that repository by the beginning of 1998, paying into a fund to cover associated costs.

Decades after the government was supposed to start taking spent fuel, however, there is still no permanent repository, and utilities continue to be locked in long-running legal battles over the government's contractual breaches.

The first settlement was reached in 2000, and the government had paid out about \$8 billion in related settlements and judgments as of the end of fiscal 2019, according to a 2020 Congressional Research Service report. The department estimated in 2019 that potential liabilities from delays in disposing of

waste could be as high as \$36.5 billion.

That hurts the government and utilities alike, and cases will continue for as long as utilities have no place to send their spent fuel, said Pillsbury Winthrop Shaw Pittman LLP partner Alex Tomaszczuk, who has extensive experience representing companies in these disputes.

"The utilities are continuing to have to store fuel on site at their facilities located around the country and there's costs associated with that," he said. "So until the government commences performance of its contractual obligations, there's going to be either litigation or litigation that results in settlements."

Despite those judgments and settlements, nuclear power companies aren't really being "made whole" as a result, said Brad Fagg, co-leader of Morgan Lewis & Bockius LLP's energy litigation and government contracting practices, who has also represented many utilities in their spent nuclear fuel cases.

"There's a time value of money, and there are aspects of recoverability against the government — time value or interest that you just can't get," he said. "Then there are a lot of harder to quantify burdens for utilities to store fuel that don't readily translate into dollars that you can seek from the government."

On the government side, although there was \$40.4 billion in the related waste fund as of the beginning of fiscal year 2020, the DOE is barred by a court ruling from paying settlements or judgments from that fund, which is made up of money from nuclear power companies. That means payments come from the federal judgment fund — and ultimately taxpayers.

Further complicating matters, the DOE stopped collecting new waste disposal funds in 2014 after a related 2013 Federal Circuit ruling. That means there may not be enough in the fund by itself to establish a permanent repository for high-level waste, if and when that time actually comes.

And with an ongoing lack of political will to move forward with Yucca Mountain, those issues are likely to remain and litigation-related costs are likely to keep piling up for some time to come.

Under a 1987 amendment to the NWSA, Yucca Mountain was designated as the only location the DOE can use for a permanent high-level nuclear waste repository, but Nevada's lawmakers and officials have strongly pushed back against the idea, citing concerns about natural and technical risk, and the proposed project has long been mired in political and legal disputes.

The George W. Bush administration nonetheless sought to move forward with the project, and the DOE submitted a formal license application in 2008, but the Obama administration in 2010 halted any further design or licensing work.

There were also some moves within Congress under the Trump administration to try to push Yucca Mountain forward, but those bills did not make it to the floor for a vote. And although the administration itself pushed for funding to restart the project in fiscal years 2018 through 2020, each proposal was zeroed-out by lawmakers and the White House dropped the proposal entirely in its 2021 budget request.

At her Jan. 27 nomination hearing, Energy Secretary nominee Jennifer Granholm said that the Biden administration opposes reviving the project. She suggested instead that it would likely seek to "engage with some consensus strategies that will allow us to determine where that waste will go," as proposed by a bipartisan Blue Ribbon Commission set up under the Obama administration, which issued a final

report in 2012.

But that would require a change to the law that made Yucca Mountain the only legal choice, and Pillsbury's Tomaszczuk said that he didn't believe that the political will to resolve the issue is there, given the lack of progress to resolve spent nuclear fuel disposal issues so far.

"It's one of those things where it's just easier to kick the can down the road, right?" he said.

Geoffrey Fettus, a senior attorney with the Natural Resources Defense Council's nuclear, climate and clean energy program who has long focused on issues related to the nuclear fuel cycle, took a more positive view, saying the NRDC believed Granholm's comments on establishing a consent-based process were a "very promising" start toward solving "a multidecade challenge with a million-year repercussion."

"The Blue Ribbon Commission ... while we think some of the findings were a little too tepidly expressed, basically found the right answers, which is that the reprocessing of spent nuclear fuel will solve nothing and should not be pursued," he said. "They found that we're going to need a repository or repositories, and that if we're going to get there, we have to find a way to do it by consent."

The commission did not categorically come out against "closing" the nuclear fuel cycle — which includes reprocessing spent fuel — but said it would be premature to commit to a closed cycle as a matter of policy, citing "significant uncertainties" about the merits and viability of various fuel cycles and related technologies. But either way, deep geologic disposal capacity is an "essential" part of managing nuclear waste, with very long term isolation the "only responsible way" to manage certain waste, the commission said.

While neither the BRC nor Granholm have been explicit about what a consent-based process would look like, there are a number of ideas from groups like the NRDC on how to secure consent, such as moving nuclear waste under "bedrock" environmental laws, rather than giving it a separate, privileged status, Fettus said.

That would allow the U.S. Environmental Protection Agency and state regulators to establish meaningful protective standards and have some level of control over repositories, he said.

There are also lessons to be learned from other countries that have sought to establish similar repositories, such as Canada, Finland and Switzerland, which could help with establishing a consent-based process, said Cindy Vestergaard of the Stimson Center think tank.

But U.S. officials haven't always been willing to open their mind to the experience of other countries on those issues, "which is a huge detriment to making progress," said Vestergaard, who is director of Stimson's nuclear safeguards program.

"How they are reaching out to their communities, how they are getting acceptance is a main element missing in the United States," she said.

One potential spur to encourage the Biden administration into action on creating a new permanent repository is that it has listed nuclear power as one of its "critical clean energy technologies" as part of its policy for addressing climate change.

That would include the use of smaller, modular reactors, but several states have said they don't want new nuclear reactors built until there is a permanent solution to storing nuclear waste, Vestergaard noted.

Even if relevant laws are changed and a new permanent site can be established with the consent of nearby communities and state and local officials, the process is unlikely to be quick. A draft consent-based siting process developed by the DOE in 2017, prompted by the BRC report, estimated that it would take anywhere between 25 and 37 years to plan, approve, license and build a new permanent repository.

In the meantime, utilities will continue to act as a de facto interim spent fuel storage system — and to rack up related costs — and whatever the difficulties, it is important to make progress toward a solution, said O'Donnell of the Maryland Public Service Commission.

"The cost of inactivity in Congress and at the national level is incalculable and the burden will fall on future generations," he said. "And I view this as a matter of morality. It's immoral for us to push this issue on to future generations. We created the problem, we have to solve the problem."

--Editing by Jill Coffey and Emily Kokoll.

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