January 31, 1998 in the absence of a repository or interim storage facility constructed under the Nuclear Waste Policy Act of 1982, as amended. In addition, DOE has concluded that it lacks statutory authority under the Act to provide interim storage.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Waxman of the Department of Energy Office of General Counsel at (202) 586–6975.

SUPPLEMENTARY INFORMATION:

I. Background

The Nuclear Waste Policy Act of 1982, as amended (Act or NWPA), 42 U.S.C. 10101 et seq., provides a comprehensive framework for disposing of high level radioactive waste and spent nuclear fuel (SNF) generated by civilian nuclear power reactors. In general, the Act sets forth procedures for selecting a repository site and developing a repository for disposal of high-level radioactive waste and SNF and for financing the cost of such disposal. Section 302(a) of the Act authorizes the Secretary to enter into contracts with the owners and generators of SNF of domestic origin (utilities) for the acceptance and disposal of SNF,1 and stipulates that the contracts provide that the Secretary shall take title to the SNF as expeditiously as practicable following commencement of operation of a repository. In return for the payment of fees, section 302(a) also stipulates that the contracts provide that the Secretary, beginning not later than January 31, 1998 will dispose of such SNF.

DOE implemented the provisions of section 302(a) through rulemaking. Following notice and comment, DOE promulgated the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Nuclear Waste (Standard Contract), which set forth the contractual terms under which the Department would make its disposal services available. 48 FR 16590 (April 18, 1983), codified at 10 CFR part 961. Under the terms of the final rule promulgating the Standard Contract, all civilian nuclear utilities desiring to dispose of SNF signed individual versions of the Standard Contract.

Although the Act originally envisioned that a geologic repository would be in operation, and DOE would be prepared to begin acceptance of SNF by January 31, 1998, it since has become apparent that neither a repository nor an interim storage facility constructed

under the Act will be available by 1998. DOE currently projects that the earliest possible date for acceptance of waste for disposal at a repository is 2010.

Accordingly, DOE published the Notice of Inquiry on Waste Acceptance Issues (NOI) to elicit the views of interested parties on: (1) DOE's preliminary view that it does not have an obligation to accept SNF in the absence of an operational repository or interim storage facility constructed under the Act; (2) the need for interim storage prior to repository operation; and (3) use of the Nuclear Waste Fund to offset a portion of the financial burdens that may be incurred by utilities in continuing to store SNF at reactor sites beyond 1998. Written comments were initially due on or before September 22, 1994, 59 FR 27007 (May 25, 1994). DOE extended the comment period on the NOI until December 19, 1994 to permit additional public comment. 59 FR 52524 (October 18, 1994).

II. Written Comments

DOE received 1,111 written responses to the NOI, representing 1,476 signatories, including utilities (38 responses), public utility commissions and utility regulators (26 responses), Federal, state, and local governments, agencies, and representatives (23 responses), industry representatives and companies (30 responses), public interest groups and other organizations (19 responses), and members of the general public (975 responses). All written comments received by DOE in response to the NOI were carefully reviewed and fully considered. The majority of the responses to the NOI addressed the issue of DOE's legal obligation to accept SNF beginning in 1998 and asserted that DOE has an unconditional obligation to begin accepting SNF from the utilities by January 31, 1998.

DOE previously published a notice of the availability of DOE/RW–0462, "Summary of Responses to the Notice of Inquiry on Waste Acceptance Issues" (March 1995). 60 FR 14739 (March 20, 1995). That report contains a summary of all the comments received in response to the NOI.

This Notice sets forth DOE's conclusions with respect to the legal issues involved in the NOI. Section III below discusses DOE's final interpretation of its obligations with respect to the 1998 waste acceptance issue, addresses the issue of DOE's authority under the Act to provide interim storage, and also contains DOE's conclusions on the legal availability of the Nuclear Waste Fund to offset the

potential financial burdens that may be incurred by utilities in storing SNF onsite beyond 1998.

III. Final Interpretation of Agency Obligations and Authorities Under the Act

Most of the commenters on the NOI expressed the view that the language in section 302(a)(5)(B) of the Act, which provides that "in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel as provided in this subtitle," 42 U.S.C. 10222(a)(5)(B), creates an unconditional legal obligation, beginning January 31, 1998, for DOE to initiate acceptance of SNF from utilities under the Standard Contract. According to these commenters, DOE's obligation is clear, non-discretionary, and not inconsistent with DOE's duty to take title to SNF under section 302(a)(5)(A) of the Act following commencement of repository operations. 42 U.S.C. 10222(a)(5)(A).

However, some commenters contended that DOE does not have an unconditional duty to dispose of SNF beginning in 1998 in the absence of an operational repository. They asserted that the obligations to take title and dispose of SNF established in subsections (5)(A) and (B) of section 302(a) of the Act must be read together and ultimately are dependent upon the existence of an operational repository. Based upon the entire statutory scheme and the legislative history of the Act, these commenters suggested that the January 31, 1998 date does not create an obligation to initiate SNF disposal regardless of the availability of a repository, but rather indicates the "sense of Congress" concerning an appropriate target date for arriving at a solution to the problem of accumulating high level nuclear waste and spent nuclear fuel.

After considering the views of the commenters, the provisions of the Act and its legislative history, and the terms and conditions of the Standard Contract, DOE has concluded that it does not have a legal obligation under either the Act or the Standard Contract to begin disposal of SNF by January 31, 1998, in the absence of a repository or interim storage facility constructed under the Act.

A. DOE's Final Interpretation of Its Obligations Under Section 302(a)(5)

1. The Act does not impose a statutory obligation on DOE to begin nuclear waste disposal in 1998 in the absence of

¹ In this notice, we limit our discussion to SNF, because that is the primary concern of the utilities with whom DOE has executed the Standard Contract.