2. The legislative history of the Act confirms that both the ''take title'' and the ''dispose'' provisions of section 302(a)(5) require an operating repository before their obligations attach.

Subparagraphs (A) and (B) of Section 302(a)(5) were originally part of section 124 of H.R. 3809. The House Report on H.R. 3809 stated that ''Section 124 authorizes the Secretary to contract with utilities or other agents *requiring use of repositories* constructed under this Act to *provide repository services* in exchange for payments by *repository users* to cover program costs.'' H.R. Rep. No. 491, Part 1, 97th Cong., 2nd Sess. at 58 (1982). The House Report further stated that ''[a]ll persons desiring to dispose of high level waste or spent fuel *in repositories constructed under this subtitle* are required to pay a ratable portion of the costs of such disposal.'' H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. at 58 (April 27, 1982). As the quoted language indicates, the focus of section 124 was on contracting for the disposal of spent nuclear fuel in a repository.

With regard to what emerged as subparagraph (A) of section 302(a)(5), the House Committee Report on section 124 of H.R. 3809 stated:

> Paragraph 4(A) requires that under such contracts the Secretary will be required to take title to high level waste or spent fuel, at the request of the generator, as expeditiously as practicable *following the commencement of operation of a repository.*

H.R. Rep. No. 491, Part 1, 97th Cong., 2d Sess. at 59 (1982). Thus, subparagraph (A) in H.R. 3809, like subparagraph (A) in the Act, clearly made commencement of operation of a repository a condition precedent to taking title.

Significantly, the House Committee Report on H.R. 3809 also described the source of the current Act's subparagraph (B) in terms of the existence of a permanent disposal facility:

> Paragraph 4(B) makes the Secretary responsible for *disposing* of high level waste or spent fuel *as provided under this subtitle in permanent disposal facilities,* beginning not later than January 1998, in return for the payment of fees established by this section.

Id. at 59. ''This subtitle'' referred to Subtitle A, ''Repositories for Disposal of High-Level Radioactive Waste and Spent Nuclear Fuel,'' of which section 124 was then a part. Here too, as the underscored language and reference to Subtitle A make clear, the obligation contemplated depended upon the successful development of a repository.

The conclusion that section 302(a)(5) of the Act was not intended to create an obligation to dispose of SNF unless and until a repository had been developed is also supported by a floor statement made during the Senate's debate on the Act by the then Chairman of the Senate Energy and Natural Resources Committee, a primary sponsor of the Act, Senator James McClure. On December 13, 1982, Senators McClure, Simpson, Jackson, Johnston and Domenici offered amendment number 4983, which struck all the language after the enacting clause of H.R. 3809, and replaced it with a Senate version of the proposed legislation. Section 302 of the Senate amendment would have required DOE to take title and store or dispose of nuclear waste no later than December 31, 1996. Unlike the House version of H.R. 3809, the Senate amendment made no mention of an operating repository. *See* 128 *Cong. Rec.* S14,484, S14,501 (daily ed. Dec. 13, 1982). However, after proposing the Senate amendment, Senator McClure then offered—and the Senate accepted—an amendment to section 302(a)(5) of the substitute amendment which brought the Senate version of that provision into conformity with the House version contained in H.R. 3809. Senator McClure described the effect of this amendment as follows:

> Mr. President, this amendment amends section 302(a)(5) of the substitute amendment to provide that the Secretary of Energy take title to high-level waste or spent fuel as expeditiously as practicable upon the request of the generator of such waste. In addition, this amendment directs the Secretary to begin, not later than January 31, 1998, to begin to dispose of the high-level radioactive waste or spent nuclear fuel from those generating such waste. *Under the substitute amendment, there was some concern that, in directing the Secretary to take title to and dispose of such wastes no later than December 31, 1996, we might not be giving the Secretary enough flexibility to tailor his schedule for accepting such wastes to the availability of a repository. This amendment simply directs the Secretary to take title to such wastes as expeditiously as practicable, upon the request of the generator of those wastes, after commencement of repository operation.*

128 *Cong. Rec.* S15,657 (daily ed. Dec. 20, 1982). This summary of what section 302(a)(5) ''directs'' indicates that Congress did not intend to establish an inflexible schedule and that it intended to ''tailor'' DOE's obligation for accepting SNF to the availability of a repository, albeit that it intended for DOE to proceed ''as expeditiously as practicable.''[4]

3. The Standard Contract, which was promulgated through notice and comment rulemaking, implements the provisions of section 302(a)(5) of the Act.[5] Article II of the Standard Contract, entitled ''Scope,'' states that ''[t]he services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all (nuclear waste from the contracting utilities) has been disposed of.'' 10 CFR 961.11, Art. II.

Some commenters asserted that the language in Article II of the Standard Contract that ''(t)he services to be provided by DOE under this contract shall begin * * * not later than January 31, 1998,'' either represents DOE's recognition of, or itself creates, an unconditional legal obligation to begin accepting nuclear waste by 1998. However, the Standard Contract contains the specific condition that the services to be provided by DOE ''shall begin *after commencement of facility operations.*'' 10 CFR 961.11, Art. II.[6] One of the recitals in the preamble to

---

authority for DOE to provide interim storage in the event that a repository is not in operation.

[4] A few commenters claimed that certain statements from the legislative history of the monitored retrievable storage provisions of the Act support their assertion that DOE has an unconditional duty to accept SNF for disposal beginning in 1998. They cited the following statement of Senator Bennett Johnston, made during the floor debate on the 1987 amendments, as evidence of Congress' intent that the Department has an unconditional obligation to begin accepting waste in 1998:

> The MRS is not an alternative to at-reactor storage, and it is not a substitute for a repository. Utilities are required to take care of their own storage until 1998, but the Federal Government has a contractual commitment to take title to spent fuel beginning in 1998. An MRS will better ensure that the Department is able to meet this contractual commitment to accept spent fuel beginning in 1998.

133 *Cong. Rec.* S16,045 (daily ed. Nov. 10, 1987). The following statement of Senator James McClure from the same debate was also relied upon by a commenter:

> Furthermore, we have an option to proceed with the construction of a monitored retrievable storage (MRS) facility for receipt and temporary storage of fuel by 1998 and thereby meet the Government's statutory obligation to begin taking spent fuel by that date.

133 *Cong. Rec.* S15,795 (daily ed. Nov. 10, 1987).

DOE believes that these 1987 statements do not supplant the foregoing analysis of what Congress intended when it enacted Section 302(a)(5), because they were not contemporaneous with passage of the Act in 1982. Post-enactment views by individual legislators are entitled to little weight in construing a statute enacted by a prior Congress.

[5] The U.S. Court of Appeals for the District of Columbia Circuit has held that the Standard Contract should be treated as more akin to a regulation, rather than a traditional contract, since its terms were established by rulemaking following notice and comment. *Commonwealth Edison Co.* v. *United States Department of Energy,* 877 F.2d 1042, 1045 (D.C. Cir. 1989).

[6] Under the Standard Contract, the term ''DOE facility'' is defined to mean either a disposal or interim storage facility operated by or on behalf of DOE. *See* 10 CFR 961.11, Art. I.