No. 98-225

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

JOHN A. BRYSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to order the Department of Energy (DOE) to begin to accept for disposal spent nuclear fuel (SNF) generated by electric utilities.

2. Whether the petitioners in this case, who are States and state public utility commissions rather than owners or generators of SNF, have standing to seek an order directing DOE to begin accepting SNF for disposal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 98-225

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 128 F.3d 754. The court of appeals' order denying rehearing and denying motions to enforce the mandate (Pet. App. 17a-21a) is unreported. The court of appeals' prior opinion in *Indiana Michigan Power Co.* v. *Department of Energy* (Pet. App. 27a-37a) is reported at 88 F.3d 1272.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1997. Petitions for rehearing were denied on May 5, 1998. Pet. App. 17a-21a. The petition for a writ of certiorari was filed on August 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 119 and 302 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10139, 10222, are set forth at Pet. App. 57a-67a.

STATEMENT

1. The Nuclear Waste Policy Act of 1982 (NWPA or Act), 42 U.S.C. 10101 *et seq.*, establishes a program for disposing of high-level radioactive waste and spent nuclear fuel (SNF). The major long-term objective of the Act is the siting, construction, and operation of a deep mined geologic repository that will safely isolate SNF from the human environment for at least 10,000 years. The Department of Energy (DOE) is charged with evaluating a site at Yucca Mountain in Nevada, and if the site is found suitable for such a repository and approved in accordance with the statutory procedures, obtaining a license from the Nuclear Regulatory Commission and then constructing and operating the facility. 42 U.S.C. 10133-10135.

The program is financed in large measure by fees paid by past and present generators of nuclear power, primarily electric utilities. Congress determined that "while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and * * * spent nuclear fuel * * *, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel." 42 U.S.C. 10131(a)(4). Under Section 302 of the NWPA, those parties were assessed a "1 time" fee based on the amount of power generated prior to the effective date of the NWPA, and are assessed an ongoing fee based on the amount of power generated thereafter. 42 U.S.C. 10222(a)(2) and (3). That money is deposited into a Treasury account called the Nuclear

Waste Fund, from which Congress makes annual appropriations to fund the program. 42 U.S.C. 10222(c).[1]

2. The NWPA requires each generator owning spent fuel to have a contract with DOE for the disposal of the fuel. 42 U.S.C. 10222(b). In addition, Section 302(a)(5) provides:

> Contracts entered into under this section shall provide that—
>
> (A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and
>
> (B) 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 involved as provided in this subchapter.

42 U.S.C. 10222(a)(5).

DOE established the terms of the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste (Standard Contract) by rulemaking.

---

[1] The Department of Energy informs us that over the last 15 years, utilities have paid approximately $9 billion into the fund. Congress has appropriated, and DOE has spent, some $4.8 billion. Utilities are currently paying into the fund at the annual rate of some $600 million. Once a utility ceases generating nuclear power, however, it is no longer required to pay the ongoing fee. And once the full amount due has been paid, the utility has no further financial obligation to the federal government for the disposal of its fuel. 42 U.S.C. 10222(a)(3).

See 48 Fed. Reg. 5458 (1983) (proposed Standard Contract); 48 Fed. Reg. 16,590 (1983) (final Standard Contract). The Standard Contract is published at 10 C.F.R. 961.11. Each utility that generates SNF has signed an individual contract containing all the terms and conditions of the Standard Contract. In accordance with 42 U.S.C. 10222(a)(5), Article II of the Standard Contract 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 SNF * * * has been disposed of." 10 C.F.R. 961.11.

Article IX of the Standard Contract addresses potential delays in contract performance. Article IX states:

> A. *Unavoidable Delays by Purchaser or DOE*
>
> Neither the Government nor the Purchaser shall be liable under this contract for damages caused by failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather—cause delay in scheduled delivery, acceptance or transport of SNF * * *, the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.

B. *Avoidable Delays by Purchaser or DOE*

> In the event of any delay in the delivery, acceptance or transport of SNF * * * to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

10 C.F.R. 961.11.

3. When the NWPA was enacted, "Congress anticipated the existence of a repository by 1998." *Indiana Michigan Power Co.* v. *Department of Energy*, 88 F.3d 1272, 1277 (D.C. Cir. 1996) (Pet. App. 36a). By 1993, however, it had become apparent both that DOE would not have a repository in operation by 1998, and that an interim storage facility would not be available by that time.[2] In response to inquiries about DOE's plans and its view of the government's obligations under the statute, DOE published in the *Federal Register* a re-

---

[2] DOE currently projects that its scientific and technical evaluation of the Yucca Mountain site (a process known as site characterization) will be completed in 2001. If Yucca Mountain is found suitable for development of a repository, DOE expects to recommend approval of the site to the President in 2001. DOE further expects to be able to begin receipt of SNF at the Yucca Mountain site in 2010 if the approval is sustained (see 42 U.S.C. 10134, 10135, 10136) and if required Nuclear Regulatory Commission (NRC) licenses are issued (see 42 U.S.C. 10134, 10141). Under the NWPA, a site for a Monitored Retrievable Storage facility (*i.e.*, an interim storage facility) cannot be selected until DOE recommends a repository site to the President. See 42 U.S.C. 10165(b).

quest for comment on a preliminary interpretation of Section 302(a)(5) of the NWPA. 59 Fed. Reg. 27,007 (1994). DOE's preliminary view was that the January 31, 1998, deadline specified in that Section was implicitly conditioned on the availability of a repository or other facility licensed under the NWPA. *Ibid.*; see *id.* at 27,008. After consideration of comments from the public, DOE concluded, in accordance with the preliminary views expressed in the earlier *Federal Register* notice, that the NWPA "does not impose a statutory obligation on DOE to begin nuclear waste disposal in 1998 in the absence of a disposal or interim storage facility constructed under the Act." 60 Fed. Reg. 21,793, 21,794-21,795 (1995). DOE also stated that if the obligation to accept SNF no later than January 31, 1998, was determined to be unconditional, as the utilities contended, the Delays Clause (Art. IX, 10 C.F.R. 961.11; see pp. 4-5, *supra*) of the contract would supply the appropriate remedy. *Id.* at 21,797.

Petitioners in this case are States, state utility commissions, and a national association of state regulatory commissions. Pursuant to Section 119 of the NWPA, 42 U.S.C. 10139, they filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit challenging DOE's view of its obligations under the Act.[3] A number of utilities also filed petitions for review raising similar claims. The peti-

---

[3] Section 119 states that "the United States courts of appeals shall have original and exclusive jurisdiction over any civil action * * * for review of any final decision or action of the Secretary." 42 U.S.C. 10139(a)(1)(A). Section 119 further provides that "[a] civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved." 42 U.S.C. 10139(c).

tions for review asked the court to set aside DOE's interpretation, to permit the utilities to escrow their fee payments after January 31, 1998, and to order DOE to develop a plan for beginning disposal services as soon as possible after that date. Pet. App. 4a-6a.

The court of appeals vacated DOE's interpretation. *Indiana Michigan, supra* (Pet. App. 27a-37a). The court held that the NWPA "creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998." *Id.* at 37a. The court stated that the absence of any suitable facility for the disposal of nuclear waste "simply affects the remedy we can provide." *Id.* at 36a. The court concluded, however, that it was "premature to determine the appropriate remedy, particularly as to the interaction between Article XI and Article XVI of the Standard Contracts, as DOE has not yet defaulted upon either its statutory or contractual obligation. We therefore will remand this matter for further proceedings consistent with this opinion." *Id.* at 37a.

4. After the court of appeals issued its decision in *Indiana Michigan*, DOE issued the required notice of a delay under the Delays Clause (Art. IX, 10 C.F.R. 961.11) of the Standard Contract, and gave contract holders an opportunity to submit their views on how that delay should be addressed. See Pet. App. 5a-6a. Following review of the comments, DOE concluded that the Disputes Clause (Art. XVI, 10 C.F.R. 961.11) of the contract governed resolution of whether the delay was "[u]navoidable" or "[a]voidable." DOE also made a preliminary determination that the delay was unavoidable (Pet. App. 6a), and it provided 60 days for contract holders to make submissions supporting their

contrary view.[4] See Exh. 6, Exhibits to Respondents' Response to Petitions for a Writ of Mandamus.

Petitioners, as well as the utility companies, had in the meantime filed in the court of appeals petitions for a writ of mandamus alleging that DOE had failed to comply with the Court's mandate in *Indiana Michigan*. Pet. App. 6a. They renewed their request for an order requiring DOE to begin disposal services on January 31, 1998, and for a declaration that the utilities could escrow the payment of their fees if DOE failed to perform its obligation by that date. *Ibid*.

5. The court of appeals granted limited mandamus relief. *Northern States Power Co.* v. *United States Dep't of Energy*, 128 F.3d 754 (D.C. Cir. 1997) (Pet. App. 1a-14a). The court declined to issue a writ of mandamus directing DOE to begin accepting SNF by January 31, 1998, explaining that the utilities had a potentially adequate remedy under the Delays Clause (Art. IX, 10 C.F.R. 961.11) of the Standard Contract. Pet. App. 9a. The court concluded, however, that "DOE's current approach toward contractual remedies"—*i.e.*, the Department's preliminary determination that the expected delay in its acceptance of SNF would be "[u]navoidable" within the meaning of Article IX—was inconsistent with the *Indiana Michigan*

---

[4] DOE's preliminary determination concluded that the delay was unavoidable because the unprecedented process of siting and developing a repository had been beset by technical problems, delays necessary to satisfy a broad range of regulatory requirements, legislative amendments that effectively blocked early establishment of an interim storage facility, budgetary restrictions, litigation delays, and the legal obligation to consult a broad range of interested parties, including States, Indian tribes, and private interest groups. See Exh. 6, Exhibits to Respondents' Response to Petitions for a Writ of Mandamus.

mandate. Pet. App. 11a. The effect of the court's ruling was to require the utilities to exhaust their remedies under Article IX.B of the Standard Contract, which provides for an equitable adjustment of fees in cases involving "[a]voidable [d]elays."

6. DOE filed a petition for rehearing, arguing that the court of appeals lacked jurisdiction to determine the applicability of the "[u]navoidable [d]elays" provision of the Standard Contract. See Pet. App. 20a. DOE's rehearing petition explained that questions concerning the construction and administration of the Standard Contract are entrusted to the Court of Federal Claims, which exercises exclusive jurisdiction under the Tucker Act, 28 U.S.C. 1491 (1994 & Supp. II 1996), over actions founded on a contract with the United States. One of the utilities, Yankee Atomic Company (Yankee), also filed a rehearing petition. The petitioners in the instant case, as well as the remaining utilities, filed motions to enforce or expand the mandate. Petitioners contended that the equitable adjustment of fees was not an appropriate remedy since under the statutory requirement that DOE collect fees sufficient to ensure full program cost recovery, equitable adjustments would simply redistribute the burden of the program's costs from some utilities to other utilities. See 42 U.S.C. 10222(a)(1) (contracts shall provide for payment of fees sufficient to offset the costs of the program). They requested an order barring DOE from using fee collections to pay any costs or damages due to the delay, and they renewed their request for specific relief that would order DOE to develop a plan for disposing of their spent fuel. Pet. App. 17a-21a.

On May 5, 1998, the court denied the petitions for rehearing and the motions to enforce the mandate. Pet. App. 17a-21a. In rejecting Yankee's request for a

move-fuel order (*i.e.*, an order requiring DOE to accept SNF for disposal), the court explained (*id.* at 20a) that

> enforcement of our mandate does not extend to requiring the DOE to perform under the Standard Contract. While the statute requires the DOE to include an unconditional obligation in the Standard Contract, it does not itself require performance. Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42 U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order.

The court also rejected DOE's contention that the court's grant of mandamus relief impermissibly intruded on the jurisdiction of the Court of Federal Claims, stating (Pet. App. 20a-21a):

> The DOE * * * suggest[s] that this Court has erroneously designated itself as the proper forum for adjudication of disputes arising under the Standard Contract. As the above should make clear, we did not; we merely prohibited the DOE from implementing an interpretation that would place it in violation of its duty under the NWPA to assume an unconditional obligation to begin disposal by January 31, 1998. The statutory duty to include an unconditional obligation in the contract is independent of any rights under the contract. The Tucker Act does not prevent us from exercising jurisdiction over an action to enforce compliance with the NWPA.

7. To date, only one party to the Standard Contract has filed with DOE a request for equitable adjustment of fees under the "[a]voidable [d]elays" provision.

Instead, eleven utilities have filed suit in the Court of Federal Claims, seeking damages ranging from $70 million to $1.5 billion. Other utilities have again sought relief in the D.C. Circuit.

After the petition in the instant case was filed, the government filed its own petition for a writ of certiorari. That petition has been docketed as *United States Dep't of Energy, et al.* v. *Northern States Power Company, et al.*, No. 98-384, and is currently pending before the Court. The government's petition argues that by barring DOE from treating the delay in contract performance as "[u]navoidable" within the meaning of Article IX (10 C.F.R. 961.11) of the Standard Contract, the court of appeals has impermissibly intruded upon the jurisdiction of the Court of Federal Claims, which is vested with exclusive authority to adjudicate contract claims against the United States.

ARGUMENT

Petitioners contend that the court of appeals erred in refusing to direct DOE to commence accepting SNF for disposal. That claim is without merit. As the court of appeals ultimately recognized, DOE's obligation under the NWPA is to enter into contracts providing that it will begin to accept SNF for disposal by January 31, 1998. DOE fulfilled that obligation in promulgating the Standard Contract. See Art. II, 10 C.F.R. 961.11. Any remedy that may be available for DOE's failure to perform arises under the contract, not under the NWPA. The court of appeals lacked authority to direct DOE to commence disposal services, both because the Court of Federal Claims has exclusive jurisdiction over contract claims against the United States, and because specific performance is not an available remedy in such a suit.

Even if the NWPA did require DOE to commence acceptance of SNF by January 31, 1998, petitioners would lack standing to enforce the deadline. Petitioners do not own or generate SNF. States and public utility commissions cannot assert *parens patriae* standing against the federal government, and petitioners' role as consumers of electric power would be insufficient to accord them standing. Both because petitioners' claim lacks merit, and because petitioners are not the proper parties to assert it, the petition for a writ of certiorari should be denied.

1. a. Petitioners' claim is founded on Section 302(a) of the NWPA, 42 U.S.C. 10222(a). That Section states in relevant part:

> (5) Contracts entered into under this section shall provide that—
>
> * * * * *
>
> (B) 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 involved as provided in this subchapter.

42 U.S.C. 10222(a)(5). By its plain terms, Section 302(a)(5) requires only that contracts between DOE and generators of SNF must provide for disposal to commence no later than January 31, 1998. The court of appeals correctly recognized that "[w]hile the statute requires the DOE to include an * * * obligation in the Standard Contract, it does not itself require performance. Breach by the DOE does not violate a statutory duty; thus, our jurisdiction to hear allegations of failure to take an action required under the NWPA, see 42

U.S.C. § 10139(a)(1)(B), does not provide a basis for a move-fuel order." Pet. App. 20a.

Petitioners make virtually no effort to reconcile their position with the plain terms of Section 10222(a)(5). Rather, they argue (see Pet. 12-17) that the court of appeals' order denying the petitions for rehearing and motions to enforce the mandate (Pet. App. 17a-21a) is inconsistent with language in the court's prior opinions both in this case and in *Indiana Michigan*. We agree with petitioners that some language in those opinions suggests that DOE's duty to commence SNF disposal by January 31, 1998, is statutory rather than contractual in nature. The court of appeals ultimately recognized, however, that DOE's obligation under the NWPA was simply to include specified provisions in the Standard Contract. Any inconsistency between that holding and some of the reasoning in prior opinions issued by the same panel of the same court of appeals does not warrant review by this Court.

Petitioners also assert that a specific directive to commence acceptance of SNF is necessary in order to effectuate the congressional policies underlying the NWPA. See Pet. 7, 8-10, 16-18, 20, 22. In enacting the NWPA, however, Congress chose not to impose upon DOE a freestanding statutory obligation to accept SNF by a particular date. Rather, Congress directed DOE to enter into contracts containing specified provisions, see 42 U.S.C. 10222(a)(5), and expressly authorized DOE to establish additional contractual terms, 42 U.S.C. 10222(a)(6). In choosing that means of achieving the statutory objectives, Congress must be presumed to have intended that disputes regarding the precise nature of the parties' obligations, and the remedies for any breach thereof, would be resolved in the manner appropriate for contract claims.

b. For the reasons stated above, DOE's obligation to accept SNF by January 31, 1998, was contractual rather than statutory in nature. The court of appeals could not have directed DOE to commence acceptance of SNF as a remedy for DOE's failure to perform its obligations under the Standard Contract. It is well established that "[t]he sole remedy for an alleged breach of contract by the federal government is a claim for money damages, either in the United States Claims Court under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1982), or, if damages of no more than $10,000 are sought, in district court under the Little Tucker Act, 28 U.S.C. § 1346(a)(2) (1982)." *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.). Accord, *e.g.*, *Transohio Savings Bank* v. *Director, OTS*, 967 F.2d 598, 609-610 (D.C. Cir. 1992); *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982). The court of appeals' authority to review "any final decision or action of the Secretary" of Energy under the NWPA, 42 U.S.C. 10139(a)(1)(A), therefore does not extend to a claim for breach of contract. Moreover, specific performance is not an available remedy in contract actions against the United States. See *Sharp*, 798 F.2d at 1523.[5]

---

[5] Petitioners also suggest that the terms of the Standard Contract might themselves be violative of the requirements of the NWPA. See Pet. 19 ("the Standard Contract as drafted by DOE, and as now interpreted by the [court of appeals], delegates to DOE all aspects of performance without any effective accountability, timeliness, or incentives to perform"). At the time that the Standard Contract was promulgated in 1983, an owner or generator of SNF who believed that the terms of the contract were inconsistent with the Act could have obtained court of appeals review of that claim pursuant to 42 U.S.C. 10139(a)(1)(A). The time for filing such a challenge, however, has long since passed. See 42 U.S.C. 10139(c) ("[a] civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the

c. There is also no basis for petitioners' contention that "DOE's actions demonstrate a purposeful DOE policy to avoid its unconditional obligation under the NWPA, despite the fact that DOE has the capability and ability to comply with the statute." Pet. 9; see Pet. 9 n.5. In reaching her preliminary determination that DOE's anticipated delay in performance was "unavoidable," the Contracting Officer analyzed at length the many technical difficulties that had been encountered in the course of an unprecedented scientific and engineering project--a project that has as its goal the safe isolation of highly radioactive waste from the human environment "for at least 10,000 years." Resp. Exh. 6 (Contracting Officer's Preliminary Determination), *supra* note 4, at 4. She also considered the numerous regulatory hurdles that have impeded the project, the legislative actions that have constrained alternative approaches, and the effects of third-party legal challenges to and oversight of project activities. *Id.* at 6-16. Contrary to petitioners' suggestion (see Pet. 9 n.5), the fact that the court of appeals disagreed with DOE concerning the legal consequences of the agency's inability to accept SNF at the present time does not suggest a "purposeful DOE policy" (Pet. 9) of avoiding its statutory obligations.[6]

180th day after the date of the decision or action or failure to act involved"). In any event, petitioners have not alleged that they own or generate SNF, or that they are parties to the Standard Contract. Petitioners would therefore lack standing to challenge the terms of the contract even if the time for filing such a challenge had not expired. See pp. 16-17, *infra*.

[6] Petitioners also rely (Pet. 9 n.5) on DOE's programs under the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, to recover weapons-grade spent fuel from research reactors in a number of foreign countries, and to accept in unusual circumstances a limited

2. Even if 42 U.S.C. 10222(a)(5) directly required DOE to begin acceptance of SNF no later than January 31, 1998, petitioners would lack standing to sue to enforce that deadline. Petitioners are States, state utility commissions, and a national association of state regulatory commissions that has never alleged any interest separate from that of its members. Petitioners do not allege that they are owners or generators of spent fuel. This Court has held that a plaintiff in federal court ordinarily "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). Because any duty to accept SNF that DOE might have is owed to the owners and generators of the fuel, not to States or state regulatory commissions, petitioners cannot satisfy that requirement.

In the court of appeals, petitioners claimed to be suing in their capacity as *parens patriae.* It is well established, however, that a State may not bring a suit in its *parens patriae* capacity against the federal

---

amount of domestic fuel for research purposes. Petitioners suggest that DOE's ability to store such fuel demonstrates an intention to flout its obligation to begin disposal of commercial spent fuel. However, with respect to the spent fuel at issue in this case—*i.e.*, SNF covered by contracts under the NWPA—DOE's authority to begin disposal services is circumscribed by the specific limitations of the Act. Under 42 U.S.C. 10165(b) and 10168(d), DOE may not proceed with an interim storage program for a specific site until after a site for a repository is recommended to the President in accordance with 42 U.S.C. 10134(a), and it may not begin construction of such a facility until the Nuclear Regulatory Commission has issued a license for a repository. See note 2, *supra.* In light of those prohibitions, DOE's ability to accept spent fuel under other authority is not evidence of an intent to avoid its obligations to the contract holders here.

government. See, *e.g.*, *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as *parens patriae* to bring an action against the Federal Government.") (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)).[7] Petitioners have also asserted that their status as purchasers of electricity gives them a cognizable interest in the outcome of this case. They have failed to establish, however, that a judicial order requiring DOE to accept SNF for disposal, or an order allowing utilities to escrow their fee payments, would result in reduced rates for consumers of nuclear-generated power. Cf. *Burton* v. *Central Interstate Low-Level Radioactive Waste Compact Comm'n*, 23 F.3d 208, 210 (8th Cir.), cert. denied, 513 U.S. 951 (1994) (ratepayers lack standing to sue governmental entity that taxes utilities).

3. The government has filed its own petition for a writ of certiorari seeking review of the court of appeals' decision in this case. That petition has been docketed as *United States Dep't of Energy, et al.* v. *Northern States Power Company, et al.*, No. 98-384, and is currently pending before the Court. We argue in *Northern States* that while the court of appeals correctly held in its order denying rehearing that DOE's duty to commence SNF disposal by January 31, 1998, was contractual rather than statutory in nature, its earlier rulings intruded impermissibly upon the jurisdiction of the Court of Federal Claims. If the Court grants the

---

[7] See also *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 320 (D.C. Cir. 1985) (citing *Mellon*); *Pennsylvania* v. *Kleppe*, 533 F.2d 668, 677 (D.C. Cir. 1976) (same). But see *United States Dep't of Interior* v. *FERC*, 952 F.2d 538, 544 n.4 (D.C. Cir. 1992) (asserting in dicta that state agencies had *parens patriae* standing to sue a federal agency).

petition in No. 98-384, it may wish to grant the petition in the instant case as well. That course of action would ensure that the Court has before it the broadest range of views concerning the nature and scope of DOE's obligations under the NWPA and the proper means of enforcing those obligations.[8]

On balance, however, we believe that the petition in the instant case should be denied even if the petition in No. 98-384 is granted. In our view, the plain terms of 42 U.S.C. 10222(a)(5)(B) unambiguously refute petitioners' contention that DOE is subject to an unconditional statutory obligation to begin acceptance of SNF by January 31, 1998. Petitioners in any event lack standing to pursue that claim. We therefore believe that plenary consideration of the petition in the instant case would be unlikely to enhance the Court's understanding of the issues raised by the government's petition in No. 98-384.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

JOHN A. BRYSON
Attorney

OCTOBER 1998

---

[8] Another possibility would be to hold the present petition pending the Court's decision in No. 98-384, since a decision in favor of the government in No. 98-384 would obviate any need to consider whether the present petition warrants review.