CASE LAW

Australia

Federal Court Decision on Jabiluka Uranium Mine

On 11 February 1998 the Federal Court of Australia upheld the validity of the mining lease held by Energy Resources of Australia Ltd. (ERA) over the Jabiluka uranium deposit. Justice Sackville handed down a judgement in proceedings commenced on behalf of a senior Aboriginal Traditional Owner of the Jabiluka region, situated on the edge of the Kakadu national park in the Northern Territory.

The application made on 11 June 1997 was for orders to prevent the Minister for Resources and Energy from granting approval for the export of uranium by ERA obtained by mining carried out on the Jabiluka project area. The application also sought a declaration that the Commonwealth was the owner of the uranium and had granted no valid interest in the uranium to any other person.

The Federal Court rejected the argument that the mineral lease issued by the Northern Territory in 1982 was invalid. In doing so it cleared the way for the development of the mine. ERA announced that it will continue its consultations with the Northern Land Council, who act on behalf of the Traditional Owners, with respect to the Jabiluka proposal.

Germany

New Decisions on the Mülheim-Kärlich and Krümmel Nuclear Power Plants*

Judgement of the Federal Administrative Court, of 14 January 1998, concerning the Mülheim-Kärlich Nuclear Power Plant

The Federal Administrative Court has once again decided on the legality of RWE Energie AG's first partial construction licence to build a nuclear power plant in Mülheim-Kärlich. In 1993, the Federal Administrative Court had reversed a judgement of the Superior Administrative Court of Rheinland-Pfalz[1] which had granted a rescission action against the licence, and referred the matter back to that court.[2] In 1995, the Superior Administrative Court of Rheinland-Pfalz again decided that the licence was invalid, but on different grounds.[3] This time the appeal of RWE Energie AG was rejected

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* This note has kindly been prepared by Dr. Herbert Posser, a partner in the law firm Bruckhaus Westrick Heller Löber. The facts contained and ideas expressed in this note are the responsibility of the author alone.

1. DVBI. 1992, 57 *et seq*.

2. BVerwGE 92, 185 *et seq*.

3. ET 1996, 257 *et seq*.

by the Federal Administrative Court. The Superior Administrative Court had argued that the Licensing Authority had wrongfully assumed that state-of-the-art precautionary measures against damages had been taken (Section 7 (2) 3, Atomic Energy Act), because the risks in case of an earthquake had not been sufficiently evaluated. In order to grant the license, the Licensing Authority was allowed to resort to the corresponding rules of the Nuclear Engineering Committee as a basis for making a proper assessment of these risks. However, the application of the rules of this Committee would have required concrete investigations and methodical considerations with regard to the case at hand. Only such individual investigations would have enabled the Licensing Authority to lay down the appropriate safety precautions against earthquakes. In the case at hand, the Licensing Authority had failed to make the required individual case investigations.

The Federal Administrative Court considered the judgement of the Superior Administrative Court, to the effect that the official database was insufficient, to be a statement of fact. It considered itself to be bound by it, because no objection had been made on grounds of procedural error against the assessment of the evidence by the lower court. This approach led to the illegality of the licence contested because it is an established practice of the Federal Administrative Court that a lack of investigation and evaluation will result in the illegality of a nuclear energy activity licence, regardless of whether this lack had a probative influence on the decision of the Licensing Authority in the actual case. The Federal Administrative Court holds the view that under nuclear energy law, it must not replace evaluations of the Licensing Authority by evaluations of its own.[4]

The Federal Administrative Court, in this decision, examined whether a licence under nuclear legislation can be set aside if there is any possibility that matters not clarified by the Licensing Authority had an impact on their licensing decision or – as RWE Energie AG had argued – only if the Court sees the *concrete* possibility that the licensing decision is influenced by the lack of investigation or evaluation. RWE Energie AG's conception of legality was rejected by the judges for lack of a legal basis. The Federal Administrative Court stated that in nuclear energy law, in contrast to most fields of planning law, the principle that the Court must not interfere with official risk evaluations is still valid. The result would be different only if the lack of investigation and evaluation had *obviously* not influenced the decision. According to the Federal Administrative Court, the interests of the Licensing Authority and the operator of the power plant to maintain the licence are ensured by the Licensing Authority's right to remedy a lack of investigation and evaluation up until the last hearing of the Court. However, the Licensing Authority failed to do so in this case.

It has to be stated that the Federal Administrative Court based its judgement on precedents, so the decision should come as no surprise. Nevertheless, the Court missed a good opportunity to alter its concept of legality. Once again, the risk evaluation capacity granted to the Licensing Authority turned out to be a curse in the legal proceedings, due to the complexity of the matter. Almost any lack of investigation and evaluation that is assumed by the Court to have taken place, will result in the cancellation of the licence. Even if one shares the legal opinion that the Court may not replace evaluations of the Licensing Authority by evaluations of its own, the Court could, nevertheless, decide upon the impact of a lack of investigation/evaluation upon the decision of the Licensing Authority. If the Court has the right to judge whether there is a lack of investigation/evaluation, it follows that it should be given the right to decide whether this lack has influenced the decision of the Licensing Authority.

Last, but not least, it is incomprehensible from a legal point of view that the Licensing Authority did not make supplementary investigations and evaluations to remedy the lack of investigation

4. BVerwGE 78, 177 (180 f.); 80, 207 (217); 101, 347 (363).

held to exist by the Superior Administrative Court. There was enough time to do this during the appeal proceedings, which lasted more than two years. The reason for this behaviour is the political decision to opt out of nuclear energy. The failure to act properly may, again, result in government liability.

Decision of the Superior Administrative Court of Schleswig-Holstein, of 7 November 1996, Regarding the Krümmel Nuclear Power Plant

In this case, the Superior Administrative Court of Schelswig-Holstein took up matters considered by the Federal Administrative Court concerning the legality of the operation of the Krümmel nuclear power plant.[5] The Federal Administrative Court had decided in the principal proceedings that, in issuing an amended licence, the question of whether state-of-the-art precautionary measures have been taken with regard to the radiological effects of the entire nuclear power plant in modified form[6] must be considered. In this case, it was questionable whether the Licensing Authority had met this requirement when it issued the amended licence, in view of the number of leukaemia cases in the area surrounding the plant. The principal proceedings had been referred back to the Superior Administrative Court of Schleswig-Holstein by the Federal Administrative Court.

With reference to the new decision of the Federal Administrative Court, people living near the plant had demanded that, in contrast to an earlier decision made by the Superior Administrative Court, their action against the approval of the operation of the plant should have the effect of suspending such operation until a decision in the principle proceedings was rendered. Again, these applications were rejected.

The Superior Administrative Court made it quite plain that the amended licence was lawful. In particular, the Superior Administrative Court held the view that the limiting values under the Radiological Protection Ordinance kept by the Krümmel nuclear power plant are state-of-the-art. It stated that these dose limiting values are significantly lower than the values which are internationally recognised. The Court said that the competent Federal Ministry of the Environment did not ignore, but sufficiently examined, the increase in leukaemia cases; there was no evidence of a connection between the operation of the nuclear power plant and cancer cases. It was also the opinion of the Court that the Licensing Authority had sufficiently investigated and evaluated the increase in leukaemia cases. A large number of examinations were initiated by the Authority. The criticism relating to the examinations was itself subject to evaluation, and it was found that such criticism did not constitute scientific evidence to confirm the suspicion of the applicants that the Krümmel nuclear power plant was responsible for the cancer cases.

5. ET 1997, P. 178 *et seq* = RdE 1997, P.106 *et seq.*

6. BVerwGE 101, 347 *et seq.*

Hungary

Appeal Court Decision in favour of complainant concerning Chernobyl-related damage

The Appeal Court of Budapest has finally handed down judgement in a six-year lawsuit between the widow of a truck driver, who claimed that her husbands' sojourn into Ukraine just three months after the accident at the Chernobyl Nuclear Power Plant had directly contributed to his subsequent death, and the transport firm which had employed him at that time. The driver had been sent to Kiev in July 1986 to make a delivery. Upon leaving the country five days later, his vehicle had been carefully washed at the border crossing although he himself had not been subject to any health or contamination monitoring measures. The man remained in good health for several years, but became ill in 1991 and died the following year from an auto-immune disease and cardio-respiratory problems.

In the early stages of the lawsuit, the Court of first instance (the labour court) had requested expert advice on the issue from the Director General of the Frédéric Joliot-Curie National Research Institute for Radiobiology and Radiohygiene (OSSKI). His findings, which were based upon data not only produced by OSSKI itself but received from a wide variety of competent international bodies in the field, concluded that it was highly unlikely that the driver's clinical condition and the pathological damage observed were due to the radiation exposure he received during his trip to Ukraine. According to this expert's assessment, the excess radiation dose received by the driver during the period he spent in Ukraine was approximately 0.1 mSv, this being near to 1/25 of the average dose received each year by Hungarian citizens from natural radiation sources. The Forensic Committee of the Scientific Council on Health, which is part of the Hungarian Ministry of Welfare, supported these conclusions.

However, different evidence was offered by a radiological expert from the Radiological Clinic of the Semmelweis Medical University in Budapest. According to this expert, on the basis of current radiobiological and radiohaematological knowledge, the driver's auto-immune disease could certainly be attributed to his having worked in Kiev and its environs for the length of time he actually did and under the ecological conditions then existent. "Since he had been clinically healthy before travelling abroad, the physical and eco-biological evidence of the contraction of his illness cannot be disputed. The Chernobyl-origin of his disease is, therefore, accepted." This opinion was endorsed, without qualification or reservation, by the University's Institute of Forensic Medicine.

The Appeal Court found that there was an unquestionable causal relationship between the disease and subsequent death of the driver and his stay in Ukraine during July 1986, and that his employer was liable therefor. There was no court hearing and the ruling was based only upon an examination of the available documentation. The decision of the Appeal Court is final, however, according to Hungarian law, there is a possibility to submit the case to the Supreme Court. It should not be excluded that the respondent (the company which is required to pay compensation of approx. 10 000 US$ to the widow) will continue the case, since other drivers and employees of the same company died between 1991 and 1996. However, until now the widows of these drivers had refrained from introducing a lawsuit.

United States

Department of Energy's Responsibility for Disposal of Spent Fuel*

The U.S. Court of Appeals for the District of Columbia Circuit issued an opinion on 14 November 1997, in *Northern States Power v. U.S. Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997), holding that the Standard Contract between the Department of Energy and the nuclear utilities provides a potentially adequate remedy if the Department failed to perform its disposal obligations by the statutory deadline of 31 January 1998, but specifically precluded the Department from recourse to "unavoidable delays" provisions or any construction of the contract that would excuse its performance on the ground that it has not yet established a permanent repository or interim storage program. Immediately after the statutory date of 31 January 1998 for waste acceptance, the utilities and various States filed suit for prompt enforcement of the Court's 1997 mandate in *Northern States*. Although the 1998 waste acceptance issue remains in litigation, the following is a brief *apercu* of the situation and of the arguments advanced.

As background, on 23 July 1996, the U.S. Court of Appeals for the District of Columbia Circuit held in *Indiana Michigan Power Co. v. U.S. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996) that the Nuclear Waste Policy Act of 1982, as amended (NWPA)[1] created an unconditional obligation that the Department commence disposing of the utilities' spent nuclear fuel no later than 31 January 1998, in return for payment of fees under the Standard Contract.[2] The Department had argued that it did not have an unconditional statutory or contractual obligation to accept spent nuclear fuel by 31 January 1998, in the absence of a repository or interim storage facility constructed and licensed under the NWPA.

On 31 January 1997, 36 utility contract holders and 33 States filed petitions in *Northern States Power Co. et al. v. U.S. Department of Energy*, again in the U. S. Court of Appeals for the District of Columbia Circuit, for "enforcement" of the 1996 *Indiana Michigan* decision. They asserted that the anticipated inability of the Department to meet the 31 January 1998 deadline constituted an anticipatory breach of provisions of the NWPA and their contracts. They also contended that they should be entitled to suspend their payment of fees into the Nuclear Waste Fund and that these fees should be placed in escrow until the Department commences disposal pursuant to the Standard Contract.

On 14 November 1997, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *Northern States*, concluding that the "remedial scheme of the Standard Contract offers a

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* This note has kindly been prepared by Sophia Angelini, Attorney Adviser in the Office of General Counsel for Civilian Nuclear Programmes, U.S. Department of Energy. The facts contained and ideas expressed in this note are the responsibility of the author alone. For a review of the draft legislation intended to address the problems discussed in this case note, see the article by the same author in Nuclear Law Bulletin No. 60, entitled "*United States Nuclear Waste Policy Act*".

1. The Nuclear Waste Policy Act of 1982, as amended, appears at 42 United States Code 10101 *et seq.*

2. The nuclear utilities in the United States are all signatories to the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste which appears at 10 Code of Federal Regulations Part 961. Article IX of the Standard Contract entitled "Delays" contains provisions governing "A. Unavoidable Delays by Purchaser or DOE" and "B. Avoidable Delays by Purchaser or DOE."

potentially adequate remedy" for the Department's anticipated failure to meet the 1998 deadline and holding that the petitioners must pursue the remedies provided in the Standard Contract. However, in ordering the parties to proceed with contractual remedies, the Court specifically precluded the Department of Energy from "concluding that its delay was unavoidable on the ground that it has not yet prepared a permanent repository or that it has no authority to provide storage in the interim." Article IX of the Standard Contract, entitled "Delays", provides for an equitable adjustment of charges and schedules if a party's delay is avoidable "to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay."

On 10 December 1997, consistent with the Court decision, the Department issued letters to the contract holders withdrawing its previously issued determination, of a *force majeure* nature, that the Department's delay had been "unavoidable".[3] However, on 29 December 1997, the Department filed a petition for rehearing by the Court asserting, *inter alia*, that:

> "The remedy provided by the contract for avoidable delay is for "charges and schedules specified by this contract [to] be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay." Art. IX.B. Ascertaining what "additional costs" will be incurred due to DOE's delay is an intensely fact-specific inquiry unique to each individual contract holder. Depending upon factors such as a contract holder's particular delivery commitment schedule (see Art. V), inventory of spent fuel, and storage capabilities, the "additional costs incurred" by different utilities will vary widely. Accordingly, treating DOE's failure to meet the 1998 deadline as an avoidable delay would result in different contract holders receiving different equitable adjustments to their fees.
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> It is predictable that many, if not most, and perhaps all, contract holders will be dissatisfied by this remedy because DOE is required by the NWPA to review fees annually and, as necessary, propose adjustments that will "insure full cost recovery" for the repository program (42 U.S.C. 10222(a)(4)), any substantial downward adjustments in the fees paid by some contract holders in later years may well force offsetting upward adjustments in the fees paid by other contract holders."

Lake Barrett, Director of the Office of Civilian Radioactive Waste Management, issued a statement on 30 January 1998, confirming that the United States remains committed to permanent disposal and that this policy is not only essential for commercial spent fuel, but also for cleanup of the nuclear weapons complex, as well as the United States' international nonproliferation policy. He stated that the Standard Contract's delays clause remains the appropriate means to address the Department's delay. He noted that the delay does not create a safety problem and that the utilities can continue to

3. The Contracting Officer's "Preliminary Determination that the Department of Energy's Delay in Beginning Spent Fuel Disposal Was Unavoidable", June 3, 1997. The determination contended that the delay in disposing of the contract holders' spent fuel was an "unavoidable delay", as defined in Article IX of the Standard Contract, and that: "*Article IX provides, in brief that neither the Government nor the contract holder shall be liable for damages caused by failure to perform its obligations if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform...*"

safely store spent nuclear fuel at their reactor sites, a fact which has been confirmed by the Nuclear Regulatory Commission.[4]

The Nuclear Energy Institute (NEI)[5] reports that 27 reactors in the United States are expected to exhaust existing on-site fuel storage capacity by 1998, with 80 reactors expected to exhaust such capacity by 2010. NEI estimates that if the Department of Energy does not accept fuel until the year 2030, costs to the utilities for used fuel management could range from $34 billion to a high estimate of $56 billion.[6]

The Department of Energy's speculation that it might be obliged under the NWPA's "full cost recovery" provisions to propose offsetting fee adjustments (i.e. to charge higher disposal fees to the utilities), if equitable adjustments of fees under the Standard Contract were to substantially impact the Nuclear Waste Fund, apparently struck a neuralgic note. On 2 February 1998, a group including 35 States filed a motion in the United States Court of Appeals for the District of Columbia Circuit for prompt enforcement of the Court's decisions in the *Indiana Michigan* and *Northern States* cases. The State petitioners asserted that the Department "views the Nuclear Waste Fund (NWF) and prospective fee adjustments and increases as a source of funds to pay all costs or damages resulting from its refusal to comply with the NWPA and this Court's decisions." The motion seeks an order preventing future fee adjustments that might be necessary to "insure full cost recovery" under the NWPA.[7] It also seeks an order requiring that performance commence under the Standard Contract before the Department accepts any further shipments of foreign spent fuel.

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4. "Statement by Lake Barrett, Acting Director of the Office of Civilian Radioactive Waste Management on the DOE Obligation to Accept Waste on 31 January 1998", DOE Press Release (R-98-007) 30 January 1998. He states regarding the issue of interim storage by the Department, in the absence of a permanent repository:

   "We understand the frustration of the utilities that the Department is not able to begin spent fuel acceptance this year. But, we believe it would be a mistake to divert our resources and efforts to a temporary "fix", which could undermine our focus on obtaining a permanent solution, and burden future generations. When the Department of Energy entered into contracts with the utilities in 1983, both sides recognized the uncertainties of a complex program expected to last decades. As a result, the contracts contained provisions to address delays. We continue to believe that the contracts are the appropriate means to address the delay. Early last year, Secretary Pena met with nuclear utility executives to work out some accommodation to address our anticipated delay, including offers of compensation. Unfortunately, the utilities were for the most part disinterested and went back to court. Today, we remain willing to work with the contract holders to address any hardships associated with this delay, and, of course, will comply with any applicable court order. It is important to emphasize that the Department's delay does not create a safety problem. While storing spent nuclear fuel may entail a cost and maintenance burden to some utilities that they would like to avoid, until a facility constructed under the Nuclear Waste Policy Act can be developed to accept spent nuclear fuel, utilities can continue to safely store spent nuclear fuel safely at their reactor sites. The Nuclear Regulatory Commission, in its most recent Waste Confidence Proceeding, affirmed this belief."

5. NEI represents all of the nuclear utilities in the United States, as well as nuclear vendors, radiopharmaceutical companies and universities with nuclear programs. Information concerning NEI is available on the World Wide Web at: http://www.nei.org The web site is updated periodically.

6. "Congress Faces $56 Billion Liability for Default on Nuclear Fuel Storage Contracts", *NEI Fact Sheet* (1998). NEI argues that without a federal storage facility, nuclear power plants would be forced to house used fuel in stainless steel containers at plant sites in 34 states. According to NEI, building such on-site storage systems beginning in 1998 through 2030 would cost $1.2 billion, or an average of $75,000 per metric ton of uranium. That cost would include design, engineering, quality assurance, license, construction and operation of the on-site facility. (Also, Elaine Hiruo, "Critics Say that Financial Liability, Not Spent Fuel, Moved on January 31", *Nuclear Fuel*, February 9, 1998, p. 1.)

7. 42 U.S.C. 10222(a)(4).

On 18 February 1998, the Yankee Atomic Electric Company, which owns a shut-down nuclear power plant, filed a complaint in the U.S. Court of Federal Claims (the court with jurisdiction over government contracts) claiming damages in the amount of $70 million associated with extended storage of its spent fuel-consisting of 127 metric tons currently stored onsite at the Yankee Rowe nuclear plant in Massachusetts.[8] Yankee Atomic argued that it has no adequate remedy under the Standard Contract, such as an equitable adjustment of charges and schedules, having paid in full all required spent fuel disposal fees (reportedly $22.5 million) and having permanently ceased operations in 1992. It asserted that, without removal of its spent fuel, it cannot complete the decommissioning process which is 80% complete, that it cannot obtain substitute performance of the government's obligations, and that its plant site will, in effect, be converted into a nuclear waste storage facility.[9] Yankee Atomic noted that the Department currently accepts and stores spent fuel from 41 foreign countries.

Thereafter, on 19 February 1998, 41 utilities filed motions to enforce the Court's mandate in *Northern States* and prohibit the Department of Energy from using the Nuclear Waste Fund as a "damages fund" to pay for the utilities' additional costs or from increasing fees that the utilities pay into the Fund. The lawsuit further seeks an order: (1) compelling the Department to submit, within 30 days, a program with milestones to dispose of the Standard Contract holders' spent fuel; (2) relieving the Standard Contract signatories from their obligation to pay fees and authorizing them to place fees in escrow until the Department commences disposal; and (3) prohibiting the Department from imposing any interest or penalty as a result of any Standard Contract holder's suspension of payments into the Fund.

The Department of Energy's answers to the arguments above have included the following:

1. That the 1997 *Northern States* decision held that the contracts provide a "potentially adequate remedy" and therefore directed that the utilities exhaust their remedies under the Standard Contract.[10] The Department notes that the outcomes of any administrative proceedings (under the Standard Contract) will necessarily vary given the disparity in the individual contract holders' circumstances, such as their particular delivery commitment schedules, inventory of spent fuel and storage capabilities.

2. That with respect to Yankee Atomic's request for removal of its spent fuel, the utility has not demonstrated any immediate harm to justify excusing it from the normal rule applicable to parties to contracts in the United States – that they first exhaust contract remedies; that Yankee's situation is not unique as there are 12 other reactors that are shut down and the owners of four such reactors have also paid all their fees and have no other

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8. On 29 December 1997, Yankee Atomic Electric Company filed a petition for rehearing in the U.S. Court of Appeals for the District of Columbia Circuit seeking an order that the Department of Energy remove its spent fuel. That petition is pending, along with the petition for rehearing filed by the Department.

9. Yankee Atomic has claimed in the past that its plant could be completely dismantled and the site restored to a "green field" as early as the year 2003. It has also asserted that a 30-year delay would impose an inequitable burden on Yankee Atomic because it would be obliged to construct dry storage facilities for holding spent fuel, pending acceptance by the Department, and maintain infrastructure - with a resulting burden on ratepayers and without electricity generation as a source of revenue.

10. The Department has submitted in its "Respondents' Opposition to State Petitioners' Motion For Enforcement of Limited Mandamus" (12 February 1998) that the State petitioners have no "standing" to dispute the benefits or defects of remedies provided under the Standard Contract to which they are not parties. The U.S. Supreme Court has held that to have "standing" a plaintiff "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).

nuclear facilities on site; that the utility's contract provisions for ranking spent fuel and allocating disposal and storage capacity demonstrate that Yankee would not be able to complete decommissioning for nearly 20 years; and that a court order accelerating Yankee's priority and removal of all spent fuel at once is not justified – in light of potentially inequitable consequences for other contract holders.

3. That the Department's program to accept foreign research reactor spent fuel supports the United States' nonproliferation policy; that the program is designed to recover highly enriched uranium fuels previously supplied by the United States to foreign research reactors and facilitate their conversion to low enriched uranium fuels that are not conducive to nuclear weapons use; and that the program is carried out under authority of the Atomic Energy Act (AEA)[11], not the NWPA.

4. That the Department has used its authorities under the AEA in a few limited cases to accept reactor material from commercial reactors for specific research purposes, such as in 1984 to examine the damaged Three Mile Island reactor core to better understand degraded core performance, but that these authorities do not allow the Department to establish a general program for the purpose of storing commercial spent fuel prior to disposal.[12]

5. That Congress enacted the elaborate scheme of the NWPA for storage and disposal of, inter alia, commercial spent fuel and that the NWPA precludes bypassing this comprehensive scheme through reliance on authorities under the AEA to provide such services.[13]

11. 42 U.S.C. 2011 et seq.

12. "Respondent's [Department of Energy] Response to Petition for a Writ of Mandamus" at 9, *Northern States Power Co. v. Dept. of Energy*, 128 F.3d 754 (D.C. Cir. 1997) (Nos. 97-1064 and 97-1065).

13. Id. at 10.