

# New York Law Authorizing Taxation of Spent Nuclear Fuel Storage Facilities Raises Property Tax Issues for the U.S. Nuclear Industry

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*A recent change in New York law requires local authorities to assess spent nuclear fuel storage facilities at permanently shutdown nuclear power plants as real property for ad valorem tax purposes. The legislation raises a number of complex valuation issues for owners of shutdown nuclear power plants in New York. The authors of this article discuss the new legislation and the issues, which they suggest may well become a national concern.*

New York Governor Andrew M. Cuomo has approved legislation subjecting pools and dry cask storage systems storing spent nuclear fuel at closed nuclear power plants to ad valorem taxation.<sup>1</sup> The legislation raises a host of important property tax issues and may portend long, complex valuation disputes between local assessors and nuclear power plant owners around the country.

## **BACKGROUND**

When it is unloaded from a reactor core, used or “spent” nuclear fuel is very hot and radioactive. Plant owners use a combination of on-site pools (wet storage) and specially licensed dry cask storage systems (dry storage) to cool the spent fuel and protect public health and safety and the environment. Pools and casks were originally intended to be used for temporary on-site storage until the spent fuel could be transported to a permanent repository operated by the federal government.

The federal government, for its part, has not complied with the Nuclear Waste Policy Act of 1982, as amended, which designated Yucca Mountain as the nation’s sole, permanent repository for commercial spent fuel and required the government to begin disposing of commercial spent fuel by January 1998. The Obama administration sought to terminate the Yucca Mountain project, and Congress has not appropriated the funds needed to complete the licensing process and construct the facility, forcing plant owners to store their spent fuel in pools and dry casks indefinitely.

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<sup>1</sup> 2020 N.Y. Laws ch. 358 (S.B. S8075).

Until the spent fuel pools at permanently shutdown reactors are emptied, the plants cannot be fully decommissioned. Unless and until Yucca Mountain begins accepting spent fuel or the U.S. Nuclear Regulatory Commission approves a license for an alternative consolidated interim storage facility, essentially all commercial spent fuel will remain on site long after plants are shut down and decommissioned. Because the federal government has failed to meet its obligations, plant owners have sued the government and have been recovering costs caused by the government's breach.

## OVERVIEW OF THE LEGISLATION

Effective January 1, 2021, the new legislation treats “spent fuel pools and dry cask storage systems in which nuclear fuel is stored and is pending further or final disposal from a nuclear power station following the permanent cession of power operations of such station” as real property subject to assessment and taxation under New York’s Real Property Tax Law.<sup>2</sup>

The immediate target of the new law is Indian Point Energy Center, a nuclear power plant along the Hudson River that is slated for permanent shutdown by April 30, 2021,<sup>3</sup> but the new law will apply with equal force to pools and dry casks at other nuclear power plants in New York when electric-generation operations permanently cease.

The bill sponsor memo notes that plants like Indian Point must be used for spent fuel storage because the federal government “failed to follow through” with its commitment to open Yucca Mountain. The memo also claims that spent fuel is “quite valuable” because it is capable of being reprocessed and reused, although it fails to mention that there are no commercial reprocessing facilities currently operating in the United States, have not been any since the early 1970s, and there are no plans for any in the future.

According to the memo, the legislation “will give utilities an incentive to seek . . . storage sites other than their own utility plants” and benefit the state by “aggressively encouraging the federal government to comply with its agreement to store spent fuel or to reimburse the utility for such storage costs.”

Either way, the memo concludes, “the host community would no longer unfairly bear the costs of this additional burden on its property values.”

## VALUATION ISSUES ABOUND

If the new legislation is expected to help local governments mitigate property tax revenue losses stemming from plant closures, the overarching question is

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<sup>2</sup> *Id.* §§ 1–2.

<sup>3</sup> S.B. S8075, 243th Leg. (N.Y. 2000), <https://www.nysenate.gov/legislation/bills/2019/s8075> (Sponsor Memo, Justification).

how local assessors will value pools and dry casks storing hazardous waste. This potentially raises a number of complicated valuation issues.

In New York, as in many other states, real property is generally assessed based on its full value, which courts have equated with market value or “what ‘a seller under no compulsion to sell and a buyer under no compulsion to buy’ would agree to as the subject property’s price.”<sup>4</sup> The following are just some of the questions surrounding the valuation of pools and dry casks:

- Is there a proven and established market for pools and dry casks storing spent fuel?
- What is the market value of an asset with significant operating expenses that produces no saleable product?
- How will assessors account for federal regulations concerning the handling and storage of spent fuel, as well as other relevant state environmental regulations?
- Will assessors make appropriate adjustments for depreciation?
- Will assessors properly remove all intangible values?

The valuation of pools and dry casks is far from certain. Even if local governments regard them as having significant potential value, it is unclear which appraisal principles they will use to make their assessments. Valuation disputes may be inevitable.

## A NATIONAL ISSUE

The recent New York legislation points to a broader, national issue. Nuclear power plants make up an outsized percentage of the local property tax base in the communities around the country that host those plants. Plant shutdowns can create revenue shortfalls, leaving local governments to search for new value or raise rates, or both.

With more than 90 commercial power reactors currently operating and more than 20 commercial power reactors undergoing decommissioning in the United States,<sup>5</sup> measures like New York’s may become a trend. Other state and local

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<sup>4</sup> *Commerce Holding Corp. v. Bd. of Assessors*, 88 N.Y.2d 724, 729 (1996) (quoting *Matter of Allied Corp. v. Town of Camillus*, 80 N.Y.2d 356 (1992)).

<sup>5</sup> U.S. Nuclear Regulatory Commission, Operating Reactors, <https://www.nrc.gov/reactors/operating.html>; U.S. Nuclear Regulatory Commission, Locations of Power Reactor Sites Undergoing Decommissioning, <https://www.nrc.gov/info-finder/decommissioning/power-reactor/index.html>.

governments are taking stock of New York's approach to spent fuel pools and dry casks and could very well adopt similar measures.<sup>6</sup>

Further, to the extent assessors in New York are able to develop defensible methodologies for valuing pools and dry casks storing spent fuel, assessors in other states may adopt the same or similar methodologies for pools and dry casks at operational and shutdown plants alike.

The federal government's failure to dispose of commercial spent fuel as required by the Nuclear Waste Policy Act has resulted in breach of contract lawsuits against the government and recovery of the costs resulting from the government's breach from the federal Judgment Fund.<sup>7</sup> Plant owners are likely to seek recovery for the property taxes paid as a result of the new legislation, as they do for all other breach-related costs.

## CONCLUSION

If state and local governments are aggressive in valuing such property, the resulting disputes could take years to fully resolve. To stay ahead of any potential valuation issues, plant owners should consider starting the process of compiling information relevant to the value (if any) of pools and dry casks and developing their positions now.

Plant owners should also consider ways of minimizing or avoiding the uncertainty surrounding the valuation of spent fuel storage facilities, including a PILOT (payment in lieu of taxes) agreement.

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<sup>6</sup> See, e.g., Donna Borak, *N.Y. Law Spotlights Lost Nuclear Plant Tax Revenue Nationally*, Bloomberg Law News, Daily Tax Report: State (Jan. 11, 2021) (describing interest in New Jersey and Illinois).

<sup>7</sup> See, e.g., *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336 (Fed. Cir. 2000); *Pac. Gas & Elec. Co., v. United States*, 536 F.3d 1282 (Fed. Cir. 2008).