

**GAO**

Report to the Honorable  
James H. Bilbray,  
House of Representatives

January 1991

# NUCLEAR WASTE

## Quality Assurance Auditors Need Access to Employee Records





**Resources, Community, and  
Economic Development Division**

B-240668

January 18, 1991

The Honorable James H. Bilbray  
House of Representatives

Dear Mr. Bilbray:

In your November 1, 1989, letter and in subsequent discussions, you expressed concerns about whether the Privacy Act of 1974 (5 U.S.C. 552a) could hamper the ability of the Department of Energy (DOE) to verify the proficiency of both DOE and contractor employees who characterize (investigate) Yucca Mountain, Nevada, as a potential site for a nuclear waste repository. That act generally provides restrictions on what information about private individuals a federal agency may maintain in a system of records, and prohibits the agency's disclosure of such information unless certain statutory conditions for disclosures are met. The Nuclear Regulatory Commission (NRC), which must approve any of DOE's future applications for authorization to construct a repository at the Yucca Mountain site, requires a quality assurance program to meet prescribed quality standards, which include ensuring that studies of the site are performed by qualified employees. This program would entail verification of the training and qualifications of DOE and contractor employees.

As agreed with your office, we reviewed (1) DOE's efforts to identify and resolve the implications of the Privacy Act for DOE's quality assurance program and (2) the ways in which the delay in resolving Privacy Act issues may have affected preliminary work on the Yucca Mountain project.

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**Results in Brief**

Three years ago, DOE anticipated that it might need to reconcile the NRC program requirement for quality assurance audits of employee qualifications with Privacy Act requirements that safeguard the confidentiality of federal agency records on individuals. Almost 2 years passed, however, before DOE decided to establish a new system of training and qualification records, covering project employees of both DOE and its contractors, that would make these records accessible to quality assurance auditors and preserve the records for repository licensing, while also complying with the Privacy Act. DOE only recently issued a public notice of its decision to establish this new system of records. The notice, issued in August 1990, became effective on October 8, 1990. DOE has

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begun to review and modify its project contracts to require contractors to implement the new system of records for their employees.

One reason for the delay in resolving the issue was confusion within DOE concerning whether the Privacy Act applies to employee records of DOE contractors. The manager of the Yucca Mountain Project Office (YMPO) believed the act did apply and told contractors they could withhold the records from quality assurance auditors. However, DOE's Office of General Counsel subsequently concluded that the act does not apply to these records unless they are part of DOE's system of records. Thus far, the records of five of the seven principal contractors have been audited. Nevertheless, to ensure that contractor records will be available for a future licensing proceeding, DOE is making them part of the new system of records, with access for audit purposes specifically authorized as a routine use. DOE agreed to wait until the system is in place to audit the records of the remaining two contractors. Finally, DOE will be able to audit the training records and qualifications of United States Geological Survey (USGS) employees who work on the Yucca Mountain project after USGS also implements a new system of records for its project employees.

The issue of auditors' access to employee records is but one of several problems DOE has encountered that have contributed to delay in achieving NRC's acceptance of DOE's overall program for ensuring that work at Yucca Mountain will be acceptable—a prerequisite to beginning full-scale investigation of the site. The state of Nevada has also refused to issue environmental permits that DOE needs to begin new site characterization work. For this reason, the records issue and other quality-related problems have not directly delayed the start of new site investigations.

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## Background

The Nuclear Waste Policy Act of 1982, as amended, directs DOE to characterize the Yucca Mountain site to determine if the site is suitable for a nuclear waste repository. First, however, litigation between DOE and Nevada over Nevada's refusal to act on DOE's applications for state environmental permits must be resolved. Should the litigation be resolved in the favor of DOE, the agency expects to begin investigating the site in January 1991.<sup>1</sup> If DOE eventually determines that the site is suitable and

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<sup>1</sup>For a more complete discussion of this litigation, see *Nuclear Waste: Quarterly Report as of September 30, 1989* (GAO/RCED-90-103, Mar. 2, 1990). The U.S. Court of Appeals recently decided that case in DOE's favor, *Nevada v. Department of Energy*, Nos. 86-7308, 90-70004 (9th Cir. Sept. 19, 1990), but Nevada has appealed the case to the Supreme Court.

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it is selected for a repository, the agency will seek authorization (a license) from NRC to construct the repository.

The nuclear waste program authorized by the nuclear waste act is unique in that, of all of DOE's nuclear programs, it alone is subject to NRC's licensing requirements. To obtain a license, DOE must demonstrate that the repository can be safely constructed and operated and that it can isolate nuclear waste for thousands of years. To win NRC's approval for constructing a repository, NRC requires DOE to include a sound quality assurance program in its site investigation. Such a program is intended to provide a process for demonstrating that the quality of the site investigation is sufficient for NRC's future licensing decision on DOE's application to construct a repository at the site.

The quality assurance program requires DOE to document that DOE and contractor employees who perform repository-related work important to safety and waste isolation are properly qualified and trained for their positions. These records are required to be available for audit as a part of a comprehensive system of planned and periodic audits of the quality assurance programs of each DOE organization and project contractor. These audits are performed by both DOE and the contractors themselves, under the observation of NRC and Nevada. NRC and Nevada may also periodically perform independent audits.

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## DOE Has Not Given Priority to Identifying and Resolving Privacy Act Issues

Although DOE's Office of Civilian Radioactive Waste Management (OCRWM) had raised the Privacy Act issue in July 1987, it did not begin to resolve the problem until March 1989, almost 2 years later. At that time DOE decided to establish, in accordance with the Privacy Act, a new system of records that covers employees of both DOE and its contractors and that permits quality assurance auditors to have access to the records. After 3 years of effort, DOE just began implementing the new system of records in October 1990.

In July 1987 executives at an OCRWM quality assurance coordinating group meeting recognized that the Privacy Act had potential implications for the requirement that DOE and its contractors make specific employee records available to DOE, NRC, and Nevada staff who audit the effectiveness of the quality assurance programs of both DOE and its contractors. In March 1989 DOE determined that the system of records that it maintains for its own employees did not permit auditors to have access to training and qualification records for conducting quality assurance audits because these audits were not, under the Privacy Act

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requirements, a "routine use" for which the existing system of records were established.

Although DOE does not plan to apply for a construction authorization until 2001, it must take steps throughout site characterization to ensure that the training and qualification records of all applicable employees of DOE and its contractors will be available for use in a future licensing proceeding. To ensure that the employee records of DOE contractors will be available, DOE determined that it must have physical custody of these records as well as the records of its own employees.

To accomplish this, DOE decided in March 1989 to create, in accordance with the Privacy Act, a new system of records covering the training and qualifications for both DOE and contractor employees. DOE also determined that its project contracts would have to be reviewed and, if necessary, amended to require contractors to provide DOE with access to and ultimate physical custody of the necessary records as part of DOE's new system of records.

In May 1989 OCRWM circulated a draft of the public notice of its intent to establish the new system of records. Shortly thereafter, it told NRC that the issue should be resolved in about 6 months. However, it was not until August 8, 1990—about 15 months later—that DOE published a notice in the Federal Register announcing the creation of the new system of records. It has just begun reviewing project contracts and negotiating any necessary changes to these contracts. (Appendix I discusses the major events that occurred from July 1987 until October 1990.)

Part of the delay was due to confusion over the applicability of the Privacy Act to the employee records of DOE contractors. The act does not extend to the employee records of contractors unless those records are made part of an agency's system of records. Nevertheless, on April 21, 1989, the manager of YMPO, which manages project activities, incorrectly notified project contractors that they could, at their discretion, deny auditors access to employee records until a system of records was in place. This issue appears to have been settled only after DOE's Office of General Counsel commented on a draft letter concerning a contractor's decision to deny auditors access to employee records. The draft letter, prepared within OCRWM, expressed concern about granting auditors access to training and qualification records of the employees of DOE contractors without an appropriate system of records. The Office of General Counsel comments made it clear to OCRWM that the act does not

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automatically apply to the employee records maintained by its contractors.

OCRWM had planned to audit the training and qualification records of employees from OCRWM headquarters and YMPO in the summer of 1990. However, because it had not published a notice of, obtained comments on, established, and implemented the new system of employee records, this schedule could not be met. On May 14, 1990, the new Director of OCRWM announced that the scheduled audits would be postponed until the development and implementation in June 1990 of a plan to improve management of the nuclear waste program. According to the Director, the postponement would not affect major program milestones. The audit was finally conducted in October 1990.

DOE's inability to resolve these questions about the applicability of the Privacy Act to its quality assurance program in a timely manner is but one example of the difficulties it has had over the last several years in developing a satisfactory quality assurance program. This was discussed in three of our earlier reports.<sup>2</sup> In our June and September 1988 reports, for example, we indicated that most of NRC's concerns about DOE's quality assurance program remained unresolved for long periods of time. We concluded in the latter report that this was due, in part, to delays and competing priorities within DOE's nuclear waste program. We also concluded that the lower priority DOE had assigned to resolving quality assurance issues appeared inconsistent with its commitment to having a satisfactory quality assurance program in place by the time it is ready to investigate the Yucca Mountain site. In September 1989 we reported that NRC continued to hold that none of DOE's quality assurance programs met NRC's requirements at that time. However, in October 1990 DOE won NRC's full approval of quality assurance programs for two of its contractors. The other four received qualified approval subject to resolution of the Privacy Act issue as a prerequisite for conducting personnel qualifications audits in addition to resolution of other issues raised in quality assurance audits.

The Director of the OCRWM office that has the primary responsibility for DOE's quality assurance program agreed that competing nuclear waste program priorities, such as preparing the investigation plan for the site,

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<sup>2</sup>Nuclear Waste: Quarterly Report on DOE's Nuclear Waste Program as of June 30, 1988 (GAO/RCED-88-204BR, Aug. 29, 1988); Nuclear Waste: Repository Work Should Not Proceed Until Quality Assurance Is Adequate (GAO/RCED-88-159, Sept. 29, 1988); and the Sept. 1989 quarterly report (GAO/RCED-90-103).

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contributed to delay in resolving the Privacy Act issue. Also contributing to the delay, he said, were (1) the need to develop the project's overall quality assurance program, (2) efforts to staff OCRWM and project-level quality assurance organizations, and (3) DOE's inexperience in developing a system of employee records that includes the records of contractor employees.

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## Effects of Delay in Resolving Privacy Act Issue

Because OCRWM had not yet resolved the Privacy Act issue, quality assurance auditors were temporarily not allowed to verify that employees of several project contractors met training and qualification requirements for their positions. Although such verification was subsequently permitted for these contractors, the employee records of USGS and two other project contractors have still not been made available for audit. Because DOE was not able to implement the proposed system of records as well as review and amend project contracts in time to audit each project organization of DOE and its contractors, DOE obtained NRC's limited acceptance of the quality assurance program for selected site characterization activities scheduled for January 1991.

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## Independent Verification of Qualifications Denied

During a March 1988 quality assurance audit of the contractor responsible for designing the underground part of an exploratory shaft facility, auditors were denied access to training and qualification records of the contractor's employees because of what the contractor stated were concerns that disclosure of these records might violate the Privacy Act. Before they were denied access to the records, however, the auditors reviewed the qualification records of some employees and raised questions about the proficiency of several of these employees. In one case, for example, the auditors found that an engineer apparently did not have design experience in the technology selected by the contractor. As a result, the auditors were not satisfied that the contractor's employees had acquired the necessary proficiency. The audit finding was eventually resolved when the contractor brought in new project employees with the necessary qualifications.

Similarly, the scope of audits of three other DOE contractors and USGS, conducted between August and November 1989, did not include evaluations of employee qualifications because OCRWM officials continued to believe—incorrectly—that the Privacy Act precluded access to these contractors' employee qualification records by quality assurance auditors. After OCRWM recognized that the employee records maintained by its contractors are not automatically subject to Privacy Act restrictions,



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two of the three contractors made their records available for quality assurance audits and no deficiencies were found.

By fall 1990, five of DOE's seven major project contractors had successfully undergone qualification audits. The remaining two contractors elected, as permitted by the YMPO manager, to defer audits until the new system of records was in place. DOE still has to review and amend all of these contracts, as necessary, to bring them within the proposed new system of records. USGS, as a federal agency, is subject to the Privacy Act, but has not yet completed arrangements to make records of its project employees available for audit. USGS has prepared a notice to create a system similar to that of DOE.

Finally, the records of DOE employees will not be available for audit until the new system of records has been implemented. DOE performed training and qualification audits for employees of DOE headquarters and the Yucca Mountain Project Office in October 1990. These audits were conducted with information assembled from DOE's existing system of records since the new system was not yet in operation.

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### DOE Awaits NRC Approval for Initiation of New Work at Yucca Mountain by 1991

NRC and DOE have agreed that DOE should not begin new site characterization work at Yucca Mountain until (1) DOE has adequate written quality assurance programs in place, (2) DOE has determined, through audits, that the programs are being effectively implemented, and (3) NRC has accepted DOE's determination. In keeping with this policy, NRC's position is that, before NRC can accept DOE's quality assurance program for the purpose of beginning new site characterization work, DOE must ensure that its quality assurance auditors and observers from NRC and Nevada have unrestricted access to the training and qualification records of DOE and contractor employees. DOE expects that implementation of the new system of records will resolve NRC's concerns about the Privacy Act and access to records.

Now that DOE has adopted the new system of records, the agency must identify and make any necessary changes to its project contracts. Then, DOE and its contractors must implement the new system of records by establishing a file containing the relevant records for each affected DOE and contractor employee. Only after these steps have been completed will DOE have its system of employee training and qualification records available for audit by project quality assurance auditors and NRC's and Nevada's observers.

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In September 1990 DOE sent NRC a request for acceptance of the quality assurance programs for six contractors, with exceptions noted for one contractor and USGS because of Privacy Act concerns. USGS must develop a separate system of records in compliance with the Privacy Act in order to obtain NRC's full acceptance of its program. In October 1990 NRC granted full approval to four of the contractors' plans and gave qualified approval to the other two if they complete personnel audits in accordance with the Privacy Act. Provision for access to employee records will be made upon full adoption of DOE's new system of records. By January 1991, DOE hopes to have in place a quality assurance program accepted by NRC. DOE's current plan is to obtain NRC's acceptance of its quality assurance program as it pertains to two specific site characterization activities so that it will be prepared to begin that work by January 1991. Other detailed site characterization work would be deferred until DOE obtains NRC's acceptance of its overall quality assurance program.

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## Conclusions

By not giving the Privacy Act issue the management attention needed to understand the issue and resolve it sooner, quality assurance auditors were temporarily prevented from verifying that work performed by some project contractors had been done by qualified employees. Moreover, the auditors have not had unrestricted access to the records of employees of DOE, USGS, and two project contractors because the notice of the new system of records did not take effect until October 1990. Although NRC and DOE officials consider it unlikely that these employees would be found unqualified, any further discrepancies in employee qualifications found by auditors, once they begin audits of the remaining employee records, could raise questions about the quality of their work.

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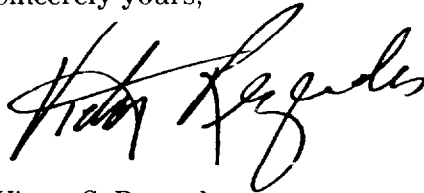
We discussed the information contained in this report with DOE officials. For the most part, they agreed that the information was factually accurate. In instances in which they did not agree, they provided us with additional documentation, which we considered in preparing the report. We also discussed the information related to NRC with officials of that agency, and they agreed that the information was factually accurate. As agreed with your office, however, we did not obtain official agency comments on a draft of this report. Our work was performed between January and October 1990 in accordance with generally accepted government auditing standards. (Appendix III discusses our objectives, scope, and methodology.)

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Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to the Secretary of Energy, appropriate Congressional committees and Members of Congress, and other interested parties. Copies will be made available to others upon request.

If you have any questions regarding this report, please call me at (202) 275-1441. Major contributors to this report are listed in appendix IV.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Victor S. Rezendes". The signature is fluid and cursive, with the first name "Victor" and last name "Rezendes" clearly distinguishable.

Victor S. Rezendes  
Director, Energy Issues

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**Abbreviations**

DOE	Department of Energy
GAO	General Accounting Office
NRC	Nuclear Regulatory Commission
OCRWM	Office of Civilian Radioactive Waste Management
USGS	United States Geological Survey
YMPO	Yucca Mountain Project Office

# DOE's Efforts to Address the Privacy Act's Implications for the Agency's Quality Assurance Program

OCRWM anticipated in July 1987 that the Privacy Act might have implications for its quality assurance program. It did not, however, begin to address this issue until March 1989, or about 20 months later. At that time, OCRWM decided to develop a new system of training and qualification records covering both DOE and contractor employees. DOE established this new system in October 1990 and has begun its implementation. A senior OCRWM official attributes the delay in resolving the issue to competing waste program priorities, including development of the overall quality assurance program, as well as to inexperience within OCRWM in the procedures for developing and implementing a new system of records.

## Privacy Act Issue Raised but Not Addressed for 20 Months

At a July 22, 1987, executive meeting of OCRWM's quality assurance coordinating group, OCRWM officials discussed their concerns about how the Privacy Act, which restricts the disclosure of certain information about individuals maintained by federal agencies, might affect the quality assurance program, which requires audits of the qualifications of employees investigating Yucca Mountain, Nevada, as a potential nuclear waste repository site. No action was taken, however, until early in 1988. The acting director of quality assurance then notified OCRWM's resources management office that it had been assigned responsibility for developing the process necessary to make employee records available to DOE and interested third parties (such as NRC and the state of Nevada). The acting director also stated that

- resolution of these issues was fundamental to meeting the basic requirements of OCRWM's quality assurance program and
- OCRWM's (then) objective of having a fully qualified quality assurance program in place by January 1, 1989, could not be achieved unless these issues were resolved by June 30, 1988.

On May 18, 1988, OCRWM's resources office requested a legal opinion concerning the types of employee records that, in a manner consistent with the Privacy Act, could be generated and audited by DOE and its contractors and also be made available to NRC and the state of Nevada. At a subsequent meeting, a representative of DOE's general counsel said he could advise OCRWM on Privacy Act matters once OCRWM had identified the employee records that should be generated and subjected to audit.

There was no additional movement on the issue until after it was raised again following a December 1988 report on a quality assurance audit of YMPO. The audit report stated that YMPO was not complying with a

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**Appendix I  
DOE's Efforts to Address the Privacy Act's  
Implications for the Agency's Quality  
Assurance Program**

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quality assurance procedure requiring it to compile and maintain individual training and qualification files on all applicable employees. YMPO's evaluation of the audit finding led it to conclude that the system of records, which it had created in accordance with the quality assurance procedure, and which covered both DOE and its contractor employee assigned to YMPO, violated the Privacy Act because this system had not been created in accordance with the procedural requirements of the act. Therefore, YMPO suspended its implementation of the procedure until legal requirements could be met. In responding to the audit report, YMPO stated that the applicability of the Privacy Act had been unanticipated when the quality assurance procedure was developed.

On January 23, 1989, OCRWM sought legal advice on

- the required procedures for establishing qualification records for DOE and contractor employees that would be accessible during audits by DOE, its contractors, NRC, and Nevada, and
- the way in which any Privacy Act restrictions might be overcome.

OCRWM also stated that it proposed to create a separate file on each DOE and contractor employees performing work that affected quality. The file would include a description of duties and work experience, verification of college degrees, a supervisor's certification that the employee is qualified for the position, and relevant training records. The files would be used to document employees' qualifications and would also be subject to audit. OCRWM recommended that employees' official personnel folders not be used because some information in these folders had no relevance to quality assurance requirements.

On February 27, 1989, DOE's Office of General Counsel advised OCRWM that, to maintain information on employees for satisfying quality assurance requirements, OCRWM should first review DOE's existing systems of records to determine if the necessary information was part of one of those systems. If not, then OCRWM must begin the administrative process to maintain the information in accordance with the Privacy Act. Specifically, according to the Office of General Counsel, OCRWM must publish a notice of the proposed system of records in the Federal Register identifying the individuals covered, types of information to be maintained, those who would have access to the information, the authority to maintain the information, and routine uses permitted to DOE contractors, NRC, and the state of Nevada.

Shortly thereafter, at a March 2, 1989, meeting to discuss the issue further, the general counsel representative stated that establishing a new system of records was a procedural matter of notifying the Congress and publishing the system notice. The official also mentioned that contracts covering work on the Yucca Mountain project would have to be amended to require contractors to maintain the necessary employee records. DOE decided to include contractors in the system of records because of the possibility that NRC might want to review the records before making a decision in the licensing application for the repository which may not occur until the late 1990s. DOE determined that it must have ultimate physical custody of the records in order to ensure that they would be available for NRC's review. By incorporating the contractor employee records into the proposed system, DOE made them subject to the Privacy Act. Estimates of the time needed to implement the proposed system of records varied from 3 to 6 months. Finally, the participants agreed that USGS—a project participant—should be notified that it would have to prepare its own system notice for the employee records it is maintaining for quality assurance purposes.

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## **OCRWM Decides to Implement a New System of Records**

Prompted by the findings of the December 1988 audit report, representatives from OCRWM, YMPO, DOE headquarters and Nevada's Privacy Act offices, and project contractors met on March 7, 1989, to address the Privacy Act issue. OCRWM's representatives stated that their office would take the lead in creating, in accordance with the Privacy Act, a new system of records covering employees of DOE and its contractors for use in quality assurance audits. An additional concern was what to do until the new system of records was in place. The participants discussed which of DOE's existing systems of records to use if YMPO attempted to maintain records on DOE and contractor employees before the new system of records was established. They noted that DOE's existing records systems did not apply to DOE contractors. They also noted that all contracts should be modified to indicate that the contractors were maintaining quality assurance records on their employees for DOE. Finally, they agreed that no audits of employee training and qualification records would be performed until the system notice was in effect.

In April 1989 OCRWM developed and circulated the first draft of the notice for internal review. At a May 1989 meeting between DOE and NRC on quality assurance, OCRWM told NRC that about 6 months would be needed to resolve the Privacy Act issue. NRC responded that the issue must be settled prior to its acceptance of DOE's quality assurance program for site characterization. In September 1990, DOE submitted to NRC



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**Appendix I**  
**DOE's Efforts to Address the Privacy Act's**  
**Implications for the Agency's Quality**  
**Assurance Program**

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a request for acceptance of quality assurance programs for six contractors: Fenix and Scisson, Lawrence Livermore National Laboratory, Sandia National Laboratory, Holmes and Narver, Reynolds Electrical and Engineering Company, and USGS. NRC granted full approval to four of the contractor programs and gave qualified approval to the other two (USGS and Reynolds) pending completion of personnel qualifications audits.

OCRWM circulated revised drafts of the notice about the system of records within DOE between June 1989 and March 1990. As of June 1, 1990, according to OCRWM officials, it had obtained concurrence on the notice from DOE's other program offices and was awaiting concurrence from DOE's Office of Administration prior to forwarding it to the Secretary of Energy for final review. On July 20, 1990, the Secretary completed his review and the notice was published in the Federal Register on August 8, 1990. Since DOE did not receive any adverse comments on the notice, it became effective on October 8, 1990.

As discussed above, DOE will also have to review and, as necessary, amend its contracts involving work on the Yucca Mountain project to require contractors to maintain files—as part of DOE's new system of records—on employee training and qualifications and to provide quality assurance auditors access to these employee records. Although the need for such contract amendments was recognized in March 1989, OCRWM did not begin to review the contracts until August 1990.

Table I.1 contains a chronology of the events that occurred in DOE's handling of the Privacy Act issue.

**Appendix I  
DOE's Efforts to Address the Privacy Act's  
Implications for the Agency's Quality  
Assurance Program**

**Table I.1: Chronology of DOE's Effort to  
Address Privacy Act Requirements in the  
Agency's Quality Assurance Program**

<b>Date</b>	<b>Event</b>
July 1987 <sup>a</sup>	OCRWM management discusses implications of Privacy Act for quality assurance.
Feb. -Mar. 1988	Auditors are denied access to a contractor's employee records on the grounds that access would violate Privacy Act.
May 1988	OCRWM requests legal advice on applicability of Privacy Act to contractor employees.
Aug. 1988	DOE's Privacy Act Office advises OCRWM on how to develop public notice of new system of records.
Nov. 1988	Audit finds that YMPO is not maintaining system of records needed for quality assurance audits.
Jan. 1989	OCRWM requests legal advice on applicability of Privacy Act to system of records covering DOE and contractor employees.
Feb. 1989	Office of General Counsel advises OCRWM that a quality assurance system of records covering both DOE and contractor employees must comply with Privacy Act.
Feb. 1989	Quality assurance auditor denied access to employee records of Holmes and Narver, a DOE contractor.
Mar. 1989	DOE and contractor officials discuss applicability of Privacy Act to quality assurance. OCRWM decides to prepare public notice of a new system of records for quality assurance. It is recognized that DOE will have to review and amend contracts to implement new system of records.
Mar. 1989	A DOE contractor notifies YMPO that Privacy Act applies to Yucca Mountain project and, therefore, contractor suspends audits of employee records.
Apr. 1989	YMPO notifies contractors that for pending audits it will abide by contractors' decisions on whether to permit access to their employee records but will review their systems for generating these records.
Apr. 1989	First draft of system notice is prepared by OCRWM.
May 1989	NRC expresses concern about lack of resolution of Privacy Act issue.
June 1989	Second draft of system notice is circulated within DOE.
Aug. -Nov. 1989	Audits of four contractors do not include review of employee training and qualification records because of Privacy Act concerns.
Sept. 1989	NRC reiterates concern about failure to resolve Privacy Act issue.
Oct. 1989	Third draft of system notice is circulated within DOE.
Oct. 1989	Representative Bilbray requests DOE's investigation of decision to deny quality assurance auditor access to records on Privacy Act grounds.
Nov. 1989	Fourth draft of system notice circulated within DOE.
Nov. 1989	Drafts of OCRWM's replies to Representative Bilbray state that denial of access to employee records was based on concerns about violating Privacy Act.
Jan. 1990	Letter to Representative Bilbray states that Privacy Act did not apply to contractor's records and that access has now been provided.
Mar. 1990	OCRWM sends its final version of notice to DOE's Privacy Act Office for review.

(continued)

**Appendix I  
DOE's Efforts to Address the Privacy Act's  
Implications for the Agency's Quality  
Assurance Program**

<b>Date</b>	<b>Event</b>
May 1990	OCRWM plans to use existing system of records covering only DOE employees for audits scheduled for summer 1990 but then postpones audits pending new management plan.
Aug. 1990	DOE publishes notice of intent to establish new system of records and begins related review of contracts.
Aug. 1990	OCRWM Director orders DOE supervisors to verify qualifications of their employees in preparation for upcoming audit.
Sept. 1990	DOE submits request for acceptance of quality assurance programs to NRC.
Oct. 1990	Notice for establishment of system of records becomes effective and DOE begins its implementation. DOE conducts quality assurance audits of OCRWM and its YMPO personnel. NRC approves contractors' quality assurance plans.

<sup>a</sup>Source document including reference to July 1987 meeting is undated, but OCRWM officials believe it was produced in May 1988.

## **Reasons Given by OCRWM Official for Delay on Privacy Act Issue**

We discussed OCRWM's handling of the Privacy Act issue with its Director for Administration and Resources Management, who has chief responsibility for resolving the issue. He agreed that the issue has remained unresolved for too long, and stated that the three factors listed below contributed to the delay.

- There are competing priorities within the nuclear waste program. For example, from mid-1987 through 1988 OCRWM and its contractors were trying to complete the draft and final versions of the site characterization plan for Yucca Mountain.
- DOE has emphasized the development of the overall quality assurance program. For example, OCRWM, YMPO, and project contractors were developing basic quality assurance program policies and procedures and were also organizing and staffing quality assurance units within their project organizations.
- OCRWM is inexperienced in developing systems of employee records extending to contractor employees.

# Effects of Delay in Resolving Privacy Act Issue

During the 3-year period in which DOE was attempting to resolve the Privacy Act issue, the repository project was beset with a number of problems. For example, Nevada would not issue environmental permits that DOE needed to begin new site characterization work at Yucca Mountain and DOE experienced many other problems in developing a quality assurance program. Although the Privacy Act issue did not, in itself, delay the start of new work at the site, DOE's inability to resolve the issue expeditiously contributed to delay in the agency's readiness for site characterization.

Furthermore, because the issue was not resolved, quality assurance auditors have so far been prevented from determining, on the basis of documentary evidence, if employees of USGS and two project contractors are qualified for their positions. For other project contractors, auditors were initially prevented from auditing employee qualifications, but were subsequently permitted to do so. In one case in which auditors reviewed some employee records, they questioned the proficiency of some of the contractor's employees and, as a result, the contractor brought in qualified new employees.

## Quality Assurance Auditors Denied Access to Records in Early 1988

The first significant effect of the Privacy Act issue occurred more than 6 months after the July 1987 executive meeting of OCRWM's quality assurance coordinating group. In February and March 1988, a team of quality assurance auditors from YMPO was denied access to the employee records of Fenix and Scisson—a DOE contractor at the Nevada Test Site—which was responsible for designing the underground portion of the exploratory shaft facility at Yucca Mountain. This facility will be the major facility that DOE will construct and use at the site for characterization purposes. NRC staff observed the audit team, and on April 12, 1988, they filed an observation audit report. NRC's observers noted, among other things, that YMPO's audit team had attempted to examine the education, training, and experience of the contractor's staff in the design of shafts and underground testing areas mined with conventional "drill and blast" technology. However, the resumes for the contractor's design engineers and managers were not made available to the auditors on the mistaken basis that providing the resumes would violate the Privacy Act.

According to NRC's observation report, the audit team saw a few resumes for the contractor's design engineers before being denied further access to employee records. In one case, the audit team found that

an engineer apparently did not have experience in designing underground excavations or "drill and blast" shafts and tunnels. Also, position descriptions were written in a general way and important work experience was not specified. Finally, some position descriptions were missing.

Because of these and other audit findings, NRC's observers reported that the audit team correctly attempted to establish if the contractor's design engineers and managers were proficient in designing shafts using the "drill and blast" technology. From the limited information the contractor provided, however, the audit team was unable to conclude that sufficient proficiency had been acquired by the contractor's employees. NRC's observers agreed with this conclusion. According to the deputy director of NRC's Division of High-Level Waste Management, this matter was satisfactorily resolved after the contractor recruited and assigned staff to the project with sufficient experience in the drill and blast technology.

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## Auditor Denied Access to Employee Records in February 1989

In February 1989, Mr. Donald Brown, a quality assurance engineer then employed by Holmes and Narver on the Yucca Mountain project, audited selected project activities and records of that contractor. Among other things, Mr. Brown noted in his audit report that his review of educational qualifications of 30 employees showed discrepancies between the professional experience of 5 employees and their position descriptions. Holmes and Narver officials subsequently denied Mr. Brown further access to employee records on the grounds that a quality assurance audit was not a "routine" use of the records permitted by the Privacy Act.

Subsequently, in an April 21, 1989, letter, the manager of YMPO advised DOE's project contractors that YMPO recognized the legal restrictions imposed on the gathering and maintenance of employee qualification and training records in the absence of an approved records system that complies with the Privacy Act. Therefore, the manager said, for the upcoming audits of the contractors' quality assurance programs (then scheduled for the summer and fall of 1989), contractors would be asked if employee training and qualification records were available for audit. Audit teams would then abide by the contractors' decisions on the availability of these records. The manager also stated that OCRWM would

expedite publication in the Federal Register of a notice of DOE's intent to create a new system of records for quality assurance purposes.

In a letter of October 26, 1989, to the Secretary of Energy, Representative James Bilbray of Nevada questioned how a quality assurance auditor, such as Mr. Brown, could perform his duties without access to records on employee training and qualifications. On January 5, 1990, the Acting Director, OCRWM, responded that, according to DOE's policy, quality assurance auditors—whether employees of DOE or its contractors—should have access to such records. He added that Mr. Brown had not been provided access to the records in question because of DOE's concern for the privacy of employees and because of a misunderstanding between DOE and Holmes and Narver on the ownership of the records, which determines the applicability of the act to the records. Although access to these records had been denied because of Privacy Act concerns, that law could only be involved to protect agency records that were part of a system of records created in accordance with the Privacy Act. Upon review, the Acting Director said, it was clarified that the records in question were not agency records and therefore were not subject to the Privacy Act. Finally, according to the Acting Director, the contractor had subsequently provided Mr. Brown access to the necessary records to verify corrective actions.<sup>1</sup>

The Privacy Act pertains only to federal agency records contained in an official records system, or to the contractor's personnel records contractually included in such a record of system, these particular records were not subject to the Privacy Act disclosure restrictions because they were not part of a system of records. In other words, Holmes and Narver incorrectly cited the Privacy Act as justification for denying Mr. Brown access to the records. Had OCRWM obtained a timely and correct understanding of the Privacy Act and proceeded more expeditiously in creating a new system of records for quality assurance audits, Mr. Brown would have been granted access, subject to the Privacy Act's appropriate safeguards, to the records in question.

Earlier drafts of OCRWM's response, however, show that OCRWM still did not, after more than 2 years of addressing the applicability of the Privacy Act to training and qualification records, understand the act and

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<sup>1</sup>According to DOE officials, Mr. Brown verified the corrective actions taken by Holmes and Narver on the deficiency report Mr. Brown had prepared by indicating that he found satisfactory objective evidence that the employees in question were qualified for their positions.

its relationship to contractors' records on their employees and to quality assurance audits of them. Between November 1989 and January 1990, DOE prepared six draft responses to Representative Bilbray's letter. In each of these drafts, DOE expressed concern that the Privacy Act would be violated if the agency granted the quality assurance auditor access to contractor Holmes and Narver's personnel records in question. The draft responses of DOE did not distinguish between the agency's records for its employees, which are automatically subject to the act, and the contractor's employee records, which, in the absence of a relevant contractual provision, were not covered by the act. Only the final review of the draft letter by an attorney in DOE's Office of the General Counsel prevented OCRWM from transmitting incorrect information to Representative Bilbray about the applicability of the Privacy Act to the records of contractor employees. At the attorney's request, the draft letter was modified to state that Holmes and Narver's employee records were not subject to the Privacy Act because they were the property of the contractor and therefore were not part of DOE's system of records.

### Quality Assurance Auditors Not Able to Review Employee Qualifications in Other Audits

Between August and November 1989, YMPO conducted audits, which NRC officials observed, of USGS and three other contractors on the Yucca Mountain Project. The three contractors were Sandia National Laboratories, Los Alamos National Laboratory, and Reynolds Electric and Engineering Corporation. For each of the four audits, the quality assurance auditors were unable to evaluate the qualifications of the project employees of USGS and the contractor on the stated basis of constraints imposed by the Privacy Act. In subsequent audits held in the summer of 1990, auditors were finally able to review credentials of employees of Sandia and Los Alamos; however, access to records of the other contractors was still withheld pending resolution of the Privacy Act issue.

Because the auditors were not allowed to review the employee records of these contractors, documentary evidence was not presented to them showing that these employees were qualified for their positions. As discussed above, however, in January 1990 OCRWM realized that the requirements of the Privacy Act do not extend to DOE contractors unless their employee records are a part of DOE's system of records. Subsequently, two of the three contractors provided quality assurance auditors access to employee records, and the auditors did not find deficiencies in employee training and qualifications. USGS, like DOE, not yet having established a system of records covering the training and qualification records of its project employees, has also not made its records available to DOE's quality assurance auditors and observers from

NRC and Nevada. (USGS is now in the process of creating a system of records similar to that of DOE.) Finally, Reynolds Electric and Engineering Corporation and one other major project contractor—Science Applications International Corporation—have still not granted quality assurance auditors access to their employee training and qualification records pending final implementation of the system of records.

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## Privacy Act Issue Has Contributed to Delay of Acceptance of Quality Assurance Plans

In late November 1989, DOE announced, among other plans, a new schedule for investigating the Yucca Mountain site. If successful in obtaining certain environmental work permits from the State of Nevada, DOE planned to initiate new investigations in January 1991. In addition, DOE said it expected to obtain NRC's acceptance of its quality assurance program—a prerequisite for beginning the investigation—in August 1990; however, DOE did not even file its request for acceptance until September 1990. At the time of DOE's announcement, it expected to have the proposed system of records in place in the spring of 1990; as previously discussed, however, DOE's system of records did not become effective until October 8, 1990.

As a part of obtaining NRC's acceptance of its quality assurance program, DOE had planned to audit the quality assurance programs of OCRWM headquarters and YMPO in June and July 1990. Because an approved system of records was not in place, OCRWM had planned to substitute one of DOE's systems of records, one existing that supervisors maintain on their employees for the audits, even though it did not contain complete information needed for the quality assurance audits. In January 1990, while planning this audit, OCRWM's senior quality assurance manager told us that it might be necessary for auditors to do a second audit because of information gaps in this substitute system. Because the new Director of OCRWM issued a request in August 1990 for collection of needed information, this second audit may not be necessary.

On May 14, 1990, however, the new Director, OCRWM, announced that he had postponed the June and July audits pending development and implementation of a plan to improve management of the nuclear waste program. According to the Director, the postponement will not affect major program milestones. This audit of DOE headquarters and YMPO personnel was finally conducted in October 1990.

In October 1990 DOE obtained full NRC approval of quality assurance programs for two contractors (Lawrence Livermore and Sandia National



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**Appendix II**  
**Effects of Delay in Resolving Privacy**  
**Act Issue**

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Laboratories) and qualified NRC approval for four contractors (Fenix and Scisson, Holmes and Narver, USGS, and REECO) subject to resolutions of open audit items, which, for the latter two contractors, include performance of quality assurance audits of personnel training and qualifications.

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# Objectives, Scope, and Methodology

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Our objectives were to review

- the efforts of DOE to identify and resolve the implications of the Privacy Act for its quality assurance program and
- the effects of delay in resolving these issues on preliminary work on the Yucca Mountain project.

To obtain an understanding of how the Privacy Act affects quality assurance and auditors' access to records of both DOE and contractor employees, we reviewed the Privacy Act, NRC's quality assurance regulations, one of DOE's contracts that includes work on the nuclear waste program, and legal and programmatic documents on the implications of the Privacy Act for DOE's quality assurance program. We also interviewed officials with OCRWM, with DOE's Office of the General Counsel and DOE's Privacy Act Branch, and with NRC.

To evaluate DOE's efforts to ensure, by means consistent with the Privacy Act, that quality assurance auditors have access to necessary employee records, and to identify the effects of delay in resolving this issue on the nuclear waste program, we also reviewed correspondence and other documents that we obtained from OCRWM's Office of Quality Assurance and Resource Management and from NRC. We also discussed these aspects of our review with officials in these offices, as well as with officials in DOE's Office of General Counsel and DOE's Privacy Act Office, and NRC. In addition, we obtained documents on the Privacy Act issue from officials with YMPO and with DOE's Nevada Operations Office located in Las Vegas, Nevada. Finally, we reviewed the minutes of the bimonthly meetings between DOE and NRC on quality assurance and NRC's reports on its observations of DOE's audits of DOE contractors.

Our review was conducted between January and August 1990 in accordance with generally accepted government auditing standards.

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