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ONE HUNDRED NINTH CONGRESS

U.S. House of Representatives  
Committee on Energy and Commerce  
Washington, DC 20515-6115

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May 23, 2005

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The Honorable Samuel Bodman  
Secretary  
Department of Energy  
Forrestal Building  
1000 Independence Avenue, S.W.  
Washington, D.C. 20585

Dear Secretary Bodman:

We are writing with respect to the Department of Energy's (DOE) program to construct a repository to dispose of nuclear waste at Yucca Mountain, Nevada, pursuant to the Nuclear Waste Policy Act of 1982 (NWPA). This is one of the Department's most challenging responsibilities, and is at a critical juncture.

As you know, we are long-time supporters of the Nuclear Waste Policy Act of 1982 and its repository program. It is important that the government keep its bargain with the ratepayers who have contributed over \$22 billion to the Nuclear Waste Fund, of which about \$17 billion remains unexpended. The program faces numerous challenges, foremost among them securing annual appropriations sufficient to permit the Department to submit a license application to the Nuclear Regulatory Commission (NRC) as soon as possible. In light of the mounting damages awarded utilities that are currently storing waste on-site, further delay in securing a license for the repository serves neither the interest of ratepayers, the nuclear industry, nor the U.S. taxpayer.


In addition to these ongoing concerns, two recent developments have raised new questions regarding the future of the repository program.

First, a recent judicial decision suggests new remedies may be available to utilities that have brought suit against the Department for its failure to begin accepting waste as required by their contracts with the Department. Second, the House Appropriations Committee's report accompanying H.R. 2419, the "Energy and Water Development Appropriations FY 2006," has proposed a number of substantial changes to the repository program which the Department currently is authorized to pursue under the NWPA.

The Honorable Samuel Bodman  
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In order to assist Members in understanding these matters, we would appreciate your response to the attached questions no later than June 6, 2005.

Sincerely,



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JOHN D. DINGELL  
RANKING MEMBER



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RICK BOUCHER  
RANKING MEMBER  
SUBCOMMITTEE ON ENERGY AND  
AIR QUALITY

Attachment

cc: The Honorable Joe Barton, Chairman  
Committee on Energy and Commerce

The Honorable Ralph M. Hall, Chairman  
Subcommittee on Energy and Air Quality

## QUESTIONS FOR SECRETARY BODMAN

1. What are the Department's current time estimates for (1) filing a license application with the NRC and (2) assuming the Commission grants DOE a license, commencing waste acceptance at the Yucca Mountain repository?
2. On March 10, 2005, in a written statement submitted at a hearing of the Subcommittee on Energy and Air Quality, the Department's representative stated "It is my understanding that if the Administration were to unilaterally reclassify the fees [contributed to the Nuclear Waste Fund] through administrative action, it would be a departure from past practice but does not appear to be prohibited by law."
  - a. Does the Department plan to pursue reclassification of fee revenues through administrative action?
  - b. Is the Department seeking legislation to reclassify the fees?
  - c. Does the Department expect to seek other legislation on nuclear waste during this session of Congress? If so, will it propose legislative language?
3. What is the current unexpended balance in the Nuclear Waste Fund? Assuming these funds could be made available to the program upon request by the Department, how many years could this balance (apart from future ratepayer contributions) fund the program under the DOE's current cost projections?
4. A U.S. Court of Federal Claims judge recently issued an order directing the Government *inter alia* to show cause (a) why the Standard Contract for waste acceptance should not be ruled void, (b) how such an order could prejudice its interests, and (c) why restitution of monies previously paid into the Nuclear Waste Fund is not an appropriate remedy (*Sacramento Municipal Utility District v. U.S.*, *U.S. Court of Federal Claims*, April 21, 2005).
  - a. What is the Department's position on the three questions put to it by the Court?
  - b. What is the procedural status of this case, and when does the Department anticipate a final ruling?
5. On May 18, 2005, the House Committee on Appropriations reported legislation (H.R. 2419) appropriating funds for Yucca Mountain and other nuclear waste activities in Fiscal Year 2006. The bill appropriates \$5,500,000 more than the Administration's budget request for the "Advanced Fuel Cycle Initiative" (AFCI), for a total of \$75,500,000, an increase of \$8,044,000 over current year funding. The committee report accompanying the bill directs that the additional funds be used to accelerate the development of technology to "address the current inventories of commercial spent nuclear fuel, and prepare an integrated spent nuclear fuel recycling plan."

- a. If enacted, would this directive constitute a change in the policy embodied in the NWPA and its existing plans for treating current inventories of spent fuel? If so, does the Department support this policy change?
  - b. Since H.R. 2419 appropriates \$5,500,000 more than the Administration requested for the AFCEI, wouldn't this increase effectively compete with and potentially reduce the amount of funding likely to be appropriated for FY 2006 to the Yucca Mountain repository program, in light of overall limits on Federal spending?
  - c. Does the Department support this appropriations increase?
6. H.R. 2419 contains a lump sum appropriation of \$310 million for "nuclear waste disposal activities to carry out the purposes of the Nuclear Waste Policy Act of 1982." While the statutory language does not specify changes to the NWPA, the report language directs the Department to pursue several new policies which appear to alter or conflict with its existing statutory authority.

Specifically, the report directs the Department to "take title to some commercial spent fuel" and "to begin the movement of spent fuel to centralized interim storage at one or more DOE sites within fiscal year 2006." The report further indicates that potential locations for such interim storage include DOE sites in Washington, Idaho, and South Carolina, each of which already stores defense waste, or other Federal sites such as closed military bases.

- a. Does the Department support modification of the existing nuclear waste repository program to establish a "centralized interim storage facility" for current inventories of commercial spent fuel? If so, does the Department support locating such a facility at one of its own sites?
- b. Does the NWPA or other existing law authorize the Department to establish such an interim storage facility at one of its own sites or elsewhere? Do you believe the statutory language of H.R. 2419 or the accompanying committee report confer new authority and requirements upon the Department to do so?
- c. Please identify each of the DOE sites that could be a candidates for an interim storage facility, and how quickly DOE could begin accepting waste at each site.
- d. If you believe the NWPA, other existing law, or H.R. 2419 (if enacted) authorizes the Department to establish an interim storage facility:
  - (i) Is there a limit under any of these authorities on how much waste the Department could accept at such a facility, or on how long waste could remain there?

- (ii) Would such a facility be required to be licensed by the NRC or another independent agency, such as is required for on-site utility storage? Would such a facility be subject to the Environmental Protection Agency's (EPA) radiation protection standards, which will be part of the licensing criteria for a repository at Yucca Mountain?
  - (iii) Which, if any, requirements of the National Environmental Policy Act of 1969 (NEPA) would apply to the Department's establishment of such a facility?
- 7. Although the statutory language of H.R. 2419 does not address the concept of centralized interim storage, the committee report suggests this facility should be funded from the Nuclear Waste Fund and provides a \$10 million increase over the Department's request for nuclear waste disposal, to be used for early acceptance of commercial spent fuel at the new facility.
  - a. Does the Department support diversion of these funds from work on the repository to a centralized interim storage facility?
  - b. Is the Department authorized by the NWPA or other existing law to use Nuclear Waste Fund monies to establish an interim storage facility? If not, do you believe H.R. 2419 confers such authority on the Department?
  - c. How much would the interim storage facility cost over its life cycle?
  - d. In light of the Department's estimates of likely funding shortfalls in the Yucca Mountain program, as provided by the Department's written testimony of March 10, 2005, before the Subcommittee on Energy and Air Quality, how much would the added costs of an interim storage facility delay the opening a Yucca Mountain repository?
  - e. Could establishment of an interim storage facility result in some utility ratepayers paying more in the long term due to:
    - (i) the additional cost of building and operating the interim storage facility?
    - (ii) added transportation costs for moving spent fuel once to the interim facility and again to the repository?
    - (iii) an effective shift in the source of reimbursement for the cost of at-reactor storage pending the Department's acceptance of spent fuel, from reimbursement through damage awards (paid from the Judgment Fund) to ratepayer-supported interim storage (paid from the Nuclear Waste Fund)?

8. The committee report acknowledges “there is an established queue that defines the order in which DOE is to take title to commercial spent fuel” but nonetheless states “there can be legitimate arguments to move fuel other than that with priority in the queue, such as spent fuel from reactors that are already decontaminated and decommissioned, or fuel from a utility which agrees to settle, drop, or otherwise limit its claim against the Federal government.”
  - a. What law, contract, or other policy requirements apply to the existing queue for DOE acceptance of spent fuel from utilities? What flexibility, if any, does the Department currently have to alter the queue?
  - b. Please provide information as to utilities’ respective rights under the existing queue.
  - c. Do you believe the Department has authority under current law to leapfrog utilities that “settle, drop, or otherwise limit” their claims (as described in the committee report) over other utilities in the queue? If not, would H.R. 2419 confer such authority? If so, does the Department support that policy?
9. If H.R. 2419 were enacted, could suits be filed alleging Congress had committed a separate breach of contract similar to that found in *U.S. v. Winstar*, (518 U.S. 839, 1996) by ordering the Department to (i) alter the queue and hence the order in which utility waste is accepted, or (ii) establish an interim storage facility, resulting in further delay of the date on which the repository at Yucca Mountain would open?
10. In comparison to reliance on the repository alone, how much would use of a centralized interim storage facility increase the total numbers of waste shipments?