Department of Energy
Washington, DC 20585

001.12 (107)

March 12, 1987

Honorable Philip R. Sharp
Chairman
Subcommittee on Energy and Power
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in further response to the legal questions that you directed to Secretary Herrington in your letters of February 2 and 12, 1987, and which I had the opportunity to discuss with the Subcommittee's professional staff in our meeting of February 27, 1987.

The first question dealt with the legal relationship between the Nuclear Waste Policy Act and the draft amendments to the Mission Plan that would propose indefinite suspension of site-specific work in the second repository program. Your letter quoted the pertinent excerpts from my memorandum of September 5, 1986 to the effect that, as a matter of law, an amendment to the Mission Plan, standing alone, would not have the legal effect of altering the provisions of sections 112 and 114 of the Nuclear Waste Policy Act insofar as they require particular recommendations by particular times regarding the second repository site. The Secretary's letter of February 11, 1987 likewise acknowledged the need for new legislation should the approach contained in the draft amendments to the Mission Plan for the second repository program be carried out.

Your second question dealt with the proposed extension of the date for the operation of the first repository from 1998 to 2003. As a general matter, precisely the same type of legal analysis is pertinent with respect to the first repository program as that which was done with respect to the second repository program. That is, as with the second repository program, an amendment to the Mission Plan, standing alone, cannot amend or supplant a specific requirement contained in the statute itself.

With respect to the requirements of sections 112 and 114, the first repository differs from the second not so much in the basic

legal principles necessary to our analysis, but rather in the different stages at which the two programs now find themselves. Site-specific work has continued in the first repository program, the selection of three sites for characterization required by section 112 of the Act has in fact been made, and the Department is proceeding toward selection of a site as is required by section 114 of the Act.

As to your third question, we have already provided a copy of the contract as requested in 3(a). Question 3(b) is addressed in responding to question 3(c) which posed several particular inquiries growing out of the Department's contract obligations to accept waste under this program.

In 3(c)(i) you inquired regarding the Department's fundamental obligation under the contract to provide the services set forth in the contract in accordance with its terms. These services are set forth in Article IV B of the contract, and include acceptance of title to spent fuel by DOE, provision of subsequent transportation for such material to a DOE facility, and disposal of such material in accordance with the terms of the contract.

In this connection, the contract obligation to provide "transportation for such material to the DOE facility" must be read in terms of the definition of "DOE facility" contained in Article I 10 of the contract. That definition expressly includes a facility to which spent fuel "may be shipped by DOE prior to its transportation to a disposal facility." The purpose of that definition was described in the preamble of the final rule adopting the contract terms "to expressly state, in accordance with the Act, that there may be an interim storage facility . . . which DOE may utilize prior to emplacement in a repository." 48 FR 16591 (April 18, 1983). Thus, in response to question 3(c)(ii), acceptance of spent fuel for storage at an MRS facility beginning January 31, 1998 would comply with the contract requirements that were based on the Nuclear Waste Policy Act, including section 302(a)(5)(B) of that statute. In response to question 3(b), the term "facility operations" is not separately defined in the contract.

In question 3(c)(iii) you inquired whether the Department would be in a position to take title to spent fuel by January 31, 1998 in the event a repository is not operational. This question was premised on depicting section 302(a)(5)(A) as one "which permits the Secretary to take title" to spent fuel after commencement of operation of a repository.

That section actually states that following commencement of a repository, "the Secretary shall take title to the . . . spent

nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such . . . spent nuclear fuel. . . ." Thus, we believe section 302(a)(5)(A) imposes a duty on the Secretary after commencement of repository operations to take title to spent fuel promptly on request, but does not foreclose the Secretary from taking title to spent fuel in advance of commencement of repository operations if that step is necessary and appropriate in fulfilling the terms of the contract by which the program is implemented.

I hope this information will be helpful to you and to the Subcommittee, and please let me know if you have any further questions.

Sincerely,

J. Michael Farrell
General Counsel

cc: Honorable Carlos J. Moorhead
Ranking Minority Member