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U.S. House of Representatives  
 Committee on Energy and Commerce

SUBCOMMITTEE ON ENERGY AND POWER

Washington, DC 20515

ROOM 22-331  
 HOUSE OFFICE BUILDING ANNEX NO. 2  
 PHONE (202) 226-2500

March 20, 1987

The Honorable John S. Herrington  
 Secretary  
 Department of Energy  
 Washington, D.C. 20585

Dear Mr. Secretary:

Thank you for the letter from the Department's General Counsel J. Michael Farrell, dated March 12, 1987, in response to the Subcommittee's request dated February 2, 1987.

Your response of February 11, 1987 states that carrying out waste activities in the way described in the proposed amendments to the Mission Plan "will require some form of new legislation to accomplish." Mr. Farrell's letter of March 12, 1987, makes clear that the postponement of the selection of the second repository will require "new legislation."

I agree with your General Counsel's current legal assessments. Normally, I would prefer not to continue to engage in a dialogue by letter, but in this case it is essential in order to resolve various statements made to the Congress and the public by Department officials about the need for, and desirability of, legislation.

For example, at a press conference on May 28, 1986, announcing your decision, the following exchange took place:

QUESTION: Would you not need Congressional ratification on your decision to suspend site-specific work on the second repository?

SECRETARY HERRINGTON: No. There is no site-specific work going on at this time. We also had the lawyers look at it very carefully. And we had a good input of information at this point.

Similarly, on July 8, 1986, in a letter to the Subcommittee on Energy Conservation and Power, you opposed various bills to completely terminate the second repository program. Rather than proposing amendments to the bills, or proposing your own legislation, you expressed the Department's opposition to all amendments to the Nuclear Waste Policy Act (NWPA), stating:

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 CORRESPONDENCE PDR

We would not favor the proposed changes to the current law. The Department's policy continues to be that the current law, which was the result of many years of intensive consideration by the Congress, provides a comprehensive and adequate framework to dispose of the Nation's high-level radioactive waste and spent nuclear fuel.

Now that the Department has acknowledged Congressional ratification through new legislation is required to carry out the Mission Plan amendment, it is important for our Subcommittee to know specifically what legislation you seek, what you oppose, and your reasons. You stated at our February 11, 1987, hearing that you would commence work on the second repository this summer if Congress fails to agree to your proposals through legislation. I am concerned that your decision not to propose legislation during the past ten months, and your opposition to amendments to the NWPA during that period, combined with the amount of time necessary for Congress to consider your legislative proposals when they are submitted, will cause a restart of the second repository program this summer whether or not that is the wisest policy choice.

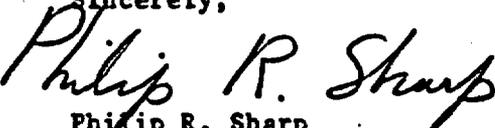
Of equal concern is what appears to be a possible intent on your part to avoid the authorizing committees, that is, the committees that wrote the NWPA, and to rely upon appropriations acts to circumvent the NWPA's requirements. As many of my colleagues expressed to you at our February 11 hearing, we would oppose such an effort. I am enclosing a copy of a letter that was sent recently to the Chairman of the House Appropriations Committee on this subject.

As I have stated before, there may be considerable merit in your policy views on the second repository postponement and first repository extension. Therefore, should you continue to believe that the proposed amendments to the mission plan are desirable, I request that you transmit to the Congress as soon as possible the proposed legislation that you believe is necessary. Should your request be a free standing bill, rather than in the form of an amendment to the NWPA, I request that as a service to this Subcommittee, the Department review each section of the NWPA and identify those sections which would require an amendment to make the law consistent with your amended mission plan. This analysis will aid the Subcommittee should it choose to draft amendments to the Act as the mechanism for considering your amended mission plan.

My letter of February 2, 1987, requested in question 3(c)(ii) a legal opinion of whether the acceptance of waste for storage in a monitored retrievable storage facility met the statutory obligation of section 302(a)(5)(b) of the NWPA. Mr. Farrell's response does not directly address this question, and instead discusses only the Department's contractual obligations. As part of either your legislative request, or the section-by-section analysis of the Act I requested in the previous paragraph, please explain whether section 302(a)(5)(b) should or should not be amended. I also await your response to question 3(d) of my letter.

I would appreciate your response no later than March 31, 1987, in order to allow the Subcommittee adequate time to consider your proposal and/or analyses.

Sincerely,

  
Philip R. Sharp  
Chairman

PRS:ds

Enclosure

# Congress of the United States

Washington, D.C. 20515

March 20, 1987

Honorable Jamie L. Whitten  
Chairman  
Committee on Appropriations  
H218 Capitol  
Washington, DC 20515

Dear Mr. Chairman:

We are writing to inform you of recent developments in the high-level nuclear waste program. Last month the Department of Energy (DOE) sent to the Congress a Draft Mission Plan Amendment. The Mission Plan is a comprehensive report which describes in detail DOE's plans for carrying out its responsibilities under the Nuclear Waste Policy Act (NWPA).

The Draft Amendment alters the current Mission Plan in three fundamental respects:

- o It establishes a revised and lengthened schedule for the first high-level waste repository;
- o It postpones site-specific work for the second repository until the mid-1990's; and
- o It announces DOE's intention to submit a proposal to construct a Monitored Retrievable Storage (MRS) facility.

Since the DOE first announced its plans to postpone site-specific work on the second repository, there has been considerable debate over the legality of such a decision, in light of the statutory deadline in the NWPA for the selection of three sites for a second repository by July 1, 1989. It is our view that the Draft Amendment is inconsistent with current law, and has no legal effect in amending the law's requirements. We are enclosing legal opinions by the DOE General Counsel and the General Accounting Office which confirm this view.

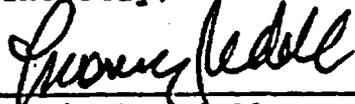
Nonetheless, Energy Secretary John Herrington has suggested, albeit ambiguously, that the Administration may construe an appropriation bill as congressional approval of the DOE plan. It is our opinion that only an amendment of the NWPA itself could relieve the Secretary of his legal responsibilities under the Act.

We are also concerned that the Department might seek to fund an MRS facility through an appropriation bill without first obtaining the specific authorization required by the NWPA. Should the courts permit the DOE to transmit its proposal for an MRS facility, we are prepared to consider any legislative request for a specific authorization. However, we would oppose any appropriation for an MRS facility prior to the enactment of specific authorization legislation.

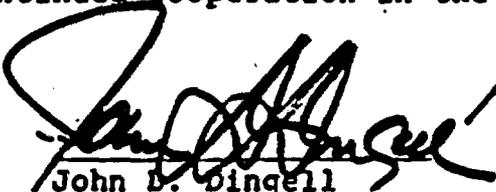
We appreciate the difficult situation in which the DOE's course of action places your Committee. We request that your Committee make clear to the DOE in your hearings and in your Committee Report on appropriations for the Nuclear Waste Fund that an appropriation cannot act to ratify a course of conduct that is contrary to the Secretary's responsibilities under the Act. For our part, we stand ready to consider any legislative amendments to the Act that the DOE believes to be advisable.

We appreciate your cooperation on this matter and look forward to working with you in continued cooperation in the coming year.

Sincerely,



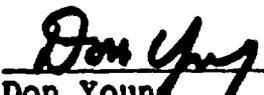
Morris K. Udall  
Chairman  
Committee on Interior  
& Insular Affairs



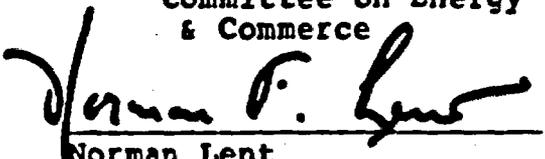
John D. Dingell  
Chairman  
Committee on Energy  
& Commerce



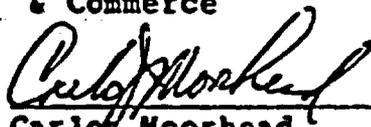
Philip R. Sharp  
Chairman  
Subcommittee on Energy  
& Power  
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Don Young  
Ranking Minority Member  
Committee on Interior  
& Insular Affairs



Norman Lent  
Ranking Minority Member  
Committee on Energy  
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Carlo Moorhead  
Ranking Minority Member  
Subcommittee on Energy  
& Power  
Committee on Energy  
& Commerce

Enclosure

cc: Silvio Conte, Ranking Minority Member, Committee on Appropriations  
Tom Bevill, Chairman, Subcommittee on Energy and Water Development  
John Myers, Ranking Minority Member, Subcommittee on Energy and  
Water Development