Department of Energy
Washington, DC 20585

October 6, 1992

The Honorable James R. Curtiss
Commissioner
Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Commissioner Curtiss:

During the Nuclear Regulatory Commission's meeting of June 24, 1992, you directed to me certain questions involving the Department's legal obligations under the Nuclear Waste Policy Act, and suggested that some of the Department's correspondence involving these issues had not enunciated consistent positions.

You first inquired whether the Department would be legally obligated either under the Act or under the Standard Contract to accept spent nuclear fuel in 1998 even if a Monitored Retrievable Storage facility were not ready to receive it at that time.

As was stated in a February 7, 1991, letter from the Department's General Counsel to the General Accounting Office, the Department's obligation to begin accepting spent nuclear fuel in 1998 arises "following commencement of facility operations." Neither the statute as a whole nor the Standard Contract purports to obligate the Department to begin accepting spent nuclear fuel in the absence of an operating facility at which the spent fuel can be either stored or disposed of in the fashion contemplated by the Act. I am enclosing for your information a copy of the February 7, 1991, letter from the Department's General Counsel which addresses this and several other related legal questions bearing on this program.

All of the Department's recent correspondence is entirely consistent on this point. My letter of February 14, 1992, to Commissioner Sanda indicated that neither the Act nor the Standard Contract imposes an unconditional obligation to accept spent nuclear fuel by January 31, 1998. This point is entirely consistent with the Secretary's letter of May 27, 1992, to Mr. Keesler, which emphasized the Department's policy commitment to meet the program schedule which calls for a Monitored Retrievable Storage facility to be operating by 1998. The Secretary's letter of May 29, 1992, to Mr. Howard concerned storage of spent nuclear fuel at a utility site, and again emphasized the importance the Department attaches to meeting all of its responsibilities under the Nuclear Waste Policy Act.

Finally, there is nothing inconsistent with the Department's descriptions of its legal obligation to accept spent fuel and the points made by former Secretary Hodel in his letter of February 7, 1984, to which you directed my attention during the June 24, Commission meeting. In sum, this letter stated that the Standard Contract, together with the "overall thrust" of the Nuclear Waste Policy Act, created an obligation of the Department "to accept spent fuel in 1998 whether or not a repository is in operation." Although the Nuclear Waste Policy Act itself explicitly required the Department to commit to accept spent nuclear fuel only "following commencement of operation of a repository," the Standard Contract established a less confining condition to the legal obligation to begin accepting spent fuel. It did so by paraphrasing the statutory condition such that it describes the obligation to begin accepting spent nuclear fuel as arising "after commencement of facility operations," and elsewhere by defining the term "facility" as including not only a repository but also "such other facility(ies) to which spent nuclear fuel...may be shipped by DOE prior to its transportation to a disposal facility." This definition includes a Monitored Retrievable Storage facility constructed and licensed under the Nuclear Waste Policy Act. Thus under the Standard Contract, as was stated by then-Secretary Hodel, once a Monitored Retrievable Storage facility is available, the Department will be obligated to begin accepting spent fuel "whether or not a repository is in operation."

Finally I want to emphasize that at no time during my appearance before the Commission on June 24, 1992, did I intend to convey any doubt of the consistency of positions adopted by the Department on these questions. Any hesitancy that I may have exhibited about speaking extemporaneously to some of the legal points that can be raised by this intricate statute should not be misinterpreted as implying any view on my part that the Department has been at all inconsistent in its carefully studied approach to these issues.

I hope this information will be helpful to you and the Commission.

Sincerely,

John W. Bartlett

John W. Bartlett, Director
Office of Civilian Radioactive
Waste Management

Enclosure

Department of Energy
Washington, DC 20585

FEB 7 1991

Martin J. Fitzgerald, Esq.
Special Assistant to the General Counsel
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Fitzgerald:

This responds to your letter of September 20, 1990, in which you raise a number of issues concerning the obligation of the Department of Energy (DOE) to accept and dispose of high-level radioactive waste (HLW) and spent nuclear fuel (SNF) pursuant to the Nuclear Waste Policy Act of 1982, as amended (NWPA).

The answers to some of your questions are interrelated. In order to avoid any redundancy or even confusion, I thought it would be useful to set forth the applicable statutory regime from which the particular obligations arise. Then, I think, the answers will follow logically and can be dealt with in an abbreviated manner.

Disposal Authority

The authority for delivery, acceptance, and taking title to HLW and SNF is provided in sections 111(a), 123 and 302(a) of the NWPA. Section 111(a) of the NWPA acknowledges the Federal Government's responsibility to provide for the permanent disposal of HLW and SNF in order to protect the public health and safety and the environment. The generators and owners of the waste materials, however, have the primary responsibility to provide for, and pay the costs of, the interim storage of HLW and SNF until such materials are accepted by the DOE. See section 111(a)(5) of the NWPA.

Section 123 of the NWPA provides that delivery, and acceptance by the Secretary, of HLW or SNF for a repository constitutes a transfer of title to the Secretary of such HLW or SNF. A repository is defined in the NWPA as a system licensed by the Nuclear Regulatory Commission for the permanent deep geologic disposal of HLW and SNF, whether or not such system is designed to permit the recovery, for a limited period during initial operation, of any materials placed in such system. See section 2(18).

Section 302(a) of the NWPA authorizes the Secretary to enter into contracts with the generators and owners of HLW or SNF of domestic origin for the acceptance of title, subsequent transportation, and disposal of such HLW or SNF.

Section 302(a) provides further that:

> Contracts entered into under this section shall provide that-
>
> (A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and
>
> (B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subtitle.

Storage Authority

Section 142 of the NWPA authorizes the DOE to accept HLW and SNF for temporary storage at a monitored retrievable storage (MRS) facility before fulfilling its obligation to provide for the disposal of such materials, subject to certain limitations specified in sections 141, 145 and 148 of the NWPA.

DOE therefore has provided in the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste (the Standard Contract) that it will take title to the materials "after commencement of facility operations...." 10 C.F.R. §961.11, Article II. The Standard Contract defines a DOE facility to include not only a disposal facility, i.e. a repository, but "such other facility(ies) to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility," e.g. an MRS facility.

Question 1:

Can DOE take title to high-level radioactive waste or spent nuclear fuel from private utilities prior to the commencement of operation of a repository? If so, what is DOE's legal authority for taking title?

Answer:

Under the Standard Contract, DOE can take title to HLW or SNF from private utilities prior to commencement of repository operations if an MRS facility has commenced operations.

Question 2:

What is DOE's legal obligation to "dispose" of high-level waste or spent nuclear fuel from the utilities? Under either the Act or its contracts, is DOE required to accept such waste beginning in 1998?

Answer:

As set forth above, under the NWPA, DOE is obligated to dispose of HLW or SNF from the utilities, beginning in 1998, following commencement of repository operations. Under the Standard Contract, DOE is obligated to accept waste, beginning in 1998, following commencement of facility operations.

Question 3(a):

What is the relationship of the statutory definition of "disposal" contained in the Nuclear Waste Policy Act to the Department's duty under (a) the Act and (b) the contracts, to "dispose" of utilities' high-level radioactive waste or spent nuclear fuel?

Answer:

Neither the NWPA nor the Standard Contract defines "dispose." Section 111(a) of the NWPA acknowledges the Federal Government's responsibility "to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment...." In both the NWPA and the Standard Contract, "disposal" refers to the emplacement in a repository of HLW or SNF with no foreseeable intent of recovery, whether or not such emplacement permits recovery of the materials. Under 302(a) of the NWPA and Article IV of the Standard Contract, DOE has the responsibility to "dispose" of these materials in accordance with the NWPA and the Standard Contract. Thus, DOE believes that its obligation to "dispose" is the obligation to emplace in a repository. As described in 3(b), below, DOE can undertake temporary waste storage at an MRS.

Question 3(b):

Does either the statutory or contractual requirement to "dispose" of waste include temporary storage at an MRS?

Answer:

Neither the statutory nor the contractual "disposal" requirement includes temporary storage at an MRS. However, under the NWPA

and the Standard Contract, DOE can accept the materials for temporary storage at an MRS facility before fulfilling its obligation to provide for their "disposal."

Question 3(c):

If so, what is the Department's legal authority for providing temporary storage?

Answer:

Section 142 of the NWPA authorizes DOE to site, construct, and operate an MRS, subject to the limitations specified in sections 141, 145 and 148 of the NWPA.

Question 3(d):

What is the difference between "storage" and "pre-disposal packaging?"

Answer:

The Act defines "storage" as the retention of HLW, SNF, or transuranic waste with the intent to recover such waste or fuel for subsequent use, processing, or disposal. The term "pre-disposal packaging" is not defined in either the statute or the Standard Contract and may be subject to varying interpretations. However, in previous public statements DOE has used "pre-disposal packaging" to refer to a potential use that could be made of an MRS: to prepare and package high-level radioactive waste and spent nuclear fuel for disposal, prior to transportation to the repository for emplacement.

Question 4:

If neither the repository nor an MRS facility is in operation by 1998, how will DOE be able to meet its statutory and contractual obligations to the utilities? If DOE is unable to accept waste by 1998, does the contract provision dealing with delays become operative? How does the Department expect that these provisions will be implemented?

Answer:

As previously noted, the obligation by DOE to accept the materials in 1998 arises "following commencement of facility operations." However, DOE anticipates that acceptance of the materials at an MRS facility can begin in 1998, in accordance with the Secretary of Energy's initiatives detailed in the

November 1989 "Report to Congress on Reassessment of the Civilian Radioactive Waste Management Program". In any event, it would be appropriate to consider the effect of such contract provisions only after all the facts and circumstances are known. Therefore, the Department has not considered what actions it may pursue or whether the contract provision dealing with delays may become operative if no facility is available.

Question 5:

Does the Department plan to amend the contracts to modify the date for acceptance of waste? Would such an amendment require a legislative change to the Nuclear Waste Policy Act?

Answer:

DOE does not plan to amend the Standard Contract because, as stated above, DOE anticipates that acceptance of the materials will begin at an MRS facility in 1998.

I trust that these comments are responsive to your inquiry.

Sincerely,

Stephen A. Wakefield
General Counsel

The Secretary of Energy
Washington, DC 20585

May 29, 1992

Mr. James J. Howard
Chairman and Chief Executive Officer
Northern States Power Company
414 Nicollet Mall
Minneapolis, Minnesota 55401-1993

Dear Mr. Howard:

Thank you for your letter of April 15, 1992, concerning an Administrative Law Judge's (ALJ) recommendation that the Minnesota State Public Utilities Commission (PUC) deny or defer to the State legislature Northern States Power Company (NSP) request to build a dry cask storage facility for spent nuclear fuel. The Department is very concerned that this ALJ decision, if adopted by the PUC, could force NSP to derate and possibly even shut down a safe, reliable, and economical nuclear power plant.

We fundamentally disagree with the conclusions reached by the ALJ with respect to whether the Department will succeed in siting and developing a permanent nuclear waste repository. I recognize that there are those who question the Department's ability to develop a monitored retrievable storage (MRS) facility and a permanent waste repository in a timely manner. Let me make very clear, however, that the Department is committed to fulfill the mandates imposed by the Nuclear Waste Policy Act.

Recent developments suggest that, contrary to the ALJ's decision, the Department will develop a permanent nuclear waste repository in a timely fashion. First, the schedule delays caused by litigation with the State of Nevada are largely behind us. Nevada has now issued the three permits that were the subject of litigation. We began new Yucca Mountain site characterization work last year and are making good progress. Second, we have accomplished specific milestones in our site suitability evaluation. These include completion of a baseline plan for the characterization work, completion of an interim evaluation of site suitability, and redesign of the underground Exploratory Studies Facility. Further, a panel of the National Academy of Sciences has provided a compelling basis for favorable resolution of one of the key-site suitability issues.

I am also heartened by the action taken by the House of Representatives on May 21, 1992, to include in H.R. 776 authority

to enable us to proceed with further site studies at Yucca Mountain without procedural delays by Nevada. This clearly demonstrates Congressional resolve not to permit spent nuclear fuel to permanently remain at reactor sites.

Our current schedule calls for having an MRS facility operating by 1998. The permanent repository will commence operation within 6 years of completion of the Nuclear Regulatory Commission reviews of the repository license application. We expect to start accepting spent fuel at the repository in 2010.

The MRS schedule assumes that the Nuclear Waste Negotiator will begin development of a negotiated agreement with the candidate MRS host in the first half of 1993. Because this is a voluntary process being carried out with a number of parties, it is not possible to establish a more precise date at this time. However, the Negotiator has identified a number of jurisdictions that are candidates for future negotiations leading to hosting an MRS facility. Applications for 20 Phase I grants have been received from jurisdictions interested in investigating the feasibility of hosting an MRS facility. The first part of a Phase II grant was recently awarded to a potential host jurisdiction to study siting an MRS within its jurisdiction in greater detail. We anticipate additional Phase II applications and grant awards.

This effort is necessary prior to formal negotiations between the potential host and the Negotiator over the siting of an MRS. Once the Negotiator finalizes an agreement with a potential host, and the proposed agreement is enacted into law by Congress, construction of an MRS could proceed promptly.

To meet our schedules, we have established specific interim milestones to impose discipline and accountability. Top-level milestones are listed on the enclosure to this letter. Several occur during the next 2 to 3 years and will provide a means for readily measuring our progress. As part of this measurement process, we are continually assessing the MRS and repository programs to ensure that we are taking whatever action is necessary to meet our goals. The results of our latest assessment will be submitted as part of the fiscal year 1994 budget to be presented to the Congress in January 1993.

In sum, the Department has sound, integrated program plans that should enable us to begin spent fuel receipt at an MRS facility in 1998 and to begin accepting spent fuel at the repository in 2010. However, should it become clear that our currently-planned actions and progress towards the milestones listed in the enclosure will not ensure that the Department can accept spent nuclear fuel by 1998, we will take whatever actions are necessary and in

accordance with the law to meet our obligations under the Nuclear Waste Policy Act. Further, we would seek additional legislative authority if appropriate.

Under the Department's 10 CFR Part 961 regulations, the Department and NSP have a contract which commits the Department to accept title to, transport, and dispose of the spent fuel from Prairie Island. From our review of the shipment schedule for Prairie Island, combined with our commitment to accept spent nuclear fuel in 1998, we conclude that the spent fuel proposed to be stored in dry cask storage at Prairie Island will be shipped to an MRS facility within the 25-year time limit envisioned by the ALJ's recommendation.

I recognize that resolution of the waste disposal problem is critical to NSP and to the entire nuclear industry. It is a problem, therefore, which must have a satisfactory conclusion. The Department will continue to work to ensure that an MRS facility and a permanent repository are constructed expeditiously.

If the Department can provide more details for your use with the Minnesota PUC, we would be pleased to do so.

Sincerely,

James D. Watkins
Admiral, USN (Retired)

Enclosure

cc:
The Honorable Krista Sanda
Commissioner of the Minnesota
Department of Public Service

Enclosure

Key MRS Program Milestones

Complete Environmental Assessment of Potential Sites	June 1993
Submit Siting Recommendation to Congress	June 1993
Congress Complete Review of Siting Decision	September 1993
Complete Design in Support of Safety Analysis Report	September 1994
Issue Environmental Impact Statement (EIS)	August 1995
Submit License Application	September 1995
Start Construction of MRS Facility	September 1996
First Production of Transport Casks	January 1997
Start Receipt of Spent Fuel at MRS	January 1998

Key Yucca Mountain Milestones

Start Exploratory Studies Facility (ESF) Collar/portal Construction	November 1993
Start ESF In-situ Test Phase	September 1995
Start Repository License Application Design	June 1996
Issue Repository EIS Notice of Intent	May 1997
Start EIS Preparation	February 1998
Site Recommendation to the President	April 2001
Submit License Application to NRC	October 2001
NRC Complete Licensing Reviews	October 2004
Start Repository Construction	December 2004
Start Accepting Spent Fuel at a Repository	January 2010

The Secretary of Energy
Washington, DC 20585

May 27, 1992

Mr. Allen J. Keesler, Jr.
Chairman, American Committee
on Radwaste Disposal
Florida Power Corporation
P.O. Box 14042
St. Petersburg, Florida 33733

Dear Mr. Keesler:

Thank you for your letter of April 13, 1992, on behalf of the American Committee on Radwaste Disposal (ACORD), urging the Department of Energy (DOE) to review its position on DOE obligation to begin receipt of spent nuclear fuel (SNF) on January 31, 1998.

The Nuclear Waste Policy Act (NWPA) states that Congressional policy is to provide for the disposal of SNF in the near term, rather than leaving that problem to future generations. Congress viewed the disposal of SNF as a national problem and charged the DOE with responsibility for developing and implementing a Federal nuclear waste management system.

I take that responsibility most seriously. The DOE schedule to develop a nuclear waste management system, which was established in my November 1989 "Report to Congress on Reassessment of the Civilian Radioactive Waste Management Program," is to begin SNF acceptance from reactors in 1998 for storage in a Monitored Retrievable Storage (MRS) facility and to begin accepting spent fuel at a repository in 2010.

We have confidence that we will be able to meet our schedule despite the uncertainties inherent in a program of this magnitude. As you note in your letter, we have made significant progress over the last several months in the MRS program.

The efforts of the Nuclear Waste Negotiator have been rewarded by 20 requests for Phase I grants from jurisdictions interested in exploring the feasibility of hosting an MRS facility. Several of these applicants have strong prospects to enter into negotiated agreements. Based on this progress, the Negotiator expects that one or more MRS facility hosts can be identified by early next year. This would enable us to begin spent fuel receipt in 1998.

If, contrary to our current expectations, we are not able to begin spent fuel receipt at an MRS facility by January 31, 1998, the Department has determined that it is not legally obligated to accept SNF. We understand ACORD desire for certainty regarding the management of SNF, but nothing in the NWPA, or in the implementing contracts, requires DOE to take spent fuel if, despite our best efforts, we have no operating MRS facility in which to put it.

However, should it become clear to me that our currently-planned actions will not ensure that the Department can accept SNF by 1998, we will take whatever actions are necessary and in accordance with the law to meet our obligations under the Nuclear Waste Policy Act. Further, we would seek additional legislative authority if appropriate.

In summary, the DOE remains firmly committed to living up to our responsibilities under the NWPA, including our programmatic schedule goals. We are making good progress toward that end and welcome ACORD interest and support.

Sincerely,

James D. Watkins
Admiral, U.S. Navy (Retired)