



B-223315  
B-223370

September 12, 1986

The Honorable Edward J. Markey  
Chairman, Subcommittee on Energy  
Conservation and Power  
Committee on Energy and Commerce  
House of Representatives

Dear Mr. Chairman:

In your letter of June 5, 1986, you expressed concern regarding the Secretary of Energy's decision, announced on May 28, 1986, "to postpone indefinitely plans for any site-specific work related to a second [nuclear waste] repository." You asked that we undertake a study of the legal issues raised by this postponement.

In brief, even before the Secretary's decision, the Department of Energy (DOE) had said that it would not be able to meet the statutory deadlines in 1989 and 1990 for the second repository. Those deadlines were established in 1983. In light of subsequent experience, DOE believes they are very difficult, if not unrealistic, time frames, in part because the statutory process of seeking and responding to comments by affected groups has taken longer than anticipated.

Now, DOE has publicly abandoned, as a matter of policy, its efforts to meet the deadlines. While DOE has not yet failed to meet any of the statutory deadlines for the second repository, its decision to postpone site-specific work makes it highly unlikely that DOD will be able to support a recommendation for potential second repository sites by 1989. Unless the Congress acts, the deadlines remain binding on the Administration, and failure to take the required actions in 1989 and 1990 will violate the law. Under the Act, no penalty or other legal consequence will flow from this failure. However, at least one state has sued the Secretary seeking a court order requiring DOE to meet the statutory deadlines, or, in the alternative, enjoining DOE from proceeding further with first repository siting. Should the Congress intend that DOE move ahead with development of a second repository, it may wish to consider further legislative action. A detailed explanation follows.

B-223315  
B-223370

As you know, the Nuclear Waste Policy Act, 42 U.S.C. § 10101 et seq. (the Act), establishes a procedure designed to result in a Presidential recommendation to the Congress of a site for a second repository. (The site selection process mandated by the Act for the first repository continues and is not directly at issue here.) The Act requires DOE to nominate five sites by July 1, 1989, and to recommend three of them to the President as "candidate sites" which DOE believes are suitable for geologic and other testing ("site characterization"). 42 U.S.C. § 10132(b)(1)(C) After site characterization and other prescribed activities, but not later than March 31, 1990 (or March 31, 1991, if the President reports to the Congress by March 31, 1989, that he is extending the deadline), the President must recommend to the Congress the site he considers qualified, based on the Secretary's report to him, for a second repository. 42 U.S.C. § 10134(a)(2)(A), (B).

The Secretary, in his May 28 announcement, indicated in effect that the Administration would not attempt to meet these deadlines: the May 28 statement announced that "the Nation need not consider a second repository until at least the mid-1990's or much later."<sup>1/</sup> Because the Act does not require any action by DOE until 1989, DOE has not yet failed to meet any deadline imposed by the statute. However, at least one state has sued the Secretary because of the announcement. The state of Washington seeks a court order requiring that the schedule be met, or that DOE be enjoined from proceeding further with first repository siting.

In responding to your inquiries regarding this postponement, DOE said that it would "place the entirety of its proposal for continuing to carry out the second repository program before the Congress through an amendment"

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<sup>1/</sup> We have not analyzed the projections and other data DOE cites in support of this determination. Consequently, we have no position as to whether, or when, a second repository will be needed.

B-223315  
B-223370

to the nuclear waste program's mission plan.<sup>2/</sup> The Secretary said that this would "afford the Congress a thorough opportunity to review the second repository provision," under the statutory procedure for the mission plan to lie before the Congress before going into effect. Because of the pending litigation, the Secretary declined to discuss the issue of non-compliance with the statutory deadline for the second repository. (July 8, 1986, letter from Secretary Herrington, answer to question five.)

In response to our inquiry, DOE's Assistant General Counsel for Environment advises that DOE views an amendment to the mission plan as a vehicle for laying before the Congress its position regarding the second repository program. The mission plan amendment, according to this official, will "aid [the Congress] in taking whatever future legislative action on this subject that the Congress may consider appropriate." (August 11, 1986, letter from the Assistant General Counsel for Environment, DOE.)

DOE, of course, has no authority to change or eliminate deadlines imposed on it by the legislation. Unless the Congress acts, the 1989 and 1990 deadlines remain binding on the Administration. See, e.g., Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 954 (1983): "Amendment and repeal of statutes, no less than enactment, must conform with Art. I." Congressional inaction in response to DOE's mission plan amendment would not constitute ratification of DOE's proposal to postpone second repository siting.

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<sup>2/</sup> The Act required the Secretary to prepare and submit to the Congress by June 7, 1984, a "mission plan," "a comprehensive report . . . which shall provide an informational basis sufficient to permit informed decisions to be made in carrying out the repository program . . . ." The plan could be used after lying before the Congress for a specified period. 42 U.S.C. § 10221. ✓  
DOE submitted the mission plan to the Congress in July 1985.

B-223315  
B-223370

Thus, submitting an amendment to the mission plan would not, as a legal matter, vitiate noncompliance with the statutory deadlines, if that in fact occurs. Without action by the Congress to change the deadlines, a failure by the Administration to meet the deadlines, whether willful or otherwise, would violate the Act. However, the Act prescribes no consequences for failure to meet its deadlines.


If Congress wants DOE to adhere to the deadlines, it may wish to consider legislation specifically mandating that the deadlines be met and appropriating non-impoundable funds expressly for that purpose. However, according to DOE, there may be little the Congress can do to achieve the current legislated schedule. DOE has said that its experience in siting the first repository indicates that the 1989 and 1990 deadlines are unrealistic, even if DOE were to attempt to meet them. It argues that first repository site characterization alone, for example, will require 5 years to complete. The second repository siting program has not advanced to the site characterization phase. In September 1985 DOE announced that because of delays in siting the first repository, it would not be able to nominate five second repository sites until 1991 (the Act requires nomination in 1989), and the President would not recommend a second repository site until 1998, instead of 1990 as the Act requires. (We do not here address the issue of whether the deadlines are indeed unrealistic.)

If the Congress agrees with DOE that second repository siting activities should be postponed, it may wish to consider amending the Act to change or eliminate the deadlines currently imposed. An alternative would be to specify in DOE's appropriation that DOE may not use appropriated funds for second repository siting.

B-223315  
B-223370

activities.<sup>3/</sup> Because this approach would, in effect, ratify a postponement on a fiscal year basis, but would not repeal the underlying legal requirements to nominate five sites in 1989 and to recommend one site in 1990, it would necessitate congressional action each fiscal year.

Sincerely yours,

*for*   
Charles A. Bowsler  
Comptroller General  
of the United States

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<sup>3/</sup> Based on DOE's stated intention not to proceed with the second repository, the House-passed version of DOE's fiscal year 1987 appropriation, while it does not prohibit use of funds for a second repository, provides funding for nuclear waste disposal activities, which includes siting of the repositories, at a level arrived at by subtracting from the budget request an amount representing second repository funding. H.R. Rep. No. 670, 99th Cong., 2d Sess. 107 (1986). The Senate has not yet acted on the bill.