

ONE HUNDRED FIFTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON ENERGY AND COMMERCE

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August 21, 2017

The Honorable Rick Perry  
Secretary  
U.S. Department of Energy  
1000 Independence Avenue, S.W.  
Washington, DC 20585

Dear Secretary Perry:

I appreciate your commitment to following the Nuclear Waste Policy Act (NWPA) and resumption of the Yucca Mountain project. As you rightly expressed earlier this year, the Department of Energy (DOE) has a moral and legal obligation to dispose of our nation's nuclear waste and spent nuclear fuel (SNF). The Administration's budget request is a good first step to getting a nuclear waste program back on track. Addressing this issue is also critical for the long-term fiscal health of the Federal government, as evidenced by ballooning litigation costs paid out of the Judgment Fund.

The Committee on Energy and Commerce favorably reported H.R. 3053, the Nuclear Waste Policy Amendments Act of 2017, by a vote of 49-4. The bi-partisan legislation provides practical reforms to the NWPA to reestablish DOE's nuclear waste program and to fulfill DOE's legal requirement to dispose of SNF. One of these reforms will fix a broken financing system for the Nuclear Waste Fund (NWF), including by prohibiting reinstatement of the fee until the Nuclear Regulatory Commission (NRC) makes a final decision approving or disapproving the authorization to construct the Yucca Mountain repository.

In 2010, the previous Administration took a number of steps to terminate the Yucca Mountain project, closed DOE's Office of Civilian Radioactive Waste Management (OCRWM), and attempted to withdraw the pending license application from NRC consideration. Despite these actions, ratepayers continued to pay the nuclear waste fee for DOE for spent nuclear fuel disposal. Ratepayers continued to pay the fee until the U.S. Court of Appeals for the District of Columbia Circuit ordered DOE to suspend collection in the decision regarding *National Association of Regulatory Utility Commissioners vs. U.S. Department of Energy*.

On January 3, 2014, Secretary of Energy Moniz sent a notification to Congress with a proposal to adjust the nuclear waste fee to zero. The proposal noted:

“Consistent with the mandate issued by the United States Court of Appeals for the District of Columbia Circuit in *National Association of Regulatory Utility Commissioners v. United States Department of Energy* (Nos. 11-1066 and 11-1068 ; D.C. Cir 2013), and notwithstanding the absent of the determination required to be made pursuant to the Nuclear Waste Policy Act of 1982 (NWOA), as amended, 42 U.S.C. 10222(a)(4), I hereby propose, **subject to any further judicial decision in this proceeding, including with respect to the petition for rehearing *en banc* filed on January 3, 2014**, to adjust the fee, established by Section 302(a)(2) of the NWPA, 42, U.S.C. 10222(a)(2), to zero.”<sup>1</sup> [emphasis added]

Subsequently, DOE’s petition for a rehearing was denied. From the time the Obama Administration closed OCRWM and terminated its nuclear waste program until the fee collection was halted, ratepayers paid over \$2.5 billion to the Nuclear Waste Fund.

However, despite DOE’s ending fee collections in early 2014, the Congressional Budget Office (CBO) and Office of Management and Budget (OMB) have continued to include receipts for the NWF in baseline budget projections. CBO justified the baseline costs to Congress:

“CBO’s baseline projections of nuclear waste fees reflect uncertainty about events that could transpire under current law. **Utilities are not paying annual fees, and it is widely assumed that they are unlikely to resume paying fees in the absence of clear steps taken toward enabling DOE to begin to accept and dispose of waste.** However, notwithstanding the court ruling that required DOE to reduce annual fees to zero, the NWPA provides a mechanism for DOE to reinstate the fees if it can demonstrate—through a new assessment of the adequacy of such fees—that additional collections are warranted to cover the costs of implementing a legally justifiable waste management strategy. Given that possibility—that the Administration could pursue actions, under current law, to reinstate annual fees—CBO’s baseline follows the agency’s usual practices for projecting spending and receipts related to activities involving uncertain administrative actions. Specifically, CBO estimates the total amounts that would be collected if fees were fully reinstated and includes 50 percent of those amounts in its baseline. **Thus, CBO’s baseline includes \$385 million annually in nuclear waste fees—roughly half the amount that had been collected before utilities ceased payments.** The Administration follows similar procedures in preparing baseline projections of nuclear waste fees.”<sup>2</sup> [emphasis added]

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<sup>1</sup> Letter from Ernest J. Moniz to John Boehner, January 3, 2014.

<sup>2</sup> Kim Cawley, Chief, Natural and Physical Resources Cost Estimates Unit, Congressional Budget Office. Testimony before Committee on Energy and Commerce Subcommittee on Environment and the Economy, “*The Nuclear Waste Fund: Budgetary, Funding, and Scoring Issues.*” December 3, 2015. Accessible at: <https://energycommerce.house.gov/hearings-and-votes/hearings/nuclear-waste-fund-budgetary-funding-and-scoring-issues>



The CBO scoring of the baseline receipts for the DOE Nuclear Waste Fund appears to be based on a misunderstanding of the range of administrative action available to DOE under current law and the *NARUC v. DOE* decision. In order to clarify whether there is a rationale for including NWF receipts in the budget baseline, it would be helpful if DOE could provide succinct and direct responses to the following questions:

1. If OMB and CBO projections were accurate,<sup>3</sup> what is the estimated total NWF receipts collected since Secretary Moniz set the fee to zero in 2014?
2. To date, what is the actual level of NWF receipts collected since Secretary Moniz set the fee to zero in 2014?
3. Absent Congressional action on either new authorization legislation or appropriations, what action can DOE take administratively that would result in resumption of the collection of NWF fees?
4. The current scorekeeping guidelines, as reported in OMB Circular No. A-11, were originally put in place as part of the legislative history accompanying the enactment of the Budget Enforcement Act of 1990 (BEA). The BEA authorities expired in 2002. Since 2002, in how many instances has OMB administratively reclassified budget accounts from mandatory to discretionary or vice versa?
5. If Congress acts, either through authorization legislation or appropriations to re-establish the DOE nuclear waste program, thus enabling the resumption of the collection of NWF fees at some time in the future, does the Administration have authority to classify the resumption of the collection of fees as an offsetting collection to discretionary spending?

I appreciate your support and commitment to fulfill DOE's nuclear waste obligations. If you have any questions regarding this letter, please contact Andy Zach of the Committee Majority staff at (202) 225-2927.

Sincerely,



John Shinkus  
Chairman, Subcommittee on Environment  
Committee on Energy and Commerce

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<sup>3</sup> For example, the President's Fiscal Year 2018 budget was transmitted to Congress on May 23, 2017, more than halfway through FY 2017. The budget showed an estimated NWF receipts of \$388 million to be deposited in the Treasury in FY 2017. Additionally, on July 14, 2017, the Administration released its Mid-Session Review of the budget. The Mid-Session Review did not modify the FY 2017 receipt estimate for the NWF.

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cc: The Honorable Mick Mulvaney, Director  
White House Office of Management and Budget

The Honorable Frank Pallone, Jr., Ranking Member  
Committee on Energy and Commerce

The Honorable Paul Tonko, Ranking Member  
Subcommittee on Environment