

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-2927
Minority (202) 225-3641
August 21, 2017

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

Dear Secretary Perry:

The Nuclear Waste Policy Act established a January 31, 1998 deadline for the Department of Energy (DOE) to take title to spent nuclear fuel (SNF) for disposal. However, significant delays from DOE's nuclear waste management program have resulted in the Federal government being held liable for costs of storage at utility sites. Payments for these costs are drawn from an account known as the Judgment Fund.¹ Every year, DOE estimates the total expected liability due to this litigation as part of the Agency Financial Report (AFR).²

In 2008, DOE submitted the Yucca Mountain construction authorization to the Nuclear Regulatory Commission (NRC) and had in place a schedule to open the repository to receive SNF by 2017. At that time, the total expected liability was about \$12 billion and each year of delay in repository operations was projected to add \$500 million to the Federal government's total liability. However, DOE's experience since then has greatly diverged from those projections.

The Obama Administration terminated the Yucca Mountain project in 2009 and DOE subsequently had no basis to update its liability exposure. Despite the unknown disposal schedule, DOE estimated that liability would total \$13.1 billion if DOE began taking title in 2021.³ The 2009 AFR noted:

¹ The Judgment Fund is a "permanent, indefinite appropriation available to pay judicially and administratively ordered monetary awards against the United States."

² The Agency Financial Report "provides key financial and performance information that demonstrates DOE's accountability to enhance U.S. security and economic growth through transformative science, technology innovation and market solutions to meet our energy nuclear security and environmental challenges." For a list of recent reports see: <https://energy.gov/cfo/listings/agency-financial-reports>

³ "Budget Implications of Closing Yucca Mountain," Committee on the Budget. July 27, 2010.

“[t]he Department previously reported several developments that made it difficult to reasonably predict the amount of the Government’s likely liability. The courts have not resolved whether the Government can assert the unavoidable delays defense, under which, if applicable, the Government would not be liable for any damages. Future determinations on how the Department will meet its obligations under the standard contracts could materially decrease or increase the spent nuclear fuel litigation liability.”⁴

In 2010, the U.S. Court of Appeals for the Federal Circuit held that the U.S. government was unable to claim “unavoidable delays” defense and consequently taxpayers continue to be on the hook for these litigation costs.⁵

By Fiscal Year (FY) 2013, taxpayer liability increased 64% from the FY 2009 levels and totaled over \$19 billion. This estimate was based on the implementation of DOE’s “Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Waste” (Strategy). The key assumptions from the Strategy were “(1) spent nuclear fuel remains in all sites until 2021 at which time an interim storage facility will open and begin receiving spent nuclear fuel and (2) reactors will incur costs reimbursable by the Department until it fulfills its contractual obligations.”⁶

As you know, implementation of the Strategy was contingent on enactment of legislation because the Nuclear Waste Policy Act prohibits DOE from utilizing a private entity as an interim storage facility and the conditions for DOE to pursue a monitored retrievable storage facility have not yet been met. DOE’s subsequent AFRs for FY2014, 2015,⁷ and 2016 continued using the assumptions, although the expected date for DOE’s accepting used fuel was pushed back due to the lack of legislation.

While the projected increase of liability in 2010 was originally estimated to be \$500 million per year, the annualized increase from 2008 through 2016 is about \$2 billion and total anticipated liability is nearly \$30 billion. DOE notes:

“the industry is reported to estimate that damages for all utilities with which the Department has contracts ultimately will be at least \$50 billion. The Department believes that the industry’s estimate is highly inflated and...that the Government’s ultimate liability is likely to be significantly less than that estimate.”⁸

⁴ https://energy.gov/sites/prod/files/2009PARAFR_1.pdf

⁵ <https://www.law360.com/energy/articles/143101/fed-circ-cuts-through-doe-s-delays-defense>

⁶ <https://energy.gov/sites/prod/files/2013/12/f6/2013parAFR.pdf>

⁷ For example, the FY2015 report said “for the purposes of past liability estimates, new legislation was assumed to have been enacted by the end of calendar year 2014. While the Department believes the operational dates for facilities set forth in the Strategy may still be attainable, because legislation has not passed, operational dates were moved forward one year.” See: https://energy.gov/sites/prod/files/2015/11/f27/DOE_FY2015_AFR.pdf

⁸ https://energy.gov/sites/prod/files/2016/11/f34/DOE_FY2016_AFR.pdf

However, the established trend demonstrates that the industry estimate is quite possible. DOE's estimated liability is further conditioned on certain assumptions relating to how quickly the Department can take title and transport spent nuclear fuel.⁹

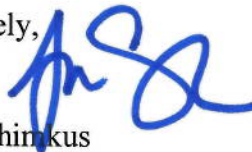
On June 28, the Committee on Energy and Commerce favorably reported H.R. 3053, the Nuclear Waste Policy Amendments Act of 2017, with a vote of 49-4. Enactment of H.R. 3053 would help DOE get its nuclear waste management program back on track to fulfill its legal obligations and reduce Judgment Fund payments associated with spent nuclear fuel litigation.

In order to help the Committee get a full understanding of how enactment of legislation would protect taxpayers from endless litigation claims, I request DOE's Chief Financial Officer, in coordination, as necessary, with the Department of Justice:

1. Brief Committee staff on the underlying assumptions that have justified DOE's previous liability estimates, including shipping acceptance rates, availability of transportation infrastructure, and program management.
2. Include in the consolidated and combined financial statements, submitted as part of DOE's FY 2017 AFR:
 - a. The estimated liability if H.R. 3053 is enacted, including a "best case scenario" for the expeditious pursuit of the Yucca Mountain repository in coordination with consolidated interim storage facilities authorized by the legislation;
 - b. The estimated liability if new legislation is not enacted, but DOE opened the Yucca Mountain repository in a reasonable timeframe; and
 - c. A "no action" scenario in which no legislation is enacted for interim storage and there is no further appropriation provided to develop a permanent repository.

I appreciate your responsiveness to this request. If you have any questions regarding this letter, please contact Andy Zach of the Committee Majority staff at (202) 225-2927.

Sincerely,



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

cc: The Honorable Jeff Sessions, Attorney General
U. S. Department of Justice

⁹ DOE has previously noted that it will not have the transportation resources available to ship spent nuclear fuel until 2023, thus making the 2021 goal unattainable.

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

The Honorable Paul Tonko, Ranking Member
Subcommittee on Environment