COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-164105

June 19, 1978

The Honorable John D. Dingell, Chairman
Subcommittee on Energy and Power
Committee on Interstate and Foreign
Commerce
House of Representatives

Dear Mr. Chairman:

You recently requested our views on statements made by the Department of Energy (DOE) to State officials regarding the establishment of nuclear waste repositories. In your letter, you express the belief that DOE may have exceeded its authority in giving certain States a "veto" over the establishment of nuclear waste repositories, as you are unaware of any statutory provision authorizing DOE to share decision-making responsibilities with the States. Accordingly, you request our opinion concerning the legal basis for these statements, particularly to the State of Louisiana.

A document entitled "Principles of Understanding," dated February 27, 1978, was signed by the Governor of Louisiana and by the Deputy Secretary of DOE. In it--

> "* * * the parties * * * agree that to the extent permitted by law, they will use their best efforts to adhere to the following policies and practices * * *:
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> * * * * *
>
> "8. Nuclear Storage--All Federal Government studies relating to nuclear waste disposal in the Vacherie Salt Dome in Webster Parish and the Rayburn's Salt Dome in Bienville Parish will be subject to this stipulation: the Department of Energy will not construct any nuclear waste repository for long-term disposal in Louisiana if the State objects. Studies of possible areas in Louisiana as well as in other states would continue with some test drilling which will always be preceded by complete discussions with state officials." (Emphasis added.)

Included with your letter were copies of correspondence with New York and New Mexico State officials. The March 22, 1978 letter from the DOE Deputy Secretary to the Governor of New York had the stated

purpose of clarifying DOE's position on State participation in establishing nuclear waste repositories. The letter said:

> "Let me reaffirm our conversation of last week that it is Secretary Schlesinger's view that the proposed location of nuclear waste geologic disposal facilities will be subject to State concurrence. We have not yet formulated specific views on the most appropriate procedures for implementation of this assurance. At the appropriate time this question would be approached initially through discussions between DOE and State officials. * * *"

In a letter to the New Mexico Attorney General, and in a separate letter to the Lieutenant Governor of New Mexico, both dated March 15, 1978, the Deputy Secretary gave similar assurances.

The Department of Energy Organization Act of August 4, 1977, 91 Stat. 565, Pub. L. No. 95-91, established DOE in the executive branch by the reorganization of energy functions within the Federal Government. Section 301(a) of the Act included, generally, the transfer to the Secretary of Energy of all functions formerly vested by law in the Administrator of Energy Research and Development, in the Energy Research and Development Administration (ERDA), and in officers and components thereof.

DOE, as successor to ERDA, is responsible for nuclear waste management, including the establishment of facilities for the storage and ultimate disposal of nuclear wastes (other than those limited categories covered by NRC-State agreements under section 274 of the Atomic Energy Act of 1954). In accordance with sections 102 and 103 of the DOE Organization Act, supra, it is to provide for public participation and cooperation with State and local governments in the development of national energy policies and programs and to give due consideration to the needs of a State where a proposed action conflicts with the State's energy plan. However, we are not aware of any statutory authority which extends the State's participation in the process of establishing nuclear waste facilities to the exercise of a right of noncurrence or "veto" power so as to prevent the selection of a particular site as a nuclear waste repository. Specific statutory authority would appear necessary for this purpose since the vesting of authority in DOE by the 1977 Act does not include the right to redelegate or share the nuclear waste disposal site selection authority with the States.

The lack of such authority, before the enactment of the DOE Organization Act, was recognized in Senate debate on the 1978 ERDA authorization bill. Senator McGovern offered an amendment to the bill which would have amended the Energy Reorganization Act of 1974 to prohibit

contracting for or construction of a radioactive waste storage facility in the event a State legislature by resolution or law, or a State-wide referendum, disapproves of the use of a particular site in the State. After a colloquy regarding the advisability of adopting the amendment, a majority of the Senate voted to "lay it on the table" (123 Cong. Rec. S 11643-11650 (daily ed. July 12, 1977)) and it was not subsequently acted upon. We find nothing in the DOE Organization Act, enacted thereafter, which would support a conclusion that the States could be given a "veto" power by DOE.

Pursuant to the request contained in your letter of April 21, 1978, to the Secretary of Energy, we were furnished with copies of DOE documents relating to the establishment of permanent nuclear waste repositories. Included was a memorandum prepared in the Department's Office of General Counsel on March 13, 1978, which we are informed represents that Office's current legal opinion. The memorandum concluded that the Secretary of Energy under existing law does not have the legal authority to enter into a binding agreement with a State pursuant to which the State would have the power to veto or forbid the establishment of a proposed nuclear waste repository in the State.

We agree with this view. In the absence of statutory authority permitting such action, we believe that any agreement by the Secretary of Energy, or any of his subordinates, with a State to make DOE's choice of a nuclear waste repository subject to rejection or disapproval by the State, is legally unenforceable.

In our view, however, the Secretary has not attempted to enter into a legally binding agreement with the State of Louisiana. The "Principles of Understanding," signed by DOE and the Governor of Louisiana, are described therein as "policies and practices," which will be followed "to the extent permitted by law." This is the kind of language typically used to set forth a mutual code of behavior which remains in force only so long as the parties agree to adhere to it. In basic contract hornbook law, it would be described as a "statement of intention," as opposed to an offer and acceptance with mutual obligation, or even a unilateral agreement on which the second party had a right to rely. In view of the carefully worded preamble to the DOE-Louisiana document, we do not believe that it could be considered by the parties to be a legally binding agreement. (These comments are, of course, equally applicable to any agreements with other States of similar tenor.)

In reply to your letter of April 21, 1978, the Deputy Secretary of Energy, on May 11, 1978, stated as follows:

"While we are continuing to improve our understanding of the technical issues that will have to be resolved with the Nuclear Regulatory Commission, the identification of potentially-suitable sites is a prime concern. This is a national issue with substantial local impact and we believe we should, as a matter of policy, act in a manner consistent with the desires of the state in which these facilities will be located. This issue was, as you know, discussed on the floor of the Senate last year and we recognize that the question of state participation in the siting process is a subject of pending Congressional proposals.

"In this connection we recognize that Congress has placed responsibility for final siting decisions upon the Department. Therefore, what we have done is to advise the states that the Department would not make a final decision to proceed with construction of a facility within a state if that state had indicated that it did not concur. In the course of my recent trip to New Mexico, I drew the distinction between the policy of respecting a state's non-concurrence and delegating to the state the final decision making authority in the form of a legally binding state veto over the siting decision, noting that I could not offer the latter."

From the foregoing, it appears that DOE's current policy is that of "respecting a state's non-concurrence." We understand this to mean that if, during DOE's consideration of a particular repository site, a State (through its Governor or otherwise) expresses disapproval of the proposed siting choice, the Department will not as a matter of policy choose the location in question, even though there is no legal requirement to abide by the State's wishes. While such a policy stance is not legally objectionable, the same considerations raised by Senator Church in reference to Senator McGovern's proposed amendment of the Energy Reorganization Act of 1974 to afford the States veto power over repository site selection, appear applicable:

"* * * for years now we have been trying to find a permanent depository for the wastes we have already created. As yet, we have not found a State government that has been willing to accept that depository. I think that it is a suggestion of what lies in store for the country if we adopt this amendment in its present form. The problems we face would become unsolvable." (123 Cong. Rec. S 1648 (daily ed. July 12, 1977).)

Apparently, there are only a limited number of sites in a few States which are suitable for a permanent repository. Under the above-stated DOE policy it appears that if each of the States were to object to any site selected in that State, none would be available for establishment of the repository. In such circumstances, if DOE is to exercise its authority to establish waste storage facilities, it would have to abandon its policy and choose a location without regard to the State's objection (as it is legally free to do). Failure by DOE to so act would mean, in effect, that the site selection decision would have to be made by the Congress.

Sincerely yours,

R.F.KELLER

Acting Comptroller General
of the United States