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ONE HUNDRED NINTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
FACSIMILE (202) 225-3974
MINORITY (202) 225-5051
TTY (202) 225-6852

<http://reform.house.gov>

January 24, 2006

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INDEPENDENT

The Honorable Samuel W. Bodman
Secretary
U.S. Department of Energy
1000 Independence Avenue SW
Washington, D.C. 20585

Dear Secretary Bodman:

This letter responds to your letter of September 9, 2005, regarding the Department's compliance with the subpoena issued by the House Committee on Government Reform (GRC) on July 20, 2005, compelling production of ten categories of documents relating to the Yucca Mountain Project. That letter states that the Department is proceeding to collect and produce all documents described in items one through six and item nine, but requests that the outstanding subpoena "be amended to exclude the draft license application information described in items seven and eight and to defer production of the materials related to the ongoing uncompleted review of the scientific work performed by" certain U.S. Geological Service ("USGS") scientists until that review is completed. As you know, I only issued the subpoena after the Subcommittee had exhausted all reasonable efforts for voluntary compliance with its requests.

Aside from these items, the Subcommittee has, to date, received documents responsive to items one through four, six, and nine. The Subcommittee, however, has not received documents responsive to item five. Specifically, the Subcommittee has not received a list of employees who worked on the water infiltration models from 1997 to the present, including both the names of the employees and the models they worked on. Thus, even aside from your request, the Department has failed to furnish information important to the Subcommittee's investigation and remains in noncompliance with the subpoena, regardless of my decision on your request.

As you know, as a result of our personal discussion last summer, I decided to forego at that time insisting that the draft license application (items seven and eight from the subpoena schedule) or documents relating to your internal review (item 10 from the subpoena schedule) be produced. I had forgone insistence on production of these items at that time to allow further investigation of the underlying falsification and out of respect

for the Department's concerns for the sensitivity of the documents and its claims regarding the legal status of the draft license agreement.

Since that time, however, further investigation has led me to the conclusion that a review of the draft license application by the Subcommittee is essential to determine the impact on the draft license application of the work contributed to the Project by the USGS scientists, as well as others whose work is implicated by the evidence of falsification already uncovered by the Subcommittee. Further, based on documentary evidence uncovered in recent months, there are indications of additional possible falsification of scientific records and apparent misconduct associated with engineering records. Thus, our need to review the application is heightened by the expanding scope of possible falsification.

Notwithstanding the fact that the draft license application remains a work in progress subject to revision in the future, the Subcommittee's ability to discern the extent of the relevant work contributed by federal employees and the significance attached thereto is absolutely essential at this time. Because examination of the application in this respect is an integral and logical next step of the investigation, a delay in the examination of the application, in and of itself, effectively obstructs the heart of the investigation. Such a result would run counter to the public interest.

In addition, it is my understanding that the previous legal concern regarding whether the draft license application would be made publicly available through the License Support Network (LSN) may no longer be valid. On September 22, 2005, the NRC Pre-License Application Presiding Officer ("PAPO") Board issued a Memorandum and Order granting the State of Nevada's June 6, 2005 motion to compel production of the Department of Energy's July 2004 Draft License Application. The NRC concluded that the Department's draft license application is documentary material, is a circulated draft, and is not protected by the litigation work product or deliberative process privileges and ordered the Department to make the draft license application available on the LSN. The Order was subsequently appealed on October 3, 2005, with respect to the definition of "circulated draft" and a stay was requested regarding the effectiveness of that Order pending a final Commission decision on the appeal.

It is my understanding that pursuant to NRC Memorandum and Order issued on November 11, 2005, the stay was denied and the Order requiring disclosure of the draft licensing agreement on the LSN remains in effect. Accordingly, the Department's legal concerns appear to be no longer valid.

Providing the draft license application should not prejudice the Department's process in any way, since the Department is already in the process of identifying and evaluating all of the technical and scientific work in the application done by any of the employees implicated in the potential falsification of documents. According to the testimony of Deputy Director of the Office of Civilian Radioactive Waste Management John Arthur at a Subcommittee hearing on June 29, 2005, the Department is "currently in

a process to re-evaluate data that has come under question on the infiltration model because our quality assurance requirements may not have been met." Thus, identifying portions of the draft license application that are supported by the work completed by those individuals implicated in the allegations of falsification should not be difficult since according to the Department it is already re-evaluating the data and is committed "to ensur[ing] that [it] has a sound technical basis going forward."

Records relating to that review are also the subject of item ten of the subpoena. Interviews of Department officials and employees in November revealed that the review has been completed and that a report entitled "Impact of Technical Evaluation Report" has been prepared. Accordingly it is now appropriate to produce that report to allow the Subcommittee to assess the scope, detail, and findings of the review.

Finally, with regard to item five called for by the subpoena, which requests a listing of Project employees who worked on the water infiltration models from 1997 through present date, the Subcommittee has requested this information since its first meeting with Department officials on April 27, 2005, as indicated above. Given that the water infiltration models are at the center of the alleged falsification of data, it is essential that the appropriate documents be provided to identify the models and those who worked on the models in question, inclusive of those who may have relied upon or adopted work performed by Alan Flint, Lorrie Flint and/or Joseph Hevesi. Although the Subcommittee investigators believe they have been able to piece this information together, it would still be quite helpful if the Department would produce this information to my staff. Although an actual "list" may not be in existence, I ask the Department to either prepare such a list or produce documents that will permit the investigators to prepare a list.

I also want to address any concerns you may have regarding the confidentiality of documents produced to the Subcommittee. The Subcommittee has never released documents produced by the Department in this investigation without first consulting with the Department. Even then, the Subcommittee has only released documents once over the objection of the Department. That particular release, however, involved the documents produced by both the Departments of Energy and Interior in response to the March 23, 2005 request concerning the e-mails and related documents at the center of the instant controversy and followed extensive consultation with both Departments. In fact, the Subcommittee told both Departments it intended to release those documents publicly even before they were produced to the Subcommittee.

Chairman Porter believed it was in the public interest to make these employee emails available, provided it did not interfere with ongoing criminal or inspector general investigations. There was enormous public concern about the nature, scope, and effect of the falsification of documents following the March 16, 2005 Department of Energy ("DOE") press release that announced "DOE contractors discovered multiple e-mails" that certain employees working on the Project "may have falsified documentation of their work."

Before releasing the documents, Chairman Porter gave serious consideration to the Department's claims that disclosure would affect these investigations. But no entity actually conducting the investigations has expressed any concerns with the Subcommittee's disclosure. In fact, as a special precaution, the Subcommittee staff personally contacted the Inspector General and Justice Department offices to discuss this matter and were advised they had no concerns.

Moreover, aware of the potential sensitivity involved, the Subcommittee asked both the Departments of Energy and Interior, well in advance of the March 29, 2005, production, to provide the Subcommittee with a redacted set of the requested documents to produce to the public, in addition to an unredacted set. The two Departments were asked repeatedly in unequivocal terms to redact the documents for public release and yet they chose not to redact the documents. When the Departments failed to redact the documents, the Subcommittee staff themselves, at my direction, redacted any sensitive and personal identifying information, erring on the side of caution. Some of the documents were so heavily redacted by Subcommittee staff that the substance of the documents became unclear.

Other than these documents, the Subcommittee has not made available, shared, or allowed for review any of the produced documents with anyone or any entity outside of the U.S. Congress; nor has the Subcommittee given copies of any of the produced documents to anyone outside of the Subcommittee. Consistent with past practice, the Subcommittee will consult with the Department of Energy before publicly disclosing any of the produced documents.

The scope and perspective of our investigation is the conduct of federal employees implicated in the alleged falsification of documents and scientific records and the impact of the work contributed by them to the Project. Thus, it is not our intent to undermine the confidentiality of the "employee concerns" files and the draft license application or to disclose sensitive national security information which should be segregated from portions of the draft license application produced that are non-classified.

Finally, I am in receipt of the recent November 2005 Inspection Report issued by the Department's Office of Inspector General entitled "*Quality Assurance Weaknesses in the Review of Yucca Mountain Electronic Mail for Relevancy to the Licensing Process.*" This report identifies additional emails containing language that could indicate possible conditions adverse to quality. Therefore, at this time, I am requesting unredacted copies of the five emails cited in Appendix A of the report. I am further advised that the Inspector's Office has reported these emails to the Department for further inquiry and investigation.

In view of these considerations, I respectfully request that the Department work with the Subcommittee in complying with the aforementioned request in addition to the outstanding subpoena items, namely items five, seven, eight, and ten no later than

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February 7, 2006. I also request that the Department continue its efforts to provide supplemental documentation as collection efforts continue.

I appreciate your cooperation in this matter. This important investigation must not be further delayed. Your accommodation of the Subcommittee in its pursuit of the public interest in finding out the truth would be greatly appreciated. Should you have any questions, please contact Keith Ausbrook, Chief Counsel, Government Reform Committee, at 202-226-6122.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Davis". The signature is fluid and cursive, with a large loop at the end.

Tom Davis
Chairman