

October 24, 2002

Dr. Thomas B. Cochran, Director, Nuclear Program
Mr. Geoffrey H. Fettus, Staff Attorney
Natural Resources Defense Council
1200 New York Avenue, N.W.
Washington, D.C. 20005

Dear Dr. Cochran and Mr. Fettus:

In your letter of September 26, 2002, to me, you invoke 10 CFR 2.206 and request that the Nuclear Regulatory Commission (NRC) “assert immediate regulatory jurisdiction over all DOE radioactive waste disposal facilities” As noted in your letter, this issue has been previously addressed on a number of occasions. Your reliance on recent NRC court filings is misplaced and does not provide a basis to revisit this issue pursuant to 10 CFR 2.206.

Your letter notes that the Natural Resources Defense Council (NRDC) “has long advocated that the Department of Energy’s (DOE’s) numerous radioactive waste storage and disposal facilities ... should be subject to licensing and regulation by the NRC.” You also note, however, that the NRC has in the past denied requests by the NRDC to assert regulatory jurisdiction over certain DOE waste facilities, on the ground that the NRC lacked authority over the facilities in question. Your letter then states your belief that the NRC has apparently changed its policy and reached “new legal conclusions” about the NRC’s “plenary jurisdiction over DOE radioactive waste disposal sites.”

As the basis for your view that the NRC asserts such “plenary jurisdiction” you cite Commission filings before the United States Court of Appeals for the D.C. Circuit in *State of Nevada v. NRC*, No. 02-1116. In that case the Commission moved the court to dismiss for lack of jurisdiction Nevada’s petition to review an NRC rule establishing licensing criteria for disposal of spent nuclear fuel at DOE’s proposed geologic repository at Yucca Mountain, Nevada. The Commission argued that the NRC had promulgated the rule pursuant to its authority under the Atomic Energy Act (AEA) and that the statutes governing judicial review of such rules established a 60-day deadline for seeking judicial review. Nevada filed its petition for review outside this deadline.

It was central to the Commission’s argument that the AEA, together with Section 202(3) of the Energy Reorganization Act of 1974, gave the Commission authority to license and regulate DOE’s proposed disposal at Yucca Mountain of high-level radioactive waste “resulting from activities licensed” under the AEA, *i.e.*, high-level radioactive waste from nuclear reactors licensed by the Commission. The NRC’s reply filing in the court of appeals points out the “activities licensed under the Act” limitation on the NRC’s authority (at p. 2), but your letter does not acknowledge this.

Nothing in the NRC’s court filings or other NRC documents you cite purports to claim “plenary jurisdiction” over all DOE radioactive waste disposal sites. Your letter quotes a sentence that appears in full on page 7 of the Commission’s motion to dismiss: “The NRC unquestionably had, and always has had, authority under the AEA to promulgate safety rules governing disposal of *spent nuclear fuel in a repository.*” (Emphasis added.) By omitting the italicized

language and replacing it with “at DOE sites” your letter misstates the limited nature and scope of the Commission’s assertion of authority. The Commission does not claim to have regulatory jurisdiction over “all DOE radioactive waste disposal facilities.”

Similarly, your reliance on the quotation from pages 4 and 5 of the Commission’s reply to the response to the motion to dismiss is misplaced. Read in context, it is clear that the quoted language refers to a geologic repository licensed under 10 CFR Parts 60 and 63. In fact, the very next sentence addresses the Part 60 rulemaking. There is no basis to infer that the reference to “a DOE nuclear disposal facility” was to anything other than a geologic disposal facility for high level waste. The Commission’s reply in no way evidences a regulatory position that the NRC has jurisdiction over all DOE disposal facilities.

In sum, I see no basis to support your request. Therefore the NRC will not “assert immediate regulatory jurisdiction over all DOE radioactive waste disposal facilities,” as you request.

Sincerely,

/RA/

William D. Travers
Executive Director for Operations

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