

POLICY ISSUE NOTATION VOTE

January 24, 2003

SECY-03-0009

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: DENIAL OF PETITION FOR RULEMAKING (PRM-63-1) - THE STATE
OF NEVADA

PURPOSE:

To obtain Commission approval to deny a petition for rulemaking (PRM-63-1) submitted by the State of Nevada.

BACKGROUND:

By letter dated July 12, 2002, the State of Nevada submitted a document entitled "Petition to Institute Rulemaking: Part 63" (Petition) (Attachment 1). The petition requests the U.S. Nuclear Regulatory Commission (NRC) to amend its regulations in 10 CFR Part 63 governing the disposal of high-level radioactive waste (HLW) in a proposed geologic repository at Yucca Mountain (YM), Nevada. The petitioner believes that the present regulations are deficient because they do not provide the regulatory framework to ensure that the repository isolates HLW over the long term primarily by geologic means and because they do not demand that the applicant provide an affirmative safety case for the repository. These deficiencies, in petitioner's view, indicate that the regulations are not in full compliance with the Nuclear Waste Policy Act of 1982, as amended (NWPA), and/or the Atomic Energy Act of 1954, as amended (AEA).

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Petitioner proposes amendments that, taken as a whole, are designed to cure these alleged deficiencies. These amendments include provisions requiring that: (a) the U.S. Department of Energy (DOE) use criteria, in its site characterization activities, that will ensure that the geologic setting of the YM site is the primary barrier for waste isolation; (b) DOE's license application include documentation propounding an affirmative safety case for the repository and consideration of potentially disqualifying conditions; (c) there be subsystem performance objectives for the geologic setting and for the peak dose; (d) the geologic setting shall constitute the primary barrier for waste isolation; and (e) the Commission find "reasonable assurance," rather than "reasonable expectation," that the individual protection standard after permanent closure will be met.

DISCUSSION:

The NRC staff has reviewed the petition and recommends denial because: (1) petitioner's assertion that Part 63 is not in full compliance with NWPA or AEA is completely without substance; and (2) the petition does not appear to present significant new factual information nor policy recommendations not considered by the Commission in the recent rulemaking which established Part 63. The staff believes it would be an unwise expenditure of resources to reconsider issues resolved in that rulemaking. Because no purpose would be served by soliciting public comment on issues already resolved in a recent rulemaking, the staff did not seek public comment on the petition. The reasons staff is recommending denial are briefly described below and more fully explained in the draft *Federal Register* notice denying the petition (Attachment 2).

Petitioner asserts that current Part 63 regulations are not in full compliance with NWPA because, in petitioner's view, the current rule does not "...provide the regulatory framework to assure that the repository isolates [HLW] over the long term primarily by geologic means." Nevada's PRM, page 4. The difficulty with petitioner's position is that there is no legal requirement in NWPA placing a duty on NRC to assure that geological barriers are the primary means of waste isolation. Congress gave directions to NRC regarding rulemakings to be undertaken to set requirements for a repository in Section 121 of NWPA. In doing so, Congress placed some restrictions on the substance of the regulations NRC was to promulgate, including the direction that NRC's criteria "...shall provide for the use of a system of multiple barriers in the design of the repository." Section 121(b)(1)(B) of NWPA. Congress did not, however, place any requirement that the geologic barriers be primary nor did Congress add any such requirement in subsequent legislative revisions to its HLW disposal program. Petitioner relies instead on Section 112 of NWPA, which requires DOE to establish guidelines for the recommendation of sites for repositories, including guidelines specifying that geologic considerations be the primary criteria for the selection of sites, and on Section 113 of NWPA, which requires DOE to establish criteria to determine the suitability of a candidate site for a repository. However, whatever duties these provisions of NWPA may place on DOE, they place no duties on NRC's examination of a license application for the site ultimately selected. In short, petitioner's claim that Part 63 is not in full compliance with NWPA is completely without foundation.

Petitioner also claims that Part 63 is not in full compliance with NRC's duty, in Section 161b. of the AEA, to establish rules governing the possession and use of radioactive materials "...as the Commission may deem necessary or desirable to promote the common defense and security or

to protect health or to minimize danger to life and property,” because Part 63 lacks requirements, such as subsystem performance objectives, or that the regulatory compliance period be broad enough to include the peak dose, which petitioner deems essential to establishing the safety of the repository. But the statute itself provides the Commission wide discretion in determining appropriate standards for the repository. The statute simply does not require the Commission to make the choices the petitioner prefers, rather than the standards the Commission has found sufficient for a determination that the repository will not pose an unreasonable risk to the health and safety of the public.

The NRC staff also recommends denial of the petition because reopening the final Part 63 rule would be an unwise expenditure of resources, given that the petition does not appear to present any significant new factual information not previously considered during the rulemaking proceeding. The Commission proposed its Part 63 rule on February 22, 1999 (64 FR 8640) and launched a rulemaking proceeding with enhanced public participation, including a series of public meetings in Nevada. Petitioner, and many others, filed extensive comments on the proposed rule, that the Commission fully considered before issuing the final rule on November 2, 2001 (66 FR 55732). The NRC staff has examined the petition to determine if petitioner has presented issues not previously considered, or significant new factual information on old issues. The staff finds that this is not the case. The issues of chief concern to petitioner (e.g., whether “reasonable assurance” or “reasonable expectation” should be used to characterize the degree of certainty to be achieved; whether the sub-system requirements of Part 60 should be retained; whether the regulations should include potentially disqualifying conditions; whether the compliance period should be longer than 10,000 years) were all treated at length during the Part 63 rulemaking. In arguing that the regulations must require DOE to present “an affirmative safety case” for the repository, petitioner relies on An International Peer Review of the Yucca Mountain Project TSPA-SR, March 2002 (Peer Review). This document criticizes DOE’s Total System Performance Assessment for the site recommendation process, issued in December 2000, particularly on the grounds that more attention needs to be given to system understanding, as opposed to numerical compliance with regulatory criteria. However, the views the Peer Review expresses are not new, and Part 63 does provide that NRC will consider a broad range of information in reaching a licensing decision, not just whether the numerical performance standards are met. Therefore, the staff does not believe that the Peer Review provides a basis for reopening issues determined in the Part 63 rulemaking.

COORDINATION:

The Office of the General Counsel has no legal objection to the denial of this petition.

RECOMMENDATIONS:

That the Commission:

1. Approve the denial of the PRM and publication of the *Federal Register* notice announcing the denial.

The Commissioners

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2. Note that appropriate Congressional Committees will be informed; and
3. Note that a letter is attached for the Secretary's signature (Attachment 3), informing the petitioner of the Commission's decision to deny the petition.

/RA/

William D. Travers
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for Operations

Attachments:

1. State of Nevada Petition dated July 12, 2002
2. Federal Register Notice
3. Letter to the Petitioner

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