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June 16, 1992

Mr. John Linehan
Division of High-Level
Waste Management
Unites States Nuclear Regulatory
Commission
Washington, DC 20555

RE: Pre-licensing Interaction Between the NRC and DOE; Scope, Purpose and Limits of NRC's Review of DOE Topical Reports

Dear Mr. Linehan:

On March 23, 1992, I wrote to you and Chairman Selin regarding various issues relating to the prelicensing interaction between the NRC and DOE. You responded on May 6 that the staff of the NRC Division of High-Level Waste Management, Office of Nuclear Material Safety and Safeguards, was in "substantial agreement" with the account of the events of the February 6, 1992 meeting between NRC, DOE and my staff that were synopsized in my letter.

Among other things, my March 23 letter addressed NRC reaction to topical reports proposed by the DOE. Our understanding was that NRC would not entertain any DOE topical reports until the NRC had prepared a draft statement of the purpose, scope and limits of NRC staff review of such reports. However, on April 22, 1992, DOE submitted its Outline for Topical Report on Erosion Rates at Yucca Mountain Geologic Setting: Methodology and Results (Outline) to the NRC. The cover letter from Mr. Roberts of DOE to Mr. Holonich stated that:

> This TR, when final will present the technical basis supporting a <u>conclusion</u> that extreme erosional conditions are not a factor bearing upon waste isolation potential at the Yucca Mountain site, and that sufficient information has been collected to support the absence of a potentially

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adverse condition per title 10 Code of Federal Regulation (CFR), Part 60.122(c)(16). . . .

Topical Reports are a means by which DOE will be submitting documentation to the U.S. Nuclear Regulatory Commission (NRC) staff concerning some aspect of compliance with 10 CFR 60. In TRs, DOE will document that: (1) adequate and sufficient data exist and/or adequate analysis has been performed during site characterization to support acceptance by DOE and NRC staff that <u>some aspect(s) of the requirements in 10 CFR 60 has been met</u>; or (2) a methodology is sufficient and acceptable for showing compliance. DOE intends that TRs will be incorporated into potential license application by reference, if the Yucca Mountain Site is found suitable. [Emphasis supplied.]

The conclusion section of the Outline proposed that the section would:

summarize the technical details presented above, <u>draw conclusions with respect to compliance with regulatory requirements and resolve the issue from an NRC and license application perspective</u>. [Emphasis supplied.]

A meeting to discuss the Outline was held on May 27, 1992. The purpose of this letter is to summarize and record the discussion and conclusions of that meeting.

<u>Appropriate Sequencing of NRC Consideration of DOE's Topical Report:</u>

Needless to say, we were much surprised to discover that the NRC was willing to entertain DOE's topical report before NRC has published even a draft statement of the purpose, scope and limits of NRC staff review of such reports. Nevada staff expressed this at the May 27 meeting. You explained (1) that NRC staff intended to entertain the topical report as a case study of the kinds of reaction which DOE was requesting; (2) that you still intended to publish a statement of the purpose, scope and limits of NRC staff review of topical reports and conduct a management meeting on that subject in the near future; and (3) that any reaction by NRC staff on the Outline would not be binding on NRC staff or the Commission in any event (see discussion of this subject below).

<u>Role of Topical Reports in a Licensing Proceeding</u>:

At the May 27 meeting, representatives of DOE explained that, in their opinion, "A Topical Report is a document prepared by DOE, upon its own volition or at the request of the NRC staff, on specific important-to safety subjects for submittal to the NRC for review independent of any licensing review." DOE anticipates that a topical report will be "approved" by NRC staff in the form of a

Safety Evaluation Report and referenced in the license application.

NRC staff responded that a topical report would not be used "to officially establish or change technical and/or regulatory positions, extract commitments, or agree to courses of action." NRC staff reiterated that topical reports "do not resolve/close licensing issues." "Resolution [of issues] must still be demonstrated in the license application." In addition, Mr. James Wolfe, representing the Office of General Counsel of the NRC opined that topical reports referenced in license applications, as well as NRC staff positions or comments which may have been made at any time regarding such topical reports, would have no probative value in a licensing proceeding. Mr. Wolfe's opinion was based on 10 CFR 60.18(1), which provides:

> The activities described in paragraph (a) through (k) of this section constitute informal conference between a prospective applicant and the staff, as described in § 2.101(a)(1) of this chapter and are not part of a proceeding under the Atomic Energy Act of 1954, as amended. Accordingly, neither the issuance of a site characterization analysis <u>nor any other comments of the Director</u> made under this section constitutes a commitment to issue any authorization or license or in any way affect the authority of the Commission, the Atomic Safety and Licensing Appeal Board, Atomic Safety and Licensing Boards, other presiding officers, or the Director, in any such proceeding.

Mr. John Roberts and Ms. Linda Desell, acting for the DOE, agreed with Mr. Wolfe's opinion and stated that all issues are not settled prior to the actual licensing proceeding and that any issue may be explored by the NRC staff in the future prior to licensing for any reason. We presume from these various statements of NRC and DOE that all parties, including intervenors, in any high level nuclear waste repository construction authorization or other licensing proceeding will be entitled to raise and discuss any issue regardless of the previous interaction between NRC staff and DOE.

In addition to the effect of 10 CFR 60.18(1) of preserving all issues for the licensing proceeding, you expressed that the NRC staff will not take a position at any time prior to commencement of the licensing proceeding that any of the particular requirements of 10 CFR 60 has been met. You stated that all of the DOE-NRC interaction is part of and in anticipation of the licensing process which the NRC engages in pursuant to its licensing authority. NRC's prelicensing interaction with DOE cannot, therefore, accurately be described as "independent of any licensing review". From this perspective, you stated that the greatest commitment which NRC staff could make in response to DOE's topical reports is: "Based on this information, we believe that this document would be acceptable to be referenced in a license application."

Consistency of 10 CFR 60.18(1) with the Agreement Reached at the February 6 Meeting.

We do not disagree with the NRC's reliance upon and interpretation of 10 CFR 60.18(1) that the NRC staff cannot bind the Commission, the ASLAB, other presiding officers or the Director in any subsequent proceeding. However, I have been surprised to discover that the NRC staff, including Messrs. William Parler, General Counsel, and James M. Taylor, Executive Director for Operations,[1] as well as Commissioner Kenneth Rogers[2] have characterized 10 CFR 60.18(1) as the essence of the agreement reached at the February 6 meeting, when it was not. The agreement reached at that meeting, and summarized in my March 23, 1992 letter, was as follows:

> . . . the term "closure", which both [NRC and DOE] use in the context of discussing continued controversy over technical issues, is an administrative term of art which means that there are no more questions and no more disagreement, for the present. The term "closure", does not mean "approval", as "approval" comes from the Commission itself, or its designated hearing panel.

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[1]See April 8, 1992, Memorandum to the Chairman from William C. Parler, General Counsel, and James M. Taylor, Executive Director for Operations, regarding "Openness of Interactions Between the U.S. Nuclear Regulatory Commission and the U.S. Department of Energy in the High-Level Radioactive Waste Management Repository Program" at page 2, lines 12-19, and accompanying "Report on Openness of Interactions Between the U.S. Nuclear Regulatory Commission and the U.S. Department of Energy in the High-Level Waste Radioactive Waste Management Repository Program", at page 8 lines 1-4.

[2]See, "the Unique Role of a Regulator in Ensuring Safe Management of High-Level Radioactive Waste", Remarks of Commissioner Kenneth C. Rogers, U.S. Nuclear Regulatory Commission at the International High-Level Radioactive Waste Management Conference, Las Vegas, Nevada, April 13, 1992, page 8. Commissioner Rogers correctly restated the February 6 agreement that "the term "closure" does not mean that any party to an eventual licensing proceeding is foreclosed from raising questions about an issue or submitting evidence relevant to an issue. DOE is entitled to decide to cease searching for additional information regarding a technical issue based on interactions with the NRC, but DOE accepts the risk of doing so." However, he incorrectly stated "The parties to [the February 6, 1992] meeting have agreed that, at this time, issues are "resolved" or "closed" only at the staff level."

Therefore, the term "closure" does not mean that NRC staff may not raise questions regarding the same issue later in the pre-licensing period. In response to the question: "What is the threshold standard for 'reopening' an issue previously addressed by the staff?" you responded that there was no threshold standard as issues were not "closed" in that sense.

Although 10 CFR 60.18(1) is not inconsistent with the agreement reached, it does not go far enough. Nevada staff clearly understood that the NRC staff would make no commitments to DOE which would bind the staff, let alone the Commission.

Procedure for Response to Topical Report on Erosion:

At the conclusion of the May 27 meeting you committed to defer reaction to DOE's Topical Report on Erosion until DOE staff communicated clearly what it wants in response. Thereafter, NRC staff will prepare a generic plan for the role of topical reports in NRC-DOE pre-licensing interaction. The plan will describe the nature and timing of NRC reaction to topical reports. The generic plan will be discussed at a management meeting. No reaction to the Topical Report on Erosion will be offered or issued until the generic plan is complete. No technical exchanges or other topical reports will be scheduled until the generic plan is complete.

Conclusion:

We trust that the NRC staff's decision to entertain DOE's Topical Report on Erosion, in order to present a case study of the kinds of reaction which the NRC staff might offer, does not constitute any retrenchment from the commitments made at the February 6, 1992 meeting as they are summarized in my March 23 letter.

We look forward to the NRC staff clarification of these procedural matters of concern which will provide for a mutual understanding among the parties of the staff's role and intent in its review of DOE topical reports.

Sincerely,

Robert R. Loux
Executive Director

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