

MAR 03 1994

Mr. John L. Meder, Senior Research Analyst
State of Nevada, Legislative Counsel Bureau
Legislative Building, Capitol Complex
Carson City, Nevada 89710

Dear Mr. Meder:

SUBJECT: RESPONSE TO QUESTIONS OF FEBRUARY 4, 1994

This is in response to your letter of February 4, 1994, which expressed a concern by Senator Hickey on the subject of environmental studies that have been conducted by the U.S. Department of Energy (DOE) for the Yucca Mountain Site Characterization Project. You suggest/request an analysis from NRC's perspective of an interview of Dr. Malone, published in the January 1994 *Nevada Nuclear Waste News* (Volume 5, No. 1). Your letter also includes three specific questions.

We would prefer not to review and comment on the responses by Dr. Malone to an interviewer's questions because we do not know the purpose and context of the interview and whether Dr. Malone considers that the article accurately reflects his actual responses. However, we are responding to your specific questions, and we will respond to other specific questions Senator Hickey or you may have regarding the points made by Dr. Malone in the article. The questions in your letter are repeated and answered below.

QUESTION 1. Is it the NRC's opinion that an adequate environmental impact analysis has been conducted to date by the DOE during the Site Characterization Program in order to comply with NRC and the U.S. Environmental Protection Agency standards?

RESPONSE: This inquiry is directed at DOE's activities to satisfy its responsibilities under the National Environmental Policy Act (NEPA) rather than the Atomic Energy Act -- i.e., analysis of environmental issues rather than radiological safety issues. The NRC has no responsibility or authority with respect to control of environmental impacts during DOE site characterization. However, the NRC has a limited, though important, role in this area at the time of licensing--one that reflects the mandate of the Nuclear Waste Policy Act that requires NRC to adopt the DOE environmental impact statement to the extent practicable. The Commission intends to participate constructively as a commenting agency in DOE's NEPA activities from the scoping stage through preparation of the environmental impact statement; but, as a general rule, NRC can adequately exercise its NEPA decisionmaking responsibility with respect to a repository by relying upon DOE's environmental impact statement rather than making an independent determination of compliance with NEPA.

NRC does not have an ongoing program to review DOE activities pertaining to NEPA compliance. It therefore has no opinion with respect to the adequacy of DOE's NEPA compliance to date. However, at such time as DOE

1 9403150096 940303
PDR WASTE
WM-11 PDR

*102.8
WM-11
NHK*

Mr. John L. Meder

The subject of NRC responsibilities with respect to implementation of NEPA was discussed extensively in two rulemaking documents that are enclosed for your information. (Enclosure 1, *Notice of Proposed Rulemaking*, 53 Fed.Reg. 16131, May 5, 1988; and Enclosure 2, *Notice of Final Rulemaking*, 54 Fed.Reg. 27864, July 3, 1989.)

QUESTION 2. If the DOE should determine that Yucca Mountain is suitable for a repository and submits a license application, does the NRC foresee any problems or delays in the licensing review process as a result of the environmental impact analysis work that has been conducted?

RESPONSE: In the absence of significant and substantial new information or new considerations not reflected in DOE's final environmental impact statement, NRC does not foresee any problems or delays in the licensing review process.

QUESTION 3. Are there additional studies or information on the environment and potential impacts from a repository that, in the NRC's opinion, should be developed to meet licensing procedure requirements?

RESPONSE: NRC staff views with respect to studies or information having radiological safety significance (and hence relevant to Atomic Energy Act issues) are set out in its comments on DOE program documents such as the Site Characterization Plan, license application annotated outline, etc. NRC has no opinion with respect to additional studies or information on the environment; NRC may, however, comment upon the need for such studies or information once DOE initiates the scoping process.

For clarification or additional information on these matters, please contact Philip Justus, On-Site Representative in Las Vegas, (702) 388-6125.

Sincerely,

B. J. Youngblood, Director
Division of High-Level Waste Management
Office of Nuclear Material Safety
and Safeguards

Enclosures: As stated

DISTRIBUTION (HLWM 94-04)

CNWRA
LPDR
RBallard, HLGE

NMSS R/F
ACNW
MFederline

HLPD R/F
PDR
JSpraul

LSS
CENTRAL FILES
On-Site Reps

OFC	HLPD	E	HLPD	E	HLPD	E	HLWM		HLWM	
NAME	PJustus/dh		JWolf		JHolonich		JLinehan		JYoungblood	
DATE	02/22/94		02/19/94		02/25/94		02/ /94		02/ /94	

C = COVER
s:\HLWM9404.PJ

E = COVER & ENCLOSURE
OFFICIAL RECORD COPY

N = NO COPY
February 22, 1994

Mr. John L. Meder

- 3 -

cc: R. Loux, State of Nevada
T. J. Hickey, Nevada Legislative Committee
J. Meder, Nevada Legislative Counsel Bureau
R. Nelson, YMPO
M. Murphy, Nye County, NV
M. Baughman, Lincoln County, NV
D. Bechtel, Clark County, NV
D. Weigel, GAO
P. Niedzielski-Eichner, Nye County, NV
B. Mettam, Inyo County, CA
V. Poe, Mineral County, NV
F. Mariani, White Pine County, NV
R. Williams, Lander County, NV
L. Fiorenzi, Eureka County, NV
J. Hoffman, Esmeralda County, NV
C. Schank, Churchill County, NV
L. Bradshaw, Nye County, NV

Enclosure 1

Notice of Proposed Rulemaking

53 Fed.Reg. 16131

May 5, 1988

determining whether such adoption is practicable.

In summary, under the proposed rule:

(1) The Commission will conduct a thorough review of DOE's draft EIS and will provide comments to DOE regarding the adequacy of the statement.

(2) If requested by Congress pursuant to the NWPA, the Commission will provide comments on DOE's EIS to the Congress with respect to a State or Tribal notice of disapproval of a designated site.

(3) The NRC will find it practicable to adopt DOE's EIS (and any DOE supplemental EIS) unless:

(a) The action proposed to be taken by the NRC differs in an environmentally significant way from the action described in DOE's license application, or

(b) Significant and substantial new information or new considerations render the DOE EIS inadequate.

(4) The DOE EIS will accompany the application through the Commission's review process, but will be subject to litigation in NRC's licensing proceeding only where factors 3(a) or 3(b) are present.

In accordance with NWPA, the primary responsibility for evaluating environmental impacts lies with DOE, and DOE would therefore be required to supplement the EIS, whenever necessary, to consider changes in its proposed activities or any significant new information.

DATES: Comment period expires August 3, 1988. Comments received after August 3, 1988 will be considered if it is practical to do so, but assurance of consideration is given only for comments filed on or before that date.

ADDRESSES: Submit written comments and suggestions to: Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC, 20555, Attention: Docketing and Service Branch. Copies of comments received may be examined at the NRC Public Document Room, 1717 H Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: James R. Wolf, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 492-1641.

SUPPLEMENTARY INFORMATION:

Table of Contents

Introduction
The Pre-NWPA Licensing Framework
The Nuclear Waste Policy Act of 1962
Site Selection under the Nuclear Waste Policy Act
NRC NEPA Responsibilities in Light of NWPA

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2, 51 and 60

NEPA Review Procedures for Geologic Repositories for High-Level Waste

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to revise its procedures for implementation of the National Environmental Policy Act (NEPA). The proposed rule would address the Commission's role under NEPA in connection with a license application submitted by the Department of Energy with respect to a geologic repository for high-level radioactive waste (HWL). The changes are needed in order to reflect the provisions of the Nuclear Waste Policy Act of 1982 (NWPA), as amended. Under that Act, the Commission is required to adopt the Department's environmental impact statement (EIS) to the extent practicable. The proposed rule, among other things, sets out the standards and procedures that would be used in

Legislative History

"Adoption" and the Nuclear Waste Policy Act

The Preclusive Effect of Section 119

The Nuclear Waste Policy Amendments Act of 1987

The Proposed Rules

Actions Requiring Preparation of

Environmental Document

Submission of Environmental Information

Preparation of Environmental Impact Statements

NEPA Procedure and Administrative Action

Public Information

Commenting

Responsible Official

Conforming Amendments

Petition for Rulemaking

Environmental Impact Categorical Exclusion

Paperwork Reduction Act Statement

Regulatory Flexibility Certification

List of Subjects in 10 CFR Part 2

List of Subjects in 10 CFR Part 51

List of Subjects in 10 CFR Part 60

Issuance

Introduction

All agencies of the Federal Government are charged with the duty to interpret and administer the laws of the United States, to the fullest extent possible, in accordance with the policies set forth in the National Environmental Policy Act of 1969, as amended (NEPA), 42 U.S.C. 4321 *et seq.* Under NEPA, the Nuclear Regulatory Commission is required to prepare an environmental impact statement (EIS) with respect to any major Federal action in which it is engaged that might significantly affect the quality of the human environment. The EIS contains a detailed statement of the environmental impacts of a proposed action, including adverse unavoidable effects resulting from its implementation, as well as an identification and environmental evaluation of alternatives to the proposed action.

The Commission is responsible for the licensing and regulation of activities involving the possession of nuclear materials. Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.* The Department of Energy (DOE) must obtain a license from NRC before disposing of high-level radioactive waste (HLW) in geologic repositories. Section 202, Energy Reorganization Act of 1974, 42 U.S.C. 5842. The licensing of DOE to receive and possess HLW at a geologic repository involves one or more major Federal actions which might significantly affect the quality of the human environment. Accordingly, NEPA requires the Commission to have an EIS (or multiple EIS's if more than one major Federal action by NRC is involved) to accompany its decision process when it considers a license application from

DOE involving HLW disposal. Further direction regarding NRC's NEPA responsibilities is provided by the Nuclear Waste Policy Act of 1982 (NWPA), as amended, 42 U.S.C. 10101 *et seq.*

The Commission in 1984 promulgated revised regulations (10 CFR Part 51) to implement section 102(2) of NEPA, the section which, among other things, calls for the preparation of an EIS. 49 FR 9352, March 12, 1984, and 49 FR 24512, June 14, 1984. In issuing these regulations, the Commission noted that it had initiated a review of the licensing procedures applicable to geologic repositories in the light of the Nuclear Waste Policy Act and that the Commission would determine, as part of that review, whether further changes to 10 CFR Part 51 are needed. On July 30, 1986, the Commission promulgated certain amendments to 10 CFR Part 60, 51 FR 27158. Those amendments deal with (1) the role of NRC during site screening and site characterization activities and (2) State, tribal, and public participation in NRC activities with respect to geologic repositories. In proposing those rules, the commission had noted that issues pertaining to NRC responsibilities under NEPA will require modifications to 10 CFR Part 51 and that such amendments would be the subject of a subsequent rulemaking. 50 FR 2570, Jan. 17, 1985. The statement of considerations accompanying the final amendments advised that Part 51 "will need to be changed—specifically to (1) define the alternatives that must be discussed in an environmental impact statement; (2) exempt the promulgation of the NRC licensing requirements and criteria from environmental review under NEPA, and (3) set out procedures that will be followed by the Commission in determining whether or not to adopt the DOE EIS."

As contemplated by its prior statements, the Commission now proposes amendments dealing with NRC implementation of NEPA in connection with Department of Energy geologic repositories. A full appreciation of these amendments requires an understanding of NEPA itself and the Commission's original plans for meeting its NEPA responsibilities; an analysis of the text and legislative history of NWPA, and of the recent amendments thereto, with particular regard to the policies and procedures established by that law for the resolution of environmental issues; and, finally, the specific regulations the Commission would promulgate in order to implement the NWPA policies and procedures. These matters are examined in the following discussion.

The Pre-NWPA Licensing Framework

The Commission believes it will be helpful to outline the repository licensing procedure that it had approved before enactment of NWPA. As appears below, that procedure included a customary NEPA review of DOE's license application. With that intention in mind, the Commission required DOE to characterize at least three sites and to provide certain timely information to the Commission regarding its site selection process. The Commission's requirements had been promulgated before the passage of NWPA; and they were familiar to Congress. In some respects the new law tracked the Commission rules closely; in other cases, however, there were marked differences, and from these differences a modification of policy can be inferred. A review of the pre-NWPA framework is therefore essential.

To begin this review with fundamental considerations, it is first noted that the Atomic Energy Act of 1954 charges the Commission with several types of licensing responsibility. One class of Commission action is *materials licensing*. Under its statutory authority, the Commission prescribes such rules as it finds to be needed to assure that persons possess and use the regulated materials in a manner that protects public health and safety and is not inimical to the common defense and security. DOE's disposal of HLW at a geologic repository is subject to this materials licensing authority of the Commission. The Commission several years ago determined that it would be necessary, to protect health and safety, to review DOE's plans with respect to a geologic repository before commencement of construction. 46 FR 13971, Feb. 25, 1981 (final licensing procedures). Accordingly, DOE may not commence construction of a geologic repository unless it has first filed a license application and obtained the Commission's construction authorization. 10 CFR 60.3(b). A construction authorization is not itself a license, since it does not authorize possession or use of nuclear materials, but DOE's failure to comply with the requirement to apply for and to obtain construction authorization constitutes grounds for denial of the license that DOE would later need in order to receive high-level waste at the repository. Moreover, the Commission may, if necessary, issue orders to secure compliance with construction authorization conditions and to protect the integrity of the repository. 46 FR 13971.

In the pre-NWPA licensing framework, the Commission specified that an environmental report prepared in accordance with 10 CFR Part 51 was to accompany the license application. 10 CFR 60.21(a). The environmental report was to discuss relevant NEPA considerations. In particular, as provided by this regulation, 10 CFR 51.40(d)(1983):

The discussion of alternatives shall include site characterization data for a number of sites in appropriate geologic media so as to aid the Commission in making a comparative evaluation as a basis for arriving at a reasoned decision under NEPA. Such characterization data shall include results of appropriate in situ testing at repository depth unless the Commission finds with respect to a particular site that such testing is not required. The Commission considers the characterization of three sites representing two geologic media at least one of which is not salt to be the minimum necessary to satisfy the requirements of NEPA. (However, in light of the significance of the decision selecting a site for a repository, the Commission fully expects the DOE to submit a wider range of alternatives than the minimum required here.)

Failure to provide the specified site characterization data would constitute grounds for denial of a license application. 10 CFR 2.101(f)(4). If DOE had prepared its own EIS, that document could be submitted so long as it contained the information called for by the regulation; the Commission noted, however, that it could not be bound to accept judgments arrived at by DOE in its EIS. 46 FR 13973.

NRC was to publish notices of the availability of the environmental report and of its intent to prepare an environmental impact statement. 10 CFR 51.50(a), (b)(1983). An environmental impact statement would be required before issuance of a construction authorization. 10 CFR 51.5(a)(11)(1983); and an EIS might also be determined to be necessary for issuance of the license to possess high-level waste at a repository. *id.* at § 51.5(b)(11), or to terminate such license. *id.* at § 51.5(b)(10). The EIS prepared before construction would be supplemented prior to issuance of a license to take account of any substantial changes in the activities proposed to be carried out or significant new information regarding the environmental impacts of the proposed activities. *id.* at § 51.41.

Whenever an EIS was required, it was first to be distributed as a draft and, after receipt of comments, NRC would then prepare a final EIS which would respond to any responsible opposing view not adequately discussed in the draft. The draft and final statements, and comments received, were to

accompany the application through the Commission's review processes. *Ibid.* (reference to §§ 51.22-51.28). In an adjudicatory hearing, as is required before issuance of construction authorization for a repository, the NRC staff was to offer the final EIS in evidence. Any part of the proceeding could have taken a position and offered evidence on NEPA issues. As a result of the hearing, the Commission could have arrived at findings and conclusions different from those in the final EIS prepared by the staff, and the final EIS would have been deemed modified to that extent. *Id.* at § 51.52(b).

Upon review and consideration of an application and environmental report, a construction authorization could have been issued if the following environmental standard was met:

That, after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, the action called for is issuance of the construction authorization, with any appropriate conditions to protect environmental values. 10 CFR 60.31(c).

While the Commission's formal NEPA determination would thus have been made in the course of licensing proceedings, the regulation (Buenos Aires, Argentina), provided further for NRC involvement at an even earlier stage—namely, at the time of site characterization. Site characterization is a program of exploration and testing that includes specified activities "to determine the suitability of the site for a geologic repository." 10 CFR 60.2(p)(1983). It is needed not only to determine whether defects are present, but also to determine specific properties such as homogeneity, porosity, the extent of fracturing and jointing, and thermal response of the rock. Site characterization data are needed so as to provide a satisfactory basis for arriving, with confidence, at the technical judgments underlying the Commission's initial licensing decision. 44 FR 70410, Dec. 6, 1979 (proposed licensing procedures). The Commission noted its belief that it would be necessary for DOE to carry out site characterization at three or more sites in two (or more) geologic media, at least one of which is not salt. Such a program of multiple site characterization would provide the only effective means by which NRC could make a comparative evaluation of alternatives as a basis for arriving at a reasoned decision under NEPA. It was estimated that \$30,000,000 represented the upper limit for the "at depth" portion of site characterization in soft rock, with a limit of up to about \$40,000,000 in hard rock. 46 FR 13972-73.

The Commission regulations called upon DOE to submit, in advance of site characterization, a Site Characterization Report, which would have been reviewed informally by NRC. In addition to describing the site to be characterized and the proposed site characterization program, the report would have included several items of information pertaining to site selection, specifically:

- The criteria used to arrive at the candidate area.
- The method by which the site was selected for site characterization.
- Identification and location of alternative media and sites at which site characterization is contemplated.
- A description of the decision process by which the site was selected for characterization, including the means used to obtain public, Indian tribal and State views during selection.

10 CFR 60.11 (1983). The Commission found the inclusion of plans for considering alternative sites to be necessary so that NRC could call to the attention of DOE, in a timely manner, additional information that might be needed by the Commission in reviewing a license application in accordance with NEPA. 46 FR 13972. (Also, in the preamble to the proposed licensing procedures, the Commission had discussed the requirement that DOE describe the site selection process, and State involvement therein. The Commission noted its belief, in this connection, that many issues, "including the NEPA questions related to alternatives and alternative sites," would be more easily resolved if State concerns were identified and addressed at the earliest possible time. 44 FR 70412.)

The Nuclear Waste Policy Act of 1982

[Note: Under this heading, the Commission reviews its NEPA responsibilities under the Nuclear Waste Policy Act as originally enacted; that is, this discussion does not reflect the 1987 amendments. The 1987 changes, which will be analyzed below (under the heading "Nuclear Waste Policy Amendments Act of 1987"), were not intended to alter the duties of the Commission with respect to NEPA; and it is therefore in order to review the pre-1987 situation in order to understand the Commission's role. All citations in this part of this notice are to NWPA as codified as of January 1, 1987.]

Congress established Federal policy for civilian radioactive waste disposal in the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10131 et seq.). The Commission's responsibilities for radiological safety, under prior law, were recognized and confirmed—most clearly in the express provision in section 114(f) that "Nothing

in this Act shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear [sic] Regulatory Commission as established in title II of the Energy Reorganization Act of 1974 (Pub. L. 93-438).¹ 42 U.S.C. 10134(f).

The statute provides for a licensing process that conforms closely to the preexisting framework of 10 CFR Part 60. NWSA thus requires DOE to carry out a program of site characterization, after first submitting to NRC a general plan for site characterization activities (along with certain information regarding waste form or packaging as well as a conceptual repository design). Section 113(b)(1), 42 U.S.C. 10133(b)(1). This corresponds closely to the Site Characterization Report provision of Part 60, 10 CFR 60.11(a) (1982); notably, however, the NEPA-related requirement of the regulation that DOE include site screening and selection information in its submission was omitted. (As discussed below, the site screening and selection information must be identified in a separate document—the environmental assessment—which does not require NRC review.)

As provided earlier in Part 60, an application is to be submitted in advance of construction. This is to be followed by Commission review in accordance with the laws applicable to such applications and a decision approving or disapproving the issuance of a construction authorization. Section 114 (b), (d), 42 U.S.C. 10134 (b), (d). In addition to its action on applications for construction authorization, the Commission would review, and approve or disapprove, applications for licenses to receive and possess the waste (and spent fuel) in a repository and applications for closure and decommissioning. See section 121(b), 42 U.S.C. 10141(b). For the corresponding provisions of NRC regulations, see 10 CFR 60.31 (construction authorization), 60.41 (license to receive and possess), and 60.51 (license amendment for permanent closure).¹

¹ One difference between the language of NWSA and Part 60 is worthy of note: that the statute differentiates between an application for construction authorization and an application for a license, whereas the regulation had referred, and continues to refer, solely to an application for a license to receive and possess waste (to be filed prior to construction). The Commission considers this differentiation to lack any substantive significance in the view to the Commission, the information it needs in order to be able to consider the issuance of a construction authorization is generally the same as will be needed prior to issuance of the license to receive and possess HLW. For this reason, the Commission regulations call for the application to be as complete as possible in the light of information that is reasonably available at the time of docketing—i.e., prior to commencement

The Nuclear Waste Policy Act also confirmed the Commission's most important stated position with respect to compliance with NEPA. In its regulations, cited above, the Commission had construed NEPA's direction to consider reasonable alternatives as constituting a mandate to characterize at least three sites, in at least two geologic media. Although establishing new procedures, NWSA followed precisely the same substantive approach.

Site Selection Under the Nuclear Waste Policy Act

The Nuclear Waste Policy Act directed the development of two geologic repositories. This section will describe the process leading to the selection of a site for the first repository. The process for a second repository was generally the same, except that the statutory dates for particular actions were several years later.

The site selection process, as carried out by DOE, began with the identification of States with "potentially acceptable sites"—sites at which DOE, after geologic studies and field mapping, was to undertake preliminary drilling and geophysical testing for the definition of site location. DOE was required to notify States involved, and affected Indian tribes, of the identification of such sites. Section 116(a), 42 U.S.C. 10136(a). DOE identified nine potentially acceptable sites for the first repository and provided notice to the six States in which such sites were located.

Before the selection process could move any further, DOE had to issue "general guidelines for the recommendation of sites for repositories." NWSA provided that, under the guidelines, DOE would need to consider the various geologic media in which sites may be located and, to the extent practicable, to recommend sites in different geologic media. The guidelines were to specify factors that qualify or disqualify a site from development as a repository; among the factors specified by the law were certain nonradiological environmental concerns as well as considerations related to the isolation of the radionuclides in the waste. NWSA required DOE, prior to issuance of the guidelines, to consult with the Council on Environmental Quality, the Environmental Protection

Agency, the Geologic Survey, and interested Governors. DOE was also required to obtain the concurrence of the Commission in the guidelines. Section 112(a), 42 U.S.C. 10132(a). Guidelines have been issued by DOE. 49 FR 47714, Dec. 6, 1984. The concurrence of the Commission in the guidelines was published in the Federal Register on July 10, 1984. 49 FR 28130.

DOE was directed, following issuance of the guidelines and consultation with the governors of affected States, to nominate at least 5 sites determined to be suitable for site characterization. Section 112(b)(1)(A), 42 U.S.C. 10132(b)(1)(A). Nomination had to be preceded by public hearings near the site, on which occasions residents of the area would be solicited with respect to issues that should be addressed by DOE in its environmental assessment and site characterization plan. Section 112(b)(2), 42 U.S.C. 10132(b)(2). Also, before nomination DOE was required to notify the States or affected Indian tribes of its intent to nominate a site and of the basis for such nomination. Section 112(b)(1)(F), 42 U.S.C. 10132(b)(1)(F). The nomination itself needed to be accompanied by an environmental assessment, which set out the basis for nomination and which discussed the probable impacts of site characterization activities. The environmental assessment, to be made public, would contain an evaluation of the suitability of the site for site characterization under the general guidelines, an evaluation of the suitability of the site for development as a repository under each guideline that does not require site characterization as a prerequisite for application, an evaluation of the effects of site characterization on the public health and safety and the environment, a comparative evaluation with other sites that have been considered, a description of the decision process by which the site was recommended, and an assessment of the regional and local impacts of locating the repository at the site. The sufficiency of an environmental assessment with respect to these matters was subject to the judicial review provisions of the statute, which generally require petitions for review to be filed within 180 days after the action involved. Section 112(b)(1) (E through G), 119; 42 U.S.C. 10132(b)(1) (E through G), 10139. On May 28, 1988, DOE released final environmental assessments on five potential repository sites (at Yucca Mountain, Nevada; Deaf Smith County, Texas; the Hanford Reservation, Washington; Richton Dome, Mississippi; and Davis Canyon,

of construction, 10 CFR 60.24(a). Accordingly, the Commission intends to retain its requirement of a unitary application; it is not required to, and it does not propose to, modify its rules to provide separately for applications for construction authorization on the one hand and a license to receive waste on the other.

Agency, the Geologic Survey, and interested Governors. DOE was also required to obtain the concurrence of the Commission in the guidelines. Section 112(a), 42 U.S.C. 10132(a). Guidelines have been issued by DOE. 49 FR 47714, Dec. 6, 1984. The concurrence of the Commission in the guidelines was published in the Federal Register on July 10, 1984. 49 FR 28130.

DOE was directed, following issuance of the guidelines and consultation with the governors of affected States, to nominate at least 5 sites determined to be suitable for site characterization. Section 112(b)(1)(A), 42 U.S.C. 10132(b)(1)(A). Nomination had to be preceded by public hearings near the site, on which occasions residents of the area would be solicited with respect to issues that should be addressed by DOE in its environmental assessment and site characterization plan. Section 112(b)(2), 42 U.S.C. 10132(b)(2). Also, before nomination DOE was required to notify the States or affected Indian tribes of its intent to nominate a site and of the basis for such nomination. Section 112(b)(1)(F), 42 U.S.C. 10132(b)(1)(F). The nomination itself needed to be accompanied by an environmental assessment, which set out the basis for nomination and which discussed the probable impacts of site characterization activities. The environmental assessment, to be made public, would contain an evaluation of the suitability of the site for site characterization under the general guidelines, an evaluation of the suitability of the site for development as a repository under each guideline that does not require site characterization as a prerequisite for application, an evaluation of the effects of site characterization on the public health and safety and the environment, a comparative evaluation with other sites that have been considered, a description of the decision process by which the site was recommended, and an assessment of the regional and local impacts of locating the repository at the site. The sufficiency of an environmental assessment with respect to these matters was subject to the judicial review provisions of the statute, which generally require petitions for review to be filed within 180 days after the action involved. Section 112(b)(1) (E through G), 119; 42 U.S.C. 10132(b)(1) (E through G), 10139. On May 28, 1988, DOE released final environmental assessments on five potential repository sites (at Yucca Mountain, Nevada; Deaf Smith County, Texas; the Hanford Reservation, Washington; Richton Dome, Mississippi; and Davis Canyon,

Utah). (The NRC staff had previously reviewed and commented on the draft environmental assessments for these sites.)

Subsequent to site nomination, DOE was required to recommend to the President three of the nominated sites for characterization as candidate sites. Section 112(b)(1)(B), 42 U.S.C. 10132(b)(1)(B). Upon arrival of the candidate sites, the States and affected Indian tribes were to be notified. Section 112(c), 42 U.S.C. 10132(c). On May 28, 1986, the Secretary of Energy formally recommended the sites in Nevada, Texas, and Washington, and these recommendations were approved by the President.

Before sinking shafts at an approved site, DOE is to submit to the States and affected Indian tribes—and, in this instance to the Commission as well—for their review and comment a general plan for site characterization activities, a description of the possible form or packaging of the waste, and a conceptual repository design. The general plan is to describe the site, the proposed site characterization activities, plans for decommissioning a site that is determined to be unsuitable (and plans for investigation of significant adverse environmental impacts of site characterization), the criteria to be used to determine site suitability (i.e., the siting guidelines), and other information related to site characterization activities required by the Commission. Section 113(b), 42 U.S.C. 10133(b). Congress has declared that site characterization activities shall not require the preparation of an environmental impact statement, or other environmental review under NEPA. Section 113(d), 42 U.S.C. 10133(d). However, DOE is to hold public hearings near a site, and to receive comments of residents of the area with respect to the site characterization plan. Section 113(b)(2), 42 U.S.C. 10133(b)(2). And those comments, as well as those received on the environmental assessments, are to be considered by DOE. DOE, in consultation with the States and affected Indian tribes (but not specifically the Commission), is to conduct site characterization activities in a manner that minimizes significant adverse environmental impacts identified in the comments. Section 113(a), 42 U.S.C. 10133(a). DOE is to report periodically to the Commission and to States and affected Indian tribes on the progress of site characterization and the information developed to date. Section 113(b)(3), 42 U.S.C. 10133(b)(3).

Under NWPA, the selection process was to continue with the identification

of one site for development of a repository. DOE was required to hold hearings near that site, and it was also required to complete site characterization not only for that site but for at least two other sites as well. DOE might recommend to the President that he approve the site where hearings were held. The recommendation, notice of which would be given to States and affected Indian tribes, was to be accompanied by a description of the proposed repository and waste form or packaging; a discussion of data, obtained in site characterization activities, relating to the safety of the site; a final environmental impact statement, together with comments made concerning such statement by the Commission and others; preliminary Commission comments regarding the sufficiency of data for inclusion in a license application; comments of States and affected Indian tribes, with DOE's response; and an impact report prepared by States or affected Indian tribes requesting financial or technical assistance, to mitigate impacts. Section 114(a)(1), 42 U.S.C. 10134(a)(1). Subject to a good cause exception, the EIS might only be reviewed by the courts if a petition is filed within 180 days after the date of the decision concerned (i.e., presumably, the recommendation to the President). Section 119(a)(1)(D), 42 U.S.C. 10139(a)(1)(D). The alternative sites to be considered in the EIS would consist of three sites at which characterization has been completed and DOE has made a preliminary determination of their suitability for development as repositories under the guidelines issued earlier. Section 114(f), 42 U.S.C. 10134(f).

The President might submit to Congress a recommendation of a site that had previously been recommended to him by DOE. By law, the President's recommendation would not require the preparation of an EIS or other NEPA environmental review. Section 114(a), 42 U.S.C. 10134(a). A State might disapprove a site recommended by the President, by giving notice of such action to Congress. Any such notice of disapproval is to be accompanied by a statement of the State's reasons. Section 116(b), 42 U.S.C. 10136(b). In the case of a site on a reservation, the affected Indian tribe might submit such a notice of disapproval. Section 118(a), 42 U.S.C. 10138. The President's recommendation would then become effective only if Congress passes a resolution approving the site, and such resolution thereafter becomes law. Section 115(c), 42 U.S.C. 10135(c). In considering a notice of disapproval, Congress might obtain

comments of the Commission, but the provision of comments would not bind the Commission with respect to any licensing action. Section 115(g), 42 U.S.C. 10135(g).

If the site designation becomes effective—by virtue of a State or Tribe's failure to disapprove within the specified times or by virtue of the Congressional override of the State's or Tribe's notice of disapproval—DOE was directed then to submit its application to the Commission. Section 114(b), 42 U.S.C. 10134(b). The Commission was to consider an application in accordance with the laws applicable thereto. Section 114(d), 42 U.S.C. 10134(d).

If DOE's application is acceptable, the site selection process would then end, subject to judicial review, with the Commission's issuance of a construction authorization.

NRC NEPA Responsibilities in Light of NWPA

The Nuclear Waste Policy Act of 1982 generally preserves the Commission's obligation to comply with NEPA. Nevertheless, the scope of the inquiry and the standards and procedures to be applied in arriving at findings in accordance with NEPA are clearly influenced by the express and implied mandates of the later statute. The import of NWPA is especially forceful in relation to site selection, but the Commission regards the statute as having a pervasive effect upon all of its NEPA responsibilities.

First, there are several express provisions of NWPA that narrow the range of alternatives that must be considered in the environmental impact statement, especially for the first repository. Thus, DOE's compliance with the procedures and requirements of the Nuclear Waste Policy Act "shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository." Even more forcefully, the 1982 Act declares that any EIS prepared with respect to the first repository shall not consider the need for a repository or nongeologic alternatives to the site; and the alternative sites to be considered are those candidate sites (three in the case of the first repository, and at least three in the case of subsequent repositories) with respect to which site characterization has been completed and the Secretary of Energy has made a preliminary determination that such sites are suitable for development of

repositories. Section 114(f), 42 U.S.C. 10134(f).

In addition, section 114(f) directs the Commission to adopt DOE's EIS "to the extent practicable." As a minimum, this requires the Commission to give substantial weight to the findings of other bodies, where relevant to the determinations to be made by the Commission itself. This is consistent with prior practice. For example, in *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 527 (1977), the Commission observed that a competent and responsible state authority's approval of the environmental acceptability of a site or a project after extensive and thorough and environmentally sensitive hearings is properly entitled to such substantial weight in the conduct of its own NEPA analysis. Similarly, to the extent that Congress has enacted legislation approving a specific project, an agency's obligation to discuss alternatives in its EIS is relatively narrow; although the "rule of reason" applies, such action does have a bearing on what is considered a reasonable alternative and a reasonable discussion. *Isaak Walton League v. Marsh*, 755 F.2d 346, 372 (D.C. Cir. 1981), citing *Sierra Club v. Adams*, 578 F.2d 389, 396 (D.C. Cir. 1978). The concept of adoption, as it appears in NWPFA, is examined more fully below.

The Nuclear Waste Policy Act provides that adoption of the EIS shall be deemed to satisfy the Commission's NEPA responsibilities "and no further consideration shall be required." While the purpose of this provision is not entirely clear, it appears to counsel against the wide-ranging independent examination of environmental concerns that is customary in NRC licensing proceedings.

The final limitation on the Commission's consideration of NEPA issues stems from the judicial review provisions of the Nuclear Waste Policy Act. Section 119, 42 U.S.C. 10139 provides for the United States courts of appeals to have original and exclusive jurisdiction over any civil action for review of any environmental impact statement prepared with respect to a geologic repository and imposes a deadline of 180 days (with certain exceptions) for commencing such an action. Thus, a review of the adequacy of DOE's environmental impact statement must be sought, if at all, within 180 days after the Secretary has made a site recommendation to the President. As a minimum, any judicial findings with respect to the adequacy of the EIS prepared by DOE would be

entitled to substantial weight in the Commission's deliberations. But this statement is incomplete. As explained below, if the EIS prepared by DOE has been adjudged to be adequate for purposes of the site recommendation made by the Department, further litigation of the issues in NRC adjudications would be precluded under the doctrine of collateral estoppel. *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3) ALAB-378, 5 NRC 557, 561 (1977). And, if an issue bearing upon the adequacy of that EIS could have been raised, but was not raised in a timely manner, the deadline for commencing action set out in section 119 operates to bar a challenge at a later date in NRC licensing proceedings.

In the light of the policies and procedures established by the Nuclear Waste Policy Act, the Commission regards the scope of its NEPA review to be narrowly constrained, with those issues that were ripe for consideration after issuance of DOE's EIS being excluded from independent examination, for purposes of NEPA, in the course of NRC licensing proceedings. It will be useful to review the legislative history of the Act and certain regulations of the Council on Environmental Quality, and to discuss applicable principles of repose, in order to explain the basis for the Commission's views.

Legislative History

The Nuclear Waste Policy Act of 1982 reflects a judgment that the Commission is to concern itself primarily with issues of health and safety rather than the other kinds of issues that are ordinarily considered in the context of reviews under NEPA. This judgment is especially clear in connection with the screening and selection of repository sites. The only provisions for NRC involvement in the site screening and selection process concern the issuance of the general guidelines for the recommendation of sites for repositories (in which the Commission is required to concur), the Department's plans for site characterization (which must be submitted to the Commission for review and comment), and the preparation of preliminary comments by the Commission to accompany the Secretary's recommendation of a site concerning the extent to which DOE's site characterization analysis and waste form proposal seem to be sufficient for inclusion in a license application. With the possible exception of the guidelines, the Commission's role is defined so as to address the safety issues (which are the subject of DOE's site characterization program and waste form proposal) that

must be resolved in licensing proceedings. Where Congress sets up a detailed mechanism for consideration of particular issues by an agency, and both judicial and legislative review of that agency's decisions, as it has here done with respect to the NEPA actions of DOE, it may be inferred that it did not intend to rely upon this Commission to challenge DOE's possible "disregard of the law" after all these procedures have run their course. Cf. *Block v. Community Nutrition Institute*, 487 U.S. 340, 351, 61 L.Ed.2d 270, 279 (1984).

A consideration of the legislative history lends further support to this analysis. Although there were several bills dealing with nuclear waste issues before the 97th Congress, the provisions dealing with site selection issues can be traced directly to H.R. 3809, as reported out by the Committee on Interior and Insular Affairs, H.R. Rep. 97-491, Part 1, 97th Cong., 2d Sess. (1982). The bill included sections—similar to those ultimately enacted—on guidelines, site characterization, site approval and construction authorization, review of repository site selection by Congress, participation of States and Indian tribes, etc. The provision relating to the site characterization plan to be prepared by DOE was drawn directly from the corresponding NRC regulation. (Compare H.R. 3809, section 113(b)(1)(B) with 10 CFR 60.11(a) (1982). All the matters related to the ability of the site to host a repository and isolate radioactive waste were carried over from the regulation to the bill. But matters pertaining to the screening and selection of sites, though set out in the regulation, were omitted in the bill. These include the requirements that DOE discuss the decision process used by DOE in selecting sites for characterization and identify alternative media and sites at which DOE intended to conduct site characterization. Under the proposed legislation, this information would no longer come to the Commission for review. H.R. 3809 also included the provision, ultimately enacted, that the Commission would be required to adopt the EIS prepared by the Secretary "to the extent practicable." The limited nature of the Commission's role was emphasized by the explanatory language of the report to the effect that the Commission would be required so to adopt the EIS "to the maximum extent practicable" (emphasis added). Moreover, the EIS "is intended to suffice regarding the issues addressed and not be duplicated by the Commission unless the Commission determines, in its discretion, that significant and substantial new

information or new considerations render the Secretary's statement inadequate as a basis for the Commission's determinations." H.R. Rep. 97-491, Part 1, 53-54.

There was no specific provision in H.R. 3809 requiring DOE to carry out and document a comparative evaluation of sites considered for site characterization. Later in the year, however, such a provision was incorporated into the bill (now H.R. 6598), as reported by the Committee on Energy and Commerce, H.R. Rep. 97-785, Part 1, 97th Cong., 2d Sess. (1982). Among other things, the bill (in section 113(b)(1)(A)(v)) would have required DOE to prepare, prior to site characterization, an environmental assessment which would include a description of any other sites considered for site characterization. This information would have been submitted to the Commission for its review and comment. The purpose of providing reports at this stage was "to assure that adequate information is available to the Commission regarding the Secretary's proposed activities." *Id.* at 64. H.R. 6598 retained the provision for NRC adoption of DOE's environmental impact statement. The report explained, *id.* at 69:

This provision is intended to avoid the duplication caused as a result of the applicability of NEPA to the actions of both the Secretary and the Commission regarding the preparation of an environmental impact statement. While the Commission is encouraged to adopt the Secretary's statement, or parts of such statement, the independent responsibilities of the Commission are specifically recognized. To the extent the Commission determines it is not practicable to adopt all or part of the Secretary's environmental impact statement, the Commission's responsibilities under NEPA remain in force, thus requiring the preparation of a supplemental environmental impact statement.

Floor consideration in the House was addressed to H.R. 7187, as a substitute for both H.R. 3809 and H.R. 6598. The EIS-adoption language appears once again. However, the provisions for an environmental assessment were modified in two important ways. First, DOE would not explicitly be required to make "a reasonable comparative evaluation" of the sites that had been considered for site characterization. Section 112(b)(1)(A). Second, under H.R. 7187 the environmental assessment would precede, rather than follow, the President's approval of sites to be characterized, and it would no longer be submitted to the Commission for review and comment. *Ibid.*

There was no committee report on H.R. 7187, but a summary of its provisions noted:

In issuing the construction permit and license the NRC will rely on the Environmental Impact Statement prepared by the Secretary of Energy in recommending the repository site. The Commission will have to supplement any environmental impact statement with considerations of the public health and safety required under the Atomic Energy Act of 1954.

128 Cong. Rec. H8163 (daily ed. Sept. 30, 1982) (statement of Rep. Udall). Rep. Moorhead also characterized the Commission's role in terms of its health and safety responsibilities:

... an extensive environmental assessment must be developed by the Secretary of Energy in consultation with the States. There will be a full and complete review of the planned site under the National Environmental Policy Act, culminating in a comprehensive environmental impact statement. This as well as all other final agency actions will be open to full judicial review. The Nuclear Regulatory Commission will have oversight authority over the development of this repository under its independent public health and safety standards.

Id. at H8170. Congressman Ottinger, too, differentiated in passing between "full environmental review" on the one hand and "full NRC licensing procedures to assure that the storage is safe" on the other. 128 Cong. Rec. H8527 (daily ed. Nov. 29, 1982).

The legislative history in the Senate is less illuminating, inasmuch as its bill, S. 1662, differs substantially from the final legislation. (S. 1662, as reported from the Committee on Energy and Natural Resources, appears at 128 Cong. Rec. S4139 ff., daily ed. Apr. 28, 1982.) Under S. 1662, the Commission would have a more substantive role with respect to implementation of NEPA. There would be no direction to the Commission to adopt the DOE environmental impact statement. Rather, under Section 405, the Commission would be required to consider the application in accordance with the laws applicable thereto; as an exception, however, the bill provided that the Commission need only consider as alternate sites for the proposed repository those sites which have been approved by the President for characterization. Senator Simpson, sponsor of the legislation, explained that the NRC licensing process would provide opportunities for "a detailed evaluation of the health and safety and environmental aspects of the proposed project" (emphasis added). 128 Cong. Rec. S4302 (daily ed. Apr. 29, 1982).

In December 1982, the Senate turned to consider legislation following the

pertinent language of the bill which had by that time been passed by the House of Representatives. Senator Mitchell declared that the national nuclear waste policy should "preserve the integrity and full scope of the NRC licensing review and environmental analysis under the National Environmental Policy Act." 128 Cong. Rec. S15869 (daily ed. Dec. 20, 1982), but the broad scope of his remarks leaves it of doubtful import in the context of geologic repositories alone. Of more significance, perhaps, is the colloquy with respect to an amendment proposed by Senator Levin, and passed, to include in section 114(f) the language that nothing in the Act should be construed to amend or otherwise detract from the Commission's licensing requirements. Sen. Levin stated his understanding that the Act was not intended to restrict, or amend, or modify NRC requirements for the repository in any way "including, but not limited to, findings of need." Senator McClure, the floor manager of the bill, replied that Sen. Levin was correct and added that "that is my understanding also." Since findings of need have generally been regarded as NEPA issues, this could be taken to mean that the Commission should discharge its NEPA requirements in the same way as it would in the absence of the review procedures prescribed by the Nuclear Waste Policy Act. This cannot be the case, however, in light of the other provisions of the Act, including those in section 114(f) itself. It seems clear that the law was not intended to modify any of the Commission's licensing requirements under the Atomic Energy Act. The Commission construes the clause in question to be limited to those requirements; it does not pertain to the provisions of NEPA. The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 60 L.Ed.2d 208, 231 (1979), especially where as here their significance is not apparent without further study. Whatever the understanding of Sen. Levin may have been, the Nuclear Waste Policy Act manifestly does affect the manner in which the NEPA responsibilities of the Commission must be carried out, and the rules proposed below indicate the approach which we intend to take.

Although the views of Congress are not entirely unambiguous, the overall tenor is that the Commission's role should focus upon radiological safety, with an independent review of NEPA factors only where warranted in the light of "significant and substantial new information or new consideration."

"Adoption" and the Nuclear Waste Policy Act

The Council on Environmental Quality has established procedures to guide agencies that are engaged in actions that have related environmental impacts. These procedures allow for several approaches to NEPA compliance, including one approach in which the environmental impact statement prepared by one agency is "adopted" by another agency. 40 CFR 1506.3. In appropriate circumstances, an EIS prepared by another agency may be adopted, in accordance with CEQ regulations, in whole or part by NRC. 10 CFR Part 51, Appendix A to subpart § 1(b). An examination of those regulations will illuminate the direction to the Commission, in section 114(f) of the Waste Policy Act, to "adopt" the DOE EIS to the extent practicable. In the absence of irreconcilable conflict with other provisions of NWPA, those regulations should be followed.

The CEQ regulations provide that where more than one agency is involved in the same action, either one agency will be designated a lead agency to prepare an EIS, or two (or more) agencies will be designated as joint lead agencies. Any agency which has jurisdiction by law with respect to the action shall be a cooperating agency, if so requested by the lead agency. A non-agency—even if it has jurisdiction—need not serve as a cooperating agency, however, unless the lead agency has requested it to do so. Whether or not it is a cooperating agency, a Federal agency with jurisdiction by law or special expertise with respect to any environmental impact involved has a duty to comment on a lead agency's statement within the commenting agency's jurisdiction, expertise, or authority. 40 CFR 1501.5, 1501.6, 1503.2.

In the context of NWPA, it is apparent that the Department of Energy would be the lead agency and that the Commission would not be a lead agency. The Commission could either be a cooperating agency, with the particular responsibilities set out in § 1501.6 of the CEQ regulations, or a commenting agency. The NWPA points to the Commission's assuming the latter role. A cooperating agency is required to participate in the NEPA process at the earliest possible time, to participate in the scoping process leading to preparation of the environmental impact statement, and to assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the EIS concerning which the cooperating agency has special

expertise. The framework of NWPA, as rehearsed above, contemplates no such involvement by the Commission. It would be far more faithful to the statutory scheme for this agency merely to provide its comments, from time to time, with respect to environmental impacts falling within its jurisdiction or areas of special expertise. This is entirely consistent with the statutory provision that the Secretary of Energy's recommendation to the President of a site for repository development shall be accompanied by a final EIS, together with comments made by the Commission concerning such EIS. Section 114(a)(1)(D), 42 U.S.C. 10134(a)(1)(D).

As a commenting agency, the Commission would be authorized to adopt the EIS prepared by DOE, provided that the statement meets the standards for an adequate statement under the CEQ regulations. The pendency or outcome of litigation with respect to the DOE EIS is one factor to be considered. This is apparent from CEQ's direction to the adopting agency to specify, where applicable, that "the statement's adequacy is the subject of a judicial action which is not final." Since the actions covered by the DOE EIS and the Commission's action are substantially the same—namely, development of a geologic repository of the proposed design at the proposed site—the Commission would not be required to recirculate the DOE EIS except as a final statement. 40 CFR 1506.3.

The Commission can follow the CEQ procedures for a commenting agency, including the procedures for adoption of DOE's EIS. But the Commission can only be adopted if it meets the standards for an "adequate statement." The approach being taken by the Commission, in these proposed rules, is that NWPA and the principles of res judicata obviate the need for an entirely independent adjudication of the adequacy of the EIS by this agency. As this might be seen as a departure from established practices, the differences merit some further discussion.

It is well established that the Commission has a responsibility to consider environmental issues just as it considers other matters within its mandate. Moreover, the duty to consider environmental issues extends through all stages of the Commission's review processes, including proceedings before hearing boards. And the Commission may not simply defer totally to the standards set by other regulatory authorities with respect to environmental matters within their jurisdiction; to do

so would be an abdication of the Commission's NEPA authority. *Clavert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971). There would be an abdication because NEPA mandates a case-by-case balancing judgment—a judgment that is entirely different from the piecemeal certification by another agency that its own environmental standards are met. The only agency in a position to make the kind of balancing judgment contemplated by NEPA is the agency with overall responsibility for the proposed federal action. *Id.* at 1123. In *Clavert Cliffs*, only the Atomic Energy Commission could make the required decision. In the case of a geologic repository, the Department of Energy is required to make precisely the kind of analysis that the court there deemed to be essential. For the Commission to adopt the DOE EIS without independent analysis, after there had been opportunity for judicial review, therefore, would be entirely consistent with the reasoning of the earlier case. Similarly, the overlap between DOE and Commission actions distinguishes the present situation from the other NEPA decisions which required an independent balancing judgment by each of the agencies involved in a project. See *Silentman v. Federal Power Commission*, 566 F.2d 237, 240 (D.C. Cir. 1977); *Henry v. Federal Power Commission*, 513 F.2d 395, 407 (D.C. Cir. 1975) (Bureau of Reclamation control of relevant water rights for coal gasification plant; FPC regulation of gas transportation).

The similarity of DOE and Commission actions, from the standpoint of their respective environmental impacts, has not in the past been considered, by itself, to be sufficient to persuade the Commission to defer to DOE's balancing judgments. The fact that the applicant for a license to build a nuclear power plant is another Federal agency has not excused NRC from carrying out its usual NEPA obligations, even though both agencies were considering the same impacts associated with construction and operation of the facility. *Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2)*, ALAB-506, 6 NRC 533, 545 (1978). But in prior practice there was no prior judicial determination that the other agency's EIS was adequate and there was no special statutory scheme for consideration of environmental impacts by interested parties and Congress. It is the judgment of the Commission that these unique considerations warrant, and indeed require, adoption of an EIS

that is adequate to meet the obligations of DOE.

To repeat: the Commission must consider the environmental impacts resulting from the construction and development of geologic repository for high-level radioactive waste. All that is in question is the basis for the Commission's consideration. The factors discussed above make it entirely reasonable for the Commission not to reopen issues that have been, or could previously have been, brought before the courts for resolution. The Commission does not derogate the importance of NEPA issues. Under the Nuclear Waste Policy Act, they are extremely important—and in fact they are central to many of the elaborate procedural provisions incorporated in that legislation. It is to those provisions that parties concerned must turn. But once an application is submitted to the Commission, the primary question to be addressed is no longer one of environmental balancing, but rather the critical issue of radiological safety. That is an issue that is entrusted solely to the Commission, and the Commission can discharge its duties most effectively if it makes that the primary basis for decision.

The Preclusive Effect of Section 119

The approach being proposed by the Commission reflects the policies of repose associated with the rules of res judicata. Before examining those rules in detail, it might be helpful to go over, once again, salient features of the NWPA site selection and approval procedures.

The NWPA procedures really reflect two different kinds of review. The first requires judgments regarding the radiological safety of HLW disposal—matters to adjudicated solely by the Commission, taking into account the standards issued by the Environmental Protection Agency. The Act clearly recognizes that while the Commission's preliminary views are to be solicited and considered on several occasions, a final judgment of radiological safety can only be made at the conclusion of the adjudicatory licensing process. The Commission is expected and required to deny an application—long after other procedures had run their course—if it is unable to find, with reasonable assurance, that the relevant safety criteria have been met. The responsibility of consideration of the radiological consequences of a proposed action is advisedly vested in the Commission, which can bring its experience and expertise to the task, in accordance with the Atomic Energy Act.

The second kind of review involves the weighing of the range of environmental concerns that are addressed by NEPA. This review focuses heavily on the comparison of alternatives, including alternative sites, rather than with the narrower task of evaluating a specific site. Moreover, the relevant concerns under NEPA are multitudinous, as opposed to the single issue of radiological safety that is the primary concern of the Atomic Energy Act. While the Commission does have experience and expertise in carrying out a review under NEPA, Congress in 1982 elected not to rely upon the Commission in this regard. It structured the process in such a way that the evaluation of alternatives—in particular, alternative sites—would have been attended to before the Commission was required to act. This was accomplished largely through the State and Tribal participation provisions, including the requirement of Congressional action to proceed in the face of a notice of disapproval. And, additionally, it was accomplished through requiring early judicial review.

The consequence of this approach is that the Commission would carry out a licensing review to assure that a repository could be operated safely—but that it would, in general, treat as settled those other issues arising under NEPA.

The Commission's understanding, based in particular upon its reading of section 119, merits a fuller statement of the legal doctrines that are collectively referred to as the rules of *res judicata*. One of these doctrines is the rule of "claim preclusion"—that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. The related rule of "issue preclusion" (or collateral estoppel) reflects the principle that one who has actually litigated an issue should not be allowed to relitigate it. The effect, and value, of these rules is that they compel repose, so that the indefinite continuation of a dispute can be avoided. Judgments must in general be accorded finality despite flaws in the processes leading to decision and the unavoidable possibility that the results in some instances were wrong. Only when there is a substantial possibility of injustice might relitigation be warranted. *Restatement (Second) of Judgments* 2-12.

The clearest application of these principles would occur where there has actually been a timely challenge to the adequacy of DOE's environmental statement. A final judgment in such litigation would be conclusive, in any subsequent action between the parties,

as to any issue of law or fact that had actually been litigated, *id.*, section 27. Moreover, the party who had challenged the EIS would thereafter be precluded from litigating such issues with another person as well, *id.*, section 29.

The judgment in an action, under section 119(a)(1)(D), for review of DOE's environmental impact statement will therefore preclude the petitioner from later litigating the same issues with NRC (even assuming that NRC is a different person, for these purposes, from its sister agency, DOE). The dimensions of the issue that were determined by the judgment may be a matter of debate. But if the litigant has had an adequate day in court, a desire to prevent repetitious litigation of what is essentially the same dispute justifies preclusion of the issue's being raised anew. While the action being taken by DOE is the recommendation to the President of a site for repository development and the action being taken by the Commission is the issuance of a construction authorization for a repository, the relevant considerations in the two situations are identical. Both agencies will be addressing the development of a repository at a specific location and both will require an environmental impact statement that describes the pertinent environmental impacts and considers appropriate alternatives. If the DOE EIS is found to be adequate to meet the requirements of NEPA, then it would ordinarily be proper to preclude a challenge to the "adequacy" of the identical EIS, if relied upon by the Commission. See *id.*, section 27.

The preclusive effect of a prior judgment sustaining DOE's environmental impact statement would not necessarily be limited to the petitioner of record in that proceeding. It can be argued that those who were represented by that petitioner would also be barred from litigating the issue in a subsequent action.²

Section 119 specifically requires that a civil action for review of an environmental impact statement with respect to any action under Subtitle A (pertaining to geologic repositories) be

² For example, if the EIS had been challenged by the public officials of the State in which a repository was proposed to be located, members of the public who had been represented by those officials might be precluded, to the same extent, from raising the issues anew. *Restatement (Second) of Judgments* § 41, comment d. The basis for this argument would be that, under the doctrine of *parens patriae*, a State is deemed to represent all of its citizens when the State is a party in a suit involving a matter of sovereign interest. See, e.g., *Environmental Defense Fund, Inc. v. Higginson*, 637 F.2d 738 (D.C. Cir. 1979); *U.S. v. Olin Corp.*, 606 F. Supp. 1307 (N.D. Ala. 1985).

brought within a period of 180 days after the date of the action (or after obtaining actual or constructive knowledge thereof). Thus, a failure to meet the deadline for challenging the DOE environmental impact statement would foreclose any subsequent litigation with respect to the action to which that EIS pertains. The objective appears to have been to identify issues promptly and to seek to resolve them in a timely manner. Where there is litigation in accordance with this provision, the principles described above would preclude further judicial examination of the same issues as they relate to the Commission's action. But what would happen if for some reason the adequacy of the DOE environmental impact statement had not been challenged judicially before it was time for the Commission to act—or if it had been challenged, the action had been brought by other parties? If the Commission were to adopt the DOE environmental impact statement, would the merits of the decision to adopt be subject to further review? The Commission suggests that the courts should deny a petition under these circumstances as being untimely. There would be, in this case, only one environmental impact statement and, in accordance with section 119, there would be but one opportunity for review. To conclude otherwise would be to frustrate the objective of seeking an early resolution of the environmental issues that might be involved. See *Eagle-Picher Industries v. U.S. Environmental Protection Agency*, 759 F.2d 905, 911-919 (D.C. Cir. 1985). See also *National Wildlife Federation v. Gorsuch*, 744 F.2d 963 (3rd Cir. 1984), in which the National Wildlife Federation, having been aware of prior litigation and having elected not to intervene, was barred from later raising the issues of concern to it.

The Nuclear Waste Policy Amendments Act of 1987

The Nuclear Waste Policy Amendments Act of 1987 (Amendments Act), Title V, Subtitle A, Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, redirected the nuclear waste program. Under section 5011 of that law site characterization for the first repository is to be carried out exclusively at the Yucca Mountain site in the State of Nevada, with site specific activities at other candidate sites to be phased out promptly. NWPAs as amended, section 160(s), 42 U.S.C. 10172. The provision of NWPAs that contemplated a second repository are removed, and DOE is expressly prohibited from conducting site specific activities with respect to a second repository unless Congress has

specifically authorized and appropriated funds for such activities. NWPAs as amended, section 161(a), 42 U.S.C. 10172a.

Conforming to this redirection of the waste program, the law revises the provisions of Section 114 of NWPAs that deal with the application of NEPA to the licensing process. The language of section 114(a)(1)(D) describing DOE's final environmental impact statement, which is to be submitted to the President with DOE's recommendation of approval for development of a repository, is revised so that DOE "shall not be required . . . to consider the need for a repository, the alternatives to geological disposal, or alternative sites to the Yucca Mountain site". NWPAs as amended, section 160(h), 42 U.S.C. 10134 (emphasis supplied). Section 114(f), 42 U.S.C. 10134(f), is revised in the same way, so that DOE "need not consider alternative sites to the Yucca Mountain site;" and, moreover, the Commission in its NEPA review is similarly advised that it need not consider such alternative sites. NWPAs as amended, section 160(i), 42 U.S.C. 10134. (In the case of a site negotiated under Title IV of NWPAs, added by Section 5041 of Pub. L. 100-203, at a site other than Yucca Mountain, consideration would be given to Yucca Mountain as an alternate site. NWPAs as amended, section 407, 42 U.S.C. 10247).

The merits of multiple site characterization were addressed in the course of the Congressional debate that immediately preceded passage of the Amendments Act. Senator Burdick, in particular, noted that full characterization of three sites (according to the original NWPAs) was based, in part, on the important NEPA principle of fully considering reasonable alternatives when making important decisions that will significantly affect the human environment. In discussing the different approach (in the conference report on the pending budget reconciliation, legislation) that was soon to be adopted, he stated:

Other than the elimination of the consideration of three alternate sites for the repository, which was just outlined, is a major and dangerous departure from current law, the [conference] substitute does not effect the application of NEPA to the repository program. Congressional Record, S 15674 (daily ed., Dec. 21, 1987).

The conference report expresses the same point. It declares:

The provisions of the Nuclear Waste Policy Act pertaining to the application of the National Environmental Policy Act (NEPA) are preserved except that the existing requirement that the environmental impact statement accompanying DOE's repository

siting recommendation consider alternative sites is eliminated. NEPA applies to the redirected program under this Act in the same way as NEPA applied to the Nuclear Waste Policy Act of 1982. The conferees do not intend that enactment of the conference substitute result in any change in NEPA application except as expressly provided. Omnibus Budget Reconciliation Act of 1987, Conference Report to Accompany H.R. 3545, 100th Cong., 1st Sess. H.R. Rept. 100-695, 776.

The Commission has explained above that, under NWPAs as originally enacted, it should make an independent review of NEPA factor only when warranted in the light of "significant and substantial new information or new consideration." Further, it was the duty of the Commission, under that law, to adopt an EIS that is adequate to meet the obligations of DOE. Since the Amendments Act was not intended to affect the implementation of NEPA with respect to the repository program—except as to the consideration of alternative sites—the Commission will follow the same procedure, discussed below, that it would have had the Amendments Act not been passed.

The Proposed Rules

This rulemaking proceeding is primarily concerned with amendments to 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions." The proceeding also encompasses conforming amendments to other parts of the Commission's regulations.

Subpart A of 10 CFR Part 51 sets out NRC regulations for implementing section 102(2) of NEPA. The principal matters addressed by Subpart A are the following: (1) Identification of licensing and regulatory actions requiring the preparation of environmental impact statements or environmental assessments; (2) requirements for the submission of environmental reports and information by license applicants and petitioners for rulemaking; (3) contents and distribution of draft and final environmental impact statements; (4) NEPA procedure and administrative action; and (5) public notice of and access to environmental documents. Since each of these topics is treated, expressly or implicitly, by the Nuclear Waste Policy Act, as amended, the Commission proposes to develop as part of Subpart A certain new rules, discussed below, that will apply to geologic repositories and that will take into account the provisions of the Act.*

* The Nuclear Waste Policy Act applies only with respect to geologic repositories that are used, at

Actions Requiring Preparation of Environmental Document

Under Section 121 of the Nuclear Waste Policy Act, 42 U.S.C. 10141, the Commission's promulgation of technical requirements and criteria in 10 CFR Part 60 does not require the preparation of an environmental impact statement or other environmental review under section 102(2) of NEPA. The proposed rules incorporate this provision.⁴ Under existing 10 CFR Part 51, certain procedural actions pertaining to the licensing of geologic repositories have been determined to be categorically excluded from environmental assessment. See references to 10 CFR Part 60 in 10 CFR 51.22(c). No change in those provisions is needed.

Under 10 CFR 51.20(a), an environmental impact statement is required if the proposed action is a major Federal action significantly affecting the quality of the human environment or if the Commission, in the exercise of its discretion, determines that the proposed action should be covered by such an EIS. Section 114(f) of the Nuclear Waste Policy Act, 42 U.S.C. 10134(f), reflects a Congressional understanding, with which the Commission is in full accord, that the issuance of a construction authorization and license for a geologic repository will require an environmental impact statement. This has been incorporated into the proposed rules. Other licensing actions, unless covered by existing categorical exclusions (see paragraphs (10), (11), and (12) of 10 CFR 51.22(c)), would require an environmental assessment under 10 CFR 51.21.

Ordinarily, a determination that an environmental impact statement (or supplement) will be prepared triggers public notice and the initiation of a scoping process. Where another agency prepares the EIS, however, it has the responsibility to carry out these functions. We are proposing to clarify this point by limiting the application of these procedures to situations in which the appropriate NRC staff director determines that an environmental

impact statement will be prepared "by NRC." See the amendment to § 51.26(a).

Submission of Environmental Information

The Commission's regulations encourage prospective applicants or petitioners for rulemaking to confer with NRC staff before submitting environmental information. 10 CFR 51.40. The regulations also provide that the Commission may require such persons to submit information which may be useful in aiding the Commission in complying with section 102(2) of NEPA. 10 CFR 51.41. These general provisions are compatible with the requirements of the Nuclear Waste Policy Act.

The more specific regulations dealing with the submission of environmental reports are inappropriate in the context of the geologic repository program. Instead of providing for the submission of an environmental report, the Nuclear Waste Policy Act requires that NRC consider, and if practicable adopt, a final environmental impact statement prepared by DOE at the time of its recommendation to the President for the development of a repository at a particular site. Section 114, 42 U.S.C. 10134. The recommendation for development of a repository includes, as a minimum, the obtaining of a license from NRC to receive and possess wastes. The environmental impact statement must therefore address not only the environmental effects of construction but those of repository performance as well. This is reflected in the statutory direction to the Commission to adopt the environmental impact statement, to the extent practicable, "in connection with the issuance by the Commission of a construction authorization and license for such repository."

DOE will therefore be required to submit an environmental impact statement instead of an environmental report. The Commission may nevertheless be unable to adopt that statement, with respect either to the construction authorization or the license, unless it has been supplemented to take into account significant new information such as that developed during the course of construction as part of the performance confirmation program or significant changes in the plans of DOE since the time of its site recommendation to the President. See 40 CFR 1502.9(c)(1) (CEQ regulations). Accordingly, the proposed rules provide for the timely submission by DOE of supplemental environmental impact statements as needed.

The information to be contained in an environmental impact statement is set out in section 102(2) of NEPA itself, and the submission of such information is required by the proposed rules. The scope of alternatives to be considered in the EIS is restricted, however, to take into account the limitations in section 114(f) of the Nuclear Waste Policy Act, 42 U.S.C. 10134(f), with respect to the need for a repository, the time of the initial availability of a repository, alternatives to the isolation of waste in a repository, and the identification of alternate sites. Moreover, the proposed rule requires DOE to inform the Commission of the extent to which, pursuant to section 119, 42 U.S.C. 10139, the environmental impact statement may have been found to be adequate or inadequate and the extent to which, under that section, issues related to the adequacy of the environmental impact statement may remain subject to judicial review.

Because one of the alternatives available to the Commission is denial of the application, the environmental impacts of such denial need to be addressed. Even though denial of an application involves action by the Commission, it is proper for the environmental impacts to be addressed by DOE, since the lead agency is required by CEQ regulations to include reasonable alternatives not within its jurisdiction. 40 CFR 1502.14(c).

The Commission has not included any specific requirements for the submission of environmental information by petitioners for rulemaking. The only rules likely to have significant environmental effects would be technical requirements and criteria to be used in licensing; as already noted, such rules would be exempt from the requirement of environmental review under NEPA. Section 121(c), 42 U.S.C. 10141(c). In a particular case, however, environmental information could be required, if needed to comply with law, pursuant to the general language of 10 CFR 51.41.

Preparation of Environmental Impact Statements

The NRC regulations include a group of sections that prescribe a procedure for preparation and distribution by the NRC of draft and final environmental impact statements. With respect to materials licenses, these requirements apply to certain specified categories of NRC actions other than the issuance of a construction authorization or license to receive and possess high-level radioactive waste at a geologic repository. 10 CFR 51.80 (citing

least in part, for the disposal of waste from civilian nuclear waste activities. Section 4, 42 U.S.C. 10108. Under the Act, however, high-level radioactive waste resulting from atomic energy defense activities is to be disposed of in such repositories, along with civilian wastes, unless the President finds that a separate facility is required. The President has determined that such a separate facility is not needed. In the light of these developments, the Commission believes that it is sufficient to limit the scope of this action to those facilities that may be situated and constructed in accordance with the Nuclear Waste Policy Act.

⁴ See § 51.22(d). Conforming amendments would be made in § 51.27 and in the caption of § 51.22.

§ 51.20(b)(7)-(12)). Because NRC, under the Nuclear Waste Policy Act, will in general have no need to prepare its own environmental impact statement, the proposed amendments would provide (in accordance with CEQ regulations) for the distribution of the EIS, if and as adopted by the Commission, only as a final statement.

NEPA Procedure and Administrative Action

Although the procedures established in Part 51 are designed for the case in which NRC prepares its own environmental impact statement, they can equally well be applied in the situation where the EIS is prepared in the first instance by a license applicant. Thus, no action will be taken by the Commission until necessary documents have been filed—in this case by DOE rather than NRC—with the Environmental Protection Agency. See 10 CFR 51.100. NRC will not take action concerning the proposal which would have an adverse environmental impact until a record of decision is issued. See 10 CFR 51.101. A record of decision will be prepared as part of the initial or final decision on issues adjudicated in formal hearings. See 10 CFR 51.102. The record of decision will state the decision, including alternatives considered and the relevant factors upon which preferences among the alternatives are based. See 10 CFR 51.103. In the case of the adoption of a EIS prepared by DOE concerning a geologic repository, the relevant factors would include the special provisions of the Nuclear Waste Policy Act.

In addition to these rules of general application, Part 51 includes specific procedural provisions for different categories of licensing actions. A new § 51.109 would be added to describe the NEPA procedure to be followed with respect to licenses issued under 10 CFR Part 60.

The basic premise of § 51.109 is that it is practicable to adopt the EIS prepared by DOE if that statement is adequate to meet the requirements of section 102(2)(C) of NEPA. The focus of the procedure, therefore, is the presiding officer's determination of the extent to which it is practicable to adopt the DOE EIS. To the extent adoption is practicable, the issues would be excluded from independent NRC inquiry. The adoption of the statement does not necessarily mean that NRC would independently have arrived at the same conclusions on matters of fact or policy. And, of course, the adoption of the EIS would have no probative weight with respect to any safety findings that

the Commission must make under 10 CFR Part 60.

It would still be proper to consider NEPA contentions with respect to significant matters that arose after issuance of the EIS. But note, even in this regard, that if there are significant new circumstances or information relevant to environmental concerns and bearing on the action proposed by DOE or its impacts, DOE would be obliged to prepare a supplemental EIS that would be subject to adoption by the Commission under the same standards as the original document. Challenges to DOE's supplement should be adjudicated in the courts of appeals, pursuant to section 119 of NWSA, in the same manner as challenges to the original EIS.

The Commission fully expects that supplementation of the EIS by DOE will resolve any new circumstances or information that might arise, and that supplementation by the NRC will not be necessary. Nevertheless, in theory there might be situations when NRC must prepare a supplemental environmental impact statement. Under the proposed regulations, such action might be initiated by the staff before the hearing or might be found to be necessary in light of the record of the proceedings after the hearing. The former case is addressed in § 51.28(c), the latter (implicitly) in § 51.109(e). In each situation, though, the standards for adoption set out in § 51.109(c) would be observed.

The proposed rules provide a structured mechanism to address NEPA concerns in a licensing hearing. This is the presentation of the staff position with respect to the practicability of adoption, which appears in § 51.109(a)(1). As noted above, it is expected that DOE would, where necessary, supplement its EIS. Accordingly, the staff position is likely to be that it is practicable for the Commission to adopt the DOE EIS, as it may have been supplemented by DOE and as filed with the Commission. Nevertheless, in some situations, the staff position could be that it is not practicable to adopt the DOE EIS, as it may have been supplemented, in which case an NRC EIS would be required. In that event, the staff is under an obligation to have prepared the necessary final EIS so as to be able to present its position on matters within the scope of NEPA. Whatever the staff position may be, any other party may seek to have the issue regarding practicability of adoption resolved by the presiding officer, but any contentions to that effect must set forth

the basis of the claim under the criteria set out in the proposed rule. Moreover, it is contemplated that the procedures that would be used by the presiding officer to resolve disputes regarding adoption would resemble those employed to rule on motions to reopen records. See 10 CFR 2.734.

Several situations in which adoption of DOE's EIS is impracticable could conceivably arise. For example, if the Commission were to impose license conditions requiring DOE to take actions other than those which DOE had proposed, the Commission would need to consider the environmental impacts of such actions in accordance with NEPA. However, the Commission does not anticipate imposition of license conditions with significant environmental impacts. Under NWSA, DOE has the primary responsibility for consideration of environmental matters; and if significant changes from DOE's original proposal are needed, the Commission believes that DOE should amend its license application and supplement its EIS, precluding any need for NRC supplementation. Should DOE fail to do so, the Commission might deny DOE's application rather than impose license conditions requiring NRC supplementation of DOE's EIS. In theory, though, it would still be possible for NRC to prepare its own EIS. The scope of the review would be limited, however, to the actions being required by the Commission. It is not intended that other environmental issues would be reopened and relitigated in the licensing proceeding.

Another situation in which NRC would prepare a supplemental EIS relates to new information which it regards as significant even though DOE may not have treated it as such. We recognize that DOE's failure to supplement the EIS might arguably be viewed as a final action, so that objecting parties might have to seek review in the courts within the statutory 180-day review period, with any failure to do so barring later challenge in NRC proceedings. But such a reading of the law would have undesirable consequences upon NRC administrative proceedings. It would require NRC to decide whether or not adoption is practicable on the basis of factual and legal considerations (pertaining to DOE's duty to supplement the EIS and, in particular, the time such duty may have arisen), which go far beyond the materials otherwise requiring NRC review. Accordingly, NRC proposes to prepare a supplemental EIS, if DOE is not doing so, whenever NRC regards

such a supplemental EIS to be required by law.⁶

Furthermore, the Commission will review any statements in the DOE's environmental impact statement relating to radiological concerns. If such statements are inconsistent with the facts found by the Commission on the basis of the record of the proceedings, the Commission will specifically determine whether or not the findings constitute "significant and substantial new information or new considerations" which, under the rule, would render the environmental impact statement to that extent inadequate. The statement will be supplemented where required by law, or otherwise will be deemed modified to the extent necessary, in accordance with Commission practice. *Citizens for Safe Power v. NRC*, 524 F.2d 1291, 1294, n. 5 (D.C. Cir. 1975); *Public Service Company of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 29 (1976).

The Commission would make its own NEPA findings, including an independent balance of relevant factors, "to the extent that it is not practicable to adopt" the DOE EIS—that is, to the extent that the Commission finds that the balance of these factors would be affected by the new information or new considerations involved. This procedure is consistent with 10 CFR 51.41, which states that the Commission "will independently evaluate and be responsible for the reliability of any information which it uses."

Public Information

Sections 51.116 through 51.118 concern public notices about the preparation of an environmental impact statement. They apply in any situation in which a notice of intent to prepare an EIS is prepared "in accordance with § 51.26." But, as discussed above, § 51.26 would be amended so as to apply only when NRC itself intends to prepare an EIS. Since the EIS with respect to a repository would be prepared by DOE rather than by NRC, the notice provisions of §§ 51.116—51.118 would not come into play. Section 51.118 would be amended, however, to require circulation of a final environmental impact statement, if and when adopted by NRC.

Commenting

It is the policy of the Commission to comment on draft environmental impact

statements prepared by other Federal agencies, consistent with the provisions of 40 CFR 1503.2 and 1503.3, 10 CFR 51.124. The Commission intends to follow this policy in connection with the draft environmental impact statement prepared by DOE in connection with a geologic repository recommendation. The submission of such comments is specifically called for, in fact, by the Nuclear Waste Policy Act. See Sec. 114(a)(1)(D), 42 U.S.C. 10134(a)(1)(D).

NRC will comment on environmental issues even though those issues may be precluded from litigation in the licensing proceedings. The reason for this is that an inadequate EIS may be set aside in the course of judicial review. Should this occur, it would of course not be practicable for the Commission to adopt it. If NRC has objections or reservations about the DOE proposal on grounds of environmental impact, it will specify the mitigation measures it considers necessary to withstand challenge in court. The theory underlying such comments is that if the EIS is found not to be adequate, in the course of judicial review, NRC could not adopt it and, in the absence of suitable revisions or supplementation, the Commission could not issue a construction authorization or license. See 40 CFR 1503.3(d) (duty to specify mitigation measures considered necessary to allow license to be granted).

Ordinarily an agency that receives comments from another agency must consider them, but it may exercise its discretion in determining how they should affect the decision at hand. In principle, therefore, DOE could in some cases reject comments made by NRC on grounds that might be unsatisfactory to the Commission. Still, the Commission's comments will be a matter of public record and will be available for consideration during judicial and Congressional review of DOE's EIS and related actions. The Commission regards these forums, rather than the NRC usual review, to be the appropriate place, under NWPA, for review of DOE's responses to comments as well as other matters related to the EIS.

Responsible Official

No change is required in the provision establishing responsibilities within NRC for NEPA compliance.

Conforming Amendments

Several changes to Part 60 of the Commission's regulations are needed in order to reflect the provisions of the Nuclear Waste Policy Act, as amended, that deal with environmental review.

Under the Nuclear Waste Policy Act, DOE is required to prepare an environmental impact statement instead of an environmental report. Several changes to Part 60 are proposed to reflect this direction. Revisions to the environmental impact statement would take the form of "supplements" instead of the "amendments" or "updates" referred to in the existing rule.

The requirement in § 60.15 that multiple sites be characterized is eliminated so as to conform to the provisions of the Amendments Act.

The language of the findings for the issuance of the construction authorization requires consideration of costs and benefits and consideration of alternatives. § 60.31(c). This language would not be changed. However, it should be understood that a determination that it is practicable to adopt the DOE environmental impact statement will necessarily result in the specified environmental finding that the action called for is issuance of the construction authorization.

The construction authorization is to include such conditions as the Commission "finds to be necessary to protect . . . environmental values." 10 CFR 60.32(a). The Commission would include such conditions only where the environmental impact statement (as it may have been supplemented) specifically calls for them. In principle, the incorporation of appropriate conditions in the construction authorization could enhance environmental protection, since NRC would then have a basis to inspect, and take enforcement action where needed, to assure that the conditions are observed. However, we doubt that the adequacy of the EIS would ever depend upon NRC's being vested with this authority. DOE can describe in the EIS—and in fact it must describe—the mitigation measures which are proposed to assure protection of the environment. Should DOE subsequently fail to implement these measures, affected parties can seek redress against DOE in the courts. Moreover, the written agreements to be entered into between DOE and the States and affected Indian tribes under section 117(c) of the Nuclear Waste Policy Act, 42 U.S.C. 10137(c), provide a supplemental channel for identifying and resolving environmental concerns on an ongoing basis without direct NRC participation. Our approach, therefore, will be to require the observance of environmental protection conditions where the environmental impact statement which we adopt provides for the Commission to include such conditions in the

⁶ The Commission once again emphasizes that, under NWPA, DOE has the primary responsibility to supplement an EIS to take significant new information into consideration. This obligation is reflected in the proposed revision to § 60.24(c).

construction authorization (license); but if it is practicable for us to adopt an EIS that makes no provision for NRC to impose and enforce such conditions, we would not on our own initiative find such conditions to be necessary. Even if NRC comments on the DOE proposal had specified mitigation measures considered necessary to allow NRC to grant a construction authorization or license, these measures generally would not be incorporated as licensing conditions; for, as discussed above, the basis for NRC's comments was that the measures were necessary for the EIS to be considered "adequate" by the courts, and it is expected that this issue would already have been resolved.

The rules of practice (10 CFR Part 2) also need to be amended to take account of DOE's submission of an environmental impact statement instead of an environmental report. Because the EIS must conform to statutory requirements, and because its completeness would have been subject to challenge in court prior to filing with NRC, a completeness determination by NRC at the time of docketing is unnecessary, and provision for such determination would be omitted. As in the case of Part 60, reference would be made to "supplements" rather than "amendments" to the environmental impact statement.

Petition for Rulemaking

The States of Nevada and Minnesota have petitioned the Commission to amend 10 CFR 60.24 so as to adopt DOE's environmental impact statement only if such adoption "would not compromise the independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954". 50 FR 51701, December 18, 1985 (FRM-60-2A). (The language proposed by the petitioners also includes several matters which would be considered by the Commission in making the foregoing determination). In this regard, the Commission notes its resolve that adoption of the environmental impact statement must not compromise its independent responsibilities under the Atomic Energy Act. Adoption of the rules proposed herein would be fully consistent with this resolve.

The matters identified by petitioners for consideration by the Commission relate largely to the adequacy of the procedures followed by DOE in implementing the Nuclear Waste Policy Act and in preparing its EIS. Nevertheless, as stated in the cited Federal Register notice, the Commission will give further consideration, in this rulemaking proceeding, to the issues

raised by the petitioners, as they may relate to this agency's responsibilities. Generally, the Commission proposes to deal with these issues in a manner consistent with the discussion above.

Any person desiring to comment on the rulemaking petition, insofar as it relates to 10 CFR 60.24, should do so as part of this rulemaking proceeding.

Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed regulation is the type of action described in categorical exclusion 10 CFR 51.22(c) (1) and (3). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

Paperwork Reduction Act Statement

The proposed rule contains no information collection requirements and therefore is not subject to the Paperwork Reduction Act (Pub. L. 96-511).

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certified that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The only entity subject to regulation under this amended rule is the U.S. Department of Energy.

List of Subjects

10 CFR Part 2

Administrative practice and procedure. Antitrust, Byproduct material. Classified information. Environmental protection. Nuclear materials. Nuclear power plants and reactors. Penalty. Sex discrimination. Source material. Special nuclear material. Waste treatment and disposal.

10 CFR Part 51

Administrative practice and procedure. Environmental impact statement. Nuclear materials. Nuclear power plants and reactors. Reporting and record keeping requirements.

10 CFR Part 60

High-level waste. Nuclear power plants and reactors. Nuclear materials. Penalty. Reporting and record keeping requirements. Waste treatment and disposal.

Issuance

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the National

Environmental Policy Act of 1969, as amended, the Nuclear Waste Policy Act of 1982, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 51, and related conforming amendments to 10 CFR Parts 2 and 60.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161, 161, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 78 Stat. 400 (42 U.S.C. 2241); sec. 201, 68 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 83, 62, 63, 61, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2072, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2273, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 63 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 68 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 163, 169, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 63 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 68 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 63 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Section 2.790 also issued under sec. 103, 68 Stat. 938, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 576, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-560, 64 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 69 Stat. 1642 (42 U.S.C. 2021b et seq.).

2. In § 2.101, paragraphs (f) (1), (2), (5), and (7) are revised and (f)(4) is removed and reserved to read as follows:

§ 2.101 Filing of application.

(f)(1) Each application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and any environmental impact statement required in connection therewith pursuant to Subpart A of Part 51 of this chapter shall be processed in accordance with the provisions of this paragraph.

(2) To allow a determination as to whether the application is complete and

acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room. Twenty copies shall be filed to enable this determination to be made.

(4) [Reserved]

(5) If a tendered document is acceptable for docketing, the applicant will be requested to (i) submit to the Director of Nuclear Material Safety and Safeguards such additional copies of the application and environmental impact statement as the regulations in Part 60 and Subpart A of Part 51 of this chapter require, (ii) serve a copy of such application and environmental impact statement on the chief executive of the municipality in which the geologic repository operations area is to be located, or if the geologic repository operations area is to be located within a municipality, on the chief executive of the county (or to the Tribal organization, if it is to be located within an Indian reservation), and (iii) make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards. All such copies shall be completely assembled documents, identified by docket number. Subsequently distributed amendments to the application, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages.

(7) Amendments to the application and supplements to the environmental impact statement shall be filed and distributed and a written statement shall be furnished to the Director of Nuclear Material Safety and Safeguards in the same manner as for the initial application and environmental impact statement.

PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

3. The authority citation for Part 51 is revised to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); secs. 201, as amended, 202, 68 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 63 Stat. 853-854, as amended (42

U.S.C. 4332, 4334, 4335); and Pub. L. 95-604, Title II, (2 Stat. 3033-3041. Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 82 Stat. 3036-3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Secs. 81.43 and 81.106 also issued under Nuclear Waste Policy Act of 1982, sec. 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)).

4. In § 51.20, existing paragraph (b)(13) is redesignated as paragraph (b)(14) and a new paragraph (b)(13) is added to read as follows:

§ 51.20 Criteria for and identification of licensing and regulatory actions requiring environmental impact statements.

(b) * * *

(13) Issuance of a construction authorization and license pursuant to Part 60 of this chapter.

5. Section 51.21 is revised to read as follows:

§ 51.21 Criteria for and identification of licensing and regulatory actions requiring environmental assessments.

All licensing and regulatory actions subject to this subpart require an environmental assessment except those identified in § 51.20(b) as requiring an environmental impact statement, those identified in § 51.22(c) as categorical exclusions, and those identified in § 51.22(d) as other actions not requiring environmental review. As provided in § 51.22(b), the Commission may, in special circumstances, prepare an environmental assessment on an action covered by a categorical exclusion.

6. Section 51.22 is amended, by revising the heading and adding a new paragraph (d), to read as follows:

§ 51.22 Criterion for categorical exclusion; identification of licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review.

(d) In accordance with section 121 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10141), the promulgation of technical requirements and criteria that the Commission will apply in approving or disapproving applications under Part 60 of this chapter shall not require an environmental impact statement, an environmental assessment, or any environmental review under subparagraph (E) or (F) of section 102(2) of NEPA.

7. In § 51.26, paragraph (a) is revised and a new paragraph (c) is added, to read as follows:

§ 51.26 Requirement to publish notice of intent and conduct scoping process.

(a) Whenever the appropriate NRC staff director determines that an environmental impact statement will be prepared by NRC in connection with a proposed action, a notice of intent will be prepared as provided in § 51.27, and will be published in the Federal Register as provided in § 51.118, and an appropriate scoping process (see §§ 51.27, 51.28 and 51.29) will be conducted.

(c) Upon receipt of an application and accompanying environmental impact statement under § 60.22 of this chapter (pertaining to geologic repositories for high-level radioactive waste), the appropriate NRC staff director will include in the notice of docketing required to be published by § 2.101(f)(8) of this chapter a statement of Commission intention to adopt the environmental impact statement to the extent practicable. However, if the appropriate NRC staff director determines, at the time of such publication or at any time thereafter, that NRC should prepare a supplemental environmental impact statement in connection with the Commission's action on the license application, the procedures set out in paragraph (a) of this section shall be followed.

8. A new § 52.67 is added to read as follows:

§ 52.67 Environmental information concerning geologic repositories.

(a) In lieu of an environmental report, the Department of Energy, as an applicant for a license or license amendment pursuant to Part 60 of this chapter, shall submit to the Commission any final environmental impact statement, and any supplement thereto, which the Department prepares in connection with any geologic repository developed under Subtitle A of Title I of the Nuclear Waste Policy Act of 1982.

(b) The final environmental impact statement which accompanies the Department of Energy's recommendation to the President to approve a site for a geologic repository shall be submitted to the Commission at the time and in the manner described in § 60.22 of this chapter. Such statement shall be prepared in accordance with the provisions of section 114(f) of the Nuclear Waste Policy Act of 1982. The statement shall include, among the alternatives under consideration, denial of a license or construction authorization by the Commission.

(c) Under applicable provisions of law, the Department of Energy is

required to supplement its final environmental impact statement whenever the Department makes a substantial change in its proposed action that is relevant to environmental concerns or determines that there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. The Department shall submit any supplement to its final environmental impact statement to the Commission at the time and in the manner described in § 60.22 of this chapter.

(d) Whenever the Department of Energy submits a final environmental impact statement, or a final supplement to an environmental impact statement, to the Commission pursuant to this section, it shall also inform the Commission of the status of any civil action for judicial review initiated pursuant to section 119 of the Nuclear Waste Policy Act of 1982. This status report, which the Department shall update from time to time to reflect changes in status, shall:

(1) State whether the environmental impact statement has been found by the courts of the United States to be adequate or inadequate; and

(2) Identify any issues relating to the adequacy of the environmental impact statement that may remain subject to judicial review.

9. A new § 51.109 is added to read as follows:

§ 51.109 Public hearings in proceedings for issuance of materials license with respect to a geologic repository.

(a)(1) In a proceeding for the issuance of a license to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area, the NRC staff shall present its position on whether it is practicable to adopt, without further supplementation, the environmental impact statement (including any supplement thereto) prepared by the Secretary of Energy. If the position of the staff is that supplementation of the environmental impact statement by NRC is required, it shall file its final supplemental environmental impact statement with the Environmental Protection Agency, furnish that statement to commenting agencies, and make it available to the public, before presenting its position. In discharging its responsibilities under this paragraph, the staff shall be guided by the principles set forth in paragraphs (c) and (d) of this section.

(2) Any other party to the proceeding who contends that it is not practicable to adopt the DOE environmental impact

statement, as it may have been supplemented, shall file a contention to that effect in accordance with § 2.714(b) of this chapter. Such contention must be accompanied by one or more affidavits which set forth factual and/or technical bases for the claim that, under the principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented. The presiding officer shall resolve disputes concerning adoption of the DOE environmental impact statement by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under § 2.734 of this chapter.

(b) In any such proceeding, the presiding officer will determine those matters in controversy among the parties within the scope of NEPA and this subpart, specifically including whether, and to what extent, it is practicable to adopt the environmental impact statement prepared by the Secretary of Energy in connection with the issuance of a construction authorization and license for such repository.

(c) The presiding officer will find that it is practicable to adopt the environmental impact statement prepared by the Secretary of Energy unless:

(1)(i) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and

(ii) The difference may significantly affect the quality of the human environment; or

(2) Significant and substantial new information or new considerations render the environmental impact statement inadequate. New information or new consideration shall not be deemed to render the environmental impact statement inadequate, for purposes of this paragraph, if the new information or new considerations have been addressed in a supplemental environmental impact statement that the Secretary of Energy has submitted to the Commission in accordance with the provisions of this chapter.

(d) To the extent that the presiding officer determines it to be practicable to adopt the environmental impact statement prepared by the Secretary of Energy, such adoption shall be deemed to satisfy all responsibilities of the Commission under NEPA and no further consideration under NEPA or this subpart shall be required.

(e) To the extent that it is not practicable to adopt the environmental impact statement prepared by the

Secretary of Energy, the presiding officer will:

(1) Determine whether the requirements of section 102(2) (A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical and other benefits against environmental and other costs, whether the construction authorization or license should be issued, denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the construction authorization or license should be issued as proposed.

(f) In making the determinations described in paragraph (e) of this section, the environmental impact statement will be deemed modified to the extent that findings and conclusions differ from those in the final statement prepared by the Secretary of Energy, as it may have been supplemented. The initial decision will be distributed to any persons not otherwise entitled to receive it who responded to the request in the notice of docketing, as described in § 51.26(c). If the Commission or the Atomic Safety and Licensing Appeal Board reaches conclusions different from those of the presiding officer with respect to such matters, the final environmental impact statement will be deemed modified to that extent and the decision will be similarly distributed.

(g) The provisions of this section shall be followed, in place of those set out in § 51.104, in any proceedings for the issuance of a license to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area.

10. In § 51.118, the existing text is redesignated as paragraph (a) and a new paragraph (b) is added, to read as follows:

§ 51.118 Final environmental impact statement—Notice of availability.

(a) . . .

(b) Upon adoption of a final environmental impact statement or any supplement to a final environmental impact statement prepared by the Department of Energy with respect to a

geologic repository that is subject to the Nuclear Waste Policy Act of 1982, the appropriate NRC staff director shall follow the procedures set out in paragraph (a) of this section.

PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

11. The authority citation for Part 60 is revised to read as follows:

Authority: Secs. 51, 53, 82, 83, 85, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 68 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 633 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97-425, 96 Stat. 2213, 2228, as amended (42 U.S.C. 10134, 10141).

For the purpose of section 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 60.10, 60.71 to 60.75 are issued under sec. 161c, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

12. In § 60.15, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

13. In § 60.21, paragraph (a) is revised to read as follows:

§ 60.21 Content of application.

(a) An application shall consist of general information and a Safety Analysis Report. An environmental impact statement shall be prepared in accordance with the Nuclear Waste Policy Act of 1982, as amended, and shall accompany the application. Any Restricted Data or National Security Information shall be separated from unclassified information.

14. Section 60.22 is revised to read as follows:

§ 60.22 Filing and distribution of application.

(a) An application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area at a site which has been characterized, and any amendments thereto, and an accompanying environmental impact statement and any supplements, shall be signed by the Secretary of Energy or the Secretary's authorized representative and shall be filed in triplicate with the Director.

(b) Each portion of such application and any amendments, and each environmental impact statement and any supplements, shall be accompanied by 30 additional copies. Another 120 copies shall be retained by DOE for distribution in accordance with written instructions from the Director or the Director's designee.

(c) DOE shall, upon notification of the appointment of an Atomic Safety and Licensing Board, update the application, eliminating all superseded information, and supplement the environmental impact statement if necessary, and serve the updated application and environmental impact statement (as it may have been supplemented) as directed by the Board. At that time DOE shall also serve one such copy of the application and environmental impact statement on the Atomic Safety and Licensing Appeal Panel. Any subsequent amendments to the application or supplements to the environmental impact statement shall be served in the same manner.

(d) At the time of filing of an application and any amendments thereto, one copy shall be made available in an appropriate location near the proposed geologic repository operations area (which shall be a public document room, if one has been established) for inspection by the public and updated as amendments to the application are made. The environmental impact statement and any supplements thereto shall be made available in the same manner. An updated copy of the application, and the environmental impact statement and supplements, shall be produced at any public hearing held by the Commission on the application, for use by any party to the proceeding.

(e) The DOE shall certify that the updated copies of the application, and the environmental impact statement as it may have been supplemented, as referred to in paragraphs (c) and (d) of this section, contain the current contents of such documents submitted in accordance with the requirements of this part.

15. In § 60.24, the section heading and paragraphs (a) and (c) are revised to read as follows:

§ 60.24 Updating of application and environmental impact statement.

(a) The application shall be as complete as possible in the light of information that is reasonably available at the time of docketing.

(c) The DOE shall supplement its environmental impact statement in a timely manner so as to take into account the environmental impacts of any substantial changes in its proposed actions or any significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

16. In § 60.31, the introductory paragraph is revised to read as follows:

§ 60.31 Construction authorization.

Upon review and consideration of an application and environmental impact statement submitted under this part, the Commission may authorize construction if it determines:

17. In § 60.51, the introductory portion of paragraph (a), and paragraph (b), are revised to read as follows:

§ 60.51 License amendment for permanent closure.

(a) DOE shall submit an application to amend the license prior to permanent closure. The submission shall consist of an update of the license application submitted under §§ 60.21 and 60.22, including:

(b) If necessary, so as to take into account the environmental impact of any substantial changes in the permanent closure activities proposed to be carried out or any significant new information regarding the environmental impacts of such closure. DOE shall also supplement its environmental impact statement and submit such statement, as supplemented, with the application for license amendment.

Dated at Rockville, Maryland this 29th day of April 1988.

For the Nuclear Regulatory Commission,
Samuel J. Chalk,

Secretary of the Commission.

(FR Doc. 88-9979 Filed 5-4-88; 8:45 am)

BILLING CODE 7530-01-M

Enclosure 2

Notice of Final Rulemaking

54 Fed.Reg. 27864

July 3, 1989

FOR FURTHER INFORMATION CONTACT: James R. Wolf, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 492-1841.

SUPPLEMENTARY INFORMATION: Under applicable law, the Nuclear Regulatory Commission exercises regulatory authority with respect to the development, operation, and permanent closure of one or more geologic repositories for high-level radioactive waste and spent nuclear fuel. In connection with the exercise of this authority, the Commission is required by the National Environmental Policy Act of 1969 (NEPA), to give appropriate consideration to the environmental impacts of its actions. The scope of such consideration and the procedure to be followed by the Commission in fulfilling its NEPA responsibilities are addressed by the Nuclear Waste Policy Act of 1982, as amended (NWPAA). This statute directs the Commission to adopt the environmental impact statement (EIS) prepared by the Department of Energy (the applicant for the NRC license with respect to the repository) "to the extent practicable," with the further proviso that adoption of DOE's EIS shall be deemed to satisfy the Commission's NEPA responsibilities "and no further consideration shall be required." The Commission has been engaged in rulemaking to implement this statutory framework.

The Commission accordingly undertook a careful review of the text and statutory history of the pertinent provisions of the Nuclear Waste Policy Act. The results of this review were presented in the notice of proposed rulemaking published in the Federal Register on May 5, 1988, 53 FR 19131. As summarized therein:

(1) The Commission will conduct a thorough review of DOE's draft EIS and will provide comments to DOE regarding the adequacy of the statement.

(2) If requested by Congress pursuant to the NWPAA, the Commission will provide comments on DOE's EIS to the Congress with respect to a State or Tribal notice of disapproval of a designated site.

(3) The NRC will find it practicable to adopt DOE's EIS (or any DOE supplemental EIS) unless:

(a) The action proposed to be taken by the NRC differs in an environmentally significant way from the action described in DOE's license application, or

(b) Significant and substantial new information or new considerations render the DOE EIS inadequate.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2, 51, and 60

RIN 3150-AC04

NEPA Review Procedures for Geologic Repositories for High-Level Waste

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is adopting procedures for implementation of the National Environmental Policy Act with respect to geologic repositories for high-level radioactive waste. In accordance with the Nuclear Waste Policy Act of 1982, as amended, the Commission will adopt, to the extent practicable, the final environmental impact statement prepared by the Department of Energy that accompanies a recommendation to the President for repository development. The rule requires that the primary responsibility for reviewing environmental impacts rests with the Department of Energy, consistent with this view, that the standards and procedures that would be used in determining whether adoption of the Department's final environmental impact statement is practicable.

EFFECTIVE DATE: August 2, 1989.

(4) The DOE EIS will accompany the application through the Commission's review process, but will be subject to litigation in NRC's licensing proceeding only where factors 3(a) or 3(b) are present.

In accordance with NWPA, the primary responsibility for evaluating environmental impacts lies with DOE, and DOE would therefore be required to supplement the EIS, whenever necessary, to consider changes in its proposed activities or any significant new information.

The Commission received nine letters of comment in response to its notice of proposed rulemaking. The commenters were the State of Nevada (Nuclear Waste Project Office), the U.S. Department of Energy, the Council on Environmental Quality, the U.S. Environmental Protection Agency, and several private organizations (the Nevada Nuclear Waste Task Force, the Environmental Defense Fund, the Southwest Research and Information Center, the Sierra Club, and the Edison Electric Institute).

After reviewing and giving careful consideration to all the comments received, the Commission now adopts, in substantial part, the position set forth in its earlier notice. In particular, the Commission continues to emphasize its view that its role under NWPA is oriented toward health and safety issues and that, in general, nonradiological environmental issues are intended to be resolved in advance of NRC licensing decisions through the actions of the Department of Energy, subject to Congressional and judicial review in accordance with NWPA and other applicable law. The Commission anticipates that many environmental questions would have been, or at least could have been, adjudicated in connection with an environmental impact statement prepared by DOE, and such questions should not be reopened in proceedings before NRC.

State of Nevada Comments

We begin with the comments presented by the State of Nevada not only because of its important sovereign interests, but because of the fundamental nature of the issues that are raised. In Nevada's view, NRC "poses, analyzes and answers the wrong question." According to Nevada, the question is how NRC should perform its own, independent, NEPA responsibilities and not how NRC should review and approve the adequacy of DOE's EIS.

Having posed the question in terms of responsibilities under NEPA, Nevada reviews the many cases that hold that

where a major federal action involves two or more federal agencies, each agency must evaluate the environmental consequences of the entire project and determine independently whether the statutory requirements have been satisfied. NRC is not relieved from the responsibility of making such an independent determination, according to the State, because it would still be able to carry out its licensing responsibilities in a manner consistent with law. NRC, which is directed by NWPA to adopt the DOE environmental impact statement "to the extent practicable," need only do so to the extent that it is otherwise within the customary practice of the agency.

The views of the State bring the question into sharp focus. If the issue were properly to be posed as Nevada urges—i.e., with an assumption that the Commission's NEPA responsibilities are not modified by NWPA—then the regulatory language suggested in its comment letter would have merit. But the Commission firmly believes that the law was intended to have all matters associated with the environmental impacts of repository development considered and decided, to the fullest extent practicable, apart from NRC licensing proceedings. As explained when the proposed rule was published, this interpretation is supported both by the specific legislative and judicial review procedures built into the statutory structure and by the accompanying legislative history. The Commission believes that the result is sensible. Concerns arising under NEPA—if not resolved through the negotiation procedures established by NWPA—would be adjudicated early, with finality, and with every reasonable argument being capable of being advanced to the oversight of Congress and the courts. From that point on, in the absence of substantial new information or other new considerations, it would be proper to inquire only whether the specific detailed proposal of the Department of Energy could be implemented in a manner consistent with the health and safety of the public. The resolution of issues in this manner for purposes of NEPA would in no event affect the framing or decision of health and safety issues, under the Atomic Energy Act, in NRC licensing proceedings.³

³ The State took exception to the standard for completeness of information in a license application—viz. the "reasonably available" standard of 10 CFR 60.24. Although the matter is not strictly at issue in this rulemaking, the Commission regards the State's concern in this regard to be overdrawn. While information may be sufficient to meet the requirements of § 60.24, this in no way

Although quite different statutory schemes are involved, we perceive a parallel with issues raised in *Quivira Mining Company v. NRC*, 866 F.2d 1248 (10th Cir. 1989). That case concerned regulations adopted by NRC pursuant to the Uranium Mill Tailings Radiation Control Act of 1978. It considered, among other things, the extent to which NRC, in giving the "due consideration to economic costs" required by the statute, could rely upon a cost-benefit study previously carried out by the Environmental Protection Agency to support EPA's rulemaking responsibilities. The Commission concluded that since the agencies' actions coincided in material respects, all statutory language would retain significant force and effect, and the time period allowed for the issuance of its regulations was inadequate for an independent study. Congress did not wish to require the NRC to perform a second cost-benefit analysis. The Court found the legislative history, as well as the statutory language, to be ambiguous on the question; as such, it upheld the NRC construction. Here, given the identity of the actions being considered by the two agencies (DOE and NRC), we believe it to be a fair reading of Congressional intent that NRC can adequately exercise its NEPA decisionmaking responsibility with respect to a repository by relying upon DOE's environmental impact statement. As in *Quivira Mining*, the timing requirement—under NWPA, a three-year licensing process for a unique facility, involving standards of exceptional complexity, requiring disputatious predictions of future human activity and natural processes for thousands of years—supplies practical support for our interpretation. Congress did not speak to the precise question of the standard to be used in deciding whether adoption of DOE's environmental impact statement is practicable; and if our construction is not the only one that might be proposed, it seems to us to be, at a minimum, "permissible."

Once DOE's EIS has been adopted, the statute expressly relieves the Commission from further consideration of the environmental concerns addressed in the statement. Congressional review of a State's resolution of disapproval—should such a resolution be passed—would permit (and, most likely, virtually ensure) that issues other than those to be

implies that such information will prove to be sufficient to meet the applicant's burden of persuasion under § 60.51.

adjudicated under the Atomic Energy Act would have been considered and weighed. Under these circumstances, it would do no violence to national environmental policy to proscribe further examination in administrative proceedings.

Council on Environmental Quality Comments

The Commission invited the Council on Environmental Quality to comment on the proposed rule. The conclusion of CEQ was similar to that of the State of Nevada. In particular, CEQ read the phrase "to the extent practicable" to mean that NRC should make an independent evaluation of the DOE environmental impact statement, adopting some or all of it as appropriate so as to avoid unnecessary duplication. From the Commission's perspective, though, the position does not fully take into account the detailed scheme for environmental review established by NWA. Neither the related provisions of the statute (including, for example, those dealing with legislative and judicial review and establishing time frames for Commission decisionmaking) are analyzed, nor is there any examination of the legislative history which, as described in the preamble to the proposed rule, supports our point of view. We continue to believe that it is clear—at least in the debates of the House of Representatives with respect to the bill which, with amendments, was enacted into law—that the Commission role was intentionally to be directed to health and safety issues to the exclusion, absent new information or new considerations, of issues arising under NEPA.

It is worth noting, though, that CEQ recognizes that the Commission might "defer" to a court finding that the DOE environmental impact statement is adequate. This is certainly close, if not identical to, the Commission's position that a judicial finding of adequacy would preclude further litigation of the matter in NRC licensing proceedings.

Comments of Environmental Organizations

The environmental organizations' comments included a number of arguments similar to those of the State of Nevada with respect to the Commission's customary NEPA responsibilities. As already indicated, it is our view that Congress intended, under NWA, for NRC to accept the DOE EIS in the absence of substantial new considerations or new information. We reject the suggestion made by the Sierra Club that the approach we have

outlined amounts to an abdication of any Commission responsibility.

In addition, however, a number of comments of somewhat narrower scope were submitted by environmental organizations (as well as by the State of Nevada) and are addressed here.

One matter that particularly concerned the private Nevada Nuclear Waste Task Force involved the relationship between the judicial process and the Commission's administrative process. The Task Force cautioned that NRC should not rely on there having been a court ruling with regard to the adequacy of DOE's environmental impact statement in advance of the Commission's licensing decision (when a judicial finding of inadequacy, affecting much or little of the EIS, could be treated as a new consideration). In fact, such reliance is not essential. It is our expectation that, under NWA, a petition for review of the EIS would need to have been filed roughly contemporaneously with DOE's submission of a license application to NRC, and that judgment might have been entered within the three years envisaged for Commission licensing. Whether or not this proves to be the case is not controlling, for the standard for adoption does not rest upon collateral estoppel principles. Similarly, we find it beside the point to speculate regarding the possibility that a reviewing court might delay its decision on the adequacy until it sees the NRC conclusions in the licensing proceeding. Such delay would not stand in the way of the Commission's taking final action.

Although we thus do not rest our position upon the availability of a prior judgment of a court, we reiterate our view, as described in the preamble to the proposed rule, that such a judgment, if entered, would be controlling on the question of the adequacy of the EIS; and if the EIS were found to be adequate, it would be practicable for the Commission to adopt it.

We were criticized for suggesting that members of the public might be precluded from raising issues anew on the grounds that they had been represented by State officials in prior judicial proceedings. This position was claimed to be inconsistent with NRC intervention rules which, it is correctly argued, traditionally consider the interests of the state in which a facility is located as being distinguishable from the interests of particular members of the public who may be affected by the issuance of a license. Our first response is that our case law with respect to standing for purposes of intervention does not necessarily apply in the

context of collateral estoppel or issue preclusion, where the policies of repose come into play. But, in addition, we would reach the same result even if informed members of the public were not constrained by the putative prior judgment against the state; for in that event their failure to pursue their claims within the 180 days specified by section 119 of NWA would operate as a bar.

The Commission's position that failure to challenge DOE's environmental impact statement promptly in the courts bars subsequent challenge to that EIS in NRC proceedings was also criticized. Commenters suggested, instead, that affected parties may decide for reasons of litigative strategy or otherwise to contest questions regarding the repository in NRC licensing proceedings rather than by going to court about the DOE environmental impact statement. But such a unilateral decision on their part cannot operate as a means to circumvent the clear policy of the NWA requiring prompt adjudication of the issues raised by the EIS. When there has been a full and fair opportunity to raise the challenge, a party's failure to avail itself should in our view be regarded as an abandonment of its right to do so many years later. See *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 642, 647 (9th Cir. 1987).

There is force to a commenter's suggestion that our proposed rules failed to take account of an EIS having been prepared in connection with a Negotiator-selected site, in which case the Commission review would be governed by section 407 of NWA, as amended, 42 U.S.C. 10247, instead of section 114, 42 U.S.C. 10134. One difference, as pointed out by the comment, is that for a Negotiator-selected site DOE makes no formal recommendation to the President and the President makes no decision with respect to approval of the site. This difference alone would not affect the approach we take to discharging our NEPA responsibilities, in part because we would expect early judicial review to be available even in the absence of a Presidential decision. In this regard, NWA authorizes a civil action to review any EIS prepared with respect to "any action" under the applicable subpart and, given our perspective on the intended allocation of functions between DOE and NRC, "any action" could include the Secretary of Energy's submission of an application to the Commission. We think the intent of Congress, as evidenced by the considerable parallelism of the language employed, was generally to establish the

same sort of role for the Commission with respect to any site—whether at Yucca Mountain or at a Negotiator-selected location. We recognize that it is our obligation "to consider the Yucca Mountain site as an alternate to (the Negotiator-selected site) in the preparation of" an EIS. This obligation will be discharged, though, to the extent of our adoption of the DOE environmental impact statement, provided that the alternative sites were addressed therein.

One aspect of the Negotiator-selected site provisions does have to be taken into account, however. For a Negotiator-selected site, a Commission decision to adopt the environmental impact statement must be made "in accordance with § 1506.3 of Title 40, Code of Federal Regulations,"—a limitation that we found not to apply to the EIS submitted under section 114 of NWPA. Under the cited section of the CEQ regulations, the Commission may only adopt the DOE statement if it is "adequate." While a judicial decision on the point would be controlling, we would otherwise need to make an independent judgment in accordance with established practice. The final regulations reflect this possibility. In passing, though, we observe that we find nothing anomalous in having this responsibility in the case of a Negotiator-selected site but not in the case of the Congressionally-designated site at Yucca Mountain, for in the latter case there are opportunities for State disapproval and Congressional consideration that serve to provide a forum outside the Department for the evaluation of environmental concerns.

We are not persuaded by the comment that took exception to our requirement that needed supplements to the EIS would, as a general rule, have to be prepared by DOE—and that DOE's failure to comply with this requirement might be grounds for denial of a construction authorization. It seems to us that such supplementation by DOE would ordinarily be appropriate whenever, in the light of new information or new considerations, its proposed action may give rise to significant environmental impacts that were not addressed in its original EIS.

We were urged to reconsider our position with respect to the imposition of license conditions directed at mitigation of adverse environmental impacts. We had suggested that DOE could itself be held accountable for compliance with the mitigation measures described in its EIS, so that there was no need for them to be subject to litigation in NRC proceedings. The basis for our position is that the

departure from planned mitigation measures may well be a major Federal action having significant environmental impacts, which would necessitate the preparation of an environmental impact statement for a project that was otherwise determined to be without significant impact. But, in any event, we see no basis for employing our regulatory authority in this instance to police DOE's compliance with its mitigation plans; it will be subject to no more and no less oversight from interested persons than would be the case for many other developmental projects carried out, after preparation of appropriate environmental documentation, by Federal departments and agencies. To permit the mitigation measures to be litigated in NRC administrative proceedings—legitimate as this may be in other contexts—would run counter to the direction of the NWPA. It would bring in through the back door at least some of the contentions which, in our view, were to be settled in other forums.

An argument was made that amended section 114(f)(6)—which provides that "the Commission" need not consider enumerated factors in any EIS prepared with respect to a repository—indicates that Congress intended for NRC to issue its own EIS. The language in question appears to have been designed as an editorial measure, lacking substantive effect. The legislative history, cited with the proposed rule, demonstrates that no important change was being made in NRC's NEPA responsibilities, which under the 1982 statute were limited in the manner we have described. The statutory language is not surplusage, for NRC may have an obligation to prepare a supplemental EIS where there are new considerations or new information.

Department of Energy Comments

The Department of Energy, which is the prospective applicant affected by the proposed rules, agreed that NWPA counsels against wide-ranging independent examination by NRC of environmental concerns during the course of the licensing proceedings. DOE also concurred with NRC's view that a judicial determination of adequacy of an EIS precludes further litigation of that issue and that failure to raise an issue within the time set out in NWPA bars later challenge. The other DOE comments call for some clarification of the Commission's intentions, but do not prompt any fundamental change of the position that had previously been outlined.

For example, we can put to rest DOE's concern that NRC might defer its acceptance review of the license

application until the entire judicial review process on the EIS had run its course. Under the amendments, both as proposed and as adopted, the acceptance review applies only to the completeness of "the application," not "the application or environmental report" as under existing 10 CFR 2.101(f)(2).

We believe we can also satisfy DOE's concern with respect to our mention, at 53 FR 16192, that there may be a need for "multiple EIS's." The point being made was not that NRC might need to prepare its own EIS when DOE had already done so, but that the licensing process may involve more than one major federal action (for example, the construction of the repository on the one hand and the emplacement of waste on the other) that could necessitate the preparation of a supplemental EIS if not an entirely new one, if the impacts of such actions are not evaluated or properly encompassed in the initial EIS.

The responsibility for supplementation was another point of contention. DOE—along with some of the other commenters—argued that it would be inappropriate for it to be obliged to supplement its completed EIS in order to satisfy any independent NEPA responsibilities of the Commission. We agree with this statement. But, as DOE itself acknowledges, it might need to supplement the EIS if it were to make a substantial change in the proposed action or if significant new circumstances or information were to become available. That is all that is required by the regulatory language (10 CFR 60.24(c)).

However, in support of its position, DOE suggested that NRC adoption under the NWPA provisions was related specifically to the EIS "submitted as part of the Department's recommendation to the President." But the language of Section 114(f) quite clearly applies to "any environmental impact statement prepared in connection with a repository proposed to be constructed" by DOE under NWPA.

DOE is correct in pointing out that a supplemental EIS would not necessarily be required in the event of a substantial change in the proposed action, where the change and the impacts thereof had previously been considered in the original statement.

The principal remaining issue raised by DOE's comments concerns the appropriate role of NRC in DOE's NEPA activities. DOE suggests that NRC should be a "cooperating agency," a role that the Council on Environmental

Quality has recognized as being appropriate in the licensor-licensee context. We are not persuaded. The present situation is unique because—unlike the customary licensor-licensee situation—the particular statute guiding our approach (i.e., NWPAs) removes the balancing of environmental considerations from our independent judgment. Under these circumstances, it strikes us as particularly out of place for NRC to undertake the kind of critical evaluation that a “cooperating agency” should perform in the preparation of an EIS. The Commission, nevertheless, has jurisdiction and expertise that it can, and will, bring to DOE’s attention as a commenting agency through the entire DOE NEPA process. We shall not hesitate, in particular, to raise concerns that might subsequently also require adjudication, under the standards of the Atomic Energy Act, in our licensing proceedings. Other issues, of course, can be identified in our comments as well. In other words, NRC as a commenting agency can and will play an important constructive role all the while from the scoping stage through preparation of the environmental impact statement; but as the sole responsibility for weighing the environmental impacts in support of a recommendation to the President is vested in DOE, DOE properly should be the agency with formal sponsorship of the EIS as well.

We respond, finally, to DOE’s claim that the requirement for DOE to inform the Commission of the status of legal action on the repository is unnecessary, since this information is a matter of public record. As a general rule, the applicant has the burden of placing on the record those factual matters upon which NRC decisions may be predicated. Although we have not placed sole reliance upon principles of issue preclusion (collateral estoppel), it remains our position that a final judgment of a reviewing court with respect to the adequacy of the DOE final environmental impact statement would be controlling and would support our adoption of such FEIS. Accordingly, it is appropriate for DOE to report on the status thereof.

Industry Comments

Comments received from Edison Electric Institute generally supported the Commission’s view that its essential responsibility under NWPAs is to address radiological safety issues under the Atomic Energy Act, and that the requirements of NEPA were substantively modified as they apply to the high-level nuclear waste program.

We decline to follow EEI’s suggestion that issues related to adoption of DOE’s

environmental impact statement be made prior to the hearing process and outside the adjudicatory arena. As we have noted before, the impact statement does not simply “accompany” an agency recommendation for action in the sense of having some independent significance in isolation from the deliberative process. Rather the impact statement is an integral part of the Commission’s decision. It forms as much a vital part of the NRC’s decisional record as anything else. *Public Service Company of Oklahoma* (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 275 (1980). Even though the range of issues to be considered in the hearing may be limited, the formal function of the environmental impact statement as an element of the licensing decision remains.

However, we find merit in EET’s proposal to fix an early schedule for the NRC staff to present its position on the practicability of adoption and for other parties to file contentions with respect to the practicability of adoption. Accordingly, the final rule requires the NRC staff to present its position on adoption at the time that the notice of hearing is published in the Federal Register. Any contentions filed by any other party to the proceeding must be filed within thirty days after the notice of hearing is published. In the event that “substantial new considerations or new information” subsequently arises, contentions concerning the practicability of adopting DOE’s EIS that are filed after the 30-day deadline established in the rule must be accompanied by a demonstration of compliance with the late filing criteria in 10 CFR 2.1014.

Changes from the Proposed Rule

Section 51.67 Environmental Information Concerning Geologic Repositories

This section is revised to provide for the submission of environmental impact statements, pursuant to Title IV of NWPAs, as amended, with respect to a Negotiator-selected site. A further change reflects DOE’s comment that supplement would not be required where a modification to its plans had been previously addressed by its EIS.

Section 51.109 Public Hearings in Proceedings for Issuance of Materials License with Respect to a Geologic Repository

In the final rule, paragraph (a) incorporates a schedule for the staff to present its position on the practicability of adoption of the DOE environmental impact statement, and for the filing of

contentions with respect thereto. Consistent with the recently-completed LSS (Licensing Support System) rulemaking, a period of thirty days after notice of hearing is provided for the submission of contentions.

Paragraph (c) is revised so that the special criterion for adoption, as discussed herein, will apply only with respect to the geologic repository at the Yucca Mountain site. Any EIS for a Negotiator-selected site would be excluded from the application of this paragraph. A conforming change appears in paragraph (d).

Paragraph (e) is modified to emphasize that the Commission’s customary policies will be observed except for adoption of an EIS prepared under Section 114. This is achieved by the insertion of the cross-reference (“in accordance with paragraph (c)”) in the introductory clause. As the language has been modified, it permits the adoption of other DOE environmental impact statements with respect to a Negotiator-selected site in accordance with generally applicable law. This includes observance of the procedures outlined in 40 CFR 1506.3. This is addressed adequately in Appendix A to 10 CFR Part 51, Subpart A, and requires no further elaboration in the text of the rule.

Petition for Rulemaking

The Commission’s earlier notice invited comments upon the related portions of a petition for rulemaking submitted by the States of Nevada and Minnesota, PRM-80-2A, 50 FR 51701, December 19, 1985. With the exception of the State of Nevada, none of the comments received by the Commission in response to the notice addressed the petition as such. The State of Nevada referred to the petition, recognized that some of the considerations therein have been mooted, and urged that alternative language be considered in the proposed rule, in place of that which they had recommended in the petition.

The section of the petition which provides language pertaining to the adoption of DOE’s EIS (i.e., Section IV.3) is denied. However, the issues identified by the petition regarding the criteria and procedures for adoption of DOE’s EIS have been considered in this proceeding. Although the language being promulgated differs from that proposed by the petitioners, the Commission is in full agreement with the petitioners’ argument that adoption of DOE’s EIS must not compromise the independent responsibilities of NRC to protect the public health and safety under the Atomic Energy Act of 1954. Our

rulemaking approach is in fact designed to enhance our ability to address these health and safety issues as effectively and objectively as possible.

Environmental Impact Categorical Exclusion

The NRC has determined that this regulation is the type of action described in categorical exclusions 10 CFR 51.22(c)(1) and (3). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this regulation.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval numbers 3150-0021 and 0127.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 USC 605(b)), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. The only entity subject to regulation under this amended rule is the U.S. Department of Energy.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and record keeping requirements.

10 CFR Part 60

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting and record keeping requirements, Waste treatment and disposal.

Issuance

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the National Environmental Policy Act of 1969, as amended, the Nuclear Waste Policy Act of 1982, as amended, and 5 U.S.C. 553,

the NRC adopts the following amendments to 10 CFR Part 51, and related conforming amendments to 10 CFR Parts 2 and 60.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 78 Stat. 409 (42 U.S.C. 2241); sec. 201, 68 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2072, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat. 653, as amended (42 U.S.C. 4332); sec. 301, 68 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 208, 68 Stat. 1248 (42 U.S.C. 5848). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 653, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Sections 2.764 and Table 1A of Appendix C also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.806 also issued under 5 U.S.C. 553. Section 2.808 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-258, 71 Stat. 879, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 169, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 8, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. In § 2.101, paragraphs (f)(1), (2), (5), and (7) are revised and (f)(4) is removed and reserved to read as follows:

§ 2.101 Filing of application.

(f)(1) Each application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and any environmental impact statement required in connection therewith pursuant to Subpart A of Part 51 of this chapter shall be processed in accordance with the provisions of this paragraph.

(2) To allow a determination as to whether the application is complete and acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room. Twenty copies shall be filed to enable this determination to be made.

(4) (Reserved)

(5) If a tendered document is acceptable for docketing, the applicant will be requested to (i) submit to the Director of Nuclear Material Safety and Safeguards such additional copies of the application and environmental impact statement as the regulations in Part 60 and Subpart A of Part 51 of this chapter require, (ii) serve a copy of such application and environmental impact statement on the chief executive of the municipality in which the geologic repository operations area is to be located, or if the geologic repository operations area is not to be located within a municipality, on the chief executive of the county (or to the Tribal organization, if it is to be located within an Indian reservation), and (iii) make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards. All such copies shall be completely assembled documents, identified by docket number. Subsequently distributed amendments to the application, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages.

(7) Amendments to the application and supplements to the environmental impact statement shall be filed and distributed and a written statement shall be furnished to the Director of Nuclear Material Safety and Safeguards in the same manner as for the initial application and environmental impact statement.

PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

3. The authority citation for Part 51 is revised to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); secs. 201, as amended, 202, 68 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853-854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub. L. 95-604, Title II, 92 Stat. 3033-3041. Sections 51.20, 51.30, 51.60, 51.61, 51.80, and 51.97 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241, and sec. 148, Pub. L. 100-203, 101 Stat. 1330-223 (42 U.S.C. 10155, 10161, 10166). Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 82 Stat. 3036-3038 (42 U.S.C. 2027) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Secs. 51.43, 51.67, and 51.109 also issued under Nuclear Waste Policy Act of 1982, sec. 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)).

4. In § 51.20, existing paragraph (b)(13) is redesignated as paragraph (b)(14) and a new paragraph (b)(13) is added to read as follows:

§ 51.20 Criteria for and identification of licensing and regulatory actions requiring environmental impact statements.

(b) * * *

(13) Issuance of a construction authorization and license pursuant to Part 60 of this chapter.

5. Section 51.21 is revised to read as follows:

§ 51.21 Criteria for and identification of licensing and regulatory actions requiring environmental assessments.

All licensing and regulatory actions subject to this subpart require an environmental assessment except those identified in § 51.20(b) as requiring an environmental impact statement, those identified in § 51.22(c) as categorical exclusions, and those identified in § 51.22(d) as other actions not requiring environmental review. As provided in § 51.22(b), the Commission may, in special circumstances, prepare an environmental assessment on an action covered by a categorical exclusion.

6. Section 51.22 is amended, by revising the heading and adding a new paragraph (d), to read as follows:

§ 51.22 Criterion for categorical exclusion; identification of licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review.

(d) In accordance with section 121 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10141), the promulgation of technical requirements and criteria that the Commission will apply in approving or disapproving applications under Part 60 of this chapter shall not require an environmental impact statement, an environmental assessment, or any environmental review under

paragraph (E) or (F) of section 102(2) of NEPA.

7. In § 51.28, paragraph (a) is revised and a new paragraph (c) is added, to read as follows:

§ 51.28 Requirement to publish notice of intent and conduct scoping process.

(a) Whenever the appropriate NRC staff director determines that an environmental impact statement will be prepared by NRC in connection with a proposed action, a notice of intent will be prepared as provided in § 51.27, and will be published in the Federal Register as provided in § 51.116, and an appropriate scoping process (see §§ 51.27, 51.28, and 51.29) will be conducted.

(c) Upon receipt of an application and accompanying environmental impact statement under § 60.22 of this chapter (pertaining to geologic repositories for high-level radioactive waste), the appropriate NRC staff director will include in the notice of docketing required to be published by § 2.101(f)(8) of this chapter a statement of Commission intention to adopt the environmental impact statement to the extent practicable. However, if the appropriate NRC staff director determines, at the time of such publication or at any time thereafter, that NRC should prepare a supplemental environmental impact statement in connection with the Commission's action on the license application, the procedures set out in paragraph (a) of this section shall be followed.

8. A new § 51.67 is added to read as follows:

§ 51.67 Environmental information concerning geologic repositories.

(a) In lieu of an environmental report, the Department of Energy, as an applicant for a license or license amendment pursuant to Part 60 of this chapter, shall submit to the Commission any final environmental impact statement which the Department prepares in connection with any geologic repository developed under Subtitle A of Title I, or under Title IV, of the Nuclear Waste Policy Act of 1982, as amended. (See § 60.22 of this chapter as to required time and manner of submission.) The statement shall include, among the alternatives under consideration, denial of a license or construction authorization by the Commission.

(b) Under applicable provisions of law, the Department of Energy may be required to supplement its final environmental impact statement if it makes a substantial change in its

proposed action that is relevant to environmental concerns or determines that there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. The Department shall submit any supplement to its final environmental impact statement to the Commission. (See § 60.22 of this chapter, as to required time and manner of submission.)

(c) Whenever the Department of Energy submits a final environmental impact statement, or a final supplement to an environmental impact statement, to the Commission pursuant to this section, it shall also inform the Commission of the status of any civil action for judicial review initiated pursuant to section 119 of the Nuclear Waste Policy Act of 1982. This status report, which the Department shall update from time to time to reflect changes in status, shall:

(1) State whether the environmental impact statement has been found by the courts of the United States to be adequate or inadequate; and

(2) Identify any issues relating to the adequacy of the environmental impact statement that may remain subject to judicial review.

9. A new § 51.109 is added to read as follows:

§ 51.109 Public hearings in proceedings for issuance of materials license with respect to a geologic repository.

(a)(1) In a proceeding for the issuance of a license to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area, the NRC staff shall, upon the publication of the notice of hearing in the Federal Register, present its position on whether it is practicable to adopt, without further supplementation, the environmental impact statement (including any supplement thereto) prepared by the Secretary of Energy. If the position of the staff is that supplementation of the environmental impact statement by NRC is required, it shall file its final supplemental environmental impact statement with the Environmental Protection Agency, furnish that statement to commenting agencies, and make it available to the public, before presenting its position, or as soon thereafter as may be practicable. In discharging its responsibilities under this paragraph, the staff shall be guided by the principles set forth in paragraphs (c) and (d) of this section.

(2) Any other party to the proceeding who contends that it is not practicable

to adopt the DOE environmental impact statement, as it may have been supplemented, shall file a contention to that effect within thirty days after the publication of the notice of hearing in the Federal Register. Such contention must be accompanied by one or more affidavits which set forth factual and/or technical bases for the claim that, under the principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented. The presiding officer shall resolve disputes concerning adoption of the DOE environmental impact statement by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under § 2.734 of this chapter.

(b) In any such proceeding, the presiding officer will determine those matters in controversy among the parties within the scope of NEPA and this subpart, specifically including whether, and to what extent, it is practicable to adopt the environmental impact statement prepared by the Secretary of Energy in connection with the issuance of a construction authorization and license for such repository.

(c) The presiding officer will find that it is practicable to adopt any environmental impact statement prepared by the Secretary of Energy in connection with a geologic repository proposed to be constructed under Title I of the Nuclear Waste Policy Act of 1982, as amended, unless:

(1)(i) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and

(ii) The difference may significantly affect the quality of the human environment; or

(2) Significant and substantial new information or new considerations render such environmental impact statement inadequate.

(d) To the extent that the presiding officer determines it to be practicable, in accordance with paragraph (c) of this section, to adopt the environmental impact statement prepared by the Secretary of Energy, such adoption shall be deemed to satisfy all responsibilities of the Commission under NEPA and no further consideration under NEPA or this subpart shall be required.

(e) To the extent that it is not practicable, in accordance with paragraph (c) of this section, to adopt the environmental impact statement prepared by the Secretary of Energy, the presiding officer will:

(1) Determine whether the requirements of section 102(2) (A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical and other benefits against environmental and other costs, whether the construction authorization or license should be issued, denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the construction authorization or license should be issued as proposed.

(f) In making the determinations described in paragraph (e), the environmental impact statement will be deemed modified to the extent that findings and conclusions differ from those in the final statement prepared by the Secretary of Energy, as it may have been supplemented. The initial decision will be distributed to any persons not otherwise entitled to receive it who responded to the request in the notice of docketing, as described in § 51.28(c). If the Commission or the Atomic Safety and Licensing Appeal Board reaches conclusions different from those of the presiding officer with respect to such matters, the final environmental impact statement will be deemed modified to that extent and the decision will be similarly distributed.

(g) The provisions of this section shall be followed, in place of those set out in § 51.104, in any proceedings for the issuance of a license to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area.

10. In § 51.118, the existing text is redesignated as paragraph (a) and a new paragraph (b) is added, to read as follows:

§ 51.118 Final environmental impact statement—Notice of availability.

(b) Upon adoption of a final environmental impact statement or any supplement to a final environmental impact statement prepared by the Department of Energy with respect to a geologic repository that is subject to the Nuclear Waste Policy Act of 1982, the appropriate NRC staff director shall

follow the procedures set out in paragraph (a) of this section.

PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

11. The authority citation for Part 60 is revised to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 61, 161, 182, 183, 68 Stat. 829, 830, 832, 833, 835, 848, 853, 854, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233), secs. 202, 206, 88 Stat. 1244, 1248 (42 U.S.C. 5842, 5848); secs. 10 and 14, Pub. L. 95-601, 82 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 653 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 87-425, 86 Stat. 2213, 2228, as amended (42 U.S.C. 10134, 10141).

For the purposes of sec. 223, 68 Stat. 858, as amended (42 U.S.C. 2273), §§ 60.10, 60.71 to 60.75 are issued under sec. 161c, 68 Stat. 858, as amended (42 U.S.C. 2201(o)).

§ 60.15 (Amended)

12. In § 60.15, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

13. In § 60.21, paragraph (a) is revised to read as follows:

§ 60.21 Content of application.

(a) An application shall consist of general information and a Safety Analysis Report. An environmental impact statement shall be prepared in accordance with the Nuclear Waste Policy Act of 1982, as amended, and shall accompany the application. Any Restricted Data or National Security Information shall be separated from unclassified information.

14. Section 60.22 is revised to read as follows:

§ 60.22 Filing and distribution of application.

(a) An application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area at a site which has been characterized, and any amendments thereto, and an accompanying environmental impact statement and any supplements, shall be signed by the Secretary of Energy or the Secretary's authorized representative and shall be filed in triplicate with the Director.

(b) Each portion of such application and any amendments, and each environmental impact statement and any supplements, shall be accompanied by 30 additional copies. Another 120 copies shall be retained by DOE for distribution in accordance with written instructions from the Director or the Director's designee.

(c) DOE shall, upon notification of the appointment of an Atomic Safety and Licensing Board, update the application, eliminating all superseded information, and supplement the environmental impact statement if necessary, and serve the updated application and environmental impact statement (as it may have been supplemented) as directed by the Board. At that time DOE shall also serve one such copy of the application and environmental impact statement on the Atomic Safety and Licensing Appeal Panel. Any subsequent amendments to the application or supplements to the environmental impact statement shall be served in the same manner.

(d) At the time of filing of an application and any amendments thereto, one copy shall be made available in an appropriate location near the proposed geologic repository operations area (which shall be a public document room, if one has been established) for inspection by the public and updated as amendments to the application are made. The environmental impact statement and any supplements thereto shall be made available in the same manner. An updated copy of the application, and the environmental impact statement and supplements, shall be produced at any public hearing held by the Commission on the application, for use by any party to the proceeding.

(e) The DOE shall certify that the updated copies of the application, and the environmental impact statement as it may have been supplemented, as referred to in paragraphs (c) and (d) of this section, contain the current contents of such documents submitted in accordance with the requirements of this part.

15. In § 60.24, the section heading and paragraphs (a) and (c) are revised to read as follows:

§ 60.24 Updating of application and environmental impact statement.

(a) The application shall be as complete as possible in the light of information that is reasonably available at the time of docketing.

(c) The DOE shall supplement its environmental impact statement in a timely manner so as to take into account the environmental impacts of any substantial changes in its proposed actions or any significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

16. In § 60.31, the introductory paragraph is revised to read as follows:

§ 60.31 Construction authorization.

Upon review and consideration of an application and environmental impact statement submitted under this part, the Commission may authorize construction if it determines:

17. In § 60.51, the introductory portion of paragraph (a), and paragraph (b), are revised to read as follows:

§ 60.51 License amendment for permanent closure.

(a) DOE shall submit an application to amend the license prior to permanent closure. The submission shall consist of an update of the license application submitted under §§ 60.21 and 60.22, including:

(b) If necessary, so as to take into account the environmental impact of any substantial changes in the permanent closure activities proposed to be carried out or any significant new information regarding the environmental impacts of such closure, DOE shall also supplement its environmental impact statement and submit such statement, as supplemented, with the application for license amendment.

Dated at Rockville, Maryland this 28th day of June 1989.

For the Nuclear Regulatory Commission,

Samuel J. Chik,

Secretary of the Commission.

[FR Doc. 89-15633 Filed 6-30-89; 8:45 am]

GILLING CODE 780-01-0