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March 23, 1992

Mr. John J. Linehan
Division of High-Level
Waste Management
United States Nuclear Regulatory
Commission
Washington, D.C. 20555

Re: Pre-licensing Interaction Between the NRC and DOE; Scope, Purpose and Limits of NRC's Review of DOE's Annotated Outlines for the Geologic Repository and Monitored Retrievable Storage Facility; NRC Topical Reports and Study Plans

Dear Mr. Linehan:

At the invitation of the Nuclear Regulatory Commission, representatives of the State of Nevada attended a meeting on February 6, 1992 in Rockville, Maryland, with the staff of the NRC Division of High-Level Waste Management and the staff of the Department of Energy. The spokesperson for the DOE was Linda Desell, Chief, Regulatory Integration Branch, Office of Systems and Compliance. Representing Nevada were Steve Frishman, of this Office, and Special Deputy Attorney General James Davenport.

The purpose of the meeting was for representatives of the NRC, DOE, and affected parties to discuss the scope, purpose, and limits of NRC's review of DOE's "Annotated Outline Planning Package" for the geologic repository and monitored retrievable storage facility and NRC's topical reports and study plans. The purpose of this letter is to summarize and record the discussion and conclusions of that meeting.

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Definition of "Pre-licensing Period":

You clarified that "pre-licensing" refers to a period of time only and not to any particular process by which the NRC makes decisions which have "any binding effect on licensing". According to your interpretation, "pre-licensing" is the time period prior to the date established under 42 U.S.C. 10134(b) when the DOE may file a formal application for a construction authorization for the construction of a high level nuclear waste repository pursuant to 42 U.S.C. 10134(c) and 10 C.F.R. 60.

Statutory Authority of the Commission:

You clarified that the statutory authority of the NRC to engage in pre-licensing interaction with the Department of Energy is 42 U.S.C. 10133(b)(1) and (3); 10133(c)(1) and (2)(A); 10134(a)(1)(D) and (E); and 10137(a). You acknowledged that 42 U.S.C. 10134(c) addresses actual consideration of a filed application and does not address pre-licensing interaction.

Focus of NRC Staff Activity During the Pre-licensing Period:

You clarified that, during the pre-licensing period, the NRC staff would focus on the question: "What is going to be sufficient for inclusion in the license application?" The purpose of this question is to establish criteria to determine whether to docket, or formally accept, an application filed with the NRC by DOE. As an example, prior to docketing the application, it will be necessary to evaluate whether the model proposed by DOE to demonstrate compliance with the Environmental Protection Agency standard (40 C.F.R. 191) is "reasonably appropriate for evaluating the subject site". If it were not, it would not be sufficient for inclusion in the license application.

Also, as another example, the NRC's determination that the site characterization plan, published by DOE under 42 U.S.C. 10133, is "sufficient", is merely a determination that the inquiry described therein will provide information which it is reasonably appropriate to include in a license application.

Definition of "Closure" of Issues During the Pre-licensing Period:

You and representatives of the Department of Energy agreed that the term "closure", which both agencies use in the context of discussing the continuing controversy over technical issues, is an administrative term of art which means that there are no more questions or comments for the present as to a particular

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

The term "closure" does not mean that any party to an eventual proceeding to consider a construction authorization, including the NRC staff, is foreclosed from raising questions about the issue, submitting evidence relevant to the issue, or asserting a position inconsistent with administrative reticence regarding the issue. Particularly, during the meeting representatives of both agencies agreed that issues related to methods of data collection, the scientific processes of arriving at scientific conclusions, the method to evaluate compliance with the EPA standard (40 C.F.R. 191), and any determination of compliance with that standard would all remain entirely open to consideration within the proceeding to consider a construction authorization.

Representatives of DOE expressed concern that the intelligent martialing of resources dictated that certain technical issues be "closed" when it was determined that the technical issue was no longer sensitive to search for additional information. You expressed your opinion that DOE was entitled to make internal determinations that it would cease searching for additional information regarding given technical issues, but that DOE accepted the risk of doing so. DOE representatives concurred in this observation. NRC staff volunteered to make greater effort in the future to distinguish between issues which it regarded as "open", i.e. requiring response from DOE, and those issues where NRC merely wanted to make suggestions of things to explore. NRC and DOE staff agreed to conduct a conference call to discuss the status of "open items", "partially open items", and "amended open items".

DOE's Annotated Outline Planning Package:

DOE's representative explained that the Annotated Outline Planning Package was an internal management tool, would be informational only to the NRC and that NRC's response was desired but not mandatory. DOE further explained that the Annotated Outline Planning Package will be used to support a determination of site suitability.

You stated that DOE's "skeleton" Annotated Outline corresponds to NRC Draft Regulatory Guide DG-3003, Format and Content for the License Application for the High-Level Waste Repository, November 1990. We presume that the "skeleton" document you referred to was MGDS Annotated Outline Planning Package for the preparation of a License Application, Revision 2, December 13, 1991. You expressed the opinion that NRC silence in response to DOE's submission of its Annotated Outline Planning Package did not constitute resolution of any issue discussed therein. DOE's representative agreed to memorialize this understanding by the preparation of a draft statement of the purpose, scope and limits of NRC staff review of the Annotated Outline. This draft statement will be provided to NRC staff and affected parties for discussion at a NRC/DOE management meeting in the near future. NRC and DOE will aim at arriving at agreement on the specific text of a statement of understanding. Future iterations of the Annotated Outline, planned by DOE, will be reviewed by NRC pursuant to that statement of understanding.

NRC Topical Reports:

DOE representatives requested information regarding the significance of NRC's reaction to or adoption of topical reports prepared by the DOE. You expressed the opinion that topical reports prepared by DOE or issued by NRC staff merely constitute the basis of review and comment at the staff level. Consistent with the discussion of "closure" above, the preparation or publication of a topical report does not foreclose later discussion of the issue. You agreed to memorialize this understanding by preparing a draft statement of the purpose, scope and limits of the NRC staff review of DOE topical reports. This statement will be provided to DOE staff and affected parties for discussion at a NRC/DOE management meeting in the near future. NRC and DOE will aim at arriving at agreement on the specific text of a statement of understanding. Future NRC review of DOE topical reports will be carried out pursuant to that statement of understanding.

Prerequisite for DOE Filing or NRC Docketing of Application for Construction Authorization:

You and representatives of DOE agreed that DOE must comply with the statutory prerequisites of the Nuclear Waste Policy Act before DOE may file, or NRC may docket, DOE's application for construction authorization. In particular, those prerequisites include: 1) completion of site characterization (42 U.S.C. 10133); 2) determination that the site is "suitable" for development as a repository under the siting guidelines

(42 U.S.C. 10132(a), Nevada v. Watkins (III),939 F.2d 710, (9th Cir. 1991); Nevada v. Watkins (IV), 943 F.2d 1080, note 9 (9th Cir. 1991); 3) publication of an environmental impact statement (42 U.S.C. 10134(a)(1)(D) and (f), Nevada v. Watkins III, supra); 4) Secretarial recommendation to the President (42 U.S.C. 10134(a)(1)); 5) Presidential recommendation to the Congress (42 U.S.C.10134(a)(2) and (4); and 6) Congressional approval (42 U.S.C. 10134(b).

NRC and DOE staff agreed that NRC's statutory authority to consider the merits of the application for a construction authorization is not ripe until these prerequisites have been met.

DOE's Report on Early Site Suitability Evaluation of the Potential Repository Site (ESSE):

DOE will publish a Report on Early Site Suitability Evaluation of the Potential Repository Site at Yucca Mountain, Nevada. Representatives of DOE acknowledged and agreed that the determination by DOE that a site is "suitable" is not the same as a determination by NRC that a site is "licensable." Suitability is an analysis that each of several qualifiers or disqualifiers mandated in 42 U.S.C. 10132(a) is present or not. A determination of licensability, on the other hand, must include analysis of compliance with EPA and NRC standards. DOE representatives agreed with this distinction.

The NRC has not determined whether it will review DOE's Early Site Suitability report. In the event it does, NRC will make available for comment a statement of the purpose and scope of its review prior to initiating a review of DOE's report.

Burden of Proof in Proceeding on Construction Authorization:

Representatives of DOE clarified their understanding that the burden of proving compliance with any statutory, or regulatory standard for issuance of a construction authorization will be upon the applicant, DOE. No interaction with NRC staff during the pre-licensing period will affect that burden.

Conclusion:

This meeting and your presentation, in our view, laid an important foundation for a better understanding of the basis for, and a clarification for all parties of the role of the NRC staff during the pre-licensing period. We concur in your statement that NRC's "focus during pre-licensing is on the review of programs, plans, assumptions, interpretations, and methodologies, not on the adequacy of compliance with 10 CFR Part 60." (Linehan, 2/6/92 presentation, page 6.) We look forward to a continued participation in the processes initiated at this meeting. If you

have comments or questions regarding our summary understanding of the outcome of the February 6, 1992, NRC/DOE management meeting, please do not hesitate to contact me.

Sincerely,

for

Robert R. Loux
Executive Director

SF/RRL/sjc

cc: Ivan Selin
Chairman, NRC
Linda Desell, DOE