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MEMORANDUM

DATE: February 12, 1986

FOR: Robert E. Browning, Director
Division of Waste Management

FROM: Paul T. Prestholt, Sr. OR - NNWSI

PM

SUBJECT: Assessment of The Ninth Circuit Court Opinion: State
of Nevada vs. DOE

During the conference call that took place on December 19, 1985, between yourself and the OR's, you asked for an assessment of the Opinion of the U.S. Ninth Circuit Court of Appeals on the suit brought by the State of Nevada against the DOE. You asked that this assessment speak to two specific areas:

1. How the Opinion would effect the NRC's QA program;
2. Should the NRC consider performing independent investigations on-site?

The lawsuit was the result of DOE's refusal to fund independent technical investigations that the State of Nevada wished to conduct in the vicinity of Yucca Mountain. The State contended that such funding was authorized by Sec.116(c)(1)(A) of the NHPA, Public Law 97-425. The DOE disagreed under provisions of Guidelines on Nuclear Waste Repository Program Grants. The State sought to have the above guidelines declared unlawful.

The suit was resolved in favor of the State, but with important limitations.

HOW THE OPINION WILL AFFECT NRC'S QA PROGRAM.

The Court's Opinion specifically directs the DOE to grant funding for studies that will support the State of Nevada's "Statement of Reasons" why [the State] disapproved the recommended repository site," (the Opinion, line 18, page 6). Therefore the studies funded by Order of this Opinion do not

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To: REBrowning
From: PTPresthol

directly concern the NRC. However, the staff should pay close attention to these studies and the QA procedures applied to them by the State because:

1. The State's activities at the site may, if not properly supervised, compromise the integrity of the site; and
2. The NRC will undoubtedly be presented with any data collected by the State that would support a negative licensing decision.

Point one, above may not be a QA function, but may be taken care of by normal technical overview of the work done at the Site. However, the QA organization could and should have an important role in the technical overview of the State's activities.

In considering point two, the QA pedigree of the data collected by the State would be most important to the staff if the NRC was asked to consider the data during the staff's review of the DOE's license application and prior to consideration of the application by the License Review Board. These data must meet all the requirements of 10 CFR 50 App. B and the Division QA Review Plan.

If these data (from the State) are presented during consideration of the DOE license application by the Licensing Review Board, they would, most likely, be treated as would the data from any intervenor and would have to stand on their own merit.

The NRC Staff (licensing, technical, QA) should maintain a full awareness of the State's on-site activities. Further, the staff must maintain open lines of communication with the State and any contractors working for the State on-site. Since the staff has no legal authority to monitor any state's activity, consideration should be given to entering into an agreement, similar to the NRC/DOE Site Specific Agreement, with each state that contemplates performing on-site tests and investigations.

SHOULD THE NRC CONSIDER PERFORMING INDEPENDENT INVESTIGATIONS ON-SITE?

I could find no direct authorization in the NWSA, Public Law 97-425 or in 10 CFR 60 that would permit the NRC, Division of Waste Management to conduct technical field investigations on-site prior to license application. However, Section 3, Paragraph C of the NRC/DOE Site Specific Procedural Agreement (FR48:38701) states:

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"The NRC will also notify the DOE of its schedule (and those of its contractors) of planned field and laboratory testing conducted at or with samples from potential repository sites and will establish, maintain, update, and provide the DOE an inventory of data as described in the preceding paragraph."

(emphasis mine). This statement clearly gives the NRC Division of Waste Management, and its contractors, the right to conduct tests on-site prior to license application by the DOE.

This being the case, the Division of Waste Management should maintain an open policy concerning the conduct of non-destructive site specific tests and investigations. The Geotechnical Branch, Geology Section, is presently considering sponsoring a consultant (Russ Purcell through the LLNL contact) to conduct studies in trenches dug across fault traces in the vicinity of Yucca Mountain, Nevada. Other studies that the NRC, Division of Waste Management might consider sponsoring or participating in, include:

1. Low sun angle aerial photography;
2. High resolution reflection and refraction seismic surveys;
3. Confirmatory surface geologic mapping;
4. Mapping in the exploratory shaft and underground facilities.

If the NRC, Division of Waste Management should decide to sponsor or participate in independent testing at a DOE site, I believe that these investigations must be conducted under a QA program as rigorous as is imposed on the DOE. Any thing less would result in serious criticism of the NRC program, by DOE, the States and Tribes, and the public.

PTP/brm

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