

*Encl. to memo to
J. Davis from REB
7/5/84*

84/07/03

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NOTE TO: Bob Johnson

FROM John Surmeier

SUBJECT: POLICY INCONSISTENCY BETWEEN EA REVIEW PLAN AND SITING GUIDELINES

Yesterday, I reviewed the EA Review Plan and told you that it looked good and I would concur in the document. However, after reading the "Revised Final Decision on Concurrence in DOE Siting Guidelines" this morning, I believe that there is a major inconsistency between the position taken in the EA Review Plan (and most likely the Amendments to 10 CFR Part 60 Procedural Rule) and the Guidelines. I have not had time to get all my thoughts organized but believe this issue is of sufficient importance to bring it to your attention as soon as possible.

The EA Review Plan argues that it need not comment on the "methodology used by DOE to compare or select sites, the relative merits of one site against another, or environmental effects of site characterization." The logic basis for this appears to be in conflict with the position taken by the Commission on its concurrence of the DOE Siting Guidelines.

The NRC staff/Commission took the following position on the concurrence of the Siting Guidelines:

1. Concurrence would be only on those areas in which the Commission believed it had statutory responsibility.
2. The Commission required DOE to address three conditions for its concurrence (5,6, and 7) in which DOE stated it believed went substantially beyond what the Nuclear Waste Policy Act required. In response, the Commission stated that it continued to "believe that the several acts cited in the Commission's preliminary decision extend to its broad jurisdiction over matters regarding protection of the public health and safety from exposures to radiation and over environmental impacts arising from NRC licensed facilities. This authority provides an ample basis for inclusion of Conditions 5, 6, and 7."

These three conditions, as described below, are related to the site nomination. The EA's are required under Section 112(b)(1)(E) of NWPA. If NRC believed it had statutory responsibility in the areas of Conditions 5,6, and 7, what is the legal basis for the NRC to state it will not comment on the use of the guidelines in the EA Review Plan?

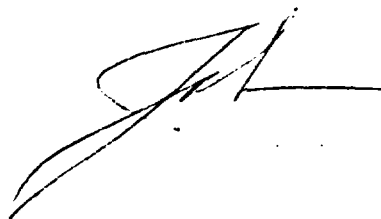
- a. Condition 5 relates to how guidelines would be applied at each siting stage including site nomination and characterization.

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- b. Condition 6 relates to the kinds of information necessary for DOE to make decision on the nomination of at least five sites and recommend three sites to the President.
 - c. Condition 7 relates to adding disqualifying conditions to the guidelines with sufficient specificity to ensure that unacceptable sites are eliminated as early as practicable. Condition 7 states that "in view of its NEPA responsibilities, the Commission wanted some of these disqualifying conditions to be applied early in the site selection process to ensure that unacceptable sites will be eliminated as early as practicable."
3. The Commission and DOE agreed that the Secretary would make its preliminary determination under Section 114(f) that the sites were suitable for development as repositories consistent with the guidelines after site characterization had been completed. This would appear to imply that it is even more important for DOE to select sites for nomination and characterization that will survive.

If NRC does not provide comments on the methodology used by DOE to compare or select the sites or the relative merits of one site against another, is NRC fulfilling its obligations under NEPA?

Bob, given the above concerns, I believe it might be appropriate to have OELD provide a written legal opinion as to why the Commission's position on the Concurrence in the DOE Siting Guidelines is consistent with the approach of taken in the EA Review Plan.

A handwritten signature in black ink, consisting of a stylized, cursive 'J' followed by a horizontal line extending to the right.