

AUG 9 1988

- 1 -

MEMORANDUM FOR: Robert E. Browning, Director
Division of High-Level Waste Management

FROM: Joseph O. Bunting, Jr., Chief
High-Level Systems Engineering and
Evaluation Branch

SUBJECT: TRANSMITTAL OF STAFF PAPER ON THE DEVELOPMENT OF A
TECHNICAL POSITION INTO A RULEMAKING

Pursuant to your request, my staff has prepared the enclosed paper on the development of a technical position into a rulemaking. A previous draft of this paper was provided to HLTR, HLOB, RES and OGC for review and comment. Their comments were incorporated into the enclosed paper. This paper presents various scenarios for the technical position-to-rulemaking process. Most important, it also demonstrates that generally, there is a small difference in time and resource requirements between the development of a technical position and the development of a rule. This small difference does not justify development of a non-binding technical position when an issue could be settled with the force of law.

Although rulemaking does not totally eliminate the possibility of subsequent contentions, the fact that rulemakings are backed by the force of law gives us a higher level of confidence than would a technical position or other guidance document that an issue has been resolved. Other things being equal, in view of the small difference in time and resources, it would therefore seem to be more efficient to use rulemaking as the chief means of resolving significant outstanding regulatory uncertainties prior to the licensing hearing.

At present, nine regulatory uncertainties have been identified as candidates for rulemaking. Under our program architecture, a more comprehensive review is currently underway which may identify additional regulatory uncertainties which may be of sufficient significance to add as candidates for rulemaking. Our efforts to develop factors for identifying and prioritizing candidate uncertainties for rulemaking suggest that there will be a considerable number of such candidate uncertainties. It is also apparent that we will have to go to rulemaking on each of the regulatory uncertainties before we can even consider going to rulemaking on the associated technical uncertainties. If we were to take no action in this area, we will be forced to accept the onus of delaying the DOE program because of unresolved safety issues, even if we allow for slippages in DOE's schedule.

There are several possible NRC responses to the lack of time for the rulemaking efforts that currently appear to be required to meet the NWPA construction authorization decision deadline:

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Approach A

Under this approach, all candidate issues that have been identified through the screening process must be resolved by rulemaking to assure that there will not be any significant problems at the licensing hearing. There are several possible responses.

1. Seek additional resources;
2. Under Section 114(e)(2) of the Nuclear Waste Policy Act, we could submit a written report to the Secretary (DOE) and Congress explaining the reason for our failure or expected failure to meet the deadline in the project decision schedule.
3. Make it clear to all concerned that NRC will be unable to meet the NWPA timetable for a repository licensing decision without significant additional time and resources to complete the rulemakings needed to reduce the issues for adjudication at the hearing to a manageable number. (This assumes that we can identify an optimum number of issues for rulemaking and credibly estimate the additional time and resources required.)
4. Seek alternative methods of establishing regulatory requirements with the force of law;
 - a. Promulgating interim final or immediately effective rules pending subsequent public comment.
 - b. Rulemaking by adjudication -- see A Guide to Federal Agency Rulemaking, Administrative Conference of the United States (ACUS), pp. 72-83.)
 - c. Negotiated rulemaking can be used to develop a proposed rule or at least develop consensus that can be used by the agency to draft a proposed rule. For purposes of negotiation, it may be of greater cost/benefit to group related issues together. This option would have to be examined on a case-by-case basis.

Approach B

Although A is the desired approach, limits on our time and resources mean that we may make it impossible to go to rulemaking on all of the candidate issues. If we can not live with the risk that an issue we could not resolve by rule might appear on the hearing agenda, we should consider pursuing alternative methods of dispute resolution prior to licensing. The objective here would be to identify dispute resolution methods, such as mediated consensus-building, that could be used for some issues as a complement or alternative to conventional guidance development efforts to achieve a lower level of risk (if

AUG 9 1988

possible at lower cost) that the issues would significantly affect the licensing proceeding. Thus, in addition to the alternatives presented under Approach A, under Approach B we would also pursue alternatives designed to enable NRC to:

1. Forego rulemaking, at reduced risk (compared to conventional non-rulemaking approaches to pre-licensing resolution of issues) that the issues on which consensus is reached would be resurrected for reconsideration during the licensing proceeding; and/or
2. Expedite rulemaking, if desired, based on the consensus achieved among the interested parties to the dispute.

For the purposes of consensus building, it may be of greater cost-benefit to group related issues together and subject them to negotiations with the affected parties. The decision to use this alternative would have to be addressed on a case-by-case basis. There is also the possibility that some combination of the above alternatives would enable us to fulfil our mission.

We have already had several meetings with the other branches, OGC, and RES in regard to identifying and establishing priorities for resolving uncertainties. I would like to circulate this paper to add to our discussion, and would appreciate your comments as early as possible.

RMacDougall
for Joseph O. Bunting, Jr., Chief
 Division of Systems Engineering
 and Evaluation Branch

Enclosure: As stated.

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DATE: 8/9/88	:	8/9/88	:	8/9/88	:	:	:	:	:

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The limits on our time and resources mean that we may not be able to go to rulemaking on all of the candidate issues. If we are not in a position to live with the risk of these issues appearing on the hearing agenda, then it will be necessary to pursue alternative methods of dispute resolution to enable NRC management to resolve these issues prior to the licensing hearing. In addition to the alternatives presented under Approach A, under Approach B we would also pursue alternatives designed to enable NRC to:

1. Forego rulemaking, at reduced risk (compared to conventional non-rulemaking approaches to pre-licensing resolution of issues) that the issues on which consensus is reached would be resurrected for reconsideration during the licensing proceeding; and/or
2. Expedite rulemaking, if desired, based on the consensus achieved among the interested parties to the dispute.

For the purposes of consensus building, it may be of greater cost-benefit to group related issues together and subject them to negotiations with the affected parties. The decision to use this alternative would have to be addressed on a case-by-case basis. There is also the possibility that some combination of the above alternatives would enable us to fulfil our mission.

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