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Mr. Robert R. Loux, Director  
Agency for Nuclear Projects  
Nuclear Waste Project Office  
State of Nevada  
Carson City, Nevada 89710

Dear Mr. Loux:

I am responding to your letter of January 18, 1989, in which you gave us comments on the U.S. Nuclear Regulatory Commission (NRC) staff's Commission paper entitled "Regulatory Strategy and Schedules for the High-Level Waste Repository Program" (SECY-88-285). I would like to address the concerns and recommendations discussed in your letter.

Your primary concern is with our overall strategy of early resolution of issues. You state that "aside from obvious disqualifiers, no issue involving the ultimate demonstration of the repository's capability to isolate high-level nuclear waste should be resolved prior to the actual licensing proceeding in which all parties are able to fully 'litigate' that issue." I believe that it is the NRC staff's responsibility, during the prelicense application phase, to identify and reduce uncertainties that may become licensing issues. The NRC staff emphasized, in SECY-88-285, that resolution of potential licensing issues will be achieved through rulemaking for certain regulatory uncertainties where the meaning of a regulatory requirement is subject to different interpretations. These rulemakings are not designed to address site-specific uncertainties involving the ultimate demonstration of the repository's capability to isolate high-level nuclear waste. The issue of compliance with the regulation, as it might be revised, could still be litigated for a particular facility. In addition, guidance in the form of Technical Positions will be prepared for selected technical uncertainties. Although Technical Positions will help reduce uncertainties, which may be site-specific in nature, they do not resolve uncertainties as rulemakings do. As with any staff guidance document, the staff approach given in a Technical Position, unless specifically incorporated into a regulation, is subject to challenge in a hearing.

You recommend that some of our potential rulemaking topics should not be pursued, since you do not consider them to be regulatory uncertainties, but, rather, areas that DOE would like to make either more lenient or prescriptive. The NRC staff's independent review concluded that these topics may be subject to different interpretations; therefore, consistent with the strategy in SECY-88-285, the NRC staff will continue to work on resolving these uncertainties.

You also recommend deferring, for later consideration, some of our potential rulemakings that depend on U.S. Environmental Protection Agency (EPA) or other NRC rulemakings. The NRC staff also recognizes these dependencies. The schedules shown in SECY-88-285 for the dependent rulemakings assume that work will proceed in parallel, but slightly behind, the rulemakings on which they depend. The NRC staff is taking this approach to minimize the impact on the overall rulemaking and license application schedule.

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You suggest that our Regulatory Guide on the format and content of the License Application be considered in a rulemaking. SECY-88-285 does identify a potential rulemaking to revise the general content requirements of the License Application and establish criteria for the acceptance of the License Application. The staff's intent is to have general content requirements in the regulation and more detailed format and content guidance in the Regulatory Guide.

Your letter states that Technical Positions ". . . may unintentionally acquire the appearance or effect of rule, albeit unofficial. . ." and that ". . . the Commission may inadvertently constrain itself and the parties in the license proceeding by earlier staff determinations which will not have had the benefit of either rulemaking or a contested case process." Be assured that guidance given in any form, including Technical Positions, will not unduly constrain the Commission, the staff, or any party to the license proceeding. If new site data would indicate a change in a Technical Position, the staff would modify its guidance accordingly.

Finally, I would like to note that all rulemakings, Technical Positions, and the Regulatory Guide will be issued first as drafts, so that all interested parties, including the State of Nevada, may comment on them. Therefore, any concerns that you might have about specific topics may be expressed during the comment period, as well as during any comment response meetings that might be scheduled.

I appreciate your thorough analysis of our regulatory strategy and welcome your continued interest and participation in our program. Please let me or John Linehan of my staff know if you would like to further discuss your concerns or be briefed on our regulatory strategy.

Sincerely,

(Signed) Robert M. Bernero

Robert M. Bernero, Director  
Office of Nuclear Material Safety  
and Safeguards

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