

received  
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dated 5/3/88

**NUCLEAR REGULATORY COMMISSION**

**10 CFR Parts 2, 51 and 60**

**NEPA Review Procedures for Geologic Repositories for High-Level Waste**

**AGENCY: Nuclear Regulatory Commission.**

**ACTION: Proposed rule.**

**SUMMARY:** The Nuclear Regulatory Commission is proposing to revise its procedures for implementation of the National Environmental Policy Act (NEPA). The proposed rule would address the Commission's role under NEPA in connection with a license application submitted by the Department of Energy with respect to a geologic repository for high-level radioactive waste (HLW). The changes are needed in order to reflect the provisions of the Nuclear Waste Policy Act of 1982 (NWPA), as amended. Under that Act, the Commission is required to adopt the Department's environmental impact statement (EIS) to the extent practicable. The proposed rule, among other things, sets out the standards and procedures that would be used in determining whether such adoption is practicable.

**In summary, under the proposed rule:**

- (1) The Commission will conduct a thorough review of DOE's draft EIS and will provide comments to DOE regarding the adequacy of the statement.**

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(2) If requested by Congress pursuant to the NWPA, the Commission will provide comments on DOE's EIS to the Congress with respect to a State or Tribal notice of disapproval of a designated site.

(3) The NRC will find it practicable to adopt DOE's EIS (and any DOE supplemental EIS) unless:

(a) the action proposed to be taken by the NRC differs in an environmentally significant way from the action described in DOE's license application, or

(b) significant and substantial new information or new considerations render the DOE EIS inadequate.

(4) The DOE EIS will accompany the application through the Commission's review process, but will be subject to litigation in NRC's licensing proceeding only where factors 3(a) or 3(b) are present.

In accordance with NWPA, the primary responsibility for evaluating environmental impacts lies with DOE, and DOE would therefore be required to supplement the EIS, whenever necessary, to consider changes in its proposed activities or any significant new information.

**DATES:** Comment period expires August 3, 1988. Comments received after August 3, 1988 will be considered if it is practical to do so, but assurance of consideration is given only for comments filed on or before that date.

**ADDRESSES:** Submit written comments and suggestions to: Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C., 20555, Attention: Docketing and Service Branch. Copies of comments received may be examined at the NRC Public Document Room, 1717 H Street, N.W., Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** James R. Wolf, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone (301) 492-1641.

**SUPPLEMENTARY INFORMATION:**

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## INTRODUCTION

All agencies of the Federal Government are charged with the duty to interpret and administer the laws of the United States, to the fullest extent possible, in accordance with the policies set forth in the National Environmental Policy Act of 1969, as amended (NEPA). 42 U.S.C. 4321 et seq. Under NEPA, the Nuclear Regulatory Commission is required to prepare an environmental impact statement (EIS) with respect to any major Federal action in which it is engaged that might significantly affect the quality of the human environment. The EIS contains a detailed statement of the

environmental impacts of a proposed action, including adverse unavoidable effects resulting from its implementation, as well as an identification and environmental evaluation of alternatives to the proposed action.

The Commission is responsible for the licensing and regulation of activities involving the possession of nuclear materials. Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq. The Department of Energy (DOE) must obtain a license from NRC before disposing of high-level radioactive waste (HLW) in geologic repositories. Sec. 202, Energy Reorganization Act of 1974, 42 U.S.C. 5842. The licensing of DOE to receive and possess HLW at a geologic repository involves one or more major Federal actions which might significantly affect the quality of the human environment. Accordingly, NEPA requires the Commission to have an EIS (or multiple EIS's if more than one major Federal action by NRC is involved) to accompany its decision process when it considers a license application from DOE involving HLW disposal. Further direction regarding NRC's NEPA responsibilities is provided by the Nuclear Waste Policy Act of 1982 (NWPAct), as amended, 42 U.S.C. 10101 et seq.

The Commission in 1984 promulgated revised regulations (10 CFR Part 51) to implement Section 102(2) of NEPA, the section which, among other things, calls for the preparation of an EIS. 49 FR 9352, March 12, 1984, and 49 FR 24512, June 14, 1984. In issuing these regulations, the Commission noted that it had initiated a review of the licensing procedures applicable to geologic repositories in the light of the Nuclear Waste Policy Act and that the Commission would determine, as part of that review, whether further changes to 10 CFR Part 51 are needed. On July 30, 1986, the Commission promulgated certain amendments to 10 CFR Part 60. 51 FR 27158. Those amendments deal

with (1) the role of NRC during site screening and site characterization activities and (2) State, tribal, and public participation in NRC activities with respect to geologic repositories. In proposing those rules, the Commission had noted that issues pertaining to NRC responsibilities under NEPA will require modifications to 10 CFR Part 51 and that such amendments would be the subject of a subsequent rulemaking. 50 FR 2579, Jan. 17, 1985. The statement of considerations accompanying the final amendments advised that Part 51 "will need to be changed - specifically to (1) define the alternatives that must be discussed in an environmental impact statement, (2) exempt the promulgation of NRC licensing requirements and criteria from environmental review under NEPA, and (3) set out procedures that will be followed by the Commission in determining whether or not to adopt the DOE EIS."

As contemplated by its prior statements, the Commission now proposes amendments dealing with NRC implementation of NEPA in connection with Department of Energy geologic repositories. A full appreciation of these amendments requires an understanding of NEPA itself and the Commission's original plans for meeting its NEPA responsibilities; an analysis of the text and legislative history of NHPA, and of the recent amendments thereto, with particular regard to the policies and procedures established by that law for the resolution of environmental issues; and, finally, the specific regulations the Commission would promulgate in order to implement the NHPA policies and procedures. These matters are examined in the following discussion.

## THE PRE-NWPA LICENSING FRAMEWORK

The Commission believes it will be helpful to outline the repository licensing procedure that it had approved before enactment of NWPA. As appears below, that procedure included a customary NEPA review of DOE's license application. With that intention in mind, the Commission required DOE to characterize at least three sites and to provide certain timely information to the Commission regarding its site selection process. The Commission's requirements had been promulgated before the passage of NWPA, and they were familiar to Congress. In some respects the new law tracked the Commission rules closely; in other cases, however, there were marked differences, and from these differences a modification of policy can be inferred. A review of the pre-NWPA framework is therefore essential.

To begin this review with fundamental considerations, it is first noted that the Atomic Energy Act of 1954 charges the Commission with several types of licensing responsibility. One class of Commission action is materials licensing. Under its statutory authority, the Commission prescribes such rules as it finds to be needed to assure that persons possess and use the regulated materials in a manner that protects public health and safety and is not inimical to the common defense and security. DOE's disposal of HLW at a geologic repository is subject to this materials licensing authority of the Commission. The Commission several years ago determined that it would be necessary, to protect health and safety, to review DOE's plans with respect to a geologic repository before commencement of construction. 46 FR 13971, Feb. 25, 1981 (final licensing procedures). Accordingly, DOE may not commence construction of a geologic repository unless it has first filed a license application and

obtained the Commission's construction authorization. 10 CFR §60.3(b). A construction authorization is not itself a license, since it does not authorize possession or use of nuclear materials, but DOE's failure to comply with the requirement to apply for and to obtain construction authorization constitutes grounds for denial of the license that DOE would later need in order to receive high-level waste at the repository. Moreover, the Commission may, if necessary, issue orders to secure compliance with construction authorization conditions and to protect the integrity of the repository. 46 FR 13971.

In the pre-NWPA licensing framework, the Commission specified that an environmental report prepared in accordance with 10 CFR Part 51 was to accompany the license application. 10 CFR §60.21(a). The environmental report was to discuss relevant NEPA considerations. In particular, as provided by this regulation, 10 CFR § 51.40(d)(1983):

The discussion of alternatives shall include site characterization data for a number of sites in appropriate geologic media so as to aid the Commission in making a comparative evaluation as a basis for arriving at a reasoned decision under NEPA. Such characterization data shall include results of appropriate in situ testing at repository depth unless the Commission finds with respect to a particular site that such testing is not required. The Commission considers the characterization of three sites representing two geologic media at least one of which is not salt to be the minimum necessary to satisfy the requirements of NEPA. (However, in light of the significance of the decision selecting a site for a repository, the Commission fully expects the DOE to submit a wider range of alternatives than the minimum required here.)

Failure to provide the specified site characterization data would constitute grounds for denial of a license application. 10 CFR §2.101(f)(4). If DOE had prepared its own EIS, that document could be submitted so long as it contained the information called for by the regulation; the Commission noted,

however, that it could not be bound to accept judgments arrived at by DOE in its EIS. 46 FR 13973.

NRC was to publish notices of the availability of the environmental report and of its intent to prepare an environmental impact statement. 10 CFR §51.50(a),(b)(1983). An environmental impact statement would be required before issuance of a construction authorization, 10 CFR § 51.5(a)(11)(1983); and an EIS might also be determined to be necessary for issuance of the license to possess high-level waste at a repository, id. at §51.5(b)(11), or to terminate such license. id. at §51.5(b)(10). The EIS prepared before construction would be supplemented prior to issuance of a license to take account of any substantial changes in the activities proposed to be carried out or significant new information regarding the environmental impacts of the proposed activities, id. at §51.41.

Whenever an EIS was required, it was first to be distributed as a draft and, after receipt of comments, NRC would then prepare a final EIS which would respond to any responsible opposing view not adequately discussed in the draft. The draft and final statements, and comments received, were to accompany the application through the Commission's review processes. Ibid. (reference to §§51.22-51.26). In an adjudicatory hearing, as is required before issuance of construction authorization for a repository, the NRC staff was to offer the final EIS in evidence. Any party to the proceeding could have taken a position and offered evidence on NEPA issues. As a result of the hearing, the Commission could have arrived at findings and conclusions different from those in the final EIS prepared by the staff, and the final EIS would have been deemed modified to that extent. Id. at §51.52(b).

Upon review and consideration of an application and environmental report, a construction authorization could have been issued if the following environmental standard was met:

That, after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, the action called for is issuance of the construction authorization, with any appropriate conditions to protect environmental values. 10 CFR § 60.31(c).

While the Commission's formal NEPA determination would thus have been made in the course of licensing proceedings, the regulations provided further for NRC involvement at an even earlier stage - namely, at the time of site characterization. Site characterization is a program of exploration and testing that includes specified activities "to determine the suitability of the site for a geologic repository." 10 CFR § 60.2(p)(1983). It is needed not only to determine whether defects are present, but also to determine specific properties such as homogeneity, porosity, the extent of fracturing and jointing, and thermal response of the rock. Site characterization data are needed so as to provide a satisfactory basis for arriving, with confidence, at the technical judgments underlying the Commission's initial licensing decision. 44 FR 70410, Dec. 6, 1979 (proposed licensing procedures). The Commission noted its belief that it would be necessary for DOE to carry out site characterization at three or more sites in two (or more) geologic media, at least one of which is not salt. Such a program of multiple site characterization would provide the only effective means by which NRC could make a comparative evaluation of alternatives as a basis for arriving at a reasoned decision under NEPA. It was estimated that \$30,000,000 represented the upper limit for the "at depth" portion of site characterization in soft rock, with a limit of up to about \$40,000,000 in hard rock. 46 FR 13972-73.

The Commission regulations called upon DOE to submit, in advance of site characterization, a Site Characterization Report, which would have been reviewed informally by NRC. In addition to describing the site to be characterized and the proposed site characterization program, the report would have included several items of information pertaining to site selection, specifically:

- The criteria used to arrive at the candidate area.
- The method by which the site was selected for site characterization.
- Identification and location of alternative media and sites at which site characterization is contemplated.
- A description of the decision process by which the site was selected for characterization, including the means used to obtain public, Indian tribal and State views during selection.

10 CFR § 60.11 (1983). The Commission found the inclusion of plans for considering alternative sites to be necessary so that NRC could call to the attention of DOE, in a timely manner, additional information that might be needed by the Commission in reviewing a license application in accordance with NEPA. 46 FR 13972. (Also, in the preamble to the proposed licensing procedures, the Commission had discussed the requirement that DOE describe the site selection process, and State involvement therein. The Commission noted its belief, in this connection, that many issues, "including the NEPA questions related to alternatives and alternative sites," would be more easily resolved if State concerns were identified and addressed at the earliest possible time. 44 FR 70412.)

THE NUCLEAR WASTE POLICY ACT OF 1982

[Note: Under this heading, the Commission reviews its NEPA responsibilities under the Nuclear Waste Policy Act, as originally enacted; that is, this discussion does not reflect the 1987 amendments. The 1987 changes, which will be analyzed below (under the heading "Nuclear Waste Policy Amendments Act of 1987"), were not intended to alter the duties of the Commission with respect to NEPA; and it is therefore in order to review the pre-1987 situation in order to understand the Commission's role. All citations in this part of this notice are to NWPA as codified as of January 1, 1987.]

Congress established Federal policy for civilian radioactive waste disposal in the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10131 et seq.). The Commission's responsibilities for radiological safety, under prior law, were recognized and confirmed - most clearly in the express provision in Section 114(f) that "Nothing in this Act shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear [sic] Regulatory Commission as established in title II of the Energy Reorganization Act of 1974 (Public Law 93-438)." 42 U.S.C. 10134(f).

The statute provides for a licensing process that conforms closely to the preexisting framework of 10 CFR Part 60. NWPA thus requires DOE to carry out a program of site characterization, after first submitting to NRC a general plan for site characterization activities (along with certain information regarding waste form or packaging as well as a conceptual repository design). Sec. 113(b)(1), 42 U.S.C. 10133(b)(1). This corresponds closely to the Site Characterization Report provision of Part 60, 10 CFR §60.11(a) (1982); notably, however, the NEPA-related requirement of the regulation that DOE

include site screening and selection information in its submission was omitted. (As discussed below, the site screening and selection information must be identified in a separate document - the environmental assessment - which does not require NRC review.)

As provided earlier in Part 60, an application is to be submitted in advance of construction. This is to be followed by Commission review in accordance with the laws applicable to such applications and a decision approving or disapproving the issuance of a construction authorization. Sec. 114(b),(d), 42 U.S.C. 10134(b),(d). In addition to its action on applications for construction authorization, the Commission would review, and approve or disapprove, applications for licenses to receive and possess the waste (and spent fuel) in a repository and applications for closure and decommissioning. See Sec. 121(b), 42 U.S.C. 10141(b). For the corresponding provisions of NRC regulations, see 10 CFR 560.31 (construction authorization), 60.41 (license to receive and possess), and 60.51 (license amendment for permanent closure). <sup>1/</sup>

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<sup>1/</sup> One difference between the language of NWSA and Part 60 is worthy of note: that the statute differentiates between an application for construction authorization and an application for a license, whereas the regulation had referred, and continues to refer, solely to an application for a license to receive and possess waste (to be filed prior to construction). The Commission considers this differentiation to lack any substantive significance. In the view of the Commission, the information it needs in order to be able to consider the issuance of a construction authorization is generally the same as will be needed prior to issuance of the license to receive and possess HLW. For this reason, the Commission regulations call for the application to be as complete as possible in the light of information that is reasonably available at the time of docketing - i.e. prior to commencement of construction. 10 CFR 560.24(a). Accordingly, the Commission intends to retain its requirement of a unitary application; it is not required to, and it does not propose to, modify its rules to provide separately for applications for construction authorization on the one hand and a license to receive waste on the other.

The Nuclear Waste Policy Act also confirmed the Commission's most important stated position with respect to compliance with NEPA. In its regulations, cited above, the Commission had construed NEPA's direction to consider reasonable alternatives as constituting a mandate to characterize at least three sites, in at least two geologic media. Although establishing new procedures, NWPA followed precisely the same substantive approach.

#### Site Selection Under the Nuclear Waste Policy Act

The Nuclear Waste Policy Act directed the development of two geologic repositories. This section will describe the process leading to the selection of a site for the first repository. The process for a second repository was generally the same, except that the statutory dates for particular actions were several years later.

The site selection process, as carried out by DOE, began with the identification of States with "potentially acceptable sites" -- sites at which DOE, after geologic studies and field mapping, was to undertake preliminary drilling and geophysical testing for the definition of site location. DOE was required to notify States involved, and affected Indian tribes, of the identification of such sites. Sec. 116(a), 42 U.S.C. 10136(a). DOE identified nine potentially acceptable sites for the first repository and provided notice to the six states in which such sites were located.

Before the selection process could move any further, DOE had to issue "general guidelines for the recommendation of sites for repositories." NWPA provided that, under the guidelines, DOE would need to consider the various geologic media in which sites may be located and, to the extent practicable, to

recommend sites in different geologic media. The guidelines were to specify factors that qualify or disqualify a site from development as a repository; among the factors specified by the law were certain nonradiological environmental concerns as well as considerations related to the isolation of the radionuclides in the waste. NHPA required DOE, prior to issuance of the guidelines, to consult with the Council on Environmental Quality, the Environmental Protection Agency, the Geological Survey, and interested Governors. DOE was also required to obtain the concurrence of the Commission in the guidelines. Sec. 112(a), 42 U.S.C. 10132(a). Guidelines have been issued by DOE. 49 FR 47714, Dec. 6, 1984. The concurrence of the Commission in the guidelines was published in the Federal Register on July 10, 1984. 49 FR 28130.

DOE was directed, following issuance of the guidelines and consultation with the governors of affected States, to nominate at least 5 sites determined to be suitable for site characterization. Sec. 112(b)(1)(A), 42 U.S.C. 10132(b)(1)(A). Nomination had to be preceded by public hearings near the site, on which occasions residents of the area would be solicited with respect to issues that should be addressed by DOE in its environmental assessment and site characterization plan. Sec. 112(b)(2), 42 U.S.C. 10132(b)(2). Also, before nomination DOE was required to notify the States or affected Indian tribes of its intent to nominate a site and of the basis for such nomination. Sec. 112(b)(1)(H), 42 U.S.C. 10132(b)(1)(H). The nomination itself needed to be accompanied by an environmental assessment, which set out the basis for nomination and which discussed the probable impacts of site characterization activities. The environmental assessment, to be made public, would contain an evaluation of the suitability of the site for site characterization under the

general guidelines, an evaluation of the suitability of the site for development as a repository under each guideline that does not require site characterization as a prerequisite for application, an evaluation of the effects of site characterization on the public health and safety and the environment, a comparative evaluation with other sites that have been considered, a description of the decision process by which the site was recommended, and an assessment of the regional and local impacts of locating the repository at the site. The sufficiency of an environmental assessment with respect to these matters was subject to the judicial review provisions of the statute, which generally require petitions for review to be filed within 180 days after the action involved. Sec. 112(b)(1)(E through G), 119; 42 U.S.C. 10132(b)(1)(E through G), 10139. On May 28, 1986, DOE released final environmental assessments on five potential repository sites (at Yucca Mountain, Nevada; Deaf Smith County, Texas; the Hanford Reservation, Washington; Richton Dome, Mississippi; and Davis Canyon, Utah). (The NRC staff had previously reviewed and commented on the draft environmental assessments for these sites.)

Subsequent to site nomination, DOE was required to recommend to the President three of the nominated sites for characterization as candidate sites. Sec. 112(b)(1) (B), 42 U.S.C. 10132(b)(1)(B). Upon approval of the candidate sites, the States and affected Indian tribes were to be notified. Sec. 112(c), 42 U.S.C. 10132(c). On May 28, 1986, the Secretary of Energy formally recommended the sites in Nevada, Texas, and Washington, and these recommendations were approved by the President.

Before sinking shafts at an approved site, DOE is to submit to the States and affected Indian tribes - and, in this instance to the Commission as well -

for their review and comment, a general plan for site characterization activities, a description of the possible form or packaging of the waste, and a conceptual repository design. The general plan is to describe the site, the proposed site characterization activities, plans for decommissioning a site that is determined to be unsuitable (and plans for investigation of significant adverse environmental impacts of site characterization), the criteria to be used to determine site suitability (i.e., the siting guidelines), and other information related to site characterization activities required by the Commission. Sec. 113(b), 42 U.S.C. 10133(b). Congress has declared that site characterization activities shall not require the preparation of an environmental impact statement, or other environmental review under NEPA. Sec. 113(d), 42 U.S.C. 10133(d). However, DOE is to hold public hearings near a site, and to receive comments of residents of the area with respect to the site characterization plan. Sec. 113(b)(2), 42 U.S.C. 10133(b)(2). And those comments, as well as those received on the environmental assessments, are to be considered by DOE. DOE, in consultation with the States and affected Indian tribes (but not specifically the Commission), is to conduct site characterization activities in a manner that minimizes significant adverse environmental impacts identified in the comments. Sec. 113(a), 42 U.S.C. 10133(a). DOE is to report periodically to the Commission and to States and affected Indian tribes on the progress of site characterization and the information developed to date. Sec. 113(b)(3), 42 U.S.C. 10133(b)(3).

Under NWSA, the selection process was to continue with the identification of one site for development of a repository. DOE was required to hold hearings near that site, and it was also required to complete site characterization not only for that site but for at least two other sites as well.

DOE might recommend to the President that he approve the site where hearings were held. The recommendation, notice of which would be given to States and affected Indian tribes, was to be accompanied by a description of the proposed repository and waste form or packaging; a discussion of data, obtained in site characterization activities, relating to the safety of the site; a final environmental impact statement, together with comments made concerning such statement by the Commission and others; preliminary Commission comments regarding the sufficiency of data for inclusion in a license application; comments of States and affected Indian tribes, with DOE's response; and an impact report prepared by States or affected Indian tribes requesting financial or technical assistance to mitigate impacts. Sec. 114(a)(1), 42 U.S.C. 10134(a)(1). Subject to a good cause exception, the EIS might only be reviewed by the courts if a petition is filed within 180 days after the date of the decision concerned (i.e., presumably, the recommendation to the President). Sec. 119(a)(1)(D), 42 U.S.C. 10139 (a)(1)(D). The alternative sites to be considered in the EIS would consist of three sites at which characterization has been completed and DOE has made a preliminary determination of their suitability for development as repositories under the guidelines issued earlier. Sec. 114(f), 42 U.S.C. 10134(f).

The President might submit to Congress a recommendation of a site that had previously been recommended to him by DOE. By law, the President's recommendation would not require the preparation of an EIS or other NEPA environmental review. Sec. 114(a), 42 U.S.C. 10134(a). A State might disapprove a site recommended by the President, by giving notice of such action to Congress. Any such notice of disapproval is to be accompanied by a statement of the State's reasons. Sec. 116(b), 42 U.S.C. 10136(b). In the

case of a site on a reservation, the affected Indian tribe might submit such a notice of disapproval. Sec. 118(a), 42 U.S.C. 10138. The President's recommendation would then become effective only if Congress passes a resolution approving the site, and such resolution thereafter becomes law. Sec. 115(c), 42 U.S.C. 10135(c). In considering a notice of disapproval, Congress might obtain comments of the Commission, but the provision of comments would not bind the Commission with respect to any licensing action Sec. 115(g) , 42 U.S.C. 10135(g).

If the site designation becomes effective - by virtue of a State or Tribe's failure to disapprove within the specified times or by virtue of the Congressional override of the State's or Tribe's notice of disapproval - DOE was directed then to submit its application to the Commission. Sec. 114(b), 42 U.S.C. 10134(b). The Commission was to consider an application in accordance with the laws applicable thereto. Sec. 114(d), 42 U.S.C. 10134(d).

If DOE's application is acceptable, the site selection process would then end, subject to judicial review, with the Commission's issuance of a construction authorization.

#### NRC NEPA Responsibilities In Light of NWA

The Nuclear Waste Policy Act of 1982 generally preserves the Commission's obligation to comply with NEPA. Nevertheless, the scope of the inquiry and the standards and procedures to be applied in arriving at findings in accordance with NEPA are clearly influenced by the express and implied mandates of the later statute. The import of NWA is especially forceful in

relation to site selection, but the Commission regards the statute as having a pervasive effect upon all of its NEPA responsibilities.

First, there are several express provisions of NWPA that narrow the range of alternatives that must be considered in the environmental impact statement, especially for the first repository. Thus, DOE's compliance with the procedures and requirements of the Nuclear Waste Policy Act "shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository." Even more forcefully, the 1982 Act declares that any EIS prepared with respect to the first repository shall not consider the need for a repository or nongeologic alternatives to the site; and the alternative sites to be considered are those candidate sites (three in the case of the first repository, and at least three in the case of subsequent repositories) with respect to which site characterization has been completed and the Secretary of Energy has made a preliminary determination that such sites are suitable for development of repositories. Sec. 114(f), 42 U.S.C. 10134(f).

In addition, Section 114(f) directs the Commission to adopt DOE's EIS "to the extent practicable." As a minimum, this requires the Commission to give substantial weight to the findings of other bodies, where relevant to the determinations to be made by the Commission itself. This is consistent with prior practice. For example, in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 527 (1977), the Commission observed that a competent and responsible state authority's approval of the environmental acceptability of a site or a project after

extensive and thorough and environmentally sensitive hearings is properly entitled to such substantial weight in the conduct of its own NEPA analysis. Similarly, to the extent that Congress has enacted legislation approving a specific project, an agency's obligation to discuss alternatives in its EIS is relatively narrow; although the "rule of reason" applies, such action does have a bearing on what is considered a reasonable alternative and a reasonable discussion. Izaak Walton League v. Marsh, 655 F.2d 346, 372 (D.C. Cir. 1981), citing Sierra Club v. Adams, 578 F.2d 389, 396 (D.C. Cir. 1978). The concept of adoption, as it appears in NWPA, is examined more fully below.

The Nuclear Waste Policy Act provides that adoption of the EIS shall be deemed to satisfy the Commission's NEPA responsibilities "and no further consideration shall be required." While the purpose of this provision is not entirely clear, it appears to counsel against the wide-ranging independent examination of environmental concerns that is customary in NRC licensing proceedings.

The final limitation on the Commission's consideration of NEPA issues stems from the judicial review provisions of the Nuclear Waste Policy Act. Section 119, 42 U.S.C. 10139 provides for the United States courts of appeals to have original and exclusive jurisdiction over any civil action for review of any environmental impact statement prepared with respect to a geologic repository and imposes a deadline of 180 days (with certain exceptions) for commencing such an action. Thus, review of the adequacy of DOE's environmental impact statement must be sought, if at all, within 180 days after the Secretary has made a site recommendation to the President. As a minimum, any judicial findings with respect to the adequacy of the EIS prepared by DOE would be entitled to substantial weight in the Commission's deliberations. But this

statement is incomplete. As explained below, if the EIS prepared by DOE has been adjudged to be adequate for purposes of the site recommendation made by the Department, further litigation of the issues in NRC adjudications would be precluded under the doctrine of collateral estoppel. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561 (1977). And, if an issue bearing upon the adequacy of that EIS could have been raised, but was not raised in a timely manner, the deadline for commencing action set out in Section 119 operates to bar a challenge at a later date in NRC licensing proceedings.

In the light of the policies and procedures established by the Nuclear Waste Policy Act, the Commission regards the scope of its NEPA review to be narrowly constrained, with those issues that were ripe for consideration after issuance of DOE's EIS being excluded from independent examination, for purposes of NEPA, in the course of NRC licensing proceedings. It will be useful to review the legislative history of the Act and certain regulations of the Council on Environmental Quality, and to discuss applicable principles of repose, in order to explain the basis for the Commission's views.

#### Legislative History

The Nuclear Waste Policy Act of 1982 reflects a judgment that the Commission is to concern itself primarily with issues of health and safety rather than the other kinds of issues that are ordinarily considered in the context of reviews under NEPA. This judgment is especially clear in connection with the screening and selection of repository sites. The only provisions for NRC involvement in the site screening and selection process

concern the issuance of the general guidelines for the recommendation of sites for repositories (in which the Commission is required to concur), the Department's plans for site characterization (which must be submitted to the Commission for review and comment), and the preparation of preliminary comments by the Commission to accompany the Secretary's recommendation of a site concerning the extent to which DOE's site characterization analysis and waste form proposal seem to be sufficient for inclusion in a license application. With the possible exception of the guidelines, the Commission's role is defined so as to address the safety issues (which are the subject of DOE's site characterization program and waste form proposal) that must be resolved in licensing proceedings. Where Congress sets up a detailed mechanism for consideration of particular issues by an agency, and both judicial and legislative review of that agency's decisions, as it has here done with respect to the NEPA actions of DOE, it may be inferred that it did not intend to rely upon this Commission to challenge DOE's possible "disregard of the law" after all these procedures have run their course. Cf. Block v. Community Nutrition Institute, 467 U.S. 340, 351, 81 L.Ed.2d 270, 279 (1984).

A consideration of the legislative history lends further support to this analysis. Although there were several bills dealing with nuclear waste issues before the 97th Congress, the provisions dealing with site selection issues can be traced directly to H.R. 3809, as reported out by the Committee on Interior and Insular Affairs. H.R. Rep. 97-491, Part 1, 97th Cong., 2d Sess. (1982). The bill included sections - similar to those ultimately enacted - on guidelines, site characterization, site approval and construction authorization, review of repository site selection by Congress, participation of States and Indian

tribes, etc. The provision relating to the site characterization plan to be prepared by DOE was drawn directly from the corresponding NRC regulation. (Compare H.R. 3809, Sec. 113(b)(1)(B) with 10 CFR § 60.11(a) (1982).) All the matters related to the ability of the site to host a repository and isolate radioactive waste were carried over from the regulation to the bill. But matters pertaining to the screening and selection of sites, though set out in the regulation, were omitted in the bill. These include the requirements that DOE discuss the decision process used by DOE in selecting sites for characterization and identify alternative media and sites at which DOE intended to conduct site characterization. Under the proposed legislation, this information would no longer come to the Commission for review. H.R. 3809 also included the provision, ultimately enacted, that the Commission would be required to adopt the EIS prepared by the Secretary "to the extent practicable." The limited nature of the Commission's role was emphasized by the explanatory language of the report to the effect that the Commission would be required so to adopt the EIS "to the maximum extent practicable" (emphasis added). Moreover, the EIS "is intended to suffice regarding the issues addressed and not be duplicated by the Commission unless the Commission determines, in its discretion, that significant and substantial new information or new considerations render the Secretary's statement inadequate as a basis for the Commission's determinations." H. R. Rep. 97-491, Part 1, 53-54.

There was no specific provision in H.R. 3809 requiring DOE to carry out and document a comparative evaluation of sites considered for site characterization. Later in the year, however, such a provision was incorporated into the bill (now H.R. 6598), as reported by the Committee on Energy and Commerce. H. R. Rep. 97-785, Part 1, 97th Cong., 2d Sess. (1982). Among

other things, the bill (in Sec. 113(b)(1)(A)(v)) would have required DOE to prepare, prior to site characterization, an environmental assessment which would include a description of any other sites considered for site characterization. This information would have been submitted to the Commission for its review and comment. The purpose of providing reports at this stage was "to assure that adequate information is available to the Commission regarding the Secretary's proposed activities." Id. at 64. H.R. 6598 retained the provision for NRC adoption of DOE's environmental impact statement. The report explained, id. at 69:

This provision is intended to avoid the duplication caused as a result of the applicability of NEPA to the actions of both the Secretary and the Commission regarding the preparation of an environmental impact statement. While the Commission is encouraged to adopt the Secretary's statement, or parts of such statement, the independent responsibilities of the Commission are specifically recognized. To the extent the Commission determines it is not practicable to adopt all or part of the Secretary's environmental impact statement, the Commission's responsibilities under NEPA remain in force, thus requiring the preparation of a supplemental environmental impact statement.

Floor consideration in the House was addressed to H.R. 7187, as a substitute for both H.R. 3809 and H.R. 6598. The EIS-adoption language appears once again. However, the provisions for an environmental assessment were modified in two important ways. First, DOE would now explicitly be required to make "a reasonable comparative evaluation" of the sites that had been considered for site characterization. Sec. 112(b)(1)(A). Second, under H.R. 7187 the environmental assessment would precede, rather than follow, the President's approval of sites to be characterized, and it would no longer be submitted to the Commission for review and comment. Ibid.

There was no committee report on H.R. 7187, but a summary of its provisions noted:

In issuing the construction permit and license the NRC will rely on the Environmental Impact Statement prepared by the Secretary of Energy in recommending the repository site. The Commission will have to supplement any environmental impact statement with considerations of the public health and safety required under the Atomic Energy Act of 1954.

128 Cong.Rec. H8163 (daily ed. Sept. 30, 1982) (statement of Rep. Udall). Rep. Moorhead also characterized the Commission's role in terms of its health and safety responsibilities:

"... an extensive environmental assessment must be developed by the Secretary of Energy in consultation with the States. There will be a full and complete review of the planned site under the National Environmental Policy Act, culminating in a comprehensive environmental impact statement. This as well as all other final agency actions - will be open to full judicial review. The Nuclear Regulatory Commission will have oversight authority over the development of this repository under its independent public health and safety standards."

Id. at H8170. Congressman Ottinger, too, differentiated in passing between "full environmental review" on the one hand and "full NRC licensing procedures to assure that the storage is safe" on the other. 128 Cong.Rec. H8527 (daily ed. Nov. 29, 1982).

The legislative history in the Senate is less illuminating, inasmuch as its bill, S. 1662, differs substantially from the final legislation. (S. 1662, as reported from the Committee on Energy and Natural Resources, appears at 128 Cong.Rec. S4139 ff., daily ed. Apr. 28, 1982.) Under S. 1662, the Commission would have a more substantive role with respect to implementation of NEPA. There would be no direction to the Commission to adopt the DOE environmental impact statement. Rather, under Section 405, the Commission would be required to consider the application in accordance with the laws applicable thereto; as an exception, however, the bill provided that the Commission need only consider as alternate sites for the proposed repository

those sites which have been approved by the President for characterization. Senator Simpson, sponsor of the legislation, explained that the NRC licensing process would provide opportunities for "a detailed evaluation of the health and safety and environmental aspects of the proposed project" (emphasis added). 128 Cong.Rec. S4302 (daily ed. Apr. 29, 1982).

In December 1982, the Senate turned to consider legislation following the pertinent language of the bill which had by that time been passed by the House of Representatives. Senator Mitchell declared that the national nuclear waste policy should "preserve the integrity and full scope of the NRC licensing review and environmental analysis under the National Environmental Policy Act," 128 Cong.Rec. S15669 (daily ed. Dec. 20, 1982), but the broad scope of his remarks leaves it of doubtful import in the context of geologic repositories alone. Of more significance, perhaps, is the colloquy with respect to an amendment proposed by Senator Levin, and passed, to include in Section 114(f) the language that nothing in the Act should be construed to amend or otherwise detract from the Commission's licensing requirements. Sen. Levin stated his understanding that the Act was not intended to restrict, or amend, or modify NRC requirements for the repository in any way "including, but not limited to, findings of need." Senator McClure, the floor manager of the bill, replied that Sen. Levin was correct and added that "that is my understanding also." Since findings of need have generally been regarded as NEPA issues, this could be taken to mean that the Commission should discharge its NEPA requirements in the same way as it would in the absence of the review procedures prescribed by the Nuclear Waste Policy Act. This cannot be the case, however, in light of the other provisions of the Act, including those in Section 114(f) itself. It seems clear that the law was not intended to modify

any of the Commission's licensing requirements under the Atomic Energy Act. The Commission construes the clause in question to be limited to those requirements; it does not pertain to the provisions of NEPA. The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history, Chrysler Corp. v. Brown, 441 U.S. 281, 311, 60 L.Ed.2d 208, 231 (1979), especially where as here their significance is not apparent without further study. Whatever the understanding of Sen. Levin may have been, the Nuclear Waste Policy Act manifestly does affect the manner in which the NEPA responsibilities of the Commission must be carried out, and the rules proposed below indicate the approach which we intend to take.

Although the views of Congress are not entirely unambiguous, the overall tenor is that the Commission's role should focus upon radiological safety, with an independent review of NEPA factors only where warranted in the light of "significant and substantial new information or new considerations."

#### "Adoption" and the Nuclear Waste Policy Act

The Council on Environmental Quality has established procedures to guide agencies that are engaged in actions that have related environmental impacts. These procedures allow for several approaches to NEPA compliance, including one approach in which the environmental impact statement prepared by one agency is "adopted" by another agency. 40 CFR § 1506.3. In appropriate circumstances, an EIS prepared by another agency may be adopted, in accordance with CEQ regulations, in whole or part by NRC. 10 CFR Part 51, Appendix A to Subpart A ¶1(b). An examination of those regulations will illuminate the direction to the Commission, in Section 114(f) of the Waste Policy

Act, to "adopt" the DOE EIS to the extent practicable. In the absence of irreconcilable conflict with other provisions of NWPA, those regulations should be followed.

The CEQ regulations provide that where more than one agency is involved in the same action, either one agency will be designated a lead agency to prepare an EIS, or two (or more) agencies will be designated as joint lead agencies. Any agency which has jurisdiction by law with respect to the action shall be a cooperating agency, if so requested by the lead agency. An agency - even if it has jurisdiction - need not serve as a cooperating agency, however, unless the lead agency has requested it to do so. Whether or not it is a cooperating agency, a Federal agency with jurisdiction by law or special expertise with respect to any environmental impact involved has a duty to comment on a lead agency's statement within the commenting agency's jurisdiction, expertise, or authority. 40 CFR §§ 1501.5, 1501.6, 1503.2.

In the context of NWPA, it is apparent that the Department of Energy would be the lead agency and that the Commission would not be a lead agency. The Commission could either be a cooperating agency, with the particular responsibilities set out in § 1501.6 of the CEQ regulations, or a commenting agency. The NWPA points to the Commission's assuming the latter role. A cooperating agency is required to participate in the NEPA process at the earliest possible time, to participate in the scoping process leading to preparation of the environmental impact statement, and to assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the EIS concerning which the cooperating agency has special expertise. The framework of NWPA, as rehearsed above, contemplates no such involvement by the Commission. It would be far

more faithful to the statutory scheme for this agency merely to provide its comments, from time to time, with respect to environmental impacts falling within its jurisdiction or areas of special expertise. This is entirely consistent with the statutory provision that the Secretary of Energy's recommendation to the President of a site for repository development shall be accompanied by a final EIS, together with comments made by the Commission concerning such EIS. Sec. 114(a)(1)(D), 42 U.S.C. 10134(a)(1)(D).

As a commenting agency, the Commission would be authorized to adopt the EIS prepared by DOE provided that the statement meets the standards for an adequate statement under the CEQ regulations. The pendency or outcome of litigation with respect to the DOE EIS is one factor to be considered. This is apparent from CEQ's direction to the adopting agency to specify, where applicable, that "the statement's adequacy is the subject of a judicial action which is not final." Since the actions covered by the DOE EIS and the Commission's action are substantially the same - namely, development of a geologic repository of the proposed design at the proposed site - the Commission would not be required to recirculate the DOE EIS except as a final statement. 40 CFR § 1506.3.

The Commission can follow the CEQ procedures for a commenting agency, including the procedures for adoption of DOE's EIS. But the EIS can only be adopted if it meets the standards for an "adequate statement." The approach being taken by the Commission, in these proposed rules, is that NWPA and the principles of res judicata obviate the need for an entirely independent adjudication of the adequacy of the EIS by this agency. As this might be seen as a departure from established practices, the differences merit some further discussion.

It is well established that the Commission has a responsibility to consider environmental issues just as it considers other matters within its mandate. Moreover, the duty to consider environmental issues extends through all stages of the Commission's review processes, including proceedings before hearing boards. And the Commission may not simply defer totally to the standards set by other regulatory authorities with respect to environmental matters within their jurisdiction; to do so would be an abdication of the Commission's NEPA authority. Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971). There would be an abdication because NEPA mandates a case-by-case balancing judgment - a judgment that is entirely different from the piecemeal certification by another agency that its own environmental standards are met. The only agency in a position to make the kind of balancing judgment contemplated by NEPA is the agency with overall responsibility for the proposed federal action. Id. at 1123. In Calvert Cliffs, only the Atomic Energy Commission could make the required decision. In the case of a geologic repository, the Department of Energy is required to make precisely the kind of analysis that the court there deemed to be essential. For the Commission to adopt the DOE EIS without independent analysis, after there had been opportunity for judicial review thereof, would be entirely consistent with the reasoning of the earlier case. Similarly, the overlap between DOE and Commission actions distinguishes the present situation from other NEPA decisions which required an independent balancing judgment by each of the agencies involved in a project. See Silentman v. Federal Power Commission, 566 F.2d 237, 240 (D.C. Cir. 1977); Henry v. Federal Power Commission, 513 F.2d 395, 407 (D.C. Cir. 1975)

(Bureau of Reclamation control of relevant water rights for coal gasification plant; FPC regulation of gas transportation).

The similarity of DOE and Commission actions, from the standpoint of their respective environmental impacts, has not in the past been considered, by itself, to be sufficient to persuade the Commission to defer to DOE's balancing judgments. The fact that the applicant for a license to build a nuclear power plant is another Federal agency has not excused NRC from carrying out its usual NEPA obligations, even though both agencies were considering the same impacts associated with construction and operation of the facility. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, 8 NRC 533, 545 (1978). But in prior practice there was no prior judicial determination that the other agency's EIS was adequate and there was no special statutory scheme for consideration of environmental impacts by interested parties and Congress. It is the judgment of the Commission that these unique considerations warrant, and indeed require, adoption of an EIS that is adequate to meet the obligations of DOE.

To repeat: the Commission must consider the environmental impacts resulting from the construction and development of a geologic repository for high-level radioactive waste. All that is in question is the basis for the Commission's consideration. The factors discussed above make it entirely reasonable for the Commission not to reopen issues that have been, or could previously have been, brought before the courts for resolution. The Commission does not derogate the importance of NEPA issues. Under the Nuclear Waste Policy Act, they are extremely important - and in fact they are central to many of the elaborate procedural provisions incorporated in that legislation. It is to those provisions that parties concerned must turn. But

once an application is submitted to the Commission, the primary question to be addressed is no longer one of environmental balancing, but rather the critical issue of radiological safety. That is an issue that is entrusted solely to the Commission, and the Commission can discharge its duties most effectively if it makes that the primary basis for decision.

### The Preclusive Effect of Section 119

The approach being proposed by the Commission reflects the policies of repose associated with the rules of res judicata. Before examining those rules in detail, it might be helpful to go over, once again, salient features of the NWPA site selection and approval procedures.

The NWPA procedures really reflect two different kinds of review. The first requires judgments regarding the radiological safety of HLW disposal - matters to be adjudicated solely by the Commission, taking into account the standards issued by the Environmental Protection Agency. The Act clearly recognizes that while the Commission's preliminary views are to be solicited and considered on several occasions, a final judgment on radiological safety can only be made at the conclusion of the adjudicatory licensing process. The Commission is expected and required to deny an application - long after other procedures had run their course - if it is unable to find, with reasonable assurance, that the relevant safety criteria have been met. The responsibility for consideration of the radiological consequences of a proposed action is advisedly vested in the Commission, which can bring its experience and expertise to the task, in accordance with the Atomic Energy Act.

The second kind of review involves the weighing of the range of environmental concerns that are addressed by NEPA. This review focuses heavily on the comparison of alternatives, including alternative sites, rather than with the narrower task of evaluating a specific site. Moreover, the relevant concerns under NEPA are multitudinous, as opposed to the single issue of radiological safety that is the primary concern of the Atomic Energy Act. While the Commission does have experience and expertise in carrying out a review under NEPA, Congress in 1982 elected not to rely upon the Commission in this regard. It structured the process in such a way that the evaluation of alternatives - in particular, alternative sites - would have been attended to before the Commission was required to act. This was accomplished largely through the State and Tribal participation provisions, including the requirement of Congressional action to proceed in the face of a notice of disapproval. And, additionally, it was accomplished through requiring early judicial review.

The consequence of this approach is that the Commission would carry out a licensing review to assure that a repository could be operated safely - but that it would, in general, treat as settled those other issues arising under NEPA.

The Commission's understanding, based in particular upon its reading of Section 119, merits a fuller statement of the legal doctrines that are collectively referred to as the rules of res judicata. One of these doctrines is the rule of "claim preclusion" - that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. The related rule of "issue preclusion" (or collateral estoppel) reflects the principle that one who has actually litigated an issue

should not be allowed to relitigate it. The effect, and value, of these rules is that they compel repose, so that the indefinite continuation of a dispute can be avoided. Judgments must in general be accorded finality despite flaws in the processes leading to decision and the unavoidable possibility that the results in some instances were wrong. Only when there is a substantial possibility of injustice might relitigation be warranted. Restatement (Second) of Judgments 2-12.

The clearest application of these principles would occur where there has actually been a timely challenge to the adequacy of DOE's environmental statement. A final judgment in such litigation would be conclusive, in any subsequent action between the parties, as to any issue of law or fact that had actually been litigated, Id. § 27. Moreover, the party who had challenged the EIS would thereafter be precluded from litigating such issues with another person as well, Id. § 29.

The judgment in an action, under Section 119(a)(1)(D), for review of DOE's environmental impact statement will therefore preclude the petitioner from later litigating the same issues with NRC (even assuming that NRC is a different person, for these purposes, from its sister agency DOE). The dimensions of the issue that were determined by the judgment may be a matter of debate. But if the litigant has had an adequate day in court, a desire to prevent repetitious litigation of what is essentially the same dispute justifies preclusion of the issue's being raised anew. While the action being taken by DOE is the recommendation to the President of a site for repository development and the action being taken by the Commission is the issuance of a construction authorization for a repository, the relevant considerations in the two situations are identical. Both agencies will be addressing the development

of a repository at a specific location and both will require an environmental impact statement that describes the pertinent environmental impacts and considers appropriate alternatives. If the DOE EIS is found to be adequate to meet the requirements of NEPA, then it would ordinarily be proper to preclude a challenge to the "adequacy" of the identical EIS, if relied upon by the Commission. See Id., § 27.

The preclusive effect of a prior judgment sustaining DOE's environmental impact statement would not necessarily be limited to the petitioner of record in that proceeding. It can be argued that those who were represented by that petitioner would also be barred from litigating the issue in a subsequent action. <sup>2/</sup>

Section 119 specifically requires that a civil action for review of an environmental impact statement with respect to any action under Subtitle A (pertaining to geologic repositories) be brought within a period of 180 days after the date of the action (or after obtaining actual or constructive knowledge thereof). Thus, a failure to meet the deadline for challenging the DOE environmental impact statement would foreclose any subsequent litigation with respect to the action to which that EIS pertains. The objective appears to have been to identify issues promptly and to seek to resolve them in a timely man-

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<sup>2/</sup> For example, if the EIS had been challenged by the public officials of the State in which a repository was proposed to be located, members of the public who had been represented by those officials might be precluded, to the same extent, from raising the issues anew. Restatement (Second) of Judgments §41, comment d. The basis for this argument would be that, under the doctrine of parens patriae, a state is deemed to represent all of its citizens, when the state is a party in a suit involving a matter of sovereign interest. See, e.g., Environmental Defense Fund, Inc. v. Higginson, 631 F.2d 738 (D.C. Cir. 1979); U.S. v. Olin Corp., 606 F.Supp. 1301 (N.D. Ala. 1985).

ner. Where there is litigation in accordance with this provision, the principles described above would preclude further judicial examination of the same issues as they relate to the Commission's action. But what would happen if for some reason the adequacy of the DOE environmental impact statement had not been challenged judicially before it was time for the Commission to act -- or if it had been challenged, the action had been brought by other parties? If the Commission were to adopt the DOE environmental impact statement, would the merits of the decision to adopt be subject to further review? The Commission suggests that the courts should deny a petition under these circumstances as being untimely. There would be, in this case, only one environmental impact statement; and, in accordance with section 119, there would be but one opportunity for review. To conclude otherwise would be to frustrate the objective of seeking an early resolution of the environmental issues that might be involved. See Eagle-Picher Industries v. U.S. Environmental Protection Agency, 759 F.2d 905, 911-919 (D.C. Cir. 1985). See also National Wildlife Federation v. Gorsuch, 744 F.2d 963 (3rd Cir. 1984), in which the National Wildlife Federation, having been aware of prior litigation and having elected not to intervene, was barred from later raising the issues of concern to it.

#### THE NUCLEAR WASTE POLICY AMENDMENTS ACT OF 1987

The Nuclear Waste Policy Amendments Act of 1987 (Amendments Act), Title V, Subtitle A, Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, redirected the nuclear waste program. Under Section 5011 of that law site characterization for the first repository is to be carried out exclusively at the Yucca Mountain site in the State of Nevada, with site specific activities at

other candidate sites to be phased out promptly. NWPA as amended, §160(a), 42 U.S.C. \_\_\_\_\_. The provisions of NWPA that contemplated a second repository are removed, and DOE is expressly prohibited from conducting site specific activities with respect to a second repository unless Congress has specifically authorized and appropriated funds for such activities. NWPA as amended, §161(a), 42 U.S.C. \_\_\_\_\_.

Conforming to this redirection of the waste program, the law revises the provisions of Section 114 of NWPA that deal with the application of NEPA to the licensing process. The language of §114(a)(1)(D) describing DOE's final environmental impact statement, which is to be submitted to the President with DOE's recommendation of approval for development of a repository, is revised so that DOE "shall not be required ... to consider the need for a repository, the alternatives to geological disposal, or alternative sites to the Yucca Mountain site", NWPA as amended, §160(h), 42 U.S.C. \_\_\_\_\_ (emphasis supplied). Section 114(f), 42 U.S.C. 10134(f), is revised in the same way, so that DOE "need not consider alternative sites to the Yucca Mountain site;" and, moreover, the Commission in its NEPA review is similarly advised that it need not consider such alternative sites. NWPA as amended, § 160(i), 42 U.S.C. \_\_\_\_\_. (In the case of a site negotiated under Title IV of NWPA, added by Section 5041 of Pub. L. 100-203, at a site other than Yucca Mountain, consideration would be given to Yucca Mountain as an alternate site. NWPA as amended, § 407, 42 U.S.C. \_\_\_\_\_).

The merits of multiple site characterization were addressed in the course of the Congressional debate that immediately preceded passage of the Amendments Act. Senator Burdick, in particular, noted that full

characterization of three sites (according to the original NWPA) was based, in part, on the important NEPA principle of fully considering reasonable alternatives when making important decisions that will significantly affect the human environment. In discussing the different approach (in the conference report on the pending budget reconciliation legislation) that was soon to be adopted, he stated:

"Other than the elimination of the consideration of three alternate sites for the repository, which as just outlined, is a major and dangerous departure from current law, the [conference] substitute does not affect the application of NEPA to the repository program." Congressional Record, S 18674 (daily ed., Dec. 21, 1987).

The conference report expresses the same point. It declares:

"The provisions of the Nuclear Waste Policy Act pertaining to the application of the National Environmental Policy Act (NEPA) are preserved except that the existing requirement that the environmental impact statement accompanying DOE's repository siting recommendation consider alternative sites is eliminated. NEPA applies to the redirected program under this Act in the same way as NEPA applied to the Nuclear Waste Policy Act of 1982. The conferees do not intend that enactment of the conference substitute result in any change in NEPA application except as expressly provided." Omnibus Budget Reconciliation Act of 1987, Conference Report to Accompany H.R. 3545, 100th Cong., 1st Sess. H.R. Rept. 100-495, 776.

The Commission has explained above that, under NWPA as originally enacted, it should make an independent review of NEPA factors only when warranted in the light of "significant and substantial new information or new considerations." Further, it was the duty of the Commission, under that law, to adopt an EIS that is adequate to meet the obligations of DOE. Since the Amendments Act was not intended to affect the implementation of NEPA with respect to the repository program - except as to the consideration of alternate sites - the Commission will follow the same procedures, discussed below, that it would have had the Amendments Act not been passed.

## THE PROPOSED RULES

This rulemaking proceeding is primarily concerned with amendments to 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions." The proceeding also encompasses conforming amendments to other parts of the Commission's regulations.

Subpart A of 10 CFR Part 51 sets out NRC regulations for implementing Section 102(2) of NEPA. The principal matters addressed by Subpart A are the following: (1) identification of licensing and regulatory actions requiring the preparation of environmental impact statements or environmental assessments; (2) requirements for the submission of environmental reports and information by license applicants and petitioners for rulemaking; (3) contents and distribution of draft and final environmental impact statements; (4) NEPA procedure and administrative action; and (5) public notice of and access to environmental documents. Since each of these topics is treated, expressly or implicitly, by the Nuclear Waste Policy Act, as amended, the Commission proposes to develop as part of Subpart A certain new rules, discussed below, that will apply to geologic repositories and that will take into account the provisions of that Act. <sup>3/</sup>

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<sup>3/</sup> The Nuclear Waste Policy Act applies only with respect to geologic repositories that are used, at least in part, for the disposal of waste from civilian nuclear waste activities. Sec. 8, 42 U.S.C. 10108. Under the Act, however, high-level radioactive waste resulting from atomic energy defense activities is to be disposed of in such repositories, along with civilian wastes, unless the President finds that a separate facility is required. The President has determined that such a separate facility is not needed. In the light of these developments, the Commission believes

(FOOTNOTE CONTINUED ON NEXT PAGE)

Actions Requiring Preparation of Environmental Document

Under Section 121 of the Nuclear Waste Policy Act, 42 U.S.C. 10141, the Commission's promulgation of technical requirements and criteria in 10 CFR Part 60 does not require the preparation of an environmental impact statement or other environmental review under section 102(2) of NEPA. The proposed rules incorporate this provision. <sup>4/</sup> Under existing 10 CFR Part 51, certain procedural actions pertaining to the licensing of geologic repositories have been determined to be categorically excluded from environmental assessment. See references to 10 CFR Part 60 in 10 CFR § 51.22(c). No change in those provisions is needed.

Under 10 CFR § 51.20(a), an environmental impact statement is required if the proposed action is a major Federal action significantly affecting the quality of the human environment or if the Commission, in the exercise of its discretion, determines that the proposed action should be covered by such an EIS. Section 114(f) of the Nuclear Waste Policy Act, 42 U.S.C. § 10134(f), reflects a Congressional understanding, with which the Commission is in full accord, that the issuance of a construction authorization and license for a geologic repository will require an environmental impact statement. This has

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

that it is sufficient to limit the scope of this action to those facilities that may be situated and constructed in accordance with the Nuclear Waste Policy Act.

<sup>4/</sup> See § 51.22(d). Conforming amendments would be made in § 51.21 and in the caption of § 51.22.

been incorporated into the proposed rules. Other licensing actions, unless covered by existing categorical exclusions (see paragraphs (10), (11), and (12) of 10 CFR § 51.22(c)), would require an environmental assessment under 10 CFR § 51.21.

Ordinarily, a determination that an environmental impact statement (or supplement) will be prepared triggers public notice and the initiation of a scoping process. Where another agency prepares the EIS, however, it has the responsibility to carry out these functions. We are proposing to clarify this point by limiting the application of these procedures to situations in which the appropriate NRC staff director determines that an environmental impact statement will be prepared "by NRC." See the amendment to Section 51.26(a).

#### Submission of Environmental Information

The Commission's regulations encourage prospective applicants or petitioners for rulemaking to confer with NRC staff before submitting environmental information. 10 CFR § 51.40. The regulations also provide that the Commission may require such persons to submit information which may be useful in aiding the Commission in complying with Section 102(2) of NEPA. 10 CFR § 51.41. These general provisions are compatible with the requirements of the Nuclear Waste Policy Act.

The more specific regulations dealing with the submission of environmental reports are inappropriate in the context of the geologic repository program. Instead of providing for the submission of an environmental report, the Nuclear Waste Policy Act requires that NRC consider, and if practicable adopt, a final environmental impact statement prepared by DOE at the time of its

recommendation to the President for the development of a repository at a particular site. Sec. 114, 42 U.S.C. 10134. The recommendation for development of a repository includes, as a minimum, the obtaining of a license from NRC to receive and possess wastes. The environmental impact statement must therefore address not only the environmental effects of construction but those of repository performance as well. This is reflected in the statutory direction to the Commission to adopt the environmental impact statement, to the extent practicable, "in connection with the issuance by the Commission of a construction authorization and license for such repository."

DOE will therefore be required to submit an environmental impact statement instead of an environmental report. The Commission may nevertheless be unable to adopt that statement, with respect either to the construction authorization or the license, unless it has been supplemented to take into account significant new information such as that developed during the course of construction as part of the performance confirmation program or significant changes in the plans of DOE since the time of its site recommendation to the President. See 40 CFR § 1502.9(c)(1) (CEQ regulations). Accordingly, the proposed rules provide for the timely submission by DOE of supplemental environmental impact statements as needed.

The information to be contained in an environmental impact statement is set out in section 102(2) of NEPA itself, and the submission of such information is required by the proposed rules. The scope of alternatives to be considered in the EIS is restricted, however, to take into account the limitations in section 114(f) of the Nuclear Waste Policy Act, 42 USC 10134(f), with respect to the need for a repository, the time of the initial availability of a repository, alternatives to the isolation of waste in a repository, and the

Identification of alternate sites. Moreover, the proposed rule requires DOE to inform the Commission of the extent to which, pursuant to section 119, 42 U.S.C. 10139, the environmental impact statement may have been found to be adequate or inadequate and the extent to which, under that section, issues related to the adequacy of the environmental impact statement may remain subject to judicial review.

Because one of the alternatives available to the Commission is denial of the application, the environmental impacts of such denial need to be addressed. Even though denial of an application involves action by the Commission, it is proper for the environmental impacts to be addressed by DOE, since the lead agency is required by CEQ regulations to include reasonable alternatives not within its jurisdiction. 40 CFR § 1502.14(c).

The Commission has not included any specific requirements for the submission of environmental information by petitioners for rulemaking. The only rules likely to have significant environmental effects would be technical requirements and criteria to be used in licensing; as already noted, such rules would be exempt from the requirement of environmental review under NEPA. Section 121(c), 42 U.S.C. 10141(c). In a particular case, however, environmental information could be required, if needed to comply with law, pursuant to the general language of 10 CFR § 51.41.

#### Preparation of Environmental Impact Statements

The NRC regulations include a group of sections that prescribe a procedure for preparation and distribution by the NRC of draft and final environmental impact statements. With respect to materials licenses, these

requirements apply to certain specified categories of NRC actions other than the issuance of a construction authorization or license to receive and possess high-level radioactive waste at a geologic repository. 10 CFR § 51.80 (citing § 51.20(b)(7)-(12)). Because NRC, under the Nuclear Waste Policy Act, will in general have no need to prepare its own environmental impact statement, the proposed amendments would provide (in accordance with CEQ regulations) for the distribution of the EIS, if and as adopted by the Commission, only as a final statement.

#### NEPA Procedure and Administrative Action

Although the procedures established in Part 51 are designed for the case in which NRC prepares its own environmental impact statement, they can equally well be applied in the situation where the EIS is prepared in the first instance by a license applicant. Thus, no action will be taken by the Commission until necessary documents have been filed - in this case by DOE rather than NRC - with the Environmental Protection Agency. See 10 CFR § 51.100. NRC will not take action concerning the proposal which would have an adverse environmental impact until a record of decision is issued. See 10 CFR § 51.101. A record of decision will be prepared as part of the initial or final decision on issues adjudicated in formal hearings. See 10 CFR § 51.102. The record of decision will state the decision, including alternatives considered and the relevant factors upon which preferences among the alternatives are based. See 10 CFR § 51.103. In the case of the adoption of an EIS prepared by DOE concerning a geologic repository, the relevant factors would include the special provisions of the Nuclear Waste Policy Act.

In addition to these rules of general application, Part 51 includes specific procedural provisions for different categories of licensing actions. A new section 51.109 would be added to describe the NEPA procedure to be followed with respect to licenses issued under 10 CFR Part 60.

The basic premise of § 51.109 is that it is practicable to adopt the EIS prepared by DOE if that statement is adequate to meet the requirements of Section 102(2)(C) of NEPA. The focus of the procedure, therefore, is the presiding officer's determination of the extent to which it is practicable to adopt the DOE EIS. To the extent adoption is practicable, the issues would be excluded from independent NRC inquiry. The adoption of the statement does not necessarily mean that NRC would independently have arrived at the same conclusions on matters of fact or policy. And, of course, the adoption of the EIS would have no probative weight with respect to any safety findings that the Commission must make under 10 CFR Part 60.

It would still be proper to consider NEPA contentions with respect to significant matters that arose after issuance of the EIS. But note, even in this regard, that if there are significant new circumstances or information relevant to environmental concerns and bearing on the action proposed by DOE or its impacts, DOE would be obliged to prepare a supplemental EIS that would be subject to adoption by the Commission under the same standards as the original document. Challenges to DOE's supplement should be adjudicated in the courts of appeals, pursuant to Section 119 of NHPA, in the same manner as challenges to the original EIS.

The Commission fully expects that supplementation of the EIS by DOE will resolve any new circumstances or information that might arise, and that supplementation by the NRC will not be necessary. Nevertheless, in theory

there might be situations when NRC must prepare a supplemental environmental impact statement. Under the proposed regulations, such action might be initiated by the staff before the hearing or might be found to be necessary in light of the record of the proceedings after the hearing. The former case is addressed in § 51.26(c), the latter (implicitly) in § 51.109(e). In each situation, though, the standards for adoption set out in § 51.109(c) would be observed.

The proposed rules provide a structured mechanism to address NEPA concerns in a licensing hearing. This is the presentation of the staff position with respect to the practicability of adoption, which appears in § 51.109(a)(1). As noted above, it is expected that DOE would, where necessary, supplement its EIS. Accordingly, the staff position is likely to be that it is practicable for the Commission to adopt the DOE EIS, as it may have been supplemented by DOE and as filed with the Commission. Nevertheless, in some situations, the staff position could be that it is not practicable to adopt the DOE EIS, as it may have been supplemented, in which case an NRC EIS would be required. In that event, the staff is under an obligation to have prepared the necessary final EIS so as to be able to present its position on matters within the scope of NEPA. Whatever the staff position may be, any other party may seek to have the issue regarding practicability of adoption resolved by the presiding officer, but any contentions to that effect must set forth the basis of the claim under the criteria set out in the proposed rule. Moreover, it is contemplated that the procedures that would be used by the presiding officer to resolve disputes regarding adoption would resemble those employed to rule on motions to reopen records. See 10 CFR §2.734.

Several situations in which adoption of DOE's EIS is impracticable could conceivably arise. For example, if the Commission were to impose license conditions requiring DOE to take actions other than those which DOE had proposed, the Commission would need to consider the environmental impacts of such actions in accordance with NEPA. However, the Commission does not anticipate imposition of license conditions with significant environmental impacts. Under NHPA, DOE has the primary responsibility for consideration of environmental matters; and if significant changes from DOE's original proposal are needed, the Commission believes that DOE should amend its license application and supplement its EIS, precluding any need for NRC supplementation. Should DOE fail to do so, the Commission might deny DOE's application rather than impose license conditions requiring NRC supplementation of DOE's EIS. In theory, though, it would still be possible for NRC to prepare its own EIS. The scope of the review would be limited, however, to the actions being required by the Commission. It is not intended that other environmental issues would be reopened and relitigated in the licensing proceeding.

Another situation in which NRC would prepare a supplemental EIS relates to new information which it regards as significant even though DOE may not have treated it as such. We recognize that DOE's failure to supplement the EIS might arguably be viewed as a final action, so that objecting parties might have to seek review in the courts within the statutory 180-day review period, with any failure to do so barring later challenge in NRC proceedings. But such a reading of the law would have undesirable consequences upon NRC administrative proceedings. It would require NRC to decide whether or not adoption is practicable on the basis of factual and legal considerations

(pertaining to DOE's duty to supplement the EIS and, in particular, the time such duty may have arisen), which go far beyond the materials otherwise requiring NRC review. Accordingly, NRC proposes to prepare a supplemental EIS, if DOE is not doing so, whenever NRC regards such a supplemental EIS to be required by law. <sup>5/</sup>

Furthermore, the Commission will review any statements in the DOE's environmental impact statement relating to radiological concerns. If such statements are inconsistent with the facts found by the Commission on the basis of the record of the proceedings, the Commission will specifically determine whether or not the findings constitute "significant and substantial new information or new considerations" which, under the rule, would render the environmental impact statement to that extent inadequate. The statement will be supplemented where required by law, or otherwise will be deemed modified to the extent necessary, in accordance with Commission practice. Citizens for Safe Power v. NRC, 524 F.2d 1291, 1294, n. 5 (D.C. Cir. 1975); Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), CLI-78-1, 7 NRC 1, 29 (1978).

The Commission would make its own NEPA findings, including an independent balance of relevant factors, "to the extent that it is not practicable to adopt" the DOE EIS - that is, to the extent that the Commission finds that the balance of these factors would be affected by the new information or new considerations involved. This procedure is consistent with

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<sup>5/</sup> The Commission once again emphasizes that, under NWPA, DOE has the primary responsibility to supplement an EIS to take significant new information into consideration. This obligation is reflected in the proposed revision to §60.24(c).

10 CFR § 51.41, which states that the Commission "will independently evaluate and be responsible for the reliability of any information which it uses."

#### Public Information

Sections 51.116 through 51.118 concern public notices about the preparation of an environmental impact statement. They apply in any situation in which a notice of intent to prepare an EIS is prepared "in accordance with § 51.26." But, as discussed above, § 51.26 would be amended so as to apply only when NRC itself intends to prepare an EIS. Since the EIS with respect to a repository would be prepared by DOE rather than by NRC, the notice provisions of §§ 51.116 - 51.118 would not come into play. Section 51.118 would be amended, however, to require circulation of a final environmental impact statement, if and when adopted by NRC.

#### Commenting

It is the policy of the Commission to comment on draft environmental impact statements prepared by other Federal agencies, consistent with the provisions of 40 CFR §§ 1503.2 and 1503.3. 10 CFR § 51.124. The Commission intends to follow this policy in connection with the draft environmental impact statement prepared by DOE in connection with a geologic repository recommendation. The submission of such comments is specifically called for, in fact, by the Nuclear Waste Policy Act. See Sec. 114(a)(1)(D), 42 U.S.C. 10134(a)(1)(D).

NRC will comment on environmental issues even though those issues may be precluded from litigation in the licensing proceedings. The reason for this

is that an inadequate EIS may be set aside in the course of judicial review. Should this occur, it would of course not be practicable for the Commission to adopt it. If NRC has objections or reservations about the DOE proposal on grounds of environmental impacts, it will specify the mitigation measures it considers necessary to withstand challenge in court. The theory underlying such comments is that if the EIS is found not to be adequate, in the course of judicial review, NRC could not adopt it and, in the absence of suitable revisions or supplementation, the Commission could not issue a construction authorization or license. See 40 CFR § 1503.3(d) (duty to specify mitigation measures considered necessary to allow license to be granted).

Ordinarily an agency that receives comments from another agency must consider them, but it may exercise its discretion in determining how they should affect the decision at hand. In principle, therefore, DOE could in some cases reject comments made by NRC on grounds that might be unsatisfactory to the Commission. Still, the Commission's comments will be a matter of public record and will be available for consideration during judicial and Congressional review of DOE's EIS and related actions. The Commission regards these forums, rather than the NRC usual review, to be the appropriate place, under NHPA, for review of DOE's responses to comments as well as other matters related to the EIS.

Responsible Official

No change is required in the provision establishing responsibilities within NRC for NEPA compliance.

### Conforming Amendments

Several changes to Part 60 of the Commission's regulations are needed in order to reflect the provisions of the Nuclear Waste Policy Act, as amended, that deal with environmental review.

Under the Nuclear Waste Policy Act, DOE is required to prepare an environmental impact statement instead of an environmental report. Several changes to Part 60 are proposed to reflect this direction. Revisions to the environmental impact statement would take the form of "supplements" instead of the "amendments" or "updates" referred to in the existing rule.

The requirement in § 60.15 that multiple sites be characterized is eliminated so as to conform to the provisions of the Amendments Act.

The language of the findings for the issuance of the construction authorization requires consideration of costs and benefits and consideration of alternatives. § 60.31(c). This language would not be changed. However, it should be understood that a determination that it is practicable to adopt the DOE environmental impact statement will necessarily result in the specified environmental finding that the action called for is issuance of the construction authorization.

The construction authorization is to include such conditions as the Commission "finds to be necessary to protect . . . environmental values." 10 CFR § 60.32(a). The Commission would include such conditions only where the environmental impact statement (as it may have been supplemented) specifically calls for them. In principle, the incorporation of appropriate conditions in the construction authorization could enhance environmental protection, since NRC would then have a basis to inspect, and take enforcement action where needed,

to assure that the conditions are observed. However, we doubt that the adequacy of the EIS would ever depend upon NRC's being vested with this authority. DOE can describe in the EIS - and in fact it must describe - the mitigation measures which are proposed to assure protection of the environment. Should DOE subsequently fail to implement these measures, affected parties can seek redress against DOE in the courts. Moreover, the written agreements to be entered into between DOE and the States and affected Indian tribes under Section 117(c) of the Nuclear Waste Policy Act, 42 USC 10137(c), provide a supplemental channel for identifying and resolving environmental concerns on an ongoing basis without direct NRC participation. Our approach, therefore, will be to require the observance of environmental protection conditions where the environmental impact statement which we adopt provides for the Commission to include such conditions in the construction authorization (or license); but if it is practicable for us to adopt an EIS that makes no provision for NRC to impose and enforce such conditions, we would not on our own initiative find such conditions to be necessary. Even if NRC comments on the DOE proposal had specified mitigation measures considered necessary to allow NRC to grant a construction authorization or license, these measures generally would not be incorporated as licensing conditions; for, as discussed above, the basis for NRC's comments was that the measures were necessary for the EIS to be considered "adequate" by the courts, and it is expected that this issue would already have been resolved.

The rules of practice (10 CFR Part 2) also need to be amended to take account of DOE's submission of an environmental impact statement instead of an environmental report. Because the EIS must conform to statutory requirements, and because its completeness would have been subject to

challenge in court prior to filing with NRC, a completeness determination by NRC at the time of docketing is unnecessary, and provision for such determination would be omitted. As in the case of Part 60, reference would be made to "supplements" rather than "amendments," to the environmental impact statement.

### PETITION FOR RULEMAKING

The States of Nevada and Minnesota have petitioned the Commission to amend 10 CFR §60.24 so as to adopt DOE's environmental impact statement only if such adoption "would not compromise the independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954". 50 FR 51701, December 19, 1985 (PRM-60-2A). (The language proposed by the petitioners also includes several matters which would be considered by the Commission in making the foregoing determination). In this regard, the Commission notes its resolve that adoption of the environmental impact statement must not compromise its independent responsibilities under the Atomic Energy Act. Adoption of the rules proposed herein would be fully consistent with this resolve.

The matters identified by petitioners for consideration by the Commission relate largely to the adequacy of the procedures followed by DOE in implementing the Nuclear Waste Policy Act and in preparing its EIS. Nevertheless, as stated in the cited Federal Register notice, the Commission will give further consideration, in this rulemaking proceeding, to the issues raised by the petitioners, as they may relate to this agency's responsibilities.

Generally, the Commission proposes to deal with these issues in a manner consistent with the discussion above.

Any person desiring to comment on the rulemaking petition, insofar as it relates to 10 CFR §60.24, should do so as part of this rulemaking proceeding.

#### ENVIRONMENTAL IMPACT: CATEGORICAL EXCLUSION

The NRC has determined that this proposed regulation is the type of action described in categorical exclusions 10 CFR §51.22(c)(1) and (3). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

#### PAPERWORK REDUCTION ACT STATEMENT

The proposed rule contains no information collection requirements and therefore is not subject to the Paperwork Reduction Act (Pub. L. 96-511).

#### REGULATORY FLEXIBILITY CERTIFICATION

In accordance with the Regulatory Flexibility Act of 1980 (5 USC 605(b)), the Commission certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The only entity subject to regulation under this amended rule is the U.S. Department of Energy.

LIST OF SUBJECTS IN 10 CFR PART 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

LIST OF SUBJECTS IN 10 CFR PART 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and record keeping requirements.

LIST OF SUBJECTS IN 10 CFR PART 60

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting and record keeping requirements, Waste treatment and disposal.

ISSUANCE

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the National Environmental Policy Act of 1969, as amended, the Nuclear Waste Policy Act of 1982, and 5 U.S.C. 553, the NRC is

proposing to adopt the following amendments to 10 CFR Part 51, and related conforming amendments to 10 CFR Parts 2 and 60.

## **PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS**

1. The authority citation for Part 2 is revised to read as follows:

Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553.

Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. In section 2.101, paragraphs (f)(1), (2), (4), (5), and (7) are revised to read as follows:

§ 2.101 Filing of application.

\* \* \* \* \*

(f)(1) Each application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and any environmental impact statement required in connection therewith pursuant to Subpart A of Part 51 of this chapter shall be processed in accordance with the provisions of this paragraph.

(2) To allow a determination as to whether the application is complete and acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room. Twenty copies shall be filed to enable this determination to be made.

\* \* \* \* \*

(4) [Reserved]

(5) If a tendered document is acceptable for docketing, the applicant will be requested to (i) submit to the Director of Nuclear Material Safety and Safeguards such additional copies of the application and environmental impact

statement as the regulations in Part 60 and Subpart A of Part 51 of this chapter require, (ii) serve a copy of such application and environmental impact statement on the chief executive of the municipality in which the geologic repository operations area is to be located, or if the geologic repository operations area is not to be located within a municipality, on the chief executive of the county (or to the Tribal organization, if it is to be located within an Indian reservation), and (iii) make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards. All such copies shall be completely assembled documents, identified by docket number. Subsequently distributed amendments to the application, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages.

\* \* \* \* \*

(7) Amendments to the application and supplements to the environmental impact statement shall be filed and distributed and a written statement shall be furnished to the Director of Nuclear Material Safety and Safeguards in the same manner as for the initial application and environmental impact statement.

\* \* \* \* \*

**PART 51 - ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS**

3. The authority citation for Part 51 is revised to read as follows: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853-854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub.L. 95-604, Title II, 92 Stat. 3033-3041. Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036-3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Secs. 51.43 and 51.109 also issued under Nuclear Waste Policy Act of 1982, sec. 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)).

4. In § 51.20, existing paragraph (b)(13) is redesignated as paragraph (b)(14) and a new paragraph (b)(13) is added to read as follows:  
§ 51.20 Criteria for and Identification of licensing and regulatory actions requiring environmental impact statements.

\* \* \* \* \*

(b) \*\*\*

\* \* \* \* \*

(13) Issuance of a construction authorization and license pursuant to Part 60 of this chapter.

\* \* \* \* \*

5. Section 51.21 is revised to read as follows:

**§ 51.21 Criteria for and Identification of licensing and regulatory actions requiring environmental assessments.**

All licensing and regulatory actions subject to this subpart require an environmental assessment except those identified in § 51.20(b) as requiring an environmental impact statement, those identified in § 51.22(c) as categorical exclusions, and those identified in § 51.22(d) as other actions not requiring environmental review. As provided in § 51.22(b), the Commission may, in special circumstances, prepare an environmental assessment on an action covered by a categorical exclusion.

6. Section 51.22 is amended, by revising the heading and adding a new paragraph (d), to read as follows:

**§ 51.22 Criterion for categorical exclusion; Identification of licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review.**

\* \* \* \* \*

(d) In accordance with section 121 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10141), the promulgation of technical requirements and criteria that the Commission will apply in approving or disapproving applications under Part 60 of this chapter shall not require an environmental impact statement, an environmental assessment, or any environmental review under subparagraph (E) or (F) of section 102(2) of NEPA.

7. In § 51.26, paragraph (a) is revised and a new paragraph (c) is added, to read as follows:

**§ 51.26 Requirement to publish notice of intent and conduct scoping process.**

(a) Whenever the appropriate NRC staff director determines that an environmental impact statement will be prepared by NRC in connection with a proposed action, a notice of intent will be prepared as provided in § 51.27, and will be published in the Federal Register as provided in § 51.116, and an appropriate scoping process (see §§ 51.27, 51.28 and 51.29) will be conducted.

\* \* \* \* \*

(c) Upon receipt of an application and accompanying environmental impact statement under §60.22 of this chapter (pertaining to geologic repositories for high-level radioactive waste), the appropriate NRC staff director will include in the notice of docketing required to be published by §2.101(f)(8) of this chapter a statement of Commission intention to adopt the environmental impact statement to the extent practicable. However, if the appropriate NRC staff director determines, at the time of such publication or at any time thereafter, that NRC should prepare a supplemental environmental impact statement in connection with the Commission's action on the license application, the procedures set out in paragraph (a) of this section shall be followed.

8. A new § 51.67 is added to read as follows:

**§ 51.67 Environmental information concerning geologic repositories.**

(a) In lieu of an environmental report, the Department of Energy, as an applicant for a license or license amendment pursuant to Part 60 of this chapter, shall submit to the Commission any final environmental impact

statement, and any supplement thereto, which the Department prepares in connection with any geologic repository developed under Subtitle A of Title I of the Nuclear Waste Policy Act of 1982.

(b) The final environmental impact statement which accompanies the Department of Energy's recommendation to the President to approve a site for a geologic repository shall be submitted to the Commission at the time and in the manner described in § 60.22 of this chapter. Such statement shall be prepared in accordance with the provisions of section 114(f) of the Nuclear Waste Policy Act of 1982. The statement shall include, among the alternatives under consideration, denial of a license or construction authorization by the Commission.

(c) Under applicable provisions of law, the Department of Energy is required to supplement its final environmental impact statement whenever the Department makes a substantial change in its proposed action that is relevant to environmental concerns or determines that there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. The Department shall submit any supplement to its final environmental impact statement to the Commission at the time and in the manner described in § 60.22 of this chapter.

(d) Whenever the Department of Energy submits a final environmental impact statement, or a final supplement to an environmental impact statement, to the Commission pursuant to this section, it shall also inform the Commission of the status of any civil action for judicial review initiated pursuant to section 119 of the Nuclear Waste Policy Act of 1982. This status report,

which the Department shall update from time to time to reflect changes in status, shall:

(1) State whether the environmental impact statement has been found by the courts of the United States to be adequate or inadequate; and

(2) Identify any issues relating to the adequacy of the environmental impact statement that may remain subject to judicial review.

9. A new § 51.109 is added to read as follows:

§ 51.109 Public hearings in proceedings for issuance of materials license with respect to a geologic repository.

(a) (1) In a proceeding for the issuance of a license to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area, the NRC staff shall present its position on whether it is practicable to adopt, without further supplementation, the environmental impact statement (including any supplement thereto) prepared by the Secretary of Energy. If the position of the staff is that supplementation of the environmental impact statement by NRC is required, it shall file its final supplemental environmental impact statement with the Environmental Protection Agency, furnish that statement to commenting agencies, and make it available to the public, before presenting its position. In discharging its responsibilities under this paragraph, the staff shall be guided by the principles set forth in paragraphs (c) and (d) of this section.

(2) Any other party to the proceeding who contends that it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented, shall file a contention to that effect in accordance with §2.714(b) of this chapter. Such contention must be accompanied by one or

more affidavits which set forth factual and/or technical bases for the claim that, under the principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented. The presiding officer shall resolve disputes concerning adoption of the DOE environmental impact statement by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under §2.734 of this chapter.

(b) In any such proceeding, the presiding officer will determine those matters in controversy among the parties within the scope of NEPA and this subpart, specifically including whether, and to what extent, it is practicable to adopt the environmental impact statement prepared by the Secretary of Energy in connection with the issuance of a construction authorization and license for such repository.

(c) The presiding officer will find that it is practicable to adopt the environmental impact statement prepared by the Secretary of Energy unless:

(1)(i) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and

(ii) The difference may significantly affect the quality of the human environment; or

(2) Significant and substantial new information or new considerations render the environmental impact statement inadequate. New information or new considerations shall not be deemed to render the environmental impact statement inadequate, for purposes of this paragraph, if the new information or new considerations have been addressed in a supplemental environmental

Impact statement that the Secretary of Energy has submitted to the Commission in accordance with the provisions of this chapter.

(d) To the extent that the presiding officer determines it to be practicable to adopt the environmental impact statement prepared by the Secretary of Energy, such adoption shall be deemed to satisfy all responsibilities of the Commission under NEPA and no further consideration under NEPA or this subpart shall be required.

(e) To the extent that it is not practicable to adopt the environmental impact statement prepared by the Secretary of Energy, the presiding officer will:

(1) Determine whether the requirements of section 102(2)(A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical and other benefits against environmental and other costs, whether the construction authorization or license should be issued, denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the construction authorization or license should be issued as proposed.

(f) In making the determinations described in paragraph (e), the environmental impact statement will be deemed modified to the extent that findings and conclusions differ from those in the final statement prepared by the Secretary of Energy, as it may have been supplemented. The initial decision will be distributed to any persons not otherwise entitled to receive it who responded to the request in the notice of docketing, as described in §51.26(c). If the Commission or the Atomic Safety and Licensing Appeal Board reaches conclusions different from those of the presiding officer with respect to such matters, the final environmental impact statement will be deemed modified to that extent and the decision will be similarly distributed.

(g) The provisions of this section shall be followed, in place of those set out in §51.104, in any proceedings for the issuance of a license to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area.

10. In § 51.118, the existing text is redesignated as paragraph (a) and a new paragraph (b) is added, to read as follows:

§ 51.118 Final environmental impact statement - Notice of availability.

(a) \*\*\*

(b) Upon adoption of a final environmental impact statement or any supplement to a final environmental impact statement prepared by the Department of Energy with respect to a geologic repository that is subject to the Nuclear Waste Policy Act of 1982, the appropriate NRC staff director shall follow the procedures set out in paragraph (a).

**PART 60 - DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES**

11. The authority citation for Part 60 is revised to read as follows: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97-425, 96 Stat. 2213, 2228, as amended (42 U.S.C. 10134, 10141).

For the purposes of section 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 60.10, 60.71 to 60.75 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

12. In § 60.15, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

13. In § 60.21, paragraph (a) is revised to read as follows:

**§ 60.21 Content of application.**

(a) An application shall consist of general information and a Safety Analysis Report. An environmental impact statement shall be prepared in accordance with the Nuclear Waste Policy Act of 1982, as amended, and shall accompany the application. Any Restricted Data or National Security Information shall be separated from unclassified information.

\* \* \* \* \*

14. Section 60.22 is revised to read as follows:

§ 60.22 Filing and distribution of application.

(a) An application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area at a site which has been characterized, and any amendments thereto, and an accompanying environmental impact statement and any supplements, shall be signed by the Secretary of Energy or the Secretary's authorized representative and shall be filed in triplicate with the Director.

(b) Each portion of such application and any amendments, and each environmental impact statement and any supplements, shall be accompanied by 30 additional copies. Another 120 copies shall be retained by DOE for distribution in accordance with written instructions from the Director or the Director's designee.

(c) DOE shall, upon notification of the appointment of an Atomic Safety and Licensing Board, update the application, eliminating all superseded information, and supplement the environmental impact statement if necessary, and serve the updated application and environmental impact statement (as it may have been supplemented) as directed by the Board. At that time DOE shall also serve one such copy of the application and environmental impact statement on the Atomic Safety and Licensing Appeal Panel. Any subsequent amendments to the application or supplements to the environmental impact statement shall be served in the same manner.

(d) At the time of filing of an application and any amendments thereto, one copy shall be made available in an appropriate location near the proposed

geologic repository operations area (which shall be a public document room, if one has been established) for inspection by the public and updated as amendments to the application are made. The environmental impact statement and any supplements thereto shall be made available in the same manner. An updated copy of the application, and the environmental impact statement and supplements, shall be produced at any public hearing held by the Commission on the application, for use by any party to the proceeding.

(e) The DOE shall certify that the updated copies of the application, and the environmental impact statement as it may have been supplemented, as referred to in paragraphs (c) and (d) of this section, contain the current contents of such documents submitted in accordance with the requirements of this part.

15. In § 60.24, the section heading and paragraphs (a) and (c) are revised to read as follows:

§ 60.24 Updating of application and environmental impact statement.

(a) The application shall be as complete as possible in the light of information that is reasonably available at the time of docketing.

\* \* \* \* \*

(c) The DOE shall supplement its environmental impact statement in a timely manner so as to take into account the environmental impacts of any substantial changes in its proposed actions or any significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

16. In § 60.31, the introductory paragraph is revised to read as follows:

§ 60.31 Construction authorization.

Upon review and consideration of an application and environmental impact statement submitted under this part, the Commission may authorize construction if it determines:

\* \* \* \* \*

17. In § 60.51, the introductory portion of paragraph (a), and paragraph (b), are revised to read as follows:

§ 60.51 License amendment for permanent closure.

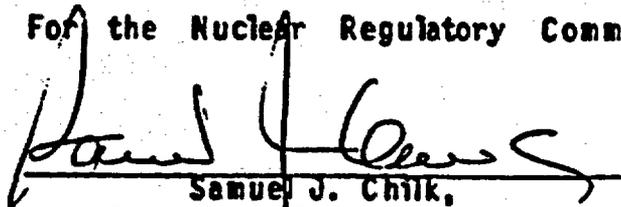
(a) DOE shall submit an application to amend the license prior to permanent closure. The submission shall consist of an update of the license application submitted under §§ 60.21 and 60.22, including:

\* \* \* \* \*

(b) If necessary, so as to take into account the environmental impact of any substantial changes in the permanent closure activities proposed to be carried out or any significant new information regarding the environmental impacts of such closure, DOE shall also supplement its environmental impact statement and submit such statement, as supplemented, with the application for license amendment.

Dated at Rockville, Maryland this 29<sup>th</sup> day of April 1988.

For the Nuclear Regulatory Commission.



Samuel J. Chilk,  
Secretary of the Commission.

DOCUMENT NAME: Part 51 Transmittal

DOCUMENT PREPARATION CHECKLIST  
DIVISION OF HIGH-LEVEL WASTE MANAGEMENT

This checklist is to be submitted with each document sent for typing or for distribution

1. Is this document a draft? Yes \_\_\_\_\_ No X
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ANY OTHERS?

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| PDR         | Yes <input checked="" type="checkbox"/> | No _____                               | <u>J Wolf, OGC</u> | _____ |
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5. CC's ~~Robert~~ Hertz; Stein

6. CONCURRENCES:  
Please list the names of all individuals who should be on concurrence:  
ETT, JL, BJY, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_,  
\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.

7. Date Originated: 5/3/88 Date Due or Needed 5/4/88

8. Task Assigned to: Elen Tana Date Completed and sent to 4-C-20 5/3/88

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