UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL PANEL
WASHINGTON, D.C. 20555

October 2, 1986

To: Alan Rosenthal

From: Christine Kohl CK

Re: Alternative Approaches to Licensing a Geologic Repository (Draft OGC/EDO Memorandum)

I have only a few comments on the project outlined in the above-referenced memorandum.

Obviously, the task of licensing a high-level waste repository will be a formidable one. While the draft memorandum certainly recognizes this, I think it assumes too great a degree of cooperation and agreement from would-be intervenors. Given the statutory time constraints, however, there may be no real alternative to such optimistic thinking, and perhaps it will become a self-fulfilling prophecy.

I agree with the memorandum that use of partial initial decisions will be a relatively efficient way of disposing of certain issues. The draft correctly notes, however, that this device will be risky if used before DOE files its completed license application. Although the memorandum does not mention it, I believe that establishment of more than one licensing board to decide different issues (e.g., a radiation safety board, an environment board, an earthquake board, etc.) -- already used effectively in some Part 50 licensing proceedings -- would logically complement the use of partial initial decisions.

The memorandum does not discuss appellate review within the agency. Because this would not be a Part 50 proceeding, the licensing board's decisions would not be appealed to an appeal board, absent a special Commission delegation of authority. As with any complex litigation, there will be numerous interlocutory appeals; it cannot be assumed that all appellate review will await the conclusion of the proceeding. The Commission should thus decide at the outset how much appellate review is required and desirable, how formal it will be, and who will do it. (The TMI-1 Restart situation, where the Commission vacillated throughout the entire proceeding about the extent of appeal board review it wanted, should be avoided.) I also believe it would be

desirable to suspend the rule prohibiting interlocutory appeals (10 C.F.R. § 2.730(f)) in at least certain categories. For example, I would require parties to appeal the rejection or admission of contentions, as well as summary disposition rulings, at the time those decisions are rendered, rather than at the conclusion of the proceeding. This has obvious benefits: litigation of improper issues would be minimized, and issues wrongly excluded would be discovered and remedied before the hearing is closed and licensing action is taken. Moreover, because all the parties will be operating under serious time constraints, I do not believe that permitting interlocutory appeals will encourage frivolous filings. It will also keep the appellate process more "in sync" with the evidentiary hearings.

On the other hand, the Commission might consider invoking the "due and timely execution of its functions" provision of the APA, 5 U.S.C. § 557(b)(2), and omit formal partial initial decisions and "appeals" entirely; i.e., it would receive "findings" from the licensing board, but the Commission itself would issue the actual final decision, thereby eliminating any formal appeal stage. This would, of course, require close monitoring of the licensing proceeding by Commission representatives.

One recommendation with which I disagree (pp. 6-7) is codifying the practice of using the Federal Rules of Evidence (FRE) as guidance, particularly Rule 403. The stated purpose of this proposal is to confer on the board "discretion" to exclude unreliable, cumulative evidence. Our Rules of Practice, however, already clearly authorize and direct the boards to exclude unreliable, unduly repetitious, cumulative, and "time-wasting" evidence. See 10 C.F.R. §§ 2.743(c), 2.757. Case precedent supports this as well. Thus, another regulation for this purpose is wholly unnecessary. Similarly, our cases already recognize the usefulness of the FRE as guidance. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 474-75 (1982), is just one example. To "codify" this in a regulation is unnecessary and risks an argument that the board should follow rules that might be less flexible and less desirable for application in a HLW proceeding. Specifically recognizing the use of Rule 403 for this administrative proceeding is also unnecessary and

risky.[1] It may cause a board to exclude more evidence at the outset than it would otherwise, providing more issues for appellate and judicial review. It is more efficient in the long run for a board to admit evidence initially (providing it is relevant, reliable, and noncumulative) and give it appropriate weight later as part of the decisionmaking process.

The recommendation implies that codifying the use of the FRE as guidance will make this already existing practice more uniform among the boards. I do not agree; uniformity among decisionmakers cannot really ever be enforced. The better course, in my view, is for the Commission, in its order instituting the proceeding and establishing the licensing board(s), to make explicit reference to each of the case-management rules and techniques already in existence in the NRC's regulations and case law.

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[1] Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.