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MEMORANDUM FOR: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech

From: Trip Rothschild

FROM: Martin G. Malsch
Deputy General Counsel

SUBJECT: SECY-86-51 -- NEPA Review Procedures for Geologic Repositories for High-Level Waste

Background

SECY-86-51 proposes alternatives for discharging NRC's environmental review responsibilities in licensing a DOE high-level waste ("HLW") repository under the Nuclear Waste Policy Act ("NWPA"). We initiated an independent legal review of staff's proposals because of the importance of the legal issues to the HLW repository licensing program and the need for an independent legal review of a differing professional opinion on the subject. Subsequent to the initiation of our review, Commissioner Asselstine also requested that we review the paper.

Summary

The staff paper raises three issues: (1) is the NRC required to conduct a review of the final DOE Environmental Impact Statement ("EIS") on the high-level waste repository before determining whether to adopt it and, if a review is required, what standard and scope of review should be used; (2) are there procedural requirements that the Commission must observe before determining whether to adopt the DOE EIS; and (3) if the NRC adopts the DOE EIS, can parties still litigate issues addressed in that document in the repository licensing proceeding. Based on our review of the NWPA and its legislative history and other applicable law, OGC concludes that (1) NRC must review the final DOE EIS before making a determination whether to adopt it, but that review is limited to whether there are substantial new information or other considerations; (2) the Commission needs to provide a means for parties to the repository licensing proceeding to submit views to the NRC on whether the EIS should be adopted; and (3) issues

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addressed in portions of the DOE EIS adopted by the Commission should not be litigated in the NRC licensing proceeding. None of the alternatives presented by the staff in SECY-86-51 are entirely consistent with our analysis.

Legal Analysis

I. The Statute

Section 114(a)(1)(D) of the NWPA requires in relevant part that DOE's recommendation of a HLW repository site to the President include a "final environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 ("NEPA"), and that "comments made concerning such environmental impact statement by ... the Commission" be included in such final statement. Section 114(f) restates the requirement for DOE to prepare a final EIS, and goes on to specify NRC's NEPA environmental review obligations as follows:

> Any environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary [of Energy] under this subtitle shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under the National Environmental Policy Act of 1969 and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954. Nothing in this Act shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear Regulatory Commission as established in title II of the Energy Reorganization Act of 1974. [Citations omitted]

Sections 114-118 then provide procedures for State, Indian Tribe, and Congressional participation in the site selection process.

The remaining relevant provision of the NWPA is section 119. Section 119(a)(1) provides that, "except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action -- (A) for review of any final decision of the ... Commission under this subtitle [subtitle A of Title I, which includes section 114] [or] ... (D) for review of any environmental impact statement prepared pursuant to [NEPA] with respect to any action under this subtitle." Section 119(c) then specifies that

> A civil action for judicial review described under subsection (a)(1) may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

Several things are clear from the NWPA language. DOE must prepare a final EIS for inclusion in its repository recommendation to the President. Under sections 114-118 this final EIS, including NRC comments, is subject to review by the President, States and Indian tribes, and the Congress, all of whom may, on the basis of the statement, exercise their Constitutional and/or statutory rights to disapprove. NRC is to adopt the EIS "to the extent practicable" and, to the extent NRC does so, its NEPA environmental review obligations are satisfied. DOE's final EIS is subject to judicial review if and only if a petition for review is filed not later than the 180th day after the date of the statement.[1] Moreover, the NRC HLW repository licensing decision is also subject to judicial review if a petition is filed not later than the 180th day after the Commission makes its licensing decision.

However, several important things are also unclear from the statutory language. Section 114(f) does not specify what criteria the NRC is to apply in deciding whether adoption would be "practicable," or what public procedures are to be followed by NRC in making this decision. The statute also does not explicitly address the extent to which NEPA issues can be litigated in the NRC licensing process. The legal analysis which follows focuses on these issues. Section 119 complicates resolution of these issues because of the possibility that judicial review of the adequacy of the DOE statement must be pursued independent of NRC's own review of the statement.

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[1]The exception to the 180 day requirement in section 119(c), which relates to lack of knowledge of the statement or decision, will not likely apply given the wide publicity of the HLW repository program and the fact that Federal Register notice of the issuance of the statement will constitute constructive notice.

II. What Matters Should NRC Consider in Deciding Whether Adoption of the DOE Statement is "Practicable".

A. Statutory Language

Under section 114(f) NRC must adopt the DOE statement "to the extent practicable." The term "practicable" is not defined in the NWPA. The dictionary[2] defines the term as "possible to practice or perform" (the equivalent of "feasible"), or as "capable of being used" (the equivalent of "usable"). To say that NRC should adopt the DOE statement to the extent "feasible" or to the extent that it is "capable of being used" does not advance the discussion. In sum, the term is ambiguous.

B. Legislative History

The legislative history does offer guidance. Legislative concern regarding NEPA review procedures surfaced as early as 1981. A Senate Committee Report on a predecessor HLW repository licensing bill (S. 1662), prepared jointly by the Committee on Energy and Natural Resources and the Committee on Environment and Public Works, stated that the NRC should

> [R]ely on the environmental impact statement prepared by DOE to the extent possible, consistent with the independent responsibilities of the NRC. The Committee intends that NRC minimize as much as possible the need to duplicate work already done by DOE in the Department's environmental impact statement. To carry out this intent, the Committee expects DOE to consult with NRC and to consider in the Department's statement to the extent possible those areas that the NRC believes important.[3]

However, the bill under consideration did not include any statutory language to effectuate this policy statement, so its usefulness as legislative history is limited. But the House Interior Committee soon took up the NEPA issue discussed in the Senate Committee's Report.

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[2] Webster's Third New International Dictionary (1976).

[3] S. Rept. 97-282, 97th Cong., 1st Sess. at 22 (Nov. 30, 1981).

H.R. 3809, as reported by the House Interior Committee, provided in section 114(f) that:

> Any environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary under this subtitle shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization for such repository. In any such statement prepared with respect to the first repository to be constructed under this subtitle, the Commission shall not consider the need for a repository or nongeologic alternatives to the site of such repository.

The Committee Report indicated that the bill was intended to include a "roadmap" for DOE and NRC compliance with NEPA. In two separate places the intent behind new section 114(f) was explained:

> The Committee amendment directs the Commission to use the Secretary's alternative site review and other data prepared for the site selection EIS to the maximum extent practicable. It is the Committee's intent that the Commission be precluded from having to undertake a repetition of the Department of Energy decisions unless it determines that new information or other considerations make a review necessary.
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> The Commission is required to adopt the statement prepared by [the] Secretary under this subtitle to the maximum extent practicable.
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> The Secretary's statement 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.
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> H. Rept. 97-491, Part 1, 97th Cong., 2d Sess. at 48, 53-54 (April 27, 1982).

With minor editorial revisions, the House Energy and Commerce Committee adopted the Interior Committee language.[4] It also added a sentence indicating that if the NRC adopted the DOE EIS, its NEPA responsibilities would be satisfied and no further consideration would be required. Its Report described the provision as follows:

> The Committee expects that the development of the repository will be subject to complete and thorough environmental review under NEPA, including the preparation of an environmental impact statement by the Secretary to accompany the Secretary's recommendation of a site for the location of a repository. The Committee intends to minimize duplication of effort by the Secretary and the Commission in the preparation of such statement. Therefore, the bill provides that the Commission shall adopt the Secretary's EIS or any portion thereof to the extent practicable. To the extent the Commission adopt [sic] such statement, its responsibilities under NEPA are to be discharged. To the extent such statement is not so adopted or does not address issues required to be addressed by the Commission, the Commission's responsibilities under NEPA shall not be deemed to have been so satisfied.
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> * * * * *
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> 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.
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> H.R. Rept. 97-785, Part 1, 97th Cong., 2d Sess. at 37, 69 (1982).

Subsequently, in floor debate Congressman Udall briefly explained section 114(f) to his colleagues. In a summary of the proposed legislation inserted into the Congressional Record, Congressman Udall stated:

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[4]The Report language is consistent with a dialogue between Congressmen Ottinger and Corcoran, and Chairman Palladino that occurred in Committee hearings on the proposed legislation. Nuclear Waste Disposal Policy, Hearings before the Subcommittee

[Footnote Continued]

> 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....
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> 128 Cong. Rec. H. 8163 (September 30, 1982).

There is no other useful legislative history on the meaning of section 114(f).[5]

[Footnote Continued]

on Energy Conservation and Power of the House Committee on Energy and Commerce, 97th Cong., 2d Sess. at pp. 521-524 (1982).

[5]In December 1982, the Senate turned to consider the House legislation. Senator Mitchell declared in floor remarks 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. S. 15669 (daily ed. Dec. 20, 1982), but the broad scope of his remarks is at odds with the plain language of section 114(f) of the bill actually passed by the Senate which, as did the House-passed bill, clearly limited NRC's NEPA review -- at least with regard to repository alternative sites. The colloquy with respect to an amendment proposed by Senator Levin, and passed, to include in section 114(f) the current language that "nothing in the Act should be construed to amend or otherwise detract from the licensing requirements of the Nuclear Regulatory Commission as established in Title II of the Energy Reorganization Act of 1974" is confusing. Senator Levin stated his understanding that the Act was not intended to restrict, or amend, or modify NRC licensing 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 Senator Levin was correct and added that "that is my understanding also." 128 Cong. Rec. S. 15653 (daily ed. Dec. 20, 1982). Since findings of need have generally been regarded as NEPA issues, this could be taken to reflect an understanding 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 NWPA. However, this would be contrary to the plain language of the Senate-passed bill which in section 114(f) provided specifically that "compliance with the procedures and requirements of this Act [NWPA] shall be deemed adequate considerations of need for the repository ...." Thus these floor remarks by Senators Mitchell, Levin and McClure are not useful legislative history.

[Footnote Continued]

Thus the useful legislative history of section 114(f) is confined essentially to the two House committee reports and the House floor summary of the bill by Congressman Udall. If we eliminate language from these materials that merely restates or closely paraphrases the actual bill language, two types of statements still remain as useful elaborations of Congressional intent. First there is the statement in the House Interior Committee Report that adoption "to the extent practicable" means that the DOE statement is to be adopted by the Commission and to satisfy NRC's NEPA review obligations "unless the Commission determines, in its discretion, that significant and substantial new information or new considerations render the Secretary's statement inadequate as the basis for the Commission's deliberations." Then there is the summary of the bill used during House floor consideration and prepared by Congressman Udall which states that "the Commission will have to supplement any environmental impact statement [by DOE] with considerations of the public health and safety required under the Atomic Energy Act of 1954 ...."

We believe that these statements are deserving of special weight in the legislative history analysis. The House Report statements are by the committee which originated the statutory language in question, and the floor summary was prepared by the chairman of that same committee and floor manager of the bill. None of the statements are contradicted by any other credible legislative history. Therefore we have treated them as authoritative indicators of Congressional intent.

C. Analysis

The first concept that is apparent from this authoritative legislative history is that the Udall floor summary and the House Report language are totally consistent if one makes the reasonable assumption that the NRC safety review could produce substantial new information or new considerations. This assumption is reasonable because of the sequence of events in the NWPA whereby DOE submits a repository application for NRC review only after issuance of the final DOE statement.

The second concept that is apparent is that the NRC decision whether to adopt cannot be made until after the final DOE EIS has been issued and reviewed by NRC.[6] Otherwise there is no way to

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[Footnote Continued]

There was no conference or conference report on the NWPA.

[6] If a court were to find the DOE statement to be inadequate, we would treat that court decision as a substantial new consideration. That could warrant preparation of a supplemental NRC EIS.

tell if there is any substantial "new information" or "new considerations." Moreover, the final decision whether to adopt cannot be made until after the NRC has commenced its safety review, since the results of this review must be factored into the analysis whether to adopt.

Thirdly, if NRC does not adopt some of the DOE statement, then NRC must prepare its own supplemental environmental statement. Congressman Udall specifically mentioned the possible need for a supplemental statement in the summary of the bill used in floor debate.[7]

Finally, the concept that NRC should adopt the DOE statement unless substantial new information or considerations, including the results of NRC's safety review, indicate otherwise, fits in neatly with the judicial review provision of section 119. Truly "new" information or considerations, including NRC's final safety review, will by definition not have been addressed in the DOE statement. Thus judicial review of that statement should not affect NRC's own NEPA review whether to adopt, and judicial review of NRC's own licensing decision, including NRC's NEPA adoption decision, should not duplicate any prior judicial review of the DOE statement.

We have been unable to resolve one remaining issue -- whether substantial NRC comments on the draft DOE EIS, rejected by DOE in its final EIS, may be grounds for an NRC supplemental EIS and litigation in the NRC licensing hearing. It can be argued, on the one hand, that there would be no "new" information or consideration in this circumstance because the material was raised in comments and was considered by DOE in preparing the final EIS, and that precluding any further NRC consideration of its own comments is not unreasonable given that NRC comments will have been fully considered by DOE, the President, States and Indian Tribes, the Congress, and possibly the courts before submittal of a license application.

On the other hand, refusal to consider DOE's rejection of a substantial NRC comment as ground for further NRC consideration in a supplemental EIS would place NRC in the awkward position of having to adopt an EIS which it had considered to be inadequate.

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[7]The NEPA regulations of the President's Council on Environmental Quality offer criteria for preparation of supplemental statements that were in force when the NWPA was being considered by the Congress and that are remarkably similar to the language in the House Report. 40 CFR 1502.9(c)(1)(ii) requires a supplemental statement if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

We suggest that NRC highlight this issue for public comment in the proposed rulemaking.

III. What Public Procedures Should be Followed by NRC in Deciding Whether to Adopt the DOE Statement?

We will assume here for discussion purposes that the standard for whether NRC may adopt the DOE final statement is whether substantial new information or considerations arising since issuance of the DOE final statement, including the results of the NRC safety review, require NRC to prepare a supplemental statement. At issue here is what procedures the NRC is to follow in determining whether to adopt the DOE EIS; specifically whether public participation in the decisionmaking process is required.

A. The Statutory Language and Legislative History

Congress indicated in section 114(f) of the NWPA that if the Commission adopted the DOE EIS, the NRC's NEPA responsibilities would be fulfilled and "no further consideration [of such matters] shall be required." But the statute is silent about the procedures NRC is to follow in deciding whether to adopt. There is no useful legislative history on point. Since both the statute and legislative history are silent, then existing law apart from the NWPA should dictate the answer.

B. Law Apart from NWPA

Under NEPA agencies are required to solicit comments from interested federal, state and local agencies before preparing final environmental impact statements. Also, NEPA section 102(2)(C) requires that final environmental impact statements "shall accompany the proposal through the existing agency review processes." The U.S. Supreme Court has held that NEPA itself does not require public hearings,[8] but that "where an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing." Aberdeen & Rockfish R. Co. v. Scrap, 422 U.S. 289, 320 (1975).

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[8] See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 548 (1978).

The Commission has applied that decision to its construction permit and operating license proceedings. Parties to those proceedings have been permitted to file contentions on issues addressed in the staff NEPA statement although it is not clear in NRC practice that licensing hearings follow an agency proposal for action within the meaning of NEPA.

However, NEPA is silent on the public procedures that must be followed in deciding whether to prepare an EIS statement or a supplemental EIS.

The NEPA regulations of the President's Council on Environmental Quality (CEQ), which by their terms are binding on NRC,[9] do provide useful information on public procedures. 40 CFR 1505.1(c) requires that relevant NEPA documents (which would legitimately include an NRC evaluation whether the DOE final statement should be adopted) "be part of the record in formal ... adjudicatory proceedings."

In sum, NEPA is silent on whether an NRC evaluation whether to prepare a supplemental statement must be included in the adjudicatory hearing record, but pertinent CEQ regulations which are binding on the NRC would require inclusion in the record.

What this means in terms of public procedure on NRC's adoption decision can be determined by legal principles applying to the conduct of adjudicatory proceedings. Applying traditional adjudicatory principles, before determining whether to adopt the DOE EIS the NRC would need to provide an opportunity for parties to the NRC licensing proceeding to submit their views in writing on the matter to the NRC. The Commission would then evaluate the submissions and determine whether to adopt the DOE EIS in whole or in part. Based on the analysis in section II above, the Commission would evaluate the views of the parties and any information derived from the staff's ongoing safety review of the DOE application to determine whether there is substantial new information or new considerations which warrant preparation of a supplemental EIS. Absent a finding that a supplemental EIS is warranted, the DOE EIS would be adopted. These proposed

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[9] 40 CFR 1500.3. In San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), the court noted that the NRC has often asserted that the CEQ regulations did not bind the NRC and other independent regulatory agencies. The court asserted: "Without deciding, we assume that the regulations apply to the Commission." 751 F.2d at 1302, n.73. The Commission itself has stated that it does believe that CEQ regulations are binding on it insofar as they are procedural in nature. 49 FR 9352 (March 12, 1984) (preamble to final 10 CFR Part 51 rule). The cited regulation is procedural in nature.

procedures and standards are closely analogous to those used in determining whether to open a closed adjudicatory record.

IV. Litigation of NEPA in the NRC licensing proceeding after the agency makes its decision on adoption.

The legislative history of the NWPA discussed in Section II above makes clear that if the NRC prepares a supplemental EIS, full NEPA procedures would apply. This means the NRC would prepare a draft EIS for public comment and then prepare a final EIS which addressed the comments. Under the SCRAP decision, CEQ regulations, and NRC NEPA practice, the adequacy of the supplemental EIS could be litigated in the NRC licensing proceeding.

The NWPA and its legislative history are less explicit on the question whether issues addressed in portions of the DOE EIS adopted by the NRC may be litigated in the NRC licensing proceeding. We believe that Congress did not contemplate that such litigation would be permitted.

The plain language found in section 114(f) of the NWPA provides that if NRC adopted the DOE EIS "this satisfies the responsibilities of the Commission under [NEPA]" and "no further consideration" of such matters is required. This legislative language would have little meaning if litigation of the adopted EIS was permitted. Since the Atomic Energy Act only requires hearings on public health and safety issues, in contrast to environmental matters, if the NRC's NEPA obligations have been fulfilled by adoption of the EIS, it follows that litigation of such issues in the NRC proceeding is not required. Accordingly, to the extent the NRC adopts the DOE EIS, the SCRAP decision is not applicable.

In addition, litigation of the adopted DOE EIS would also be inconsistent with Congressional intent because to a great extent the value of adopting the DOE EIS would be eliminated.

Moreover, a strong argument can be made that Congress did not intend to provide for duplicative judicial review. Under section 119(c) of the NWPA, those aggrieved by the DOE EIS may seek judicial review in the court of appeals within 180 days after publication of the final DOE EIS. If litigation of the portions of the DOE EIS adopted by the Commission is permitted in the NRC proceeding, at the end of the NRC proceeding judicial review of the NEPA findings would again be available in the court of appeals. A compelling argument can be made that Congress would not enact a scheme that provided aggrieved parties two bites at the apple. Duplicative litigation is inconsistent with principles of judicial economy and, might in any event, be barred by the principles of res judicata or collateral estoppel. Moreover, such a scheme would raise the possibility that the second court

of appeals reviewing the DOE EIS could reach a result that differed from the first court. This could cause confusion.

V. Application of Analysis to SECY-86-51

In SECY-86-51, the NRC staff presented the Commission with three alternative rulemaking approaches. None of these options is entirely consistent with our interpretation of section 114(f). Under the first option the NRC would not conduct an independent review of the EIS and would promulgate a rule stating that regardless of the content of the DOE statement, the NRC will adopt the entire DOE document unless NRC's safety review results in license conditions with environmental impacts that are larger than those evaluated in the DOE statement. No litigation of NEPA issues would be permitted in the licensing proceeding. In our view this option is inconsistent with Congressional intent underlying section 114(f). As discussed above, we believe Congress expected the NRC to conduct a limited, non-duplicative review of substantial new information or considerations before deciding whether to adopt the DOE statement. The NRC was not to adopt the DOE statement if substantial new information or new considerations rendered it inadequate. NRC's safety review could be a source of such new information or considerations, but is not the only possible source. The determination whether to adopt cannot be made until the NRC reviews the final DOE statement.

Under the second option the NRC would by regulation specify in advance specific portions of the DOE statement that would be adopted without NRC review. The NRC in the rule would declare that it will prepare a supplement to the DOE statement that would contain an independent NRC cost-benefit analysis of the DOE proposal. As noted above, we believe that it would be inconsistent with section 114(f) for the NRC to announce in advance which portions of the DOE impact statement will be adopted. That determination can be made only after a review of the final DOE statement. We would reserve until after review of the DOE statement whether NRC should prepare an independent cost-benefit analysis. In the absence of substantial new information or considerations, there should be no reason to do so.

Under the third option the NRC would conduct an independent review of the DOE statement and prepare its own analysis adopting portions of the DOE statement where practicable. All environmental issues could be litigated in the NRC licensing proceeding. While we believe that Congress contemplated that the NRC would conduct a review of the DOE statement, Congress did not contemplate that the NRC would do a duplicative review or allow unlimited NEPA litigation. Instead, we were directed to adopt to the extent practicable the DOE statement and prepare a supplemental EIS only in limited circumstances.

VI. Recommendation

OGC suggests that the notice of proposed rulemaking provide that the NRC will adopt the DOE final statement unless, after Commission review, the Commission determines that substantial new information or substantial new considerations have arisen since the DOE statement which render the document inadequate under NEPA to support an NRC licensing decision. The NRC safety review would constitute one source of possible new information or considerations. The Commission should solicit public comment on whether the DOE statement should be adopted if DOE rejects NRC's comments on the draft EIS. Whether the adoption standard is met would be determined using procedures that are similar to those that are followed in deciding whether to reopen a record. The parties to the licensing proceeding would be afforded an opportunity to present their views to the Commission on the adoption issue. After evaluating the comments and any other pertinent material the Commission would render its decision on whether to adopt the DOE statement in whole or in part. If the standard is met, then the substantial new information or consideration would be evaluated in a supplemental impact statement that would be offered into evidence and subject to litigation at the hearing. Portions of the EIS adopted could not be litigated in the NRC licensing proceeding.

cc: OPE
SECY
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