July 5, 1985

POLICY ISSUE
(Notation Vote)

SECY-85-237

For: The Commissioners

From: William J. Dircks
Executive Director for Operations

Subject: TIMING OF THE U.S. DEPARTMENT OF ENERGY'S "PRELIMINARY DETERMINATION" REQUIRED BY THE NWPA THAT THREE SITES ARE SUITABLE FOR DEVELOPMENT AS REPOSITORIES

Purpose: The U.S. Department of Energy (DOE) will be issuing its final Mission Plan in the very near future. The purpose of this paper is to advise the Commission that DOE has modified its position on the timing of the Secretary of Energy's preliminary determination that is required by Section 114(f) of the Nuclear Waste Policy Act (NWPA). DOE intends to make the preliminary determination sometime after three sites are recommended to the President for characterization rather than after the completion of site characterization. This change in the timing of the preliminary determination raises several questions. These questions include:

(1) Does the Nuclear Waste Policy Act require that DOE complete characterization at a site before making a preliminary determination that the site is suitable for development as a repository?

(2) Will the identification of alternative sites on the basis of preliminary determinations made before the completion of site characterization satisfy the "rule of reason" for NEPA alternatives?

(3) Was DOE's earlier commitment to make the preliminary determination after the completion of the site characterization an important element in the Commission's decision to grant its concurrence in the siting guidelines? If so, should DOE be informed that it must submit its proposal to depart from the guidelines for Commission concurrence once again?

Contact:
R. Boyle, NMSS
x74799

8508020082
PUBLIC

Regardless of whether DOE's commitment on the timing of the preliminary determination was a key element in the Commission's concurrence decision, does the Commission find that DOE's change represents a revision to or an interpretation of the guidelines that requires that it be submitted to the NRC for its review and concurrence?

(4) If DOE proceeds to make the preliminary determination before the completion of site characterization, will DOE comply with the statutory requirement of Section 114(f) of the NWPA which states that the Secretary "has made a preliminary determination, that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 112(a)" (emphasis added)? That is, can DOE make the preliminary determination before the completion of site characterization and maintain that it has complied with the guidelines in which the Commission has concurred?

The staff will review the final Mission Plan to determine how comments and objections of NRC on the draft Mission Plan have been dealt with. The staff is requesting Commission guidance on how to pursue this matter in reviewing the final Mission Plan. This paper suggests three options for the Commission's consideration.

Background: Section 114 (f) of the Nuclear Waste Policy Act (Act) states in relevant part:

> "For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 1321 et seq.) and this section, the Secretary shall consider as alternative sites for the first repository to be developed under this subtitle 3 candidate sites with respect to which (1) site characterization has been completed under section 113;

> and (2) the Secretary has made a preliminary determination, that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 112 (a)" (emphasis added).

In addition, Section 114(f) requires that the NRC shall, to the extent practicable, adopt DOE's EIS.

The Commission and DOE agreed during the Commission's concurrence proceedings on the DOE siting guidelines that the preliminary determination would be made after the completion of site characterization. This agreement was made at a June 22, 1984 public meeting. At that meeting Commissioner Asselstine stated that in his view, the preliminary determination should be made after site characterization rather than before.[1] Mr. Rusche of DOE agreed and stated, "We believe that the preliminary determination for those three sites under 114(f) should be made after the completion of site characterization."[2] However, Mr. Rusche added that in his view all three sites do not have to be acceptable at the end of site characterization.[3]

As a result of the June 22, 1984 meeting, the Commission directed the staff to incorporate the following statement into the final concurrence decision on the DOE siting guidelines: "[T]he Commission and DOE agreed that the preliminary determination required by section 114(f) of the NWPA should be made after the completion of site characterization and not at the time of site nomination and recommendation. The Commission and DOE therefore agree that the last sentence of the first full paragraph in §960.3-2-3 of Subpart B should be deleted," (July 3, 1984

[1]Public meeting, "Discussion on Possible Vote of Commission Concurrence on DOE Siting Guidelines," June 22, 1984, page 65, lines 8-11.

[2]Ibid., page 96, lines 4-13.

[3]Ibid., page 141, lines 10-13.

memorandum for William J. Dircks from Samuel J. Chilk [Enclosure 1])[4] and (49 FR 28139, July 10, 1984). Chairman Palladino and Commissioner Roberts agreed to deleting the sentence in question but would have preferred to remain silent on when the preliminary determination is to be made.[5]

DOE has now modified its position and will make the preliminary determination, "---sometime after three sites are recommended to the President for site characterization."[6] DOE has taken this new position in its draft Mission Plan[7] and draft Project Decision Schedule.[8] According to DOE's draft Mission Plan, "The Secretary will make a preliminary finding of the suitability of a site as a repository at the time of nomination and recommendation before detailed site characterization." Likewise, DOE's draft Project Decision Schedule shows that the preliminary determination lies on the critical path of activities required by the Act and will be made sometime after three sites are recommended to the President for detailed site characterization (Enclosure 2). In its comments on the draft Mission Plan[9] (Enclosure 3) and the draft Project Decision

[4]July 3, 1984 memorandum from Samuel J. Chilk, Secretary to William J. Dircks, Executive Director for Operations, Subject: Staff requirements - discussion/ possible vote of Commission concurrence on DOE siting guidelines; 9:30 a.m., and 2:30 p.m., Friday, June 22, 1985, Commissioners' conference room, D.C. office (open to public attendance).

[5]Ibid.

[6]Testimony of Ben C. Rusche, Director, Office of Civilian Radioactive Waste Management, U.S. Department of Energy, before the Committee on Energy and Commerce, Subcommittee on Energy Conservation and Power, March 21, 1985.

[7]Mission Plan for the Civilian Radioactive Waste Management Program, Draft, U.S. Department of Energy, DOE/RW-0005, April, 1984, p. 3-A-33.

[8]Project Decision Schedule, Preliminary Draft, U.S. Department of Energy, DOE/RW-0018, January, 1985.

[9]Letter to Ben C. Rusche, Director, Office of Civilian Radioactive Waste Management, U.S. Department of Energy from Nunzio J. Palladino, Chairman, U.S. Nuclear Regulatory Commission, dated July 31, 1984.

Schedule[10] (Enclosure 4), the staff has recommended that DOE return to its previous position, to which the Commission agreed, and revise the Mission Plan and Project Decision Schedule accordingly.

Two recent reports discuss, to some extent, the matter addressed in this paper. These reports are entitled (1) Nuclear Waste Policy Act: 1984 Implementation Status, Progress, and Problems, Draft of a Proposed Report, GAO/RCED-85-100, May, 1985; and (2) Managing the Nation's Commercial High-Level Radioactive Waste, Office of Technology Assessment, March, 1985. The draft GAO report recommends that DOE should consider maximizing the number of suitable sites and have back-up sites available. The GAO states that the Waste Act does not limit DOE's site characterization authority to only three sites. The OTA report also encourages DOE to characterize a fourth site to give confidence that at least one acceptable site will be available when needed even if some candidates are rejected. The NRC has not taken a position on this particular issue as it is a risk-benefit decision which only DOE can make. [However, in response to an inquiry from the State of Utah prior to the passage of the NWPA (Enclosure 5), the Commission took the position that to meet Commission regulations and to satisfy NEPA, not all three sites characterized would have to be licensable after site characterization.] In making these recommendations, GAO and OTA recognized the controversy over the timing of the preliminary determination and if it is required to be made after site characterization, inclusion of backup sites might be prudent.

Resources: In planning for NRC resources, it has been assumed that only three sites would be characterized and that the staff's review of these sites would not be done concurrently. If DOE were to characterize one or more additional sites, staff resources would have to be

[10] Letter to Ben C. Rusche, Director, Office of Civilian Radioactive Waste Management, U.S. Department of Energy from John G. Davis, Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, dated March 4, 1985.

modified accordingly. The staff estimates that if DOE were to characterize one additional site, staff resources would have to be increased by about 17 FTE and two and one-half million dollars per year.

Recommendation: The staff recommends that the Commission consider the following options as a means of addressing DOE's new position on the timing of the preliminary determination:

1. No Action.

With this option the Commission might be seen as tacitly accepting DOE's position. DOE believes that its position conforms with the requirements of the Act.[11] The Act, however, is not clear on when the preliminary determination should be made. According to the Executive Legal Director, in an opinion written before the siting guidelines were concurred in by the Commission, the timing of preliminary determination "---is dependent upon the facts existent at that time. A number of different scheduling and documentation approaches of the NWPA are possible. These matters are left to DOE's discretion" (Enclosure 6). After issuance of the guidelines, however, the Executive Legal Director viewed the timing to have been "settled by the stated agreement of NRC and DOE." (Enclosure 7).

Many states and public interest groups supported the position that the preliminary determination be made after site characterization. If DOE now changes its previously held position and makes the preliminary determination earlier, its actions might be challenged and found to be in violation of the NWPA and NEPA. The NEPA claim could be based on DOE's failure to identify reasonable alternatives. Under that circumstance, DOE's EIS might be found to be inadequate, and therefore, the NRC could not adopt it.

[11] Testimony of Ben C. Rusche, Director, Office of Civilian Radiaoctive Waste Management, U.S. Department of Energy, before the Committee on Energy and Commerce, Subcommitttee on Energy Conservation and Power, March 21, 1985.

2. Request that DOE conform its position to the guidelines as reflected in the NRC/DOE agreement. The Commission may consider DOE's agreement to complete site characterization before making its preliminary determination as being a condition of the Commission's concurrence in the guidelines. In that case, DOE's course would be subject to the additional potential challenge that its preliminary determination was invalid because it was not "consistent with the guidelines," as required by Section 114(f) of the NWPA. Bearing in mind DOE's commitment to obtain NRC's concurrence on revisions to or interpretations of the guidelines, the Commission may find it proper to identify this concern to DOE at this time.

3. Wait until Congress has reviewed DOE's Mission Plan and Project Decision Schedule before deciding on a course of action.

   The staff expects that the final Mission Plan and Project Decision Schedule will clearly show that DOE will make its preliminary determination shortly after DOE recommends sites for characterization. Since Congress will review both documents along with the public comments, the Commission can wait and see if Congress objects to DOE's schedule. If Congress disagrees with DOE, then corrective action might be initiated by DOE without any official action by NRC. If, however, Congress agrees with DOE or does not comment, the Commission may find no need to initiate any action itself. [Some members of Congress have already expressed their views on this matter (see Enclosure 8).] It should be noted, however, that it is likely that Congress would ask the Commission for its views on this matter before Congress acts.

Action: The staff awaits the Commission's guidance before pursuing this matter further.

Schedule: It appears that DOE plans to make its preliminary determination as early as the fall of this year. Option 2 (request that DOE conform its position to the guidelines) would be overtaken by events if the Commission does not take timely action.

William J. Dircks
Executive Director for Operations

Enclosures:
1. July 3, 1984 memorandum from Chilk to Dircks
2. Table 2 of Project Decision Schedule
3. NRC Comments on Mission Plan
4. NRC Comments on Project Decision Schedule
5. October 18, 1982 letter to Governor Matheson from Chairman Palladino
6. ELD legal opinion dated June 10, 1983
7. ELD legal opinion dated July 31, 1984
8. June 25, 1985 letter to J. Herrington from Senators Johnston, McClure, Simpson, and Domenici

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Wednesday, July 24, 1985.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, July 17, 1985, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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Enclosure 1

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE SECRETARY

IN RESPONSE, PLEASE REFER TO: M840622A

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MEMORANDUM FOR: William J. Dircks, Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - DISCUSSION/POSSIBLE VOTE OF COMMISSION CONCURRENCE ON DOE SITING GUIDELINES, 9:30 A.M. AND 2:20 P.M., FRIDAY, JUNE 22, 1984, COMMISSIONERS' CONFERENCE ROOM, D.C. OFFICE (OPEN TO PUBLIC ATTENDANCE)

The Commission met to discuss the proposed NRC concurrence in the DOE guidelines for siting of nuclear waste repositories.

The Commisison heard presentations from representatives of States, Indian tribes, Department of Energy and NRC staff (see Attachment 1).

The Commission unanimously concurred in the staff-proposed decision (SECY-84-233) for publication in the Federal Register, as modified at the meeting (see Attachment 2). The concurrence was subject to further review of written comments provided by State and Indian representatives submitted the morning of June 22, 1984; the staff was instructed to report any new, significant information to the Commission by c.o.b. June 25, 1984. If no new significant information is found by the staff, the Commission concurrence need not be reviewed, and the staff should submit the revised Federal Register notice for signature by the Secretary.
(NMSS)
(Subsequently, the information was received on June 29.)

Attachments:
As stated

cc: Chairman Palladino
Commissioner Gilinsky
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commission Staff Offices
PDR - Advance
DCS - 016 Phillips

Rec'd Off. EDO
Date 7-3-84
Time 8 Am

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WM Project
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PDR
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ATTACHMENT 1

Individuals making presentations at June 22, 1984 meeting:

D. Reinbolt, State of Minnesota
R. Forsythe, State of Mississippi
J. Davenport, State of Nevada
B. Vild, State of Rhode Island
S. Frishman, State of Texas
L. Pickerell, State of Utah
R. Halstead, State of Wisconsin
C. Sinderbrand, State of Wisconsin
D. Tousley, Representing the Yakima Indian Nation
J. Friloux, State of Louisiana
B. Rusche, Department of Energy
NRC Staff Members

ATTACHMENT 2

SUMMARY OF COMMISSION MODIFICATIONS ON SITING GUIDELINES APPROVED AT JUNE 22, 1984 MEETING

1. Timing of preliminary determination

   Add the following on page 51 of Enclosure 1 of staff paper and on page 12 of Subpart B, Subtask 960.3-2-3, of the guidelines, delete the last sentence of the first paragraph.

   "The Commission and DOE agree that the preliminary determination required by Section 114(f) of the NWPA should be made after the completion of site characterization and not at the time of site nomination and recommendation. The Commission and DOE therefore agree that the last sentence of the first full paragraph should be deleted from page 12 of Subpart B."

   (Chairman Palladino and Commissioner Roberts did agree to striking the sentence in question. However, they would have preferred to remain silent on when the preliminary determination is made.)

2. NRC concurrence on all revisions. Change sentence at top of page 12 in Enclosure 1 of staff paper to read as follows:

   "The DOE will submit revisions to the NRC and obtain their concurrence prior to issuance."

3. Assertion that conditions 5, 6, and 7 apply

   Wording to be suggested by staff in the same kind of language that was in the preliminary decision.

4. Preamble

   "The Commission expects, to the extent that the Secretary of DOE promulgates revisions to the guidelines or interpretations of the guidelines, the DOE will submit the revisions or interpretations to NRC for its review and concurrence."

   Staff is to place the preceding at an appropriate place in the concurrence decision, rather than the guidelines. Staff is to apply a reasonableness standard on the interpretations.

5. Revisions for conformance with EPA standards

   Staff to add a sentence in the concurrence decision, to the effect that the Commission would expect that, once the EPA standards are finalized, the DOE would revise the guidelines accordingly.

6. Clarification of staff rationale for not including additional suggested disqualifying conditions (page 46).

   Staff to provide wording.

7. Inclusion of the words "and significant" on page 4 of Subsection C.

   Discussed at meeting. Not adopted by Commission.

8. Engineered barriers

   Revise page 5, Subpart B, paragraph 3, line 3:

   ...engineered barriers shall be considered only to the extent necessary to obtain realistic source terms for comparative site evaluations, based on the sensitivity of the natural barriers to such realistic engineered barriers.

Enclosure 2

DOE/RW-0018

Preliminary Draft

Radioactive Waste Management System

Project Decision Schedule

January 1985

U.S. Department of Energy
Office of Civilian Radioactive Waste Management
Office of Policy, Integration and Outreach

TABLE 1 (Continued)
NWPA Activities Required to Site, Construct and Operate
the First Geologic Repository

	Provision and Required Action	NWPA Schedule	Reference Schedule	Agency
*(6)	Three Site Recommendation "Subsequent to such nomination, the Secretary shall recommend to the President three of the nominated sites not later than January 1, 1985, for characterization as candidate sites." Section 112(b)(1)(B).			
	(6a) Secretary Recommend Three Sites	1/1/85	7/5/85	DOE
*(7)	Preliminary Determination "...the Secretary shall consider as alternate sites for the first repository to be developed under this subtitle three candidate sites with respect to which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination, that such sites are suitable for development as repositories..." Section 114(f).			
	(7a) Secretary Makes Preliminary Determination That Sites Are Suitable for Development	N/A	After 6a	DOE
*(8)	Presidential Review of Recommendation "The President shall review each candidate site recommendation made by the Secretary under Subsection (b Not later than 60 days after the submission by the Secretary of a recommendation of a candidate site, the President, in his discretion, may either approve or disapprove such candidate site." Section 112(c)(1).			
	(8a) Transmit Decision on Approval or Disapproval of Site Recommendation to the DOE and the Affected States and/or Indian Tribes.	3/1/85 (possible 6 mo. extension)	9/5/85	President
(9)	Grants for Candidate Sites The Secretary shall make grants to each State (affected Indian tribe) in which a candidate site for a repository is approved under section 112(c). Section 116(c)(1)(B) and (118(b)(2)(A)).			
	(9a) Provide Grants to States and/or Affected Indian Tribes Having a Candidate Site	N/A	Negotiated Upon Request	DOE

*CRITICAL PATH ACTIVITY

Enclosure 3

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

July 31, 1984

Mr. Ben C. Rusche, Director
Office of Civilian Radioactive
Waste Management
U.S. Department of Energy
Washington, D. C. 20585

Dear Mr. Rusche:

In response to Mr. Michael J. Lawrence's request of May 8, 1984, the Commission is pleased to provide agency comments prepared by the NRC staff on the Department of Energy's draft Mission Plan for the Civilian Radioactive Waste Management Program. This draft is a substantial improvement over the preliminary draft on which the NRC commented in February 1984. We trust that the comments provided will develop for both agencies a common understanding of each agency's responsibilities in relation to implementation of the Civilian Radioactive Waste Management Program. We are committed to ensuring that any regulatory issues are identified and addressed early in the development of this program so that wherever possible, they will not delay the implementation of your program.

To facilitate your review of the comments, they are structured in accordance with the requirements of the Nuclear Waste Policy Act (NWPA) Section 301(b)(2) and Section 301(b)(3). Enclosure 1 provides general overview comments on the NRC staff's review of the Mission Plan. Specific comments including agency objections are contained in Enclosures 2 and Enclosure 3 respectively, and generally fall into four broad categories:

1. Areas where the Mission Plan is not clear about how or whether regulatory requirements and information needs will be addressed;

2. Areas where the Mission Plan is not clear about how the performance goals for various repository system components will be established and controlled throughout the data gathering, design, and construction phases;

3. Areas where we feel the DOE program could benefit from additional prelicensing consultation with the NRC;

4. Areas where DOE's plans appear to differ from what is required by existing regulations.

Enclosure 4 provides a matrix showing how the objections and other comments in Enclosures 2 and 3 fit into these four categories.

Commissioner Asselstine provides the following additional objections:

1. The Mission Plan should make it clear that, after completion of site characterization, DOE must have three sites that continue to be suitable for development as repositories consistent with the site selection guidelines. As the staff's comments point out, the Mission Plan must be revised to reflect the Commission's agreement with DOE that the preliminary determination on site suitability under section 114 (f) of the Act will be made after the completion of site characterization. Since the Act defines the preliminary determination as a finding that the sites <u>are suitable</u> for development as repositories, the Mission Plan should clearly state that three qualified sites are needed after characterization. DOE should also revise its program, as described in the Mission Plan, to provide a high degree of assurance that it will have three suitable sites after site characterization is completed.

2. Section 3.14.2 of Volume II of the Mission Plan should be revised to indicate that potential legal problems regarding varying interpretations of the Act will be resolved on the basis of statutory language and its legislative history. Subsequent Congressional interpretation through the budgetary process, at least absent the enactment of amendments to the Act, does not provide a sound legal basis for resolving differing interpretations of the Act. Reliance on this type of subsequent interpretation could provide the basis for successful legal challenges to actions by the Department and by the Commission. If there are serious questions of interpretation of provisions of the Act, the Congress should be asked to amend the Act itself to provide the necessary clarification.

Regarding Commissioner Asselstine's separate objections the Commission notes that, while it is taking no position at this time with respect to either objection, an evaluation of the issue in Objection #1 is being considered. If additional NRC comments are identified, they will be fowarded to you as soon as possible.

We appreciate the opportunity to address the issues arising from development of the Mission Plan. Since the Mission Plan and the Project Decision Schedule are important to NRC as well as DOE planning, we are continuing our staff interaction to ensure timely preparation of the final Mission Plan.

Sincerely,

Nunzio J. Palladino

Enclosures:
1. General NRC Staff Overview Comments
2. Objections to DOE Draft Mission Plan
3. Comments on DOE Draft Mission Plan
4. Comment Matrix

testing to support these performance assessments. Based on ongoing, quality-assured data collection and site-specific testing, performance assessment should be used to refine the initial component performance goals as well as to evaluate additional data needs and design requirements as stated in Section 2.6.2. However, until initial requirements are set, major questions about the necessary scope of DOE programs and schedules cannot be answered.

DOE must take the lead on this because deciding on initial performance targets will require consideration of many internal DOE budgetary, programmatic, and scheduling factors in addition to the overall performance objectives of 10 CFR Part 60. The NRC staff, however, stands ready to consult with DOE as these performance targets are established to help assure that ultimate licensing information needs are met.

OBJECTION #5

The Mission Plan should be revised to reflect the recent agreement between DOE and the Commission on the timing of the preliminary determination under Section 114(f) of NWPA.

At the June 22, 1984 Commission meeting on the Commission's concurrence decision on the DOE siting guidelines, the Commission and DOE agreed that the preliminary decision required by Section 114(f) of the NWPA should be made after the completion of site characterization and not at the time of site recommendation for characterization. The Mission Plan should be revised accordingly to reflect this agreement.

OBJECTION #6

The Mission Plan should provide additional information to justify the large diameter of the second exploratory shaft.

Pages 3-A-20 and 3-A-21 of the Draft Mission Plan contain a discussion of DOE's intent to "sink two exploratory shafts at each candidate site where they are required." The second shaft will be sunk to support safe operation of the underground testing program and will have a larger diameter than the first shaft. This larger diameter shaft will be approximately the same diameter as that indicated in the conceptual designs for repository access shafts (V. II, 7-15). The primary objective of the larger diameter shaft would be to "... provide flexibility in the scope and duration of in-situ testing" and to provide "... a demonstration of the ability to sink shafts of a size comparable to that needed for a repository." (3-A-21). DOE also notes that "... a large shaft could be

Enclosure 4

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

MAR 4, 1985

Mr. Ben C. Rusche, Director
Office of Civilian Radioactive
Waste Management
U.S. Department of Energy
Washington, D.C. 20585

Dear Mr. Rusche:

In response to your letter of January 15, 1985, I am pleased to provide the enclosed NRC staff comments (Enclosure 1) on the preliminary draft Project Decision Schedule. As you requested, we have focused our comments on the accuracy, clarity, and completeness of the information presented, and have addressed the expected duration of key program activities rather than the actual dates shown for their completion. I anticipate that the actual dates you will be proposing for NRC to commit to will be provided in the Draft Project Decision Schedule, which I understand will be issued after the Mission Plan is finalized.

With the exception of items noted in the enclosed comments, we believe this preliminary draft provides the appropriate level of detail and contains the necessary NRC milestones and lead times. One area which could become problematic if not corrected is that the preliminary draft does not recognize all of the steps involved in obtaining from NRC the license for a repository under 10 CFR Part 60. Therefore, the staff has devoted one section of the enclosed comments specifically to revisions to ensure that the licensing process is accurately described and schedule implications are understood by DOE. Further clarification of NRC's licensing process can be found in our July 31, 1984 comments to you on the Draft Mission Plan (Enclosure 2 of Mission Plan comments, p. 11). Both the Final Mission Plan and the Draft Project Decision Schedule should reflect an understanding of these requirements. My staff is available to discuss this if further clarification is necessary.

The schedules presented in the preliminary draft assume a 10-month period for NRC's preparation of final Site Characterization Analyses, in accordance with the current procedural requirements of 10 CFR Part 60. Proposed amendments to these requirements were published by NRC on January 17, 1985 and are provided in Enclosure 2. We have estimated that these amendments would reduce the time period for preparation of SCA's to 5 months. However, the 10-month schedule should continue to be used for planning purposes until the schedular impact of the final version of these amendments has been assessed.

Most of the other comments in Enclosure 1 relate to specific milestones. Adjustments to the proposed schedules for NRC actions have been recommended for Draft EIS comments, "preliminary sufficiency comments" (Section 114(a)(1)(E) of

NWPA), adoption of the Final EIS, comments on the MRS proposal, and concurrence in the use of radioactive material in site characterization, among others. The milestones not addressed in the comments appear to be satisfactory, but we await the program details in the Final Mission Plan before we can recommend that the Commission commit to specific schedules. Additional comments address the timing of the preliminary determination of site suitability, the need for additional information on the two-stage construction plan, planned activities during the site characterization phase, and other subjects.

NRC's position on the proposed milestones, including those which are not addressed in the comments since they appear to be satisfactory, is based on two important assumptions. First, we assume that adequate resources will be provided to the NRC to perform its functions on schedule. However, as NRC has recently informed its Congressional oversight committees, OMB reductions have resulted in a significant shortfall in our high-level waste program resources for FY86, which may cause a delay in DOE's initiation of shaft construction and in situ site characterization activities, as well as certain other delays. We will continue to assess the likely impact of budget restraints on our ability to meet DOE schedules, and will keep you informed of these impacts.

Second, our position on the license review schedules proposed in the preliminary draft assumes that DOE's license application will be high-quality and complete, providing all of the information NRC identifies as necessary as a basis for its licensing decisions. We believe this is an appropriate assumption because of the opportunities provided by NWPA, our regulations, and the NRC/DOE Procedural Agreement for interaction between NRC and DOE on the large number of potential licensing issues which must be addressed. These opportunities include NRC staff comments on DOE's Site Characterization Plans and their updates, and staff resolution of potential licensing issues through issuance of staff technical positions and the informal prelicensing consultation process before decisions are made by DOE on long lead time items and major resources are committed. The Project Decision Schedule should explicitly recognize that meeting the major milestones contained in it requires meeting many other internal milestones within the DOE development and site characterization program, and depends upon consultation with the NRC staff at these points.

NRC's prelicensing consultation and guidance is intended to assure that DOE's program provides essential and acceptable data without costly delay or rework, and to develop the methods for DOE to demonstrate compliance with performance objectives in 10 CFR Part 60. This will permit an independent determination on the adequacy of DOE's program. NRC is also considering selected licensing issues for generic resolution through formal rulemaking and other mechanisms, and we have begun

efforts to identify some of the issues appropriate for such resolution. Formal generic resolution will facilitate the closing out and narrowing of issues and consequently help avoid delays in the license process.

It may be appropriate to include specific milestones in the Project Decision Schedule for issues we intend to pursue through formal resolution when they are identified. We also recommend that DOE identify licensing issues that it would propose for formal resolution, and discuss them with NRC promptly. As these issues are identified, DOE should add milestones for their resolution to the Project Decision Schedule or its updates. Please refer to our July 31, 1984 comments on the Draft Mission Plan for further discussion of issue resolution (Enclosure 3 of Mission Plan comments, p. 5).

Finally, I would like to note that our comments are based on the staff's estimate of the required duration of NRC activities, including time for Commission involvement as appropriate. We have begun discussions with the Commission to address the planned duration of NRC high-level waste actions, but have not yet obtained Commission endorsement of these estimates. Therefore, the comments on specific milestones are subject to change in our comments on the Draft Project Decision Schedule, which will be approved by the Commission and signed out by the Chairman.

Thank you for giving us the opportunity to participate in this early stage of development of the Project Decision Schedule. Please contact Mr. Robert E. Browning, Director of the Division of Waste Management, if you would like to discuss any of these comments further.

Sincerely,

John G. Davis, Director
Office of Nuclear Material Safety
and Safeguards

Enclosures:
1. NRC Comments on Draft
   Project Decision Schedule
2. Proposed 10 CFR 60
   Procedural Amendments

III. Other Comments

1. The preliminary draft should be revised in several locations to reflect the agreement between the Commission and the Director of DOE's Office of Civilian Radioactive Waste Management on June 22, 1984 that the preliminary determination of site suitability required under Section 114(f) of NWPA will be made after site characterization has been completed. Revisions are required on pp. 4, 36, and 52, and a milestone for this action should be added on pp. 12 and 26. Also, it should not be indicated that Site Characterization Plans will be issued after this preliminary determination is made (p. 37).

2. We reiterate comments provided to DOE on the Draft Mission Plan (July 31, 1984, Enclosure 3, Comment # 1), regarding the need for additional information on the two-stage construction plan for the first repository. The Final Mission Plan should include such information as the basis for the Project Decision Schedule.

3. Like the Draft Mission Plan, the preliminary Draft Project Decision Schedule divides the repository program into five major phases (p. 8). The same terminology is used to distinguish between the initial 400 metric ton per year capacity facility (Phase 1) and the full-scale 3000 metric ton per year capacity facility (Phase 2) planned by DOE for the first repository. It would be helpful to use different terminology for these two purposes (such as by calling the two first repository facilities "Stage 1" and "Stage 2").

   Moreover, the references to Phase 3 and Phase 4 on pp. 15 and 16 should be changed to Phase 4 and Phase 5, respectively.

4. The preliminary draft provides a brief outline of the major activities planned during Phase 2, the site characterization phase (p. 11, second and third paragraphs). The discussion should be expanded to state that: 1) development of repository designs will also occur during this phase; and 2) laboratory testing of site samples will occur during this phase, as well as laboratory testing to evaluate the performance of materials planned for use as engineered barriers.

5. The preliminary draft describes the procedures for interaction and preliminary consultation between DOE and NRC through the site characterization period, and the procedural agreement between DOE and NRC that outlines such activities (p. 30, paragraph 2). We recommend adding the following passage at the end of that paragraph:

Enclosure 5

WASHINGTON, D. C. 20555

HAIRMAN

October 18, 1982

The Honorable Scott M. Matheson
Governor of Utah
Salt Lake City, Utah 84114

Dear Governor Matheson:

The Commission's responses to the questions regarding site characterization for potential high-level waste repositories contained in your letter dated September 9, 1982 are enclosed.

I have also instructed the Executive Director for Operations to keep you informed of major decisions and significant correspondence between DOE and the NRC regarding the siting and licensing of a repository in Utah.

Sincerely,

Original signed by
Nunzio J. Palladino

Nunzio J. Palladino

Enclosures:
As stated

Question 1. In fulfilling the requirement to nominate three sites, may the Department of Energy (DOE) submit a candidate repository site which has not been fully characterized because of technical flaws or which has been through detailed site characterization and which has been found to be technically unsound?

Response: Prior to any site characterization, 10 CFR 60.11 requires that DOE submit to the NRC a Site Characterization Report for each of the candidate sites, and the reports will be subjected to analysis. These reports will not be complete site characterizations, but will be based upon a screening process and limited geophysical testing at the sites. It must be recognized that, as a practical matter, a candidate site which appears satisfactory after a reasonable screening process and preliminary site investigation may subsequently be found to have technical flaws as it is subjected to more extensive investigation during the site characterization process. The Commission would probably consider any site as an adequate candidate if the Commission is satisfied that, in accordance with the provisions of 10 CFR 60.11(a), the criteria, methodology and decision process used by DOE in selecting the site was reasonable. Characterization of several sites is intended to prevent a premature commitment by DOE to a particular site and to assure that DOE's preferred site will be chosen from a slate of sites that are among the best that can reasonably be found. The phrase "among the best that can reasonably be found," however, does not necessarily mean that each of the three or more candidate sites nominated by DOE must in fact be licensable after the completion of site characterization.

Question 2. If a candidate site were suspected to be technically unsound prior to detailed site characterization, but the DOE carried out the characterization studies anyway, and the suspicions were confirmed, would NRC accept that site as a real alternative?

Response: The Commission assumes that the DOE fully intends to carry out its site characterization activities in good faith and will produce a slate of sites that are among the best that can reasonably be found. The procedures set forth in 10 CFR 60.11 are intended to ensure this result and include specific provisions to encourage substantial public involvement in the site characterization process. Accordingly, the Commission believes it is unlikely that DOE would proceed to characterize a site when it has a reasonable basis to suspect the site is technically unsound prior to detailed site characterization. While it is difficult to comment in the abstract how the Commission would act should DOE proceed to characterize such a site, the Commission probably would be unwilling to accept the site as a reasonable alternative under existing law.

Enclosure 6

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

June 10, 1983

MEMORANDUM FOR: John G. Davis, Director
Office of Nuclear Material Safety
and Safeguards

FROM: Guy H. Cunningham, III
Executive Legal Director

SUBJECT: LEGAL OPINION CONCERNING SITE CHARACTERIZATION UNDER THE NUCLEAR WASTE POLICY ACT OF 1982

You have requested a legal analysis concerning whether the Nuclear Waste Policy Act of 1982 (42 U.S.C. §§ 10101 et seq.) requires three sites to be suitable for repository development after site characterization has been completed. In addition, your May 20, 1983 memorandum asks me to identify any potential legal problems which might arise if DOE adopts a different interpretation.

The answer to your question is dependent on the facts at the time DOE completes its site characterization program. There are conceivable situations where one or more sites which had been characterized could be inappropriate for repository development and DOE could legally proceed to seek construction authorization for a repository. If NRC and DOE disagreed on interpretation it would most likely concern the application of NWPA's provisions to the particular facts of the situation.

The selected excerpts from the Congressional Record which were digested by your staff and attached to your memo indicate that the question you posed results from reading Section 114(f). (42 U.S.C. § 10134) In pertinent part the section reads:

> "...For purposes for complying with the National Environmental Policy Act of 1969 (42 U.S.C. 1321 et seq.) and this section, the Secretary shall consider as alternate sites for the first repository to be developed under this subtitle 3 candidate sites with respect to which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination, that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 112(a). ..."

The procedure outlined in sections 112-114 is relatively straightforward. Under section 112 the Secretary promulgates guidelines which will be used to identify sites in different geologic media which are suitable for repositories. Some of the information necessary to evaluate sites against

the guideline criteria cannot be obtained until the sites have been characterized. Under section 113 characterization at the site is undertaken until sufficient information is obtained to evaluate the site against all of the guideline criteria. When a preliminary determination is made that three sites have been identified which meet the criteria, the Secretary undertakes the process of formulating a recommendation for licensing of the first repository pursuant to section 114 which culminates in a final environmental impact statement under section 114(f).

Section 113 indicates that site characterization is complete when the Secretary considers that enough data is available to evaluate the suitability for the site for a construction authorization application. (Note that the Commission may require further data but the Secretary may not believe it is needed to evaluate site suitability.) If the Secretary determines the site unsuitable, section 113 requires DOE to reclaim the site and mitigate environmental damage. No terms requiring three sites to be suitable for development as a repository appear in section 113. Thus, for purposes of section 114 site characterization under section 113 is complete for any particular site whenever the Secretary concludes that sufficient data is available to assess site suitability or unsuitability.

The basic issue raised by your memorandum thus becomes whether the NWPA requires the Secretary to identify additional suitable sites where information developed after the Secretary makes the preliminary determination called for by section 114(f) would disqualify one or more of the 3 characterized sites under the guidelines.

Obviously, reason should prevail to some extent so that some reasonable bounds are placed on the process to achieve the purpose of site characterization. Certainly, at the time of the preliminary determination there should be three qualified sites.

A key question, consequently, is the timing of the Secretary's "preliminary determination" that three sites are available which are suitable for development as repositories consistent with section 112(a) guidelines. The earlier such a determination is made, the more likely that subsequent events such as the preparation and circulation of a draft EIS or new developments could result in questions concerning the continuing viability of the preliminary determination. For example, if, after site characterization at three sites was completed, a new demographic study showed population density at one of the sites would exceed the guidelines, would section 114 require the Secretary to declare the site unsuitable and halt pursuit of DOE's construction authorization?

This question is highly dependent upon the facts existent at the time. A number of different scheduling and documentation approaches to implementation of the NWPA are possible. These are matters left to DOE's discretion. For instance, will there be a single draft environmental impact statement issued for comment prior to the preparation of the Final EIS called for by Section

114? Alternatively will the environmental assessments for each site and the public hearing and comment process on each form the basis for the preparation of a Final EIS? Will the entire EIS process proceed simultaneously with site characterization or will it follow in its entirety the Secretary's preliminary determination of suitability? The DOE approach will be extremely important to the legal conclusions to be drawn concerning the adequacy of the Final EIS.

At this time there are no facts available which would allow the resolution of these issues. However, it is at least possible that the Secretary may have determined that a particular site was suitable for development as a repository only to discover late in the process that it no longer qualified under one or more of the guidelines. There is no compelling reason to determine at this time that such a hypothetical situation would preclude the Secretary as a matter of law from proceeding with an application for construction authorization and license.

Nothing in the discussion above is at odds with the legislative history of NWPA. Legislative history cannot be used to alter legislation unless ambiguity makes resort to legislative history necessary. In this case, however, the legislative history supplied by your staff is consistent with the analysis set forth above. In fact, Congressman Ottinger's comments probably could be used to support a less stringent interpretation than I have suggested. Interestingly, he stated that the site characterization requirement "...is not intended to force the Secretary to demonstrate site suitability to the same degree as the recommended site... ." (128 Cong. Rec. 48796 (daily ed. Dec. 21, 1982.)) Continuing, he remarked "... It is envisioned that this preliminary determination would occur late in the site characterization program...." Although he also later remarked that the Act required the completion of site characterization at three sites, it could be argued that the remarks evidence a Congressional recognition that activities could be ongoing at the sites after the Secretary made his determination which could result in data not considered at the time of the preliminary determination.

The other exchanges in the legislative debate supplied with your memorandum are not pertinent to the central question of the timing of the Secretary's preliminary determination. It should be emphasized that a key word in this discussion is "preliminary". Section 114 references the Secretary's "preliminary decision." Both Sections 112 and 113 have subsections entitled "Preliminary Activities." During the legislative debates Senator Gorton emphasized the significance of these terms indicating that "... all of the President's or Secretary's actions taken pursuant to section 112 and section 113, respectively, are 'preliminary decisionmaking activities' and that such actions do not require the preparation of an environmental impact statement. ..." (128 Cong. Rec. 515667 (daily ed. Dec. 20, 1982)) This discussion is relevant because the development of the final EIS under section 114, the Commission's consideration of whether to adopt the EIS, and licensing proceedings on a DOE application are all subsequent activities where

WJOlmstead	Cormella(RES)
OELD Reading	Bunting
OELD Subject File	Bell
Central File	H.Miller
Regs Reading File	W. Parler
Browning (NMSS)	J. Wolf/L. Gilbert
	Trubatch (OGC)

additional information concerning a particular site's suitability may be available. Such information may or may not be developed by DOE. Consequently, it is conceivable that had the information been considered by the Secretary at the time of the "preliminary determination" one or more of the characterized sites would have been found to fail to meet one or more of the guidelines. Although such hypothetical facts cannot be prejudged at this time, it cannot be concluded as a matter of law that another site would have to have been found that would survive characterization in accordance with the guidelines.

Finally, it should be noted that these are legal issues which DOE must resolve. It is likely that any challenge to the preliminary determination and site characterization program would be made under section 119 of NWPA which governs judicial review. In subsection (c) a party is required to bring an action within 180 days of the date of decision or action or failure to act. A person seeking to challenge the Secretary's preliminary determination, therefore, would probably feel the need to do so well before the time the Commission was required to review the question. Although if a person failed to bring such a challenge, an attempt might be made to raise it in Commission proceedings to avoid the 180 day clock. The Commission would judge the challenge to the site characterization program pursuant to its NEPA responsibilities. The NWPA site selection process is in some respects more rigorous than NEPA requires in terms of alternative analysis. Thus, it is highly unlikely that the Commission would conclude that it was unable to adopt a DOE EIS because of a flawed alternative site analysis.

As a licensing agency, NRC can accept an application for NEPA purposes so long as it concludes there are no "obviously superior" alternatives. The type of investigations required by NWPA appear to satisfy the court fashioned "hard look" at alternatives. Should someone disagree with DOE's interpretation, it is most likely that such a person would seek some type of court review of DOE's decision rather than attempting to fashion a questionable challenge against the NRC. Thus, the answer to your question concerning potential legal problems if DOE's interpretation differs from NRC's is that NRC probably would not review the issue using the same criteria and therefore would not directly disagree with DOE on an interpretation of the Act.

Original signed by
Guy H. Cunningham, III

Guy H. Cunningham, III
Executive Legal Director

cc: W.J. Dircks

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DATE	:6/9/83	:6/10/83	:	:	:	:	:

ENCLOSURE 7

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

WM Record File 440.9
WM Project WM
Docket No.
PDR
LPDR

JUL 31 1984

Distribution:
REB JOB JSS HJM
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(Return to WM, 623-SS)

MEMORANDUM FOR: John G. Davis, Director
Office of Nuclear Material Safety and Safeguards

FROM: Guy H. Cunningham, III
Exeuctive Legal Director

SUBJECT: PRELIMINARY DETERMINATION UNDER §114(f) OF THE NUCLEAR WASTE POLICY ACT OF 1982

This is in reply to your memorandum dated July 18, 1984 with respect to preliminary determinations under Section 114(f) of the Nuclear Waste Policy Act of 1982.

Section 114(f), 42 U.S.C. 10134(f), deals with the environmental impact statement which is to accompany any recommendation to the President to approve a site for a repository. With respect to the first repository, it states in relevant part:

> "For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 1321 [sic] et seq.) and this section, the Secretary shall consider as alternate sites for the first repository to be developed under this subtitle 3 candidate sites with respect to which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination, that such sites are suitable for development as respositories [sic] consistent with guidelines promulgated under section 112(a)."

Section 114(f) contains similar language with respect to subsequent repositories as well.

The specific question raised by your memorandum is whether the three candidate sites referred to by the statute must be found to be suitable after the completion of site characterization. In view of statements contained in the Commission's decision to concur in the DOE siting guidelines, it is my opinion that this is indeed the case.

The proper interpretation of section 114(f) has been a matter of recurring interest. In my memorandum to you dated June 10, 1983 ("Legal Opinion Concerning Site Characterization under the Nuclear Waste Policy Act of 1982"), I suggested that (1) as to timing, a section 114(f) determination should be made "when the Secretary considers that enough data is available to evaluate the suitability for the site for a construction authorization application"

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(emphasis in original) and (2) at the time a preliminary determination is made under section 114(f), there certainly should be three qualified sites. Subsequently, I advised you as follows:

> "We cannot categorically conclude that the Secretary's decision to make that determination at the time of recommending three sites for characterization would be precluded by the NWPA. However, in order to ensure that three reasonable alternatives are evaluated in the DOE decision-making process, we believe the better interpretation of the NWPA would require the Secretary to make the preliminary determination after some amount of site characterization has occurred. Even if this were not to include all the site investigations needed to support a license application, it should be sufficiently detailed to enable substantive analysis under all of the guidelines." ("Memorandum to John G. Davis, May 25, 1984, "Review of DOE Formal Draft Mission Plan for the Civilian Radioactive Waste Management Program.")

The timing of the preliminary determination was addressed recently in connection with the review of the Department of Energy's general guidelines for the recommendation of sites for nuclear waste repositories. As submitted to the Commission, the preliminary determination would have been made at the time of site nomination and recommendation prior to site characterization. After discussion with the Commission, DOE modified its position, and this was reflected in the Commission's final concurrence decision as follows:

> "At the June 22, 1984 Commission meeting, the Commission and DOE agreed that the preliminary determination required by Section 114(f) of the NWPA should be made after the completion of site characterization and not at the time of site nomination and recommendation."
> 49 Fed. Reg. 28130, 28139, July 10, 1984.

While, as indicated above, the timing of the preliminary determination was subject to varying interpretations, there can be no doubt with respect to the substance of such determinations. The statutory language is unambiguous: it is to be a determination "that such sites are suitable for development as respositories [sic] consistent with the guidelines promulgated under section 112(a)." As the timing is settled by the stated agreement of NRC and DOE, and as the content of the determination is defined by law, Commissioner Asselstine's understanding that all three sites must be found to be suitable after the completion of site characterization logically follows. We can find no basis to reconcile the cited language with Mr. Rusche's view which, as you have stated it, is that not all three sites need be found suitable for development as repositories after the completion of site characterization.

There remains the question of the extent of the activities that will be necessary in order to "complete" site characterization. "Site characterization" is an imprecise term. It refers to a program of activities undertaken to establish the geologic condition and the ranges of the parameters

of a candidate site relevant to the location of a repository. See NWPA, sec. 2(21), 42 U.S.C. 10101(21); 10 CFR § 60.2. Based on the sparse legislative history, I suggest that it should include, as a prerequisite to the making of a preliminary determination, sufficient at-depth testing to permit a detailed understanding of the sites' geologic characteristics. This would provide the State in which a recommended site is located with assurance that the site selection was based on geologic suitability considerations from among sites which are genuine alternatives. See 128 Cong. Rec. H 8796 (daily ed. December 21, 1982) (extended remarks of Congressman Ottinger).

Nevertheless, the information needed to support a preliminary determination of suitability need not be as great as that required in a license application. Ibid. (preliminary determination requirement "is not intended to force the Secretary to demonstrate site suitability to the same degree as the recommended site.") It would be anomalous to regard such additional information as being the product of "site characterization" if site characterization must be "complete" before the preliminary determination of suitability is made. Rather, consistent with both the letter and spirit of 10 CFR Part 60, the investigations undertaken after site characterization might be regarded as "performance confirmation."

In other words, while DOE would "complete site characterization" at three sites, each of which would be determined preliminarily to be suitable, it could conduct additional studies in support of a license application for its recommended site. Indeed, under existing NRC regulations, DOE is directed to start a performance confirmation program even earlier -- namely, during site characterization. 10 CFR § 60.140(b). The performance confirmation activities are to include "tests, experiments, and analysis which is conducted to evaluate the accuracy and adequacy of the information used to determine with reasonable assurance that the performance objectives for the period after permanent closure will be met." 10 CFR § 60.2. This is a program to gain additional data to indicate, among other things, whether the limits assumed on the basis of site characterization data are valid. See 10 CFR § 60.140(a). It may be that the Secretary will discover, as a result of his conduct of performance confirmation activities, that a particular site is no longer qualified under one or more of the guidelines. But since the preliminary determination would have been made in accordance with law, I believe the Secretary could still proceed with an application for construction authorization and license with respect to a different candidate site.

You are correct that present NRC regulations do not require that all three sites be suitable following site characterization. In fact the regulations, since promulgation of revised 10 CFR Part 51, no longer mandate the characterization of multiple sites at all. However, under the language formerly set out at 10 CFR § 51.40(d), DOE would have been required to characterize at least three sites in order to satisfy the Commission's view of NEPA requirements. The site characterization program would have needed to provide data, generally based on in situ testing at repository depth, about the alternative sites, but the provisions of the regulation could have

been met even though the site proved to be unsuitable. The standard by which the site characterization program for alternative sites was to be measured was whether the data would "aid the Commission in making a comparative evaluation as a basis for arriving at a reasoned decision under NEPA." The position taken by Commissioner Asselstine, that three sites or more must appear suitable after characterization, reflects a departure from (or at least a new interpretation of) the policy formerly contained in these superseded NRC regulations, but the change is one that is consistent with the Nuclear Waste Policy Act.

I believe that this discussion covers the points raised in your inquiry. Please let me know if any clarification or further advice would be of assistance.

Guy H. Cunningham, III
Executive Legal Director

Enclosure 8

JAMES A. McCLURE, IDAHO, CHAIRMAN
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FRANK M. CUSHING, STAFF DIRECTOR
GARY G. ELLSWORTH, CHIEF COUNSEL
D. MICHAEL HARVEY, CHIEF COUNSEL FOR THE MINORITY

United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510

June 25, 1985

The Honorable John Herrington
Secretary
United States Department of Energy
Washington, D.C. 20585

Dear Mr. Secretary:

It has recently come to our attention that considerable confusion has arisen over the proper interpretation of a key provision of the Nuclear Waste Policy Act of 1982 (NWPA), section 114(f), governing the Department's program for the selection and characterization of sites for a high-level nuclear waste repository. Because of the pivotal significance of this early stage of the Department's site selection and characterization activities for the ultimate success of the entire nuclear waste disposal program, we would like to take this opportunity to share with you our understanding of Congress' intent in enacting the provision that now appears to be in dispute. In so doing, we trust that you will, in turn, take firm action to clarify any confusion that may have arisen over the direction that the Department intends to take in implementing this provision, and do so as promptly as possible, in order to avoid potentially significant and disruptive delays at later stages of the Department's program.

Section 114(f) of the NWPA provides that, as part of the final environmental impact statement accompanying the Secretary's recommendation to the President of a single site for construction of a repository,

> "the Secretary shall consider as alternate sites for the first repository . . . 3 candidate sites with respect to which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 112(a)."

We understand that two questions have been raised concerning Congress' intent in enacting this provision:

(1) Upon completion of site characterization, is the Secretary required, in recommending a single site to the President for the development of a repository (an action that, under section 114(f), is a major federal action, requiring the preparation of an environmental impact statement), to have three alternate sites from which to choose, all three of which have been found to be "qualified for application for a construction authorization for a repository" (i.e., three "perfect sites")?

(2) At what point in the process of site selection and characterization must the Secretary make the preliminary determination of site suitability required under section 114(f)?

As we understand the position taken by the Department of Energy in response to the first question, the NWPA does not require that there be three "perfect sites", each of which is found to be "qualified for application for a construction authorization for a repository", upon the completion of site characterization at each of those three sites. That position, which has been set forth in the Department's draft Mission Plan for the Civilian Radioactive Waste Management Program, the preliminary draft Project Decision schedule, and in a statement by Ben Rusche, Director of the Office of Civilian Radioactive Waste Management, to the Nuclear Regulatory Commission on June 22, 1984, is consistent with the requirements and objectives of the NWPA and, in our judgment, is the correct reading of the Act.

The NWPA requires that, at a minimum, there be one qualified site that emerges from the site characterization process. Indeed, the requirements of sections 112, 113, and 114 have been carefully structured so as to ensure that the single site recommended by the Secretary to the President is, in fact, one that the Secretary finds to be "qualified for application for a construction authorization for a repository." If it turns out that all three sites characterized by the Secretary prove to be "qualified for application for a construction authorization", the Secretary may recommend, and the President may submit to the Congress, any one of those three sites. Alternatively, the Secretary may exercise the broad latitude available under the NWPA to characterize additional sites, in the event that one or more of the sites initially characterized proves not to be "qualified for application for a construction authorization." But nothing in the NWPA requires the Secretary to characterize additional sites, in the event that one or more of those sites initially characterized proves not to be qualified, so long as at least one site is found to be "qualified for application for a construction authorization for a repository."

With regard to the second question, we understand that considerable confusion has arisen over the timing of the "preliminary determination" that the Secretary is required to make under section 114(f). In fact, it appears to us that recent

discussions regarding this issue (e.g., the June 22, 1984 meeting between Ben Rusche, Director of the Office of Civilian Radioactive Waste Management, and the Nuclear Regulatory Commission) have resulted in statements that not only compound the confusion but may indeed be inconsistent with the position that the Department has taken on the first issue discussed in this letter. Accordingly, we would like to take this opportunity to clarify the purpose of the "preliminary determination" that the Secretary is required to make under section 114(f).

During Congressional consideration of the NWPA in the 97th Congress, both the House and the Senate decided that, in order to avoid unnecessary confusion and delay in carrying out the high-level waste program, it would be appropriate to establish a statutory "roadmap" for the development of a geologic repository. As part of this "roadmap", both the House- and the Senate-passed bills included provisions prescribing those steps that must be taken in order to satisfy the requirements of the National Environmental Policy Act (NEPA)--provisions that were eventually reconciled in what is now section 114(f) of the NWPA.

Prior to final reconciliation of the House and Senate bills, a number of members raised a concern about the NEPA "roadmap" prescribed in section 114(f) of the House-passed bill and, in particular, about the very issue that now appears to be in dispute--the timing of the "preliminary determination" that the Secretary is required to make. In considering the House-passed bill prior to Senate action, we emphasized to our counterparts in the House that it was our understanding that section 114(f) of the House-passed bill--requiring the Secretary to make a "preliminary determination that such sites are suitable for development as repositories"--was intended merely to provide a safeguard against the Secretary simply focusing all of his attention and resources on a single site that he was already predisposed to select for construction of a repository (a concern that some had raised as a possibility which, if it were to occur, would then, in turn, result in the Secretary throwing in two "bogus" sites that were clearly not "suitable for development as repositories," simply to satisfy the requirement to consider three alternate sites). The inclusion of the section 114(f) safeguard was acceptable to us if it was intended merely to ensure that the Secretary would be required to select three sites for characterization, each of which, based upon the information available at that stage, the Secretary finds to be suitable for development as a repository. With that understanding, we agreed that a "preliminary determination" of site suitability was appropriate and should be required.

In order to clarify that this particular provision was being included in the bill for the limited purpose described above and not for the purpose of requiring three "perfect sites," the House-passed section 114(f) was amended by the Senate to add a reference to the guidelines promulgated under section 112(a)--a change that is now reflected in the version of the NWPA passed by the Congress. The

addition of this reference to the guidelines developed pursuant to section 112(a)--guidelines which the Secretary is to use "in considering candidate sites for recommendation under subsection (b)"--is intended to clarify that the Secretary's "preliminary determination" is to be made at that point in time when the guidelines are applied "in considering candidate sites for recommendation". Under section 112(b) of the NWPA, this occurs when the Secretary recommends three of the candidate sites to the President for characterization (i.e., prior to site characterization). Accordingly, this is the stage at which the "preliminary determination" required under section 114(f) is to be made.

To read the NWPA as requiring that the "preliminary determination" be made after the completion of site characterization is not only at odds with the language and intent of the Act, but is also incompatible with the approach that DOE has taken--correctly, in our judgment--with regard to the first issue discussed in this letter.

Accordingly, we urge you to take whatever action is necessary to clarify any confusion that may have arisen over these two issues.

Thank you for the opportunity to express our views on this important subject.

Sincerely,

J. Bennett Johnston
Ranking Minority Member
Committee on Energy
and Natural Resources

James A. McClure
Chairman
Committee on Energy
and Natural Resources

Alan K. Simpson
Chairman, Subcommittee on
Nuclear Regulation
Committee on Environment
and Public Works

Pete V. Domenici
Chairman, Subcommittee on Energy
Research and Development
Committee on Energy
and Natural Resources

cc: The Honorable Nunzio Palladino, NRC
The Honorable James Asselstine, NRC
The Honorable Frederick Bernthal, NRC
The Honorable Thomas Roberts, NRC
The Honorable Lando Zech, NRC

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
SECRETARY

August 8, 1985

(head T/1)

MEMORANDUM FOR: ~~Commissioner Roberts~~
~~Commissioner Bernthal~~

FROM: Samuel J. Chilk, Secretary

SUBJECT: SECY-85-237 - TIMING OF THE U.S. DEPARTMENT OF ENERGY'S "PRELIMINARY DETERMINATION" REQUIRED BY THE NWPA THAT THREE SITES ARE SUITABLE FOR DEVELOPMENT AS REPOSITORIES

The status of the subject staff paper is as follows:

- The period for Commissioner comments has expired.

- A majority of the Commission has provided views.

  Chairman Palladino approved option 1 - 7/31
  Commissioner Asselstine approved option 2 - 8/7
  Commissioner Zech approved option 3 - 8/5

Your response to SECY on this staff paper within three working days indicating your views would be appreciated. If you have not responded by c.o.b. Tuesday, August 13, 1985, it will be presumed that, in accordance with the Commission's rules of procedure, you are not participating in this action.

cc: Chairman Palladino
Commissioner Asselstine
Commissioner Zech