

memorandum

DATE: AUG 26 1987

REPLY TO: RW-241

ATTN OF: '87 AUG 28 A7:52

SUBJECT: Reference Package for September 15-17, 1987, Environmental Coordinating Group Meeting in Washington, D.C.

TO: Environmental Coordinating Group

WM Record File: 109

WM Project: 1

Docket No.:

FDR:

Distribution: *Still MJB*

Linehan

Ballard

Youngblood

(Return to WM, 623-SS)

This memo transmits the attached reference package for the September 15-17, 1987, Environmental Coordinating Group (ECG) meeting. The meeting will be held in Room 1E-245 of the Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. Information on the preliminary agenda and schedule was sent to you in my July 22, 1987, memorandum.

Attachment 1 includes: the revised agenda for the ECG plenary session which will be held on Tuesday afternoon and Wednesday morning, September 15 and 16; the agenda for the Environmental Planning Working Group (EPWG) meeting which will be held on Wednesday afternoon, September 16; and the agenda for the Environmental Regulatory Compliance Working Group (ERCWG) meeting which will be held on Thursday morning, September 17. Attachment 2 is the reference package which includes background information on the agenda topics.

The attached final agenda reflects suggestions from participants. No responses were received to the request for additions or corrections to the minutes from the May meeting. Therefore, those minutes are included in final form as Tab A (Plenary Session), Tab K (EPWG), and Tab O (ERCWG).

If you have any questions about the ECG meeting, please call me at (202) 586-5679, Susan Peterson at (202) 586-4957, or Janet Friedman at (202) 646-6641. I look forward to seeing you at the meeting.

Jerry
Gerald J. Parker, Chief
Site Evaluation Branch
Office of Civilian Radioactive
Waste Management

Attachments

8712100029 870826
PDR WASTE
WM-1 PDR

Attachment 1
ENVIRONMENTAL COORDINATING GROUP MEETING
PLENARY SESSION

AGENDA

Washington, D.C.

Tuesday, September 15, 1987

<u>Time</u>	<u>Topic</u>	<u>Speaker</u>	<u>Reference</u>
1:00	Opening Remarks <ul style="list-style-type: none">• Agenda Overview• May ECG Meeting Minutes• May ECG Action Items• Environmental Program Overview	J. Parker	This Agenda Tab A: May Minutes Tab B: Action Items Tab C: Environmental Program Overview
1:45	Environmental Monitoring & Mitigation Plans (EMMPs) <ul style="list-style-type: none">• Status and Schedule• Comment Analysis Documents	J. Jones	Tab D: Kale Memo to PMs on EMMP Schedule (7-15-87)
2:00	Court Decision on Challenge to EPA Standard (40 CFR 191)	R. Mussler	Tab E: NRDC vs EPA Court Decision
2:30	B R E A K		
2:45	Nevada NWPO Questions	C. Malone	Tab F: Loux Letter to Parker (7-28-87)
4:00	Affected Parties Discussion	States and Indian Tribes	
4:30	Adjourn	J. Parker	

Attachment 1
(Page 2)

ENVIRONMENTAL COORDINATING GROUP MEETING
PLENARY SESSION

AGENDA

Washington, D.C.

Wednesday, September 16, 1987

<u>Time</u>	<u>Topic</u>	<u>Speaker</u>	<u>Reference</u>
8:30	Opening Remarks	J. Parker	
9:00	National Historic Preservation Act Programmatic Agreements (PAs) <ul style="list-style-type: none">• Status• Schedule	S. Peterson	Tab G: PA Schedule
9:15	Review and Discussion of National Historic Preservation Act (NHPA)	J. Friedman	Tab H: Advisory Council Information
9:40	SRPO Programmatic Agreement Implementation	B. White	Tab I: SRPO PA and transmittal letters
10:00	B R E A K		
10:15	BWIP Environmental Program Status Report	S. Whitfield	Handout
10:30	NNWSI Environmental Program Status Report	E. McCann	Handout
10:45	SRPO Environmental Program Status Report	B. White	Handout
11:00	Affected Parties' Comments and Questions	States and Indian Tribes	
11:45	Plenary Session Summary	J. Parker	
12:00	Adjourn		

Attachment 1
(Page 3)

ENVIRONMENTAL PLANNING
WORKING GROUP (EPWG)

AGENDA

Wednesday, September 16, 1987

<u>Time</u>	<u>Topic</u>	<u>Speaker</u>	<u>Reference</u>
1:00	Opening Remarks	R. Sharma	This Agenda Tab J: Revised EPWG Charter
1:15	Discussion of Action Items from May Meeting	R. Sharma	Tab K: Action Items
1:30	DOE Response to Loux Letter Regarding Environmental Program Planning	R. Sharma	Tab L: Loux Letter to Sharma (5-14-87) Tab M: Kale Response to Loux (7-30-87)
2:00	Discussion of Environmental Program Planning Issues by Affected Parties	States and Indian Tribes	
2:45	B R E A K		
3:00	Environmental Field Activity Plans (EFAPs) • Process • Schedule	R. Sharma	Tab N: Kale Memo to PMs (8-13-87)
3:10	BWIP EFAPs	S. Whitfield	Handout
3:30	NNWSI EFAPs	M. Dussman	Handout
3:50	SRPO EFAPs	T. Ladino	Handout
4:10	Summary of Agreements and Action Items	R. Sharma	
4:30	Adjourn		

Attachment 1
(Page 4)

ENVIRONMENTAL REGULATORY COMPLIANCE WORKING GROUP (ERCWG)
AGENDA

Washington, D.C.

Thursday, September 17, 1987

<u>Time</u>	<u>Topic</u>	<u>Speaker</u>	<u>Reference</u>
8:30	Opening Remarks	D. Valentine	This Agenda
8:45	Discussion of Action Items from May Meeting	D. Valentine	Tab O: Action Items
9:15	Status of Environmental Regulatory Compliance Plans (ERCs)	D. Valentine	Tab P: Annual Report
9:30	Report on BWIP Meeting with State/Federal Regulatory Agencies and Indian Tribes	S. Whitfield	Handout
9:50	Break		
10:05	Report on NNWSI Meeting with State/Federal Regulatory Agencies	E. McCann	Handout.
10:25	Report on SRPO Meeting with State/Federal Regulatory Agencies	B. White	Handout
10:45	DOE Response to Loux Letter Regarding Environmental Regulatory Compliance	D. Valentine	Tab Q: Loux Letter to Valentine (5-14-87) Tab M: Kale Response to Loux (7-30-87)
11:00	Comments/Questions from Affected Parties	States and Indian Tribes	
11:30	Summary of Agreements and Action Items	D. Valentine	
12:00	Adjourn		

Attachment 2

REFERENCE PACKAGE
ENVIRONMENTAL COORDINATING GROUP MEETING
SEPTEMBER 15-17, 1987
WASHINGTON, D.C.

Tab A:

Minutes

Environmental Coordinating Group Meeting

May 5-6, 1987

Seattle, Washington

MEETING MINUTES
PLENARY SESSION
of the
ENVIRONMENTAL COORDINATING GROUP
MAY 5-6, 1987
SEATTLE, WASHINGTON

INTRODUCTION

The meeting was opened by the Chairman of the Environmental Coordinating Group, Jerry Parker, Department of Energy-Headquarters (DOE-HQ), who welcomed participants. He emphasized that the purposes of the Environmental Coordinating Group (ECG) meetings are to serve as an information exchange, to provide a forum for discussion, and to give all participants the opportunity to be informed about the details of the on-going environmental activities of DOE's nuclear waste repository program.

Larry Calkins, Confederated Tribes of the Umatilla Indian Reservation, raised a question about the minutes of the January ECG meeting. The January minutes state (on page 5, Section V, paragraph 2) that State and Indian Tribe representatives had requested that DOE initiate baseline data collection efforts for the Environmental Impact Statement (EIS) prior to EIS scoping. L. Calkins stated that he would prefer that EIS scoping take place before baseline data collection.

J. Parker discussed the agenda (Minutes Tab A) and requested that all participants sign the attendance sheets (Minutes Tab B). He recommended that participants refer to the draft "Environmental Program Overview" found at Tab K of their pre-meeting reference package, for clarification of environmental program components.

ACTION ITEMS FROM JANUARY ECG MEETING:

J. Parker discussed the list of action items from the January ECG meeting, and addressed the progress that has been made in completing each item. (Action items resulting from the current ECG meeting are included at Minutes Tab C).

- Participation by States and Indian Tribes in working group meetings.

At the previous ECG meeting, the States and Indian Tribes had requested the opportunity to participate in the various working groups (e.g., Environmental Regulatory Compliance Working Group [ERCWG] and Environmental Planning Working Group [EPWG]), and be informed of their activities. J. Parker announced that this request has been positively addressed. He referenced a memo (found at Tab A of the pre-meeting reference package) from Stephen Kale, DOE Associate Director for Geologic Repositories, asking Coordinating Group chairmen to develop mechanisms for working with representatives of the States and Indian Tribes in resolving issues, and using the coordinating groups as an aspect of consultation and cooperation. J. Parker invited representatives of the States and Indian Tribes to participate in the ERCWG and EPWG meetings after the ECG meeting plenary session.

- Environmental baseline information for Environmental Monitoring and Mitigation Plans (EMMPs).

The representatives from the State of Nevada had expressed concern at the January ECG meeting about the level of background environmental information upon which the EMMPs would be based. J. Parker assured participants that DOE will collect an adequate data base prior to beginning any site characterization activities which have a potential for significant environmental impact. He referred participants to a letter from Ben Rusche, Director of the Office of Civilian Radioactive Waste Management, to Governor Richard Bryan of Nevada (reference package Tab G), in which Mr. Rusche agreed that "site-specific environmental data will be collected before and during site characterization activities. These data will be used to monitor those aspects of the site that have the potential for experiencing significant impacts".

J. Parker noted that the issue is sufficiently important that a separate agenda item was allotted to discussing it at the plenary session of the ECG (9:15 a.m., May 6), in addition to its discussion as an action item.

- o Timing of EEMP review coordinated with Environmental Regulatory Compliance Plan (ERCP).

Texas representatives had raised the concern at the January ECG meeting that it would be difficult for them to review the EEMP except in conjunction with the ERCP. In response to this concern, the Salt Repository Project Office (SRPO) agreed to a separate schedule from the Federal sites for EEMP review. Although Texas representatives received the EEMP on December 1, 1986, as did Washington and Nevada, the State of Texas representatives will submit their comments after September 1, 1987, when the ERCP is released.

- o DOE Office of Environmental Audits Survey of the Hanford Reservation.
- o DOE Office of Environmental Audits Survey of the Nevada Test Site.

Steve Frank, DOE Office of Environment, Safety and Health (EH), reported on the on-going activity reviews at Hanford and Nevada. S. Frank stressed, first, that the surveys are not environmental compliance audits and, second, that they are surveys of the entire DOE facility, not just the nuclear waste-related operations. DOE is looking at its existing operations to identify potential impacts to safety, health and the environment, to address critical on-going impacts, and to prioritize other impacts. Impacts are classified into four categories: (1) life threatening (demanding immediate attention); (2) environmental, health or safety risk (response need not wait until end of survey); (3) lower risk (to be considered in multi-year budget reviews); and (4) administrative non-compliance. A more complete description of the survey is included at Tab D of these minutes.

EH will meet with field personnel and representatives of States, affected Indian Tribes and other parties to identify issues, carry out field work, prepare the draft report, review its technical accuracy and risk categorization, revisit the site in 2-3 months for additional in-depth data collection, analyze data, prepare an interim report on each site, and develop a summary report covering both sites.

The currently projected schedule for this work is:

<u>Activity</u>	<u>Dates</u>	
	Hanford	Nevada Test Site
Meeting with States and Indian Tribes	7/14 - 7/18/86	5/7/87
Field work	8/18 - 9/5/86	Mid-June, 1987 (May be delayed due to testing)
Draft report	7/87	7/87
Sampling & analysis	4 - 6/87	11/87
Analytic review	3 months	3/88
Report write-up	3 months	
Interim report	1/88	7/88

Don Provost, Washington State representative, expressed concern that violations of environmental regulations are ongoing at Hanford, even as the EH study is being conducted. He said that he is particularly worried about iodine contamination at the Hanford Reservation.

Carl Johnson, Nevada representative, indicated that he had been told a different date for the EH meeting, (announced by S. Frank for May 7), and had received no paperwork about it. S. Frank checked with his office, and reported back that the State had been sent paperwork on the meeting, although the Nevada State Nuclear Waste Project Office may not have received notification from the other State agency. As a result of the ECG meeting discussion, the confusion regarding dates was corrected. S. Frank agreed to provide a progress report on this activity at the September ECG meeting (Action Item S-1).

- New overall schedule and implications for Environmental Impact Statement (EIS)

At the January ECG meeting, J. Parker had suggested that the schedule for the EIS may change as a result of Congressional budget review, and in response to amendments to the Mission Plan which were to be released after the conclusion of the January meeting. Because neither of these activities had occurred at the time of the January ECG meeting, he could not provide specific information until now. The schedule change

has major programmatic consequences; therefore, J. Parker noted that it would be addressed as a separate agenda item (8:15 a.m., May 6).

- Environmental checklists from Hanford Reservation to Washington State representatives.

Steve Whitfield, DOE/BWIP, reported that 37 environmental checklists, covering activities from 1977 to the present, had been sent to Washington State in response to the request for them made at the January ECG meeting. Washington State representatives expressed dissatisfaction with the materials they had received. They were not, according to the recipients, clear and straightforward, and would need to be analyzed and evaluated. Of particular concern was the lack of information on existing contamination at Hanford and, possibly, on the BWIP site.

Jack Wittman, representative of the Yakima Indian Nation, suggested that DOE sponsor a workshop to explain the use and formulation of the checklists by going over specific examples of activities covered by the checklists. S. Whitfield agreed to hold a workshop after all participants had completed a retrospective review of the checklists (Action Item S-2). BWIP currently has such a review underway.

Once again, Washington representatives expressed concern that DOE would not comply with regulations, would begin site characterization prior to completion of the ERCP, would only comply with those selected regulations that would not slow the process, and would not keep the States and Indian Tribes informed of DOE activities.

J. Parker emphasized that the ERCP is only a planning and management tool for DOE, and that DOE will be in compliance with regulations both before and after the ERCP is released. He reiterated the position of B. Rusche and Secretary Herrington that environmental protection will not be jeopardized by DOE activities.

ENVIRONMENTAL MONITORING AND MITIGATION PLAN (EMMP) OVERVIEW

Jay Jones, DOE/HQ, presented an update and overview of progress on the draft EMMPs (Tab E of this package).

Terry Husseman, Washington State representative, expressed concern that DOE would start large scale hydrological testing before the EMMP and ERCP are released. S. Whitfield, DOE/BWIP, responded that planning documents are separate from compliance and monitoring activities. The planning documents

are a management tool for DOE, and are a useful mechanism for working with the affected parties to ensure that all potential impacts are evaluated and monitored; compliance with regulation will take place regardless of when plans are available.

D. Provost stressed that, because the Hanford site is already contaminated, it is necessary to assess the degree of contamination before activities begin. He emphasized that baseline data on existing contamination have not been made available to the State. A discussion ensued regarding the disposal of iodine on the Hanford Reservation as a result of defense wastes. D. Provost stressed that the presence of iodine, which illustrates the problem of existing contamination, will have a bearing on site selection and should be included in the EMP. S. Whitfield agreed to investigate the study on iodine releases and report back on the matter at the next ECG meeting (Action Item S-3).

Betty Jankus, DOE/NNWSI, reiterated that the EMP is an early draft document, as requested by the States and affected Indian tribes, which will be revised as a result of consultation. It must be viewed as part of a progression of information development, not as an end-all document. She acknowledged that it is difficult to evaluate the EMP except in the context of the Site Characterization Plan (SCP) and other plans. However, because the States and Indian Tribes have requested the opportunity for an early review of the draft EMP, it is not possible to incorporate comparison with other documents in this first round of review.

J. Parker emphasized that the information provided in the Environmental Assessments (EAs), the 23,000 public comments on the EAs, and the Comment Response Document provide a base of information for productive discussion. The EMP itself is not required by statute; it is an effort by DOE to ensure that responsibilities for environmental protection are met during site characterization as required by Section 113 of the Act. The EMP also provides an open forum for discussion with States and affected Indian Tribes.

Nevada representatives expressed concern that the data in the EAs lack the specificity they consider necessary for establishing the baseline environmental conditions. They expressed the need for a complete environmental survey prior to characterization in order to evaluate whether or not there is a significant environmental impact which should be monitored and mitigated during site characterization. J. Parker responded that the EMP continues to be an open, evolving document which will incorporate information derived from the SCP hearings. Such issues as the kind of data-base needed and approaches to mitigation will be resolved through on-going consultation.

C. Johnson, of Nevada, reiterated that the current environmental situation is not known and that pre-activity data collection is needed to assess what the impacts are. He emphasized that it is not possible to discuss impacts without knowing about the current environmental condition. J. Parker stressed that DOE will conduct pre-activity data collection in those areas which the Department identifies as subject to potentially significant adverse impact. He expressed confidence that enough information is known and presented in the EAs to begin a useful dialogue. EMMPs will be completed before potentially endangering activities are undertaken. The environmental baseline information upon which the EIS will be based will be collected as part of the "site investigations" described in the Siting Guidelines (10 CFR 960).

S. Whitfield, DOE/BWIP, discussed the progress on BWIP's EMMF (Tab F). He provided a chronological update, and discussed comments from affected parties regarding key policy and technical issues. He provided preliminary responses to those questions raised by States and Indian Tribes.

B. Jankus, DOE/NNWSI, reported on the progress on the NNWSI EMMF (Tab G). She discussed the purpose and scope of the NNWSI site characterization environmental monitoring and mitigation program. She identified the technical disciplines for environmental monitoring as historic preservation, threatened and endangered species, air quality and radiological safety. She discussed the comments received from the State of Nevada, and DOE's position on each comment, and provided a schedule for EMMF development.

Bill White, DOE/SRPO, discussed the progress on the SRPO EMMF (Tab H). The State of Texas will not formally submit comments on the EMMF until the ERCP is released; therefore, B. White discussed comments submitted by Mississippi and Utah. He stressed that many comments refer to the EAs, rather than to the EMMFs.

J. Parker summarized the discussion on EMMFs. He concluded by saying that the EMMFs suggest what studies need to be conducted to meet the requirements of Section 113(a) of the Act. The Environmental Study Plans will detail how those requirements will be met.

ENVIRONMENTAL IMPACT STATEMENT (EIS) SCHEDULE

J. Parker discussed the current plans and schedule for developing the EIS (Tab I). He said that as a result of amendments to the Mission Plan, we are now operating within a 1993-94 time-frame, with scoping to take place in 1989.

ENVIRONMENTAL BASELINE ISSUES

J. Parker led a discussion on the issue of the environmental baseline (Tab J). He stressed that, for purposes of the EIS, the environmental baseline will be the fully characterized site. In regard to site characterization, the EMP and reclamation background environmental data stem from the EAs, as well as recent and ongoing field studies.

The chief objection to this concept of baseline data was expressed by the State of Nevada which felt that not enough is known about the environment to be able to proceed with site characterization until a thorough study has been made of the existing environmental conditions. The chief objection of the State of Washington is that the approach outlined by J. Parker is predicated on going into a virgin site. Because the Hanford Reservation has been used by the Department of Energy for many years, it is necessary to know exactly where contamination has taken place in the past in order to assess cumulative effects that will result from site characterization activities. The State would like maps clearly showing all contaminated areas. The main issue at Hanford, for the State of Washington, is chemical and radiological contamination.

J. Parker explained that using the term "baseline" complicates the issue. DOE is using the term "baseline" in regard to the data upon which the EIS is based. For the EIS, "baseline" will be the state of the environment after site characterization impacts have occurred. For the EMP, background data will be collected to supplement that information available in the EAs.

PROGRAMMATIC AGREEMENTS

J. Jones, DOE/HQ, reviewed the current progress and schedule for Programmatic Agreements (PAs) which currently are being developed for each site (Tab K). The PAs are being written to satisfy DOE's responsibilities under Section 106 of the National Historic Preservation Act of 1966 and outline DOE's procedures for considering historic properties during site characterization activities.

J. Jones reported that the PA for SRPO currently is in concurrence (Action Item S-4). The NNWSI PA will be sent to the Nevada State Historic Preservation Officer for consultation in June (Action Item S-5). The EWIP PA is closely tied to on-going activities on the entire Hanford Reservation and it is not anticipated that it will be completed until June, 1988.

PROJECT OFFICE ENVIRONMENTAL ACTIVITIES OVERVIEWS

S. Whitfield, DOE/BWIP, reported on environmental activities at the BWIP site (Tab L). A discussion ensued regarding environmental checklists, defense wastes and existing contamination on the Hanford Reservation. S. Whitfield suggested that Washington State representatives formally request information from the Hanford Operations Office regarding iodine contamination.

B. Jankus reported on NNWSI environmental activities (Tab M). B. Jankus described the Environmental Program Plan as the document which details what DOE needs to know and how it will be done, the environmental analog to the Site Characterization Plan.

C. Johnson of Nevada said that he understands that Environmental Field Study Plans are being developed for those impacts and activities identified in the EMMP. He asked when it will be possible to compare the EMMPs to the study plans. J. Parker explained that the EMMPs identify information needs, and the study plans detail how data will be collected to fulfill the data needs identified in the EMMPs. There will be several study plans, one for each of a number of relevant environmental disciplines.

B. Jankus commented that NNWSI is completing four study plans, one for each of the four areas identified in the EMMP as potentially subject to impact during site characterization. These areas are: radiation, historic preservation, threatened and endangered species, and air quality. Other environmental study plans will be written later as a result of data needs identified in the Environmental Regulatory Compliance Plan. The NNWSI Project Office will initiate meetings with Nevada State agencies once the preliminary drafts have been reviewed by HQ, and revisions have been made in response to HQ comments.

B. Jankus explained that in order to comply with all regulations, DOE looks at every activity and ensures compliance with all required procedures. Every activity is evaluated, and impacts found to be minor are documented in a memo to the file. Where some questions exist regarding the presence and severity of impacts, DOE did an EA, generally leading to a "Finding of No Significant Impact (FONSI)."

Nevada representatives requested the opportunity to review those memos to the file, EAs, and FONSI. B. Jankus agreed to inquire about the public availability of such documents and to report back at the next Environmental Coordinating Group Meeting (Action Item S-6).

Eric Stenehjem, Battelle/ONWI, reported on the environmental activities for SRPO. SRPO is concentrating on implementing a Systems Engineering Management Plan (SEMP) as a mechanism for isolating information needs in detail before going into the field. This system, required by DOE Orders, directs managers to evaluate for each activity "why" DOE should pursue the activity or "why not". Tony Ladino, DOE/SRPO volunteered to provide, at the next ECG meeting details on DOE Orders related to SEMP and its component documents (Action Item S-7).

D. Provost, Washington, indicated that he saw little commonality among Project Office presentations. He had hoped to be able to easily follow presentations for the sites other than BWIP, in order to make comparisons among them, but had been unable to because of different charts, approaches and terminology. J. Parker responded that there is a dichotomy in such criticism since the States have also been critical of DOE for requiring a Headquarters (HQ) comparability review of materials before they are given to the States.

D. Provost responded that the HQ consistency check had gutted the BWIP EMP and caused it to be useless. J. Parker explained that the scope of the EMP had been more clearly defined by HQ in order to develop comparability. Studies were eliminated from the EMP because they are not within the scope of Section 113(a) impacts. They will be carried out in response to other requirements (e.g. ERCP or EIS). S. Whitfield added that BWIP's work is based on the same planning model as that presented for SRPO. BWIP stressed field work in its ECG presentation because BWIP is farther along in that area due to their access to the land.

In support of J. Parker's position, J. Wittman (representing the Yakima Indian Nation) indicated that HQ must coordinate all Project Office (PO) activities, but, at the same time, must remember that each of the sites is unique, and that all are in different stages of development. J. Parker reiterated his confidence in the PO's. He stressed that HQ is striving for some level of comparability, but not at the expense of recognizing that each PO staff is most familiar with its particular site.

DISCUSSION AND CONCLUSION

L. Calkins, representative of the Confederated Tribes of the Umatilla Indian Reservation, said that they take a broad view of environmental concerns. He felt that scoping ought to take place prior to site characterization and baseline data collection, and that BWIP, particularly, needs to emphasize the importance of cultural and ethno-historical values.

J. Wittman asked if aerial photography would be used for soils studies. S. Whitfield answered that the aerial photography would be used as a tool for information on vegetation and habitat more than for soils mapping. Although soils mapping is a potential use, nothing is underway currently. Soil profiles could be constructed based on air photos. However, at present they will be based on sampling.

C. Johnson, Nevada, requested that the hand-outs used at this meeting be re-drafted before they are distributed with the minutes package. Minutes of meetings are placed in Nevada reading rooms for public information. Some hand-outs used at this meeting indicated that materials had been completed and distributed and, in fact, they were not yet available; in other cases, they contained inaccurate dates.

Jim Knight, Director of DOE's Siting, Licensing and Quality Assurance Division, said that all corrections would be made before the minutes package was distributed (Action Item S-8).

J. Parker requested that representatives of States and Indian Tribes inform him if they will need a separate meeting room at the next ECG meeting for their Executive Sessions (Action Item S-9).

J. Parker thanked participants for their attendance and adjourned the meeting.

Tab B:

Action Items

Environmental Coordinating Group Meeting

May 5-6, 1987

Seattle, Washington

Action Items

Environmental Coordinating Group
May 5-7, 1987
Seattle, Washington

<u>Item</u>	<u>Assigned to</u>	<u>Due</u>
S-1 Report on on-going status of EH environmental review at Hanford & NTS	Steve Frank	Next ECG meeting
S-2 Hold a workshop to explain Hanford environmental check-lists	Steve Whitfield	After completion of retrospective review by all parties
S-3 Identify Iodine 129 studies and report back	Steve Whitfield	Next ECG Meeting
S-4 Send SRPO Programmatic Agreement to Texas SHPO for signature	Jay Jones	June 1987
S-5 Send NNWSI Programmatic Agreement to Nevada SHPO	Betty Jankus	June 1987
S-6 Investigate public availability of NNWSI "memos to the file" and report back	Betty Jankus	Next ECG Meeting
S-7 Provide detail on DOE orders related to SEMP and its component documents	Tony Ladino	Next ECG Meeting
S-8 Redraft May ECG meeting hand-outs	HQ and POs	Prior to distribution of minutes
S-9 Inform DOE if a room is needed for Executive Sessions for affected parties	States and affected Indian Tribes	August 15, 1987

Tab C:

Draft Report

Environmental Program Overview for

Nuclear Waste Repository Program

August 1987

DRAFT

**ENVIRONMENTAL PROGRAM OVERVIEW FOR
NUCLEAR WASTE REPOSITORY PROGRAM**

August 1987

Prepared for

**Site Evaluation Branch, Office of Geologic Repositories,
Office of Civilian Radioactive Waste Management, U.S. Department of Energy**

by

Energy and Environmental Systems Division, Argonne National Laboratory, Argonne, Illinois

DRAFT

**ENVIRONMENTAL PROGRAM OVERVIEW
HIGH-LEVEL NUCLEAR WASTE REPOSITORY PROGRAM**

August 1987

**SITE EVALUATION BRANCH
OFFICE OF CIVILIAN RADIOACTIVE WASTE MANAGEMENT
DEPARTMENT OF ENERGY**

DRAFT

DRAFT

CONTENTS

	<u>Page</u>
CONTENTS.....	i
1 INTRODUCTION.....	1
2 ENVIRONMENTAL ASSESSMENTS.....	1
3 ENVIRONMENTAL PROGRAM.....	3
3.1 Environmental Checklists.....	5
3.2 Environmental Monitoring and Mitigation Plans.....	5
3.3 Environmental Regulatory Compliance Plans.....	6
3.4 Environmental Site Suitability Plans.....	6
3.5 Environmental Decommissioning and Reclamation Plans.....	8
3.6 Environmental Impact Statement.....	8
3.6.1 EIS Scoping.....	9
3.6.2 EIS Implementation Plan.....	9
3.6.3 Interagency Cooperative Agreements.....	10
3.6.4 EIS Management Plan.....	11
4 SITE INVESTIGATIONS.....	11
5 REPOSITORY ENVIRONMENTAL MONITORING PROGRAM.....	13
6 REPOSITORY POSTCLOSURE ENVIRONMENTAL MONITORING PROGRAM.....	15

1 INTRODUCTION

The Site Evaluation Branch (SEB) of the Office of Geologic Repositories (OGR) is implementing an integrated environmental program to fulfill the responsibilities of the Office of Civilian Radioactive Waste Management (OCRWM) in evaluating the high-level nuclear waste repository candidate sites. The purpose of the program is to meet the statutory requirements of the Nuclear Waste Policy Act (NWPA), the National Environmental Policy Act (NEPA), and other applicable federal statutes and regulations.

This document provides a summary overview of the various components of the environmental program. The principal components are discussed within the context of an environmental impact statement (EIS) for site recommendation and a subsequent license application for the selected site. The relationships of these components are shown in Fig. 1.

2 ENVIRONMENTAL ASSESSMENTS

Section 112(b)(1)(E) of the Nuclear Waste Policy Act required the DOE to prepare environmental assessments (EAs) as part of the process to nominate at least five sites for site characterization. Pursuant to Section 112(b)(2) of the Act, public hearings were held in the vicinity of the nine potential sites to inform residents of the proposed action and the proposed site location, and to receive public comments and recommendations. At the hearings, public input was solicited on issues that should be addressed in the EAs and in the Site Characterization Plan (SCP). The DOE elected to prepare draft EAs for nine sites. The draft EAs were issued in December 1984, and final EAs for the five nominated sites were issued in May 1986. On May 28, 1986, the President approved three

sites recommended by DOE for characterization from among the five sites nominated pursuant to Section 112(b)(1)(B) of the NWPA. These three sites are Yucca Mountain, Nevada; Deaf Smith County, Texas; and Hanford, Washington. The EAs provide a basis for environmental planning for site characterization. Each EA discussed the impacts of specific site-characterization activities and described the regional and local impacts of locating the proposed repository at the particular site.

3 ENVIRONMENTAL PROGRAM

The site-characterization phase of the repository program began with Presidential approval of the three sites for characterization on May 28, 1986, and will continue for 3-5 years. During site characterization, the DOE will collect detailed information on the geotechnical, geochemical, geologic, and hydrologic characteristics of each site.

The DOE is implementing two mechanisms to ensure protection of environmental resources during site characterization. Until approval of the formal Site Characterization Plans, the DOE will use Environmental Checklists (see Sec. 3.1) to conduct environmental reviews of planned activities. Section 113(a) of the NWPA requires that once a Site Characterization Plan is approved, the DOE must conduct site characterization in a manner that minimizes any significant adverse environmental impacts. To ensure compliance with Section 113(a), the DOE has made a programmatic decision to prepare and implement Environmental Monitoring and Mitigation Plans (EMMPs) (Sec. 3.2). These plans will provide for monitoring of environmental variables where site characterization activities are somewhat uncertain or impacts are believed to be adverse and potentially significant. DOE also has developed and will implement Environmental Regulatory Compliance Plans (ERCPs) (Sec. 3.3) for each Project Office (PO). These plans discuss how the DOE intends to comply with regulatory requirements.

3.1 ENVIRONMENTAL CHECKLISTS

During the interim period from May 28, 1986, until approval of a Site Characterization Plan for each site, the DOE Project Offices might be conducting onsite activities as part of site investigations. The environmental effects of these activities will be monitored as appropriate to ensure that they do not cause significant adverse impacts. If warranted, the DOE will provide the field contractor engaged in site investigations with procedures to minimize or mitigate impacts. The DOE POs will maintain an Environmental Checklist that includes all ongoing and proposed environmental activities for the interim period.

3.2 ENVIRONMENTAL MONITORING AND MITIGATION PLANS

The EMMP for each site is a means of documenting DOE compliance with Section 113(a) of the NWPA by (1) providing a strategy for monitoring potentially significant adverse environmental impacts of site-characterization activities; (2) identifying how and when data will be collected, reported, and evaluated; and (3) recommending (as warranted) changes in site-characterization activities in order to minimize adverse impacts. The final EMMPs will be prepared by the DOE after discussions with representatives of the repository host states and affected Indian Tribes. The initial identification of variables to be monitored is based on the assessment of impacts anticipated from site characterization as presented in Chapter 4 of the EAs, the comment response documents, and updated information on site characterization activities.

Each EMMP will summarize the site-characterization program, discuss activities with a potential to cause significant adverse environmental impacts during site characterization, discuss the specific monitoring and mitigation programs for the

to be used for the major siting decisions, nomination and recommendation of candidate sites for site characterization pursuant to 112(b) of the NWPA, the preliminary determination of suitability required by Section 114(f), and the repository site selection.

The EAs issued in May 1986 included the site suitability analysis in Chapter 6. At the same time, the Secretary of Energy made a preliminary determination that the three sites recommended for site characterization were suitable for development of repositories.

The NWPA, Sec. 113(b)(1)(A)(iv), directs the DOE to develop "criteria to be used to determine suitability of such candidate site for the location of a repository, developed pursuant to Section 112(a)." For those guidelines that require site characterization, the criteria required above will be included in the SCPs.

An Environmental Site Suitability Plan will be developed to provide criteria to be used to determine suitability under the following guidelines:

- 960.4-2-8-2 Human Interference
- 960.5-2-2 Site Ownership and Control
- 960.5-2-3 Meteorology
- 960.5-2-4 Offsite Installations and Operations
- 960.5-2-5 Environmental Quality

These criteria will be consistent with Appendix III of the Siting Guidelines - "Application of the System and Technical Guidelines During the Siting Process."

description of the proposed action (i.e., repository construction, operation, and closure procedures) will be needed to assess impacts to the environment.

3.6.1 EIS Scoping

Public input will be solicited as part of the EIS preparation process. Public meetings will provide a forum for members of the public to learn about the proposed action and to provide input to the DOE on issues that should be addressed in the EIS.

The DOE will hold scoping meetings in at least the three affected states before an EIS Implementation Plan is finalized. A Notice of Intent (NOI) will be published in the Federal Register at least 30 days before the beginning of the scoping meetings. The NOI will describe DOE's intent to prepare an EIS; provide dates, times, and locations for the scoping meetings; and summarize the proposed action, alternatives to the proposed action, and anticipated environmental impacts. Descriptive information on the proposed action and general information on the contents of an EIS will be made available at the meetings.

3.6.2 EIS Implementation Plan

The DOE will prepare an EIS Implementation Plan (IP) to incorporate the results of the public scoping process and to guide the preparation of the EIS. A draft IP will include the following information:

- Background - description of requirements concerning development of the EIS-IP and EIS, including brief information summaries from NWPA and NEPA, as well as input from various agencies (i.e., DOE, CEQ, EPA, and NRC)
- Description of Proposed Action

species. Other agencies and affected states and Tribes may also be approached by the DOE to enter into similar agreements for various issues.

The interagency agreements should enhance the DOE's ability to address complex technical issues pertinent to the repository program. The interagency agreements may address such subjects as (1) reaching decisions on an assessment approach, (2) reviewing preliminary sections of the EIS, (3) identifying EIS sections to be prepared by the cooperating agency, and (4) obtaining official agency positions or opinions on certain technical issues to be addressed in the EIS.

3.6.4 EIS Management Plan

The DOE will prepare an EIS Management Plan to ensure that the EIS is prepared in a timely and efficient manner. The Management Plan will describe the means by which the EIS will be prepared, including (1) the nature of contractor assistance, (2) target time limits for EIS preparation, (3) allocation of assignments among DOE and cooperating agencies, and (4) relationships between the schedules for preparing environmental analyses and the DOE's tentative planning and decision-making schedule. The Management Plan also will identify organizational reporting relationships within OCRWM and coordination and concurrence processes needed to complete the EIS.

4 SITE INVESTIGATIONS

Site investigations is the collective term given to studies conducted in parallel with site characterization to gather data on the environment, socioeconomics, and transportation modes and routes of the site and site vicinity. The data will be used as background information for such purposes as demonstrating compliance with federal statutes and regulations, obtaining permits, demonstrating the minimization of

3. EFAPs will be prepared. These plans initially will emphasize environmental data needed for site characterization and the NEPA process. Revisions to the plans will reflect studies to be conducted during repository construction.

4. A format for recording the data obtained from specific field studies will be developed. Topical reports will be prepared for each of the nine or more environmental study categories. Periodic updates will be issued as more data are collected and additional analyses are performed. These topical reports will be used as references for various programmatic documents, including the EMMP Progress Reports, Site Suitability Plans, EIS, and others.

Table 1 provides a graphic illustration of this planning process in matrix form.

5 REPOSITORY ENVIRONMENTAL MONITORING PROGRAM

When a repository site has been licensed, the DOE will implement an environmental monitoring program covering the period of construction and operation. A principal objective of the monitoring program will be to continuously evaluate the success of DOE's HLW shipment and storage procedures with respect to human health and safety and environmental protection. The program will consist of monitoring plans for each environmental discipline. An overview of the individual monitoring plans will be presented in the EIS.

The environmental monitoring plans will include a description and rationale for the variables to be monitored and information on data collection frequency and analysis techniques. A major point to be covered in the overall program pertains to data availability and data reporting. The host state, appropriate federal agencies, and

affected Indian Tribes may have need for monitoring data on a regular basis. The DOE monitoring program will address this issue.

6 REPOSITORY POSTCLOSURE ENVIRONMENTAL MONITORING PROGRAM

During the latter stages of repository operations, the DOE will develop a postclosure monitoring program to document the adequacy of the underground geologic barrier. Emphasis will be placed on examining the potential effects of spent fuel storage on land, air, and water resources, as well as on human health and safety.

Tab D:

Memo to Project Managers (PMs) from S. Kale
Environmental and Socioeconomic Monitoring
and Mitigation Plan Schedule

July 15, 1987

memorandum

DATE: JUL 15 1987

REPLY TO
ATTN OF: RW-241

SUBJECT: Environmental and Socioeconomic Monitoring and Mitigation Plan
Schedule

TO: M. Kunich, NNWSI
J. Neff, SRPO
J. Anttonen, BWIP

As a result of the June 4-5, 1987, meeting in Chicago between the three Project Offices and Headquarters, and the June 18, 1987, meeting in Las Vegas between NNWSI and HQ, HQ has revised both the EMMP and SMMP schedule for NNWSI and BWIP; a separate MMP schedule is now being developed for SRPO. The attached revised schedule allows for complete review and analysis of comments received from States and Indian Tribes. As shown, Revision 1 of the EMMPs and SMMPs are to be sent from the Project Managers to the States and Indian Tribes on October 19, 1987. This letter revises the baseline schedule for the EMMP and SMMP milestones. These baseline changes should be reflected in your monthly MSA reports.

In order to facilitate the HQ review process, each Project Office should ensure that its legal counsel reviews and concurs on your draft Revision 1 EMMPs and SMMPs (and Comment Analysis Documents) before they are sent to Headquarters. After consideration of relevant comments received at Site Characterization Plan public hearings, DOE will make appropriate revisions to the EMMPs and SMMPs.

DOE is committed to being responsive to the comments received on the MMPs and ensuring that the views expressed in those comments are being considered. Therefore, as part of revising the MMPs, DOE will prepare an analysis of the comments received from the States, Indian Tribes, and other organizations. The POs will organize the comments into chapter, site-specific, and general categories. Teleconference notes describing the proposed format for the Comment Analysis Document are attached. The POs will respond to site-specific issues, and HQ will coordinate responses that require guidance on policy-related issues. All comment analyses will be concurred upon by appropriate staff at HQ and the Project Offices.

In preparing for Revision 1, HQ is revising Chapters 2 and 6 of the EMMPs and SMMPs to be more consistent. Chapter 2 deals with background, purpose and approach and Chapter 6 with the procedures for modifying the MMPs. Draft versions of these sections, to be incorporated into the MMPs, will be sent to your staff for their review and comment. Any necessary changes to these chapters will be finalized before the MMPs are completed.

If you or your staff have questions about either the process or schedule for completing the EMMPs, please call Jay Jones of my staff on FTS 896-4970. Questions on the SMMPs should be directed to Ann McDonough on FTS 896-5975.

f *Bry Gale*
Stephen H. Kale
Associate Director for
Geologic Repositories

Attachments

cc: T. Isaacs, RW-20
J. Bresee, RW-22
R. Blaney, RW-222
V. Cassella, RW-222
J. Morris, RW-222
J. Daley, RW-222
B. Gale, RW-223
A. McDonough, RW-223
R. Stein, RW-23
J. Knight, RW-24
J. Parker, RW-241
J. Jones, RW-241
R. Mussler, GC-11
C. Borgstrom, EH-25
S. Frank, EH-25
W. Metz, ANL
E. Pentecost, ANL
E. McCann, SAIC
E. Lundgaard, NNWSI
W. Dixon, NNWSI
M. Blanchard, NNWSI
D. Gassman, NNWSI
G. Appel, SRPO
W. White, SRPO
B. Darrough, SRPO
A. Handwerker, SRPO
J. Mecca, BWIP
S. Whitfield, BWIP
J. Comins-Rick, BWIP
K. McGinnis, Westinghouse
C. McDavid, Weston
R. Travis, Weston
J. DiCerbo Weston
J. Gibson, Weston
G. Shaw, Weston

ATTACHMENT

SOCIOECONOMIC AND ENVIRONMENTAL MONITORING AND MITIGATION PLAN
SCHEDULE FOR BWIP AND NNWSI

<u>ACTIVITY</u>	<u>DATE</u>
POs submit Draft Revision 1 SMMPs and EMMPs to HQ for concurrence review	7/20/87 <u>1/</u>
POs submit draft Comment Analysis Documents (CADs) to HQ for concurrence review	8/3/87
HQ sends concurrence required changes on MMPs and CADs to POs	8/27/87
POs submit Revision 1 SMMPs and EMMPs and draft CADs with concurrence changes to HQ	9/21/87 <u>1/</u>
DOE sends Revision 1 SMMPs and EMMPs and CADs to States and Indian Tribes (POs begin implementation of SMMPs and EMMPs as appropriate)	10/19/87
DOE makes revisions to EMMPs and SMMPs, as necessary, in consideration of relevant comments (POs proceed to fully implement SMMPs and EMMPs)	After completion of SCP Public Hearing Process
DOE issues SMMP and EMMP Progress Reports <u>2/</u>	Subsequent to SCP Progress Reports

1/ These submissions should be reviewed and concurred upon by the legal counsel in the Project Office.

2/ Because the SMMPs and EMMPs are documents that require modifications due to various reasons, such as changes in site characterization plans or schedules, these documents will be modified, as appropriate. Such modifications will be released as part of the SMMP and EMMP Progress Reports.

ATTACHMENT

**JUNE 29, 1987 TELECONFERENCE NOTES
DESCRIBING FORMAT FOR COMMENT ANALYSIS DOCUMENT**

Participants:

J. Jones, DOE/HQ
A. McDonough, DOE/HQ
S. Whitfield, BWIP
T. Page, PNL

W. Dixon, NNWSI
M. Dussman, SAIC
G. Fasano, SAIC
B. McKinnon, SAIC

Pursuant to the telephone call of June 29, 1987 among DOE/HQ, Project Offices in Richland and Las Vegas, and contractor support, the following agreements were reached on the Comment Analysis Document (CAD), which will accompany the EMMP and SMMP, to be released on October 19, 1987. The CADs will be sent to the affected parties from the Project Managers as an attachment to the MMP transmittal letters, and will include copies of the comment letters.

A separate CAD should be prepared by BWIP and NNWSI for the EMMP and SMMP. Each PO will review all State, Indian Tribe, and other organization comment letters submitted on the MMPS, and prepare responses to those comments that apply to its site. Comments will be categorized according to Chapter (2, 3, 4, 5, and 6) and similar comments can be grouped into common issues. For those comments which cannot be assigned to a specific chapter, a category on general comments will be provided with accompanying responses. Each comment or issue will be addressed with a proposed response, and all responses will be reviewed and concurred upon by HQ.

For the SMMPs, HQ has already provided to the POs draft responses for general policy-related comments. The POs will use these draft responses as guidance in preparing their CADs. HQ will review all responses for consistency and policy and send its comments to the POs according to the EMMP and SMMP schedule.

Tab E:

Petition for Review of Action
First Circuit Court of Appeals

**United States Court of Appeals
For the First Circuit**

No. 85-1915

**NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CONSERVATION LAW FOUNDATION OF NEW ENGLAND,
ENVIRONMENTAL POLICY INSTITUTE, STATE OF MAINE,
and STATE OF VERMONT,**

Petitioners,

v.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and UNITED STATES OF AMERICA,**

Respondents.

ARIZONA NUCLEAR POWER PROJECT, ET AL.,

Intervenors.

CAROLINA POWER & LIGHT COMPANY, ET AL.,

Intervenors.

No. 86-1096

STATE OF VERMONT,

Petitioner,

v.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
and UNITED STATES OF AMERICA,**

Respondents.

ARIZONA NUCLEAR POWER PROJECT, ET AL.,

Intervenors.

CAROLINA POWER & LIGHT COMPANY, ET AL.,

Intervenors.

No. 86-1097

STATE OF TEXAS,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY
and LEE M. THOMAS, ADMINISTRATOR,

Respondents.

ARIZONA NUCLEAR POWER PROJECT, ET AL.,

Intervenors.

CAROLINA POWER & LIGHT COMPANY, ET AL.,

Intervenors.

No. 86-1098

STATE OF MINNESOTA, By Its
ATTORNEY GENERAL HUBERT H. HUMPHREY, III,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ARIZONA NUCLEAR POWER PROJECT, ET AL.,

Intervenors.

CAROLINA POWER & LIGHT COMPANY, ET AL.,

Intervenors.

ON PETITIONS FOR REVIEW OF ACTIONS OF
THE ENVIRONMENTAL PROTECTION AGENCY

Before

Campbell, Chief Judge,

Aldrich and Coffin, Circuit Judges.

Dan W. Reicher with whom Charles Magraw, Jacqueline M. Warren, Natural Resources Defense Council, Armond Cohen, Conservation Law Foundation of New England, Merideth Wright, Assistant Attorney General, State of Vermont, Suellen Keiner, Environmental Policy Institute, and Philip Ahrens, Assistant Attorney General, State of Maine, Chief, Natural Resources Section, were on brief for petitioners Natural Resources Defense Council, Inc., Conservation Law Foundation of New England, Environmental Policy Institute, State of Maine and State of Vermont.

Carl A. Sinderbrand, Assistant Attorney General, State of Wisconsin, Bronson C. LaPollette, Attorney General, State of Wisconsin, Lacy H. Thornburg, Attorney General, State of North Carolina, S. Thomas Rhodes, Secretary, North Carolina Department of Natural Resources and Community Development, and Michael J. Dowers, Attorney General, State of Georgia, were on brief for the States of Wisconsin, Georgia, and North Carolina, amici curiae.

David W. Zugschwerdt with whom Susan L. Smith, U.S. Department of Justice, F. Henry Habicht, II, Assistant Attorney General, Christopher C. Herman, U.S. Environmental Protection Agency, Francis S. Blake, General Counsel, Alan W. Eckert, Associate General Counsel, and Charles S. Carter, Assistant General Counsel, were on brief for respondents.

Renea Hicks, Assistant Attorney General, with whom Jim Mattox, Attorney General, Mary F. Keller, Executive Assistant Attorney General for Litigation, Nancy W. Lynch, Chief, Environmental Protection Division, and Nancy E. Olinger, Assistant Attorney General, were on brief for petitioner State of Texas.

Joseph G. Maternowski, Special Assistant Attorney General, with whom Jocelyn Furtwangler Olson, Special Assistant Attorney General, and Hubert H. Humphrey, III, Attorney General, were on brief for petitioner State of Minnesota.

Scott A. Harman with whom Maurice Axelrad, Michael A. Bauser, Pamela A. Lacey and Newman & Holtzinger, P.C. were on brief for intervenor utilities.

July 17, 1987

CAMPBELL, Chief Judge. This is a petition to review the standards promulgated by the Environmental Protection Agency ("EPA") for the long-term disposal of high level radioactive waste under the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10226 (1982). The states of Maine and Vermont, and the Natural Resources Defense Council, Conservation Law Foundation of New England, and Environmental Policy Institute were the original petitioners. Later Minnesota and Texas also challenged the same standards in separate proceedings. All suits have been consolidated in this circuit. A coalition of nuclear power utilities has been permitted to intervene.

I. STATUTORY BACKGROUND

The challenged standards were written by the EPA to regulate harmful releases into the environment from radioactive waste stored in repositories planned for its disposal. (The standards also regulate releases occurring while the waste is being managed prior to its disposal.)

The waste in question is derived from the fissioning of nuclear fuel in commercial nuclear power plants and in military reactors. Some of the material is first reprocessed so as to recover unfissioned uranium and plutonium. Reprocessing results in a transfer of most of the radioactivity into acidic liquids that are later converted into solid radioactive waste. Some spent nuclear fuel is not reprocessed

and itself becomes a waste. Collectively this waste is called high level waste ("HLW"). It is extremely toxic and will maintain its toxicity for thousands of years.

Recognizing the need for repositories within which to dispose safely of the growing amounts of HLW, Congress in 1982 enacted the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. §§ 10101 et seq. The Act provides for a coordinated effort within the federal government to design, construct and operate nationally at least two HLW disposal facilities. 42 U.S.C. § 10134(2)(A). Without foreclosing other disposal methods, Congress focused in the NWPA on the creation of repositories located deep underground. These will depend on the surrounding underground rock formations together with engineered barriers, to contain safely the radioactivity from these wastes. See H.R. Rep. No. 491, 97th Cong., 2d Sess. 29-34, reprinted in 1982 U.S. Code Cong. & Admin. News 3792, 3795-3800.

The underground repositories are expected to be constructed using conventional mining techniques in geologic media such as granite, basalt (solidified lava), volcanic tuff (compacted volcanic ash) or salt. The solidified high level waste will be housed in canisters placed in boreholes drilled into the mine floor. When the repository is full, it will be backfilled and sealed. See Background Information Document for Final Rule at 4-1, 4-2.

In the NWPA, Congress prescribed a complex process for selecting the sites of the high level waste repositories. We shall summarize the selection process since it is relevant to an overall understanding of the standards in question. The Department of Energy ("DOE") begins the process by naming states containing "potentially acceptable sites." 42 U.S.C. § 10136(a). Within 90 days of identification, DOE must tell the governors and legislatures of the identified states where these sites are. Simultaneously, DOE must adopt guidelines for the selection of sites in various geologic media. 42 U.S.C. § 10132(a). DOE is then to apply the guidelines to the potentially acceptable sites and nominate at least five sites as suitable for characterization as candidate sites for the first repository. 42 U.S.C. § 10132(a), (b)(1)(A). Under this format, DOE in February of 1983 identified nine potentially acceptable sites (a Nevada site in tuff; a Washington site in basalt; two Texas sites in bedded salt; two Utah sites in bedded salt; one Louisiana site in a salt dome; and two Mississippi sites in salt domes). See Background Information Document for Final Rule at 4-2.

The Act required DOE to recommend to the President three of the nominated sites for detailed characterization studies. 42 U.S.C. § 10132(b)(1)(B). The President may then approve or disapprove a nominated site. 42 U.S.C. § 10132(c). In December 1984 DOE tentatively identified five sites for

possible detailed site characterization. Three of these sites were formally recommended for detailed site characterization studies (Yucca Mountain site in Nevada; Deaf Smith County site in Texas; and the Hanford site in Washington). See Background Information Document at 4-5.

Nominated sites approved by the President are then to be characterized by DOE. 42 U.S.C. § 10133. After conducting the detailed site characterization studies, DOE must make a recommendation to the President concerning the final site approval. Before DOE recommends a site it must hold public hearings, must notify any affected state or Indian tribe, and must prepare an environmental impact statement for each site to be recommended to the President. The President must then submit to Congress an endorsement of one site from the three sites characterized and recommended by DOE. 42 U.S.C. § 10134(a)(2)(A).

The site recommended by the President becomes the approved site for the first repository after 60 days, unless the affected state or Indian tribe submits to Congress a notice of disapproval. 42 U.S.C. § 10135(b). If such notice of disapproval is received, the site is disapproved unless, during the first 90 days after receipt of the notice, Congress passes a resolution of repository siting approval. 42 U.S.C. § 10135(c). The same site approval process is prescribed for the selection of a second federal repository site.

Several federal agencies share responsibility for building, licensing and laying down standards for the HLW repositories. The Department of Energy is to design, build and operate each federally owned repository. 42 U.S.C. § 10134. However, the Nuclear Regulatory Commission ("NRC") has responsibility to license the repositories. 42 U.S.C. § 10134(d). Under its licensure powers, the NRC regulates the construction of the repositories, licenses the receipt and possession of high level radioactive waste at the repositories, and authorizes the closure and decommissioning of repositories. See 42 U.S.C. § 10141(b).

The EPA also has a major regulatory role. The Act provides that EPA,

pursuant to authority under other provisions of law, shall, by rule, promulgate generally applicable standards for protection of the general environment from offsite releases from radioactive material in repositories.

42 U.S.C. § 10141(a) (emphasis added). The language, "pursuant to authority under other provisions of law," refers to the EPA's responsibility and authority under the Atomic Energy Act of 1954, 42 U.S.C. § 2201(b). The Reorganization Plan No. 3 of 1970 (which was the vehicle used by the executive branch to organize the newly formed Environmental Protection Agency), transferred to the EPA certain functions of the Atomic Energy Commission

to the extent that such functions of the Commission consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material.

Reorganization Plan No. 3 of 1970, 3 C.F.R. § 1072 (1966-70 compilation).

It is these generally applicable HLW environmental standards, recently promulgated by the EPA pursuant to the directive of the NWPA, which we are now called upon to review. DOE must follow these standards when siting, designing, constructing and operating the repositories. See 10 C.F.R. Part 960 (1987). The NRC must likewise obey them when licensing the repositories. See 10 C.F.R. Part 60 (1987). EPA's standards will also apply to defense-related DOE facilities (not licensed by the NRC) which store and dispose of defense-related waste.

II. THE HIGH LEVEL WASTE ENVIRONMENTAL STANDARDS

The HLW environmental standards have two parts. Subpart A, 40 C.F.R. § 191.01-.05 (1986), entitled "Environmental Standards for Management and Storage," sets individual exposure limits from radiation releases during the management, interim storage, and preparation for disposal of the radioactive wastes. Subpart A requires that the management and storage of HLW during this phase be conducted in such a manner as to provide reasonable assurances that the total annual exposure to any individual member of the public shall not

exceed a stated limit (25 millirems to the whole body, 75 millirems to the thyroid, and 25 millirems to any other critical organ), 40 C.F.R. § 191.03. Subpart A also allows the EPA to issue alternative standards for waste management and storage operations at DOE disposal facilities that are not regulated by the NRC (i.e., DOE defense-related facilities), 40 C.F.R. § 191.04.

Subpart B, 40 C.F.R. § 191.11-.18 (1986), entitled "Environmental Standards for Disposal," is intended to ensure long-term protection of public health and the environment from releases of radiation after the HLW has been stored in the chosen manner. Although this subpart was developed having in mind storage at underground repositories, the standards are said to apply also to any other disposal method that may be chosen.¹

Subpart B comprises four different types of environmental standards. The first type is the general containment requirements, 40 C.F.R. § 191.13. These require that nuclear waste disposal systems be designed to provide a reasonable expectation, based on performance assessment, that the cumulative releases of radiation to anywhere in the

1. The HLW environmental standards do not apply to disposal in or below the ocean since ocean disposal is prohibited by the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1414 (1982). Also, the environmental standards do not apply to radioactive wastes that have already been disposed of. See 50 Fed. Reg. 38,070, col. 3.

"accessible environment," for 10,000 years after disposal, shall not exceed certain designated levels.²

The term "accessible environment" is defined as the atmosphere; land surfaces; surface waters; oceans; and all of the "lithosphere" that is beyond the "controlled area." 40 C.F.R. § 191.12(k). The "lithosphere," as defined, includes the entire solid part of the earth below the surface, including any ground water contained within it. 40 C.F.R. § 191.12(j). The "controlled area" is the surface and underground area (and any ground water found therein) immediately surrounding the repository "that encompasses no more than 100 square kilometers and extends horizontally no more than 5 kilometers in any direction" from the disposed waste. 40 C.F.R. § 191.12(g).

These definitions taken together show that the general containment requirements limit the total, cumulative releases of radiation, for 10,000 years, anywhere in the environment, outside the controlled area. Within the controlled area itself, the general containment requirements

2. Because of inherent uncertainties over the long time period in question, the general containment requirements do not require complete assurance that the release limits will be met. The performance assessments must show that the disposal system will have "a likelihood of less than one chance in 10 of exceeding" the set limits and that the disposal system will have "a likelihood of less than one chance in 1,000 of exceeding ten times" the set limits. 40 C.F.R. § 191.13.

are inapplicable and, therefore, they place no limits on radiation releases.

An example of how the general release limits apply is found in the limits for uranium. The repositories must be designed to give reasonable assurance that for the radionuclide uranium (and all its isotopes) the total radiation release, over a 10,000-year period, to the entire accessible environment (including any ground water) must be less than 100 curies (per 1,000 metric tons of heavy metal waste disposed of).³ Similar limits are established for other radionuclides, e.g., Americium-241, -243; Plutonium-238, -239, -240, -242. See Table of Release Limits for Containment Requirements, 40 C.F.R. Part 191, Appendix A (1986).

According to the EPA, the above general containment requirements constitute the principal protection mechanism of the HLW environmental standards. If cumulative releases are within these levels, overall adverse health effects upon the general population will be low. The EPA estimates that the general containment requirements limit population risks from the disposal of these wastes to "no more than the midpoint of the range of estimated risks that future generations would have been exposed to if the uranium ore used to create the

3. A curie is the unit rate of radioactive decay; the quantity of any radionuclide which undergoes 3.7×10^{10} disintegrations per second.

wastes had never been mined." 50 Fed. Reg. 38,072, col. 1 (Sept. 19, 1985).

The second type of environmental standard found in Subpart B is the assurance requirements, 40 C.F.R. § 191.14. These are a kind of practical backup to the cumulative release requirements just mentioned.

The assurance requirements provide, among other things, that "active institutional controls" over disposal sites be maintained for as long a period of time as is practicable after disposal. 40 C.F.R. § 191.14(a). (Active institutional controls include actions like controlling public access to a site, performing maintenance operations and cleaning up releases.) Other facets of the assurance requirements are as follows: that disposal arrangements be monitored in the future to detect deviations from expected performance, 40 C.F.R. § 191.14(b); that there be permanent markers, records and archives (so-called "passive institutional controls") to indicate to future generations the presence and location of the dangerous waste, 40 C.F.R. § 191.14(c); that disposal systems not rely on just one type of barrier to isolate waste, but rather employ both engineered and natural barriers, 40 C.F.R. § 191.14(d); that repository sites be selected that avoid areas where it is reasonable to expect future exploration for scarce or easily accessible resources, 40 C.F.R. § 191.14(e); that disposal systems be

such that, for a reasonable time after disposal, most of the radioactive waste can be removed, 40 C.F.R. § 191.14(f).

The assurance requirements are applicable only to disposal facilities that are not regulated by the NRC (i.e., certain DOE national defense-related facilities) because in its comments on the originally proposed rule, the NRC objected to inclusion of the assurance requirements, arguing that they transcended the EPA's authority to set generally applicable environmental standards. The NRC felt that the assurance requirements were not environmental standards at all but rather were simply ways of ensuring compliance with environmental standards. Since it is the NRC's responsibility to make sure that the repositories comply with the different regulations, the NRC saw the EPA's assurance requirements as an intrusion upon the NRC's jurisdiction. The agencies ultimately resolved the dispute by (1) making the EPA's assurance requirements applicable only to facilities not licensed by the NRC, and (2) by having the NRC modify its regulations where necessary to incorporate the essence of the EPA's assurance requirements. See 50 Fed. Reg. 38,072, col. 3.

When the EPA published a first draft of its standards, Subpart B only included the two standards so far described (general containment requirements and assurance requirements). See Proposed Rule, 40 C.F.R. Part 191, 47 Fed. Reg. 58,196 (Dec. 29, 1982). The EPA at first believed that

these two proposed standards -- aimed to keep the total radiation release over a 10,000-year period below specified safe limits -- would suffice. Later, however, it was persuaded to add so-called individual protection requirements, to deal with the possibility that radioactivity might be concentrated in specific areas. Release limits designed to protect individuals were thought necessary because, while overall releases to the environment as a whole would be within tolerable limits, particular individuals might end up being exposed to excessively large doses of radiation: for example, radiation from waste eventually released into, and concentrated in, ground water that is in the immediate vicinity of a repository. The EPA explained that

Since ground water generally provides relatively little dilution, anyone using such contaminated ground water in the future may receive a substantial radiation exposure (e.g., several rems per year or more). This possibility is inherent in collecting a very large amount of radioactivity in a small area.

See 50 Fed. Reg. 38,077, col. 3. Therefore, after the notice and comment period, two additional provisions, the individual protection requirements, and the ground water protection requirements, were added to Subpart B of the final rule. These were mainly intended to protect individuals located near a repository who might be exposed to contamination emanating from the site.

The individual protection requirements, 40 C.F.R. § 191.15, require that disposal systems be designed to provide a reasonable expectation that, for 1,000 years after disposal, the annual radiation exposure to any member of the public in the accessible environment shall not exceed 25 millirems to the whole body or 75 millirems to any organ. The standard requires that in assessing the anticipated performance of a repository, all potential so-called "pathways" of radiation releases from the repository must be considered. The term "potential pathway" represents the expected scenario of how the released radioactivity will travel from the repository to the accessible environment and ultimately to individuals. There are various possible pathways which could result in exposures to individuals. These possible pathways include, for example, direct releases via seepage to the land surface and then to food crops ingested by man; or similar releases travelling to a river or to an ocean and then to fish which man would ingest; or releases to ground water that is used for drinking. See Background Information Document for Final Rule at Chapter 7.

As discussed above, the Agency was concerned about individual exposures especially because of the possibility that radiation might be released to and become concentrated in ground water, some of which might permeate even the rock surrounding a repository and might find its way, in time, to

supplies of ground water beyond the site. Since ground water contaminated by seepage from the site might be used for drinking water, the individual protection requirements expressly require that in determining whether a repository will comply with the annual exposure limits, the assessments must assume that individuals consume all their drinking water (two liters per day) from any "significant source" of ground water⁴ outside of the controlled area. This express requirement places an indirect limit on releases to ground water outside of the controlled area (the "controlled area" being, as already described, the area occupied by the repository and a specified surface and below-ground area surrounding the repository, see definition supra).

The fourth section of Subpart B is the special source ground water protection requirements, 40 C.F.R. § 191.16. The term "ground water protection requirements" is somewhat misleading. The provision does not protect ground water generally but only ground water of a very special type within or very near "controlled areas." Thus these requirements apply only to Class I ground waters, as defined by the

4. A "significant source" of ground water is defined in the standard so as to identify an underground water source of sufficient quantity and quality that it would be able to supply a community water system (as that term is used in the regulations pertaining to the Safe Drinking Water Act). See 40 C.F.R. § 191.12(n).

EPA's Ground-Water Protection Strategy,⁵ that also meet the following three conditions:

(1) They are within the controlled area or near (less than five kilometers beyond) the controlled area; (2) they are supplying drinking water for thousands of persons as of the date that the Department [of Energy] selects the site for extensive exploration as a potential location of a disposal system; and (3) they are irreplaceable in that no reasonable alternative source of drinking water is available to that population.

See 40 C.F.R. § 191.12(n).

The radiation concentration limits set by this rule are similar to the maximum radiation concentration limits established under the Safe Drinking Water Act, 42 U.S.C. §§ 300f-j, for community water systems. See 40 C.F.R. Part 141. As with the individual protection requirements, the ground water protection requirements will apply only for the first 1,000 years after disposal.

5. The Ground-Water Protection Strategy (published in August 1984) is, in effect, an in depth policy statement which is designed to help provide consistency and coordination among the many EPA programs that relate either directly or indirectly to ground water quality. As such, it was not adopted through rulemaking, but rather is intended to be implemented through the various EPA regulatory programs that involve ground water.

Class I ground waters⁶ are defined as ground waters that are highly vulnerable to contamination because of local hydrological characteristics and that are also either irreplaceable (i.e., there is no reasonable alternative source of drinking water) or vital to a particularly sensitive ecological system. Environmental Protection Agency, Ground-Water Protection Strategy at 5-6 (August 1984).

The ground water protection requirements thus apply to an extremely narrow category of ground water found within, or within five kilometers of, the repository site. The Agency explained that the ground water protection requirements provision is necessary and adequate to avoid any significant degradation of this important ground water resource. See 50 Fed. Reg. 38,074 (Sept. 19, 1985). The practical effect of these requirements seems less to provide ongoing regulation than simply to deter the choosing of a site containing ground water of this especially valuable kind upon which "thousands of persons" already depend. If this were the real purpose, however, the EPA did not say so in so many words.

6. Class II ground waters are defined as all other ground water that is currently used or potentially available for drinking water or other beneficial use. See Ground-Water Protection Strategy at 6. This class comprises most of the usable ground water in the United States. Id. at 45. Class III ground waters are ground water supplies that are not considered as potential sources of drinking water because of heavy salinity or other contamination. Id. at 6.

III. OUR STANDARD OF REVIEW

In reviewing the above described standards,⁷ which were promulgated pursuant to notice and comment rulemaking, see 5 U.S.C. § 553(c) (1982), we must make sure that the Agency followed proper procedures in developing the final standards and that the Agency acted within its statutory authority. South Terminal Corp. v. EPA, 504 F.2d 646, 655 (1st Cir. 1974). If so, we will invalidate the standards only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1982). In reviewing administrative actions, courts will look to see whether the agency has adequately explained the facts and policies upon which it relied. BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 652 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980); National Nutritional Foods Association v. Weinberger, 512 F.2d 688, 701 (2d Cir.) (agency obliged to publish statement of reasons for conclusions that will be sufficiently detailed to permit judicial review), cert. denied, 432 U.S. 827 (1975). Reviewing courts also require that the facts relied upon have some supporting basis

7. Our jurisdiction over this petition is conferred by 42 U.S.C. § 2239(b) (1982), which authorizes judicial review of final orders under the Atomic Energy Act. See Quivira Mining Co. v. United States, 728 F.2d 477 (10th Cir. 1984) (judicial review provision applies to final orders of EPA promulgated pursuant to EPA's authority under Atomic Energy Act and Reorganization Plan No. 3 of 1970).

in the administrative record. BASF Wyandotte Corp., 598 F.2d at 652. If these requirements are satisfied, we will not substitute our judgment for that of the agency. Objections to the merits of the standards are outside our province unless it is shown that the agency's decision was not based on relevant factors or was a clear error of judgment. South Terminal Corp., 504 F.2d at 655. We will delve into the soundness of the agency's reasoning only to ascertain that the conclusions reached are rationally supported. Id. at 655 n.5.

In their challenge to the HLW standards, petitioners raise numerous and varied objections. The Natural Resources Defense Council ("NRDC"), among others, charges that the individual and ground water protection requirements are not in accordance with law since the EPA has violated a duty under the Safe Drinking Water Act to prevent the endangerment of drinking water by underground injection.

The state of Texas claims that in enacting the ground water protection requirements, the EPA has failed to provide legally adequate notice and comment procedures. In addition to these two broad attacks on the standards, all the petitioners raise numerous other claims. They contend, inter alia, that certain aspects of the standards are either irrational or arbitrary; are not supported in the record; or are not adequately explained by the agency. Because of the nature and complexity of these standards, many of these

complaints are interrelated and overlap. We shall now consider the various claims, turning first to the contention that EPA has violated the Safe Drinking Water Act.

IV. DO EPA'S REGULATIONS VIOLATE THE SAFE DRINKING WATER ACT?

Part C of the Safe Drinking Water Act, 42 U.S.C. § 300h (1982) ("SDWA"), indicates that the EPA has a duty to assure that underground sources of drinking water will not be endangered by any underground injection. Petitioners argue here that endangerment of such drinking water is bound to result if HLW is disposed of, underground, under standards no more stringent than the EPA's current HLW regulations. Since violations of the SDWA are inevitable, so petitioners argue, the present regulations are "not in accordance with law" and hence invalid.

To understand this argument we must first look at the SDWA, an Act which preceded the NHPA. The SDWA was enacted in 1974 to assure safe drinking water supplies, protect especially valuable aquifers,⁸ and protect drinking water from contamination by the underground injection of waste. The SDWA required the EPA to promulgate standards to protect public health, by setting either (1) maximum contaminant

8. An aquifer is an underground geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring. See 40 C.F.R. § 146.3 (1986).

levels for pollutants in a public water supply, or (2) a treatment technique to reduce the pollutants to an acceptable level if the maximum contaminant level is not economically or technologically attainable. Maximum contaminant levels are to be established at a level having no known or adverse human health effect, with an adequate margin for safety. 42 U.S.C. § 300g-1(b)(1)(B). The EPA has established maximum contaminant levels for man-made radionuclides, see 40 C.F.R. § 141.16, as well as a maximum contaminant level for naturally occurring radium, see 40 C.F.R. § 141.15.

These standards apply to "public water systems" which regularly supply water to 15 or more connections or to 25 or more individuals at least 60 days per year. 42 U.S.C. § 300f(4); 40 C.F.R. § 141.1(e). The public water system has the responsibility to make sure the water it supplies meets these limits. In effect, the community water system must either clean up existing water if below standard, or find a new water supply which meets the maximum contaminant levels. The EPA is given certain powers to enforce its standards. 42 U.S.C. § 300g-3(b).

The SDWA also authorizes EPA to designate, on its own initiative or upon petition, an area as having an aquifer which is the sole source of the area's water supply and which would create a significant hazard to public health if contaminated. Once an area is so designated, no federal

assistance may be provided for any project in the area which EPA determines may contaminate the aquifer. See 42 U.S.C. § 300h-3(e).

The SDWA's only provision for directly regulating pollution-causing activities is found in Part C, 42 U.S.C. § 300h. There Congress sought to protect underground sources of drinking water from what are termed "underground injections." Underground injection is the subsurface emplacement of contaminating fluids⁹ by well injection. 42 U.S.C. § 300h(d)(1). Part C requires the EPA to promulgate regulations governing underground injection control programs.

The EPA is directed to publish a list of each state for which an underground injection control program would be necessary to assure that underground injection would not endanger drinking water sources. 42 U.S.C. § 300h-1(a). The EPA has listed all states as needing underground injection control programs. 40 C.F.R. § 144.1(e).

The EPA is also required to promulgate regulations governing state underground injection control programs to ensure that the state programs prevent underground injection which could endanger drinking water sources. 42 U.S.C. § 300h(a)(1), (b)(1). If a state program does not comply

9. EPA's regulations define "fluid" as "any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state." 40 C.F.R. § 144.3.

with the EPA's regulations, the EPA itself is to promulgate a regulatory program for that state and enforce compliance 42 U.S.C. § 300h-1(c). To be approved by EPA, a state control program has to meet certain standards. It must prevent underground injection unless authorized by permit or rule; it may authorize underground injection only where it is demonstrated that the injection will not endanger drinking water sources; and it shall include inspection, monitoring, recordkeeping and reporting requirements. 42 U.S.C. § 300h(b)(1)(A)-(C). State regulatory programs (as well as any EPA regulations for non-complying states) apply to underground injections by federal agencies as well as all others. 42 U.S.C. § 300h(b)(1)(D).

In requiring EPA to regulate state underground injection control programs, Congress restrained the EPA's authority in several ways in order to accommodate existing state programs and avoid disrupting oil and gas production. EPA's regulations may not interfere with or impede the production or recovery of oil or natural gas, unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection. 42 U.S.C. § 300h(b)(2). EPA's regulations are to reflect the variations in geologic, hydrological or historical conditions between the states. 42 U.S.C. § 300h(b)(3)(A). To the extent feasible, EPA is not to promulgate rules which unnecessarily

disrupt state underground injection control programs that were earlier in effect. 42 U.S.C. § 300h(b)(3)(B). Congress made it clear, however, that, despite the deference the EPA was to afford the states, the goal of protecting underground drinking water was to be preeminent. The SDWA states,

Nothing in this section shall be construed to alter or affect the duty to assure that underground sources of drinking water will not be endangered by any underground injection.

42 U.S.C. § 300h(b)(3)(C). This language in particular, petitioners say, establishes that the EPA has an overriding statutory mandate, unaffected by the NHPA, to protect underground drinking water against endangerment.

The SDWA defines what is meant by the term "endanger":

Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

42 U.S.C. § 300h(d)(2).

Petitioners assert that the EPA, in promulgating the HLW standards, has violated this so-called "no endangerment mandate" because its rules will allow underground

injections that result in radiation contamination of underground drinking water supplies.

Analysis of petitioners' argument requires us to address several questions: (1) whether storage of HLW in underground repositories will constitute an "underground injection" as that term is used in the SDWA; (2) whether the EPA's HLW standards sanction activities that will "endanger drinking water," as that phrase is used in the SDWA; and (3) whether, if the two previous questions are answered in the affirmative, EPA's HLW regulations are contrary to law or, if not, are nonetheless arbitrary and capricious. We shall deal with each of these questions in turn.

(1) Does Storage Of HLW In Underground Repositories
Constitute Underground Injection?

What petitioners call the no endangerment provision of the SDWA, 42 U.S.C. § 300h(3)(c), indicates that the EPA has a duty "to assure that underground sources of drinking water will not be endangered by any underground injection." For the Agency to have violated that duty by adopting the present HLW regulations, it is necessary that the proposed placing of HLW in underground repositories constitute an "underground injection." The SDWA defines underground injection as the "subsurface emplacement of fluids by well injection." 42 U.S.C. § 300h(d)(1) (emphasis added). The

EPA, in its regulations enacted pursuant to the SDWA, has defined the terms "fluids" and "well injection."

Well injection is the "subsurface emplacement of fluids through a bored, drilled or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension." 40 C.F.R. § 146.3.

The Department of Energy, in its Mission Plan, has described how the HLW will be disposed of underground. The HLW will be removed from transportation casks, packaged and then transferred underground through the waste-handling shaft. "Once underground, the wastes will be emplaced in boreholes" Mission Plan at 33. Thus it seems that waste will be "emplaced underground through a bored, drilled or driven shaft."

The EPA has defined the term "fluids" broadly as including a "material or substance which flows or moves whether in a semi-solid, liquid, sludge, gas or any other form or state." 40 C.F.R. § 146.3. This definition was taken directly from the legislative history which made it clear that "[t]he definition of 'underground injection' is intended to be broad enough to cover any contaminant which may be put below ground level and which flows or moves, whether the contaminant is in semi-solid, liquid, sludge, or any other form or state." H.R. Rep. No. 1185, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6454, 6483. The definition of

high level waste in the NWPA shows that at least some of the waste material to be disposed of originates in a liquid form.

The term "high-level radioactive waste" means--

(A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations

42 U.S.C. § 10101(i2). According to the EPA, the waste to be stored underground will be converted, before storage underground, into a solid. See Background Information Document at 3-4. This does not mean that the contemplated waste disposal system is not an underground injection, since the definition of fluids (following the directive in the legislative history, see supra) is very broad and includes waste "in any other form or state" if it flows or moves. 40 C.F.R. § 146.3. The dangerous component of this waste, i.e., the radiation, regardless of whatever "form or state" it is emitted from, will flow or move, thus having the capacity to do harm to drinking water sources far distant from the original site as more conventional injected fluids would do. The HLW waste rules "apply to radionuclides that are projected to move into the 'accessible environment' during the first 10,000 years." See Preamble, 50 Fed. Reg. 38,071, col. 2. The definition of "barrier" in the regulations includes a structure which prevents or substantially "delays movement"

of water or radionuclides toward the accessible environment.
40 C.F.R. § 191.12(d).

The Arizona Nuclear Power Project, et al., intervenors in this case, argue that disposal of this radioactive waste underground is not the "type" of underground disposal that Congress was concerned with when it enacted Part C of the SDWA. Intervenor claim that the type of underground injection which disturbed Congress was a method whereby contaminants were injected into the subsurface and allowed to disperse freely into the general environment. Intervenor assert that the type of disposal contemplated by the HLW rules is different because the waste will be packaged in containers, and will be surrounded by barriers that are designed to isolate this waste from the environment. Thus, they conclude, Part C does not apply to this disposal system.

While Congress may have been especially concerned with a different type of underground disposal when it passed Part C of the SDWA, this does not negate its overall intent to protect future supplies of drinking water against contamination. Unusable ground water is unusable ground water no matter whether the original source of the pollution arrived in a loose, free form manner, or in containers injected into the ground. We find no language in the SDWA showing that Congress meant to regulate only certain forms of underground pollution, while overlooking other forms of contamination of

ground water via underground injection. Indeed, the legislative history indicates that the phrase "underground injection which endangers drinking water sources" was to have the broadest applicability:

It is the Committee's intent that the definition be liberally construed so as to effectuate the preventative and public health protective purposes of the bill. The Committee seeks to protect not only currently-used sources of drinking water, but also potential drinking water sources for the future. . . .

The Committee was concerned that its definition of "endangering drinking water sources" also be construed liberally. Injection which causes or increases contamination of such sources may fall within this definition even if the amount of contaminant which may enter the water source would not by itself cause the maximum allowable levels to be exceeded. The definition would be met if injected material were not completely contained in the well, and if it may enter either a present or potential drinking water source, and if it (or some form into which it might be converted) may pose a threat to human health or render the water source unfit for human consumption.

H.R. Rep. No. 1185, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News at 6484.

We believe that the narrow and constrained reading of Part C of the SDWA advocated by intervenors would do violence to the intent of Congress. We decline that reading.

We conclude that the primary disposal method being considered, underground repositories, would likely constitute an "underground injection" under the SDWA.

(2) Do The Regulations Under Review Sanction Activities That Will "Endanger Drinking Water"?

Part C of the SDWA, 42 U.S.C. § 300h(3)(c), speaks of the EPA's duty "to assure that underground sources of drinking water will not be endangered by any underground injection." (Emphasis supplied.) Assuming, as discussed above, that the planned disposal of HLW in underground repositories amounts to "underground injection," will such injection, if carried out under the EPA's current HLW standards, "endanger" underground sources of drinking water? We believe the answer is "yes."

As noted, the term "endanger" is defined in the SDWA to include any injection which may result in the presence "in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant . . . if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation." 42 U.S.C. § 300h(d)(2). Measured against this definition, the HLW standards permit contamination of most categories of underground water within the so-called controlled area without restriction of any type. More fundamentally, they permit water supplies outside the

controlled area to be contaminated by radiation up to individual exposure levels that exceed the levels allowed in national primary drinking water regulations. It follows that the HLW regulations under review not only do not "assure" the non-endangerment of underground sources of drinking water, but sanction disposal facilities allowing certain levels of endangerment as that term is used in the SDWA. We shall now discuss our conclusions in greater detail.

A. Endangerment In Controlled Area

The two major components of the HLW rules, the general containment requirements and the individual protection requirements, supra, set limits on radiation releases to every part of the earth, including ground water, beyond the area under direct control of those in charge of disposing of this waste (referred to as the controlled area). These requirements have various release limits (depending on which rule is involved, i.e., the limits of the general containment requirements are of a different type from those of the individual protection requirements) which apply outside the controlled area, but neither sets limits on contamination of ground water within the controlled area. A further component, the special source ground water protection requirements, sets limits on releases to certain ground water supplies found within the controlled area, or within five kilometers of the

controlled area. However, this rule applies to only a very special class of ground water.

Thus, while the ground water outside the controlled area is covered by both the general containment requirements and the individual protection requirements (the sufficiency of which we shall later address), there is essentially no protection of ground water within the controlled area (other than the specific ground water rule, infra, with its highly limited applicability). This is because the general containment and individual protection requirements apply only to releases to the accessible environment. The accessible environment is defined as "(1) the atmosphere; (2) land surfaces; (3) surface waters; (4) oceans; and (5) all of the lithosphere that is beyond the controlled area." 40 C.F.R. § 191.12(k). Lithosphere is defined as the solid part of the earth below the surface, including any ground water contained within it. 40 C.F.R. § 191.12(j). Controlled area is defined as: (1) A surface location, to be identified by passive institutional controls, that encompasses no more than 100 square kilometers and extends horizontally no more than five kilometers in any direction from the outer boundary of the original location of the radioactive wastes in a disposal system; and (2) the subsurface underlying such a surface location. 40 C.F.R. § 191.12(g).

Thus the two broadly applicable rules (general containment and the individual protection requirements) set some limits on radiation releases to every part of the earth, including the ground water, except within the controlled area, i.e., the part of the earth immediately surrounding the repository. This means that any ground water found within the controlled area (except the special water protected under the ground water protection requirements) may be contaminated without limit. The administrator has explained that the definition of "accessible environment,"

was intended to reflect the concept that the geologic media surrounding a mined repository are part of the long-term containment system, with disposal sites being selected so that the surrounding media prevent or retard transport of radionuclides through ground water. Such surrounding media would be dedicated for this purpose, with the intention to prohibit incompatible activities (either those that might disrupt the disposal system or those that could cause significant radiation exposures) in perpetuity. Applying standards to the ground water contained within these geologic media surrounding a repository would ignore the role of this natural barrier, and it could reduce the incentive to search for sites with characteristics that would enhance long-term containment of these wastes.

50 Fed. Reg. 38,077, col. 1. The administrator further explained that the accessible environment

does not include the lithosphere (and the ground water within it) that is below the "controlled area" surrounding a disposal system. The standards are formulated this way because the properties of the geologic media around a mined repository are expected to provide much of the disposal system's capability to isolate these wastes over these long time periods. Thus, a certain area of the natural environment is envisioned to be dedicated to keeping these dangerous materials away from future generations and may not be suitable for certain other uses.

50 Fed. Reg. 38,071, col. 2. Hence the regulations under review deliberately expose the ground water in the controlled area to contamination in the belief that the controlled area may appropriately be used in this manner to keep the dangerous high level wastes "away from future generations." There can be little doubt, therefore, that the current HLW standard allows "endangerment," as the term is used in the SDWA, of most kinds of drinking water sources in the controlled area. However, as we later discuss, the EPA's choice to sacrifice the purity of water at repository sites as part of the control strategy was impliedly sanctioned by Congress when, subsequent to passage of the SDWA, it enacted the Nuclear Waste Policy Act. We accordingly find no illegality. (Our conclusion in this regard is discussed in a later part of this opinion.)

While unlimited "endangerment" of most waters is thus allowed (albeit permissibly) within the controlled area, there is within the controlled area one special category of

ground water which, as we have seen, receives special protection. The special source ground water protection requirements afford protection to Class I ground water of certain types in and close to (within five kilometers of) the controlled area. The ground water requirements limit the radionuclide concentrations in these Class I waters for 1,000 years to no more than concentration limits similar to those established for community water systems under the SDWA. That is, this standard sets limits that are compatible with the maximum contaminant level for man-made radiation set under the SDWA. Thus, when applicable, the special source ground water protection requirements comply with the no endangerment policy expressed in Part C of the SDWA since they exactly parallel the limits set by the EPA under the SDWA. However, the ground water protection requirements apply only to so-called "Class I" ground water (as defined in the EPA's Ground-Water Protection Strategy published in August 1984). In addition, they apply only to those "Class I" waters which also meet the following conditions:

- (1) They are within the controlled area or near (less than five kilometers beyond) the controlled area;
- (2) they are supplying drinking water for thousands of persons as of the date that the Department [of Energy] selects the site for extensive exploration as a potential location of a disposal system; and
- (3) they are irreplaceable in that no reasonable alternative source of drinking water is available to that population.

Clearly, the applicability of the special source ground water protection requirements is very much restricted. Petitioners, indeed, make much of this. They assert that this rule violates the SDWA's no endangerment policy since it protects so limited a class of water within so small an area, omitting the great bulk of the nation's usable ground water.

But while petitioners are doubtless right concerning the narrow scope of this provision, their criticism fails to take account of the EPA's strategy of dedicating the geologic media within the controlled area (including any ground water found within such geologic media) to serve as a part of the containment mechanism. The EPA obviously intended the special source ground water rule to provide protection only to a small category of ground water deemed to be so valuable that it should not be used for containment purposes. As the Agency assumed that ground water within the controlled area will be part of the containment mechanism, and that therefore a direct limit on releases to ground water within the controlled area is an exception to the general approach, it is understandable that any ground water requirements within the controlled area would have a very limited applicability.

These ground water requirements will likely serve more as a deterrent to siting repositories at places containing valuable ground water resources of this description than as

a protective mechanism at actual repositories (where the special ground water covered by the ground water rule is unlikely to be present). Moreover, the ground water requirements have no effect more than five kilometers beyond the controlled area. It follows that there will likely be no protection to ground water within an actual controlled area site.

B. Endangerment Beyond Controlled Area

We turn next to the larger issue of whether the HLW regulations permit "endangerment" as defined in the SDWA of underground drinking water sources beyond the controlled areas. As just discussed, the special source ground water requirements do not apply at all outside the repository site and five kilometers beyond. The individual protection requirements, however, while not a ground water rule as such, give a considerable measure of protection to ground water outside the controlled area.¹⁰

The individual protection requirements are designed

10. The general containment requirements also theoretically provide some protection of ground water because these limits apply to releases anywhere in the accessible environment, including ground water beyond the controlled area. However, the connection between the general containment requirements and the no endangerment policy is an attenuated one, at best. The general containment requirements are designed to reduce overall population risks by setting cumulative release limits over the full 10,000-year period, while the maximum contaminant levels of the SDWA are designed to protect individuals against harm from drinking water. It would be impracticable to force the EPA to harmonize these two regulatory schemes that address wholly separate goals using standards which do not lend themselves to comparison.

to protect individuals in the vicinity of a disposal system by setting annual individual exposure limits effective for 1,000 years. (This contrasts with the general containment release limits which are designed to reduce risks to the general population through standards which limit the cumulative release of radiation for 10,000 years anywhere in the accessible environment.) The Agency added the individual protection requirements because, although it felt that the general containment requirements would ensure that the overall population risks to future generations would be acceptably small, it also felt that individuals near the repositories might receive substantially greater exposure to radiation than the average person. While overall releases from a repository could be within the total cumulative release limits of the general containment requirements, there might be nearby localities where the radiation would be concentrated, and thus pose a substantial risk to some individuals. As the Agency explained in the preamble to the HLW rules:

Even with good engineering controls, some waste may eventually (i.e., several hundreds or thousands of years after disposal) be released into any ground water that might be in the immediate vicinity of a geologic repository. Since ground water generally provides relatively little dilution, anyone using such contaminated ground water in the future may receive a substantial radiation exposure (e.g., several rems per year or more). This possibility is inherent in collecting a very large amount of radioactivity in a small area.

50 Fed. Reg. 38,077, col. 3. To avoid this problem the Agency added the individual protection requirements.

The individual protection requirements limit the annual exposure from the disposal system to any individual member of the public for the first 1,000 years to no more than 25 millirems to the whole body, or 75 millirems to any organ. This limit applies outside the controlled area. Inherent in the individual protection requirements is an indirect protection of ground water because in assessing compliance with this requirement, all potential pathways of radiation from the repository to individuals must be considered, and the assumption must be made that an individual drinks two liters per day from any significant source of ground water outside the controlled area. A significant source of ground water is defined as any aquifer currently providing the primary source of water for a community water system, or any aquifers that satisfy five technical criteria. These criteria, according to the EPA, identify underground water formations that could meet the needs of community water systems in the future. See 50 Fed. Reg. 38,078, col. 3.

While the individual protection requirements thus provide a level of protection, they also tolerate levels of contamination of drinking water sources well in excess of primary drinking water standards established by EPA under the SDWA, thus permitting "endangerment" of such sources as

defined in the SDWA. Pursuant to the SDWA, the EPA has established the maximum contaminant level for man-made radionuclides in drinking water. 42 U.S.C. § 300g-1. Accordingly, "drinking water shall not produce an annual dose equivalent to the total body or any internal organ greater than 4 millirem/year." 40 C.F.R. § 141.16(a). With the exception of two specific radionuclides (Tritium and Strontium-90), the concentration of man-made radionuclides causing 4 millirems total body (or organ dose equivalents) is to be calculated on the basis of assuming that the individual will consume two liters of drinking water per day. 40 C.F.R. § 141.16(b).

As set out, supra, drinking water supplies are to be considered endangered under the SDWA if the underground injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation." 42 U.S.C. § 300h(d)(2) (emphasis supplied). Since the maximum contaminant level of four millirems was promulgated as a national primary drinking water regulation under the SDWA, and since the individual protection requirements (promulgated under the NWPA) allow an individual dose of 25 millirems, it follows that the individual protection requirements allow HLW

to be disposed of under circumstances that, in time, may result in endangering underground sources of drinking water.

It can be argued that the individual protection requirements do not necessarily endanger ground water resources because the allowable exposure (25 millirems) might result through a pathway that does not include contamination of ground water supplies. There are several possible pathways that the EPA considers when assessing individual exposure. These possible pathways include direct releases to the land surface, releases through a river, releases to an ocean (then to ocean fish which man would ingest). See Background Information Document at Chapter 7. It is conceivable that an individual could receive only 2 millirem/year from underground drinking water sources and the remaining 23 millirems from a different pathway. This, theoretically, would not result in ground water contamination in violation of the no endangerment mandate, i.e., ground water would still be under four millirems. However, this scenario is highly unlikely.

In the preface to the HLW rules the EPA concedes that "the geological and geochemical characteristics of appropriate sites tend to concentrate eventual releases of wastes in any ground water that is close to the site." Preamble, 50 Fed. Reg. 38,078. Moreover, the Agency admitted that even with very good engineered controls, radiation may

eventually be released in ground water in the immediate vicinity of a repository. 50 Fed. Reg. 38,077, col. 2. The Agency states that "anyone using such contaminated ground water in the future may receive a substantial radiation exposure (e.g., several rems per year or more)." 50 Fed. Reg. 38,077, col. 3 (emphasis supplied). Since a rem is equal to 1,000 millirems (a millirem equals one thousandth of a rem), a possible exposure level of several rems per year will equate to several thousand millirems. In view of the EPA's own references to substantial exposure through sources of drinking water, it seems clear that a large proportion of the allowable 25 millirems would reach the individual through the drinking water pathway. We note in this regard that the definition of endangerment, found in the SDWA, see 42 U.S.C. § 300h(d)(2), does not require actual violations of primary drinking water standards but rather merely that underground injection may result in contamination in excess of the maximum contamination levels set forth pursuant to the Safe Drinking Water Act.

Nor is a violation of the no endangerment provision prevented by EPA's assertion, in the preamble to these rules, that the individual protection requirement "in no way limits the future applicability of the Agency's drinking water standards (40 C.F.R. Part 141) -- which protect community water supply systems through institutional controls." 50 Fed.

Reg. 38,073, col. 2. Once HLW is placed in a repository, the situation may well be irreversible: there may be no feasible way, years later, to arrest ongoing contamination of surrounding water supplies. To be sure, if a community's water supply is contaminated above levels set in the SDWA, authorities may require that it be abandoned and a new source of supply used. But the EPA's duty under the SDWA is to ensure non-endangerment of underground sources of drinking water. 42 U.S.C. § 300h(b)(3)(C). This cannot be done after the fact.

The individual protection requirements may allow endangerment of drinking water supplies in another way. The individual protections apply for 1,000 years, as compared to the general containment requirements, which apply for 10,000 years. Thus, after 1,000 years, exposures to individuals near the repositories are not regulated (other than to the extent that the generally applicable 10,000 year cumulative release limits regulate any releases near the repositories). Apparently the rule allows for virtually unlimited degradation of underground water supplies near the control area after 1,000 years. Thus, after 1,000 years, the no endangerment provision would be violated. Whether this is a permissible deviation is discussed below. We mention it in this section merely as a further way that the current rules may be said to permit endangerment.

We conclude that the individual protection requirements will permit repositories to be built and used for the disposal of HLW which will, judged by the stricter standard of the SDWA, "endanger" drinking water supplies.

(3) Does Noncompliance With SDWA Make The Regulations Contrary To Law Or Arbitrary And Capricious?

We have determined in sections (1) and (2) above that the challenged HLW regulations pertain to underground injection, and that the standards they provide will allow underground sources of drinking water to be "endangered" within the meaning of the SDWA.

We must now ask whether the foregoing conclusions cause the current regulations to be contrary to law or arbitrary and capricious. The EPA asserts that the no endangerment provision of the SDWA applies to the EPA only in its role as administrator under the SDWA. In its different role as regulator of the disposal of high level waste under the NHPA, the Agency argues that it is free to adopt standards different from the ground water standards established under SDWA. EPA also makes other arguments supporting the proposition that the SDWA is irrelevant to our review of the HLW standards. See infra.

In analyzing the relation between the SDWA's no endangerment provision and the HLW standards, we divide our

discussion into two parts: (A) Non-compliance with the SDWA in the controlled area, and (B) Non-compliance outside the controlled area.

Briefly summarized, our conclusion in respect to (A) is that when enacting the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101-10226 (1982), Congress was aware that the area in immediate proximity to the buried HLW would likely be dedicated as a natural protective barrier, and hence could become contaminated. We read the NWPA as containing, by implication, authority for the EPA to depart from SDWA standards in any "controlled area." It follows that insofar as the regulations under review permit radiation contamination of ground water located within the controlled area itself, they are not contrary to law nor do we find them to be arbitrary and capricious.

In respect to (B) our conclusion is different. We find no evidence that Congress expected the HLW standards to permit underground sources of drinking water outside the controlled area to be degraded to levels beneath the standards EPA had established under the SDWA. At very least, such permitted degradation, without any accompanying explanation showing a clear need or justification for a different and lower standard than the SDWA prescribes, is arbitrary and capricious.

We now discuss these matters in detail.

(A) Non-compliance With The SDWA In The Controlled Area

As we have pointed out above, the only protection for ground water within the controlled area comes from the special source ground water requirements. These requirements, however, only apply to specially defined Class I ground waters supplying drinking water "for thousands of persons." It is quite likely that the ground water found in the controlled areas of actually selected repositories will not be of this type. Hence in the controlled area there will probably, as a practical matter, be no limits on the radioactive contamination of such ground water as is present. It follows that any ground water within the controlled area which is a source or potential source of drinking water will be subject to "endangerment" within the SDWA.

However, based on our reading of the Nuclear Waste Policy Act and its legislative history, we conclude that Congress did not expect that its prior no endangerment policy, as found in the SDWA, should be applied to ground water found within the controlled area, even assuming such water were a source or potential source of drinking water.

The NWPA sets out the requirements of the EPA's task. The administrator "pursuant to authority under other provisions of law, shall, by rule, promulgate generally

applicable standards for protection of the general environment from offsite releases from radioactive material in repositories." 42 U.S.C. § 10141(a). The EPA's duty applies to releases offsite. We read the statute as allowing onsite releases, or at least as acknowledging that some releases onsite are inevitable.

The EPA has explained that the ground water within the controlled area is necessarily part of the geologic mechanism that is going to be used to contain these wastes. This view has some support in the legislative history. That history, unfortunately, provides little discussion of the EPA's duties beyond merely reiterating that the administrator is to promulgate general standards for protection of the general environment. H.R. Rep. No. 491, 97th Cong., 2d Sess. 57, reprinted in 1982 U.S. Code Cong. & Admin. News 3792, 3823. However, in its discussion of the Department of Energy's responsibility in selecting a site for a repository, the legislative history reveals that Congress knew that some contamination of ground water in the immediate vicinity of the radioactive material was inevitable. The House Report describes the Secretary of Energy's responsibility to

develop guidelines to be used in selecting sites qualified to merit in-depth study as possible repository sites. The primary feature of the site specifically to be evaluated consists of a rock medium about 1,000 or more feet underground which will of itself provide one of the primary containments of the waste. Some surface or associated geologic features are also important concerns in site selection. The Secretary is required to specify in the guidelines factors which would qualify or disqualify a site from development as a repository, including proximity to natural resources or populations, hydrogeophysics, seismic activity and nuclear defense activities. The Secretary is required to give priority to sites in rock which tend to slow down transportation of radionuclides by water.

1982 U.S. Code Cong. & Admin. News at 3816. Since Congress told the Department of Energy to give "priority to sites in rock which tend to slow down transportation of radionuclides by water," it is clear that Congress knew of the inevitability of some contamination of ground water in the immediate area of the stored waste. Had Congress intended that there be no contamination of ground water in the immediate vicinity, it would have required that the DOE select rock formations that would stop the transportation of radionuclides by water, rather than merely giving priority to rock formations that slow down the spread of radionuclides by water.

Further support for the EPA's approach can be found in the EPA's duties under the Act. The EPA's responsibility is "pursuant to authority under other provisions of law."

42 U.S.C. § 10141(a). The other "provisions of law" that are referred to are found in the Reorganization Plan No. 3 of 1970, 3 C.F.R. § 1072 (1966-70 compilation), which was the method, within the executive branch, for organizing the newly created EPA in 1970. The reorganization plan transferred to the EPA the

functions of the Atomic Energy Commission under the Atomic Energy Act of 1954, as amended, administered through its Division of Radiation protection standards, to the extent that such functions of the Commission consist of establishing generally applicable standards for the protection of the general environment from radioactive material. As used herein, standards mean limits of radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material.

Reorganization Plan No. 3 of 1970, § 2(a)(6), 3 C.F.R. § 1073. See Quivira Mining Co. v. EPA, 728 F.2d 477 (10th Cir. 1984) (reorganization plan effectively transferred Atomic Energy Commission's authority to EPA).

This definition of the parameters of the general environment to be protected by EPA further supports the view that Congress intended that the EPA only regulate releases beyond the controlled site. Since Congress knew that some ground water contamination is unavoidable and since Congress also knew that the EPA was working under this definition of the general environment (i.e., "outside the boundaries of

locations under the control of persons possessing or using radioactive material"), it would be irrational and illogical to assume that Congress expected the EPA to set standards that would prohibit or severely limit all releases to the ground water within the controlled area, especially as Congress acknowledged that some releases are inevitable. We have previously said, "[w]e would be loath to construe the [Clean Air] Act as requiring the Administrator to do the impossible." NRDC v. EPA, 478 F.2d 875 (1st Cir. 1973).

Moreover, if Congress disagreed with this definition of the general environment from the reorganization plan (which defined the duties of the EPA), Congress would not have used the same terminology (i.e., the term "general environment") that was used in the reorganization plan. This view is further bolstered by the language of the NWPA itself, which required the EPA to protect the general environment from offsite releases. 42 U.S.C. § 10141(a). Since EPA's duty only applies to protect against offsite releases, Congress implicitly allowed or at least expected releases onsite.

Finally, we note that the SDWA was enacted in 1974. The NWPA was enacted in 1982. As Congress knew that this nuclear waste could not be disposed of underground without some onsite contamination of ground water, and given the existence of the no endangerment policy of the SDWA, we are

faced with conflicting statutory mandates. Using familiar statutory interpretation, when there is such a conflict, the most recent and more specific congressional pronouncement will prevail over a prior, more generalized statute. See 2A C. Sands, Sutherland on Statutes and Statutory Construction § 51.02 (4th ed. 1984). True, "repeals by implication are not favored," Morton v. Mancari, 417 U.S. 535, 551 (1974); nonetheless, within the controlled area, we think the two statutes are irreconcilable. Id. at 550 (only permissible reason for finding of repeal by implication is when earlier and later statutes are irreconcilable). Congress ordered that these highly dangerous wastes be placed underground with the intent that the surrounding geologic formations would be the major component of the containment mechanism. Since Congress knew that such underground disposal will inevitably contaminate some ground water, we cannot read the NHPA as intending that any ground water found within the geologic formations, acting as a containment mechanism, must be kept at drinking water quality. We conclude that Congress meant to override SDWA's no endangerment policy for releases onsite, and therefore the no endangerment provision does not apply to potential drinking water sources within the controlled area. This being so, the "endangerment" of these onsite waters is not contrary to law nor, obviously, would it be arbitrary and capricious, given the administrator's reasoned

explanation that contamination of this relatively small area is an essential part of his plan for protecting the outside environment.

(B) Non-compliance In The Accessible Environment

Outside the controlled area, we have much greater difficulty with EPA's arguments seeking to justify a standard which permits the radioactive contamination of sources of drinking water at levels higher than the same agency has deemed acceptable for public water supplies under the SDWA. We are told to read possibly conflicting statutes so as to "give effect to each if we can do so while preserving their sense and purpose." Watt v. Alaska, 451 U.S. 259, 267 (1981).

The EPA asserts that Part C of the SDWA does not impose a substantive no endangerment duty upon the Agency. The EPA asserts that the no endangerment provisions apply solely within the context of the SDWA itself. It asserts that Part C merely required the EPA to make sure that the states, in implementing their underground injection control programs, did not allow underground injection that would endanger drinking water sources. And so, according to the EPA, Part C imposed no duties which extend beyond its task of establishing minimum requirements for state underground injection control programs.

That reading of Part C of the SDWA seems too narrow. Congress enacted Part C because of concern about the

indiscriminate underground disposal of hazardous substances, and the resulting possible loss of drinking water resources. The EPA was directed to see that, wherever necessary, the state had regulatory systems in place that would protect against future endangerment of drinking water supplies by underground injections. While the states were to do the regulating, EPA was to determine the adequacy of their programs and was directed to devise and impose regulations of its own if a state did not adopt a proper program. Congress's clear intent was that the states should, inter alia, "refrain from adopting regulations which either on their face or as applied would authorize underground injection which endangers drinking water sources." H.R. Rep. No. 1185, 93d Congress, 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6454, 6481 (emphasis supplied). This blanket policy applies to federal as well as state agencies. 42 U.S.C. § 300h(b)(1)(D). Part C thus establishes a clear federal policy to avoid endangering drinking water supplies through underground injection. Moreover, EPA itself set the drinking water standard which it thought proper to assure public health and safety.

It would be anomalous if EPA, as administrator of such a program with a statutory responsibility to assure non-endangerment of drinking water supplies, were free, without examination or explanation, to adopt regulations in other

areas of its jurisdiction which authorize underground
injections that violate its own standards. Perhaps if it
were scientifically impossible to meet the goals of the NHPA
except by reducing the standards for sources of drinking water
near a repository, this would justify a deviation from the
SDWA. Or perhaps there are good reasons reconciling the
apparent inconsistency between the two standards. But the
administrator nowhere states that compliance with SDWA is
impossible or inconsistent with the goals of the NHPA, nor
does he offer any explanation of why he deems the lesser
standard in the HLW rules to be adequate to protect the public
although he does not find it adequate under the SDWA. Moreover,
the individual protection requirements apply for 1,000 years,
and the Administrator does not explain why drinking water
supplies will not be protected at levels established by the
SDWA beyond the first 1,000 years.

The EPA asserts that absent some type of
"consistency" provision, the requirements of Part C of the
SDWA do not apply to rules promulgated under the NHPA.
"Consistency" provisions have been used to expressly require
that rules promulgated by the EPA under one statute be
consistent with rules under another statute. See, e.g.,
Uranium Mill Tailings Radiation Control Act, 42 U.S.C.
§ 2022(a) (1982) (EPA's environmental standards for control
of uranium mill tailings must be consistent, to the maximum

extent practicable, with requirements under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991 (1982)); Resource Conservation and Recovery Act, 42 U.S.C. § 6905(b) (1982) (EPA must integrate regulations, "to maximum extent practicable, with appropriate provisions of the Clean Air Act, the Federal Water Pollution Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Safe Drinking Water Act, the Marine Protection, Research and Sanctuaries Act of 1972 and such other Acts of Congress as grant regulatory authority to the Administrator.").

Since the NWPA has no such explicit "consistency" clause, the EPA denies any duty to harmonize the HLW rules with Part C of the SDWA. The Agency argues that neither the NWPA, the SDWA, nor the Administrative Procedure Act, requires every new regulation to dovetail with every other statute and regulation administered by the Agency. But the SDWA is no mere incidental provision. It reflects a national policy and standard relative to the country's water supplies. Safeguarding such resources and their users is likewise implicit in the EPA's duty under the NWPA to promulgate HLW "standards for the protection of the general environment from offsite releases from radioactive material in repositories." 42 U.S.C. § 10141(a). EPA's national rule under the SDWA specifying maximum permissible levels of contaminants in public drinking supplies presumably reflects the Agency's

best thinking as to what the protection of the public requires. It is puzzling, to say the least, when the same agency now endorses a significantly lower standard -- and does so entirely without explanation. Either the SDWA standard is much too stringent or the present standard is inadequate. In the absence of a showing by EPA that, for some reason, the standards of the SDWA are inappropriate to its present task, we think it may not cavalierly ignore those standards. We thus find the current standard arbitrary and capricious.¹¹

The EPA argues that there will be no violation of

11. Since the EPA's unexplained issuance of a standard allowing radioactive contamination of drinking water at levels which violate SDWA limits is arbitrary and capricious, requiring remand, we need not decide if this same inconsistency causes the HLW regulation to be "not in accordance with law." 5 U.S.C. § 706(2)(A).

The argument that it is illegal depends on the breadth of the EPA's duty under Part C of the SDWA to prevent non-endangerment of underground drinking water sources. The EPA insists the duty there referred to is limited to its administrative responsibilities under the SDWA.

We also note that until a repository site is selected and designed, it remains speculative whether actual endangerment of water will occur: the protection provided by the engineered barriers and geologic formations might exceed the HLW standards. Indeed, since both the President and Congress have considerable control over the choice of site and design of the facility, higher standards may be required, as a matter of administrative choice. The HLW standards do not require that only minimal norms be observed.

While it is thus arguable that these regulations do not necessarily violate the law, we think it clear for reasons stated above that issuance, without explanation, of a conflicting standard in this critical area is, at very least, arbitrary and capricious. It leaves the executive branch and the public without guidance as to which standard must be observed to assure a proper measure of environmental safety.

the SDWA, relying on its statement in the preamble to the HLW rules that they in no way limit "the future applicability of the Agency's drinking water standards (40 C.F.R. Part 141) -- which protect community water supply systems through institutional controls." 50 Fed. Reg. 38,073, col. 2 (Sept. 19, 1985). The Agency nowhere claims, however, that HLW must be disposed of so that radiation levels will meet SDWA's underground injection rules rather than only the more liberal individual protection standard. Applicability of 40 C.F.R. Part 141 means merely that community water systems must be monitored and treated, as necessary, to ensure that radionuclide concentrations do not exceed the levels allowed under the drinking water standards. See 40 C.F.R. §§ 141-143 (1985). Thus the Agency's reliance on the future applicability of these rules means, in effect, that the responsibility and burden of cleaning up the excessive radiation releases to drinking water resources will fall on the local water companies. While placing this burden on the local water companies may prevent this contaminated water from being improperly used as drinking water, it will not prevent the future endangerment of drinking water supplies, which is a declared purpose of the Safe Drinking Water Act.

We cannot accept the Agency's claim that it may close its eyes to the possible and very likely future violations of the SDWA that will result from these design

criteria, while blithely asserting that in the future the SDWA's regulations will still apply so as to protect drinking water. Enforcing the SDWA sometime in the future might well be too late since Congress's intent in enacting Part C of the SDWA was to prevent the endangerment of drinking water sources and thus ensure that there will be sufficient quantities of usable groundwater for future generations. Once those drinking water resources are contaminated, the other regulations under the SDWA may guard against improper use of this water for drinking, but the SDWA will not restore the drinking water sources to their original quality.

The simple fact is that disposal of HLW in the manner here contemplated will very likely amount to an "underground injection." In announcing criteria which, until far in the future, the planned injection must be presently designed to satisfy, the EPA was irrational to establish, without a word of explanation, different and more relaxed criteria than the EPA's co-existing SDWA standard applicable to all other underground injections. By so doing, DOE and other agencies responsible for site selection and design are left in a quandary as to their possible separate responsibilities under the SDWA, since it is known that underground water will likely be encountered and that future contamination is a serious possibility. To be rational, the HLW regulations either should have been consistent with the SDWA standard --

thus requiring repositories to be designed so that future emissions into any sources of drinking water will not result in contamination exceeding SDWA standards -- or else should have explained that a different standard was adopted and justify such adoption. As matters now stand, the DOE may be encouraged to expend large sums on site selection, design and construction only to discover itself embroiled in a dispute as to whether the EPA's HLW standards excuse it from securing a state underground injection permit based on the EPA's different, more stringent standards. These are matters the EPA, relying on its expertise, should face and clarify in the HLW regulations; otherwise the HLW regulations will be on a collision course with the SDWA regulations. It is irrational for the EPA, as administrator of both sets of regulations, to ignore the inevitable clash. Rationally, this is the time for the Agency to determine and express its position, since all concerned are entitled to know whether the EPA believes that repositories must meet the SDWA's underground injection control rules as well as the individual protection standards and, if not, the rationale upon which a lesser standard is deemed sufficiently safe.

We emphasize that we are not holding that the Agency is necessarily incorrect in promulgating the present standard. We do not possess the necessary expertise to judge whether there are grounds for a lesser standard than that under the

SDWA. See South Terminal Corp., 504 F.2d at 665; Duquesne Light Co. v. EPA, 522 F.2d 1186, 1196 (3d Cir. 1975). As we are not scientists, we recognize that there could be valid explanations, not occurring to us, which would support a finding that these standards are rational. However, the Agency has never even acknowledged the interrelationship of the two statutes in respect to the Part C underground injection rules, and it has presented no reasoned explanation for the divergence between the level of contamination allowed by the HLW rules and the permissible levels of radiation contamination under the SDWA. Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co., 463 U.S. 29 (1983) (agency decision to rescind rule arbitrary and capricious because agency failed to consider relevant issue and failed to give sufficient explanation for decision); Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800 (1973) (agency's decision to allow rate change remanded because agency failed to set forth clearly the grounds on which it acted).

We hold that, for this reason, the present HLW rules are, on their face, arbitrary and capricious and hence invalid. They must be returned to the Agency for further consideration, which will result in either a new rule or, if the present standard is retained, an explanation of the present apparent inconsistency and irrationality.

V. PROCEDURAL CHALLENGE TO THE GROUND WATER PROTECTION REQUIREMENTS

Texas complains that in promulgating the ground water protection requirements, 40 C.F.R. § 191.16, the EPA failed to provide adequate notice and opportunity for comment as required by the Administrative Procedure Act, 5 U.S.C. § 553(b), (c). Texas especially attacks the definition of "special source of ground water," 40 C.F.R. § 191.12(o), which delineates the class of ground water that is covered by the ground water protection requirements (i.e., Class I ground waters that also meet three additional criteria, see supra). Texas's primary complaint is that the definition of special source of ground water is so narrowly drawn that most of the nation's usable ground water is not protected.¹² Texas asserts

12. This attack really goes beyond a challenge to this particular, very narrow rule, and challenges the HLW standards' overall approach to ground water protection. As we have pointed out, the principal offsite ground water protection in EPA's present scheme comes from the individual protection requirements, which include the requirement that it be assumed that individuals consume two liters a day from any significant source of ground water outside the controlled area. In the previous section of this opinion, we have found that the 25/75 millirems standard there adopted was arbitrary and capricious since it is significantly more liberal than the SDWA standard. The special source ground water requirement is the only part of the HLW rule that utilizes the stricter SDWA standard -- yet it applies only to a very specialized and limited class of water at the controlled area, the one place where Congress seems clearly to have envisaged allowing radiation contamination.

The present procedural attack on the special source ground water requirement thus implicates not just the procedural validity of that rule but, more generally, the procedural validity of the entire HLW rule insofar as it may

that if it had been given notice that ground water protections were being considered, and especially if it had been given notice that such a narrow class of water was going to be protected, it would have commented and pointed out its perceived problems with the rule.

The HLW rules when initially proposed included only (1) Subpart A, which governed management and storage (prior to disposal) and which set exposure limits for individuals at 25 millirems to the whole body; 75 millirems to the thyroid, 25 millirems to any other organ (this portion of the rule had some minor changes in the final rule); (2) the general containment requirements, which were modified in the final rule; (3) the assurance requirements, which were also modified in the final rule. See Proposed Rule, 47 Fed. Reg. 58,204 (Dec. 29, 1982). The individual and ground water protection standards were not part of the proposed rule, but were added to the final rule. The Agency argues that the latter two provisions were added in response to comments received during the comment period, and that the final rule is a logical outgrowth of the notice and comments received.

A final rule which contains changes from the proposed rule need not always go through a second notice and

(cont.)

or may not afford an adequate level of protection to ground water and drinking water.

comment period. An agency can make even substantial changes from the proposed version, as long as the final changes are "in character with the original scheme" and "a logical outgrowth" of the notice and comment. South Terminal Corp. v. EPA, 504 F.2d 646, 658 (1st Cir. 1974); BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980).

The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan. We must be satisfied, in other words, that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing. Thus, where the final rules "are a result of a complex mix of controversial and uncommented upon data and calculations," remand may be in order. Similarly, where the Agency adds a new pollution control parameter without giving notice of intention to do so or receiving comments, there must be a remand to allow public comment. The question, however, always requires careful consideration on a case-by-case basis.

BASF Wyandotte, 598 F.2d at 642 (emphasis added).

Here, although the proposed rule did not contain either the individual protection requirements or the ground water protection requirements, in the preamble to the proposed rule the Agency expressed its concern that perhaps protections for individuals were necessary, explaining that,

We particularly seek comment on a different approach to our standards for disposal -- an alternative that would establish radiation exposure limits for individuals, such as the limit of 25 millirems per year in Subpart A of this proposal, rather than the radionuclide release limits that we are proposing.

Standards based on individual exposure limits, or equivalent standards which limit radionuclide concentrations in air or water, restrict the risks that any particular individual may be exposed to. [The Agency went on to explain why it thought that an approach based upon individual dose limits would not be appropriate.] Thus, we believe our proposed approach will facilitate licensing of good disposal systems while providing appropriate environmental protection from the long term risks presented by high-level wastes. However, the arguments favoring individual exposure limits are also persuasive, and we particularly seek comments on which approach we should ultimately select.

See Preamble to Proposed Rules, 47 Fed. Reg. 58,203, col. 2 (Dec. 29, 1982).

The public comment period for the proposed rule lasted until May 2, 1983. Also in May of 1983, the EPA held public hearings in Washington, D.C. and Denver, Colorado. As a result of the hearings, the Agency identified several issues upon which it felt additional comments were needed. The Agency opened a new round of notice and comment on these issues which lasted until June 20, 1983. See Request for Post-Hearing Comments, 48 Fed. Reg. 23,666 (May 26, 1983). The EPA also sent a letter, which identified the same issues

for comment, to everyone that had originally commented on the proposed rules.

One of the issues highlighted for comment specifically addressed the question of an individual protection requirement and it alluded to the possibility that an individual dose limit might include ground water limits.¹³ However, the issues highlighted for review did not mention that an additional and separate ground water rule was contemplated.

Also during 1983, a subcommittee of the Science Advisory Board ("SAB")¹⁴ conducted a scientific review of the proposed rule. The SAB subcommittee's final report was

13. The questions highlighted for comment on this issue included: Should we include a limit on individual exposure in our standards for disposal, considering the arguments that have been offered in the comments on our proposed rule?; If so, should it apply to someone who might attempt to use ground water in the vicinity of a disposal site sometime in the future?; Should it apply only for ground water at some distance from the repository -- like the distances considered in the potential definitions of the "accessible environment" -- or should it apply to any ground water source?; Would it be adequate to add a qualitative requirement that individual doses should be kept as low as reasonable?; Would it be adequate to explicitly rely upon other existing individual dose limitations -- such as EPA's drinking water standards or NRC's 10 C.F.R. Part 20 -- for protection regarding ground water that might be contaminated in the future by disposal systems?

14. The Science Advisory Board is an independent consultative body established under the Environmental Research, Development and Demonstration Authorization Act of 1978, 42 U.S.C. § 4365, to "provide such scientific advice as may be requested by the administrator."

submitted to the EPA in February 1984. The subcommittee's report recommended that the definition of accessible environment be extended to include major sources of potable ground water beyond the controlled area (the original definition of accessible environment did not expressly include all ground water beyond the controlled area). However, there was no recommendation that a separate ground water protection limit be set, or that the Agency should place direct release limits on ground water. Since the Agency anticipated that many of the subcommittee's recommendations would be incorporated into the final rule, the EPA also sought public comment on the SAB subcommittee's report. See 49 Fed. Reg. 19,604 (May 29, 1984).

We believe that the Agency gave reasonably clear notice that individual protection requirements were being considered since it expressly invited comments on the question of whether an individual exposure limit was appropriate. Moreover, in seeking such comment, the Agency drew the public's attention to the 25/75 millirem individual exposure limit that was part of the proposed management and storage rule of Subpart A. Thus the public was reasonably on notice of the expected form that such a new rule might take. See 5 U.S.C. § 553(b)(3) (notice in the Federal Register shall include either "the terms or substance of the proposed rule or a description of the subjects and issues involved"). However,

we are not convinced that the Agency gave sufficient notice concerning any requirements that might be tied specifically into the protection of ground water.¹⁵ We stated in BASF Wyandotte,

The essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan. We must be satisfied, in other words, that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing.

BASF Wyandotte, 598 F.2d at 642.

Here, since the concept of a separate rule setting limits on ground water was never presented to the public, nor were the final ground water protection requirements ever opened for public comment, we are convinced that given a new opportunity to comment, commenters would "have their first occasion to offer new and different criticisms which the Agency might find convincing." Id. This conclusion is bolstered by reviewing the definition of special source ground water itself. The linchpin of the definition is the designation of Class I ground water, as defined in the EPA's Ground-Water Protection Strategy, and yet the Ground-Water

15. As we have already remanded the individual protection requirements to the Agency for further study, we need not consider whether a second round of notice and comment was required in respect to the part of these requirements that indirectly protects ground water.

Protection Strategy was not even published until August 1984, which was at least one month after the official public notice period ended in June 1984.¹⁶ The public was never able to comment on the appropriateness of using this Class I designation as a definition of what ground water would be protected since the term "Class I" had never been coined until after the official public comment period had closed. Nor was the public able to comment on the additional criteria which further reduced the amount of Class I ground water that would be protected. Given the initial lack of sufficient notice that a separate ground water protection rule was being considered, it was clearly impossible for the public to offer useful comment as to the scope of protection that the new rule should provide. See Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983) ("Agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and

16. The Federal Register notices each established a specific deadline for submission of written comments. Apparently the Agency continued to review public comments received after the deadlines. See Background Information Document at 1-1. However, there is no evidence of public notice to the effect that the Agency was willing to receive additional comments, and so no member of the public was expressly on notice that they could continue to comment on the newly published Ground-Water Protection Strategy.

notice will not lead to better-informed agency decisionmaking.").

It seems significant that the majority of the complaints presented to this court concerning the HLW rules relate to the ground water protection requirements. The various petitioners attack the special source ground water definition as being far too underinclusive; as being too vague; or as being useless in that the rule does not really protect any ground water that is likely to be contaminated. Because the public never saw this provision until the final rule was promulgated,¹⁷ it is not surprising that the petitioners are now raising so many challenges to this provision since this court provides the first and only forum that they have had in which to express their concerns. Had the EPA opened a new comment period when they promulgated this never before proposed or foreshadowed rule, a significant

17. According to Texas a definition of special source of ground water (which differed from that finally adopted) first appeared in a document entitled Working Draft No. 5, dated March 21, 1985. Apparently each page was marked "FOR REVIEW WITHIN EPA AND OTHER FEDERAL AGENCIES." Nevertheless, the working drafts were filed in the rulemaking docket located in Washington, D.C.; however, there was no notice of availability placed in the Federal Register. Thus, apparently an interested member of the public could travel to Washington to review the docket to see what the Agency was considering. Since this working draft was dated well after the official published deadline for comments, see note 16, supra, adequate notice cannot be inferred from the working draft. It is unreasonable to expect the public periodically to check the administrative docket, located in Washington, long after the comment period deadlines have passed.

number of the complaints that are before us now could have been resolved by the Agency either by amending the rule or by adequately explaining why the commenters' suggestions were not adopted.¹⁸ See National Tour Brokers Association v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978) (purpose of notice and comment rulemaking is both to allow the agency to benefit from the experience and input of the parties who file comments and to make sure that the agency maintains a flexible and open-minded attitude toward its own rules); Chocolate Manufacturers Association of the United States v. Block, 755 F.2d 1098 (4th Cir. 1985) (public participation in rulemaking ensures informed agency decisionmaking).

We note that in order for a rule to be upheld against a substantive challenge (as opposed to a procedural challenge) the Agency must give an adequate explanation of why the rule

18. After the official comment period, the state of Texas sent a letter to the EPA, with a new suggestion that there should be a separate ground water protection rule (at that time there was no indication that the EPA was considering a separate ground water rule). Texas wanted a zero based release limit, i.e., no detectable release of radiation, and Texas suggested that all ground water that is or might be used for agricultural purposes be protected by the rule. Apparently, the EPA accepted some of Texas's suggestion by instituting a separate ground water rule; however, the new rule has little resemblance to Texas's suggested rule. Inexplicably, in the Response to Comments document, the EPA does not discuss the Texas suggestion nor does it explain why the EPA decided not to specifically protect ground water used for agricultural purposes.

was promulgated in its final form.¹⁹ The EPA's explanation of why only certain Class I ground waters were protected by the ground water protection requirements is not very helpful. The EPA merely states that "the Agency believes these provisions are necessary and adequate to avoid any significant degradation of the important drinking water resources provided by these Class I ground waters." 50 Fed. Reg. 38,074, col. 1. This statement does not explain why all Class I ground waters were not protected or why the Agency chose the limiting criteria that cut back the type of Class I ground water that the rule protects. Nor does this explanation point to any evidence in the administrative record which supports this bald assertion. Because the petitioners never had a comment period in which to express their concerns, of course the Agency's explanation is going to be vague and cannot address petitioners' complaints.

We realize that in promulgating the ELW rules the Agency was faced with a difficult task, and that the Agency

19. Reviewing courts will not rely on appellate counsel's post hoc rationalizations in lieu of adequate findings or explanations from the agency itself. NRDC, Project on Clean Air, 478 F.2d at 881.

was working under severe time restraints.²⁰ However, we believe that in this case, where the issues are so complex, the Agency must be careful to give full and adequate public notice. As has been pointed out before, since a reviewing court normally gives deference to the Agency's substantive conclusions in complex regulatory matters, we will insist that the required procedures be strictly complied with. BASF Wyandotte Corp. v. Costle, 598 F.2d at 641; Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978).

We must therefore remand the ground water protection requirements for a second round of notice and comment.

VI. OTHER CHALLENGES

Petitioners assert a number of additional challenges to the ELW rules, many of which relate to the ground water protection requirements. Since we are remanding the ground water standard for further notice and comment, we will not address the claims that directly challenge that standard.

20. The NWPA required the EPA to promulgate these standards no later than January 7, 1984. When the standards were not promulgated a year after that deadline, the NRDC, Environmental Policy Institute, and others sued the EPA over its failure to comply with the statutory deadline. A consent order was agreed to by the parties mandating issuance of the standards by August 15, 1985. The final standards were published in September 1985.

**(1) The Individual Protection Requirements'
1,000 Year Design Criterion**

Petitioners, NRDC, et al., attack as arbitrary and capricious the EPA's decision to limit the duration of the individual protection requirements to 1,000 years. Their argument is different from the one discussed above that the 1,000 year time frame allows for a violation of the SDWA after the first 1,000 years. Here they argue that the 1,000 year time frame is simply unsupported and arbitrary. We believe this argument has merit and therefore remand this aspect of the individual protection requirements to the Administrator.

EPA originally decided to base its regulatory approach on population risk criteria and, toward this goal, adopted the general containment requirements of 40 C.F.R. § 191.13. See 47 Fed. Reg. 58,198-58,200 (Dec. 29, 1982). In response to comments, however, the Agency came to believe that reduction of population risk alone was insufficient and that there were "important advantages in providing for individual protection in ways compatible with the containment and assurance requirements." 50 Fed. Reg. 38,073 (Sept. 19, 1985). The inadequacy of relying on the containment regulations alone to protect certain individuals from significant doses is best described in the Agency's own words:

The Agency believes that the containment requirements in § 191.13 will insure that the overall population risks to future generations from disposal of these wastes will be acceptably small. However, the situation with regard to potential individual doses is more complicated. Even with good engineering controls, some waste may eventually (i.e., several hundred of thousands of years after disposal) be released into any ground water that might be in the immediate vicinity of a geologic repository. Since ground water generally provides relatively little dilution, anyone using such contaminated ground water in the future may receive a substantial radiation exposure (e.g., several rems per year or more). This possibility is inherent in collecting a very large amount of radioactivity in a small area.

50 Fed. Reg. 38,077, col. 3 (Sept. 19, 1985). Moreover, even though the Agency's Science Advisory Board advocated retention of the population risk criteria as the primary measure of performance for the proposed standards, it also supported the formulation of special protections for individuals near repository sites. SAB Subcommittee Report at 4-5.

EPA's original proposed regulations had relied solely on certain of the assurance requirements in section 191.14 -- including the requirement that both natural and engineered barriers be employed at any repository site -- to reduce the likelihood of long-term, damaging exposure to individuals. Public comments on the original proposed rules, however, convinced the Agency that numerical restrictions on potential individual doses were needed in the

revised regulations. See 50 Fed. Reg. 38,078 (Sept. 19, 1985). Rather than completely replace the containment requirements with individual dose limitations, EPA sought in the revised rules to achieve a mix of regulatory mechanisms by adding a layer of specific protections for individuals that would be consistent with, yet remedy the shortcomings of, the containment requirements. To achieve this end, the Agency promulgated regulations requiring that disposal systems be designed to provide a reasonable expectation that, for the first 1,000 years after disposal, individuals will not absorb an annual dose of radiation in excess of 25 millirems to the whole body (or 75 millirems to any critical organ). 40 C.F.R. § 191.15.

EPA cites at least two specific reasons for refusing to extend the duration of the individual protections further into the future than the first 1,000 years after disposal. First, it states that 1,000 years is "long enough to insure that particularly good engineered barriers would need to be used at some potential sites where some ground water would be expected to flow through a mined geologic repository." 50 Fed. Reg. 38,073, col. 1 (Sept. 19, 1985). Second, the Agency asserts that

demonstrating compliance with individual exposure limits for times much longer than 1,000 years appears to be quite difficult because of the analytical uncertainties involved. It would require predicting radionuclide concentrations -- even from releases of tiny portions of the waste -- in all the possible ground water pathways flowing in all directions from the disposal system, at all depths down to 2,500 feet, as a function of time over many thousands of years. At some of the sites being considered (and possibly all of them, depending upon what is discovered during site characterization) the only certain way to comply with such requirements for periods on the order of 10,000 years appears to be to use very expensive engineered barriers that would rule out any potential release over most of this period. While such barriers could provide longer-term protection for individuals, they would not provide substantial benefits to populations because the containment and assurance requirements already reduce population risks to very small levels.

See 50 Fed. Reg. 38,073, cols. 1-2 (Sept. 19, 1985). Furthermore, in another portion of its discussion of the new regulations, EPA explains that adopting individual protection regulations of longer duration "could substantially delay development of disposal systems without providing significantly more protection to populations," 50 Fed. Reg. 38,078, col. 2 (Sept. 19, 1985), and that it "consider[ed] . . . this information" in crafting the individual protections contained in section 191.15.

Petitioners challenge EPA's choice of a 1,000 year duration on several grounds, arguing that the 1,000 year

limitation is arbitrary and capricious, amounts to an error of judgment, and is not supported by evidence in the administrative record. Petitioners are troubled by the fact that EPA's choice of the 1,000 year period ensures that the new numerical standards will not apply at the precise moment in time when EPA expects significant contamination of the accessible environment to begin to occur. On a more concrete level, petitioners contend that the Agency impermissibly considered population risk in setting the time limit, wrongly considered the likelihood of delay in the construction of a disposal system, and concluded, without record support, that a duration longer than 1,000 years would lead to prohibitive costs and difficulties in demonstrating compliance with the standards.

We are not persuaded that the Agency's action amounted to a clear error of judgment, but we do agree with petitioners' complaint concerning EPA's apparently exclusive reliance on considerations of population risk in explaining its reasons for limiting the duration of the individual protections to 1,000 years. The Agency's principal response to this charge is that the Administrator's decisionmaking was not driven by considerations of either population risk or individual risk to the exclusion of the other. Instead, his objective was to combine the two types of protection in an effort to obtain a comprehensive regulatory scheme with the

proper mix of both approaches. We would be willing to accept this rationalization as a proper exercise of the Agency's expertise in arriving at such complex policy judgments if, indeed, the administrative record demonstrated that individual risk assessment had played some part in the calculation of the durational limit in section 191.15. Our review of the record, however, does not support this conclusion. Although the concept of individual risk assessment was noted, the explanation offered by the Agency reflects an analysis made solely in terms of population risk.

As we have noted, EPA has determined that the containment requirements contained in section 191.13 (which are designed to reduce population risk) are an inadequate means of controlling risk to certain individuals and that individuals located in the vicinity of potential repository sites could be at extreme risk of receiving substantial doses of radiation after several hundred or thousand years, even if "good" engineered barriers are utilized. EPA also recognizes that individual risk could be significantly reduced if the duration of the protections contained in section 191.15 were increased. Such an increase in the duration of the individual dose limitations would apparently call for either more stringent siting criteria (for example, use of sites featuring a salt medium that appear capable of protecting individuals from significant exposure for 10,000 years even

without the use of engineered barriers), see, e.g., Final Regulatory Impact Analysis at 55, or for better canisters that could assure compliance with the longer duration of the standards (such as the "very good canisters," crafted from copper, that EPA admits could ensure compliance with the individual protection standards for 10,000 years even at a basalt repository site), see id. at 56-59. Yet the Agency's reasons for limiting the duration of the individual protections to 1,000 years curiously turn only on an assessment of how a longer duration would affect population risk. The Agency does not mention the concomitant reduction in individual risk (which revised section 191.15 was designed to address), nor does it even purport to weigh these competing goals in light of the increased costs and complications expected to accompany the adoption of a design criterion in excess of 1,000 years.

As petitioners point out, EPA's primary reason for not choosing a longer period is that there would be difficulties "demonstrating compliance with individual exposure limits for times much longer than 1,000 years." 50 Fed. Reg. 38,073, col. 2 (Sept. 19, 1985). EPA admits, however, that better engineered barriers could ensure almost certain compliance at all potential sites for times on the order of 10,000 years. Id. It rejects this option only because, although "such barriers could provide longer-term

protection for individuals, they would not provide substantial benefits to populations." Id. (emphasis supplied). We find this explanation to be deficient because it purports to justify the Agency's policy choice solely in terms of a variable that the individual protections were not designed to influence. There must be some additional explanation concerning why the enhanced individual protection that could be achieved is outweighed by other factors.

Likewise, EPA's Final Regulatory Impact Analysis of 40 C.F.R. Part 191 demonstrates that more rigorous site selection could produce sites with such impermeable geologic media that compliance with the individual protections for a much longer duration would not even require the extra cost of "very good" engineered canisters. See Final Regulatory Impact Analysis at 55-56. EPA's only apparent reason for rejecting this option is that, "[a]lthough it might be possible to find certain geologic settings that avoid [the problem of substantial releases of radiation into groundwater after 1,000 years], such restrictive siting prerequisites could substantially delay development of disposal systems without providing significantly more protection to populations." 50 Fed. Reg. 38,078, col. 2 (Sept. 19, 1985) (emphasis supplied). Again in this portion of its justification, it does not appear that the Agency has permitted individual risk assessment to enter into its cost-benefit calculus.

EPA's only affirmative reason for choosing a duration of at least 1,000 years for section 191.15 is that "the Agency's assessments indicate it is long enough to insure that particularly good engineered barriers would need to be used at potential sites where some ground water would be expected to flow through a mined geologic repository." 50 Fed. Reg. 38,073, col. 1 (Sept. 19, 1985). This rationale, however, simply begs the question. The record contains no sufficient explanation of why the Agency opted to draft section 191.15 in a manner that would require only "particularly good engineered barriers." Without appropriate justification for this policy choice, we hesitate to defer to the Agency's expertise even in this scientifically complex area.

We admit to being disturbed by the fact that the addition of individual protections with explicit numerical dose limitations will apparently have no practical effect on the Department of Energy's siting determinations or on the choice of what quality engineered barriers should be used at a given repository:

[T]he Agency believes that there need not be any significant additional costs to the national program for disposal of commercial wastes caused by retaining the proposed level of protection in the final rule, compared to the costs of choosing levels considerably less stringent. In other words, all of the disposal sites being evaluated by the Department [of Energy], assuming compliance with the existing requirements of 10 C.F.R. Part 60, are expected to be able to meet these disposal standards without additional precautions beyond those planned.

50 Fed. Reg. 38,084, col. 1 (Sept. 19, 1985) (emphasis supplied). This admission by the Agency that the individual protections, as drafted, will have little, if any, impact strengthens our conviction that the Agency has not provided an adequate explanation for selecting a 1,000 year design criterion. Thus, for all of the reasons stated, we hold that the 1,000 year design criterion of section 191.15 is arbitrary and capricious on the administrative record before us. In so holding, we are not concluding that the choice of a 1,000 year duration is inherently flawed, but only that the record and the Agency's explications as they now stand do not sufficiently support the Agency's choice. We remand this portion of the HLW regulations to the Agency for reconsideration of the 1,000 year design criterion or, at the very least, a more thorough explanation of the reasons underlying the choice of 1,000 years.

(2) The Variance Provision Of Subpart A

Minnesota challenges the Subpart A variance provision. Subpart A sets annual exposure limits to individuals from the predisposal management and storage of HLW. The rule includes a variance mechanism which allows the EPA to issue alternative standards for facilities not regulated by the NRC (i.e., DOE military-related facilities) if upon review of an application the administrator determines that certain set annual exposures will not be exceeded and if

The Administrator promptly makes a matter of public record the degree to which continued operation of the facility is expected to result in levels in excess of the standards specified in 191.02(b) [the normal annual exposure limits].

See 40 C.F.R. § 191.04. The variance provision also requires that an application for such alternative standards be submitted as soon as possible after the DOE determines that a facility's continued operation will result in excessive releases of radiation. Id.

Minnesota argues that this variance provision is vague and provides the EPA with overly broad discretion. Minnesota asserts that this variance mechanism will allow the Agency to permanently modify the standards, and that the DOE would have no obligation to comply with the current standards. Therefore, Minnesota argues the variance mechanism will not serve to protect the public health and environment.

We do not accept this contention. The DOE is required to comply with the standards at the current exposure levels since nothing in the variance procedure allows the DOE to ignore these limits. Should the DOE feel it needs a variance, it must go through the alternative standards procedure. Thus we do not find that this provision fails to protect the public health.

As to the possibly permanent nature of such a variance and the allegedly overly broad discretion given the EPA, we note that the Agency must notify the public concerning the variance. EPA's counsel represented at oral argument that Federal Register notice and judicial review would be available for any alternative standards. Thus the reasonableness of any such variance in terms of either length of time (i.e., permanent or temporary) or allowable exposure limits will be subject to judicial review. See American Mining Congress v. Thomas, 772 F.2d 617, 639 (10th Cir. 1985) (upholding an alternative compliance exception to regulations under the Uranium Mill Tailings Radiation Control Act, since judicial review was available to test the reasonableness of granted exceptions), cert. denied, 106 S. Ct. 2276 (1986).

(3) The Assurance Requirements

Minnesota also attacks the EPA's decision that the assurance requirements, 40 C.F.R. § 191.14, will be applicable only to disposal facilities that are not regulated by the NRC. Minnesota asserts that this creates a "loophole" that the NRC could use to avoid compliance with the assurance requirements.

When the HLW rules were first proposed, the assurance requirements applied to all facilities, including those regulated by the NRC. In its comments on the proposal, the NRC argued that such qualitative assurance requirements, which are designed to ensure that the numerical containment requirements are met, are beyond EPA's statutory authority. The NRC argued that the EPA's authority only extended to setting generally applicable environmental standards. The NRC viewed the assurance requirements as a compliance mechanism which interferes with its responsibility, as the licensing agency, to ensure compliance. Thus the NRC argued that the EPA was exceeding its authority and that this compliance mechanism was within the NRC's authority.

EPA felt that the assurance requirements were an appropriate part of the environmental standards because they are necessary to establish the regulatory context for the quantitative containment requirements. However, in order to avoid delay in promulgating the standards, the agencies

decided to resolve the jurisdictional dispute by having the NRC modify its regulations to incorporate, where necessary, the intent of the assurance requirements. The NRC has proposed additions to its rules so as to incorporate the substance of the EPA's assurance requirements. See Notice of Proposed Rulemaking, 51 Fed. Reg. 22,299 (June 19, 1986). The EPA intends to participate in the NRC's rulemaking in order to ensure that the intent of all the assurance requirements are embodied in federal regulations. See 50 Fed. Reg. 38,072, col. 3. Moreover, EPA intends to amend its regulations if the NRC's amendments prove unsatisfactory. "[T]he Agency will review the record and outcome of the Part 60 rulemaking [the NRC rules] to determine if any modifications to 40 C.F.R. Part 191 [the EPA rules] are needed." 50 Fed. Reg. 38,072, col. 3.

Since the Agency intends to make certain that the assurance requirements are included in the federal regulations either by NRC's promulgation, or, if necessary, by amendments to its own regulations, we find that this is a reasonable method of settling the interagency jurisdictional dispute. Under the NWPA, the NRC is required to ensure that its licensing decisions are consistent with the EPA-promulgated standards, 42 U.S.C. § 10141(b)(1)(C), and if the EPA changes its standards, the NRC must accordingly amend its licensing standards, 42 U.S.C. § 10141(b)(2). Thus, it is the NRC's

licensing decisions which will be the actual vehicle for implementing the EPA's standards. We see little substantive difference between having the NRC enforce compliance with the assurance requirements, as articulated under EPA's part of the federal regulations (40 C.F.R. Part 160), or having the NRC enforce compliance of the assurance requirements which have been incorporated into its own rules (10 C.F.R. Part 60), so long as the full intent of the assurance requirements are embodied in either section.

Minnesota further challenges the assurance requirements themselves, arguing that the EPA was arbitrary and capricious in its decision to delete one of the originally proposed assurance requirements. The originally proposed standards contained an assurance requirement that

Disposal systems shall be selected and designed to keep releases to the accessible environment as small as reasonably achievable, taking into account technical, social and economic considerations.

See 47 Fed. Reg. 58,205 (Dec. 29, 1982).

In the final rule, EPA decided to delete this assurance requirement finding it unnecessary because two aspects of related rules that were subsequently promulgated by NRC and DOE embodied the same concept. 50 Fed. Reg. 38,072, col. 2. The NRC adopted a multiple barrier principle which required very good performance from two types of engineered barriers: a 300 to 1,000 year lifetime for waste containers

during which there would be essentially no waste releases; and a long-term waste release rate of no more than one part in 100,000 per year. EPA asserts that this requirement by NRC represents the "best performance reasonably achievable for currently foreseeable engineered components." Id.

DOE promulgated a provision in its site selection rules that requires significant emphasis be placed on selecting sites that demonstrate the lowest release of radiation over 100,000 years compared to alternative possible sites. EPA believes that this provision ensures adequate encouragement to choose sites that provide the best available isolation capabilities. 50 Fed. Reg. 38,072, col. 2.

Since EPA felt that these two provisions already codified the intent of the proposed assurance requirement, to keep long-term releases as small as reasonably achievable, the EPA deleted as no longer necessary the proposed assurance requirement. Minnesota argues that the NRC rule merely focuses on reasonably achievable technology rather than minimizing potential releases, which was the intent of the proposed assurance requirement. We believe it is well within the EPA's expertise to determine that a rule regulating technology will accomplish the desired limit on releases.

Minnesota further argues that the DOE's rule merely requires DOE to compare releases and does not require DOE to select sites which have the lowest releases. EPA responds

that there is nothing in the originally proposed qualitative assurance requirement that would absolutely require the selection of one site over another, especially since the proposed regulation required that technological, social and economic considerations should be factored into the goal of selecting disposal systems that minimize releases.

As the EPA pointed out to this court, the assurance requirement at issue is hardly a precise, absolute standard. It comes closer to being simply an exhortation. The assurance requirements are not a primary protection mechanism, but are a backup designed to aid in achieving the primary protections -- the containment requirements. We believe the EPA was acting well within its range of discretion when it concluded that the goal of this assurance requirement, to keep releases as small as reasonably achievable, would be independently and adequately achieved through the NRC and DOE rules, and that therefore the proposed requirement was unnecessary.

(4) The Containment Requirements' 10,000 Year
Design Criteria

Minnesota challenges EPA's adoption of the 10,000 year time frame for the assessment of disposal facility performance under the containment requirements, 40 C.F.R. § 191.13. Contending that the EPA has not provided a technical or scientific basis for the choice of 10,000 years, Minnesota asserts that this provision is arbitrary and capricious. We

must reject this claim because we find that the Agency has provided an adequate explanation for its decision.

In the preamble to the proposed rules, the Agency explained that it chose 10,000 years for two reasons: first, because the choice of a shorter period for assessing repository effectiveness would give deceptively low estimates of long-term risks. See 47 Fed. Reg. 58,199 (Dec. 29, 1982). Second, a time period greater than 10,000 years would necessarily be impacted by major unpredictable geologic changes. Thus, the 10,000 year period was chosen because it is "long enough to distinguish geologic repositories with relatively good capabilities to isolate wastes from those with relatively poor capabilities," see 50 Fed. Reg. 38,070, and yet this time period is short enough "so that major geologic changes are unlikely and repository performance might reasonably be projected." 50 Fed. Reg. 38,071. Thus, the 10,000 year period was chosen to give sufficiently reliable data; and as the Agency explained, scientifically reliable assessments are unattainable for longer periods of time. Moreover, the Agency believed that a disposal system capable of meeting the numerical containment requirements for 10,000 years would continue to protect the environment well beyond the initial 10,000 years.

The SAB subcommittee reviewed and supported the Agency's choice of 10,000 years, finding it a "scientifically

acceptable regulatory approach." See Response to Comments, Vol. II, at 2-6. The SAB subcommittee stated that

Modeling and risk assessments for the time periods involved in radioactive waste disposal require extension of such developing techniques well beyond usual extrapolations; however, the extension for 10,000 years can be made with reasonable confidence. Also, the period of 10,000 years is likely to be free of major geologic changes, such as volcanism or renewed glaciation, and with proper site selection the risk from such changes can be made negligible.

SAB Report at 4.

The subcommittee further recommended that the process for selecting sites also take into account potential releases "somewhat beyond 10,000 years." Id. In response to this further recommendation, the EPA "worked closely" with the DOE and NRC in developing the siting provision, discussed supra, calling for DOE to compare releases from sites over a 100,000 year period. These comparisons between prospective sites are to be one of the significant considerations in selecting sites according to the rule adopted by DOE. See 10 C.F.R. § 960.3-1-5.

Given the nature of this type of decision, which involves many unquantifiable variables, we believe that it was appropriately within the Agency's discretion. As the Supreme Court has stated, when an Agency's action involves scientific decisions "within its area of special expertise, at the frontiers of science," a reviewing court must be at

its most deferential. Baltimore Gas & Electric v. NRDC, 462 U.S. 87, 103 (1983). We affirm the Agency's decision to select 10,000 years for the repository assessment period as being rational, technologically based and within the Agency's discretion.

(5) The Containment Requirements' Reasonable Expectation Of Compliance Provision

Minnesota also attacks the containment requirements' provision which requires only that a "reasonable expectation" of compliance with the containment requirements be shown. Minnesota asserts that the Agency's reliance on a reasonable expectation of compliance provides no assurance that the public health and environment will be protected, since, it asserts, this standard grants implementing agencies a range of discretion in determining whether the containment requirements will be met.

The Agency explained that unequivocal proof of compliance was not required because of the "substantial uncertainties inherent in such long-term projections." See Response to Comments, Vol. I, at 5-4. Since absolute proof is impossible to achieve, the Agency felt that the appropriate standard is "a reasonable expectation of compliance based upon practically obtainable information and analysis." Id.

Given that absolute proof of compliance is impossible to predict because of the inherent uncertainties,

we find that the Agency's decision to require "reasonable expectation" of compliance is a rational one. It would be irrational for the Agency to require proof which is scientifically impossible to obtain. Any such purported absolute proof would be of questionable veracity, and thus of little value to the implementing agencies. Nor can we say that this provision is arbitrary and capricious because it will afford the implementing agencies a degree of discretion, since such imprecision is unavoidable given the current state of scientific knowledge. Thus we are again faced with a decision that is within the Agency's area of expertise and on the frontiers of science, and, as such, we refuse to substitute our judgment for that of the Agency.

VII. CONCLUSION

Because the EPA did not consider the interrelationship of the high level waste rules and Part C of the Safe Drinking Water Act and thus failed either to reconcile the two regulatory standards or to adequately explain the divergence, we find that the Agency was arbitrary and capricious in its promulgation of the individual protection requirements. We must therefore remand to the Agency for further consideration. See, e.g., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 57 (1983) (where agency failed to supply reasoned analysis for its decision, remand to agency for further

consideration necessary); Federal Power Commission v. Trans-continental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976) (where agency's decision not sustainable on administrative record, decision must be vacated and the matter remanded for further consideration). We are also remanding the individual protection requirements for further consideration because the Agency has not provided an adequate explanation for selecting the 1,000 year design criterion. Further, we find that the ground water protection requirements were promulgated without proper notice and comment as required by the Administrative Procedure Act, 5 U.S.C. § 553(c). We therefore remand for further notice and comment procedures. See PPG Industries, Inc. v. Costle, 659 F.2d 1239 (D.C. Cir. 1981) (where EPA failed to fully meet notice requirements, remand was appropriate to allow agency to consider issues raised by parties in properly noticed rulemaking). We reject the petitioners' remaining challenges to the high level waste rules.

Accordingly, the petition for review of the ELW rules is granted with respect to the issues of the individual and ground water protection requirements, and is denied with respect to the remaining challenges. The ELW rules, 40 C.F.R. Part 191 (1986), are vacated and remanded to the Agency for further proceedings not inconsistent with this opinion.

So ordered.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

Tab F:

Letter to J. Parker from R. Loux

July 28, 1987

Questions for Discussion

at

Environmental Coordinating Group Meeting



**AGENCY FOR NUCLEAR PROJECTS
NUCLEAR WASTE PROJECT OFFICE**

Capitol Complex
Carson City, Nevada 89710
(702) 885-3744

July 28, 1987

Mr. Gerald J. Parker
OCRWM (RW-241)
U.S. Department of Energy
Washington, DC 20585

Dear Mr. Parker:

We have received a copy of your memorandum of July 22, 1987 regarding the upcoming meeting of the Environmental Coordinating Group (ECG) and look forward to the opportunity provided to address issues previously raised and yet unresolved. Rather than call your attention at this time to past correspondence that remains unanswered by the Department of Energy (DOE) I wish to restate several questions and points of interest that we hope can be addressed during portions of the September 15 - 17 meetings that are open to affected parties.

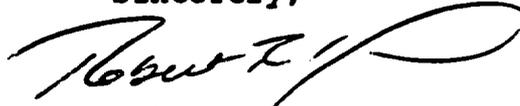
- Can ECG clarify for us why reclamation of areas disturbed during site characterization is not considered to be a mitigation measure as defined by NEPA regulations under 40 CFR 1508.20(6)?
- It would be appreciated if ECG could review the logic DOE has used in considering the May 1986 Final Environmental Assessments (EAs) both as decision aiding documents and part of the process of fulfilling the agency's NEPA obligations under 10 CFR 1021 and DOE 5440.1C. Insight into where other documents such as Environmental Checklists fit into these procedures also would be welcomed.
- Last year at the September meeting of ECG a commitment was made by DOE to provide affected parties with current copies of the DOE Environmental Compliance Guide (DOE/EV-0132) and the related DOE/EP manuals. A status report on that topic would be appreciated.
- How will the environmental baseline for PSD determinations for the ESF and the repository be established?

- What is the relationship between the ongoing EH&S environmental survey/audit program at the federal sites and the site characterization programs? Are environmental, impact, and compliance audits to be performed as part of OCRWM activities?
- Discussion on resolution of environmental aspects of Mission Plan Key Issue 3 will be appreciated as will clarification as to how Issue 3.1 applies to the repository siting program. Does "siting" as used in the Key Issues exclude or include selection of sites for characterization and when/where will issues resolution for the candidate repository sites be addressed?
- What is the programmatic relationship between Key Issues and the siting guidelines, and what is the rationale for distinguishing between guidelines that do and do not require site characterization? If some issues and guidelines will not benefit from objective evaluation in the course of site characterization what subjective reasoning and thought processes will be employed to address them? What will be the balance between objective and subjective processes to be used for evaluating the environmental quality guideline, 10 CFR 960.5-2-5?
- Comments would be appreciated on how the environmental and NEPA regulations under 10 CFR 51 and 40 CFR 1500-1508 relate to the repository EIS. Also, a status report on the EIS implementation plan would be welcomed.
- What role is envisioned for the "super integrator" in the OCRWM environmental program and at what stage in the program will the new contractor become involved in and responsible for environmental programs?
- DOE views on the potential consequences that the court's decision on 40 CFR 191 might have on the OCRWM environmental program are of interest to us.

We realize there is a natural tendency to defer addressing issues such as the above or to qualify comments on them to the extent that any information departed is couched in overwhelming uncertainty. However, these are points upon which we have sought meaningful discussion a number of times to no avail. With your help perhaps the upcoming meeting of ECG can prove the exception and result in seriously addressing these and other critical issues. My staff stands ready to work with ECG to that end.

Please call me or Charlie Malone if there are questions or suggestions regarding our participation in the September 15 - 17 meetings.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert R. Loux". The signature is fluid and cursive, with a large, sweeping loop at the end.

Robert R. Loux
Executive Director

RRL:CRM/njc

cc: Dr. Raj Sharma, U.S. Department of Energy
Ms. Deborah Valentine, U.S. Department of Energy
Affected States/Tribes
NRC

h

Tab G:
Programmatic Agreement Schedule

h

NATIONAL HISTORIC PRESERVATION ACT
PROGRAMMATIC AGREEMENTS

ENVIRONMENTAL COORDINATING GROUP

SEPTEMBER 16, 1987

WASHINGTON, D.C.

BASALT WASTE ISOLATION PROJECT (BWIP)
STATUS OF PROGRAMMATIC AGREEMENT (PA)

AUGUST 1987 COMMENTS EXPECTED FROM STATE AND AFFECTED INDIAN TRIBES ON DRAFT RESEARCH DESIGN

SEPTEMBER 1987 CONSULTATION MEETING PLANNED WITH AFFECTED INDIAN TRIBES

OCTOBER 1987 RESOLVE REVIEW COMMENTS ON DRAFT RESEARCH DESIGN

OCTOBER 13, 1987 ENVIRONMENTAL FIELD ACTIVITY PLAN FOR ARCHEOLOGICAL AND CULTURAL RESOURCES TO BE DISTRIBUTED TO STATES AND AFFECTED INDIAN TRIBES

JANUARY 1988 BEGIN PREPARATION OF PA FOR BWIP AND HANFORD WITH ACHP AND WASHINGTON SHPO, IN CONSULTATION WITH AFFECTED INDIAN TRIBES

MAY 1988 FINALIZE PA

JUNE 1988 PA TO BE SIGNED BY DOE/BWIP, DOE/HQ, ACHP, WASHINGTON SHPO, AND AFFECTED INDIAN TRIBES

SALT REPOSITORY PROJECT OFFICE (SRPO)
STATUS OF PROGRAMMATIC AGREEMENT (PA)

APRIL 22, 1987	PA SIGNED BY DOE/SRPO
MAY 28, 1987	PA SIGNED BY DOE/HQ
JUNE 23, 1987	PA SIGNED BY TEXAS SHPO
JULY 24, 1987	PA SIGNED BY ADVISORY COUNCIL ON HISTORIC PRESERVATION (ACHP)
JULY 24, 1987	PA RATIFIED BY ALL PARTIES AND IN EFFECT
OCTOBER 13, 1987	ENVIRONMENTAL FIELD ACTIVITY PLAN (EFAP) FOR CULTURAL RESOURCES TO BE DISTRIBUTED TO STATE. EFAP DIRECTED TOWARD FULFILLMENT OF PA STIPULATIONS 1-5

NEVADA NUCLEAR WASTE STORAGE
INVESTIGATIONS (NNWSI)
STATUS OF PROGRAMMATIC AGREEMENT

AUGUST 1987	REVISED PA SENT TO NEVADA SHPO
SEPTEMBER 1987	RESOLUTION OF OUTSTANDING ISSUES
SEPTEMBER 1987	PA TO BE SIGNED BY DOE/NNWSI, DOE/HQ, ACHP, NEVADA SHPO
OCTOBER 13, 1987	ENVIRONMENTAL FIELD ACTIVITY PLAN FOR CULTURAL RESOURCES STUDIES TO BE DISTRIBUTED TO STATE.

Tab H:
National Historic Preservation Act
and
Implementing Regulations (36 CFR 800)

National Historic Preservation Act of 1966, as amended

**This material was prepared by the Advisory Council on Historic
Preservation, Washington, D.C.**

**First edition, 1981
Second edition, 1984**

National Historic Preservation Act of 1966, as amended

AN ACT to Establish a Program for the Preservation of Additional Historic Properties throughout the Nation, and for Other Purposes, Approved October 15, 1966 (Public Law 89-665; 80 STAT. 915; 16 U.S.C. 470) as amended by Public Law 91-243, Public Law 93-54, Public Law 94-422, Public Law 94-458, Public Law 96-199, Public Law 96-244, and Public Law 96-515).

Section 1 (16 U.S.C. 470)

Short title

(a) This Act may be cited as the "National Historic Preservation Act."

Purpose of the Act

(b) The Congress finds and declares that—

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

Section 2 (16 U.S.C. 470-1)

Declaration of policy

It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals to—

(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations;

(3) administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4) contribute to the preservation of nonfederally owned prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6) assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

TITLE I

Section 101 (16 U.S.C. 470a)

*National Register of Historic Places,
expansion and maintenance*

(a)(1)(A) The Secretary of the Interior is authorized to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture.

National Historic Landmarks, designation

(B) Properties meeting the criteria for National Historic Landmarks established pursuant to paragraph (2) shall be designated as "National Historic Landmarks" and included on the National Register, subject to the requirements of paragraph (6). All historic properties included on the National Register on the date of enactment of the National Historic Preservation Act Amendments of 1980 shall be deemed to be included on the National Register as of their initial listing for purposes of this Act. All historic properties listed in the Federal Register of February 6, 1979, as "National Historic Landmarks" or thereafter prior to the effective date of this Act are declared by Congress to be National Historic Landmarks of national historic significance as of their initial listing as such in the Federal Register for purposes of this Act and the Act of August 21, 1935 (49 Stat. 666); except that in cases of National Historic Landmark districts for which no boundaries have been established, boundaries must first be published in the Federal Register and submitted to the Committee on Energy and Natural Resources of the United States Senate and to the Committee on Interior and Insular Affairs of the United States House of Representatives.

*Criteria for National Register and National
Historic Landmarks and regulations*

(2) The Secretary in consultation with national historic and archeological associations, shall establish or revise criteria for properties to be included on the National Register and criteria for National Historic Landmarks, and shall also promulgate or revise regulations as may be necessary for—

(A) nominating properties for inclusion in, and removal from, the National Register and the recommendation of properties by certified local governments;

(B) designating properties as National Historic Landmarks and removing such designation;

(C) considering appeals from such recommendations, nomination, removals, and designations (or any failure or refusal by a nominating authority to nominate or designate);

(D) nominating historic properties for inclusion in the World Heritage List in accordance with the terms of the Convention concerning the Protection of the World Cultural and Natural Heritage;

(E) making determinations of eligibility of properties for inclusion on the National Register; and

(F) notifying the owner of a property, any appropriate local governments, and the general public, when the property is being considered for inclusion on the National Register, for designation as a National Historic Landmark or for nomination to the World Heritage List.

Nominations to the National Register

(3) Subject to the requirements of paragraph (6), any State which is carrying out a program approved under subsection (b), shall nominate to the Secretary properties which meet the criteria promulgated under subsection (a) for inclusion on the National Register. Subject to paragraph (6), any property nominated under this paragraph or under section 110(a)(2) shall be included on the National Register on the date forty-five days after receipt by the Secretary of the nomination and the necessary documentation, unless the Secretary disapproves such nomination within such forty-five day period or unless an appeal is filed under paragraph (5).

*Nominations from individuals and local
governments*

(4) Subject to the requirements of paragraph (6) the Secretary may accept a nomination directly from any person or local government for inclusion of a property on the National Register only if such property is located in a State where there is no program approved under subsection (b). The Secretary may include on the National Register any property for which such a nomination is made if he determines that such property is eligible in accordance with the regulations promulgated under paragraph (2). Such determinations shall be made within ninety days from the date of nomination unless the nomination is appealed under paragraph (5).

Appeals of nominations

(5) Any person or local government may appeal to the Secretary a nomination of any historic property for inclusion on the National Register and may appeal to the Secretary the failure or refusal of a nominating authority to nominate a property in accordance with this subsection.

Owner participation in nomination process

(6) The Secretary shall promulgate regulations requiring that before any property or district may be included on the National Register or designated as a National Historic Landmark, the owner or owners of such property, or a majority of the owners of the properties within the district in the case of an historic district, shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property or district for such inclusion or designation. If the owner or owners of any privately owned property, or a majority of the owners of such properties within the district in the case of an historic district, object to such inclusion or designation, such property shall not be included on the National Register or designated as a National Historic Landmark until such objection is withdrawn. The Secretary shall review the nomination of the property or district where any such objection has been made and shall determine whether or not the property or district is eligible for such inclusion or designation, and if the Secretary determines that such property or district is eligible for such inclusion or designation, he shall inform the Advisory Council on Historic Preservation, the appropriate State Historic Preservation Officer, the appropriate chief elected local official and the owner or owners of such property, of his determination. The regulations under this paragraph shall include provisions to carry out the purposes of this paragraph in the case of multiple ownership of a single property.

Regulations for curation, documentation, and local government certification

(7) The Secretary shall promulgate, or revise, regulations—
(A) ensuring that significant prehistoric and historic artifacts, and associated records, subject to section 110 of this Act, the Act of June 27, 1960 (16 U.S.C. 469c), and the Archeological Resources Protection Act of 1979 (16 U.S.C. 470aa and following) are deposited in an institution with adequate long-term curatorial capabilities;
(B) establishing a uniform process and standards for documenting historic properties by public agencies and private parties for purposes of incorporation into, or complementing, the national historic architectural and engineering records within the Library of Congress; and
(C) certifying local governments, in accordance with subsection (c)(1) and for the allocation of funds pursuant to section 103(c) of this Act.

State Historic Preservation Programs

(b)(1) The Secretary, in consultation with the National Conference of State Historic Preservation Officers and the National Trust for Historic Preservation, shall promulgate or revise regulations for State Historic Preservation Programs. Such regulations shall provide that a State program submitted to the Secretary under this section shall be approved by the Secretary if he determines that the program—

Designation of the State Historic Preservation Officer (SHPO)

(A) provides for the designation and appointment by the Governor of a "State Historic Preservation Officer" to administer such program in accordance with paragraph (3) and for the employment or appointment by such officer of such professionally qualified staff as may be necessary for such purposes;
(B) provides for an adequate and qualified State historic preservation review board designated by the State Historic Preservation Officer unless otherwise provided for by State law; and
(C) provides for adequate public participation in the State Historic Preservation Program, including the process of recommending properties for nomination to the National Register.

Review of State programs

(2) Periodically, but not less than every four years after the approval of any State program under this subsection, the Secretary shall evaluate such program to make a determination as to whether or not it is in compliance with the requirements of this Act. If at any time, the Secretary determines that a State program does not comply with such requirements, he shall disapprove such program, and suspend in whole or in part assistance to such State under subsection (d)(1), unless there are adequate assurances that the program will comply with such requirements within a reasonable period of time. The Secretary may also conduct periodic fiscal audits of State programs approved under this section.

SHPO responsibilities

(3) It shall be the responsibility of the State Historic Preservation Officer to administer the State Historic Preservation Program and to—

(A) in cooperation with Federal and State agencies, local governments, and private organizations and individuals, direct and conduct a comprehensive statewide survey of historic properties and maintain inventories of such properties;

(B) identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties on the National Register;

(C) prepare and implement a comprehensive statewide historic preservation plan;

(D) administer the State program of Federal assistance for historic preservation within the State;

(E) advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;

(F) cooperate with the Secretary, the Advisory Council on Historic Preservation, and other Federal and State agencies, local governments, and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development;

(G) provide public information, education and training, and technical assistance relating to the Federal and State Historic Preservation Programs; and

(H) cooperate with local governments in the development of local historic preservation programs and assist local governments in becoming certified pursuant to subsection (c).

Arrangements with nonprofit organizations

(4) Any State may carry out all or any part of its responsibilities under this subsection by contract or cooperative agreement with any qualified nonprofit organization or educational institution.

Approval of existing programs

(5) Any State historic preservation program in effect under prior authority of law may be treated as an approved program for purposes of this subsection until the earlier of—

(A) the date on which the Secretary approves a program submitted by the State under this subsection, or

(B) three years after the date of the enactment of the National Historic Preservation Act Amendments of 1980.

Certification of local governments

(c)(1) Any State program approved under this section shall provide a mechanism for the certification by the State Historic Preservation Officer of local governments to carry out the purposes of this Act and provide for the transfer, in accordance with section 103(c), of a portion of the grants received by the States under this Act, to such local governments. Any local government shall be certified to participate under the provisions of this section if the applicable State Historic Preservation Officer, and the Secretary, certifies that the local government—

(A) enforces appropriate State or local legislation for the designation and protection of historic properties;

(B) has established an adequate and qualified historic preservation review commission by State or local legislation;

(C) maintains a system for the survey and inventory of historic properties that furthers the purposes of subsection (b);

(D) provides for adequate public participation in the local historic preservation program, including the process of recommending properties for nomination to the National Register; and

(E) satisfactorily performs the responsibilities delegated to it under this Act.

Where there is no approved State program, a local government may be certified by the Secretary if he determines that such local government meets the requirements of subparagraphs (A) through (E); and in any such case the Secretary may make grants-in-aid to the local government for purposes of this section.

Participation of certified local governments in National Register nominations

(2)(A) Before a property within the jurisdiction of the certified local government may be considered by the State to be nominated to the Secretary for inclusion on the National Register, the State Historic Preservation Officer shall notify the owner, the applicable chief local elected official, and the local historic preservation commission. The commission, after reasonable opportunity for public comment, shall prepare a report as to whether or not such property, in its opinion, meets the criteria of the National Register. Within sixty days of notice from the State Historic Preservation Officer, the chief local elected official shall transmit the report of the commission and his recommendation to the State Historic Preservation Officer. Except as provided in subparagraph (B), after receipt of such report and recommendation, or if no such report and recommendation are received within sixty days, the State shall make the nomination pursuant to section 101(a). The State may expedite such process with the concurrence of the certified local government.

(B) If both the commission and the chief local elected official recommend that a property not be nominated to the National Register, the State Historic Preservation Officer shall take no further action, unless within thirty days of the receipt of such recommendation by the State Historic Preservation Officer an appeal is filed with the State. If such an appeal is filed, the State shall follow the procedures for making a nomination pursuant to Section 101(a). Any report and recommendations made under this section shall be included with any nomination submitted by the State to the Secretary.

(3) Any local government certified under this section or which is making efforts to become so certified shall be eligible for funds under the provision of section 103(c) of this Act, and shall carry out any responsibilities delegated to it in accordance with such terms and conditions as the Secretary deems necessary or advisable.

Grants to States

(d)(1) The Secretary shall administer a program of matching grants-in-aid to the States for historic preservation projects, and State historic preservation programs, approved by the Secretary and having as their purpose the identification of historic properties and the preservation of properties included on the National Register.

Grants to the National Trust

(2) The Secretary shall administer a program of matching grants-in-aid to the National Trust for Historic Preservation in the United States, chartered by Act of Congress approved October 26, 1949 (63 Stat. 947), for the purposes of carrying out the responsibilities of the National Trust.

Direct grants for threatened National Historic Landmarks, demonstration projects, training, and displacement prevention

(3)(A) In addition to the programs under paragraphs (1) and (2), the Secretary shall administer a program of direct grants for the preservation of properties included on the National Register. Funds to support such program annually shall not exceed 10 per centum of the amount appropriated annually for the fund established under section 108. These grants may be made by the Secretary, in consultation with the appropriate State Historic Preservation Officer—

(i) for the preservation of National Historic Landmarks which are threatened with demolition or impairment and for the preservation of historic properties of World Heritage significance;

(ii) for demonstration projects which will provide information concerning professional methods and techniques having application to historic properties;

(iii) for the training and development of skilled labor in trades and crafts, and in analysis and curation, relating to historic preservation; and,

(iv) to assist persons or small businesses within any historic district included in the National Register to remain within the district.

Grants and loans to minority groups

(B) The Secretary may also, in consultation with the appropriate State Historic Preservation Officer, make grants or loans or both under this section to Indian tribes and to nonprofit organizations representing ethnic or minority groups for the preservation of their cultural heritage.

(C) Grants may be made under subparagraph (A)(i) and (iv) only to the extent that the project cannot be carried out in as effective a manner through the use of an insured loan under section 104.

Prohibition on compensating intervenors

(e) No part of any grant made under this section may be used to compensate any person intervening in any proceeding under this Act.

Guidelines for Federal agency responsibilities

(f) In consultation with the Advisory Council on Historic Preservation, the Secretary shall promulgate guidelines for Federal agency responsibilities under section 110 of this title.

Preservation standards for federally owned properties

(g) Within one year after the date of enactment of the National Historic Preservation Act Amendments of 1980, the Secretary shall establish, in consultation with the Secretaries of Agriculture and Defense, the Smithsonian Institution, and the Administrator of the General Services Administration, professional standards for the preservation of historic properties in Federal ownership or control.

Technical advice

(h) The Secretary shall develop and make available to Federal agencies, State and local governments, private organizations and individuals, and other nations and international organizations pursuant to the World Heritage Convention, training in, and information concerning professional methods and techniques for the preservation of historic properties and for the administration of the historic preservation program at the Federal, State, and local level. The Secretary shall also develop mechanisms to provide information concerning historic preservation to the general public including students.

Section 102 (16 U.S.C. 470b)

Grants requirements

(a) No grant may be made under this Act—

(1) unless application therefore is submitted to the Secretary in accordance with regulations and procedures prescribed by him;

(2) unless the application is in accordance with the comprehensive statewide historic preservation plan which has been approved by the Secretary after considering its relationship to the comprehensive statewide outdoor recreation plan prepared pursuant to the Land and Water Conservation Fund Act of 1965 (78 Stat. 897);

(3) for more than 50 per centum of the aggregate cost of carrying out projects and programs specified in section 101(d) (1) and (2) in any one fiscal year, except that for the costs of State or local historic surveys or inventories the Secretary shall provide 70 per centum of the aggregate cost involved in any one fiscal year;

(4) unless the grantee has agreed to make such reports, in such form and containing such information as the Secretary may from time to time require;

(5) unless the grantee has agreed to assume, after completion of the project, the total cost of the continued maintenance, repair, and administration of the property in a manner satisfactory to the Secretary; and

(6) until the grantee has complied with such further terms and conditions as the Secretary may deem necessary or advisable.

Except as permitted by other law, the State share of the costs referred to in paragraph (3) shall be contributed by non-Federal sources. Notwithstanding any other provision of law, no grant made pursuant to this Act shall be treated as taxable income for purposes of the Internal Revenue Code 1954.

Waiver for the National Trust

(b) The Secretary may in his discretion waive the requirements of subsection (a), paragraphs (2) and (5) of this section for any grant under this Act to the National Trust for Historic Preservation in the United States, in which case a grant to the National Trust may include funds for the maintenance, repair, and administration of the property in a manner satisfactory to the Secretary.

Limitation on matching

(c) No State shall be permitted to utilize the value of real property obtained before the date of approval of this Act in meeting the remaining cost of a project for which a grant is made under this Act.

Section 103 (16 U.S.C. 470c)

Apportionment of survey and planning grants

(a) The amounts appropriated and made available for grants to the States for comprehensive statewide historic surveys and plans under this Act shall be apportioned among the States by the Secretary on the basis of needs as determined by him.

Apportionment of project and program grants

(b) The amounts appropriated and made available for grants to the States for projects and programs under this Act for each fiscal year shall be apportioned among the States by the Secretary in accordance with needs as disclosed in approved statewide historic preservation plans. The Secretary shall notify each State of its apportionment under this subsection within thirty days following the date of enactment of legislation appropriating funds under this Act. Any amount of any apportionment that has not been paid or obligated by the Secretary during the fiscal year in which such notification is given and for two fiscal years thereafter, shall be reapportioned by the Secretary in accordance with this subsection.

Apportionment to certified local governments

(c) A minimum of 10 per centum of the annual apportionment distributed by the Secretary to each State for the purposes of carrying out this Act shall be transferred by the State, pursuant to the requirements of this Act, to local governments which are certified under section 101(c) for historic preservation projects or programs of such local governments. In any year in which the total annual apportionment to the States exceeds \$65,000,000, one half of the excess shall also be transferred by the States to local governments certified pursuant to section 101(c).

Guidelines for apportionment to local governments

(d) The Secretary shall establish guidelines for the use and distribution of funds under subsection (c) to insure that no local government receives a disproportionate share of the funds available, and may include a maximum or minimum limitation on the amount of funds distributed to any single local government. The guidelines shall not limit the ability of any State to distribute more than 10 per centum of its annual apportionment under subsection (c), nor shall the Secretary require any State to exceed the 10 per centum minimum distribution to local governments.

Section 104 (16 U.S.C. 470d)

Insured loans for National Register properties

(a) The Secretary shall establish and maintain a program by which he may, upon application of a private lender, insure loans (including loans made in accordance with a mortgage) made by such lender to finance any project for the preservation of a property included on the National Register.

Requirements

(b) A loan may be insured under this section only if—

(1) the loan is made by a private lender approved by the Secretary as financially sound and able to service the loan properly;

(2) the amount of the loan, and interest rate charged with respect to the loan, do not exceed such amount, and such a rate, as is established by the Secretary, by rule;

(3) the Secretary has consulted the appropriate State Historic Preservation Officer concerning the preservation of the historic property;

(4) the Secretary has determined that the loan is adequately secured and there is reasonable assurance of repayment;

(5) the repayment period of the loan does not exceed the lesser of forty years or the expected life of the asset financed;

(6) the amount insured with respect to such loan does not exceed 90 per centum of the loss sustained by the lender with respect to the loan; and

(7) the loan, the borrower, and the historic property to be preserved meet other terms and conditions as may be prescribed by the Secretary, by rule, especially terms and conditions relating to the nature and quality of the preservation work.

Interest rates

The Secretary shall consult with the Secretary of the Treasury regarding the interest rate of loans insured under this section.

Limitation on loan authority

(c) The aggregate unpaid principal balance of loans insured under this section and outstanding at any one time may not exceed the amount which has been covered into the Historic Preservation Fund pursuant to section 108 and subsection (g) and (i) of this section, as in effect on the date of the enactment of the Act but which has not been appropriated for any purpose.

Assignability and effect

(d) Any contract of insurance executed by the Secretary under this section may be assignable, shall be an obligation supported by the full faith and credit of the United States, and shall be incontestable except for fraud or misrepresentation of which the holder had actual knowledge at the time it became a holder.

Method of payment for losses

(e) The Secretary shall specify, by rule and in each contract entered into under this section, the conditions and method of payment to a private lender as a result of losses incurred by the lender on any loan insured under this section.

Protection of Government's financial interests; foreclosure

(f) In entering into any contract to insure a loan under this section, the Secretary shall take steps to assure adequate protection of the financial interests of the Federal Government. The Secretary may—

(1) in connection with any foreclosure proceeding, obtain, on behalf of the Federal Government, the property securing a loan insured under this title; and

(2) operate or lease such property for such period as may be necessary to protect the interest of the Federal Government and to carry out subsection (g).

Conveyance of foreclosed property

(g)(1) In any case in which a historic property is obtained pursuant to subsection (f), the Secretary shall attempt to convey such property to any governmental or nongovernmental entity under such conditions as will ensure the property's continued preservation and use; except that if, after a reasonable time, the Secretary, in consultation with the Advisory Council on Historic Preservation, determines that there is no feasible and prudent means to convey such property and to ensure its continued preservation and use, then the Secretary may convey the property at the fair market value of its interest in such property to any entity without restriction.

(2) Any funds obtained by the Secretary in connection with the conveyance of any property pursuant to paragraph (1) shall be covered into the historic preservation fund, in addition to the amounts covered into such fund pursuant to section 108 and subsection (i) of this section, and shall remain available in such fund until appropriated by the Congress to carry out the purposes of this Act.

Fees

(h) The Secretary may assess appropriate and reasonable fees in connection with insuring loans under this section. Any such fees shall be covered into the Historic Preservation Fund, in addition to the amounts covered into such fund pursuant to section 108 and subsection (g) of this section, and shall remain available in such fund until appropriated by the Congress to carry out the purposes of this Act.

Loans to be considered non-Federal funds

(i) Notwithstanding any other provision of law, any loan insured under this section shall be treated as non-Federal funds for the purposes of satisfying any requirement of any other provision of law under which Federal funds to be used for any project or activity are conditioned upon the use of non-Federal funds by the recipient for payment of any portion of the costs of such project or activity.

Appropriation authorization

(j) Effective after the fiscal year 1981 there are authorized to be appropriated, such sums as may be necessary to cover payments incurred pursuant to subsection (e).

Prohibition against acquisition by Federal Financing Bank

(k) No debt obligation which is made or committed to be made, or which is insured or committed to be insured, by the Secretary under this section shall be eligible for purchase by, or commitment to purchase by, or sale or issuance to, the Federal Financing Bank.

Section 105 (16 U.S.C. 470e)

Recordkeeping

The beneficiary of assistance under this Act shall keep such records as the Secretary shall prescribe, including records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

Section 106 (16 U.S.C. 470f)

*Advisory Council on Historic Preservation,
comment on Federal undertakings*

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Section 107 (16 U.S.C. 470g)

*Exemption of White House, Supreme
Court, and Capitol*

Nothing in this Act shall be construed to be applicable to the White House and its grounds, the Supreme Court building and its grounds, or the United States Capitol and its related buildings and grounds.

Section 108 (16 U.S.C. 470h)

*Establishment of Historic Preservation
Fund; authorization for appropriations*

To carry out the provisions of this Act, there is hereby established the Historic Preservation Fund (hereafter referred to as the "fund") in the Treasury of the United States.

There shall be covered into such fund \$24,400,000 for fiscal year 1977, \$100,000,000 for fiscal year 1978, \$100,000,000 for fiscal year 1979, \$150,000,000 for fiscal year 1980, \$150,000,000 for fiscal year 1981, and \$150,000,000 for each of fiscal years 1982 through 1987, from revenues due and payable to the United States under the Outer Continental Shelf Lands Act (67 Stat. 462, 469) as amended (43 U.S.C. 338) and/or under the Act of June 4, 1920 (41 Stat. 813) as amended (30 U.S.C. 191), notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury. Such moneys shall be used only to carry out the purposes of this Act and shall be available for expenditure only when appropriated by the Congress. Any moneys not appropriated shall remain available in the fund until appropriated for said purposes: Provided, that appropriations made pursuant to this paragraph may be made without fiscal year limitation.

Section 109 (16 U.S.C. 470h-1)

Donations to the Secretary

(a) In furtherance of the purposes of sections of this Act, the Secretary may accept the donation of funds which may be expended by him for projects to acquire, restore, preserve, or recover data from any district, building, structure, site, or object which is listed on the National Register of Historic Places established pursuant to section 101 of this Act, so long as the project is owned by a State, any unit of local government, or any nonprofit entity.

Expenditure of donated funds

(b) In expending said funds, the Secretary shall give due consideration to the following factors: the national significance of the project; its historical value to the community; the imminence of its destruction or loss; and the expressed intentions of the donor. Funds expended under this subsection shall be made available without regard to the matching requirements established by section 102 of this Act, but the recipient of such funds shall be permitted to utilize them to match any grants from the Historic Preservation Fund established by section 108 of this Act.

*Transfer of funds donated for the National
Park Service*

(c) The Secretary is hereby authorized to transfer unobligated funds previously donated to the Secretary for purposes of the National Park Service, with the consent of the donor, and any funds so transferred shall be used or expended in accordance with the provisions of this Act.

Section 110 (16 U.S.C. 470h-2)

Federal agencies' responsibility to preserve and use historic buildings

(a)(1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency. Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 101(f), any preservation, as may be necessary to carry out this section.

Protection and nomination to the National Register of Federal properties

(2) With the advice of the Secretary and in cooperation with the State Historic Preservation Officer for the State involved, each Federal agency shall establish a program to locate, inventory, and nominate to the Secretary all properties under the agency's ownership or control by the agency, that appear to qualify for inclusion on the National Register in accordance with the regulations promulgated under section 101(a)(2)(A). Each Federal agency shall exercise caution to assure that any such property that might qualify for inclusion is not inadvertently transferred, sold, demolished, substantially altered, or allowed to deteriorate significantly.

Recordation of historic properties prior to demolition

(b) Each Federal agency shall initiate measures to assure that where, as a result of Federal action or assistance carried out by such agency, an historic property is to be substantially altered or demolished, timely steps are taken to make or have made appropriate records, and that such records then be deposited, in accordance with section 101(a), in the Library of Congress or with such other appropriate agency as may be designated by the Secretary, for future use and reference.

Designation of Federal agency preservation officers

(c) The head of each Federal agency shall, unless exempted under section 214, designate a qualified official to be known as the agency's "preservation officer" who shall be responsible for coordinating that agency's activities under this Act. Each Preservation Officer may, in order to be considered qualified, satisfactorily complete an appropriate training program established by the Secretary under section 101(g).

Conduct of agency programs consistent with Act

(d) Consistent with the agency's mission and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this Act and, give consideration to programs and projects which will further the purposes of this Act.

Transfer of surplus Federal historic properties

(e) The Secretary shall review and approve the plans of transferees of surplus federally owned historic properties not later than ninety days after his receipt of such plans to ensure that the prehistorical, historical, architectural, or culturally significant values will be preserved or enhanced.

Federal undertakings affecting National Historic Landmarks

(f) Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

Preservation activities as an eligible project cost

(g) Each Federal agency may include the costs of preservation activities of such agency under this Act as eligible project costs in all undertakings of such agency or assisted by such agency. The eligible project costs may also include amounts paid by a Federal agency to any State to be used in carrying out such preservation responsibilities of the Federal agency under this Act, and reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit.

Preservation awards program

(h) The Secretary shall establish an annual preservation awards program under which he may make monetary awards in amounts not to exceed \$1,000 and provide citations for special achievements to officers and employees of Federal, State, and certified local governments in recognition of their outstanding contributions to the preservation of historic resources. Such program may include the issuance of annual awards by the President of the United States to any citizen of the United States recommended for such award by the Secretary.

Applicability of National Environmental Policy Act

(i) Nothing in this Act shall be construed to require the preparation of an environmental impact statement where such a statement would not otherwise be required under the National Environmental Policy Act of 1969, and nothing in this Act shall be construed to provide any exemption from any requirement respecting the preparation of such a statement under such Act.

(j) The Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security.

Section 111 (16 U.S.C. 470h-3)

Leases or exchanges of Federal historic properties

(a) Notwithstanding any other provision of law, any Federal agency may, after consultation with the Advisory Council on Historic Preservation, lease an historic property owned by the agency to any person or organization, or exchange any property owned by the agency with comparable historic property, if the agency head determines that the lease or exchange will adequately insure the preservation of the historic property.

Use of proceeds

(b) The proceeds of any lease under subsection (a) may, notwithstanding any other provision of law, be retained by the agency entering into such lease and used to defray the costs of administration, maintenance, repair, and related expenses incurred by the agency with respect to such property or other properties which are on the National Register which are owned by, or are under the jurisdiction or control of, such agency. Any surplus proceeds from such leases shall be deposited into the Treasury of the United States at the end of the second fiscal year following the fiscal year in which such proceeds were received.

Management contracts

(c) The head of any Federal agency having responsibility for the management of any historic property may, after consultation with the Advisory Council on Historic Preservation, enter into contracts for the management of such property. Any such contract shall contain such terms and conditions as the head of such agency deems necessary or appropriate to protect the interests of the United States and insure adequate preservation of historic property.

TITLE II

Section 201 (16 U.S.C. 470i)

Advisory Council on Historic Preservation; membership

(a) There is established as an independent agency of the United States Government an Advisory Council on Historic Preservation (hereinafter referred to as the "Council") which shall be composed of the following members:

(1) a Chairman appointed by the President selected from the general public;

(2) the Secretary of the Interior;

(3) the Architect of the Capitol;

(4) the Secretary of Agriculture and the heads of four other agencies of the United States (other than the Department of the Interior), the activities of which affect historic preservation, appointed by the President;

(5) one Governor appointed by the President;

(6) one mayor appointed by the President;

(7) the President of the National Conference of State Historic Preservation Officers;

(8) the Chairman of the National Trust for Historic Preservation;

(9) four experts in the field of historic preservation appointed by the President from the disciplines of architecture, history, archeology, and other appropriate disciplines; and,

(10) three at-large members from the general public, appointed by the President.

Designees

(b) Each member of the Council specified in paragraphs (2) through (8) (other than (5) and (6)) may designate another officer of his department, agency, or organization to serve on the Council in his stead, except that, in the case of paragraphs (2) and (4), no such officer other than an Assistant Secretary or an officer having major department-wide or agency-wide responsibilities may be so designated.

Term of office

(c) Each member of the Council appointed under paragraph (1), and under paragraphs (9) and (10) of subsection (a) shall serve for a term of four years from the expiration of his predecessor's term; except that the members first appointed under that paragraph shall serve for terms of one to four years, as designated by the President at the time of appointment, in such manner as to insure that the terms of not more than two of them will expire in any one year. The members appointed under paragraphs (5) and (6) shall serve for the term of their elected office but not in excess of four years. An appointed member whose term has expired shall serve until that member's successor has been appointed.

Vacancies

(d) A vacancy in the Council shall not affect its powers, but shall be filled not later than sixty days after such vacancy commences, in the same manner as the original appointment (and for the balance of any unexpired terms). The members of the Advisory Council on Historic Preservation appointed by the President under this Act as in effect on the day before the enactment of the National Historic Preservation Act Amendments of 1980 shall remain in office until all members of the Council, as specified in this section, have been appointed. The members first appointed under this section shall be appointed not later than one hundred and eighty days after the enactment of the National Historic Preservation Act Amendments of 1980.

Vice Chairman

(e) The President shall designate a Vice Chairman, from the members appointed under paragraphs (5), (6), (9), or (10). The Vice Chairman may act in place of the Chairman during the absence or disability of the Chairman or when the office is vacant.

Quorum

(f) Nine members of the Council shall constitute a quorum.

Section 202 (16 U.S.C. 470j)

Duties of Council

(a) The Council shall—

(1) advise the President and the Congress on matters relating to historic preservation, recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation; and advise on the dissemination of information pertaining to such activities;

(2) encourage, in cooperation with the National Trust for Historic Preservation and appropriate private agencies, public interest and participation in historic preservation;

(3) recommend the conduct of studies in such areas as the adequacy of legislative and administrative statutes and regulations pertaining to historic preservation activities of State and local governments and the effects of tax policies at all levels of government on historic preservation;

(4) advise as to guidelines for the assistance of State and local governments in drafting legislation relating to historic preservation;

(5) encourage, in cooperation with appropriate public and private agencies and institutions, training and education in the field of historic preservation;

(6) review the policies and programs of Federal agencies and recommend to such agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out under this Act; and,

(7) inform and educate Federal agencies, State and local governments, Indian tribes, other nations and international organizations and private groups and individuals as to the Council's authorized activities.

Annual and special reports

(b) The Council shall submit annually a comprehensive report of its activities and the results of its studies to the President and the Congress and shall from time to time submit such additional and special reports as it deems advisable. Each report shall propose such legislative enactments and other actions as, in the judgment of the Council, are necessary and appropriate to carry out its recommendations and shall provide the Council's assessment of current and emerging problems in the field of historic preservation and an evaluation of the effectiveness of the programs of Federal agencies, State and local governments, and the private sector in carrying out the purposes of this Act.

Section 203 (16 U.S.C. 470k)

Information from agencies

The Council is authorized to secure directly from any department, bureau, agency, board, commission, office, independent establishment or instrumentality of the executive branch of the Federal Government information, suggestions, estimates, and statistics for the purpose of this title; and each such department or instrumentality is authorized to furnish such information, suggestions, estimates, and statistics to the extent permitted by law and within available funds.

Section 204 (16 U.S.C. 470l)

Compensation of members

The members of the Council specified in paragraphs (2), (3), and (4) of section 201(a) shall serve without additional compensation. The other members of the Council shall receive \$100 per diem when engaged in the performances of the duties of the Council. All members of the Council shall receive reimbursement for necessary traveling and subsistence expenses incurred by them in the performance of the duties of the Council.

Section 205 (16 U.S.C. 470m)

Executive Director

(a) There shall be an Executive Director of the Council who shall be appointed in the competitive service by the Chairman with the concurrence of the Council. The Executive Director shall report directly to the Council and perform such functions and duties as the Council may prescribe.

General Counsel and attorneys

(b) The Council shall have a General Counsel, who shall be appointed by the Executive Director. The General Counsel shall report directly to the Executive Director and serve as the Council's legal advisor. The Executive Director shall appoint such other attorneys as may be necessary to assist the General Counsel, represent the Council in courts of law whenever appropriate, including enforcement of agreements with Federal agencies to which the Council is a party, assist the Department of Justice in handling litigation concerning the Council in courts of law, and perform such other legal duties and functions as the Executive Director and the Council may direct.

Appointment and compensation of staff

(c) The Executive Director of the Council may appoint and fix the compensation of such officers and employees in the competitive service as are necessary to perform the functions of the Council at rates not to exceed that now or hereafter prescribed for the highest rate for grade 15 of the General Schedule under section 5332 of title 5, United States Code: *Provided, however,* That the Executive Director, with the concurrence of the Chairman, may appoint and fix the compensation of not to exceed five employees in the competitive service at rates not to exceed that now or hereafter prescribed for the highest rate of grade 17 of the General Schedule under section 5332 of Title 5, United States Code.

Appointment and compensation of additional personnel

(d) The Executive Director shall have power to appoint and fix the compensation of such additional personnel as may be necessary to carry out its duties, without regard to the provisions of the civil service laws and the Classification Act of 1949.

Consultants

(e) The Executive Director of the Council is authorized to procure expert and consultant services in accordance with the provisions of section 3109 of title 5, United States Code.

Financial and administrative services

(f) Financial and administrative services (including those related to budgeting, accounting, financial reporting, personnel and procurement) shall be provided the Council by the Department of the Interior, for which payments shall be made in advance, or by reimbursement, from funds of the Council in such amounts as may be agreed upon by the Chairman of the Council and the Secretary of the Interior; *Provided,* That the regulations of the Department of the Interior for the collection of indebtedness of personnel resulting from erroneous payments (5 U.S.C. 46e) shall apply to the collection of erroneous payments made to or on behalf of a Council employee, and regulations of said Secretary for the administrative control of funds (31 U.S.C. 665(g)) shall apply to appropriations of the Council: *And provided further,* That the Council shall not be required to prescribe such regulations.

Provision of assistance by members

(g) The members of the Council specified in paragraphs (2) through (4) of section 201(a) shall provide the Council, with or without reimbursement as may be agreed upon by the Chairman and the members, with such funds, personnel, facilities, and services under their jurisdiction and control as may be needed by the Council to carry out its duties, to the extent that such funds, personnel, facilities, and services are requested by the Council and are otherwise available for that purpose. To the extent of available appropriations, the Council may obtain, by purchase, rental, donation, or otherwise, such additional property, facilities, and services as may be needed to carry out its duties and may also receive donations of moneys for such purpose, and the Executive Director is authorized, in his discretion, to accept, hold, use, expend, and administer the same for the purposes of this Act.

Section 206 (16 U.S.C. 470n)

International Centre for the Study of the Preservation and Restoration of Cultural Property; authorization

(a) The participation of the United States as a member of the International Centre for the Study of the Preservation and Restoration of Cultural Property is hereby authorized.

Members of official delegation

(b) The Council shall recommend to the Secretary of State, after consultation with the Smithsonian Institution and other public and private organizations concerned with the technical problems of preservation, the members of the official delegation which will participate in the activities of the Centre on behalf of the United States. The Secretary of State shall appoint the members of the official delegation from the persons recommended to him by the Council.

Authorization for membership payment

(c) For the purposes of this section there is authorized to be appropriated an amount equal to the assessment for United States membership in the Centre for fiscal years 1979, 1980, 1981, and 1982: *Provided*, That no appropriation is authorized and no payment shall be made to the Centre in excess of 25 per centum of the total annual assessment of such organization. Authorization for payment of such assessment shall begin in fiscal year 1981, but shall include earlier costs.

Section 207 (16 U.S.C. 470o)

Transfer of funds

So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, held, used, programmed, or available or to be made available by the Department of the Interior in connection with the functions of the Council, as the Director of the Office of Management and Budget shall determine, shall be transferred from the Department to the Council within 60 days of the effective date of this Act.

Section 208 (16 U.S.C. 470p)

Rights of Council employees

Any employee in the competitive service of the United States transferred to the Council under the provisions of this section shall retain all rights, benefits, and privileges pertaining thereto held prior to such transfer.

Section 209 (16 U.S.C. 470q)

Exemption from Federal Advisory Committee Act

The Council is exempt from the provisions of the Federal Advisory Committee Act (86 Stat. 770), and the provisions of the Administrative Procedure Act (80 Stat. 381) shall govern the operations of the Council.

Section 210 (16 U.S.C. 470r)

Submission to the Congress

No officer or agency of the United States shall have any authority to require the Council to submit its legislative recommendations, or testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress. In instances in which the Council voluntarily seeks to obtain the comments or review of any officer or agency of the United States, the Council shall include a description of such actions in its legislative recommendations, testimony, or comments on legislation which it transmits to the Congress.

Section 211 (16 U.S.C. 470s)

Regulations for Section 106; local government participation

The Council is authorized to promulgate such rules and regulations it deems necessary to govern the implementation of section 106 of this Act. The Council shall, by regulation, establish such procedures as may be necessary to provide for participation by local governments in proceedings and other actions taken by the Council with respect to undertakings referred to in section 106 which affect such local governments.

Section 212 (16 U.S.C. 470t)

Council appropriation authorization

(a) The Council shall submit its budget annually as a related agency of the Department of the Interior. To carry out the provisions of this title, there are authorized to be appropriated not more than \$1,500,000 in fiscal year 1977, \$1,750,000 in fiscal year 1978, and \$2,000,000 in fiscal year 1979. There are authorized to be appropriated not to exceed \$2,250,000 in fiscal year 1980, \$2,500,000 in fiscal year 1981, \$2,500,000 in fiscal year 1982, and \$2,500,000 in fiscal year 1983.

Concurrent submission of budget to Congress

(b) Whenever the Council submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit copies of that estimate or request to the House and Senate Appropriations Committees and the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources.

Section 213 (16 U.S.C. 470u)

Reports from Secretary at request of Council

To assist the Council in discharging its responsibilities under this Act, the Secretary at the request of the Chairman, shall provide a report to the Council detailing the significance of any historic property, describing the effects of any proposed undertaking on the affected property, and recommending measures to avoid, minimize, or mitigate adverse effects.

Section 214 (16 U.S.C. 470v)

Exemptions for Federal activities from provisions of the Act

The Council, with the concurrence of the Secretary, shall promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this Act when such exemption is determined to be consistent with the purposes of this Act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties.

TITLE III

Section 301 (16 U.S.C. 470w)

Definitions

As used in this Act, the term—

(1) “Agency” means agency as such term is defined in section 551 of title 5, United States Code, except that in the case of any Federal program exempted under section 214, the agency administering such program shall not be treated as an agency with respect to such program.

(2) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands.

(3) “Local government” means a city, county, parish, township, municipality, or borough, or any other general purpose political subdivision of any State.

(4) “Indian tribe” means the governing body of any Indian tribe, band, nation, or other group which is recognized as an Indian tribe by the Secretary of the Interior for which the United States holds land in trust or restricted status for the entity or its members. Such term also includes any Native village corporation, regional corporation, and Native Group established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1701 et seq.).

(5) “Historic property” or “historic resource” means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register; such term includes artifacts, records, and remains which are related to such a district, site, building, structure, or object.

(6) “National Register” or “Register” means the National Register of Historic Places established under section 101.

(7) “Undertaking” means any action as described in section 106.

(8) “Preservation” or “historic preservation” includes identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance and reconstruction, or any combination of the foregoing activities.

(9) “Cultural park” means a definable urban area which is distinguished by historic resources and land related to such resources and which constitutes an interpretive, educational, and recreational resource for the public at large.

(10) “Historic conservation district” means an urban area of one or more neighborhoods and which contains (A) historic properties, (B) buildings having similar or related architectural characteristics, (C) cultural cohesiveness, or (D) any combination of the foregoing.

(11) “Secretary” means the Secretary of the Interior except where otherwise specified.

(12) "State Historic Preservation Review Board" means a board, council, commission, or other similar collegial body established as provided in section 101(b)(1)(B)—

(A) the members of which are appointed by the State Historic Preservation Officer (unless otherwise provided for by State law),

(B) a majority of the members of which are professionals qualified in the following and related disciplines: history, prehistoric and historic archeology, architectural history, and architecture, and

(C) which has the authority to—

(i) review National Register nominations and appeals from nominations;

(ii) review appropriate documentation submitted in conjunction with the Historic Preservation Fund;

(iii) provide general advice and guidance to the State Historic Preservation Officer, and

(iv) perform such other duties as may be appropriate.

(13) "Historic preservation review commission" means a board, council, commission, or other similar collegial body which is established by State or local legislation as provided in section 101(c)(1)(B), and the members of which are appointed, unless otherwise provided by State or local legislation, by the chief elected official of the jurisdiction concerned from among—

(A) professionals in the disciplines of architecture, history, architectural history, planning, archeology, or related disciplines, to the extent such professionals are available in the community concerned, and

(B) such other persons as have demonstrated special interest, experience, or knowledge in history, architecture, or related disciplines and as will provide for an adequate and qualified commission.

Section 302 (16 U.S.C. 470w-1)

Authority to expend funds for purposes of this Act

Where appropriate, each Federal agency is authorized to expend funds appropriated for its authorized programs for the purposes of activities carried out pursuant to this Act, except to the extent appropriations legislation expressly provides otherwise.

Section 303 (16 U.S.C. 470w-2)

Donations to Secretary; money and personal property

(a) The Secretary is authorized to accept donations and bequests of money and personal property for the purposes of this Act and shall hold, use, expend, and administer the same for such purposes.

Donations of less than fee interests in real property

(b) The Secretary is authorized to accept gifts or donations of less than fee interests in any historic property where the acceptance of such interests will facilitate the conservation or preservation of such properties. Nothing in this section or in any provision of this Act shall be construed to affect or impair any other authority of the Secretary under other provision of law to accept or acquire any property for conservation or preservation or for any other purpose.

Section 304 (16 U.S.C. 470w-3)

Confidentiality of the location of sensitive historic resources

The head of any Federal agency, after consultation with the Secretary, shall withhold from disclosure to the public, information relating to the location or character of historic resources whenever the head of the agency or the Secretary determines that the disclosure of such information may create a substantial risk of harm, theft, or destruction to such resources or to the area or place where such resources are located.

Section 305 (16 U.S.C. 470w-4)

Attorneys' fees

In any civil action brought in any United States district court by any interested person to enforce the provisions of this Act, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

Section 306 (16 U.S.C. 470w-5)

National Center for the Building Arts

(a) In order to provide a national center to commemorate and encourage the building arts and to preserve and maintain a nationally significant building which exemplifies the great achievements of the building arts in the United States, the Secretary and the Administrator of the General Services Administration are authorized and directed to enter into a cooperative agreement with the Committee for a National Museum of the Building Arts, Incorporated, a nonprofit corporation organized and existing under the laws of the District of Columbia, or its successor, for the operation of a National Museum for the Building Arts in the Federal Building located in the block bounded by Fourth Street, Fifth Street, F Street, and G Street, Northwest in Washington, District of Columbia. Such museum shall—

(1) collect and disseminate information concerning the building arts, including the establishment of a national reference center for current and historic documents, publications, and research relating to the building arts;

(2) foster educational programs relating to the history, practice and contribution to society of the building arts, including promotion of imaginative educational approaches to enhance understanding and appreciation of all facets of the building arts;

(3) publicly display temporary and permanent exhibits illustrating, interpreting and demonstrating the building arts;

(4) sponsor or conduct research and study into the history of the building arts and their role in shaping our civilization; and

(5) encourage contributions to the building arts.

Cooperative agreement

(b) The cooperative agreement referred to in subsection (a) shall include provisions which—

(1) make the site available to the Committee referred to in subsection (a) without charge;

(2) provide, subject to available appropriations, such maintenance, security, information, janitorial and other services as may be necessary to assure the preservation and operation of the site; and

(3) prescribe reasonable terms and conditions by which the Committee can fulfill its responsibilities under this Act.

Grants to Committee

(c) The Secretary is authorized and directed to provide matching grants-in-aid to the Committee referred to in subsection (a) for its programs related to historic preservation. The Committee shall match such grants-in-aid in a manner and with such funds and services as shall be satisfactory to the Secretary, except that no more than \$500,000 may be provided to the Committee in any one fiscal year.

Site renovation

(d) The renovation of the site shall be carried out by the Administrator with the advice of the Secretary. Such renovation shall, as far as practicable—

(1) be commenced immediately,

(2) preserve, enhance, and restore the distinctive and historically authentic architectural character of the site consistent with the needs of a national museum of the building arts and other compatible use, and

(3) retain the availability of the central court of the building, or portions thereof, for appropriate public activities.

Annual report

(e) The Committee shall submit an annual report to the Secretary and the Administrator concerning its activities under this section and shall provide the Secretary and the Administrator with such other information as the Secretary may, from time to time, deem necessary or advisable.

Definition of "building arts"

(f) For purposes of this section, the term "building arts" includes, but shall not be limited to, all practical and scholarly aspects of prehistoric, historic, and contemporary architecture, archeology, construction, building technology and skills, landscape architecture, preservation and conservation, building and construction, engineering, urban and community design and renewal, city and regional planning, and related professions, skills, trades and crafts.

Section 307 (16 U.S.C. 470w-6)

Transmittal of regulations to Congressional committees

(a) At least thirty days prior to publishing in the Federal Register any proposed regulation required by this Act, the Secretary shall transmit a copy of the regulation to the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the Senate. The Secretary also shall transmit to such committees a copy of any final regulation prior to its publication in the Federal Register. Except as provided in subsection (b) of this section, no final regulation of the Secretary shall become effective prior to the expiration of thirty calendar days after it is published in the Federal Register during which either or both Houses of Congress are in session.

Emergency regulations

(b) In the case of an emergency, a final regulation of the Secretary may become effective without regard to the last sentence of subsection (a) if the Secretary notified in writing the Committee on Interior and Insular Affairs of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate setting forth the reasons why it is necessary to make the regulation effective prior to the expiration of the thirty-day period.

Disapproval by Congress

(c) Except as provided in subsection (b), the regulation shall not become effective if, within ninety calendar days of continuous session of Congress after the date of promulgation, both Houses of Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows: "That Congress disapproves the regulation promulgated by the Secretary dealing with the matter of _____, which regulation was transmitted to Congress on _____," the blank spaces therein being appropriately filled.

Inaction by Congress

(d) If at the end of sixty calendar days of continuous session of Congress after the date of promulgation of a regulation, no committee of either House of Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the regulation, and neither House has adopted such a resolution, the regulation may go into effect immediately. If, within such sixty calendar days, such a committee has reported or been discharged from further consideration of such a resolution, the regulation may go into effect not sooner than ninety calendar days of continuous session of Congress after its promulgation unless disapproved as provided for.

Definitions

(e) For the purposes of this section—

(1) continuity of session is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of sixty and ninety calendar days of continuous session of Congress.

Effect of Congressional inaction

(f) Congressional inaction on or rejection of a resolution of disapproval shall not be deemed an expression of approval of such regulation.

**APPENDIX: National Historic Preservation Act
Amendments of 1980, Public Law 96-515, December 12, 1980,
94 Stat. 3000**

This appendix contains related legislative provisions enacted in the National Historic Preservation Act Amendments of 1980 but that are not part of the National Historic Preservation Act.

Section 208 (16 U.S.C. 469c-2)

Identification, surveys, and evaluation of historic properties

Notwithstanding section 7(a) of the Act of June 27, 1960 (16 U.S.C. 469c), or any other provision of law to the contrary—

(1) identification, surveys, and evaluation carried out with respect to historic properties within project areas may be treated for purposes of any law or rule of law as planning costs of the project and not as costs of mitigation;

(2) reasonable costs for identification, surveys, evaluation, and data recovery carried out with respect to historic properties within project areas may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit; and

Waiver

(3) Federal agencies, with the concurrence of the Secretary and after notification of the Committee on Interior and Insular Affairs of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate, are authorized to waive, in appropriate cases, the 1 per centum limitation contained in Section 7(a) of such Act.

Section 401 (16 U.S.C. 470a-1)

United States participation in the World Heritage Convention

(a) The Secretary of the Interior shall direct and coordinate United States participation in the Convention Concerning the Protection of the World Cultural and Natural Heritage, approved by the Senate on October 26, 1973, in cooperation with the Secretary of State, the Smithsonian Institution, and the Advisory Council on Historic Preservation. Whenever possible, expenditures incurred in carrying out activities in cooperation with other nations and international organizations shall be paid for in such excess currency of the country or area where the expense is incurred as may be available to the United States.

Nomination of property to the World Heritage Committee

(b) The Secretary of the Interior shall periodically nominate properties he determines are of international significance to the World Heritage Committee on behalf of the United States. No property may be so nominated unless it has previously been determined to be of national significance. Each such nomination shall include evidence of such legal protections as may be necessary to ensure preservation of the property and its environment (including restrictive covenants, easements, or other forms of protection). Before making any such nomination, the Secretary shall notify the Committee on Interior and Insular Affairs of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate.

Nomination of non-Federal property to the World Heritage Committee

(c) No non-Federal property may be nominated by the Secretary of the Interior to the World Heritage Committee for inclusion on the World Heritage List unless the owner of the property concurs in writing to such nomination.

Section 402 (16 U.S.C. 470a-2)

Federal undertakings outside the United States; mitigation of adverse effects

Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.

Section 502 (16 U.S.C. 470a note)

Secretary's report to the President and Congress: folklife

The Secretary, in cooperation with the American Folklife Center of the Library of Congress shall, within two years after the date of the enactment of this Act, submit a report to the President and the Congress on preserving and conserving the intangible elements of our cultural heritage such as arts, skills, folklife, and folkways. The report shall take into account the view of other public and private organizations, as appropriate. This report shall include recommendations for legislative and administrative actions by the Federal Government in order to preserve, conserve, and encourage the continuation of the diverse traditional prehistoric, historic, ethnic, and folk cultural traditions that underlie and are a living expression of our American heritage.

Section 503 (16 U.S.C. 470j note)

Council's report to the President and Congress: tax laws

The Advisory Council on Historic Preservation, in cooperation with the Secretary and the Secretary of the Treasury, shall submit a report to the President and the Congress on Federal tax laws relating to historic preservation or affecting in any manner historic preservation. Such report shall include recommendations respecting amendments to such laws which would further the purposes of this Act. Such report shall be submitted within one year after the date of enactment of this Act.

Section 504 (16 U.S.C. 470h note)

Secretary's report to the President and Congress: Historic Preservation Fund

The Secretary shall submit a report directly to the President and the Congress on or before June 1, 1986, reviewing the operation of the Historic Preservation Fund and the national historic preservation program since the enactment of this Act and recommending appropriate funding levels, the time period for the reauthorization for appropriations from the fund, and other appropriate legislative action to be undertaken upon the expiration of the current fund authorization.

Section 505 (40 U.S.C. 874 note)

Pennsylvania Avenue Development Corporation: development plan, review, report to congressional committees

The Pennsylvania Avenue Development Corporation shall review the development plan for those parts of the development area which are not under development or committed for development as of the date of the enactment of this Act, to identify means by which the historic values of such parts of the development area may be preserved and enhanced to the maximum extent feasible. The foregoing review shall not be limited by the applicable provisions of the development plan in effect at the time of the review; nor shall the review require any actions by the Corporation during the course of the review or during its consideration by the Congress. Within one year of the date of this Act the Corporation shall submit to the appropriate committees of Congress a report containing the findings of the review required under this section, together with the Corporation's recommendations for any legislative measures or funding necessary to carry out the purposes of this section. The report shall also include a description of those activities which the Corporation proposes to undertake to carry out the purposes of this section and the financial implications of carrying out those activities.

Section 506 (16 U.S.C. 470a note)

Secretary's study and report to the President and Congress: cultural parks

The Secretary shall undertake a comprehensive study and formulate recommendations for a coordinated system of cultural parks and historic conservation districts that provide for the preservation, interpretation, development, and use by public and private entities of the prehistoric, historic, architectural, cultural, and recreational resources found in definable urban areas throughout the Nation. The study shall propose alternatives concerning the management and funding of such system by public and private entities and by various levels of government. The Secretary shall submit a report of his study and recommendations to the President and the Congress within two years after the enactment of this Act.

Section 507 (16 U.S.C. 470a note)

*Secretary's report to the President and
Congress: fire in historic properties*

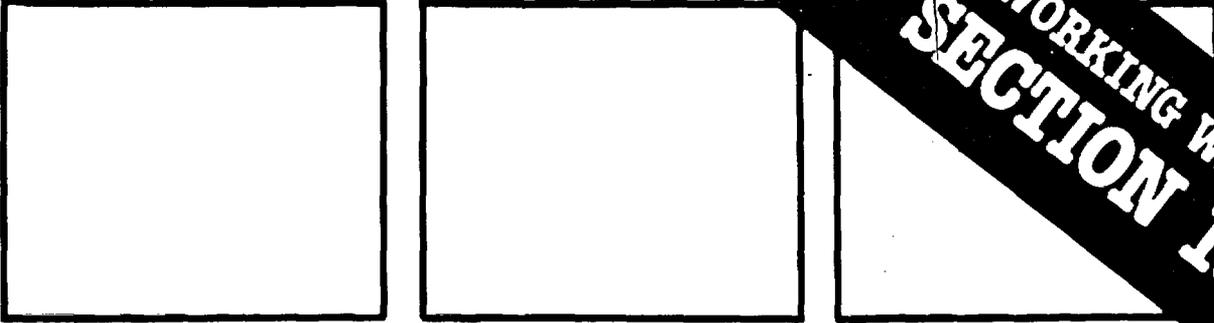
The Secretary, in cooperation with the Secretary of the Treasury, the Administrator of the United States Fire Administration, and the Administrator of the Federal Insurance Administration, shall submit a report to the President and the Congress on fire in historic properties. Such report shall include a review of Federal laws to determine any relationship between these laws and arson or fire by "suspicious origin", and to make recommendations respecting amendments to such laws should a correlation be found to exist. Such report shall include the feasibility and necessity of establishing or developing protective measures at the Federal, State, or local level for the prevention, detection, and control of arson or fire by "suspicious origin" in historic properties. Such report shall also include recommendations regarding the Federal role in assisting the States and local governments with protecting historic properties from damage by fire. Such report shall be submitted within eighteen months after the date of enactment of this Act.

**The Advisory Council on
Historic Preservation is the chief
policy advisor to the President and
Congress on matters of historic
preservation. An independent
Federal agency, the Council was
established by the National
Historic Preservation Act of 1966.**

**Responsibilities of the
19-member body include guiding
other Federal agencies to ensure
that their programs are carried out
with consideration to preserving
the Nation's historic resources.**

**Staff headquarters of the
Council are located in
Washington, D.C.**

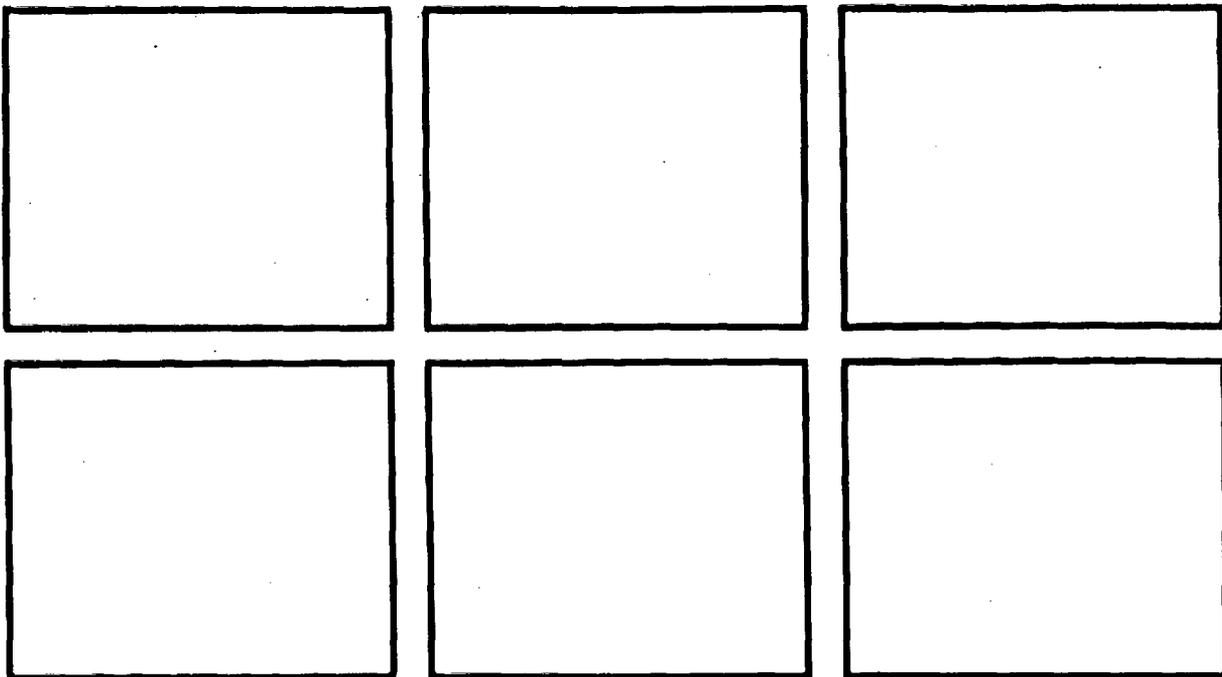
**WORKING WITH
SECTION 106**



36 CFR Part 800:

Protection of Historic Properties

Regulations of the
Advisory Council on Historic Preservation
Governing the Section 106 Review Process



Advisory Council on Historic Preservation

Effective October 1, 1986

36 CFR PART 800: PROTECTION OF HISTORIC PROPERTIES

The italicized marginal annotations are intended to aid the reader in locating regulatory topics. They are not a part of the formal regulations.

The text immediately below was published in the Federal Register on September 2, 1986 (51 FR 31115), as 36 CFR Part 800, "Protection of Historic Properties." These regulations govern the Section 106 review process established by the National Historic Preservation Act of 1966, as amended.

SUBPART A—BACKGROUND AND POLICY

800.1 Authorities, purposes, and participants.

What §106 requires of Federal agencies

(a) **Authorities.** Section 106 of the National Historic Preservation Act requires a Federal agency head with jurisdiction over a Federal, federally assisted, or federally licensed undertaking to take into account the effects of the agency's undertakings on properties included in or eligible for the National Register of Historic Places and, prior to approval of an undertaking, to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Section 110(f) of the Act requires that Federal agency heads, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking and, prior to approval of such undertaking, afford the Council a reasonable opportunity to comment. These regulations define the process used by a Federal agency to meet these responsibilities, commonly called the Section 106 process.

What §110(f) requires of Federal agencies

(b) **Purposes of the Section 106 process.** The Council seeks through the Section 106 process to accommodate historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts between the two and to help resolve such conflicts in the public interest. The Council encourages this accommodation through consultation among the Agency Official, the State Historic Preservation Officer, and other interested persons during the early stages of planning. The Council regards the consultation process as an effective means for reconciling the interests of the consulting parties.

Accommodation of historic preservation concerns and needs of Federal undertakings

Early integration of §106 into project planning

Integration of the Section 106 process into the normal administrative process used by agencies for project planning ensures early, systematic consideration of historic preservation issues. To this end, the Council encourages agencies to examine their administrative processes to see that they provide adequately for the efficient identification and consideration of historic properties, that they provide for participation by the State Historic Preservation Officer and others interested in historic preservation, that they provide for timely requests for Council comment, and that they promote cost-effective implementation of the Section 106 process. When impediments are found to exist in the agency's administrative process, the agency is encouraged to consult with the Council to develop special Section 106 procedures suited to the agency's needs.

§106 participants

Consulting parties

Federal agency's general responsibilities

SHPO's general responsibilities

Council's general responsibilities

Interested persons' participation

Local governments' participation

(c) Participants in the Section 106 process.

(1) Consulting parties. Consulting parties are the primary participants in the Section 106 process whose responsibilities are defined by these regulations. Consulting parties may include:

(i) Agency Official. The Agency Official with jurisdiction over an undertaking has legal responsibility for complying with Section 106. It is the responsibility of the Agency Official to identify and evaluate affected historic properties, assess an undertaking's effect upon them, and afford the Council its comment opportunity. The Agency Official may use the services of grantees, applicants, consultants, or designees to prepare the necessary information and analyses, but remains responsible for Section 106 compliance. The Agency Official should involve applicants for Federal assistance or approval in the Section 106 process as appropriate in the manner set forth below.

(ii) State Historic Preservation Officer. The State Historic Preservation Officer coordinates State participation in the implementation of the National Historic Preservation Act and is a key participant in the Section 106 process. The role of the State Historic Preservation Officer is to consult with and assist the Agency Official when identifying historic properties, assessing effects upon them, and considering alternatives to avoid or reduce those effects. The State Historic Preservation Officer reflects the interests of the State and its citizens in the preservation of their cultural heritage and helps the Agency Official identify those persons interested in an undertaking and its effects upon historic properties. When the State Historic Preservation Officer declines to participate or does not respond within 30 days to a written request for participation, the Agency Official shall consult with the Council, without the State Historic Preservation Officer, to complete the Section 106 process. The State Historic Preservation Officer may assume primary responsibility for reviewing Federal undertakings in the State by agreement with the Council as prescribed in Section 800.7 of these regulations.

(iii) Council. The Council is responsible for commenting to the Agency Official on an undertaking that affects historic properties. The official authorized to carry out the Council's responsibilities under each provision of the regulations is set forth in a separate, internal delegation of authority.

(2) Interested persons. Interested persons are those organizations and individuals that are concerned with the effects of an undertaking on historic properties. Certain provisions in these regulations require that particular interested persons be invited to become consulting parties under certain circumstances. In addition, whenever the Agency Official, the State Historic Preservation Officer, and the Council, if participating, agree that active participation of an interested person will advance the objectives of Section 106, they may invite that person to become a consulting party. Interested persons may include:

(i) Local governments. Local governments are encouraged to take an active role in the Section 106 process when undertakings affect historic properties within their jurisdiction. When a local government has legal responsibility for Section 106 compliance under programs such as the Community Development Block Grant Program, participation as a consulting party is required. When no

such legal responsibility exists, the extent of local government participation is at the discretion of local government officials. If the State Historic Preservation Officer, the appropriate local government, and the Council agree, a local government whose historic preservation program has been certified pursuant to Section 101(c)(1) of the Act may assume any of the duties that are given to the State Historic Preservation Officer by these regulations or that originate from agreements concluded under these regulations.

Federal applicants' participation

(ii) *Applicants for Federal assistance, permits, and licenses.* When the undertaking subject to review under Section 106 is proposed by an applicant for Federal assistance or for a Federal permit or license, the applicant may choose to participate in the Section 106 process in the manner prescribed in these regulations.

Indian tribes' participation

(iii) *Indian tribes.* The Agency Official, the State Historic Preservation Officer, and the Council should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties. When an undertaking will affect Indian lands, the Agency Official shall invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement. When an Indian tribe has established formal procedures relating to historic preservation, the Agency Official, State Historic Preservation Officer, and Council shall, to the extent feasible, carry out responsibilities under these regulations consistent with such procedures. An Indian tribe may participate in activities under these regulations in lieu of the State Historic Preservation Officer with respect to undertakings affecting its lands, provided the Indian tribe so requests, the State Historic Preservation Officer concurs, and the Council finds that the Indian tribe's procedures meet the purposes of these regulations. When an undertaking may affect properties of historic value to an Indian tribe on non-Indian lands, the consulting parties shall afford such tribe the opportunity to participate as interested persons. Traditional cultural leaders and other Native Americans are considered to be interested persons with respect to undertakings that may affect historic properties of significance to such persons.

Public participation

(iv) *The public.* The Council values the views of the public on historic preservation questions and encourages maximum public participation in the Section 106 process. The Agency Official, in the manner described below, and the State Historic Preservation Officer should seek and consider the views of the public when taking steps to identify historic properties, evaluate effects, and develop alternatives. Public participation in the Section 106 process may be fully coordinated with, and satisfied by, public participation programs carried out by Agency Officials under the authority of the National Environmental Policy Act and other pertinent statutes. Notice to the public under these statutes should adequately inform the public of preservation issues in order to elicit public views on such issues that can then be considered and resolved, when possible, in decisionmaking. Members of the public with interests in an undertaking and its effects on historic properties should be given reasonable opportunity to have an active role in the Section 106 process.

Definitions

800.2 Definitions.

- "Act"* (a) "Act" means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. §§ 470-470w-6.
- "Agency Official"* (b) "Agency Official" means the Federal agency head or a designee with authority over a specific undertaking, including any State or local government official who has been delegated legal responsibility for compliance with Section 106 and Section 110(f) in accordance with law.
- "Area of potential effects"* (c) "Area of potential effects" means the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist.
- "Council"* (d) "Council" means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.
- "Historic property"* (e) "Historic property" means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. This term includes, for the purposes of these regulations, artifacts, records, and remains that are related to and located within such properties. The term "eligible for inclusion in the National Register" includes both properties formally determined as such by the Secretary of the Interior and all other properties that meet National Register listing criteria.
- "Indian lands"* (f) "Indian lands" means all lands under the jurisdiction or control of an Indian tribe.
- "Indian tribe"* (g) "Indian tribe" means the governing body of any Indian tribe, band, nation, or other group that is recognized as an Indian tribe by the Secretary of the Interior and for which the United States holds land in trust or restricted status for that entity or its members. Such term also includes any Native village corporation, regional corporation, and Native Group established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §1601, *et seq.*
- "Interested person"* (h) "Interested person" means those organizations and individuals that are concerned with the effects of an undertaking on historic properties.
- "Local government"* (i) "Local government" means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.
- "National Historic Landmark"* (j) "National Historic Landmark" means a historic property that the Secretary of the Interior has designated a National Historic Landmark.
- "National Register"* (k) "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior.
- "National Register Criteria"* (l) "National Register Criteria" means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR Part 60).
- "Secretary"* (m) "Secretary" means the Secretary of the Interior.

"SHPO"

(n) "State Historic Preservation Officer" means the official appointed or designated pursuant to Section 101(b)(1) of the Act to administer the State historic preservation program or a representative designated to act for the State Historic Preservation Officer.

"Undertaking"

(o) "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106.

How the §106 process works

SUBPART B—THE SECTION 106 PROCESS

800.3 General.

*Scope of the regulations;
alternative methods of meeting
§106 requirements.*

(a) **Scope.** The procedure in this subpart guides Agency Officials, State Historic Preservation Officers, and the Council in the conduct of the Section 106 process. Alternative methods of meeting Section 106 obligations are found in Section 800.7, governing review of undertakings in States that have entered into agreements with the Council for Section 106 purposes, and Section 800.13, governing Programmatic Agreements with Federal agencies that pertain to specific programs or activities. Under each of these methods, the Council encourages Federal agencies to reach agreement on developing alternatives or measures to avoid or reduce effects on historic properties that meet both the needs of the undertaking and preservation concerns.

Procedural flexibility

(b) **Flexible application.** The Council recognizes that the procedures for the Agency Official set forth in these regulations may be implemented by the Agency Official in a flexible manner reflecting differing program requirements, as long as the purposes of Section 106 of the Act and these regulations are met.

Timing of the §106 process

(c) **Timing.** Section 106 requires the Agency Official to complete the Section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license or permit. The Council does not interpret this language to bar an Agency Official from expending funds on or authorizing nondestructive planning activities preparatory to an undertaking before complying with Section 106, or to prohibit phased compliance at different stages in planning. The Agency Official should ensure that the Section 106 process is initiated early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration. The Agency Official should establish a schedule for completing the Section 106 process that is consistent with the planning and approval schedule for the undertaking.

*Allowance for nondestructive
planning before the §106
process is completed*

Steps of the §106 process

Agency's determination of what information will be needed to complete the §106 process

Agency's location of historic properties in the project area

Agency's evaluation of whether properties found are "historic"

Agency/SHPO agreement about National Register eligibility of properties found

800.4 Identifying historic properties.

(a) Assessing information needs.

(1) Following a determination by the Agency Official that a proposed project, activity, or program constitutes an undertaking and after establishing the undertaking's area of potential effects, the Agency Official shall:

(i) Review existing information on historic properties potentially affected by the undertaking, including any data concerning the likelihood that unidentified historic properties exist in the area of potential effects;

(ii) Request the views of the State Historic Preservation Officer on further actions to identify historic properties that may be affected; and

(iii) Seek information in accordance with agency planning processes from local governments, Indian tribes, public and private organizations, and other parties likely to have knowledge of or concerns with historic properties in the area.

(2) Based on this assessment, the Agency Official should determine any need for further actions, such as field surveys and predictive modeling, to identify historic properties.

(b) Locating historic properties. In consultation with the State Historic Preservation Officer, the Agency Official shall make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register. Efforts to identify historic properties should follow the Secretary's "Standards and Guidelines for Archeology and Historic Preservation" (48 FR 44716) and agency programs to meet the requirements of Section 110(a)(2) of the Act.

(c) Evaluating historical significance.

(1) In consultation with the State Historic Preservation Officer and following the Secretary's Standards and Guidelines for Evaluation, the Agency Official shall apply the National Register Criteria to properties that may be affected by the undertaking and that have not been previously evaluated for National Register eligibility. The passage of time or changing perceptions of significance may justify reevaluation of properties that were previously determined to be eligible or ineligible.

(2) If the Agency Official and the State Historic Preservation Officer agree that a property is eligible under the criteria, the property shall be considered eligible for the National Register for Section 106 purposes.

(3) If the Agency Official and the State Historic Preservation Officer agree that the criteria are not met, the property shall be considered not eligible for the National Register for Section 106 purposes.

Disagreement about National Register eligibility of properties found

(4) If the Agency Official and the State Historic Preservation Officer do not agree, or if the Council or the Secretary so request, the Agency Official shall obtain a determination from the Secretary of the Interior pursuant to applicable National Park Service regulations.

(5) If the State Historic Preservation Officer does not provide views, then the State Historic Preservation Officer is presumed to agree with the Agency Official's determination for the purpose of this subsection.

Agency's actions if no historic properties are found

(d) When no historic properties are found. If the Agency Official determines in accordance with Sections 800.4(a)-(c) that there are no historic properties that may be affected by the undertaking, the Agency Official shall provide documentation of this finding to the State Historic Preservation Officer. The Agency Official should notify interested persons and parties known to be interested in the undertaking and its possible effects on historic properties and make the documentation available to the public. In these circumstances, the Agency Official is not required to take further steps in the Section 106 process.

Agency's actions if historic properties are found

(e) When historic properties are found. If there are historic properties that the undertaking may affect, the Agency Official shall assess the effects in accordance with Section 800.5.

Agency's assessment of project effects on historic properties found

800.5 Assessing effects.

(a) Applying the Criteria of Effect. In consultation with the State Historic Preservation Officer, the Agency Official shall apply the Criteria of Effect (Section 800.9(a)) to historic properties that may be affected, giving consideration to the views, if any, of interested persons.

Agency's use of Criteria of Effect

(b) When no effect is found. If the Agency Official finds the undertaking will have no effect on historic properties, the Agency Official shall notify the State Historic Preservation Officer and interested persons who have made their concerns known to the Agency Official and document the finding, which shall be available for public inspection. Unless the State Historic Preservation Officer objects within 15 days of receiving such notice, the Agency Official is not required to take any further steps in the Section 106 process. If the State Historic Preservation Officer files a timely objection, then the procedures described in Section 800.5(c) are followed.

Agency's actions if no effect is found

(c) When an effect is found. If an effect on historic properties is found, the Agency Official, in consultation with the State Historic Preservation Officer, shall apply the Criteria of Adverse Effect (Section 800.9(b)) to determine whether the effect of the undertaking should be considered adverse.

Agency's use of Criteria of Adverse Effect

(d) When the effect is not considered adverse.

(1) If the Agency Official finds the effect is not adverse, the Agency Official shall:

Agency's actions if effects are not adverse

(i) Obtain the State Historic Preservation Officer's concurrence with the finding and notify and submit to the Council summary documentation, which shall be available for public inspection; or

(ii) Submit the finding with necessary documentation (Section 800.8(a)) to the Council for a 30-day review period and notify the State Historic Preservation Officer.

(2) If the Council does not object to the finding of the Agency Official within 30 days of receipt of notice, or if the Council objects but proposes changes that the Agency Official accepts, the Agency Official is not required to take any further steps in the Section 106 process other than to comply with any agreement with the State Historic Preservation Officer or Council concerning the undertaking. If the Council objects and the Agency Official does not agree with changes proposed by the Council, then the effect shall be considered as adverse.

Agency's actions if effects are adverse

Consultation to avoid or reduce adverse effects; Council participation is optional

Invitation to interested persons to join in consultation

(e) When the effect is adverse. If an adverse effect on historic properties is found, the Agency Official shall notify the Council and shall consult with the State Historic Preservation Officer to seek ways to avoid or reduce the effects on historic properties. Either the Agency Official or the State Historic Preservation Officer may request the Council to participate. The Council may participate in the consultation without such a request.

(1) *Involving interested persons.* Interested persons shall be invited to participate as consulting parties as follows when they so request:

(i) The head of a local government when the undertaking may affect historic properties within the local government's jurisdiction;

(ii) The representative of an Indian tribe in accordance with Section 800.1(c)(2)(iii);

(iii) Applicants for or holders of grants, permits, or licenses, and owners of affected lands; and

(iv) Other interested persons when jointly determined appropriate by the Agency Official, the State Historic Preservation Officer, and the Council, if participating.

Documentation needed for consultation

(2) *Documentation.* The Agency Official shall provide each of the consulting parties with the documentation set forth in Section 800.8(b) and such other documentation as may be developed in the course of consultation.

Public notification about consultation

(3) *Informing the public.* The Agency Official shall provide an adequate opportunity for members of the public to receive information and express their views. The Agency Official is encouraged to use existing agency public involvement procedures to provide this opportunity. The Agency Official, State Historic Preservation Officer, or the Council may meet with interested members of the public or conduct a public information meeting for this purpose.

Memorandum of Agreement (MOA) reached through consultation; MOA signatories

(4) *Agreement.* If the Agency Official and the State Historic Preservation Officer agree upon how the effects will be taken into account, they shall execute a Memorandum of Agreement. When the Council participates in the consultation, it shall execute the Memorandum of Agreement along with the Agency Official and the State Historic Preservation Officer. When the Council has not participated in consultation, the Memorandum of Agreement shall be submitted to the Council for comment in accordance with Section 800.6(a). As appropriate, the Agency Official, the State Historic Preservation Officer, and the Council, if participating, may agree to invite other consulting parties to concur in the agreement.

Amendments to MOA's

(5) *Amendments.* The Agency Official, the State Historic Preservation Officer, and the Council, if it was a signatory to the original agreement, may subsequently agree to an amendment to the Memorandum of Agreement. When the Council is not a party to the Memorandum of Agreement, or the Agency Official and the State Historic Preservation Officer cannot agree on changes to the Memorandum of Agreement, the proposed changes shall be submitted to the Council for comment in accordance with Section 800.6.

Ending consultation

(6) *Ending consultation.* The Council encourages Agency Officials and State Historic Preservation Officers to utilize the consultation process to the fullest extent practicable. After initiating consultation to seek ways to reduce or avoid effects on historic properties, the State Historic Preservation Officer, the Agency Official, or the Council, at its discretion, may state that further consultation will not be productive and thereby terminate the consultation process. The Agency Official shall then request the Council's comments in accordance with Section 800.6(b) and notify all other consulting parties of its requests.

800.6 Affording the Council an opportunity to comment.

Council review of an MOA

(a) Review of a Memorandum of Agreement.

Documentation for MOA review

(1) When an Agency Official submits a Memorandum of Agreement accompanied by the documentation specified in Section 800.8(b) and (c), the Council shall have 30 days from receipt to review it. Before this review period ends, the Council shall:

(i) Accept the Memorandum of Agreement, which concludes the Section 106 process, and inform all consulting parties; or

(ii) Advise the Agency Official of changes to the Memorandum of Agreement that would make it acceptable; subsequent agreement by the Agency Official, the State Historic Preservation Officer, and the Council concludes the Section 106 process; or

(iii) Decide to comment on the undertaking, in which case the Council shall provide its comments within 60 days of receiving the Agency Official's submission, unless the Agency Official agrees otherwise.

(2) If the Agency Official, the State Historic Preservation Officer, and the Council do not reach agreement in accordance with Section 800.6(a)(1)(ii), the Agency Official shall notify the Council, which shall provide its comments within 30 days of receipt of notice.

Council comment, absent an MOA

(b) Comment when there is no agreement.

Documentation for Council comment, absent an MOA

(1) When no Memorandum of Agreement is submitted, the Agency Official shall request Council comment and provide the documentation specified in Section 800.8(d). When requested by the Agency Official, the Council shall provide its comments within 60 days of receipt of the Agency Official's request and the specified documentation.

Additional information, onsite inspection, public meeting, absent an MOA

(2) The Agency Official shall make a good faith effort to provide reasonably available additional information concerning the undertaking and shall assist the Council in arranging an onsite inspection and public meeting when requested by the Council.

How the Council provides comments, absent an MOA

(3) The Council shall provide its comments to the head of the agency requesting comment. Copies shall be provided to the State Historic Preservation Officer, interested persons, and others as appropriate.

Agency's response to Council comment

(c) Response to Council comment.

(1) When a Memorandum of Agreement becomes final in accordance with Section 800.6(a)(1)(i) or (ii), the Agency Official shall carry out the undertaking in accordance with the terms of the agreement. This evidences fulfillment of the agency's Section 106 responsibilities. Failure to carry out the terms of a Memorandum of Agreement requires the Agency Official to resubmit the undertaking to the Council for comment in accordance with Section 800.6.

Failure to carry out terms of an MOA

(2) When the Council has commented pursuant to Section 800.6(b), the Agency Official shall consider the Council's comments in reaching a final decision on the proposed undertaking. The Agency Official shall report the decision to the Council, and if possible, should do so prior to initiating the undertaking.

Agency's consideration of Council comment

(d) Foreclosure of the Council's opportunity to comment.

(1) The Council may advise an Agency Official that it considers the agency has not provided the Council a reasonable opportunity to comment. The decision to so advise the Agency Official will be reached by a majority vote of the Council or by a majority vote of a panel consisting of three or more Council members with the concurrence of the Chairman.

Agency actions that preempt reasonable opportunity for Council comment

(2) The Agency Official will be given notice and a reasonable opportunity to respond prior to a proposed Council determination that the agency has foreclosed the Council's opportunity to comment.

Public objection to agency determinations about whether historic properties or effects are present

(e) Public requests to the Council.

(1) When requested by any person, the Council shall consider an Agency Official's finding under Sections 800.4(b), 800.4(c), 800.4(d), or 800.5(b) and, within 30 days of receipt of the request, advise the Agency Official, the State Historic Preservation Officer, and the person making the request of its views of the Agency Official's finding.

(2) In light of the Council views, the Agency Official should reconsider the finding. However, an inquiry to the Council will not suspend action on an undertaking.

(3) When the finding concerns the eligibility of a property for the National Register, the Council shall refer the matter to the Secretary.

Substitute review processes developed by States for §106 review

Council review of a proposed substitute State review process

SHPO/Council consultation about a proposed substitute State review process

800.7 Agreements with States for Section 106 reviews.

(a) Establishment of State agreements.

(1) Any State Historic Preservation Officer may enter into an agreement with the Council to substitute a State review process for the procedures set forth in these regulations, provided that:

(i) The State historic preservation program has been approved by the Secretary pursuant to Section 101(b)(1) of the Act; and

(ii) The Council, after analysis of the State's review process and consideration of the views of Federal and State agencies, local governments, Indian tribes, and the public, determines that the State review process is at least as effective as, and no more burdensome than, the procedures set forth in these regulations in meeting the requirements of Section 106.

(2) The Council, in analyzing a State's review process pursuant to Section 800.7(a)(1)(ii), shall:

(i) Review relevant State laws, Executive Orders, internal directives, standards, and guidelines;

(ii) Review the organization of the State's review process;

(iii) Solicit and consider the comments of Federal and State agencies, local governments, Indian tribes, and the public;

(iv) Review the results of program reviews carried out by the Secretary; and

(v) Review the record of State participation in the Section 106 process.

(3) The Council will enter into an agreement with a State under this section only upon determining, at minimum, that the State has a demonstrated record of performance in the Section 106 process and the capability to administer a comparable process at the State level.

(4) A State agreement shall be developed through consultation between the State Historic Preservation Officer and the Council and concurred in by the Secretary before submission to the Council for approval. The Council may invite affected Federal and State agencies, local governments, Indian tribes, and other interested persons to participate in this consultation. The agreement shall:

(i) Specify the historic preservation review process employed in the State, showing that this process is at least as effective as, and no more burdensome than, that set forth in these regulations;

(ii) Establish special provisions for participation of local governments or Indian tribes in the review of undertakings falling within their jurisdiction, when appropriate;

(iii) Establish procedures for public participation in the State review process;

(iv) Provide for Council review of actions taken under its terms, and for appeal of such actions to the Council; and

(v) Be certified by the Secretary as consistent with the Secretary's "Standards and Guidelines for Archeology and Historic Preservation."

Agency's use of substitute State review processes

(5) Upon concluding a State agreement, the Council shall publish notice of its execution in the *Federal Register* and make copies of the State agreement available to all Federal agencies.

(b) Review of undertakings when a State agreement is in effect.

(1) When a State agreement under Section 800.7(a) is in effect, an Agency Official may elect to comply with the State review process in lieu of compliance with these regulations.

(2) At any time during review of an undertaking under a State agreement, an Agency Official may terminate such review and comply instead with Sections 800.4 through 800.6 of these regulations.

(3) At any time during review of an undertaking under a State agreement, the Council may participate. Participants are encouraged to draw upon the Council's expertise as appropriate.

Monitoring or terminating substitute State review processes

(c) Monitoring and termination of State agreements.

(1) The Council shall monitor activities carried out under State agreements, in coordination with the Secretary of the Interior's approval of State programs under Section 101(b)(1) of the Act. The Council may request that the Secretary monitor such activities on its behalf.

(2) The Council may terminate a State agreement after consultation with the State Historic Preservation Officer and the Secretary.

(3) An agreement may be terminated by the State Historic Preservation Officer.

(4) When a State agreement is terminated pursuant to Section 800.7(c)(2) and (3), such termination shall have no effect on undertakings for which review under the agreement was complete or in progress at the time the termination occurred.

800.8 Documentation requirements.

Documentation for finding of no adverse effect

(a) Finding of no adverse effect. The purpose of this documentation is to provide sufficient information to explain how the Agency Official reached the finding of no adverse effect. The required documentation is as follows:

(1) A description of the undertaking, including photographs, maps, and drawings, as necessary;

(2) A description of historic properties that may be affected by the undertaking;

(3) A description of the efforts used to identify historic properties;

(4) A statement of how and why the Criteria of Adverse Effect were found inapplicable;

(5) The views of the State Historic Preservation Officer, affected local governments, Indian tribes, Federal agencies, and the public, if any were provided, as well as a description of the means employed to solicit those views.

Documentation required for consultation

(b) Finding of adverse effect. The required documentation is as follows:

- (1)** A description of the undertaking, including photographs, maps, and drawings, as necessary;
- (2)** A description of the efforts to identify historic properties;
- (3)** A description of the affected historic properties, using materials already compiled during the evaluation of significance, as appropriate; and
- (4)** A description of the undertaking's effects on historic properties.

Documentation required for submitting a signed MOA for Council review

(c) Memorandum of Agreement. When a memorandum is submitted for review in accordance with Section 800.6(a)(1), the documentation, in addition to that specified in Section 800.8(b), shall also include a description and evaluation of any proposed mitigation measures or alternatives that were considered to deal with the undertaking's effects and a summary of the views of the State Historic Preservation Officer and any interested persons.

Documentation required for requesting written Council comment, absent an MOA

(d) Requests for comment when there is no agreement. The purpose of this documentation is to provide the Council with sufficient information to make an independent review of the undertaking's effects on historic properties as the basis for informed and meaningful comments to the Agency Official. The required documentation is as follows:

- (1)** A description of the undertaking, with photographs, maps, and drawings, as necessary;
- (2)** A description of the efforts to identify historic properties;
- (3)** A description of the affected historic properties, with information on the significant characteristics of each property;
- (4)** A description of the effects of the undertaking on historic properties and the basis for the determinations;
- (5)** A description and evaluation of any alternatives or mitigation measures that the Agency Official proposes for dealing with the undertaking's effects;
- (6)** A description of any alternatives or mitigation measures that were considered but not chosen and the reasons for their rejection;
- (7)** Documentation of consultation with the State Historic Preservation Officer regarding the identification and evaluation of historic properties, assessment of effect, and any consideration of alternatives or mitigation measures;
- (8)** A description of the Agency Official's efforts to obtain and consider the views of affected local governments, Indian tribes, and other interested persons;
- (9)** The planning and approval schedule for the undertaking; and

(10) Copies or summaries of any written views submitted to the Agency Official concerning the effects of the undertaking on historic properties and alternatives to reduce or avoid those effects.

800.9 Criteria of Effect and Adverse Effect.

Criteria of Effect

(a) An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of the property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered.

Criteria of Adverse Effect

(b) An undertaking is considered to have an adverse effect when the effect on a historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on historic properties include, but are not limited to:

(1) Physical destruction, damage, or alteration of all or part of the property;

(2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;

(3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;

(4) Neglect of a property resulting in its deterioration or destruction; and

(5) Transfer, lease, or sale of the property.

Exceptions to the Criteria of Adverse Effect

(c) Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of these regulations:

(1) When the historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;

(2) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected historic property through conformance with the Secretary's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings"; or

(3) When the undertaking is limited to the transfer, lease, or sale of a historic property, and adequate restrictions or conditions are included to ensure preservation of the property's significant historic features.

SUBPART C—SPECIAL PROVISIONS

Special agency requirements for National Historic Landmarks

800.10 Protecting National Historic Landmarks.

Section 110(f) of the Act requires that the Agency Official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in Sections 800.4 through 800.6 and give special consideration to protecting National Historic Landmarks as follows:

(a) Any consultation conducted under Section 800.5(e) shall include the Council;

(b) The Council may request the Secretary under Section 213 of the Act to provide a report to the Council detailing the significance of the property, describing the effects of the undertaking on the property, and recommending measures to avoid, minimize, or mitigate adverse effects; and

(c) The Council shall report its comments, including Memoranda of Agreement, to the President, the Congress, the Secretary, and the head of the agency responsible for the undertaking.

Discovery of historic properties after a project has begun

800.11 Properties discovered during implementation of an undertaking.

Prior agency planning for discoveries

(a) Planning for discoveries.

When the Agency Official's identification efforts in accordance with Section 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking, the Agency Official is encouraged to develop a plan for the treatment of such properties if discovered and include this plan in any documentation prepared to comply with Section 800.5.

(b) Federal agency responsibilities.

(1) When an Agency Official has completed the Section 106 process and prepared a plan in accordance with Section 800.11(a), the Agency Official shall satisfy the requirements of Section 106 concerning properties discovered during implementation of an undertaking by following the plan.

(2) When an Agency Official has completed the Section 106 process without preparing a plan in accordance with Section 800.11(a) and finds after beginning to carry out the undertaking that the undertaking will affect a previously unidentified property that may be eligible for inclusion in the National Register, or affect a known historic property in an unanticipated manner, the Agency Official shall afford the Council an opportunity to comment by choosing one of the following courses of action:

(i) Comply with Section 800.6;

Agency responsibilities absent a plan for discoveries

(ii) Develop and implement actions that take into account the effects of the undertaking on the property to the extent feasible and the comments from the State Historic Preservation Officer and the Council pursuant to Section 800.11(c); or

(iii) If the property is principally of archeological value and subject to the requirements of the Archeological and Historic Preservation Act, 16 U.S.C. §§ 469 (a)-(c), comply with that Act and implementing regulations instead of these regulations.

(3) Section 106 and these regulations do not require the Agency Official to stop work on the undertaking. However, depending on the nature of the property and the undertaking's apparent effects on it, the Agency Official should make reasonable efforts to avoid or minimize harm to the property until the requirements of this section are met.

Council comments when historic properties are discovered after a project has begun

(c) Council Comments.

(1) When comments are requested pursuant to Section 800.11(b)(2)(i), the Council will provide its comments in a time consistent with the Agency Official's schedule, regardless of longer time periods allowed by these regulations for Council review.

(2) When an Agency Official elects to comply with Section 800.11(b)(2)(ii), the Agency Official shall notify the State Historic Preservation Officer and the Council at the earliest possible time, describe the actions proposed to take effects into account, and request the Council's comments. The Council shall provide interim comments to the Agency Official within 48 hours of the request and final comments to the Agency Official within 30 days of the request.

(3) When an Agency Official complies with Section 800.11(b)(2)(iii), the Agency Official shall provide the State Historic Preservation Officer an opportunity to comment on the work undertaken and provide the Council with a report on the work after it is undertaken.

Agency actions to determine National Register eligibility of newly discovered properties

(d) Other considerations.

(1) When a newly discovered property has not previously been included in or determined eligible for the National Register, the Agency Official may assume the property to be eligible for purposes of Section 106.

(2) When a discovery occurs and compliance with this section is necessary on lands under the jurisdiction of an Indian tribe, the Agency Official shall consult with the Indian tribe during implementation of this section's requirements.

Discovery of properties on Indian lands

Waiver of §106 requirements during disasters or declared emergencies

800.12 Emergency undertakings.

(a) When a Federal agency head proposes an emergency action and elects to waive historic preservation responsibilities in accordance with 36 CFR § 78.2, the Agency Official may comply with the requirements of 36 CFR Part 78 in lieu of these regulations. An Agency Official should develop plans for taking historic properties into account during emergency operations. At the request of the Agency Official, the Council will assist in the development of such plans.

(b) When an Agency Official proposes an emergency undertaking as an essential and immediate response to a disaster declared by the President or the appropriate Governor, and Section 800.12(a) does not apply, the Agency Official may satisfy Section 106 by notifying the Council and the appropriate State Historic Preservation Officer of the emergency undertaking and affording them an opportunity to comment within seven days if the Agency Official considers that circumstances permit.

(c) For the purposes of activities assisted under Title I of the Housing and Community Development Act of 1974, as amended, Section 800.12(b) also applies to an imminent threat to public health or safety as a result of natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or the State Historic Preservation Officer objects, the Agency Official shall comply with Sections 800.4 through 800.6.

(d) This section does not apply to undertakings that will not be implemented within 30 days after the disaster or emergency. Such undertakings shall be reviewed in accordance with Sections 800.4 through 800.6.

30-day timeframe for §106 waiver in disaster situations

Agency's use of Programmatic Agreements

800.13 Programmatic Agreements.

(a) **Application.** An Agency Official may elect to fulfill an agency's Section 106 responsibilities for a particular program, a large or complex project, or a class of undertakings that would otherwise require numerous individual requests for comments, through a Programmatic Agreement. Programmatic Agreements are appropriate for programs or projects:

(1) When effects on historic properties are similar and repetitive or are multi-State or national in scope;

(2) When effects on historic properties cannot be fully determined prior to approval;

(3) When non-Federal parties are delegated major decisionmaking responsibilities;

(4) That involve development of regional or land-management plans; or

(5) That involve routine management activities at Federal installations.

Examples of projects or programs suitable for Programmatic Agreements

Agency/Council consultation to reach a Programmatic Agreement

(b) Consultation process. The Council and the Agency Official shall consult to develop a Programmatic Agreement. When a particular State is affected, the appropriate State Historic Preservation Officer shall be a consulting party. When the agreement involves issues national in scope, the President of the National Conference of State Historic Preservation Officers or a designated representative shall be invited to be a consulting party by the Council. The Council and the Agency Official may agree to invite other Federal agencies or others to be consulting parties or to participate, as appropriate.

Public involvement in Programmatic Agreement consultation

(c) Public involvement. The Council, with the assistance of the Agency Official, shall arrange for public notice and involvement appropriate to the subject matter and the scope of the program. Views from affected units of State and local government, Indian tribes, industries, and organizations will be invited.

Signatories of a Programmatic Agreement

(d) Execution of the Programmatic Agreement. After consideration of any comments received and reaching final agreement, the Council and the Agency Official shall execute the agreement. Other consulting parties may sign the Programmatic Agreement as appropriate.

Effect of a Programmatic Agreement

(e) Effect of the Programmatic Agreement. An approved Programmatic Agreement satisfies the Agency's Section 106 responsibilities for all individual undertakings carried out in accordance with the agreement until it expires or is terminated.

Public notification of a Programmatic Agreement

(f) Notice. The Council shall publish notice of an approved Programmatic Agreement in the *Federal Register* and make copies readily available to the public.

Failure to carry out terms of a Programmatic Agreement

(g) Failure to carry out a Programmatic Agreement. If the terms of a Programmatic Agreement are not carried out or if such an agreement is terminated, the Agency Official shall comply with Sections 800.4 through 800.6 with regard to individual undertakings covered by the agreement.

Coordination of §106 with other authorities

800.14 Coordination with other authorities.

To the extent feasible, Agency Officials, State Historic Preservation Officers, and the Council should encourage coordination of implementation of these regulations with the steps taken to satisfy other historic preservation and environmental authorities by:

Coordination with NEPA environmental studies

(a) Integrating compliance with these regulations with the processes of environmental review carried out pursuant to the National Environmental Policy Act, and coordinating any studies needed to comply with these regulations with studies of related natural and social aspects;

Multipurpose determinations and agreements

(b) Designing determinations and agreements to satisfy the terms not only of Section 106 and these regulations, but also the requirements of such other historic preservation authorities as the Archeological and Historic Preservation Act, the Archeological Resources Protection Act, Section 110 of the National Historic Preservation Act, and Section 4(f) of the Department of Transportation Act, as applicable, so that a single document can be used for the purposes of all such authorities;

Multipurpose studies and surveys

(c) Designing and executing studies, surveys, and other information-gathering activities for planning and undertaking so that the resulting information and data is adequate to meet the requirements of all applicable Federal historic preservation authorities; and

Coordinated public involvement

(d) Using established agency public involvement processes to elicit the views of the concerned public with regard to an undertaking and its effects on historic properties.

Agency's use of counterpart regulations to substitute for 36 CFR Part 800

800.15 Counterpart regulations.

In consultation with the Council, agencies may develop counterpart regulations to carry out the Section 106 process. When concurred in by the Council, such counterpart regulations shall stand in place of these regulations for the purposes of the agency's compliance with Section 106.

Fact Sheet

Advisory Council on Historic Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809, Washington, DC 20004

A FIVE-MINUTE LOOK AT SECTION 106 REVIEW

as revised by regulations published September 2, 1986

About the Section 106 review process

WHAT IS SECTION 106 REVIEW? This term refers to the Federal review process designed to ensure that historic properties are considered during Federal project planning and execution. The review process is administered by the Advisory Council on Historic Preservation, an independent Federal agency.

WHO ESTABLISHED SECTION 106? The Congress did, as part of the National Historic Preservation Act of 1966 (NHPA). NHPA, strengthened and expanded by several subsequent amendments, today has become the cornerstone of this country's historic preservation policy.

WHY WAS SECTION 106 CREATED? NHPA was enacted because of public concern that so many of our Nation's historic resources were not receiving adequate attention as the Government sponsored much-needed public works projects. In the 1960's, Federal preservation law applied only to a handful of nationally significant properties, and Congress recognized that new legislation was needed to protect the many other historic properties that were being harmed by Federal activities.

WHAT DOES NHPA SAY? Section 106 of NHPA requires that every Federal agency "take into account" how each of its undertakings could affect historic properties. An agency must also afford the Council a reasonable opportunity to comment on the agency's project.

WHAT IS A FEDERAL "UNDERTAKING"? This term includes a broad range of Federal activities: construction, rehabilitation and repair projects, demolition, licenses, permits, loans, loan guarantees, grants, Federal property transfers, and many other types of Federal involvement. Whenever one of these activities affects a historic property, the sponsoring agency is obligated to seek Council comments.

WHAT IS A HISTORIC PROPERTY? For purposes of Section 106, any property listed in or eligible for the National Register of Historic Places is considered historic.

The National Register is this country's basic inventory of historic resources and is maintained by the Secretary of the Interior. The list includes buildings, structures, objects, sites, districts, and archeological resources. The listed properties are not just of nationwide importance; most are significant primarily at the State or local level. It is important to note that the protections of Section 106 extend to properties that possess significance but have not yet been listed or formally determined eligible for listing. Even properties that have not yet been discovered, but that possess significance, are subject to Section 106 review.

About the Council

WHAT IS THE ADVISORY COUNCIL ON HISTORIC PRESERVATION?
The 19-member Council is composed of a Chairman, Vice Chairman, six other private citizen members, a governor, and a mayor--all appointed by the President of the United States. The Council also includes the Secretaries of the Interior and Agriculture, the heads of four Federal agencies designated by the President (currently Treasury, HUD, Transportation, and the Office of Administration), the Architect of the Capitol, the Chairman of the National Trust for Historic Preservation, and the President of the National Conference of State Historic Preservation Officers. The Council members usually meet four times during the year. Day-to-day business of the Council involving Section 106 review is conducted by an Executive Director and a professional staff of historians, architects, archeologists, planners, lawyers, and administrative personnel.

Section 106 participants

WHO INITIATES SECTION 106 REVIEW? The Federal agency involved in the proposed project or activity is responsible for initiating and completing the Section 106 review process. Under certain circumstances, local governmental bodies may act as the responsible agency. The agency works with the State Historic Preservation Officer (an official appointed in each State or territory to administer the national historic preservation program) and the Council to do so. In this fact sheet, the term "agency" is used to mean the responsible unit of government, be it Federal or local. There can be other participants in the Section 106 process as well. At times, local governments, representatives of Indian tribes, applicants for Federal grants, licenses, or permits, and others may join in the review process when it affects their interests or activities.

A brief look at the review process

HOW DOES SECTION 106 REVIEW WORK? Federal regulations spell out the specific process by which an agency affords the Council an opportunity to comment on the agency's proposed activity. The Council's regulations, "Protection of Historic Properties," appear in the U.S. Code of Federal Regulations at 36 CFR Part 800. These

regulations were revised and reissued on September 2, 1986 (51 FR 31115). A simplified look at the process follows:

FIVE STEPS OF SECTION 106 REVIEW

Step 1: IDENTIFY AND EVALUATE HISTORIC PROPERTIES. First, the agency reviews all of the available information that could help in determining whether there may be historic properties in the area of the proposed activity. Based on this review, the agency decides whether any additional survey work is needed to locate possible historic properties.

Next, the agency identifies all National Register-listed properties that might be affected by the proposed activity. The agency also identifies properties not actually listed in the Register, but which appear to meet eligibility criteria. Then the agency and the State Historic Preservation Officer (SHPO) together apply the National Register criteria to decide whether the properties are eligible for listing, and thus subject to the Section 106 process.

Step 2: ASSESS EFFECTS. Once historic properties have been identified and found to meet National Register criteria, the Federal agency determines whether its proposed activity will affect them in any way. Again, the agency works with the SHPO, making judgments based on criteria found in the Council's regulations. There are three possible findings:

- o **No effect:** If there will be no effect of any kind on the historic properties, the agency notifies the SHPO and interested parties of its determination of no effect. If the SHPO does not object, the agency proceeds with the project.
- o **No adverse effect:** If there could be an effect, but the effect would not be harmful to the historic properties, the agency obtains SHPO concurrence and submits to the Council a determination of no adverse effect. Or, the agency can submit its determination of no adverse effect directly to the Council for review and notify the SHPO of its determination. Unless the Council objects, the agency proceeds with its project or activity.
- o **Adverse effect:** If there could be a harmful effect to a historic property, the agency begins the consultation process.

Step 3: CONSULTATION. During this step, an effort is made to find acceptable ways to reduce the harm ("avoid or mitigate the adverse effect") to the historic properties. The consulting parties are the agency and the SHPO; Council involvement in consultation is optional. Other interested parties (such as a local government, Indian tribe, or Federal applicant for a grant, license, or permit) may also be invited to join the consultation, and must be invited under certain circumstances.

The agency gathers needed documentation, informs the public that consultation is underway, and works with the consulting parties to find

a solution. When the consulting parties have agreed on steps to avoid or reduce harm to historic properties, they sign a Memorandum of Agreement (MOA).

In a very few cases, the consulting parties cannot agree on a solution, in which case the consultation is terminated. The agency may then submit documentation to the Council and request the issuance of written Council comments.

Step 4: COUNCIL COMMENT. Unless the Council has already signed the MOA (by virtue of being a consulting party), the agency submits the signed MOA to the Council for review. The Council can accept the MOA, request changes to it, or opt to issue written comments on the proposed activity.

If the consulting parties have terminated consultation, the Council issues written comments about the proposed agency action directly to the head of that agency.

Step 5: PROCEED. If the Section 106 review process has resulted in a Council-accepted Memorandum of Agreement, the agency proceeds with its proposed activity according to the terms of that MOA. Absent an MOA, the agency must take into account the Council's written comments, after which the agency makes the final decision about how (or whether) to proceed with its proposed activity. The agency notifies the Council of its decision.

Either outcome concludes the Section 106 review process and satisfies the agency's statutory responsibilities under Section 106 of the National Historic Preservation Act of 1966.

HOW LONG DOES SECTION 106 REVIEW TAKE? The timetable for Steps 1-3 (identification through consultation) are up to the agency, as the Council is not typically involved at this point. Once the agency submits a signed MOA (with needed documentation) for Council review, that review can take up to 30 days. If there is no MOA, the agency can request issuance of Council comments within 60 days of when the Council receives required documentation.

For more information

WHERE DOES ONE GET MORE INFORMATION? This brief look at Section 106 review obviously cannot tell the whole story. For complete information about the Council's review process, consult the Council's regulations (at 36 CFR Part 800), published September 2, 1986 (51 FR 31115). The Council has available without charge an annotated version of its regulations, which aids understanding of the regulatory language, as well as a booklet entitled "Section 106, Simply Explained," which provides a more detailed introductory look at the process.

For easy-to-understand training on the Section 106 process, the Council offers a two-day course, "Introduction to Federal Projects and Historic Preservation Law," which is offered in many locations

around the country each year. The course is designed for the Section 106 novice and explains, step-by-step, what actions are required by Federal, State, and local officials to meet the requirements of the law.

For more information, write: Advisory Council on Historic Preservation, The Old Post Office Building, 1100 Pennsylvania Avenue, N.W., Suite 809, Washington, DC 20004. Telephone: 202/786-0503 (executive offices and training office); 202/786-0505 (Section 106 review office).

Revised September 1986

Fact Sheet

Advisory Council on Historic Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809, Washington, DC 20004

SECTION 106 PARTICIPATION BY INDIAN TRIBES AND OTHER NATIVE AMERICANS

Introduction

Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on such undertakings. The Council has issued regulations (36 CFR Part 800) spelling out how agencies are to comply with Section 106. These regulations, as revised in 1986 (51 FR 31115), are discussed in detail in the Council publication, Section 106, Step-by-Step.

When the regulations were revised in 1986, special attention was given to ensuring that Indian tribes and other Native American groups were provided full opportunity to participate in the review of Federal undertakings under Section 106. This fact sheet discusses and elaborates upon the provisions designed to provide such opportunities.

Definitions

"Indian lands"

"Indian lands" are defined in the regulations as "all lands under the jurisdiction or control of an Indian tribe." [36 CFR § 800.2(f)]

"Indian tribe"

An "Indian tribe" is defined in Section 301(4) of the National Historic Preservation Act, and in the regulations at 36 CFR § 800.2(g), as "the governing body of any Indian tribe, band, nation, or other group which is recognized as an Indian tribe by the Secretary of the Interior for which the United States holds land in trust or restricted status for the entity or its members. Such term also includes any Native village corporation,

regional corporation, and Native Group established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1701 et seq.)."

"Interested person"

"Interested persons" are defined in the regulations as "those individuals and organizations that are concerned with the effects of a particular undertaking on historic properties." [36 CFR § 800.2(h)]

"Other Native Americans"

The term "other Native American" is used but not defined in the regulations. The Council's publication, Section 106, Step-by-Step, offers the following clarification:

This term refers to American Indians, including Carib and Arawak, Eskimo and Aleut, and Native Micronesians and Polynesians, who are identified by themselves and recognized by others as members of a named cultural group that historically has shared linguistic, cultural, social, and other characteristics, but that is not necessarily an Indian tribe as defined above.

"Section 106 process"

This process is described in Section 106, Step-by-Step as the "review process established under Section 106 of the National Historic Preservation Act...and administered by the Advisory Council on Historic Preservation under its regulations at 36 CFR Part 800." In other words, it is the review process prescribed by the Council's regulations.

"State Historic Preservation Officer (SHPO)"

The "State Historic Preservation Officer (SHPO)" is defined in the regulations as "the official appointed or designated pursuant to Section 101(b)(1) of the [National Historic Preservation] Act to administer the State Historic Preservation Program or a representative designated to act for the [SHPO]." [36 CFR § 800.2(n)]

"Traditional cultural leader"

The term "traditional cultural leader" is used but not defined in the regulations. Section 106, Step-by-Step, advises that a "traditional cultural authority" is:

...an individual in a Native American group or other social or ethnic group who is recognized by members of the group as an expert on the group's traditional history and cultural practices.

The Section 106 Process in a Nutshell

Briefly, the Council's regulations set forth a process consisting of five basic steps, as follows:

Step 1: Identification and evaluation of historic properties

The agency determines that it has an undertaking subject to review under Section 106, determines the area that the undertaking will affect, and identifies the historic

properties, if any, that exist in the area. Identification involves assessing the adequacy of existing information on the area's historic properties, conducting further studies as needed, consulting with the State Historic Preservation Officer (SHPO) and other interested parties, and documenting the results of the agency's efforts. If properties are found that may be eligible for the National Register of Historic Places but have not yet been listed in the Register or determined eligible for such listing, the agency consults with the SHPO and, if needed, the Keeper of the National Register to determine eligibility.

Step 2: Assessment of effects

If properties on or eligible for the Register exist in the undertaking's area of potential effect, the agency consults with the SHPO to determine what effect the undertaking will have on them. The agency may find that the undertaking will have no effect on historic properties, will have no adverse effect on such properties, or will have an adverse effect on them.

Step 3: Consultation

If the undertaking will have an adverse effect, the agency consults with the SHPO, other interested persons, and sometimes the Council, to seek agreement on ways to avoid or reduce the adverse effects. If agreement is reached, a Memorandum of Agreement is drawn up. If not, the comments of the Council are requested without such an agreement.

Step 4: Council comment

The comments of the Council may be rendered by the Council's execution or acceptance of a Memorandum of Agreement, or by issuance of written comments in the absence of a Memorandum of Agreement.

Step 5: Proceed

Having obtained the Council's comments, the agency either carries out the terms of the Memorandum of Agreement or considers the Council's written comments in making further decisions about whether and how to proceed with the undertaking.

Participation by Indian Tribes in General

Sensitivity to tribal concerns

The regulations encourage Federal agencies, SHPO's, and the Council itself to "be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands to other historic properties." [36 CFR § 800.1(c)(2)(ii)] Such concerns might include the interest of a relocated tribe in the historic places of its ancestral but now distant homeland, or the interest of a tribe in lands near its present reservation that have been ceded or otherwise lost to non-Indians. Concerns often expressed are of an academic or educational nature, such as the desire to

learn about tribal history and transmit this information to younger generations. Also expressed are concerns of a cultural or religious nature, such as the desire to preserve ancestral burial places or sacred sites from desecration, or the desire to maintain access to such places for ritual purposes. The regulations encourage full and sympathetic consideration of such concerns by the participants in Section 106 review, but they spell out no particular process by which such consideration should be given.

Tribal participation in identification and evaluation of historic properties

When a Federal agency seeks to identify historic properties subject to effect by one of its undertakings, the regulations require that the agency, among other things, "seek information in accordance with agency planning processes from...Indian tribes...likely to have knowledge of or concerns with historic properties in the area." [36 CFR § 800.4(a)(1)(iii)]

Participation when historic properties may be affected

If the agency's identification efforts lead it to conclude that there are no historic properties in the area to be affected by the undertaking, the agency "should notify interested persons and parties known to be interested in the undertaking and its possible effects on historic properties." [36 CFR § 800.4(d)] If the agency determines that there are such properties, but that the undertaking will have no effect on them, the agency must so notify "interested persons who have made their concerns known to the Agency Official." [36 CFR § 800.5(b)] Tribes consulted during identification, or that express concerns about the undertaking's effects on historic properties, are thus given the opportunity to become aware of the agency's determinations. 36 CFR § 800.6(e) permits "any person" to request that the Council consider an agency's findings under the above sections. When so requested, the Council is required to consider the findings and provide its views to the agency within 30 days. The agency should reconsider its finding based on the Council's views, though it is not required to change the finding if it disagrees with the Council.

Provisions Specific to Indian Lands

Formal tribal participation in consultation

Consultation normally leads to an agreement on measures to avoid or reduce adverse effects on historic properties. Consulting parties other than the SHPO and the agency may or may not be invited to concur in such agreements. However, when an undertaking reviewed under the regulations will affect Indian lands, the regulations require that the Federal agency responsible for the undertaking "invite the governing body of the responsible tribe to be a consulting party and to concur in any agreement." [36 CFR § 800.1(c)(2)(iii)]

Should the tribe choose not to participate in consultation, the regulations do not forbid the agency and SHPO from consulting, and if the tribe does not chose to concur in an agreement, the regulations do not prohibit the agency and SHPO from concluding such an agreement. However, the regulations do not modify other laws and regulations that may give tribes greater authority concerning Federal actions on their lands.

Consultation with tribes in discovery situations

When an agency has complied with the Council's regulations regarding an undertaking and then finds a historic property on Indian land during the undertaking's implementation, the regulations require that the agency consult with the tribe in carrying out actions to take into account the effects of the undertaking on the newly discovered property. [36 CFR § 800.11(d)(2)]

Use of tribal procedures

The regulations require that when an Indian tribe has formal historic preservation procedures of its own, the Federal agency responsible for an undertaking, the SHPO, and the Council "shall, to the extent feasible, carry out responsibilities under these regulations consistent with such procedures." [36 CFR § 800.1(c)(2)(11)] Clearly, the degree to which such consistency will be feasible depends largely on the extent to which the tribe's procedures and the regulations are compatible, or at least not in conflict. Examples of such procedures might be a tribal requirement that a particular officer of the tribal government, traditional cultural leaders, or representatives of particular kin groups be consulted or allowed to speak for the tribe under specified circumstances; a requirement that particular methods, such as ethnographic fieldwork, be used to elicit information about historic properties; or a requirement that particular information, such as the locations of sacred sites, be kept confidential.

The requirement to seek consistency with tribal procedures is not restricted to instances in which Indian lands are involved. In some cases in which tribes have ceded lands to others but retain residual rights to use of the land for subsistence and/or cultural purposes, the tribes might establish formal procedures for addressing historic preservation concerns on such lands. In other cases, a tribe might adopt formal procedures concerning properties of cultural importance to the tribe that lie on non-Indian, nonceded lands that would govern the activities of tribal members or provide guidance to land-management agencies and others.

Participation of a
tribe in lieu of the
SHPO

The regulations permit a tribe to "participate in activities under these regulations in lieu of the [SHPO] with respect to undertakings affecting its lands, provided the Indian tribe so requests, the State Historic Preservation Officer concurs, and the Council finds that the Indian tribe's procedures meet the purposes of these regulations." [36 CFR § 800.1(c)(2)(iii)]

Substitution of a tribe for a SHPO can occur on a case-by-case basis or programmatically; that is, a tribe could request that it be recognized in lieu of the SHPO with respect to a particular undertaking or with respect to all undertakings affecting lands under its jurisdiction or control. Substitution also can be either partial or complete. For example, a tribe might seek to substitute for the SHPO with respect to properties of cultural importance to its members, but leave to the SHPO the responsibility to be concerned about properties having other kinds of historic value. A tribe might seek to substitute for the SHPO but to retain the services of the SHPO in a consultative capacity. Finally, when both Indian and non-Indian lands are affected by an undertaking, a tribe might seek to substitute for the SHPO with respect to effects on its lands, but the SHPO could remain a consulting party with respect to effects on non-Indian lands.

When a tribe wishes to assume some or all of the functions of the SHPO under the Council's regulations with respect to Federal undertakings and their impacts on historic properties within the tribe's jurisdiction, the tribe should contact the Council for guidance.

Tribal Participation on Non-Indian Lands

As noted in the section of this fact sheet dealing with tribal participation in general (page 4), the regulations require agencies to "seek information in accordance with agency planning processes from...Indian tribes...likely to have knowledge of or concerns with historic properties in the area" as they begin their efforts to identify historic properties subject to effect. [36 CFR § 800.4(a)(1)(iii)] Agencies are encouraged to "notify interested persons and parties known to be interested in the undertaking and its possible effects on historic properties," such as concerned tribes, if they determine that no historic properties exist in the area subject to effect. Also, agencies are required to notify "interested persons who have made their concerns known to the Agency Official" if they determine that such properties do exist but will not be affected. [36 CFR §§ 800.4(d), 800.5(b)] Tribes

and others who disagree with an agency's determination can seek Council review of the determination under 36 CFR § 800.6(e). All these provisions apply to non-Indian lands as well as to Indian lands.

The regulations require that when an undertaking "may affect properties of historic value to an Indian tribe on non-Indian lands, the consulting parties shall afford such tribe the opportunity to participate as interested persons." [36 CFR § 800.1(c)(2)(iii)] Such a tribe may be invited to be a consulting party if the agency and the SHPO, and the Council if it is participating in consultation, agree that such an invitation should be extended. [36 CFR § 800.1(c)(2)]

Tribes can facilitate their participation in the Section 106 process regarding undertakings on non-Indian lands by advising agencies and SHPO's, as early as possible in the planning process that precedes each undertaking, of their interest in participating. Tribes may wish to establish standing agreements with agencies and SHPO's that specify how they can be consulted with respect to particular areas, properties, property types, or undertakings.

Participation by Other Native Americans

The regulations provide that "other Native Americans are considered to be interested persons with respect to undertakings that may affect historic properties of significance to such persons." [36 CFR § 800.1(c)(2)(iii)] As with Indian tribes, agencies should seek information from other Native Americans during identification of historic properties and notify them of determinations. Other Native Americans can be invited to be consulting parties if the agency, the SHPO, and the Council, if it is participating, agree to do so.

As with tribes, other Native Americans can facilitate their participation in the Section 106 process by advising agencies and SHPO's, as early as possible in the planning process that precedes each undertaking, of their interest in participating. Native American groups may wish to establish standing agreements with agencies and SHPO's that specify how they can be consulted with respect to particular areas, properties, property types, or undertakings.

Participation by Traditional Cultural Leaders

The regulations provide that "traditional cultural leaders...are considered to be interested persons with respect to undertakings that may affect historic

properties of significance to such persons." [36 CFR § 800.1(c)(2)(iii)] Such leaders, in other words, are to be involved in the Section 106 process just as are other Native Americans and Indian tribal governments, except that they, like other Native Americans, lack the explicit right to be consulting parties and to concur in agreements that is enjoyed by Indian tribes with respect to undertakings affecting Indian lands.

Traditional cultural leaders within Indian tribes, other Native American groups, and other ethnic groups may not always be readily conversant in the English language or comfortable with Federal agency planning processes. As a result, it may be necessary for Federal agencies, SHPO's, tribal governments, and others to use special methods to involve them in consultation. For instance, formal ethnographic research and working with intermediaries and translators may help to ensure that the knowledge and concerns of traditional cultural leaders are taken into account.

Confidentiality

Maintaining confidentiality is often a concern of traditional cultural leaders, particularly with respect to the nature and location of sacred places. It should be noted that Section 304 of the National Historic Preservation Act directs Federal agencies, after consultation with the Secretary of the Interior, to "withhold from disclosure to the public, information relating to the location or character of historic resources whenever the head of the agency or the Secretary determines that the disclosure of such information may create a substantial risk of harm, theft, or destruction to such resources or to the area or place where such resources are located." This section should provide sufficient authority when agencies seek to protect sensitive information related to historic properties that is provided by traditional cultural leaders.

Conclusion

The Council's regulations provide broad encouragement and authority for participation in the Section 106 process by Indian tribes, other Native Americans, and traditional cultural leaders. More specific provisions are included for participation by Indian tribal governments per se, particularly with respect to lands under their jurisdiction.

Fact Sheet

Advisory Council on Historic Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809, Washington, DC 20004

INTRODUCTION TO FEDERAL PROJECTS AND HISTORIC PRESERVATION LAW

1988 training schedule

For your information and convenience, the 1988 training schedule and nomination procedure for INTRODUCTION TO FEDERAL PROJECTS AND HISTORIC PRESERVATION LAW are summarized below. This course has been designed by the Advisory Council on Historic Preservation to explain the requirements of Section 106 of the National Historic Preservation Act, which apply any time a Federal or federally assisted project, activity, or undertaking could affect a property listed in or eligible for the National Register of Historic Places. The course is jointly sponsored by the Advisory Council on Historic Preservation and the General Services Administration Training Center.

The Council is expanding its course to a 3-day format in 1988 in order to cover more thoroughly the compliance options available under the Council's recently revised regulations, which went into effect October 1, 1986. The 1988 training sessions will be held according to the following schedule:

January 26-28	Washington, D.C.
February 9-11	Dallas, Texas
February 23-25	Atlanta, Georgia
March 8-10	Honolulu, Hawaii
March 22-24	Denver, Colorado
April 18-20	Chicago, Illinois
May 2-4	Phoenix, Arizona
May 11-13	New York, New York
May 25-27	Orlando, Florida
June 14-16	San Francisco, California
July 12-14	Kansas City, Missouri
August 2-4	Seattle, Washington
September 13-15	Washington, D.C.

**Nomination
procedure**

The cost of the 3-day training for each participant is \$195 (not including food, travel, or lodging). A FEDERAL nomination should be submitted through agency authorizing officials and training offices on an agency's training form. This may be a Standard Form 182, a "Request, Authorization, Agreement and Certification of Training," a DOD 1556 or its equivalent, or a purchase order. A STATE OR LOCAL GOVERNMENT nomination and nominations for persons in the PRIVATE SECTOR should be submitted by letter from an authorized person and should include the following information:

- o Title, date, and location of the course;
- o Name, office address, and phone number of the nominee;
- o Position or title of the nominee;
- o Name and address of the office and organization to be billed; and
- o Any accounting data or funding code data necessary for billing.

Please note that nomination letters for persons in the PRIVATE SECTOR must explain why the nominee needs to take the course in order to fulfill his or her responsibilities for a government agency.

Nominations must be received by the GSA Training Center at least three weeks prior to the first day of class. Offices will be billed for accepted nominees unless CANCELLATION is received two weeks before the first day of class. Substitutions may be made up to the first day of class. Send nomination forms, letters, or purchase orders to:

Property Management Institute
GSA Training Center
P.O. Box 15608
Arlington, VA 22215-0608

Accepted nominees will receive a confirmation letter from the GSA Training Center approximately 3-4 weeks prior to the course session that will confirm the registration and advise the nominee of the location and time of the course session.

**Special course
offerings**

The Council can accommodate a limited number of requests for special onsite course sessions each year. Such special sessions can be requested by agencies and State and local government offices for groups of up to 30 persons. If your agency or office is interested in requesting a special onsite training session, you can call Shauna Holmes, the Council's training coordinator, at 202-786-0503 or FTS 786-0503 for further information.

Tab I:

SRPO Programmatic Agreement Transmittal Letters

DOE to Texas SHPO (June 3, 1987)

Texas SHPO to DOE (June 26, 1987)

Advisory Council to DOE (July 29, 1987)

and

SRPO Programmatic Agreement



Department of Energy
Washington, DC 20585

June 3, 1987

Curtis Tunnell
Executive Director, Texas Historical Commission
P.O. Box 12276
Capitol Station
Austin, Texas 78711

Dear Mr. Tunnell:

Enclosed for your signature is a Programmatic Agreement (PA) prepared pursuant to regulations of the Advisory Council on Historic Preservation (36 CFR 800). The PA demonstrates the Department of Energy's (DOE) compliance with Section 106 of the National Historic Preservation Act in regard to siting a nuclear waste repository in Deaf Smith County, Texas.

The PA was prepared by DOE in cooperation with the Advisory Council on Historic Preservation, with significant input from the National Conference of State Historic Preservation Officers. DOE worked closely with Dr. LaVerne Herrington of your staff, and modified the agreement to respond to her concerns.

The agreement has been signed by Benard C. Rusche, the Director of the Office of Civilian Radioactive Waste Management, and Jefferson O. Neff, the Salt Repository Project Manager. We look forward to working with you to implement the stipulations outlined in the PA. If you or your staff have any questions, please call Jay Jones at (202) 586-4970 or Jerry Parker at (202) 586-5679.


James P. Knight
Siting, Licensing, and Quality
Assurance Division
Office of Civilian Radioactive
Waste Management

Enclosure

cc: S. Kale, RW-20
T. Isaacs, RW-20
J. Bresee, RW-22
R. Stein, RW-23
J. Parker, RW-241
J. Jones, RW-241

M. Crosland, GC-11
J. Friedman, Weston
S. Frank, EH-25
T. King, ACHP
J. Neff, SRPO
B. White, SRPO



CURTIS TUNNELL
EXECUTIVE DIRECTOR

TEXAS HISTORICAL COMMISSION

P.O. BOX 12276

AUSTIN, TEXAS 78711

(512) 463-6100

June 26, 1987

Mr. James P. Knight
Siting, Licensing, and Quality
Assurance Division
Office of Civilian Radioactive
Waste Management
Department of Energy
Washington, D.C. 20585

Re: PMOA among DOE, ACHP, and Texas SHPO for
the First Nuclear Waste Deep Geologic
Repository Program, Deaf Smith County, Texas
(DOE, A5)

Dear Mr. Knight:

Enclosed is the signed Programmatic Memorandum of Agreement for the siting of a nuclear waste facility in Deaf Smith County, Texas. We look forward to receipt of a copy of the final document after it has been signed by the Advisory Council on Historic Preservation.

Thank you for your assistance in development of the agreement.

Sincerely,

Marcy Adele Kenmore
for

Curtis Tunnell
State Historic Preservation
Officer

NK/CT/lft

Enclosure

cc: Tom King, ACHP
Steven Frishman, Office of the Governor, w/encl.

The State Agency for Historic Preservation

Advisory Council On Historic Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809
Washington, DC 20004

JUL 29 1987

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

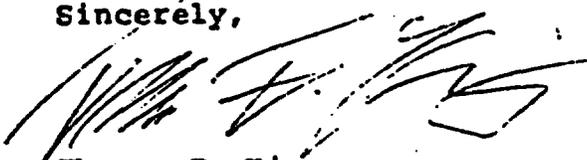
Dear Mr. Rusche:

Chairman Baker has executed our Programmatic Agreement dealing with historic preservation at the Deaf Smith County site during site characterization activities. A copy of the Agreement is enclosed for your files.

The Agreement is now fully in effect, and we will look forward to working with you and the Texas State Historic Preservation Officer as it is implemented. We will anticipate receiving the first annual report on program implementation, pursuant to Stipulation 1, in August of 1988, but will be pleased to assist you as needed in the interim.

Fulfillment of the terms of the Agreement satisfies the Department of Energy's responsibilities under Section 106 of the National Historic Preservation Act with respect to site characterization activities at the Deaf Smith County site. We look forward to early conclusion of similar agreements for the Hanford and Yucca Mountain sites.

Sincerely,



Thomas F. King
Director, Office of Cultural
Resource Preservation

Enclosure

**PROGRAMMATIC AGREEMENT
AMONG
THE UNITED STATES DEPARTMENT OF ENERGY (DOE),
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION (COUNCIL),
AND THE
TEXAS STATE HISTORIC PRESERVATION OFFICER (SHPO)
FOR THE
FIRST NUCLEAR WASTE DEEP GEOLOGIC REPOSITORY PROGRAM
DEAF SMITH COUNTY SITE, TEXAS**

WHEREAS, the United States Department of Energy (DOE) has been directed by Congress under the Nuclear Waste Policy Act of 1982 (P.L. 97-425), to identify and evaluate sites for repositories for the permanent deep geological disposal of high-level radioactive waste and spent nuclear fuel; and

WHEREAS, the phased program for site selection for the first repository entails the following:

- 1. Identification of potentially acceptable sites for the first repository (completed in February 1983).**
- 2. Secretary of Energy's (Secretary's) nomination of at least five sites as suitable for site characterization for the selection of the first repository, accompanied by an environmental assessment for each nominated site (completed in May 1986).**
- 3. Secretary's recommendation to the President of three of the nominated sites for characterization as candidate sites (completed in May 1986).**
- 4. Approval by the President of the candidate sites recommended by the Secretary (completed in May 1986).**
- 5. Characterization of each candidate site approved by the President, including extensive data collection and analysis, and testing.**
- 6. Recommendation by the Secretary to the President of one site from among the characterized sites for development as the repository, supported by a final environmental impact statement prepared pursuant to the National Environmental Policy Act and the Nuclear Waste Policy Act; and**

WHEREAS, the undertaking, for purposes of this Programmatic Agreement, is: nomination; recommendation and approval for site characterization; and site characterization for the first repository; and

WHEREAS, development of one site as the first repository, and the entire site selection process for the second repository and other facilities specified in the Nuclear Waste Policy Act are not within the scope of this Programmatic Agreement, but will be dealt with through additional consultation with the Advisory Council on Historic Preservation (Council) pursuant to the Council's regulations "Protection of Historic and Cultural Properties" (36 CFR Part 800, as revised on September 2, 1986 in 51 FR 31115) (Appendix 1); and

WHEREAS, Section 120 of the Nuclear Waste Policy Act requires Federal agencies, including the Council, to expedite consideration and issuance of any required authorizations related to site characterization; and

WHEREAS, DOE has determined that the proposed undertaking potentially could have effects upon historic, prehistoric, archeological, architectural, and cultural properties included in or eligible for inclusion in the National Register of Historic Places (hereinafter referred to as "historic properties"); and

WHEREAS, pursuant to Section 106 of the National Historic Preservation Act of 1966, Section 2(b) of Executive Order 11593, and the Council's regulations, DOE has requested the comments of the Council; and

WHEREAS, pursuant to 36 CFR 800.13 of the Council's regulations DOE has requested the development of a Programmatic Agreement to fulfill DOE's responsibilities under Section 106 of the National Historic Preservation Act and the Council's regulations for all undertakings carried out in accordance with this Programmatic Agreement; and

WHEREAS, DOE, the Council, and the Texas State Historic Preservation Officer (SHPO), have consulted and will continue to consult and to review the undertakings to consider feasible and prudent alternatives to avoid, minimize, or satisfactorily mitigate adverse effects to historic properties;

NOW, THEREFORE, it is mutually agreed that implementation of the undertaking in accordance with the following stipulations will avoid or satisfactorily mitigate the adverse effects of the undertaking on historic properties and will, therefore, satisfy all of DOE's responsibilities under Section 106 of the National Historic Preservation Act and the Council's regulations.

STIPULATIONS

1. Monitoring the Programmatic Agreement

DOE will monitor compliance with this Programmatic Agreement. Representatives of DOE will ensure that the stipulations in this Programmatic Agreement are satisfied in a complete and timely fashion and will report to the Council and the Texas SHPO annually on progress in implementation. This annual report should include a compilation of the monitoring reports written during the year and previously reviewed by the SHPO as actions occurred.

2. Coordination

As soon as possible, before any earthmoving or other activities connected with site characterization that could affect a unit of land are undertaken on the site, and throughout the process in accordance with 36 CFR 800.13(b) and (c), the DOE will:

- A. Consult with other appropriate Federal agencies to assure that their concerns relevant to historic properties are met. DOE will ensure that data, materials, and reports from its contractors will be available in a timely manner to those agencies during the course of on-going work relevant to this Programmatic Agreement.
- B. Consult with the Texas SHPO. The DOE will ensure that data, materials, and reports from its contractors will be available in a timely manner to the Texas SHPO during the course of on-going work relevant to this Programmatic Agreement.
- C. Contact the Bureau of Indian Affairs, the Texas SHPO, local tribes with current or historic ties to the land, and other parties that have expressed interest to ensure identification and notification of all potentially involved American Indian groups or other ethnic, cultural, or social groups with historic ties to the site. DOE will continue its on-going consultation with such groups having traditional cultural ties to the area. Consultation will be held to assure that historic properties of cultural or religious value to such groups are identified and avoided to the extent feasible.

If such properties are identified and effects on them cannot be avoided, the DOE will consult further with the American Indian or ethnic group(s) involved, the Texas SHPO, and the Council to seek ways to mitigate project effects on such properties. The DOE will consider recommended mitigation measures.

Consultation will be undertaken with reference to the Council's March, 1985 draft, "Guidelines for Consideration of Traditional Cultural Values in Historic Preservation Review" (Appendix 2).

3. Worker Education Program

As early as possible and before a significant influx of workers arrives at the site, the DOE, with the advice of the Texas SHPO, will develop and implement a comprehensive worker education program for archeological and historic resources. The program will include, but need not be limited to, the following components:

- A. Distribution of information to all project workers and their dependents, informing them about the Archeological Resources Protection Act, warning against the unauthorized collection or disturbance of archeological materials, and explaining the requirements to report the discovery of such materials to appropriate authorities.
- B. If warranted, development of an education program using such techniques as slide presentations, brochures, and films to inform workers about local history and prehistory, the science of archeology and the importance of archeological resources.

- C. If warranted, development of a display and interpretation of local history and prehistory in an appropriate project facility on site.
- D. Placement of warning signs and physical barriers as necessary around highly visible sites which are potentially subject to vandalism.

4. Research Design

The DOE, in consultation with the Texas SHPO, will develop and implement a research design to guide archeological and historical surveys, data recovery and analysis during site characterization. This research design should:

- A. Be built on data identification already undertaken by DOE at the site. The work previously performed included a preliminary assessment (Class I) of cultural resources for the Deaf Smith site and vicinity. This assessment consisted of a literature search and archival review which provided an analysis and evaluation of recorded sites. Potentially sensitive locations where unrecorded sites may be located, were identified in the preliminary assessment of the site and vicinity. In addition, a limited number of 1.6 hectare (4 acre) cultural resource surveys at boreholes have been conducted.
- B. Be at a level of detail appropriate to the known and expected resource base at the site and its environs.
- C. Establish significant, defensible research questions to be addressed. Such questions should be developed with reference to the Council's Handbook, "Treatment of Archeological Properties", particularly Appendix A (Handbook) (Appendix 3) and the Texas State Historic Preservation Planning Process.
- D. Establish cost-effective strategies and methods for addressing the research questions.
- E. Identify actual and potential archeological and historic sites and areas that should be investigated in order to address the research questions, and which are subject to effect by the project.
- F. Be consistent with: the Handbook (Appendix 3); the Council of Texas Archeologists' Guidelines (Appendix 4); "Archeology and Historic Preservation; Secretary of the Interior's Standards and Guidelines" (Appendix 5); and, as applicable, the "Standards of Research Performance" of the Society of Professional Archeologists (Appendix 6).
- G. Develop an approach for identifying and evaluating the significance of sites, and seeking determinations of eligibility or nominating sites to the National Register of Historic Places (National Register). DOE will work with the Texas SHPO to develop an efficient system for ensuring compliance with the regulations of the National Register (36 CFR Part 60 and Part 63) (Appendix 7).

Should the eligibility of a property for the National Register be determined by any of the parties to this agreement to require review, before any earthmoving activity, alteration or damage to a building or structure occurs, the DOE will request a determination from the Keeper of the National Register.

The DOE may choose to wait for a formal determination of eligibility or may elect to treat any site as if it is eligible until such time as the Keeper has made a formal determination that it is not eligible.

- H. Build in a system for reporting progress in implementation to the SHPO, and for responding to SHPO comments.

5. Survey and Treatment of Historic Properties

A. Before any earthmoving or other activities that could affect a unit of land are undertaken at the site in connection with site characterization, the DOE will ensure completion of field surveys of historic properties on that unit of land. Such surveys will:

- i) be conducted to identify and evaluate historic properties on the basis of the criteria of the National Register (36 CFR Part 60) (Appendix 7);
- ii) identify properties which may be subject to effect as determined with reference to the Council's regulations (36 CFR Part 800) (Appendix 1);
- iii) be consistent with the research design developed pursuant to Stipulation 4;
- iv) be designed to satisfy the requirements of 36 CFR 800.4, 800.5, and 800.9.

B. Survey will concentrate on both on-site and off-site effects such as impacts from construction, land-use changes, vandalism, and induced growth. Such effects are those which are reasonably foreseeable and can reasonably be tied to the project. Such potential effects will be those identified during on-going environmental planning, and in site planning and evaluation documents. These effects will be considered in accordance with 36 CFR 800.9.

C. DOE will make every effort to design project activities to avoid damage to any historic property.

D. If avoidance of damage to historic properties is not possible, the DOE will develop and implement a data recovery plan in consultation with the Texas SHPO.

- i) Any data recovery plan prepared under this Programmatic Agreement will be in accordance with "Archeology and Historic Preservation; Secretary of the Interior's Standards and Guidelines" (Appendix 5) and will incorporate the recommendations in Part III of the Council's Handbook, "Treatment of Archeological Properties" (Appendix 3). Activities will be subject to quality control and DOE will seek to comply with the Council of Texas Archeologists' Guidelines (Appendix 4).
- ii) The data recovery plan will outline activity-specific and site-specific procedures to be followed in mitigating adverse impacts through data recovery. Further consultation will not be required unless conditions differ from those specified in this plan.
- iii) Permanent curation of any recovered artifacts will be coordinated with the Texas SHPO to assure use of a qualified Texas facility which meets professional standards for curation.

6. Professional Qualifications

All required archeological work will be carried out under the direct supervision of a professional archeologist who meets the Membership Requirements of the Society of Professional Archeologists (Appendix 8) or the Secretary of the Interior's "Professional Qualifications Standards" (Appendix 9). Historic work will be carried out under the direct supervision of a professional historian, architectural historian or historical architect, as appropriate, minimally meeting the Secretary of the Interior's "Professional Qualifications Standards" for that given profession.

7. DOE Contractors

DOE will ensure that contractors and subcontractors used in connection with this undertaking are provided copies of this Programmatic Agreement and will comply with its terms.

8. Dispute Resolution

- A. Disagreements regarding interpretation and implementation of this Programmatic Agreement will be resolved by consultation between DOE and the Texas SHPO, with informal participation by the Council, if necessary, at the request of either party.
- B. Should disagreements not be resolved in accordance with Stipulation 8(A) (above), DOE will provide to the Council documents and information regarding the disagreement necessary to allow the Council to comment pursuant to its responsibilities under 36 CFR 800.6. Within 15 working days of receipt of such documents and information, the Council will:
 - i) provide DOE a finding of fact and recommendations, after consideration of which the DOE will make a final decision in the matter; or

ii) notify the DOE that the matter will be scheduled for review and comment by the full Council or a panel, and conclude such review and comment within 45 days, after which the DOE will make a final decision in the matter.

C. The DOE will provide to the Texas SHPO, the Council, and relevant agencies copies of all written objections, findings and recommendations or comments of the Council, determinations from the Keeper, and determinations of final action of its own.

9. Council Comments

If the DOE is unable to carry out the terms of this Programmatic Agreement as required by 36 CFR 800.13(g), DOE will not take or sanction any action or make any irreversible commitment that would result in an adverse effect on National Register or eligible properties within the scope of this Programmatic Agreement or would foreclose the Council's consideration of avoidance or mitigation alternatives until it has obtained the Council's comments, pursuant to the Council's regulations, for each individual action carried out as part of this undertaking.

10. Modification

Any modification of this Programmatic Agreement, to become effective, will require consultation and agreement among the signatories in the same manner as the original Programmatic Agreement was developed and signed, pursuant to 36 CFR 800.13.

11. Effective Date

This Programmatic Agreement will become effective upon ratification by the Chairman of the Advisory Council.

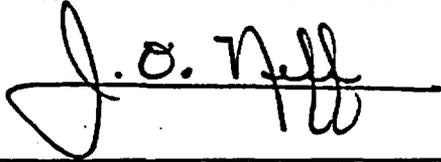
12. On-Going Work

DOE already has initiated implementation of various stipulations in this Programmatic Agreement, and will not be required to begin them anew, but will continue on-going activities in satisfaction of the terms of this Programmatic Agreement.

13. Recommendation of one Site for Development as the First Repository

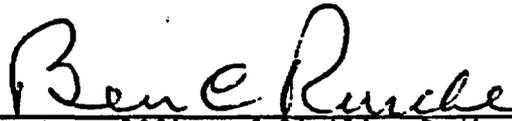
DOE will again seek the comments of the Council and the appropriate State Historic Preservation Officer pursuant to Section 106 and the Council's regulations prior to the Secretary's recommendation of one site for development as the first repository.

Execution of this Programmatic Agreement evidences that the DOE has afforded the Council a reasonable opportunity to comment on the subject undertaking and its effect on historic properties and that the DOE has taken into account the effects of its undertaking on historic properties.



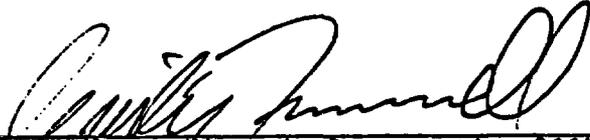
Project Manager, Salt Repository Project Office,
United States Department of Energy

4/22/87
Date



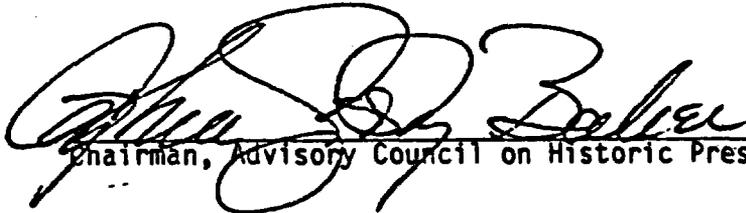
Director, Office of Civilian Radioactive Waste
Management, United States Department of Energy

5/28/87
Date



Texas State Historic Preservation Officer

6-23-87
Date



Chairman, Advisory Council on Historic Preservation

24 July 87
Date

Tab J:
Revised Charter
Environmental Planning Working Group

CHARTER FOR THE ENVIRONMENTAL PLANNING WORKING GROUP

SCOPE

The DOE has recommended, and the President has approved, three sites for site characterization for the first geologic repository for the disposal of high-level radioactive waste. Environmental field programs will be conducted at each of the three sites undergoing site characterization. In order to ensure an appropriate level of comparability among each of the site environmental field programs, an Environmental Planning Working Group (EPWG) is established.

PURPOSE

The purposes of the Environmental Planning Working Group (EPWG) are to:

- Ensure coordination and communication among all HQ and PO personnel involved in environmental planning for field studies.
- Provide a forum for DOE and the Affected Parties to exchange information and ideas regarding the environmental field program.
- Provide an appropriate level of programmatic comparability among the site-specific environmental field programs.
- Ensure the responsiveness of environmental data-gathering efforts to information needs.

ORGANIZATION

The Environmental Planning Working Group (EPWG) is a subordinate group of the Environmental Coordinating Group (ECG).

MEMBERSHIP

The Environmental Planning Working Group (EPWG) is comprised of one representative from each repository Project Office, Office of Geologic Repositories (OGR); the Office of Environment, Safety and Health (EH); and the Office of General Counsel (OGC). Participation of support contractors and other DOE staff will be sought on an as needed basis.

The EPWG members are listed in Annex I.

RESPONSIBILITIES/PRODUCTS

Annex II identifies potential tasks which may be considered by the Environmental Planning Working Group (EPWG).

OPERATING PROCEDURES

- (1) The Environmental Planning Working Group (EPWG) will meet approximately every four months, in conjunction with the Environmental Coordinating Group meetings.
- (2) Prior to each meeting, the chairperson will request suggested agenda items from each member. Upon approval by the chairperson, the agenda will be forwarded to members no later than two weeks prior to the meeting. The agenda will clearly state the purpose(s) of the meeting and the topics to be covered.
- (3) The chairperson will distribute the minutes of each meeting to the EPWG members for their review. Once approved, the minutes will become the official record. The minutes will contain agreements reached, and issues resolved, as applicable, and will include action items along with assignments for each such action item.
- (4) Procedures for decisions in regard to action items, schedules, and issues resolution will be in accordance with Procedure OGR 1.0, "Coordinating Group Charter and Meetings."

Annex I

EPWG MEMBERSHIP

R. Sharma, RW-241

S. Frank, EH-25

R. Mussler, GC-11

A. Ladino, SRPO

Representative, NNWSI

S. Whitfield, BWIP

R. Toft, SRA - Executive Secretary (non-voting member)

Annex II

**POTENTIAL TASKS FOR THE
ENVIRONMENTAL PLANNING WORKING GROUP**

The following list presents tasks that will be considered by the Environmental Planning Working Group (EPWG):

- (1) Identify environmental field programs necessary to support programmatic requirements.
- (2) Review existing PO environmental planning approaches.
- (3) Provide a comparable framework for PO environmental field study planning.
- (4) Review environmental field study plans prepared by POs in accordance with agreement upon approvals for consistency with overall OCRWM policy.
- (5) Review status of implementation of PO environmental field programs.
- (6) Develop common formats for environmental topical reports.

Tab K:

Action Items and Minutes

May 6, 1987

Environmental Planning Working Group

ACTION ITEMS

**OGR ENVIRONMENTAL PLANNING WORKING
GROUP MEETING
May 6, 1987
Seattle, Washington**

<u>ITEM</u>	<u>ASSIGNED TO</u>	<u>DUE</u>
1. The Site Evaluation Branch (SEB) will revise the Environmental Planning Working Group (EPWG) charter to acknowledge that an additional reason for establishing the EPWG was to provide a forum for DOE/affected parties' interactions and coordination.	R. Toft (SRA-EPWG Exec. Secy.)	In August reference package for the next EPWG meeting.
2. The SEB will contact the Nuclear Regulatory Commission (NRC) to determine what role NRC desires in the development of DOE's Environmental Study Plans (ESPs). Steve Kale will send a memo to the Project Managers stating which ESPs, if any, the NRC wants to review.	R. Sharma	June 26
3. DOE HQ will brief the states/affected parties on the Licensing Support System (LSS). The time and location for this briefing needs to be established.	R. Sharma/ C. Head	In August reference package for the next EPWG meeting.
4. The SEB agreed to solicit agenda items from the states and affected Indian Tribes in advance of the next EPWG meeting.	R. Toft (SRA)	1 month in advance of next meeting.
5. Future meetings of the EPWG will be conducted in a "workshop" mode (to the extent it is appropriate), rather than focusing on status presentations by HQ and the Project Offices.	R. Sharma	In August reference package for the next EPWG meeting.

Meeting Minutes of the Environmental Planning
Working Group

May 6, 1987
Seattle, Washington

The second meeting of the Environmental Planning Working Group (EPWG) commenced at 1:30pm on May 6, 1987, at the Stouffer-Madison Hotel, Seattle, Washington. Present at this meeting were the members of the EPWG and, for the first time, participants from the affected States and Indian Tribes (attendance list-Attachment 1).

Raj Sharma (EPWG Chairman) welcomed the affected parties to their first EPWG meeting and provided an overview of the overall repository environmental program. Raj requested that all the EPWG participants read the Environmental Program Overview, which was prepared for DOE by Argonne National Laboratory. Raj encouraged participants to provide HQ with any comments they may have on this document.

Organizational Structure and Function of the EPWG

Raj Sharma provided the group with an overview on the organization and function of the EPWG. This presentation focused on the EPWG charter (advance copies were sent to the meeting attendees in the reference package-Tab 1). Also provided were specific details on the outline and schedule for preparing Environmental Site Study Plans (ESSPs). Betty Jankus (NNWSI), Steve Whitfield (BWIP) and Tony Ladino (SRPO) voiced concern over the schedule for producing the ESPs -- they felt it may be necessary for the Project Offices (POs) to share draft plans with the states at intervals other than those proposed in the HQ schedule. Raj indicated that to do so in advance of HQ review and approval of the ESPs could affect the POs ability to be responsive to affected parties concerns. Raj emphasized that only DOE-HQ approved study plans should be sent to the affected parties for review and comment.

Carl Johnson (Nevada) asked Raj for clarification on how the EPWG operated. Raj reported that the EPWG worked as a group - that decisions were made by the group as a whole and that those decisions were then implemented by Steve Kale memos to the Project Managers (for schedule and policy decisions) or by J. Parker/R. Sharma memos to the EPWG members for other matters, as appropriate.

Project Office Status Reports

Tony Ladino (SRPO), Betty Jankus (NNWSI) and Duane Fickeisen, for Steve Whitfield (BWIP), provided status reports on the PO preparation of the ESSPs. The state of Texas representative requested clarification on Tony Ladino's vu-graph depicting ESP information needs. Tony indicated that the information needs drivers described in the chart were the primary drivers and that others would be added as a result of progress made on developing the Environmental Regulatory Compliance Plan (ERCP) and as EIS planning proceeded. Tony emphasized that the ESSPs were "living documents" that would be revised, as necessary, to address developing program needs.

Carl Johnson asked for clarification on the extent of "completeness" of the DEIS. Raj indicated that the DEIS would be written based on information contained in the Advanced Conceptual Design (ACD) and that the impacts would be "bounded" such that changes in environmental impacts resulting from changes in the final repository design, should not require changes in the DEIS.

Duane Fickeisen (BWIP) indicated that the ESSPs would be reviewed by the NRC. Donald Provost (Washington) asked why the ESSPs content would differ just because the NRC might review them.

He asked if the content differed from original plans since the affected parties were going to review them. HQ clarified that the ESSPs content would not differ for expanded audiences. HQ also took the action to clarify NRC's role in the ESSPs development.

Discussion

Raj asked for general comments/impressions from the affected parties. The representative from the Yakima Indian Nation asked where the information from the EMMP, the ESSPs, and the SMMP would be rolled-up in a combined decision making process. Raj indicated that how the information is rolled-up is a function of the end-requirements. S. Whitfield was asked to meet with the Yakimas to clarify the process.

The Yakima Indian Nation requested that future EPWG meetings be held in a "workshop" fashion and Raj agreed that they would be held in such a manner.

The Nez Pierce representative indicated they were potentially affected by both the repository activities as well as the transportation aspects of the program. He cited the need for a consistent set of program definitions to be applied program-wide.

ACTION ITEMS

**OGR ENVIRONMENTAL PLANNING WORKING
GROUP MEETING
May 6, 1987
Seattle, Washington**

<u>ITEM</u>	<u>ASSIGNED TO</u>	<u>DUE</u>
1. The Site Evaluation Branch (SEB) will revise the Environmental Planning Working Group (EPWG) charter to acknowledge that an additional reason for establishing the EPWG was to provide a forum for DOE/affected parties' interactions and coordination.	R. Toft (SRA-EPWG Exec. Secy.)	In August reference package for the next EPWG meeting.
2. The SEB will contact the Nuclear Regulatory Commission (NRC) to determine what role NRC desires in the development of DOE's Environmental Study Plans (ESPs). Steve Kale will send a memo to the Project Managers stating which ESPs, if any, the NRC wants to review.	R. Sharma	June 26
3. DOE HQ will brief the states/affected parties on the Licensing Support System (LSS). The time and location for this briefing needs to be established.	R. Sharma/ C. Head	In August reference package for the next EPWG meeting.
4. The SEB agreed to solicit agenda items from the states and affected Indian Tribes in advance of the next EPWG meeting.	R. Toft (SRA)	1 month in advance of next meeting.
5. Future meetings of the EPWG will be conducted in a "workshop" mode (to the extent it is appropriate), rather than focusing on status presentations by HQ and the Project Offices.	R. Sharma	In August reference package for the next EPWG meeting.

Tab L:

Letter to R. Sharma from R. Loux

Regarding Environmental Program Planning

May 14, 1987



**AGENCY FOR NUCLEAR PROJECTS
NUCLEAR WASTE PROJECT OFFICE**

Capitol Complex
Carson City, Nevada 89710
(702) 885-3744

May 14, 1987

Dr. Raj Sharma
RW-241
U.S. Department of Energy
Washington, DC 20585

Dear Dr. Sharma:

Members of my staff who attended the series of environmental meetings in Seattle, May 5-7, 1987, have reported upon the activities of the Environmental Planning Working Group (EPWG) which you chair. This correspondence addresses the group's work, raises certain questions, and suggests ways that the environmental planning objectives of DOE and the interests of the State of Nevada can be fostered and made to be more complimentary.

The Nuclear Waste Project Office (NWPO) is encouraged to see a group in DOE with objectives like those of EPWG. Thus far we have not been successful in understanding the approach to environmental program planning being taken by NNWSI. We find the information you presented at the May 6th meeting more in line with our concept of an environmental program. We also note with interest that the SRPO and BWIP programs reflect a more comprehensive approach to planning; an approach we have unsuccessfully urged NNWSI to adopt.

Perhaps it would be useful if you could arrange to meet with NNWSI and my staff to explore how the environmental program for Yucca Mountain can be made more consistent with the programs for the Deaf Smith and Hanford sites. Among the issues that could be considered are the following:

1. The Environmental Checklist Procedure Adopted by DOE for Reviewing Pre-Site Characterization Activities

This approach has been successfully used by SRPO at several drilling sites in Texas, e.g., the J. Friemel, Detten, Zeeck, and Harman Sites in Deaf Smith and Swisher Counties. At BWIP the checklist has been replaced by the BWIP Environmental Review Procedure that seems thorough and responsive to the need for documenting environmental protection. We have attempted on several occasions to obtain checklists for the

exploratory activities previously conducted by NNWSI at Yucca Mountain but thus far have received no response. As we understand the response of Ms. Jankus during the meetings in Seattle, DOE-NVO does not use the checklist procedure for environmental review but relies instead upon an approach with which we are not familiar. The DOE-NVO approach may in fact run counter to the directives contained in DOE Order 5440.1C (Implementation of NEPA), DOE N 5400.1 (Environmental Policy Statement), and the NE-330 of August 6, 1981 (Environmental Checklist for Boreholes). It would seem that EPWG should address this matter in the interest of compliance and achieving consistency throughout the three projects. Any assistance that you can provide by way of making the NNWSI environmental reviews or any information on such reviews available to us will be appreciated.

2. Extent to Which Environmental Field Study Plans Are Being Developed

We note with interest that NNWSI is preparing field study plans for only four environmental areas while SRPO is preparing plans for 13 areas. More importantly, NNWSI apparently is restricting its study plans to the EMMP while SRPO is addressing information needs for all requirements that do not involve public participation. The seemingly piecemeal approach to planning reflected by the NNWSI project is, as you know, a major criticism that we have of the DOE repository program.

3. NRC Technical Review of Environmental Field Study Plans

This issue seems particularly suited for EPWG to coordinate rather than allowing BWIP and SRPO to proceed under the assumption that NRC will review the study plans while NNWSI appears to be ignoring the matter altogether. A degree of credibility otherwise lacking could be gained via reviews by NRC, NAS or another peer groups.

4. Approach to Identifying Environmental Information Needs

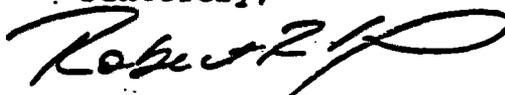
I am particularly impressed with the SEMP and RID procedures being used by SRPO to pinpoint data and information needs. The BWIP approach based upon Mission Plan Key Issue 3 seems comparable to the SRPO program while the manner in which NNWSI is identifying environmental needs for its program remains a mystery to us. This is a critical area where guidance from EPWG is urgently needed. Our views on the NNWSI environmental program will continue to be harsh as long as the approach appears to be a piecemeal one lacking the integration that we see in SRPO, BWIP, and in the Sample Field Study Plan Development Matrix which you presented in Seattle.

Perhaps you can gain a sense of the frustration we feel in attempting to understand the NNWSI approach to environmental planning by looking once more at the materials handed out during the meetings of May 5-7. Your information package as well as those presented by SRPO and BWIP relied on flow-charts, matrices, and other schemes to depict the logic and cause-and-effect relationships that define how the environmental program is being planned. There is nothing in the material prepared by NNWSI that reflects a comprehension of the types of tools employed by other DOE program offices for planning purposes. This leads us to believe that the NNWSI environmental effort is simplistic to the point of being deficient. In no way does the NNWSI program compare to our perception of the SRPO and BWIP programs, and now that EPWG exists there is a mechanism for bringing about greater comparability between the three sites.

At the close of your meeting on May 6, Mr. Carl Johnson of my staff commented on the need for more give and take in such meetings and was assured that in the future that will occur. We are reluctant to wait for another four months when EPWG next meets to address the issues outlined above. If it is not already too late to influence the NNWSI environmental program I hope you will give serious attention to the concerns raised herein and can take steps to address them. An informal meeting attended by a small number of people seems an appropriate way to proceed.

Please contact Mr. Johnson or Mr. Malone if there are questions with regard to NWPO concerns about NNWSI environmental program planning.

Sincerely,



Robert R. Loux
Executive Director

RRL:CRM/njc

cc: Dr. Donald Vieth
Mr. G.J. Parker

87 MAY 29 11:47

Tab M:

Letter to R. Loux from S. Kale

in Response to Letter of May 14, 1987

July 30, 1987



Department of Energy
Washington, DC 20585

JUL 30 1987

Mr. Robert R. Loux
Executive Director
Agency for Nuclear Projects
Nuclear Waste Project Office
Capitol Complex
Carson City, Nevada 89710

Dear Mr. Loux:

This letter is in regard to your letters of May 14, 1987, to Dr. Raj Sharma and Ms. Deborah Valentine of my staff concerning the objectives and activities of the Environmental Planning Working Group (EPWG) and the Environmental Regulatory Compliance Working Group (ERCWG).

Letter to Dr. Rajendra Sharma

We are pleased that you find the Department of Energy's (DOE) recent efforts to clarify its environmental planning efforts a positive action. The specific issues raised in your May 14th letter to Dr. Sharma are important to DOE's environmental planning efforts. Each topic is discussed below.

(1) The Environmental Checklist Procedure Adopted by DOE for Reviewing Pre-Site Characterization Activities

While NNWSI has not used the environmental checklist procedures used by BWIP, the NNWSI environmental field work being planned to support various programmatic needs (i.e. Environmental Monitoring and Mitigation Plans (EMMPs), Environmental Regulatory Compliance Plans (ERCs), and the repository Environmental Impact Statement (EIS)) is consistent with that of BWIP and SRPO. Environmental planning is being conducted to ensure that all applicable environmental requirements will be met. To facilitate Nevada's review of DOE's site characterization activities, NNWSI will be providing you with all the pre-site characterization activity environmental review documentation.

(2) Extent to Which Environmental Field Study Plans Are Being Developed

The Environmental Field Activity Plans (EFAPs) to be



prepared by the DOE Project Offices for each candidate site will be prepared for 13 separate environmental disciplines and will meet the same general format and content requirements. These EFAPs will, in some instances, be prepared on different schedules.

A set of site-specific topical EFAPs are being prepared by each Project Office. These plans will incorporate all the data collection requirements for a given environmental discipline in a single plan. For example, all the air quality data collection requirements for each site needed to support the EMMP, meet regulatory compliance requirements, and support site suitability analyses will be contained in a single Air Quality EFAP.

Development of EFAPs will be part of an ongoing process to integrate various environmental data collection efforts. Since all the data collection requirements may not be identified in the initial draft of each plan, additional requirements will be incorporated, as appropriate, in subsequent drafts.

Initially, the Project Offices are preparing EFAPs for those specific environmental disciplines needed to meet EMMP information requirements. EFAPs for other disciplines will be prepared as well. While SRPO identified five EMMP disciplines and BWIP identified seven EMMP disciplines, both of these Project Offices chose to prepare plans for all disciplines on an expedited schedule. However, NNWSI chose to prepare plans for only the four disciplines identified in the NNWSI EMMP to be monitored for potentially significant site characterization impacts. At the time of the May 6, 1987, EPWG meeting, NNWSI had begun preparation of EFAPs for these four disciplines. NNWSI will also prepare the EFAPs to address the remaining nine environmental disciplines. None of the EFAPs prepared by the Project Offices represent final documents and they will continue to be revised to incorporate EIS and other requirements at appropriate junctures.

(3) NRC Technical Review of EFAPs

There is no requirement for the NRC to review EFAPs and NRC has not expressed a desire to review the EFAPs unless they contain SCP-related issues.

(4) Approach to Identifying Environmental Information Needs

The materials distributed by the three Project Offices at the May 6th EPWG meeting are consistent in that all three Project Offices are considering the same environmental requirements (i.e. EMMP, ERCP, EIS, etc.) in developing the

EFAPs. While there is some variation in the methods and language used to describe and present the approaches used by the three Project Offices to prepare EFAPs, such differences are not germane to the format and content of the EFAPs.

The NNWSI Project Office will be contacting you soon to arrange a meeting to discuss environmental planning issues for the Yucca Mountain site.

Letter to Ms. Deborah Valentine

Thank you for the suggestions you have provided to ERCWG on DOE's approach to environmental regulatory compliance. We appreciate your thoughts on compliance procedures and on issues that ERCWG should address.

Your comments on the environmental checklist procedure were addressed above. Specific comments addressing several other environmental regulatory compliance issues which you raised are discussed below.

(1) Early Contact With Regulatory Agencies

DOE agrees that early contact with regulatory agencies is important to development of regulatory compliance strategies. The first such meeting, as you note, was the February 27, 1987, meeting between SRPO and EPA.

We have been advised by Don Vieth that NNWSI plans to meet with regulatory agencies beginning with the US EPA and then State agencies. NNWSI held an initial meeting with EPA Region 9 on July 13, 1987. The Nevada Nuclear Waste Project Office will be notified in advance of any meetings NNWSI plans to hold with Nevada State regulatory agencies.

(2) Need for a Common Focal Point in DOE for Regulatory Compliance

ERCWG has been established to be the forum for discussions on a programmatic basis concerning environmental regulatory compliance issues impacting the nuclear waste repository program. ERCWG should provide an effective means of communicating with States and affected Indian Tribes on various regulatory compliance issues.

NNWSI, in reporting to the DOE Nevada Operations Office, has the functional responsibility for ensuring environmental regulatory compliance at the Yucca Mountain site. You should consider NNWSI as your regulatory liaison for DOE.

Although the ERCWs will contain a list of the Federal, State, and local environmental laws and regulations

potentially applicable to site characterization activities, you should note that the ERCPs are not comprehensive regulatory compliance documents. Discussion of such non-environmental regulatory compliance issues as OSHA, MSHA, and various building, fire, and safety codes will be addressed in the OCRWM Safety Plan and the site health and safety plans. These documents can also be provided for your review, upon request, as they are completed.

(3) Comprehensive Nature of the Environmental Regulatory Compliance Plan

The ERCP is intended only to address environmental regulatory compliance issues relevant to the site characterization process. The environmental regulations relevant to repository development, however, will likely be similar to the regulations discussed in the ERCPs. More extensive discussions of the regulatory compliance topics relevant to repository EIS development will be provided in the repository EIS Implementation Plan which will be developed as a result of the NEPA scoping process.

(4) Comparable Approaches to Environmental Auditing

In conjunction with the ERCP, each DOE Project Office is preparing a permit management system for the environmental permitting process relevant to site characterization. This process will document that compliance with applicable regulations has occurred prior to the start of an activity. Monitoring and auditing will be conducted by the DOE Project Offices in support of both environmental regulatory requirements and Section 113 of the Nuclear Waste Policy Act.

(5) Coordination with the Environmental Survey

The Environmental Survey being conducted by DOE is intended for major existing facilities and is not applicable to current NNWSI activities. The Environmental Survey is not an audit but is, instead, a long-range planning tool to establish priorities for existing DOE facilities. The final report developed for the Environmental Survey will be made public and provided for your information.

We understand that DOE's Office of Environment, Safety, and Health contacted both your office and other Nevada State officials to announce the time and date of all activities concerning the Environmental Survey. Your office had been informed of the purposes of the Survey in a May 22, 1987, memorandum from Mary Walker, Assistant Secretary for Environment, Safety, and Health. B. Taft (NVO) also called your office one week prior to the May 7th pre-survey meeting and provided information on the meeting and the survey. I. H. Dodjion, Nevada Director of the Division of Environmental

Protection, and Jerry Grientrog, Director of the Department of Human Resources, were notified by mail and attended the environmental pre-survey meeting. Mr. Taft will continue to work with the above Nevada officials on the Environmental Survey process. You may want to contact these Nevada officials for additional information.

DOE appreciates your continued interest and input regarding the environmental aspects of the radioactive waste management program. If you have further questions, do not hesitate to contact me or Mitchell Kunich.

Sincerely,



for Stephen H. Kale
Associate Director for
Geologic Repositories
Office of Civilian Radioactive
Waste Management

cc: Mitchell Kunich, NNWSI

Tab N:

Memo to Project Managers (PMs) from S. Kale
on Environmental Program Planning

August 13, 1987

United States Government

J. Parker-RW-241
Department of Energy

memorandum

DATE: AUG 18 1987

REPLY TO
ATTN OF: RW-241

SUBJECT: Environmental Program Planning

TO: J. Anttonen, BWIP
M. Kunich, NNWSI
J. Neff, SRPO

This memorandum provides guidance on issues related to environmental program planning. As you are aware, environmental field activity plans are being prepared by your Project Offices (POs).

1. Key Issues #3 Hierarchy and the Environmental Program Planning Approaches

The EFAPs now being prepared by the POs address environmental information needs stemming from the Environmental Monitoring and Mitigation Plans (EMMPs). The EFAPs will be revised so that additional data collection requirements can be included in subsequent updates. Ultimately, all environmental data collection requirements (e.g., EMMP, 10 CFR 960, EIS, etc.) will be included in all of the EFAPs for each site. Headquarters (HQ) guidance will attempt to ensure program-wide comparability among EFAPs to the extent such comparability is warranted.

However, it was clear at the May 1987 ECG/EPWG meeting that, even though all POs were addressing the same data collection requirements in their EFAPs, the PO planning methods were not consistent. Although this situation does not appear to have caused problems in the preparation of the PO EFAPs, it presented an impression to the States and Tribes that disparate planning approaches were being followed at the three POs. Questions posed by the affected parties at the ECG/EPWG meeting and the follow-up correspondence from the State of Nevada indicate that a consistent program planning approach, in order to bridge the gap between the broad generic statement embodied in Key Issue #3 and the seven or eight study requirements, will go a long way in alleviating the concerns that the affected parties have expressed. To this end, Raj Sharma will chair a meeting on August 31, 1987, (one day prior to the EFAP workshop, Item #4 below) to

explore a common approach to planning. A proposed agenda for this meeting is attached (Attachment 1). This will also be an agenda item for discussion with the affected parties during the September 1987 ECG/EPWG meeting.

2. Nuclear Regulatory Commission Review of the EFAPs

At the May 1987 ECG/EPWG meeting, questions arose as to NRC's role in regard to the EFAPs. Under Section 113(b)(1) of NHPA, NRC has a formal review and comment responsibility for the SCPs. However, no such review and comment role is required for surface site investigations that are separate from studies conducted under the SCPs. Therefore, EFAPs will not be transmitted to NRC unless the plans, in total or in part, address the field activities identified under the SCPs. After appropriate HQ review, the EFAPs will be made available to other agencies, including NRC, for their information. We have discussed this with NRC staff and they concur in this approach.

3. HQ Review of the EFAPs

HQ staff and support contractors have reviewed the PO-prepared draft EFAPs. The list of EFAPs is provided in Attachment 2. A list of reviewers (Attachment 3) and a detailed review schedule (Attachment 4) are also attached. The current draft EFAPs cover the data collection requirements in support of the EMMPs. The EFAPs will be reviewed again after they are expanded and updated to include other data collection requirements for environmental regulatory compliance, the environmental impact statement, the site suitability analyses, etc.

4. EFAP/SCP Study Plan Programmatic Comparability Workshop

Each PO has been sent a complete set of marked-up copies of all the plans that have been reviewed under Item #3 above. Thus, each PO will be able to compare its own plan and the comments with those of the other POs. A workshop has been planned for the POs and HQ and technical support contractor staff to review, discuss, and resolve comments in order to strive for comparability among EFAPs and SCP study plans and to clarify the relationship between Key Issues 1,2 and 4 versus Key Issues 3. The importance of linkages among these issues and the supporting plans will also be discussed. The workshop will be held during the week of August 31, 1987, in Room 6E069 at the Forrestal Building in Washington, DC. The logistics of the workshop are explained in Attachment 5. A proposed list of attendees and the agenda are provided in Attachment 6.

If you or your environmental technical leads have any questions on this memorandum or other aspects of our environmental program, please call Jerry Parker at FTS 896-5679 or Raj Sharma at FTS 896-5559.

Jon Jacobs
Stephen H. Kale
for Associate Director for Office
of Geologic Repositories

Attachments

Distribution:

T. Issacs, RW-20	R. Lahoti, SRPO
J. Bresee, RW-22	A. Ladino, SRPO
R. Stein, RW-23	G. Appel, SRPO
D. Alexander, RW-232	W. White, SRPO
S. Singhal, RW-232	J. Mecca, BWIP
J. Knight, RW-24	S. Whitfield, BWIP
J. Barker, RW-241	T. Page, PNL
R. Sharma, RW-241	J. States, PNL
D. Valentine, RW-241	M. Blanchard, NNWSI
J. Jones, RW-241	M. Foley, SAIC
S. Peterson, RW-241	E. McCann, SAIC
C. Borgstrom, EH-25	
S. Frank, EH-25	
R. Mussler, GC-11	
C. McDavid, Weston	
R. Toft, SRA	
G. Marmer, ANL	

**Key Issue #3 Hierarchy/Environmental Program Planning
Meeting, Washington, D.C.**

August 31, 1987

AGENDA

8:30 - 8:45	Status Report, Scope of the Issue, Purpose of the Task	R. Sharma
8:45 - 9:30	Linkages Among SCP and Environmental Plans	D. Alexander
9:30 - 10:00	DOE Requirements for Planning	C. McDavid
10:00 - 10:15	Coffee Break	
10:15 - 11:15	SRPO Example of SEMP/RD Approach	W. White A. Ladino
11:15 - 12:15	NNWSI Example of Key Issue #3 Approach	E. McCann
12:15 - 1:30	Lunch Break	
1:30 - 2:30	BWIP Approach	T. Page
2:30 - 3:15	Discussion	D. Toft
3:15 - 3:30	Coffee Break	
3:30 - 5:30	Consensus/Action Items	R. Sharma

Attachment 2

List of Environmental Field Activity Plans (EFAPs)

The following EFAPs have been distributed for review on July 7 and 13, 1987:

	<u>SRPO</u>	<u>BWIP</u>	<u>NNWSI</u>
Air Quality	X	X	X
Noise	X	X	X
Water Resources	X	X	
Ecosystems	X*	X	X
Cultural Resources	X	X	X
Background Radiation	X	X	X

The above six disciplines are EMMP-driven. SRPO has also submitted EFAPs for the four other disciplines, (Land Use, Soils, Aesthetics, and Utilities and Solid Wastes).

*The Ecosystems EFAP from SRPO will be provided at a later date.

HQ REVIEW TEAM

In addition to members of the DOE Site Evaluation Branch (SEB) staff, DOE's Office of Environmental Health and Safety (EH) and DOE's Office of General Counsel (GC) have been provided copies of the EFAPs. The following technical personnel, who have supported the SEB during the planning and preparation of the draft plans, will provide comments in their respective disciplines:

HQ REVIEW TEAM MATRIX

ENVIRONMENTAL FIELD ACTIVITY PLANS	REVIEWERS	
	SRA TEAM	ANL
Air Quality	R. Coleman (SRA)	M. Lazzaro
Noise	R. Coleman (SRA)	M. Lazzaro
Water Resources	C. Winklehaus (SRA)	S.C.L. Yin
Ecosystems	L. Brown (CDM)	K. LaGory
Cultural Resources	S. Mernitz (CDM)	J. Hoffecker
Background Radiation	C. Jupiter (SRA)	C. Yu

In addition, appropriate Site Evaluation Branch staff and the environmental lead in Weston have also been requested to review and provide comments on all the EFAPs.

SCHEDULE FOR EFAP REVIEW

<u>ACTIVITY</u>	<u>SCHEDULE</u>
POs transmit draft EFAPS to HQ for review	7/7/87
Review team meeting (distribute copies and discuss scope of review)	7/10/87
Review comments transmitted to R. Sharma	7/31/87
HQ transmits consolidated comments to POs	8/7/87
HQ/PO workshops on comment resolution and comparability	9/1-3/87
POs transmit revised draft EFAPS to HQ	10/6/87
POs transmit revised draft EFAPS to Affected Parties	10/13/87
Affected Parties comments on revised draft EFAPS due at POs	1/15/88

HQ/PO WORKSHOP ON COMPARABILITY OF ENVIRONMENTAL FIELD
ACTIVITY PLANS (EFAPS)

LOGISTICS

A set of discipline-specific workshops will be held during the period September 1 through 3, 1987. The purpose of these workshops will be to reach agreements on the POs proposed resolution of HQ comments on the draft EFAPs. One workshop will cover two disciplines (air/noise), the other four will cover one discipline each (radiation, ecosystems, cultural resources, and water resources). The format for these workshops will be as follows:

- o The five workshops will be managed and coordinated by a group of nine persons from DOE-HQ, POs, and their support contractors, (one each from SEB, BWIP, NNWSI, SRPO, EH, GC, Weston, SRA, and ANL).
- o Technical experts from each of the POs and HQ will meet in discipline-specific workshop groups. Each workshop will be led by an HQ or HQ contractor technical expert.
- o The group of nine managers/coordinators will meet jointly with each discipline-specific workshop for a two hour period at its beginning and a two hour period at its end. During the intermediate period, the PO and HQ technical experts for each discipline will meet alone. The timing of the five workshops will be staggered to allow the group of managers/coordinators to meet in succession with each of the five discipline-specific workshops.
- o During the initial two hour period, each discipline-specific workshop will outline and discuss the conceptual and methodological differences among the EFAPs for the three sites and the comments received on each EFAP as they relate to that discipline. Broad guidance will be sought from the managers/coordinators on how to resolve differences between the EFAPs and whether, in some cases, site-specific differences might be appropriate and acceptable.
- o During the intermediate four-hour period, the POs and HQ experts will work to resolve differences--both general and specific--between the respective EFAPs and, where resolution is not achieved, will formulate a coherent statement of the alternatives and the implied ramifications of each alternative.

-2-

- o During the final two-hour period, each discipline-specific workshop will summarize its discussions and deliberations for the managers/coordinators and present to them any unresolved differences, along with the various possible alternatives for resolving the differences. The managers/coordinators will then address these unresolved differences in an appropriate manner.

PROPOSED LIST OF ATTENDEES
FOR THE WORKSHOP

1. R. SHARMA, RW-241
2. S. FRANK, EH-25
3. R. MUSSLER, GC-11
4. R. TOFT, SRA
5. G. MARMER, ANL
6. A. LADINO, SRPO
7. W. McINTOSH, ONWI
8. E. McCANN, SAIC
9. S. WHITFIELD, BWIP
10. T. PAGE, PNL
11. L. BROWN, CDM
12. S. MERNITZ, CDM
13. C. WINKLEHAUS, SRA
14. R. COLEMAN, SRA
15. C. JUPITER, SRA
16. M. LAZZARO, ANL
17. S.C.L. YIN, ANL
18. K. LaGORY, ANL
19. J. HOFFECKER, ANL
20. C. YU, ANL
21. J. FRIEDMAN, WESTON

Plus PO Technical Experts in each of the Workshop disciplines.

-2-

ENVIRONMENTAL FIELD ACTIVITY PLANS COMMENT RESOLUTION
COMPARABILITY WORKSHOPS

AGENDA

TUESDAY, SEPTEMBER 1, 1987

- 8 am - Noon Initial meeting of managers/coordinators with air/noise experts (Two hours for each discipline).
- 1 pm - 5 pm Intermediate meeting of air/noise experts.
- 1 pm - 3 pm Initial meeting of managers/coordinators with radiation experts.
- 3 pm - 5 pm Intermediate meeting of radiation experts (continued on September 2, 1987).
- 3 pm - 5 pm Initial meeting of managers/coordinators with ecosystems experts.

WEDNESDAY, SEPTEMBER 2, 1987

- 8 am - 10 am Final meeting of managers/coordinators with air/noise experts.
- 8 am - 10 am Intermediate meeting of radiation experts (cont.)
- 10 am - Noon Final meeting of managers/coordinators with radiation experts.
- 8 am - Noon Intermediate meeting of ecosystems experts.
- 1 pm - 3 pm Final meeting of managers/coordinators with ecosystems experts.
- 3 pm - 5 pm Initial meeting of managers/coordinators with cultural resources experts.

THURSDAY, SEPTEMBER 3, 1987

- 8 am - Noon Intermediate meeting of cultural resources experts.
- 8 am - 10 am Intital meeting of managers/coordinators with water resources experts.
- 10 am - Noon Intermediate meeting of water resources experts.
- 1 pm - 3 pm Final meeting of managers/coordinators with cultural resources experts.
- 1 pm - 3 pm Intermediate meeting of water resources experts. (cont.)
- 3 pm - 5 pm Final meeting of managers/coordinators with water resources experts.

SUMMARY OF AGENDA

DISCIPLINE	TUESDAY, SEPT. 1				WEDNESDAY, SEPT. 2				THURSDAY, SEPT. 3			
	8am	12	1pm	5	8am	12	1pm	5	8am	12	1pm	5
Air/Noise	«««««««	*****			»»»»							
Radiation		«««««««			**** »»»»							
Ecosystems			««««		**** ****		»»»»					
Cultural Resources								«««« **** ****		»»»»		
Water Resources									«««« ****		*****»»»»	

- «« = Initial meeting of managers/coordinators with technical experts
- ** = Intermediate meeting of technical experts
- »» = Final meeting of managers/coordinators with technical experts

**Tab 0:
Action Items**

May 7, 1987

Environmental Regulatory Compliance Working Group

ACTION ITEMS

**OGR Environmental Regulatory
Compliance Working Group
May 7, 1987
Seattle, Washington**

<u>ITEM</u>	<u>ASSIGNED TO</u>	<u>DUE</u>
1. Send Affected Parties copy of January ERCWG Meeting Minutes.	D. Valentine	June 22, 1987
2. Determine the extent of authority various DOE officials have to sign permit applications and permits issued by Federal or State permitting agencies.	J. Parker/ D. Valentine	Next ERCWG Meeting
3. Provide separate list of Action Items and determine if disposition of Action Items will be discussed at next meeting of ERCWG.	D. Valentine	June 22, 1987
4. Provide corrected vu-graphs to affected parties.	Site Evaluation Branch	June 22, 1987
5. Provide information, if requested by affected parties, describing where non-environmental permitting requirements are addressed.	Project Offices	TBD
6. Provide to D. Valentine suggested agenda items for September Meeting of ERCWG.	Affected Parties	July 31, 1987

Meeting Minutes of Environmental
Regulatory Compliance Working Group

May 7, 1987, Seattle, Washington

The fourth meeting of the Environmental Regulatory Compliance Working Group (ERCWG) commenced at 8:30 a.m. on May 7, 1987, at the Stouffer-Madison Hotel, Seattle, Washington. Present at this meeting were the members of the ERCWG and, for the first time, participants from the affected States and Indian Tribes (Attendance List - Attachment 1).

Debbie Valentine, Chairperson of the ERCWG, welcomed the participants and informed them that the minutes of the third ERCWG meeting were inadvertently excluded from the reference package and that copies would be sent to the participants (Attachment 2). After a brief introduction, D. Valentine presented her first set of vugraphs.

Organizational Structure and Function of the ERCWG

The first agenda item was a discussion of the organizational structure and function of the ERCWG Minutes (Tab U included in the minutes for this meeting). D. Valentine explained that the ERCWG has several purposes including identifying and developing issue resolution strategies and discussing compliance approaches. She also discussed the responsibilities of the ERCWG which include reviewing the Project Office Environmental Regulatory Compliance Plans (ERCPs) and monitoring Project Office compliance

activities. The membership of the ERCWG was also presented to the group. No discussion followed this presentation.

Interaction with Federal EPA Region VI-Representatives - Presentation by
W. White [Salt Repository Project Office (SRPO)]

W. White presented a summary of the SRPO meeting with representatives of EPA Region VI (See Tab V of these minutes and the complete report at Reference Package Tab M). The purpose of this meeting was to obtain information from EPA Region VI concerning the implementation of the Clean Air Act, Clean Water Act and other regulatory programs administered by EPA and/or the State of Texas.

W. White expressed the opinion that discussions with Federal agencies provided an excellent foundation for future discussions with the State of Texas regulatory agencies.

Discussion

W. White's presentation stimulated discussion in several areas. D. Stevens, a consultant to the State of Washington Office of High-Level Nuclear Waste, noted that DOE should allow sufficient time for the State permitting process, particularly since the State of Washington processes applications on a first-come-first-serve basis. Therefore, DOE should not expect priority treatment. However, a schedule could be negotiated with the State of Washington as was done in earlier phases of the repository program.

J. Reed, the representative from the State of Texas, requested from SRPO a schedule showing planned meetings with the Texas regulatory agencies. W. White responded that no dates had been set as yet. SRPO envisions that the first meeting with State agencies would introduce the SRPO program to the Texas regulatory agencies and discussions regarding permits to be obtained would be initiated in subsequent meetings.

J. Reed asked whether the draft ERCP would be revised after meetings with State agencies. W. White responded affirmatively. D. Valentine reiterated that the Draft ERCP will be used to initiate discussions with the States and will be modified, where necessary, after meetings with State officials.

B. Jankus of the NNWSI Project Office indicated meetings with Nevada State agencies are being planned for the near future, and a NNWSI staff member will soon be contacting the subject agencies. C. Johnson, the representative from the Nevada Nuclear Waste Project Office offered his opinion that the purpose of the meeting held in January 1987 between NNWSI and State regulatory officials was to discuss the Environmental Monitoring and Mitigation Plans (EMMPs), and not environmental regulatory compliance. He indicated that Nevada processes applications on a first-come-first-serve basis. He agreed that Nevada would meet in the future with NNWSI to discuss environmental regulatory compliance.

S. Whitfield indicated that BWIP's schedule of field activities precluded the same approach to meeting with Federal and State agencies as the other projects; BWIP will meet with State agencies on a case-by-case basis.

D. Provost stressed the need for BWIP to inform the State of Washington Office of High-Level Nuclear Waste prior to meeting with any Washington State regulatory Agency. This would allow the Office of High-Level Nuclear Waste to direct BWIP to the appropriate State agency. D. Provost also indicated that State permitting agencies would require BWIP to identify those portions of the site which are contaminated with radioactive or chemical hazardous waste.

D. Valentine presented a number of issues which had been discussed by the ERCWG at previous meetings (Tab U).

Issue No. 1: Contents of ERCP

The discussion dealt with the contents of the ERCP (Tab U).

D. Valentine acknowledged that some of the information had been presented at the January 1987 ECG meeting. The purpose of repeating it at this ERCWG meeting is to allow further discussion with the States and Indian Tribes.

D. Valentine discussed the revisions that were made to the preliminary working draft ERCP. An example is the integration of the description of field activities in Chapter 2 with the compliance requirements in Chapter 3.

Discussion

The representatives of the affected parties requested clarification as to whether the State or the DOE will make the ultimate determination about the applicability of a particular statute or regulation. The DOE representatives reiterated the DOE position that it will comply with all applicable Federal statutes and all State statutes which are Federal flow-down statutes. For other State laws, J. Parker reiterated the DOE position that it will comply with substantive requirements relating to the protection of the environment. However, there may be situations where DOE and an affected party will disagree on the need for compliance. It is DOE's intent to avoid this situation by consultation and negotiation with the affected parties.

A representative from Argonne National Laboratory asked whether the activities described in the ERCP were comparable to those activities described in the Environmental Monitoring and Mitigation Plan (EMMP). D. Valentine responded affirmatively and with the caveat that the ERCP description may be broader because more field activities are covered in the ERCP.

A question was raised as to how the ERCP relates to the DOE Project Decision Schedule (PDS). The DOE representatives acknowledged that State permitting schedules may need to be acknowledged in the Project Decision Schedule. It was noted by DOE that the purpose of the PDS is to provide coordination among the Federal agencies, and does not address coordination with State agencies. J. Parker noted that the PDS is also a mechanism to

allow OCRWM to have priority status with the other Federal agencies and he hoped that the same priority could be given by States to the DOE repository program.

There was a general discussion of schedule and content of the ERCP. W. White noted that SRPO will be submitting its next draft of the SRPO ERCP to Headquarters within the next two weeks. This version will include a description of State laws. SRPO will be consulting with the State of Texas regulatory agencies after the draft is transmitted to the State on September 1.

C. Johnson asked how the issuance of the ERCP relates to the issuance of the SCP, and whether there will be time for compliance with permitting requirements. DOE representatives assured the States that all required permits will be acquired.

C. Johnson requested that the State be given the opportunity to review the ERCP before meeting with the Project Office to discuss permits. J. Parker commented that DOE would expect the State to meet with the Project Offices on specific permitting issues, irrespective of the ERCP reviews.

Representatives from each State expressed the need to have a description of all the proposed activities prior to making a determination on the need for specific permits. S. Whitfield indicated that BWIP's detailed description of the proposed activities will be in the Site Characterization Plan (SCP). W. White indicated that the SRPO ERCP will contain detailed information, but will not go beyond what is in the Environmental Assessment (EA). J. Parker explained that the "big picture" can be derived from the EA, ERCP and the

SCP. In addition, the Project Offices have sufficient information at this time to provide an overview of the project site characterization activities.

Mr. Glenn Lane, the representative from the Council of Energy Resource Tribes (CERT), Nez Perce and Umatilla Indian Tribes, observed that SRPO seemed to be ahead of the other projects in providing detailed information. It also appears as if construction of the exploratory shaft is the schedule driver, and thus sufficient time for planning and permitting was not being allotted. J. Parker commented that DOE will continue on its current SCP schedule.

B. Jankus asked whether any State had a "one-stop" permitting process. D. Provost responded that the State of Washington has this option available to an applicant if it is requested. In order to exercise this option, the applicant must provide a description of the total program. Representatives from Nevada and Texas pointed out that their States do not have the "one-stop" permitting process.

During the discussion of the scope of the ERCP, C. Johnson asked where the requirements not addressed in the ERCP would be discussed. He inquired whether a list of those requirements or where they are identified in other OCRWM documents could be provided to the States. J. Parker indicated that if such a list were requested by a State, the Project Offices could provide such information. W. White stated that SRPO has developed a list which identifies all requirements and the organizations/persons who are responsible for implementing the requirements.

There was a general discussion on the subject of compliance with State requirements for acquisition of water, and the issue of DOE compliance with State laws. D. Gassman, Field Counsel for Nevada Operations, indicated that where appropriate, NNWSI will apply for permits and comply with terms and conditions. C. Johnson indicated his agreement with this approach.

D. Provost requested BWIP's position on compliance with Washington's water acquisition permit requirements. J. Comins Rick, Field Counsel for Richland Operations, reiterated Secretary Herrington's commitment to apply for a permit as a matter of comity. She expressed that it is unclear what this will entail. D. Provost inquired as to DOE's plans if BWIP requires the water before the permitting process is complete. J. Comins Rick responded that BWIP is in contact with State of Washington officials and will provide the appropriate information to the State. She also stressed BWIP's position that the Hanford Reservation has a "reserved water right", and does not need a permit from the State. D. Provost expressed his opposition to this position because BWIP's activities do not come under the War Powers Act.

Issue No. 2: Under What Circumstances Should Project Offices Use Similar Models?

D. Valentine stressed that the Project Office must work with DOE Headquarters to assure comparable approaches to modeling and level of detail, taking into account different site conditions. The Project Offices and Headquarters will examine the benefits of using models suggested by EPA or the State when they differ from models used at other sites.

Discussion

D. Provost indicated that unless the DOE uses the model required by the State, it may antagonize the State permitting agency. He also expressed the opinion that such issues should not arise because the ultimate decision as to which model should be used lies with the State. J. Parker indicated that the reason this issue was discussed internally is to ensure, where necessary and appropriate, that the Project Offices are consistent.

Discussion continued on the subject of timing of permitting activities. A representative from the State of Washington questioned whether the BWIP Project Office has allowed for sufficient time to obtain the appropriate permits. S. Whitfield responded that where an activity is on the critical path, contacts have been initiated with the appropriate State or Federal agency (e.g. Washington Department of Ecology and U.S. Fish and Wildlife Service).

C. Johnson asked whether the DOE would take its conclusion on the applicability of a particular statute to the State permitting agency. There was an affirmative response from each of the Project Offices.

J. Parker indicated that, consistent with DOE policy, if a permit is required before an activity may commence, the DOE will obtain the permit. S. Whitfield affirmed that this philosophy will apply to the upcoming BWIP large scale hydrologic test. He also indicated that the ERCP provides the "big picture", but the BWIP checklist will be used to assure that where any

activity requires a permit or consultation, it will be accomplished prior to the commencement of the activity.

In response to a concern raised by D. Provost that the ERCP may only be a public relations document, J. Parker emphasized that the ERCP is not a PR document; it is an internal management tool which will demonstrate DOE's plan to comply with applicable laws and regulations.

Issue No. 3: Who Should Sign Environmental Permit Applications?

D. Valentine presented the position that the Project Offices should use the procedures that are currently used by the specific DOE Operations Office.

Discussion

D. Gassman indicated that for the NNWSI program, the authorized signature will be the Operations Office rather than the NNWSI Project Manager (PM). C. Johnson offered the view that the Project Manager should sign in order that there would be direct accountability, and Nevada officials would have a contact with line management authority. D. Gassman responded that the Project Manager may not have the authority to bind DOE; however, it may be possible for the PM to be a co-signer.

S. Whitfield indicated that the BWIP Project Manager may sign the permit; however this is still under consideration.

B. White indicated that the permit will be signed by a DOE official and not a contractor.

J. Parker offered the observation that the DOE Operations Office has responsibility for compliance, and Headquarters (both Environment Health and Safety and RW) have a role because the repository is a national program and there is a need for consistency among the Project Office.

G. Lane requested that DOE officials at the highest level sign the permits. This does not necessarily mean signatures are required at the Director level, which was the approach used by DOE in earlier C&C negotiations. It was also noted that, in light of a new integrating contractor, the PMs may not be able to anticipate future events relating to the permit process.

C. Johnson offered the opinion that DOE should not do business as usual with this program. He suggested that if the DOE and affected parties agree upon an approach, then it should be implemented even if it differs from past DOE practices.

D. Valentine agreed to examine the extent of authority DOE officials have to sign permit applications and permits issued by Federal or State permitting agencies and the flexibility DOE officials have to delegate this authority.

Issue No. 4: Should all Project Offices Use On-Site Data For Demonstrating Compliance with Air Quality or other Permitting Requirements?

D. Valentine indicated that the current DOE position is that the Project Office should use permitting data which is acceptable to the permitting agency. If one agency requires on-site and another regional data, it would not be necessary for all projects to acquire on-site data.

Discussion

D. Provost inquired why on-site data would not be used. W. White responded that SRPO will use regional data where it is acceptable to the State. B. Jankus indicated that for a flat site, such as Deaf Smith, regional air quality data should be acceptable. J. Parker pointed out that one reason for not using on-site data may be the inability to obtain access to the site.

Both C. Johnson and D. Provost stressed the need to satisfy the permitting agency.

Issue No. 5: Should Classification of Hazardous Waste Be Consistent for All Projects?

D. Valentine indicated that the current DOE position is that there will be a consistent classification, subject to any specific State requirements such as those of the State of Washington.

Discussion

D. Stevens raised the question as to why this and other issues were considered "issues". The answers should have been obvious to the DOE and not raised to the level of issues. D. Provost agreed with Mr. Stevens.

A. Wagenbach, attorney with Battelle Project Management, responded that in the early stages of the development of the ERCP, Project Offices were not examining activities in the same way with respect to RCRA and other environmental regulatory issues.

This concluded D. Valentine's presentation. She requested the affected parties to provide to her suggested agenda items for the September Meeting of ERCWG.

C. Johnson asked who is responsible for completion of the Action Items, if a separate list of Action Items could be made available, and if at the next meeting the disposition of the Action Items could be an agenda item. He reminded the group of J. Knight's commitment to have vugraphs corrected and the corrected vugraphs distributed to the affected parties. J. Parker, in response to C. Johnson's concerns on the disposition of Action Items, set forth the process for implementing the Action Items. The process is that minutes are prepared and appropriate OGR supervisors review the minutes and the Action Items. Action Items are implemented by guidance memos from the appropriate level within OGR (e.g., Mr. Kale or Mr. Knight).

D. Valentine read the Action Items from the January ERCWG meeting and gave the status of each. The Action Items related to the timing of submissions of draft ERCPs to Headquarters and steps taken to change internal DOE milestones relating to the issuance of the draft ERCP. All the required actions were met, except for the submission of the SRPO draft ERCP to Headquarters.

A discussion was held on the purposes of the ERCWG meetings. It was agreed that the purpose is information exchange and deliberation, but not joint decision-making by the DOE and the affected parties, nor is final policy to be set at these meetings.

The meeting was adjourned at approximately 11:30 a.m.

ACTION ITEMS

**OGR Environmental Regulatory
Compliance Working Group
May 7, 1987
Seattle, Washington**

<u>ITEM</u>	<u>ASSIGNED TO</u>	<u>DUE</u>
1. Send Affected Parties copy of January ERCWG Meeting Minutes.	D. Valentine	June 22, 1987
2. Determine the extent of authority various DOE officials have to sign permit applications and permits issued by Federal or State permitting agencies.	J. Parker/ D. Valentine	Next ERCWG Meeting
3. Provide separate list of Action Items and determine if disposition of Action Items will be discussed at next meeting of ERCWG.	D. Valentine	June 22, 1987
4. Provide corrected vu-graphs to affected parties.	Site Evaluation Branch	June 22, 1987
5. Provide information, if requested by affected parties, describing where non-environmental permitting requirements are addressed.	Project Offices	TBD
6. Provide to D. Valentine suggested agenda items for September Meeting of ERCWG.	Affected Parties	July 31, 1987

Tab P:

Annual Report

Environmental Regulatory Compliance Working Group

1st Annual Status Report on Environmental Regulatory Compliance
Environmental Regulatory Compliance Working Group

The Nuclear Waste Policy Act (NWPA) of 1982 established a Federal policy for radioactive waste management with the ultimate objective of safe permanent disposal of high-level radioactive waste in deep mined geologic repositories. The NWPA also established a process and schedule for the development of geologic repositories. On May 28, 1986, a major phase of this process was completed with the nomination, recommendation, and approval of candidate sites for the first repository. The geologic repository program has now entered the next major phase--site characterization--which will be conducted in accordance with Section 113 of the Act. Three candidate sites have been selected for characterization: Deaf Smith County, Texas; Hanford, Washington; and Yucca Mountain, Nevada.

The policy of the Department of Energy (DOE) is to conduct its site characterization operations in an environmentally safe and sound manner. To coordinate environmental compliance activities during site characterization and beyond, DOE established the Environmental Regulatory Compliance Working Group (ERCWG) in June 1986. ERCWG is comprised of representatives from the three project offices as well as representatives from the following HQ organizations: The Office of Environment, Safety, and Health; the Siting, Licensing and Quality Assurance Division; the Engineering and Geotechnology Division; and the Office of General Counsel. The purposes of the ERCWG, as stated in its charter, are as follows:

- Ensure coordination and communication among all personnel involved in environmental regulatory compliance activities;
- Provide assistance to the repository projects on environmental regulatory compliance issues;
- Identify per procedures and or recommend solutions to senior management of the Office of Geologic Repositories on program wide issues with respect to environmental regulatory compliance;
- Discuss approaches for achieving environmental regulatory compliance;
- Integrate environmental program activities with regulatory compliance;
- Provide a forum for exchanging information on regulatory compliance and environmental activities;
- Ensure integration of the Project Offices (POs) Environmental Regulatory Compliance Plans with the Office of Civilian Radioactive Waste Management (OCRWM) Project Decision Schedule.

In addition to the purposes identified above, the ERCWG charter requires the production of an annual status report on Environmental Regulatory Compliance. This annual report provides highlights from each of the four ERCWG meetings, examines the environmental regulatory compliance achievements of the three POs during the previous year, and previews future environmental regulatory compliance milestones and activities.

ERCWG Meeting Highlights

The First ERCWG Meeting

The first ERCWG meeting was held in Denver, Colorado on August 20, 1986. During this meeting the purpose and objectives of the ERCWG were established. These objectives were subsequently incorporated into the ERCWG charter. One of the initial tasks for the ERCWG identified was reviewing Project Office Environmental Regulatory Compliance Plans (ERCPs). During this meeting, Chairperson Deborah Valentine introduced a July 23, 1986, memo by William Purcell that outlined Headquarters (HQ) policy for environmental regulatory compliance. According to the memo, DOE's approach to environmental regulatory compliance would embody three central principles. First, DOE would be required to meet all substantive and procedural Federal environmental requirements as set forth by Federal laws and regulations, Executive Orders, and DOE Orders. Second, DOE would comply with State and local environmental requirements for which the Congress has not waived Federal sovereign immunity, as a matter of comity, to the extent that those requirements are not inconsistent with DOE's responsibilities under the Nuclear Waste Policy Act. Third, consultation with States and Indian Tribes would be essential throughout the planning phases in identifying appropriate mechanisms for addressing applicable State and local environmental requirements." The memo also identified specific environmental regulatory compliance activities that the POs would undertake including the development of ERCPs and the implementation of an environmental compliance tracking system. Lastly, the memo defined the necessity, scope, and purpose of the ERCWG.

The POs provided a summary of their environmental regulatory compliance plans and activities at this meeting. Representatives from the Salt Repository Project Office (SRPO) described the SRPO Statutory Compliance Plan and the Permitting Management Plan. Representatives from Basalt Waste Isolation Project (BWIP) outlined the Hanford Environmental Management Plan (HEMP) as well as plans for completing the BWIP ERCP. Finally, representatives from Nevada Nuclear Waste Storage Investigations (NNWSI) described progress on the development of their ERCP.

The Second ERCWG Meeting

The second ERCWG meeting was held on November 7, 1986, in Columbus, Ohio. The meeting focused on proposed changes to ERCWG charter, the schedule for the preparation of draft ERCPs, as well as a the development of an annotated table of contents (ATC) for the ERCPs. Discussion on the ATC generated further questions concerning the scope of the ERCP. It was agreed that Headquarters would provide guidance on this subject as well as on the amount of detail that the ERCPs should contain.

During the meeting it was agreed that the Purcell memo would be used as the guidance for compliance with Federal, State, and local laws governing environmental regulatory compliance. Moreover, the suggestion was made that the discussion of State and local laws in the draft ERCP be limited to identifying applicable laws. It was also suggested that the process of compliance with applicable State and local laws be discussed in greater detail in a later draft.

The Third ERCWG Meeting

The third ERCWG meeting was held on January 22, 1987 in Las Vegas, Nevada. The meeting focused on comments generated by Headquarters on the SRPO and NNWSI Preliminary Working Drafts of the ERCPs. The POs requested and received clarification of certain Headquarter comments. SRPO and NNWSI agreed to provide Headquarters with the rationale for their disposition of the Headquarter comments.

Two approaches to the preparation of the first draft of the ERCP were also discussed by ERCWG. The first approach involved preparing a draft ERCP that contained a listing of applicable Federal, State and local environmental regulatory requirements. Discussion of the process for compliance with the State and local requirements would be included after discussions with the States. The second approach would involve preparing a comprehensive document that would represent the "best" thinking of the POs regarding environmental regulatory compliance requirements. Under this approach, the ERCP would be modified to reflect the outcome of discussions with Federal and State regulatory authorities. ERCWG decided that the latter approach would best serve the interests of the POs and the affected parties.

The Fourth ERCWG Meeting

The fourth ERCWG meeting was held on May 5-7, 1987, in Seattle, Washington. In accordance with Headquarters policy announced in Steven Kale's memo of January 15, 1987, this meeting included representatives from affected

States and Indian Tribes. The first agenda item discussed was the organizational structure and function of the ERCWG.

SRPO presented a summary of its meeting with representatives of Environmental Protection Agency (EPA) Region VI. The purpose of this meeting was to obtain information regarding the implementation of the Clean Air Act, Clean Water Act, and other regulatory programs administered by the EPA. The SRPO representative, Bill White, expressed the opinion that discussion with Federal Agencies like the EPA provided an excellent foundation for future discussions with Texas regulatory agencies. Bill White's presentation stimulated discussion between members of ERCWG and representatives from affected States and Indian Tribes on several topics, including time requirements for State permits and future meetings with State regulatory authorities.

Chairperson Deborah Valentine then presented a number of issues that had been discussed by the ERCWG at prior meetings. These issues included the contents of the ERCP, the conditions that would require the POs to use similar models, authorized signatures for permit applications, and consistency in the classification of hazardous waste. These issues, in turn, stimulated a wide ranging discussion between representatives of Headquarters, the POs, and the affected parties. Some of the discussion focused on the comprehensiveness of the description of site characterization activities in the ERCPs, compliance with the Washington Water Pollution Control Act and the Safe Drinking Water Act, and timing of permitting activities. Moreover, one participant raised a question regarding the purpose of the ERCWG meetings. The purpose as expressed in the ERCWG charter was reiterated. Additionally, it was also stressed that final policy would not to be established at these meetings.

Project Office Environmental Regulatory Compliance Activities

This section summarizes the PO environmental regulatory compliance activities of each PO over the past year.

NNWSI

Over the last year, the Nevada Nuclear Waste Site Investigation Project (NNWSI) has focused their environmental regulatory compliance efforts on identifying the applicable regulatory compliance requirements for site characterization and on establishing a program to satisfy these requirements. To this end, NNWSI prepared a draft ERCP. Consistent with guidance provided by ERCWG, this document identifies site characterization activities, the requirements triggered by these activities, and process for complying with identified requirements.

Consultations with Federal agencies regarding environmental regulatory compliance have been initiated. The first of these meetings occurred on July 13, 1987, with EPA Region IX. Topics discussed included an explanation of the ERCP program and a basic introduction to site characterization activities. This meeting also served to establish contacts for future consultations.

BWIP

The Basalt Waste Isolation Project (BWIP) also developed a draft ERCP. In addition, eight BWIP Environmental Reviews (BERs) were completed that complement the ERCP. The BERs are activity specific reviews based on a

customized version of the environmental checklist used to comply with DOE Order 5440.1. The BERs cover various site characterization activities including the extension of the exploratory shaft site.

Meetings and consultations with Federal Agencies on regulatory compliance have been initiated. A preliminary meeting with the U.S. Fish and Wildlife Service was held in July 1987 to discuss consultation requirements of the Endangered Species Act.

Second, meetings have been held with the affected Indian tribes and the State Historic Preservation Office to discuss the Draft Cultural Resource Research Design which was issued for comment in December 1986.

Third, a consultation was initiated with the affected Indian tribes, the purpose of which was to discuss compliance issues associated with the American Indian Religious Freedom Act (42 USC Section 1996). Finally, in the area of water acquisition, a water rights appropriation permit application was submitted to the Washington Department of Ecology for consideration.

SRPO

The SRPO identified environmental regulatory requirements associated with site characterization. These requirements are contained in the SRPO draft ERCP. SRPO also successfully negotiated a Programmatic Agreement under the provisions of Section 106 of the National Historic Preservation Act. This Programmatic Agreement has been signed by the Texas SHPO, SRPO, DOE-HQ, and the director of Archeological Council on Historic Preservation. SRPO now plans to contact the Texas Historical Commission to begin talks on implementation of the agreement.

SRPO has also commenced consultations with regulatory agencies. On February 27, 1987, a meeting was held with representatives of EPA Region VI to explain the site characterization program to EPA and discuss the environmental regulatory compliance program potentially applicable to SRPO.

Future Activities of the ERCWG

ERCWG's responsibilities during its second year will include overseeing the completion and public release of the ERCPs. Moreover, during the permitting process leading to the commencement of site characterization, ERCWG will continue to serve as a forum for exchanging information and addressing issues essential to ensuring a level of environmental regulatory compliance consistent with DOE policy and the Nuclear Waste Policy Act of 1982. Issues that will be addressed by ERCWG include the development and implementation of an environmental regulatory compliance tracking system, revisions to the ERCPs resulting from discussions with affected States and Indian Tribes, procedures for revising the ERCPs in response to alterations in the Site Characterization Plans (SCPs), and the ERCP/SCP briefing schedule.

Tab Q:

Letter to D. Valentine from R. Loux

Regarding Regulatory Compliance Procedures and Issues

May 14, 1987



**AGENCY FOR NUCLEAR PROJECTS
NUCLEAR WASTE PROJECT OFFICE**

Capitol Complex
Carson City, Nevada 89710
(702) 885-3744

May 14, 1987

Ms. Deborah Valentine
RW-241
U.S. Department of Energy
Washington, DC 20585

Dear Ms. Valentine:

Mr. Carl Johnson and Mr. Charles Malone reported to me that at the conclusion of the May 7, 1987 meeting of the Environmental Regulatory Compliance Working Group (ERCWG) in Seattle you invited recommendations on compliance procedures and on issues that ERCWG should address. To that end I submit this letter for your consideration and request that matters raised herein be called to the attention of ERCWG. An early acknowledgement that the request is being considered will be appreciated.

Some of the issues discussed below are related to other issues directed to Dr. Raj Sharma via separate correspondence and you may wish to coordinate with him on matters of common interest. For example, we are concerned about differences between NNWSI, BWIP, and SRPO relative to use of the DOE Environmental Checklist Procedure. Also, we are interested in learning about regulations and guidelines that apply to the repository EIS. It is unclear to whom these concerns should be directed as both the checklist and the EIS are elements of Dr. Sharma's environmental program but both also are components of regulatory compliance, under your direction. Apparently there was no clear response to questions about the checklists and the EIS requirements when my staff raised the issues during the May 5-7, 1987 environmental meetings in Seattle. It seems certain, however, that between your group and Dr. Sharma's a mechanism must exist for addressing State concerns in a timely fashion.

In the report my staff made on the May 7, 1987 meeting are the following issues for ERCWG's consideration:

1. Early Contact With Regulatory Agencies

A precedent was set by the SRPO-EPA meeting in Dallas, on February 27, 1987 that should be followed by NNWSI. This would be taken by the State of Nevada as a show of good faith that an effort will be made by DOE to comply with environmental regulations in future activities at the Yucca Mountain site. We ask also that ERCWG make it a policy that DOE project offices notify State high level waste repository offices whenever meetings are scheduled with State regulatory agencies.

2. Need for a Common Focal Point in DOE for Regulatory Compliance

I was surprised to learn that DOE will make no effort to manage environmental, health, and safety regulatory compliance under a single program, such as yours. This is contrary to our expectations and leaves us at a loss as to where to turn for regulatory liaison with DOE. Mr. Johnson requested on May 7th that ERCWG provide us a list of all the environmental, health, and safety regulations that will be complied with by NNWSI and which DOE working group is responsible for the regulations. Such a request is in keeping with the burden of responsibility resting with the regulated party as opposed to the regulator for complying with appropriate laws. We look forward to receiving the list at an early date and trust that we will not have to wait until September when the NNWSI regulatory compliance plan is due before we learn what is included and what is not.

3. Comprehensive Nature of the Environmental Regulatory Compliance Plan

If the NNWSI compliance plan will address only environmental requirements it should at least include all federal, state, and local environmental regulations including those that will govern the repository EIS and NEPA compliance. I understand that Mr. Malone did not receive an answer to his question about regulations and guidelines that will be followed for the EIS. This matter is of sufficient concern to us that we expect ERCWG to address it and to assure us that it will be covered in the NNWSI compliance plan. It is imperative that we understand the EIS requirements that will be the root of the environmental field study plans for NNWSI.

4. Comparable Approaches to Environmental Auditing

There is need for NNWSI, BWIP, and SRPO to adopt a common procedure for designating regulatory requirements and compliance actions. Environmental auditing is essential for large projects and the SEMP approach adopted by SRPO is a satisfactory means for identifying and classifying requirements. When coupled with an appropriate management system for assigning responsibilities SEMP or some comparable tool will serve for environmental auditing of projects like NNWSI. In the interest of comparability ERCWG must request all sites to establish environmental auditing programs. This will allow affected parties to understand what actions trigger regulatory requirements and who in DOE is responsible for them. We have seen no indication that NNWSI has performed a regulatory analysis nor that it has a compliance management program, as evidenced by Mr. Johnson's comment to ERCWG on May 7th regarding the need for the project manager to be part of the environmental permitting process.

We expect to see a permit management system for NNWSI, either as a major component of the compliance plan or as a separate functional document that reflects the substance of how DOE will conduct compliance affairs for the project. At a minimum it should designate who is responsible for construction reviews, evaluating alternative actions, obtaining permits and approvals, completing monitoring and noncompliance reports, maintaining surveillance of the project and site, and providing liaison with regulatory agencies and my Office.

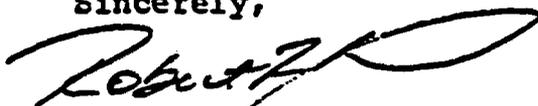
5. Coordination With the DOE Environmental Survey

Projects such as NNWSI must be coordinated with the ongoing Environmental Survey at major DOE facilities and the survey must be reflected in the scope of ERCWG. My Office must be kept informed of DOE policy for NTS because it is likely NNWSI will utilize NTS environmental management facilities and programs. Therefore, without full cognizance of the Environmental Survey at NTS we cannot properly oversee the NNWSI compliance program. I view DOE's approach and commitment to Environmental Surveys and interaction with regulatory agencies as a sign of Department of Energy policy towards protection of the environment. I hope you do not underestimate the importance of this issue as a reflection of DOE's credibility and good faith in the repository program.

It is encouraging to know that you stated on May 7th that DOE will do what is necessary to protect the environment. This was reflected in Mr. David Gassman's statement that NNWSI would comply with Nevada water rights requirements. The ERCWG represents a vital aspect of the overall DOE program and has a crucial role in

maintaining credibility and confidence with regards to affected parties. I hope that serious consideration will be given to the matters discussed above because they reflect concerns that the State of Nevada has regarding NNWSI. I look forward to your reply, and in the meantime please contact me or my staff if we can assist ERCWG.

Sincerely,



Robert R. Loux
Executive Director

RRL:CRM/njc

cc: Dr. Donald Vieth
Mr. G.J. Parker

87 MAY 29 P 1: 48