



POLICY ISSUE **(Notation Vote)**

SECY-91-115

May 1, 1991

For:

The Commissioners

From:

James M. Taylor
Executive Director for Operations

Subject:

SCOPING STUDY FOR POTENTIAL NEGOTIATED RULEMAKING FOR
HIGH-LEVEL WASTE STANDARDS

Purpose:

To inform the Commission of (1) plans by the U.S. Environmental Protection Agency (EPA) to explore the possibility of using a negotiated rulemaking to develop its high-level waste (HLW) standards, and (2) the staff's views regarding such a negotiated rulemaking.

To request Commission approval of the staff's proposed negotiating position and designation of Mr. Bernero and Mr. Malsch as representatives of the NRC for interactions with EPA regarding the potential for a negotiated rulemaking.

Background:

On September 28, 1990, the U.S. Nuclear Waste Technical Review Board suggested that the U.S. Nuclear Regulatory Commission (NRC) and EPA jointly initiate a negotiated rulemaking regarding the two agencies' HLW regulations (see Enclosure 1). Chairman Carr responded to the Board's suggestion by noting that the intent of the Board's proposal was to foster a more open and productive exchange on the issues rather than to necessarily initiate a formal negotiated rulemaking (see Enclosure 2). Chairman Carr agreed that the two agencies should work to ensure that their regulations form a consistent and workable regulatory framework for repository licensing. However, he questioned

**NOTE: TO BE MADE PUBLICLY AVAILABLE
WHEN THE FINAL SRM IS MADE
AVAILABLE**

CONTACT:

Daniel Fehring, NMSS
492-0426

Public
9105060039

the prospects for successful completion of a negotiated rulemaking at this time. The Chairman also indicated that the NRC remains strongly committed to fostering an open exchange of views by all interested parties, but stated that the NRC has no plans at this time to initiate a negotiated rulemaking regarding the EPA and NRC regulations.

Discussion:


EPA has contracted with the Conservation Foundation to conduct a scoping study regarding the feasibility of a negotiated rulemaking for development of EPA's HLW standards. The timing of this scoping study is uncertain. A significant step in the scoping study will consist of a survey of the interested parties to determine their willingness to participate in a potential negotiated rulemaking. The staff anticipates that the NRC will be one of the interested parties surveyed by the Conservation Foundation. Accordingly, the staff wishes to inform the Commission of its plans for participation in the scoping study.

There has been some discussion of the interface for the scoping study and an initial meeting has been scheduled for June 7, 1991, here at the NRC (see enclosed letters). The staff proposes that Mr. Robert M. Bernero, Director, Office of Nuclear Material Safety and Safeguards, and Mr. Martin G. Malsch, Deputy General Counsel for Licensing and Regulations, Office of the General Counsel, will represent the NRC in all matters related to EPA's scoping study and any subsequent negotiated rulemaking that might be pursued by EPA. Both have extensive knowledge of the issues faced by EPA in developing its HLW standards, both are familiar with the interests of many of the other parties who might be participants in a negotiated rulemaking, and both have previous experience with the negotiated rulemaking process.

The staff intends to participate in this dialogue with an open mind. While it is not clear that a negotiated rulemaking is the right choice, if it succeeds on a timely basis, it may offer a chance to reach real progress in timely resolution of this issue. The staff is certainly aware of the importance of the outcome to NRC's own activities and responsibilities. The staff will report to the Commission on the progress of this activity, normally in the staff's quarterly HLW Report.

Recommendation: That the Commission approve designation of Mr. Bernero and Mr. Malsch as representatives of the NRC for interactions with EPA regarding the potential for, or conduct of, a negotiated rulemaking.

Coordination: The Office of the General Counsel has concurred in this paper.


James M. Taylor
Executive Director
for Operations

Enclosures:

1. September 28, 1990 letter from Dr. Don U. Deere to Chairman Carr.
2. November 15, 1990 letter from Chairman Carr to Dr. Don U. Deere.
3. April 25, 1991 letter from Mr. Richard J. Guimond to Mr. Bernero.
4. April 25, 1991 letter from Ms. Abby Arnold to Mr. Bernero.

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Wednesday, May 15, 1991.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, May 8, 1991, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISTRIBUTION:

Commissioners

OGC

QIG

LSS

GPA

REGIONAL OFFICES

EDO

ACNW

SECY

Enclosure 1



UNITED STATES
NUCLEAR WASTE TECHNICAL REVIEW BOARD
1100 Wilson Boulevard, Suite 910
Arlington, VA 22209

September 28, 1990

Dr. Kenneth M. Carr
Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Dr. Carr:

The Nuclear Waste Technical Review Board has been reviewing and evaluating the Department of Energy's repository development program for high-level radioactive waste since the Board was established in early 1989. The Board's *First Report to the U.S. Congress and the U.S. Secretary of Energy* was published in March 1990, and the second report is scheduled for publication in mid-November 1990.

Our Board's efforts have included a review and discussions of the standards and regulations that are pertinent to the licensing, operation, closure, and postclosure of a repository for high-level radioactive waste. At this time, there is widespread dialog in the United States and other countries regarding the various issues involved with the disposal of high-level radioactive waste.

It is noted that 10 CFR 60 was published in 1983 and that 40 CFR 191 [part of which is under a July 1987 remand by the U.S. Court of Appeals (First Circuit)] is still under development in a procedure that began in 1978. Also, as recently as July 27, 1990, the U.S. Nuclear Regulatory Commission issued a clarification on the meaning and intent of a subsystem regulation in 10 CFR 60 that pertains to the design lifetime of high-level radioactive waste packages.

In addition, many voices have been raised about the environmental standards and regulations applicable to the disposal of high-level radioactive waste in the United States.

Major issues include:

1. The requirement that the environmental standards and regulations fully protect the public's health and safety without being overly stringent.
2. The obligation that the standards and regulations be consistent and compatible. There must be a closer, workable nexus between 40 CFR 191 and 10 CFR 60.

3. The need to have pertinent standards and regulations stated in a clear and understandable manner.

4. The desirability for having the rationale, including established risk levels, be an inherent part of appropriate environmental standards, rules, and regulations.

5. The need to ensure that the environmental standards are applicable and defensible in the licensing arena.

6. A desire (because of uncertainties and limitations in data) for some degree of flexibility in the regulation and control of a first-time technical venture whose impacts will extend more than 10,000 years.

7. A desire to have environmental standards reasonably consistent with today's standards and have these standards apply to future populations.

In light of these concerns, the Nuclear Waste Technical Review Board believes that the current circumstances and interest suggest a need, and opportunity, for the U.S. Environmental Protection Agency and the U.S. Nuclear Regulatory Commission to enter jointly into negotiated rule making regarding 40 CFR 191 and 10 CFR 60. Such a process would appear to be timely and extremely useful.

Our Board stands ready to be of appropriate assistance to you in such an endeavor.

Sincerely,



Don U. Deere
Chairman

cc:

Mr. William K. Reilly
Dr. John W. Bartlett

Enclosure 2



CHAIRMAN

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

November 15, 1990

Dr. Don U. Deere
 Chairman
 U.S. Nuclear Waste Technical Review Board
 1100 Wilson Boulevard, Suite 910
 Arlington, Virginia 22209

Dear Dr. Deere:

I am writing in response to your September 28, 1990 letter in which you suggested that the Environmental Protection Agency (EPA) and the Nuclear Regulatory Commission (NRC) enter into a negotiated rulemaking regarding EPA's standards in 40 CFR Part 191 and NRC's requirements in 10 CFR Part 60 for high-level radioactive waste (HLW) disposal. Based on your conversations with Mr. Robert Bernero of the NRC staff and those between Dr. Melvin Carter and my fellow Commissioners, we understand that the intent of the Board's proposal for a negotiated rulemaking was to foster a more open and productive exchange on the issues rather than to necessarily initiate a formal negotiated rulemaking. We agree with you that both agencies should endeavor to ensure that, taken together, the generally applicable environmental standard established by EPA and NRC's implementing regulations form a coherent, consistent, and workable regulatory framework within which repository licensing decisions can be made.

Although we appreciate your suggestion and understand the reasons behind it, we are concerned that formal negotiated rulemaking may not hold sufficient promise of fostering the broad consensus you seek. For a formal negotiated rulemaking to be successful, the issues for negotiation must be relatively clear, and all parties to the proceeding (not just the two government agencies) must be willing to negotiate and believe that a negotiated agreement will provide a better solution to the issues than a rule developed under traditional processes. With regard to EPA and NRC requirements for HLW disposal, that does not yet appear to be the case. Moreover, we believe it is premature to revisit Part 60 until EPA has indicated the extent to which it intends to substantively change 40 CFR 191 in response to the Court's remand. For these reasons, we have no plans to initiate a negotiated rulemaking regarding 10 CFR Part 60 and 40 CFR Part 191 at this time.

We note with interest that EPA, in its response to your proposal, indicates an intent to ascertain the willingness of the potentially interested parties to participate in such a rulemaking. The NRC remains strongly committed to working with EPA as it revises its standards and to fostering an open exchange

Originated RBernero, NMSS

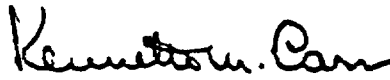
RECEIVED
 NOV 16 1990
 NRC

Del: all chet except 40 CFR

2-1 407
 WU-1

of views by all interested parties. Once EPA completes its standards, the NRC welcomes and intends to solicit input from all interested parties as we revise NRC requirements in Part 60 to conform to the EPA standard. We look forward to your participation in these interactions as well as to continued cooperation between the Nuclear Waste Technical Review Board and the NRC.

Sincerely,



Kenneth M. Carr

cc: The Honorable William K. Reilly, -EPA
Dr. John W. Bartlett, DCE

Distribution:

Taylor
Sniezek
Thompson
Blaha
EDO 5866
EDO R/F
ACNW
RBallard
EBeckjord
KKalman
BJYoungblood
LAltoft
HLPD R/F

LSS
JLinehan
JBunting
JHolonich
CNWRA
CJenkins
NMSS R/F
RBrowning
On-Site Reps
JScinto

Enclosure 3



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 25 1991

OFFICE OF
AIR AND RADIATION

Mr. Robert Bernero
US Nuclear Regulatory Commission
Washington, DC 20555

Dear Mr. Bernero:

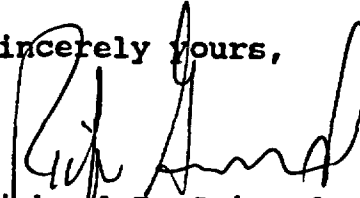
In 1985, the Environmental Protection Agency (EPA) issued environmental protection standards for the management and disposal of radioactive waste (40 CFR 191). In 1987, following a legal challenge, the standards were remanded to the Agency for reconsideration.

As you know, we are currently considering the possibility of revising 40 CFR 191 through a regulatory negotiation process. In the event that that proves infeasible, we are also investigating alternative processes for constructive dialogue. Such processes would involve a variety of constituencies (e.g., Federal agencies, States, industry and environmentalists) in an attempt to arrive at a consensus on appropriate revisions to the standards.

The Office of Radiation Programs has contracted with the Conservation Foundation's "RESOLVE" environmental mediation project for assistance in soliciting the views of potential participants on the appropriateness of regulatory negotiations or discussions on revisions to 40 CFR 191. RESOLVE will also assist us in assessing the willingness of potential parties to participate if we go forward with such negotiations or discussions. It is our understanding that you have been identified as the Nuclear Regulatory Commission point of contact on this matter. As such, you should expect a call, in the not too distant future, from a representative from "RESOLVE."

I certainly look forward to working with you on this important undertaking. Please feel free to contact me if you have any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Richard J. Guimond', written over the typed name below.

Richard J. Guimond
Assistant Surgeon General, USPHS
Director, Office of Radiation Programs

Enclosure 4

4/29/91

RESOLVE
Center for Environmental Dispute Resolution

April 25, 1991

Mr. Robert Bernero
Nuclear Regulatory Commission
Mail Stop OWFN-6E6
Washington D.C. 20555

Dear Mr. Bernero:

I am writing to confirm our meeting Friday, June 7 from 10:30 a.m. - 12:00 p.m. at your office. Howard Bellman, Senior Fellow here at RESOLVE will join me.

The purpose of the meeting will be to discuss NRC's perspective, interest and concerns regarding developing a standard for regulating disposal of radioactive wastes, under Subpart B of 40 CFR Part 191.


The EPA contracted RESOLVE to assess whether it is appropriate to use a regulatory negotiation process, or another process, to develop standards for Subpart B of the Environmental Radioactive Waste Protection Standards.

In response to EPA's request, we are approaching this convening in one, or possibly, two phases. Phase I includes interviews with Washington D.C. based parties, such as yourself. If after we finish Phase I interviews it appears that using a consultative process is feasible, RESOLVE will recommend moving on to Phase II. If approved by EPA, as currently envisioned, Phase II would involve meeting with additional parties outside of the Washington D.C. area and completing the convening.

Prior to our meeting, the EPA's Office of Radiation Programs will send you a copy of the third draft of 40 CFR 191. We will base the meeting discussion around the third draft. While we are not in a position to discuss specific technical questions, we will be interested in your assessment of the issues that need to be resolved.

I look forward to meeting with you. In the interim, if you have any questions please feel free to call me.

Sincerely,


Abby Arnold

cc: Mr. Malsch

