

# SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.

570 Seventh Avenue - Suite 1007 • New York, New York 10018 • (212) 840-6595

Miro M. Todorovich - Executive Director

DOCKET NUMBER  
PROPOSED RULE **PR-60**  
**(50 FR 2579)**

SE2

January 31, 1986

RE: Procedural Amendments To 10 CFR 60 Dealing With Site Characterization and the Participation of States and Indian Tribes (SECY-85-333; 50 Fed. Reg. 2579 (January 17, 1985))

### EXECUTIVE COMMITTEE

Frederick Salt, Chairman  
Rochester University  
Erich Isaac, Vice Chairman  
CUNY, City College  
Robert K. Adair, Vice Chairman  
Yale University  
Miro M. Todorovich, Exec. Dir.  
CUNY, Bronx Community College

### MEMBERS (partial listing)

Luis W. Alvarez  
Univ. of California, Berkeley  
Henry H. Barschall  
University of Wisconsin  
Hans A. Bethe\*  
Cornell University  
David Bodansky  
University of Washington  
Norris E. Bradbury  
Los Alamos National Lab.  
D. Allen Bromley  
Yale University  
R. Craighton Buck\*  
University of Wisconsin  
Bernard L. Cohen  
University of Pittsburgh  
Karl Cohen\*  
Consultant  
Thomas J. Connolly  
Stanford University  
John C. Courtney  
Louisiana State University  
Dwight H. Damon  
Univ. of Connecticut, Storrs  
R. H. Dicke  
Princeton University  
Albert Gold\*  
Desert Research Institute  
William W. Havens  
Columbia University  
Robert Heister\*  
University of Minnesota  
Robert Hofstadter  
Stanford University  
Herbert Kosta\*  
Brookhaven National Lab.  
Behram Kursunoglu  
University of Miami  
Robert Lee  
Energy Consultant  
Milton Loveman  
American Nuclear Society  
Loons Libby  
Univ. of California, LA  
John McCarthy\*  
Stanford University  
Daniel F. Madison  
Health Physics Society  
Robert S. Mulliken  
University of Chicago  
Thomas Pigford  
Univ. of California, Berkeley  
Ernest C. Pollard  
Duke University  
James Ralwater\*  
Columbia University  
Norman C. Rasmussen  
Mass. Institute of Technology  
Dixy Lee Ray  
Energy Consultant  
Glean Saaborg  
Univ. of California, Berkeley  
Malcolm J. Sherman  
State Univ. of NY, Albany  
Edward Teller\*  
Stanford University  
James A. Van Allen  
University of Iowa  
Alexander von Graevenitz\*  
University of Zurich  
Alvin M. Weinberg  
Oak Ridge Associated Univ.  
Engene F. Wigner\*  
Princeton University  
Richard Wilson  
Harvard University  
Werner Wolf  
Yale University

BY HAND

Chairman Nunzio J. Palladino  
Commissioner Thomas M. Roberts  
Commissioner James K. Asselstine  
Commissioner Frederick M. Bernthal  
Commissioner Lando W. Zech, Jr.  
U.S. Nuclear Regulatory Commission  
1717 H Street, N.W.  
Washington, DC 20555

Gentlemen:

We submit these additional comments on the subject proposed regulation pursuant to the Chairman's authorization at the Commission's hearing on this matter. January 24, 1985 Transcript ("TR.") at 107, 11.7-12. The only commenter requesting this additional "bite of the apple" was the representative of the Natural Resources Defense Council and the Environmental Policy Institute; no other participant expected a further procedure. While we are generally opposed to such "one more chance" submittals, we feel an obligation to the public interest to submit the following clarifications, since the Chairman has determined that submissions within one week of the hearing will not delay promulgation of the rule. Id.

### 1. Proposed Section 60.18 Overreaches the Commission's Statutory Site Characterization Role.

The fundamental point is that the Commission is not acting in its "regulatory" role in the site characterization process; it will have that regulatory role later in the licensing process. To state the obverse: In the site characterization process, Congress made the Department of Energy ("DOE") the decisionmaker and relegated the Commission to the role of an advisor ("review and comment").

Consistent with these assigned roles, Congress provided for public comment to the decisionmaker, DOE, and did not provide for public comment to the Commission in the site characterization process.

FEB 7, 1986

110  
DS10  
add: [unclear] 11305  
James Wolf, 900 AMNB  
Edward [unclear] 11305

8603060093 860131  
PDR PR  
60 50FR2579 PDR

\*Member, Steering Committee  
Affiliation for identification only

Given this statutory structure for the site characterization process, we suggest that there is no statutory requirement for the Commission to seek public comment. And, a fortiori, the extraordinarily complex web of invitations for public comment and Commission review in Proposed Section 60.18 is not only counterproductive to the Commission's advisory role in site characterization, but also probably contrary to the statutory scheme.

As we offered to Commissioner Asselstine at the hearing (TR.91 1.23-92 1.11): insofar as the Commission truly desires "informal" public comment at the site characterization stage, almost all of proposed Section 60.18 could be eliminated in favor of a simple provision authorizing the Director to solicit comment, to receive unsolicited comments, and to consider such comments in his professional judgment.

After the licensing process begins, the Commission will be the decisionmaker and the time-tested procedures in, and pursuant to, Part 2 of the Commission's Regulations will be appropriate. (In this respect, we caution that the Commission and its licensing boards should probably gird themselves to resist the almost certain onslaught, when the licensing process begins, of requests for additional procedures to those already established in, and pursuant to, Part 2.)

2. Proposed Section 60.63 Would Convert an Inadvisable Act of Grace into Legal Rights.

One of the nine specific legal comments addressed in the Addendum to our written testimony also deserves further explication: Proposed Section 60.63 addresses "participation in license reviews."

a) Proposed subsection 60.63(a) contains an implied negative by failing to address the modes of participation for those who are not state or local governments or Indian Tribes. This could be remedied by inserting "and others" after "tribes."

b) - Proposed subsections 60.63(b)-(f) then set out an administrative scheme for the submission of proposals by the states and Indian Tribes for Commission services and activities to assist the proposers in participating in review of site characterization plans and/or licensing proceedings. As detailed in paras. 2(c)-(e) below, we believe that these provisions would be: (i) contrary to the Nuclear Waste Policy Act ("NWPA" or "Act"), (ii) not authorized by any statute cited as authority, and (iii), even if the Commission decides it has general authority to grant such assistance, unwise and potentially disruptive of the NWPA's purposes.

(c) Under the Act, DOE is assigned authority and responsibility to consult and cooperate with, as well as provide technical and financial assistance to, the relevant states and Indian Tribes. NWA §§116-18. The Commission's authority and responsibility in these respects is limited to providing the relevant states and Indian Tribes "timely and complete information regarding [the Commission's] determinations and plans made with respect to the site characterization siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository." NWA §117(a)(1) (emphasis added.). Thus, it appears that the Commission would not only be exercising authority not provided by the NWA but also would be usurping and interfering with responsibilities given to DOE under the Act. The Commission's statutory responsibilities in these respects are already adequately addressed in proposed subsection 60.61.

(d) Even if the Commission decides that it has the authority to provide some such assistance and that such a provision need not interfere with DOE's authority or the Act's purposes, such proposals should not be permitted to be "submitted at any time." See proposed subsection 60.63(b), 2d sentence. Such proposals must be made reasonably in advance of the schedule for the activity they are designed to assist. The proposed open-ended language could be used to boot-strap requests for delays in licensing and other review schedules contrary to the primary purpose of the Act and orderly administrative procedure. E.g., NWA §111 (b)(1).

(e) The requirements in proposed subsections 60.63(c)-(f) would establish a formal mechanism for the review and approval, modification, or disapproval of the proposals according to specified criteria.

(i) The NWA does not appear to give the Commission any authority for such a mechanism, although it does provide a similar authority to DOE. Further, the only authority cited by the Commission which may be relevant is the reference to 42 U.S.C. §2051 in 42 U.S.C. §2201, and even that does not appear to reach activities relating to any repository development.

~~(ii) The formal nature of the mechanism may convert a possibly-inadvisable act of grace into a judicially reviewable issue of entitlement or right, leading to litigation and thus delays. See especially proposed subsection 60.63(e).~~

(iii) The standards established for approval, modification or disapproval inappropriately shift the burden for modification or disapproval from the applicant to the Director. On the one hand, the applicant need only "discuss" its proposal with the NRC staff. On the other hand, after such discussion, the Director must ("shall") approve the entire proposal unless he can make determinations (implicitly, "based on the record") that part(s) or all of the proposal (A) cannot be supported by available funds, (B) are not "suitable", (C) will not "enhance communications" between NRC and the applicant, (D) will not "make a productive and timely contribution to the review", and/or (E) are not "authorized by law." If such Commission assistance is considered appropriate and authorized by law, the Director should have the fullest discretion to decide in an unreviewable manner on the extent of such assistance in accord with "advisory only" guidelines.

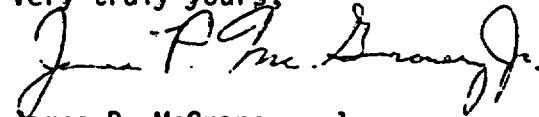
3. The Authority Cited is Inadequate and Must Be Supplemented.

Our review of the "Authority" cited in the current version of the proposed rule indicates that the only section of the NWPA relied on is Section 121. See SECY-85-333, Encl. A at 17. Section 121 relates only to environmental protection standards and criteria. While 10 C.F.R. Part 60 may appropriately deal, at least partially, with the Commission's responsibilities under NWPA Section 121, its scope is much broader and, therefore, references to many other sections of the NWPA are both appropriate and necessary.

4. Conclusion.

We wish to thank the Commission for the opportunity to participate in the review of the proposed rule and look forward to the promulgation of a final rule which gives notice of the Commission's implementation of its appropriate role in the construction and operation of repositories.

Very truly yours,



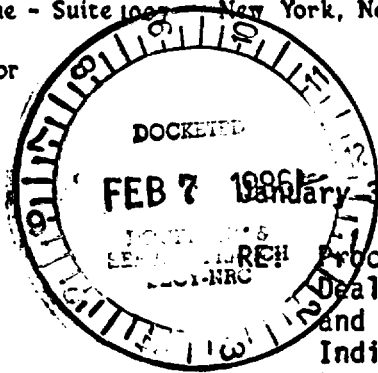
James P. McGranery, Jr.

cc: Chief, Docketing and Service Branch  
U.S. Nuclear Regulatory Commission  
(for docketing)

# SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.

570 Seventh Avenue - Suite 1007 - New York, New York 10018 • (212) 840-6595

Miro M. Todorovich - Executive Director



✓  
18 SE2

### EXECUTIVE COMMITTEE

Frederick Seta, Chairman  
Rockefeller University  
Erich Isaac, Vice Chairman  
CUNY, City College  
Robert K. Adair, Vice Chairman  
Yale University  
Miro M. Todorovich, Exec. Dir.  
CUNY, Bronx Community College

### MEMBERS (partial listing)

Luis W. Alvarez  
Univ. of California, Berkeley  
Henry H. Barschall  
University of Wisconsin  
Hans A. Bethe\*  
Cornell University  
David Bodansky  
University of Washington  
Neville E. Bradbury  
Los Alamos National Lab.  
D. Allan Bromley  
Yale University  
R. Creighton Buck\*  
University of Wisconsin  
Bernard L. Cohen  
University of Pittsburgh  
Karl Cohen\*  
Consultant  
Thomas J. Connolly  
Stanford University  
John C. Courtney  
Louisiana State University  
Dwight H. Damon  
Univ. of Connecticut, Storrs  
R. H. Dickie  
Princeton University  
Albert Gold\*  
Desert Research Institute  
William W. Havens  
Columbia University  
Robert Hexter\*  
University of Minnesota  
Robert Hofstadter  
Stanford University  
Herbert Kestis\*  
Brookhaven National Lab.  
Behram Kurusoglu  
University of Miami  
Robert Lee  
Energy Consultant  
Milton Levenson  
American Nuclear Society  
Leona Libby  
Univ. of California, LA  
John McCarthy\*  
Stanford University  
Daniel P. Madison  
Health Physics Society  
Robert S. Mulliken  
University of Chicago  
Thomas Picford  
Univ. of California, Berkeley  
Ernest C. Pollard  
Duke University  
James Rainwater\*  
Columbia University  
Norman C. Rasmussen  
Mass. Institute of Technology  
Dixie Lee Ray  
Energy Consultant  
Gleason Seaberg  
Univ. of California, Berkeley  
Malcolm J. Sherman  
State Univ. of NY, Albany  
Edward Teller  
Stanford University  
James A. Van Allen  
University of Iowa  
Alexander von Graevenitz\*  
University of Zurich  
Alvin M. Weinberg  
Oak Ridge Associated Univ.  
Eugene P. Wigner\*  
Princeton University  
Richard Wilson  
Harvard University  
Werner Wolf  
Yale University

BY HAND

Procedural Amendments To 10.CFR 60  
Dealing With Site Characterization  
and the Participation of States and  
Indian Tribes (SECY-85-333; 50 Fed.  
Reg. 2579 (January 17, 1985))

Chairman Nunzio J. Palladino  
Commissioner Thomas M. Roberts  
Commissioner James K. Asselstine  
Commissioner Frederick M. Bernthal  
Commissioner Lando W. Zech, Jr.  
U.S. Nuclear Regulatory Commission  
1717 H Street, N.W.  
Washington, DC 20555

Gentlemen:

We submit these additional comments on the subject proposed regulation pursuant to the Chairman's authorization at the Commission's hearing on this matter. January 24, 1985 Transcript ("TR.") at 107,11.7-12. The only commenter requesting this additional "bite of the apple" was the representative of the Natural Resources Defense Council and the Environmental Policy Institute; no other participant expected a further procedure. While we are generally opposed to such "one more chance" submittals, we feel an obligation to the public interest to submit the following clarifications, since the Chairman has determined that submissions within one week of the hearing will not delay promulgation of the rule. Id.

### 1: Proposed Section 60.18 Overreaches the Commission's Statutory Site Characterization Role.

The fundamental point is that the Commission is not acting in its "regulatory" role in the site characterization process; it will have that regulatory role later in the licensing process. To state the obverse: In the site characterization process, Congress made the Department of Energy ("DOE") the decisionmaker and relegated the Commission to the role of an advisor ("review and comment").

Consistent with these assigned roles, Congress provided for public comment to the decisionmaker, DOE, and did not provide for public comment to the Commission in the site characterization process.

2/3...To EDO for Appropriate Action...Cpys to: Chm Cmrs PE GC  
SECY...86-0090

\* Member, Steering Committee  
Affiliation for identification only

DS 10: C. Pickard, 1130 93  
J. L. ... 901 ...

E. ... 623

Given this statutory structure for the site characterization process, we suggest that there is no statutory requirement for the Commission to seek public comment. And, a fortiori, the extraordinarily complex web of invitations for public comment and Commission review in Proposed Section 60.18 is not only counterproductive to the Commission's advisory role in site characterization, but also probably contrary to the statutory scheme.

As we offered to Commissioner Asselstine at the hearing (TR.91 1.23-92 1.11): insofar as the Commission truly desires "informal" public comment at the site characterization stage, almost all of proposed Section 60.18 could be eliminated in favor of a simple provision authorizing the Director to solicit comment, to receive unsolicited comments, and to consider such comments in his professional judgment.

After the licensing process begins, the Commission will be the decisionmaker and the time-tested procedures in, and pursuant to, Part 2 of the Commission's Regulations will be appropriate. (In this respect, we caution that the Commission and its licensing boards should probably gird themselves to resist: the almost certain onslaught, when the licensing process begins, of requests for additional procedures to those already established in, and pursuant to, Part 2.)

2. Proposed Section 60.63 Would Convert an Inadvisable Act of Grace into Legal Rights.

One of the nine specific legal comments addressed in the Addendum to our written testimony also deserves further explication: Proposed Section 60.63 addresses "participation in license reviews."

a) Proposed subsection 60.63(a) contains an implied negative by failing to address the modes of participation for those who are not state or local governments or Indian Tribes. This could be remedied by inserting "and others" after "tribes."

b) Proposed ~~subsections 60.63(b)-(f)~~ then set out an administrative scheme for the submission of proposals by the states and Indian Tribes for Commission services and activities to assist the proposers in participating in review of site characterization plans and/or licensing proceedings. As detailed in paras. 2(c)-(e) below, we believe that these provisions would be: (i) contrary to the Nuclear Waste Policy Act ("NWPA" or "Act"), (ii) not authorized by any statute cited as authority, and (iii), even if the Commission decides it has general authority to grant such assistance, unwise and potentially disruptive of the NWPA's purposes.

(c) Under the Act, DOE is assigned authority and responsibility to consult and cooperate with, as well as provide technical and financial assistance to, the relevant states and Indian Tribes. NWPA §§116-18. The Commission's authority and responsibility in these respects is limited to providing the relevant states and Indian Tribes "timely and complete information regarding [the Commission's] determinations and plans made with respect to the site characterization siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository." NWPA §117(a)(1) (emphasis added.). Thus, it appears that the Commission would not only be exercising authority not provided by the NWPA but also would be usurping and interfering with responsibilities given to DOE under the Act. The Commission's statutory responsibilities in these respects are already adequately addressed in proposed subsection 60.61.

(d) Even if the Commission decides that it has the authority to provide some such assistance and that such a provision need not interfere with DOE's authority or the Act's purposes, such proposals should not be permitted to be "submitted at any time." See proposed subsection 60.63(b), 2d sentence. Such proposals must be made reasonably in advance of the schedule for the activity they are designed to assist. The proposed open-ended language could be used to boot-strap requests for delays in licensing and other review schedules contrary to the primary purpose of the Act and orderly administrative procedure. E.g., NWPA §111 (b)(1).

(e) The requirements in proposed subsections 60.63(c)-(f) would establish a formal mechanism for the review and approval, modification, or disapproval of the proposals according to specified criteria.

(i) The NWPA does not appear to give the Commission any authority for such a mechanism, although it does provide a similar authority to DOE. Further, the only authority cited by the Commission which may be relevant is the reference to 42 U.S.C. §2051 in 42 U.S.C. §2201. and even that does not appear to reach activities relating to any repository development.

~~(ii) The formal nature of the mechanism may convert a possibly~~  
inadvisable act of grace into a judicially reviewable issue of entitlement or right, leading to litigation and thus delays. See especially proposed subsection 60.63(e).

(iii) The standards established for approval, modification or disapproval inappropriately shift the burden for modification or disapproval from the applicant to the Director. On the one hand, the applicant need only "discuss" its proposal with the NRC staff. On the other hand, after such discussion, the Director must ("shall") approve the entire proposal unless he can make determinations (implicitly, "based on the record") that part(s) or all of the proposal (A) cannot be supported by available funds, (B) are not "suitable", (C) will not "enhance communications" between NRC and the applicant, (D) will not "make a productive and timely contribution to the review", and/or (E) are not "authorized by law." If such Commission assistance is considered appropriate and authorized by law, the Director should have the fullest discretion to decide in an unreviewable manner on the extent of such assistance in accord with "advisory only" guidelines.

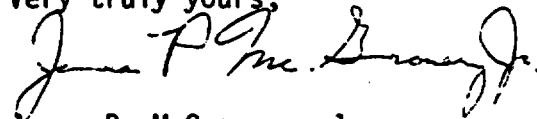
3. The Authority Cited is Inadequate and Must Be Supplemented.

Our review of the "Authority" cited in the current version of the proposed rule indicates that the only section of the NWA relied on is Section 121. See SECY-85-333, Encl. A at 17. Section 121 relates only to environmental protection standards and criteria. While 10 C.F.R. Part 60 may appropriately deal, at least partially, with the Commission's responsibilities under NWA Section 121, its scope is much broader and, therefore, references to many other sections of the NWA are both appropriate and necessary.

4. Conclusion.

We wish to thank the Commission for the opportunity to participate in the review of the proposed rule and look forward to the promulgation of a final rule which gives notice of the Commission's implementation of its appropriate role in the construction and operation of repositories.

Very truly yours,



James P. McGranery, Jr.

cc: Chief, Docketing and Service Branch  
U.S. Nuclear Regulatory Commission  
(for docketing)