ENVIRONMENTAL POLICY INSTITUTE

In The Matter of:

REVISIONS BY THE NUCLEAR REGULATORY COMMISSION OF 10 CFR PART 60; SUPPLEMENTAL STATEMENT TO ORAL TESTIMONY FOR PUBLIC MEETING

SUPPLEMENTAL STATEMENT OF THE ENVIRONMENTAL POLICY INSTITUTE AND THE NATURAL RESOURCES DEFENSE COUNCIL

JANUARY 31, 1986

The Environmental Policy Institute and the Natural Resources Defense Council wish to thank the Commission for the opportunity to testify before the Commission on January 24, 1986 on the proposed revisions to 10 CFR Part 60 and to present these supplemental comments.

GENERAL COMMENTS

The central issue before the Commission concerning its proposed revision of 10 CFR Part 60 is the degree to which the NRC will be involved in the repository site selection process prior to receipt of DOE's license application. The record and nature of this rulemaking indicate that this an area where NRC intends to withdraw from the more formal and structured relationship outlined in the current Part 60 and embrace a more informal relationship largely predicated on the NRC/DOE Procedural Agreement. In so doing, NRC argues that Congress deliberately excluded from Nuclear Waste Policy Act(NWPA) the site selection review role now contained in Part 60 at the time of enactment. Perhaps a more accurate reading of the NWPA is that the statute is silent on many of the specific aspects of NRC

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review, such as comment on the DOE's environmental assessments.

Secondly, Congress could have directed NRC to conform Part 60 to the NWPA, as it customarily does in legislation, and did not do so. In Sec. 114(f) and in Sec. 121 where the NWPA did address the question of existing NRC requirements and the promulgation of new requirements, Congress did not suggest in anyway that NRC should alter 10 CFR Part 60. Sec. 114(f) of the NWPA unequivocally states that,

> "Nothing in this Act shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear Regulatory Commission as established in title II of the Energy Reorganization Act of 1974(Public Law 93-438).

NRC's efforts to read into the NWPA a rescission of the current provisions of 10 CFR Part 60 has been a long-standing complaint of ours during this rulemaking.

In addressing objections by our organizations and other parties to the shift to an ad hoc review of DOE site selection decisions, NRC has repeatedly attempted to assure us that it is not abandoning its role in early pre-licensing review of DOE. As stated in the draft preamble now before the Commission,

> "In regard to the generalized concern that NRC should be involved in the site selection process, it is noted that the NRC has played an important role in this process and will continue to do so." (SECY-85-333, Enclosure A, p. 5)

While we are gratified that NRC staff has recognized our concerns, the entirely ad hoc nature of the new relationship between DOE and NRC is far from satisfactory. While the current proposal correctly revises the references to the Procedural Agreement in the proposed rule, the fact remains that the Procedural Agreement and other ad hoc protocals govern much of

NRC's new role including its comments on the DOE's environmental assessments(EA). Such arrangements do not provide the assurances that NRC's site selection participation, now articulated clearly in Part 60, will be fully identifiable and comparable in scope.

The NRC staff has, to a substantial extent in SECY 85-333, attempted to direct the Commission's attention away from the question of the scope and completeness of NRC's site selection review and toward more tangential alterations of Part 60. For example, NRC staff has construed and reduced our insistence that NRC explicitly specify NRC's role in site selection in Part 60 to a narrower issue of NRC's required content of Site Characterization Plan(SCP).

We reiterate a point made in our comments in the proposed rule and sidestepped by the staff--

If early site review is no longer an SCP function, but is now an EA function, then Part 60 should spell this out and articulate how NRC will carry out its site selection role in commenting on the EA's. It is not the form of the review that is at issue but that it take place, that it be comparable in scope to the current Part 60 program and that it be based on codified regulations.

It is also not enough for NRC to say, as stated in SECY-85-333, "that we're already doing it." We refer the Commission to an NRC staff memo appended to EPI's comments on the proposed rule(see SECY-85-333, Attachment C) from Mr. Robert Browning to Mr. Richard Cunningham. The memo clearly states that in comment on the EA's, NRC will not comment on DOE's comparison of sites or

the merits of one site versus another; a critical element of DOE's site selection process. NRC's EA comments submitted to DOE on March 20, 1985 are consistent with this policy.

NRC staff assurances to the contrary, the truth of the matter is that while NRC is involved in review of DOE's site selection activities, 1) involvement is limited and avoids certain key aspects like site ranking, and 2) involvement proceeds on an ad hoc basis defined neither by Part 60 nor by Part 51.

As noted in our earlier comments, this is bad policy. It blurs the distinction between DOE and NRC as licensee and regulator and may have compromised NRC's Administrative Procedures Act obligations to give notice and comment and to issue a final rule before proceeding to implement this new "informal" approach. Final rules changes should have preceeded NRC's decision to restrict the scope of its EA comments.

NRC staff's argument that it need not simultaneously revise Part 51 and Part 60 begs the fact that NRC has apparently already implemented changes to both sets of regulations in the absence of a final rulemaking in either case. It also begs the more basic issue of how NRC will engage in its review of the site selection process. The issue is not simultaneous issuance of regulations, but the establishment and explicit promulgation of a fundamental Commission policy and regulatory program on review of site selection now while DOE is in the site selection phase and not in a piecemeal fashion.

RESPONSE TO GENERAL ISSUES RAISED BY SECY-85-333

Draft Site Characterization Assessment(DSCA)---Contrary to the impression given by NRC staff, NRC submission of its Site

Characterization Assessment(SCA) is not merely a typical interagency comment process. The SCA will be a definitive statement by the NRC of the information necessary to obtain a license for a specific site and it is my personal view that the SCA document will bound both data collection efforts during characterization and limit future requests, challenges, or licensing issues surrounding the adequacy of data. I believe this to be the case due to the very tight DOE schedules for collection of site specific data and preparation of a license application. For example, DOE now projects a mere 8 months of in situ data collection for its salt site(s)(see Final Mission Plan, Volume I, p. 62). The notion conveyed in the SECY paper that the SCA and DOE site characterization plan are "living" documents offering numerous opportunities for review as DOE proceeds is simply contrary to DOE's schedule.

The NRC's SCA is a critical regulatory document and its importance is not subsumed by NRC's informal review process or the conduct of numerous technical meetings. The question is one of the adequacy and sufficiency of NRC's analysis before NRC signs off on the SCP and before DOE goes ahead with site characterization; not afterward. Open technical meetings do not substitute for an open public review of NRC's final analysis and determinations before it issues its SCA.

During the NRC public meeting on this matter on January 24, 1986 and in the NRC staff response to criticisms of dropping the DSCA, a confusion has been created between opportunities to comment of DOE's SCP with opportunities to comment on NRC's SCA.

NRC staff has repeatedly attempted, as did DOE in its presentation to the Commission on January 24th, to portray comment on the SCP as being synonymous or preemptive of comment on the NRC's SCA.

This is not the issue. The NRC is proposing to deny the opportunity to comment on the analysis and conclusions of the NRC concerning DOE's proposed site characterization activities which is an entirely separate matter from commenting on the SCP. NRC appears to have deliberately misconstured comments about this change. Dropping the DSCA has all the hallmarks of a bureaucracy seeking to avoid controversy by precluding outside review before its makes a final decision.

Site Selection Information---Generally addressed above.

Shaft Sinking---As in the case of the DSCA, this appears to be a case where the Commission simply doesn't want to put itself in a position where it might have a highly visible or controversial role in the site selection process. By refusing to require DOE to wait for a final SCA before sinking a shaft and arguing that the informal DOE/NRC process will have solved all problems, NRC is simply ducking the issue. If the informal process solves the problems, neither NRC nor DOE have anything to fear by waiting. If problems are not solved prior to the SCA, they should be before DOE proceeds. The requirement that DOE merely wait for the SCA does not even convey a requirement that DOE address NRC comments before proceeding and is not an onerous requirement.

Simultaneous Promulgation---As noted earlier, this "issue" is a dramatic oversimplification of the question of under what authority NRC will conduct its review of DOE site selection

activities such as comment on the EA's. The issue is the lack of an explicit codification of the NRC's review authority and requirements and not simultaneous issuance of Part 60 and Part 51. NRC also has an obligation to change to establish a regulatory program and issue appropriate regulations for review of DOE site selection activities prior to implementing new practices as it has apparently done.

Party Status for Host State---We reiterate here our earlier comments that the requirements of the NWPA to consult and cooperate with states and Indian Tribes constitutes an additional requirement beyond the obligation of federal agencies to provide standing and allow participation of all interested and affected parties.

ADDITIONAL SECY 85-333 RULEMAKING PACKAGE ISSUES

There are there are several additional issues raised by the SECY 85-333 package including some questionable interpretations of the Nuclear Waste Policy Act(NWPA) and other requirements:

1) Decision memo, on bottom of page 2, attempts to construe the NWPA as specifying that certain items currently required by the SCP are now required by the NWPA to be presented in the EA's. *This is an interpretation by the staff and not an explicit requirement of the NWPA and should be so stated.*

2) On page 6 of the Decision Memo, NRC staff rejects comments concerning the need to "condense the numerous technical issues and discussions," because unspecified documentation of informal technical meetings will be placed in public document rooms. Placing ad hoc minutes or other materials relevent to hundreds or

thousands of informal technical meetings does not substitute for the opportunity to review NRC's analysis of information discussed at those meetings pertinent to the SCP. Patronizing statements about the placement of materials in a public document room does not speak to the well recognized difficulty of maintaining a process for documenting informal meetings or protocals for keeping minutes nor does it speak to the basic difficulty of obtaining the resources and experts to sift through thousands, if not hundreds of thousands of pages of "documents."

The DOE/NRC staff discussions concerning Commission concurrence conditions in the DOE site selection guidelines, a highly visible undertaking, are an example of the inadequacy of the proposed "public document room" approach. No transcripts were made of several of the guidelines meetings even after a decision to do so was apparently made. Staff minutes and summaries of the discussions and follow-up meetings failed to reflect the range of issues discussed and failed to reflect the comments of outside parties even when given an opportunity to address the staff at the close of the meetings.

3) Page 11 of the decision memo implies and page 9 of the proposed rule states that revisions to Part 60 are exempt from NEPA under Sec. 121 of the NWPA. In point of fact, the NEPA exemption contained in Sec. 121(c) only pertains to the promulgation of technical requirements and criteria developed pursuant to Sec. 121 and would not extend to this rulemaking. While this promulgation may not require a NEPA statement, NRC must make a separate finding concerning this requirement and may not rely upon Sec. 121(c) to provide a statutory exemption.

4) Enclosure B, Comment No. 2 includes a statement that the EPA assurance requirements are not relevent to repositories licensed by NRC. While this is true in the sense that EPA may not apply the assurance requirements to NRC repositories under its own authority, the EPA rules clearly contemplate NRC rulemaking "...to insure that the objectives of all of the assurance requirements in 40 CFR Part 191 will be accomplished through compliance with 10 CFR Part 60,"(50 FR 38079, September 19, 1986). This would indicate that the EPA assurance requirements are not only very relevent to NRC licensed repositories, but that ultimately compliance with those assurance requirements is a prerequisite for licensing approval.

Submitted by,

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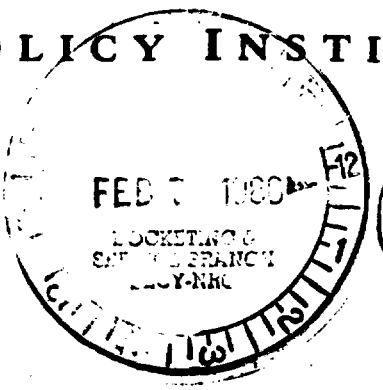

50FR2579

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