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

MEMORANDUM FOR: Robert E. Browning, Director
Division of Waste Management

FROM: Joseph O. Bunting, Jr., Chief
Policy and Program Control Branch

SUBJECT: NON-CONCURRENCE ON PROPOSED PROCEDURAL AMENDMENTS TO
10 CFR PART 60 DEALING WITH SITE CHARACTERIZATION AND
THE PARTICIPATION OF STATES AND INDIAN TRIBES

The purpose of this memorandum is to explain our decision not to concur in the subject document. As you know from our past memoranda on this question, we believe that significant revisions to Part 60 procedures for site characterization review and state/tribal participation are neither strategically advisable nor required to comply with the provisions of the Nuclear Waste Policy Act (NWPA). Nor do we know of any documented experience over the past three years that would support the asserted need to revise the regulation. On the contrary, all the documented evidence of which we are aware supports the regulation in its current form. We are concerned that the risks of entering a formal rulemaking -- with no constituency but NRC staff -- to reduce NRC's responsibilities for interaction with states, tribes, and public are likely to outweigh any benefits in more convenient procedures.

Looking at the merits of the document apart from our strategic concerns about a possible loss of NRC credibility, we have also found a major substantive concern. As discussed below, we believe the staff draft proposed rule contains a significant policy change that deserves to be called specifically to the Commission's attention.

We do find at least one significant improvement: the inclusion of a ninety-day public comment period for the Director's comments on DOE's Site Characterization Plan. There are a number of areas where we would have advised a different approach, however. Chief among these are:

1. Alternative Sites for Characterization: The draft proposed rule effectively retreats from the requirement now underlying Part 60 that DOE submit for licensing a site "from a slate of candidate sites among the best that can reasonably be found." The draft proposes to delete the existing Part 60 requirement for site selection information in the Site Characterization Report (Section

60.11(a)(1-5)), and makes clear in the Supplementary Information that in reviewing DOE's Environmental Assessments (EA's) for nominated sites, NRC staff will not comment on DOE's siting methodology or the relative merits of the sites selected for characterization. In our view, this has several significant implications for our safety reviews.

First, these proposed revisions would effectively forfeit the opportunity for NRC to provide early advice to DOE on the sites that, on comparison, appear to have fewest or least complicated technical uncertainties likely to appear on the critical path. This opportunity is currently built into Section 60.11 requirements for the SCR review.

Second, the proposed revisions signal to DOE that the Commission intends to absent itself from any advisory judgments concerning DOE's selection of alternative sites for characterization. The proposed changes could be interpreted to mean, in effect, that even if NRC staff does find deficiencies in DOE's choice of candidate sites, we do not intend to intrude into DOE's siting prerogatives enough to say anything about them.

Either of the above unnecessarily enhances the probability of difficulties later in the program, because both tend to insulate DOE from full awareness of the consequences of bad judgment at the outset.

Third, any shift in our regulatory requirements that allows DOE to select "technically adequate" sites instead of sites "among the best that can reasonably be found" needlessly surrenders an additional margin of safety conservatism that may make the difference between a timely licensing process and an untimely one. We believe it will be difficult enough under the most favorable of circumstances to make licensing judgments in the statutory time allowed.

We accept that the Commission may well decide to adopt the approach set forth in the draft proposed rule, but we believe this decision should be made openly and deliberately after careful consideration. The staff draft would not ensure that result.

2. Approval of Proposals: The newly-inserted additional criterion for approval of proposals to participate in NRC reviews will make it virtually impossible for NRC to maintain an independent relationship

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with states and tribes under Subpart C. Section 60.63(d)(2) provides that the Director approve a state or tribal proposal if the proposed activities "are not of a kind eligible for financial or technical assistance from DOE under sections 116 or 118 of the Nuclear Waste Policy Act." Among other things, sections 116(c)(1)(B) and 118(b)(2)(A) provide that DOE shall make grants to enable the state or tribe, respectively, to review "activities taken under this subtitle with respect to such site for purposes of determining any potential ... public health and safety, and environmental impacts of such repository." These sections also provide for DOE funding to enable states and tribes to "provide information to the residents [of the state or tribe] regarding any activities" of the Commission, DOE, or the state or tribe with respect to the site. Broadly construed, these provisions could enable DOE to fund almost any proposed state or tribal participation with NRC, including employment or exchange of state personnel under the Intergovernmental Personnel Act. We do not believe the Waste Policy Act was intended to preclude an independent NRC relationship with states and tribes, so long as such relationship supports our execution of independent licensing responsibilities.

In all of these comments, our principal concern is that the Commission be fully cognizant not only of the arguments for adoption of the staff's proposed amendments, but the arguments that the policy implications may not be minor, and adoption would not be without risks.


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