RULEMAKING ISSUE
(Information)

April 22, 1986 SECY-86-51A

For: The Commissioners

From: Victor Stello, Jr.
Executive Director for Operations

Subject: Differing Professional Opinion Concerning NEPA Review Procedures For High Level Waste Geologic Repositories

Purpose: To transmit to the Commission for consideration in connection with SECY-86-51 a differing professional opinion on the above subject

Discussion: In SECY-86-51, the staff set forth three options for developing NEPA review procedures to be used in connection with the issuance of a construction authorization and license for a high level waste geologic repository. The proposed rule would establish procedures and criteria to govern the Commission's review and adoption of the Department of Energy's environmental impact statement pursuant to § 114(f) of the Nuclear Waste Policy Act of 1982.

Shortly before SECY-86-51 was forwarded to the Commission, the Executive Legal Director received formal notification of a differing professional opinion (DPO-86-01) concerning the options presented in the Commission paper. Because the Office of the General Counsel would be reviewing that paper, the Executive Legal Director requested that OGC perform a peer review of the differing professional opinion, as contemplated by NRC Manual Chapter 4125. OGC agreed, and forwarded its peer review report to ELD and the Commission in a memorandum to the Commissioners from the Deputy General Counsel dated April 14, 1986.

Contact: Linda S. Gilbert, OELD
492-7678

8807270222
PUBLIC

To assist the Commission in its consideration of SECY-86-51 and the OGC memorandum of April 14, 1986, enclosed are documents setting forth the differing professional opinion. In addition, the staff will soon provide further information to clarify its recommendations in light of the OGC memorandum. The Executive Legal Director has informed me that the attorney who holds the differing professional opinion will consider it resolved for the purposes of NRC Manual Chapter 4125 if the matter is forwarded to the Commission for its consideration in connection with SECY-86-51. Accordingly, no further action to formally resolve the differing professional opinion is required. However, the Commission should consider it and the forthcoming staff clarification in arriving at a final decision on the options presented for developing a proposed rule.

Scheduling: The Commission should defer final action on SECY-86-51 until receipt of the staff clarification which will be forwarded within 30 days.

Victor Stello, Jr.
Executive Director for Operations

Enclosures:

A. 04/14/86 Memorandum to Cunningham from Malsch (w/ peer review report attached)

B. 02/10/86 Memorandum to Plaine from Cunningham (w/ documents setting forth DPO-86-01)

C. 04/16/86 Memorandum to Cunningham from Wolf (w/modifications to proposal in DPO-86-01)

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ENCLOSURE A

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

April 14, 1986

MEMORANDUM FOR: Guy H. Cunningham, III
Executive Legal Director

FROM: Martin G. Malsch
Deputy General Counsel

SUBJECT: DIFFERING PROFESSIONAL OPINION CONCERNING NEPA REVIEW PROCEDURES FOR HIGH LEVEL WASTE GEOLOGIC REPOSITORIES

At your request, OGC prepared the attached peer review report on James R. Wolf's dissenting professional opinion.

Attachment: As Stated

cc: J. Wolf, ELD w/attach
W. Olmstead, ELD w/attach

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

April 14, 1986

MEMORANDUM FOR: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech

FROM: Martin G. Malsch
Deputy General Counsel

SUBJECT: SECY-86-51 -- NEPA Review Procedures for Geologic Repositories for High-Level Waste

Background

SECY-86-51 proposes alternatives for discharging NRC's environmental review responsibilities in licensing a DOE high-level waste ("HLW") repository under the Nuclear Waste Policy Act ("NWPA"). We initiated an independent legal review of staff's proposals because of the importance of the legal issues to the HLW repository licensing program and the need for an independent legal review of a differing professional opinion on the subject. Subsequent to the initiation of our review, Commissioner Asselstine also requested that we review the paper.

Summary

The staff paper raises three issues: (1) is the NRC required to conduct a review of the final DOE Environmental Impact Statement ("EIS") on the high-level waste repository before determining whether to adopt it and, if a review is required, what standard and scope of review should be used; (2) are there procedural requirements that the Commission must observe before determining whether to adopt the DOE EIS; and (3) if the NRC adopts the DOE EIS, can parties still litigate issues addressed in that document in the repository licensing proceeding. Based on our review of the NWPA and its legislative history and other applicable law, OGC concludes that (1) NRC must review the final DOE EIS before making a determination whether to adopt it, but that review is limited to whether there are substantial new information or other considerations; (2) the Commission needs to provide a means for parties to the repository licensing proceeding to submit views to the NRC on whether the EIS should be adopted; and (3) issues

Contact:
Trip Rothschild, OGC, 41465

> A civil action for judicial review described under subsection (a)(1) may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

Several things are clear from the NWPA language. DOE must prepare a final EIS for inclusion in its repository recommendation to the President. Under sections 114-118 this final EIS, including NRC comments, is subject to review by the President, States and Indian tribes, and the Congress, all of whom may, on the basis of the statement, exercise their Constitutional and/or statutory rights to disapprove. NRC is to adopt the EIS "to the extent practicable" and, to the extent NRC does so, its NEPA environmental review obligations are satisfied. DOE's final EIS is subject to judicial review if and only if a petition for review is filed not later than the 180th day after the date of the statement.[1] Moreover, the NRC HLW repository licensing decision is also subject to judicial review if a petition is filed not later than the 180th day after the Commission makes its licensing decision.

However, several important things are also unclear from the statutory language. Section 114(f) does not specify what criteria the NRC is to apply in deciding whether adoption would be "practicable," or what public procedures are to be followed by NRC in making this decision. The statute also does not explicitly address the extent to which NEPA issues can be litigated in the NRC licensing process. The legal analysis which follows focuses on these issues. Section 119 complicates resolution of these issues because of the possibility that judicial review of the adequacy of the DOE statement must be pursued independent of NRC's own review of the statement.

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[1]The exception to the 180 day requirement in section 119(c), which relates to lack of knowledge of the statement or decision, will not likely apply given the wide publicity of the HLW repository program and the fact that Federal Register notice of the issuance of the statement will constitute constructive notice.

H.R. 3809, as reported by the House Interior Committee, provided in section 114(f) that:

> Any environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary under this subtitle shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization for such repository. In any such statement prepared with respect to the first repository to be constructed under this subtitle, the Commission shall not consider the need for a repository or nongeologic alternatives to the site of such repository.

The Committee Report indicated that the bill was intended to include a "roadmap" for DOE and NRC compliance with NEPA. In two separate places the intent behind new section 114(f) was explained:

> The Committee amendment directs the Commission to use the Secretary's alternative site review and other data prepared for the site selection EIS to the maximum extent practicable. It is the Committee's intent that the Commission be precluded from having to undertake a repetition of the Department of Energy decisions unless it determines that new information or other considerations make a review necessary.
>
> * * * * *
>
> The Commission is required to adopt the statement prepared by [the] Secretary under this subtitle to the maximum extent practicable.
>
> The Secretary's statement is intended to suffice regarding the issues addressed and not be duplicated by the Commission unless the Commission determines, in its discretion, that significant and substantial new information or new considerations render the Secretary's statement inadequate as a basis for the Commission's determinations.
>
> H. Rept. 97-491, Part 1, 97th Cong., 2d Sess. at 48, 53-54 (April 27, 1982).

> In issuing the construction permit and license - the NRC will rely on the Environmental Impact Statement prepared by the Secretary of Energy in recommending the repository site. The Commission will have to supplement any environmental impact statement with considerations of the public health and safety required under the Atomic Energy Act of 1954....
>
> 128 Cong. Rec. H. 8163 (September 30, 1982).

There is no other useful legislative history on the meaning of section 114(f).[5]

[Footnote Continued]

on Energy Conservation and Power of the House Committee on Energy and Commerce, 97th Cong., 2d Sess. at pp. 521-524 (1982).

[5] In December 1982, the Senate turned to consider the House legislation. Senator Mitchell declared in floor remarks that the national nuclear waste policy should "preserve the integrity and full scope of the NRC licensing review and environmental analysis under the National Environmental Policy Act," 128 Cong. Rec. S. 15669 (daily ed. Dec. 20, 1982), but the broad scope of his remarks is at odds with the plain language of section 114(f) of the bill actually passed by the Senate which, as did the House-passed bill, clearly limited NRC's NEPA review -- at least with regard to repository alternative sites. The colloquy with respect to an amendment proposed by Senator Levin, and passed, to include in section 114(f) the current language that "nothing in the Act should 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" is confusing. Senator Levin stated his understanding that the Act was not intended to restrict, or amend, or modify NRC licensing requirements for the repository in any way "including, but not limited to, findings of need." Senator McClure, the floor manager of the bill, replied that Senator Levin was correct and added that "that is my understanding also." 128 Cong. Rec. S. 15653 (daily ed. Dec. 20, 1982). Since findings of need have generally been regarded as NEPA issues, this could be taken to reflect an understanding that the Commission should discharge its NEPA requirements in the same way as it would in the absence of the review procedures prescribed by the NWPA. However, this would be contrary to the plain language of the Senate-passed bill which in section 114(f) provided specifically that "compliance with the procedures and requirements of this Act [NWPA] shall be deemed adequate considerations of need for the repository ...." Thus these floor remarks by Senators Mitchell, Levin and McClure are not useful legislative history.

[Footnote Continued]

tell if there is any substantial "new information" or "new considerations." Moreover, the final decision whether to adopt cannot be made until after the NRC has commenced its safety review, since the results of this review must be factored into the analysis whether to adopt.

Thirdly, if NRC does not adopt some of the DOE statement, then NRC must prepare its own supplemental environmental statement. Congressman Udall specifically mentioned the possible need for a supplemental statement in the summary of the bill used in floor debate.[7]

Finally, the concept that NRC should adopt the DOE statement unless substantial new information or considerations, including the results of NRC's safety review, indicate otherwise, fits in neatly with the judicial review provision of section 119. Truly "new" information or considerations, including NRC's final safety review, will by definition not have been addressed in the DOE statement. Thus judicial review of that statement should not affect NRC's own NEPA review whether to adopt, and judicial review of NRC's own licensing decision, including NRC's NEPA adoption decision, should not duplicate any prior judicial review of the DOE statement.

We have been unable to resolve one remaining issue -- whether substantial NRC comments on the draft DOE EIS, rejected by DOE in its final EIS, may be grounds for an NRC supplemental EIS and litigation in the NRC licensing hearing. It can be argued, on the one hand, that there would be no "new" information or consideration in this circumstance because the material was raised in comments and was considered by DOE in preparing the final EIS, and that precluding any further NRC consideration of its own comments is not unreasonable given that NRC comments will have been fully considered by DOE, the President, States and Indian Tribes, the Congress, and possibly the courts before submittal of a license application.

On the other hand, refusal to consider DOE's rejection of a substantial NRC comment as ground for further NRC consideration in a supplemental EIS would place NRC in the awkward position of having to adopt an EIS which it had considered to be inadequate.

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[7]The NEPA regulations of the President's Council on Environmental Quality offer criteria for preparation of supplemental statements that were in force when the NWPA was being considered by the Congress and that are remarkably similar to the language in the House Report. 40 CFR 1502.9(c)(1)(ii) requires a supplemental statement if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

The Commission has applied that decision to its construction permit and operating license proceedings. Parties to those proceedings have been permitted to file contentions on issues addressed in the staff NEPA statement although it is not clear in NRC practice that licensing hearings follow an agency proposal for action within the meaning of NEPA.

However, NEPA is silent on the public procedures that must be followed in deciding whether to prepare an EIS statement or a supplemental EIS.

The NEPA regulations of the President's Council on Environmental Quality (CEQ), which by their terms are binding on NRC,[9] do provide useful information on public procedures. 40 CFR 1505.1(c) requires that relevant NEPA documents (which would legitimately include an NRC evaluation whether the DOE final statement should be adopted) "be part of the record in formal ... adjudicatory proceedings."

In sum, NEPA is silent on whether an NRC evaluation whether to prepare a supplemental statement must be included in the adjudicatory hearing record, but pertinent CEQ regulations which are binding on the NRC would require inclusion in the record.

What this means in terms of public procedure on NRC's adoption decision can be determined by legal principles applying to the conduct of adjudicatory proceedings. Applying traditional adjudicatory principles, before determining whether to adopt the DOE EIS the NRC would need to provide an opportunity for parties to the NRC licensing proceeding to submit their views in writing on the matter to the NRC. The Commission would then evaluate the submissions and determine whether to adopt the DOE EIS in whole or in part. Based on the analysis in section II above, the Commission would evaluate the views of the parties and any information derived from the staff's ongoing safety review of the DOE application to determine whether there is substantial new information or new considerations which warrant preparation of a supplemental EIS. Absent a finding that a supplemental EIS is warranted, the DOE EIS would be adopted. These proposed

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[9] 40 CFR 1500.3. In San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), the court noted that the NRC has often asserted that the CEQ regulations did not bind the NRC and other independent regulatory agencies. The court asserted: "Without deciding, we assume that the regulations apply to the Commission." 751 F.2d at 1302, n.73. The Commission itself has stated that it does believe that CEQ regulations are binding on it insofar as they are procedural in nature. 49 FR 9352 (March 12, 1984) (preamble to final 10 CFR Part 51 rule). The cited regulation is procedural in nature.

of appeals reviewing the DOE EIS could reach a result that differed from the first court. This could cause confusion.

V. Application of Analysis to SECY-86-51

In SECY-86-51, the NRC staff presented the Commission with three alternative rulemaking approaches. None of these options is entirely consistent with our interpretation of section 114(f). Under the first option the NRC would not conduct an independent review of the EIS and would promulgate a rule stating that regardless of the content of the DOE statement, the NRC will adopt the entire DOE document unless NRC's safety review results in license conditions with environmental impacts that are larger than those evaluated in the DOE statement. No litigation of NEPA issues would be permitted in the licensing proceeding. In our view this option is inconsistent with Congressional intent underlying section 114(f). As discussed above, we believe Congress expected the NRC to conduct a limited, non-duplicative review of substantial new information or considerations before deciding whether to adopt the DOE statement. The NRC was not to adopt the DOE statement if substantial new information or new considerations rendered it inadequate. NRC's safety review could be a source of such new information or considerations, but is not the only possible source. The determination whether to adopt cannot be made until the NRC reviews the final DOE statement.

Under the second option the NRC would by regulation specify in advance specific portions of the DOE statement that would be adopted without NRC review. The NRC in the rule would declare that it will prepare a supplement to the DOE statement that would contain an independent NRC cost-benefit analysis of the DOE proposal. As noted above, we believe that it would be inconsistent with section 114(f) for the NRC to announce in advance which portions of the DOE impact statement will be adopted. That determination can be made only after a review of the final DOE statement. We would reserve until after review of the DOE statement whether NRC should prepare an independent cost-benefit analysis. In the absence of substantial new information or considerations, there should be no reason to do so.

Under the third option the NRC would conduct an independent review of the DOE statement and prepare its own analysis adopting portions of the DOE statement where practicable. All environmental issues could be litigated in the NRC licensing proceeding. While we believe that Congress contemplated that the NRC would conduct a review of the DOE statement, Congress did not contemplate that the NRC would do a duplicative review or allow unlimited NEPA litigation. Instead, we were directed to adopt to the extent practicable the DOE statement and prepare a supplemental EIS only in limited circumstances.

ENCLOSURE B

February 10, 1986

MEMORANDUM FOR: Herzel H. E. Plaine
General Counsel

FROM: Guy H. Cunningham, III
Executive Legal Director

SUBJECT: DIFFERING PROFESSIONAL OPINION CONCERNING NEPA REVIEW PROCEDURES FOR HIGH LEVEL WASTE GEOLOGIC REPOSITORIES

Enclosed for your review are documents setting forth a differing professional opinion within our office concerning NEPA review procedures for high level waste geologic repositories. The documents are relevant to the rulemaking options for the Commission's adoption of the DOE environmental impact statement in connection with the issuance of a construction authorization and license for a geologic repository. The staff expects to submit a Commission paper discussing those options shortly.

Because your office will be reviewing that paper, it is appropriate that you be apprised of the basis for this differing professional opinion. In addition, your review of the Commission paper provides an ideal opportunity for a concurrent peer review of the differing professional opinion, as contemplated by NRC Manual Chapter 4125. Accordingly, I would like to request that your office perform such a review. Upon receipt of the peer review report, I would then take the necessary steps to formally resolve the differing professional opinion. I have discussed this approach with Martin G. Malsch, who agrees that it appears appropriate under these circumstances.

Please let me know as soon as possible whether this procedure is acceptable to you. To enable me to resolve the differing professional opinion within the time frame specified in NRC Appendix 4125, Section G.2.a., I would appreciate receiving the peer review report by March 7, 1986.

Original Signed By
Guy H. Cunningham, III

Guy H. Cunningham, III
Executive Legal Director

Enclosure: As stated

cc: Victor Stello, Jr., EDO
Ronald M. Scroggins, RM

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

FEB 4 1986

MEMORANDUM FOR: Guy H. Cunningham III
Executive Legal Director

FROM: James R. Wolf
Senior Regulations Attorney
Office of the Executive Legal Director

SUBJECT: DIFFERING PROFESSIONAL OPINION CONCERNING NEPA REVIEW PROCEDURES FOR HIGH LEVEL WASTE GEOLOGIC REPOSITORIES

This memorandum sets forth my written comments concerning views expressed by Mr. Olmstead in his memorandum of February 3, 1986. It is submitted for the record, as provided by NRCM Appendix 4125 G.2.c.

I agree that the Commission may adopt the DOE EIS without repeating the procedural steps of draft, comment, and analysis. However, contrary to Mr. Olmstead's view, I regard Section 114(f), in the context of the Nuclear Waste Policy Act, as relieving the Commission of its responsibility to consider the environmental impacts identified in its EIS as part of its licensing decision process (so long as the conditions of construction and operation authorized by the Commission conform to the pertinent assumptions of the EIS).

I have made no argument that NWPA "overrules" the SCRAP decision. In the absence of statutory provisions such as those contained in Section 114(f), agencies most emphatically do have the obligations identified by the Supreme Court. My point is, simply, that Congress has made a judgment that the customary responsibilities of an agency under NEPA, as recognized in SCRAP, do not apply in this case.

Mr. Olmstead characterizes my view incorrectly. It is not my position that the environmental issues should be regarded as res judicata. Rather, it is the adequacy of the EIS that may not be relitigated. And because the EIS has been found to be adequate [not because of any judgment regarding the specific issues raised in the EIS], it is practicable to adopt it. That is precisely the standard for adoption that is established in CEQ regulations. 40 CFR § 1506.3(a).

Moreover, contrary to Mr. Olmstead's suggestion, I agree that notwithstanding NRC's adoption of the EIS, the statement must accompany the proposal through the existing agency review processes. This is important, because when the Commission determines the conditions to be

included in the construction authorization (pursuant to 10 CFR § 60.32), it will need to consider whether they were covered by the EIS. If they were not, then to that extent adoption of the EIS would not be practicable.

Another reason the EIS must accompany the proposal through the process is to enable the Commission to make the environmental findings set out in § 60.31(c) - that the action called for is issuance of the construction authorization, with any appropriate conditions to protect environmental values. If the EIS is adequate and can practicably be adopted, then the mandate of NWPA requires that (if safety and other non-NEPA requirements are satisfied) the construction authorization should be issued; and that it should include such conditions to protect environmental values as are specified in the DOE application and evaluated in its EIS.

If all that Congress had intended was that NRC should be relieved of a duty to prepare, circulate, and finalize an EIS, there would have been no need for the statutory language that was used. CEQ regulations would already have permitted NRC to adopt the EIS as finalized by DOE. By declaring that adoption of the statement by Commission "shall be deemed to also satisfy the responsibilities of the Commission under [NEPA] and no further consideration shall be required," Congress was directing something more. My opinion is that it was directing the Commission <u>not</u> to make the independent NEPA judgments that would otherwise be necessary.

James R. Wolf
Senior Regulations Attorney
Office of the Executive Legal Director

cc: WJOlmstead

FEB 3 1986

Note to: Guy H. Cunningham

DIFFERING PROFESSIONAL OPINIONS FROM J. R. WOLF

Attached for your review and disposition under NRCM 4125 "Differing Professional Opinions" is a memorandum to me from J. R. Wolf, Senior Regulations Attorney concerning NEPA review procedures for High Level Waste Geologic Repositories and my memorandum to Mr. Wolf in response. I am also forwarding a copy of the Manual Chapter for your use. Since Mr. Wolf and I have discussed this matter extensively, I am forwarding these materials to you per his discussions.

Bill

William J. Olmstead

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

FEB 3 1986

MEMORANDUM FOR: James R. Wolf
Senior Regulations Attorney
Office of the Executive Legal Director

FROM: William J. Olmstead, Director
Regulations Division
Office of the Executive Legal Director

SUBJECT: DIFFERING PROFESSIONAL OPINION CONCERNING NEPA REVIEW PROCEDURES FOR HIGH LEVEL WASTE GEOLOGIC REPOSITORIES

On January 30, 1986, you formally submitted a memorandum to me outlining a "Differing Professional Opinion" concerning the options presented in a Commission paper. The paper sets forth three options for Commission consideration concerning how the Commission might implement Section 114(f) of the Nuclear Waste Policy Act of 1982 which relates to the preparation of Environmental Impact Statements. Option 1 in the paper would allow the Commission to adopt the DOE EIS in its entirety but would require the Commission's ultimate decision on DOE's application for approval to construct a repository to include consideration of the environmental impacts identified in the EIS adopted by the Commission.

You believe that NRC is not required to factor environmental concerns into its licensing decision if it adopts the DOE EIS. You read Section 114(f) as evidence of Congressional intent to relieve the Commission of <u>any</u> NEPA responsibility to the extent that it adopts the EIS prepared by DOE. You are persuaded that the provisions for judicial review after the DOE EIS is finalized and before an application is before the Commission for review are tantamount to making the environmental issues <u>res adjudicata</u>. Consequently, you believe that such issues can not be properly reopened during the Commission's deliberations on the application.

You disagree with my position that the NEPA words "such statement ... shall accompany the proposal through the existing agency review processes" remain operative even though the Commission adopts the EIS under Section 114(f).

As you know, I have not accepted your opinion concerning the effect of Section 114(f) on the operative language in Section 102(2)(c) of NEPA. I continue to believe that NEPA requires a federal agency to consider the environmental implications of its decisions. Since there can be no argument that the NRC's licensing decision is a "major federal action", NEPA requires that the NRC consider the environmental consequences of its decision. In <u>Aberdeen & Rockfish R. Co. v. SCRAP</u>, 422 U.S. 289 (1975), the Supreme Court stated:

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"NEPA does create a discrete procedural obligation on Government agencies to give written consideration of environmental issues in connection with certain major federal actions and a right of action in adversely affected parties to enforce that obligation. When agency or departmental consideration of environmental factors in connection with that 'federal action' is complete, notions of finality and exhaustion do not stand in the way of judicial review of the adequacy of such consideration. ..." p. 319.

In considering the import of the NEPA language concerning the EIS accompanying the existing agency review processes, the Supreme Court stated:

"Where an agency initiates federal action by publishing a proposal and then holding hearings on the proposal, the statute would appear to require an impact statement to be included in the proposal and to be considered at the hearing." p. 320.

I find nothing in the NWPA which would specifically overrule the SCRAP decision or alter this agency's long-standing practice concerning the role the FES has in agency decisionmaking, whether or not the NRC chooses to adopt all or part of the DOE EIS as its EIS for purposes of its decision.

It is my opinion that there are two distinct considerations which the Commission is required to include in its process. First, the Commission must determine to what extent it is required to prepare, circulate, and finalize an environmental impact statement. Second, it must determine how to use that statement in its decision process. Regarding the first consideration, it is clear that Section 114(f) of the NWPA allows the Commission to adopt the DOE EIS without repeating the procedural steps of draft, comment, and analysis. Nothing in Section 114(f), however, relieves the Commission of its responsibility to consider the environmental impacts identified in its EIS (whether it adopts DOE's or prepares its own) as part of its licensing decision process.

Since you and I have had innumerable discussions concerning this issue over the past six months, I am acknowledging receipt of your memorandum and am forwarding it along with this response to Guy H. Cunningham, III, Executive Legal Director for further handling in accordance with NRCM 4125.

William J. Olmstead

William J. Olmstead, Director
Regulations Division
Office of the Executive Legal Director

cc: GHCunningham, III

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

JAN 2 0 1985

MEMORANDUM FOR: William J. Olmstead
Director, Regulations Division
Office of the Executive Legal Director

FROM: James R. Wolf
Senior Regulations Attorney
Office of the Executive Legal Director

SUBJECT; NEPA REVIEW PROCEDURES FOR GEOLOGIC REPOSITORIES FOR HIGH-LEVEL WASTE: DIFFERING PROFESSIONAL OPINION

Section 114(f) of the Nuclear Waste Policy Act of 1982 provides, in part, that: "To the extent such [environmental impact statement prepared by DOE in connection with a repository] is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954."

It is my professional opinion that the Act means what it says - that adoption of the DOE EIS satisfies the Commission's NEPA responsibilities (to the extent of such adoption). The Commission paper prepared by the staff on NEPA review procedures contemplates that notwithstanding adoption of the EIS, the Commission would be required to independently factor into its licensing decision the environmental values identified by NEPA. In my view, this would be contrary to the legislative scheme and, in addition, unsound as a matter of policy. The Commission has been charged with the great responsibility of making a judgment for which it alone has the necessary expertise - namely, whether the specific repository proposed by DOE can be constructed and operated safely, from the standpoint of radiological concerns, both in the short term and over thousands of years in the future. Congress intended that this should be the fundamental concern of the Commission and structured the Nuclear Waste Policy Act so as to focus the Commission's decisionmaking almost exclusively thereon.

Another provision of Section 114(f) requires the Commission to adopt the DOE environmental impact statement "to the extent practicable." It is my view, consistent with the first alternative in the staff paper, that it is practicable to adopt an EIS that has been found by a court of competent jurisdiction to be adequate. If the action involved is the same - i.e., if the repository program proposed by DOE in its license application is the same as the one considered in the EIS - then further litigation on the

adequacy of the EIS is foreclosed under conventional principles of collateral estoppel.

Although the staff's first alternative - adopting the EIS to the extent it survives judicial review - is most faithful to legislative intent, in my opinion, an argument could also be made for the third alternative. This would allow all relevant and material environmental issues to be contested in NRC licensing proceedings. The recommended alternative (alternative 2), however, would require the Commission to determine the extent to which it will consider environmental issues on grounds that appear to be entirely unrelated to NEPA. This could well lead to challenges that the Commission's rules were arbitrary.

The Nuclear Waste Policy Act is designed to assure that safety and environmental issues receive exceptional scrutiny before the construction of a geologic repository is ever authorized. (Many of the issues of the greatest sensitivity are, of course, matters of direct concern for both safety and environmental reasons. Such issues would be addressed both in the context of the Atomic Energy Act and NEPA.) The structure of the Act makes it clear that environmental issues are to be evaluated through elaborate procedures that run their course before the Commission ever receives a license application. Thus, DOE is required to prepare environmental assessments on sites being considered for site characterization and there must be prior consultation with the Governors of the affected States and public hearings - but there is no provision whatsoever for NRC involvement. NWPA, Sec. 112(b). Site characterization is to be carried out in a manner to minimize significant adverse environmental impacts and DOE is to consider comments of area residents and is to consult with the Governor of the State involved - but once again the Commission is not named. NWPA, Sec. 113(a). DOE must have completed a final environmental impact statement at the time it submits to the President a recommendation of a site for development of a repository; upon final action by DOE or the President, this EIS is subject to judicial review. NWPA, Secs. 114(a), 119(a). Generally, judicial review of the EIS is barred unless a petition is filed within 180 days after such final action. NWPA, Sec. 119(c). In addition, a State may submit to Congress a notice of disapproval, which results in blocking further development unless Congress passes a resolution of siting approval which becomes law. NWPA, Sec. 115. In practice, this provides a final opportunity to evaluate whether - apart from radiological safety concerns - the construction and operation of the proposed repository presents an acceptable balance between environmental benefits and costs. It would border on the absurd for the Commission to open up issues that had been resolved as a matter of policy by the enactment of a pertinent law.

Environmental concerns are of critical importance to the nation. And so are radiological safety concerns. The Nuclear Waste Policy Act provides for both. It places a heavy burden on the Commission to ensure that a repository, if constructed, will isolate waste for thousands of years in accordance with the standard issued by the Environmental Protection Agency.

It leaves to others, including the courts and Congress, the responsibility for nonradiological judgments. The Commission need only recognize and implement this direction.

Statement of Differing Professional Opinion

In accordance with NRC Manual, Chapter NRC-4125, it is my opinion that:

1. The prevailing staff view is that existing agency NEPA practice should be followed with respect to environmental issues that are not independent of actual repository performance and that adoption of DOE's EIS would not relieve NRC of its duty, under NEPA, to factor nonradiological environmental concerns into its licensing decision.

2. The Commission should adopt the DOE EIS to the extent that it has been found to be adequate by a court of competent jurisdiction (or to the extent that legal challenge is barred on grounds of timeliness) and that, to the extent of such adoption, the Commission is relieved of any further responsibility under NEPA. It is my further opinion that a proposed rule, in the form of Attachment A to this statement, should be issued by the Commission for public comment. (It would need to be amended to invite related comments on the pending rulemaking petition filed by the States of Nevada and Minnesota.)

3. Failure to adopt this opinion will result in some loss of focus and direction in the Commission's program. NRC will do a better job of determining whether a repository can be constructed and operated safely if it sees this task as its sole mission and conveys this view to all parties concerned. Similarly, it will assist all other interested parties to address nonradiological issues, and to have them resolved through an orderly process, if they understand that NRC is not directly involved in the judgments in question. What is at stake, primarily, is a question of accountability. I believe that Congress intended the Commission to be accountable for judgments regarding the radiological safety of HLW disposal at a repository, while DOE, the President, and Congress itself would decide all other matters.

Failure to adopt this opinion will also have significant time and resource implications. To start with, implementation of any of the alternatives being proposed by the staff is likely to require that a period of several months be devoted to the preparation of a proposed rule. Then, over the years ahead, staff resources might be required (depending upon the alternative selected) to assess, and respond to State inquiries regarding, issues unrelated to the radiological safety of repository performance. Similarly, the scope of licensing proceedings and the Commission's

decisionmaking could be significantly expanded by the introduction of NEPA concerns. This could further complicate NRC's ability to meet its scheduling goals. More importantly, it could divert attention from the matters that are central to the Commission's role. Adoption of the staff recommendations would not be fully responsive to the mandate of the Nuclear Waste Policy Act and, accordingly, would carry with it significant litigative risk.

James R. Wolf
Senior Regulations Attorney
Office of the Executive
Legal Director

Enclosure: As stated

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2, 51 and 60

NEPA Review Procedures for Geologic Repositories for High-Level Waste

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to revise its procedures for implementation of the National Environmental Policy Act (NEPA). The proposed rule would address the Commission's role under NEPA in connection with a license application submitted by the Department of Energy with respect to a geologic repository for high-level radioactive waste (HLW). The changes are needed in order to reflect the provisions of the Nuclear Waste Policy Act of 1982. Under that Act, the Commission is required to adopt the Department's environmental impact statement to the extent practicable. The proposed rule, among other things, sets out the standards and procedures that would be used in determining whether such adoption is practicable.

DATES: Comment period expires _____. Comments received after _____ will be considered if it is practical to do so, but assurance of consideration cannot be given except at to comments filed on or before that date.

ADDRESSES: Submit written comments and suggestions to: Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C., 20555, Attention: Docketing and Service Branch. Copies of comments received may be

examined at the NRC Public Document Room, 1717 H Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Clark Prichard, Division of Radiation Programs and Earth Sciences, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone (301) 427-4586 or James R. Wolf, Office of the Executive Legal Director, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone (301) 492-8694.

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INTRODUCTION

All agencies of the Federal Government are charged with the duty to interpret and administer the laws of the United States, to the fullest extent possible, in accordance with the policies set forth in the National Environmental Policy Act of 1969, as amended (NEPA). 42 U.S.C. 4321 et seq. Under NEPA, the Nuclear Regulatory Commission is required to prepare an environmental impact statement (EIS) with respect to any major Federal action significantly affecting the quality of the human environment. The EIS contains a detailed statement of the environmental impacts of a proposed

action, including adverse unavoidable effects resulting from its implementation, as well as an identification of alternatives to the proposed action.

The Commission is responsible for the licensing and regulation of activities involving the possession of nuclear materials. Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq. The Department of Energy (DOE) must obtain a license from NRC before disposing of high-level radioactive waste (HLW) in geologic repositories. Sec. 202, Energy Reorganization Act of 1974, 42 U.S.C. 5842. The licensing of DOE to receive and possess HLW at a geologic repository involves one or more major Federal actions significantly affecting the quality of the human environment. Accordingly, NEPA requires the Commission to have an EIS (or multiple EIS's if more than one major Federal action by NRC is involved) to accompany its decision process when it considers a license application from DOE involving HLW disposal. Further direction regarding NRC's NEPA responsibilities is provided by the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10101 et seq.

The Commission has recently promulgated revised regulations (10 CFR Part 51) to implement Section 102(2) of NEPA, the section which, among other things, calls for the preparation of an EIS. 49 FR 9352, March 12, 1984, and 49 FR 24512, June 14, 1984. In issuing these regulations, the Commission noted that it had initiated a review of the licensing procedures applicable to geologic repositories in the light of the Nuclear Waste Policy Act and that the Commission would determine, as part of that review, whether further changes to 10 CFR Part 51 are needed. Recently, the Commission also proposed certain amendments to 10 CFR Part 60. 50 FR 2579, Jan. 17, 1985. Those amendments deal with (1) the role of NRC during site screening and site

characterization activities and (2) State, tribal, and public participation in NRC activities with respect to geologic repositories. In proposing those rules, the Commission noted that issues pertaining to NRC responsibilities under NEPA will require modifications to 10 CFR Part 51 and that such amendments would be the subject of a subsequent rulemaking.

As contemplated by its prior statements, the Commission now proposes amendments dealing with NRC implementation of NEPA in connection with Department of Energy geologic repositories.

THE PRE-NWPA LICENSING FRAMEWORK

The Atomic Energy Act of 1954 charges the Commission with several types of licensing responsibility. One class of Commission action is materials licensing. Under its statutory authority, the Commission prescribes such rules as it finds to be needed to assure that persons possess and use the regulated materials in a manner that protects public health and safety and is not inimical to the common defense and security. DOE's disposal of HLW at a geologic repository is subject to this materials licensing authority of the Commission. The Commission several years ago determined that it would be necessary, to protect health and safety, to review DOE's plans with respect to a geologic repository before commencement of construction. 46 FR 13971, Feb. 25, 1981 (final licensing procedures). Accordingly, DOE is required not to commence construction of a geologic repository unless it has first filed a license application and obtained the Commission's construction authorization. 10 CFR §60.3(b). A construction authorization is not itself a license, since

it does not authorize possession or use of nuclear materials, but DOE's failure to comply with the requirement to apply for and to obtain construction authorization constitutes grounds for denial of the license that DOE would later need in order to receive high-level waste at the repository. Moreover, the Commission may, if necessary, issue orders to secure compliance with construction authorization conditions and to protect the integrity of the repository. 46 FR 13971.

In prescribing the information to be submitted by DOE, the Commission specified that an environmental report prepared in accordance with 10 CFR Part 51 shall accompany the license application. 10 CFR §60.21(a). The environmental report would discuss relevant NEPA considerations. In particular, as provided by this regulation, 10 CFR § 51.40(d)(1983):

> The discussion of alternatives shall include site characterization data for a number of sites in appropriate geologic media so as to aid the Commission in making a comparative evaluation as a basis for arriving at a reasoned decision under NEPA. Such characterization data shall include results of appropriate in situ testing at repository depth unless the Commission finds with respect to a particular site that such testing is not required. The Commission considers the characterization of three sites representing two geologic media at least one of which is not salt to be the minimum necessary to satisfy the requirements of NEPA. (However, in light of the significance of the decision selecting a site for a repository, the Commission fully expects the DOE to submit a wider range of alternatives than the minimum required here.)

Failure to provide the specified site characterization data would constitute grounds for denial of a license application. 10 CFR §2.101(f)(4). If DOE had prepared its own EIS, that document could be submitted so long as it contained the information called for by the regulation; the Commission noted, however, that it could not be bound to accept judgments arrived at by DOE in its EIS. 46 FR 13973.

NRC would publish notices of the availability of the environmental report and of its intent to prepare an environmental impact statement. 10 CFR §51.50(a),(b)(1983). An environmental impact statement would be required before issuance of a construction authorization, 10 CFR §51.5(a)(11)(1983); and an EIS might also be determined to be necessary for issuance of the license to possess high-level waste at a repository, id. at §51.5(b)(11), or to terminate such license. id. at §51.5(b)(10). The EIS prepared before construction would be supplemented prior to issuance of a license to take account of any substantial changes in the activities proposed to be carried out or significant new information regarding the environmental impacts of the proposed activities, id. at §51.41.

Whenever an EIS was required, it would first be distributed as a draft and, after receipt of comments, NRC would then prepare a final EIS which would respond to any responsible opposing view not adequately discussed in the draft. The draft and final statements, and comments received, would accompany the application through the Commission's review processes. Ibid. (reference to §§51.22-51.26). In an adjudicatory hearing, as is required before issuance of construction authorization for a repository, the NRC staff would offer the final EIS in evidence. Any party to the proceeding may take a position and offer evidence on NEPA issues. As a result of the hearing, the Commission may arrive at findings and conclusions different from those in the final EIS prepared by the staff, and the final EIS will be deemed modified to that extent. Id. at §51.52(b).

Upon review and consideration of an application and environmental report, a construction authorization could be issued if the following environmental standard is met:

> That, after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, the action called for is issuance of the construction authorization, with any appropriate conditions to protect environmental values.

10 CFR § 60.31(c).

While the Commission's formal NEPA determination would thus have been made in the course of licensing proceedings, the regulations provided further for NRC involvement at an even earlier stage - namely, at the time of site characterization. Site characterization is a program of exploration and research that includes specified activities "to determine the suitability of the site for a geologic repository." 10 CFR § 60.2(p)(1983). It is needed not only to determine whether defects are present, but also to determine specific properties such as homogeneity, porosity, the extent of fracturing and jointing, and thermal response of the rock. Site characterization data are needed so as to provide a satisfactory basis for arriving, with confidence, at the technical judgments underlying the Commission's initial licensing decision. 44 FR 70410, Dec. 6, 1979 (proposed licensing procedures). The Commission noted its belief that it would be necessary for DOE to carry out site characterization at three or more sites in two (or more) geologic media, at least one of which is not salt. Such multiple site characterization would provide the only effective means by which NRC can make a comparative evaluation of alternatives as a basis for arriving at a reasoned decision under NEPA. 46 FR 13972.

The Commission regulations called upon DOE to submit, in advance of site characterization, a Site Characterization Report, which would be reviewed informally by NRC. In addition to describing the site to be characterized and the proposed site characterization program, the report would include several items of information pertaining to site selection, specifically:

- The criteria used to arrive at the candidate area.
- The method by which the site was selected for site characterization.
- Identification and location of alternative media and sites at which site characterization is contemplated.
- A description of the decision process by which the site was selected for characterization, including the means used to obtain public, Indian tribal and State views during selection.

10 CFR § 60.11 (1983). The Commission found the inclusion of plans for considering alternative sites to be necessary so that NRC could call to the attention of DOE, in a timely manner, additional information that might be needed by the Commission in reviewing a license application in accordance with NEPA. 46 FR 13972. (Also, in the preamble to the proposed licensing procedures, the Commission had discussed the requirement that DOE describe the site selection process, and State involvement therein. The Commission noted its belief, in this connection, that many issues, "including the NEPA questions related to alternatives and alternative sites," would be more easily resolved if State concerns were identified and addressed at the earliest possible time. 44 FR 70412.)

THE NUCLEAR WASTE POLICY ACT

Congress established Federal policy for civilian radioactive waste disposal in the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10131 et seq.). The Commission's responsibilities for radiological safety, under prior law, were recognized and confirmed - most clearly in the express provision in Section 114(f) that "Nothing in this Act shall be construed to amend or otherwise detract from the licensing requirements of the Nucler [sic] Regulatory Commission as established in title II of the Energy Reorganization Act of 1974 (Public Law 93-438)." 42 U.S.C. 10134(f).

The statute provides for a licensing process that conforms closely to the preexisting framework of 10 CFR Part 60. NWPA thus requires DOE to carry out a program of site characterization, after first submitting to NRC a general plan for site characterization activities (along with certain information regarding waste form or packaging as well as a conceptual repository design). Sec. 113(b)(1), 42 U.S.C. 10133(b)(1). This corresponds closely to the Site Characterization Report provision of Part 60, 10 CFR §60.11(a); notably, however, the NEPA-related requirement of the regulation that DOE include site screening and selection information in its submission was omitted. (As discussed below, the site screening and selection information must be identified in a separate document - the environmental assessment - which does not require NRC review.)

As provided earlier in Part 60, an application is to be submitted in advance of construction. This is to be followed by Commission review in accordance with the laws applicable to such applications and a decision

approving or disapproving the issuance of a construction authorization. Sec. 114(b),(d), 42 U.S.C. 10134(b),(d). In addition to its action on applications for construction authorization, the Commission would review, and approve or disapprove, applications for licenses to receive and possess the waste (and spent fuel) in a repository and applications for closure and decommissioning. See Sec. 121(b), 42 U.S.C. 10141(b). For the corresponding provisions of NRC regulations, see 10 CFR §§60.31 (construction authorization), 60.41 (license to receive and possess), and 60.51 (license amendment for permanent closure). 1/

The Nuclear Waste Policy Act also confirms the Commission's most important stated position with respect to compliance with NEPA. In its

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1/ One difference between the language of NWPA and Part 60 is worthy of note: that the statute differentiates between an application for construction authorization and an application for a license, whereas the regulation refers solely to an application for a license to receive and possess waste (to be filed prior to construction). The Commission considers this differentiation to lack any substantive significance. There is, first, the legal consideration that the "laws applicable to such applications" - namely, the Atomic Energy Act - provide only for the submission by prospective materials licensees of applications for licenses. The basis for any licensing decision by the Commission in the absence of such of a license application is doubtful. Second, and perhaps more important, the information which the Commission needs in order to be able to consider the issuance of a construction authorization is generally the same as will be needed prior to issuance of the license to receive and possess HLW. For this reason, the Commission regulations call for the application to be as complete as possible in the light of information that is reasonably available at the time of docketing - i.e. prior to commencement of construction. 10 CFR §60.24(a). Accordingly, the Commission intends to retain its requirement of a unitary application; it is not required to, and it does not propose to, modify its rules to provide separately for applications for construction authorization on the one hand and a license to receive waste on the other.

regulations, cited above, the Commission had construed NEPA's command to consider reasonable alternatives as a requirement for characterization of at least three sites, in at least two geologic media. Although establishing new procedures, NWPA follows precisely the same substantive approach.

Site Selection under the Nuclear Waste Policy Act

The Nuclear Waste Policy Act directs the development of two geologic repositories. This section will describe the process leading to the selection of a site for the first repository. The process for a second repository is generally the same, except that the statutory dates for particular actions are several years later.

The site selection process (which is well under way) began with DOE's identification of States with "potentially acceptable sites" -- sites at which DOE, after geologic studies and field mapping, was to undertake preliminary drilling and geophysical testing for the definition of site location. DOE was required to notify States involved, and affected Indian tribes, of the identification of such sites. Sec. 116(a), 42 U.S.C. 10136(a). DOE identified nine potentially acceptable sites for the first repository and provided notice to the six states in which such sites were located.

Before the selection process could move any further, DOE had to issue "general guidelines for the recommendation of sites for repositories." NWPA provides that, under the guidelines, DOE would need to consider the various geologic media in which sites may be located and, to the extent practicable,

to recommend sites in different geologic media. The guidelines were to specify factors that qualify or disqualify a site from development as a repository; among the factors specified by the law were certain nonradiological environmental concerns as well as considerations related to the isolation of the radionuclides in the waste. NWPA required DOE, prior to issuance of the guidelines, to consult with the Council on Environmental Quality, the Environmental Protection Agency, the Geological Survey, and interested Governors. DOE was also required to obtain the concurrence of the Commission in the guidelines. Sec. 112(a), 42 U.S.C. 10132(a). Guidelines have been issued by DOE. 49 FR 47714, Dec. 6, 1984.

Following issuance of the guidelines and consultation with the governors of affected States, DOE is to nominate at least 5 sites determined to be suitable for site characterization. Sec. 112(b)(1)(A), 42 U.S.C. 10132(b)(1)(A). Nomination must be preceded by public hearings near the site, on which occasions residents of the area will be solicited with respect to issues that should be addressed by DOE in its environmental assessment and site characterization plan. Sec. 112(b)(2), 42 U.S.C. 10132(b)(2). Also before nomination DOE must notify the States or affected Indian tribes of its intent to nominate a site and of the basis for such nomination. Sec. 112(b)(1)(H), 42 U.S.C. 10132(b)(1)(H). The nomination itself must be accompanied by an environmental assessment, which sets out the basis for nomination and which dicusses the probable impacts of site characterization activities. The environmental assessment, which is to be made public, contains an evaluation of the suitability of the site for site characterization under the general guidelines, an evaluation of the suitability of the site for development as a

repository under each guideline that does not require site characterization as a prerequisite for application, an evaluation of the effects of site characterization on the public health and safety and the environment, a comparative evaluation with other sites that have been considered, a description of the decision process by which the site was recommended, and an assessment of the regional and local impacts of locating the repository at the site. The sufficiency of an environmental assessment with respect to these matters is subject to the judicial review provisions of the statute, which generally require petitions for review to be filed within 180 days after the action involved. Sec. 112(b)(1)(E through G), 119; 42 U.S.C. 10132(b)(1)(E through G), 10139. DOE has released draft environmental assessments, but final environmental assessments have not as yet been issued. The NRC staff reviewed and commented on the draft environmental assessments.

Subsequent to site nomination, DOE is to recommend to the President three of the nominated sites for characterization as candidate sites. Sec. 112(b)(1) (B), 42 U.S.C. 10132(b)(1)(B). Once sites are approved by the President, the States and affected Indian tribes will be notified. Sec. 112(c), 42 U.S.C. 10132(c).

Before sinking shafts at an approved site, DOE is to submit to the States and affected Indian tribes - and, in this instance to the Commission as well - for their review and comment, a general plan for site characterization activities, a description of the possible form or packaging of the waste, and a conceptual repository design. The general plan is to describe the site, the proposed site characterization activities, plans for decommissioning a site that is determined to be unsuitable (and plans for

investigation of significant adverse environmental impacts of site characterization), the criteria to be used to determine site suitability (i.e., the siting guidelines), and other information related to site characterization activities required by the Commission. Sec. 113(b), 42 U.S.C. 10133(b). Congress has declared that site characterization activities shall not require the preparation of an environmental impact statement, or other environmental review under NEPA. Sec. 113(d), 42 U.S.C. 10133(d). However, DOE is to hold public hearings near a site, and to receive comments of residents of the area with respect to the site characterization plan. Sec. 113(b)(2), 42 U.S.C. 10133(b)(2). And those comments, as well as those received on the environmental assessments, are to be considered by DOE. DOE, in consultation with the States and affected Indian tribes (but not specifically the Commission) is to conduct site characterization activities in a manner that minimizes significant adverse environmental impacts identified in the comments. Sec. 113(a), 42 U.S.C. 10133(a). DOE is to report periodically to the Commission and to States and affected Indian tribes on the progress of site characterization and the information developed to date. Sec. 113(b)(3), 42 U.S.C. 10133(b)(3).

The selection process continues with the identification of one site for development of a repository. DOE must hold hearings near that site, and it must complete site characterization not only for that site but for at least two other sites as well. DOE may recommend to the President that he approve the site where hearings were held. The recommendation, notice of which is to be given to States and affected Indian tribes, is to be accompanied by a description of the proposed repository and waste form or packaging; a

discussion of site characterization activities, relating to the safety of the site; a final environmental impact statement; preliminary Commission comments regarding the sufficiency of data for inclusion in a license application; comments of States and affected Indian tribes, with DOE's response; and an impact report prepared by States or affected Indian tribes requesting financial or technical assistance to mitigate impacts. Sec. 114(a)(1), 42 U.S.C. 10134(a)(1). The EIS is reviewable (except for good cause) only if a petition is filed within 180 days after the date of the decision concerned (i.e., presumably, the recommendation to the President). Sec. 119(a)(1)(D), 42 U.S.C. 10139 (a)(1)(D). The alternative sites to be considered are three sites at which characterization has been completed and DOE has made a preliminary determination of their suitability for development as repositories under the guidelines issued earlier. Sec. 114(f), 42 U.S.C. 10134(f).

The President may submit to Congress a recommendation of a site that has previously been recommended to him by DOE. By law, the President's recommendation does not require the preparation of an EIS or other NEPA environmental review. Sec. 114(a), 42 U.S.C. 10134(a). A State may disapprove a site recommended by the President, by giving notice of such action to Congress. The notice of disapproval is to be accompanied by a statement of the State's reasons. Sec. 116(b), 42 U.S.C. 10136(b). In the case of a site on a reservation, the affected Indian tribe may submit such a notice of disapproval. Sec. 118(a), 42 U.S.C. 10138. The President's recommendation would then become effective only if Congress passes a

resolution approving the site, and such resolution thereafter becomes law. Sec. 115(c), 42 U.S.C. 10135(c).

If the site designation becomes effective - by virtue of a State or Tribe's failure to disapprove within the specified times or by virtue of the Congressional override of the State's notice of disapproval - DOE is directed then to submit its application to the Commission. Sec. 114(b), 42 U.S.C. 10134(b). The Commission is to consider an application in accordance with the laws applicable thereto. Sec. 114(d), 42 U.S.C. 10134(d). (While the statute refers to the DOE submission as being an "application for a construction authorization," the regulations provide for the submission to be a license application, since that is the statutory framework set out in the Atomic Energy Act, which is the pertinent applicable law. See note 1, supra.)

If DOE's application is acceptable, the site selection process then ends, subject to judicial review, with the Commission's issuance of a construction authorization.

NRC NEPA Responsibilities in Light of NWPA

The Nuclear Waste Policy Act preserves the Commission's obligation to comply with NEPA. Nevertheless, the scope of the inquiry and the standards and procedures to be applied in arriving at findings in accordance with NEPA are clearly influenced by the express and implied mandates of the later statute. The import of NWPA is especially forceful in relation to site selection, but the Commission regards the statute as having a pervasive effect upon all of its NEPA responsibilities.

First, there are several express provisions of NWPA that narrow the range of alternatives that must be considered in the environmental impact statement, especially for the first repository. Thus, DOE's compliance with the procedures and requirements of the Nuclear Waste Policy Act "shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository." Even more forcefully, the Act declares that any EIS prepared with respect to the first repository shall not consider the need for a repository or nongeologic alternatives to the site; and the alternative sites to be considered are those candidate sites (three in the case of the first repository, and at least three in the case of subsequent repositories) with respect to which site characterization has been completed and the Secretary (of DOE) has made a preliminary determination that such sites are suitable for development of repositories. Sec. 114(f), 42 U.S.C. 10134(f).

In addition, Section 114(f) directs the Commission to adopt DOE's EIS "to the extent practicable." As a minimum, this requires the Commission to give substantial weight to the findings of other bodies, where relevant to the determinations to be made by the Commission itself. This is consistent with prior practice. For example, in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 527 (1977), the Commission observed that a competent and responsible state authority's approval of the environmental acceptability of a site or a project after extensive and thorough and evnironmentally sensitive hearings is properly ertitled to such substantial weight in the conduct of its own NEPA analysis.

Similarly, to the extent that Congress has enacted legislation approving a specific project, an agency's obligation to discuss alternatives in its EIS is relatively narrow; although the "rule of reason" applies, such action does have a bearing on what is considered a reasonable alternative and a reasonable discussion. Izaak Walton League v. Marsh, 655 F.2d 346, 372 (D.C. Cir. 1981), citing Sierra Club v. Adams, 578 F.2d 389, 396 (D.C. Cir. 1978). The concept of adoption, as it appears in NWPA, is examined more fully below; for the present, it is sufficient to note that it at least reinforces a deferential standard for Commission review.

The Waste Policy Act provides that adoption of the EIS shall be deemed to satisfy the Commission's NEPA responsibilities "and no further consideration shall be required." What "further consideration" is at issue? Perhaps this was intended to limit judicial review of the Commission's decision, by committing that decision to the Commission's discretion. This seems improbable, however, since administrative actions are presumed to be reviewable unless it can clearly be shown that judicial review would be inappropriate. International Ladies' Garment Workers Union v. Donovan, 722 F.2d 795, 807 (D.C. Cir. 1983). A preferable construction, therefore, would be that if the Commission had adopted the EIS after having completed an appropriate review, no further consideration should be undertaken in subsequent formal adjudicatory proceedings.

The final limitation on the Commission's consideration of NEPA issues stems from the judicial review provisions of the Nuclear Waste Policy Act. Section 119, 42 U.S.C. 10139 provides for the United States courts of appeals to have original and exclusive jurisdiction over any civil action for review

of any environmental impact statement prepared with respect to a geologic repository and imposes a deadline of 180 days (with certain exceptions) for commencing such an action. Thus, review of the adequacy of DOE's environmental impact statement must be sought, if at all, within 180 days after the Secretary has made a site recommendation to the President. As a minimum, any judicial findings with respect to the adequacy of the EIS prepared by DOE would be entitled to substantial weight in the Commission's deliberations. But this statement is incomplete. In fact, if the EIS prepared by DOE has been adjudged to be adequate for purposes of the site recommendation made by the Department, further litigation of the issues in NRC adjudications would be precluded under the doctrine of collateral estoppel. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561 (1977). And, if an issue bearing upon the adequacy of that EIS could have been raised, but was not raised in a timely manner, the deadline for commencing action set out in Section 119 operates to bar a challenge at a later date in NRC licensing proceedings.

The Preclusive Effect of Section 119

The Commission's reading of Section 119 merits a fuller statement of the legal doctrines that are collectively referred to as the rules of *res judicata*. One of these doctrines is the rule of "claim preclusion" - that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. The related rule of "issue preclusion" (or collateral estoppel) reflects the principle that

one who has actually litigated an issue should not be allowed to relitigate it. The effect, and value, of these rules is that they compel repose, so that the indefinite continuation of a dispute can be avoided. Judgments must in general be accorded finality despite flaws in the processes leading to decision and the unavoidable possibility that the results in some instances were wrong. Only when there is a substantial possibility of injustice might relitigation be warranted. Restatement (Second) of Judgments 2-12.

The clearest application of these principles would occur where there has actually been a timely challenge to the adequacy of DOE's environmental statement. A final judgment in such litigation would be conclusive, in any subsequent action between the parties, as to any issue of law or fact that had actually been litigated, id. § 27. Moreover, the party who had challenged the EIS would thereafter be precluded from litigating such issues with another person as well, id. § 29.

The judgment in an action, under Section 119(a)(1)(D), for review of DOE's environmental impact statement will therefore preclude the petitioner from later litigating the same issues with NRC (even assuming that NRC is a different person, for these purposes, from its sister agency DOE). The dimensions of the issue that were determined by the judgment may be a matter of debate. But if the litigant has had an adequate day in court, a desire to prevent repetitious litigation of what is essentially the same dispute justifies preclusion of the issue's being raised anew. While the action being taken by DOE is the recommendation to the President of a site for repository development and the action being taken by the Commission is the issuance of a construction authorization for a repository, the relevant

considerations in the two situations are identical. Both agencies will be addressing the development of a repository at a specific location and both will require an environmental impact statement that describes the pertinent environmental impacts and considers appropriate alternatives. If the DOE EIS's legal effect is found to be adequate to meet the requirements of NEPA, then it would ordinarily be proper to preclude a challenge to the identical EIS relied upon by the Commission. See Id., § 27.

The preclusive effect of a prior judgment sustaining DOE's environmental impact statement would not necessarily be limited to the petitioner of record in that proceeding. Those who were represented by that petitioner would also be barred from litigating the issue in a subsequent action. For example, if the EIS had been challenged by the public officials of the State in which a repository was proposed to be located, members of the public who had been represented by those officials would be precluded, to the same extent, from raising the issues anew. Id., § 41, comment d.

Another provision in Section 119 requires that a civil action for review of an environmental impact statement with respect to any action under Subtitle A (pertaining to geologic repositories) be brought within a period of 180 days after the date of the action (or after obtaining actual or constructive knowledge thereof). Thus, a failure to meet the deadline for challenging the DOE environmental impact statement would foreclose any subsequent litigation with respect to the action to which that EIS pertains. The objective appears to have been to identify issues promptly and to seek to resolve them in a timely manner. Where there is litigation in accordance with this provision, the principles described above would preclude further

judicial examination of the same issues as they relate to the Commission's action. But what would happen if for some reason the adequacy of the DOE environmental impact statement had not been reviewed judicially before it was time for the Commission to act? If the Commission were to adopt the DOE environmental impact statement, would a petitioner be able to seek review thereof at that time? The Commission is of the opinion that the courts would deny such a petition as being untimely. There would be, in this case, only one environmental impact statement; and, in accordance with section 119, there would be but one opportunity for review. To conclude otherwise would be to frustrate the objective of seeking an early resolution of the environmental issues that might be involved. See Eagle-Picher Industries v. U.S. Environmental Protection Agency, 759 F.2d 905, 911-919 (D.C. Cir. 1985).

Legislative History

The language of the Nuclear Waste Policy Act conveys a direction to the Commission to concern itself with issues of health and safety and not - except insofar as health and safety may be concerned - with the kinds of issues that are ordinarily considered in the context of reviews under NEPA. This direction appears especially clearly in connection with the screening and selection of repository sites. The only provisions for NRC involvement in the site screening and selection process concern the issuance of the general guidelines for the recommendation of sites for repositories (in which the Commission is required to concur), the Department's plans for site characterization (which must be submitted to the Commission for review and comment), and the preparation of preliminary comments by the Commission to

accompany the Secretary's recommendation of a site concerning the extent to which DOE's site characterization analysis and waste form proposal seem to be sufficient for inclusion in a license application. With the possible exception of the guidelines, the Commission's role is defined so as to address the safety issues (which are the subject of DOE's site characterization program and waste form proposal) that must be resolved in licensing proceedings. Where Congress sets up a detailed mechanism for consideration of particular issues by an agency, and review of that agency's decisions, as it has here done with respect to the NEPA actions of DOE, it may be inferred that it did not intend to rely upon this Commission to challenge DOE "disregard of the law" after all these procedures have run their course. Cf. Block v. Community Nutrition Institute, ___ U.S. ___, 81 L.Ed.2d 270, 279 (1984); see also Brown & Root, Inc. v. Donovan, 747 F.2d 1029, 1035 (5 Cir. 1984) (detailed regulation of nuclear industry under direction of Congress indicates that additional regulation would upset the cost-benefit balance intended by the legislature).

A consideration of the legislative history lends further support to this analysis. Although there were several bills dealing with nuclear waste issues before the 97th Congress, the provisions dealing with site selection issues can be traced directly to H.R. 3809, as reported out by the Committee on Interior and Insular Affairs. H.R. Rep. 97-491, Part 1, 97th Cong., 2d Sess. (1982). The bill included sections - similar to those ultimately enacted - on guidelines, site characterization, site approval and construction authorization, review of repository site selection by Congress, participation of States and Indian tribes, etc. The provision relating to the site

characterization plan to be prepared by DOE was drawn directly from the corresponding NRC regulation. (Compare H.R. 3809, Sec. 113(b)(1)(B) with 10 CFR § 60.11(a) (1982).) All the matters related to the ability of the site to host a repository and isolate radioactive waste were carried over from the regulation to the bill. But matters pertaining to the screening and selection of sites, though set out in the regulation, were omitted in the bill. These include the requirements that DOE discuss the decision process used by DOE in selecting sites for characterization and identify alternative media and sites at which DOE intended to conduct site characterization. Under the proposed legislation, this information would no longer come to the Commission for review. H.R. 3809 also included the provision, ultimately enacted, that the Commission would be required to adopt the EIS prepared by the Secretary "to the extent practicable." The limited nature of the Commission's role was emphasized by the explanatory language of the report to the effect that the Commission would be required so to adopt the EIS "to the maximum extent practicable" (emphasis added). Moreover, the EIS "is intended to suffice regarding the issues addressed and not be duplicated by the Commission unless the Commission determines, in its discretion, that significant and substantial new information or new considerations render the Secretary's statement inadequate as a basis for the Commission's determinations." H.R. Rep. 97-491, Part 1, 53-54.

There was no specific provision in H.R. 3809 requiring DOE to carry out and document a comparative evaluation of sites considered for site characterization. Later in the year, however, such a provision was incorporated into the bill (now H.R. 6598), as reported by the Committee on Energy and

Commerce. H.R. Rep. 97-785, Part I, 97th Cong., 2d Sess. (1982). Among other things, the bill (in Sec. 113(b)(1)(A)(v)) would have required DOE to prepare, prior to site characterization, an environmental assessment which would include a description of any other sites considered for site characterization. This information would have been submitted to the Commission for its review and comment. The purpose of providing reports at this stage was "to assure that adequate information is available to the Commission regarding the Secretary's proposed activities." Id. at 64. H.R. 6598 retained the provision for NRC adoption of DOE's environmental impact statement. The report explained, id. at 69:

> This provision is intended to avoid the duplication caused as a result of the applicability of NEPA to the actions of both the Secretary and the Commission regarding the preparation of an environmental impact statement. While the Commission is encouraged to adopt the Secretary's statement, or parts of such statement, the independent responsibilities of the Commission are specifically recognized. To the extent the Commission determines it is not practicable to adopt all or part of the Secretary's environmental impact statement, the Commission's responsibilities under NEPA remain in force, thus requiring the preparation of a supplemental environmental impact statement.

Floor consideration in the House was addressed to H.R. 7187, as a substitute for both H.R. 3809 and H.R. 6598. The EIS-adoption language appears once again. However, the provisions for an environmental assessment were modified in two important ways. First, DOE would now explicitly be required to make "a reasonable comparative evaluation" of the sites that had been considered for site characterization. Sec. 112(b)(1)(A). Second, under H.R. 7187 the environmental assessment would precede, rather than follow, the President's approval of sites to be characterized, and it would no longer be submitted to the Commission for review and comment. Ibid.

There was no committee report on H.R. 7187, but a summary of its provisions noted:

> In issuing the construction permit and license the NRC will rely on the Environmental Impact Statement prepared by the Secretary of Energy in recommending the repository site. The Commission will have to supplement any environmental impact statement with considerations of the public health and safety required under the Atomic Energy Act of 1954.

128 Cong.Rec. H8163 (daily ed. Sept. 30, 1982) (statement of Rep. Udall). Rep. Moorhead also characterized the Commission's role in terms of its health and safety responsibilities:

> "... an extensive environmental assessment must be developed by the Secretary of Energy in consultation with the States. There will be a full and complete review of the planned site under the National Environmental Policy Act, culminating in a comprehensive environmental impact statement. This as well as all other final agency actions - will be open to full judicial review. The Nuclear Regulatory Commission will have oversight authority over the development of this repository under its independent public health and safety standards."

Id. at H8170. Congressman Ottinger, too, differentiated in passing between "full environmental review" on the one hand and "full NRC licensing procedures to assure that the storage is safe" on the other. 128 Cong.Rec. H8527 (daily ed. Nov. 29, 1982).

The legislative history in the Senate is less illuminating, inasmuch as its bill, S. 1662, differs substantially from the final legislation. (S. 1662, as reported from the Committee on Energy and Natural Resources, appears at 128 Cong.Rec. S4139 ff., daily ed. Apr. 28, 1982.) Under S. 1662, the Commission would have a more substantive role with respect to implementation of NEPA. There would be no direction to the Commission to adopt the DOE environmental impact statement. Rather, under Section 405, the Commission

would be required to consider the application in accordance with the laws applicable thereto; as an exception, however, the bill provided that the Commission need only consider as alternate sites for the proposed repository those sites which have been approved by the President for characterization. Senator Simpson, sponsor of the legislation, explained that the NRC licensing process would provide opportunities for "a detailed evaluation of the health and safety and environmental aspects of the proposed project" (emphasis added). 128 Cong.Rec. S4302 (daily ed. Apr. 29, 1982).

In December 1982, the Senate turned to consider legislation following the pertinent language of the bill which had by that time been passed by the House of Representatives. Senator Mitchell declared that the national nuclear waste policy should "preserve the integrity and full scope of the NRC licensing review and environmental analysis under the National Environmental Policy Act," 128 Cong.Rec. S15669 (daily ed. Dec. 20, 1982), but the broad scope of his remarks leaves it of doubtful import in the context of geologic repositories alone. Of more significance, perhaps, is the colloquy with respect to an amendment proposed by Senator Levin, and passed, to include in Section 114(f) the language that nothing in the Act should be construed to amend or otherwise detract from the Commission's licensing requirements. Sen. Levin stated his understanding that the Act was not intended to restrict, or amend, or modify NRC requirements for the repository in any way "including, but not limited to, findings of need." Senator McClure, the floor manager of the bill, replied that Sen. Levin was correct and added that "that is my understanding also." Since findings of need have generally been regarded as NEPA issues, this could be taken to mean that the Commission

should discharge its NEPA requirements in the same way as it would in the absence of the review procedures prescribed by the Nuclear Waste Policy Act. This cannot be the case, however, in light of the other provisions of the Act, including those in Section 114(f) itself. It seems clear that the law was not intended to modify any of the Commission's licensing requirements under the Atomic Energy Act. The Commission construes the clause in question to be limited to those requirements; it does not pertain to the provisions of NEPA. The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history, Chrysler Corp. v. Brown, 441 U.S. 281, 311, 60 L.Ed.2d 208, 231 (1979), especially where as here their significance is not apparent without further study. Whatever the understanding of Sen. Levin may have been, the Nuclear Waste Policy Act manifestly does affect the manner in which the NEPA responsibilities of the Commission must be carried out, and the rules proposed below indicate the approach which we intend to take.

"Adoption" and the Nuclear Waste Policy Act

The Council on Environmental Quality has established procedures to guide agencies that are engaged in actions that have related environmental impacts. These procedures allow for several approaches to NEPA compliance, including one approach in which the environmental impact statement prepared by one agency is "adopted" by another agency. 40 CFR § 1506.3. In appropriate circumstances, an EIS prepared by another agency may be adopted, in accordance with CEQ regulations, in whole or part by NRC. 10 CFR Part 51,

Appendix A to Subpart A ¶1(b). An examination of those regulations will illuminate the direction to the Commission, in Section 114(f) of the Waste Policy Act, to "adopt" the DOE EIS to the extent practicable. In the absence of irreconcilable conflict with other provisions of NWPA, those regulations should be followed.

The CEQ regulations provide that where more than one agency is involved in the same action, either one agency will be designated a lead agency to prepare an EIS, or two (or more) agencies will be designated as joint lead agencies. Any agency which has jurisdiction by law with respect to the action shall be a cooperating agency, if so requested by the lead agency. An agency - even if it has jurisdiction - need not serve as a cooperating agency, however, unless the lead agency has requested it to do so. Whether or not it is a cooperating agency, a Federal agency with jurisdiction by law or special expertise with respect to any environmental impact involved has a duty to comment on a lead agency's statement within the commenting agency's jurisdiction, expertise, or authority. 40 CFR §§ 1501.5, 1501.6, 1503.2.

In the context of NWPA, it is apparent that the Department of Energy would be the lead agency and that the Commission would not be a lead agency. The Commission could either be a cooperating agency, with the particular responsibilities set out in § 1501.6 of the CEQ regulations, or merely a commenting agency. The NWPA points to the Commission's assuming the latter role. A cooperating agency is required to participate in the NEPA process at the earliest possible time, to participate in the scoping process leading to preparation of the environmental impact statement, and to assume on request of the lead agency responsibility for developing information and preparing

environmental analyses including portions of the EIS concerning which the cooperating agency has special expertise. The framework of NWPA, as rehearsed above, contemplates no such involvement by the Commission. It would be far more faithful to the statutory scheme for this agency merely to provide its comments, from time to time, with respect to environmental impacts falling within its jurisdiction or areas of special expertise. This is entirely consistent with the statutory provision that the Secretary of Energy's recommendation to the President of a site for repository development shall be accompanied by a final EIS, together with comments made by the Commission concerning such EIS. Sec. 114(a)(1)(D), 42 U.S.C. 10134(a)(1)(D).

As a commenting agency, the Commission would be authorized to adopt the EIS prepared by DOE provided that the statement meets the standards for an adequate statement under the CEQ regulations. The pendency or outcome of litigation with respect to the DOE EIS is one factor to be considered. This is apparent from CEQ's direction to the adopting agency to specify, where applicable, that "the statement's adequacy is the subject of a judicial action which is not final." Since the actions covered by the DOE EIS and the Commission's action are substantially the same - namely, development of a geologic repository of the proposed design at the proposed site - the Commission would not be required to recirculate the DOE EIS except as a final statement. 40 CFR § 1506.3.

The Commission can follow the CEQ procedures for a commenting agency, including the procedures for adoption of DOE's EIS. But the EIS can only be adopted if it meets the standards for an "adequate statement." The approach being taken by the Commission, in these proposed rules, is that NWPA and the

principles of res judicata will generally obviate the need for a separate review of the adequacy of the EIS by this agency. As this might be seen as a departure from established practices, the differences merit some further discussion.

It is well established that the Commission has a responsibility to consider environmental issues just as it considers other matters within its mandate. Moreover, the duty to consider environmental issues extends through all stages of the Commission's review processes, including proceedings before hearing boards. And the Commission may not simply defer totally to the standards set by other regulatory authorities with respect to environmental matters within their jurisdiction; to do so would be an abdication of the Commission's NEPA authority. Calvert Cliffs' Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971). There would be an abdication because NEPA mandates a case-by-case balancing judgment - a judgment that is entirely different from the piecemeal certification by another agency that its own environmental standards are met. The only agency in a position to make the kind of balancing judgment contemplated by NEPA is the agency with overall responsibility for the proposed federal action. Id. at 1123. In Calvert Cliffs, only the Atomic Energy Commission could make the required decision. In the case of a geologic repository, the Department of Energy is required to make precisely the kind of analysis that the court there deemed to be essential. For the Commission to adopt the DOE EIS without independent analysis, after there had been opportunity for judicial review thereof, would be entirely consistent with the reasoning of the earlier case. Similarly, the overlap between DOE and Commission actions

distinguishes the present situation from other NEPA decisions which required an independent balancing judgment by each of the agencies involved in a project. See Silentman v. Federal Power Commission, 566 F.2d 237, 240 (D.C. Cir. 1977); Henry v. Federal Power Commission, 513 F.2d 395, 407 (D.C. Cir. 1975) (Bureau of Reclamation control of relevant water rights for coal gasification plant; FPC regulation of gas transportation).

The similarity of DOE and Commission actions, from the standpoint of their respective environmental impacts, would not by itself be sufficient to persuade the Commission to defer to DOE's balancing judgments. The fact that the applicant for a license to build a nuclear power plant is another Federal agency does not excuse NRC from carrying out its usual NEPA obligations, even though both agencies would then be considering the same impacts associated with construction and operation of the facility. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, 8 NRC 533, 545 (1978). Were it not for the provisions of the Nuclear Waste Policy Act, discussed previously, the Commission would follow this precedent. But in that case there was no prior judicial determination that the other agency's EIS was adequate and there was no special statutory scheme for consideration of environmental impacts by interested parties and Congress. It is the judgment of the Commission that these unique considerations warrant, and indeed require, adoption of an EIS that is adequate to meet the obligations of DOE.

To repeat: the Commission must consider the environmental impacts resulting from the construction and development of a geologic repository for high-level radioactive waste. All that is in question is the basis for the Commission's consideration. As in other contexts, the Commission's decision

must satisfy a "rule of reason." The factors discussed above make it entirely reasonable for the Commission not to reopen issues that have been, or could previously have been, litigated. The Commission does not derogate the importance of NEPA issues. Under the Nuclear Waste Policy Act, they are extremely important - and in fact they are central to many of the elaborate procedural provisions incorporated in that legislation. It is to those provisions that parties concerned must turn. But once an application is submitted to the Commission, the question to be addressed is no longer one of environmental balancing, but rather the critical issue of radiological safety. That is an issue that is entrusted solely to the Commission, and the Commission can discharge its duties most effectively if it makes that the sole issue for decision.

THE PROPOSED RULES

This rulemaking proceeding is primarily concerned with amendments to 10 CFR Part 51, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions." The proceeding also encompasses conforming amendments to other parts of the Commission's regulations.

Subpart A of 10 CFR Part 51 sets out NRC regulations for implementing Section 102(2) of NEPA. The principal matters addressed by Subpart A are the following: (1) identification of licensing and regulatory actions requiring the preparation of environmental impact statements or environmental assessments; (2) requirements for the submission of environmental reports and information by license applicants and petitioners for rulemaking; (3)

contents and distribution of draft and final environmental impact statements; (4) NEPA procedure and administrative action; and (5) public notice of and access to environmental documents. Since each of these topics is treated, expressly or implicitly, by the Nuclear Waste Policy Act, the Commission proposes to develop as part of Subpart A certain new rules, discussed below, that will apply to geologic repositories and that will take into account the provisions of that Act. 2/

Actions Requiring Preparation of Environmental Document

Under Section 121 of the Nuclear Waste Policy Act, 42 U.S.C. 10141, the Commission's promulgation of technical requirements and criteria in 10 CFR Part 60 does not require the preparation of an environmental impact statement or other environmental review under section 102(2) of NEPA. The proposed

2/ The Nuclear Waste Policy Act applies only with respect to geologic repositories that are used, at least in part, for the disposal of waste from civilian nuclear waste activities. Sec. 8, 42 U.S.C. 10108. Under the Act, however, high-level radioactive waste resulting from atomic energy defense activities is to be disposed of in such repositories, along with civilian wastes, unless the President finds that a separate facility is required. The President has recently determined that such a separate facility is not needed. In the light of these developments, the Commission believes that it is sufficient to limit the scope of this action to those facilities that may be situated and constructed in accordance with the Nuclear Waste Policy Act.

rules incorporate this provision. [3/] Under existing 10 CFR Part 51, certain procedural actions pertaining to the licensing of geologic repositories have been determined to be categorically excluded from environmental assessment. See references to 10 CFR Part 60 in 10 CFR § 51.22(c). No change in those provisions is needed.

Under 10 CFR § 51.20(a), an environmental impact statement is required if the proposed action is a major Federal action significantly affecting the quality of the human environment or if the Commission, in the exercise of its discretion, determines that the proposed action should be covered by such an EIS. Section 114(f) of the Nuclear Waste Policy Act, 42 U.S.C. § 10134(f), reflects a Congressional understanding, with which the Commission is in full accord, that the issuance of a construction authorization and license for a geologic repository will require an environmental impact statement. This has been incorporated into the proposed rules. Other licensing actions, unless covered by existing categorical exclusions (see paragraphs (10), (11), and (12) of 10 CFR § 51.22(c)), would require an environmental assessment under 10 CFR § 51.21.

Ordinarily, a determination that an environmental impact statement will be prepared triggers public notice and the initiation of a scoping process. Where another agency prepares the EIS, however, it has the responsibility to carry out these functions. We are proposing to clarify this point by limiting the application of these procedures to situations in which the

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3/ See § 51.22(d). Conforming amendments would be made in § 51.21 and in the caption of § 51.22.

appropriate NRC staff director determines that an environmental impact statement will be prepared "by NRC." See the amendment to Section 51.26(a).

Submission of Environmental Information

The Commission's regulations encourage prospective applicants or petitioners for rulemaking to confer with NRC staff before submitting environmental information. 10 CFR § 51.40. The regulations also provide that the Commission may require such persons to submit information which may be useful in aiding the Commission in complying with Section 102(2) of NEPA. 10 CFR § 51.41. These general provisions are compatible with the requirements of the Nuclear Waste Policy Act.

The more specific regulations dealing with the submission of environmental reports are inappropriate in the context of the geologic repository program. Instead of providing for the submission of an environmental report, the Nuclear Waste Policy Act requires that NRC consider, and if practicable adopt, a final environmental impact statement prepared by DOE at the time of its recommendation to the President for the development of a repository at a particular site. Sec. 114, 42 U.S.C. 10134. The recommendation for development of a repository includes, as a minimum, the obtaining of a license from NRC to receive and possess wastes. The environmental impact statement must therefore address not only the environmental effects of construction but those of repository performance as well. This is reflected in the statutory direction to the Commission to adopt the environmental impact statement, to

the extent practicable, "in connection with the issuance by the Commission of a construction authorization and license for such repository."

DOE will therefore be required to submit an environmental impact statement instead of an environmental report. The Commission may nevertheless be unable to adopt that statement, with respect either to the construction authorization or the license, unless it has been supplemented to take into account significant new information such as that developed during the course of construction as part of the performance confirmation program or significant changes in the plans of DOE since the time of its site recommendation to the President. See 40 CFR § 1502.9(c)(1) (CEQ regulations). Accordingly, the proposed rules provide for the timely submission by DOE of supplemental environmental impact statements as needed.

The information to be contained in an environmental impact statement is set out in section 102(2) of NEPA itself, and the submission of such information is required by the proposed rules. The scope of alternatives to be considered in the EIS is restricted, however, to take into account the limitations in section 114(f) of the Nuclear Waste Policy Act, 42 USC 10134(f), with respect to the need for a repository, the time of the initial availability of a repository, alternatives to the isolation of waste in a repository, and the identification of alternate sites. Moreover, because of its pertinence to the practicability of adoption of the EIS, DOE will be required to assess the extent to which, pursuant to section 119, 42 U.S.C. 10139, the environmental impact statement may have been found to be adequate or inadequate and the extent to which, under that section, issues related to

the adequacy of the environmental impact statement may remain subject to judicial review.

The Commission has not included any specific requirements for the submission of environmental information by petitioners for rulemaking. The only rules likely to have significant environmental effects would be technical requirements and criteria to be used in licensing; as already noted, such rules would be exempt from the requirement of environmental review under NEPA. Section 121(c), 42 U.S.C. 10141(c). In a particular case, however, environmental information could be required, if needed to comply with law, pursuant to the general language of 10 CFR § 51.41.

Preparation of Environmental Impact Statements

The NRC regulations include a group of sections that prescribe a procedure for preparation and distribution by the NRC of draft and final environmental impact statements. With respect to materials licenses, these requirements apply to certain specified categories of NRC actions other than the issuance of a construction authorization or license to receive and possess high-level radioactive waste at a geologic repository. 10 CFR § 51.80 (citing § 51.20(b)(7)-(12)). Because NRC, under the Nuclear Waste Policy Act, will in general have no need to prepare its own environmental impact statement, the proposed amendments would provide (in accordance with CEQ regulations) for the distribution of the EIS, if and as adopted by the Commission, only as a final statement.

NEPA Procedure and Administrative Action

Although the procedures established in Part 51 are designed for the case in which NRC prepares its own environmental impact statement, they can equally well be applied in the situation where the EIS is prepared in the first instance by a license applicant. Thus, no action will be taken by the Commission until necessary documents have been filed - in this case by DOE rather than NRC - with the Environmental Protection Agency. See 10 CFR § 51.100. NRC will not take adverse environmental action concerning the proposal until a record of decision is issued. See 10 CFR § 51.101. A record of decision will be prepared as part of the initial or final decision on issues adjudicated in formal hearings. See 10 CFR § 51.102. The record of decision will state the decision, including alternatives considered and the relevant factors upon which preferences among the alternatives are based. See 10 CFR § 51.103. In the case of the adoption of an EIS prepared by DOE concerning a geologic repository, the relevant factors would include the special provisions of the Nuclear Waste Policy Act. The NRC staff may not offer the final environmental impact statement in evidence or present its position on NEPA issues until the final EIS has been filed with the Environmental Protection Agency. See 10 CFR § 51.104. This provision can be applied as written even though the required filing would have been accomplished by DOE rather than NRC.

In addition to these rules of general application, Part 51 includes specific procedural provisions for different categories of licensing actions.

A new section 51.109 would be added to describe the NEPA procedure to be followed with respect to licenses issued under 10 CFR Part 60.

The basic premise of § 51.109 is that it is practicable to adopt the EIS prepared by DOE if that statement is adequate to meet the requirements of Section 102(2)(C) of NEPA. As the adequacy of the EIS may have been litigated in court before the Commission decides whether or not to grant a construction authorization or license, the established principles of issue preclusion, discussed above, may well bar further examination of the question. See also Safir v. Gibson, 432 F.2d 137 (2 Cir. 1970). The statutory language and legislative history indicate that Congress intended to remove from the licensing proceedings those issues which would not implicate our special expertise in the field of radiological safety. The need for independent NRC review of nonradiological matters is largely mooted, in our opinion, by the opportunity for State or tribal disapproval of a proposed repository and the necessity for affirmative Congressional action before DOE's license application can be considered. And, as to safety concerns, it may be observed that they need not be resolved for purposes of NEPA, since the findings of safety required to be made by the Commission in issuing a construction authorization and a license would a fortiori establish the absence of any significant environmental impact, radiological in nature, arising out of the licensed activity itself. Cf. City of Aurora v. Hunt, 749 F.2d 1457, 1468 (10 Cir. 1984). All these considerations - along with the time constraints for Commission action, which appear to us to warrant some special attention to managing the scope of the proceedings - lead us to propose a limitation on the NEPA issues that may be litigated before us.

Accordingly, we have provided in the proposed rule that the presiding officer shall carry out the same general functions as are prescribed in reactor licensing cases - but only after first determining the extent to which it is practicable to adopt the DOE EIS. When adoption is practicable - because the statement has been found adequate or because further review would be untimely - the issues would be excluded from independent NRC inquiry. The adoption of the statement does not necessarily mean that NRC would independently have arrived at the same conclusions on matters of fact or policy. The adoption of the EIS would accordingly have no probative weight with respect to any safety findings that the Commission must make under 10 CFR Part 60.

The effect of the rules would be to limit the litigation of NEPA contentions to matters that arose after issuance of the EIS. But note, even in this regard, that if there are significant new circumstances or information relevant to environmental concerns and bearing on the action proposed by DOE or its impacts, the supplemental EIS that DOE must prepare would be subject to adoption by the Commission under the same standards as the original document. To be sure, if DOE failed to supplement its statement, then to that extent the open issues might be adjudicated in our proceedings in the manner we have provided. (Still, if judicial review is foreclosed because the deadline for challenging DOE's failure to supplement the EIS has passed, it would once again be practicable to adopt the unsupplemented EIS, and the presiding officer would be directed to do so.)

One important exception is that if the Commission were to impose license conditions requiring DOE to take actions other than those which DOE had proposed, then the Commission would need to consider the environmental

impacts of such actions in accordance with NEPA. For example, if the Commission were to determine that DOE must acquire certain additional property rights, to protect health and safety, it would have to assess the environmental impacts resulting from DOE's acquisition of such rights. An environmental impact statement might be found to be necessary. The scope of the review would be limited, however, to the actions being required by the Commission. It is not intended that other environmental issues would be reopened and relitigated in the licensing proceeding.

In short, we believe that, by "practicable," Congress intended that the Commission adopt the DOE environmental impact statement to the fullest extent to which it is legally capable. Congress has used the term in this way on other occasions. City of Columbia v. Costle, 710 F.2d 1009, 1013 (4 Cir. 1983). By broadening the scope of our NEPA review, we would be departing from the statutory direction, and this of course we must decline to do.

Public Information

Sections 51.116 through 51.118 concern public notices about the preparation of an environmental impact statement. They apply in any situation in which a notice of intent to prepare an EIS is prepared "in accordance with § 51.26." But, as discussed above, § 51.26 would be amended so as to apply only when NRC itself intends to prepare an EIS. Since the EIS with respect to a repository would be prepared by DOE rather than by NRC, the notice provisions of §§ 51.116 - 51.118 would not come into play. Section 51.118 would be amended, however, to require circulation of a final environmental impact statement, if and when adopted by NRC.

Commenting

It is the policy of the Commission to comment on draft environmental impact statements prepared by other Federal agencies, consistent with the provisions of 40 CFR §§ 1503.2 and 1503.3. 10 CFR § 51.124. The Commission intends to follow this policy in connection with the draft environmental impact statement prepared by DOE in connection with a geologic repository recommendation. The submission of such comments is specifically called for, in fact, by the Nuclear Waste Policy Act. See Sec. 114(a)(1)(D), 42 U.S.C. 10134(a)(1)(D).

NRC will comment on environmental issues even though those issues may be precluded from litigation in the licensing proceedings. The reason for this is that an inadequate EIS may be set aside in the course of judicial review. Should this occur, it would of course not be practicable for the Commission to adopt it. If NRC has objections or reservations about the DOE proposal on grounds of environmental impacts, it will specify the mitigation measures it considers necessary to enable the EIS to withstand challenge in court - such result being essential to NRC's adoption of the EIS and issuance of a construction authorization or license. See 40 CFR § 1503.3(d) (duty to specify mitigation measures considered necessary to allow license to be granted).

Responsible Official

No change is required in the provision establishing responsibilities within NRC for NEPA compliance.

CONFORMING AMENDMENTS

Several changes to Part 60 of the Commission's regulations are needed in order to reflect the provisions of the Nuclear Waste Policy Act that deal with environmental review.

Section 60.10(c) needs to be revised to indicate that the requirement for characterization of multiple sites is based upon the Nuclear Waste Policy Act rather than former § 51.40.

Under the Nuclear Waste Policy Act, DOE is required to prepare an environmental impact statement instead of an environmental report. Several changes to Part 60 are proposed to reflect this direction. Revisions to the environmental impact statement would take the form of "supplements" instead of the "amendments" or "updates" referred to in the existing rule.

The language of the findings for the issuance of the construction authorization requires consideration of costs and benefits and consideration of alternatives. § 60.31(c). This language would not be changed. However, it should be understood that a determination that it is practicable to adopt the DOE environmental impact statement will necessarily result in the specified environmental finding that the action called for is issuance of the construction authorization.

The construction authorization is to include such conditions as the Commission "finds to be necessary to protect . . . environmental values." 10 CFR § 60.32(a). The Commission would include such conditions only where the environmental impact statement specifically calls for them. In principle, the incorporation of appropriate conditions in the construction

authorization could enhance environmental protection, since NRC would then have a basis to inspect, and take enforcement action where needed, to assure that the conditions are observed. However, we doubt that the adequacy of the EIS would ever depend upon NRC's being vested with this authority. DOE can describe in the EIS - and in fact it must describe - the mitigation measures which are proposed to assure protection of the environment. Should DOE subsequently fail to implement these measures, judicial relief may be available. Moreover, the written agreements to be entered into between DOE and the States and affected Indian tribes under Section 117(c) of the Nuclear Waste Policy Act, 42 USC 10137(c), provide a supplemental channel for identifying and resolving environmental concerns on an ongoing basis without direct NRC participation. Our approach, therefore, will be to require the observance of environmental protection conditions where the environmental impact statement which we adopt provides for them to be included in the construction authorization (or license); but if it is practicable for us to adopt an EIS that makes no provision for NRC to impose and enforce such conditions, we will not on our own initiative find such conditions to be necessary.

The rules of practice (10 CFR Part 2) also need to be amended to take account of DOE's submission of an environmental impact statement instead of an environmental report. Because the EIS must conform to statutory requirements, and because its completeness would have been subject to judicial review prior to filing with NRC, a completeness determination by NRC at the time of docketing is unnecessary, and provision for such determination would be omitted. As in the case of Part 60, reference would be made to

"supplements," rather than "amendments," to the environmental impact statement.

ENVIRONMENTAL IMPACT: CATEGORICAL EXCLUSION

The NRC has determined that this proposed regulation is the type of action described in categorical exclusions 10 CFR 51.22(c)(1) and (3). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

PAPERWORK REDUCTION ACT STATEMENT

The proposed rule contains no new or amended recordkeeping, reporting or application requirements, or any other type of information collection requirements, subject to the Paperwork Reduction Act (Pub. L. 96-511).

REGULATORY ANALYSIS

The Commission has prepared a draft regulatory analysis on this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The draft analysis is available for inspection in the NRC Public Document Room, 1717 H Street, N.W., Washington, D.C. Single copies of the analysis may be obtained from _____.

REGULATORY FLEXIBILITY CERTIFICATION

In accordance with the Regulatory Flexibility Act of 1980 (5 USC 605(b)), the Commission certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The only entity subject to regulation under this amended rule is the U.S. Department of Energy.

LIST OF SUBJECTS IN 10 CFR PART 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

LIST OF SUBJECTS IN 10 CFR PART 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and record keeping requirements.

LIST OF SUBJECTS IN 10 CFR PART 60.

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting and record keeping requirements, Waste treatment and disposal.

ISSUANCE

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the National Environmental Policy Act of 1969, the Nuclear Waste Policy Act of 1982, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 51, and related conforming amendments to 10 CFR Parts 2 and 60.

PART 51 - ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

1. The authority citation for Part 51 is revised to read as follows:

   AUTHORITY: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

   Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853-854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub.L. 95-604, Title II, 92 Stat. 3033-3041. Section

51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036-3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Secs. 51.43 and 51.109 also issued under Nuclear Waste Policy Act of 1982, sec. 114(f), 96 Stat. 2216 (42 U.S.C. 10134(f)).

2. In § 51.20, existing paragraph (a)(13) is redesignated as paragraph (a)(14) and a new paragraph (a)(13) is added to read as follows:

<u>§ 51.20 Criteria for and identification of licensing and regulatory actions requiring environmental impact statements</u>.

(a) * * *

* * * * *

(13) Issuance of a construction authorization and license pursuant to Part 60 of this chapter.

(14) * * *

3. Section 51.21 is revised to read as follows:

<u>§ 51.21 Criteria for and identification of licensing and regulatory actions requiring environmental assessments</u>.

All licensing and regulatory actions subject to this subpart require an environmental assessment except those identified in § 51.20(b) as requiring an environmental impact statement and those identified in § 51.22 as categorical exclusions or as other actions not requiring environmental review. As provided in § 51.22(b), the Commission may, in special circumstances, prepare an environmental assessment on an action covered by a categorical exclusion.

4. Section 51.22 is amended, by revising the caption and adding a new paragraph (d), to read as follows:

§ 51.22 Licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review.

* * * * *

(d) In accordance with section 121 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10141), the promulgation of technical requirements and criteria that the Commission will apply in approving or disapproving applications under Part 60 of this chapter shall not require an environmental impact statement or environmental assessment.

5. In § 51.26, paragraph (a) is revised to read as follows:

§ 51.26 Requirement to publish notice of intent and conduct scoping process.

(a) Whenever the appropriate NRC staff director determines that an environmental impact statement will be prepared by NRC in connection with a proposed action, a notice of intent will be prepared as provided in § 51.27, and will be published in the Federal Register as provided in § 51.116, and an appropriate scoping process (see §§ 51.27, 51.28 and 51.29) will be conducted.

* * * * *

6. A new § 51.67 is added to read as follows:

§ 51.67 Environmental information concerning geologic repositories.

(a) In lieu of an environmental report, the Department of Energy, as an applicant for a license or license amendment pursuant to Part 60 of this chapter, shall submit to the Commission any final environmental impact

statement and any supplement thereto, which the Department prepares in connection with any geologic repository developed under Subtitle A of Title I of the Nuclear Waste Policy Act of 1982.

(b) The final environmental impact statement which accompanied the Department of Energy's recommendation to the President to approve a site for a geologic repository shall be submitted to the Commission at the time and in the manner described in § 60.22 of this chapter. Such statement shall be prepared in accordance with the provisions of section 114(f) of the Nuclear Waste Policy Act of 1982.

(c) Under applicable provisions of law, the Department of Energy is required to supplement its final environmental impact statement whenever the Department makes a substantial change in its proposed action that is relevant to environmental concerns or determines that there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. The Department shall submit any supplement to its final environmental impact statement to the Commission at the time and in the manner described in § 60.22 of this chapter.

(d) Whenever the Department of Energy submits a final environmental impact statement, or final supplemental environmental impact statement, to the Commission pursuant to this section, it shall accompany such statement with an assessment of the extent to which, pursuant to section 119 of the Nuclear Waste Policy Act of 1982:

(1) Such statement may have been found by the courts of the United States to be adequate or inadequate; and

(2) Issues related to the adequacy of the environmental impact statement may remain subject to judicial review.

7. A new § 51.109 is added to read as follows:

<u>§ 51.109 Public hearings in proceedings for issuance of license to receive and possess material at a geologic repository</u>.

(a) In a proceeding for the issuance of a license to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area, the procedures specified in this section shall be observed in addition to the applicable requirements of § 51.104.

(b) In any such proceeding, the presiding officer will determine if, and to what extent, it is practicable to adopt the environmental impact statement prepared by the Secretary of Energy in connection with the issuance of construction authorization and license for such repository.

(c) In general:

(1) The presiding officer will find that it is practicable to adopt the environmental impact statement prepared by the Secretary of Energy to the extent that:

(i) Said statement has been found to be adequate by the courts of the United States; or

(ii) Review of said statement in the courts of the United States is unavailable because of a failure to commence action prior to a deadline prescribed by law.

(2) If a civil action for review of an environmental impact statement prepared by the Secretary of Energy has been initiated in the courts of the United States but has not been decided, the presiding officer shall defer the finding under paragraph (c)(1) of this section until a judgment in such civil action has been entered.

(d) Notwithstanding paragraph (c), the presiding officer will find that it is not practicable to adopt the environmental impact statement prepared by the Secretary of Energy to the extent that:

(1) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and

(2) The difference may significantly affect the quality of the human environment.

(e) To the extent that the presiding officer determines it to be practicable to adopt the environmental impact statement prepared by the Secretary of Energy, such adoption shall be deemed to satisfy all responsibilities of the Commission under NEPA and no further consideration under NEPA or this subpart shall be required.

(f) To the extent that it is not practicable to adopt the environmental impact statement prepared by the Secretary of Energy, the presiding officer will:

(1) Determine whether the requirements of section 102(2)(A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical and other benefits against environmental and other costs, whether the construction authorization or license should be issued,

denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the construction authorization or license should be issued as proposed.

8. Section 51.118 is amended by redesignating the existing text as paragraph (a) and by adding a new paragraph (b), to read as follows:

§ 51.118 Final environmental impact statement - notice of availability.

(a) * * *

(b) Upon adoption of a final environmental impact statement or any supplement to a final environmental impact statement, prepared by the Department of Energy with respect to a geologic repository that is subject to the Nuclear Waste Policy Act of 1982, the Director of the Office of Nuclear Materials Safety and Safeguards shall follow the procedures set out in paragraph (a).

PART 60 - DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

9. The authority citation for Part 60 is revised to read as follows:

AUTHORITY: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C.

5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97-425, 96 Stat. 2213, 2228 (42 U.S.C. 10134, 10141).

For the purposes of section 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 60.71 - 60.75 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

10. In § 60.10, paragraph (c) is revised to read as follows:

§ 60.10 Site characterization.

* * * * *

(c) As provided in the Nuclear Waste Policy Act of 1982, DOE is also required to conduct a program of site characterization, including *in situ* testing at depth, with respect to alternative sites.

* * * * *

11. In § 60.21, paragraph (a) is revised to read as follows:

§ 60.21 Content of application.

(a) An application shall consist of general information and a Safety Analysis Report. An environmental impact statement shall be prepared in accordance with the Nuclear Waste Policy Act of 1982 and shall accompany the application. Any Restricted Data or National Security Information shall be separated from unclassified information.

* * * * *

12. Section 60.22 is revised to read as follows:

§ 60.22 Filing and distribution of application.

(a) An application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area

at a site which has been characterized, and any amendments thereto, and an accompanying environmental impact statement and any supplements, shall be filed in triplicate with the Director and shall be signed by the Secretary of Energy or the Secretary's authorized representative.

(b) Each portion of such application and any amendments, and each environmental impact statement and any supplements, shall be accompanied by 30 additional copies. Another 120 copies shall be retained by DOE for distribution in accordance with written instructions from the Director or the Director's designee.

(c) DOE shall, upon notification of the appointment of an Atomic Safety and Licensing Board, update the application, eliminating all superseded information, and supplement the environmental impact statement if necessary, and serve such updated application and environmental impact statement (as it may have been supplemented) as directed by the Board. At that time DOE shall also serve one such copy of the application and environmental impact statement on the Atomic Safety and Licensing Appeal Panel. Any subsequent amendments to the application or supplements to the environmental impact statement shall be served in the same manner.

(d) At the time of filing of an application and any amendments thereto, one copy shall be made available in an appropriate location near the proposed geologic repository operations area (which shall be a public document room, if one has been established) for inspection by the public and updated as amendments to the application are made. The environmental impact statement and any supplements thereto shall be made available in the same manner. An updated copy of the application, and

the environmental impact statement and supplements, shall be produced at any public hearing held by the Commission on the application, for use by any party to the proceeding.

(e) The DOE shall certify that the updated copies of the application, and the environmental impact statement as it may have been supplemented, as referred to in paragraphs (c) and (d) of this section, contain the current contents of such documents submitted in accordance with the requirements of this part.

13. In § 60.24, paragraphs(a) and (c) are revised to read as follows:

§ 60.24 Updating of application.

(a) The application shall be as complete as possible in the light of information that is reasonably available at the time of docketing.

* * * * *

(c) The DOE shall supplement its environmental impact statement in a timely manner so as to take into account the environmental impacts of any substantial changes in it proposed actions or any significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

14. In § 60.31, the introductory paragraph is revised to read as follows:

§ 60.31 Construction authorization.

Upon review and consideration of an application and environmental impact statement submitted under this part, the Commission may authorize construction if it determines:

* * * * *

15. In § 60.51, the introductory portion of paragraph (a), and paragraph (b), are revised to read as follows:

§ 60.51 License amendment for permanent closure.

(a) DOE shall submit an application to amend the license prior to permanent closure. The submission shall consist of an update of the license application submitted under §§ 60.21 and 60.22, including:

* * * * *

(b) If necessary, so as to take into account the environmental impact of any substantial changes in the permanent closure activities proposed to be carried out or any significant new information regarding the environmental impacts of such closure, DOE shall also supplement its environmental impact statement and submit such statement, as supplemented, with the application for license amendment.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

16. The authority citation for Part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213 (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat.

853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846), Sections 2.300-2.309 also issued under Pub. L. 97-415, 96 Stat. 2071 (42 U.S.C. 2133). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557, Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Appendix A also issued under sec. 6, Pub. L. 91-580, 84 Stat. 1473 (42 U.S.C. 2135).

17. In section 2.101, paragraph (f) is revised to read as follows:

<u>§ 2.101 Filing of application.</u>

* * * * *

(f)(1) Each application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and any environmental impact statement required in connection therewith pursuant to Subpart A of Part 51

of this chapter shall be processed in accordance with the provisions of this paragraph.

(2) To allow a determination as to whether the application is complete and acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room. Twenty copies shall be filed to enable this determination to be made.

(3) * * *

(4) [Reserved]

(5) If a tendered document is acceptable for docketing, the applicant will be requested to (i) submit to the Director of Nuclear Material Safety and Safeguards such additional copies of the application and environmental impact statement as the regulations in Part 60 and Subpart A of Part 51 of this chapter require, (ii) serve a copy of such application and environmental impact statement on the chief executive of the municipality in which the geologic repository operations area is to be located, or if the geological repository operations area is not to be located within a municipality, on the chief executive of the county (or to the Tribal organization, if it is to be located within an Indian reservation), and (iii) make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards. All such copies shall be completely assembled documents, identified by docket number. Subsequently distributed amendments to the application, however, may include

revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages.

(6) * * *

(7) Amendments to the application and supplements to the environmental impact statement shall be filed and distributed and a written statement shall be furnished to the Director of Nuclear Material Safety and Safeguards in the same manner as for the initial application and environmental impact statement.

(8) * * *

Dated at Washington, D.C., this _____ day of 1985.

For the Nuclear Regulatory Commission.

_____
Samuel J. Chilk
Secretary for the Commission

TO ALL EMPLOYEES

Form NRC-489
(1-76)

U. S. NUCLEAR REGULATORY COMMISSION
NRC MANUAL
TRANSMITTAL NOTICE

CHAPTER NRC-4125 DIFFERING PROFESSIONAL OPINIONS

SUPERSEDED:	Number	Date	TRANSMITTED:	Number	Date
			TN	4100-92	
Chapter	NRC-4125	9/19/80	Chapter	NRC-4125	7/23/85
Page			Page		
Appendix	NRC-4125	9/19/80	Appendix	NRC-4125	7/23/85

REMARKS:

This issuance provides all NRC employees with the recently Commission-approved revision to Chapter NRC-4125, Differing Professional Opinions (DPO). During the process of revision, both the Commission and the EDO reaffirmed their continued full support for the DPO Policy and Process. In addition, they stressed the need for NRC management to act objectively in handling Differing Professional Opinions.

This revision reflects the evaluation and report of the Special Review Panel as well as requests from NRC management and recommendations of the Office of Inspector and Auditor, and includes:

1. more emphasis on the establishment of timely procedures for the resolution of differing professional opinions (DPO's).

2. requirement for Office Directors and Regional Administrators to provide for maintenance of written records to provide accountability for actions taken to resolve DPO's and to place completed cases in centrally located office files.

3. statements of responsibilities for Regional Administrators and for the Office of Resource Management concerning the processing and resolution of statements of differing professional opinions.

4. provision for the Office of Resource Management to submit to the Commission an annual, rather than a quarterly, report on DPO's and actions taken to achieve their resolution.

5. statement indicating that RM maintains a file of all initial and final DPO's handled by NRC; and requirement that the Director, RM, will notify the EDO of any DPO's that are not being resolved within the prescribed schedule.

6. statement that managers advising employees to file DPO's will inform the employees' management of that action.

7. addition of a summary and schedule of the DPO resolution process.

8. requirement for Office Directors and Regional Administrators to obtain a control number for each DPO from RM.

9. highlighting of methods to address alleged retaliation for having filed a DPO.

10. requirement for the Director, Office of Administration, to provide an overview of the DPO program in orientation of new employees.

U.S. NUCLEAR REGULATORY COMMISSION
NRC MANUAL

Volume: 4000 Personnel
Part : 4100 Federal RM

CHAPTER 4125 DIFFERING PROFESSIONAL OPINIONS

4125-01 COVERAGE

This chapter and appendix comprise NRC policy, objectives, procedures, responsibilities and other basic requirements and definitions established to provide for the expression and resolution of differing professional opinions concerning matters related to the agency's mission.

4125-02 POLICY AND OBJECTIVES

021 Policy. It is the policy of the Nuclear Regulatory Commission, and the responsibility of all NRC supervisory and managerial personnel, to maintain a working environment that encourages employees to make known their best professional judgments even though they may differ from a prevailing staff view, disagree with a management decision or policy position, or take issue with proposed or established agency practices. Each differing professional opinion of an NRC employee will be evaluated on its own merit. Further, each differing professional opinion will be pursued to resolution and the employee's statement of differing professional opinion, together with the agency's final response, will be made available to the public to ensure the openness of NRC decisions that may affect the public.

It is not only the right but the duty of all NRC employees to make known their best professional judgments on any matter relating to the mission of the agency. Moreover, both the general public and the Nuclear Regulatory Commission benefit when the agency seriously considers NRC employees' differing professional opinions that concern matters related to the agency's mission. This policy is intended to assure all employees the opportunity to express differing professional opinions in good faith, to have these opinions heard and considered by NRC management, and to be protected against retaliation in any form.

022 Objectives.

a. To define differing professional opinions.

b. To distinguish between differing professional opinions and the differences of views and opinions routinely raised and resolved among staff members in the ordinary conduct of agency business.

c. To provide a primary channel for submitting differing professional opinions.

d. To specify the recommended content of a statement of differing professional opinions.

e. To provide reasonable time and reasonable administrative assistance to help employees develop and document their differing professional opinions.

f. To provide for acknowledgment of receipt of statements of differing professional opinion and for advising originators of planned actions for their resolution.

g. To provide accountability by requiring a written record of all actions taken on differing professional opinions.

h. To provide for resolution within the agency of differing professional opinions, if at all possible.

i. To provide alternative channels for expressing a differing professional opinion either on the record or anonymously.

j. To provide disciplinary sanctions against employees who take retaliatory actions that affect the originators of, or employees who support, differing professional opinions.

k. To prevent intentional misuse of these procedures.

l. To provide for periodic assessment to ensure that implementation of these procedures accomplishes the stated objectives and to recommend appropriate changes .

m. To provide recognition to the originators of differing professional opinions if their opinions contribute significantly to achieving the agency's mission.

4125-03 RESPONSIBILITIES AND AUTHORITIES

031 The Executive Director for Operations (EDO):

a. assures that a written record is maintained to provide accountability for all subsequent actions taken to resolve the differing professional opinions.

b. ensures that differing professional opinions which are not resolved within four calendar months after their submission are resolved by the responsible office director as promptly as is practicable.

c. annually appoints a Special Review Panel to evaluate and report on the functioning of the differing professional opinion procedures.

032 Directors of Offices and Regional Administrators:

a. determine actions to be taken on statements of differing professional opinion (DPO).

b. obtain a unique control number from RM to place on the original DPO and all subsequent correspondence and documentation on that DPO.

c. within 10 days of its submission, forward the differing professional opinion either to the appropriate manager within his or her own office or to the director of the office with basic responsibility for the issues raised in the differing professional opinion with copies to the EDO and Director, Office of Resource Management.

d. convene an impartial peer review group to address the substance of the issues raised either when requested by the originator or when he determines that the complexity of the issues raised justifies such a review.

e. inform the Atomic Safety and Licensing Board Panel and the Atomic Safety and Licensing Appeal Panel of any differing professional opinion that relates to issues pending before them or scheduled for their consideration.

f. assure that every effort is made to expedite the resolution of differing professional opinions within the time frame specified in Appendix 4125, Section G.2.a.

g. provide the originator with a copy of the peer review group's report.

h. inform the EDO of reasons for delay and submit, for EDO approval, a proposed plan for resolution of DPO's not resolved within four calendar months after submission.

i. provide the originator with written notification of the resolution of his differing professional opinion with a copy to the Director, Office of Resource Management, and the EDO, and access to all documents generated in connection with its resolution.

j. after the issue is resolved and the case closed, complete files on the DPO will be maintained centrally by the cognizant office.

k. provide the Office of Resource Management with an annual Differing Professional Opinion Status Report. (See Appendix 4125, Section G.4.)

033 The Director, Office of Resource Management (RM):

a. provides the Commission with an annual report identifying all differing professional opinions submitted and specifying the actions that have been taken to achieve their resolution.

b. assigns a unique control number to each DPO at the time the offices initially provide documentation to RM on the origination of a specific DPO.

c. maintains a file of all initial and final DPO's handled by NRC.

d. advises the immediate supervisors of originators of DPO's of the requirements to maintain a written record to provide accountability for all subsequent actions taken to resolve the differing professional opinions. (See 4125-036 h.)

e. notifies the EDO of any DPO's currently under review that are not anticipated to be resolved within 30 days after initial submission.

034 The Director, Office of Administration (ADM), requires all of the Headquarters and Regional personnel offices to include an overview of the DPO program in the orientation for new employees.

035 The Advisory Committee on Reactor Safeguards:

a. appends comments to all referred statements of differing professional opinion and forwards them for resolution to the appropriate office director, if the differing professional opinion relates to a potential safety issue within their purview.

b. responds to appeals by an originator if the differing professional opinion concerns matters of public health or safety.

036 Immediate Supervisors:

a. advise and assist employees in administratively preparing adequate written statements of differing professional opinion and aid them in identifying related information.

b. in consultation with their managers, determine the amount of the originator's work time and administrative support to be provided in response to the originator's request for assistance.

c. receive signed statements of differing professional opinion from the originator.

d. within five working days of receipt acknowledge receipt of statements of differing professional opinion by memoranda to the originators. A copy of the acknowledgment memo and the DPO statement is forwarded to the EDO and the Director, Office of Resource Management.

e. return to the originator any statement excluded from the definition of a differing professional opinion together with a memorandum citing the specific exclusion with a copy to the EDO and Director, Office of Resource Management.

f. forward statements of differing professional opinion, via their chain-of-command, to his or her office director for action with a copy to the EDO and Director, Office of Resource Management.

g. assure that statements of differing professional opinion are incorporated into the receiving organization's normal work tracking system.

h. maintain a written record to provide accountability for all subsequent actions taken to resolve the differing professional opinion while the DPO is active.

i. when the DPO is completed or withdrawn, forwards the complete file to the office director's office, where it will be centrally maintained.

037 All Employees:

a. make known their best professional judgments on any matter relating to the mission of the agency by submitting to their immediate supervisor a signed statement of differing professional opinion when appropriate.

b. before submitting a statement of differing professional opinion, should consult with their immediate supervisor who will aid them in identifying related information and assist them, if requested, in clarifying the issues.

c. may request an Open Door meeting with any manager to discuss their views.

d. may request that their differing professional opinion be presented to an impartial peer review group for review, evaluation, and comment.

e. may communicate a differing professional opinion concerning a potential safety issue directly to the chairman or any member of the ACRS.

f. may appeal the resolution of their differing professional opinion to a higher level of NRC management.

4125-04 DEFINITIONS

041 Differing Professional Opinion. A conscientious expression of professional judgment as contained in a written, signed statement submitted to one's immediate supervisor, or submission of an unsigned anonymous statement

(see NRC Appendix 4125, Section H.1) which, on any matter relating to NRC's mission or organizational activities, differs from the prevailing staff view within an organization, disagrees with a management decision or policy position, or takes issue with a proposed or an established agency practice. Differing professional opinions may involve technical, management, legal, or policy issues and are not limited to the originator's area of expertise. Matters that are subject to employee grievance in accordance with Chapter NRC-4157 and matters covered by the negotiated grievance procedure do not qualify as differing professional opinions.

042 Manager. An employee who directs the work of an organization, is held accountable for specific line or staff programs or activities, and whose primary duties are managerial.

043 Peer Group. A group of NRC staff with expertise in the area encompassed by a given DPO, convened for the purpose of addressing the substance of the issues raised by the DPO.

4125-05 BASIC REQUIREMENTS

051 Applicability. These procedures for the expression and resolution of differing professional opinions are for the use of all NRC employees including supervisors and managers. The procedures supplement other stated rights, duties, and safeguards applicable to all Federal employees who make their views known either within or outside their agencies, including:

a. the independent right of free speech provided by the First Amendment to the U.S. Constitution.

b. the right of government employees to petition the Congress (5 USC 7102).

c. the rights of employees to communicate directly with the Congress as outlined in the Code of Ethics for Government Service (10 CFR 0.735 - Annex A).

d. provisions of the 1978 Civil Service Reform Act dealing with prohibited personnel practices and the regulations of the Merit System Protection Board.

052 Appendix 4125. This appendix provides procedures for the expression and resolution of differing professional opinions.

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PROCEDURES FOR THE EXPRESSION AND RESOLUTION OF DIFFERING PROFESSIONAL OPINIONS

A. Normal Differing Views vs. Differing Professional Opinions

A normal differing view, developed in the free and open discussion of work matters, becomes a differing professional opinion only when the originator brings it to NRC management attention in accordance with these procedures.

In the free and open discussion of work matters, professional differences of opinion are common. Employees may also develop critical views concerning matters other than their personal work assignments, such as issues under consideration in another part of NRC or relating to an agency practice or position that is neither currently under review nor in the agency's decisionmaking process.

In both these instances employees normally try, and should be encouraged, to resolve their concerns through discussions with their co-workers and immediate supervisors. In some cases, such discussions may lead to the submission of a suggestion as part of the NRC suggestion program (Chapter NRC-4154).

However, these informal discussions may not resolve the matter and an employee may be convinced that the agency and the public would be better served if another opinion prevailed. To further pursue such concerns using these procedures, an employee should submit a written statement of differing professional opinion in accordance with these procedures. With the submission of this statement, the employee's differing view becomes a differing professional opinion.

An employee may not use these procedures for differing professional opinions without submitting a written statement. The employee may, however, express any concerns orally or in writing to the ACRS and may also discuss these concerns with any NRC manager as provided in the Open Door Policy. (See Section H).

B. Primary Channel for Expressing Differing Professional Opinions

These procedures are invoked when employees submit to their immediate supervisor a written statement of differing professional opinion. As indicated in the statement of policy, it is not only the right but the duty of all NRC employees to make known their best professional judgments on any matter relating to the mission of the agency.

Before submitting the statement, employees should consult with their immediate supervisor who will aid them in identifying related information and assist them, if requested, in clarifying the issues. Originators of differing professional opinions may request agency resources for preparing adequate written statements of differing professional opinion and such requests shall include estimates of the resources required.

After registering a DPO, an individual should be prepared to describe his background as it relates to the issue raised, since the initial credibility given his opinion may rest, in part, on that background.

C. Content of a Written Statement of Differing Professional Opinion

A written statement of differing professional opinion, while being brief, should in all cases include the following:

1. a summary of the originator's perception of the prevailing staff view, existing management decision or stated position, or the proposed or established agency practice.

2. a description of the originator's opinions and how they differ from any items discussed in 1. above.

3. a statement of the originator's assessment of the resulting consequences if the differing professional opinion is not adopted by the agency.

D. Resources to Assist Originators of Differing Professional Opinions

To assist originators in preparing adequate written statements of differing professional opinion, NRC management will allow a reasonable amount of the originator's work time and administrative support. If called to testify before a Licensing Board or an Appeal Board, the employee may receive, upon request, assistance from the staff legal office in preparing testimony or other documents to be filed with the Board. Such assistance will be solely for the purpose of facilitating the filing of the necessary documents and will not constitute legal representation of the employee by the legal staff. The originator's immediate supervisor, in consultation with his or her manager, will determine the amount of the originator's work time and administrative support to be provided in response to the originator's request for assistance.

E. Acknowledgment of Differing Professional Opinions

The immediate supervisor shall, upon receiving a written statement of differing professional opinion, discuss the statement with the originator if this has not previously been done. In addition, the immediate supervisor must, within five working days, acknowledge receipt by a memorandum to the originator with a copy to the EDO and a copy to the Director, Office of Resource Management. This memorandum will also indicate the actions that will be taken to resolve the differing professional opinion.

Upon receipt, statements of differing professional opinion will be incorporated into the receiving organization's normal work tracking system. This tracking should assure that the status of each differing professional opinion is regularly reviewed, aid in its prompt resolution, and provide a systematic basis for keeping the originator informed.

F. Written Record of Actions on Differing Professional Opinions

Once a differing professional opinion has been submitted, a written record must be maintained by the immediate supervisor while the DPO is active to provide accountability for all subsequent actions taken to resolve that differing professional opinion on its merits. This record will consist of signed notations of all supervisory and managerial determinations and actions based upon the differing professional opinion. Changes in the original documentation that are requested by the originator will also be made a part of this written record. Copies of the initial and the final DPO documents will be sent to the Director, Office of Resource Management, and the EDO. All pertinent documentation will be retained by the supervisor while the DPO is active and centrally by the office director for a period of ten years after the DPO becomes inactive.

G. Resolution of Differing Professional Opinions

1. Definition of Resolution

A differing professional opinion is considered resolved by the NRC when:

a. NRC management adopts the views expressed in the originator's written statement of differing professional opinion; or

b. NRC management adopts a part of the judgments expressed in the originator's written statement of differing professional opinion and informs the originator of the reasons for not adopting the remainder; or

c. The responsible office director determines that evaluation of the differing professional opinion fails to justify modification of a management decision, policy position, or a proposed or an existing agency practice; or

d. The responsible office director determines that the impact of the potential consequences stated in the differing professional opinion is insufficient to justify a detailed evaluation of the differing professional opinion; or

e. The differing professional opinion is withdrawn by the originator.1/

1/In such cases, NRC management may elect to pursue the matter further based on its merit even though it is no longer considered to be a differing professional opinion.

In each of the preceding cases, the resolution process is complete only when the originator has been informed of the decision or action of NRC management and, consistent with security classification policy, both the statement of differing professional opinion and the response of NRC management have been placed in NRC's Public Document Room.

2. Resolution Process

a. Summary and schedule of resolution process:

Originator submits DPO to immediate supervisor;

(Within five working days of receipt) immediate supervisor forwards DPO to office director with comments of all others in chain-of-command appended;

(Within 10 working days of submission) office director forwards DPO to appropriate manager for action [If transferred to another office, DPO must be assigned to responsible program manager within 15 working days after submission by originator.];

(Within 15 days after submission) office director informs ASLBP and ASLAP of any DPO that relates to issues pending before them or scheduled for their consideration;

(Within 30 working days after assignment to responsible manager) DPO normally resolved;

(Four calendar months after submission) if DPO not resolved, responsible office director informs the EDO of reasons for delay and submits, for EDO approval, a proposed plan and schedule for completing resolution.

b. When submitting a differing professional opinion, the originator may request that it be presented to an impartial peer review group for review, evaluation, and comment. If such request is not made by the originator, and if the responsible office director determines that such review is justified by the complexity or the potential significance of the issues raised, he shall convene an impartial peer review group to address the substance of the issues raised in the differing professional opinion. In either case, the responsible office director will assure that members of the peer review groups convened for this purpose are specifically selected for their impartiality and professional competence concerning matters discussed in each differing professional opinion. The responsible office director

will carefully consider peer review group recommendations in the resolution of applicable differing professional opinions and will provide the originator with a copy of the peer review group's report.

c. Upon receiving a statement of differing professional opinion from the originator, the immediate supervisor will forward it, via the chain-of-command, to his or her office director for action with copies to the EDO and the Office of Resource Management. The immediate supervisor and all others in the chain- of-command shall append their views concerning matters discussed in the differing professional opinion. The differing professional opinion, with comments appended, shall be provided to the office director within five working days after its submission by the originator. Copies of these comments, together with all other documents generated in response to the differing professional opinion, shall be made available to the originator as they are generated. At his option, the originator may submit written comments for the record concerning views expressed by his immediate supervisor or others in the chain-of-command, or views expressed by intermediate NRC management personnel in the course of resolution of the differing professional opinion.

d. The office director will obtain a unique DPO control number and will forward the differing professional opinion, within 10 working days of its submission by the originator, either to the appropriate manager within his or her own office or to the director of the office that has basic responsibility for the issues raised in the differing professional opinion, with copies to the EDO and Director, Office of Resource Management. If transferred to another office for resolution, the differing professional opinion must be assigned to the responsible program manager within 15 working days after its submission by the originator. The responsible manager will incorporate the statement of differing professional opinion into the organization's normal work tracking system and, until the differing professional opinion has been resolved, shall provide the originator with brief monthly status reports. Copies of these reports shall also be provided to the responsible office director. The responsible manager will also inform the originator of other differing professional opinions received that are relevant to that submitted by the originator.

e. The responsible office director will, within 15 working days after its submission by an originator, inform the Atomic Safety and Licensing Board Panel and the Atomic Safety and Licensing Appeal Panel of any differing professional opinion that relates to issues pending before them or scheduled for their consideration.

f. Every effort shall be made to expedite the resolution of differing professional opinions. Normally, a differing professional opinion should be resolved by the responsible office director within 30 working days after its assignment to the responsible manager. An extension of 15 working days will, however, be automatically granted upon certification by the responsible manager to the originator that: (1) resolution of the differing professional opinion involves especially complex issues, (2) the workload of managerial personnel involved in resolution of the issues is temporarily heavier than normal, or (3) that resolution of the differing professional opinion involves the participation of several levels of NRC management. Additional extensions of 15 working days each may be granted only upon application to and approval by the responsible office director who will consider comments of both the managerial personnel involved and the originator with regard to the proposed extension.

g. If a differing professional opinion is not resolved within four calendar months after its submission, the responsible office director shall inform the Executive Director for Operations (EDO) of the reasons for the delay and shall submit, for EDO approval, a proposed plan and schedule for completing its resolution. The responsible office director shall provide the originator with a copy of the EDO-approved plan and schedule for resolution. The EDO will ensure that differing professional opinions in this category are resolved by the responsible office director as promptly as is practicable.

h. The responsible office director shall provide the originator with written notification of the resolution of his differing professional opinion with a copy to the Director, Office of Resource Management, (see Section 4125-03) and the EDO, and access to all documents generated in connection with its resolution. While the DPO is active, the immediate supervisor will maintain the file. When the DPO is complete or inactive, the office director will centrally maintain the file.

3. Appeal

The originator may appeal the resolution of his differing professional opinion to a higher level of NRC management including ultimately, the Commission. Normally, it would be expected that appeals by individuals assigned to Program Offices or to EDO Staff Offices would be submitted to the EDO and that individuals assigned to the Commission or to Commission Staff Offices would submit appeals or to the Commission. Moreover, if a differing professional opinion concerns matters of public health or safety, the appeal may be forwarded through the ACRS with a request that the ACRS comment on the potential safety implications of the resolution that is being appealed.

These procedures make no provision for further appeal of the resolution by NRC management of a differing professional opinion. However, originators who are dissatisfied with either NRC management's resolution of their differing professional opinion or the results of their appeal of this resolution may further pursue their concerns via the Open Door policy or the ACRS as appropriate.

4. Reports to the Commission

The Office of Resource Management (RM) shall provide the Commission with annual reports identifying all differing professional opinions submitted and specifying the actions that have been taken to achieve their resolution. This information shall be provided by the responsible office directors who shall, within five working days after each calendar year, provide RM with a Differing Professional Opinion Status Report that contains:

a. A listing and a description of all differing professional opinions received together with a brief status report of all efforts that have been taken to achieve their resolution. Items shall be reported and summarized in the following three categories:

(1) Differing professional opinions submitted since the last status report.

(2) Differing professional opinions previously received and reported but not yet resolved.

(3) Differing professional opinions previously received and reported that were resolved on the following dates.

b. Information obtained from the originator of each differing professional opinion resolved during the year which indicates the originator's general reactions to these procedures. As a minimum, this information should include the originator's evaluation of the utility of these procedures for handling his or her differing professional opinion, areas in which these procedures inhibited rather than aided the achievement of their objectives, and comments or recommendations for improvement of these procedures.

H. Alternate Channels for Expressing Differing Professional Opinions

Two alternate channels are available for employees who prefer not to use the primary channel for expressing their differing professional opinions. Once a differing professional opinion submitted via either of these two channels has been forwarded to the responsible office director, subsequent procedural steps involved in resolution of the differing professional opinion are essentially identical with those prescribed for the primary channel. The basic difference between the primary channel and the two alternatives discussed below is that the alternatives permit the originator to select the individual manager to whom the differing professional opinion will be submitted and, in

addition, they make provision for the submission of anonymous differing professional opinions upon request.

1. Open Door Policy

The Open Door Policy of NRC provides that NRC employees may, on their own initiative, meet with any manager, including a Commissioner or the Chairman of NRC, to discuss any matter of concern to the employee. Employees may request an Open Door meeting directly with the selected manager's secretary or administrative assistant and there is no requirement for the approval of requests for such meetings by intermediate management.

An employee's request for anonymity will be honored by any manager contacted via the Open Door except in two special situations that could occur if the manager contacted is an NRC Commissioner. Each Commissioner is legally required to inform all other Commissioners of any information which he believes to be related to the responsibility or the function of the Commission. (This requirement for mandatory information sharing applies only to the Commissioners and does not extend to others within NRC.) Subject to this constraint, NRC Commissioners will honor an employee's request for anonymity made in connection with communications via the Open Door. Therefore, when an employee requests anonymity in an Open Door contact with a Commissioner, no Commissioner will disclose to another Commissioner the identity of the employee unless (a) as a practical matter it is impossible to convey the substance of the information without making known the identity of the employee, (b) disclosure of the employee's identity to the other Commissioners is essential for determination of the accuracy and reliability of the information, or (c) the employee's identity is required to be released by law.

If Open Door discussions disclose that an employee's views constitute a differing professional opinion, the contacted manager should advise the employee to submit a signed, written statement of differing professional opinion in accordance with these procedures and should inform the employee's management that he has been advised to prepare such a statement. If the employee insists on remaining anonymous but wishes to have his or her views considered as a differing professional opinion, the employee should submit an unsigned statement of differing professional opinion to the manager contacted via the Open Door and that manager will forward the anonymous statement of differing professional opinion to the office director having programmatic responsibility for the issues raised in the differing professional opinion. Resolution of the differing professional opinion will then be completed in accordance with these procedures. To protect the employee's anonymity in such cases, however, it may not be possible to provide the acknowledgment of receipt of the differing professional opinion

or the reports on resolution directly to the originator of the differing professional opinion. In such cases, the manager originally contacted via the Open Door shall relay to the originator both the acknowledgment of receipt and all reports received by that manager concerning resolution of the differing professional opinion.

Differing opinions not expressed in writing as required by Section C shall be considered to be normal differing views as discussed in Section B, and may not be pursued further using the procedures for differing professional opinions.

Open Door discussions between employees and managers may also relate to subjects other than normal differing views and differing professional opinions. In these cases, the managers contacted will work to resolve an employee's concerns, to answer any questions, and to honor any request for anonymity. Honoring a request for anonymity may, however, limit a manager's assistance either to discussions with the employee or to providing advice and counsel on matters of concern to the employee.

Managers should advise employees of the proper channels to be used for the resolution of concerns that may not be resolved using these procedures for differing professional opinions. If the contacted manager believes that others should be notified of issues raised in these Open Door discussions, he should notify offices with programmatic responsibility, and others (e.g., the Office of Inspector and Auditor).

2. The ACRS

If the differing professional opinion relates to a potential safety issue within the purview of the Advisory Committee on Reactor Safeguards, an NRC employee may communicate orally or in writing directly with the Chairman or any member of the ACRS. Such communication may be anonymous. The ACRS will append comments, as appropriate, to all referred statements of differing professional opinion and will forward these statements for resolution to the appropriate NRC office director.

An NRC employee may also appear before the ACRS or an ACRS Subcommittee as deemed appropriate by the Committee. The ACRS will assure that all such statements that do not constitute a differing professional opinion are forwarded to the appropriate NRC office director for information.

I. Prevention of Retaliation Against Individuals Who Express or Support Differing Professional Opinions

Any NRC employee who retaliates against another employee for submitting or supporting a differing professional opinion is subject to disciplinary action in accordance with Chapter NRC-4171 (Discipline, Adverse Actions and Separations). This applies to retaliatory actions described in the

following paragraph and to all prohibited personnel practices specified in Section 2302, Title 5, U.S. Code, as amended by the Civil Service Reform Act of 1978.

Retaliation consists of injurious actions taken against the originator of a differing professional opinion in which a motivating factor for such actions derived from the submission of a differing professional opinion by the originator. Retaliation may involve transfer; detail; ostracism; loss of staff assistance, space, or equipment; physical isolation; the absence of assignments involving substantive work; or the denial of promotion, attendance at professional society meetings, or justified training.

Employees who allege that retaliatory actions have been taken because of their submission or support of a differing professional opinion may seek redress through the negotiated grievance procedure or through the grievance procedure described in Chapter NRC-4157 (Employee Grievances). This is the formal route. Employees may also use the "Open Door Policy" as described in Section H.1 of this appendix.

In a case where an employee files a grievance alleging that he/she has been retaliated against for having filed a DPO, the grievance may be reviewed initially by the same managers (usually lower level management) who allegedly have engaged in retaliation. However, the agency grievance procedures provide for review of the allegation by higher level management. In addition, grievants under agency practice and procedures have the right to present the issue to an independent third party from outside the NRC; grievants covered by the negotiated Union Agreement may, with the concurrence of the Union, proceed to binding arbitration before a third party arbitrator from outside the NRC.

J. Prevent Intentional Misuse of Procedures for Differing Professional Opinions

No NRC employee should intentionally misuse these procedures. Examples of intentional misuse would include but not be limited to frivolous use, attempts to treat a personnel-grievance type action as a differing professional opinion, and repeated attempts to use these procedures to obtain a resolution of views that do not satisfy the criteria for differing professional opinions.

K. Special Review Panel for Follow-up on Functioning of Differing Professional Opinion Procedures

Annually the Executive Director for Operations will appoint a Special Review Panel to evaluate and report on the functioning of these differing professional opinion procedures. Four members of the Special Review Panel will be NRC employees (two managers and two nonmanagers), and the fifth member will be chosen from outside the NRC. Two of the NRC-employee members will be selected from a list of at least five (5) candidates nominated by the National Treasury Employees Union (NTEU). Membership shall not be limited to scientific or engineering personnel. All NRC employees will receive a copy of the letter appointing members of the Special Review Panel. The forwarding memorandum may also solicit

employee comments on these procedures to be considered by the Special Review Panel. Employee recommendations for membership of subsequent Special Review Panels will also be solicited.

The Special Review Panel will study NRC's experience in handling differing professional opinions, evaluate the functioning of these differing professional opinion procedures by assessing the degree to which the objectives are accomplished, and make appropriate recommendations for change. The Special Review Panel may recommend decreasing the frequency of these reviews when evaluations indicate that the NRC procedures for differing professional opinions are functioning effectively.

The findings and recommendations of the Special Review Panel will be distributed simultaneously to the Commission, EDO, NRC employees and the public when the panel's deliberations are complete and before any revisions to Chapter NRC-4125 are initiated.

L. Recognition of Originators of Significant Differing Professional Opinions

In addition, the Special Review Panel described in Section K, above, will annually review all differing professional opinions submitted during the prior year to identify employees whose differing professional opinions made significant contributions to the agency or to public safety but who had not been recognized by his or her supervisor for this contribution. It is anticipated that employees who provide significant contributions to the agency or to public health and safety will be recommended for appropriate awards by their immediate supervisors. Where award recommendations have not been made, they may be made by this Panel in accordance with provisions of NRC's Incentive Awards Program (Chapter NRC-4154). Copies of such recommendations for award will be included in the Special Review Panel's written report to the EDO and the Commissioners.

ENCLOSURE C

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

APR 1 9 1986

MEMORANDUM FOR: Guy H. Cunningham, III
Executive Legal Director

FROM: James R. Wolf
Senior Regulations Attorney
Office of the Executive Legal Director

SUBJECT: DIFFERING PROFESSIONAL OPINION CONCERNING NEPA REVIEW PROCEDURES FOR HIGH LEVEL WASTE GEOLOGIC REPOSITORIES

This will acknowledge receipt of the peer review report, dated April 14, 1986, prepared by the Office of General Counsel on the subject differing professional opinion.

The OGC report suggests that the Commission's regulations should provide for independent NRC review of NEPA issues where significant and substantial new information or new considerations render the environmental impact statement inadequate. A modification of the language proposed in the differing professional opinion would be needed to accommodate this concern. In particular, § 51.109(d) would have to be revised as indicated in the attachment to this memorandum.

The matters are now ripe for consideration by the Commission. Further administrative review would appear to serve no useful purpose. Accordingly, please be advised that I would regard the forwarding of the differing professional opinion (including the supplemental comments dated February 4, 1986) and this memorandum to the Commission, for its consideration, as resolution of the DPO for purposes of NRC Manual Chapter 4125.

James R. Wolf
Senior Regulations Attorney
Office of the Executive
Legal Director

Revision to § 51.109 Public hearings in proceedings for issuance of license to receive and possess material at a geologic repository.

(a) [The procedures in this section shall be observed.]

(b) [The presiding officer will determine if, and to what extent, it is practicable to adopt the DOE EIS.]

(c) [Generally, it is practicable to adopt to the extent EIS survives judicial review.]

(d) Notwithstanding paragraph (c), the presiding officer will find that it is not practicable to adopt the environmental impact statement prepared by the Secretary of Energy to the extent that:

(1) (a) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and

(b) The difference may significantly affect the quality of the human environment; or

(2) Significant and substantial new information or new considerations render the environmental impact statement inadequate. (No new information or new considerations may be deemed to render the environmental impact statement inadequate, for purposes of this paragraph, if:

(a) They have been addressed in a supplemental environmental impact statement that has been found to be adequate by the courts of the United States; or

(b) They would have required the preparation of a supplemental environmental impact statement by the Secretary of Energy and review, in the courts of the United States, of the Secretary's failure to prepare such a statement is unavailable because of a failure to commence action prior to a deadline prescribed by law.)

(e) [Adoption of the EIS satisfies NRC NEPA responsibilities and no further consideration under NEPA or this subpart shall be required.]

(f) [To the extent the EIS is not adopted, presiding cfficer will determine if NEPA requirements have been satisfied, determine what action is appropriate, etc.]

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