



OFFICE OF THE
SECRETARY

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

IN RESPONSE, PLEASE
REFER TO: M860313

DCS

March 19, 1986

MEMORANDUM FOR: ~~Victor Stello, Jr.~~
Acting Executive Director for Operations

Herzel H.E. Plaine, General Counsel

FROM: ^{A.S.C.} Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION
AND VOTE, 11:30 A.M., THURSDAY, MARCH 13,
1986, COMMISSIONERS' CONFERENCE ROOM, D.C.
OFFICE (OPEN TO PUBLIC ATTENDANCE)

I. SECY-86-57A - Extension of the Comanche Peak Construction
Permit

The Commission, by a 4-1 vote, approved an order responding to a request filed on January 31, 1986 by the Citizens Association for Sound Energy, which sought Commission action in connection with the extension of the Comanche Peak construction permit. The order (1) denies both CASE's request for a halt to construction and its request for the institution of a new construction permit proceeding; (2) denies CASE's request for a stay of staff's extension of CPPR-126; (3) rejects CASE's view that significant hazards considerations are involved in the extension of CPPR-126; (4) refers CASE's request for enforcement action to the staff for consideration under 10 CFR 2.206; and (5) refers CASE's request for a hearing to the Chairman of the Atomic Safety and Licensing Board Panel for appointment of a hearing board to rule on the hearing request and to conduct any necessary hearings in accordance with Subpart G of 10 CFR Part 2.

Commissioner Asselstine disapproved the order, preferring an alternative approach, and provide separate views.

(Subsequently, on March 13, 1986 the Secretary signed the Order.)

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II. SECY-85-333 - Procedural Amendments to 10 CFR 60 Dealing with Site Characterization and the Participation of States and Indian Tribes

The Commission (with Chairman Palladino and Commissioners Roberts, Bernthal and Zech agreeing) approved the procedural amendments to 10 CFR Part 60 dealing with site characterization and the participation of states and Indian tribes subject to:

~~(1) incorporating the following additional provisions into Part 60:~~

- (a) Host states and affected Indian tribes have an questionable legal right to full party status.
- (b) The NRC will review and concur in the necessity for the use of all radioactive materials, including radioactive tracers, on a case-by-case basis.
- (c) The NWSA requirements that DOE defer the sinking of shafts at least until such time as there has been an opportunity for pertinent comments on shaft sinking to have been solicited and considered by DOE.

(2) The definition of "Indian tribe" and "tribal organization" should remain as they are defined in Part 60 and not be changed as proposed.

(3) The attached changes should be incorporated.

(4) On page 6, line 4 of the first complete paragraph of the rule change "new statute" to "NWSA".

(5) On page 9, line 1 of the rule change "the responsibilities" to "its obligations".

(6) The Commission has agreed that this rulemaking should not be held up to tie it in with the Part 51 changes. Accordingly the last paragraph on page 9 should be edited to read:

"It is important to proceed with the present actions without awaiting other changes to Part 51 that will be prepared in the light of the NWSA. This would allow for changes related to"

(7) The rulemaking package should also be reviewed to assure that additional modifications needed for consistency with the above changes are incorporated.

Commissioner Asselstine approved in part and disapproved in part, he disapproved in that he would also have retained the present requirements to issue the draft site characterization analysis for public comment and staff analysis of those comments as well as the requirement for NRC review of DOE's site screening and selection process. His separate views are attached and should be published with the Federal Register Notice.

The final rule should be revised as noted and returned for signature and publication in the Federal Register.

(EDO)

(SECY Suspense: 4/18/86)

Attachments:

As stated

cc: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech
Commission Staff Offices
PDR - Advance
DCS - 016 Phillips

COMMENT NO. 6

Comment Summary:

The rule should state that the SCA will be provided to DCE within 150 days after NRC receives an SCP and that comments related to shaft sinking will be provided within 90 days.

A new section should be added putting into Part 60 the NWA schedule requirements for NRC review of the license application. This would emphasize NRC's dual obligations to conduct its licensing proceedings in a full, fair and open manner, but also to reach its decisions in a timely manner.

Response:

The Commission does not believe it is advisable to codify the timetables for these reviews. We interpret the timeframes in the NWA to be directory rather than mandatory. NRC estimates that the review of an SCP of high quality and completeness will require 5 months. While NRC will endeavor to complete reviews of the SCPs and license application as promptly as is consistent with a thorough review, the time required for review is highly dependent on the quality and completeness of the DCE submittals.

The providing of separate comments related to shaft sinking after 90 days would not be practical. The staff effort involved in the preparation and release of such separate comments would significantly delay the release of the complete set of comments on the SCP. It is possible that such separate comments could not be released much more quickly than could the entire set of comments.

We recognize that many potential licensing questions related to shaft construction (a critical path activity) must be addressed well before the start of shaft construction and, in some instances, even before SCP issuance. The NRC's ability to provide timely comments and guidance to DCE on shaft-related activities is contingent on DCE scheduling effective interchange with NRC before commitments and decisions are made on these activities, so that DCE can consider and develop satisfactory resolution of any NRC comment in a manner not to delay DCE's schedule.

In any event, codifying such schedule provisions might leave the sufficiency of an otherwise proper proceeding or review in question and subject to legal challenge.

COMMENT NO. 20

Comment Summary:

Section 60.18 (a), which concerns NRC's finding of necessity for onsite testing with radioactive materials, should state that NRC will concur in the use of radioactive tracers if certain criteria are met, and that the removal of these trace amounts at the end of site characterization shall not be required.

Response:

When the Commission adopted 10 CFR Part 60, it determined that it lacked jurisdiction over the use of radioactive material by DOE for purposes of site characterization. 46 FR 13974-75. This conclusion is expressly stated in the regulations. 10 CFR § 60.7(a). The Commission does not regard NWA as having expanded its licensing jurisdiction. As before, NRC may neither allow nor prohibit DOE's use of radioactive materials in site characterization.

The Nuclear Waste Policy Act does confer new authority upon NRC, but it is limited in scope. This is the authority to concur that DOE's use of radioactive material "is necessary to provide data for the preparation of the required environmental reports and an application for a construction authorization for a repository at such candidate site." Sec. 113(c)(2)(A), 42 U.S.C. 10133. While NRC concurrence may be a legal prerequisite to DOE's use of radioactive material in characterization, this limitation is derived from the statute itself and not from any regulatory action, such as licensing, on the part of the Commission. The Commission merely makes a finding of necessity. Thus, it is not appropriate for NRC to specify residual quantities of radioactive material which would be "allowed".

While the statutory provisions of NWA Section 113 (c) (2) (B) refer to the responsibilities of DOE, and it is not appropriate for NRC to construe the obligations of another agency, it is not apparent to the NRC that these provisions were intended to apply to tracer amounts of materials. We believe that this provision in the Act was intended to prevent DOE from creating a de facto unlicensed repository by bringing in large amounts of HLW or spent fuel under the guise of testing which was in fact unnecessary.

COMMENT NO. 25

Comment Summary:

Contrary to page 16 of SECY-84-263, NWA Section 117 does provide new rights to states to receive information, and to be able to comment on such information and have such comment considered and acted upon by the Commission.

Response:

The Commission agrees that ~~to some extent~~ Section 117 of the NWA ~~may have~~ established new rights for the States to receive information, comment on such information, and have such comments considered. Since the proposed regulation incorporates the language of Section 117, the States are assured that NRC's regulatory program will accommodate any such rights notwithstanding the discussion of Section 117 in the statement of considerations.

COMMENT NO. 27

Comment Summary:

✓ The term "semi-annual reports" in Section 60.18 (g) is incorrect as the NHPA and the proposed rule require reports "not be less than once every 6 months". It is inappropriate that the Commission waive its expectation for more than the minimum reporting from DOE.

Response:

As the comments noted, the rule does require that "DOE shall report not less than once every six months" as required by the NHPA. Referring to such reports as semi-annual does not prevent DOE from making more frequent submissions if appropriate.

COMMENT NO. 29

Comment Summary:

Issues could be more readily brought to the Commission's attention by establishing a notice and public comment process for the NRC review of the semi-annual SCP updates.

Response:

There is nothing that requires NRC to comment on the semi-annual reports on site characterization, and there will not necessarily be an NRC response to the DOE document. The DOE semi-annual reports will go to States and tribes as well as NRC, and States and Tribes may comment directly to DOE on them. A notice and public comment procedure would be too cumbersome and create the potential for unproductive delays. However, the rule ~~could~~ provide for public comment on the NRC responses to DOE by having the Director invite comments, and this has been added to the rule.

Does

COMMENT NO. 34

Comment Summary:

NRC should fund State involvement in repository planning because States have had difficulty obtaining funds from DOE.

Response:

The Commission explained, in the preamble to the proposed rule, that it believed Congress intended that DOE should assume the Federal responsibility for funding State involvement in repository planning. The commenter does not take issue with this view. If, as appears to be agreed, NWPA vests DOE with this responsibility, the appropriate action for the Commission is to eliminate any inconsistent or contrary provisions from its regulation. The concern of the State appears to be its lack of confidence in DOE's exercise of its funding authority. As in the case of other comments of this nature, discussed above, this is a matter for the affected States to work out with DOE; it is not something which the Commission is authorized to resolve or remedy. It remains true that the Commission may, in appropriate circumstances, turn to a State for particular services required by NRC in order to be able to carry out its own licensing functions effectively. But, as was explained at the time the proposed rule was issued, this is best characterized as a standard procurement activity rather than as part of the regulatory scheme for implementation of NWPA.

SHOULD NOTE RECENT COURT DECISION WHICH RULED IN FAVOR OF NEVADA.

Separate Views of Commissioner Asselstine

I approve the procedural amendments to 10 CFR Part 60 in part and disapprove in part. I believe the Commission has gone too far in deleting two very important provisions from the Commission's original procedural rule. These two important elements are: (1) the requirement for NRC review of the Department of Energy's site screening and selection process for a high-level radioactive waste repository; and (2) the requirement for NRC issuance of a draft site characterization analysis of DOE's site characterization plan for public comment, and staff analysis of those comments.

The Commission issued its licensing procedures for a high-level radioactive waste repository on February 25, 1981. These licensing procedures included NRC review of DOE's site screening and selection process and NRC issuance of a draft site characterization analysis for public comment. These were two provisions which the Commission at the time considered to be important for it to carry out effectively its licensing responsibility of a high-level radioactive waste repository. The Nuclear Waste Policy Act (NWPA) was enacted in 1982. The Congress was aware of NRC's high-level waste licensing procedures when it passed the NWPA. Congress did not object to these important provisions. However, the Commission is now taking the position that because these provisions are not required by the NWPA, then the Commission should delete them from its regulations. The fact that the new law is silent as to those two provisions does not serve as a

justification for deleting these provisions from the Commission's regulations.

I believe the Commission should retain these two very important provisions in 10 CFR Part 60. The Commission's health and safety and environmental protection responsibilities warrant NRC review of DOE's site screening and selection process. I also believe that NRC issuance of its site characterization analysis for public comment will contribute to a more rigorous and thorough review of the DOE site characterization plans, which in turn, will enhance public confidence. What the Commission considered important to carry out its health and safety responsibilities in 1981 is still important and has not been changed by the NWPA.