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Department of Energy
Washington, DC 20585

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Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

OFFICE OF
CIVILIAN
RADIACTIVE
WASTE
MANAGEMENT

Dear Sir:

The Department of Energy (Department) has reviewed the proposed amendment to 10 CFR Part 51, published on May 5, 1988, concerning Nuclear Regulatory Commission (NRC) review procedures for geologic repositories under the National Environmental Policy Act (NEPA) and the Nuclear Waste Policy Act (NWPA). With respect to most topics covered by this proposed rule, the Department is in agreement with NRC statements and interpretations of requirements under the NEPA and the NWPA. The Department appreciates the efforts made by the NRC to help clarify this area of the regulations.

In its review, the Department identified certain concerns with a number of aspects of the proposed rule. The Department's concerns focus on five areas: first, the NRC position on cooperating versus commenting agency status with respect to the Department's environmental impact statement (EIS) covering the geologic repository; second, the requirement that the Department supplement the final EIS to satisfy NRC obligations under NEPA; third, the indication that multiple EISs may be necessary; fourth, potential confusion in the interpretation of NRC's ability to take action on a license application during litigation on the Department's EIS; and fifth, preservation of the distinction that a construction authorization is not a license under the Atomic Energy Act. Our specific comments are included in the enclosure to this letter.

We appreciate the opportunity to comment on these proposed revisions. Please feel free to contact Ms. Linda Desell (586-1464) of my staff or Mr. Steven Frank (586-1979) of the Office of NEPA Project Assistance about any questions.

Sincerely,

Charles E. Kay, Acting Director
Office of Civilian Radioactive
Waste Management

Enclosure

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ENCLOSURE
DEPARTMENT OF ENERGY
COMMENTS ON PART 51

1. COOPERATING AGENCY

The Department of Energy (Department or DOE) believes that the NRC can maintain its independent role and most effectively contribute to the process under the National Environmental Policy Act (NEPA) by becoming a cooperating agency. DOE recognizes that the NRC has an important independent review and licensing authority in the siting of a repository, and that this independence must be maintained. DOE nevertheless believes that it is appropriate under section 1501.6 of the Council on Environmental Quality (CEQ) regulations to suggest that the NRC, which has licensing authority pursuant to the Atomic Energy Act (AEA) and Nuclear Waste Policy Act (NWPA), become a cooperating agency in the preparation of the Department's repository EIS. The cooperating role described in section 1501.6(b) is not inconsistent with the NRC's independent authority, and the clarification in the "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" (46 FR 18026) recognizes the role of licensor and licensee and provides for such independence with respect to scope, level of detail, and adequacy in meeting the needs of the cooperating agency with jurisdiction by law.

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2. SUPPLEMENTAL EIS

DOE is concerned with the proposed requirement in the rule to have DOE "supplement" its final EIS (FEIS) in order to satisfy NRC's NEPA obligations. Any recommendation to the President made by DOE under section 114 of the NWPA is a major Federal action and such recommendation is to be accompanied by an EIS. If, following completion of the EIS, DOE decides to revise the recommendation by making a substantial change in the proposed action that is relevant to environmental concerns, or if significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts becomes available, then DOE would prepare any requisite supplement in accordance with applicable CEQ regulations implementing NEPA.

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However, subsequent to the President's decision, the NRC has a separate responsibility under NEPA relative to its decision whether to grant or deny the Department's application for a license to receive and emplace high-level waste. In developing its EIS the NRC is to adopt, to the maximum extent practicable, the DOE EIS submitted as part of the Department's recommendation to the President. DOE believes that it is inappropriate and contrary to the CEQ scheme of

agency assignment of responsibilities for DOE to undertake the supplementation of its completed EIS in order to satisfy NRC's separate NEPA responsibilities. DOE also believes that, just as it is appropriate for NRC to be a cooperating agency in the preparation of DOE's EIS, it would be equally appropriate for DOE to be a cooperating agency in the preparation of any NRC EIS or any later supplements required for the NRC to meet its NEPA obligations.

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3. MULTIPLE EISs

In the preamble, at 53 FR 16132, the NRC indicates that multiple EISs may be necessary in considering the license application from DOE involving high-level waste disposal. The DOE does not agree that multiple EISs will be needed because DOE will scope the EIS, with public and other agency participation, to assure that all reasonable alternatives relative to the siting, construction, operation and decommissioning of the proposed repository will be contained in the EIS. NRC's participation as a cooperating agency would greatly facilitate this objective. It is the Department's position that the NEPA, the NWPA and the CEQ regulations call for a single EIS and the Department does not believe that any multiple EISs are necessary.

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4. JUDICIAL REVIEW

In the preamble discussion, at 53 FR 16142, the NRC states that "...no action will be taken by the Commission until necessary documents have been filed... with the Environmental Protection Agency. NRC will not take action concerning the proposal which would have an adverse environmental impact until a record of decision is issued." The preamble further states, at 53 FR 16144, that "Because the EIS must conform to statutory requirements, and because its completeness would have been subject to challenge in court prior to filing with the NRC, a completeness determination by NRC at the time of docketing is unnecessary..." One reading of these statements is that the NRC is proposing to suspend work on the license application until the entire judicial review process is complete. This would be decidedly inefficient, and would potentially cause major delays without providing additional environmental protection beyond the normal process. It would be consistent with normal operating procedures and far preferable from a programmatic perspective for the NRC to make a prima facie decision that, absent a reversal by the Court of Appeals, the EIS is judged to be adequate, and to process the license application. There is no need for the NRC's acceptance review of the Department's EIS to be on the licensing critical path. Clarification on NRC processing plans and expectations would be useful.

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5. CONSTRUCTION AUTHORIZATION NOT A LICENSE

Footnote 1 - at 53 FR 16134. DOE recognizes the statutory language of the NWPA reference to a construction authorization and NRC's own interpretation in the text of this document that a construction authorization under the NWPA is not a license under the AEA. DOE affirms this interpretation which is reflected in the AEA, and opposes any erosion of this distinction by the NRC. Historically, the NRC and its predecessor, the AEC, has affirmed that a construction authorization, unlike a construction permit, is not a license under the AEA. DOE will continue to interpret the term "construction authorization" accordingly.

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- 6. Sections 51.67(c), 51.109(c), and 60.24(c) should be amended to add a qualifier to reflect that a supplement may be required if DOE makes a substantial change, not previously considered in its EIS, that is relevant to environmental concerns, etc.
- 7. Proposed section 51.67(d) requires the Department to inform the NRC of the status of any legal action taken against the repository EIS and to submit periodic updates. This requirement seems unnecessary since NRC will already have this information available to it through the normal contact of its own General Counsel with the Department of Justice. Further, such information is normally readily available in weekly trade publications. This requirement should be deleted.
- 8. The Department also notes that section 113 of the NWPA was inadvertently misquoted at the bottom of column 1, 53 FR 16135. The phrase "to the maximum extent practicable" was omitted in describing the manner in which DOE must conduct site characterization to minimize significant adverse environmental effects.
- 9. At 53 FR 16139, Column 3, NRC points out that the DOE action is the recommendation to the President of the Yucca Mountain site for repository development. As mandated by NWPA section 114(f), and also expressed in CEQ regulations 10 CFR section 1502.5, this recommendation must include an FEIS prepared by DOE.

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NWPA Section 114(f) also mandates that NRC shall (to the extent practicable) adopt this EIS in connection with the issuance of a construction authorization for the repository. Thus, the use of the same EIS for the two agency actions (to the extent practicable) is the clear intent of the law. The DOE concurs in this position.

10. The NRC concluded, at 53 FR 16136 that the NWPA "provides that adoption of the EIS shall be deemed to satisfy the NRC's NEPA responsibilities 'and that no further consideration shall be required.'" NRC also notes that this provision "appears to counsel against the wide-ranging independent examination of environmental concerns that is customary in NRC licensing proceedings." This is consistent with the Department's reading of the NWPA. Specifically, this concept is included in section 51.67 of the proposed rules, which state that the FEIS shall be submitted in lieu of an environmental report.

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11. At 53 FR 16136 the NRC states that, if the DOE EIS is judged to be adequate, "further litigation would be precluded under the doctrine of collateral estoppel." Also, the NRC states that "if an issue bearing upon the adequacy of the EIS could have been raised in a timely manner, but was not, the deadline for commencing action set out in section 119 operates to bar a challenge at a later date in NRC licensing proceedings." The DOE agrees with this interpretation.

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12. At 53 FR 16138, the NRC states the position that "The approach being taken by the Commission...is that the NWPA and the principle of res judicata obviate the need for an entirely independent adjudication of the adequacy of the EIS by this Agency." This is elaborated upon at 53 FR 16139. The DOE agrees with this interpretation.

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13. The Department agrees with NRC that adoption of the DOE EIS should not compromise the NRC's independent responsibilities under the Atomic Energy Act.

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14. The Department is in agreement with the NRC with respect to several statements concerning the content of the EIS and the role of NRC:

"that the Commission's role should focus upon radiological safety, with an independent review only if there is significant and substantial new information or new consideration...;" (53 FR 16137)

8-14

"that the EIS must address the environmental impacts of construction and those of performance..." (53 FR 16141); and

In addition, NRC's requirement in the proposed new Section 51.67(b) that the FEIS must "include, among the alternatives under consideration, denial of a license or construction authorization" by NRC follows directly from CEQ Section 1502.14(d), which states "Include the alternative of no

action." The Department concurs with this requirement and has already planned to include the no action alternative within the scope of the EIS.

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