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James R. Wolf, Esq.  
Office of the General Counsel  
Nuclear Regulatory Commission  
Washington, D.C. 20555

DOCKET NUMBER PR 2,514,60  
PROPOSED RULE 53FR16131

Dear Mr. Wolf:

The proposed regulations developed by the Nuclear Regulatory Commission (NRC) concerning review procedures under the National Environmental Policy Act (NEPA) for geologic repositories for high-level waste were referred to me for evaluation. As a preliminary matter, I want to apologize for responding late in the process and to express my appreciation for your efforts to seek out the Council's comments. Those efforts demonstrate the value which you and the Commission place on protecting the quality of the environment.

The regulations proposed by NRC set forth how it perceives its NEPA responsibilities in connection with a license application submitted by the Department of Energy (DOE) for a high-level waste repository in accordance with the Nuclear Waste Policy Act, as amended (NWSA). As I mentioned when we met in August, my primary concern with the proposed regulations is the scope of NRC's review of the environmental impact statement (EIS) submitted by DOE for the repository.

The NWSA requires DOE to recommend to the President one site for a nuclear waste repository. The recommendation must be accompanied by a final EIS. If the President and Congress concur in the recommendation, DOE must submit to the NRC an application for a construction authorization for the repository. 42 USC § 10134(a) and (b).

Any EIS prepared in connection with a repository proposed to be constructed by DOE "shall, to the extent practicable, be adopted by the [NRC] in connection with the issuance by the [NRC] of a construction authorization and license for such repository." To the extent that an EIS is adopted by NRC, "such adoption shall be deemed to also satisfy the responsibilities of the [NRC] under the National Environmental Policy Act...and no further consideration shall be required..." 42 USC § 10134(f).

The judicial review provision of the NWSA gives exclusive jurisdiction to the United States Courts of Appeals over any civil action for review of "any environmental impact statement prepared pursuant to the National Environmental Policy Act...."

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42 USC § 10139(a)(1)(D). Such an action must be brought within 180 days of "the decision or action involved...." 42 USC § 10139(b).

NRC's proposed regulations address the standards and procedures to be used in adopting a DOE EIS. NRC states that it will conduct a "thorough" review of DOE's draft EIS and will provide comments on its adequacy. The agency also states that it will "find it practicable to adopt DOE's EIS (and any DOE supplemental EIS)" unless (a) NRC's action differs in an environmentally significant way from the action described in DOE's license application, or (b) significant and substantial new information or new considerations render DOE's EIS inadequate. Proposed Rules at 2.

While NRC recognizes its ability to adopt DOE's EIS, it views the NWPA as limiting the scope of its review of that EIS. Specifically, NRC cites the NWPA's directive to adopt DOE's EIS "to the extent practicable" and interprets this as requiring it to give substantial weight to DOE's findings. Proposed Rules at 20-21. Further, the agency notes that its adoption of a DOE EIS is deemed to satisfy its NEPA responsibilities and that "no further consideration shall be required;" NRC concludes that this appears to counsel against the wide-ranging independent examination of environmental concerns that is customary in NRC licensing proceedings." Id. at 21.

The NWPA's judicial review provision is also said to limit NRC's consideration of NEPA issues. NRC states that review of DOE's EIS must be sought, if at all, within 180 days after DOE makes its recommendation to the President. If the EIS is judged to be adequate for purposes of the site recommendation made by DOE, further litigation of the issues in NRC adjudications would be precluded. Moreover, if an issue bearing on the adequacy of the EIS could have been raised, but was not raised in a timely manner, the judicial review provision operates as a bar to a challenge at a later date in NRC proceedings. Proposed Rules at 22.

Thus, NRC regards the scope of its NEPA review to be narrowly constrained, with those issues which are ripe for consideration after issuance of DOE's EIS being excluded from an independent examination by NRC. Proposed Rules at 22. The agency takes the position "that the NWPA and the principles of *res judicata* obviate the need for an entirely independent adjudication of the adequacy of the EIS" prior to adoption by NRC. Id. at 30. According to NRC, "[t]he factors discussed above make it entirely

reasonable for the Commission not to reopen issues that have been, or could previously have been, brought before the courts for resolution." Id. at 32. "The consequence of this approach is that the Commission would carry out a licensing review to assure that a repository could be operated safely -- but that it would, in general, treat as settled those other issues arising under NEPA." Id. at 34.

These proposed regulations appear to allow NRC to adopt the final EIS issued by DOE without the independent analysis required under the CEQ regulations for the adoption of another agency's EIS. See 40 CFR § 1506.3; see also "CEQ Guidance Regarding NEPA Regulations," 48 Fed. Reg. 34263, 34265 (1983). NRC's rationale for this is that the EIS should be deemed adequate unless a court says it is inadequate. The reliance on judicial action is based upon the NWPA's provisions for adoption "to the extent practicable" and for judicial review.

I disagree with this interpretation of the NWPA, and read the phrase "to the extent practicable" to mean just that: after looking at DOE's EIS and evaluating it, NRC should adopt some or all of it in order to avoid unnecessary duplication. In addition, I do not read the judicial review provision as requiring someone to challenge the adequacy of an EIS for the waste repository within 180 days of its issuance by DOE.

Clearly, if a court deems DOE's EIS adequate, NRC is in no position to reject that finding (although that does not automatically mean that the EIS is acceptable for NRC's purposes). The absence of any litigation on DOE's EIS, however, should not allow NRC to adopt the EIS without its own evaluation. The absence of litigation, for whatever reason, offers no authoritative conclusion as to the adequacy of the EIS. Further, there is an excellent chance that any litigation brought challenging DOE's EIS will not be completed by the time NRC needs to make its licensing determination.

A better approach would be for NRC to do an independent evaluation of DOE's EIS, taking any court decisions into account, and determine on the basis of that evaluation whether to adopt the document. At the NRC licensing proceeding, intervenors could raise as an issue the propriety of NRC's adoption decision, e.g., that the EIS was not adequate for NRC's purposes for whatever reasons. If the intervenors raised issues which had been raised in litigation, NRC could defer to the court, although this would delay an NRC decision.

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Why?  
Seems to ignore the fact that NWPA charged NRC NEPA responsibilities

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In this way, issues relating to the adequacy of DOE's EIS would be litigated only once, and NRC would fulfill its obligation under NEPA and the CEQ regulations to independently evaluate an EIS before adopting it.

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I hope these comments have been useful to you. Please do not hesitate to call me if you have any questions.

Sincerely,

*Lucinda Low Swartz*  
Lucinda Low Swartz  
Deputy General Counsel

ENCLOSURE F

NEPA Compliance for HLW Repositories - Comment Analysis

Comment	Response
<p>** Nevada Nuclear Waste Task Force</p> <p>1 1 The proposed rule doesn't display understanding of the role of providing NEPA documentation for license application, not site selection, in the context of an EIS arising from a Negotiator-selected site.</p> <p>1 2 The proposed rule does not consider the likelihood that a court will find the FEIS in part inadequate, in which case the Commission would have to review the decision and FEIS to determine impact on the license application, including adequacy of the SAR.</p> <p>1 3 The proposed rule does not consider situation in which a court might not decide EIS challenge before NRC reaches its licensing determination, in which case NRC should review environmental issues.</p> <p>1 4 The proposed rule does not consider the possibility that a court might delay its decision on the adequacy of a FEIS until it sees the Commission's findings in a licensing decision.</p> <p>1 5 The suggestion that members of the public who had been represented by state officials in prior judicial proceedings might be precluded from raising issues anew is inconsistent with NRC intervention rules and reflects prejudice vs. citizen participation.</p> <p>1 6 The proposed rule overlooks the possibility that a party might decide to litigate basic issues regarding adequacy of the repository in NRC licensing proceedings (and then in court) rather than in a NEPA challenge to the FEIS.</p>	<p>The final rule provides for NEPA review with respect to a Negotiator-selected site to follow customary practice.</p> <p>A judicial finding of inadequacy of DOE's EIS, in part or in toto, would be new information or a new consideration necessitating independent NRC review.</p> <p>A prior judicial decision is not a prerequisite to NRC adoption of the DOE EIS.</p> <p>It is unlikely the court would defer its ruling, since the issues would be ripe and no special NRC expertise is needed. However, in the event of deferral, NRC would adopt the EIS (absent the other factors specified in the rule).</p> <p>Failure to raise the issues by persons with knowledge and an interest would result in their being time barred even they were not estopped by virtue of their representation by State officials.</p> <p>NWPA requires that challenges to the EIS be litigated promptly. Although NRC's final decision would be subject to judicial review, its adoption under the standards of the rule would be in accordance with law and hence upheld on the merits.</p>
<p>** State of Nevada (Nuclear Waste Project Office)</p> <p>2 1 Although NRC and DOE each has its part in the same major federal action, each agency must evaluate environmental consequences of entire project and determine independently whether NEPA has been satisfied.</p> <p>2 2 The statutory provisions with respect to adoption merely restate prior law, compromising independent review only where the responsible agency is forbidden to act as NEPA might otherwise demand or its ability to carry out its duties would be frustrated.</p> <p>2 3 The proposed rule misapplies the concept of "practicability." NEPA itself requires use of all practicable means to accomplish environmental objectives and this does not require compromise of an agency's more specific statutory responsibilities.</p>	<p>Under NWPA, Congress intends for NRC to adopt the EIS in the absence of substantial new information or new considerations.</p> <p>The NRC view is that NWPA was intended to make a substantive change in the law.</p> <p>As indicated by the discussion of the proposed rule, Congress intended NRC to adopt the DOE EIS if at all possible - i.e., absent new information or new considerations. The State's citations do not mandate a different view.</p>

NEPA Compliance for HLW Repositories - Comment Analysis

Comment	Response
2 4 The performance of NEPA duties by NRC would not frustrate the Commission's ability to carry out its specific statutory duties, including the issuance (if otherwise warranted) of a construction authorization within a three (or four) year period.	The extent to which a proceeding would be extended is speculative. To some degree, the ability to meet the timetable could be jeopardized.
2 5 The statutory provision that "no further consideration shall be required" after adoption does not remove environmental issues from litigation, since under Calvert Cliffs NRC must consider the EIS and environmental factors through agency review processes.	The EIS will accompany the application through the entire review process. The formal adoption will be part of the decision made after the hearing is concluded.
2 6 Under Calvert Cliffs, NRC may not abdicate to other agencies' certifications, but must make a balancing judgment itself.	Under NWPA, NRC must make a balancing judgment only as necessary to consider new considerations or new information.
2 7 The proposed rule erroneously suggests that NEPA issues may be treated as "settled" inasmuch as NRC's refusal to issue its own EIS or to consider the environmental impacts of DOE's action is subject to judicial review.	While NRC's decision is subject to judicial review, NRC anticipates that a decision pursuant to the rule would be found to be in accordance with applicable law.
2 8 Collateral estoppel does not have the effect asserted by the proposed rule because the two agencies' actions are independent and pose different legal and factual questions.	Both agencies are concerned with the same action: construction and operation of a specific repository. Under these circumstances, it would be proper for NRC to conclude that if the EIS is adequate for DOE's action, it is adequate for NRC's as well.
2 9 Elimination of environmental issues from the licensing proceeding on the grounds of collateral estoppel would be contrary to the NEPA directive that "to the fullest extent possible," the laws are to be administered in accordance with NEPA.	Where principles of collateral estoppel are properly invoked, further inquiry is barred. This is fully consistent with NEPA.
2 10 A final judicial judgment is inapposite because NRC has no duty to review DOE's EIS for its legal adequacy. The issue is not whether DOE's EIS is legally adequate, but how NRC is to perform its own NEPA responsibility.	Since CEQ's standard for adoption is the "adequacy" of the EIS, the issue under NWPA is the adequacy of the EIS.
2 11 NWPA imposes no duty upon States and Tribes to help DOE evaluate alternatives under NEPA, nor has DOE offered any opportunity to do so, and accordingly the established agency responsibilities to consider alternatives remain in full force and effect.	NWPA provides the opportunity for consultation with regard to the environmental impacts of a repository and contemplates efforts to resolve State and tribal objections through negotiation. Remaining concerns could be addressed under the veto provisions.
2 12 The proposed rule's indication that failure to challenge DOE's EIS might result in a potential challenger's being time barred from raising issues in NRC proceedings is offensive to NEPA.	Under NWPA, Congress intended issues concerning DOE's EIS to be settled early. The time bar is necessary to reflect this policy.
2 13 The existing rule's standard for completeness of DOE's license application is insufficient, because it does not place upon DOE the requirement that its application be submitted by sufficient information.	The challenged language restates the existing rule, and the comment hence is beyond the present rulemaking. Nevertheless, NRC considers the standard to be sound. There is no implication DOE's compliance with 60.24 assures favorable NRC licensing action.

NEPA Compliance for HLW Repositories - Comment Analysis

Comment	Response
2 14 It is wrong to characterize the change in DOE's statutory responsibilities (under the NWPA) as an intention to change NRC's statutory responsibilities.	NRC did not claim any such change. In fact, the Commission said it would follow the same procedures that it would have had the Amendments Act not been passed. 53 FR 16140.
2 15 Although a number of considerations suggested in the State's petition for rulemaking have been mooted by NWPA. A. the NRC response is inadequate. NRC should adopt a substantive standard for performance of NEPA responsibilities, preserving its discretion.	In view of its interpretation of NWPA, NRC declines to follow the substantive standard proposed by the State of Nevada. NRC believes it should adopt the DOE FEIS in the absence of significant new information or new considerations.
2 16 NRC should issue rules conforming to language suggested by Nevada, under which adoption "will fit within the administrative structure by which the Commission" considers NEPA issues, utilizing portions of the DOE EIS on which NRC, under NEPA, may rely.	See response to preceding comment.
2 17 Nevada's suggested rule would preserve, for a negotiated site state, full consideration of environmental issues by NRC even though the affected state will have foregone its right to litigate DOE's EIS altogether.	The final rule allows litigation of NEPA issues for a negotiated site in accordance with customary practice.
2 18 Nevada's proposed rule eliminates the possibility that NRC might be unable to move because protracted litigation makes it impossible for NRC staff to take a position on the practicability of adoption of the DOE EIS.	The pendency of litigation will not prevent the NRC staff from being able to take a position on the practicability of adoption of the DOE EIS.
** Environmental Defense Fund	
3 1 While NWPA narrows NRC duty to consider need, alternative technologies and sites, and time of availability, NRC still has duty under AEA to comply with NEPA and consider impacts on human environment.	Under NWPA, this duty arises where there are new considerations or new information. The basis for this position was explained in connection with issuance of the proposed rule. NRC does not rely solely on the statutory changes to the scope of the EIS.
3 2 The legislative history of NWPA supports the principle that NRC is not allowed to forego its NEPA duties and rely entirely on DOE's NEPA compliance.	On the contrary, NWPA was intended to eliminate independent NEPA review by NRC, absent new information or new considerations.
3 3 Section 114(f)(6) of NWPA provides that "the Commission" need not consider enumerated factors in any EIS prepared with respect to the repository. This indicates that Congress intended for NRC to issue its own EIS.	Congress made it clear that NWPA was not intended to change the NRC role which, it is clear, required no NRC EIS. In any event, the cited amended language could be applied in their literal terms with respect to any supplemental EIS prepared by NRC.
3 4 NRC may not abdicate its role under NEPA simply because DOE has complied with the laws, including NEPA, applicable to the Department [citing Calvert Cliffs, the relevance of which was dismissed by NRC].	NRC does not abdicate any statutory role. It will discharge its NEPA responsibilities in the manner contemplated by NWPA.

NEPA Compliance for HLW Repositories - Comment Analysis

Comment	Response
3 5 Under the "practicable" standard, NRC retains flexibility to exercise independent judgment - as NRC recognized in the context of uranium mill tailings regulations - especially since Congress intended NRC to comply independently with NEPA.	In construing its duties under AEA 84(c), both the purpose and grammatical structure of the law persuaded NRC that it retained independent judgment so as to be able to grant a variance from EPA standards. NWPA's purpose and language indicate otherwise.
3 6 Although a judicial decision on the adequacy of DOE's EIS binds NRC to the extent of the holding, NRC would not be relieved of its independent NEPA responsibilities since these are separate and distinct from DOE's responsibilities.	For purposes of the doctrine of issue preclusion, there is an identity of factual and legal issues. The major federal action involved is the construction and operation of the repository, and an EIS that is found "adequate" for DOE is "adequate" for NRC.
3 7 If NRC were to await a court decision on the adequacy of DOE's EIS, this could be years after issuance of DOE's EIS and long after such decision could be meaningful during the Commission's expedited licensing proceeding.	NRC will not necessarily await a court decision on the adequacy of DOE's EIS. In the absence of substantial and significant new information or new considerations, it would adopt the DOE EIS whether or not a judgment had been entered.
3 8 For NRC to perform its licensing function adequately, it must produce a competent EIS and allow issues to be subject to argument in the licensing proceeding. To ensure this, Congress provided NRC with authority to adopt, in whole, part, or not at all.	NRC believes that the statutory scheme embodied in NWPA contemplates that the nonsafety issues would not be subject to argument in licensing proceedings except where there are substantial or significant new considerations or new information.
3 9 NRC position is contrary to (1) its NEPA duties, (2) 10 CFR 60 provisions contemplating NRC review of at least some environmental issues, and (3) implications of NWPA 121 direction to EPA to adopt environmental standards with which NRC must conform.	The position conforms to NWPA as to discharge of NEPA duties. 10 CFR 60 references to NEPA are procedural, not substantive. The NWPA 121 direction to EPA pertains to its authority, under existing law, to establish radiological standards under the AEA.
3 10 NRC's statement that it does not anticipate environmental license conditions is unjustified and irresponsible. NRC is ultimate guarantor of safety, including protection of human environment, and must place all necessary conditions into the license.	If DOE's FEIS calls for mitigative measures to be incorporated into the license, NRC expects to do so. Otherwise, though, the litigation of potential environmental license conditions would as a rule be contrary to NWPA's objectives as construed by NRC.
3 11 NRC's claim that mitigation measures proposed in an EIS are independently enforceable is not supported by any cited authority. Given that no such authority exists, NRC must allow such conditions to be subjected to scrutiny in the licensing process.	Mitigation conditions are enforceable to the same extent as applies to other nonlicensed major federal actions. Deviation could necessitate preparation of a supplemental EIS.
3 12 NRC adoption of all or part of DOE's EIS does not mean that NRC can avoid considering environmental issues at its licensing proceedings. This is no different from cases cited by NRC in which an independent evaluation was required.	NWPA does make a change in substantive law. Under NWPA, an independent evaluation is contemplated only for significant new information or new considerations.
3 13 NRC cannot deny DOE's application to avoid having to supplement the EIS. NRC cannot force DOE to perform the Commission's own responsibilities through the threat of license denial. EDF urges the Commission to rethink such juvenile behavior.	There would be no such denial unless DOE had failed to carry out its own duties under NEPA to supplement an EIS - not where supplementation was an NRC responsibility.

NEPA Compliance for HLW Repositories - Comment Analysis

Comment	Response
** Southwest Research and Information Center	
4 1 NHPA language intended to expedite NRC review of the license application does not limit the NEPA issues NRC can address. NHPA does not limit to radiological safety the issues that could lead to rejection of an application.	NRC believes that Congress intended to limit its independent consideration of NEPA issues unless there are new considerations or new information. [Also, standards for NRC review do not come from Sections 116 and 118 of NHPA cited by SRIC.]
4 2 NHPA does not prohibit NRC from imposing conditions, including those related to environmental issues, on its licensees. In such cases, a supplement to the FEIS would be necessary.	If it is practicable to adopt the EIS, no supplement would be necessary.
4 3 The proposed rule, which says NRC review begins with DOE's DEIS, ignores the NRC's 1986 statement that it would review and comment on DOE's scoping documents and activities for implementing NEPA. NRC should be an active participant in scoping hearings.	NRC will review and comment on DOE's scoping documents, as a commenting agency.
4 4 NRC should expressly acknowledge its role in reviewing an environmental assessment developed for a site proposed by the Negotiator, especially so in view of Section 403(c), which allows the Negotiator to solicit and consider NRC comments on a site.	The NRC role is prescribed by the statute, as cited, so if requested by the Negotiator, the Commission would comment on the suitability of the site for characterization. If requested by DOE, NRC would comment on the EA as to matters in its jurisdiction.
4 5 For a Negotiator-chosen site, the FEIS provides necessary NEPA documentation only for the license application, not for site selection. The proposed rule shows no recognition of this, but describes the FEIS as being for both.	The cited text discusses issue preclusion in the context of a FEIS for the recommendation (DOE) and for the license review (NRC). For a Negotiator-chosen site, with the EIS supporting the application, the argument would actually be stronger.
4 6 With a Negotiator-selected site, it is quite likely that there will be no NEPA challenge since the affected state will not oppose the designation before Congress, the courts, or the Commission. Also, the 180-day review period will start later.	NRC considers the affected state's obligation to seek prompt judicial review of DOE's EIS to be applicable to a Negotiator-selected site. The review period would start later, though, and under the final rule NRC's adoption standard would be modified.
4 7 NRC should begin defining its role in relation to the Negotiator, whose Office will be a new agency with which NRC will interact.	The present rulemaking starts to construct a framework for such interaction.
4 8 The proposed rule does not adequately describe NRC's role as an active, involved, commenting agency. The Commission should fulfill its role of providing expert analysis of public health and safety issues throughout DOE's NEPA process.	Consistent with the availability of resources, NRC will provide (as a commenting agency with expertise and jurisdiction) expert analysis of health and safety issues throughout the DOE NEPA process.
4 9 NRC should develop a mechanism to directly receive comments from interested parties as well as have a method to review comments received by DOE on NEPA issues.	NRC believes it has sufficient access to information needed to carry out its responsibilities under NEPA as a commenting agency. Of course, as to Atomic Energy Act issues public concerns will be ventilated through both informal and formal procedures.

NEPA Compliance for HLW Repositories - Consent Analysis

Comment	Response
4 10 NRC should compare the SAR to the FEIS to ensure the two documents are not inconsistent. Differences could require revisions to the SAR or supplementation of the FEIS.	If NRC's findings of fact are different from facts considered in DOE's FEIS, and may give rise to significant environmental impacts not considered in the EIS, supplementation might be necessary.
4 11 If Congress intended to limit NRC's licensing review, it would not be appropriating substantial sums to ensure that environmental as well as radiological safety documents are included in the Licensing Support System.	There is nothing wrong with having the LSS serve data-collection requirements that are not strictly material to NRC licensing decisions. In any event, since an EIS found to be inadequate would prevent licensing, environmental data would be relevant.
4 12 The proposed rule overlooks the possibility that only the NRC will adjudicate the adequacy of the EIS - e.g., in the case of a Negotiator-chosen site, where the affected state or tribe would be precluded from challenging the EIS.	The final rule provides a different standard for NEPA review by NRC with respect to a Negotiator-chosen site.
4 13 The proposed rule overlooks the possibility that there is no legal challenge to the FEIS, but rather parties litigate all such issues during the licensing proceeding. NRC must then review the FEIS in detail.	Challenges to the FEIS would be time-barred, at least as to affected persons having knowledge thereof, should they choose not to seek judicial review.
4 14 The proposed rule erroneously argues that radiological safety "is entrusted solely to the Commission." In fact, such issues could be raised by parties to NEPA litigation and addressed in a court's review.	Only NRC makes radiological safety findings under the Atomic Energy Act.
4 15 The proposed rule overlooks the situation where a Court concludes that an FEIS is inadequate on any of a number of grounds. NRC would then have to evaluate all issues decided by the Court to determine the decision's impact on the license application.	Should the FEIS be found inadequate, NRC agrees that it would have to evaluate the issues decided by the Court to determine the decision's impact. The decision would constitute new information or new considerations and treated as such under the rule.
4 16 The proposed rule overlooks the possibility of a Court's delaying its decision on the adequacy of the FEIS pending the Commission's findings as to its adequacy in the licensing proceeding - e.g., to enable the Court to take advantage of NRC expertise.	Such a delay is not anticipated, either on grounds of ripeness or primary jurisdiction. In any event, however, in the absence of new information or new considerations, NRC would still adopt the FEIS.
4 17 The proposed overlooks the situation where a Court does not make its decision before the Commission makes its licensing decision.	As indicated above, this would not prevent NRC from arriving at a final decision.
4 18 The language related to limitations on issues that parties can raise in NRC hearings (i.e. pertaining to members of the public represented by states in judicial proceedings) is premature and inappropriate, particularly in view of NRC intervention rules.	It is desirable to articulate as clearly as possible the principles by which the Commission intends its proceedings to be governed. The intervention rules are not necessarily controlling with respect to issue preclusion (collateral estoppel) matters.

NEPA Compliance for HLW Repositories - Comment Analysis

Comment	Response
** Edison Electric Institute	
5 1 The commenter agrees that Congress, in passing NWPA, substantively modified the requirements of NEPA as they apply to the high-level nuclear waste program. NRC's responsibility is to address radiological safety issues under Atomic Energy Act.	No response required.
5 2 Issues pertaining to the practicability of adoption of the DOE EIS should be resolved outside of hearings, where it would inevitably interfere with the primary focus of the proceedings, viz. issues affecting public health and safety.	The decision with respect to NEPA must be made as a part of the Commission's final decision on the license application. Resolution outside the hearings would therefore not be appropriate.
5 3 The determination whether it is practicable to adopt the DOE EIS should be made prior to the hearing process (and outside the adjudicatory arena). NRC can solicit comment when DOE issues its EIS, allowing public participation without needless delay.	The suggestion should not be accepted - not only because NEPA enters into the final decision, but because new information or new considerations could arise later.
5 4 NRC should explicitly state that its decisions, including determination of practicability of adoption of DOE's EIS, need not await outcome of litigation as to the adequacy of the EIS. If a court later rules EIS deficient, NRC can then act as necessary.	This is correct, and statements to this effect will accompany publication of the final rule.
5 5 Final rule should reemphasize that NRC responsibility to resolve radiological safety issues in licensing hearing is not to be burdened with continued analysis of and challenge on NEPA-related matters	Such emphasis is provided, to the extent contemplated by NWPA.
5 6 To provide controls to meet the 3-year licensing schedule, NRC should provide a time period within which NRC staff must present its position on practicability of adoption of EIS - e.g. within 90 days after publication of the EIS.	The language of 51.26(c), which provides for inclusion in the notice of docketing of a statement of intention to adopt, <u>implies at least a tentative staff judgment.</u> It provides <u>appropriately</u> for supplementation, then or later, if deemed necessary.
5 7 If NRC does not remove the practicability determination from the adjudicatory hearing, the rule should provide a time period for filing contentions with respect to the practicability of adoption - e.g. date on which initial contentions are due.	The Commission considers that its rules of practice provide workable guides to decide whether or not contentions with respect to the practicability of adoption have been filed in a timely manner.
5 8 The concept that adoption of DOE's EIS does not necessarily mean that NRC would independently have arrived at the same conclusions on matters of fact or policy should be embodied in the rule itself.	The concept is already clearly embodied in the rule itself.
5 9 NRC should clarify in the rule that the criteria for evaluating the extent to which it is practicable to adopt the EIS are those provided in NEPA and subsequent judicial interpretations.	This is incorrect. The standard for adoption is derived in large part from the structure, purposes, and legislative history of NWPA.

But NEPA does not require hearings

NEPA Compliance for HLW Repositories - Comment Analysis

Comment	Response
5 10 NRC should clarify in the rule that it intends to make independent NEPA findings, including independent balancing of relevant factors, only to extent NRC itself must prepare an EIS or supplemental EIS (because of new information or new considerations).	These considerations were stated clearly in the proposed rule and do not require change.
** U.S. Environmental Protection Agency	
6 1 EPA believes that the proposed rule reflects the appropriate requirements under the Nuclear Waste Policy Act, as amended.	No response required.
** Sierra Club	
7 1 The proposal amounts to abdication of NRC's responsibility to assure safety and protect the environment when determining licensability of a HLW repository. This is unwise and contrary to Congressional intent, and will result in loss of NRC credibility.	NRC believes that its interpretation of NWPA reflects the intent of Congress and will enhance its ability to assure safety.
7 2 The Sierra Club endorses and wishes to be associated with the conclusions reached in the letter of comment reached in the letter submitted by the Environmental Defense Fund.	See responses to letter submitted by EDF.
7 3 Under the dubious theory that Congress crowned DOE as lead agency, NRC would charge DOE with responsibility to frame issues in advance of, and as basis, for NRC's own proceeding - esp., the invitation for DOE to present consequences of license denial.	Nothing done by DOE in fulfilling its NEPA responsibilities will affect the framing or decision of radiological safety issues in NRC licensing proceedings.
7 4 NRC should not implicitly embrace a process where the real standard is whether licensing the proposed action is better than the status quo ante. The real standard must be radiological safety in specific regard to the proposed action.	The Commission's decision will address radiological safety in specific regard to the proposed action - among other things, applying the EPA's general environmental standard.
7 5 NRC's tortured reading is out of line. The direction to adopt the EIS was clearly intended to avoid unnecessary duplication of effort in preparing separate statements - not to relieve NRC of fundamental responsibility to pass on environmental adequacy.	NRC believes that its interpretation of NWPA reflects the intent of Congress. Avoidance of unnecessary duplication of effort was a consideration, but not the only consideration.
7 6 The standard of practicability for adoption of the EIS erects an impossibly high hurdle for rejecting DOE's EIS and abdicates NRC obligation to assure protection of public health and safety and the environment. Even legal insufficiency would be ignored.	There is no abdication of NRC responsibility. The ability to assure protection of health and safety is enhanced, not diminished, by the concentration of effort in that direction. A judgment of insufficiency would be a new consideration requiring review.

NEPA Compliance for HLW Repositories - Comment Analysis

Comment	Response
** Dept. of Energy 8 1 It is appropriate under CEQ regulations to suggest that NRC become a cooperating agency in preparation of DOE's EIS. NRC's independence with respect to review and licensing can be maintained as a cooperating agency.	NRC believes that a commenting agency role is more appropriate, because DOE under NWPA should develop the required information and environmental analyses. As a commenting agency, however, NRC will still participate in scoping and other early activities.
8 2 Although DOE may be required to supplement the EIS if it makes a substantial change in its recommendation to the President or new data is available, DOE should not supplement the EIS merely to satisfy NRC's separate NEPA responsibilities.	DOE is correct. But, as it acknowledges, it might need to supplement if it were to make a substantial change or if there were new information or new considerations. That is all that 60.24(c) requires.
8 3 DOE disagrees with NRC's indication that multiple EISs may be necessary in considering DOE's license application, since all pertinent matters will be addressed in an EIS that has been scoped in accordance with CEQ regulations.	NRC did not mean to imply that multiple EISs would be required when it was considering the issuance of a construction authorization. Rather, it is in the entire adjudicatory process, including operation, closure, etc., that new EISs may be needed.
8 4 Certain NRC statements could be interpreted as meaning that it would suspend work on the license application until the entire judicial review process is complete, placing NRC's acceptance review of the EIS on the licensing critical path.	In fact the rule eliminates an acceptance review for the EIS, thereby removing it from the critical path. As DOE suggests, the EIS would be presumed to be adequate absent contrary judicial action, and NRC could proceed to consider the application.
8 5 DOE recognizes the NWPA reference to construction authorization and NRC's interpretation that a construction authorization is not a license under the Atomic Energy Act. DOE opposes any erosion of this distinction.	NRC is in accord with the comment. The discussion of this issue cited by DOE (53 FR 16134, n.1) does not reflect any contrary position.
8 6 Those provisions of the regulations that require DOE to supplement the EIS if it makes a substantial change in the proposed action should be qualified so as refer only to changes that were not previously considered in DOE's EIS.	NRC agrees that the language needs to be qualified so as to require supplementation only in situations covered by NEPA and CEQ regulations.
8 7 The proposed requirement that DOE inform NRC of the status of legal action on the repository EIS is unnecessary, since this information is a matter of public record.	As a general rule, the applicant has the burden of placing on the record those factual matters upon which NRC decisions may be predicated. Since NRC's decision regarding adoption of the EIS may depend upon judicial action, DOE should report accordingly.
8 8 DOE notes that the reference to Section 113 of NWPA omitted the phrase "to the maximum extent practicable" in describing the manner in which DOE must conduct site characterization to minimize significant adverse environmental effects.	NRC regrets the omission of the phrase in question. The discussion was informational, however, and the omission is not material to the issues being considered in this rulemaking.
8 9 DOE concurs with NRC's view that the use of the same EIS for DOE's recommendation of a site and NRC's issuance of construction authorization (to the extent practicable) is the clear intent of NWPA.	No response required.

NEPA Compliance for HLW Repositories - Comment Analysis

Comment	Response
8 10 NRC's note that NWPA (which provides that adoption satisfies NRC's NEPA responsibilities) counsels against wide-ranging independent examination of environmental concerns in licensing proceedings is consistent with DOE's reading of the law.	No response required.
8 11 DOE agrees that a judicial determination of adequacy precludes further litigation on that issue, and that failure to raise an issue within the time set out in NWPA bars later challenge.	No response required.
8 12 DOE agrees that NWPA and principles of res judicata obviate the need for an entirely independent adjudication of the adequacy of the EIS by NRC.	No response required.
8 13 DOE agrees that adoption of the DOE EIS should not compromise the NRC's independent responsibilities under the Atomic Energy Act.	No response required.
8 14 DOE agrees with statements pertaining to NRC's focus on radiological safety, consideration of environmental impacts of construction and performance in the EIS, and treatment of license denial [or, no action] as an alternative.	No response required.
** Council on Environmental Quality	
9 1 I read the phrase "to the extent practicable" to mean that NRC should look at DOE's EIS and evaluate it, adopting some or all of it in order to avoid unnecessary duplication.	The comment does not take into account the context of the NWPA as a whole, which implies that NRC should adopt DOE's FEIS absent new information or considerations.
9 2 I do not read the judicial review provision as requiring someone to challenge the adequacy of an EIS for the waste repository within 180 days of its issuance by DOE. The absence of litigation does not establish adequacy or allow NRC to avoid evaluation.	NRC believes that NEPA challenges were intended to be disposed of promptly, and that parties who might sit on their rights should be time-barred from raising them later.
9 3 NRC should make an independent evaluation, though to the extent that intervenors raised issues in litigation, NRC could defer to the court, although this would delay an NRC decision.	NRC, also, considers that a judicial determination of the adequacy of DOE's EIS should be regarded as controlling. In NRC's view, though, independent evaluation is only required, pursuant to NWPA, if significant new information or considerations exist.

ENCLOSURE G

> 50 FR 51701  
Published 12/19/85  
Comment period expires 2/18/86.

**10 CFR Part 60**

**(Docket No. PRM-60-2A)**

**States of Nevada and Minnesota: Filing  
of Petition for Rulemaking**

**AGENCY: Nuclear Regulatory  
Commission.**

**ACTION: Notice of Receipt of Amended  
Petition for Rulemaking from the States  
of Nevada and Minnesota.**

**SUMMARY: The Nuclear Regulatory  
Commission is publishing for public  
comment this notice of receipt of a  
petition for rulemaking that amends an  
earlier petition for rulemaking (PRM-60-  
2) filed with the Commission on January  
21, 1985. This amended petition, filed by  
the States of Nevada and Minnesota,  
and dated September 30, 1985, was  
docketed by the Commission on October  
3, 1985, and assigned Docket No. PRM-  
60-2A. The petitioner requests the  
Commission to amend its repository  
licensing regulations to incorporate the  
equivalent substance of the assurance  
requirements as issued in the final  
Environmental Protection Agency (EPA)  
Standards.**

**DATE: Comment period expires February  
18, 1986. Comments received after this  
date will be considered if it practical to  
do so, but assurance of consideration  
cannot be given except as to comments  
received on or before this date.**

**ADDRESSES: All persons who desire to  
submit written comments concerning the  
petition for rulemaking should send their  
comments to the Secretary of the  
Commission, U.S. Nuclear Regulatory  
Commission, Washington, DC 20555.  
Attention: Docketing and Service  
Branch.**

**Single copies of the petition may be  
obtained free by writing to the Division**

## PART 60 • PETITIONS FOR RULEMAKING

of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

The petition, copies of comments, and accompanying documents to the petition may be inspected and copies for a fee at the NRC Public Document Room, 1717 H Street, NW, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** John Philips, Chief, Rules and Procedures Branch, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301-492-7086 or Toll Free: 800-368-5642.

### **SUPPLEMENTARY INFORMATION:**

#### **Background**

##### **I. Statement of Grounds and Interests:**

The State of Nevada filed this amended rulemaking petition as a State notified pursuant to the Nuclear Waste Policy Act (NWPA), that a potentially acceptable site for a repository has been identified within the state. The State of Nevada avers that it may become affected for purposes of participation in site characterization, pursuant to § 213 of the NWPA.

The State of Minnesota joins this amended petition as a state informed that it is being considered for site characterization for a second repository. The State of Minnesota avers that it may be directly affected by the substance of standards for the development of repositories.

The States of Nevada and Minnesota ground this petition on their respective interest in, and the prevailing responsibility for, the protection of the future health and safety of their citizens.

##### **II. Issues Raised in PRM-60-2 and 60-2A**

###### **PRM-60-2**

The petitioner filed the original petition (PRM-60-2) with the Commission on January 21, 1985. The petitioner requested the Commission to adopt a regulation governing the implementation of certain environmental standards which had been proposed by the Environmental Protection Agency. The NRC published a notice of the petition for rulemaking in the Federal Register on April 30, 1985 (50 FR 18267) and requested comments. The comment period closed on July 1, 1985. Six comments were received in response to the notice.

###### **PRM-60-2A**

The petitioner states that this amendment to PRM-60-2 is based on the intervening action of the Environmental Protection Agency (EPA) on September 18, 1985 (50 FR 38066), in which the EPA issued final standards for protection of the general

environment from offsite releases from radioactive material in repositories. The petitioner hopes to accomplish two objectives in this amendment: (1) To place before the Commission the substance of the assurance requirements, in terms of amendments to 10 CFR Part 60, which the EPA's recently published standards failed to make applicable to NRC licensees, i.e. Department of Energy (DOE) high-level waste repositories; (2) to propose to the Commission requirements and considerations for the process of adopting the DOE Environmental Impact Statement.

##### **III. Proposed Commission Findings**

The petitioner states that during the pendency of the EPA rulemaking, significant interaction occurred between Commission and EPA staff regarding which was the proper agency to adopt rules in the nature of "assurance requirements" that would apply to Commission licensees, to insure against the inherent uncertainties in selecting, designing and licensing waste disposal systems that must be very effective for more than 10,000 years. The Petitioner indicates that the two agencies agreed informally, and the EPA standard as finally issued provides, that assurance requirements are an appropriate mechanism to better guarantee that numerical standards will be realized; that the NRC was the more appropriate agency to adopt such standards as they apply to NRC licensees, and that the NRC approach would be to integrate the essence of EPA's earlier proposed rules into the repository licensing provisions of 10 CFR Part 60. Further, the Petitioner states that since evidence used by DOE to apply the siting guidelines includes analysis of expected repository performance to assess the likelihood of demonstrating compliance with the EPA standard, the rule proposed herein must be in place in order that DOE may design its site characterization plan in a manner consistent with the siting guidelines. The Petitioner proposes that the Commission make findings accordingly.

##### **IV. The Petitioner Proposes the Following Amendments to 10 CFR Part 60:**

1. Add definitions to § 60.2:  
( ) "Active institutional control" means any measure other than a passive institutional control performed to: (1) Control access to a site, (2) perform maintenance operations or remedial actions at a site, (3) control or clean up releases from a site; or (4) monitor parameters related to geologic repository performance and compliance with standards limiting releases of radioactivity to the accessible environment.

( ) "Passive institutional control"

means: (1) permanent markers placed at a site, (2) public records and archives, (3) government ownership and regulations regarding land or resource use, and (4) other methods of preserving knowledge about the location, design, and the contents of a geologic repository.

2. Add § 60.21(c) "Content of [license] application" and renumber remaining sections:

(9) A general description of the program for post-permanent closure monitoring of the geologic repository.

3. Add a new § 60.24(c), (d) and reletter the remaining subsection as (e).

(c) The Commission shall evaluate the environmental impact statement required by 42 U.S.C. 10134(f) and 10 CFR 60.21(a) to determine whether its adoption by the Commission would not compromise the independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954 (42 U.S.C. 2011, *et seq.*). In making such a determination, the Commission shall consider:

(1) Whether the Department of Energy has complied with the procedures and requirements of the Nuclear Waste Policy Act (42 U.S.C. 10101 *et seq.*).

(2) Whether the alternative sites proposed in the environmental impact statement are bona fide alternative sites; that site characterization under 42 U.S.C. 10133 has been completed at such sites; and that the Secretary, after site characterization is complete, or substantially complete, at such sites, has made a preliminary determination that such sites are suitable for development as repositories consistent with the guidelines promulgated pursuant to 42 U.S.C. 10132.

(3) Whether the consideration of the alternative sites considered in the environmental impact statement included consideration of the natural properties that are expected to provide better isolation of the wastes from the accessible environment for 100,000 years after disposal; and whether the analyses used by the Department of Energy to compare the capabilities of different sites to isolate wastes were based upon the following:

(i) Only the undisturbed performance of the disposal system has been considered;

(ii) The performance of the waste packages and waste forms planned for the disposal system was assumed to be the same from site to site and assumed to be at least an order of magnitude less effective than the performance required by 10 CFR 60.113; and

(iii) No credit was taken for other engineering controls intended to correct preexisting natural flaws in the geologic media (e.g., grouting of fissures shall not be assumed, but effective sealing of the

## PART 60 • PETITIONS FOR RULEMAKING

shafts needed to construct the repository shall be assumed).

(4) Whether the disposal systems considered, selected or designed will keep releases to the accessible environment as low as reasonably achievable, taking into account technical, social and economic considerations.

(d) If the Commission determines that adoption of the environmental impact statement would compromise the independent responsibilities of the Commission, then the Commission shall consider fully the environmental impact of the selection of the proposed site as required by 42 U.S.C. 4321, *et seq.*

4. Revise § 60.51(a)(1) "License amendment for permanent closure" as follows:

(1) A detailed description of the program for post-permanent closure monitoring of the geologic repository in accordance with § 60.144. As a minimum, this description shall:

(A) Identify those parameters that will be monitored;

(B) Indicate how each parameter will be used to evaluate the expected performance of the repository;

(C) Describe those monitoring devices which will indicate the likelihood that standards limiting releases of radioactivity to the accessible environment may not be met.

(D) Discuss the length of time over which each parameter should be monitored to adequately confirm the expected performance of the repository;

(E) Indicate how the results of post-permanent closure monitoring will be shared with affected State, Indian tribal and local governments.

5. Add a new subsection to § 60.52(c) "Termination of license" and renumber current § 60.52(c)(3) as 60.52(c)(4).

(3) That the results available from the post-permanent closure monitoring program confirm the expectation that the repository will comply with the performance objectives set out at Sections 60.112 and 60.113.

6. Modify § 60.113 by adding:

(d) In any event, however, and notwithstanding the provisions of (b) above, the geologic repository shall incorporate a system of multiple barriers, both engineered and natural, each designed or selected so that it complements the others and can significantly compensate for uncertainties about the performance of one or more of the other barriers. "Barrier" means any material or structure that prevents or substantially delays movement of water or radionuclides.

7. Add a new § 60.114 "Institutional Controls":

Neither active nor passive institutional controls shall be deemed to assure compliance with the overall

performance objective set out at § 60.112 for more than 100 years after disposal. However, the effects of passive institutional controls may be considered in assessing the likelihood and consequences of processes and events affecting the geologic setting.

8. Add a new § 60.122(c)(16) and renumber later sections:

(16) The presence of significant concentrations of any naturally-occurring material that is not widely available from other sources.

9. Add a new § 60.144 "Post-Permanent Closure Monitoring":

A program of post-permanent closure monitoring shall be conducted and shall provide for monitoring of all repository characteristics which can reasonably be expected to provide substantive confirmatory information regarding long-term repository performance, provided that the means for conducting such monitoring will not degrade repository performance. This program shall be continued until termination of a license which shall not occur until the Commission is convinced that there is no significant concern which could be addressed by further monitoring.

### V. Statement in Support

The Petitioner states that the rules proposed here are substantively equivalent to the EPA assurance requirements (which, by their terms, do not apply to NRC licensees), with one very notable exception: proposed 10 CFR 60.24(c). The Petitioner points out that this proposed new section relates to NRC review and adoption of DOE's environmental impact statement (EIS), a document developed in DOE's selection of a repository site. EPA's proposed 40 CFR 101.14(e) dealt with site selection, as NRC staff recognized in comments published by EPA in "Background Paper: Potential Changes in 10 CFR 60 to Replace Assurance Requirements in 40 CFR 101, March 21, 1985". NRC staff, however, found that DOE's site selection guidelines, 10 CFR 60.3-1-6, adequately address this issue. Nevada and Minnesota are concerned, and the Petitioner believes that the Commission should also be, that DOE's site selection process may not produce bona fide alternatives for consideration in DOE's EIS because of DOE's current interpretation of section 114(f), 42 U.S.C. 10134(f). Petitioner asserts if it does not, NRC's "independent responsibilities . . . to protect the public health and safety under the Atomic Energy Act of 1954" (section 114(f), 42 U.S.C. 10134(f)) will be implicated. The National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*, together with the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011, *et seq.*, require the Commission to consider bona fide alternatives, even if section 112 of the Nuclear Waste Policy Act, 42

U.S.C. 10132, does not require DOE to do so. Petitioner believes the rule proposed here would guarantee that bona fide alternatives were evaluated by the NRC, if not also DOE. The "low as reasonably achievable" releases concept has also been reintroduced in this context. The bases for DOE's consideration of natural properties expected to provide better isolation have also been introduced.

The Petitioner states that in adopting the language of section 114(f) of the NWPA, Congress did not change the requirement for consideration of bona fide alternatives in an EIS. It merely narrowed the universe of all alternatives which DOE must consider in the final EIS, from all sites reasonably available to only those three sites which has been characterized, and for which the Secretary had made a preliminary determination as to site suitability. The Petitioner believes that a site which the Secretary has determined to be unsuitable for development as a repository, or, conversely, at which the Secretary was unable to make a preliminary determination of suitability, is simply not an alternative. The Petitioner believes the Secretary's responsibilities, under either the NWPA or NEPA, to consider alternative sites, is simply not met by the consideration of three sites, one or two of which were determined at any time to be unsuitable for development as repositories. The Petitioner states further that neither would the Commission's responsibilities be carried out in such a case, and thus such a result would severely jeopardize the Commission's ability, under section 114(f), to adopt the Secretary's final EIS in order to meet the Commission's legal obligations under NEPA.

### VI. Notice Regarding Related Actions

The Commission presently has underway rulemaking actions which, when finalized, will address the concerns expressed by the petitioner. The Commission is now preparing to publish proposed amendments to 10 CFR Part 60 to eliminate inconsistencies between the EPA standard and the rule (see *Unified Agenda of Federal Regulations, Current and Projected Rulemaking—Elimination of Inconsistencies between NRC Regulations and EPA standards—OMB Regulation Identifier Number 3160-AC03, 50 FR 44902, October 29, 1985*). The Commission anticipates that the proposed rule would incorporate the EPA "assurance requirements" in Part 60, to the extent appropriate, satisfying that aspect of the petitioner's request. The remaining aspect of the petitioner's request, adding a provision to Part 60 relating to NRC review and adoption of DOE's environmental impact statement, falls within the scope of a separate,

## PART 60 • PETITIONS FOR RULEMAKING

ing rulemaking which would amend  
to conform to provisions of the  
ear Waste Policy Act concerning  
environmental review in HLW geologic  
repository licensing procedures (see  
*Unified Agenda of Federal Regulations*,  
Current and Projected Rulemaking—Part  
81 Conforming Amendments—OMB  
Regulation Identifier Number 3150-  
AC04, 50 FR 41992, October 29, 1985).  
Accordingly, commenters are advised  
that further consideration of the issues  
raised by the petitioner will be deferred  
for consideration in the rulemaking  
actions referred to above. The present  
schedule calls for the publication of  
these two proposed rules within nine  
months. Any comments received in  
response to this notice would, in that  
event, be incorporated in the  
administrative record for those  
proceedings.

Dated at Bethesda, Maryland, this 16th day  
of December, 1985.

For the Nuclear Regulatory Commission,  
Samuel J. Chalk,  
Secretary of the Commission.

- e. The Office of Governmental and Public Affairs has determined that it is necessary to issue a public announcement similar to Enclosure C in connection with these amendments.
- f. The recommended changes from the proposed rule are provided in comparative text as Enclosure D.
- g. Public comments on the proposed rule are provided as Enclosure E.
- h. A staff analysis of the public comments is provided as Enclosure F.
- i. Enclosure G contains the Commission's notice of receipt of the rulemaking petition (PRM-60-2A) from the States of Nevada and Minnesota. A brief notice of the Commission's action with respect to the petition will be published in the Federal Register; it will state that the petition is denied in part and will refer to the present rulemaking (Enclosure A) for further information.

William C. Parler  
General Counsel

Attachment: NWPA, as amended,  
Section 114(f).

Enclosures:

- A. Federal Register Notice with final amendments to 10 CFR Parts 2, 51, 60.
- B. Draft Congressional Letter.
- C. Public Announcement.
- D. Comparative Text.
- E. Public Comment Letters.
- F. Public Comment Analysis.
- G. Notice of Receipt of PRM-60-2A.

OFC	: NMSS <i>RC/S</i>	: NMSS <i>exp</i>	: DEDO <i>ED</i>	: EDO <i>W</i>	:	:
NAME	: RBrowning	: RBernero	: HThompson	: VStello	:	:
DATE	: 4/26/89	: 4/24/89	: 4/27/89	: 4/27/89	:	:
OFC	: R&FC/OGC	: D/R&FC/OGC	: DGC/OGC	: TOGC <i>W</i>	:	:
NAME	: JWolfe <i>JW</i>	: STreby	: MMalsch <i>W</i>	: WParler	:	:
DATE	: 4/27/89	: 4/27/89	: 4/27/89	: 4/27/89	:	:

Commissioner Curtiss' comments on SECY-89-140:

1. It is not clear from the proposed final rule when the staff is to file its position on whether it is practicable to adopt the DOE EIS. The Statement of Considerations indicates that the staff's position would be filed "at the outset of the proceeding" (Statement of Considerations, p. 18). The response to public comment 5-6, on the other hand, suggests that only a "tentative staff judgment" would be made at this point. And the Office of General Counsel's April 14, 1986 memorandum on this same subject seems to indicate that the final decision on whether to adopt the DOE EIS cannot be made until the NRC has "commenced its safety review" of the DOE application (see Memorandum from Martin G. Malsch to the Commission, April 14, 1986).

To clarify this matter, I would recommend that section 51.109(a)(1) and the accompanying Statement of Considerations be modified to require the staff to file its position on adoption at the time that the Notice of Hearing on DOE's application is published. Since the staff will have already reviewed DOE's draft EIS and be familiar with the contents and the adequacy of the document, the staff should be well prepared at this point to set forth its views on the adequacy of the EIS, the need for supplementation, and the practicability of adopting all or part of that document. Then, once intervenor contentions are filed on the ~~adequacy of the EIS~~ (see comment 2, below), the Licensing Board can begin processing the contentions and render a decision on adoption at an early stage in the licensing process. If significant and substantial new information or new considerations should subsequently arise (including any new information or new considerations that might arise as a result of the staff's safety review), the staff can then advise DOE of the need to supplement the EIS pursuant to section 60.24(c) or, if DOE declines, proceed with the preparation of its own EIS <sup>supplement</sup>.

practicability  
of adoption  
and the need  
to supplement  
DOE's

2. Section 51.109(a)(2) should be modified to require that intervenor contentions on both the practicability of adoption and the need to supplement DOE's EIS should be filed within 30 days of the Notice of Hearing. This would comport with the model timeline contained in the recently promulgated ISS rule for the filing of intervenor contentions.
3. Finally, I support the staff's proposal to coordinate with DOE at an early stage on the scoping process for the EIS (Statement of Considerations, p. 17). Before that consultative process begins, however, I would recommend that the staff be directed to submit to the

Commission a paper setting forth the staff's views on what the scope of DOE's EIS should be from our standpoint as the licensing agency, specifically focusing on identifying those issues that DOE must address in its EIS in order for us to make a licensing decision under 10 CFR Part 60. I am particularly interested in how we intend to approach issues such as national transportation routing in our licensing proceeding. Since the scoping process will be the first opportunity for us to convey our position on this and other similar issues, I believe that the Commission needs to be involved early in the formulation of the agency's position on the scope of matters that must be addressed in the EIS and, by implication, in our licensing proceeding.

Minor editorial comments on page 15 are attached.

JRC  
JRC  
JPK

June 7, 1989

FOR AFFIRMATION

Thursday, June 8, 1989

SECY-89-140 - NEPA REVIEW PROCEDURES FOR GEOLOGIC  
REPOSITORIES FOR HIGH-LEVEL WASTE

The Commission is being asked to approve a final rule adopting procedures for implementation of the National Environmental Policy Act with respect to geologic repositories for high-level radioactive waste. In accordance with the Nuclear Waste Policy Act of 1982, as amended, the rule provides for the Commission to adopt, to the extent practicable, the final environmental impact statement prepared by the Department of Energy that accompanies a recommendation to the President for repository development. The rule recognizes that the primary responsibility for evaluating environmental impacts lies with the Department of Energy; and, consistent with this view, it sets out the standards and procedures that would be used in determining whether adoption of the Department's final environmental impact statement is practicable.

All Commissioners have approved the rule with modifications, as attached.

Attachment:  
As Stated

*Samuel J. Chilk*  
Samuel J. Chilk  
Secretary of the Commission

Copies:  
Chairman Zech  
Commissioner Roberts  
Commissioner Carr  
Commissioner Rogers  
Commissioner Curtiss  
OGC  
EDO

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NWPA bars later challenge. The other DOE comments call for some clarification of the Commission's intentions, but do not prompt any fundamental change of the position that had previously been outlined.

For example, we can put to rest DOE's concern that NRC might defer its acceptance review of the license application until the entire judicial review process on the EIS had run its course. Under the amendments, both as proposed and as adopted, the acceptance review applies only to the completeness of "the application," not "the application or environmental report" as under existing 10 CFR 2.101(f)(2).

We believe we can also satisfy DOE's concern with respect to our mention, at 53 FR 16132, that there may be a need for "multiple EIS's." The point being made was not that NRC might need to prepare its own EIS when DOE had already done so, but that the licensing process may involve more than one major federal action (for example, the construction of the repository on the one hand and the emplacement of waste on the other) that could necessitate the preparation of a supplemental EIS if not an entirely new one, *if the impacts of such actions are not evaluated or properly encompassed in the initial EIS.*

The responsibility for supplementation was another point of contention. DOE - along with some of the other commenters - argued that it would be inappropriate for it to be obliged to supplement its completed EIS in order to satisfy any independent NEPA responsibilities of the Commission. We agree with this statement. But, as DOE itself acknowledges, it might need to supplement the EIS if it were to make a substantial change in the proposed action or if significant new circumstances or information were to

address radiological safety issues under the Atomic Energy Act, and that the requirements of NEPA were substantively modified as they apply to the high-level nuclear waste program.

We decline to follow EEI's suggestion that issues related to adoption of DOE's environmental impact statement be made prior to the hearing process and outside the adjudicatory arena. As we have noted before, the impact statement does not simply "accompany" an agency recommendation for action in the sense of having some independent significance in isolation from the deliberative process. Rather the impact statement is an integral part of the Commission's decision. It forms as much a vital part of the NRC's decisional record as anything else. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 275 (1980). Even though the range of issues to be considered in the hearing may be limited, the formal function of the environmental impact statement as an element of the licensing decision remains.

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~~Nor do we consider it desirable to dictate firm deadlines for either the NRC staff to present its position on practicability of adoption or for the filing of contentions with respect to the practicability of adoption. On the contrary, we cannot predict when the conditions that potentially could necessitate supplementation of the EIS - "new" considerations or "new" information might arise. It is our intention that the NRC staff should present its position at the outset of the proceeding. Other parties seeking to litigate the matter would be well advised to file contentions promptly, as nontimely filings will only be entertained under the conditions described in 10 CFR 2.714(a)(1).~~

JC  
~~Handwritten notes and signatures in the right margin.~~

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(JC)

However, we find merit in EEI's proposal to fix an early schedule for the NRC staff to present its position on the practicability of adoption and for other parties to file contentions with respect to the practicability of adoption. Accordingly, the final rule requires the NRC staff to present its position on adoption at the time that the notice of hearing is published in the Federal Register. Any contentions filed by any other party to the proceeding must be filed within thirty days after the notice of hearing is published. In the event that "substantial new considerations or new information" subsequently arises, contentions concerning the practicability of adopting DOE's EIS that are filed after the 30-day deadline established in the rule must be accompanied by a demonstration of compliance with the late filing criteria in 10 CFR 2.1014.

CHANGES FROM THE PROPOSED RULE

Section 51.67. Environmental information concerning geologic repositories.

This section is revised to provide for the submission of environmental impact statements, pursuant to Title IV of NHPA, as amended, with respect to a Negotiator-selected site. A further change reflects DOE's comment that supplement would not be required where a modification to its plans had been previously addressed by its EIS.

Section 51.109. Public hearings in proceedings for issuance of materials license with respect to a geologic repository.

Paragraph (c) is revised so that the special criterion for adoption, as discussed herein, will apply only with respect to the geologic repository at the Yucca Mountain site. Any EIS for a Negotiator-selected site would be excluded from the application of this paragraph. A conforming change appears in paragraph (d).

Paragraph (e) is modified to emphasize that the Commission's customary policies will be observed except for adoption of an EIS prepared under Section 114. This is achieved by the insertion of the cross-reference ("in accordance with paragraph (c)") in the introductory clause. As the language has been modified, it permits the adoption of other DOE environmental impact statements with respect to a Negotiator-selected site in accordance with generally applicable law. This includes observance of the procedures outlined in 40 CFR 1506.3. This is addressed adequately in

JC  
In the final rule, paragraph incorporates the staff position or practicality of adoption of DOE environmental impact statements and for the fill of contents with respect thereto. Consistent with the recently completed LSS (Licensing Support System) rules a period of thirty days notice of hearing is provided for the submission of contention.

Appendix A to 10 CFR Part 51, Subpart A, and requires no further elaboration in the text of the rule.

PETITION FOR RULEMAKING

The Commission's earlier notice invited comments upon the related portions of a petition for rulemaking submitted by the States of Nevada and Minnesota, PRM-60-2A, 50 FR 51701, December 19, 1985. <sup>With the exception of the State of Nevada,</sup> None of the comments received by the Commission in response to the notice addressed the petition as such. <sup>The</sup> State of Nevada referred to the petition, recognized that some of the considerations therein have been mooted, and urged ~~the other actions discussed herein.~~ However, the issues identified by the petition

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regarding the criteria and procedures for adoption of DOE's EIS have been considered in this proceeding. <sup>Although</sup> ~~Since~~ the language being promulgated differs from that proposed by the petitioners, ~~the section of the petition pertaining to adoption of DOE's EIS (i.e., Section IV.3) is denied.~~ <sup>The</sup> Commission nevertheless observes that although it does not employ the ~~language proposed by the petitioners,~~ it is in full agreement with the petitioners' argument that adoption of DOE's EIS must not compromise the independent responsibilities of NRC to protect the public health and safety under the Atomic Energy Act of 1954. Our rulemaking approach is in fact designed to enhance our ability to address these health and safety issues as effectively and objectively as possible.

that alternative language be considered in the proposed rule, in place of that which they had recommended in the petition.

The section of the petition which provides language pertaining to the adoption of DOE's EIS (i.e., Section IV.3) is denied.

PT51FINL3 - 4/20/89



by the Secretary of Energy. If the position of the staff is that supplementation of the environmental impact statement by NRC is required, it shall file its final supplemental environmental impact statement with the Environmental Protection Agency, furnish that statement to commenting agencies, and make it available to the public, before presenting its position, <sup>or as soon thereafter as may be practicable.</sup> In discharging its responsibilities under this paragraph, the staff shall be guided by the principles set forth in paragraphs (c) and (d) of this section.

JC

(2) Any other party to the proceeding who contends that it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented, shall file a contention to that effect, <sup>within thirty days after the publication of the notice of hearing.</sup> ~~in accordance with~~ <sup>in the</sup> ~~§ 2.714(b) of this chapter.~~ Such contention must be accompanied by one or more affidavits which set forth factual and/or technical bases for the claim that, under the principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented. The presiding officer shall resolve disputes concerning adoption of the DOE environmental impact statement by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under § 2.734 of this chapter.

JC  
in the  
Federal  
Register.

(b) In any such proceeding, the presiding officer will determine those matters in controversy among the parties within the scope of NEPA and this subpart, specifically including whether, 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 a construction authorization and license for such repository.

The rule states that the NRC would find it practicable to adopt DOE's environment impact statement unless:

(1) Actions that the NRC proposes to require DOE to take differ in an environmentally significant way from the actions proposed in DOE's license application or

(2) Significant and substantial new information or new considerations make DOE's environmental impact statement inadequate.

Although there might be situations in which the NRC itself must prepare a supplementary environmental impact statement, the Commission expects as a general rule, that DOE will supplement the statement as needed ~~and that this will resolve any new circumstances or information that might arise.~~

KC

✓  
AS WRITTEN IN  
MAY BE SUBJECT  
TO FOLLOW

In public hearings on whether an authorization to construct a repository should be issued, parties to the licensing proceeding, including the NRC staff, will have an opportunity to indicate whether they consider it practicable to adopt DOE's statement without supplementing it. The presiding officer in the hearing (a license board) would then determine the extent to which adoption of the DOE environmental impact statement is practicable.

A proposed rule on this subject was published in the Federal Register for public comment on May 5, 1988. In response to the comments, a change was made to deal with a site other than the Yucca Mountain, Nev., site that has been designated by Congress. Under NWPA provisions relating to a Negotiator-selected site, the existing regulations of the Council on

A F F I R M A T I O N   V O T E

R E S P O N S E   S H E E T

TO:            SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM:         COMMISSIONER CURTISS

SUBJECT:      SECY-89-140 - NEPA REVIEW PROCEDURES FOR GEOLOGIC REPOSITORIES  
                 FOR HIGH-LEVEL WASTE

APPROVED \_\_\_\_\_ DISAPPROVED \_\_\_\_\_ ABSTAIN \_\_\_\_\_

NOT PARTICIPATING \_\_\_\_\_ REQUEST DISCUSSION \_\_\_\_\_

COMMENTS:

\_\_\_\_\_  
SIGNATURE

\_\_\_\_\_  
DATE

YES

NO

ENTERED ON "AS"    
NRC-SECY FORM MAY, 1987

#### DEFINITION OF VOTES

1. Approved. This constitutes agreement with the recommendations contained in the applicable Commission paper or memorandum.
2. Disapproved. This constitutes disagreement with the recommendations contained in the applicable Commission paper or memorandum.
3. Not Participating. This is a statement of intent not to take part in the decision taken on the applicable Commission paper or memorandum. As such, the vote will not be counted in either determining the action of the Commission or the presence of a quorum.
4. Abstain. This is a statement of intent not to participate in the decision taken on the applicable Commission paper or memorandum, but indicates a willingness to participate for the purpose of establishing "a quorum required for Commission action," if needed. As such it will be counted for quorum purposes only. If not needed for quorum purposes, the vote will be considered and treated the same as a vote of not participating. That is to say, it will not be counted for either quorum or action purposes.

Commission to make its safety determinations, including the determination that the application is consistent with the certified design. This information may be acquired by appropriate arrangements with the design certification applicant.

**Subpart C—Combined Licenses**

**§ 52.71 Scope of Subpart.**

This subpart sets out the requirements and procedures applicable to Commission issuance of combined licenses for nuclear power facilities.

**§ 52.73 Relationship to Subparts A and B.**

An application for a combined license under this subpart may, but need not, reference a standard design certification issued under Subpart B of this part or an early site permit issued under Subpart A of this part, or both. In the absence of a demonstration that an entity other than the one originally sponsoring and obtaining a design certification is qualified to supply such design, the Commission will entertain an application for a combined license which references a standard design certification issued under Subpart B only if the entity that sponsored and obtained the certification supplies the certified design for the applicant's use.

**§ 52.75 Filing of applications.**

Any person except one excluded by 10 CFR 50.38 may file an application for a combined license for a nuclear power facility with the Director of Nuclear Reactor Regulation. The applicant shall comply with the filing requirements of 10 CFR 50.4 and 50.20 (a) and (b), except for paragraph (b)(6) of § 50.4, as they would apply to an application for a nuclear power plant construction permit. The fees associated with the filing and review of the application are set out in 10 CFR Part 170.

**§ 52.77 Contents of applications; general information.**

The application must contain all of the information required by 10 CFR 50.33, as that section would apply to applicants for construction permits and operating licenses, and 10 CFR 50.33a, as that section would apply to an applicant for a nuclear power plant construction permit. In particular, the applicant shall comply with the requirement of § 50.33a(b) regarding the submission of antitrust information.

**§ 52.79 Contents of applications; technical information.**

(a)(1) In general, if the application references an early site permit, the application need not contain information or analyses submitted to the

Commission in connection with the early site permit, but must contain, in addition to the information and analyses otherwise required, information sufficient to demonstrate that the design of the facility falls within the parameters specified in the early site permit, and to resolve any other significant environmental issue not considered in any previous proceeding on the site or the design.

(2) If the application does not reference an early site permit, the applicant shall comply with the requirements of 10 CFR 50.30(f) by including with the application an environmental report prepared in accordance with the provisions of Subpart A of 10 CFR Part 51.

(3) If the application does not reference an early site permit which contains a site redress plan as described in § 52.17(c), and if the applicant wishes to be able to perform the activities at the site allowed by 10 CFR 50.10(e)(1), then the application must contain the information required by § 52.17(c).

(b) The application must contain the technically relevant information required of applicants for an operating license by 10 CFR 50.34. The final safety analysis report and other required information may incorporate by reference the final safety analysis report for a certified standard design. In particular, an application referencing a certified design must describe those portions of the design which are site-specific, such as the service water intake structure and the ultimate heat sink. An application referencing a certified design must also demonstrate compliance with the interface requirements established for the design under § 52.47(a)(1), and have available for audit procurement specifications and construction and installation specifications in accordance with § 52.47(a)(2). If the application does not reference a certified design, the application must comply with the requirements of § 52.47(a)(2) for level of design information, and shall contain the technical information required by §§ 52.47(a)(1) (i), (ii), (iv), and (v) and (3), and, if the design is modular, § 52.47(b)(3).

(c) The application for a combined license must include the proposed test, inspections, and analyses which the licensee shall perform and the acceptance criteria therefor which are necessary and sufficient to provide reasonable assurance that, if the tests, inspections and analyses are performed and the acceptance criteria met, the facility has been constructed and will operate in conformity with the combined license. Where the application

references a certified standard design, the test, inspections, analyses and acceptance criteria contained in the certified design must apply to those portions of the facility design which are covered by the design certification.

(d) The application must contain emergency plans which provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the site.

(1) If the application references an early site permit, the application may incorporate by reference emergency plans, or major features of emergency plans, approved in connection with the issuance of the permit.

(2) If the application does not reference an early site permit, or if no emergency plans were approved in connection with the issuance of the permit, the applicant shall make good faith efforts to obtain certifications from the local and State governmental agencies with emergency planning responsibilities (i) that the proposed emergency plans are practicable, (ii) that these agencies are committed to participating in any further development of the plans, including any required field demonstrations, and (iii) that these agencies are committed to executing their responsibilities under the plans in the event of an emergency. The application must contain any certifications that have been obtained. If these certifications cannot be obtained, the application must contain information, including a utility plan, sufficient to show that the proposed plans nonetheless provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the site.

**§ 52.81 Standards for review of applications.**

Applications filed under this subpart will be reviewed according to the standards set out in 10 CFR Parts 20, 50, 51, 55, 73, and 100 as they apply to applications for construction permits and operating licenses for nuclear power plants, and as those standards are technically relevant to the design proposed for the facility.

**§ 52.83 Applicability of Part 50 provisions.**

Unless otherwise specifically provided in this subpart, all provisions of 10 CFR Part 50 and its appendices applicable to holders of construction permits for nuclear power reactors also apply to holders of combined licenses issued under this subpart. Similarly, all provisions of 10 CFR Part 50 and its

*Jim -  
The error in the draft rule - reference to a nonexistent § 50.30(b)(6) has been corrected.*



OFFICE OF THE  
SECRETARY

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

JRC  
JPK

May 26, 1989

1989 MAY 26 PM 4:46

RECEIVED

MEMORANDUM FOR: Commissioner Rogers  
Commissioner Curtiss

FROM: *U.S. Chilk* Samuel J. Chilk, Secretary

SUBJECT: SECY-89-140 - NEPA REVIEW PROCEDURES  
FOR GEOLOGIC REPOSITORIES FOR HIGH-LEVEL  
WASTE

The status of the subject staff paper is as follows:

- The period for Commissioner comments has expired.
- A majority of the Commission has provided views.

Chairman Zech approved - 5/9/89  
Commissioner Carr approved - 5/23/89  
Commissioner Roberts approved - 5/26/89

Your response to SECY on this staff paper within three working days (Thursday, June 1, 1989) indicating your views would be appreciated. We plan to schedule the rule for affirmation during the week of June 5, 1989.

cc: Chairman Zech  
Commissioner Carr  
Commissioner Roberts

A F F I R M A T I O N   V O T E

~~JRC~~  
~~JRG~~  
JFK

R E S P O N S E   S H E E T

TO:            SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM:        CHAIRMAN ZECH

SUBJECT:    SECY-89-140 - NEPA REVIEW PROCEDURES FOR GEOLOGIC REPOSITORIES  
FOR HIGH-LEVEL WASTE

APPROVED      xx      DISAPPROVED                  ABSTAIN              

NOT PARTICIPATING                                    REQUEST DISCUSSION              

COMMENTS:

RECEIVED  
1989 MAY 10 PM 2:55

*Carlo W. Zech J.*

SIGNATURE

*5-9-89*

DATE

YES            NO

ENTERED ON "AS"          
NRC-SECY FORM MAY, 1987

A F F I R M A T I O N   V O T E

JRC  
JRG  
JFK

R E S P O N S E   S H E E T

TO:            SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM:        COMMISSIONER CARR

SUBJECT:    SECY-89-140 - NEPA REVIEW PROCEDURES FOR GEOLOGIC REPOSITORIES  
FOR HIGH-LEVEL WASTE

APPROVED   X   w/comment    DISAPPROVED \_\_\_\_\_    ABSTAIN \_\_\_\_\_

NOT PARTICIPATING \_\_\_\_\_    REQUEST DISCUSSION \_\_\_\_\_

COMMENTS:    Approved with the attached edit to the press announcement

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1989 MAY 24 AM 8:49

Kenneth L. Carr  
SIGNATURE

5.23.89  
DATE

YES      NO

ENTERED ON "AS"    
NRC-SECY FORM MAY, 1987

The rule states that the NRC would find it practicable to adopt DOE's environment impact statement unless:

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(2) Significant and substantial new information or new considerations make DOE's environmental impact statement inadequate.

Although there might be situations in which the NRC itself must prepare a supplementary environmental impact statement, the Commission expects as a general rule, that DOE will supplement the statement as needed, ~~and that this will resolve any new circumstances or information that might arise.~~

✓  
AS WRITTEN, THIS  
MAY MISLEAD  
THE PUBLIC

In public hearings on whether an authorization to construct a repository should be issued, parties to the licensing proceeding, including the NRC staff, will have an opportunity to indicate whether they consider it practicable to adopt DOE's statement without supplementing it. The presiding officer in the hearing (a license board) would then determine the extent to which adoption of the DOE environmental impact statement is practicable.

A proposed rule on this subject was published in the Federal Register for public comment on May 5, 1988. In response to the comments, a change was made to deal with a site other than the Yucca Mountain, Nev., site that has been designated by Congress. Under NWPA provisions relating to a Negotiator-selected site, the existing regulations of the Council on



address radiological safety issues under the Atomic Energy Act, and that the requirements of NEPA were substantively modified as they apply to the high-level nuclear waste program.

We decline to follow EEI's suggestion that issues related to adoption of DOE's environmental impact statement be made prior to the hearing process and outside the adjudicatory arena. As we have noted before, the impact statement does not simply "accompany" an agency recommendation for action in the sense of having some independent significance in isolation from the deliberative process. Rather the impact statement is an integral part of the Commission's decision. It forms as much a vital part of the NRC's decisional record as anything else. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 275 (1980). Even though the range of issues to be considered in the hearing may be limited, the formal function of the environmental impact statement as an element of the licensing decision remains.

~~EEI~~  
~~Review of the~~  
~~Impact Statement~~  
~~to be made~~  
~~outside the~~  
~~adjudicatory~~  
~~arena.~~  
~~10/17/89~~

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~~Nor do we consider it desirable to dictate firm deadlines for either the NRC staff to present its position on practicability of adoption or for the filing of contentions with respect to the practicability of adoption. On the contrary, we cannot predict when the conditions that potentially could necessitate supplementation of the EIS - "new" considerations or "new" information might arise. It is our intention that the NRC staff should present its position at the outset of the proceeding. Other parties seeking to litigate the matter would be well advised to file contentions promptly, as nontimely filings will only be entertained under the conditions described in 10 CFR 2.714(a)(1).~~

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~~with~~  
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~~position~~  
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~~contentions~~

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However, we find merit in EEI's proposal to fix an early schedule for the NRC staff to present its position on the practicability of adoption and for other parties to file contentions with respect to the practicability of adoption. Accordingly, the final rule requires the NRC staff to present its position on adoption at the time that the notice of hearing is published in the Federal Register. Any contentions filed by any other party to the proceeding must be filed within thirty days after the notice of hearing is published. In the event that "substantial new considerations or new information" subsequently arises, contentions concerning the practicability of adopting DOE's EIS that are filed after the 30-day deadline established in the rule must be accompanied by a demonstration of compliance with the late filing criteria in 10 CFR 2.1014.

CHANGES FROM THE PROPOSED RULE

Section 51.67. Environmental information concerning geologic repositories.

This section is revised to provide for the submission of environmental impact statements, pursuant to Title IV of NHPA, as amended, with respect to a Negotiator-selected site. A further change reflects DOE's comment that supplement would not be required where a modification to its plans had been previously addressed by its EIS.

Section 51.109. Public hearings in proceedings for issuance of materials license with respect to a geologic repository.

Paragraph (c) is revised so that the special criterion for adoption, as discussed herein, will apply only with respect to the geologic repository at the Yucca Mountain site. Any EIS for a Negotiator-selected site would be excluded from the application of this paragraph. A conforming change appears in paragraph (d).

Paragraph (e) is modified to emphasize that the Commission's customary policies will be observed except for adoption of an EIS prepared under Section 114. This is achieved by the insertion of the cross-reference ("in accordance with paragraph (c)") in the introductory clause. As the language has been modified, it permits the adoption of other DOE environmental impact statements with respect to a Negotiator-selected site in accordance with generally applicable law. This includes observance of the procedures outlined in 40 CFR 1506.3. This is addressed adequately in

*In the final rule, paragraph (a) incorporates a schedule for the staff to present its position on the practicability of adoption of the DOE environmental impact statement, and for the filing of contentions with respect thereto. Consistent with the recently-completed LSS (Licensing Support System) rulemaking, a period of thirty days after notice of hearing is provided for the submission of contentions.*

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. (See § 60.22 of this chapter as to required time and manner of submission.)

(c) Whenever the Department of Energy submits a final environmental impact statement, or a final supplement to an environmental impact statement, to the Commission pursuant to this section, it shall also inform the Commission of the status of any civil action for judicial review initiated pursuant to section 119 of the Nuclear Waste Policy Act of 1982. This status report, which the Department shall update from time to time to reflect changes in status, shall:

(1) State whether the environmental impact statement has been found by the courts of the United States to be adequate or inadequate; and

(2) Identify any issues relating to the adequacy of the environmental impact statement that may remain subject to judicial review.

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

§ 51.109 Public hearings in proceedings for issuance of materials license with respect to a geologic repository.

(a) (1) 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 NRC staff shall <sup>upon the publication of the notice of hearing in the Federal Register,</sup> present its position on whether it is practicable to adopt, without further supplementation, the environmental impact statement (including any supplement thereto) prepared

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~~60.22~~

by the Secretary of Energy. If the position of the staff is that supplementation of the environmental impact statement by NRC is required, it shall file its final supplemental environmental impact statement with the Environmental Protection Agency, furnish that statement to commenting agencies, and make it available to the public, before presenting its position, <sup>or as soon thereafter as may be practicable.</sup> In discharging its responsibilities under this paragraph, the staff shall be guided by the principles set forth in paragraphs (c) and (d) of this section.

(2) Any other party to the proceeding who contends that it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented, shall file a contention to that effect, <sup>within thirty days after the publication of the notice of hearing</sup> ~~in accordance with~~ <sup>in the</sup> ~~§ 2.714(b) of this chapter.~~ Such contention must be accompanied by one or <sup>Federal</sup> ~~more~~ affidavits which set forth factual and/or technical bases for the claim that, under the principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented. The presiding officer shall resolve disputes concerning adoption of the DOE environmental impact statement by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under § 2.734 of this chapter.

(b) In any such proceeding, the presiding officer will determine those matters in controversy among the parties within the scope of NEPA and this subpart, specifically including whether, 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 a construction authorization and license for such repository.

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~~the filing of contentions with respect to the practicability of adoption. Consistent with 10 CFR § 2.1014, the final rule establishes a deadline for the filing of contentions. The contrary, we cannot predict when the conditions that potentially would necessitate supplementation of the EIS "new" considerations or new formation might arise. It is our intention that the NRC staff should also be required to present its position at the outset of the proceeding. Other parties seeking to litigate the matter would be well advised to file contentions promptly.~~ *Consistent with 10 CFR § 2.1014, the final rule establishes a deadline for the filing of contentions. The contrary, we cannot predict when the conditions that potentially would necessitate supplementation of the EIS "new" considerations or new formation might arise. It is our intention that the NRC staff should also be required to present its position at the outset of the proceeding. Other parties seeking to litigate the matter would be well advised to file contentions promptly.*

~~untimely filings will only be entertained under the conditions described~~

~~10 CFR 2.714(a)(1).~~ *Of course, "new considerations" or "new information" might arise subsequently - but later contentions addressed under these circumstances to the adoption of the EIS would need to be supported by good cause and compliance with the late filing criteria in 10 CFR § 2.1014.*

PT51FINL3 - 4/20/89  
a demonstration of

CHANGES FROM THE PROPOSED RULE

Section 51.67. Environmental information concerning geologic repositories.

This section is revised to provide for the submission of environmental impact statements, pursuant to Title IV of NHPA, as amended, with respect to a Negotiator-selected site. A further change reflects DOE's comment that supplement would not be required where a modification to its plans had been previously addressed by its EIS.

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(c) Whenever the Department of Energy submits a final environmental impact statement, or a final supplement to an environmental impact statement, to the Commission pursuant to this section, it shall also inform the Commission of the status of any civil action for judicial review initiated pursuant to section 119 of the Nuclear Waste Policy Act of 1982. This status report, which the Department shall update from time to time to reflect changes in status, shall:

(1) State whether the environmental impact statement has been found by the courts of the United States to be adequate or inadequate; and

(2) Identify any issues relating to the adequacy of the environmental impact statement that may remain subject to judicial review.

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

§ 51.109 Public hearings in proceedings for issuance of materials license with respect to a geologic repository.

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of hearing in the Federal Register

by the Secretary of Energy. If the position of the staff is that supplementation of the environmental impact statement by NRC is required, it shall file its final supplemental environmental impact statement with the Environmental Protection Agency, furnish that statement to commenting agencies, and make it available to the public, before presenting its position, <sup>or as soon thereafter as may be practicable.</sup> In discharging its responsibilities under this paragraph, the staff shall be guided by the principles set forth in paragraphs (c) and (d) of this section.

(2) Any other party to the proceeding who contends that it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented, shall file a contention to that effect ~~in accordance with~~ <sup>within thirty days after the</sup> ~~§ 2.714(b) of this chapter.~~ Such contention must be accompanied by one or more affidavits which set forth factual and/or technical bases for the claim that, under the principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE environmental impact statement, as it may have been supplemented. The presiding officer shall resolve disputes concerning adoption of the DOE environmental impact statement by using, to the extent possible, the criteria and procedures that are followed in ruling on motions to reopen under § 2.734 of this chapter.

publication of the notice of hearing in the Federal Register

(b) In any such proceeding, the presiding officer will determine those matters in controversy among the parties within the scope of NEPA and this subpart, specifically including whether, 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 a construction authorization and license for such repository.

A F F I R M A T I O N V O T E

R E S P O N S E S H E E T

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER CURTISS

SUBJECT: SECY-89-140 - NEPA REVIEW PROCEDURES FOR GEOLOGIC REPOSITORY  
FOR HIGH-LEVEL WASTE

APPROVED x w/Comments\* DISAPPROVED \_\_\_\_\_ ABSTAIN \_\_\_\_\_

NOT PARTICIPATING \_\_\_\_\_ REQUEST DISCUSSION \_\_\_\_\_

COMMENTS:

\* Commissioner Curtiss' comments are attached.

James R. Curtiss  
SIGNATURE

5/30/89

DATE

ENTERED ON "AS" YES NO  
5/30/89  
   
NRC-SECY FORM MAY, 1987

Commissioner Curtiss' comments on SECY-89-140:

1. It is not clear from the proposed final rule when the staff is to file its position on whether it is practicable to adopt the DOE EIS. The Statement of Considerations indicates that the staff's position would be filed "at the outset of the proceeding" (Statement of Considerations, p. 18). The response to public comment 5-6, on the other hand, suggests that only a "tentative staff judgment" would be made at this point. And the Office of General Counsel's April 14, 1986 memorandum on this same subject seems to indicate that the final decision on whether to adopt the DOE EIS cannot be made until the NRC has "commenced its safety review" of the DOE application (see Memorandum from Martin G. Malsch to the Commission, April 14, 1986).

To clarify this matter, I would recommend that section 51.109(a)(1) and the accompanying Statement of Considerations be modified to require the staff to file its position on adoption at the time that the Notice of Hearing on DOE's application is published. Since the staff will have already reviewed DOE's draft EIS and be familiar with the contents and the adequacy of the document, the staff should be well prepared at this point to set forth its views on the adequacy of the EIS, the need for supplementation, and the practicability of adopting all or part of that document. Then, once intervenor contentions are filed on the practicability of adoption and the need to supplement DOE's EIS (see comment 2, below), the Licensing Board can begin processing the contentions and render a decision on adoption at an early stage in the licensing process. If significant and substantial new information or new considerations should subsequently arise (including any new information or new considerations that might arise as a result of the staff's safety review), the staff can then advise DOE of the need to supplement the EIS pursuant to section 60.24(c) or, if DOE declines, proceed with the preparation of its own EIS supplement.

2. Section 51.109(a)(2) should be modified to require that intervenor contentions on both the practicability of adoption and the need to supplement DOE's EIS should be filed within 30 days of the Notice of Hearing. This would comport with the model timeline contained in the recently promulgated LSS rule for the filing of intervenor contentions.
3. Finally, I support the staff's proposal to coordinate with DOE at an early stage on the scoping process for the EIS (Statement of Considerations, p. 17). Before that consultative process begins, however, I would

recommend that the staff be directed to submit to the Commission a paper setting forth the staff's views on what the scope of DOE's EIS should be from our standpoint as the licensing agency, specifically focusing on identifying those issues that DOE must address in its EIS in order for us to make a licensing decision under 10 CFR Part 60. I am particularly interested in how we intend to approach issues such as national transportation routing in our licensing proceeding. Since the scoping process will be the first opportunity for us to convey our position on this and other similar issues, I believe that the Commission needs to be involved early in the formulation of the agency's position on the scope of matters that must be addressed in the EIS and, by implication, in our licensing proceeding.

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We believe we can also satisfy DOE's concern with respect to our mention, at 53 FR 16132, that there may be a need for "multiple EIS's." The point being made was not that NRC might need to prepare its own EIS when DOE had already done so, but that the licensing process may involve more than one major federal action (for example, the construction of the repository on the one hand and the emplacement of waste on the other) that could necessitate the preparation of a supplemental EIS if not an entirely new one, *if the impacts of such actions are not evaluated or properly encompassed in the initial EIS.*

The responsibility for supplementation was another point of contention. DOE - along with some of the other commenters - argued that it would be inappropriate for it to be obliged to supplement its completed EIS in order to satisfy any independent NEPA responsibilities of the Commission. We agree with this statement. But, as DOE itself acknowledges, it might need to supplement the EIS if it were to make a substantial change in the proposed action or if significant new circumstances or information were to



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A F F I R M A T I O N   V O T E

R E S P O N S E   S H E E T

TO:            SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM:        COMMISSIONER CURTISS

SUBJECT:    SECY-89-140 - NEPA REVIEW PROCEDURES FOR GEOLOGIC REPOSITORIES  
              FOR HIGH-LEVEL WASTE

APPROVED   x w/Comments\*      DISAPPROVED \_\_\_\_\_    ABSTAIN \_\_\_\_\_

NOT PARTICIPATING \_\_\_\_\_    REQUEST DISCUSSION \_\_\_\_\_

COMMENTS:

\* Commissioner Curtiss' comments are attached.

*James R. Curtiss*  
\_\_\_\_\_  
SIGNATURE

5/30/89  
\_\_\_\_\_  
DATE

ENTERED ON "AS"    YES    NO  
                          5/30/89    \_\_\_\_\_  
                                
NRC-SECY FORM MAY, 1987

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**2.a. EPA Assurance Requirement:**

(b) Disposal systems shall be monitored after disposal to detect any substantial and detrimental deviations from expected performance. This monitoring shall be done with techniques that do not jeopardize the isolation of the wastes and shall be conducted until there are no significant concerns to be addressed by further monitoring.

**b. Discussion:**

Part 60 currently requires completion of a performance confirmation program prior to repository closure, but does not require monitoring during the period following closure but prior to license termination. The Commission chose not to require post-closure monitoring because of doubts about the usefulness of such monitoring and because of fears that monitoring in or near a repository after closure could degrade repository performance. The type of monitoring envisioned by EPA does not involve direct monitoring of the repository itself (which might degrade repository performance). Rather, EPA proposes monitoring of such parameters as regional groundwater flow characteristics. The NRC agrees that such monitoring may, in some cases, provide desirable information beyond that which would be obtained in the performance confirmation program which Part 60 now requires to be continued until permanent closure. The NRC therefore proposes to require monitoring as an extension of performance confirmation, as appropriate, when such monitoring can be conducted without degrading repository performance.

**c. Proposed Changes to Part 60:**

Add to §60.21(c) a new ¶ (9) as follows:

(9) A general description of the program for post-permanent closure monitoring of the geologic repository.

Renumber the current ¶ (9) through (15) accordingly.

Revise §60.51(a)(1) to read:

(1) A detailed description of the program for post-permanent closure monitoring of the geologic repository in accordance with §60.144. As a minimum, this description shall:

- (i) identify those parameters that will be monitored;
- (ii) indicate how each parameter will be used to evaluate the expected performance of the repository; and
- (iii) discuss the length of time over which each parameter should be monitored to adequately confirm the expected performance of the repository.

Add to §60.52(c) a new ¶ (3) as follows:

(3) That the results available from the post-permanent closure monitoring program confirm the expectation that the repository will comply with the performance objectives set out at §60.112 and §60.113; and

Renumber the current ¶ (3) as ¶ (4).

Add a new §60.144 as follows:

§60.144 Monitoring After Permanent Closure

A program of monitoring shall be conducted after permanent closure to monitor all repository characteristics which can reasonably be expected to provide material confirmatory information regarding long-term repository performance, provided that the means for conducting such monitoring will not degrade repository performance. This program shall be continued until termination of a license.

Include in the Supplementary Information of the Federal Register notice proposing these changes the following paragraph:

Part 60 currently requires DOE to carry out a performance confirmation program which is to continue until repository closure. Part 60 does not now require monitoring after repository closure because of the likelihood that post-closure monitoring of the underground facility would degrade repository performance. The Commission recognizes, however, that monitoring such parameters as regional groundwater flow characteristics may, in some cases, provide desirable information beyond that which would be obtained in the performance confirmation program. The proposed requirement for post-permanent closure monitoring requires that such monitoring be continued until termination of a license. The Commission intends that a repository license not be terminated until such time as the Commission is convinced that there is no significant additional information to be obtained from such monitoring which would be material to a finding of reasonable assurance that long-term repository performance would be in accordance with the established performance objectives.

**3.a. EPA Assurance Requirement:**

**(c) Disposal sites shall be designated by the most permanent markers, records, and other passive institutional controls practicable to indicate the dangers of the wastes and their location.**

**b. Discussion:**

**No revisions to Part 60 are needed. §60.21(c)(8), 60.51(a)(2), and 60.121 contain equivalent provisions.**

**4.a. EPA Assurance Requirement:**

(d) Disposal systems shall use several different types of barriers to isolate the wastes from the environment. Both engineered and natural barriers shall be included.

**b. Discussion:**

The NRC considers that Part 60 already requires use of both engineered and natural barriers. Nevertheless, in order to avoid any possible confusion regarding the provisions of §60.113(b), the NRC proposes to add additional clarifying language to §60.113.

**c. Proposed Changes to Part 60:**

Add a new ¶ (d) to §60.113 as follows:

(d) Notwithstanding the provisions of (b) above, the geologic repository shall incorporate a system of multiple barriers, both engineered and natural.

In the Supplementary Information of the Federal Register notice proposing these changes include the following:

Questions might arise regarding the types of engineered or natural materials or structures which would be considered to constitute barriers. The Commission notes that §60.2 now contains the definition: "'Barrier' means any material or structure that prevents or substantially delays movement of water or radionuclides." Thus, the Commission considers that the new paragraph to be added to §60.113 will confirm the Commission's commitment to a multiple barrier approach as contemplated by Section 121(b)(1)(B) of the Nuclear Waste Policy Act.

**5.a. EPA Assurance Requirement:**

(e) Places where there has been mining for resources, or where there is a reasonable expectation of exploration for scarce or easily accessible resources, or where there is a significant concentration of any material that is not widely available from other sources, should be avoided in selecting disposal sites. Resources to be considered shall include minerals, petroleum or natural gas, valuable geologic formations, and ground waters that are either irreplaceable because there is no reasonable alternative source of drinking water available for substantial populations or that are vital to the preservation of unique and sensitive ecosystems. Such places shall not be used for disposal of the wastes covered by this Part unless the favorable characteristics of such places compensate for their greater likelihood of being disturbed in the future.

**b. Discussion:**

Part 60 contains provisions equivalent to this assurance requirement in §60.122(c)(17), (18) and (19). Part 60 does not, however, address "a significant concentration of any material that is not widely available from other sources."

It is possible that the economic value of materials could change in the future in a way which might attract future exploration or development detrimental to repository performance. The NRC proposes to add an additional potentially adverse condition to Part 60 related to significant concentrations of material that is not widely available from other sources. As with the other potentially adverse conditions, the presence of such a condition would require an evaluation of the effect of the condition on repository performance as specified in §60.122(a)(2)(ii), but would not preclude selection of a site for repository construction. (It should be noted that DOE's siting guidelines contain an identical provision in 10 CFR 960.4-2-8-1.)

**c. Proposed Changes to Part 60:**

Add a new ¶ (18) to §60.122(c) as follows:

(18) The presence of significant concentrations of any naturally-occurring material that is not widely available from other sources.

Renumber the current ¶ (18) through (21) accordingly.

**6.a. EPA Assurance Requirement:**

(f) Disposal systems shall be selected so that removal of most of the wastes is not precluded for a reasonable period of time after disposal.

**b. Discussion:**

EPA's concept of "removal" is significantly different from "retrieval" in Part 60. EPA wants to preclude disposal concepts such as deep well injection for which it would be virtually impossible to remove or recover wastes regardless of the time and resources employed. For a mined geologic repository wastes could be located and recovered, albeit at great cost, even after repository closure. EPA therefore considers that a repository complies with this assurance requirement, and no revision to Part 60 is needed.



OFFICE OF THE  
SECRETARY

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

November 27, 1985

MEMORANDUM FOR: William J. Dircks  
Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - NOTATION VOTE ON  
SECY-85-272 - REPORT ON THE ENVIRONMENTAL  
PROTECTION AGENCY'S ENVIRONMENTAL  
STANDARDS FOR HIGH-LEVEL RADIOACTIVE WASTE  
DISPOSAL

On September 19, 1985, the Commission (with all Commissioners agreeing) approved the proposed letter to EPA, as attached. Immediately following Commission approval, the ACRS requested that this matter be discussed with the Committee. On October 21, 1985, the Commission met with the staff, ACRS and others to discuss conflicting views.

Upon due consideration of the concerns expressed by the ACRS and the responses by the staff, the Commission reaffirmed releasing the letter to EPA.

The letter has been forwarded to the Chairman for his signature.

In addition, EDO is directed to submit to the Commission the rulemaking package which conforms 10 CFR Part 60 with the EPA Standard. The Commission also stresses the importance for the staff to clearly articulate, in the changes to Part 60, how we interpret the EPA's Standards and that the ACRS' concerns be addressed by clearly defining the basis for the assurance that adequate flexibility exists in the standards for their implementation. In particular, care should be taken to avoid any ambiguity in the application of probabilistic conditions placed on the post-closure containment requirements.

(EDO Suspense: 2/15/86)

The Commission also agrees that the staff and the ACRS should interact with each other early in the process of developing the package on 10 CFR Part 60 as well as in future reviews of NRC activities under the NWPA so that valuable technical advice and input can be used in a timely manner by the Commission.

Chairman Palladino requested, in line with ACRS comments, that EDO accelerate its efforts to develop analytical methods to be used in making a determination that a licensee is complying with the EPA Standards. These methods should receive as broad an input and review as possible.

Attachment:  
As stated

cc: Chairman Palladino  
Commissioner Roberts  
Commissioner Asselstine  
Commissioner Bernthal  
Commissioner Zech  
OGC  
OPE  
ACRS



CHAIRMAN

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

The Honorable Lee Thomas  
Administrator  
U.S. Environmental Protection Agency  
Washington, D.C. 20460

Dear Mr. Thomas:

On May 10 and 11, 1982 the Nuclear Regulatory Commission (NRC) submitted formal comments on the Environmental Protection Agency's proposed environmental standards for management and disposal of high-level radioactive wastes. Among other things, we stated our view that the proposed "assurance requirements" and "procedural requirements" contained in those proposed standards involved matters of implementation and thus went beyond the limits of EPA's jurisdiction.

In letters dated July 19 and August 15, 1984 Acting Chairman Roberts and Former Administrator Ruckelshaus, respectively, agreed that the staffs of EPA and NRC should attempt to develop modifications to 10 CFR Part 60 to incorporate the principles of EPA's proposed assurance and procedural requirements. EPA could then delete these requirements or make them applicable only to facilities not licensed by the NRC, eliminating any potential problems of jurisdictional overlap.

The NRC staff recently reported to the Commission several proposed changes to Part 60 which have been worked out by the NRC and EPA staff (text enclosed). Consistent with the provisions of the Administrative Procedure Act, the Commission will propose these changes for incorporation into Part 60 now that the final EPA high-level waste standards have been published. The NRC staff anticipates submittal of a rulemaking package, incorporating both these wording changes and other conforming amendments, to the Commission within 120 days.

The Commission appreciates the cooperation shown by the EPA staff in working to reach this agreement.

Sincerely,

Nunzio J. Palladino

Enclosure:  
Proposed changes to  
10 CFR Part 60

EPA ASSURANCE REQUIREMENTS AND  
PROPOSED CHANGES TO PART 60

1.a. EPA Assurance Requirement:

(a) Active institutional controls over disposal sites should be maintained for as long a period of time as is practicable after disposal; however, performance assessments that assess isolation of the wastes from the accessible environment shall not consider any contributions from active institutional controls for more than 100 years after disposal.

(In Working Draft No. 8 "active institutional control" means: (1) controlling access to a disposal site by any means other than passive institutional controls, (2) performing maintenance operations or remedial actions at a site, (3) controlling or cleaning up releases from a site, or (4) monitoring parameters related to disposal system performance.)

b. Discussion:

The Commission's existing provisions (§60.52) related to license termination will determine the length of time for which institutional controls should be maintained, and there is therefore no need to alter Part 60 based on the first part of this assurance requirement.

The second part of this assurance requirement would require that "active" institutional controls be excluded from consideration (after 100 years) when the Commission assesses the isolation characteristics of a repository. The NRC staff understands that remedial actions (or other active institutional controls) would not be relied upon under Part 60 to compensate for a poor site or inadequate engineered barriers. However, in the definition of "unanticipated events and processes," Part 60 expressly contemplates that, in assessing human intrusion scenarios, the Commission would assume that "institutions are able to assess risk and to take remedial action at a level of social organization and technological competence equivalent to, or superior to, that which was applied in initiating the processes or events concerned" (emphasis added). Therefore, it might appear at first blush that Part 60 is at odds with the draft EPA standards.

2.a. EPA Assurance Requirement:

(b) Disposal systems shall be monitored after disposal to detect any substantial and detrimental deviations from expected performance. This monitoring shall be done with techniques that do not jeopardize the isolation of the wastes and shall be conducted until there are no significant concerns to be addressed by further monitoring.

b. Discussion:

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NOTATION VOTE

RESPONSE SHEET

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER ZECH

SUBJECT: SECY-85-272 - REPORT ON THE ENVIRONMENTAL PROTECTION AGENCY'S ENVIRONMENTAL STANDARDS FOR HIGH-LEVEL RADIO-ACTIVE WASTE DISPOSAL

APPROVED  DISAPPROVED \_\_\_\_\_ ABSTAIN \_\_\_\_\_  
NOT PARTICIPATING \_\_\_\_\_ REQUEST DISCUSSION \_\_\_\_\_

COMMENTS:

*Carlo W. Zech Jr.*  
\_\_\_\_\_  
SIGNATURE

9-9-85

\_\_\_\_\_  
DATE

Entered on "AS"

YES      NO  
     

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.



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



OFFICE OF THE  
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In letters dated July 19 and August 15, 1984 Acting Chairman Roberts and Former Administrator Ruckelshaus, respectively, agreed that the staffs of EPA and NRC should attempt to develop modifications to Part 60 to incorporate the principles of EPA's proposed assurance and procedural requirements. EPA could then delete these requirements or make them applicable only to facilities not licensed by the NRC, eliminating any potential problems of jurisdictional overlap.

The NRC staff recently reported to the Commission several proposed changes to Part 60 which have been worked out by the NRC and EPA staff (text enclosed). <sup>The Commission</sup> ~~The Commission finds the wording of these changes acceptable and~~ consistent with the provisions of the Administrative Procedure Act, will propose these changes for incorporation into Part 60 after publication of the final EPA high-level waste standards. The NRC staff anticipates submittal of a rulemaking package, incorporating both these wording changes and other conforming amendments, to the Commission within 120 days after publication of the final EPA standards.

<sup>The Commission</sup> appreciate the cooperation shown by the EPA staff in working to reach this agreement.

Sincerely,

Nunzio J. Palladino, Chairman

Enclosure: Proposed changes to  
10 CFR Part 60

NOTATION VOTE

RESPONSE SHEET

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER ASSELSTINE

SUBJECT: SECY-85-272 - REPORT ON THE ENVIRONMENTAL PROTECTION AGENCY'S ENVIRONMENTAL STANDARDS FOR HIGH-LEVEL RADIO-ACTIVE WASTE DISPOSAL

APPROVED AS MODIFIED DISAPPROVED \_\_\_\_\_ ABSTAIN \_\_\_\_\_  
NOT PARTICIPATING \_\_\_\_\_ REQUEST DISCUSSION \_\_\_\_\_

COMMENTS:

James K. Asselstine  
SIGNATURE

8-12-85  
DATE

Entered on "AS"  YES  NO

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.



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

OFFICE OF THE  
CHAIRMAN

The Honorable Lee Thomas  
Administrator  
U.S. Environmental Protection Agency  
Washington, D. C. 20460

Dear Mr. Thomas:

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*THE COMMISSION*

I appreciate the cooperation shown by the EPA staff in working to reach this agreement.

*HAVE BEEN PUBLISHED.*

*NOW THAT*

Sincerely,

Nunzio J. Palladino, Chairman

Enclosure: Proposed changes to  
10 CFR Part 60

NOTATION VOTE

RESPONSE SHEET

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER BERNTHAL

SUBJECT: SECY-85-272 - REPORT ON THE ENVIRONMENTAL PROTECTION AGENCY'S ENVIRONMENTAL STANDARDS FOR HIGH-LEVEL RADIOACTIVE WASTE DISPOSAL

APPROVED  DISAPPROVED \_\_\_\_\_ ABSTAIN \_\_\_\_\_  
NOT PARTICIPATING \_\_\_\_\_ REQUEST DISCUSSION \_\_\_\_\_

COMMENTS: *I agree with the chairman's comment.*

*[Handwritten Signature]*  
\_\_\_\_\_  
SIGNATURE

*9/18/85*  
\_\_\_\_\_  
DATE

Entered on "AS"  YES  NO

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.

NOTATION VOTE

RESPONSE SHEET

TO: SAMUEL J. CHILK, SECRETARY OF THE COMMISSION

FROM: COMMISSIONER ROBERTS

SUBJECT: SECY-85-272 - REPORT ON THE ENVIRONMENTAL PROTECTION AGENCY'S ENVIRONMENTAL STANDARDS FOR HIGH-LEVEL RADIOACTIVE WASTE DISPOSAL

APPROVED X DISAPPROVED \_\_\_\_\_ ABSTAIN \_\_\_\_\_  
NOT PARTICIPATING \_\_\_\_\_ REQUEST DISCUSSION \_\_\_\_\_

COMMENTS:

*Samuel J. Chilk*

SIGNATURE

9/16/85

DATE

Entered on "AS" YES  NO

SECRETARIAT NOTE: PLEASE ALSO RESPOND TO AND/OR COMMENT ON OGC/OPE MEMORANDUM IF ONE HAS BEEN ISSUED ON THIS PAPER.