

# POLICY ISSUE NOTATION VOTE

June 13, 2005

SECY-05-0104

FOR: The Commissioners

FROM: Luis A. Reyes  
Executive Director for Operations

SUBJECT: OPTIONS AND RECOMMENDATION FOR THE POTENTIAL ROLE OF THE NUCLEAR REGULATORY COMMISSION DURING THE DEVELOPMENT OF THE DEPARTMENT OF ENERGY ENVIRONMENTAL IMPACT STATEMENT ON DISPOSAL OF GREATER-THAN-CLASS-C RADIOACTIVE WASTE (SRM-M050215)

PURPOSE:

To provide a discussion of the advantages and disadvantages of options for the potential role of the U. S. Nuclear Regulatory Commission (NRC) in the U. S. Department of Energy's (DOE) development of an environmental impact statement (EIS) to address disposal of Greater-than-Class-C (GTCC) radioactive waste, and to request Commission approval of the staff's recommendation that NRC become a cooperating agency for the EIS.

SUMMARY:

This paper discusses two options for NRC participation in the DOE EIS, acting as either a: (1) cooperating agency; or (2) commenting agency. The staff recommends that the Commission authorize the staff to pursue a written cooperating agency agreement (memorandum of understanding [MOU]) with DOE.

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The primary advantages of the cooperating agency option are that NRC can: (1) realize an overall resource savings by potentially reducing or eliminating the need for NRC to develop its own EIS or to expend significant efforts toward adoption of DOE's EIS; (2) provide timely explanations of NRC's independent role, requirements, and plans; and (3) allow early planning to assure the regulatory infrastructure is in place to proceed with a timely licensing decision. In addition, the cooperating agency option is consistent with both NRC obligations under the National Environmental Policy Act of 1969 (NEPA) and the Council on Environmental Quality (CEQ) guidance. The primary disadvantage of this option is that some stakeholders may perceive that a cooperating agency role is not consistent with NRC's independent regulatory responsibilities. The staff has identified cooperating agency interactions that provide opportunities for managing such perceptions.

The primary advantage of the commenting agency option is to reduce, rather than eliminate, the likelihood that individuals/groups develop the perception that NRC is not acting in an independent regulatory manner. Additionally, resource expenditures will potentially be less during the DOE EIS phase of the overall Federal process (DOE EIS through NRC licensing) to accomplish GTCC disposal. However, resource usage will likely increase significantly to support the NRC EIS phase of NRC licensing. The total resources that NRC would expend to complete the entire Federal process as a commenting agency would likely exceed the total expended as a cooperating agency. In addition to greater expenditure of total resources, the commenting agency option disadvantages also include minimal opportunity for NRC to assure that the DOE EIS fulfills NRC needs and expectations for potential adoption of the DOE EIS.

#### BACKGROUND:

This paper responds to the Commission's February 28, 2005, staff requirements memorandum (SRM) addressing the February 15, 2005, briefing on waste safety programs, performance, and plans by the Office of Nuclear Material Safety and Safeguards (NMSS). The SRM directed the staff to provide the Commission its assessment of the advantages and disadvantages of options considered for NRC's potential role in DOE's EIS and to provide its recommendations.

On May 11, 2005, DOE issued an advanced notice of intent (ANOI) to prepare an EIS for a GTCC disposal facility (Attachment 1). On May 18, 2005, DOE sent NRC a letter inviting NRC to become a cooperating agency (Attachment 2). The DOE notice of intent is scheduled to be published in Fall 2005. In a March 2005 meeting, DOE staff indicated that their preliminary schedule is to issue a final EIS within 18 to 24 months (consistent with the ANOI). The DOE staff indicated that the schedule is based on internal DOE guidance applied to all of its EIS reviews.

The DOE staff has identified potential areas of the EIS process where NRC can assist as a cooperating agency: disposal facility performance objectives; disposal facility licensing options and compliance areas, including clarification of Agreement State authority; and regulatory guidance on characterization, transport, and disposal of radioactive waste.

The Commission should also be aware of draft legislation which has been introduced into the 109th Congress, H.R.6, the "Energy Policy Act of 2005." Proposed Section 635 of H.R.6 specifies, among other things, that DOE coordinate with NRC and the U.S. Environmental

Protection Agency on the need for regulatory guidance for disposal of GTCC waste (Attachment 3). Finally, existing Federal regulations and guidance relating to cooperating and/or commenting agency roles are listed in Attachment 4.

#### DISCUSSION:

The Low Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA) assigned the Federal Government responsibility for disposal of GTCC waste [Section 3(b)(1)(D)]. The LLRWPA also specifies that all GTCC waste resulting from the activities licensed by NRC (and NRC Agreement States), “shall be disposed of in a facility licensed by the Nuclear Regulatory Commission that the Commission determines is adequate to protect the public health and safety” [Section 3(b)(2)]. DOE accepted responsibility for GTCC waste disposal in 1986 (SECY-89-083, Enclosure D, DOE Memorandum from Sandra Sherman to Joseph Coleman, dated November 25, 1986).

Both DOE and NRC will need to address the NEPA provisions for preparing an EIS addressing their decisions about siting and licensing GTCC facilities (respectively). As either a cooperating or commenting agency, NRC will have the option of adopting all or part of the DOE EIS in place of or in support of NRC completing its own EIS. As a cooperating agency for the DOE EIS, NRC may participate directly in the development and information flow during all phases of the DOE EIS<sup>1</sup>. In a commenting agency role, NRC participation and information will be limited to public comment periods and observations during public scoping meetings and other publicly available information. Finally, as a commenting agency, there is greater likelihood that NRC will need to produce its own EIS, rather than being able to adopt all or part of the DOE EIS.

An overview of the advantages and disadvantages of each NRC option is provided below, with supporting discussion in Attachment 5.

#### Cooperating Agency Option

The CEQ regulations for implementing NEPA define “cooperating agency” in 40 CFR 1508.5 as meaning, “any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal...” NRC has both jurisdiction by law and special expertise. Further, the role of a cooperating agency is to (1) participate in the NEPA process at the earliest possible time, (2) participate in the scoping process, and (3) assume, on request of the lead agency, responsibility for developing information and preparing environmental analyses including portions of the EIS concerning which the cooperating agency has special expertise (40 CFR 1501.7). Overall, the cooperating agency option is consistent with NRC NEPA obligations, CEQ guidance, and the principles of efficiency in “good government” (see Attachment 5).

The cooperating agency option also has the advantage of positioning NRC to: (1) better assure the DOE EIS addresses areas and issues that will increase the potential for NRC to adopt all or

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<sup>1</sup> It should be noted that serving as a cooperating agency does not preclude an agency’s right to prepare its own EIS if it determines the EIS prepared by the lead agency is not complete. See CEQ Forty Most Asked Questions, 14b (Attachment 4).

part of the EIS, as well as begin early planning for guidance development and possibly rulemaking activities; (2) engage in early, two-way communication with stakeholders and the public to identify and address their interests, concerns, and need for accurate and timely explanations of the independent NRC role, requirements, and planning; and (3) save resources when NRC later engages in its own EIS process or adoption of the DOE EIS.

A potential disadvantage of this option is the necessity for earlier obligation of resources, with initial spending slightly higher than for the commenting agency option during the DOE EIS phase of the overall Federal process (DOE EIS through NRC licensing). However, the cooperating agency option may save significantly more resources during the NRC licensing phase to result in an overall total of NRC resources spent on the entire Federal process that will likely be less than total resources for NRC starting the process in a commenting agency role.

Another disadvantage is the potential that the public and stakeholders may perceive that NRC cooperating agency activity is not consistent with its *independent* regulatory responsibilities. This perception is balanced by the possibility that if NRC abstains from becoming a cooperating agency, NRC can be perceived as not fulfilling its NEPA obligations. Furthermore, the cooperating agency option has specific opportunities for managing NRC activities so as to minimize and/or address such perceptions. The staff can clarify NRC's independent role through several means: (1) cooperating agency interactions with the public and stakeholders at scoping meetings; (2) the language and content of a written cooperating agency agreement with DOE [e.g., MOU]; and (3) conducting and documenting the regulatory and technical review of the license application in the same independent manner that NRC does for other license application reviews.

### Commenting Agency Option

If NRC does not participate in the DOE EIS process as a cooperating agency, it is still responsible under NEPA for commenting on the DOE draft EIS during the public comment period. In this case, NRC will not be involved in development of the EIS or its supporting analyses. Further, DOE will be required to consider NRC comments made during the public comment period, but will not be required to interact with NRC to address NRC comments or the comments of stakeholders and the public.

As a commenting agency, NRC will still need to interact with DOE as DOE goes through decision making related to its EIS, new disposal program planning, and, ultimately, its NRC license application. These interactions are standard for any license applicant in the early stages of developing its planning. Finally, this option will necessitate that the NRC licensing review include either development of a separate NRC EIS or adoption and likely supplementation the DOE EIS.

The primary advantage of the commenting agency option is to reduce, rather than eliminate, the likelihood that individuals and groups will perceive that NRC is not acting in an independent regulatory manner. Additionally, the commenting agency role will initially require fewer resources than the cooperating agency role.

There are several disadvantages to the commenting agency option: (1) significant resource expenditures for an NRC EIS or a supplemental EIS that will likely result in total NRC resource

expenditures exceeding cooperating agency totals for the entire Federal process; (2) minimal opportunity for NRC to assure that the DOE EIS fulfills NRC needs and expectations for adoption; (3) limited access to early information and discussions which will inform NRC comments on the draft EIS, and NRC decisions before and after the EIS; and (4) NRC will not realize the benefits of early interaction with DOE that can otherwise assist NRC in identifying issues and begin planning for both new technical guidance and rulemaking. NRC will also likely receive some criticism as a result of refraining from participating as a cooperating agency.

#### COMMITMENTS:

Consistent with the Commission direction in its SRM, dated February 28, 2005, the staff has not committed to serving as a cooperating or commenting agency for the DOE GTCC EIS.

#### RECOMMENDATION:

The staff recommends that the Commission authorize NRC to become a cooperating agency for the DOE GTCC EIS.

To facilitate the cooperating agency activities, the staff also recommends development of a formal MOU with DOE. An MOU will provide the means for identifying and containing NRC cooperating agency activities. In addition, an MOU will permit the staff to negotiate appropriate time frames for NRC activities, resulting in an EIS schedule commensurate with NRC budgeted resources and overall staffing levels.

#### RESOURCES:

The NMSS budget includes 0.5 full-time equivalents (FTE) in Fiscal Year (FY) 2006 and 0.7 FTE with \$100K in FY 2007. These resource estimates were developed prior to detailed discussions with DOE and with the uncertainty as to what role NRC will pursue (either cooperating agency or commenting agency). These resources will be sufficient to serve as a commenting agency. The level of resources needed to serve as a cooperating agency is highly dependent on how the Commission intends for the staff to participate. Based on our current understanding of DOE's potential expectations for NRC participation as a cooperating agency, the staff estimates resource needs will be 0.75 FTE in FY 2006 and 1 FTE with \$100K in FY 2007. Any additional funds needed above the budgeted resources in FY 2006 and FY 2007 will be reallocated from the Materials Users Environmental Reviews Planned Activity (Subprogram Nuclear Materials Users Licensing and Inspection, C-3 Line 175) (this represents the portion of resources originally budgeted for the environmental review associated with controlling the disposition of solid materials).

The Office of the General Counsel (OGC) anticipates that its resource needs will be 0.1 FTE in FY 2006 and 0.1 FTE in FY 2007 if NRC is a commenting agency. If NRC is a cooperating agency, OGC expects that 0.2 FTE in FY 2006 and 0.2 FTE in FY 2007 will be needed. These resources are within OGC's budget.

Given the dependence of the staff's recommendation on DOE planning and implementation, as well as the dynamic of H.R.6, if a significant amount of time (greater than 30 days) passes or the Commission gives staff direction differing from staff's recommended action, this section of the paper will need to be revisited after issuance of the related draft SRM.

COORDINATION:

The OGC has no legal objection. The Office of the Chief Financial Officer reviewed the paper and concurs.

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Luis A. Reyes  
Executive Director  
for Operations

Attachments:

1. DOE Advance Notice of Intent (ML051540458)
2. DOE Cooperating Agency Invitation Letter (ML051540447)
3. Excerpt From Proposed Section 635 of H.R.6, the "Energy Policy Act of 2005" (ML051580272)
4. Requirements and Guidance Associated with Cooperating and Commenting Agency Roles
5. Information Supporting The Advantages and Disadvantages for Each NRC Option

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**ML051540273**

\*See previous concurrence

<b>OFC</b>	DWMEP:PM	DWMEP:SC*	DWMEP:DD*	OCFO*	Tech Ed*	DWEP: D*
<b>NAME</b>	SWoods	BJDavis	SFlanders	RHesselink for BFicks	PKleene	SFlanders for LCamper
<b>DATE</b>	06/07/05	06/03/05	06/02/05	6/03 /05	5/26 /05	6/02/05
<b>OFC</b>	OGC*	NMSS:OD	DEDMRS	EDO		
<b>NAME</b>	STreby	JRStrosnider	MJVirgilio	LAReyes		
<b>DATE</b>	6/ 06/05	6 /08/05	6/13/05	6/13/05		

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**ATTACHMENT 1:**

**DOE Advance Notice of Intent**

**ML051540458**



**ATTACHMENT 2:**

**DOE Cooperating Agency Invitation Letter to NRC**

**ML051540447**

**ATTACHMENT 3:**

**Excerpt From Proposed Section 635 of H.R.6,  
the "Energy Policy Act of 2005"**

**ML051580272**