

Information Supporting The Advantages and Disadvantages for Each NRC Option

I. Cooperating Agency Option

A. Advantages

1. Positions U.S. Nuclear Regulatory Commission (NRC) to better assure that the U.S. Department of Energy (DOE) environmental impact statement (EIS) addresses areas and issues that will increase the potential for NRC to adopt all or part of the EIS. As a corollary, NRC is also positioned to identify key issues early for a potential licensing proceeding, and begin planning for both guidance development and rulemaking activities.

As stated in the DOE advanced notice of intent (ANOI), the scope of the EIS includes specific disposal technologies and locations. The scope of the DOE EIS will likely encompass the scope of an NRC EIS associated with licensing a Greater-than-Class-C (GTCC) disposal facility. Thus, NRC staff will be in a position to adopt the DOE EIS, provided the staff determines that the EIS addresses the environmental impacts as NRC would examine them in its own EIS to support its own licensing decisions. Serving as a cooperating agency will provide for more staff involvement in the preparation of the EIS. Providing this NRC expertise, with early regulatory clarifications, better assures that the environmental impacts associated with licensing a GTCC facility are fully addressed and are more likely to facilitate the NRC licensing decision. Specifically, serving as a cooperating agency increases the likelihood that a single EIS can satisfy both DOE and NRC statutory responsibilities. The cooperating agency role also provides a well-defined construct for interactions with DOE regarding issues such as the formulation of performance criteria and objectives, licensing options, compliance and guidance.

As recently shared by DOE staff, DOE's development of the scope of the EIS and potential disposal options will require DOE to interface with NRC staff in areas such as performance criteria and objectives, licensing options, compliance, and guidance. The NRC will need to address these areas with DOE, regardless of whether NRC takes on a cooperating or commenting role. Additionally, NRC may need to develop technical guidance in order to license GTCC disposal. In its May 25, 1989, *Federal Register* notice (54 FR 22578), the Commission noted that additional technical criteria might be needed for licensing disposal facilities other than "near surface" disposal. If needed, such criteria would be added to Part 61 before licensing an "intermediate disposal facility." Serving as a cooperating agency will allow the staff to identify key technical issues early and begin early planning for technical guidance. This will facilitate timely guidance development and rulemaking activities, as necessary.

The cooperating agency role better positions NRC to provide early, accurate, and timely information that will assist DOE to examine alternatives that are viable within the NRC regulatory framework and, consequently, impact DOE GTCC regulatory compliance and licensing. In general, the areas identified by DOE staff for NRC interaction are common to

all potential license applicants seeking information that supports decisions about their programs. Early NRC interaction to provide information on these areas during license applicant program planning has demonstrated that the applicant develops plans that more effectively implement NRC requirements, which results in fewer NRC and applicant resources expended during the licensing process.

2. Positions NRC to 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.

Participating in the public process of developing an EIS provides NRC with the opportunity to achieve the strategic Openness goal early, with the potential to build stakeholder and public rapport that will support NRC's efforts throughout both the EIS process and licensing review. Specifically, as a cooperating agency, NRC can actively participate in the scoping process, and will, therefore, be in a position to identify the need for, and provide accurate and timely explanations of its requirements, independent review role and potential licensing structure. During scoping interactions, NRC can directly address emerging stakeholder and public concerns related to the agency's regulatory role and independent assessment. Alternatively, an NRC commenting role will be limited to written input during public comment periods, which may result in dilution amongst other comments and summaries. Further, as a cooperating agency, NRC will be in a better position to request timely discussion and resolution of issues. NRC can also better identify and ensure that issues it views pertinent to satisfying public and stakeholder concerns are addressed, especially those issues relevant to its independent examination and potential adoption of all or part of the EIS.

3. Will save NRC resources, whether NRC engages in either its own EIS process or adopts all or part of the DOE EIS.

The cooperating agency role also presents more opportunities to meet the strategic management goal via efficient use of resources and maintenance of staff technical skills. A cooperating agency agreement with DOE yields a framework for each agency to coordinate timing and efforts associated with its independent role, without repeating each other's work and extending the overall Federal process to achieve safe GTCC disposal. Further, the increased potential for NRC to adopt all or part of the DOE EIS will likely save significant resources, compared to NRC completing its own EIS process without the benefit of these prior EIS interactions (as is the situation for a commenting agency role). Specifically, after participating as a cooperating agency, should NRC determine that it needs to supplement the DOE EIS prior to adopting it, the scope of any such supplement will likely be less than if NRC did not serve as a cooperating agency. Further, cooperating agency interactions will better assure that the staff will be up-to-date on technology, issues, and interests when the license application is submitted for review.

4. Assures consistency with NRC's National Environmental Policy Act of 1969 (NEPA) obligations and Council on Environmental Quality (CEQ) guidance, CEQ cooperating agency guidance, and the principles of efficiency in "good government."

The cooperating agency option is consistent with the Title 10 of the *Code of Federal Regulations* (10 CFR) §51.10(b) provision that, "...[T]he Commission will: ... [f]ollow the provisions of Title 40 of the Code of Federal Regulations 1501.5 and 1501.6 relating to lead

agencies and cooperating agencies” Further, NRC fulfills CEQ definition of a cooperating agency (reference Attachment 4) as it has both “special expertise” and “jurisdiction by law” in this case. Pursuing this option is also consistent with recent CEQ guidance (December 23, 2004; reference Attachment 4), emphasizing that agencies should engage in cooperating agency roles as an efficient arrangement. In other words, efficiency as a matter of “good government” (a phrase currently emphasizing Federal agency decisions as being comparable to the planning and actions of “good business.”)

B. Disadvantages

1. A potential disadvantage of this option is earlier obligation of resources, initially spending slightly more resources than the commenting agency option for the DOE EIS phase of the overall Federal process. However, the cooperating agency option does have the potential for significantly greater resource savings later, during the NRC licensing phase. (See discussion under Advantage I.A.3 above.)

Resources will need to be committed, as already budgeted, upon agreement to become a cooperating agency with DOE. The resource expenditure can also be controlled by establishing an MOU with DOE that clearly delineates the scope and schedule of the staff's activities as a cooperating agency. However, this early commitment of resources may obviate the need to commit significantly more resources later to either supplement or prepare a separate EIS.

2. There is a potential for the public and stakeholders to develop the perception that the NRC cooperating agency activity is not consistent with its independent regulatory charge.

This perception is balanced by the possibility that if NRC does not become a cooperating agency, NRC can be perceived as not fulfilling its NEPA obligations. For example, some individuals will view NRC's expertise as important to fully informing the NEPA process and/or saving Federal government resources by trying to eliminate or limit NRC EIS efforts. However, as described above in I.A.2, the cooperating agency option presents opportunities to address these concerns.

Further, the cooperating agency interactions with the public and stakeholders presents specific opportunities for managing its activities so as to minimize and/or address erroneous perceptions.

II. Commenting Agency Option

A. Advantages

1. 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.

As a commenting agency, some criticism about NRC meeting its independent role remains likely as NRC engages in any interaction with DOE. Additionally, if NRC decides to adopt the DOE EIS, NRC may still be subject to the perception that NRC is not acting independently.

2. The commenting agency role will initially require fewer resources than the cooperating

agency role.

This decrease in resources is potentially minimal as NRC will need to expend resources for the same or similar activities engaged in under the cooperating agency option, such as: (1) technical review of the draft EIS during the public comment period; (2) attendance at scoping meetings (as a member of the audience); and (3) participation in discussions and presentations addressing NRC positions and/or based on NRC expertise.

B. Disadvantages

1. Expenditure of significant resources for an NRC EIS or supplement to the DOE EIS.

This option will necessitate developing an NRC EIS or adopting and supplementing the DOE EIS as part of the NRC licensing review. Further, selection of the commenting agency option is supported by 10 CFR §51.10, if NRC chooses to engage the provision that “except that the Commission reserves the right to prepare an independent environmental impact statement whenever the NRC has the regulatory jurisdiction over an activity even though the NRC has not been designated as lead agency for preparation of the statement.” Overall, compared to a cooperating agency, NRC resource expenditures as a commenting agency will shift from the DOE EIS phase to the NRC licensing phase and result in a likely overall greater total resource expenditure for the entire Federal process (DOE EIS through licensing phases).

2. Minimal opportunity for the NRC to assure that the DOE EIS fulfills NRC needs and expectations for adoption.

NRC will be required to develop an EIS as part of the GTCC licensing review. If NRC does not participate in development of the DOE GTCC EIS, it will far more likely need to develop its own EIS rather than potentially adopting DOE’s EIS. Specifically, as a commenting agency NRC will have little opportunity to assure that the DOE EIS includes information and addresses issues to the extent that it can replace NRC addressing these areas in its own EIS. In addition, early NRC interactions with license applicants during the program planning and application development process have demonstrated that the applicant develops plans that more effectively implement NRC requirements, which results in fewer resources expended during the licensing process.

3. Limited access to early information and discussions will limit information for both NRC comments on the draft EIS and NRC decisions before and after the EIS.
4. NRC will not realize the benefits of early interaction with DOE.

Early interaction will not be available to assist NRC staff in identifying key technical issues early and in planning for both new technical guidance and rulemaking needed for licensing a GTCC disposal facility. Further, the opportunities to bring the staff up-to-date on information and issues for use at the outset of licensing will, instead, be potentially delayed.

5. NRC will also likely receive some criticism as a result of refraining from participating as a

cooperating agency.

Unlike the cooperating agency option, NRC will not have the opportunity to actively participate in the DOE scoping process directly. Hence, there will be minimal opportunities for early two-way communication of timely exchanges about NRC's independent review role, regulatory requirements, and the potential licensing structure.