



Department of Energy
Washington, DC 20585

July 31, 2006

Chief
Rules and Directives Branch
Mail Stop T6-D59
Nuclear Regulatory Commission
Washington, D.C. 20555-0001

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RULES AND DIRECTIVES
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USNRC

Docket Nos. PROJ0734, PROJ0735, PROJ0736 and POOM-32
Attention: Anna Bradford

The Department of Energy (Department or DOE) has reviewed the draft Standard Review Plan (SRP) for activities related to DOE waste determinations, which the Nuclear Regulatory Commission (Commission or NRC) issued on May 23, 2006. DOE respectfully objects to the draft SRP because it reflects a fundamental misreading of the plain meaning of section 3116 of the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005. If followed, the draft SRP would result in a regulatory process neither authorized by law nor contemplated when section 3116 was enacted.

Section 3116(a) expressly provides that the Secretary is the exclusive decision maker for determining whether radioactive waste resulting from the reprocessing of spent nuclear fuel at certain DOE sites is high-level radioactive waste. While section 3116(a) assigns the NRC a limited role as an informed consultant to aid the Secretary in making such waste determinations, the statute does not grant the Commission authority to license, certify or otherwise regulate DOE activities relating to determining that waste from reprocessing is not high-level radioactive waste. Nor does the statute specify particular sets of issues upon which the Secretary is to request aid from the NRC or authorize the Commission to dictate the terms and conditions of such consultations.

Despite the limited consultative role that section 3116(a) assigns to the Commission, the overall effect of the draft SRP would be to establish a process that casts the Commission in the role of the regulator, and the Secretary in the role of an applicant, with the apparent objective of treating the Secretary the same as the Commission treats licensees. For example, the draft SRP purports to: i) prescribe the role of the Commission as performing a technical review of a DOE waste determination in order to arrive at an independent conclusion as to whether there is reasonable assurance that the criteria in section 3116(a) can be met; ii) obligate DOE to demonstrate compliance with numerous NRC requirements and standards not set forth in section 3116(a) or justify why DOE used another approach; iii) define and interpret terms and concepts used in section 3116; iv) make all documents provided to the NRC by DOE publicly available, even though many of these documents would be part of the deliberative process that underlies a Secretarial determination under section 3116(a);

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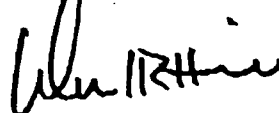
and v) convert the responsibility of the Commission under section 3116(b) to monitor into a requirement that DOE adopt and implement a monitoring plan that addresses concerns identified by the NRC.

The process set forth in the draft SRP is not the consultation for which section 3116 calls, and instead turns the concept of "consultation" on its head. Section 3116(a) neither authorizes the Commission to make any regulatory "decision" at all, nor makes the Secretary an "applicant" for permission of any sort from the Commission. Rather, section 3116(a) imposes a duty on the NRC to aid the Secretary in making his decisions. It follows from this that the NRC's role under section 3116(a) is to aid the Secretary as an informed consultative resource. It likewise follows from this that the procedural terms under which that resource will be made available to the Secretary are to be made by the Secretary, and not by the resource that section 3116(a) makes available to him.

In light of the foregoing, the Department requests that the Commission withdraw the draft SRP. In addition, the Department recommends that senior DOE and NRC managers meet to discuss how best to conduct 3116 consultations to make those consultations more efficient and effective with the primary focus on the candid exchange of views and information between DOE and NRC staffs to assist the Secretary in making determinations under section 3116(a). These meetings also could address how the Department could assist the Commission in fulfilling its monitoring responsibilities under section 3116(b).

To discuss this matter further, please contact Ben McRae, Assistant General Counsel for Civilian Nuclear Programs, at 202-586-4331.

Sincerely,



David R. Hill
General Counsel

cc: Karen D. Cyr
General Counsel
Nuclear Regulatory Commission