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From: "Bob Loux" <bloux@nuc.state.nv.us>
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Subject: Preliminary comments on SECY-07-0126

Following are Nevada's preliminart comments on SECY-07-0126:

The draft proposed rule in SECY-07-0126 is intended to upgrade the NRC's requirements for physical protection and material control and accounting at Yucca Mountain. These upgrades are clearly necessary and Nevada supports most of the draft proposed rule. However, three aspects of the draft proposed rule are of concern to the State of Nevada.

Denial of Hearing Rights

The first concern involves an unlawful denial of Nevada's right to a full hearing on DOE's construction authorization. Under the draft proposed rule the construction authorization application ("CA/LA") would be sufficient if it included "descriptions" of DOE's physical protection plan, safeguards contingency plan, security organization personnel training and qualifications plan, and material control and accounting plan. See proposed 63.21(b)(3) and 63.21(b)(4). The plans themselves are not required to be a part of the CA/LA, or even to accompany it, but are instead required to be submitted to NRC for its approval 180 days after issuance of the construction authorization ("CA"). See 63.24(d). This post-CA submittal of the plans would be in the form of a supplement to the license application. See also proposed 73.53(b) and 74.71(c). None of these plans needs to be implemented until the operating license is issued. See proposed 73.53(b) and 74.71(c).

The preamble to the draft proposed rule explains that the CA/LA needs to have descriptions of these plans to demonstrate that DOE can adequately address and meet NRC's requirements, that some aspects of the plans can be better integrated during construction, and that submittal 180 days after issuance of the CA will allow DOE to include new technology not available when the CA/LA was filed. See draft notice at pp. 11-12.

The content of the CA/LA, as specified in the regulation, will dictate the scope of the licensing review and hearing. This means that the draft proposed rule would confine the licensing review and hearing to issues with respect to the adequacy of the "descriptions" of the plans, as opposed to issues with respect to the adequacy of the plans themselves. . It is not explained how the adequacy of the "descriptions" can be evaluated without

consideration of the plans being described, or how NRC can consider whether DOE will be able to comply with NRC's requirements without seeing in detail how those requirements will be implemented in actual plans. Indeed, NRC's insistence on reviewing and approving of the plans very shortly after the CA is issued, before any significant construction will have begun, as opposed to postponing submission of the plans until the operating (receipt and possession) license phase, suggests clearly that NRC regards mere descriptions as inadequate for the CA phase of review.

Apparently, NRC believes that questions about the adequacy of the actual plans must be resolved before any significant construction begins, but is postponing submission of them until just shortly after the CA is issued in an effort to preclude any consideration of the actual plans in the licensing hearing. Otherwise, why not postpone submission of the actual plans until the operating license application? Put another way, If NRC regards the actual plans as so important that they must be submitted 180 days after the CA, before significant construction begins, why are they not sufficiently important to be included (or referenced) in the CA/LA itself? It is no answer to say, as suggested in the preamble, that the submission of the plans is being postponed to allow DOE to include new technologies, because this argues for submittal of the plans at the operating license stage, when DOE will have much more time to consider new technologies, but still before they will need to be fully implemented..

Moreover, what will NRC do if the 180 day submittal is inadequate? Presumably, NRC will not revoke the CA unless it appeared that DOE was simply unable to comply. But this confirms that an inability to comply can be determined only after consideration of actual proposed plans, and that the proposed requirement that DOE include "descriptions" of the plans in the CA/LA is just "window dressing" of no real use to NRC..

NRC tried something like this before and was reversed by the D.C. Circuit. In the 1980s NRC was concerned that hearings on emergency plan exercises were delaying the issuance of operating licenses for nuclear power plants, and issued a rule that said exercises had to be taken into account before the operating license was issued but could not be considered in the hearing. The D.C. Circuit vacated the rule because, from the content of the rule, the adequacy of the exercise was apparently a material issue that had to be considered before the license was issued, and section 189 of the Atomic Energy Act precluded the NRC from categorically refusing to consider a material issue in the licensing hearing. Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984). It appears from the proposal that the NRC is trying to circumvent the law of this case by providing for submission of plans after the CA is issued, not before. However, this effort cannot succeed because the requirement to submit the plans 180 days after the CA, before significant construction begins, still implies clearly that the plans present material issued that must be resolved in connection with the issuance of the CA.

In sum, Nevada believes that this aspect of the draft proposed rule violates the hearing requirements in section 189 of the Atomic Energy Act.

NRC should require either that one or more of these plans be included in (or accompany) the CA/LA or that one or more of them be included in the operating license application. The 180-day submission requirement should be removed from the rule. The determining factor should be whether compliance with NRC requirements may be constrained or prejudiced in any way by the nature of the site or facility design. If so, then the plans should be a part of the CA/LA so that they may be evaluated on a thorough and timely basis in connection with other aspects of the site and design. If the answer is no, than it follows that compliance with NRC requirements is a procedural, resource, and staffing matter that will not be prejudiced by NRC approval of the site and design, and that review and compliance may be deferred until the operating license stage. The physical protection plan certainly appears to fall in the first category-for example the plan must account for facility descriptions and layouts and physical barriers.

Refusal to Exercise Full Authority Over DOE

The draft proposed rule would provide that NRC-mandated physical security and material control and accounting plans will not apply after the repository is closed permanently and the license is terminated. See draft preamble at pg. 23. The current rule is to the same effect. See, e.g. 73.51(e). The preamble explains that this is because NRC loses jurisdiction over DOE after the license is terminated. This is an incorrect legal conclusion. For other licensees, NRC asserts continuing jurisdiction after license termination. See 20.1401(c). There is no reason to distinguish DOE repositories, especially since section 202 of the Energy Reorganization Act of 1974 grants NRC "licensing and related regulatory authority" over DOE facilities for disposal of high-level waste and spent fuel (emphasis added).

Moreover, NRC has insisted on exercising continuing, long-term authority over DOE in less compelling circumstances. DOE has long-term custody of mill trailing piles, which present radiological hazards that are less severe than repositories but equally long-term. Under 40.27, NRC exercises regulatory authority over this DOE custodial function through the issuance, by rule, of a general license to DOE. There is no reason why NRC should not do something equivalent here.

Independent Verification of Waste Canister Contents

DOE is not required to conduct independent measurements on waste receipts. "DOE would be allowed to accept originator-assigned values." See draft preamble at pp. 13-14. DOE does have to have a way to do checks. See draft preamble at pg. 41 (discussing (g) and (g)(ii) on page 167, in Enclosure 1). But, the main reliance is on the originators' parameter values for the fuel. This means that DOE will be entitled to assume that the originators' records for what went into the TAD (or other canister) are correct. DOE should be required to verify the contents of each TAD or other canister. Reactor records have been erroneous in the past and may be erroneous in the future.

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