April 27, 1989

RULEMAKING ISSUE
(Affirmation)

SECY-89-140

For: The Commissioners

From: William C. Parler
General Counsel

Subject: NEPA REVIEW PROCEDURES FOR GEOLOGIC REPOSITORIES FOR HIGH-LEVEL WASTE

Purpose: To obtain Commission approval for publication of a final rule in the Federal Register.

Summary: The Nuclear Waste Policy Act, as amended, provides direction to the Commission with respect to the implementation of NEPA in the course of repository licensing proceedings. Pursuant to this direction, the Commission last year approved a proposed rule which, among other things, would limit its own independent review of NEPA issues to situations involving significant new information or new considerations. The staff has reviewed the nine comment letters received in response to publication of the proposed rule. The comments, though in some cases quite critical, present no new policy or legal considerations. Accordingly, with certain minor refinements, the staff is now recommending promulgation of a final rule along the lines of the one previously proposed.

Background: The proposed rule was presented to the Commission for its consideration, on March 2, 1988, in SECY-88-60. Publication in the Federal Register occurred on May 5, 1988 (53 FR 16131). (See also SECY-86-51, February 12, 1986; SECY-86-51-A, April 22, 1986; SECY-86-51B, June 27, 1986).

Discussion: Section 114(f) of the Nuclear Waste Policy Act, as amended, captioned "Environmental Impact Statement," specifically addresses the manner in which both the Department of Energy (DOE) and the Commission are to discharge their respective responsibilities under the National Environmental Policy Act of 1969. (Section 114(f) is set out in Attachment A.) An important element of this provision is that any DOE environmental impact statement prepared in connection with a repository proposed to be constructed at the Yucca Mountain site "shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the

Contact:
James R. Wolf, OGC x21641

Commission of a construction authorization and license for such repository." Further, "to the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission [under NEPA] and no further consideration shall be required ...."

When the Commission addressed these provisions in the rule proposed last year, it reviewed both the language and the legislative history of the statute and concluded that Congress intended for NRC to undertake an independent review and weighing of environmental costs and benefits only where there were significant new considerations or new information that had not been taken into account by DOE. In support of this construction, the Commission relied upon a number of factors - remarks in committee reports and floor debate (particularly in the House of Representatives), the opportunities for assessment of environmental concerns afforded by the State's right to issue a notice of disapproval (followed by mandatory Congressional consideration thereof), the requirement that judicial challenges to DOE's environmental impact statement be filed promptly, and the rather stringent timetable for NRC review of a license application. The Commission further suggested that a focus upon radiological concerns would serve to enhance the effectiveness of its license review.

The comments submitted in response to the notice of proposed rulemaking tended, in this regard, either to support without qualification the Commission's reading of the statute or, alternatively, to object to it with similar conviction. In the latter case, as the State of Nevada put it, NRC's major underlying premise "is wrong because it poses, analyzes and answers the wrong question" - viz., how NRC should review the adequacy of DOE's EIS rather than, as Nevada would state it, how NRC should perform its own, independent, NEPA responsibilities. The comments from the Council on Environmental Quality reflect a similar perspective.

The staff has reviewed with care the arguments advanced by the State and others of a similar mind. While disagreement with the Commission's conclusions is evident, there is little if any debate with the reasonableness and relevance of the considerations advanced by the Commission in support of its point of view. Rather than examine the particular meaning and context of the NWPA, the emphasis in these comments was placed upon precedents dealing with agency responsibilities under NEPA generally.

Turning now to the Department of Energy, we consider first its concern about the role of the Commission in connection with DOE's preparation of an EIS. The Commission had taken the position that NRC should function as a commenting agency, but not as a "cooperating agency" as defined in CEQ regulations. A cooperating agency, it had been noted, participates in EIS preparation - at the request of the lead agency - by developing information and preparing environmental analyses including portions of the EIS concerning which the cooperating agency has special expertise. The staff continues to believe that NWPA contemplates no such involvement by NRC in the NEPA review for a geologic repository. On the other hand, it does seem proper to comment on the DOE draft EIS, so that NRC concerns and suggestions can be taken into account. The proposed rule, as explained by the Commission, would allow for NRC to act in a commenting capacity. The preamble to the recommended final rule would point out that NRC's involvement would begin with DOE's scoping process, thereby assuring DOE that this agency would not stand mute while important decisions were being made.

DOE also took exception to the Commission's emphasis upon the Department's continuing obligation to supplement its EIS, but the staff regards the position of the proposed rule with respect to this issue to be sound. As a general rule, it will fall to DOE to do an environmental assessment, and supplement its EIS as needed, whenever there are substantial changes in its proposed actions or there are significant new circumstances or information relevant to environmental concerns and bearing upon the proposed action or its impacts. In principle, there may also be situations in which NRC may need to prepare its own supplemental EIS; and the proposed rule gave recognition to this possible eventuality. The proper procedure must await analysis in the context of the facts that arise in the course of adjudication; for the present, it suffices to note that the rule provides the flexibility and guidance that will accommodate a decision and course of action that is in accordance with law.

The only substantive revision being recommended by the staff concerns the procedure for a site that may be proposed by a Negotiator, pursuant to Title IV of NWPA, as amended. In this situation, the statute specifically provides for adoption under the standard set out in CEQ regulations. A conforming change is needed to ensure that this standard is implemented.

Copies of all comments received, along with a comment analysis by the staff, are included in the enclosures to this staff paper.

Commission resource needs to implement the provisions of NWPA have been reflected in programmatic budget requests. Thus, no significant new resource expenditures will be required by issuance of the amendments.

Coordination: The Executive Director for Operations concurs in the recommendations of this paper.

Recommendation: That the Commission:

1. Approve for publication in the Federal Register the amendments to Parts 2, 51, and 60 enclosed here (Enclosure A) which provide for the implementation of NEPA in the licensing of DOE activities with respect to a geologic repository for high-level radioactive waste.

2. Certify that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. This certification is necessary in order to satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(a).

3. Deny in part the petition for rulemaking (PRM-60-2A) filed by the States of Nevada and Minnesota.

4. Note:

   a. This regulation is the type of action described in categorical exclusions 10 CFR 51.22(c)(1) and (3). Therefore, neither an environmental impact statement not an environmental assessment has been prepared for this regulation.

   b. The Chief Counsel for Advocacy of the Small Business Administration will be informed by the Division of Rules and Records of the certification regarding economic impact on small entities.

   c. The Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works, the Subcommittee on Energy and the Environment of the House Interior and Insular Affairs Committee, and the Subcommittee on Energy and Power of the House Energy and Commerce Committee will be informed by a letter similar to Enclosure B.

   d. This rule contains no new or amended record-keeping, reporting, or application requirement, or any other type of information collection requirement, subject to the Paperwork Reduction Act (Pub. L. 96-511).

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 4/27

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.

Commissioners' comments or consent should be provided directly to SECY by c.o.b. Monday, May 15, 1989.

Commission staff office comments, if any, should be submitted to the Commissioners NLT Monday, May 8, 1989, with an information copy to SECY. If thepaper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an open meeting during the week of May 8, 1989. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION:
Commissioners
OGC
IG
GPA
REGIONAL OFFICES
EDO
ACRS
ACNW
ASLBP
ASLAP
SECY

ATTACHMENT A

Section 114(f) of The Nuclear Waste Policy Act of 1982, as amended

(f) ENVIRONMENTAL IMPACT STATEMENT.—(1) Any recommendation made by the Secretary under this section shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). A final environmental impact statement prepared by the Secretary under such Act shall accompany any recommendation to the President to approve a site for a repository.

"(2) With respect to the requirements imposed by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), compliance with the procedures and requirements of this Act shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository.

"(3) For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and this section, the Secretary need not consider alternate sites to the Yucca Mountain site for the repository to be developed under this subtitle.

"(4) Any environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary under this subtitle shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and no further consideration shall be required, except that nothing in this subsection shall affect any 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.).

(5) Nothing in this Act shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear Regulatory Commission established in title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 et seq.).

(6) In any such statement prepared with respect to the repository to be constructed under this subtitle, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or nongeologic alternatives to such site.

ENCLOSURE A

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2, 51 and 60

NEPA Review Procedures for Geologic Repositories for High-Level Waste

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is 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 Commission will 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.

EFFECTIVE DATE:

FOR FURTHER INFORMATION CONTACT: James R. Wolf, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Telephone (301) 492-1641.

SUPPLEMENTARY INFORMATION:

Under applicable law, the Nuclear Regulatory Commission exercises regulatory authority with respect to the development, operation, and permanent closure of one or more geologic repositories for high-level radioactive waste and spent nuclear fuel. In connection with the exercise of this authority, the Commission is required by the National Environmental Policy Act of 1969 (NEPA), to give appropriate consideration to the environmental impacts of its actions. The scope of such consideration and the procedure to be followed by the Commission in fulfilling its NEPA responsibilities are addressed by the Nuclear Waste Policy Act of 1982, as amended (NWPA). This statute directs the Commission to adopt the environmental impact statement (EIS) prepared by the Department of Energy (the applicant for the NRC license with respect to the repository) "to the extent practicable," with the further proviso that adoption of DOE's EIS shall be deemed to satisfy the Commission's NEPA responsibilities "and no further consideration shall be required." The Commission has been engaged in rulemaking to implement this statutory framework.

The Commission accordingly undertook a careful review of the text and statutory history of the pertinent provisions of the Nuclear Waste Policy Act. The results of this review were presented in the notice of proposed rulemaking published in the Federal Register on May 5, 1988, 53 FR 16131. As summarized therein:

(1) The Commission will conduct a thorough review of DOE's draft EIS and will provide comments to DOE regarding the adequacy of the statement.

(2) If requested by Congress pursuant to the NWPA, the Commission will provide comments on DOE's EIS to the Congress with respect to a State or Tribal notice of disapproval of a designated site.

(3) The NRC will find it practicable to adopt DOE's EIS (or any DOE supplemental EIS) unless:

(a) The action proposed to be taken by the NRC 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 the DOE EIS inadequate.

(4) The DOE EIS will accompany the application through the Commission's review process, but will be subject to litigation in NRC's licensing proceeding only where factors 3(a) or 3(b) are present.

In accordance with NWPA, the primary responsibility for evaluating environmental impacts lies with DOE, and DOE would therefore be required to supplement the EIS, whenever necessary, to consider changes in its proposed activities or any significant new information.

The Commission received nine letters of comment in response to its notice of proposed rulemaking. The commenters were the State of Nevada (Nuclear Waste Project Office), the U.S. Department of Energy, the Council on Environmental Quality, the U.S. Environmental Protection Agency, and several private organizations (the Nevada Nuclear Waste Task Force, the Environmental Defense Fund, the Southwest Research and Information Center, the Sierra Club, and the Edison Electric Institute).

After reviewing and giving careful consideration to all the comments received, the Commission now adopts, in substantial part, the position set forth in its earlier notice. In particular, the Commission continues to emphasize its view that its role under NWPA is oriented toward health and safety issues and that, in general, nonradiological environmental issues are intended to be resolved in advance of NRC licensing decisions through the actions of the Department of Energy, subject to Congressional and judicial review in accordance with NWPA and other applicable law. The Commission anticipates that many environmental questions would have been, or at least could have been, adjudicated in connection with an environmental impact statement prepared by DOE, and such questions should not be reopened in proceedings before NRC.

STATE OF NEVADA COMMENTS

We begin with the comments presented by the State of Nevada not only because of its important sovereign interests, but because of the fundamental nature of the issues that are raised. In Nevada's view, NRC "poses, analyzes and answers the wrong question." According to Nevada, the question is how NRC should perform its own, independent, NEPA responsibilities and not how NRC should review and approve the adequacy of DOE's EIS.

Having posed the question in terms of responsibilities under NEPA, Nevada reviews the many cases that hold that where a major federal action involves two or more federal agencies, each agency must evaluate the environmental consequences of the entire project and determine independently

whether the statutory requirements have been satisfied. NRC is not relieved from the responsibility of making such an independent determination, according to the State, because it would still be able to carry out its licensing responsibilities in a manner consistent with law. NRC, which is directed by NWPA to adopt the DOE environmental impact statement "to the extent practicable," need only do so to the extent that it is otherwise within the customary practice of the agency.

The views of the State bring the question into sharp focus. If the issue were properly to be posed as Nevada urges - i.e., with an assumption that the Commission's NEPA responsibilities are not modified by NWPA - then the regulatory language suggested in its comment letter would have merit. But the Commission firmly believes that the law was intended to have all matters associated with the environmental impacts of repository development considered and decided, to the fullest extent practicable, apart from NRC licensing proceedings. As explained when the proposed rule was published, this interpretation is supported both by the specific legislative and judicial review procedures built into the statutory structure and by the accompanying legislative history. The Commission believes that the result is sensible. Concerns arising under NEPA -- if not resolved through the negotiation procedures established by NWPA -- would be adjudicated early, with finality, and with every reasonable argument being capable of being advanced to the oversight of Congress and the courts. From that point on, in the absence of substantial new information or other new considerations, it would be proper to inquire only whether the specific detailed proposal of the Department of Energy could be implemented in a manner consistent with

the health and safety of the public. The resolution of issues in this manner for purposes of NEPA would in no event affect the framing or decision of health and safety issues, under the Atomic Energy Act, in NRC licensing proceedings.[1]

Although quite different statutory schemes are involved, we perceive a parallel with issues raised in Quivira Mining Company v. NRC, 866 F.2d 1246 (10th Cir. 1989). That case concerned regulations adopted by NRC pursuant to the Uranium Mill Tailings Radiation Control Act of 1978. It considered, among other things, the extent to which NRC, in giving the "due consideration to economic costs" required by the statute, could rely upon a cost-benefit study previously carried out by the Environmental Protection Agency to support EPA's rulemaking responsibilities. The Commission concluded that since the agencies' actions coincided in material respects, all statutory language would retain significant force and effect, and the time period allowed for the issuance of its regulations was inadequate for an independent study, Congress did not wish to require the NRC to perform a second cost-benefit analysis. The Court found the legislative history, as well as the statutory language, to be ambiguous on the question; as such, it upheld the NRC construction. Here, given the identity of the actions being

---

[1]The State took exception to the standard for completeness of information in a license application -- viz. the "reasonably available" standard of 10 CFR 60.24. Although the matter is not strictly at issue in this rulemaking, the Commission regards the State's concern in this regard to be overdrawn. While information may be sufficient to meet the requirements of 60.24, this in no way implies that such information will prove to be sufficient to meet the applicant's burden of persuasion under 60.31.

considered by the two agencies (DOE and NRC), we believe it to be a fair reading of Congressional intent that NRC can adequately exercise its NEPA decisionmaking responsibility with respect to a repository by relying upon DOE's environmental impact statement. As in Quivira Mining, the timing requirement - under NWPA, a three-year licensing process for a unique facility, involving standards of exceptional complexity, requiring disputatious predictions of future human activity and natural processes for thousands of years - supplies practical support for our interpretation. Congress did not speak to the precise question of the standard to be used in deciding whether adoption of DOE's environmental impact statement is practicable; and if our construction is not the only one that might be proposed, it seems to us to be, at a minimum, "permissible."

Once DOE's EIS has been adopted, the statute expressly relieves the Commission from further consideration of the environmental concerns addressed in the statement. Congressional review of a State's resolution of disapproval - should such a resolution be passed - would permit (and, most likely, virtually ensure) that issues other than those to be adjudicated under the Atomic Energy Act would have been considered and weighed. Under these circumstances, it would do no violence to national environmental policy to proscribe further examination in administrative proceedings.

COUNCIL ON ENVIRONMENTAL QUALITY COMMENTS

The Commission invited the Council on Environmental Quality to comment on the proposed rule. The conclusion of CEQ was similar to that of the

State of Nevada. In particular, CEQ read the phrase "to the extent practicable" to mean that NRC should make an independent evaluation of the DOE environmental impact statement, adopting some or all of it as appropriate so as to avoid unnecessary duplication. From the Commission's perspective, though, the position does not fully take into account the detailed scheme for environmental review established by NWPA. Neither the related provisions of the statute (including, for example, those dealing with legislative and judicial review and establishing time frames for Commission decisionmaking) are analyzed, nor is there any examination of the legislative history which, as described in the preamble to the proposed rule, supports our point of view. We continue to believe that it is clear - at least in the debates of the House of Representatives with respect to the bill which, with amendments, was enacted into law - that the Commission role was intentionally to be directed to health and safety issues to the exclusion, absent new information or new considerations, of issues arising under NEPA.

It is worth noting, though, that CEQ recognizes that the Commission might "defer" to a court finding that the DOE environmental impact statement is adequate. This is certainly close, if not identical to, the Commission's position that a judicial finding of adequacy would preclude further litigation of the matter in NRC licensing proceedings.

COMMENTS OF ENVIRONMENTAL ORGANIZATIONS

The environmental organizations' comments included a number of arguments similar to those of the State of Nevada with respect to the Commission's customary NEPA responsibilities. As already indicated, it is our view that Congress intended, under NWPA, for NRC to accept the DOE EIS in the absence of substantial new considerations or new information. We reject the suggestion made by the Sierra Club that the approach we have outlined amounts to an abdication of any Commission responsibility.

In addition, however, a number of comments of somewhat narrower scope were submitted by environmental organizations (as well as by the State of Nevada) and are addressed here.

One matter that particularly concerned the private Nevada Nuclear Waste Task Force involved the relationship between the judicial process and the Commission's administrative process. The Task Force cautioned that NRC should not rely on there having been a court ruling with regard to the adequacy of DOE's environmental impact statement in advance of the Commission's licensing decision (when a judicial finding of inadequacy, affecting much or little of the EIS, could be treated as a new consideration). In fact, such reliance is not essential. It is our expectation that, under NWPA, a petition for review of the EIS would need to have been filed roughly contemporaneously with DOE's submission of a license application to NRC, and that judgment might have been entered within the three years envisaged for Commission licensing. Whether or not this proves to be the case is not controlling, for the standard for adoption does not

rest upon collateral estoppel principles. Similarly, we find it beside the point to speculate regarding the possibility that a reviewing court might delay its decision on the adequacy until it sees the NRC conclusions in the licensing proceeding. Such delay would not stand in the way of the Commission's taking final action.

Although we thus do not rest our position upon the availability of a prior judgment of a court, we reiterate our view, as described in the preamble to the proposed rule, that such a judgment, if entered, would be controlling on the question of the adequacy of the EIS; and if the EIS were found to be adequate, it would be practicable for the Commission to adopt it.

We were criticized for suggesting that members of the public might be precluded from raising issues anew on the grounds that they had been represented by State officials in prior judicial proceedings. This position was claimed to be inconsistent with NRC intervention rules which, it is correctly argued, traditionally consider the interests of the state in which a facility is located as being distinguishable from the interests of particular members of the public who may be affected by the issuance of a license. Our first response is that our case law with respect to standing for purposes of intervention does not necessarily apply in the context of collateral estoppel or issue preclusion, where the policies of repose come into play. But, in addition, we would reach the same result even if informed members of the public were not constrained by the putative prior judgment against the state; for in that event their failure to pursue their claims within the 180 days specified by Section 119 of NWPA would operate as a bar.

The Commission's position that failure to challenge DOE's environmental impact statement promptly in the courts bars subsequent challenge to that EIS in NRC proceedings was also criticized. Commenters suggested, instead, that affected parties may decide for reasons of litigative strategy or otherwise to contest questions regarding the repository in NRC licensing proceedings rather than by going to court about the DOE environmental impact statement. But such a unilateral decision on their part cannot operate as a means to circumvent the clear policy of the NWPA requiring prompt adjudication of the issues raised by the EIS. When there has been a full and fair opportunity to raise the challenge, a party's failure to avail itself should in our view be regarded as an abandonment of its right to do so many years later. See Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 847 (9th Cir. 1987).

There is force to a commenter's suggestion that our proposed rules failed to take account of an EIS having been prepared in connection with a Negotiator-selected site, in which case the Commission review would be governed by Section 407 of NWPA, as amended, 42 USC 10247, instead of Section 114, 42 USC 10134. One difference, as pointed out by the comment, is that for a Negotiator-selected site DOE makes no formal recommendation to the President and the President makes no decision with respect to approval of the site. This difference alone would not affect the approach we take to discharging our NEPA responsibilities, in part because we would expect early judicial review to be available even in the absence of a Presidential decision. In this regard, NWPA authorizes a civil action to review any EIS prepared with respect to "any action" under the applicable subpart and,

given our perspective on the intended allocation of functions between DOE and NRC, "any action" could include the Secretary of Energy's submission of an application to the Commission. We think the intent of Congress, as evidenced by the considerable parallelism of the language employed, was generally to establish the same sort of role for the Commission with respect to any site - whether at Yucca Mountain or at a Negotiator-selected location. We recognize that it is our obligation "to consider the Yucca Mountain site as an alternate to [the Negotiator-selected site] in the preparation of" an EIS. This obligation will be discharged, though, to the extent of our adoption of the DOE environmental impact statement, provided that the alternative sites were addressed therein.

One aspect of the Negotiator-selected site provisions does have to be taken into account, however. For a Negotiator-selected site, a Commission decision to adopt the environmental impact statement must be made "in accordance with section 1506.3 of title 40, Code of Federal Regulations," - a limitation that we found not to apply to the EIS submitted under Section 114 of NWPA. Under the cited section of the CEQ regulations, the Commission may only adopt the DOE statement if it is "adequate." While a judicial decision on the point would be controlling, we would otherwise need to make an independent judgment in accordance with established practice. The final regulations reflect this possibility. In passing, though, we observe that we find nothing anomalous in having this responsibility in the case of a Negotiator-selected site but not in the case of the Congressionally-designated site at Yucca Mountain, for in the latter case there are

opportunities for State disapproval and Congressional consideration that serve to provide a forum outside the Department for the evaluation of environmental concerns.

We are not persuaded by the comment that took exception to our requirement that needed supplements to the EIS would, as a general rule, have to be prepared by DOE - and that DOE's failure to comply with this requirement might be grounds for denial of a construction authorization. It seems to us that such supplementation by DOE would ordinarily be appropriate whenever, in the light of new information or new considerations, its proposed action may give rise to significant environmental impacts that were not addressed in its original EIS.

We were urged to reconsider our position with respect to the imposition of license conditions directed at mitigation of adverse environmental impacts. We had suggested that DOE could itself be held accountable for compliance with the mitigation measures described in its EIS, so that there was no need for them to be subject to litigation in NRC proceedings. The basis for our position is that the departure from planned mitigation measures may well be a major Federal action having significant environmental impacts, which would necessitate the preparation of an environmental impact statement for a project that was otherwise determined to be without significant impact. But, in any event, we see no basis for employing our regulatory authority in this instance to police DOE's compliance with its mitigation plans; it will be subject to no more and no less oversight from interested persons than would be the case for many other developmental projects carried out, after preparation of appropriate environmental

documentation, by Federal departments and agencies. To permit the mitigation measures to be litigated in NRC administrative proceedings - legitimate as this may be in other contexts - would run counter to the direction of the NWPA. It would bring in through the back door at least some of the contentions which, in our view, were to be settled in other forums.

An argument was made that amended Section 114(f)(6) -- which provides that "the Commission" need not consider enumerated factors in any EIS prepared with respect to a repository -- indicates that Congress intended for NRC to issue its own EIS. The language in question appears to have been designed as an editorial measure, lacking substantive effect. The legislative history, cited with the proposed rule, demonstrates that no important change was being made in NRC's NEPA responsibilities, which under the 1982 statute were limited in the manner we have described. The statutory language is not surplusage, for NRC may have an obligation to prepare a supplemental EIS where there are new considerations or new information.

DEPARTMENT OF ENERGY COMMENTS

The Department of Energy, which is the prospective applicant affected by the proposed rules, agreed that NWPA counsels against wide-ranging independent examination by NRC of environmental concerns during the course of the licensing proceedings. DOE also concurred with NRC's view that a judicial determination of adequacy of an EIS precludes further litigation of that issue and that failure to raise an issue within the time set out in

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.

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

become available. That is all that is required by the regulatory language (10 CFR 60.24(c)).

However, in support of its position, DOE suggested that NRC adoption under the NWPA provisions was related specifically to the EIS "submitted as part of the Department's recommendation to the President." But the language of Section 114(f) quite clearly applies to "any environmental impact statement prepared in connection with a repository proposed to be constructed" by DOE under NWPA.

DOE is correct in pointing out that a supplemental EIS would not necessarily be required in the event of a substantial change in the proposed action, where the change and the impacts thereof had previously been considered in the original statement.

The principal remaining issue raised by DOE's comments concerns the appropriate role of NRC in DOE's NEPA activities. DOE suggests that NRC should be a "cooperating agency," a role that the Council on Environmental Quality has recognized as being appropriate in the licensor-licensee context. We are not persuaded. The present situation is unique because - unlike the customary licensor-licensee situation - the particular statute guiding our approach (i.e., NWPA) removes the balancing of environmental considerations from our independent judgment. Under these circumstances, it strikes us as particularly out of place for NRC to undertake the kind of critical evaluation that a "cooperating agency" should perform in the preparation of an EIS. The Commission, nevertheless, has jurisdiction and expertise that it can, and will, bring to DOE's attention as a commenting agency through the entire DOE NEPA process. We shall not hesitate, in

particular, to raise concerns that might subsequently also require adjudication, under the standards of the Atomic Energy Act, in our licensing proceedings. Other issues, of course, can be identified in our comments as well. In other words, NRC as a commenting agency can and will play an important constructive role all the while from the scoping stage through preparation of the environmental impact statement; but as the sole responsibility for weighing the environmental impacts in support of a recommendation to the President is vested in DOE, DOE properly should be the agency with formal sponsorship of the EIS as well.

We respond, finally, to DOE's claim that the requirement for DOE to inform the Commission of the status of legal action on the repository 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. Although we have not placed sole reliance upon principles of issue preclusion (collateral estoppel), it remains our position that a final judgment of a reviewing court with respect to the adequacy of the DOE final environmental impact statement would be controlling and would support our adoption of such FEIS. Accordingly, it is appropriate for DOE to report on the status thereof.

INDUSTRY COMMENTS

Comments received from Edison Electric Institute generally supported the Commission's view that its essential responsibility under NWPA is 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.

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).

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 NWPA, 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

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. None of the comments received by the Commission in response to the notice addressed the petition as such. (The 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 regarding the criteria and procedures for adoption of DOE's EIS have been considered in this proceeding. 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. The 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.

ENVIRONMENTAL IMPACT: CATEGORICAL EXCLUSION

The NRC has determined that this regulation is the type of action described in categorical exclusions 10 CFR 51.22(c)(1) and (3). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this regulation.

PAPERWORK REDUCTION ACT STATEMENT

The rule contains no information collection requirements and therefore is not subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

REGULATORY FLEXIBILITY CERTIFICATION

In accordance with the Regulatory Flexibility Act of 1980 (5 USC 605(b)), the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. The only entity subject to regulation under this amended rule is the U.S. Department of Energy.

LIST OF SUBJECTS IN 10 CFR PART 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

LIST OF SUBJECTS IN 10 CFR PART 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and record keeping requirements.

LIST OF SUBJECTS IN 10 CFR PART 60

High-level waste, Nuclear power plants and reactors, Nuclear materials, Penalty, Reporting and record keeping requirements, Waste treatment and disposal.

ISSUANCE

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, the National Environmental Policy Act of 1969, as amended, the Nuclear Waste Policy Act of 1982, as amended, and 5 U.S.C. 553, the NRC adopts the following amendments to 10 CFR Part 51, and related conforming amendments to 10 CFR Parts 2 and 60.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec.

191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. In section 2.101, paragraphs (f)(1), (2), (4), (5), and (7) are revised to read as follows:

§ 2.101 Filing of application.

* * * * * *

(f)(1) Each application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and any environmental impact statement required in connection therewith pursuant to Subpart A of Part 51 of this chapter shall be processed in accordance with the provisions of this paragraph.

(2) To allow a determination as to whether the application is complete and acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room. Twenty copies shall be filed to enable this determination to be made.

* * * * * *

(4) [Reserved]

(5) If a tendered document is acceptable for docketing, the applicant will be requested to (i) submit to the Director of Nuclear Material Safety and Safeguards such additional copies of the application and environmental impact statement as the regulations in Part 60 and Subpart A of Part 51 of this chapter require, (ii) serve a copy of such application and environmental impact statement on the chief executive of the municipality in which the geologic repository operations area is to be located, or if the geologic repository operations area is not to be located within a municipality, on the chief executive of the county (or to the Tribal organiza-

tion, if it is to be located within an Indian reservation), and (iii) make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards. All such copies shall be completely assembled documents, identified by docket number. Subsequently distributed amendments to the application, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages.

* * * * * *

(7) Amendments to the application and supplements to the environmental impact statement shall be filed and distributed and a written statement shall be furnished to the Director of Nuclear Material Safety and Safeguards in the same manner as for the initial application and environmental impact statement.

* * * * * *

PART 51 - ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

3. The authority citation for Part 51 is revised to read as follows: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853-854, as amended (42 U.S.C. 4332, 4334,

4335); and Pub.L. 95-604, Title II, 92 Stat. 3033-3041. Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036-3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Secs. 51.43, 51.67, and 51.109 also issued under Nuclear Waste Policy Act of 1982, sec. 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)).

4. In § 51.20, existing paragraph (b)(13) is redesignated as paragraph (b)(14) and a new paragraph (b)(13) is added to read as follows:

§ 51.20 Criteria for and identification of licensing and regulatory actions requiring environmental impact statements.

* * * * * *

(b) ***

* * * * * *

(13) Issuance of a construction authorization and license pursuant to Part 60 of this chapter.

* * * * * *

5. Section 51.21 is revised to read as follows:

§ 51.21 Criteria for and identification of licensing and regulatory actions requiring environmental assessments.

All licensing and regulatory actions subject to this subpart require an environmental assessment except those identified in § 51.20(b) as requiring an environmental impact statement, those identified in § 51.22(c) as categorical exclusions, and those identified in §51.22(d) as other actions not requiring environmental review. As provided in § 51.22(b), the

Commission may, in special circumstances, prepare an environmental assessment on an action covered by a categorical exclusion.

6. Section 51.22 is amended, by revising the heading and adding a new paragraph (d), to read as follows:

§ 51.22 Criterion for categorical exclusion; identification of licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review.

* * * * * *

(d) In accordance with section 121 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10141), the promulgation of technical requirements and criteria that the Commission will apply in approving or disapproving applications under Part 60 of this chapter shall not require an environmental impact statement, an environmental assessment, or any environmental review under subparagraph (E) or (F) of section 102(2) of NEPA.

7. In § 51.26, paragraph (a) is revised and a new paragraph (c) is added, to read as follows:

§ 51.26 Requirement to publish notice of intent and conduct scoping process.

(a) Whenever the appropriate NRC staff director determines that an environmental impact statement will be prepared by NRC in connection with a proposed action, a notice of intent will be prepared as provided in § 51.27, and will be published in the Federal Register as provided in § 51.116, and an appropriate scoping process (see §§ 51.27, 51.28 and 51.29) will be conducted.

* * * * * *

(c) Upon receipt of an application and accompanying environmental impact statement under § 60.22 of this chapter (pertaining to geologic repositories for high-level radioactive waste), the appropriate NRC staff director will include in the notice of docketing required to be published by § 2.101(f)(8) of this chapter a statement of Commission intention to adopt the environmental impact statement to the extent practicable. However, if the appropriate NRC staff director determines, at the time of such publication or at any time thereafter, that NRC should prepare a supplemental environmental impact statement in connection with the Commission's action on the license application, the procedures set out in paragraph (a) of this section shall be followed.

8. A new § 51.67 is added to read as follows:

§ 51.67 Environmental information concerning geologic repositories.

(a) In lieu of an environmental report, the Department of Energy, as an applicant for a license or license amendment pursuant to Part 60 of this chapter, shall submit to the Commission any final environmental impact statement which the Department prepares in connection with any geologic repository developed under Subtitle A of Title I, or under Title IV, of the Nuclear Waste Policy Act of 1982, as amended. (See § 60.22 of this chapter as to required time and manner of submission.) The statement shall include, among the alternatives under consideration, denial of a license or construction authorization by the Commission.

(b) Under applicable provisions of law, the Department of Energy may be required to supplement its final environmental impact statement if it makes

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 present its position on whether it is practicable to adopt, without further supplementation, the environmental impact statement (including any supplement thereto) prepared

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. 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 § 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.

(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.

(c) The presiding officer will find that it is practicable to adopt any environmental impact statement prepared by the Secretary of Energy in connection with a geologic repository proposed to be constructed under Title I of the Nuclear Waste Policy Act of 1982, as amended, unless:

(1)(i) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and

(ii) The difference may significantly affect the quality of the human environment; or

(2) Significant and substantial new information or new considerations render such environmental impact statement inadequate.

(d) To the extent that the presiding officer determines it to be practicable, in accordance with paragraph (c), to adopt the environmental impact statement prepared by the Secretary of Energy, such adoption shall be deemed to satisfy all responsibilities of the Commission under NEPA and no further consideration under NEPA or this subpart shall be required.

(e) To the extent that it is not practicable, in accordance with paragraph (c), to adopt the environmental impact statement prepared by the Secretary of Energy, the presiding officer will:

(1) Determine whether the requirements of section 102(2)(A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical and other benefits against environmental and other costs, whether the construction authorization or license should be issued, denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the construction authorization or license should be issued as proposed.

(f) In making the determinations described in paragraph (e), the environmental impact statement will be deemed modified to the extent that findings and conclusions differ from those in the final statement prepared by the Secretary of Energy, as it may have been supplemented. The initial decision will be distributed to any persons not otherwise entitled to receive it who responded to the request in the notice of docketing, as described in § 51.26(c). If the Commission or the Atomic Safety and Licensing Appeal Board reaches conclusions different from those of the presiding officer with respect to such matters, the final environmental impact statement will be deemed modified to that extent and the decision will be similarly distributed.

(g) The provisions of this section shall be followed, in place of those set out in § 51.104, in any proceedings for the issuance of a license to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area.

10. In § 51.118, the existing text is redesignated as paragraph (a) and a new paragraph (b) is added, to read as follows:

§ 51.118 Final environmental impact statement - Notice of availability.

(a) ***

(b) Upon adoption of a final environmental impact statement or any supplement to a final environmental impact statement prepared by the Department of Energy with respect to a geologic repository that is subject to the Nuclear Waste Policy Act of 1982, the appropriate NRC staff director shall follow the procedures set out in paragraph (a).

PART 60 - DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

11. The authority citation for Part 60 is revised to read as follows: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97-425, 96 Stat. 2213, 2228, as amended (42 U.S.C. 10134, 10141).

For the purposes of section 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 60.10, 60.71 to 60.75 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

12. In § 60.15, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

13. In § 60.21, paragraph (a) is revised to read as follows:

§ 60.21 Content of application.

(a) An application shall consist of general information and a Safety Analysis Report. An environmental impact statement shall be prepared in accordance with the Nuclear Waste Policy Act of 1982, as amended, and shall accompany the application. Any Restricted Data or National Security Information shall be separated from unclassified information.

* * * * * *

14. Section 60.22 is revised to read as follows:

§ 60.22 Filing and distribution of application.

(a) An application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area at a site which has been characterized, and any amendments thereto, and an accompanying environmental impact statement and any supplements, shall be signed by the Secretary of Energy or the Secretary's authorized representative and shall be filed in triplicate with the Director.

(b) Each portion of such application and any amendments, and each environmental impact statement and any supplements, shall be accompanied by 30 additional copies. Another 120 copies shall be retained by DOE for distribution in accordance with written instructions from the Director or the Director's designee.

(c) DOE shall, upon notification of the appointment of an Atomic Safety and Licensing Board, update the application, eliminating all superseded information, and supplement the environmental impact statement if necessary,

and serve the updated application and environmental impact statement (as it may have been supplemented) as directed by the Board. At that time DOE shall also serve one such copy of the application and environmental impact statement on the Atomic Safety and Licensing Appeal Panel. Any subsequent amendments to the application or supplements to the environmental impact statement shall be served in the same manner.

(d) At the time of filing of an application and any amendments thereto, one copy shall be made available in an appropriate location near the proposed geologic repository operations area (which shall be a public document room, if one has been established) for inspection by the public and updated as amendments to the application are made. The environmental impact statement and any supplements thereto shall be made available in the same manner. An updated copy of the application, and the environmental impact statement and supplements, shall be produced at any public hearing held by the Commission on the application, for use by any party to the proceeding.

(e) The DOE shall certify that the updated copies of the application, and the environmental impact statement as it may have been supplemented, as referred to in paragraphs (c) and (d) of this section, contain the current contents of such documents submitted in accordance with the requirements of this part.

15. In § 60.24, the section heading and paragraphs (a) and (c) are revised to read as follows:

§ 60.24 Updating of application and environmental impact statement.

(a) The application shall be as complete as possible in the light of information that is reasonably available at the time of docketing.

* * * * * *

(c) The DOE shall supplement its environmental impact statement in a timely manner so as to take into account the environmental impacts of any substantial changes in its proposed actions or any significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

16. In § 60.31, the introductory paragraph is revised to read as follows:

§ 60.31 Construction authorization.

Upon review and consideration of an application and environmental impact statement submitted under this part, the Commission may authorize construction if it determines:

* * * * * *

17. In § 60.51, the introductory portion of paragraph (a), and paragraph (b), are revised to read as follows:

§ 60.51 License amendment for permanent closure.

(a) DOE shall submit an application to amend the license prior to permanent closure. The submission shall consist of an update of the license application submitted under §§ 60.21 and 60.22, including:

* * * * * *

(b) If necessary, so as to take into account the environmental impact of any substantial changes in the permanent closure activities proposed to be carried out or any significant new information regarding the environmental impacts of such closure, DOE shall also supplement its

environmental impact statement and submit such statement, as supplemented, with the application for license amendment.

Dated at Rockville, Maryland this _____ day of _____ 1989.

For the Nuclear Regulatory Commission.

_____
Samuel J. Chilk,
Secretary of the Commission.

ENCLOSURE B

The Honorable Morris K. Udall, Chairman
Subcommittee on Energy and the Environment
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed for the information of the Subcommittee are copies of a public announcement and a proposed amendment to Title 10 of the Code of Federal Regulations which is to be published in the Federal Register.

The Nuclear Regulatory Commission is providing, by this amendment, the standards and procedures it will follow in satisfying its responsibilities under the National Environmental Policy Act with respect to a geologic repository. The action addresses, in particular, the provision in Section 114(f) of the Nuclear Waste Policy Act of 1982, as amended, which directs the Commission to adopt, to the extent practicable, the final environmental impact statement prepared by the Department of Energy. This final rule conforms, in large part, to the provisions of the proposed rule that was published in the Federal Register in May 1988 and furnished to you at that time.

Sincerely,

William C. Parler
General Counsel

cc: Rep. Don Young

ENCLOSURE C

DRAFT

NRC ISSUES REGULATIONS ON ENVIRONMENTAL IMPACT STATEMENTS FOR HIGH-LEVEL RADIOACTIVE WASTE REPOSITORIES

The Nuclear Regulatory Commission is amending its regulations to establish procedures for environmental reviews of applications from the Department of Energy to construct and operate high-level radioactive waste repositories.

Under the Nuclear Waste Policy Act of 1982, DOE is responsible for the construction and operation of geologic repositories for the disposal of high-level radioactive waste. DOE is required by the Act to obtain construction authorizations and licenses for the repositories from the Commission.

The National Environmental Policy Act requires agencies to prepare an environmental impact statement for any major federal action that significantly affects the quality of the human environment. The licensing of DOE to receive and possess high-level radioactive waste at a geologic repository would involve a federal action significantly affecting the environment. Therefore the Commission is required to have an environmental impact statement when it considers a license application from DOE.

However, the Nuclear Waste Policy Act (NWPA) directs the Commission--in reviewing DOE's construction authorization or license application--to adopt to the extent practicable any environmental statement prepared by DOE. The new NRC rule sets out the standards and procedures that would be used in determining whether adopting DOE's statement is practicable.

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.

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

Environmental Quality would be applied in determining whether to adopt the DOE environmental impact statement under such circumstances.

#

ENCLOSURE D

Enclosure D

COMPARATIVE TEXT

(Final vs. Proposed Rule)

§ 51.67 Environmental information concerning geologic repositories.

(a) In lieu of an environmental report, the Department of Energy, as an applicant for a license or license amendment pursuant to Part 60 of this chapter, shall submit to the Commission any final environmental impact statement ~~, and any supplement thereto,~~ which the Department prepares in connection with any geologic repository developed under Subtitle A of Title I , or under Title IV, of the Nuclear Waste Policy Act of 1982, as amended. ~~(b) The final environmental impact statement which accompanies the Department of Energy's recommendation to the President to approve a site for a geologic repository shall be submitted to the Commission at the time and in the manner described in § 60.22 of this chapter. Such statement shall be prepared in accordance with the provisions of section 114(f) of the Nuclear Waste Policy Act of 1982.~~ (See §60.22 of this chapter as to required time and manner of submission.) The statement shall include, among the alternatives under consideration, denial of a license or construction authorization by the Commission.

(b) ~~(c)~~ Under applicable provisions of law, the Department of Energy ~~is~~ may be required to supplement its final environmental impact statement if it makes 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 ~~at the time and in the manner described in § 60.22 of this chapter~~. (See §60.22 of this chapter as to required time and manner of submission.)

(c) ~~(d)~~ 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.

* * * * * * *

§ 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 present its position on whether it is practicable to adopt, without further supplementation, the environmental impact statement (including any supplement thereto) prepared 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. 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 §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.

(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.

(c) The presiding officer will find that it is practicable to adopt ~~the~~ any environmental impact statement prepared by the Secretary of Energy

in connection with a geologic repository proposed to be constructed under Title I of the Nuclear Waste Policy Act of 1982, as amended, unless:

(1)(i) The action proposed to be taken by the Commission differs from the action proposed in the license application submitted by the Secretary of Energy; and

(ii) The difference may significantly affect the quality of the human environment; or

(2) Significant and substantial new information or new considerations render the environmental impact statement inadequate. ~~New information or new considerations shall not be deemed to render the environmental impact statement inadequate, for purposes of this paragraph, if the new information or new considerations have been addressed in a supplemental environmental impact statement that the Secretary of Energy has submitted to the Commission in accordance with the provisions of this chapter.~~

(d) To the extent that the presiding officer determines it to be practicable, in accordance with paragraph (c), to adopt the environmental impact statement prepared by the Secretary of Energy, such adoption shall be deemed to satisfy all responsibilities of the Commission under NEPA and no further consideration under NEPA or this subpart shall be required.

(e) To the extent that it is not practicable, in accordance with paragraph (c), to adopt the environmental impact statement prepared by the Secretary of Energy, the presiding officer will:

(1) Determine whether the requirements of section 102(2)(A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical and other benefits against environmental and other costs, whether the construction authorization or license should be issued, denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the construction authorization or license should be issued as proposed.

(f) In making the determinations described in paragraph (e), the environmental impact statement will be deemed modified to the extent that findings and conclusions differ from those in the final statement prepared by the Secretary of Energy, as it may have been supplemented. The initial decision will be distributed to any persons not otherwise entitled to receive it who responded to the request in the notice of docketing, as described in §51.26(c). If the Commission or the Atomic Safety and Licensing Appeal Board reaches conclusions different from those of the presiding officer with respect to such matters, the final environmental impact statement will be deemed modified to that extent and the decision will be similarly distributed.

(g) The provisions of this section shall be followed, in place of those set out in §51.104, in any proceedings for the issuance of a license to

receive and possess source, special nuclear, and byproduct material at a geologic repository operations area.

ENCLOSURE E

DOCKET NUMBER PROPOSED RULE PR [illegible] (53 FR 16131)

NEVADA NUCLEAR WASTE TASK FORCE, INCORPORATED

Alamo Plaza
4550 W. Oakey Blvd.
Suite 111
Las Vegas, NV 89102
702-878-1885
FAX 702-878-0832

'88 AUG -1 P12:42

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

July 26, 1988

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atten: Docketing and Service Branch

Dear Mr. Secretary:

We enclose our comment on the NRC's proposed rule for NEPA review procedures for geologic repositories - 10CRF Parts 2, 51, and 60.

Enclosed is a copy of our brochure which describes the nature and purpose of our organization.

A functioning State Advisory Board is in place to assist in our endeavor.

The response that we receive clearly indicates that the vast majority of the residents of Nevada want to be able to participate in the licensing proceedings. They want their issues and concerns addressed. This includes the transportation issue which under NEPA requires draft and final EIS's.

Some people feel that the DOE is rushing the process. NRC rules must be designed to assure (1) a system of checks and balances, and (2) a fully open process which allows ample opportunity for public participation.

Sincerely,

Judy Treichel

Judy Treichel
Executive Director

FC/ mm

COMMENTS ON THE NRC'S PROPOSED RULE FOR NEPA REVIEW PROCEDURES FOR GEOLOGIC REPOSITORIES 10 CFR Parts 2, 51, and 60

While the Task Force has several concerns about the proposed rule, we will discuss only two major overriding concerns. First, we believe that the basic assumption that underlies the rule is, at best, based on an incomplete understanding of possible scenarios for the context of the Commission's consideration of the DOE FEIS. At worst, the assumption is erroneously based upon a very narrow view of the Commission's required detailed consideration of a FEIS on the Yucca Mountain site. Second, we believe that the proposed rule is inadequate because is inappropriately prejudices effective citizen participation in the licensing proceeding.

Therefore, we request that the rule be reissued in a much different and more complete format that addresses those concerns so that we can have a further opportunity to comment.

I. INAPPROPRIATE UNDERLYING ASSUMPTION

The proposed rule seems to assume that the only likely possibility of the Commission receiving a DOE FEIS is as part of a repository license application after: Yucca Mountain is characterized and then is recommended by the President to Congress; the State of Nevada files suit challenging the adequacy of the FEIS (and presumably files its notice of disapproval, which is overridden by Congress); the Court of Appeals finds the FEIS is not inadequate; and the only substantive issues before the NRC in the licensing proceeding relate to radiological safety issues at Yucca Mountain. While that scenario is possible, it is not the only scenario, and perhaps not even the most likely one. Thus, it is inappropriate for the Commission to base so much of its proposed rule — consciously or unconsciously — on that assumption.

For example, the proposed rule doesn't display any understanding of the somewhat different role for an EIS arising from a Negotiator-selected site. Until the passage of the Nuclear Waste Policy Act Amendments of 1987 (NWPAA), DOE's FEIS would have two purposes. First, the FEIS provides NEPA documentation for the Secretary's recommendation of a site to the President and for the President's decision. Second, the FEIS would accompany the DOE license application to the NRC and provide necessary environmental documentation for the NRC's licensing decision. However, under the requirements of the NWPAA for a Negotiator-chosen site (42 U.S.C 10247), the FEIS would not be for site selection, but would only serve the purpose of providing necessary NEPA documentation for the license application. An environmental assessment, not a FEIS, is specifically required by Section 403(d)(1)) as part of the submission to Congress for its approval of the agreement made the the affected state or Indian tribe and the DOE. The preamble shows no recognition of this Negotiator possibility since it only describes the FEIS as having the two purposes (p. 16139). 1-1

The proposed rule does not consider the likelihood that a court will find that the FEIS is, in part, inadequate. The Commission would then have to review the decision and the FEIS to determine the impact of such a ruling on the license application, including the adequacy of the Safety Analysis Report. 1-2

It is also possible that a court might not decide an EIS challenge before the Commission reached its licensing determination -- a situation in which the Commission should definitely review environmental issues, not just radiological safety issues. Since the Commission might make a licensing decision within three years of the date of the application (as DOE expects, 1-3

according to its Mission Plan and Project Decision Schedule), it is certainly possible that a court might not have make a final decision on a NEPA challenge in that timeframe. (Challenges to the DOE's guidelines have been before the 9th Circuit Court of Appeals since December 1984.) It is also possible that a court might delay its decision on the adequacy of a FEIS until it sees the Commission's findings in a licensing decision. In either case, environmental issues would not be pre-empted, nor would res judicata occur. 1-3 1-4

II. Prejudice to citizen parties in a licensing proceeding
The preamble of the proposed rule states:

> The preclusive effect of a prior judgment sustaining DOE's environmental impact statement would not necessarily be limited to the petitioner of record in that proceeding. It can be argued that those who were represented by that petitioner would also be barred from litigating the issue in a subsequent action. (p. 16139)

The accompanying footnote further indicates that "members of the public" who had been represented by state officials "might be precluded, to the same extent, from raising the issues anew." (Id.)

Those statements are not consistent with the Commission's rules for intervention and they are reflect an inappropriate and prejudicial attitude toward citizen participation in the licensing proceeding. The State of Nevada almost certainly could not effectively represent all of the diverse interests of all the citizens of the state, including members of the Task Force. Thus, the Task Force could raise similar issues but in response to different interests. Under the Commission's rules for intervention (10 CFR 2.714), individual citizens or groups can be legitimate intervenors, including in cases where state officials are also parties. The Commission's rule and the preamble must not reflect a prejudice against such citizen intervention and should not preclude their rights to raise issues, including related to the FEIS, in the licensing proceeding. 1-5

Another possible scenario is that a state or citizen group might decide that the basic issues regarding the adequacy of the repository should be litigated in the Commission licensing proceedings, rather than in a NEPA challenge to the FEIS. Such a position is both practically and legally allowed under the NWPA, since the judicial review requirements of the NWPA allow for judicial review of final decisions of the Commission — including its adopting the DOE FEIS. 42 U.S.C. 10139(a)(1)(A). 1-6

In summary, the proposed rule seems to treat the adoption of DOE's FEIS as a largely pro forma exercise, which follows exhaustive judicial review. It is not appropriate for the NRC to take that position. Such an assumption is even less tenable given the various circumstances when the FEIS might not be litigated. The Nevada Nuclear Waste Task Force believes that the proposed rule is fundamentally flawed and that it must be substantially revised and re-promulgated.

Action Plan

Form a State Advisory Board to advise and advance the public involvement program.

Provide for individual participation in the Federal and State nuclear waste programs.

Support

Readable information and summaries prepared by qualified experts.

Workshops

Debates

Lectures with emphasis on question and answer sessions.

Direct mail information.

NNWTF will serve as a public information center and clearinghouse under the sanction of the State of Nevada.

Provide administrative support to the State Advisory Board.

Membership

Complete and mail to:

Nevada Nuclear Waste Task Force
4550 W. Oakey Blvd., Suite 111
Las Vegas, Nevada 89102

Phone: (702) 878-1885

E NEVADA NUCLEAR WASTE TASK FORCE INC. AND LEARN MORE

Address

City

Organization [ ] Indiv. [ ]

following groups that you should contact to become Organizational Members

NEVADA NUCLEAR WASTE TASK FORCE, INC.
Alamo Plaza
4550 W. Oakey Blvd., Suite 111
Las Vegas, Nevada 89102

High-Level Nuclear Waste Disposal in NEVADA?

Citizen Involvement in the Federal Decision Process

NEVADA NUCLEAR WASTE TASK FORCE, INC.

The Problem

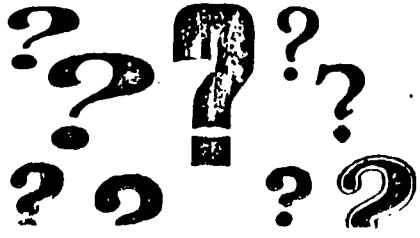
The Nuclear Waste Policy Amendments Act of 1987 designated Yucca Mountain, Nevada—85 miles northwest of Las Vegas—as the only location for further study for a potential high-level nuclear waste repository.

Forty-two years ago high-level radioactive wastes were virtually non-existent. In the 1950's and early 1960's these wastes were present in comparatively small quantities measured in ounces or pounds. Today, however, with about 100 nuclear reactors generating 15% of the nation's electrical supply, the magnitude of waste produced is measured in metric tons. This waste must be isolated for at least 10,000 years."

The capacity of the Yucca Mountain Site is to be 70,000 metric tons. The most toxic element to be entombed is plutonium which has a half life of over 24,000 years.

Some Concerns

- Is the Yucca Mountain Site safe?
- What are the risks to our air, water and land?
- Are there risks to people and wildlife?
- Transportation:
  - —What roads or railroads?
  - —What about accidents?
  - —Who pays for protection?
  - —Who pays for training?
- Are there alternatives to a repository?
- Is other research being done?
- Who pays for waste management as a whole?
- What are the socio/economic impacts?
- Is it advisable to put tons of high-level radiation in one location?



What is my role?

There is a clear need to inform ourselves and become actively involved in this national issue which affects us individually throughout the State of Nevada.

As citizens of Nevada we must be responsible for determining what is important for our lives and our future.

Remember...

"Our difficulty has never been in doing things; it has been in choosing what to do."

"The democratic faith is based not as much upon the assumption of leadership by the few, as upon the wisdom and conscience of the many."

"Democracy is the only political philosophy that entitles and enables the individual to say "NO" to the government."

Democracy says "NO" to the government that would invade the natural rights of the individual or the group."

Quotes from Norman Cousins "Human Options" 1981

N.N.W.T.F.

NEVADA NUCLEAR WASTE TASK FORCE, INC

The Nevada Nuclear Waste Task Force is a non-profit organization, serving the State of Nevada by developing and implementing a program which promotes public participation in the U.S. Department of Energy's high-level nuclear waste program in Nevada.

NNWTF believes this can be best accomplished by organizations and individuals joining together to learn and assist in the dissemination of factual information and resources.

Organizations can join the Task Force.

Individuals can join the Task Force.

There are *no* membership charges or fees.

The basic purpose of the Task Force is to *promote an informed citizenry.*

Every Nevadan should be interested, involved and prepared to influence important decisions.

(2)

'88 AUG -2 A11 :14

AGENCY FOR NUCLEAR PROJECTS
NUCLEAR WASTE PROJECT OFFICE
Capitol Complex
Carson City, Nevada 89710
(702) 885-3744

August 1, 1988

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Attn: Docketing and Service Branch
1717 H Street, N.W.
Washington, DC 20555

Dear Mr. Secretary:

Enclosed you will find the comments of the State of Nevada regarding the Proposed Rule: NEPA Review Procedures for Geologic Repositories for High-Level Waste, amending 10 C.F.R. Parts 2, 51 and 60, published in Federal Register, Vol. 53, No. 87, 5 May 1988.

We appreciate the opportunity to provide comment on this Proposed Rule.

Sincerely,

AGENCY FOR NUCLEAR PROJECTS/
NUCLEAR WASTE PROJECT OFFICE

BY: _____
Robert R. Loux
Executive Director

RRL*jm

Encl.

NEVADA'S COMMENTS ON NRC'S PROPOSED
"NEPA REVIEW PROCEDURES FOR GEOLOGIC REPOSITORIES
FOR HIGH-LEVEL WASTE"

A. Comments Regarding the Supplementary Information

1. The Premise of the Proposed "Review Procedures."

The major underlying premise contained within the Supplementary Information, offered by NRC staff to justify the proposed rule, is wrong.[1] It is wrong because it poses, analyzes and answers the wrong question. Throughout, it discusses the question how NRC should review and approve the adequacy of DOE's EIS; (See e.g. 53 Fed. Reg. 16138, col. 2, 16144, col. 1.). The correct question is how NRC should perform its own, independent, NEPA responsibilities. This fundamental error in NRC analysis leads to an unnecessary discussion about res judicata, collateral estoppel and bar, subjects wholly irrelevant to NRC's correct performance of its NEPA obligations. The real question, and the one answered by the rule Nevada proposes herein, is how the NRC can "adopt" the valuable portions of DOE's EIS to its (NRC's) own advantage in performing its own responsibilities.

2. The NRC's Independent NEPA Responsibilities.

---

[1]Because of this, Nevada's comments do not include line by line criticism of NRC's proposed rule. Rather, we have submitted an alternative proposal which is included in these comments.

Prior to passage of th National Environmental Policy Act, 42 U.S.C. 4310, et seq., the Commission's authority was confined to radiological health and safety matters. NEPA expanded that authority to guarding the environment from the adverse environmental effects of nuclear plants - even from their non radiological consequences. Where necessary the Commission may impose license conditions to minimize those impacts. This basic NRC law has been espoused by the Commission, Kansas Gas and Electric Company (Wolf Creek, Unit No. 1), CL1-77-1, 5 NRC 1 (1977); by the court of appeals, Public Service Co. v. NRC, 582 F.2d 77 (1st Cir. 1978); Culpepper League v. NRC, 574 F.2d 633 (D.C. Cir. 1978); Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); and by the Supreme Court, Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978); Kleppe v. Sierra Club, 427 U.S. 390 (1979). Those cases are stated in terms of the non-radiological environmental impacts of nuclear plants. The NRC, of course, also has authority to control the use and possession of nuclear materials in a more generic sense than just at a nuclear power plant. See §§ 51-92 of the Atomic Energy Act, 42 U.S.C. 2071-2122. That authority is recognized in §114(d) of the Nuclear Waste Policy Act, 42 U.S.C. 10134(d): "The Commission shall consider an application for a construction authorization for all or any part of a repository in accordance with the laws applicable to such applications. . . ." Those applicable laws are, obviously, the Atomic Energy Act and NEPA.

The confusion of the supplementary information regarding the proper issue to analyze is, we think, caused by the fact that more than one federal agency is involved in the major federal action of siting, licensing and developing a high-level nuclear waste repository. (The Commission staff wrongly perceives that "[w]hile the action being taken by DOE is the recommendation to the President of a site for repository development and the action being taken by the Commission is the issuance of a construction authorization for a repository, the relevant considerations in the two situations are identical." 53 Fed. Reg. 16139, col. 3.)

The law, both in the courts and at the Commission, is that, where a major federal action involves two or more federal agencies, each agency must evaluate the environmental consequences of the entire project and determine independently whether NEPA has been satisfied. Tennessee Valley Authority (Phipps Bend Nuclear Plant, Units 1 and 2), ACAB-506, 8 NRC 533, 547 (1978) (cited for this same proposition by NRC at 53 Fed. Reg. 16138, col. 3); Silentman v. FPC, 566 F.2d 237 (D.C. Cir. 1875). And, of course, each agency involved in a multi agency major federal action must independently apply its unique statutory jurisdiction and authority. Here the NRC's duty to enforce the Atomic Energy Act and the DOE's duty to

2.1

carry out the Nuclear Waste Policy Act are not the same, though each has its part in the same major federal action.[2]

There are exceptions to the general rule stated above regarding multiple agency action under NEPA. An agency's NEPA responsibilities may be compromised when the responsible agency is itself forbidden to act as NEPA might otherwise demand.[3] U.S. v. S.C.R.A.P., 412 U.S. 669 (1973). Likewise NEPA may be compromised where NEPA procedures would directly frustrate the responsible agency's ability to carry out its specific statutory duties. Flint Ridge Development Co. v. Scenic Rivers, 426 U.S. 776 (1976). See Tennessee Valley Authority, supra, p. 546. Neither of these conditions pertain to the exercise of the NRC's NEPA responsibilities. 2-2

a. Compromise of the NRC's other statutory duties. 2-3

Prior to the Nuclear Waste Amendments Act of 1987, Pub. L. 100-203, Congress had not limited the Commission's

---

[2]It is clear that the Commission and the Congress know what NRC's independent responsibilities are. The Commission staff's repeated reference to legislative reports include numerous statements of "independent responsibilities of the Commission." See 53 Feg. Reg. 16137, col. 1, 2. But the text of the supplementary information suggests that the quoted language means "independent" of NEPA when it clearly means "independent" of DOE's responsibilities.

[3]The discussion in the supplementary information implies that this exception applies when any other agency involved in the multi agency major federal action is forbidden to act as NEPA might otherwise demand.

independent NEPA responsibilities at all. The NWPA, as amended, now provides that the Commission "need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or non geologic alternatives to a site" in the Commission's own EIS. This limitation is not even preclusive of NRC's consideration of these matters as NRC may but "need not" consider them. And this new limitation only makes sense if NRC has an otherwise complete and independent responsibility under NEPA to prepare its own EIS. There are, certainly, other environmental matters which NRC must consider which DOE perhaps won't, as, for instance, 1) comparative design or operational practices and their environmental effects at the repository; 2) comparative methods for demonstration of compliance with NRC's performance objectives and their environmental effects; 3) comparative methods of verification of compliance with isolation standards and their environmental effects; and, 4) as the NRC acknowledges, the environmental effects of NRC denial of DOE's application. 53 Fed. Reg. 16141, col. 4.

The Commission's supplementary information does not base its proposed rule on what the Nuclear Waste Policy Act says about its NEPA duties. In fact the NWPA says only that any EIS prepared by the Secretary of DOE "shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization

and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall satisfy the responsibilities of the Commission under [NEPA] and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954". §114(f) as amended, 42 U.S.C. 10134(f)(4).

This is nothing more than a restatement of the law earlier set forth in T.V.A., S.C.R.A.P., and Flint Ridge, all supra. The strained analysis of the supplementary information pushes this obvious restatement of the law into authority for the unwarranted proposition that finality on the legal virtues of DOE's EIS forecloses NRC consideration of any environmental issues it so chooses, including those listed in §114(f)(6), and limits NRC's independent NEPA responsibilities.

It may help to present the obvious analysis which the supplementary information overlooks. "[T]o the extent practicable" means to the extent that it is otherwise within the customary practice of the NRC. See Webster's New International Dictionary, unabridged 3rd Edition, 1961, p. 1780, where it provides:

> Practicable
> 1. Possible to practice or perform: capable of being put into practice, done or accomplished: FEASIBLE (a practicable method) (a practicable aim)

2. a: capable of being used: usable (a practicable weapon) b of a theatrical property

Practice
1. c The usual mode or method of doing something

c.f. also, Black's Law Dictionary 1055, Random House College Dictionary 1040.

"Practicability" is, after all, a matter of fact and circumstances. It involves the reasoned evaluation whether the square peg will fit in the round hole. (NRC's effort to give the term a legal meaning in anticipation of its application is a bit mystifying, particularly when in doing so the Commission proposes to abandon some of its discretionary power.)[4] The word practicable has been analyzed in numerous contexts, all of which indicate that practicability is a question of comparing how something fits within some independent alternative structure. See, e.g. C.P.C. Intern. Inc. v. Train, 540 F.2d 1329-1341 (8th Cir. 1976) ("not wholly out of proportion to"); Oxman v. WLS-TV, 595 F.Supp. 557 (N.D. Ill, 1984) ("as soon as practicable", a "practicable" time varies from case to case); Newman v. Village of Hinsdale 592 F.Supp. 1307 (N.D. Ill, 1984) ("practicable" defined and distinguished

---

[4]Not only would we expect the Commission to be jealous of its discretionary power, but we would be surprised if the Commission really wanted to threaten the exercise of that discretion by statements of prejudgment like "the Commission does not anticipate imposition of license conditions with significant environmental impacts" 53 Fed. Reg. _____. That determination certainly can't be based on the exercise of sound discretion and judgment when no specific proposal has yet even been submitted to the Commission.

from "practical"); Frey v. Security Insurance Company of Hartford, 331 F.Supp. 140-143 (W.D. Penn, 1971) ("'practicable' means feasible in the circumstances") Young v. Travelers Insurance Co., 119 F.2d 877-880 (5th Cir. 1941) (cited and quoted with favor in Transamerica Insurance Co. v. Parrot, 531 S.W.2d 306 at 312 as follows: "[t]he words 'as soon as practicable' are not words of precise and definite impact. They are roomy words. They provide for more or less free play. They are in their nature ambulatory and subject under the guiding rule, to the impact of particular facts on particular cases"); Selinger v. Governor of Maryland, 266 Md. 431, A.2d 817, 819 (1972) ("practicable" means "of a relative and dependent character, to be controlled more or less by the circumstances of the case").

The concept of practicability in this case should be even better informed as the concept is used in NEPA itself. 42 U.S.C. 4331(b) provides that "it is the continuing responsibility of the Federal Government to use all practicable means" etc. to accomplish environmental objectives. That phrase has been much litigated and is the very basis of the exception, stated in S.C.R.A.P. supra, that NEPA fits within, i.e. does not require compromise of, an agency's more specific statutory responsibilities. Judge Wright in Calvert Cliffs', supra p. 1112. opined that the NEPA phrase "all practicable means" was a "flexible" phrase leaving the "reasonable room for the exercise of discretion.

The balance of the language of §114(f)(4) as amended, 42 U.S.C. 10134(f)(4), is also helpful. Congress, recognizing NRC's independent NEPA responsibilities, contemplated that it may be practicable only to adopt portions of DOE's EIS. And, of course, even though NRC's adoption (in whole or part) of DOE's EIS would "satisfy the responsibilities of the Commission" under NEPA,[5] the performance of those responsibilities would be open to legal challenge for failure of the adoption to have been "practicable". Judicial review of NRC's issuance of its own EIS is permitted under §119(a)(1)(D), 42 U.S.C. 10139(a)(1)(D), which permits review of any EIS prepared under NEPA with respect to Commission licensure of a repository, or action taken "under this subtitle." 2-3

b. NEPA procedures would frustrate the responsible agency's ability to carry out its statutory duties. 2-4

The second exception to NRC's precedent and the general rule that each agency has an independent duty to evaluate the environmental consequences of the entire project in a multi-agency major federal action is the Flint Ridge exception. In order for this exception to apply, NEPA procedures

---

[5]Nevada takes significant exception to the proposition that this language "counsel[s] against the wide ranging independent examination of environmental concerns that is customary in licensing proceedings" 53 Fed. Reg. 16136, col. 1. If anything, NRC's "customary" proceedings dictate the "practicability" of adopting DOE's environmental findings. And if "counsel" is actually required, the Commission would better look to the mandates of NEPA, 42 U.S.C. 4332, "to the fullest extent possible".

must directly frustrate the responsible agency's ability to carry out its specific statutory duties. Assuming, but reserving, that the Commission has a specific statutory duty to issue a construction authorization within three (or four) years after application therefore, see §114(d), 42 U.S.C. 10134(d), do NEPA procedures frustrate that duty? This, of course is a question of fact which can not be answered except in retrospect. Certainly, from today's perspective, NEPA procedures do not frustrate that duty as DOE's EIS can serve as NRC's draft EIS and the litigated licensing proceeding can serve as, or simultaneously with, the comment and republication process. The Flint Ridge exception arises from the "to the fullest extent possible" language of NEPA, 42 U.S.C. 4332, which the opinion in Flint Ridge explains was not intended to minimize NEPA but rather to assure greater compliance with NEPA's directives.

Taking this substantive NWPA and NEPA law into account, the NRC has proposed the wrong kind of rule. The rule should be positively stated, leaving open the question of which portions of DOE's EIS are practicable to adopt under the circumstances and standards then existing. The standard of practicability should be the acceptability of adoption given the constants of the NRC's then current practices and the Commission's primary responsibility under the Atomic Energy Act, the Nuclear Waste Policy Act and NEPA.

2-4

3. Corruption of the holding in "Calvert Cliffs'.

One primary error in the analysis of the supplementary information is the assumption that the NRC's responsibilities under NEPA generally are limited to the publication of an environmental impact statement and that if such a statement is produced that the Commission has no other duty to consider environmental issues. To the contrary, an environmental impact statement is a disclosure document and in normal NRC practice, environmental issues are litigable in the licensing proceeding notwithstanding the EIS process. The Commission staff would have it that the short phrase "and no further consideration shall be required.", which appears in §114(f)(4), means that adoption of DOE's EIS by NRC would remove all environmental issues from litigation in the licensing proceeding. That interpretation is contrary to the clear direction of NEPA and puts the Commission at much risk of violating NEPA on the basis of a strained interpretation of §114(f)(4).

2-5

This error is really peculiar because the supplementary information first cites Calvert Cliffs', supra, for its clear holding that the NRC's "duty to consider environmental issues extends through all stages of the Commission's review processes, including proceedings before hearing boards" and then states that the Commission adoption of DOE's EIS "without independent analysis" would square with Calvert Cliffs'. We can find no way to explain this remarkable contortion of legal

reasoning. Perhaps it would help to remind the Commission what Judge Wright said in Calvert Cliffs' case.

> "We believe that the Commission's crabbed interpretation of NEPA makes a mockery of the Act. What possible purpose could there be in the Section 102(2)(C) requirement (that the "detailed statement" accompany proposals through agency review processes) if "accompany" means no more than physical proximity - mandating no more than the physical act of passing certain folders and papers, unopened, to reviewing officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word "accompany" in Section 102(2)(C) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors, as compiled in the "detailed statement," be considered through agency review processes.
>
> "Beyond Section 102(2)(C), NEPA requires that agencies consider the environmental impact of their actions "to the fullest extent possible." The Act is addressed to agencies as a whole, not only to their professional staffs. Compliance to the "fullest" possible extent would seem to demand that environmental issues be considered at every important stage in the decision making process concerning a particular action - at every stage where an overall balancing of environmental and non-environmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs. Of course, consideration which is entirely duplicative is not necessarily required. But independent review of staff proposals by hearing boards is hardly a duplicative function. A truly independent review provides a crucial check on the staff's recommendations. The Commission's hearing boards automatically consider non-environmental factors, even though they have been previously studied by the staff. Clearly, the review process is an appropriate stage at which to balance conflicting factors against on another. And, just as clearly, it provides an important opportunity to reject or significantly modify the staff's

recommended action. Environmental factors, therefore, should not be singled out and excluded, at this stage, from the proper balance of values envisioned by NEPA.

"The Commission's regulations provided that in an uncontested proceeding the hearing board shall on its own "determine whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's regulatory staff has been adequate, to support affirmative findings on" various non-environmental factors. NEPA requires at least as much automatic consideration of environmental factors. In uncontested hearings, the board need not necessarily go over the same ground covered in the "detailed statement." But it must at least examine the statement carefully to determine whether "the review * * * by the Commission's regulatory staff has been adequate." And it must independently consider the final balance among conflicting factors that is struck in the staff's recommendation.

. . . .

". . . . NEPA establishes environmental protection as an integral part of the Atomic Energy Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and solve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation." Calvert Cliffs' Coord. Com. v. U.S. A. E. Com'n, 449 F.2d 1109, 1117-1119 (1st Cir. 1971).

The AEC's proposed regulations overturned in Calvert Cliffs' had essentially the same effect on agency environmental considerations as those proposed here. We would expect a similar judicial determination if the matter were relitigated. 2-5

Another aspect of Calvert Cliffs', the AEC's contention that it could rely on the environmental certifications of 2-6

other agencies in lieu of its own consideration of environmental matters, is surprisingly similar to the supposition of this proposed rule. But the court totally dismissed that contention.

> "Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (e.g., water pollution), but not quite enough to violate applicable (e.g., water quality) standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action - the agency to which NEPA is specifically directed.
>
> "The Atomic Energy Commission, abdicating entirely to other agencies' certifications, neglects the mandated balancing analysis. Concerned members of the public are thereby precluded from raising a wide range of environmental issues in order to affect particular Commission decisions. And the special purposes of NEPA is subverted." Calvert Cliffs' Coord. Com. v. U.S. A. E. Com'n, 449 F.2d 1109, 1123 (1st Cir. 1971).

2-6

4. The Preclusive Effect of Section 119.

The Commission staff, in the supplementary information, 53 Fed. Reg. 16139, 16140, argues that §119 of the NWPA, 42 U.S.C. 10139, permits the Commission to "carry out a licensing

review" which would "treat as settled those other issues arising under NEPA." We disagree.

First, §119(a)(1)(D) permits judicial review of any EIS with respect to action under the subtitle. 42 U.S.C. 10139(a)(1)(D). That section says nothing that would bar review of NRC's refusal to issue its own EIS nor certainly its refusal to consider the environmental merits or impacts of DOE's proposed action. §114(f)(6) as amended does, of course, permit NRC to avoid some of the issues of environmental merit, if the Commission so chooses. But that is by virtue of statutory language, not res judicata or collateral estoppel.

2-7

Second, the bar to which the supplemental information refers is the bar to relitigation of the legal adequacy of DOE's action, not NRC's. Because the two agencies' actions are independent, a different legal and factual question is posed in each instance. Certainly NRC is entitled to rely on the conclusions reached by DOE in its EIS, its NEPA and AEA discretion yet to be exercised,[6] but the Commission may not rely on the finality of challenge to DOE's EIS as a bar to its

2-8

[6]This is in accord with the proper statement of the law, at 53 Fed. Reg. 16136, that the Commission may give substantial weight to the findings of other bodies. Pub. Serv. Comm. of N.H. (Seabrook Station, Units 1 and 2.), CLI-77-8, 5 NRC 503 (1977).

exercise of that discretion or as a bar to judicial review of the failure to exercise that discretion properly.

2-8

Even if res judicata did work the way Commission staff believes it does, and it does not, the suggested approach, eliminating environmental issues from the licensing proceeding, is contrary to the directive of NEPA that "to the fullest extent possible . . . the public laws of the United States shall be interpreted and administered in accordance with [NEPA]" 42 U.S.C. 4332. That is the exact same provision upon which the TVA relied when attempting to preclude environmental issues from hearing simply because it had already done an EIS. TVA, supra.

2-9

Third, as we have commented above, the res judicata analysis presented is based on an analysis of the wrong question, to wit how to review DOE's EIS for legal adequacy. See e.g. 53 Fed. Reg. 16138, col. 2, 16144, col. 1. The right question is how to perform NRC's NEPA responsibility. NRC does not have a duty to review DOE's EIS for its legal adequacy per se. And of course, if it did, a prior judicial ruling on that issue would be res judicata. Moreover, it would be law of the case. Res judicata analysis is just plain inapposite to the correct question.

2-10

Fourth, the analysis is based on a spurious rationale that "[t]he NWPA procedures really reflect two different kinds

2-11

of review." 53 Fed. Reg. 16139, col. 1. This rationale disparges the statutory responsibilities of both the NRC and the State. The first leg of this rationale disavows the clear case law that the NRC has a duty to evaluate the radiological consequences of a proposed action under the Atomic Energy Act and a second duty, where not compromising to the first, to evaluate the other environmental consequences of the proposal. The second leg of this rationale makes a statement which Alice wouldn't recognize, that the "State and Tribal provisions of the Act" were to provide the process by which alternatives were to have been considered. The State of Nevada heartily declines to accept the proposition that it had any duty to help DOE evaluate its alternatives. DOE certainly never offered any opportunity to do so and Congress has made that all quite academic anyway.

2-11

Last, the res judicata analysis puts potential EIS challengers on the horns of a dilemma. See discussion at 53 Fed. Reg. 16140, col. 1. That dilemma is inconsistent with the solubrious purposes of NEPA. The Commission staff would hope to bar judicial review of NRC environmental review by delay past the statute of limitations, imposed by §119(c), 42 U.S.C. 10139(c), which began to turn when DOE published its EIS. Challengers would then have to choose whether to let the statute run on DOE's earlier, perhaps more limited, EIS, or challenge it as its only opportunity to raise the

2-12

environmental issues. The Commission staff's patent strategy is offensive to NEPA. 2-12

5. Completeness of Application.

The Commission staff notes in Note 1 to the supplementary information, 53 Fed. Reg. 16134, col. 1, that "the Commission regulations call for the [DOE] application [for a construction authorization] to be as complete as possible in the light of information that is reasonably available at the time of docketing - i.e. prior to commencement of construction. 10 C.F.R. 60.24(a)." The proposed rule, 53 Fed. Reg. 16147, col. 2, adopts that same basic standard. However that standard is insufficient. The problem with Section 60.24, either in its current form or as proposed, is that it does not place upon the Department of Energy the requirement that its application be supported by sufficient information. If, for instance, the Department of Energy should fail to characterize Yucca Mountain completely but nevertheless submit its application to the NRC, perhaps under political duress to do so, then it might be construed that the information then developed, even though inadequate, was all that was "reasonably available." This problem is one that has been identified repeatedly by the State of Nevada in the committee meetings of the High-Level Nuclear Waste Licensing Support System Advisory Committee which has recently proposed amendments to 10 C.F.R. Part 2 - Subpart J. NRC representatives in that advisory committee agreed, at the committee's July 19, 1988 meeting, that 2-13

reference to the 10 C.F.R. 60.24(a) standard would be deleted from the supplementary information for that proposed rule in order to leave open the question of the appropriate standard.

In the supplementary information for the 10 C.F.R. Part 2 - Subpart J rules, the Commission will express the opinion that "the information it needs in order to be able to consider the issuance of a construction authorization is generally the same as will be needed prior to issuance of a license to receive and possess high-level waste (HLW)." This, of course, overlooks the fact that during the course of construction at a repository site the Department of Energy will gain much new information about the site which will better inform the Commission in whether to grant a license to receive and posses high-level waste. Therefore the "time of docketing" the application for construction authorization hardly seems the appropriate time to determine the amount of information which is "reasonably available". The rule which we propose and submit herewith makes no amendment to Section 60.24(a), leaving that matter for further discussion of the appropriate standard. 2.13

6. <u>The Nuclear Waste Policy Amendments Act of 1987.</u>

The supplementary information discusses the changes made by Congress in the "licensing process" by the Nuclear Waste Policy Amendments Act of 1987, Title V, Subtitle A, Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203. The

Commission staff incorrectly states what Congress did. Indeed Congress made significant changes to the process by which DOE would recommend sites to the President, but the only changes which the Congress made to the "licensing process" of the Commission were adding of the language in §114(f)(6) (permitting NRC to exclude certain considerations from its EIS) and deleting the date by which the Commission was to have issued a final decision approving or disapproving the issuance of a construction authorization. See Pub. L. 100-203, §5011(j). Where Congress made a specific limited alteration to the Commission's anticipated licensing practice, it is wrong to characterize Congress's change in DOE's statutory responsibilities as an intention to change the NRC's statutory responsibilities. 2-14

7. Petition For Rulemaking.

The supplementary information to the proposed rule requests that any person desiring to comment on the rulemaking petition filed by the States of Nevada and Minnesota, docketed as PRM 60-2A on October 3, 1985, do so now.

The State of Nevada is not satisfied that the Nuclear Regulatory Commission has responded to its petition for rulemaking in a timely way. It should not take nearly three years to respond to a proposal. And the mere inclusion of opportunity for comment in the context of this rule regarding NEPA is an inadequate response. The supplementary information is correct that the petition for rulemaking 60-2A proposed an

amendment to 10 C.F.R. 60.24 which would have required the Commission to "evaluate the environmental impact statement required by 42 U.S.C. 10134(f) and 10 C.F.R. 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.)". The proposed rule then went on to specify the considerations which the Commission should take into account in making such a determination. A number, though not all, of the considerations suggested were mooted by the Nuclear Waste Policy Amendments Act of 1987. We have, therefore, rewritten and included the proposal contained in PRM60-2A in the proposed rule which we submit with these comments. Nevada continues to believe that a straightforward, substantive standard which may be applied objectively is the best course by which the NRC can guarantee the performance of its own NEPA responsibilities and preserve its own discretion. We have also attempted to create a procedure which resembles familiar practice under NEPA, rather than creating a new and unfamiliar course, the monies of which may require subsequent administrative judicial interpretation.

2-15

B. Nevada's Proposed Rules.

Nevada has submitted, as part of these comments, a redrafted version of the proposal published at 53 Fed. Reg. 16144. We have attempted to 1) integrate the NRC proposed

environmental impact statement submission process within the other amendments to 10 C.F.R. Part 2 of which we are aware by reason of Nevada's participation in the High-Level Waste Licensing Support System Advisory Committee; 2) establish a system by which the Commission can retain its discretion to consider and act upon environmental issues in licensing of a repository; and 3) at the same time adopt DOE's EIS "to the extent practicable." We have adopted as much of the NRC proposal as possible so as to minimize the differences between the two proposals. The proposed rules follow.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 is revised to read as follows: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135,

2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770 also issued under 5 U.S.C. 557. Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. In section 2.101, paragraphs (f)(1), (2), (4), (5), and (7) are revised to read as follows:

§ 2.101 Filing of application.

* * * * *

(f)(1) Each application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and any environmental impact statement required in connection

therewith pursuant to Subpart A of Part 51 of this chapter shall be processed in accordance with the provisions of this paragraph.

(2) To allow a determination as to whether the application is complete and acceptable for docketing, it will be initially treated as a tendered document, and a copy will be available for public inspection in the Commission's Public Document Room. Twenty copies shall be filed to enable this determination to be made.

* * * * *

(5) If a tendered document is complete and acceptable for docketing, the applicant will be requested to (i) submit to the Director of Nuclear Material Safety and Safeguards such additional copies of the application and environmental impact statement as the regulations in Part 60 and Subpart A of Part 51 of this chapter require, (ii) serve a copy of such application and environmental impact statement on parties and potential parties as defined by 2.1001 and (iii) make direct distribution of additional copies to Federal, State, Indian Tribe, and local officials in accordance with the requirements of this chapter and written instructions from the Director of Nuclear Material Safety and Safeguards. All such copies shall be completely assembled documents, identified by docket number. Subsequently distributed amendments to the application, however, may include revised pages to previous submittals and, in such cases, the recipients will be responsible for inserting the revised pages.

* * * * *

(7) Amendments to the application and supplements to the environmental impact statement shall be filed and distributed and a written statement shall be furnished to the Director of Nuclear Material Safety and Safeguards in the same manner as for the initial application and environmental impact statement.

* * * * *

PART 51 - ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

3. The authority citation for Part 51 is revised to read as follows: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853-854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub. L. 95-604, Title II, 92 Stat. 3033-3041. Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036-3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Secs. 51.43 and 51.109 also issued under Nuclear Waste Policy Act of 1982, sec. 114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)).

4. In § 51.20, existing paragraph (b)(13) is redesignated as paragraph (b)(14) and a new paragraph (b)(13) is added to read as follows: § 51.20 Criteria for and

identification of licensing and regulatory actions requiring environmental impact statements.

* * * * *

(b) ***

* * * * *

(13) Issuance of a construction authorization and license pursuant to Part 60 of this chapter.

* * * * *

5. Section 51.21 is revised to read as follows:

§ 51.21 Criteria for and identification of licensing and regulatory actions requiring environmental assessments.

All licensing and regulatory actions subject to this subpart require an environmental assessment except those identified in § 51.20(b) as requiring an environmental impact statement, those identified in § 51.22(c) as categorical exclusions, and those identified in § 51.22(d) as other actions not requiring environmental review. As provided in §51.22(b), the Commission may, in special circumstances, prepare an environmental assessment on an action covered by a categorical exclusion.

6. Section 51.22 is amended, by revising the heading and adding a new paragraph (d), to read as follows:

§ 51.22 Criterion for categorical exclusion; identification of licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review.

* * * * *

(d) In accordance with section 121 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10141), the promulgation of technical requirements and criteria that the Commission will apply in approving or disapproving applications under Part 60 of this chapter shall not require an environmental impact statement, an environmental assessment, or any environmental review under subparagraph (E) or (F) of section 102(2) of NEPA.

7. In § 51.26, paragraph (a) is revised and a new paragraph (c) is added, to read as follows:

§ 51.26 Requirement to publish notice of intent and conduct scoping process.

(a) Whenever the appropriate NRC staff director determines that an environmental impact statement will be prepared by NRC in connection with a proposed action, a notice of intent will be prepared as provided in § 51.27, and will be published in the Federal Register as provided in § 51.116, and an appropriate scoping process (see §§ 51.27, 51.28 and 51.29) will be conducted.

* * * * *

(c) Upon receipt of an application and accompanying environmental impact statement under §60.22 of this chapter (pertaining to geologic repositories for high-level radioactive waste), the appropriate NRC staff director will include in the notice of docketing required to be published by §2.101(f)(8) of this chapter a statement that the Commission will, in accordance with §51.109, consider whether to adopt

all or portions of the environmental impact statement. If the appropriate NRC staff director determines, at the time of such publication or at any time thereafter, that NRC should prepare an environmental impact statement in connection with the Commission's action on the license application, the procedures set out in paragraph (a) of this chapter shall be followed.

8. A new § 51.67 is added to read as follows:

§ 51.67 Environmental information concerning geologic repositories.

(a) In lieu of an environmental report, the Department of Energy, as an applicant for a license or license amendment pursuant to Part 60 of this chapter, shall submit to the Commission any final environmental impact statement, and any supplement thereto, which the Department prepares in connection with any geologic repository developed under Subtitle A of Title I of the Nuclear Waste Policy Act of 1982.

(b) The final environmental impact statement which accompanies the Department of Energy's recommendation to the President to approve a site for a geologic repository shall be submitted to the Commission at the time and in the manner described in § 60.22 of this chapter. Such statement shall be prepared in accordance with the provisions of section 114(f) of the Nuclear Waste Policy Act of 1982. The statement shall include, among the alternatives under consideration, denial of a license or construction authorization by the Commission.

(c) Under applicable provisions of law, the Department of Energy is required to supplement its final environmental

impact statement whenever the Department makes 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 final supplement to its final environmental impact statement to the Commission at the time and in the manner described in § 60.22 of this chapter.

(d) 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 by-product

material at a geologic repository operations area, the NRC staff shall present its position whether it is practicable or not to adopt, without further supplementation, the environmental impact statement (including any supplement thereto) prepared by the Secretary of Energy. 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 §2.714(b) or §2.1014 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.

(c) It shall be practicable for the Commission to adopt the environmental impact statement prepared by the Secretary of Energy if:

(1) The action proposed to be taken by the Commission is sufficiently similar to the action proposed in the license application submitted by the Secretary of Energy so that any

2-16

difference between the two actions will not significantly affect the quality of the human environment.

(2) Information or considerations unavailable to the Secretary do not render the environmental impact statement inadequate to perform the Commission's independent NEPA responsibilities. Information or considerations shall be deemed available to the Secretary if the information or considerations have been addressed in a supplemental environmental impact statement that the Secretary has submitted to the Commission in accordance with the provisions of this chapter.

(3) Adoption of the Secretary's environmental impact statement, or any portion thereof, would not compromise the independent responsibility of the Commission to protect the public health and safety under the Atomic Energy Act of 1954.

(4) Adoption of the Secretary's environmental impact statement will fit within the administrative structure by which the Commission considers the environmental implications of proposed major federal actions.

(5) The considerations established by (1), (2), (3), and (4) shall be applied in such a manner to utilize all those portions of the Secretary's environmental impact statement upon which it is permissible, under NEPA, for the Commission to independently rely.

(d) To the extent that the presiding officer determines it to be practicable to adopt all or any part of the environmental impact statement prepared by the Secretary of Energy,

such adoption shall be deemed to satisfy all responsibilities of the Commission under Section 102(2)(c) of NEPA, 42 U.S.C. 4332(2)(c). Such satisfaction shall not foreclose consideration of environmental issues by the Commission for which contentions have been filed pursuant to 2.501(a)(2) or which have been otherwise identified by the Commission.

2-14

(e) To the extent that it is not practicable to adopt the environmental impact statement prepared by the Secretary of Energy, the presiding officer will:

(1) Determine whether the requirements of section 102(2)(A), (C), and (E) of NEPA and the regulations in this subpart have been met;

(2) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken;

(3) Determine, after weighing the environmental, economic, technical and other benefits against environmental and other costs, whether the construction authorization or license should be issued, denied, or appropriately conditioned to protect environmental values;

(4) Determine, in an uncontested proceeding, whether the NEPA review conducted by the NRC staff has been adequate; and

(5) Determine, in a contested proceeding, whether in accordance with the regulations in this subpart, the construction authorization or license should be issued as proposed.

(f) The determinations described in paragraphs (b) through (e), and the similar review determinations of the

Atomic Safety and Licensing Appeal Board and the Commission, shall be incorporated in the Commission's final environmental impact statement which shall be published by the Commission in accordance with §51.118. That final environmental impact statement shall not be "final" action for purposes of judicial review until the Commission's action approving or disapproving the construction authorization is similarly "final" under the Administrative Procedures Act.

PART 60 - DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

10. The authority citation for Part 60 is revised to read as follows: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97-425, 96 Stat. 2213, 2228, as amended (42 U.S.C. 10134, 10141).

For the purposes of section 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§ 60.10, 60.71 to 60.75 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

11. In § 60.15, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

12. In § 60.21, paragraph (a) is revised to read as follows:

§ 60.21 Content of application.

(a) An application shall consist of general information and a Safety Analysis Report. An environmental impact statement shall be prepared in accordance with the Nuclear Waste Policy Act of 1982, as amended, and shall accompany the application. Any Restricted Data or National Security Information shall be separated from unclassified information.

* * * * *

13. Section 60.22 is revised to read as follows:

§ 60.22 Filing and distribution of application.

(a) An application for a license to receive and possess source, special nuclear, or by-product material at a geologic repository operations area at a site which has been characterized, and any amendments thereto, and an accompanying environmental impact statement and any final supplements thereto shall be signed by the Secretary of Energy or the Secretary's authorized representative and shall be filed in triplicate with the Director.

(b) Each portion of such application and any amendments, and each environmental impact statement and any final supplements thereto, shall be accompanied by 30 additional copies. Another 120 copies shall be retained by DOE for distribution in accordance with written instructions from the Director or the Director's designee.

(c) DOE shall, upon notification of the appointment of an Atomic Safety and Licensing Board, update the application, eliminating all superseded information, and supplement the environmental impact statement if necessary, and serve the updated application and environmental impact statement (as it may have been supplemented) as directed by the Board. At that time DOE shall also serve one such copy of the application and environmental impact statement on the Atomic Safety and Licensing Appeal Panel. Any subsequent amendments to the application or final supplements to the environmental impact statement shall be served in the same manner.

(d) At the time of filing of an application and any amendments thereto, one copy shall be made available in an appropriate location near the proposed geologic repository operations area (which shall be a public document room, if one has been established) for inspection by the public and updated as amendments to the application are made. The environmental impact statement and any final supplements thereto shall be made available in the same manner. An updated copy of the application, and the environmental impact statement and final supplements, shall be produced at any public hearing held by the Commission on the application, for use by any party to the proceeding.

(e) The DOE shall certify that the updated copies of the application, and the environmental impact statement as it may have been supplemented, as referred to in paragraphs (c) and (d) of this section, contain the current contents of such

documents submitted in accordance with the requirements of this part.

14. In § 60.24, the section heading and paragraph (c) is revised to read as follows:

§ 60.24 Updating of application and environmental impact statement.

(c) The DOE shall supplement its environmental impact statement in a timely manner so as to take into account the environmental impacts of any substantial changes in its proposed actions or any significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

15. In § 60.31, the introductory paragraph is revised to read as follows:

§ 60.31 Construction authorization.

Upon review and consideration of an application and environmental impact statement submitted under this part, the Commission may authorize construction if it determines:

* * * * *

16. In § 60.51, the introductory portion of paragraph (a), and paragraph (b), are revised to read as follows:

§ 60.51 License amendment for permanent closure.

(a) DOE shall submit an application to amend the license prior to permanent closure. The submission shall consist of any update of the license application submitted under §§ 60.21 and 60.22, including:

* * * * *

(b) If necessary, so as to take into account the environmental impact of any substantial changes in the permanent closure activities proposed to be carried out or any significant new information regarding the environmental impacts of such closure, DOE shall also supplement its environmental impact statement and submit such statement, as supplemented, with the application for license amendment.

C. Comparison of the Practical Implementations of NRC's and Nevada's Proposed Rules.

1. The Problems With Implementation of the NRC's Proposed Rule.

The NRC's proposed rule anticipated only a single repository site having been recommended by DOE in its final environmental impact statement. This overlooks the possibility that the Negotiator, established by Title IV of the NWPA as amended, § 5041, Title V. Pub. L. 100-203 recommends a different site. The procedures and environmental issues important to the NRC in that event are not anticipated by NRC's proposed rule. For instance, in a negotiated site case, the host state will have foregone its right to litigate the DOE's EIS altogether. But that state won't have relinquished its right to expect full consideration of environmental issues by the Commission. 2-17

The proposed rule does not adequately address the practical problem that litigation over DOE's EIS could be 2-18

protracted, perhaps longer than the NRC licensing process and certainly longer than the date when, under the proposed, NRC staff must advise the Board regarding its decision to adopt the EIS. This could put the Commission in a position where it could not move.

2. The Advantage of Nevada's Proposed Rule

Nevada's proposed rule retains the Commission's discretion and establishes a process which could be utilized in any DOE or Negotiator proposed action.

Nevada's proposal protects against early litigation against NRC for failure to comply with NEPA. NRC's proposal does not.

Nevada's proposal introduces no time delays in the exercise of NRC's licensing jurisdiction.

Nevada's proposal takes into account the other changes anticipated to 10 CFR 2. NRC's proposal does not.

D. Recommended Action

The Commission should make major changes in its proposed rule and submit them again for comment. In the alternative,

the Commission should establish some other mechanism by which to incorporate Nevada's concerns into the rule.

DOCKET NUMBER
PROPOSED RULE PR 2-51+60 (53FR16731) (3)

ENVIRONMENTAL DEFENSE FUND

1405 Arapahoe Avenue
Boulder, CO 80302
(303) 440-4901

'88 AUG -3 P3:2

August 2, 1988
BY EXPRESS MAIL

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Samuel Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
ATTN: Docketing and Service Branch

RE: Proposed changes to 10 C.F.R. Parts 2, 51 and 60

Dear Mr. Chilk,

The Environmental Defense Fund ("EDF") is a non-profit organization with over 60,000 members nationwide. Our members include attorneys, scientists, economists, educators and other professionals and concerned citizens who are interested in preserving and creating the best possible national and global environment. Towards that goal, EDF advocates minimizing the uses of hazardous materials and selecting the most prudent management systems for existing hazardous wastes, including nuclear waste. Through legislative, administrative, and court action, EDF has participated in the debate over this nation's long term strategy for nuclear waste disposal. For example, EDF took part in the High Level Waste Licensing Support System negotiated rulemaking conducted by the Nuclear Regulatory Commission ("NRC", "the Commission").

We have reviewed the proposed changes to NRC's rules for compliance with the National Environmental Policy Act ("NEPA") in the context of the Nuclear Waste Policy Act of 1982 and the 1987 amendments thereto (collectively "NWPA"). EDF urges the Commission to abandon the dramatic diminution of its licensing authority which these proposed changes would effect. Instead, EDF would urge the Commission to withdraw this proposal and prepare and publish a new set of amendments to its existing rules which conform them as necessary to the clear process variations required by NWPA, but do not illegally reduce the scope of NRC's repository licensing review.

National Headquarters
257 Park Avenue South
New York, NY 10010
(212) 505-2100

1616 P Street, NW
Washington, DC 20036
(202) 387-3500

5655 College Avenue
Oakland, CA 94618
(415) 658-8008

1108 East Main Street
Richmond, VA 23219
(804) 780-1297

128 East Hargett Street
Raleigh, NC 27601
(919) 821-7793

From our review, EDF would support the proposed changes to the following sections of NRC's rules in 10 C.F.R. as primarily or entirely noncontroversial: Part 2, section 101; Part 51, sections 20, 21, 22, 26(a), 67(a), 67(b), 67(d), 109(a)(1), 109(b), 109(e), 109(g), and 118; and Part 60, sections 22, 31 and 51(a). We believe that NRC could adopt these sections, following this public comment and review period, with appropriate modifications to conform to the rule which will be produced as a result of the recently completed negotiated rulemaking (that will add an new subpart to 10 C.F.R. Part 2 to allow for the use of an enhanced "Licensing Support System" during the Commission's consideration of the repository).

Interpreting the NWPA, NRC argues generally that the Commission's NEPA responsibilities are limited under the NWPA, that the Commission is entitled to adopt the Environmental Impact Statement ("EIS") that the Department of Energy ("DOE") will prepare pursuant to NWPA section 114, that the Commission need not do any independent analysis of the environmental issues which DOE covers in its EIS nor consider such issues in the licensing process, and that, with regard to environmental mitigation measures presented in DOE's EIS, NRC has no duty to include such measures as conditions in its repository license. (EDF refers through to an NRC "license" and "licensing process." Our intent

is to include in these shorthand phrases the NRC construction authorization and process for issuing such authorization, too.)

This attempt by the Commission to limit its duties is simply appalling. NRC is the sole federal agency with the power to grant or deny a license to DOE for this nation's first, and potentially only, high level nuclear waste repository. Given its role as licensor, the Commission is also the federal agency with the ultimate responsibility for the fate, and with the final say as to what must be done to ensure the public and environmental safety, of such repository. The Commission simply cannot -- by rule -- shirk the awesome responsibility which Congress gave to it -- by law.

EDF finds it ironic that the Commission, which just invested nine months worth of two day meetings to draft a rule which would govern discovery and procedural matters for the licensing, clearly a sign that the Commission recognizes the serious nature of its licensing responsibility, would now so blatantly attempt to lighten its burden, especially knowing that no other federal agency or law will operate as a backstop for those deficiencies which NRC would hereby refuse to catch. Despite the fact that Congress directed DOE to prepare an EIS to support its choice of a repository site, Congress put NRC in the position of umpire, with the final authority to call fair or foul.

NRC must exercise its NEPA duties for the repository. NRC can take an active role in the development of DOE's EIS and thereby attempt to ensure that such EIS adequately addresses all issues which it is proper for DOE to address in carrying out its responsibilities under the NWPA. Were NRC to participate actively, commenting at all phases in DOE's progress including the scoping process and the draft EIS, NRC might be able to adopt more of DOE's EIS than it would be able to adopt absent vigorous participation. However, even if NRC does take an active, early role in the development of DOE's EIS, NRC must still carry out its own NEPA responsibilities for the repository, including the preparation and issuance of its own EIS. Although parts of that EIS may in fact be adopted from DOE's NEPA compliance documents, NRC must also fill in the gaps which will result because of NRC's independent duties under NWPA which Congress explicitly recognized. Because these proposed rules would thwart NRC's NEPA responsibilities, NRC must redraft, republish and rethink the regulatory amendments it needs to adopt to fulfil its statutory obligations for licensing a high level nuclear waste repository.

1. The NWPA's limitations on NEPA compliance do not affect NRC as broadly as the Commission argues.

NRC argues that Congress significantly narrowed the scope of the Commission's NEPA compliance in the NWPA, primarily through section 114(f). The four changes to the scope of the EIS which NWPA makes are that neither DOE, as a result of section

3-1

114(a)(1)(D), nor NRC, pursuant to section 114(f) need consider: (1) the need for a repository; (2) alternatives to deep geologic storage; (3) time of initial availability of repository; and (4) alternatives to the Nevada site, if that is the site that DOE recommends.

EDF appreciates that NRC faces a daunting task, which Congress has made all the more difficult by imposing on the Commission a three year statutory deadline for issuing its construction authorization. However, the Commission may not arbitrarily remove from its licensing inquiry topics which rightfully belong there in a crass attempt to cut time out of the process. Moreover, the few limits which Congress imposed on NRC's NEPA inquiries in section 114 do not allow NRC to avoid all other NEPA considerations in its licensing. Although the Commission states that its authority under the Atomic Energy Act, as amended is limited to the protection of public health and safety, this is not quite correct. As amended, the Atomic Energy Act directs NRC to comply with NEPA; so, NRC's authority also includes the consideration of impacts to the human environment. Nothing in the NWPA changes NRC's authority, except to the limited extent set out in section 114(f).

NRC could have properly concluded that Congress, in narrowing the scope of NEPA compliance, meant to narrow <u>in the same way</u> the issues for NRC to consider in its licensing

proceeding, and EDF would have agreed with this conclusion. But instead, NRC proposes through these rules to limit its own NEPA duties and the scope of its licensing inquiry far beyond the four above-described limitations which Congress imposed in NWPA section 114. These four specific congressional limits on the scope of DOE's and NRC's NEPA duties have no relevance whatsoever to any further narrowing either of the scope of NRC's licensing inquiry or of the extent of NRC's adoption or rejection of DOE's EIS. The former is controlled by the provisions of 10 C.F.R. Part 60 and the EPA standards for high level waste repositories, 40 C.F.R. Part 121. The latter is controlled by other language in section 114(f). NRC cannot use the Congressional elimination of the four topics listed above to support an attempt to narrow far beyond those topics NRC's NEPA responsibilities or the scope of its licensing proceeding. 3-1

In fact, the very legislative history which NRC quotes regarding the Commission's independent duties vis-a-vis the repository support the principle that NRC is not allowed to forego its NEPA duties and rely entirely on DOE's NEPA compliance. 3.2

In addition to the legislative history, there is the language of NWPA itself which indicates that Congress intended for NRC to issue its own EIS. Thus, section 114(f)(6) provides: "In any [EIS] prepared with respect to the repository to be 3.3

constructed under this subtitle, the Commission need not consider [the four above-listed factors]." Emphasis added. 3-3

As EDF explains below, the interplay between federal agencies, each with distinct programmatic and NEPA responsibilities, is not one which would allow the Commission to abdicate its role simply because DOE, its sister agency, complies with the laws, including NEPA, which apply to the Department. Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971). The Commission even cites this case, 53 Fed. Reg. 16138, col. 3, yet dismisses its relevance. 3-4

2. "Adoption to the Extent Practicable" is a flexible standard which preserves NRC's discretion.

NWPA section 114(f) tells NRC to adopt DOE's EIS "to the extent practicable," from which NRC reasons that it must give the EIS "substantial weight" where relevant to Commission decisions. 3-5 Although the Commission concedes both that a "rule of reason" still applies regarding its evaluation of DOE's discussions, and that DOE might not necessarily address in its EIS all of the issues which NRC must address, the Commission translates the Congressional directive to adopt if practicable into a virtual directive to adopt. See, proposed section 51.67(c). Further, NRC suggests that, because NWPA section 114(f) allows NRC's adoption of the EIS to "satisfy" NRC's NEPA duties such that "no further consideration is required," the NWPA as a whole (or at

least in its directive in section 114(d) to NRC to issue a construction authorization for the repository) should be read as "counsel[ing] against the wide ranging independent examination of environmental concerns customary to NRC's licensing proceedings."

With regard to the standard -- that NRC may adopt "to the extent practicable" -- only to the extent that DOE's EIS does satisfy NRC's need for information in making its licensing determination would it "practicable" for NRC to adopt DOE's EIS and not consider further the matters addressed in the EIS. As NRC has long recognized, the standard "to the extent practicable" gives the Commission "flexibility" to "exercise [its] judgment" independently as to whether or not to take the action contemplated. See, e.g., 50 Fed. Reg. 41853, col. 2 and 41856, col. 1 (Oct. 16, 1985) (an NRC discussion of "to the extent practicable" in the context of its uranium mill tailings regulations and the interplay between NRC's rules and EPA's standards). Therefore, NRC cannot, as proposed in these draft rules, notice an "intent" to adopt a sister agency's EIS prior even to examining that EIS and regardless of whether such EIS adequately addresses the issues which NRC, as opposed to DOE, must address to carry out its duty - the grant or denial of a repository license. This is especially true, as explained above, given that Congress intended NRC to comply with NEPA independently from DOE.

3-5

3. NWPA's provisions for judicial review of any EISes do not relieve NRC of its independent NEPA responsibilities.

NRC makes a series of arguments on the binding nature of judicial review of DOE's EIS as a basis for the Commission's positions that it will be bound by DOE's EIS and that NRC will not rehash the environmental issues covered by DOE's EIS in the licensing proceeding. NWPA section 119, which provides for judicial review of "any" repository EIS certainly means that a court holding on the adequacy of DOE's EIS, if such ruling were final by the time of NRC's licensing proceedings, would bind the Commission's decisions to the extent of the holding. However, in making this argument, NRC appears to be desperately holding blinders on its face. Nothing about the Commission's premise allows for the leaps it makes towards its conclusions. 3.6

In fact, section 119 of the NWPA, just like section 114, would appear to contemplate the issuance of more than one EIS on the repository; in section 119, that is evidenced by the use of word "any" to modify repository EIS. If Congress had intended there to be only one EIS, it could have so stated. Moreover, NRC cannot use a potential court ruling that DOE's EIS is adequate for DOE's compliance with NEPA as the basis for an NRC decision to rely on the DOE EIS. As EDF noted above, DOE's NEPA responsibilities are separate and distinct from NRC's. That DOE's EIS complies with NEPA in satisfying DOE's duties under that law has limited relevance for NRC. The Commission must

still conduct an independent analysis -- even of those portions of DOE's EIS which the Commission wants to adopt -- to determine whether those portions which it adopts satisfy its own NEPA responsibilities. Finally, if NRC were to adopt parts of DOE's EIS, even to the extent that NRC were then bound by a court decision which found such parts in compliance with NEPA, that scenario obviously contemplates that NRC would have to wait for such court decision, which could be years after the issuance of DOE's EIS and long after such decision could be meaningful during the Commission's expedited licensing proceeding. 3.6 3.7

4. NRC may not exclude from its licensing proceeding the consideration of environmental issues.

Citing the statutory provision that allows NRC to adopt parts of DOE's EIS and various Congressional committee reports, NRC argues that the legislative history of NWPA directs the Commission to focus on health and safety issues, to the exclusion of the environmental issues ordinarily raised in the NEPA process. The Commission bases this argument on several factors, including that Congress removed NRC review of DOE's decisions on site screening and selection, that one Senate bill had included the word "environmental" which was not included in the final version of the 1982 NWPA, and that except for its review of the Guidelines, NRC's role is statutorily limited to addressing health and safety issues. NRC also cites committee reports for the proposition that NRC should not duplicate DOE's work, 3.8

although NRC admits that one such report, the Conference Report on H.R. 6598, H. Rep. 97-785, part 1, p. 69, specifically reserves NRC's independent NEPA and licensing responsibilities and recognizing NRC's duty to supplement DOE's EIS as necessary. NRC also concedes that, at least in the Senate, the bill's primary authors expected that NRC's NEPA analysis would be broad. Finally, NRC points to the sections of NWPA which make DOE actions on the repository subject to legislative and judicial review to argue that DOE's EIS does not also need NRC review. 3.9

Essentially, NRC attempts to distinguish between the Congressional intent to limit the Commission's NEPA duties but not its licensing authority. The simple response is that no such duality exists. In fact, for NRC to perform its licensing function adequately, it must produce a competent EIS which addresses all of the issues encompassed by NRC's NEPA, Atomic Energy Act and NWPA authorities and it must allow for all such issues to be subject to argument on their merits in the licensing proceeding. It is to ensure that NRC can carry out these functions that Congress expressly provided NRC with the authority to adopt DOE's EIS in whole, in part, or not at all, and to supplement that whole or partial EIS as necessary to comply with its own duties.

As to the Commission's argument that it has responsibility for health and safety issues but not protection of the human 3.9

environment, such position is contrary to (1) the Commission's NEPA duties as a federal agency undertaking a major federal action, (2) what the Commission itself saw as its responsibilities when it adopted 10 C.F.R. 60 which contemplates NRC review of at least some environmental issues, and (3) the implications of NWPA section 121 which directs EPA to adopt environmental standards and NRC to promulgate technical criteria which "shall not be inconsistent with any comparable standards promulgated by the [EPA] Administrator." Section 121 then directs NRC to revise its criteria if issued before EPA's standards and if after EPA's standards are issued it turns out that the NRC criteria are inconsistent with the EPA standards. 3-9

5. There is no basis for NRC to prejudge the nature of the license conditions which it will impose.

NRC claims that it does not anticipate the imposition of license conditions with significant environmental impacts. 53 Fed. Reg. 16142, col. 3. The Commission comes to this amazing conclusion without identifying a basis for such a dramatic limitation on its licensing duties and without the benefit of any specific information regarding the nature of the repository's environmental impacts. NRC's only authority for this attempted divestiture of its licensing authority is that, in its view, "DOE has the primary responsibility for consideration of environmental matters." Ibid. NRC makes this argument notwithstanding its recognition that its own regulations, at 10 C.F.R. Part 60.32(a) 3-10

require the Commission to address the "protection of environmental values." NRC purports to explain its new position by arguing that, if significant changes occur or new information becomes available after DOE files its original license application, then NRC would expect DOE to supplement the EIS and amend its application. Moreover, NRC explains that "affected parties [could] seek redress against DOE in the courts" for the enforcement of environmental mitigation measures identified either in the initial EIS and any supplements thereto. 53 Fed. Reg. 16143, col. 3.

This is truly an extraordinary attempt at abdication of NRC's licensing role. First of all, there is no justification for NRC to be declaring today that it will not impose environmentally significant (or any type of) licensing conditions for the repository when the licensing proceeding is unlikely to begin for at least five years. This is simply irresponsible agency behavior.

Second, although DOE can attempt to describe the environmental impacts of the repository and how it plans to comply with EPA standards and NRC criteria, NRC as the licensing agency clearly has an independent duty and the ultimate responsibility to review the application and decide what license conditions are necessary to ensure compliance with EPA's standards and the Commission criteria. DOE may have, at least

initially, the primary authority for protection of the human environment in the context of designing and constructing a repository, but NRC cannot avoid its position as ultimate guarantor of the safety of the repository, including the protection of the human environment from adverse impacts associated with the repository. As a result of its duty to license the facility, and as the sole such licensor, NRC must place all necessary conditions into its license. 3-10

Third, under NEPA, which is a law to ensure that federal agencies make their decisions on the basis of adequate information that fleshes out the environmental impacts of a proposed federal action, "affected parties" have no claim for redress on the basis of mitigation promised in an EIS if such mitigation measures are not included as a permit/license condition or otherwise required by law. NRC, in fact, cites no authority for its claim that such proposed mitigation measures are independently enforceable. Given that no such authority exists, NRC must include such conditions in its license. Therefore, NRC must allow such conditions to be subjected to the scrutiny which its licensing process affords. 3-11

6. NRC adoption of all or part of DOE's EIS does not mean that NRC can avoid considering environmental issues at its licensing proceedings.

NRC argues that for the repository, DOE is the "lead agency" for NEPA purposes and the Commission is merely a commenting 3-12

agency. See, 40 C.F.R. 1506. As such, the Commission asserts that right to adopt DOE's EIS if that statement is adequate and without doing an independent evaluation of the issues that DOE addresses in its EIS prior to such adoption. Even though NEPA would usually require the licensing agency to do an independent review, because of NWPA's limits on NEPA compliance and judicial review provisions, NRC claims it may defer to DOE's work here because DOE is the agency with the ultimate responsibility for the repository so NRC may defer to DOE's views.

3-12

EDF is appalled that NRC would attempt to cast DOE as the federal agency with the ultimate authority over the repository when it is NRC with the power to grant or deny a repository license. Because NRC is the agency with the ultimate authority to declare whether the repository is ever built, this situation is no different from the cases NRC cites that direct NRC, as the licensing agency, to do an independent evaluation of the health, safety and environmental impacts of a proposed project. In fact, the cases which NRC cites represent a bar to NRC's adoption of DOE's EIS absent the Commission's performing an independent review.

7. NRC cannot deny DOE's application to avoid having to supplement the EIS.

Section 114(f)(6) of NWPA appears to assume that NRC will issue some NEPA compliance documents, either portions of an EIS or an EIS supplement of its own. Otherwise, there would be no

3-13

reason for the language, "[i]n any such statement prepared with respect to the repository to be constructed under this subtitle, the NRC" need not consider certain issues. For NRC to use this rulemaking to announce its intention that either DOE will prepare supplements to the EIS that NRC deems necessary or NRC will deny DOE's application is simply preposterous. It is also without legal basis. 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. 3-13

For the foregoing reasons, EDF suggests that the Commission reconsider its proposal here and redraft proposed rules which would incorporate those changes that ensure that the Commission take advantage of the Congressional invitation to adopt, where practicable, the DOE EIS, while at the same time preserving the Commission's full responsibilities as the licensing agency for the repository. NRC must consider environmental issues in its licensing process. To guarantee the best possible consideration of all issues, NRC should participate in the early development of DOE's EIS and reserve its ability to supplement and change that EIS as necessary to comply with NEPA and NWPA. The proposed rules do not accomplish these goals. EDF urges NRC first to give careful consideration of the alternatives proposed by the State

of Nevada and the Southwest Research and Information Center and then to publish a second set of proposed draft amendments.

Sincerely,

Melinda Kassen

Melinda Kassen
Staff Attorney
Rocky Mountain Regional Office

SOUTHWEST RESEARCH AND INFORMATION CENTER

August 1, 1988

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

Dear People,

Enclosed are the comments of Southwest Research and Information Center (SRIC) on the NRC's proposed rule for changing 10 CFR Parts 2, 51 and 60 as noticed in the Federal Register of May 5, 1988.

SRIC is a private nonprofit organization which has been intensively involved in nuclear waste management and disposal issues for more than a decade. We have been active participants in the Department of Energy's high-level waste program.

As the comments describe in more detail, we believe that the proposed rule is fundamentally flawed. We would therefore request that the proposed rule be substantially revised and reissued for public comment.

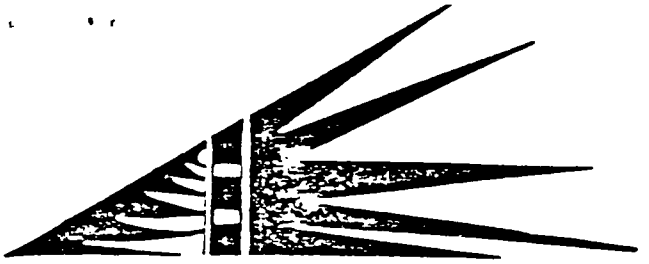
We would appreciate your careful consideration of these comments.

Yours truly,

Don Hancock

Don Hancock
Director
Nuclear Waste Safety Project

P.O. BOX 4524 ALBUQUERQUE NEW MEXICO 87106 505 - 262-1862



SOUTHWEST RESEARCH AND INFORMATION CENTER

COMMENTS ON THE NRC'S PROPOSED RULE FOR NEPA REVIEW PROCEDURES FOR GEOLOGIC REPOSITORIES 10 CFR Parts 2, 51, and 60

August 1, 1988

Submitted by

Don Hancock

Director, Nuclear Waste Safety Project

P.O. BOX 4524 ALBUQUERQUE NEW MEXICO 87106 505 - 262-1862

I. SUMMARY

The Nuclear Regulatory Commission's (NRC) proposed rule for NEPA review procedures for Geologic Repositories for High-Level Waste (10 CFR Parts 2, 51 and 60, 53 Federal Register 16131) is inadequate because it does not meet the legal requirements of NEPA and the Nuclear Waste Policy Act (NWPA), it does not address the two most imminent actions facing the Commission, and it does not adequately consider the range of alternative scenarios that relate to the Commission's adopting DOE's final environmental impact statement (FEIS).

The proposed rule seems to assume that the only likely possibility of the Commission receiving a DOE FEIS is as part of a repository license application after: Yucca Mountain is characterized and then is recommended by the President to Congress; the State of Nevada files suit challenging the adequacy of the FEIS (and presumably files its notice of disapproval, which is overridden by Congress); the Court of Appeals finds the FEIS is not inadequate; and the only substantive issues before the NRC in the licensing proceeding relate to radiological safety issues at Yucca Mountain. While that scenario is possible, it is not the only scenario, and perhaps not even the most likely one. Moreover, it is inappropriate for the Commission to base so much of its proposed rule — consciously or unconsciously — on that assumption.

Because of those inadequacies, the proposed rule should be substantially revised and reissued for additional comment before final promulgation.

II. LEGAL REQUIREMENTS FOR THE COMMISSION'S LICENSING REVIEW

The NWPA's language in section 114(f) upon which the Commission relies so heavily in the proposed rule was intended to expedite the NRC's review of the license application — which Congress hoped could be done in 3 years or a maximum of 4 years (Section 114(d)(2)). The Commission is erroneously reading

4-1

the statute to limit the NEPA and licensing issues that the NRC can address. On the contrary, the NWPA explicitly allows NRC to disapprove a construction application and does not limit to "radiological safety" the issues that could lead to such a rejection (Section 116(c)(4)(A)(iii) and Section 118(b)(5)(iii)). 4-1

Moreover, Congress is aware that the NRC often places conditions on its licensees, but it did not prohibit the Commission from imposing conditions, including those related to environmental issues. In such cases, a supplement to the FEIS would be necessary. 4-2

The Commission's self-imposed limits on the scope of its NEPA review and its licensing authority are not consistent with protecting public health and safety and the Commission's normal licensing procedures. The Commission should re-propose a rule which provides for full NEPA review, not limited to artificial distinctions of "radiological safety" and environmental concerns. In fact, in many cases those distinctions may be impossible to make since many issues will intertwine environmental and radiological concerns.

III. ACTIONS NEEDING NRC ATTENTION

The proposed rule does not focus on the actions that are most imminent and on those actions where DOE, states and tribes, and the public most need guidance from the Commission. Those actions are NRC's role in DOE's scoping process and the Commission's procedures for dealing with the new Office of Negotiator established as Title IV of the NWPA by the Nuclear Waste Policy Act Amendments of 1987 (NWPAA).

A. Scoping process for Yucca Mountain

While the Commission's consideration of DOE's FEIS in a licensing proceeding for Yucca Mountain will not commence until 1995 at the earliest, according to DOE's Draft 1988 Mission Plan Amendment (p. 51), DOE's scoping 4-3

process should begin within a year. In 1986, the Commission affirmed that it would "review and comment on DOE's scoping documents and activities for implementing NEPA." (51 Federal Register 27159). The Commission should be describing how it will be involved in the scoping process. Instead, the proposed rule totally ignores that 1986 Commission position on involvement in the scoping process and says (p. 16131) that the Commission's review begins with the DEIS.

Since DOE has not yet adequately defined its NEPA process, the Commission should be providing guidance to DOE as to how the scoping process should proceed -- including when and how the scoping process should be initiated, how the affected states and tribes and the public should be involved, and discussing the form of NRC's participation. During that scoping process, the Commission should be an active participant and should participate in scoping hearings. The NRC should also make suggestions as to how DOE can best consider a disposal system which includes both an MRS and a repository. 4-3

The proposed rule should incorporate a full understanding of the Commission's role throughout the NEPA process, including in the scoping process. The lack of such a complete understanding is a major deficiency in the proposed rule. The proposed rule should be corrected in a reissued proposed rule.

B. Nuclear Waste Negotiator

In its preamble, the proposed rule recognizes that a new Title IV of the NWPA has been created, but neither in the preamble nor in the proposed rule does the Commission describe the substantial new requirements that the Commission may have as a result of the activities of the Negotiator. Since the Negotiator is required to finish his/her work by January 1993 (pursuant to 4-4

Section 410), the Commission's activities under that Title will be accomplished before DOE even submits its draft environmental impact statement for Yucca Mountain, which is not scheduled until 1993 according to the Draft 1988 Mission Plan Amendment (p. 51).

The new Title establishes new requirements on the Commission. Section 403(c) allows the Negotiator to solicit and consider comments from the NRC on the suitability of any site for site characterization. The Negotiator will almost certainly request information and assistance from the Commission. While the statute is silent on NRC's role in reviewing an environmental assessment (EA) developed for a site proposed by the Negotiator, clearly the NRC should review such an EA in at least as much detail as it reviewed the previous draft and final EAs produced by DOE for potential repository sites. The Commission should expressly acknowledge this role. 4-4

Moreover, the new Title also changes the role of the EIS for a Negotiator-chosen site. For such a site, the FEIS would not be for the site selection decision of the Secretary of Energy and the President, but rather would only serve the purpose of providing necessary NEPA documentation for the license application. An environmental assessment, not a FEIS, is specifically required by Section 403(d)(1) as part of the submission to Congress for its approval of the agreement made the the affected state or Indian tribe and the DOE. The preamble for the proposed rule shows no recognition of this possibility since it describes the FEIS as being for both the recommendation and for the license application (p. 16139). 4-5

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. (Of course, the period of judicial 4-6

review for the FEIS on the negotiator-selected site is also different, since the 180-day time period may well not begin until the FEIS is filed with the license application.)

4.6

In addition to its impacts on the NEPA process, the Office of Negotiator will be a new agency with which NRC will interact. The Commission should begin immediately defining its role in relation to the Negotiator.

4-7

IV. THE COMMISSION'S NEPA ROLE

A. NRC participation in DOE's NEPA process

NEPA is first and foremost a public participation statute. Public participation means that full participation by the public and by state and federal agencies with responsibilities related to the proposed action. In relation to nuclear waste disposal, the EIS process must include participation from the public and by the many affected states and by federal agencies, especially the NRC, at all stages of the process: Scoping, DEIS, FEIS, and any necessary supplements.

4-8

It is important to note that DOE's EIS process is related to, but distinct from the NRC licensing process. 42 U.S.C 10134(f) requires that, consistent with NEPA, DOE must prepare a FEIS to "accompany any recommendation to the President to approve a site for a repository." That provision was not changed by the Nuclear Waste Policy Act Amendments of 1987 (NWPAA). Thus, under the NWPA, the first purpose of the FEIS is to provide necessary information to the decisionmakers — the Secretary of Energy and the President — regarding final selection of the repository site. Those Commission comments, required by 42 U.S.C. 10134(A)(1)(D), should build upon previous Commission comments during the scoping process and on the DEIS. Under the NWPA — and the provision was not changed by the NWPAA — the FEIS might not

be used in a licensing proceeding, since either the President or the Congress could decide not to approve the Secretary's recommendation, in which case the site would not be submitted to the NRC for licensing.

The preamble states (p. 16138) that the NRC will be a commenting agency, but the proposed rule does not adequately describe that role as an active, involved commentor. On the contrary, as described in the proposed rule, the Commission would effectively not be a commenting agency at all times in the NEPA process, because it would "merely ... provide its comments, from time to time, with respect to environmental impacts failling [sic] within its jurisdiction or areas of expertise" (Id.) The NWPA expands the roles of states and Indian tribes in order to "promote public confidence in the safety of disposal of such waste and spent fuel". 42 U.S.C. 10131(a)(6). But in addition to the expanded role for affected states and tribes and public involvement, the Commission should also fulfill its role of providing expert analysis of public health and safety issues throughout DOE's NEPA process. All parties expect that the Commission should use its expertise throughout the NEPA process. 4-8

The Commission should also develop a mechanism to directly receive comments from interested parties throughout the NEPA process as well as have a method to review comments received by DOE on NEPA issues. 4-9

As mentioned above, the Commission should be an active participant in the scoping process, in commenting exhaustively on the DEIS, and in reviewing the FEIS. The NRC's views on the FEIS will certainly be requested by Congress should a notice of disapproval be filed by the affected state or tribe and will also necessarily be a part of the licensing proceeding. Moreover, such views will undoubtedly be reviewed by the court of appeals should a challenge to the adequacy of the FEIS be filed.

B. NRC's review of DOE's FEIS along with the license application

DOE's FEIS is required to be part of the license application. In addition to reviewing the FEIS and the Safety Analysis Report (SAR), the NRC should compare the SAR to the FEIS to ensure that the two documents are not inconsistent. Differences in the documents could require revisions to the SAR or supplementation of the FEIS. 4-10

While it is true that NWPA has modified the NEPA requirements for geologic repositories, neither the NWPA, nor the NWPAA, require that Yucca Mountain be licensed. And, with the significant limitations noted in the preamble, the NWPAA assumes thorough NEPA review and compliance and full licensing consideration of all relevant issues, primarily, but not exclusively, radiological safety issues.

Additionally, Congress is now considering a multi-million dollar Licensing Support System (LSS), which, as we understand it, will contain many documents related to both environmental and radiological safety issues. If Congress really intended to severely limit the NRC's licensing review, it would have specifically said so and would not be appropriating substantial sums to ensure that all applicable documents are included in an LSS. 4-11

C. Scenarios for NEPA review not considered in the proposed rule

Perhaps because of the exceptions on the normal requirements for a FEIS, the proposed rule seems to assume that the proposed rule will be used only for a FEIS submitted with the Yucca Mountain license application. The rule presumes that the adequacy of the FEIS will be challenged in Court and so that all issues except radiological safety will be decided by the Court, not the Commission. However, there are several scenarios that would bring about a different situation regarding adoption of the FEIS, which seem not to have been considered in the proposed rule.

1) The only adjudication of the adequacy of the EIS is by the Commission. This situation could arise for a site chosen by a Negotiator, since there might not be any judicial review of that FEIS because the affected state or tribe would be precluded from challenging the EIS. Since the EIS would be prepared for the Commission's licensing, it could not have been challenged prior to its submittal to the Commission. 4-12

2) There is no legal challenge to the FEIS, but rather parties litigate all such issues during the licensing proceeding. The Commission must then review the FEIS in detail because its final decision on adopting the FEIS is also subject to judicial review, pursuant to 42 U.S.C. 10139(a)(1)(A). 4-13

3) Both environmental and radiological safety issues could be included in judicial review of the FEIS. In the preamble (p. 16139) the proposed rule argues that radiological safety "is entrusted solely to the Commission," but a party to NEPA litigation may well contest radiological safety issues especially since the FEIS must include performance assessment issues. So a court could make findings about environmental and radiological safety issues. 4-14

4) A Court concludes that a FEIS is inadequate on any of a number of grounds. The Commission could not then adopt that FEIS and would have to require a supplement. In such a case, the Commission would have to fully evaluate all issues decided by the Court to determine the impacts of the decision on the validity of the license application. 4-15

5) A Court decides to delay its decision on the adequacy of the FEIS pending the Commission's findings as to its adequacy in the licensing proceeding. In cases where parties challenge the adequacy of the FEIS, a court might decide to delay its final decision until it reviews the Commission's decision so as to take full advantage of the Commission's expertise. 4-16

6) A Court does not make its decision before the Commission makes its licensing decision. Since the DOE expects the Commission to take no more than three years to grant the construction license (as stated in the Mission Plan, Project Decision Schedule, and Draft 1988 Mission Plan Amendment), it is quite possible that a Court would not have issued its final order. For example, the 9th Circuit Court of Appeals has had challenges to the DOE's siting guidelines since December 1984. The preamble assumes that the Court will make its decision before the Commission acts. 4-17

The proposed rule should be revised to reflect the various alternative scenarios that have not been adequately included in the proposed rule. The varius scenarios require a more flexible approach to reviewing and adopting the FEIS than the one contemplated in the proposed rule.

D. Prejudice to intervenor parties

The preamble of the proposed rule states:

> The preclusive effect of a prior judgment sustaining DOE's environmental impact statement would not necessarily be limited to the petitioner of record in that proceeding. It can be argued that those who were represented by that petitioner would also be barred from litigating the issue in a subsequent action. (p. 16139)

The accompanying footnote further indicates that "members of the public" who had been represented by state officials "might be precluded, to the same extent, from raising the issues anew." (Id.) 4-18

The Commission should not now be limiting the issues that a party can raise in the licensing proceeding. The Commission cannot finally determine whom all the parties will be at this time. And it is certainly inappropriate to prematurely limit what issues parties can raise. It should be noted, however, that the Commission's rules for intervention (10 CFR 2.714) do not preclude individual citizens or citizens groups from becoming parties in the

licensing proceeding, even though the affected State petitioning for intervention will be a party.

The comment and footnote related to limitations on issues should be striken from the preamble because it is inappropriate and premature to make such judgments at this time.

4-18

IV. CONCLUSION

The proposed rule is seriously flawed in its understanding of the Commission's NEPA obligations and in seriously reducing the number of scenarios being considered for adopting the FEIS. That range does not include all of the possibilities expressly authorized by the NWPAA, nor does it reflect a realistic range of likely scenarios for action leading up to the NRC's decisions. The rule should be revised to take into consideration these issues and then reissued for public comment. Moreover, the proposed rule should also be expanded to describe the Commission's NEPA role prior to the submittal of the FEIS in the licensing proceeding.

JOHN J. KEARNEY, Senior Vice President

(5)

EDISON ELECTRIC INSTITUTE The association of electric companies

1111 19th Street, N.W.
Washington, D.C. 20036-3691
Tel: (202) 778-6400

August 4, 1988

Mr. Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

DOCKET NUMBER
PROPOSED RULE PR 2 5 (53FR16131)

Attention: Docketing and Service Branch

Subject: Proposed Rule on NEPA Review Procedures for Geologic Repositories for High-Level Waste (53 Fed. Reg. 16131)

Dear Mr. Chilk:

On May 5, 1988, the U.S. Nuclear Regulatory Commission (NRC) published in the Federal Register a proposed rule to codify the NRC's responsibilities under the National Environmental Policy Act of 1969 (NEPA) in connection with the licensing of the geologic repository for high-level radioactive waste. Section 114(f) of the Nuclear Waste Policy Act of 1982 (NWPA), as amended by the Nuclear Waste Policy Amendments Act of 1987 (NWPAA), provides that the NRC, in connection with the issuance of a construction authorization and license for the geologic repository, shall adopt, to the extent practicable, the Environmental Impact Statement (EIS) prepared by the Department of Energy (DOE). Section 114(f) further provides that the adoption "shall be deemed to also satisfy the responsibilites of the Commission under the National Environmental Policy Act and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commisssion to protect the public health and safety under the Atomic Energy Act of 1954."

The Edison Electric Institute (EEI) and the Utility Nuclear Waste Management Group (UNWMG) appreciate the opportunity to submit comments on the proposed rule. EEI is the association of the nation's investor-owned electric utilities. UNWMG is a group of forty-five electric utilities providing active oversight of the implementation of the federal statutes and the regulations related to radioactive waste management. Together, EEI/UNWMG represent the majority of the holders of contracts with DOE for disposal of spent nuclear fuel under the NWPA. To date, electric utilities have paid over $3.3 billion into the NWPA Nuclear Waste Fund. These funds are collected from electricity consumers. It is extremely important to electric utilities and their customers that the repository licensing be carried out in an efficient and cost-effective manner.

In general, EEI/UNWMG support the approach taken by the NRC in its proposed rule. We agree that, as stated in the supplementary information accompanying the rule, the NWPA "reflects a judgment that the Commission is to concern itself primarily with issues of health and safety rather than the other kinds of issues that are ordinarily considered in the context of reviews under NEPA." Congress intended, through passage of NWPA, to amend substantively the requirements of NEPA as they apply to the high-level nuclear waste program. The NWPA legislative history is clear that Congress intended to limit the scope of the NEPA review for the high-level waste repository by excluding issues such as the need for the repository, its timing, alternatives to geologic disposal, and alternate sites and also to avoid NRC's duplication of the NEPA reviews carried out by DOE. The NRC's responsibility under NWPA is to address and resolve radiological safety issues in the repository licensing pursuant to the NRC's mandate under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, as amended. 5-1

Notwithstanding EEI/UNWMG's general support for the NRC's overall approach, we have a number of concerns that are delineated in an enclosure to this letter that we would urge the Commission to consider. As a general principle, we believe that regulations should be stated as clearly and unambiguously as possible so that all parties affected by the regulatory process (i.e., licensees, NRC staff and the public) will be able to understand better the intent and effect of the regulations and comport their actions accordingly. The comments in the enclosure are provided with that goal in mind.

We appreciate this opportunity to respond to the Commission's notice of proposed rulemaking. We would be pleased to respond to any questions or otherwise be of assistance to the Commission as it addresses this matter.

Sincerely yours,

John J. Kearney

JJK/mlf
Enclosure

Enclosure

EDISON ELECTRIC INSTITUTE
and
UTILITY NUCLEAR WASTE MANAGEMENT GROUP

Additional Comments on
Proposed Rule on NEPA Review Procedures for Geologic
Repositories for High-Level Waste (53 Fed. Reg. 16131)

EEI/UNWMG agree with the NRC that Congress, in passing the NWPA, substantively modified the requirements of NEPA as they apply to the high-level nuclear waste program. Although EEI/UNWMG support the general approach taken by the NRC in the proposed rule, we strongly urge the NRC to incorporate the following comments when it issues the final rule.

o Procedure to Determine the Practicability of EIS Adoption

Proposed section 51.109 establishes a mechanism to determine whether it is practicable for the NRC to adopt DOE's EIS. The proposal would have the NRC Staff present its position on the practicability of adoption in the licensing hearing. Any other party to the proceeding could then submit contentions arguing that adoption was not practicable, which contentions would then be decided by the presiding officer, i.e., the Atomic Safety and Licensing Board designated to the hearing proceeding. Our major concern is that these practicability issues, as contentions in the repository hearing, will inevitably interfere with the primary focus of the proceeding, which is to address issues affecting public health and safety. These practicability issues should be resolved by the Commission, outside the adjudicatory arena. There is no requirement that these issues be handled as part of the adjudicatory hearing process, either in NEPA, NWPA, NWPAA, the Atomic Energy Act, or the Energy Reorganization Act. To add another level of unnecessary administrative procedure would be inconsistent with the schedule constraints that Congress has imposed on the repository licensing process.

5-2

o Timing of Practicability Determination

Proposed section 51.109 contemplates that the NRC Staff would not present its position on whether it is practicable to adopt DOE's EIS until there is a proceeding. The proposed rule also contemplates that the final determination on adoption would not occur until after parties to the proceeding had been admitted. The statutory framework of the NWPA does not require that the adoption determination await the commencement of the adjudicatory hearing. Indeed, NRC will best be able to achieve the three-year timetable for issuing its final decision on the

5-3

issuance of a construction authorization, NWPA section 114(d), if the adoption determination is made prior to the hearing process (and outside the adjudicatory arena). It would be unreasonable to wait until parties have been admitted to the proceeding before learning whether NRC would have to prepare its own EIS. The NWPA schedule should allow adequate time for NRC to make its determination before the start of the hearing.

Under NWPA section 114(a), DOE must make the final EIS available at the same time as it recommends approval of the repository site to the President. The draft EIS will have been available well before that time. The President must then submit the recommendation to Congress (ref. NWPA (as amended) section 114(a)(2)(A)). A minimum of sixty days would then elapse before the recommendation becomes effective (ref. NWPA section 115(b)). And an additional period of time, not to exceed ninety days, would then occur before DOE submits the application to the NRC. Several more months would likely elapse before the parties to the proceeding have been admitted. Thus, from the time that DOE's draft EIS is formally transmitted to NRC until the adjudicatory proceeding gets underway, the NRC would probably have six months or more to decide whether, and to what extent, it is practicable to adopt the DOE EIS. 5.3

There is no justification to delay the decision pending the start of the adjudicatory hearing. Nor would NRC lose the ability to obtain public input on its determination by making that determination promptly. At the time that DOE issues its draft and final EISs, NRC can solicit comments from interested parties on the practicability of NRC's adoption of the DOE EIS. NRC would thus be able to provide the state and public participation generally contemplated by NWPA section 111(a)(6), and at the same time avoid needless delay and unnecessary complexity.

o Judicial Review

NWPA specifies the time period and manner in which challenges to DOE's implementation of NWPA must be filed. The NRC licensing process should not provide an independent avenue for a legal challenge with respect to the same issues. The NRC's evaluation of the preclusive effect of Section 119 of the NWPA comprehensively and appropriately addresses that issue. However, some statements in the supplementary information to the proposed rule could be read to imply that the NRC might allow its decision on adopting DOE's EIS to be stalled during the pendency of litigation on the EIS, or even during the 180 day period provided by the NWPA for filing legal challenges to DOE's issuance of the EIS. Such delay would make it difficult, if not impossible, for the NRC to satisfy the mandate established by the U.S. Congress for the NRC to complete the licensing of the repository within a three-year period. 5-4

Moreover, there is no reason for the NRC to delay its process. From a legal standpoint the NWPA imposes no obligation on the NRC to stay its licensing proceedings pending review of DOE's EIS. It does not even require the President or Congress to defer action on a Secretary's recommendation of site approval in the event of a legal challenge to the EIS. If the site designation is permitted to take effect, the Secretary is required to submit an application for construction authority to the NRC within 90 days. Again, there is no provision for a stay of the orderly process set forth in the NWPA in the event that the EIS becomes subject to litigation. From a practical standpoint the NRC itself has stated that ". . . a final judgment of radiological safety can only be made at the conclusion of the adjudicatory licensing process." The mere fact that the DOE EIS has not emerged from judicial scrutiny at any particular point in the process is no grounds for the NRC to halt that process pending final resolution of legal challenges to the DOE EIS. The hearing process itself will not entail "any irreversible and irretrievable commitment of resources" under NEPA so as to warrant a halt of the process. 5-4

The NRC should, therefore, add language to the final rule explicitly stating that the licensing proceeding, including the determination of practicability, need not await the outcome of any litigation as to the adequacy of DOE's EIS. Should a court subsequently rule that the EIS is deficient, the NRC can appropriately revisit its practicability determination or take such other actions as may be necessary.

o Satisfaction of NEPA Requirements

Congress, in enacting the NWPA and NWPAA, significantly modified what would have been the nature of DOE's and NRC's responsibilities under NEPA as they apply to the licensing of a high-level nuclear waste repository. NRC's health and safety responsibilities under the Atomic Energy Act remain unchanged. NWPA expressly provides that to the extent the NRC adopts the DOE EIS "no further consideration" by the NRC is required under NEPA. The NWPA unequivocally makes DOE the lead agency to satisfy NEPA requirements pertaining to the high-level waste repository. NRC correctly concludes that "[t]he Nuclear Waste Policy Act of 1982 reflects a judgment that the Commission is to concern itself primarily with issues of health and safety rather than the other kinds of issues that are ordinarily considered in the context or reviews under NEPA." The final rule and accompanying supplemental information should be modified to re-emphasize that the NRC's responsibility to address and resolve radiological safety issues in the licensing hearing is not to be burdened with continued analysis of and challenge on NEPA-related matters. 5-5

o Discipline of the Licensing Process

It is in the interest of the parties to the licensing proceeding (i.e., DOE, NRC and the public) for the NRC to adopt, consistent with its formal rules, appropriate protocols and management discipline in the licensing proceeding to ensure that issues are properly evaluated and a timely decision rendered. To provide necessary administrative controls over the licensing process for the NRC to meet the three-year licensing schedule, the NRC should modify Section 51.109 to provide a time period within which the NRC staff must present its position on the practicability of adopting the DOE EIS and the filing of any necessary supplemental information, for example, 90 days after publication of the EIS. In the event that the NRC fails to adopt our comment to remove the practicability determination from the adjudicatory hearing, the rule should include a similar provision with respect to the time by which contentions regarding the practicality of the DOE EIS must be filed, for example, the date on which initial contentions are due or 90 days after EIS issuance, whichever is later.

5-6

5-7

o Practicality of Adoption by NRC of the DOE EIS

As the NRC explained in its supplemental information to the proposed rule, "[t]he adoption of the statement does not necessarily mean that NRC would independently have arrived at the same conclusions on matters of fact or policy." (53 Fed. Reg. at 16142). Rather, the NRC recognizes that it should defer to DOE's judgments on matters not related to safety findings that the Commission must make under 10 CFR Part 60. It would be appropriate for that important concept to be embodied in the rule itself.

5-8

To eliminate any possible misunderstanding, the NRC should clarify in its final rule that the criteria to be used in evaluating the extent to which it is practicable for the NRC to adopt the DOE EIS are those provided in NEPA and subsequent judicial interpretations. The NRC should clarify that it intends to make its own NEPA-mandated findings, including an independent balancing of relevant factors, only to the extent that it does not adopt the DOE EIS (i.e., because of new information or new considerations). Such findings would apply only when the NRC itself must prepare an EIS or a supplemental EIS.

5-9

* * * * * *

Agency

EPA

Federal Activities

(53FR16731)

(6)

'88 AUG -4 P5:30

AUG 3 1988

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Mr. Samuel Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Attn: Docketing and Service Branch

Dear Mr. Chilk:

In accordance with Section 309 of the Clean Air Act, the U.S. Environmental Protection Agency (EPA) has reviewed the U.S. Nuclear Regulatory Commission's proposed rule for NEPA Review Procedures for Geologic Repositories for the High-level Waste (53 FR 16131). EPA believes that the proposed rule reflects the appropriate requirements under the Nuclear Waste Policy Act, as amended. We do not have any further comments to offer. 6-1

If you have any questions, please contact Dr. W. Alexander Williams (382-5909) of my staff.

Sincerely,

Richard E. Sanderson
Director
Office of Federal Activities

SIERRA CLUB

330 Pennsylvania Avenue, S.E., Washington, D.C. 20003 (202) 547-1141

August 2, 1988

Samuel Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Docketing and Sevice Branch

Re: Proposed changes to 10 CFR Parts 2, 51, and 60, NEPA Review Procedures for Geologic Repositories for High-Level Waste.

To Whom it May Concern,

This letter contains the comments of the Sierra Club on the Commission's proposal to change its procedural requirements and obligations in regard to the preparation of NEPA documentation in connection with the design, development, construction, and permitting and licensing of the nation's first geological repository for commercial and defense high-level radioactive waste.

The Sierra Club is a national conservation organization representing more than 450,000 members. We have been directly involved with the federal effort to institute a system for the storage and disposal of nuclear waste materials for over 15 years. We participated extensively in the legislative debates which led to the enactment of the Nuclear Waste Policy Act of 1982 (NWPA), and the subsequent amendments to that Act. We have also participated at various levels of the implementation of the Act, including our recent participation in the Commission's negotiated rulemaking on the subject of the Licensing Information Support System for a HLW repository.

After reviewing the Commission's proposed changes, we must express our concern that they amount, in total, to a radical abdication of the Commission's traditional and necessary responsibility to assure the safety of the public and the protection of the human environment in the process of determining the licensability of the nation's first HLW repository. We believe that this abdication is both unwise and contrary to Congressional intent, and that, if carried through as proposed, it will result in a severe loss of credibility for the Commission in its key role as the ultimate licensing authority for this unprecedented project. 7-1

We have also reviewed the letter of comment submitted to the Commission on this issue by the Environmental Defense Fund (dated 8/2/88), and we endorse and wish to be associated with the conclusions reached in the EDF letter, including each of the seven numbered specific criticisms made of the Commission proposal. 7-2

We urge the Commission to reconsider this effort to relieve itself of its NEPA obligations, to withdraw the proposed rulemaking, and to propose a more

modest set of procedural amendments which will conform the Commission's procedures as necessary to the dictates of the NWPA as amended, without overthrowing its responsibilities to accomplish a NEPA review of the full scope of DOE's proposed action and the impacts associated with it as a basis for the Commission's licensing review.

As the Federal agency with the responsibility to make the ultimate determination of the licensability of the facility proposed to be developed by the Department of Energy (DOE), the Commission is clearly responsible for framing the issues for which elaboration and decision is necessary to form an adequate basis on which to grant or reject DOE's application for a materials license (and by implication, for a construction authorization).

The drift of the Commission's proposal, unfortunately, runs in exactly the opposite direction. That is, under these changes, and under the dubious theory that the Congress has implicitly crowned DOE as "the lead agency" for all parts of the HLW repository development and licensing effort, the Commission would unilaterally charge DOE with the responsibility to frame the issues in advance of, and as a basis for, the Commission's own licensing proceeding. This includes an extraordinary invitation (53 FR 16141, "Submission of Environmental Information," proposal at 10 CFR 51.67), for DOE to present evidence and argument to the Commission as to the consequences of license denial. Although the Commission must certainly consider the consequences of license denial in making its final determination, and although DOE may very well provide its views and pertinent information to the Commission, it is hardly the proper role of the applicant agency to provide the analytical basis on which the Commission bases its consideration. Nor is it proper for the Commission to place exclusive reliance on an applicant's analysis of such issues. This is particularly true where Congress has limited the Commission's consideration of alternatives to the proposed action. 7-3

It would be extremely unfortunate if the Commission were to be diverted, in its decision making process, from its legally required duty to provide for the public health and safety and the protection of the environment <u>in specific regard to the proposed action</u>, and instead to implicitly embrace a decision process in which the real standard is not radiological safety at all, but rather whether, on the balance of evidence presented in an environmental document prepared entirely by the applicant, the permitting and licensing of the proposed action is somehow "better" than the <u>status quo ante</u>. 7-4

Although the Commission cloaks its proposed changes in a detailed and rather contorted reading of the legislative history of the NWPA, the actual bases for the proposal are reducible to three: the specific restrictions on the scope of the EIS, and particularly its discussion of alternatives, stipulated in the NWPA, Congress' general injunction to the Commission to adopt the DOE EIS "as far as practicable," and the Commission's <u>ad hoc</u> (and presumably) clairvoyant judgments about the course of an essentially unprecedented environmental review and licensing proceeding.

There is no question that Congress did specifically limit the consideration of alternatives in the DOE EIS. NWPA section 114(f) declares, essentially, that certain issues are outside the scope of Commission review, not because

they would not normally fall within the Commmission's jurisdiction, but because they have been decided by the Congress itself. These issues are 1) the need for a repository; 2) alternatives to deep geologic storage; 3) the timing of initial availability of the repository; and 4) alternatives to the Nevada site, if that site is recommended by DOE.

Unfortunately, beyond this most basic point, the Commission's tortured reading of Congressional intent has led it to propose a narrowing of its environmental review and protection responsibilities way out of line with common sense and the language of the Act. Congress' direction to adopt the DOE EIS "to the extent practicable" was clearly intended to avoid the unnecessary duplication of effort of preparing two entirely separate environmental statements on the same facility. By no reasonable reading can it be interpreted to relieve the Commission of its fundamental responsibility to pass on the environmental adequacy of DOE's proposed action. 7-5

The Commission's proposal ignores this fact, assumes in advance the adequacy of DOE's EIS, creates an arbitrary and unwise presumption in favor of adopting DOE's EIS, and raises unnecessary hurdles in the face of any party which seeks to challenge the adoption of part or all of the document.

Perhaps the most glaring defect in the proposed rule is the standard it erects for the presiding officer in making the determination of the practicability of adopting DOE's EIS (proposal at 10 CFR 51.109 (c)). Nowhere here is there any indication that the presiding officer may decline to adopt the EIS if it, or any part of it, is inadequate, incomplete, in error, or otherwise deficient. The presiding officer may not, under this proposal, decline to adopt the DOE EIS, even if it has been found legally insufficient, unless "the action proposed to be taken by the Commission differs" from the action proposed by DOE, and unless this difference "significantly impacts the human environment." 7-6

Aside from the problem of what is meant by a "difference" between the applicant's proposed action and that of the Commission, this standard seems to erect an impossibly high hurdle for rejecting DOE's EIS, and, concomitantly, drastically and unacceptably abdicates the Commission's authority and obligation to assure the protection of the public health, safety, and the environment in discharging its licensing responsibilities.

The Commission would be better off withdrawing this proposal and proposing a rule which reflects the changes in procedure necessary under the NWPA without giving away the basic authorities and obligations on which its licensing role is founded.

Sincerely,

Brooks B. Yeager
Washington Representative

Department of Energy
Washington, DC 20585

AUG 24 1988

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

Dear Sir:

The Department of Energy (Department) has reviewed the proposed amendment to 10 CFR Part 51, published on May 5, 1988, concerning Nuclear Regulatory Commission (NRC) review procedures for geologic repositories under the National Environmental Policy Act (NEPA) and the Nuclear Waste Policy Act (NWPA). With respect to most topics covered by this proposed rule, the Department is in agreement with NRC statements and interpretations of requirements under the NEPA and the NWPA. The Department appreciates the efforts made by the NRC to help clarify this area of the regulations.

In its review, the Department identified certain concerns with a number of aspects of the proposed rule. The Department's concerns focus on five areas: first, the NRC position on cooperating versus commenting agency status with respect to the Department's environmental impact statement (EIS) covering the geologic repository; second, the requirement that the Department supplement the final EIS to satisfy NRC obligations under NEPA; third, the indication that multiple EISs may be necessary; fourth, potential confusion in the interpretation of NRC's ability to take action on a license application during litigation on the Department's EIS; and fifth, preservation of the distinction that a construction authorization is not a license under the Atomic Energy Act. Our specific comments are included in the enclosure to this letter.

We appreciate the opportunity to comment on these proposed revisions. Please feel free to contact Ms. Linda Desell (586-1464) of my staff or Mr. Steven Frank (586-1979) of the Office of NEPA Project Assistance about any questions.

Sincerely,

Charles E. Kay

Charles E. Kay, Acting Director
Office of Civilian Radioactive
Waste Management

Enclosure

DS10

ENCLOSURE
DEPARTMENT OF ENERGY
COMMENTS ON PART 51

1. COOPERATING AGENCY

The Department of Energy (Department or DOE) believes that the NRC can maintain its independent role and most effectively contribute to the process under the National Environmental Policy Act (NEPA) by becoming a cooperating agency. DOE recognizes that the NRC has an important independent review and licensing authority in the siting of a repository, and that this independence must be maintained. DOE nevertheless believes that it is appropriate under section 1501.6 of the Council on Environmental Quality (CEQ) regulations to suggest that the NRC, which has licensing authority pursuant to the Atomic Energy Act (AEA) and Nuclear Waste Policy Act (NWPA), become a cooperating agency in the preparation of the Department's repository EIS. The cooperating role described in section 1501.6(b) is not inconsistent with the NRC's independent authority, and the clarification in the "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" (46 FR 18026) recognizes the role of licensor and licensee and provides for such independence with respect to scope, level of detail, and adequacy in meeting the needs of the cooperating agency with jurisdiction by law. 8-1

2. SUPPLEMENTAL EIS

DOE is concerned with the proposed requirement in the rule to have DOE "supplement" its final EIS (FEIS) in order to satisfy NRC's NEPA obligations. Any recommendation to the President made by DOE under section 114 of the NWPA is a major Federal action and such recommendation is to be accompanied by an EIS. If, following completion of the EIS, DOE decides to revise the recommendation by making a substantial change in the proposed action that is relevant to environmental concerns, or if significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts becomes available, then DOE would prepare any requisite supplement in accordance with applicable CEQ regulations implementing NEPA. 8.2

However, subsequent to the President's decision, the NRC has a separate responsibility under NEPA relative to its decision whether to grant or deny the Department's application for a license to receive and emplace high-level waste. In developing its EIS the NRC is to adopt, to the maximum extent practicable, the DOE EIS submitted as part of the Department's recommendation to the President. DOE believes that it is inappropriate and contrary to the CEQ scheme of

agency assignment of responsibilities for DOE to undertake the supplementation of its completed EIS in order to satisfy NRC's separate NEPA responsibilities. DOE also believes that, just as it is appropriate for NRC to be a cooperating agency in the preparation of DOE's EIS, it would be equally appropriate for DOE to be a cooperating agency in the preparation of any NRC EIS or any later supplements required for the NRC to meet its NEPA obligations. 8-2

3. MULTIPLE EISs

In the preamble, at 53 FR 16132, the NRC indicates that multiple EISs may be necessary in considering the license application from DOE involving high-level waste disposal. The DOE does not agree that multiple EISs will be needed because DOE will scope the EIS, with public and other agency participation, to assure that all reasonable alternatives relative to the siting, construction, operation and decommissioning of the proposed repository will be contained in the EIS. NRC's participation as a cooperating agency would greatly facilitate this objective. It is the Department's position that the NEPA, the NWPA and the CEQ regulations call for a single EIS and the Department does not believe that any multiple EISs are necessary. 8-3

4. JUDICIAL REVIEW

In the preamble discussion, at 53 FR 16142, the NRC states that "...no action will be taken by the Commission until necessary documents have been filed... with the Environmental Protection Agency. NRC will not take action concerning the proposal which would have an adverse environmental impact until a record of decision is issued." The preamble further states, at 53 FR 16144, that "Because the EIS must conform to statutory requirements, and because its completeness would have been subject to challenge in court prior to filing with the NRC, a completeness determination by NRC at the time of docketing is unnecessary..." One reading of these statements is that the NRC is proposing to suspend work on the license application until the entire judicial review process is complete. This would be decidedly inefficient, and would potentially cause major delays without providing additional environmental protection beyond the normal process. It would be consistent with normal operating procedures and far preferable from a programmatic perspective for the NRC to make a prima facie decision that, absent a reversal by the Court of Appeals, the EIS is judged to be adequate, and to process the license application. There is no need for the NRC's acceptance review of the Department's EIS to be on the licensing critical path. Clarification on NRC processing plans and expectations would be useful. 8-4

5. CONSTRUCTION AUTHORIZATION NOT A LICENSE

Footnote 1 - at 53 FR 16134. DOE recognizes the statutory language of the NWPA reference to a construction authorization and NRC's own interpretation in the text of this document that a construction authorization under the NWPA is not a license under the AEA. DOE affirms this interpretation which is reflected in the AEA, and opposes any erosion of this distinction by the NRC. Historically, the NRC and its predecessor, the AEC, has affirmed that a construction authorization, unlike a construction permit, is not a license under the AEA. DOE will continue to interpret the term "construction authorization" accordingly. 8-5

6. Sections 51.67(c), 51.109(c), and 60.24(c) should be amended to add a qualifier to reflect that a supplement may be required if DOE makes a substantial change, not previously considered in its EIS, that is relevant to environmental concerns, etc. 8-6

7. Proposed section 51.67(d) requires the Department to inform the NRC of the status of any legal action taken against the repository EIS and to submit periodic updates. This requirement seems unnecessary since NRC will already have this information available to it through the normal contact of its own General Counsel with the Department of Justice. Further, such information is normally readily available in weekly trade publications. This requirement should be deleted. 8-7

8. The Department also notes that section 113 of the NWPA was inadvertently misquoted at the bottom of column 1, 53 FR 16135. The phrase "to the maximum extent practicable" was omitted in describing the manner in which DOE must conduct site characterization to minimize significant adverse environmental effects. 8-8

9. At 53 FR 16139, Column 3, NRC points out that the DOE action is the recommendation to the President of the Yucca Mountain site for repository development. As mandated by NWPA section 114(f), and also expressed in CEQ regulations 10 CFR section 1502.5, this recommendation must include an FEIS prepared by DOE. 8-9

NWPA Section 114(f) also mandates that NRC shall (to the extent practicable) adopt this EIS in connection with the issuance of a construction authorization for the repository. Thus, the use of the same EIS for the two agency actions (to the extent practicable) is the clear intent of the law. The DOE concurs in this position.

10. The NRC concluded, at 53 FR 16136 that the NWPA "provides that adoption of the EIS shall be deemed to satisfy the NRC's NEPA responsibilities 'and that no further consideration shall be required.'" NRC also notes that this provision "appears to counsel against the wide-ranging independent examination of environmental concerns that is customary in NRC licensing proceedings." This is consistent with the Department's reading of the NWPA. Specifically, this concept is included in section 51.67 of the proposed rules, which state that the FEIS shall be submitted in lieu of an environmental report. 8-10

11. At 53 FR 16136 the NRC states that, if the DOE EIS is judged to be adequate, "further litigation would be precluded under the doctrine of collateral estoppel." Also, the NRC states that "if an issue bearing upon the adequacy of the EIS could have been raised in a timely manner, but was not, the deadline for commencing action set out in section 119 operates to bar a challenge at a later date in NRC licensing proceedings." The DOE agrees with this interpretation. 8-11

12. At 53 FR 16138, the NRC states the position that "The approach being taken by the Commission...is that the NWPA and the principle of res judicata obviate the need for an entirely independent adjudication of the adequacy of the EIS by this Agency." This is elaborated upon at 53 FR 16139. The DOE agrees with this interpretation. 8-12

13. The Department agrees with NRC that adoption of the DOE EIS should not compromise the NRC's independent responsibilities under the Atomic Energy Act. 8-13

14. The Department is in agreement with the NRC with respect to several statements concerning the content of the EIS and the role of NRC:

    "that the Commission's role should focus upon radiological safety, with an independent review only if there is significant and substantial new information or new consideration...;" (53 FR 16137)

    "that the EIS must address the environmental impacts of construction and those of performance..." (53 FR 16141); and

    In addition, NRC's requirement in the proposed new Section 51.67(b) that the FEIS must "include, among the alternatives under consideration, denial of a license or construction authorization" by NRC follows directly from CEQ Section 1502.14(d), which states "Include the alternative of no 8-14

action." The Department concurs with this requirement and has already planned to include the no action alternative within the scope of the EIS. 8-14

(9)

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 JACKSON PLACE, NW
WASHINGTON, DC 20503

September 20, 1988

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

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 (NWPA). 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 NWPA 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 NWPA 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...."

D S10

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. 9-1

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. 9-2

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. 9-3

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. 9-3

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
** Nevada Nuclear Waste Task Force	
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 Negotator-selected site.	The final rule provides for NEPA review with respect to a Negotiator-selected site to follow customary practice.
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.	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.
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.	A prior judicial decision is not a prerequisite to NRC adoption of the DOE EIS.
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.	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).
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.	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.
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.	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.
** State of Nevada (Nuclear Waste Project Office)	
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.	Under NWPA, Congress intends for NRC to adopt the EIS in the absence of substantial new information or new considerations.
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.	The NRC view is that NWPA was intended to make a substantive change in the law.
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.	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.

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 now 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
3 14	It is wrong to characterize the change in DOE's statutory responsibilities (under the NWPAA) 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. 55 FR 16140.
2 15	Although a number of considerations suggested in the State's petition for rulemaking have been mooted by NWPAA 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 signficant 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.
xx	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 NWPAA 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 responsibilitites 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 NWPA language intended to expedite NRC review of the license application does not limit the NEPA issues NRC can address. NWPA 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 NWPA cited by SRIC.)
4 2 NWPA 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 adquately 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 - Comment 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 in 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 articulare 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	
E 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.
E 2 Issues pertaining to the practicability of adoption of the DOE EIS should be resolved ouside 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.
E 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.
E 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.
E 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.
E 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, implies at least a tentative staff judgment. It provides appropriately for supplementation, then or later, if deemed necessary.
E 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.
E 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.
E 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.

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

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 Interest

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 § 113 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 19, 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

shafts needed to construct the repository shall be assuemd).

(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)(18) and renumber later sections:

(18) 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. Stotement 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 191.14(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 191, March 21, 1985". NRC staff, however, found that DOE's site selection guidelines, 10 CFR 960.3-1-5, 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 Agendo of Federal Regulations*, Current and Projected Rulemaking—Elimination of Inconsistences between NRC Regulations and EPA standards—OMB Regulation Identifier Number 3150-AC03; 50 FR 44992, 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,

ongoing rulemaking which would amend Part 51 to conform to provisions of the Nuclear Waste Policy Act concerning environmental review in HLW geologic repository licensing procedures (see *Unified Agenda of Federal Regulations*, Current and Projected Rulemaking—Part 51 Conforming Amendments—OMB Regulation Identifier Number 3150-AC04, 50 FR 44992, October 28, 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. Chilk,

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	:NMSS	:DEDO	:EDO	:	:
NAME	:RBrowning	:RBernero	:HThompson	:VStello	:	:
DATE	:4/26/89	:4/ /89	:4/27/89	:4/27/89	:	:

OFC	:R&FC/OGC	:D/R&FC/OGC	:DGC/OGC	:OGC	:	:
NAME	:JWolf	:STreby	:MMalsch	:WParler	:	:
DATE	:4/27/89	:4/ /89	:4/ /89	:4/ /89	:	: