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MEMORANDUM TO: Robert G. Ryan
Director, Office of State Programs

FROM: Howard K. Shapar
Executive Legal Director

SUBJECT: REPORT TO THE CONGRESS ON STATE PARTICIPATION

We do not consider the draft report on State participation in the siting, licensing and development of nuclear waste facilities to be appropriate for release without revision.

1. Our primary concern relates to those portions of the report which deal with the issue of State "concurrence." The discussion and conclusions fail to identify a recommended mechanism that would be used to resolve, in the national interest, a State's nonconcurrence in the NRC decision authorizing construction. In the absence of such a defined mechanism, there is no basis for the Commission and the Congress to evaluate whether or not State "concurrence" would be consistent with the national interest or would permit any desired accommodation between State and national interests.

Moreover, the concept of a "phased concurrence process" is inadequately developed. The points at which concurrence is to be sought are not identified. The effect that failure of DOE and a host State to arrive at a mutually acceptable concurrence process would have is not spelled out; nor is there a clear statement of the effect that a State's non-concurrence is expected to have under such an agreed process.

Consideration needs to be given to the possibility that the host States may not make timely decisions, especially if multiple concurrence points are to be provided. And further, if the concurrence process is to be tied to matters other than NRC licensing decisions, it is likely to require DOE to become involved in what may amount to a separate State-directed administrative procedure, complete with adjudicatory hearings. The possibility of undersirable duplication of effort, as well as delay, should be assessed.

The "arbitration panel" suggestion is not without difficulty. If the panel is to be a Federal agency, acting in accordance with a statutory mandate, it would seem to be indistinguishable from the Commission itself. But even if some new or special body were to be empowered to resolve disputes, there should be a recommendation with respect to its composition and mode of appointment, the standards that it would use in arriving at a decision, and the scope and standards of judicial review, if any.

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2. The discussion of Commission-administered grants is incomplete. Under section 14(b) of P.L. 95-601, we are to include in this report "detailed consideration of a program to provide grants ... to any State ... for the purpose of conducting an independent State review of any proposal to develop a ... facility ... within such State." We believe that such "detailed consideration" should extend to a discussion of the activities that might be supported by the grants. Should the State review be limited to evaluations on paper, or should there be support of independent laboratory and field investigations? Would it be desirable to have a statutory ceiling on the dollar amount of the grants, or at least to develop in the report some assessment of the likely magnitude of Federal funding? Would an "independent State review" extend to an administrative proceeding (as opposed to a technical and scientific appraisal) -- if, indeed, such concurrent State administrative proceedings should be pursued at all?

3. The discussion and recommendation concerning transportation suggests that the entire transportation field is a jurisdictional morass. While we would be the last to state that all uncertainties in this area have been resolved, the situation is not quite so pessimistic as the report would have it. NRC has completed one GEIS on transportation of radioactive materials and has another in preparation, and DOT is beginning a rulemaking proceeding on routing and preemption. We believe that NRC already knows enough about the division of responsibilities in the transportation area so as to make the recommendation that NRC devote effort to "determine the current state of affairs ..." unnecessary.

4. We also enclose several more specific comments.

Howard K. Shapar
Executive Legal Director

Supplementary ELD Comments

p. 4. The footnote misquotes Section 202 of the Energy Reorganization Act. ("... which are not used for, or are part of ...")

p. 7. A word transposition is needed: "NRC will either grant or deny an authorization for repository construction and, later, a license allowing repository operation."

p. 10. General Observation no. 6 should be revised to make it clear that the "general consensus" was that of State representatives alone.

p. 17. The suggestion that DOE might publish "comprehensive site selection criteria" needs further explanation. Part of NRC's current activity is the development of site suitability criteria (as part of proposed 10 CFR Part 60). These criteria will address geologic, hydrologic, and other concerns. NRC can, of course, involve the States extensively in their formulation. It is not at all evident that DOE will need additional "site selection criteria", nor is it clear how such criteria would differ from the contents of the NRC regulations. The discussion should either address these points or omit the suggestion as to publication of criteria by DOE.

p. 18. The sense of the section on "The NRC Process and Regulatory Development" could be clarified by revising the first sentence to read: "This section addresses State participation in the NRC regulatory development and licensing of a particular nuclear waste facility."

p. 21. Is the repetitiveness of the discussion on pages 21-22 (which is essentially the same as that on pages 2-3) desirable? In any event, the statement that "There are other arguments for Federal supremacy" should be changed to read as follows: "There are other reasons to emphasize the Federal role in decisionmaking." Federal Supremacy is the law of the land (under the Constitution): it is not a matter that is the subject of argument.

p. 22. We take strong exception to the comment that national interests "can best be achieved by avoiding the use of Federal preemptive authority." We regard the inclusion of a mechanism for resolving disputes in a manner that accomodates national concern to be essential in any practicable scheme; the question, as we see it, is not whether "Federal preemptive authority" should be used, but rather under what circumstances, and by what procedures, it should be exercised.

p. 23. Our concern with the effect of "non-concurrence at any preliminary decision point" is described in the covering memorandum.

p. 23. The discussion of the question, "Are existing provisions for 'concurrence' adequate?" indicates the limited nature of judicial review and declares that this may be inadequate from the State perspective. The argument could be developed further by adding a sentence to this effect: "To accommodate the concerns of the States, there should be a forum in which the policy determinations of the Commission would be subject to challenge."

p. 23. Under the Commission's rules of practice (the "immediate effectiveness" rule), the State concurrence procedure might not serve its intended purpose if it were to be triggered at the time the Commission takes "final" action. The merits of the rule are being examined in other contexts, and perhaps ought not to be addressed here. For the present, we would recommend simply deleting the word "final" from the discussion, deferring judgment with respect to whether an initial decision or a final decision would be the appropriate point.

pp. 24-25. In the covering memorandum, we have indicated our disagreement with the considerations discussed here (commencing: "A concurrence process might include several options," and continuing to the start of the discussion of grant programs). In addition to the substantive concerns that we identified there, we take exception to the characterization of "normal judicial channels" as a means for reassessment of licensing decisions; the functions of courts are more narrowly circumscribed. Also, we think it inappropriate to let the discussion dangle with the unresolved question whether there should be a means for resolving disputes - both because we consider that to be essential and because the earlier parts of the discussion clearly point in that direction.

If the discussion referred to above is not deleted in its entirety, we would suggest that it be replaced with a single short paragraph such as this:

> "The objective of a concurrence process would be to resolve differences among DOE, NRC, the host State(s) and possibly other impacted States. Concurrence is especially desirable at the point of NRC authorization to construct a repository. At that time, the plans of DOE will be sufficiently developed for detailed review. Yet it would be early enough that a decision to abandon the site might still be made without the economic losses that would result (from "sunk" constuction costs) if it were made later. Thereafter, opportunities for reassessment of the decision to go forward would be provided by the NRC administrative procedures, with the actions of NRC being subject to judicial review."

pp. 25-26. See the covering memorandum for our views with respect to the discussion of grants programs.

p. 27. See the covering memorandum for our views with regard to the discussion of Transportation.

pp. 28-33. Many of the concerns identified above relate to portions of the Findings and Recommendations as well, and appropriate revisions should accordingly be made. Certain technical changes are needed in the discussion of Atomic Safety and Licensing Boards. An ASLB would "preside at an adjudicatory proceeding on the licensing" of a proposed repository [instead of conduct a "review of" such a repository]; moreover, it is a Board, not a "panel" that would preside in a particular proceeding.

We make the further suggestion that this concluding section of the report address only the principal policy-related issues requiring consideration by the Commission and the Congress.