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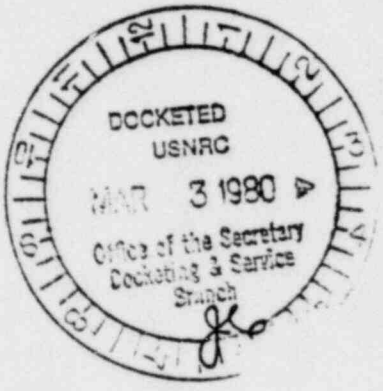

March 3, 1980

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

Attention: Docketing and Service Branch

Re: Disposal of High-Level Radioactive Wastes in Geologic Repositories; Proposed Licensing Procedures
10 CFR Parts 2, 19, 20, 21, 30, 40, 51, 60, 70
44 F.R. 70408 (December 6, 1979)

Dear Sir:

In response to the Commission's request for comments on its proposed procedural rule for licensing of disposal of high-level radioactive wastes in geologic repositories, we are pleased to submit the following comments on behalf of the Utility Waste Management Group (UWMG)* and the Edison Electric Institute (EEI).

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*/ Arizona Public Service Company; Boston Edison Company; Commonwealth Edison Company; Consolidated Edison Company, Inc.; Department of Water & Power, City of Los Angeles; Duke Power Company; Florida Power & Light Company; Georgia Power Company; Houston Lighting & Power Company; Illinois Power Company; Iowa Electric Light & Power Company; Long Island Lighting Company; Nebraska Public Power District; Northeast Utilities Service Company; Pacific Gas & Electric Company; Portland General Electric Company; Power Authority of the State of New York; Sacramento Municipal Utility District; Virginia Electric & Power Company; Yankee Atomic Electric Company.

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The Commission's proposed rule supersedes the proposed General Statement of Policy it had published on November 17, 1978 (43 F.R. 53869-72). In the UWMG's January 16, 1979, comments we pointed out that the Commission has statutory flexibility to fashion specific procedures for the licensing of repositories tailored to the particular activities and hazards involved; and we stressed that the Commission has the obligation, as well as the opportunity, to develop procedures which assure that decisions relating to the Federal waste management program are reached in timely fashion in the appropriate forum without duplicative and unnecessary environmental reviews. We indicated that there was a great deal in the procedures with which we agreed, but that the proposed policy did not seem to take into account fully that NRC licensing was only one aspect of an overall Federal program. We were concerned that the proposed licensing approach did not appropriately reflect the basic importance of the steps that the Department of Energy (DOE) will be taking nor did it reflect an appropriate allocation of responsibilities and decision-making between the two agencies.

Now that the Commission has proposed its more detailed licensing procedures, there continues to be a great deal in the Commission's approach with which we agree. Moreover, we heartily endorse the change in the Commission's approach which would eliminate the formal step of "provisional construction authorization" and permit site characterization work (including work "at depth") to be performed in advance of the filing of an application.*

However, some of the concerns we have previously expressed persist, and some new questions have arisen in light of the detailed requirements that first appear in the proposed rule.

The views and recommendations of UWMG and EEI on all of these matters are set forth below.

Duplicative Review of DOE's Programmatic Decisions

For reasons that were set forth at some length in the UWMG's January 16, 1979, comments we urged that programmatic decisions

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*/ As set forth later in these comments, we do not agree that such site characterization work should be mandated at all alternative sites. (Pages 4-5, infra.) In addition, we believe that the scope of the permitted shaft work should be expanded to include such work as DOE deems necessary or desirable. (Pages 5-6, infra.)

reached by DOE in accordance with NEPA should not be subject to unnecessary duplicative review in a subsequent licensing proceeding.* For example, we recommended that the Commission's policy and regulations should assure that its licensing proceedings not reexamine DOE's programmatic decisions on the objectives, structure and timing of the overall DOE program for the management of solidified high level wastes or spent fuel.

The Commission appears to defer acting on the UWMG's recommdendation by stating that the proposed rule does not explicitly address the NEPA responsibilities of the Commission regarding matters within the scope of DOE's generic environmental impact statement on the management of commercially generated wastes (the "GEIS"). 44 F.R. 70408. The Commission indicates that the possibility of adopting DOE's GEIS may be considered at an appropriate time. Id.

We do not quarrel with the notion that the Commission can defer some aspects of consideration of the impact of the GEIS on the Commission's program until the final GEIS is issued.** But in our view, the Commission's proposed rule fails to reflect appropriate consideration of the deference that should be given to DOE's programmatic decisions -- regardless of the precise decisions reached by DOE on the basis of the GEIS. Specifically, we believe that the Commission should not dictate either in the proposed rule or in the accompanying statement of considerations the number of alternative sites or media that DOE should explore. As the Commission is well aware, in his Message to Congress of February 12, 1980, the President, pending final decisions under NEPA, adopted an interim planning strategy under which DOE will investigate a number of potential repository sites in a variety of different geologic environments with diverse rock types. When four to five sites have been evaluated, one or more will be selected for further development as a licensed full-scale repository. Following completion of the GEIS, the President will reexamine this interim strategy and decide whether any changes need to be made. DOE will also prepare by 1981 and update biannually a National Plan for

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*/ Our comments set forth the detailed legal basis for avoidance of duplicative reconsideration of programmatic decisions citing, inter alia, Scientists Institute for Public Information v. AEC, 481 F.2d 1079 (D.C. Cir. 1973); Energy Research and Development Administration, et al., (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 73 (1976), and the then recently adopted CEQ regulations (40 CFR §§ 1502.4, 1502.20). To avoid repetition of that discussion, we simply incorporate it by reference.

** DOE has indicated that the final GEIS may be issued this fall.

Nuclear Waste Management. Both the interim strategy and any changes thereto will, of course, be subject to Congressional review processes.

DOE's ultimate determination -- subject to the foregoing Presidential and Congressional reviews -- as to the number of sites and number of media it will investigate prior to selection of the first repository site "are the very paradigm" of those entrusted to DOE under its authority to manage the Nation's defense and commercial radioactive wastes. The Commission should avoid directly or indirectly appearing to dictate the minimum number of sites and media that DOE will investigate -- otherwise it will improperly place itself "in the position of scrutinizing afresh" the judgments on program development made by the agency to which such judgments were primarily confided.*

In discussing the proposed rule, the Commission states that it anticipates that DOE will characterize a minimum of three sites representing a minimum of two geologic media and that it fully expects DOE to submit a wider range of alternatives than the minimum suggested. 44 F.R. 70411. Although at this time the Commission's expectations appear to be fully consistent with DOE's program, this does not remedy the basic flaw in the Commission's approach. The Commission's expectations simply have no place as part of the regulatory scheme. The scope and timing of DOE's consideration of alternative sites and media may change because of any number of policy considerations; such programmatic developments should not be impeded by a regulatory requirement that improperly deals with programmatic decisions.

Scope of Information on Alternative Sites

In addition to our disagreement with the possibility that the Commission may seek to dictate the number of sites and media to be investigated by DOE, we also disagree with the Commission's indication that exploration "at depth" will be necessary at the alternative sites. 44 F.R. 70409.

Until the technical requirements of Part 60 are developed, it is highly premature to judge that exploration "at depth" will be needed to satisfy such requirements.

Even when the requirements are known, however, the Commission's regulations should not prejudge or dictate how DOE should obtain the necessary information. The regulations should describe the type of information required, and allow DOE to determine how it can most effectively comply. Surely if DOE could develop the required information from existing record-

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*/ See Clinch River, supra, 4 NRC at 83.

or from data available at an adjacent site or elsewhere within the region, the Commission should not mandate investigations "at depth" for their own sake.

We should emphasize that we concur fully in the thrust of the Commission's proposed rules that would permit site characterization work (including excavation of exploratory shafts and limited subsurface laterial excavations and borings) prior to the filing of an application and the obtaining of construction authority. We agree that the obtaining of information "at depth" with respect to the site for which a license is sought may be important prior to a formal licensing decision, and we do not believe there is any countervailing significant consideration that should impede DOE's ability to obtain such information before a formal licensing proceeding is held. However, we seriously doubt that such information is necessary for purposes of a comparison of alternative sites,* and we believe that the Commission should not require that it be obtained.

It is possible that the Commission seeks to require DOE to perform work "at depth" at alternative sites in order to avoid the appearance of a premature commitment by DOE if it sinks a shaft at only a single site. 44 F.R. 70410. We believe such concern is unwarranted. DOE is entrusted with important responsibilities and is subject to a multiplicity of reviews, including those by Congress. There is no reason to expect that it will not carry on its site selection activities properly. It should not be subjected to arbitrary delays and expenditures for work that may not be required to characterize a particular site.

In this connection, we also believe that the regulation should provide that, as part of authorized site characterization work, the permitted "exploratory shaft" can include shaft work to the extent deemed necessary or desirable by DOE. If, for example, at a particular site, DOE determines that a large

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*/ In reactor licensing, the Commission has explicitly recognized that it is not necessary for purposes of site comparison that the applicant develop as much information concerning alternative sites as it has developed for the proposed site. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 529 (1977). The Commission pointed out that requiring such intensive analysis of alternative sites would involve unconscionable costs which should not be imposed in the absence of a mechanism that "would permit banking of any sites which might be previously approved." Id. Since such "banking" mechanism is equally unavailable for repository sites, the foregoing argument is similarly applicable to repository licensing.

exploratory shaft or expanded work associated with the shaft (work comparable in magnitude to a main shaft) would obviate the time and expense later required to expand or seal the shaft, the regulation should enable DOE to take what it considers to be the most effective action.

Standard for Commission's Action Under NEPA

The proposed regulation states that the Commission may authorize construction if it determines, as to environmental matters, "That, after weighing the environmental, economic, technical and other benefits and considering reasonable alternatives, the action called for is issuance of the construction authorization." (Proposed § 60.31(c)) In the Supplementary Information, the Commission indicates that it will authorize construction if it "finds after considering reasonable alternatives that the benefits of the proposal exceed the costs under NEPA. . . ." 44 F.R. 70411.

Although these iterations are similar to the approach employed in the issuance of other licenses by the Commission, in our view they are not properly applicable to the unique circumstances relevant to repository licensing.

First, we believe that a specific licensing proceeding is not the appropriate forum to compare the benefits of a repository to its costs. In our view, such overall balancing, if performed at all for regulatory purposes, should be done generically by the Commission as an amendment to the regulations after it adopts the substantive requirements applicable to repository licensing. We take this position because we believe that such balancing involves essentially policy judgments which the Commission would be better able to make than a licensing board and that relegating such decision to a licensing proceeding could unnecessarily complicate and protract such proceeding. In the case of all repositories the benefits will be the same, i.e., the fulfilling of the Federal Government's responsibility for the management of the Nation's defense and commercial wastes. Such benefits are unquantifiable, and certainly not measurable in terms which can be balanced simply against costs in a proceeding involving a single repository. The costs and impacts of a repository which satisfies the Commission's forthcoming substantive requirements -- otherwise it would not be licensed -- can be generically bounded by the Commission. Thus, there is no reason why the Commission should not reach the decision generically, instead of subjecting a specific licensing proceeding to the potential delays and complexities associated

with adjudicatory determinations of a basic policy question.*

This does not mean that the specific environmental costs or impacts of particular sites, designs or methods of operation could not be considered in the licensing proceeding. Such information would be used in evaluating whether improvements to minimize specific environmental impacts should be required as a license condition, and would also be used in comparing sites to determine that an alternative under consideration is not obviously superior. But such information would not be used for an overall balancing of benefits versus costs in an inappropriate forum.

Second, the regulation should make clear that only alternative sites proposed by DOE would be compared. For reasons discussed above, the scope and timing of DOE's investigation of alternative sites and media are basic programmatic decisions which should not be reexamined in the licensing process. Such decisions could be utterly frustrated and the licensing process subjected to extraordinary delays, if determined opponents were permitted to engage in endless debate concerning the unlimited number of sites throughout the country which might ultimately also be proven suitable for a repository.

Similarly the regulation should make clear that there would be considered only repository-related technology** would be reasonably available by the time the repository is expected to be operational.*** Proceedings could be unnecessarily protracted if they were permitted to encompass discussion of future technology not available for application in the scheduled time frame for implementation of the repository program. If the technology proposed by DOE satisfies the Commission's

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*/ If, notwithstanding our recommendation, the Commission determines that the overall balancing should be relegated to the licensing proceeding, the regulations should be modified to make clear how the benefits of the repository are to be measured and to provide explicit guidance to licensing boards as to how the balancing is to be performed.

**/ Our comments presuppose that disposal methodologies other than repositories would not be considered in a proceeding under Part 60. The Commission indicated it will consider alternative technologies later (44 F.R. 70411), but obviously any such consideration should be in a generic proceeding and not within the framework of a proceeding involving a specific repository license application.

***/ In other words, the proceeding should not engage in crystal-ball speculation concerning future waste forms, packaging, repository designs, engineered barriers, etc.

substantive requirements, it should only be compared to other available repository technology and needless speculation should be avoided concerning the benefits of improvements that will not become available until the distant future.

Information To Be Included in an Application

As in the case of reactor licensing, the proposed regulation contemplates that a construction authorization will be issued prior to construction and that an operating license will be issued prior to operation of the repository. The regulations applicable to construction permits for reactors recognize that to make the decisions pertinent to authorizing construction it is not necessary to have available final information concerning all aspects of facility design, construction and operation. Thus the regulations permit the applicant to file an application at the construction permit stage (the preliminary safety analysis report) which contains "preliminary" information on such subjects as design of the facility, analysis and evaluation of the facility's design and performance, plans for the applicant's organization, training of personnel and conduct of operations, and plans for coping with emergencies. 10 CFR § 50.34(a). The regulations then require final such information to be filed in the application for an operating license (the final safety analysis report). 10 CFR § 50.34(b).

The proposed repository regulation concerning the contents of the application for a construction authorization, however, does not use the adjective "preliminary" in describing any of the information to be submitted. (Proposed § 60.21(b)). Thus, it appears that prior to the issuance of a construction authorization "final" information must be submitted even with respect to such subjects as design of the facility, the quality assurance program for operations, plans for coping with emergencies, plans for decommissioning, etc. The only concession that some information might properly be less than final appears in another section which states, somewhat ambiguously, that the application "shall be as complete as possible in the light of information that is reasonably available at the time of submission." (Proposed § 60.24(a))

We can appreciate that the Commission would prefer to reach its judgments, even at the construction stage, on the basis of final and complete information. However, it should be recognized that until construction is authorized (including the approval of specific design criteria and design bases) refinement of design can be a wasteful and needless exercise, and that many aspects of design and operation can be more suitably

determined during construction than prior thereto. We therefore suggest that the Commission modify § 60.21(b) to identify those items of technical information which can properly be submitted in preliminary form without affecting the Commission's ability to reach an appropriate decision on construction authorization.

Respectfullly submitted,

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