

NUCLEAR REGULATORY COMMISSION

ORIGINAL

In the Matter of:

DISCUSSION OF SECY-80-474 - FINAL RULE
10CFR 60 - DISPOSAL OF HIGH LEVEL RADIOACTIVE
WASTE IN GEOLOGIC REPOSITORIES - LICENSING PROCEDURES

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DISCUSSION OF SECY-80-474 - FINAL RULE
10 CFR 60 - DISPOSAL OF HIGH LEVEL RADIOACTIVE
WASTE IN GEOLOGIC REPOSITORIES - LICENSING PROCEDURES

Room 1130,
1717 H Street Northwest,
Washington, D.C.,

Thursday, December 11, 1980

The meeting convened at 10:35 a.m., pursuant to
notice.

Present:

JOHN AHEARNE, Chairman.
JOSEPH HENDRIE, Commissioner.
VICTOR GILINSKY, Commissioner.

Present for the NRC Staff:

W. Dircks
J. Martin
J. Davis
G. Cunningham
P. Camelo

1 ALSO PRESENT:

2 Samuel Chilk, Secretary of the Commission.

3 Leonard Bickwit, Office of the General Counsel.

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P R O C E E D I N G S

CHAIRMAN AHEARNE: The meeting this morning is a series of meetings which the Commission will be holding every two weeks until we get this final rule out, in the hope that the record at least will clarify some of the remaining issues. So we have before us three papers which I would hope we can discuss in sequence.

First is the 474C which is a paper that came out December 9th, which is a supplement to the final rule, making some changes.

And the second is a paper unlabeled, which I imagine will be 474D, which is a supplement to the 474C, and then the third is a memo from the General Counsel regarding this final rule. And I would hope that we can talk to each of those in turn.

So, Bill, since the first two come from the Staff, would you like to summarize what they are and what the issues are?

MR. DIRCKS: I'll let Jack take this 474C item, and then if you -- could I add before he begins, a couple of more recent developments.

CHAIRMAN AHEARNE: Sure.

MR. DIRCKS: Last night we received a call from the Office of the Assistant Secretary for Military Programs in the Department of Energy, indicating that that program had not had

1 the opportunity to put together its comments --

2 (Commissioner Hendrie entered the conference
3 room at 10:37 a.m.)

4 -- and indicated that within a week they'd like to be
5 able to come forward with some comments on the rule, and they
6 would appreciate our being able to deal with those comments
7 in the context of the rule.

8 Now when I say within a week, maybe that's a target
9 date. It may be a week or slightly more.

10 CHAIRMAN AHEARNE: I would guess that we would be
11 going forward with this rule, and I'm not sure how rapidly we
12 will be closing, but I think we are closing on a final rule,
13 and if they have something to add, I would guess (a) it would
14 have to be very important for us to do any reconsideration; and
15 (b) it better be timely, because we are closing.

16 MR. DIRCKS: I think they are aware of that, and
17 working very hard to put it together. I think it would have to
18 be because there are now, I guess, indications that Congress
19 wishes to split within the Department of Energy the military
20 waste question from the civilian waste question, and there is
21 naturally some cross-problems there in just organizational,
22 getting the comments together.

23 The second point, if I could make it, is the memo
24 that I sent to you unlabeled and dated December 11th.

25 CHAIRMAN AHEARNE: That's the second paper.

1 MR. DIRCKS: That's the second paper. Would you care
2 to take the first one?

3 CHAIRMAN AHEARNE: The first first; and then the
4 second, second.

5 MR. MARTIN: The first paper we discussed last
6 week with the handouts that ELD provided were not lined out and
7 lined in, in this text.

8 CHAIRMAN AHEARNE: This makes no other changes?

9 MR. MARTIN: Is that correct?

10 MR. CUNNINGHAM: That's correct.

11 CHAIRMAN AHEARNE: Okay. Very good.

12 I greatly appreciate it.

13 All right. That's easily done with. All right. The
14 second paper, then.

15 MR. DIRCKS: The second paper is -- I would like
16 to call on -- attempt to clarify and simplify the process. It's
17 a result of a meeting that we had with the representative of
18 the Waste Management Program in DOE. They wish to point out
19 that in the site characterization program, they will be
20 developing reports on environmental impact statements, public
21 meetings, getting them to the point where they characterize sites.

22 I think what we tried to do is assure them that
23 what we didn't want to do is duplicate the public meetings that
24 they were going to hold on their own report, and if they were
25 going to circulate their report, we felt as though we shouldn't

1 be in the business of circulating their report. What we tried
2 to do is in two places in our rule indicate to the extent that
3 DOE is already circulating their site characterization reports
4 and holding public meetings on such reports, that we see no
5 reason why we should do it also in the site characterization
6 program.

7 We feel as though to the extent they have covered
8 information satisfactorily in their environmental impact state-
9 ment, they would not have to repeat that information in their
10 submissions to us.

11 They could incorporate it by reference to the
12 environmental impact statement. These are essentially the two
13 items that I have included in this December 11th memorandum, and
14 we can discuss that, if you wish to.

15 CHAIRMAN AHEARNE: Joe, did you have any questions
16 on that?

17 COMMISSIONER HENDRIE: This December 11th thing is
18 now D in this series?

19 MR. DIRCKS: D.

20 SECRETARY CHILK: It will be.

21 COMMISSIONER HENDRIE: Can I get a couple of assurances
22 then?

23 (Laughter.)

24 CHAIRMAN AHEARNE: What did you have in mind?

25 I haven't gone back and reread all the comparative
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1 text. The things that I was interested in being sure were and
2 were not there were, first, that there is nothing in these
3 regulations which would prohibit a spent fuel storage facility
4 on a reactor site.

5 MR. MARTIN: On the waste disposal. You said a
6 reactor site.

7 COMMISSIONER HENDRIE: Yes.

8 MR. MARTIN: Guy, do you want to deal with that?

9 (Commissioner Gilinsky entered the conference
10 room at 10:40 a.m.)

11 MR. CUNNINGHAM: Are you asking whether these regula-
12 tions prohibit spent fuel storage or waste repository on a
13 reactor site? This rule doesn't deal with storage facilities
14 at ^{HFR} APT.

15 COMMISSIONER HENDRIE: Secondly, is there anything
16 in these regulations which would prohibit canning or capsulation
17 facility at the repository site?

18 (Mr. Martin shaking head negatively.)

19 And what came out of -- let's see. It seems to me at
20 one point there was something like three sites and two media
21 suggested as a reasonable minimum for --

22 MR. DIRCKS: Three? Is that three to five, or
23 something like that?

24 MR. MARTIN: Well, we said a minimum of three sites
25 and two media, yes.

1 COMMISSIONER HENDRIE: And that hasn't changed?

2 MR. MARTIN: No.

3 COMMISSIONER HENDRIE: You'd like more, but in
4 terms of content --
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5 CHAIRMAN AHEARNE: My sense is that is something
6 that Commissioner Bradford is going to be providing some
7 comments on.

8 MR. MARTIN: We haven't gotten any comments.

9 CHAIRMAN AHEARNE: No, right. But I believe he will
10 be. So that review is still an open issue.

11 COMMISSIONER HENDRIE: That's all I've got.

12 CHAIRMAN AHEARNE: All right. Len, you sent us a
13 memo which raised a couple of interesting questions. I guess
14 what I'd be interested in is having you summarize your point
15 and hearing the Staff response.

16 MR. BICKWIT: Sure. I've already had some informal
17 discussions with Guy on this. The first point related to NRC
18 deference to DOE on the defense and security matters.

19 Guy points out that we may have overstated the extent
20 to which Staff anticipates deference, but what concerned us was
21 on page 44 of the comment analysis, the reference --

22 COMMISSIONER HENDRIE: What enclosure is that?

23 MR. BICKWIT: Enclosure B.

24 The Staff response to the comment which says, "With
25 respect to common defense and security, the Staff believes that

1 reliance upon DOE, which itself is subject to the Atomic Energy
2 Act, is appropriate; in providing for NRC to exercise licensing
3 authority, Congress wanted to make sure that issues of health
4 and safety were reviewed independently, with opportunity for
5 public participation. Extending NRC's substantive review to
6 common defense and security issues would not promote the
7 achievement of this objective."

8 And we simply wanted to make clear that it was
9 anticipated that while there might be some deference to DOE,
10 that the authority to make the common defense and security
11 judgment is with NRC, and it alone has authority to do that,
12 and if that is the understanding, then I think we would have no
13 problem, but this particular response to the comment would not
14 give that understanding.

15 MR. CUNNINGHAM: I don't think we are terribly far
16 apart on this one. It may just be a problem of words^{something} ~~something~~.
17 It would be the intent of the Staff that substantial deference
18 would be given to DOE certification, that the common defense
19 and safety would be adequately protected, and that it would be
20 unlikely there would be substantial Staff review of that
21 certification unless some question appeared on its face, or
22 in the course of a hearing process, a contention was raised.

23 The rule does preserve the requirement that we make
24 a the finding as to the common defense and security. That's a
25 finding mandated by the Atomic Energy Act.

1 So I think it's fair to characterize the Staff
2 position as one that it will give substantial deference to the
3 DOE certification and the common defense and security is adequately
4 protected.

5 MR. BICKWIT: But that NRC would retain the final
6 authority, even in an uncontested -- even if the issue were
7 uncontested?

8 MR. CUNNINGHAM: The final authority and the obliga-
9 tion to make the finding.

10 MR. BICKWIT: Right.

11 CHAIRMAN AHEARNE: It might be useful if that were
12 clarified in the comments. *it would not have*
~~Would there be~~ any problem with that
13 ~~as a~~ position?

14 COMMISSIONER GILINSKY: What does it mean?

15 MR. BICKWIT: It means that -- I think the difference
16 between "deference" and "abdication" is clear. In one case you
17 may attention, you pay pretty strong attention to what DOE says.
18 In the other case, you just listen to what DOE says and that's it.
19 And we have trouble with the second formulation.

20 COMMISSIONER GILINSKY: What are we talking about?
21 Guards in the facility? Protecting the --

22 MR. DIRCKS: Safeguards.

23 COMMISSIONER GILINSKY: Protecting the site?

24 MR. DIRCKS: That's right. That's what we're talking
25 about.

1 COMMISSIONER GILINSKY: Safeguarding the site. And
2 you're talking about a DOE statement that the site is adequately
3 guarded, or what?

4 MR. CUNNINGHAM: And protected with ^{essentially} ~~extent~~ to the
5 same safeguards that they apply to other DOE sites. They are
6 like us, bound by the Atomic Energy Act to assure the protection
7 of common defense and security.

8 I think it's fair to state that the Staff did not
9 at the time they prepared the rule contemplate an extensive
10 review of the safeguards aspects of the repository.

11 MR. DIRCKS: That's right.

12 COMMISSIONER GILINSKY: All right.

13 CHAIRMAN AHEARNE: Why don't you try to clarify -- and
14 I guess that would meet your objection, then?

15 MR. BICKWIT: That's right.

16 CHAIRMAN AHEARNE: Okay. Len, your second point?

17 MR. BICKWIT: The second point relates to alternative
18 sites. In our discussion last time, the question was raised as to
19 just what does give us the authority to prescribe three alterna-
20 tives as a minimum, and there was a statement in the common
21 analysis that suggested that NEPA didn't give us that authority,
22 and there were also a number of statements that we raised here
23 that suggested the Atomic Energy Act doesn't give us that
24 authority.

25 Our view is that both the Atomic Energy Act and NEPA

1 give us the authority to prescribe three as a minimum, to
2 prescribe a reasonable rule, and a reasonable rule would appear
3 to include a rule which said three is a minimum, and any statement
4 to the contrary, I think, ought to be taken out of the comment
5 analysis.

6 CHAIRMAN AHEARNE: Now one, I guess, could extend
7 that to say that that similarly could be used to say that four
8 is a minimum, or three is a minimum, or five is a minimum; is
9 that correct? And is the point you are making that the agency
10 can reach a judgment as to what it believes is a reasonable
11 number and defend it on the grounds that you have raised?

12 MR. BICKWIT: I believe so.

13 MR. CUNNINGHAM: We have a measure of disagreement
14 we discussed earlier, as to the extent to which the Atomic
15 Energy Act is authority for requiring consideration of alternative
16 sites.

17 Clearly if the Staff thought it was unable to make a
18 finding of reasonable assurance by looking at only one site --
19 let's assume there was no NEPA -- then the act gives it enough
20 authority to look at others.

21 On the other hand, the traditional -- the licensing
22 approach and the approach that we will have when we have the
23 technical criteria of this rule in place, is that if you meet
24 the criteria, you are entitled to a license.

25 So the question boils down to will you need to look

1 at other sites to see if the performance criteria are met.

2 CHAIRMAN AHEARNE: Len, would you talk a little
3 bit more? I'm not sure, are you saying our position would be
4 that since we know what is going to be required to provide
5 adequate protection, that we can say that we believe that to
6 provide that adequate protection will take examination of some
7 number of sites?

8 Or the alternative would be you are saying that we
9 aren't really sure what's going to require adequate protection,
10 so consequently we want an examination of a number of sites,
11 and then based upon the characteristics of those sites, we will
12 reach a conclusion as to whether or not we think we will provide
13 adequate protection?

14 MR. BICKWIT: I think it's a factual judgment. I
15 think if the Nuclear Regulatory Commission does not feel
16 confident, does not feel easy with the notion of simply
17 prescribing criteria and not comparing sites, all of which meet
18 those criteria in order to determine what is a reasonable way
19 to go forward here, that the Atomic Energy Act does give the
20 Commission the authority to prescribe a requirement that
21 alternatives be looked at.

22 CHAIRMAN AHEARNE: Let me go to a -- far ahead. Let's
23 suppose we come to a point where the Commission is now about to
24 reach a decision on construction authorization. Does the
25 Commission at that time reach a finding that that site will

1 provide adequate protection, or do we reach a finding that of
2 the sites looked at, that is the best site?

3 MR. BICKWIT: It's the first.

4 CHAIRMAN AHEARNE: It's the first.

5 MR. BICKWIT: Right. But adequate, I think, has
6 included within it the notion that this is good, and that
7 has included within it the notion of some comparison. This
8 is really a question of the technical judgment of the Commission.

9 At the last meeting I got the impression that the
10 Staff comments were to the effect that Staff might not be
11 comfortable if it couldn't look at various alternatives.

12 CHAIRMAN AHEARNE: I think that's true.

13 MR. BICKWIT: And if that is the case, and there
14 were no NEPA, I would say that the Commission does have the
15 authority to look at those alternatives under that circumstance.

16 CHAIRMAN AHEARNE: But -- and I'm not going to try
17 to speak for the Staff, for what the Staff believes. My view
18 is that it is necessary as a sort of federal government policy
19 to look at alternatives, in order to make sure there are enough
20 parallel tracks being followed, so that if one or two turn out
21 not to be acceptable, that there is still a reasonable chance
22 that one of them is going to turn out to be acceptable.

23 But I must admit I ^{have} based that more on a perspective
24 that that's the way you get a sound national policy, as opposed
25 to that in order to reach a finding that one of them is adequate,

1 I guess at the moment I don't see any problem with on our
2 finding of adequacy, of looking at one at a time.

3 The problem that I see is that as far as a national
4 program is concerned, we may very well look at that first one
5 and say it's not adequate, and then if there are a consecutive
6 series, it could make a very, very long program.

7 MR. BICKWIT: I'm not saying that the act imposes
8 a requirement, a procedural requirement on you as to how you
9 have to go. I'm saying that if the Commission wants to look at
10 these alternatives, I think there's authority in the Atomic
11 Energy Act to do that, in pursuing the question of "is this
12 adequate protection."

13 CHAIRMAN AHEARNE: And I gather that's where ELD has
14 some disagreement?

15 MR. CUNNINGHAM: No. I think we agree with the
16 premise that if it's necessary to determine adequacy that you
17 look at more than one site, the Atomic Energy Act will permit you
18 to do that. And to the extent that there are any words in here
19 that cast doubt upon that proposition, we can take them out.
20 That's fairly easily done, and I think that's all General Counsel
21 was asking.

22 MR. BICKWIT: That's correct.

23 CHAIRMAN AHEARNE: Joe?

24 All right. So, then, I gather that you will try to
25 at least work with them and see what the --

1 MR. CUNNINGHAM: We can work with them.

2 CHAIRMAN AHEARNE: Fine. All right. Our third
3 point?

4 MR. BICKWIT: Not quite. There's a second half to the
5 second point.

6 CHAIRMAN AHEARNE: Oh, that's right. That's right.
7 The banking.

8 MR. BICKWIT: There was some discussion of site
9 banking at the last meeting. All we are saying here is that
10 if the Commission now contemplates two or three waste disposal
11 sites in the last analysis, that it might want to consider
12 a slate larger than a minimum of three. Guy has pointed out to
13 me that the requirement of the minimum of three is not
14 exclusive of the requirement in Part 51, that there be an
15 adequate number of alternatives examined in association with
16 every decision under NEPA.

17 The only point we are making here is that if the
18 Commission has in mind how many sites it wants in the end --

19 CHAIRMAN AHEARNE: We don't want -- we want to have a
20 regime in place that as Energy Department proposes sites, we
21 can handle it.

22 MR. BICKWIT: All I'm saying is that if you believe
23 that the number of sites that is going to be selected under this
24 regime is on the order of three, then a slate of sites that is
25 characterized as a minimum of three is not going to make it under

1 NEPA, and if that is your --

2 CHAIRMAN AHEARNE: Well, let me see if I can under-
3 stand what you are saying. Let's say we say a minimum of three,
4 and the first cycle through DOE examines three sites, and in the
5 process ends up choosing one of those.

6 And in our examination of the other two, we have
7 reached the conclusion that they meet our adequacy test. Now
8 DOE wants to go for ³second site.
^

9 Are you saying that you don't believe that the
10 remaining two suffice for an examination of alternative sites for
11 that second site they want?

12 MR. BICKWIT: It's an easier question if you get to
13 their picking the third.

14 CHAIRMAN AHEARNE: No, I want to get to picking *the*
15 second.

16 MR. BICKWIT: Then it's close. Then it's a close
17 question.

18 CHAIRMAN AHEARNE: Would you say that if they added a
19 third site, would it be adequate only to do a characterization
20 for that third site and compare it with the already-done
21 characterizations?

22 MR. BICKWIT: Most likely, yes.

23 COMMISSIONER HENDRIE: And similarly, if they decide
24 they want a third one, they've got one left out of the original,
25 a second one out of the second, and if they add a third

1 -- characterize a third site and add it, why, you're still looking
2 at three in order to choose one. That certainly seems to me to
3 meet the NEPA alternatives.

4 CHAIRMAN AHEARNE: But here your argument is --

5 MR. BICKWIT: My concern is that if you see that
6 happening, it might be best to anticipate it early.

7 CHAIRMAN AHEARNE: But here your argument is based
8 not upon, as the previous case, our ability to require three
9 for adequacy; now you are saying that we might end up requiring
10 three for NEPA.

11 MR. BICKWIT: Yes.

12 CHAIRMAN AHEARNE: Now would you then step back and
13 say that therefore you would reach a conclusion that for this
14 first one, we would require three for NEPA?

15 MR. BICKWIT: I think that is a reasonable place to
16 draw the line, as far as the rule is concerned.

17 As Commissioner Hendrie pointed out last time, it
18 would be senseless to say that NEPA had a rigid requirement
19 that there must be three. If it's absolutely obvious that
20 there's one site that's the best of all possible sites. I don't
21 read NEPA that way. But three seems to me to be a good place to
22 be as you approach the problem.

23 I'm not saying that NEPA clearly requires three.

24 CHAIRMAN AHEARNE: This is really long-range
25 conjecture, because we are now talking about events that might

1 be happening in the '90s.

2 (Laughter.)

3 Philosophical discussions occupy a large part of our
4 time, anyway, so answer one more question:

5 Are you saying that your reading of NEPA is such that
6 if we looked at three alternative sites that DOE proposed we
7 examine, did an alternative site analysis, all three meet our
8 adequacy requirements, and all three are approximately equally
9 good, that choosing one doesn't enable you to then at a later
10 date choose the second and the third from that set?

11 MR. BICKWIT: I am saying that, once you get into
12 the third, I am saying that.

13 CHAIRMAN AHEARNE: All right. Any other questions?
14 Jack?

15 MR. MARTIN: Well, you know, there are other alterna-
16 tives there once you have the three sites characterized.

17 For example, if I were picking the second site, I
18 would think about making the first site bigger, for example.
19 You know, so there's more than just -- it's much more
20 complicated.

21 MR. DIRCKS: Another point, too, is these aren't
22 the only three that have been looked at, to get to those three.
23 They have looked at many, and the three represent -- any one
24 of ~~three could~~ *three could cross the finish line.*

25 CHAIRMAN AHEARNE: In fact, I guess under the current

1 bill that seems to be trying to come to completion, there'd be
2 four.

3 MR. DIRCKS: But I think to get down to the three
4 or four, many have been looked at.

5 CHAIRMAN AHEARNE: This is really angels on the pin,
6 as we spend a lot of time discussing about the third repository
7 site.

8 MR. MARTIN: I think the point from the Staff is
9 that there's nothing in the rule that would preclude you from
10 doing what appears to be reasonable in the '90s, whatever that
11 may be.

12 MR. BICKWIT: And as Guy pointed out, Part 51 would
13 require you to do what's reasonable, and I am willing to live
14 with that response to this.

15 CHAIRMAN AHEARNE: All right. Any other? All right,
16 your third point. Obviously a very chilling thought.
17 Seven years of ex parte.

18 MR. BICKWIT: Let's deal with the first paragraph
19 first. You'll be happy to hear that Guy and I think that
20 the second paragraph is easily manageable.

21 CHAIRMAN AHEARNE: Well, I may be happy to hear it.

22 (Laughter.)

23 MR. BICKWIT: On the first point, there was some
24 discussion last time about just what is this construction
25 authorization going to look like, and what is going to be the

1 nature of its enforceability, and we point out here that it is
2 not going to be enforceable in a way that a normal operating
3 license is enforceable, and we suggest that it might be useful
4 to look at Part 2 and see what the Commission contemplates as
5 far as enforcement actions are concerned.

6 I don't think it's absolutely essential. The basic
7 purpose in presenting this paragraph to the Commission is that
8 we want it clearly understood by the Commission what the limits
9 on enforcement will be.

10 CHAIRMAN AHEARNE: Well, it's certainly true that we
11 can stop construction? Or is it not clear?

12 MR. BICKWIT: It is not clear that you can stop
13 construction. What you can do is you can say that if construc-
14 tion doesn't stop under these circumstances, you are going to
15 apply the club of no facility license.

16 CHAIRMAN AHEARNE: I would think that we would want
17 at least to be able to stop construction.

18 MR. BICKWIT: I would think you would want to, but
19 it's not clear that you can under the act.

20 CHAIRMAN AHEARNE: Under the Atomic Energy Act?

21 MR. BICKWIT: That's right.

22 CHAIRMAN AHEARNE: Oh.

23 MR. MARTIN: That's the same problem we have with the
24 fuel cycle facility, where until we got the Mill Tailings Act,
25 we were unable to, for example, stop somebody from building a

1 uranium mill, if they wanted to. They just couldn't operate it
2 once they got it built.

3 COMMISSIONER GILINSKY: You are saying this stems
4 from the fact that you are not dealing with a reactor? Is it
5 the fact that *it's DOE --*

6 MR. BICKWIT: You're not dealing with someone who's
7 got a license.

8 COMMISSIONER GILINSKY: It isn't because it's DOE.
9 We'd have the same problem if it was a private entity?

10 MR. BICKWIT: That's right.

11 COMMISSIONER HENDRIE: It's because it isn't a
12 production utilization license under the Atomic Energy Act,
13 but rather a materials possession license, and since when the guy
14 is constructing he doesn't have any materials to possess, why,
15 your control is -- it's a distant threat that you won't let him
16 possess materials.

17 MR. BICKWIT: That's right. I don't see that there
18 is anything significant you can do about that at this *table* stage.

19 COMMISSIONER GILINSKY: It's pretty important, because
20 even if you say you're not going to let him possess material,
21 this will be the one facility in the country, material is going
22 to be building up and you're going to be saying you can't
23 possess material.

24 CHAIRMAN AHEARNE: I guess I'd like to --

25 COMMISSIONER HENDRIE: Well, you remember back when we

1 were trying to -- oh, God, two years ago or more, when we were
2 talking about various waste legislation, one of the points that
3 we made was we thought that a new class of license for permanent
4 disposal facilities would be a desirable feature in the legisla-
5 tion. It would then allow us to issue a construction permit, if
6 we wanted to split into two halves, to go that way.

7 But it seems to me that it's so desirable to get this
8 chunk of rule out, that to hang it up and try to get legislation,
9 I just --

10 CHAIRMAN AHEARNE: But, on the other hand, I think
11 it would be appropriate, while going ahead with the rule, to still
12 propose that we attempt to develop some legislation, and we
13 can propose that this come to Congress. This is a long way off
14 when this might be there, but at that time it would be nice to
15 have in place some kind of mechanism we could stop construction
16 or the Commission could stop construction if necessary.

17 As Vic points out, it would be the place. That's a lot
18 of momentum.

19 COMMISSIONER HENDRIE: It doesn't strike me as a very
20 -- you know, what you need is about one sentence in some of
21 these -- either in a waste bill or as a subsequent amendment to
22 waste legislation, or amendment to the Atomic Energy Act.

23 CHAIRMAN AHEARNE: Perhaps you could work with ELD to
24 come up with it, and in the spring we can propose it, *that there*
25 *is no transmission required*
All right, the second point.

1 MR. BICKWIT: The second point, we think, can be
2 resolved simply by specifying that the ex parte rule will apply
3 only to issues raised in the first of these two contemplated
4 hearings, only with respect to those issues that are considered
5 in the first of those hearings, without its applying to those
6 that will be taken up in the later portion of the proceeding.

7 CHAIRMAN AHEARNE: Well, I thought part of your
8 problem here that you mentioned is that the board is in existence
9 throughout this whole period. Are you proposing then to define
10 the ending of that as when the authorization is given?

11 MR. BICKWIT: Yes. In effect, what you have is the
12 construction authorization amounts to a partial initial decision.

13 CHAIRMAN AHEARNE: Right. And you're proposing --

14 MR. BICKWIT: We're proposing that that, for ex parte
15 purposes, that be treated as a proceeding.

16 CHAIRMAN AHEARNE: Okay.

17 COMMISSIONER HENDRIE: Because this is a -- we are
18 licensing under a materials license regime in which the construction
19 stage goings-on are just sort of the first part of an eventual
20 license, and because I have thought much about materials license
21 proceedings vis-a-vis ex parte matters, how tightly does the
22 legislation -- do the laws of the land, never mind our rules
23 which are adjustable -- but the laws of the land bind us in an
24 ex parte fashion in this sort of proceeding?

25 MR. BICKWIT: If you consider that first hearing as

1 part of the proceeding to arrive at an ultimate decision on the
2 materials license, and the rule is structured that way, then
3 the laws of the land apply.

4 COMMISSIONER GILINSKY: Well, but can't we decide
5 that the ex parte rule would apply only to part of the Staff and
6 the litigators or --

7 MR. BICKWIT: How? As a general proposition?

8 COMMISSIONER GILINSKY: Well, in this case.

9 MR. BICKWIT: Yes. Yes, you can always do that.
10 That is one of the issues that's before the Commission with
11 respect to the entire ex parte.

12 COMMISSIONER HENDRIE: But in this case, since
13 Martin's Marauders are not all that numerous a crowd, you know,
14 if you want to talk to the people who know most about what's
15 going on, why, they're going to have to be the same people who are
16 carrying the Staff's case.

17 COMMISSIONER GILINSKY: Well, but is it absolutely
18 clear that it applies to the technical staff, or has to apply to
19 the technical staff? It seems to me that it isn't.

20 CHAIRMAN AHEARNE: It seems in this particular case, I
21 don't see --

22 MR. CUNNINGHAM: Well, but the Staff will be a party
23 to the licensing proceeding.

24 Are you suggesting we not be a party, just stand back
25 and watch? I guess --

1 MR. BICKWIT: If the Staff were not a party, you would
2 solve your ex parte problem.

3 CHAIRMAN AHEARNE: Here is this proposal we brought
4 forth, with all of the minions and heart of the Energy Department,
5 and whatever its name is at that stage, with battalions of
6 lawyers and people. Why do --

7 MR. BICKWIT: Now you're confronting the whole neutral
8 Staff concept.

9 CHAIRMAN AHEARNE: But this is really a rare beast,
10 this particular proposal.

11 MR. BICKWIT: Yes. But what you give up with a
12 neutral Staff is the opportunity for the Staff to jaw the other
13 parties and arrive at some kind of informal resolution of some
14 of these issues before you have a hearing.

15 COMMISSIONER HENDRIE: You really gut their review
16 authorities if you're not --

17 CHAIRMAN AHEARNE: I'm not sure of that.

18 COMMISSIONER HENDRIE: If they're not parties, there's
19 no way for the Staff to step forward into the hearing proceeding
20 and say, "Here's what we think."

21 CHAIRMAN AHEARNE: Why not? Why can't the Licensing
22 Board ask the Staff, "What do you think?"

23 COMMISSIONER HENDRIE: I think that makes them parties.

24 MR. BICKWIT: Then they're taking positions.

25 MR. CUNNINGHAM: I think the Board could call the Staff

1 as disinterested expert witnesses.

2 CHAIRMAN AHEARNE: Right.

3 MR. CUNNINGHAM: But that wouldn't let the Staff
4 positively assert, take a position that wasn't ^{asked for}askable by the
5 Board.

6 But if the Staff wants to get in there and argue
7 for licensing --

8 CHAIRMAN AHEARNE: No, no, no, no. If the Board
9 were directed to ask the Staff in their judgment does this meet
10 the requirements of the NRC's regulations.

11 COMMISSIONER GILINSKY: Well, let's ask Bill if he
12 wants to be a party.

13 MR. DIRCKS: You know me, I never like to be a party
14 to any of this stuff.

15 (Laughter.)

16 I guess, you know, in the abstract, if we issue the
17 regulations, and the regulations are understandable, the question
18 is do they meet the regulations.

19 Jack, do you want to contribute?

20 CHAIRMAN AHEARNE: I guess this is getting more and
21 more philosophical.

22 MR. MARTIN: I'm having a hard time visualizing how
23 you could really get to the bottom of whether you met the
24 regulations or not without a lot of dialectic on the subject,
25 and pushing and shoving over a period of years.

1 CHAIRMAN AHEARNE: Sure.

2 MR. MARTIN: Now whether that means you have to be a
3 formal party or not, I don't know.

4 COMMISSIONER HENDRIE: Well, I don't think you've
5 got any way to get the results of your views in a proceeding in a
6 meaningful way without the participation --

7 COMMISSIONER GILINSKY: What I was asking is whether
8 you could draw the line --

9 COMMISSIONER HENDRIE: Between the lawyers and --

10 COMMISSIONER GILINSKY: -- and the technical staff,
11 yes.

12 MR. BICKWIT: That's not clear. If the technical
13 staff are going to go in and argue alongside the lawyers, then
14 you can't. The technical staff just coming in as witnesses, ✓
15 conceivable.

16 CHAIRMAN AHEARNE: And I think you could still have
17 all that jawboning originally, but that's a running argument.

18 MR. BICKWIT: That's right. I think you're better
19 off considering those questions in the broad sense. It's a
20 broad issue.

21 CHAIRMAN AHEARNE: All right. Could you-all construct
22 some appropriate language to at least enable us to talk to the
23 Staff after that partial initial decision and the appropriate
24 time prior to? And there obviously has to be a window for each
25 of the processes in which the ex parte applies, there has to be a

1 period. Because right now, for example, we know who the license
2 applicant is going to be. We know that the applicant will be
3 applying.

4 MR. BICKWIT: Yes.

5 CHAIRMAN AHEARNE: So I'd like to see when you think
6 the curtain comes down and when it's lifted and when it comes
7 down again.

8 MR. BICKWIT: Traditionally it's notice of hearing
9 or request for hearing. I don't see any reason why it should
10 be any different here.

11 CHAIRMAN AHEARNE: Well, you mean that if the state of
12 blank filed a notice as soon as you put out this rule they
13 want a hearing, and they understand DOE is preparing an applica-
14 tion, and they want a hearing on it --

15 MR. BICKWIT: No. The request for hearing is to be
16 in response to the notice of the opportunity for hearing.

17 COMMISSIONER HENDRIE: We won't get to that stage
18 until they have filed an application for construction authorization
19 under these rules.

20 MR. BICKWIT: That's right. If you want to apply
21 the rule a little earlier and --

22 COMMISSIONER HENDRIE: Len, what do you think would
23 happen up on the Hill if we came in with two lines, one of them
24 said this establishes a license regime in which we can grant a
25 construction permit for these things, and the second part said

1 that the ex parte provisions of the Administrative Procedures Act
2 would not apply to the technical staff of the Nuclear Regulatory
3 Commission for this type of licensing proceeding? Do you think
4 we could make that fly?

5 MR. BICKWIT: I don't think they'd know what you were
6 talking about.

7 (Laughter.)

8 I think --

9 COMMISSIONER HENDRIE: That sounds good. That sounds
10 encouraging.

11 (Laughter.)

12 MR. BICKWIT: I just think those issues are going to be
13 handled in different committees that are going to deal with these
14 problems generally. I just think committees that aren't used
15 to considering these Administrative Procedure Act problems are
16 going to have some trouble.

17 COMMISSIONER GILINSKY: You may have covered this
18 before I came in, but did you ever do anything about including
19 the Commission in the decision-making process?

20 MR. CUNNINGHAM: That's the question of immediate
21 effectiveness. I think it's very simply done as we did in Part
22 72. You just add another paragraph to 2.768 that says that
23 the construction authorization license to receive material will
24 not be effective until the Commission has had a chance to review.
25 If the Commission wants that in there, we'll put it in.

1 CHAIRMAN AHEARNE: I think so.

2 COMMISSIONER GILINSKY: And what about the earlier
3 stage, where you're looking at the site characterizations? I
4 mean in a sense the problem is defined at that point, and --

5 CHAIRMAN AHEARNE: I think --

6 COMMISSIONER GILINSKY: We are not granting an approval

7 CHAIRMAN AHEARNE: I think the Director of NRR
8 or NMSS is reviewing -- isn't that the way it is?

9 MR. DIRCKS: Yes.

10 CHAIRMAN AHEARNE: And provides comments?

11 MR. DIRCKS: Right. And there is no finding made.
12 There is no finding made, and I don't know whether what you are
13 talking about is the Commission should review it and give
14 approval or something to the Staff.

15 COMMISSIONER GILINSKY: Well, I assume he's going to
16 discuss it with us, if we're here.

17 MR. DIRCKS: I think we will discuss it, but I don't
18 think we would want an opinion or approval or disapproval finding
19 of the Commission.

20 COMMISSIONER GILINSKY: Well, what would you be
21 sending to DOE?

22 MR. DIRCKS: I think a series of comments, the way
23 I view it, advising them to do this or check it here. But it's
24 not approving it. They could ignore our comments, they could
25 proceed to do whatever they wanted to do.

1 CHAIRMAN AHEARNE: This is all on the site
2 characterization?

3 MR. DIRCKS: On the site characterization. What we
4 are trying to do is not get into the mold of making that
5 some sort of an official approval or disapproval.

6 COMMISSIONER HENDRIE: Sounds like a good subject for
7 one or more briefings by the Staff with the DOE waste staff
8 present and participating, if appropriate, a discussion with
9 the Commission, rather than our formal turning of the crank.

10 COMMISSIONER GILINSKY: Well, I agree with that, but
11 I think just as long as it's understood.

12 CHAIRMAN AHEARNE: By those of us who are here.

13 COMMISSIONER GILINSKY: Yes.

14 COMMISSIONER HENDRIE: I understand what John had in
15 mind was to send us a short information report, or were you just
16 going to include it as a chapter in the annual report?

17 (Laughter.)

18 CHAIRMAN AHEARNE: Okay. Any other questions?
19 Anybody?

20 All right. I guess we will schedule another meeting
21 no later than two weeks.

22 (Whereupon, at 11:20 a.m., the meeting was
23 adjourned.)

24 * * * * *

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

NRC Commission

in the matter of: COMMISSION MEETING

Date of Proceeding: Thursday, Dec. 11, 1980

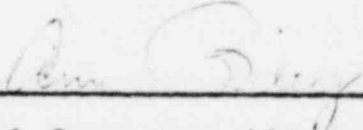
Docket Number:

Place of Proceeding: Washington, D.C.

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

ANN RILEY

Official Reporter (Typed)


Official Reporter (Signature)