(4)

SOUTHWEST RESEARCH AND INFORMATION CENTER

August 1, 1988

DOCKET NUMBER
PROPOSED RULE PR 2 51 60
(53 FR 16131)

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 Infonmation 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

DS10

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

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)).

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.

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

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.

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

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.

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).

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

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.)

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.

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.

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.

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.

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.

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.

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.

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).

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) 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.

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.

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.

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.)

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.

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.