

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

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SEP 13 1985

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Index #
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MEMORANDUM FOR: Harold R. Denton, Director
Office of Nuclear Reactor Regulation

FROM: Guy H. Cunningham, III
Executive Legal Director

SUBJECT: JURISDICTION OVER LOW LEVEL WASTE MANAGEMENT AT REACTOR
SITES IN AGREEMENT STATES

In your memorandum of August 7, 1985, you requested OELD confirmation of your understanding of NPC jurisdiction over the handling, treatment (including incineration) and storage of low level radioactive waste at nuclear reactor sites. As stated in your memorandum, in Agreement States the NRC would exercise licensing and regulatory jurisdiction over the handling and storage of low level waste within the exclusion area of the reactor site. This includes both reactor generated waste and waste from other sources. The latter situation is covered in greater detail in Generic Letter 85-14. In non-Agreement States there is no jurisdictional problem; the NRC licenses and regulates all handling, storage, and disposal of low level radioactive waste. Your memorandum also requested an opinion on the licensing, in Agreement States, of low level waste disposal within the exclusion area.

The three statements are correct. In Agreement States the NRC will license and regulate the handling and storage of low level waste in the exclusion area. When the waste is derived from offsite waste generators NRC jurisdiction is based primarily on 10 CFR 100.3(a) which requires the reactor licensee to maintain an exclusion area in which the licensee retains full control over all activities in order to protect public health and safety from a postulated fission product release resulting from a hypothetical major accident. NPC licensing authority is seen as essential to maintaining such licensee control. Thus, under Generic Letter 85-14 any program sponsored by a state to fulfill its low level waste obligations pursuant to the Low Level Radioactive Waste Policy Act (Public Law 96-573, 42 U.S.C. 2021b-2021d) by storage of waste within the exclusion area of a nuclear power reactor will be subject to the licensing and regulatory jurisdiction of the NRC.

In Agreement States the handling and storage at the reactor site of low level waste resulting from the operation of the reactor is reserved to the NPC pursuant to 10 CFR 150.15(a)(1). It is reasonable to view the exclusion area as the reactor site for this purpose since it represents spatially the area of greatest and most immediate public health and safety concern in the operation of the reactor. See e.g. Southern California Edison Company, (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-268, 1 NPC 303 (1975), ALAB-308, 3 NRC 20 (1976).

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SEP 13 1985

The conclusion differs, however, regarding the disposal of low level radioactive waste generated by the operation of the nuclear reactor. The omission of low level waste disposal in 10 CFR 150.15 as a function reserved to the Federal Government implies that it has been relinquished to the Agreement States. The Statement of Considerations accompanying Part 150 when it was promulgated clearly demonstrates that the Atomic Energy Commission considered the question of Agreement State authority over the disposal of reactor low level waste and decided to relinquish the function, while retaining handling and storage.

"The Commission has taken into consideration the comments and advice it has received in adopting the regulation set out herein. The Commission has decided against blanket reservations of control over land burial of waste and over the transfer of manufactured products.

However, as to land burial, the Commission finds, pursuant to section 274c.(4), of the Act that because of the hazards or potential hazards thereof, high level atomic energy wastes from the chemical processing of irradiated fuel elements should not be disposed of without a license from the Commission. This finding is reflected in § 150.15(a)(4). Control over the handling and storage of waste at the site of a reactor, including effluent discharge, will be retained by the Commission as part of the control of reactor operation. The states will have control over land burial of low level wastes." (emphasis supplied). (27 FR 1351, February 14, 1962).

Under Section 301(b) of the Energy Reorganization Act of 1974, the NRC is not at liberty to vary the clear meaning given to this regulation by the Atomic Energy Commission without a rulemaking proceeding, or by issuance of appropriate orders, pursuant to Section 274c. of the Atomic Energy Act, as amended. We note that Agreement State licensing of the disposal of reactor low level waste within the exclusion area is not inconsistent with the requirement in 10 CFR 100.3(a) for licensee control of activities in the exclusion area. The issuance of a license by an Agreement State for disposal of reactor low level wastes in the exclusion area only establishes the conditions under which the disposal may be made. It does not diminish either the licensee's decisional authority whether to undertake the activity, nor his control over its execution. Further, under well established rules of preemption if conditions in the State issued license for disposal conflict with the terms of the Federal operating license, then the latter will prevail. Accordingly, the legal advice previously given by this office on this matter stands.

Your memorandum raises four additional concerns arising from the conclusion given above. First, although the regulatory structure may

SEP 13 1985

not appear to be the most efficient, licensing of disposal by the Agreement States and of handling and storage by NRC are not inconsistent. The two governmental units are regulating different aspects of the waste generation and disposal process. Such divisions of responsibility are common in government. Second, IE Notice 83-05 is valid advice for reactors in non-Agreement States. It is not, however, applicable in Agreement States with respect to disposal by land burial. Third, the legal conclusion does not create the potential of each Agreement State determining release levels at each plant site. The legal advice consistently given by this office is that release levels related to the handling and storage of the waste at the reactor site are established by NRC. For example, Duke Power Company has been advised only recently that it is appropriate to use the detection levels in IE Circular E1-07 for purpose of release of waste from the site, but that the permission for actual disposal of the waste must come from the state.

Fourth, it is unnecessary for decisions associated with decommissioning of reactors and release of sites for unrestricted use to be complicated by our legal conclusion. On the contrary, it can be seen as clarifying the legal background against which those decisions will be made and insuring consistency with other low-level waste disposal decisions which will be made by the states. After removal of all special nuclear material from the site and fixing the machine so that it can never again be used in the production or utilization of special nuclear material, there is a legal basis for Agreement State regulation of the remaining byproduct radioactivity if the NRC takes the position that leaving the radioactive structures on site in some safe configuration is the method of choice for disposal of the remaining byproduct material. On the other hand, assuming a continued legal viability for 10 CFR 150.15(a)(1), a storage option would tend to preserve NRC jurisdiction. ^{1/} If continued NRC jurisdiction is considered essential for all reactor decommissioning cases, then a Commission determination that the hazards of the waste require continued Commission licensing and a rulemaking under Section 274c.(4) of the Atomic Energy Act amending 10 CFR 150.15 would be advisable.

Guy H. Cunningham, III
Executive Legal Director

cc: John G. Davis, ONMSE
James M. Taylor, IE
Wayne Kerr, OSP

^{1/} The following legal argument can be made that 10 CFR 150.15(a)(1) would have no legal significance in these circumstances. If there is no longer a reactor as defined in 10 CFR Part 50, there is no continuing basis for NRC jurisdiction under Chapter 10 of the Atomic Energy Act. Absent the latter, 10 CFR 150.15(a)(1) is of no effect. Likewise, absent a critical mass of special nuclear material, 10 CFR 150.10 provides no jurisdictional base.

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