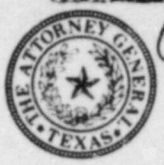

THE ATTORNEY GENERAL OF TEXAS

February 27, 1987

JIM MATTOX
ATTORNEY GENERAL

Samuel Chilk
Secretary, U.S. Nuclear Regulatory Commission
Docketing and Service Branch
Washington, D.C. 20555

Re: Negotiated rulemaking for high-level waste repository licensing proceeding

Dear Mr. Chilk:

The State of Texas submits the attached comments in response to the Nuclear Regulatory Commission's notice of intent to form an advisory committee to negotiate a proposed rule concerning the submission and management of records and documents for the proceeding on whether a construction authorization should issue for a high-level waste repository. The NRC published the notice on December 18, 1986. See 51 Fed. Reg. 45,338.

Sincerely,

Renea Hicks

Renea Hicks
Assistant Attorney General
Environmental Protection Division

P.O. Box 12548
Austin, Texas 78711-2548

RH:dan
Enclosure

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add: J.K. Cameron, 9604MNBB
K.L. Kalman, 6235S

COMMENTS OF THE STATE OF TEXAS ON NEGOTIATED RULEMAKING FOR NRC HIGH-LEVEL WASTE REPOSITORY LICENSING PROCEEDING

Introduction

Underlying the NRC's decision to undertake the negotiated rulemaking is its assumption that "[i]f the NRC is to meet the statutory deadline for making its decision on construction authorization, specific measures must be taken to streamline the NRC review process," 51 Fed. Reg. 45,339. The validity of this assumption has not been demonstrated. Also, the assumption appears to embody an NRC attitude that has at least two troubling aspects--that the statutory deadline must be met and that the NRC process must be streamlined even if thoroughness of review is sacrificed. In isolation, the attitude that the NWPA deadline is mandatory is palatable; however, the attitude cannot be assessed in isolation. The NRC's role will be played only toward the end of a process principally controlled by the Department of Energy, which repeatedly has demonstrated that it does not feel bound by the NWPA's deadlines. The courts have not yet spoken on whether the NWPA's deadlines are mandatory. If they are not, then the NRC's attitude on this matter, however laudable it may be in the abstract, must be reassessed. Such a reassessment might necessitate a review of whether the original impetus for the negotiated rulemaking remains. The second aspect of NRC's apparent attitude troubles

Texas because it emphasizes speed rather than thoroughness. The NRC's primary emphasis in the HLW licensing proceeding must be on thoroughness, and the NRC must begin to stress that point now. Otherwise, it may begin sending the wrong message to its staff. The NRC staff must be assured that the Commission's policymakers want them to study this matter thoroughly without having to worry whether they will be subjected to criticism for slowing the process. The tenor of the Federal Register notice is wrong and in discord with the NWPA's primary theme of safety derived from technical thoroughness.

This criticism should not be read as conveying an unwillingness on Texas' part to participate constructively in the negotiated rulemaking. With appropriate safeguards, streamlining the process may be possible without any sacrifice of thoroughness. If it is, then, at least in the abstract, Texas has no complaints.

Identification of interests and Texas' representative

As a state containing one of the three sites scheduled to undergo site characterization, Texas of course should have at least one representative on the negotiating committee.

The Federal Register notice does not make it clear whether possible participants should designate their representatives now. If so, Texas designates Renea Hicks, Assistant Division Chief, Environmental Protection Division, Texas Attorney General's Office.

Texas has not fully evaluated whether the NRC's list of affected interests who might be appropriate participants in the negotiations is complete. It does note, however, that the reference to "[l]ocal environmental public interest groups potentially affected by the siting of the repository" may reflect too narrow a view. In Texas, for instance, several groups have vital interests in the repository siting process, but may not fit within the category labelled "environmental public interest group." These groups include various agricultural commodity groups (e.g., the Texas Corn Growers Association), property owners, and umbrella groups (e.g., the Nuclear Waste Task Force) whose concerns stretch beyond environmental matters in the narrow sense. They certainly should be considered as participants.

Issues to be considered

In its notice, the NRC may have intended to confine the issues to be considered by the negotiators to those connected with the establishment of an "electronic information management system" for use during the licensing process; however, the outer limits of the issues to come within the negotiators' purview are not at all clear. For instance, the NRC "anticipates that additional issues will be considered by the committee as they arise." 51 Fed. Reg. 45,342. Another example of possible open-endedness concerns the question of what is a privileged document. NRC specifically lists

this question as one falling within the negotiators' purview, but does this mean that the negotiators will be empowered to modify long-established legal principles on the meaning of privilege? Even more troubling is the NRC's suggestion that the negotiators consider what "categories of information" will be relevant in the licensing proceeding. Can they thereby determine all the legal issues relevant to the licensing?

These examples demonstrate that the negotiators must be confined by a strict mission statement. Otherwise, the danger arises that wholesale rewriting of legal principles applicable to NRC proceedings may be undertaken. Texas questions the advisability of such an undertaking especially when it is being done by a limited group so far in advance of the beginning of the proceeding itself. The negotiated rulemaking should not be undertaken until a more narrowly defined statement of its mission is given.

Other concerns

A. Open meetings--The notice contemplates the establishment of working groups and caucuses. Will they, too, be subject to the open meetings requirements of the Federal Advisory Committee Act? Texas believes that they should be.

B. Consensus--The notice discusses "consensus" but does not define it. Does it mean unanimity or something less? If it means something less, will those participants not part of the consensus face any danger of somehow being bound by the consensus view?

C. Record--If the negotiated rulemaking produces a proposed rule, will the negotiation process itself--to the extent it is recorded--constitute part of the administrative record if a resulting rule is subjected to judicial review? To what extent will the negotiation process be recorded?

D. Subsequent Judicial Review--Linked with the questions about consensus and the record is the issue of how a party's participation in the negotiation process will affect that party's ability to seek judicial review of the eventual rule. If a consensus is reached, does that preclude any party that participated in the negotiation from seeking judicial review? If consensus is not reached and the NRC then proceeds to promulgate a rule, are statements made by a party during the negotiation process then part of the record? If so, open discussion during the negotiation process would be significantly impeded.

E. Funding--The NRC only "anticipates" that funding will be available for the affected interests to participate in the negotiations. Surely, those already receiving money from the Nuclear Waste Fund may use it for the negotiations. As for those who currently are not receiving any Nuclear Waste Fund money, the NRC, possibly through DOE's cooperation, should be able to make a commitment that sufficient funds will be available, either from the Nuclear Waste Fund or elsewhere. Any final notice of the formation of the advisory committee should make this commitment to all participants.

F. Sanctions--The notice does not mention the question of what sanctions would be appropriate for misuse of the LSS. Misuse of the LSS is certainly a possibility, and Texas is concerned about the effective control of such misuse. An obvious example is the failure of a party to produce all relevant information. This has become a significant issue in the current litigation by various parties against DOE. Texas fears that DOE will continue to be less than forthcoming in the NRC licensing process unless presented with a strong disincentive. Effective sanctions would provide such a disincentive.

G. NRC Staff Role--The notice indicates, albeit somewhat ambiguously, that if consensus is reached regarding a proposed rule, and the proposed rule is not in conflict with existing law, the product of the consensus will serve as the NRC staff recommendation for the proposed rule to be issued for comment. This commitment by the NRC should be clearly stated at the outset of the negotiation process.

H. Facilitator--The parties to the negotiation process should have the opportunity to make comments regarding the specific identity of any facilitator who may be employed or contracted to serve that role during negotiation process.

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