

June 9, 2006

MEMORANDUM TO: Commissioner McGaffigan
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons

FROM: Chairman Diaz /RA/

SUBJECT: IMPLEMENTATION OF NRC RESPONSIBILITIES UNDER THE
RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION
ACT

The Ronald W. Reagan National Defense Authorization Act of Fiscal Year 2005 (NDAA or Act) assigned the Commission new responsibilities regarding waste determinations to be made by the Secretary of Energy in the course of DOE's cleanup of the Savannah River Site (SRS) and Idaho National Laboratory. Under Section 3116(a) of the NDAA, DOE must consult with the NRC on the Secretary's determinations that certain wastes are not high-level radioactive wastes in accordance with criteria specified in the Act. Among these criteria are that the wastes will be disposed of in compliance with the performance objectives set out in subpart C of 10 CFR Part 61.

In addition, Section 3116(b) of the NDAA assigned the NRC to monitor DOE's disposal actions to assess compliance with the Part 61 performance objectives. As part of our monitoring responsibilities, the NRC must notify DOE, the covered State, and certain Congressional committees if the Commission considers any disposal actions taken by DOE to be not in compliance with the Part 61 performance objectives. Any failure of the Commission to carry out its Section 3116(b) monitoring and reporting responsibilities is subject to judicial review, in accordance with Section 3116(f) of the Act. Since DOE has not yet taken disposal actions pursuant to a waste classification by the Secretary, the NRC's monitoring role has not commenced.

In the SRM for SECY-05-0073, the Commission directed the staff to ensure that the technical bases for our decisions are "transparent, traceable, complete, and as open to the public and interested stakeholders as possible." Further, the staff was directed to inform the Commission how it "intends to implement the unique monitoring activities to ensure compliance" with the 10 CFR Part 61 performance objectives. The staff has striven to fully conform to the Commission's direction in its consultations with DOE.

The first consultation under Section 3116(a) of the NDAA, for salt waste disposal at SRS, was completed earlier this year. Salt waste disposal activities are expected to begin this summer, and NRC's monitoring function will begin. Accordingly, this is an appropriate time to review the agency's experiences in implementing the consultation process and to consider ways to improve the efficiency and effectiveness of this process. The salt waste determination was completed in 10 months. Before the determination was completed, South Carolina expressed concern in a September 1, 2005 letter that the process to implement Section 3116 of the Act was not meeting the joint expectation to move forward in a timely manner. The letter also indicated that the SRS tank waste has been characterized as the single largest threat to human

health and the environment in the State.

I believe that the Commission should take action to improve the performance of the consultation process, in terms of both timeliness and quality, for the benefit of the American people. I have re-examined the Section 3116 of the NDAA and the SRM for SECY-05-0073, and conclude that the guidance to the staff could be clarified to make the consultation process more collaborative and allow for early understanding of issues, particularly generic issues that may be applicable to multiple waste determinations.

The staff has informed me that a contributing factor to the time required to complete a determination is that all DOE consultations with NRC have been conducted in a public forum, which has increased the time required to resolve technical issues and complete the consultation process. In SECY-05-0073, the staff proposed to follow NRC Management Directive (MD) 3.5, "Attendance at NRC Staff Sponsored Meetings," as applied to a licensee, in meetings with DOE, and the SRM agreed that the staff should ensure that the technical bases for our decisions are "transparent, traceable, complete, and as open to the public and interested stakeholders as possible." The NDAA, however, did not make DOE our licensee, but instead established a consultation process for the purposes of sharing NRC's technical expertise with DOE, which could include, for example, preliminary ideas or concepts DOE might want to raise simply to obtain our early feedback. To strengthen the collaborative nature of the NRC's interactions with DOE on the NDAA, the Commission's previous direction to the staff should be clarified to reflect the concept that being "as open to the public and interested stakeholders as possible" does not preclude holding some technical discussions in a non-public venue. The staff should be provided the flexibility to hold closed government-to-government meetings, as appropriate and pursuant to MD 3.5. This approach will still require the staff to ensure that the technical bases that underlie our consultations in support of the DOE's waste determinations remain transparent and traceable.

In issuing the above clarifying guidance to the staff, the Commission should also clarify a potential conflict between the SRM and the NDAA. Among other things, the SRM directs the staff to inform the Commission how it "intends to implement the unique monitoring activities to ensure compliance" with the 10 CFR Part 61 performance objectives. The NDAA requires the NRC to monitor DOE's disposal actions for the purpose of assessing compliance with these performance objectives, but it does not authorize NRC to require DOE to comply with any particular NRC regulations. I believe that the language in the SRM could be interpreted to mean that NRC has a duty to ensure DOE's compliance with the plans described in its waste determination, which would exceed our NDAA mandate. The Commission should underscore this limitation to the staff, i.e., as the staff begins to undertake its monitoring activities, it will assess DOE's compliance with the performance objectives, but is not required to ensure DOE's compliance with those objectives.

The Commission should promptly issue the clarified guidance as an SRM to this memorandum. In doing so, I expect that the process for implementing the NDAA will become more efficient, timely, and effective, while retaining requisite openness regarding consultation and results of monitoring activities. These performance enhancements will result from a fuller vetting of technical issues to support more robust waste disposals.

cc: EDO
CFO
OGC

SECY, please track.