

November 24, 1998

COMMISSION VOTING RECORD

DECISION ITEM: SECY-98-237

TITLE: FINAL RULE, PART 2, SUBPART J -- "PROCEDURES APPLICABLE TO PROCEEDINGS FOR THE ISSUANCE OF LICENSES FOR THE RECEIPT OF HIGH-LEVEL RADIOACTIVE WASTE AT A GEOLOGIC REPOSITORY"

The Commission (with all Commissioners agreeing) approved the final rule as noted in the Affirmation Session and recorded in the Staff Requirements Memorandum (SRM) on the Affirmation Session of November 24, 1998.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commissioners, and the Affirmation Session SRM of November 24, 1998.

John C. Hoyle
Secretary of the Commission

Attachments: 1. Voting Summary
2. Commissioner Vote Sheets
3. Final SRM

cc: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR
DCS

VOTING SUMMARY - SECY-98-237

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACKSON	X				X	11/12/98
COMR. DICUS	X				X	11/17/98
COMR. DIAZ	X				X	11/18/98
COMR. McGAFFIGAN	X				X	11/18/98
COMR. MERRIFIELD	X					11/13/98

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the final rule and some provided additional comments. Commissioners Dicus, Diaz, and Merrifield agreed to support only the first approach to resolving funding issues while Chairman Jackson and Commissioner McGaffigan agreed that both approaches should be retained in the Federal Register notice. Commissioners Dicus, McGaffigan, and Merrifield agreed to delete subpart (4) of the definition of 'documentary material' while Chairman Jackson and Commissioner Diaz would have preferred to retain subpart (4) with a modification.

Subsequently, the Commission affirmed the final rule in an Affirmation Session as reflected in the SRM issued on November 24, 1998.

Chairman Jackson's Comments on SECY-98-237

I approve the final rule (10 C.F.R. Part 2, Subpart J) on procedures applicable to proceedings for the issuance of licenses for the receipt of high-level radioactive waste at a geologic repository, and I offer the following comments on a few aspects of the rule.

In particular, I feel that the revised definition of documentary material in the final rule is a general improvement over the definition in the proposed rule, because among other matters, it reinstates the phrase, "is likely to lead to the discovery of relevant information," in subpart 4 of the definition, to be consistent with the general parameters of discovery. See, e.g., Federal Rule of Civil Procedure 26(b)(1). Relative to subpart 4 of the definition, however, I feel that it should be clarified to explain to what the information must be relevant. Therefore, I recommend that subpart 4 be revised to read as follows: "(4) any information that is likely to lead to the discovery of information that is relevant to, the licensing of the candidate site for a geologic repository. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide."

I support the retention of the advisory review panel as opposed to an informal users group, in view of the complex issues that will need to be coordinated among the various interested participants in the implementation phase of the rule in a more structured and efficient context. Likewise, I believe that maintaining the panel membership as currently structured is manageable without sacrificing representation of the affected entities, particularly since past practice has demonstrated that individual members of the various coalitions have been afforded the opportunity to attend and participate in the panel meetings.

Finally, I emphasize my support of a separate rulemaking to amend 10 C.F.R. 2.715, the regulation on participation by a person not a party, to ensure that this rule is clearly inclusive of federally recognized Native American tribal governments.

Commissioner Dicus Comments on SECY-98-237

The proceeding for licensing of a high level waste repository will clearly be one of the most significant and challenging licensing actions undertaken by the Commission. It is my view that an efficient document control and distribution system, such as that proposed in this final rule, will be a crucial piece of the process of achieving an efficient licensing process sufficient for us to meet our obligations for reaching a decision on any repository application. Just as with the Commission's recent publication of a policy statement to improve adjudicatory proceedings, we must continue to be alert for other areas that will allow us to improve the efficiency of our responsibilities with respect to the high level waste repository.

Commissioner Diaz Comments on SECY-98-237

I approve the final rule subject to the following:

- I agree with Chairman Jackson's recommendations regarding the definition in Subpart 4.
- I approve maintaining the LSN Advisory Review Panel (LSNARP) as long as the report to the Commission from the Senior Management Team includes the public comments received at LSNARP meetings.
- Regarding the funding issue, I support the first approach, i.e., having participants approach those Affected Units of Local Governments for funds. (I believe that potential parties would be more successful approaching local units which are closer to them and thus, more understanding of, and supportive to, their needs than coming to the Federal Government.)

Commissioner McGaffigan Comments on SECY-98-237

With one exception, involving the definition of "documentary material", I approve the staff's recommended final rule and statement of considerations. I include here the FRN's statement (on page 15) that "the NRC intends to undertake a separate rulemaking to amend [2.715] to include federally recognized Native American tribal governments," and the FRN's descriptions of two approaches (on pages 13-15) to funding participants in the LSN. It is time that we made good use of technological developments since the original promulgation of Subpart J.

I would remove the 4th element in the definition of "documentary material" -- "any information that is likely to lead to the discovery of relevant material." (See 2.1001; conforming changes would need to be made to the draft statement of considerations.) The main argument for including this element is that "it states one of the generally accepted parameters for discovery." It is true that this element, besides conforming to the existing text of Subpart J, tracks closely a long-standing parameter of discovery practice in the Federal District Courts. Rule 26(b)(1) of the Federal Rules of Civil Procedures says in part, "The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." However, this District Court Rule and the proposed final definition of "documentary material" operate in quite different contexts. The Rule says what a party is obliged to provide *if asked*, but the definition of "documentary material" helps define what a party must provide *without being asked*. It is not too difficult to apply Rule 26(b)(1) to a finite and usually reasonably small set of requests and deduce what one's obligations are, but I do not see how a party to a repository licensing can reasonably be expected to usefully distinguish among vast amounts of material just that information that is likely to lead to the discovery of relevant material. It is far more likely that parties will burden the system and themselves

with every document around than that they will be able to use the 4th element of the definition to distinguish one thing from another. The Chairman's proposed revision of this language has the virtue of making the implicit explicit, but it does not remove the difficulty I see.

The proposed rule recognized that the system for electronic availability of documentary material could not contain everything. The proposed rule accordingly contained a narrowed definition of "documentary material" that focused on the important material (see pages 3-5 of the draft FRN attached to SECY 97-154). The arguments the staff then made for the narrower definition are still good and should be reinstated in the FRN for the final rule. During drafting of the proposed rule, the ASLBP argued for restoration of the breadth of the existing definition, or, in the alternative, some medium expansion of the existing definition. In my vote on the proposed rule, I adopted the medium expansion, which consists of the first three elements of the draft final definition before us (amended slightly in light of comments received). That expanded definition, together with the great detail required by 2.1003, should feed the system with what is likely to be a great deal more information than can reasonably be digested and put to good use. I see no need for more.

Last, I note, and agree with, the staff's comment (on page 6 of the SECY paper) that, if the Commission eventually makes changes in the hearing process for high level waste disposal, the regulations that are the subject of this rulemaking will need to be revisited.