



Department of Energy
Washington, D.C. 20585

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WM Record File

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WM Project 16

Docket No. _____

PDR ✓

LPDR ✓

Honorable Scott Matheson
Governor of Utah
Salt Lake City, Utah 84114

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Dear Governor Matheson:

In his letter of March 9, 1984, Secretary Model responded to your letter of December 22, 1983, regarding Department of Energy (DOE) activities under the Nuclear Waste Policy Act of 1982 (the Act). In that letter, he indicated that I would be responding to the particular issues contained in your several petitions for rulemaking and your requests for other agency action. He also indicated that I would be including a summary of DOE interactions with Utah since passage of the Act (see enclosure). I am pleased to have the opportunity to provide you this additional information.

Before turning to the specific issues, I would like to offer one general comment with regard to your petitions for rulemaking. As you know, the General Guidelines for Recommendation of Sites for Nuclear Waste Repositories (Guidelines) are with the Nuclear Regulatory Commission (NRC) for concurrence and have not yet been promulgated by the Department. Because each of your petitions relates to matters within the scope of the pending Guidelines rulemaking, the issues raised in the petitions will be considered in the context of that existing process. The section in the Administrative Procedure Act (APA) that you cited, 5 U.S.C 553(e), concerns requests for new rulemakings. This section does not apply to comments made on pending rulemakings. Consequently, in accordance with the APA and pursuant to 10 CFR 205.161(b)(2), the Department will consider your petitions as comments relating to the existing rulemaking rather than considering initiating separate rulemakings to address the issues raised in those petitions. The rationale for the ultimate acceptance or rejection of the points raised in your petitions will be included in the preamble to the final Guidelines.

Because the Guidelines were forwarded by this office to the NRC for concurrence, I am now in a position to address how this office currently views the issues raised in your petitions. You should be aware that this discussion does not in any way represent the final disposition of the issues raised in your petitions by the Department. As stated before: final disposition will be made by the Secretary by his issuance of the Guidelines following concurrence by the NRC.

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The first Utah petition for rulemaking requests that the disqualifying condition in §960.5-2-5(d)(3) of the Guidelines be amended to "assure protection for National and State Parks and other statutorily-protected reserves in full compliance with the Nuclear Waste Policy Act of 1982, National Park enabling legislation, and the Federal Land Policy and Management Act." As I understand it, your request would disqualify any potential site adjacent to federally or State-protected reserves if repository activities could cause any impairment to public enjoyment of these protected areas. The only exception to disqualification would be a determination by the Secretary of Energy in the statutory environmental assessment (EAs) that no other site can reasonably be expected to comply with all of the guidelines necessary to protect public health and safety.

While this office recognizes, and the Guidelines reflect, that proximity of a potential site to protected Federal or State reserves is an important siting consideration, the Act does not prohibit consideration of such sites in the site selection process. In regard to park impacts, we believe the standard for disqualification proposed in your petition, i.e., "any impairment", is overly stringent and, in practical effect, creates a standard which would require DOE to disqualify all sites located near protected reserves, even if only minor repository-related impacts would result. The disqualifier now in the Guidelines concerning proximity to National Parks, Section 960.5-2-5(d)(3), recognizes that repository activities near such areas do not necessarily result in impacts that would unacceptably affect the designated use of such areas. This appears to be a more reasonable approach than one that tended to ignore the nature and degree of impacts attributable to repository activities. We further believe this approach to be in accord with judicial interpretation of the statutes to which you refer.

It should be noted that the Department made a number of changes after the February 7, 1983, publication of the first draft guidelines in response to concerns raised by the State of Utah and others. For a more complete discussion of the Department's consideration of issues on this topic, see Volume 1, pages 168 through 172, of the November 18, 1983, Record of Responses to Public Comments on Proposed Guidelines for Recommendation of Sites for Nuclear Waste Repositories.

The second petition requests the initiation of a rulemaking proceeding to define the substantive basis for the selection of three sites for site characterization from the five or more nominated sites. The Secretary is obligated by the Act to base his recommendation decision on the hierarchy of considerations contained in the Guidelines, on the information and analyses presented in the EAs, and on pertinent Federal regulations. The Secretary will therefore have both a sufficient procedural and analytical basis for exercising his proper discretion in making the recommendation decision.

Furthermore, the Department believes that no decision methodology, however sophisticated, can replace the need for Federal officials, in close consultation with States and affected Indian tribes, to exercise reasonable judgment in striking a proper balance in the recommendation process.

Potential host States and affected Indian tribes will be consulted on all of the factors bearing on the Secretary's recommendation through review of comments on the draft EAs and hearings on those drafts. Cooperative activities will increase as preliminary versions of the EAs are made available to the States. The EAs will provide a strong foundation for the recommendation decision since they will establish the basis for nominations, the suitability of sites for characterization, and the data base upon which the recommendation decision will be founded. Subsequent to issuance of the draft EAs, there will be a series of discussions between Department officials and representatives of potential host States and affected Indian tribes on the ways in which the data and findings contained in the EAs and other relevant material will be organized and displayed as elements considered in the Secretary's recommendation decision. The Department believes that the recommendation process is sufficiently specified in the Guidelines in order to provide the Secretary with a comprehensive framework for his recommendation decision.

The third petition renews your request of August 5, 1983, for a rulemaking to adopt sufficiency standards for the data and informational base for site nomination. Section 960.3-2-3 of the Guidelines states that DOE shall rely on available data to nominate and recommend sites for characterization unless the Secretary determines that the data are inadequate to support site recommendations in the absence of further data collection, such as preliminary borings. The data sufficiency issue hinges on the ability to conduct the evaluations in the EAs required by Section 112(b)(1)(E) of the Act. The standard proposed in the petition could unreasonably restrict the Department's evaluations for the EAs and thereby hinder the Department's compliance with the Act. The Department intends to utilize all available information in developing the EAs. As the Section 112(b)(1)(H) guideline recognizes, it is conceivable that the Secretary may conclude that available data is insufficient to permit him to make an informed recommendation decision. If this should be the case, the Department will obtain whatever additional data are necessary.

Let me now turn to your four requests for other agency action.

We interpret the basis of your request for compliance with the rulemaking and hearing requirements in the DOE Organization Act of 1977 (Organization Act) to be your belief that the Department has violated applicable statutory rulemaking and hearing requirements in the process it has followed, to date,

in developing the Guidelines. The Department is of the view that the Guidelines development process has proceeded in accordance with the notice and comment rulemaking requirements of the APA and the DOE Act. It is important to note that the Department is not required to renotice a proposed rule for public comment unless the revisions are so major that the original notice did not adequately frame the issues for discussion. In this instance, the scope of the Guidelines has not changed since the initial proposal and the current draft is a reasonable refinement of the previous drafts published for comment. Therefore, we believe the requirements of the APA have been satisfied.

With regard to your suggestion that the rulemaking and hearing requirements of the Organization Act have been violated, we consider the preamble to the proposed Guidelines published for comment on February 7, 1983, to satisfy the requirement of the Organization Act that the publication be accompanied by a "statement of the research, analysis and other available information in support of, the need for, and the probable effect of" the proposed rule. Also, the opportunity for oral presentation of views for rules having a substantial impact or involving a substantial issue of fact or law, was satisfied by the regional public hearings held on the draft Guidelines in Chicago, Illinois, New Orleans, Louisiana, Washington, D.C., Salt Lake City, Utah, and Seattle, Washington on March 4, 7, 10, 14, and 21, 1983 respectively.

The third request calls for EA scoping hearings after the Guidelines are promulgated. You indicate that because revisions were made to the Guidelines subsequent to the original scoping hearings that new hearings are necessary. You also indicate that both State and public participants need to have a better understanding of potential siting issues. To facilitate a better understanding of issues, this office, as you know, has decided to go beyond the requirements of the Act by holding public hearings on the draft statutory EAs. We believe that these hearings will provide much the same opportunity for the communication and understanding of siting issues as would a second round of scoping hearings on the EAs. In addition, not only will States and the public have an opportunity to review the scope of the EAs after the Guidelines are promulgated, but they will also have the benefit of reviewing the Department's supporting analyses and evaluations contained in the EAs. The fourth request asks that the Department provide detailed scoping documents describing the issues and scope of inquiry to be addressed or utilized in preparation of the statutory EAs and such preliminary drafts of the EAs as are currently in the process of development. Many of these documents have already been provided to your State. In addition, I have been advised by my staff that at the January 18 meeting with Utah representatives, DOE presented a design for interaction with your State on the EAs detailing the exchange of

draft documents and data and the development of seminars and workshops concerning the EAs. I understand that your staff is now reviewing the interaction plan. We hope that this plan will further cooperative relations between DOE and the State of Utah until such time as a formal consultation and cooperation agreement can be negotiated.

I hope this response clarifies the position of DOE on the issues you raised. My staff and I are ready to provide you and the State of Utah with any further information you may require concerning this nationally important program.

Sincerely,



Michael J. Lawrence
Acting Director
Office of Civilian Radioactive
Waste Management

Enclosure

Enclosure

Summary of DOE Interactions with Utah Since Passage of
Nuclear Waste Policy Act of 1982

I. DOE Columbus, Ohio, program office meetings with Salt States (including Utah)

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|---|-----------------------|------------------|
| o | July 19-20, 1983 | (Columbus, Ohio) |
| o | August 22, 1983 | " |
| o | September 20-21, 1983 | " |
| o | October 24, 1983 | " |
| o | November 15-16, 1983 | " |
| o | January 26-27, 1984 | " |

The August and October meetings were specifically designed to address concerns of the State of Utah relating to the preparation of the statutory environmental assessments.

II. DOE Headquarters and Columbus office meetings with State of Utah High Level Nuclear Waste Policy Work Group et al.

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| o | December 8, 1983 | (Salt Lake City, Utah) |
| o | December 15, 1983 | (Washington, D.C.) |
| o | January 18, 1984 | (Salt Lake City, Utah) |

III. Other DOE cooperative activities with the State of Utah

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|---|--------------------|---|------------------------|
| o | March 14, 1983 | Public hearings on Siting Guidelines | (Salt Lake City, Utah) |
| o | May 3, 1983 | Public EA Scoping Hearing | (Monticello, Utah) |
| o | May 4, 1983 | Public EA Scoping Hearing | (Salt Lake City, Utah) |
| o | September 24, 1983 | Public Information Meeting | (Moab, Utah) |
| o | December 7, 1983 | Planning meeting to discuss future information meetings | (Moab, Utah) |