BEFORE

THE U.S. NUCLEAR REGULATORY COMMISSION

SUPPLEMENTAL STATEMENT

OF

THE ENVIRONMENTAL POLICY INSTITUTE

REGARDING

THE DOE INTERPRETATION OF SEC. 114(f) OF THE NUCLEAR WASTE POLICY ACT

SUBMITTED SEPTEMBER 17, 1985

The Environmental Policy Institute appreciates the opportunity to present its views on the timing of the Department of Energy's "preliminary determination of suitability"(PDS) pursuant to Sec. 114(f) of the Nuclear Waste Policy Act(NWPA).

INTRODUCTION

Since June 22, 1985 when it agreed with the Commission to make the PDS after site characterization, DOE has unilaterally adopted interpretations of Sec. 114(f) increasingly at odds with that agreement. Most recently at the Commission's July 29, 1985 meeting, DOE expounded a position even more extreme than that taken in the Final Mission Plan published in June, 1985 wherein DOE acknowledged that discussions at the June 22, 1984 meeting "may have indicated a further agreement relative to the timing of the preliminary determination." DOE now denies such an agreement was made. Because DOE subsequently concluded that adherence to the June 22, 1985 agreement would necessitate having three suitable sites after characterization, a condition DOE deems unacceptable, it has felt free to ignore, if not misconstrue, the

June 22, 1985 agreement.

The Environmental Policy Institute believes that the original NRC/DOE agreement is both an accurate interpretation of the NWPA and sound policy. The requirement that DOE make the "preliminary determination of suitability"(PDS) after site characterization is entirely consistent with the legislative history of the NWPA and a logical decision point since it occurs after, and not before, DOE has conducted its substantive site investigation work.

The requirement of three suitable sites after characterization which DOE has raised as an unacceptable condition is entirely reasonable when taken within the context of its limited application to the preparation of DOE's final and only environmental impact statement under Sec. 114(f) and within the broader context of the site selection process itself.

The PDS provision must be read within the context of Sec. 114(f). As such, the "three suitable site" requirement is essentially a requirement that the three sites be "suitable for the purposes of NEPA." The Sec. 114(f) requirement is not a requirement, as argued in a June 25, 1985 letter from four U.S. Senators to DOE with copies to the Commission, for three "perfect" sites after characterization or sites "qualified for application for a construction authorization for a repository."

The site selection process provided for in the NWPA and in the Commission's and EPA's regulations governing high-level waste repositories are all intended to establish that site selection decisions will, in practice, produce sites that are deemed to be suitable for development as repositories and that unsuitable sites will be "weeded out" of the process.

While the need to characterize a "fourth" site may be implicit in a strict interpretation of Sec. 114(f) as DOE fears, the entire effort in the site selection process, including the extensive DOE/NRC interactions concerning site characterization plan and early identification of licensing issues, is intended to keep the probability of a "fourth" site characterization minimal. We reject the DOE argument that a "fourth" site must be characterized from the outset as a "red herring" argument and note that DOE will conduct a "fourth" site characterization as part of its second respository selection process.

Regardless of the ultimate interpretation of Sec. 114(f), however, it does not appear that the DOE's change in policy conflicts with the letter of the final site selection guidelines No reference is made in the Guidelines to the timing of the PDS, as a result of the 1984 agreement, although DOE's Supplementary Information accompanying the issuance of the Guidelines does appear to run contrary to the spirit of the agreement. Therefore the Commission's original concurrence is not itself invalid although, as the Commission has already stated in its comments to DOE concerning the Project Decision Schedule and the Mission Plan, the DOE's conduct of its high-level repository program is in violation of the June 22, 1984 agreement with NRC.

First, we urge the Commission to reaffirm its original concurrence order. Second, because the inconsistent conduct by DOE with a formal Commission agreement raises serious questions about the NRC/DOE regulatory relationship and the legality of the DOE program, the Commission should pursue enforcement of the

agreement with DOE through the procedures provided by the NWPA procedures, such as comment on the Mission Plan and Project Decision Schedule, as the Commission has already done.

BACKGROUND

On June 22, 1985, the Commission held a public meeting to consider the issue of its concurrence in the Department of Energy's "Site Selection Guidelines for High-Level Waste Repositories"(the Guidelines) as required by Sec. 112(a) of the NWPA. Following that meeting, DOE and the Commission reached agreement on the timing of the PDS and DOE agreed to amend its Guidelines, the Commission published a final concurrence decision stating that:

> "At the June 22, 1984 Commission meeting, the Commission and the DOE agreed that the preliminary determination required by section 114(f) of the NWPA should be made after the completion of characterization and not at the time of site nomination and recommendation. The Commission and DOE therefore agree that the last sentence of the first full paragraph in Sec. 960.3-2-3 of Subpart B should be deleted(49 FR 28139, July 10, 1984)

Subsequently, on December 6, 1985, DOE promulgated final site selection guidelines(49 FR 47714-47770). At the time, DOE's Supplementary Information stated that as a result of the June 22, 1984 meeting with the Commission that it had dropped the relevent portion of the Guidelines stating,

> "The DOE agreed that the discussion of the preliminary determination was outside of the scope of the guidelines and accordingly revised Sec. 960.3-2-3 by deleting the above-mentioned statement."(49 FR 47727, December 6, 1984).

DOE further departed from the June 22, 1985 agreement with the Commission and has articulated a position that the PDS will be made at exactly the same point in the site selection

process as it proposed prior to the June 22, 1985 meeting(see DOE Draft and Final Mission Plans, DOE/RW-0005, April, 1984 and June, 1985 respectively) and DOE Preliminary Draft and Draft Project Decision Schedules, DOE/RW-0018, January, 1985 and April, 1985 respectively).

Most recently on July 29, 1985, the DOE made a presentation to the Commission at which it stated, that in its view, no agreement concerning the timing of the PDS had been agreed to at the time of the Commission's concurrence. We note here that this latter July 29th presentation extends beyond the statements actually made in the Final Mission Plan wherein DOE states that, in fact, the current DOE interpretation maybe at variance from the June 22, 1984 agreement. DOE, in the Mission Plan stated,

> "While discussions in that meeting may hve indicated a further agreement relative to the timing of the preliminary determination, the DOE has concluded that a preliminary determination made after site characterization, as suggested in the Commission's objection, would have the effect of requiring that three suitable sites be found suitable at the end of characterization." (see p. 25, Vol II, Final Plan)

The Mission Plan further states that since DOE had objected to this latter "three suitable site" requirement at the time of the June 22, 1984 meeting that it was free to make the PDS at its originally proposed time.

DOE PDS TIMING IS NOT SUBSTANTIVELY OR LEGALLY AND APPROPRIATE

DOE PDS WOULD BE MADE ON INSUFFICIENT BASIS

DOE argues that it is programmatically sound to make the PDS at the time sites are recommended for characterization(see Vol. II, Final Mission Plan, pp. 25-26, 137-142). DOE argues that,

"The Secretary will have at that time the evaluation

> to support a preliminary determination for each of the three recommended sites. Under Sec. 112(b)(1)(E) the environmental assessments that accompany site nominations are to include, among other things, both (1) and evaluation of whether the site is suitable for site characterization and (2) an evaluation as to whether the site is suitable for development as a repository. Each of these evaluations is to be based on the guidelines promulgated under Sec. 112(a). At the time of nomination, the Secretary will use the first evaluation to support the required finding that the nominated sites are suitable for characterization. Subsequently, at the time of recommendation, he will be able to use the second evaluation and any other available information to make the preliminary determination" referred to in Sec. 114(f) that the sites are suitable for development as repositories."(Vol. II, Final Mission Plan, p. 139)

As the NRC staff pointed out in Enclosure 3 of SECY-85-258, DOE intends to make the PDS principally upon on that narrow set of guidelines, defined by DOE itself, to be applicable to evaluation in the environmental assessment under Sec. 112(b)(1)(E)(ii) of the suitability of the site for development as repository. The PDS is therefore to be based principally on those guidelines that do not require characterization.

This approach in direct conflict with the literal reading of Sec. 114(f) which requires that the PDS be made in a manner consistent with the guidelines promulgated under Sec. 112(a), i.e. all of the guidelines under Sec. 112(a) and not just those that do not require site characterization. It is also in conflict with the basic premise of Sec. 112(a) which requires that geological factors be the primary criteria for recommending sites.

DOE has clearly over-reached in trying to find meaning in the Sec. 112(b)(1)(E)(ii) environmental assessment requirement relating to "suitability for the development as a repository" to

support its PDS timing. Even if one were to assume that the Sec. 112(b)(1)(E) finding of suitability had meaning outside of the environmental assessment process, such meaning would clearly make a PDS finding at the same point in time redundant. Not only does DOE make exactly the same evaluation as a part of the environmental assessment under Sec. 112(b)(1)(E)(ii), but DOE makes a nomination decision and a recommendation decision at the same point in time based upon more comprehensive analyis. The inclusion of a determination of suitability in Sec. 112(b)(1)(E)(ii) does not support DOE's interpretation but runs counter to it.

Furthermore, an examination of the Guidelines as drafted by DOE reveals that there are only a handful of factors which do not require characterization. These factors, as identified by the NRC staff are: site ownership and control, population density and distribution, meteorology, offsite installation and operations, environmental quality, socioeconomic impacts, and transportation.

None of the DOE Guidelines, even those which do not require characterization and are at issue here, are are subject to a definitive finding prior to characterization. Pursuant to Appendix III of the Guidelines no guidelines are carried to a level 2 or 4 finding prior to site characterization. DOE intends to collect additional data applicable to all guidelines during the site characterization period. As DOE intends to apply these guidelines pursuant to Appendix III, sites can be recommended, and in this case the PDS made, without any site specific data. For example, no site specific data are available on one of the

three sites proposed by DOE for characterization, the Deaf Smith County site in Texas(see Sec. 3 of the Draft Environmental Assessment for the Deaf Smith site).

We conclude that DOE's proposal to make the PDS prior to site characterization would be based on a minimal amount of data and the finding, identified by DOE, under Sec. 112(b)(1)(E) that a site is suitable for development as repository is of the most rudimentary kind and is an entirely inadequate basis for finding that a site is a reasonable alternative pursuant to NEPA. We note that the Commission in its June 22, 1984 meeting discussed precisely this point, the need for more data to make the PDS, in reaching its agreement with DOE(see Transcript of NRC/DOE Meeting, June 22, 1984, pp. 86-97).

DOE'S CONTENTION THAT THE NWPA DOES NOT ESTABLISH PDS TIMING IS INCORRECT

As for the question of DOE's legal interpretation of when the NWPA "allows" it to make the PDS, we do not believe that the NWPA gives DOE any discretion to make the decision prior to site characterization. The plain meaning of Sec. 114(f) suggests that the suitability determination, drafted as condition (2) of which sites may be considered as NEPA alternatives, follows the necessity of completion of site selection, condition (1). Whereas DOE argues that the NWPA did not include a provision establishing the timing of the PDS, condition (1), the requirement that site characterization be completed is precisely such a requirement. Given the controversy over the application of NEPA to the repository program, the extraordinary limitations on NEPA contained in the NWPA, and the creation of a NEPA

"roadmap" directing the level of NEPA compliance at each program decision stage, it is improbable that Congress "forgot" to define when the only NEPA alternatives for the only environmental impact statement provided for in the legislation would be determined.

House Interior Committee Chairman Morris K. Udall engaged in a floor colloquy at the time of final House adoption of the final legislative language clarifying that, in fact, the PDS was sequentially linked to completion of site characterization(see Congressional Record, December 20, 1985, p. H 10523).

Two letters sent by Chairman Udall, and House Energy & Commerce Committee Chairman John Dingell and other Commerce Committee members to DOE and forwarded to the Commission expand further on the requirement that the PDS is to be made after characterization.

A June 25th letter on the same subject signed by four Senators also discusses the PDS timing issue but hinges its argument entirely on the fact that a provision was added before Senate passage of the final bill to Sec. 114(f) requiring that the PDS be made consistent with the guidelines promulgated under subsection 112(a). The Senate letter argues that this necessarily means that the PDS is to be made at the same point in time as when the Guidelines are applied, i.e. when sites are recommended. There are several flaws in the Senate argument. First, the Senate letter would require the language of Sec. 114(f) that the PDS be made "consistent" with the Guidelines to be read in a manner making much more of a connection between the

PDS and the guidelines, i.e. not as "consistent" but "pursuant" to the guidelines or "upon application of the guidelines." The statue uses the word "consistent" and as the House letters point out, the inclusion of the language making the PDS consistent with the guidelines was to give greater guidance to DOE in what criteria were to be used in making the determination and not in defining its timing. This comports with the explanation made by Sen. McClure at the time the Senate added the "consistency" provision (see Cong. Rec., December 20, 1982, pp. S 15642, S 15657).

Furthermore, the Sec. 114(f) requirement of consistency with the guidelines promulgated under Sec. 112(a) necessarily includes all guidelines promulgated under Sec. 112(a) and not only to those, as DOE suggests, used in making a determination of suitability under Sec. 112(b)(1)(E). Even if one were to accept the Senate argument that application of the Guidelines was only intended to occur at the time of recommendation, one would still have to overcome the fact that all guidelines must be applied and that DOE has circumvented practical application of that principle by developing a set of Guidelines that apply to all phases of the site selection process and primarily after characterization.

DOE has made an additional argument concerning the timing of the PDS based on the contention that it is a "preliminary" determination and therefore necessarily takes place early in the site selection process, i.e. there is nothing after characterization to which it would be "preliminary."

Once again, DOE has over-reached in its reading of the statue and taken the PDS provision out of the context of Sec.

114(f). Making the PDS as a "preliminary" decision within the context of the timing of the NEPA evaluation required by Sec. 114(f), it is easy to ascribe meaning to the concept of "preliminary."

The PDS is "preliminary" to the conduct of the environmental impact preparation process. Obviously, a draft impact statement cannot be prepared nor adequate public comment made if alternatives are not provided. The PDS is also preliminary to the Secretary's submission of a recommendation of a final site to the President pursuant to Sec. 114(a)(1) as it is to the preparation of the final environmental impact statement which must accompany that recommendation. Sec. 114(a)(1) describes in detail process and the other data and decision materials necessary to accompany is recommendation the Secretary's recommendation to the President. Further, the PDS is preliminary to submission by the President of a recommendation of a final site to the Congress pursuant to Sec. 114(a)(2). The PDS is preliminary to final state or tribal approval or disapproval of the recommendation and congressional review of a state or tribal disapproval. Finally, the PDS is preliminary to the submission of a license application to the NRC.

DOE's contention that there is only room for a "final" decision after completion of the site characterization process and that the PDS must be earlier because it is "preliminary" is without basis. Even in defending its interpretation of the PDS timing in the Mission Plan, DOE itself notes that after completion of site characterization it will be unable to obtain a

construction authorization without a significant amount of additional data gathering and analysis including preparation of a preliminary safety analysis report (see Vol. II, Final Mission Plan, p. 140). In addition Sec. 114(a)(1) of the NWPA, includes a detailed list of other analyses and information which must accompany the Secretary's final recommendation which extend beyond the site characterization process including analyses of site characterization data, preliminary NRC comments on that analysis, and descriptions of the waste form and its expected performance in the specific geology of the site.

DOE's INTERPRETATION WOULD VIOLATE NEPA

The PDS is not an independent site selection finding or decision and must be read within the NEPA alternatives function assigned to it in Sec. 114(f). Following DOE's proposed timing, the PDS would be entirely redundant to the site nomination and recommendation decisions and Presidential review made at the same time under the NWPA.

It is our reading of the legislative history that while Congress intended to limit the scope of the alternatives that needed to be considered for the final environmental impact statement it intended, nonetheless, for full compliance with NEPA. Congress gave no suggestion that it intended to rewrite the NEPA "reasonable alternatives" requirement to include clearly "non-reasonable" alternatives, i.e. non-viable sites. The DOE interpretation would also render a situation in which sites which were clearly unsuitable at the time the environmental impact statement was prepared were considered "reasonable alternatives.

Although the original Senate version of the legislation (S.

1662) could have been read to require such "non-viable" alternatives by limiting the alternatives only to those sites recommended for characterization, the final legislation clearly departs from this approach by requiring the "preliminary determination of suitability" and completion of site characterization(see Sec. 405(a) of S. 1661, Cong. Rec. p. S 4182, April 28, 1982). Had Congress intended that only those sites recommended for characterization be considered NEPA alternatives, essentially the equivalent of DOE's interpretation, it would have retained the original Senate language. It did not do so.

Finally, DOE argues that acceptance of the timing of the PDS after characterization would necessarily result in a requirement that all three sites be suitable for development. Suitable sites are clearly required by condition(2) of Sec. 114(f) requiring a determination of suitability for all alternative sites and by NEPA. DOE concedes this point in a convoluted way by arguing that it can only make this clear cut determination at the time of recommendation. DOE argues, however, that compliance with condition 2, the PDS. is only practical before characterization and cannot be interpreted except as is practical(see Transcript, July 29, 1985 NRC meeting).

It is sufficient here to note that there is nothing in the way the condition 2 is drafted to support DOE's interpretation. Rather, because the entire purpose of making the PDS is its application to the preparation of that environmental impact statement, it more "practical" and likely that such determination

should be made at a point in time close to the prepration of that document.

THE "REASONABLENESS" OF THREE SUITABLE SITES

Although the issue of whether or not DOE must have three suitable sites after characterization is not immediately at issue, since the Commission's 1984 concurrence only dealt with the question of timing, it is important to address this question from a policy standpoint since it is central to DOE's decision to ignore the concurrence agreement.

PDS Must Be Based on "Reasonableness" Test

As stated earlier, the PDS is not an independent determination to be made as part of the DOE site selection process since it would be entirely redundant. It is only made within the context of the DOE's exercise of its NEPA responsibilities as specified by Sec. 114(f). The arguments that the finding of suitability must result in "perfect" sites or sites which are "qualified for application for a construction authorization" raised by June 25, 1985 Senate letter and implicit in DOE's arguments are have no basis in the statute or the legislative history.

The correct threshold for determining suitability under Sec. 114(f) is whether the three sites are suitable for development as a repository for the purposes of NEPA, i.e. are they reasonable alternatives under NEPA. The letter and legislative history of Sec. 114(f) makes clear that NEPA is limited to the extent of the consideration of alternatives to the development and timing of geologic repositories and alternative sites is constrained with regard to the application of NEPA. The NWPA further requires

that a "preliminary determination of suitability"(PDS), which is at issue here, be made for each alternative based upon the Guidelines. The full extent to which these limitations would ultimately define or constrain NEPA in terms of determining whether a given NWPA alternative constitutes a reasonable NEPA alternative remains unclear. This uncertainty would not resolved by DOE's interpretation.

Notwithstanding the uncertainties of ultimately applying NEPA, we believe that there is no reading of Sec. 114(f) other than as a requirement that the three alternative sites necessarily be found to be suitable for development as a repository. The only issue is timing and the timing of DOE's PDS would necessarily allow unsuitable sites to be considered as alternatives at the time the environmental impact statement was prepared and NEPA review completed. This appears to be entirely contrary to the congressional intent for NEPA compliance.

Characterization of "Fourth" Site is Not a Valid Argument

DOE has raised several policy arguments against a requirement for three suitable sites after characterization. Primary among these is that DOE would be required to characterize a fourth site to provide the necessary level of confidence that three sites would remain after characterization. DOE argues this would be extremely expensive, but would be necessary to save time if one of the sites was found "unsuitable." We categorically reject this "fourth site" argument. From a purely practical standpoint, confidence or time saving would not be significantly enhanced by multiple characterizations, a point Mr. Rusche argued himself

before the Commission on July 29, 1985(see Commission Transcript, July 19, 1985, pp. 50-51).

Confidence, economic cost saving, and time can only be conserved through a technically conservative site selection and characterization program. The NWPA and the NRC regulations proscribe such a program. As required by the NWPA and NRC regulations, DOE must complete an extensive site characterization planning process. NRC has itself argued in proposing revisions to Part 60 that the exhaustive informal DOE/NRC interactions including those based upon the DOE/NRC Memorandum of Understanding(48 FR 38701, August 25, 1983) will be so extensive as to permit limitation of more formal NRC review procedures such as the issuance of a draft site characterization assessment(see 50 FR 2579-2590, January 17, 1985) and now required by Part 60.

The establishment of a technically conservative program should reduce the need to characterize a "fourth site" to a very low probability. It will not eliminate it, but then characterizing four sites or five would not eliminate it either. Similarly, if a "fourth site" were needed, one would expect the technically conservative program required by the NWPA and embodied in NRC "informal" prelicensing review process to identify a flawed site well before the end of the first repository site selection process. The procedures and standards employed by NRC and DOE should be adequate to reduce the probability of the "catastrophic failure" postulated by DOE arising from a finding of unsuitability after characterization to a minimal level or they are likely to be inconsistent with the NWPA and other statutes setting general agency responsibilities

such as the Atomic Energy Act.

A corollary argument DOE makes is that the NWPA does not authorize the characterization of more than three sites and therefore even if characterization of a fourth site were deemed to be necessary it would not be permitted. The NWPA expressly allows the characterization of more than three sites. While the Secretary is instructed to recommend three sites for characterization by January 1, 1985 under Sec. 112(b) this is not a limitation on the total number, as underscored by the Sec. 112(d) express authorization continued screening and recommendation of additional sites.

Similarly, Sec. 113 authorizes characterization "beginning with the candidate sites that have been approved under section 112." Sec. 113 applies to Sec. 112 in general, including Sec. 112(d) and not specifically to Sec. 112(b). Sec. 114(a) which specifies how the final recommendation of a final repository site shall be made expressly states that characterization must be completed "at not less than 3 candidate sites." Further, Sec. 114(a)(1)(D) also states that the DOE's environmental impact statement must include consideration of "not less than three candidate sites;" the requirement expanded upon in Sec. 114(f).

PDS Application to Second Repository Highlights Flaws of DOE Interpretation

The NWPA contemplates at numerous points, that the site selection process for the second repository will utilize sites that have been characterized for the first repository and not chosen for the final repository. Such provisions have both legal and practical implications all of which lead to a presumption

that sites that are characterized for the first repository but not chosen must still be "suitable" for site selection if not "development as a repository."

For example, the pool of sites for nomination of the second repository contemplates the inclusion of the two remaining first round sites that were nominated and recommended for characterization(see Sec. 112(b)(1)(C)). Sec. 114(f) contains a requirement that the alternatives for the second repository EIS include the remaining sites recommended for characterization for the first repository. Since the PDS provisions apply identically to subsequent repositories, DOE's PDS interpretation could once again mean that sites that were found unsuitable during the first repository selection could, in subsequent EIS's, justify subsequent selection decisions. DOE's interpretation could ultimately constrain the search for additional sites for subsequent repositories since DOE's interpretation would allow DOE to use unsuitable sites to meet NWPA requirements for multiple sites.

Finally, even in the case of DOE's postulated "catastrophic" failure in which only two sites were found suitable for development, catastrophy would not ensue, at least for the want of an additional site. DOE is charged with siting a second repository. The second repository is also subject to the requirements of multiple site characterization pursuant to Sec. 112 of NWPA and would comprise an ongoing site selection/characterization process.

CONCLUSION

There is no question that alternatives required for the preparation of DOE's final environmental impact statement must be found to be preliminarily suitable for development as a repository. DOE virtually concedes this point and has attempted to manipulate the timing of the PDS to a point in time so early and on such minimal criteria and data as to nullify its meaning as a statutory requirement. At the same time, DOE and others have raised the specter of a catastrophic collapse of the repository development process in the eventuality that one of the three characterized sites is found unsuitable at a late date.

While we concede the possibility, we believe that DOE has vastly exaggerated the probability of such an occurrence and has within its authority the capability to reduce that probability to very small level. DOE's interpretation of Sec. 114(f) would have the effect of altering the application of the National Environmental Policy Act in a manner wholly inconsistent with that Act and with the congressional intent in the NWPA.

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Meeting Title: Oral Pres. on Timing of DOE's Prel. Deter. on Suitability of Sites for Develop as Repositories

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9/6/85 - Oral Presentations on Timing of DOE's Preliminary Determination on Suitability of Sites for Development as Repositories (PUBLIC MEETING)

Attachments:

1. Testimony of Del White and Ron Halfmoon

2. Views of the Yakima Indian Nation

3. Testimony of Gregg S. Larson
   State of Minnesota

4. Statement of Booth Gardner, Governor
   State of Washington

5. Comments by STAND AND POWER

6. Statement of Edison Electric Institute

7. Supplemental Statement of the Environmental Policy Institute dated September 17, 1985