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DEPARTMENT OF ENERGY & TRANSPORTATION

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OFFICE OF  
DOCKETING  
BRANCH

Mr. Samuel J. Chilk  
Secretary of the Commission  
Attention: Docketing and Service Branch  
U. S. Nuclear Regulatory Commission  
1717 H. Street, NW  
Washington, D.C. 20585

Dear Mr. Secretary:

Re: State of Mississippi comments on  
SECY 85-333

Enclosed are comments by the State of Mississippi to the Nuclear  
Regulatory Commission on SECY 85-333, Procedural Amendments to 10 CFR  
60 Dealing with Site Characterization and the Participation of States and  
Indian Tribes.

Several major issues have been raised which has prompted the State to  
submit formal comments even though the State has not provided  
commentary prior to this time. We would like to take this opportunity to  
point out that at the public meeting held on January 24, 1986 relative to  
SECY 85-333 the Commission made allowance for an additional seven day  
period to file further comments. That action resulted in the comment period  
closing on January 31, 1986. We did not receive the transcript, with notice  
of that January 31 deadline, until February 11, 1986. We regret that the  
States comments were not submitted before the January 31 deadline.

I trust that these comments will be reviewed and appropriately considered  
as constructive commentary by the State of Mississippi. They should serve  
a useful purpose in the Commission's record as the rulemaking process on  
10 CFR 60 continues.

Thank you for providing the State with this opportunity for commentary.

For the Energy and Transportation Board

*John W. Green*

John W. Green  
Executive Director

JWG:cpf  
Enclosures

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Acknowledged by card

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State of Mississippi comments on NRC's proposed amendments to 10 CFR Part 60, SECY 85-333.

A review of SECY 85-333 has been performed by representatives of the State of Mississippi. The following comments concentrate on six (6) major issues:

- (1) Whether the amendments to 10 CFR 60, 10 CFR 51 and 10 CFR 2 should be "decoupled".
- (2) Whether NRC should issue a draft for comment of the site characterization analysis.
- (3) Whether host States/Tribes should automatically be afforded party status in licensing procedures.
- (4) Whether radioactive materials useage during site characterization should be subject to licensure.
- (5) Whether site selection information should be deleted from DOE's site characterization plan.
- (6) Whether DOE should be required to receive and consider comments on the Site Characterization Plan prior to sinking shafts.

In addition to the commentary on the stated six (6) major issues, specific comments on SECY 85-333 are also presented for your consideration.

**Major Issue 1 - Coupling of rulemaking actions on 10 CFR Parts 2, 51 and 60.**

Mississippi is of the opinion that the NRC's conforming of its own rules and regulations to the provisions of the Nuclear Waste Policy Act should be accomplished with a single, coupled, rulemaking action rather than three (3) separate rulemakings. The single rulemaking approach would provide consistency in the rules and would avoid contradiction between the rules and any misunderstanding of those rules.

**Major Issue 2 - NRC should issue a draft for comment of the Site Characterization Analysis.**

The original rule as noted in 46 FR 13971 et seq. called for the issuance of a draft for comment Site Characterization Analysis to be produced by NRC in response to DOE's Site Characterization Plan. That approach by NRC was very conservative and atypical of the NRC's reactor licensing procedures. The NWPA makes no provision for NRC to issue a formal SCA; however, NRC's "conforming amendment" for Part 60 indicates that NRC will issue for comment a "final" SCA. The State notes two problems with the proposed amendment. The comment

period provided in the proposed rule for the SCA is but 90 days which is totally inadequate given no draft for preliminary review, evaluation and comment. NRC contends that the NWPA makes no provision for a draft SCA for comment. Neither does the Act make provision for a draft EA to be issued by DOE for comment. It remains to be seen how DOE will handle the comments on the EA's; however, if those comments are properly addressed, DOE has the opportunity to vastly improve upon the quality of their Environmental Assessments. NRC also contends that the schedule prescribed by the NWPA will not allow time for the issuance for comment of a draft SCA. NRC must not allow their evaluation of the SCP to be anything less than totally deliberate. Those deliberations on the SCP must be made in consultation with the host States/Tribes whose expertise on the sites is extensive. NRC, while conscious of schedules, must not allow their process to be driven by schedules.

The consultation with States/Tribes by NRC must be initiated at an early stage, thereby ensuring that any deficiencies noted in the SCP can be identified at an early stage. This consultation will be a mechanism by which DOE will best be able to attempt to meet its schedule and at the same time ensuring the technical adequacy of the SCP from a licensing standpoint.

### **Major Issue 3 - Host State/Tribe party status in licensing procedures.**

As stated in Enclosure A of SECY 85-333, "there can be no question that the host state has a legal right to be a party" in a licensing procedure. The State of Mississippi simply requests that in order to avoid confusion in the future, 10 CFR 60 be written so that there is no question as to the States/Tribes standing as a party in the licensing processes.

There is in fact another question to pose in this matter, "When does the licensing process start?" This issue leads to at least two other queries: Will shafts be licensed or subject to licensure as part of the operational facility? Will the SCP be included as part of the construction authorization application?

While the rules of practice are clear (ref. 10 CFR 2.714 and 715) as to State/Tribe standing and while statutory authority regarding party status (ref. 189(a) of the Atomic Energy Act, 42 USC 2239) clearly give the state the right to intervene as a person whose interest may be affected, the rule, 10 CFR 60, does not clearly state when the licensing process is initiated. The issue is more clearly defined when posed as, "Will NRC require the DOE to submit with the SCP technical specifications, including the quality assurance/quality control procedures, a license application for exploratory shaft facilities?" Further, if DOE does not choose to use the exploratory shaft(s) as part of the operating facility, will NRC require DOE to detail in the SCP its shaft abandonment and sealing procedures. The Commission should be urged to make the determination now and to incorporate in this rulemaking procedure, those necessary requirements to be met by DOE in terms of the SCP submittal, shaft sinking requirements, abandonment requirements, etc. The State takes a position that the licensing process is initiated with the Presidential approval of sites for characterization and further recommends that NRC consider adopting that position in terms of its rulemaking actions.

#### Major Issue 4 - Licensure of radioactive materials useage during site characterization.

The issue of the use of radioactive material during the in situ testing phase of site characterization becomes complex in terms of the license requirements related to the possession and use of radioactive materials. The State of Mississippi has, pursuant to a 274(b) Agreement with the NRC, certain regulatory authority regarding such possession. Under the rules and regulations of the State Department of Health, particularly 801.A.3.c.4.i and ii, there is a question of whether the user of such radioactive material, a DOE contractor, is subject to licensure by the State, the NRC or both.

There is a question of what radioactive materials and in what quantities may be used during site characterization activities. There is a question of whether NRC's "concurrence" implies that a license for such use has been or will have to be issued. There is a question of the authority of the State with regard to inspection and enforcement activities. There is no question that the State has certain authority over government contractors and contractors working at NRC licensed facilities (Litton Shipbuilding, NSTL and GCNS).

To complicate the matter further is the issue of whether spent fuel and/or commercial high-level waste is to be used during in situ testing as in the case of a Test and Evaluation facility. The issue is one of whether the facility would have to be "licensed" by NRC. If so, the licensing process would obviously precede the submission of a construction authorization application. The State takes the position that if licensing of the use of radioactive materials is indicated during the site characterizatoin phase, the State must have standing in the licensing process.

#### Major Issue 5 - Deletion of site selection information from the site characterization plan.

Adequacy of site screening and selection is something upon which this State has made its record clearly known. While DOE must be held totally accountable for such screening and selection, it remains our contention that NRC, in the exercise of its statutory and regulatory responsibilities, should position itself so that both generic and site specific errors in the screening and selection process are brought to DOE's attention as early as possible. The EA's provide only the first step of DOE's process; however, it is a most critical step in the process since from among those sites "recommended" for characterization, desirably, one will be selected for the Nation's first high-level nuclear waste repository. If the screening and selection process is technically flawed, the possibility that none of the sites characterized will be found suitable for such selection becomes distinct. The Commission has already provided its commentary and ultimate "Concurrence" in the initial phase of the screening process; i.e., the General Siting Guidelines. It stands to reason that the natural progression of the screening and selection process would be for NRC to evaluate the SCP's in terms of DOE's application of those guidelines including a technical interpretation of the data by which DOE's preliminary determinations of suitability have been based. The State recommends that NRC reconsider this issue.

Major Issue 6 - DOE should be required to receive and consider comments on the SCP prior to sinking shafts.

This particular issue can be approached from several different directions. The most simplistic is to have NRC incorporate its preamble statements into the rule, "The Commission believes that Congress intended that DOE should provide the plans sufficiently far in advance so that comments may be developed and submitted back to DOE early enough to be considered when shaft sinking occurs, and all times thereafter." The State recommends that NRC incorporate into the rule the following: "DOE shall submit the plans for review and comment sufficiently far in advance, but not less than 180 days prior to the sinking of shafts." The issue is better developed when the level of review is raised. Obviously, DOE will have significantly more manpower to prepare the SCP than either NRC or a host State, independently, will have to review the plan. The proposed language will allow simultaneous review by both the NRC and the State which is to the mutual benefit of both. The host State may have already provided a mechanism for its part of the review through the negotiation of a C and C Agreement. The agreement, however, is with DOE, not NRC. Unfortunately, NWPA makes no such provision for such an agreement between the State and the NRC. The suggested rule change language provided would go a long way in making timely and complete information available to all entities early in the site selection process.



Specific Comments on  
10 CFR 60 Proposed Rulemaking

1. Issue of Expertise. pp. 3-4, Encl. B

As expressed by other commenters, Mississippi believes that States/Tribes have significant expertise which can be called upon for a detailed review of the DOE's SCP. The State also recognizes the expertise being developed by NRC, and believes review and comment by both States and NRC will be beneficial to the correct placement of a high-level waste repository.

2. Issuance of draft SCA by NRC. p. 4, Encl. B

The State recognizes the merit of reviewing a draft of the SCA and providing commentary thereon. The original rule made provision for issuance of a draft for comment. We recommend maintenance of the original rule.

3. Schedule delays. p. 4, Encl. B

In light of the importance of making correct decisions regarding a repository, schedule considerations should carry minimal weight. DOE has not adhered to the NWPA scheduled milestones. NRC should not be coerced into making decisions based on a compressed schedule.

4. Attendance at Technical Meetings. p. 4, Encl. B

It is true that technical meetings provide a good forum for discussion of issues. The number of those such meetings continually increases and will continue to do so after recommendation of sites, perhaps to the point where States/Tribes will not have sufficient manpower and financial resources to attend all of the meetings in order to resolve issues. The State recommends that NRC be notified that the technical meetings cannot adequately substitute for a detailed, comprehensive review of a draft SCP.

5. NRC/State relationship. p.4, Encl. B

The States and NRC presently enjoy a comfortable working relationship. While it is desirable for that relationship to continue, when states gain party status to licensing procedures that relationship may become taxed since interests will likely be different.

6. Schedules should not drive the program. pp. 4-5, Encl. b

NRC contends that "...taking into account the scheduling provisions of the NWPA, the publication of a draft SCA is no longer warranted." NRC further contends that "the provisions established by the statute (NWPA) provide means for informing NRC of issues of concern." Those "issues" relate to State involvement. One has but look at what has happened to the schedules as a result of DOE's development of the General Guidelines and the EA publication to see how many "issues" have arisen as a direct result of state/tribal involvement. Those issues have been substantive and not obstructive. There is no reason to believe that State comments on a draft SCA will be different.

7. Draft SCA not required by law. p. 5, Encl. B  
That is a true statement. It is also true that a draft EA was not required of DOE by law. It is also true that NRC is not making law but rather the rules and regulations by which they will enforce the law. NRC should not be so schedule conscious as to provide an opportunity for a less than satisfactory SCP to be developed as a result of their own failure to provide adequate opportunity via a draft SCA for full review and comment. Schedule delays resulting from adjudicatory processes concerning the SCP and SCA could be minimized if the process included a draft SCA with an open record.
8. Solicitation of comments. p. 5, Encl. B  
The State recognizes that the proposed rule requires a solicitation of comments on the SCA; however, the State is uncomfortable with the idea that NRC will provide additional comments to DOE if the comments on the SCA "provide substantial new grounds for making additional recommendations or stating objections...". At issue is the subjectivity of the term "substantial". What is more important is the fact that shafts are being installed while NRC is trying to determine whether State comments are substantial. The horse is already out so why close the gate?
9. Formal comment analysis. p. 5, Encl. B  
This is a literal slap in the face for the States by NRC and should not be taken lightly. As noted earlier, the licensing arena is entered, in the State's opinion, with the Presidential approval of sites. Licensing is a formal process. The State finds no comfort in NRC's merely acknowledging receipt of comments with no commitment, by rule, to analyze those comments.
10. Presentation of views on the SCA. p. 5, Encl. B  
This State has already experienced an exercise in which parties were given the opportunity to present views with respect to NRC's comments on the draft EA. The State was given one (1) day to review those comments made by NRC on the Cypress Creek and Richton Dome site EA's. That provision of the proposed final regulation concerns the language of 60.18(j). The SCA will be sent to DOE and the States/Tribes with an invitation to review and comment thereon. Due to the timing of the sinking of shafts with respect to DOE's submittal of the SCP, the procedure addressed in 60.18(j) will not provide adequate time for state input prior to such shaft sinking.
11. Deletion of 60.11(a)(5).  
The State sees no particular reason for NRC to delete that provision from the original rule and would recommend its being retained.
12. Site screening and selection process. pp. 5-7, Encl. B  
The State recognizes the position being taken by NRC on this issue as being one in which NRC is reluctant to get involved in DOE's site selection process. From the regulatory standpoint, NRC has probably made a good decision. From the standpoint of the filing of an EIS pursuant to NEPA and 114(f) of the NWPA, NRC should involve itself early in the process of site comparisons. Sites are to be evaluated against the Guidelines in which NRC has concurred. Now NRC, using its rules, should evaluate how

those Guidelines are to be applied and evaluated during site characterization. Such an evaluation requires submittal of the site screening information and to a lesser extent a description of the selection process.

13. Repeal of 60.11(e)

The proposed final rule has deleted 60.11(e) which requires the submission of a draft SCA by NRC staff. In its place is 60.18(f) which provides only for a 90 day review of the SCA. In light of the time requirements provided for review of the draft EA, of which partial pre-drafts had been submitted to the State, we suggest that the 90 day review of the SCA is probably acceptable but only if a draft SCA precedes it by at least 90 days, thus providing for a 180 days review of the SCA in light of the SCP.

14. Repeal of 60.11(b)

Specific comments 8 and 9 address this issue. The State recommends that 60.18(i) be modified to read the same as the old 60.11(b).

15. Suggested revision to 60.18(j)

The State recommends that the final sentence of the subject paragraph be revised to read: "When transmitting the site characterization analysis under this paragraph, the Director shall invite the addressees to review and comment thereon and shall respond in kind to those comments within 60 days of receipt of those comments."

16. Suggested revision to 60.18(k)

In addition to placing correspondence in the Public Document Room such correspondence should be transmitted to host states and affected Indian Tribes. The section should be revised accordingly.

17. Suggested revision to 60.61(d)

As in 16. above, the copies should also be supplied to states and tribes.

18. Participation and standing of States.

This issue was developed in number 3 of the general comments. Section 60.63(a) should clearly reflect that States and affected Indian Tribes are to have standing in the license review process at such time when DOE's recommended sites are approved by the President for characterization.

19. Suggested revision to 60.18(c)

The State recommends that the verbs of the second sentence of the subject paragraph be revised from "may invite" and "may review" to "shall invite" and "shall review", respectively.

20. Suggested revision to 60.18(g)

The paragraph deals with the periodicity in which DOE is to report to NRC on the conduct of site characterization activities. The reports are to be submitted "not less than once every six months...". The second sentence begins, "The semiannual reports...". We recommend deletion of the adjective "semiannual".