State of Tennessee

OFFICE OF THE ATTORNEY GENERAL

REPORT OF THE ATTORNEY GENERAL

TO THE SAFE GROWTH CABINET COUNCIL

DISCLAIMER

W. J. MICHAEL CODY
Attorney General and Reporter
State of Tennessee

DOE/OR/21555--T3

DE92 011924

State of Tennessee

W. J. MICHAEL CODY
ATTORNEY GENERAL & REPORTER

JOHN KNOX WALKUP
CHIEF DEPUTY ATTORNEY GENERAL

WILLIAM H. FARMER
ADVOCATE GENERAL

JIMMY G. CREECY
ASSOCIATE CHIEF DEPUTY

ROBERT A. GRUNOW
ASSOCIATE CHIEF DEPUTY

OFFICE OF THE ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37219-5025

DEPUTY ATTORNEYS GENERAL
DOUGLAS BERRY
DONALD L. CORLEW
PATRICIA J. COTTRELL
R. STEPHEN DOUGHTY
KATE EYLER
ROBERT E. KENDRICK
CHARLES L. LEWIS
FRANK J. SCANLON
JENNIFER H. SMALL
JERRY L. SMITH
JOHN F. SOUTHWORTH, JR.

Mr. James E. Word, Commissioner
Tennessee Department of Health
and Environment
Chairman, Safe Growth Cabinet
Council
Room 360
Cordell Hull Building
Nashville, Tennessee 37219

Dear Commissioner Word:

On January 7, 1983, President Reagan signed into law the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10101 et seq. As part of the Act, the Congress of the United States authorized construction of a permanent deep geologic repository in an effort to solve the nation's problem with disposal of spent nuclear fuel and high-level radioactive waste. Congress also directed the Department of Energy (DOE) to study the need for and feasibility of constructing a monitored retrievable storage (MRS) facility.

In late April of 1985, DOE determined that an MRS would improve the functioning of the waste disposal program by allowing for the reprocessing and consolidation of spent fuel rods before shipment of the material to the permanent repository. In addition, some temporary storage of the nuclear waste could occur at the MRS, thus reducing the pressure to have the first permanent repository operational by 1998.

Also in late April of 1985, the State of Tennessee was informed that three potential sites for the MRS had been selected. The locations included the site of the abandoned Clinch River Breeder Reactor Project, a site on DOE's Oak Ridge Reservation, and the site of the abandoned Hartsville nuclear power plant.

To enable the State to study the DOE proposal, a federal grant was made to the State through the Tennessee Department of Health and Environment. Part of that grant was distributed to the Tennessee Attorney General's Office to assist this Office in its study of the legal aspects of the project. With DOE grant funds, I established in the Division of Environmental Enforcement an MRS section consisting of Assistant Attorney General R. Tim Wurz and Paralegal Lorrie S. Brey. I directed them to study the legal aspects of the MRS project and to be available to the Safe Growth Cabinet Council as a legal resource.

This report is intended to apprise the Council of the MRS Section's activities for the period from September 1, 1985 - November 30, 1985. As always, this Office stands ready to assist the Safe Growth Cabinet Council in any way that we can in this matter.

Sincerely yours,

W. J. MICHAEL CODY
Attorney General and Reporter

WJMC:dmm

TABLE OF CONTENTS

SUMMARY OF ACTIVITIES OF ATTORNEY GENERAL'S OFFICE

- MRS SECTION -

A. ACTIVITIES OF THE ASSISTANT ATTORNEY GENERAL

Memoranda on various topics of relevance to the siting of an MRS in Tennessee have been prepared by Assistant Attorney General R. Tim Wurz. Included in those papers are discussions of the consultation and cooperation provisions of the NWPA, a discussion of transportation issues raised by the Act, a Memorandum on the legal requirements for an Environmental Assessment (EA) under the NWPA, and an analysis of deficiencies in the draft EA prepared by the Department of Energy (DOE). Copies of these documents are attached.

The Memorandum on consultation and cooperation discusses provisions in the NWPA referring to the communication process between DOE and the State. Additionally, other federal statutes containing similar provisions are examined and court cases construing some of those consultation and cooperation provisions are discussed. The Memorandum also examines the legislative history of the NWPA in an effort to discern the congressional intent in inserting the "consultation and cooperation" language into the Act.

The Memorandum on transportation discusses the statutory scheme that applies to shipments of spent nuclear

fuel under the NWPA. Also, the applicable provisions of the Tennessee Code are examined to determine what requirements shippers entering the State with nuclear waste must meet.

Special attention is paid to the Tennessee requirement that records made in the course of State business be made available to the public. The conflict between that requirement and federal safeguarding of information about the shipments is recognized and addressed. The Memorandum suggests a solution that allows compliance with both State and federal regulations.

A third Memorandum was prepared in response to an inquiry made by you. In this Memorandum, we address the applicable federal laws with which DOE must comply in preparation of its Environmental Assessment. In this same regard, a second Memorandum has been prepared on what is perceived at this time as statutory defects in DOE's draft Environmental Assessment. It concludes that DOE has failed to examine available alternatives to the MRS proposal and has failed to address various impacts that MRS activities would have on the State.

Assistant Attorney General Wurz has also attended various meetings and seminars involving issues of importance to the examination of the MRS proposal. In early September, he attended a public hearing in Memphis sponsored by DOE and the Safe Growth Cabinet Council. The meeting was one of

four such hearings held throughout the State to acquaint the citizenry with the DOE nuclear waste disposal plan and to hear the comments of the people about the proposal.

In October, Assistant Attorney General Wurz and Paralegal Lorrie Brey attended a day-long meeting in Springfield, Illinois, sponsored by the Illinois Department of Nuclear Safety. The conference discussed the Illinois system of regulation of the transportation of hazardous materials through the State. The Illinois inspection system, physical protection program, and fee and permit system were examined and debated.

In late October and early November, Wurz attended two conferences held in conjunction with each other in Albuquerque, New Mexico. The first meeting was the quarterly gathering of the Hazardous Waste Subcommittee of the National Association of Attorneys General. The subcommittee discussed issues of relevance and importance to potential host states for both the repository and the MRS. Issues examined included transportation, liability for accidents, siting guidelines, environmental assessments, and interaction with DOE.

The second portion of the combined conference was hosted by the Hazardous Waste Subcommittee of the National Conference of State Legislatures. Issues similar to those considered by the NAAG subcommittee were also discussed by

the legislators. In addition, however, the group was taken to the Sandia National Laboratory to witness a cask demonstration designed to evaluate DOE's model for cask integrity testing.

B. ACTIVITIES OF THE PARALEGAL

The activities of the Paralegal have ranged from providing administrative suport to the Assistant Attorney General to conducting research on the legislative history of the Nuclear Waste Policy Act. Additionally, several small projects have been undertaken.

A compilation of clippings from newspapers across the State has been organized and will continue to be updated as the State's review of the MRS proposal continues. Also, background information on the work of the Southeast Compact Commission For Low-Level Radioactive Waste Management (Southeast Compact Commission) has been collected and a recent meeting of the Commission was attended.

The Southeast Compact Commission was created pursuant to a cooperative agreement among the states of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. The purpose of the compact is to develop and evaluate criteria and procedures for selecting a host state for a new low-level waste disposal site. The Commission's work on the siting of a low-

level radioactive waste disposal facility has taken added significance because of the pending proposal for an MRS facility in Tennessee. The progress of the Southeast Compact Commission will continue to be followed.

A significant portion of time has been spent reviewing and summarizing numerous government reports and documents. Among the documents reviewed have been the Comptroller General's Report to the Congress on the NWPA: 1984 Implementation Status, Progress and Problems and the DOE Draft Transportation Institutional Plan of September, 1985.

Two workshops have also been attended in an effort to keep this Office abreast of current developments. Besides attending with Assistant Attorney General Wurz the workshop hosted by the Illinois Department of Nuclear Safety in Springfield, Illinois, Paralegal Brey has attended a second workshop hosted by the DOE Office of Civilian Radioactive Waste Management. The second round of meetings was held in Atlanta to review the Draft Transportation Institutional Plan prepared by DOE.

The largest project completed by Ms. Brey has involved legislative history research on the work of the 96th Congress in developing the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10101 et seq. A compilation of the Committee reports and the congressional record of debate on

House Bill 3809 and Senate Bill 1662 has been completed. This collection has been divided into separate notebooks with the history of House Bill 3809 in Volume One and the history of Senate Bill 1662 in Volume Two. Both volumes have been indexed under nine broad subject headings. Those subject headings are:

1. Consultation and Cooperation.
2. Transportation.
3. Judicial Review.
4. Environmental Assessment.
5. Notice of Disapproval.
6. Monitored Retrievable Storage.
7. Impact Assistance Request.
8. Environmental Impact Statement.
9. Liability. (Price-Anderson).

The legislative history collection is available for inspection at the MRS Reading Room at the TERRA Building, 150 9th Avenue, North.

APPENDICES

APPENDIX A.

Memorandum on Consultation and Cooperation

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37219

MEMORANDUM

TO: FRANK J. SCANLON
Deputy Attorney General

FROM: R. TIM WURZ
Assistant Attorney General

DATE: September 23, 1985

RE: Consultation and Cooperation

I. CONSULTATION AND COOPERATION IN THE NWPA

The Nuclear Waste Policy Act of 1982 (NWPA) envisions extensive interaction between the Secretary of the Department of Energy (DOE) and the various states affected by the provisions of the legislation. Under 42 U.S.C. § 10137(b), the Secretary is commanded to "consult and cooperate" with the Governor and legislature of a state chosen as a site for a nuclear waste repository "in an effort to resolve the concerns of such State. . . regarding the public health and safety, environmental, and economic impacts of any such repository".[1]

42 U.S.C. § 10155 outlines an interim storage program for spent nuclear fuel. That section further establishes a state's right to "participate in a process of consultation and cooperation, based on public health and safety and environmental concerns, in all stages of the planning, development, modification, expansion, operation, and closure of storage capacity at a site or facility within such State. . .." The process of consultation and cooperation, for purposes of subsection 10155(d), is defined as:

---

[1]Under the provision of 42 U.S.C. § 10161(h), the reference in § 10137 to a repository "shall be considered to refer to a monitored retrievable storage facility."

> a methodology by which the Secretary,
>
> (A) keeps the State. . . fully and currently informed about the aspects of the project related to any potential impact on the public health and safety and environment;
>
> (B) solicits, receives, and evaluates concerns and objections of such State. . . with regard to such aspects of the project on an ongoing basis; and
>
> (C) works diligently and cooperatively to resolve, through arbitration or other appropriate mechanisms, such concerns and objections.

42 U.S.C. § 10155(d)(4). Subsection (d)(4) is also explicit, however, in explaining that the State's participation in the consultation and cooperation process does not serve as a grant of an absolute veto power over "any aspect of the planning, development, modification, expansion, or operation of the project." Id.

Title II of the NWPA, 42 U.S.C. §§ 10191 - 10203, relates to the development of a deep geologic test and evaluation facility. By operation of 42 U.S.C. § 10195(a), a governor of a state is granted the right to engage in a consultation and cooperation process only after that state has been chosen as a possible site for such a facility. For purposes of § 10195, the phrase "process of consultation and cooperation" is defined as the method:

> (1) by which the Secretary --
>
> (A) keeps the Governor or governing body involved fully and currently informed about any potential economic or public health and safety impacts in all stages of the siting, development, construction, and

---

operation of a test and evaluation facility;

(B) solicits, receives, and evaluates concerns and objections of such Governor or governing body with regard to such test and evaluation facility on an ongoing basis; and

(C) works diligently and cooperatively to resolve such concerns and objections; and

(2) by which the State. . . involved can exercise reasonable independent monitoring and testing of on-site activities related to all stages of the siting, development, construction, and operation of the test and evaluation facility. . ..

Again, the only limitation placed upon the consultation and cooperation process is a denial of a grant to the State of anything similar to an absolute veto over DOE actions. In 42 U.S.C. § 10195(c), Congress explained that, except as provided in the section, nothing in Title II "is intended to grant any State. . . any authority with respect to the siting, development, or loading of the test and evaluation facility."

Finally, 42 U.S.C. § 10199(a) contains a brief reference to consultation and cooperation activity undertaken pursuant to the siting of a test and evaluation facility. The section provides that the Secretary of DOE shall reimburse a state for all expenses incurred because of consultation and cooperation processes with respect to any site.

II. CONSULTATION AND COOPERATION IN THE NWPA'S LEGISLATIVE HISTORY

A. Senate

Unlike the sections of the NWPA that refer to the interim storage program and the deep geologic test and evaluation site, the sections of the Act concerning the permanent repository siting and the selection of an MRS location do not contain definitions of the terms "consultation and cooperation." In an effort to discern congressional intent regarding the meaning of those terms, an examination of the legislative history of the NWPA is instructive.

During consideration of the bill, a number of comments were made by senators that reflected their understandings of the extent of the federal-state interaction required by the Act. These comments and observations exemplified a strong states' rights slant that leaves little doubt that the states themselves were to be partners in the federal nuclear waste disposal program.

Speaking in favor of an amendment sponsored by Senator Strom Thurmond and concerning away-from-reactor (AFR) storage facilities, Senator Ernest Hollings alluded to the motivation behind the amendment. Hollings vocalized his sensitivity to states' rights issues and explained:

> [I]f the need for an away-from-reactor storage facility is ever required, I would hope that every effort would be made to insure the participation of the concerned State both before and after the site selection has been made, and both before and after the State has used its veto prerogative concerning the siting of the facility. To that end, this amendment would broaden the State cooperation and consultation requirements of the bill and insure that at no point in the process would State participation be diluted.

Cong. Record, S 15646 (December 20, 1982).

Hollings's efforts to "broaden" the states' role and participation in the waste disposal effort were clearly directed not only to the AFR proposal but to the consultation and cooperation requirements in general. The successful attempt to include states in a meaningful way in the AFR siting process[2] would thus seem to mandate meaningful participation of MRS target states "both before and after the site selection has been made, and both before and after the State has used its veto perogative. . . ." Id. Only by such an interpretation could the amendment sponsors' concerns about dilution of state participation be alleviated.

Senator William Proxmire engineered passage of a Senate amendment concerning review of a repository site selection.[3] The review procedure includes an option for the state to file with Congress a notice of disapproval of the site selection and requires both Houses of Congress to override the State veto if the repository is to be constructed.

In explaining his rationale for introducing the amendment, Proxmire echoed the state participation concerns expressed in debate on the Thurmond-Hollings amendment. Proxmire theorized that his proposal "would give states a greater role in decisions affecting siting of nuclear repositories. It would offer these states the same rights now provided to states which will be the sites of temporary away-from-reactor storage." Cong. Record, S 15649-15650 (December 20, 1982).

These remarks were followed by a reading of letters, hearing transcripts, and other reports evidencing a strong concern for allowing maximum state participation in the NWPA's programs. Included in those remarks was a statement from the National Governors' Association that expressed the association's long-maintained position that "while no

---

[2]The amendment of which Hollings spoke has been incorporated into 42 U.S.C. § 10155.

[3]The Proxmire amendment became 42 U.S.C. § 10135.

---

state may reasonably impede the national interest, federalism makes the states equal partners in pursuing that interest". Id. at S 15650.

These representative comments reflect the Senate's belief that the NWPA envisions more than passive state participation in a program orchestrated by DOE. The Thurmond-Hollings amendment made clear that the states were to be intimately and fully involved in the aspects of siting, planning, and construction of any interim storage facility. Following debate on that amendment, Proxmire expressed the intent of his amendment that those same concerns for meaningful state participation be the foundation for actions of DOE involving permanent repository sites. Additionally, "full state participation" was expected in the MRS program "in exactly the same way as it is provided in the case of repository sites." Id. at S 15642. In short, through every aspect of the bill runs the Senate's legitimate and deep concern that state governments be kept informed of and be allowed to participate in those aspects of the nuclear waste disposal program that affect their citizens. As Senator Kasten argued while urging passage of amendments that would give states "a strong role in nuclear waste siting decisions":

> The Department of Energy cannot be allowed to build a disposal facility without giving the States a meaningful role in the siting and construction decisions.
>
> A long-range nuclear waste disposal program is critical to our Nation's energy future, and. . . the proper role of states in the siting of disposal facilities is critical to the success of this program. The only successful nuclear waste disposal program will be one which matches national policy needs with local citizen concerns.

Id. at 15668.

B. House

The House debate on the level of state participation required by the NWPA includes a number of references to the strong, meaningful role that the states are to take in the nuclear waste disposal process. During the September 30, 1982, debate in the House, Congressman Lujan explained that the states, under the proposed bill, would have a clearly defined "role of participation" during site selection and site characterization. Cong. Record, H 8164 (September 30, 1982).

Congressman Glickman also announced his conditional support of the bill for the record. He stated that he was able to favor the legislation "because there are strong environmental controls over the development of a repository and because the State and the public are fully involved in decision-making all along the way." Id. at H 8165. Similarly, Congressman Winn mentioned that he supported the bill because "it assures that the States will participate in the decision on siting a repository." Id. at H 8166.

Other comments made during the various House debates on the bill reveal an equally fervent desire to insure that states are allowed to participate fully at all critical stages of all processes. House Minority Leader Michel expressed his pleasure that the Act "allows full State, local, and public participation in the siting, construction, and operation" of the necessary facilities. Id. at H 8167.

Congressman Markey sponsored a successful amendment that allowed the governor or the Legislature of a state to file a notice of disapproval over a particular site selection. According to Markey, the amendment "is another attempt to strengthen the hands of the states to insure that they will be able to play a role of real significance in any siting decision pertaining to a nuclear waste repository in their state." Cong. Record, H 8597 (November 30, 1982).

Finally, during the House debate on the bill on December 2, 1982, Congressman Ottinger emphasized the critical importance of state participation in the nuclear waste disposal program. He extolled the virtues of requiring the

---

transfer of information and opinion between the states and DOE and explained:

> The purpose of the public hearings requirement during the site selection and characterization stage is to inform the public and state and local government. . . of the activities scheduled for the site and the purpose of such activities and to give them a chance to raise objection and concerns at the earliest possible stage of the site selection process.

Cong. Record, H 8796 (December 2, 1982).

As in the Senate, debate in the House reflected a congressional concern over the proper level of state participation in the nuclear waste disposal program. The House recognized the necessity in a federal system to view state governments as partners in the decision-making process. Under such a framework, the states' participation must be significant, substantial, and meaningful. Only then can the states be treated as essential parties in the process and not mere rubber stamps of federal agency policies and activities.

III. CONSULTATION AND COOPERATION IN OTHER STATUTES

The language of the NWPA providing for "consultation and cooperation" is not unique to that piece of legislation. Numerous other federal statutes contain similar directions for such dialogue. Some of the statutes, however, unlike the NWPA, direct federal agencies to consult and cooperate only with other federal agencies embarked on similar, complementary missions. Examples of this type of directive can be found in the following statutory provisions:

7 U.S.C. § 2145(a);

---

15 U.S.C. § 638(c);

15 U.S.C. § 2609(a), (b)(2)(A), (b)(2)(B), (d), (e);

16 U.S.C. § 410ff-2(a);

16 U.S.C. § 698;

16 U.S.C. § 1456(a);

22 U.S.C. § 2575;

29 U.S.C. § 761a (h);

42 U.S.C. § 1883;

42 U.S.C. § 4336(a);

42 U.S.C. § 5590(b);

42 U.S.C. § 6244;

42 U.S.C. § 7006(b).

Other federal statutes mandating consultation and cooperation between federal agencies use special language to define the extent to which the agencies are to interact. In 16 U.S.C. § 410cc-12(a)(1), federal entities are directed to "consult with, cooperate with, and to the maximum extent practicable, coordinate its activities" with other government organizations and officials. By the use of such additional wording, Congress emphasized that intramural communication under the statute was to entail a heightened degree of cooperation.

Similarly, in 30 U.S.C. § 1413(e), 33 U.S.C. § 1504(a), 42 U.S.C. § 6617(a)(1), and 42 U.S.C. § 9112(a), Congress has required "full consultation and cooperation" or "close consultation and cooperation." (Emphasis added). Again, by use of additional language in the consultation and cooperation clauses of these statutes, it may be assumed that Congress intended that the relevant agencies engage in more than polite, deferential, administrative interaction.

A few statutes also prescribe "consultation and cooperation" between agencies of the federal government and governments or agencies of the states or other nations. Examples of such provisions are found in 16 U.S.C. § 539e(c), 22 U.S.C. § 2166, and 22 U.S.C. § 3503(d). Many of the Acts of Congress, however, that require interaction between representatives of two sovereign governmental bodies contain special language to describe the type of consultation and cooperation that was envisioned during passage of the bill.

In 16 U.S.C. § 45f(e), Congress required "the Secretary, in cooperation with the State of California [to] develop and submit. . . a comprehensive management plan. . .." Furthermore, "[i]n preparing the. . . plan. . ., the Secretary shall provide for full public participation and shall consider the comments and views of all interested agencies, organizations, and individuals."

16 U.S.C. § 758e-1 provides that the "Secretary shall consult, and may otherwise cooperate" with affected states and territories. While this statute appears to equate consultation and cooperation, 16 U.S.C. § 1535(a) emphasizes the distinctive nature of the two concepts. Section 1535(a) provides that "the Secretary shall cooperate to the maximum extent practicable with the states. Such cooperation shall include consultation with the states concerned. . .."

Other statutory provisions require that the consultation and cooperation between governments be "adequate," 20 U.S.C. § 1205(b)(3), "careful and considered," 43 U.S.C. § 1752(d), or be carried out "to the greatest extent possible," 25 U.S.C. § 1300b - 16(b), or "to the maximum extent practicable." 42 U.S.C. § 4122(b).

In short, although statutes referring to a process of consultation and cooperation are not easily categorized, certain logical conclusions may be drawn from an examination of them. In most instances, the statutory provisions regarding federal-state interaction reflect a congressional intent to respect the sovereignty of the individual state governments. Conversely, when the statutes refer only to consultation and cooperation between or among various

---

federal departments or agencies, the inclusion of the communication requirement appears to be a pro forma attempt to describe the less-than-arm's-length activities that characterize interaction within the branches of one government's structure.

IV. CONSULTATION AND COOPERATION AS INTERPRETED BY THE COURTS

As might be expected, little documentation of litigation concerning consultation and cooperation clauses has surfaced through normal research channels. A few cases, however, do explore topics similar to the consultation and cooperation requirements of the NWPA.

In Hill v. Coleman, 399 F.Supp. 194 (D.C. Del. 1975), the Court discusses the procedures and the rationales established for decision-making under the Federal Aid Highway Act. Under the Act, state highway departments that wish to be reimbursed for future expenses must follow certain guidelines codified in 23 C.F.R. Parts 790, 771, and 795 (1974). Id. at 200. Under one such guideline, the state must, in close cooperation and consultation with the FHWA, develop an environmental impact statement (EIS). As the court notes in Hill, the required cooperation and consultation is expected to be meaningful. The procedures

> afford the public as well as other state and federal agencies the opportunity to provide input regarding the wisdom of building a highway vis-a-vis building other forms of transportation or of doing nothing at all. . .. The aim and inevitable result of these FHWA required procedures is that only at their close does the state highway department formally and conclusively decide that there is a real need for a highway within the transportation corridor and then select an approximate location or route of the proposed highway.

Id.

Clearly, under the Federal Aid Highway Act and the procedures promulgated to effectuate it, the states and the public, through consultation and cooperation, have significant roles in the decision-making process. Only after the information transfer is a decision made as to whether the project should even be completed or whether an alternative plan is more feasible.

In California by and through Brown v. Watt, 520 F.Supp. 1359 (C.D. Calif. 1981), rev'd on other grounds in ___ U.S. ___, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984), the court discusses aspects of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 et seq. Under the Act, states are "to have a significant role in essential planning and coordination for the development of a coastal zone. They are intended to be involved in every stage of the planning from drawing board to execution." 520 F.Supp. at 1370.

In discussing that state involvement, the court emphasizes the congressional intent in passing the CZMA that states be afforded adequate, meaningful participation in all processes. Other statutory schemes are distinguished, id. at 1374, and the court reasons:

> The purpose of the act would not be furthered by excluding the states from the critical decision-making. . .. If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual lessees as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decision-making envisioned by the draftsmen of the CZMA.

CONCLUSION

Through an examination of legislative history, other statutory enactments, and case law interpreting similar provisions, the consultation and cooperation clauses of the NWPA begin to take on added meaning. That examination further leads to the inescapable conclusion that the interaction envisioned between the states and federal government is to be more complete and meaningful than it has been to date.

During congressional debate on the bill, NWPA proponents were emphatic in insisting that the legislature provide for extensive communication between two coordinate sovereigns -- the federal government and the government of an individual state. Numerous safeguards were installed to insure state participation at all levels and throughout all processes of the nuclear waste disposal program. The Congressional Record reflects that the representatives and senators expected a high level of state involvement from the beginning of the siting process until the end of the decommissioning of any facility.

The theme of states' rights and deference to states' interests permeates the legislative history of the NWPA. Federal lawmakers realized that states could not be allowed to exercise an absolute veto over the selection of a site for any type of nuclear waste repository; if such a veto were allowed, no nuclear waste disposal program could be effectuated because every state would veto site selections within its borders. As a concession to state sovereignty for the denial of absolute veto power, Congress attempted to provide the states with the opportunity to be equal partners with the federal government in the execution of NWPA provisions.

In construing the meaning of the NWPA and its sections, primary concern must be focused on giving effect to the purpose of the statute, as revealed through the legislative history. See Philbrook v. Glodgett, 421 U.S. 707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975). Only by assuring that the consultation and cooperation between the federal and state governments is meaningful and inclusive enough to cover all aspects of the siting, construction, and

disposal process, can the legislative intent to respect states' rights be effectuated.

Furthermore, examination of the NWPA itself lends credence to the argument that the consultation and cooperation process required under 42 U.S.C. § 10137(b) and 42 U.S.C. § 10161(h) is to be full and complete. Not only do the consultation and cooperation clauses of those subsections not contain limiting definitions such as are found in 42 U.S.C. § 10155(d) and 42 U.S.C. § 10195(a), but also, no time limitation is placed upon the interaction. In § 10195(a), the consultation and cooperation process becomes effective only after a governor has been notified of a site identification. Had Congress intended to impose a similar restriction on consultation and cooperation regarding a MRS facility or a permanent repository, similar language could have been included in the relevant statutory provisions.

The concept of consultation and cooperation, as used in 42 U.S.C. § 10137 and § 10161, imposes an affirmative duty upon the federal government to involve the states in the decision-making process at all stages of the program. Thus, a fair reading of the statute and the legislative history surrounding it would dictate that potential sites for repositories or MRS facilities should be informed and involved at the earliest possible time in the site selection process.

An examination of other statutes providing for consultation and cooperation supports the contention that states engaged in structured communications with the federal government and its agencies should play a meaningful role in the negotiations. The majority of statutes that require federal agencies to consult and cooperate with other federal agencies contain no language that indicates a congressional desire for more than normal, inter-agency communication. By contrast, most of the statutes requiring consultation and cooperation between governments or between state and federal agencies contain explicit language evidencing a congressional intent for meaningful dialogue. Use of such words or phrases as "full," "adequate," "careful and considered," "to the greatest extent possible," and "to the maximum extent practicable" to describe the mandated communications between the state and federal governments shows

---

a legislative sensitivity to the concepts of federalism or dual sovereignty that underlie our nation's history.

Additionally, judicial interpretations of statutes requiring consultation and cooperation strive to give effect to the language utilized by Congress. In each of the cases discussed in Section IV, supra, the courts reviewing the statutes attempted to make the consultation and cooperation provisions effective mechanisms for interaction. The courts have insisted that the statutory directives be viewed as affirmative duties to be performed by the federal government. Moreoever, the states and their agencies are not to become rubber stamps by being relegated to ineffective postures of merely offering futile reactions to conclusive decisions made by the federal agencies alone. Instead, the states are encouraged, indeed ordered, to become equal partners with the federal government in deciding the efficacy of a policy choice or position.

Although the consultation and cooperation provisions of 42 U.S.C. § 10137 and, by reference, § 10161(h) contain none of the special language found in other statutes mandating federal-state interaction, the legislative history of the NWPA indicates that complete, meaningful communication was to occur under that statute also. Congressional debate on the compromise bill makes clear the desire to insure a strong state presence and position in decisions made under authority of the NWPA.

The affirmative duty of the DOE to engage the states in the decision-making process requires state participation at the earliest possible juncture. Clearly, however, some preliminary decisions may be made before state entry into the process. If all states with a potential site for a repository or an MRS facility were to be included in initial negotiations, DOE would be involved in a morass of 50 state governments and innumerable agencies, task forces, and concerned groups.

Once preliminary problems of site selection have been solved, however, it is essential that states be included in further negotiations and decision-making. In carrying out its responsibilities under the NWPA, the DOE identified 11 potential sites in the southeastern United

---

States for construction of a MRS facility. At that point, at the very least, the states containing those 11 potential sites should have been encouraged to join with DOE in further selecting preferred locations for the project. Those states could have provided information and opinions on the proper criteria to be used in choosing the site, on evaluation of data already compiled by admittedly interested parties, and on the studies used to pinpoint the Southeast as the proper area for a MRS facility.

Instead, the DOE narrowed its choice of potential sites to 3, all in Tennessee, before choosing to involve the state in the decision-making process. Such delayed entry by the state into the selection system was not envisioned by Congress in passing the NWPA. Tennessee has effectively been reduced to the non-essential, silent partner that Congress sought to eliminate. By selecting Tennessee as the home of all 3 alternate sites, the state has been further muffled in its attempt to have a meaningful role in the site selection process.

The DOE's responsibility to consult and cooperate with the states is an affirmative duty. See Confederated Tribes and Bands of the Yakima Indian Nation v. F.E.R.C., 746 F.2d 466, 475 (9th Cir. 1984), cert. denied in 105 S.Ct. 2358. By failing to allow for the degree of state interaction in the process that Congress intended, DOE has undermined the legislative compromises that allowed the passage of a nuclear wate disposal bill.

RTW:dmm

APPENDIX B.

Memorandum on Transportation of Spent Nuclear Fuel

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37219

MEMORANDUM

TO: FRANK J. SCANLON
Deputy Attorney General

FROM: R. TIM WURZ
Assistant Attorney General

DATE: November 14, 1985

RE: DOE-VEPCO Shipments

I. BACKGROUND

The Department of Energy (DOE) and the Virginia Electric and Power Company (VEPCO) have entered into an agreement to handle the disposal of spent nuclear fuel from VEPCO's Surry Power Station. Pursuant to the cooperative agreement, DOE has contracted with the Tri-Star shipping company to transport the spent nuclear fuel rods from the Surry facility to DOE's Idaho National Engineering Laboratory (INEL). A total of 50 such shipments are planned, seven of which have already occurred, crossing the country by a northern route through Ohio and Illinois. Beginning in November with the advent of winter weather, however, DOE intends to ship the radioactive material by a more southerly route. That route will utilize the Tennessee interstate system, thus requiring an examination by this office of the various issues that the state may encounter.

II. SOURCE OF THE SHIPMENTS

A dispute exists among DOE and many of the states through which the VEPCO shipments are to pass. The states insist that the shipments are made under the authority of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10101 et seq. As such, the safeguards and state interaction mandated by the NWPA should be applicable to the transportation of the spent nuclear fuel.

In support of their arguments, the states point to the provisions of the NWPA itself to solidify their position

---

that the shipments are, in fact, NWPA activities. The experiments in fuel rod consolidation being conducted at INEL are authorized by 42 U.S.C. § 10198. Because of this fact and because the cooperative agreement between DOE and VEPCO specifically mentions § 10198 of the Act, many of the states involved in the transportation process assume that the shipments are governed by NWPA rules and regulations.

In contrast, DOE insists that the question of whether the VEPCO shipments fall under the aegis of the NWPA is not so easily solved. DOE points out that the shipments are not being sent to the site of either a repository or a Monitored Retrievable Storage facility (MRS). Moreover, the cost of the research project is not being borne by the utilities involved through the Nuclear Waste Fund. See 42 U.S.C § 10198(d). Rather, DOE itself is financing the project from its research budget.

The inconsistent application of the NWPA to the DOE-VEPCO shipments has clouded the issue of whether the program is indeed being undertaken through authority of the Act. The practical consequence of this uncertain application of NWPA provisions is that the regulations applied to the shipments differ according to whether or not DOE is acting under the NWPA.

III. REGULATORY SCHEME

The NWPA itself makes little mention of special transportation requirements for compliance with the Act. In fact, 42 U.S.C. § 10108 provides, "Nothing in this Act shall be construed to affect Federal, State, or local laws pertaining to the transportation of spent nuclear fuel on high-level radioactive waste."

If the DOE-VEPCO shipments are transmitted under authority of the NWPA, transportation safeguards promulgated by the Nuclear Regulatory Commission (NRC) will be implemented. At the present time, NRC safeguards apply only to NRC licensees. Even though DOE is not an NRC licensee for purposes of the VEPCO shipments, however, DOE has agreed to abide by those requirements for NWPA activities. In a June 10, 1985, "Transportation Discussion Paper," DOE stated:

> When NWPA shipments begin, DOE's Office of Civilian Radioactive Waste Management (OCRWM) will comply with whatever NRC shipment-protection requirements are in force at the time. The NRC safeguard requirements at present are limited to spent fuel shipments. OCRWM will work with NRC to establish the need for and function of safeguard requirements for the nuclear high-level radioactive waste that could be shipped under the NWPA.

Safeguards Discussion Paper, p. 3.

The NRC shipment-protection requirements are found in 10 C.F.R. Part 73.37 and establish an elaborate mechanism of notifications and escorts in order to protect shipments from sabotage and other dangers. Under the NRC regulation, a licensee shipper (or DOE, pursuant to its stated policy intention) must notify the NRC in advance of each shipment to insure that proper safeguards and protections have been put in place. 10 C.F.R. Part 73.37(b). In addition, for any shipment traveling by road, the protection plan must provide for escorts for the shipping vehicle. Id. at 73.37(c). If the vehicle travels through a heavily populated area, it must be:

> (i) Occupied by at least two individuals, one of whom serves as escort, and escorted by an armed member of the local law enforcement agency in a mobile unit of such agency; or
>
> (ii) Led by a separate vehicle occupied by at least one armed escort, and trailed by a third vehicle occupied by at least one armed escort.

Id. at 73.37(c)(1).

If the transport vehicle is not traveling within a heavily populated area, the NRC regulations require that the vehicle be:

> (i) Occupied by at least one driver and one other individual who serves as escort; or
>
> (ii) Occupied by a driver and escorted by a separate vehicle occupied by at least two escorts; or
>
> (iii) Escorted as set forth in [the section prescribing escorts through heavily populated areas].

Id. at 73.37(c)(2).

Finally, under the NRC safeguards, prior to shipment of spent nuclear fuel through a state, the governor or governor's designee of that state must be notified of the impending action. Id. at 73.37(f). That notification must be postmarked no later than 7 days prior to transporting the shipment through the state in question or else the notification must be delivered by messenger at least 4 days before the shipment.

The notification must include the name, address, and telephone number of the shipper, carrier, and receiver, a description of the shipment and the routes to be used, and a statement that certain time-and date-specific information must be protected by the governor or governor's designee until 10 days after the shipment has entered the state. Id. at 73.37(f)(2) and (3). 10 C.F.R. Part 73.21(b)(2) lists the specific information given to the state that must be safeguarded. Included in that protected information are details of the physical security plan for the shipments and the schedules and itineraries for specific shipments. "(Routes and quantities for shipments of spent fuel are not withheld from public disclosure. Schedules for spent fuel shipments may be released 10 days after the last shipment of a current series.)" Id. at 73.21(b)(2)(ii).

If the DOE-VEPCO shipments are not transported under the auspices of NWPA activity, DOE, as a non-licensee, is not obligated to follow NRC guidelines in the shipping procedures. Rather, as a shipper of irradiated reactor fuel, DOE must provide a physical protection plan established under either the requirements of the NRC or "equivalent requirements" approved by the Department of Transportation (DOT). 49 C.F.R. Part 173.22(c).

Under that DOT regulation, DOE chose to promulgate its own physical protection plan. On November 26, 1980, DOE submitted to DOT for approval a transportation physical protection plan. In 1982, DOT certified that while the DOE plan is not identical to the NRC safeguard plan, it "is at least as effective as NRC's for the purpose of limiting the possibility of theft or sabotage of a spent fuel cask." As a result, the DOE plan was approved as being "essentially 'equivalent' to requirements imposed by the NRC on its licensees."

Under the DOE plan, an effective communication system is established between the driver of the transport vehicle and various communications centers. The vehicle is also required to be escorted during transit, although the escort system does not seem to be "equivalent" to that established pursuant to NRC regulations. The DOE plan would allow a single escort traveling in the transport vehicle itself to fulfill the protective requirements of the plan. Although the driver may be escorted by a separate vehicle occupied by two escorts, such a scenario is only an alternative to the one vehicle transport. Furthermore, unlike the NRC physical protection plan, DOE's "equivalent requirements" do not mandate advance notification of shipments to the affected states.

IV. DOE-VEPCO SITUATION

DOE does not dispute the fact that the VEPCO shipments are, most probably, a component of the NWPA's research and development program. Nevertheless, DOE insists that it has committed itself to compliance with NRC regulations and physical protection requirements only for shipments to a repository or an MRS facility. Thus, the present shipments

---

of spent nuclear fuel from Virginia to INEL need comply only with required DOT guidelines. Since, under those guidelines, DOE has promulgated a plan that has been found to be "equivalent" to the NRC requirements, DOE's compliance with its own rules will satisfy the DOT mandate.

Consistent with its plan to comply with NRC regulations only for shipments involving a repository or an MRS, DOE has announced its intention not to provide armed escorts or written prenotification for the VEPCO shipments. Instead, DOE has agreed to give Tennessee "courtesy communication" regarding the shipments as well as information regarding routes and general scheduling dates. DOE refuses, however, to provide detailed itineraries revealing the expected location of the shipments at any given time during their transport through Tennessee. DOE will, however, provide state officials with a 12-hour time frame during which trucks bearing the spent nuclear fuel will enter Tennessee.

The loaded vehicles transporting the radioactive waste through the State will each weigh approximately 116,000-119,000 pounds. Because of the excessive weight of these trucks, DOE has agreed to respect any overweight vehicle regulations including reasonable restrictions on time of travel, submission to inspections and escorts, payment of permit fees, and any other guidelines imposed because of the weight of the vehicles rather than merely the nature of the cargo.

V. RELEVANT TENNESSEE STATUTORY REQUIREMENTS

Tennessee regulations regarding shipments such as those made under the DOE-VEPCO agreement are few and unrestrictive. T.C.A. § 65-15-126 contains the basic statutory scheme in Tennessee regarding the transportation of nuclear fuel. Subsection (a) of that section requires advance notice to the Public Service Commission before any spent nuclear fuel is transported on the highways of the state. Subsection (c) of T.C.A. § 65-15-126 provides further that the Public Service Commission (PSC) may adopt or promulgate rules to implement the provisions of § 65-15-126, as long as those rules are no more restrictive than any existing rule or regulation promulgated or adopted by the NRC or the United States DOT.

T.C.A. § 65-15-105 provides that chapter 15 of Title 65, including § 65-15-126, is not applicable to business conducted for the government of the United States. The section also contains an exception to the exclusion, however. If the provisions of the chapter "may be permitted under the Constitution of the United States and the acts of congress," those provisions may apply even to government business. T.C.A. § 65-15-105. Since the advance notification provision of § 65-15-126(a) does not burden commerce and is, in fact, analogous to the prenotification required under NRC regulations, it appears that the requirement is applicable to the DOE shipments made from VEPCO to INEL.

The PSC has not promulgated regulations of its own to govern shipments of spent nuclear fuel through Tennessee. Instead, pursuant to the authority granted by T.C.A. § 65-15-126(c), the Commission has adopted the regulations issued by the United States DOT. Tennessee Rules and Regulations, Chapter 1220-2-1-.20. As explained in Section III, supra, the DOT regulations regarding transportation of irradiated fuel (49 C.F.R. Part 173.22(c)) require shippers to comply with a physical protection plan identical to or "equivalent" to the NRC regulations on the subject.

Tennessee statutes also impact on the DOE-VEPCO shipments by regulating the height, width, length, and weight of trucks that use the State's highways. T.C.A. § 55-11-203(3) proscribes highway travel in Tennessee by vehicles weighing more than 80,000 pounds. Since the trucks used to ship the spent nuclear fuel to Idaho will weight almost 119,000 pounds, a special permit must be obtained, as required by T.C.A. § 55-11-205(g)(5). That permit, for vehicles weighing up to 120,000 pounds, may be obtained for an annual fee of $500.00 per vehicle. Failure to obtain the required permit will result in a misdemeanor charge with a penalty of $25.00 upon conviction. T.C.A. § 55-11-206(a).

During the period between January 15th and April 15th of each year, or at any other time when travel by an 80,000 pound vehicle would damage the road, the Tennessee DOT may specify lower maximum weight limits on state highways. T.C.A. § 55-11-303. Failure to abide by the lowered limits may result in a misdemeanor conviction and a fine of $25.00 - $500.00. T.C.A. § 55-11-304. A driver, who after

---

arrest for driving an overweight vehicle in violation of T.C.A. § 55-11-103, fails to reduce the weight of the load may be convicted of another misdemeanor and be imprisoned on the county jail for not less than 30 days. T.C.A. § 55-11-105.

A final body of Tennessee law with potential impact on the DOE-VEPCO shipments through the state involves the public records provisions of the Tennessee Code. See T.C.A. §§ 10-7-503 - 10-7-509. Pursuant to those provisions, Tennessee citizens are granted broad access to the public records made in connection with the transaction of official business by any governmental agency. T.C.A. § 10-7-301(b); 10-7-503. The only such records that are not open to the public for inspection are those for which rules have been promulgated "to maintain the confidentiality of records concerning adoption proceedings or records required to be kept confidential by federal statute or regulation as a condition for the receipt of federal funds or for participation in a federally-funded program." T.C.A. § 10-7-503. Additionally, certain "confidential records" enumerated in T.C.A. § 10-7-504 need not be made available for public inspection.

VI. CONCLUSIONS AND CONSEQUENCES

DOE claims that it does not have to comply with NRC regulations for purposes of the shipments intended to be made to the INEL facility for research and development. It would appear that DOE is correct in this position. DOE is not, for purposes of these shipments, an NRC licensee; therefore, NRC regulations are not automatically applicable to this progress. Rather, as a non-licensee, DOE need abide only by its "equivalent requirements" satisfying the mandates of 49 C.F.R. Part 173.22(c).

DOE has promised in a "memorandum of understanding" to comply with the NRC guidelines for all activities under the NWPA involving shipments to or from a repository or an MRS. Because these DOE-VEPCO shipments are not covered by that memorandum, DOE has no legal duty to comply with the NRC regulations for this project.

DOE's own regulations provide a physical protection plan for shipments made under its defense programs and for shipments such as are present in this situation. Those regulations provide for no prenotification to states through which the shipments pass. On the other hand, the DOE plan, approved by DOT under 49 C.F.R. Part 173.22(c) as being "equivalent" to NRC safeguard regulations, does not contain a ban on such advance notification to the states by the Department.

Tennessee statutory law, however, does require advance notice of any shipment of spent nuclear fuel through the state. Under T.C.A. § 65-15-126(a), the Public Service Commission is to receive such information from any shipper of spent nuclear fuel as a condition precedent to a grant of authority to transport the material on Tennessee highways. DOE has agreed to provide such advance notice to the state, thus fulfilling the requirements of the Tennessee law.[1]

Although agreeing to provide "courtesy communication" to Tennessee, DOE has insisted that the specifics of the communication remain confidential. DOE's physical protection plan (copy attached) does not, however, require such safeguarding of information.

The NRC regulations for shipping of spent fuel do require that certain elements of the shipping plan be withheld from public disclosure until 10 days after the last shipment of a current series of shipments. See 10 C.F.R. Part 73.21(b)(2)(ii). Again, though, the NRC regulation applies only to NRC licensees or to an agency that has adopted the regulations as its own. Since DOE has not thus adopted the NRC rules and because DOE claims that the Department will not abide by those requirements until shipments to or from a repository or MRS begin, DOE may not rely upon NRC regulations regarding safeguarding of certain shipment information.

---

[1]It should be noted that T.C.A. § 65-15-126(a) is very broad in the scope of the language used. As a result, the type of notice required by the statute may be written or oral, detailed or general.

In conflict with DOE's desire to maintain the confidentiality of information related to the State through "courtesy communications" is the expansive Tennessee public records law summarized in T.C.A. § 10-7-503. Under the statute, "[a]ll state...records...shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee...." Id. The term "state records" is defined so as to encompass "all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings, or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency." T.C.A. § 10-7-301(b).

If a record, as defined above, is made in conjunction with the notification by DOE of a state agency, the state's public records law would seem to mandate dissemination of the information to the citizenry upon request. Moreover, no legal conflict with the provisions of T.C.A § 10-7-503 would arise because DOE has no contrary rule or regulation that requires confidentiality. In such a situation, no issue arises as to whether or not a federal regulation will preempt the provisions of a state statute. The state law stands in isolation and the provisions thereof must be given effect.

If, however, DOE does, in fact, have authority under a regulatory scheme to demand safeguarding of certain shipping information, a conflict between that regulation and the Tennessee public records law will need to be addressed. The conflict might result because of the current practices of the Tennessee Emergency Management Agency (TEMA) in receiving information about shipments of potentially hazardous materials.

Presently, when information is relayed to TEMA, the operator answering the call either activates a recording device and tape records the call or enters the message received into a telephone log. In either case, the transcription of the advance notification would be considered a "public record" or a "state record" under T.C.A. § 10-7-301(b) and T.C.A. § 10-7-503. The public records law of Tennessee might, therefore, require TEMA to release the information to a Tennessee citizen requesting it.

If the state statute contradicts or counteracts federal legislation and regulations, a preemption question arises. In Hillsboro County, Florida v. Automated Medical Laboratories, Inc., ___ U.S. ___, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985), the Supreme Court noted that state laws may be preempted in several ways: (1) by express language of preemption; (2) by inference "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation;" (3) "where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject;'" (4) when "compliance with both federal and state regulations is a physical impossibility;" or (5) "when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

In this case, should DOE be forced by federal regulation to safeguard certain information but also be forced by state statute to allow public inspection of that same information, "compliance with both federal and state regulations is a physical impossibility." Id. In such a situation, case law has held consistently that the federal law will preempt the state statute. See e.g., Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963). Furthermore, "[f]ederal regulations have no less preemptive effect than federal statutes." Fidelity Federal Savings & Loan Assocation v. De La Cuesta, supra. Thus, if DOE can point to a federal statute or regulation in support of its contention that certain scheduling information must be kept confidential, that statute or regulation will preempt the conflicting Tennessee public records law for purposes of these shipments.

As a practical matter, DOE will be hard-pressed to justify its demand for safeguarded information. The DOE guidelines promulgated for DOE shipments contain no requirement of confidentiality. Nor can DOE take advantage of the NRC requirement of limited public access to certain scheduling plans. Although DOE has agreed to abide by NRC regu-

---

lations by the time the proposed MRS becomes operational, the Department has expressly indicated that it will not follow such guidelines for the shipments under the DOE-VEPCO agreement. Were DOE to choose to implement the NRC requirements earlier than first envisioned, it would also be forced to abide by the NRC's mandate that written prenotification of shipments be given to the states. DOE's staunch reluctance to provide such structured advance notice at this time makes this scenario highly improbable.

As a result, the situation will most likely evolve into one where DOE, acting under its own guidelines, demands safeguarding of scheduling information even though the applicable federal plan does not require preemption of the state public records law that might allow for disclosure of the sensitive information. The "safeguard communications" can remain confidential under Tennessee law, however, if the courtesy notification is never reduced to record form as defined in T.C.A. § 10-7-301(b).

The PSC proposes to receive the initial "courtesy communication" from DOE without recording the conversation or reducing it to writing. The PSC official will then notify a PSC inspector to be at a particular interstate weigh station on a designated day. By inspecting all trucks that enter that weigh station, the inspector will also be able to examine, for safety defects, the vehicle transporting the spent nuclear fuel pursuant to the DOE-VEPCO agreement.

In addition to the PSC, the Tennessee Emergency Management Agency (TEMA) receives information regarding transportation of hazardous materials through the state. See, T.C.A. § 58-2-301. Any accident involving such materials must be reported to TEMA, id., where the report is recorded as described on page 10, supra.

Furthermore, TEMA has been designated by executive order as the agency with primary responsibility and authority for activities to be undertaken in connection with accidents involving hazardous materials. Executive Order of the Governor of the State of Tennessee, No. 38, September 20, 1976. TEMA is also required to maintain records of all accident or incident reports concerning accidents involving hazardous materials. T.C.A. § 58-2-303.

Because TEMA is responsible for coordination of preparedness, response, and recovery procedures for such accidents, advance notification of the DOE-VEPCO shipments should be given to that agency. Only with such notice will TEMA be prepared to coordinate emergency response activities should they become necessary.

DOE will not provide such advance notification, it claims, unless assurances can be given that the information will remain confidential. TEMA has maintained a close and a good relationship with the media and claims that in the past, the media has delayed publication of sensitive information. Such non-binding agreements, however, present obvious potential problems for the maintenance of confidential communications.

To insure that any information regarding the DOE-VEPCO shipments is kept confidential, TEMA could institute a policy of not preserving a record of the informational notice of the spent nuclear fuel shipments. Should an accident occur, however, TEMA is required by statute to maintain records of such a mishap. When the existence of those records, is made known to the media, questions might be asked about the reasons prior information about the shipments was not released. TEMA's legitimate fear of destruction of their hard-earned relationship with the media might possibly be realized.

To prevent such a situation, it becomes essential to have TEMA records termed "confidential" according to T.C.A. § 10-7-504. Such confidential records need not be made public and no disagreements with the media would result since the information would not be obtainable under the public records law.

T.C.A § 10-7-504(a)(3) provides:

> The records, documents and papers in the possession of the military department which involve the security of the United States and/or the state of Tennessee, including but not restricted to national guard personnel records, staff studies

---

and investigations, shall be treated as confidential and shall not be open for inspection by members of the public.

The term "military department" is defined as "[t]hat agency, division or department of the state government, comprising the headquarters of the military forces of the state..., and the civil defense agency." T.C.A. § 58-1-114. Furthermore, pursuant to T.C.A. §§ 58-2-103(c)(1) and (2), after July 1, 1981, references in the Code to the state civil defense agency shall be changed to refer to the "Tennessee emergency management agency."

By statute, therefore, TEMA is an agency of the Tennessee military department. As such, all TEMA records, documents, and papers "which involve the security of the United States and/or the state of Tennessee" are confidential records that shall not be open to public inspection. Clearly, the shipment of radioactive waste over public highways involves serious potential security risks from sabotage, terrorism, or accident. The records maintained by TEMA relating to these shipments are thus "confidential records" as defined in T.C.A. § 10-7-504(a)(3), and must be safeguarded from public inspection.

CONCLUSION

1) DOE need not comply with NRC regulations for these shipments.

2) DOE must, under Tennessee law which is not preempted, provide advance notification to the PSC of the shipments.

3) DOE must comply with Tennessee overweight truck restrictions.

4) The PSC and TEMA may safeguard the scheduling information received from DOE.

RTW:dmm

APPENDIX C.

Memorandum on the Law Applicable to Preparation of

An Environmental Assessment

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37219

MEMORANDUM

TO: JAMES E. WORD, Commissioner
Tennessee Department of Health
and Environment

THROUGH: W. J. MICHAEL CODY
Attorney General and Reporter

FRANK J. SCANLON
Deputy Attorney General

FROM: R. TIM WURZ
Assistant Attorney General

DATE: November 18, 1985

RE: Environmental Assessment

The following is our analysis of the applicable federal laws and regulations governing the preparation and content of the Environmental Assessment which the United States Department of Energy must prepare pursuant to 42 U.S.C. § 10161(c) of the Nuclear Waste Policy Act, 42 U.S.C. § 10101 et seq:

The preparation and content of an Environmental Assessment under 42 U.S.C. § 10161(c) are governed by the provisions of § 10161(c), regulations of the Council on Environmental Quality found at 40 C.F.R. Part 1508.9 and authoritative interpretation of those regulations. See Federal Register, Vol. 46, No. 55 (Monday, March 23, 1981). Pursuant to 42 U.S.C. § 10161(c) of the Nuclear Waste Policy Act, the Department of Energy must submit an Environmental Assessment (EA) to Congress with any Department proposal for authorization to construct a Monitored Retrievable Storage facility (MRS). Section 10161(c) provides in full as follows:

> Preparation and submission to the Congress of the proposal required in this section shall not require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332(2)(C)). The Secretary shall prepare, in accordance with regulations issued by the Secretary implementing such Act, an environmental assessment with respect to such proposal. Such environmental assessment shall be based upon available information regarding alternative technologies for the storage of spent nuclear fuel and high-level radioactive waste. The Secretary shall submit such environmental assessment to the Congress at the time such proposal is submitted.

As indicated, the EA must be prepared in accordance with DOE regulations implementing the National Environmental Policy Act.

Rather than promulgate its own guidelines, however, DOE chose to adopt the regulations of the Council on Environmental Quality for implementing the procedural provisions of the Nuclear Waste Policy Act. See 10 C.F.R. Part 1021.2. (A copy of that regulation is attached). The Council's regulations are found in 40 C.F.R. Part 1508.9. (A copy is attached). These regulations define an Environmental Assessment as a concise public document that facilitates preparation of a more detailed Environmental Impact Statement. The Environmental Assessment must also discuss the need for the proposal, the alternatives to the proposed action, the environmental impacts of the proposed action, the environmental impacts of the alternatives to the proposed action, and a listing of agencies and individuals consulted. Id. In addition to these requirements, § 10161(c), quoted above, requires that the EA "be based upon available information regarding alternative technologies for the storage of spent nuclear fuel and high-level radioactive waste."

To assist agencies in preparing Environmental Assessments under the guidelines of 40 C.F.R. Part 1508.9, the Council on Environmental Quality has compiled a list of answers to the "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations." The questions and answers have been reprinted in the Federal Register, Vol. 46, No. 55 (Monday, March 23, 1981) and provide helpful information and an indication of the intent of the CEQ regulations. (A copy is attached.)

Although the "Forty Most Asked Questions" are not part of any promulgated regulations, the document describes the procedures that the Council envisions under 40 C.F.R. Parts 1500-1508. Moreover, courts have recognized the "Forty Most Asked Questions" in interpreting the Council's regulations. See, e.g., Sierra Club v. Marsh, 769 F.2d 868, 870 (1st Cir. 1985).

RTW:dmm

ronmental Quality (CEQ) to issue regulations to implement the procedural provisions of NEPA. Accordingly, CEQ issued final NEPA regulations (40 CFR Parts 1500-1508) on November 29, 1978.

§ 1021.2 Adoption of CEQ Regulations.

The Department of Energy (DOE) hereby adopts the CEQ regulations for implementing the procedural provisions of NEPA (40 CFR Parts 1500-1508).

§ 1021.3 Revocation of previous NEPA regulations.

DOE hereby revokes the NEPA regulations previously promulgated by the Energy Research and Development Administration (10 CFR Part 711) and the Federal Energy Administration (10 CFR Part 208) as well as the NEPA regulations of other predecessor agencies of DOE to the extent they had applied to functions transferred to DOE pursuant to the DOE Organization Act.

§ 1021.4 Applicability.

This part applies to all organizational elements of DOE, except the Federal Energy Regulatory Commission.

§ 1021.5 Effective date.

The effective date of these regulations is July 30, 1979.

PART 1022—COMPLIANCE WITH FLOODPLAIN/WETLANDS ENVIRONMENTAL REVIEW REQUIREMENTS

Subpart A—General

Subpart B—Procedures for Floodplain/Wetlands Review

AUTHORITY: E.O. 11988 (May 24, 1977) and E.O. 11990 (May 24, 1977).

SOURCE: 44 FR 12596, Mar. 7, 1979, unless otherwise noted.

Subpart A—General

§ 1022.1 Background.

Executive Order (E.O.) 11988—Floodplain Management (May 24, 1977), requires each Federal agency to issue or amend existing regulations and procedures to ensure that the potential effects of any action it may take in a floodplain are evaluated and that its planning programs and budget requests reflect consideration of flood hazards and floodplain management. Guidance for implementation of the Order is provided in the Floodplain Management Guidelines of the U.S. Water Resources Council (40 FR 6030, Feb. 10, 1978). Executive Order 11990—Protection of Wetlands (May 24, 1977), requires all Federal agencies to issue or amend existing procedures to ensure consideration of wetlands protection in decisionmaking. It is the intent of both Executive orders that Federal agencies implement the floodplain/wetlands requirements through existing procedures such as those established to implement the National Environmental Policy Act (NEPA) of 1969. In those instances where the impacts of actions in floodplains and/or wetlands are not significant enough to require the preparation of an environmental impact statement (EIS) under section 102(2)(C) of NEPA, alternative floodplain/wetlands evaluation procedures are to be established.

§ 1022.2 Purpose and scope.

(a) This part establishes policy and procedures for discharging the Department of Energy's (DOE's) responsibilities with respect to compliance with E.O. 11988 and E.O. 11990, including

lusion.
ncy.

act.

ssessment.
document.
impact statement.
.
significant impact.
nment.
law.

action.

t.

cy.

se.

he Environmental
Act of 1970, as
1 *et seq.*), sec. 309 of
amended (42 U.S.C.
(Mar. 5, 1970, as
May 24, 1977).

Nov. 29, 1978, unless

f this part shall
out the Federal

fational Environ-
as amended (42
which is also re-

will or may have

lusion.
ion" means a cat-
h do not individ-
have a signifi-
nan environment

and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

§ 1508.5 Cooperating agency.

"Cooperating agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

§ 1508.6 Council.

"Council" means the Council on Environmental Quality established by Title II of the Act.

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

"Environmental assessment":

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

"Environmental document" includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant

COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, and 1508

Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations

March 17, 1981.

AGENCY: Council on Environmental Quality, Executive Office of the President.

ACTION: Information Only: Publication of Memorandum to Agencies Containing Answers to 40 Most Asked Questions on NEPA Regulations.

SUMMARY: The Council on Environmental Quality, as part of its oversight of implementation of the National Environmental Policy Act, held meetings in the ten Federal regions with Federal, State, and local officials to discuss administration of the implementing regulations. The forty most asked questions were compiled in a memorandum to agencies for the information of relevant officials. In order efficiently to respond to public inquiries this memorandum is reprinted in this issue of the Federal Register.

FOR FURTHER INFORMATION CONTACT: Nicholas C. Yost, General Counsel, Council on Environmental Quality, 722 Jackson Place NW., Washington, D.C. 20006; 202-395-5750.

March 16, 1981.

Memorandum for Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process

Subject: Questions and Answers About the NEPA Regulations

During June and July of 1980 the Council on Environmental Quality, with the assistance and cooperation of EPA's EIS Coordinators from the ten EPA regions, held one-day meetings with federal, state and local officials in the ten EPA regional offices around the country. In addition, on July 10, 1980, CEQ conducted a similar meeting for the Washington, D.C. NEPA liaisons and persons involved in the NEPA process. At these meetings CEQ discussed (a) the results of its 1980 review of Draft EISs issued since the July 30, 1979 effective date of the NEPA regulations, (b) agency compliance with the Record of Decision requirements in Section 1505 of the NEPA regulations, and (c) CEQ's preliminary findings on how the scoping process is working. Participants at these meetings received copies of materials prepared by CEQ summarizing its oversight and findings.

These meetings also provided NEPA liaisons and other participants with an opportunity to ask questions about NEPA and the practical application of the NEPA regulations. A number of these questions were answered by CEQ representatives at the regional meetings. In response to the many requests from the agencies and other participants, CEQ has compiled forty of the most important or most frequently asked questions and their answers and reduced them to writing. The answers were prepared by the General Counsel of CEQ in consultation with the Office of Federal Activities of EPA. These answers, of course, do not impose any additional requirements beyond those of the NEPA regulations. This document does not represent new guidance under the NEPA regulations, but rather makes generally available to concerned agencies and private individuals the answers which CEQ has already given at the 1980 regional meetings. The answers also reflect the advice which the Council has given over the past two years to aid agency staff and consultants in their day-to-day application of NEPA and the regulations.

CEQ has also received numerous inquiries regarding the scoping process. CEQ hopes to issue written guidance on scoping later this year on the basis of its special study of scoping, which is nearing completion.

Nicholas C. Yost,
General Counsel.

Index

Questions and Answers About the NEPA Regulations (1981)

1a. Q. What is meant by "range of alternatives" as referred to in Sec. 1505.1(e)? [1]

A. The phrase "range of alternatives" refers to the alternatives discussed in environmental documents. It includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. Section 1502.14. A decisionmaker must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents. Moreover, a decisionmaker must, in fact, consider all the alternatives discussed in an EIS. Section 1505.1(e).

1b. Q. How many alternatives have to be discussed when there is an infinite number of possible alternatives?

[1] References throughout the document are to the Council on Environmental Quality's Regulations For Implementing The Procedural Provisions of the National Environmental Policy Act, 40 CFR Parts 1500–1508.

internally generated, such as preparing a land management plan, the proposed action might end up as the agency's preferred alternative. On the other hand the proposed action may be granting an application to a non-federal entity for a permit. The agency may or may not have a "preferred alternative" at the Draft EIS stage (see Question 4 above). In that case the agency may decide at the Final EIS stage, on the basis of the Draft EIS and the public and agency comments, that an alternative other than the proposed action is the agency's "preferred alternative."

5b. Q. Is the analysis of the "proposed action" in an EIS to be treated differently from the analysis of alternatives?

A. The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the "proposed action." Section 1502.14 is titled "Alternatives including the proposed action" to reflect such comparable treatment. Section 1502.14(b) specifically requires "substantial treatment" in the EIS of each alternative including the proposed action. This regulation does not dictate an *amount* of information to be provided, but rather, prescribes a *level of treatment*, which may in turn require varying amounts of information, to enable a reviewer to evaluate and compare alternatives.

6a. Q. What is the meaning of the term "environmentally preferable alternative" as used in the regulations with reference to Records of Decision? How is the term "environment" used in the phrase?

A. Section 1505.2(b) requires that, in cases where an EIS has been prepared, the Record of Decision (ROD) must identify all alternatives that were considered, ". . . specifying the alternative or alternatives which were considered to be environmentally preferable." The environmentally preferable alternative is the alternative that will promote the national environmental policy as expressed in NEPA's Section 101. Ordinarily, this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves, and enhances historic, cultural, and natural resources.

The Council recognizes that the identification of the environmentally preferable alternative may involve difficult judgments, particularly when one environmental value must be balanced against another. The public and other agencies reviewing a Draft EIS can assist the lead agency to develop and determine environmentally preferable alternatives by providing their views in comments on the Draft EIS. Through the identification of the environmentally preferable alternative, the decisionmaker is clearly faced with a choice between that alternative and others, and must consider whether the decision accords with the Congressionally declared policies of the Act.

6b. Q. Who recommends or determines what is environmentally preferable?

A. The agency EIS staff is encouraged to make recommendations of the environmentally preferable alternative(s) during EIS preparation. In any event the lead agency official responsible for the EIS is encouraged to identify the environmentally preferable alternative(s) in the EIS. In all cases, commentors from other agencies and the public are also encouraged to address this question. The agency must identify the environmentally preferable alternative in the ROD.

7. Q. What is the difference between the sections in the EIS on "alternatives" and "environmental consequences"? How do you avoid duplicating the discussion of alternatives in preparing these two sections?

A. The "alternatives" section is the heart of the EIS. This section rigorously explores and objectively evaluates all reasonable alternatives including the proposed action. Section 1502.14. It should include relevant comparisons on environmental and other grounds. The "environmental consequences" section of the EIS discusses the specific environmental impacts or effects of each of the alternatives including the proposed action. Section 1502.16. In order to avoid duplication between these two sections, most of the "alternatives" section should be devoted to describing and comparing the alternatives. Discussion of the environmental impacts of these alternatives should be limited to a concise descriptive summary of such impacts in a comparative form, including charts or tables, thus sharply defining the issues and providing a clear basis for choice among options. Section 1502.14. The "environmental consequences" section should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives. It forms the analytic basis for the concise comparison in the "alternatives" section.

8. Q. Section 1501.2(d) of the NEPA regulations requires agencies to provide for the early application of NEPA to cases where actions are planned by private applicants or non-Federal entities and are, at some stage, subject to federal approval of permits, loans, loan guarantees, insurance or other actions. What must and can agencies do to apply NEPA early in these cases?

A. Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed.

Through early consultation, business applicants and approving agencies may gain better appreciation of each other's needs and foster a decisionmaking process which avoids later unexpected confrontations.

Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program", such as a means for prospective applicants to conduct pre-application consultations with the lead and cooperating agencies. Applicants need to find out, in advance of project planning, what environmental studies or other information will be required, and what mitigation requirements are likely, in connection with the later federal NEPA process. Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application procedures and information requirements in newsletters or other media used by potential applicants.

Complementing Section 1501.2(d), Section 1506.5(a) requires agencies to assist applicants by outlining the types of information required in those cases where the agency requires the applicant to submit environmental data for possible use by the agency in preparing an EIS.

Section 1506.5(b) allows agencies to authorize preparation of environmental assessments by applicants. Thus, the procedures should also include a means for anticipating and utilizing applicants' environmental studies or "early corporate environmental assessments" to fulfill some of the federal agency's NEPA obligations. However, in such cases the agency must still evaluate independently the environmental issues

and take responsibility for the environmental assessment.

These provisions are intended to encourage and enable private and other non-federal entities to build environmental considerations into their own planning processes in a way that facilitates the application of NEPA and avoids delay.

9. Q. To what extent must an agency inquire into whether an applicant for a federal permit, funding or other approval of a proposal will also need approval from another agency for the same proposal or some other related aspect of it?

A. Agencies must integrate the NEPA process into other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Specifically, the agency must "provide for cases where actions are planned by . . . applicants," so that designated staff are available to advise potential applicants of studies or other information that will foreseeably be required for the later federal action; the agency shall consult with the applicant if the agency foresees its own involvement in the proposal; and it shall insure that the NEPA process commences at the earliest possible time. Section 1501.2(d). (See Question 8.)

The regulations emphasize agency cooperation early in the NEPA process. Section 1501.6. Section 1501.7 on "scoping" also provides that all affected Federal agencies are to be invited to participate in scoping the environmental issues and to identify the various environmental review and consultation requirements that may apply to the proposed action. Further, Section 1502.25(b) requires that the draft EIS list all the federal permits, licenses and other entitlements that are needed to implement the proposal.

These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval, or whether the applicant is waiting until a proposal has been substantially developed before requesting federal aid or approval.

Thus, a federal agency receiving a request for approval or assistance should determine whether the applicant has filed separate requests for federal approval or assistance with other federal agencies. Other federal agencies that are likely to become involved should then be contacted, and the NEPA process coordinated, to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions. The agency should inform the applicant that action on its application may be delayed unless it submits all other federal applications (where feasible to do so), so that all the relevant agencies can work together on the scoping process and preparation of the EIS.

10a. Q. What actions by agencies and/or applicants are allowed during EIS preparation and during the 30-day review period after publication of a final EIS?

A. No federal decision on the proposed action shall be made or recorded until at least 30 days after the publication by EPA of notice that the particular EIS has been filed with EPA. Sections 1505.2 and 1506.10. Section 1505.2 requires this decision to be stated in a public Record of Decision.

Until the agency issues its Record of Decision, no action by an agency or an applicant concerning the proposal shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives. Section 1506.1(a). But this does not preclude preliminary planning or design work which is needed *to support an application* for permits or assistance. Section 1506.1(d).

When the impact statement in question is a program EIS, no major action concerning the program may be taken which may significantly affect the quality of the human environment, unless the particular action is justified independently of the program, is accompanied by its own adequate environmental impact statement and will not prejudice the ultimate decision on the program. Section 1506.1(c).

10b. Q. Do these limitations on action (described in Question 10a) apply to state or local agencies that have statutorily delegated responsibility for preparation of environmental documents required by NEPA, for example, under the HUD Block Grant program?

A. Yes, these limitations do apply, without any variation from their application to federal agencies.

11. Q. What actions must a lead agency take during the NEPA process when it becomes aware that a non-federal applicant is about to take an action within the agency's jurisdiction that would either have an adverse environmental impact or limit the choice of reasonable alternatives (e.g., prematurely commit money or other resources towards the completion of the proposal)?

A. The federal agency must notify the applicant that the agency will take strong affirmative steps to insure that the objectives and procedures of NEPA are fulfilled. Section 1506.1(b). These steps could include seeking injunctive measures under NEPA, or the use of sanctions available under either the agency's permitting authority or statutes setting forth the agency's statutory mission. For example, the agency might advise an applicant that if it takes such action the agency will not process its application.

12a. Q. What actions are subject to the Council's new regulations, and what actions are grandfathered under the old guidelines?

A. The effective date of the Council's regulations was July 30, 1979 (except for certain HUD programs under the Housing and Community Development Act, 42 U.S.C. 5304(h), and certain state highway programs that qualify under Section 102(2)(D) of NEPA for which the regulations became effective on November 30, 1979). All the provisions of the regulations are binding as of that date, including those covering decisionmaking, public participation, referrals, limitations on actions, EIS supplements, etc. For example, a Record of Decision would be prepared even for decisions where the draft EIS was filed before July 30, 1979.

But in determining whether or not the new regulations apply to the preparation of a *particular environmental document*, the relevant factor is the date of filing of the draft of that document. Thus, the new regulations do not require the redrafting of an EIS or supplement if the draft EIS or supplement was filed before July 30, 1979. However, a supplement prepared after the effective date of the regulations for an EIS issued in final before the effective date of the regulations would be controlled by the regulations.

Even though agencies are not required to apply the regulations to an EIS or other document for which the draft was filed prior to July 30, 1979, the regulations encourage agencies to follow the regulations "to the fullest extent practicable," i.e., if it is feasible to do so, in preparing the final document. Section 1506.12(a).

12b. Q. Are projects authorized by Congress before the effective date of the Council's regulations grandfathered?

A. No. The date of Congressional authorization for a project is not determinative of whether the Council's regulations or former Guidelines apply to the particular proposal. No incomplete projects or proposals of any kind are grandfathered in whole or in part. Only certain environmental documents, for which the draft was issued before the effective date of the regulations, are grandfathered and

subject to the Council's former Guidelines.

12c. Q. Can a violation of the regulations give rise to a cause of action?

A. While a trivial violation of the regulations would not give rise to an independent cause of action, such a cause of action would arise from a substantial violation of the regulations. Section 1500.3.

13. Q. Can the scoping process be used in connection with preparation of an environmental assessment, i.e., before both the decision to proceed with an EIS and publication of a notice of intent?

A. Yes. Scoping can be a useful tool for discovering alternatives to a proposal, or significant impacts that may have been overlooked. In cases where an environmental assessment is being prepared to help an agency decide whether to prepare an EIS, useful information might result from early participation by other agencies and the public in a scoping process.

The regulations state that the scoping process is to be preceded by a Notice of Intent (NOI) to prepare an EIS. But that is only the minimum requirement. Scoping may be initiated earlier, as long as there is appropriate public notice and enough information available on the proposal so that the public and relevant agencies can participate effectively.

However, scoping that is done before the assessment, and in aid of its preparation, cannot *substitute* for the normal scoping process after publication of the NOI, unless the earlier public notice stated clearly that this possibility was under consideration, *and* the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.

14a. Q. What are the respective rights and responsibilities of lead and cooperating agencies? What letters and memoranda must be prepared?

A. After a lead agency has been designated (Sec. 1501.5), that agency has the responsibility to solicit cooperation from other federal agencies that have jurisdiction by law or special expertise on any environmental issue that should be addressed in the EIS being prepared. Where appropriate, the lead agency should seek the cooperation of state or local agencies of similar qualifications. When the proposal may affect an Indian reservation, the agency should consult with the Indian tribe. Section 1508.5. The request for cooperation should come at the earliest possible time in the NEPA process.

After discussions with the candidate cooperating agencies, the lead agency and the cooperating agencies are to determine by letter or by memorandum which agencies will undertake cooperating responsibilities. To the extent possible at this stage, responsibilities for specific issues should be assigned. The allocation of responsibilities will be completed during scoping. Section 1501.7(a)(4).

Cooperating agencies must assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. Section 1501.6(b)(3). Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its preparation, much earlier in the NEPA process—primarily at the scoping and Draft EIS preparation stages. If a cooperating agency determines that its resource limitations preclude any involvement, or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. Section 1501.6(c).

In other words, the potential cooperating agency must decide early if it is able to devote any of its resources to a particular proposal. For this reason the regulation states that an agency may reply to a request for cooperation that "other program commitments preclude any involvement or the degree of involvement requested in the *action* that is the subject of the environmental impact statement." (Emphasis added). The regulation refers to the "action," rather than to the EIS, to clarify that the agency is taking itself out of all phases of the federal action, not just draft EIS preparation. This means that the agency has determined that it cannot be involved in the later stages of EIS review and comment, as well as decisionmaking on the proposed action. For this reason, cooperating agencies with jurisdiction by law (those which have permitting or other approval authority) cannot opt out entirely of the duty to cooperate on the EIS. See also Question 15, relating specifically to the responsibility of EPA.

14b. Q. How are disputes resolved between lead and cooperating agencies concerning the scope and level of detail of analysis and the quality of data in impact statements?

A. Such disputes are resolved by the agencies themselves. A lead agency, of course, has the ultimate responsibility for the content of an EIS. But it is supposed to use the environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible, consistent with its own responsibilities as lead agency. Section 1501.6(a)(2).

If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. Thus, both lead and cooperating agencies have a stake in producing a document of good quality. Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determined early in the EIS process.

Because the EIS is not the Record of Decision, but instead constitutes the *information* and *analysis* on which to base a decision, disagreements about conclusions to be drawn from the EIS need not inhibit agencies from issuing a joint document, or adopting another agency's EIS, if the analysis is adequate. Thus, if each agency has its own "preferred alternative," both can be identified in the EIS. Similarly, a cooperating agency with jurisdiction by law may determine in its own ROD that alternative A is the environmentally preferable action, even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable.

14c. Q. What are the specific responsibilities of federal and state cooperating agencies to review draft EISs?

A. Cooperating agencies (i.e., agencies with jurisdiction by law or special expertise) and agencies that are authorized to develop or enforce environmental standards, must comment on environmental impact statements within their jurisdiction, expertise or authority. Sections 1503.2, 1508.5. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should simply comment accordingly. Conversely, if the cooperating agency determines that a draft EIS is incomplete, inadequate or inaccurate, or it has other comments, it should promptly make such comments, conforming to the requirements of specificity in section 1503.3.

14d. Q. How is the lead agency to treat the comments of another agency with jurisdiction by law or special expertise which has failed or refused to cooperate or participate in scoping or EIS preparation?

A. A lead agency has the responsibility to respond to all substantive comments raising significant issues regarding a draft EIS. Section 1503.4. However, cooperating agencies are generally under an obligation to raise issues or otherwise participate in the EIS process during scoping and EIS preparation if they reasonably can do so. In practical terms, if a cooperating agency fails to cooperate at the outset, such as during scoping, it will find that its comments at a later stage will not be as persuasive to the lead agency.

15. Q. Are EPA's responsibilities to review and comment on the environmental effects of agency proposals under Section 309 of the Clean Air Act independent of its responsibility as a cooperating agency?

A. Yes. EPA has an obligation under Section 309 of the Clean Air Act to review and comment in writing on the environmental impact of any matter relating to the authority of the Administrator contained in proposed legislation, federal construction projects, other federal actions requiring EISs, and new regulations. 42 U.S.C. Sec. 7609. This obligation is independent of its role as a cooperating agency under the NEPA regulations.

16. Q. What is meant by the term "third party contracts" in connection with the preparation of an EIS? See Section 1506.5(c). When can "third party contracts" be used?

A. As used by EPA and other agencies, the term "third party contract" refers to the preparation of EISs by contractors paid by the applicant. In the case of an EIS for a National Pollution Discharge Elimination System (NPDES) permit, the applicant, aware in the early planning stages of the proposed project of the need for an EIS, contracts directly with a consulting firm for its preparation. See 40 C.F.R. 6.604(g). The "third party" is EPA which, under Section 1506.5(c), must select the consulting firm, even though the applicant pays for the cost of preparing the EIS. The consulting firm is responsible to EPA for preparing an EIS that meets the requirements of the NEPA regulations and EPA's NEPA procedures. It is in the applicant's interest that the EIS comply with the law so that EPA can take prompt action on the NPDES permit application. The "third party contract" method under EPA's NEPA procedures is purely voluntary, though most applicants have found it helpful in expediting compliance with NEPA.

If a federal agency uses "third party contracting," the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c). Federal procurement requirements do not apply to the agency because it incurs no obligations or costs under the contract, nor does the agency procure anything under the contract.

17a. Q. If an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement. What criteria must the firm follow in determining whether it has any "financial or other interest in the outcome of the project" which would cause a conflict of interest?

A. Section 1506.5(c), which specifies that a consulting firm preparing an EIS must execute a disclosure statement, does not define "financial or other interest in the outcome of the project." The Council interprets this term broadly to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit. If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.

When a consulting firm has been involved in developing initial data and plans for the project, but does not have any financial or other interest in the outcome of the decision, it need not be disqualified from preparing the EIS. However, a disclosure statement in the draft EIS should clearly state the scope and extent of the firm's prior involvement to expose any potential conflicts of interest that may exist.

17b. Q. If the firm in fact has no promise of future work or other interest in the outcome of the proposal, may the firm later bid in competition with others for future work on the project if the proposed action is approved?

A. Yes.

18. Q. How should uncertainties about indirect effects of a proposal be addressed, for example, in cases of disposal of federal lands, when the identity or plans of future landowners is unknown?

A. The EIS must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are "reasonably foreseeable." Section 1508.8(b). In the example, if there is total uncertainty about the identity of future land owners or the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decisions.

19a. Q. What is the scope of mitigation measures that must be discussed?

A. The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. The measures must include such things as design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant." Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. Sections 1502.14(f), 1502.16(h), 1508.14.

19b. Q. How should an EIS treat the subject of available mitigation measures that are (1) outside the jurisdiction of the lead or cooperating agencies, or (2) unlikely to be adopted or enforced by the responsible agency?

A. All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed as part of the RODs of these agencies. Sections 1502.16(h), 1505.2(c). This will serve to

alert agencies or officials who *can* implement these extra measures, and will encourage them to do so. Because the EIS is the most comprehensive environmental document, it is an ideal vehicle in which to lay out not only the full range of environmental impacts but also the full spectrum of appropriate mitigation.

However, to ensure that environmental effects of a proposed action are fairly assessed, the probability of the mitigation measures being implemented must also be discussed. Thus the EIS and the Record of Decision should indicate the likelihood that such measures will be adopted or enforced by the responsible agencies. Sections 1502.16(h), 1505.2. If there is a history of nonenforcement or opposition to such measures, the EIS and Record of Decision should acknowledge such opposition or nonenforcement. If the necessary mitigation measures will not be ready for a long period of time, this fact, of course, should also be recognized.

20a. Q. When must a worst case analysis be included in an EIS?

A. If there are gaps in relevant information or scientific uncertainty pertaining to an agency's evaluation of significant adverse impacts on the human environment, an agency must make clear that such information is lacking or that the uncertainty exists. An agency must include a worst case analysis of the potential impacts of the proposal and an indication of the probability or improbability of their occurence if (a) the information relevant to adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining the information are exorbitant, or (b) the information relevant to adverse impacts is important to the decision and the means to obtain it are not known.

NEPA requires that impact statements, at a minimum, contain information to alert the public and Congress to all known *possible* environmental consequences of agency action. Thus, one of the federal government's most important obligations is to present to the fullest extent possible the spectrum of consequences that may result from agency decisions, and the details of their potential consequences for the human environment.

20b. Q. What is the purpose of a worst case analysis? How is it formulated and what is the scope of the analysis?

A. The purpose of the analysis is to carry out NEPA's mandate for full disclosure to the public of the potential consequences of agency decisions, and to cause agencies to consider those potential consequences when acting on the basis of scientific uncertainties or gaps in available information. The analysis is formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action.

For example, if there are scientific uncertainty and gaps in the available information concerning the numbers of juvenile fish that would be entrained in a cooling water facility, the responsible agency must disclose and consider the possibility of the loss of the commercial or sport fishery.

In addition to an analysis of a low probability/catastrophic impact event, the worst case analysis should also include a spectrum of events of higher probability but less drastic impact.

21. Q. Where an EIS or an EA is combined with another project planning document (sometimes called "piggybacking"), to what degree may the EIS or EA refer to and rely upon information in the project document to satisfy NEPA's requirements?

A. Section 1502.25 of the regulations requires that draft EISs be prepared concurrently and integrated with environmental analyses and related surveys and studies required by other federal statutes. In addition, Section 1506.4 allows any environmental document prepared in compliance with NEPA to be combined with any other agency document to reduce duplication and paperwork. However, these provisions were not intended to authorize the preparation of a short summary or outline EIS, attached to a detailed project report or land use plan containing the required environmental impact data. In such circumstances, the reader would have to refer constantly to the detailed report to understand the environmental impacts and alternatives which should have been found in the EIS itself.

The EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives. Section 1502.1. But, as long as the EIS is clearly identified and is self-supporting, it can be physically included in or attached to the project report or land use plan, and may use attached report material as technical backup.

Forest Service environmental impact statements for forest management plans are handled in this manner. The EIS identifies the agency's preferred alternative, which is developed in detail as the proposed management plan. The detailed proposed plan accompanies the EIS through the review process, and the documents are appropriately cross-referenced. The proposed plan is useful for EIS readers as an example, to show how one choice of management options translates into effects on natural resources. This procedure permits initiation of the 90-day public review of proposed forest plans, which is required by the National Forest Management Act.

All the alternatives are discussed in the EIS, which can be read as an independent document. The details of the management plan are not repeated in the EIS, and vice versa. This is a reasonable functional separation of the documents: the EIS contains information relevant to the choice among alternatives; the plan is a detailed description of proposed management activities suitable for use by the land managers. This procedure provides for concurrent compliance with the public review requirements of both NEPA and the National Forest Management Act.

Under some circumstances, a project report or management plan may be totally merged with the EIS, and the one document labeled as both "EIS" and "management plan" or "project report." This may be reasonable where the documents are short, or where the EIS format and the regulations for clear, analytical EISs also satisfy the requirements for a project report.

22. Q. May state and federal agencies serve as joint lead agencies? If so, how do they resolve law, policy and resource conflicts under NEPA and the relevant state environmental policy act? How do they resolve differences in perspective where, for example, national and local needs may differ?

A. Under Section 1501.5(b), federal, state or local agencies, as long as they include at least one federal agency, may act as joint lead agencies to prepare an EIS. Section 1506.2 also strongly urges state and local agencies and the relevant federal agencies to cooperate fully with each other. This should cover joint research and studies, planning activities, public hearings, environmental assessments and the preparation of joint EISs under NEPA and the relevant "little NEPA" state laws, so that one document will satisfy both laws.

The regulations also recognize that certain inconsistencies may exist between the proposed federal action and any approved state or local plan or law. The joint document should discuss the extent to which the federal agency would reconcile its proposed action with such plan or law. Section 1506.2(d). (See Question 23).

Because there may be differences in perspective as well as conflicts among

federal, state and local goals for resources management, the Council has advised participating agencies to adopt a flexible, cooperative approach. The joint EIS should reflect all of their interests and missions, clearly identified as such. The final document would then indicate how state and local interests have been accommodated, or would identify conflicts in goals (e.g., how a hydroelectric project, which might induce second home development, would require new land use controls). The EIS must contain a complete discussion of scope and purpose of the proposal, alternatives, and impacts so that the discussion is adequate to meet the needs of local, state and federal decisionmakers.

23a. Q. How should an agency handle potential conflicts between a proposal and the objectives of Federal, state or local land use plans, policies and controls for the area concerned? See Sec. 1502.16(c).

A. The agency should first inquire of other agencies whether there are any potential conflicts. If there would be immediate conflicts, or if conflicts could arise in the future when the plans are finished (see Question 23(b) below), the EIS must acknowledge and describe the extent of those conflicts. If there are any possibilities of resolving the conflicts, these should be explained as well. The EIS should also evaluate the seriousness of the impact of the proposal on the land use plans and policies, and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area. Comments from officials of the affected area should be solicited early and should be carefully acknowleged and answered in the EIS.

23b. Q. What constitutes a "land use plan or policy" for purposes of this discussion?

A. The term "land use plans," includes all types of formally adopted documents for land use planning, zoning and related regulatory requirements. Local general plans are included, even though they are subject to future change. Proposed plans should also be addressed if they have been formally proposed by the appropriate government body in a written form, and are being actively pursued by officials of the jurisdiction. Staged plans, which must go through phases of development such as the Water Resources Council's Level A, B and C planning process should also be included even though they are incomplete.

The term "policies" includes formally adopted statements of land use policy as embodied in laws or regulations. It also includes proposals for action such as the initiation of a planning process, or a formally adopted policy statement of the local, regional or state executive branch, even if it has not yet been formally adopted by the local, regional or state legislative body.

23c. Q. What options are available for the decisionmaker when conflicts with such plans or policies are identified?

A. After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts, among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal, among the other requirements of Section 1505.2. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area.

24a. Q. When are EISs required on policies, plans or programs?

A. An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal may exist in fact as well as by agency declaration that one exists." Section 1508.23.

24b. Q. When is an area-wide or overview EIS appropriate?

A. The preparation of an area-wide or overview EIS may be particularly useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography. For example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.

24c. Q. What is the function of tiering in such cases?

A. Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa. In the example given in Question 24b, this would mean that an overview EIS would be prepared for all of the energy activities reasonably foreseeable in a particular geographic area or resulting from a particular development program. This impact statement would be followed by site-specific or project-specific EISs. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement.

25a. Q. When is it appropriate to use appendices instead of including information in the body of an EIS?

A. The body of the EIS should be a succinct statement of all the information on environmental impacts and alternatives that the decisionmaker and the public need, in order to make the decision and to ascertain that every significant factor has been examined. The EIS must explain or summarize methodologies of research and modeling, and the results of research that may have been conducted to analyze impacts and alternatives.

Lengthy technical discussions of modeling methodology, baseline studies, or other work are best reserved for the appendix. In other words, if only technically trained individuals are likely to understand a particular discussion then it should go in the appendix, and a plain language summary of the analysis and conclusions of that technical discussion should go in the text of the EIS.

The final statement must also contain the agency's responses to comments on the draft EIS. These responses will be primarily in the form of changes in the document itself, but specific answers to each significant comment should also be included. These specific responses may be placed in an appendix. If the comments are especially voluminous, summaries of the comments and responses will suffice. (See Question 29 regarding the level of detail required for responses to comments.)

25b. Q. How does an appendix differ from incorporation by reference?

A. First, if at all possible, the appendix accompanies the EIS, whereas the material which is incorporated by reference does not accompany the EIS. Thus the appendix should contain information that reviewers will be likely to want to examine. The appendix should include material that pertains to preparation of a particular EIS. Research papers directly relevant to the proposal, lists of affected species, discussion of the methodology of models used in the analysis of impacts, extremely detailed responses to comments, or other information, would be placed in the appendix.

The appendix must be complete and available at the time the EIS is filed. Five copies of the appendix must be sent to EPA with five copies of the EIS for filing. If the appendix is too bulky to be circulated, it instead must be placed in conveniently accessible locations or furnished directly to commentors upon request. If it is not circulated with the EIS, the Notice of Availability published by EPA must so state, giving a telephone number to enable potential commentors to locate or request copies of the appendix promptly.

Material that is not directly related to preparation of the EIS should be incorporated by reference. This would include other EISs, research papers in the general literature, technical background papers or other material that someone with technical training could use to evaluate the analysis of the proposal. These must be made available, either by citing the literature, furnishing copies to central locations, or sending copies directly to commentors upon request.

Care must be taken in all cases to ensure that material incorporated by reference, and the occasional appendix that does not accompany the EIS, are in fact available for the full minimum public comment period.

26a. Q. How detailed must an EIS index be?

A. The EIS index should have a level of detail sufficient to focus on areas of the EIS of reasonable interest to any reader. It cannot be restricted to the most important topics. On the other hand, it need not identify every conceivable term or phrase in the EIS. If an agency believes that the reader is reasonably likely to be interested in a topic, it should be included.

26b. Q. Is a keyword index required?

A. No. A keyword index is a relatively short list of descriptive terms that identifies the key concepts or subject areas in a document. For example it could consist of 20 terms which describe the most significant aspects of an EIS that a future researcher would need: type of proposal, type of impacts, type of environment, geographical area, sampling or modelling methodologies used. This technique permits the compilation of EIS data banks, by facilitating quick and inexpensive access to stored materials. While a keyword index is not required by the regulations, it could be a useful addition for several reasons. First, it can be useful as a quick index for reviewers of the EIS, helping to focus on areas of interest. Second, if an agency keeps a listing of the keyword indexes of the EISs it produces, the EIS preparers themselves will have quick access to similar research data and methodologies to aid their future EIS work. Third, a keyword index will be needed to make an EIS available to future researchers using EIS data banks that are being developed. Preparation of such an index now when the document is produced will save a later effort when the data banks become operational.

27a. Q. If a consultant is used in preparing an EIS, must the list of preparers identify members of the consulting firm as well as the agency NEPA staff who were primarily responsible?

A. Section 1502.17 requires identification of the names and qualifications of persons who were primarily responsible for preparing the EIS or significant background papers, including basic components of the statement. This means that members of a consulting firm preparing material that is to become part of the EIS must be identified. The EIS should identify these individuals even though the consultant's contribution may have been modified by the agency.

27b. Q. Should agency staff involved in reviewing and editing the EIS also be included in the list of preparers?

A. Agency personnel who wrote basic components of the EIS or significant background papers must, of course, be identified. The EIS should also list the technical editors who reviewed or edited the statements.

27c. Q. How much information should be included on each person listed?

A. The list of preparers should normally not exceed two pages. Therefore, agencies must determine which individuals had *primary* responsibility and need not identify individuals with minor involvement. The list of preparers should include a very brief identification of the individuals involved, their qualifications (expertise, professional disciplines) and the specific portion of the EIS for which they are responsible. This may be done in tabular form to cut down on length. A line or two for each person's qualifications should be sufficient.

28. Q. May an agency file xerox copies of an EIS with EPA pending the completion of printing the document?

A. Xerox copies of an EIS may be filed with EPA prior to printing only if the xerox copies are simultaneously made available to other agencies and the public. Section 1506.9 of the regulations, which governs EIS filing, specifically requires Federal agencies to file EISs with EPA no earlier than the EIS is distributed to the public. However, this section does not prohibit xeroxing as a form of reproduction and distribution. When an agency chooses xeroxing as the reproduction method, the EIS must be clear and legible to permit ease of reading and ultimate microfiching of the EIS. Where color graphs are important to the EIS, they should be reproduced and circulated with the xeroxed copy.

29a Q. What response must an agency provide to a comment on a draft EIS which states that the EIS's methodology is inadequate or inadequately explained? For example, what level of detail must an agency include in its response to a simple postcard comment making such an allegation?

A. Appropriate responses to comments are described in Section 1503.4. Normally the responses should result in changes in the text of the EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain briefly why.

An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology. For example, if a commentor on an EIS said that an agency's air quality dispersion analysis or methodology was inadequate, and the agency had included a discussion of that analysis in the EIS, little if anything need be added in response to such a comment. However, if the commentor said that the dispersion analysis was inadequate because of its use of a certain computational technique, or that a dispersion analysis was inadequately explained because computational techniques were not included or referenced, then the agency would have to respond in a substantive and meaningful way to such a comment.

If a number of comments are identical or very similar, agencies may group the comments and prepare a single answer for each group. Comments may be summarized if they are especially voluminous. The comments or summaries must be attached to the EIS regardless of whether the agency believes they merit individual discussion in the body of the final EIS.

29b. Q. How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?

A. This question might arise in several possible situations. First, a commentor on a draft EIS may indicate that there is a possible alternative which, in the agency's view, is not a reasonable alternative. Section 1502.14(a). If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response. Section 1503.4(a). For example, a commentor on a draft EIS on a coal fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits, or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commentor on a draft EIS on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commentor on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest, and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2,000, 4,000, or 6,000 units. A commentor on the draft EIS might urge the consideration of constructing 5,000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered, and, therefore, could be addressed in the final EIS.

A fourth possibility is that a commentor points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a reasonable alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commentor on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

If the new alternative was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all alternatives.

30. Q. When a cooperating agency with jurisdiction by law intends to adopt a lead agency's EIS and it is not satisfied with the adequacy of the document, may the cooperating agency adopt only the part of the EIS with which it is satisfied? If so, would a cooperating agency with jurisdiction by law have to prepare a separate EIS or EIS supplement covering the areas of disagreement with the lead agency?

A. Generally, a cooperating agency may adopt a lead agency's EIS without recirculating it if it concludes that its NEPA requirements and its comments and suggestions have been satisfied. Section 1506.3(a), (c). If necessary, a cooperating agency may adopt only a portion of the lead agency's EIS and may reject that part of the EIS with which it disagrees, stating publicly why it did so. Section 1506.3(a).

A cooperating agency with jurisdiction by law (e.g., an agency with independent legal responsibilities with respect to the proposal) has an independent legal obligation to comply with NEPA. Therefore, if the cooperating agency determines that the EIS is wrong or inadequate, it must prepare a supplement to the EIS, replacing or adding any needed information, and must circulate the supplement as a draft for public and agency review and comment. A final supplemental EIS would be required before the agency could take action. The adopted portions of the lead agency EIS should be circulated with the supplement. Section 1506.3(b). A cooperating agency with jurisdiction by law will have to prepare its own Record of Decision for its action, in which it must explain how it reached its conclusions. Each agency should explain how and why its conclusions differ, if that is the case, from those of other agencies which issued their Records of Decision earlier.

An agency that did not cooperate in preparation of an EIS may also adopt an EIS or portion thereof. But this would arise only in rare instances, because an agency adopting an EIS for use in its own decision normally would have been a cooperating agency. If the proposed action for which the EIS was prepared is substantially the same as the proposed action of the adopting agency, the EIS may be adopted as long as it is recirculated as a final EIS and the agency announces what it is doing. This would be followed by the 30-day review period and issuance of a Record of Decision by the adopting agency. If the proposed action by the adopting agency is not substantially the same as that in

the EIS (i.e., if an EIS on one action is being adapted for use in a decision on another action), the EIS would be treated as a draft and circulated for the normal public comment period and other procedures. Section 1506.3(b).

31a. Q. Do the Council's NEPA regulations apply to independent regulatory agencies like the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission?

A. The statutory requirements of NEPA's Section 102 apply to "all agencies of the federal government." The NEPA regulations implement the procedural provisions of NEPA as set forth in NEPA's Section 102(2) for all agencies of the federal government. The NEPA regulations apply to independent regulatory agencies, however, they do not direct independent regulatory agencies or other agencies to make decisions in any particular way or in a way inconsistent with an agency's statutory charter. Sections 1500.3, 1500.6, 1507.1, and 1507.3.

31b. Q. Can an Executive Branch agency like the Department of the Interior adopt an EIS prepared by an independent regulatory agency such as FERC?

A. If an independent regulatory agency such as FERC has prepared an EIS in connection with its approval of a proposed project, an Executive Branch agency (e.g., the Bureau of Land Management in the Department of the Interior) may, in accordance with Section 1506.3, adopt the EIS or a portion thereof for its use in considering the same proposal. In such a case the EIS must, to the satisfaction of the adopting agency, meet the standards for an adequate statement under the NEPA regulations (including scope and quality of analysis of alternatives) and must satisfy the adopting agency's comments and suggestions. If the independent regulatory agency fails to comply with the NEPA regulations, the cooperating or adopting agency may find that it is unable to adopt the EIS, thus forcing the preparation of a new EIS or EIS Supplement for the same action. The NEPA regulations were made applicable to all federal agencies in order to avoid this result, and to achieve uniform application and efficiency of the NEPA process.

32. Q. Under what circumstances do old EISs have to be supplemented before taking action on a proposal?

A. As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.

If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).

33a. Q. When must a referral of an interagency disagreement be made to the Council?

A. The Council's referral procedure is a *pre-decision* referral process for interagency disagreements. Hence, Section 1504.3 requires that a referring agency must deliver its referral to the Council not later than 25 days after publication by EPA of notice that the final EIS is available (unless the lead agency grants an extension of time under Section 1504.3(b)).

33b. Q. May a referral be made after this issuance of a Record of Decision?

A. No, except for cases where agencies provide an internal appeal procedure which permits simultaneous filing of the final EIS and the record of decision (ROD). Section 1506.10(b)(2). Otherwise, as stated above, the process is a pre-decision referral process. Referrals must be made within 25 days after the notice of availability of the final EIS, whereas the final decision (ROD) may not be made or filed until after 30 days from the notice of availability of the EIS. Sections 1504.3(b), 1506.10(b). If a lead agency has granted an extension of time for another agency to take action on a referral, the ROD may not be issued until the extension has expired.

34a. Q. Must Records of Decision (RODs) be made public? How should they be made available?

A. Under the regulations, agencies must prepare a "concise *public* record of decision," which contains the elements specified in Section 1505.2. This public record may be integrated into any other decision record prepared by the agency, or it may be separate if decision documents are not normally made public. The Record of Decision is intended by the Council to be an environmental document (even though it is not explicitly mentioned in the definition of "environmental document" in Section 1508.10). Therefore, it must be made available to the public through appropriate public notice as required by Section 1506.6(b). However, there is no specific requirement for publication of the ROD itself, either in the Federal Register or elsewhere.

34b. Q. May the summary section in the final Environmental Impact Statement substitute for or constitute an agency's Record of Decision?

A. No. An environmental impact statement is supposed to inform the decisionmaker before the decision is made. Sections 1502.1, 1505.2. The Council's regulations provide for a 30-day period after notice is published that the final EIS has been filed with EPA before the agency may take final action. During that period, in addition to the agency's own internal final review, the public and other agencies can comment on the final EIS prior to the agency's final action on the proposal. In addition, the Council's regulations make clear that the requirements for the summary in an EIS are not the same as the requirements for a ROD. Sections 1502.12 and 1505.2.

34c. Q. What provisions should Records of Decision contain pertaining to mitigation and monitoring?

A. Lead agencies "shall include appropriate conditions [including mitigation measures and monitoring and enforcement programs] in grants, permits or other approvals" and shall "condition funding of actions on mitigation." Section 1505.3. Any such measures that are adopted must be explained and committed in the ROD.

The reasonable alternative mitigation measures and monitoring programs should have been addressed in the draft and final EIS. The discussion of mitigation and monitoring in a Record of Decision must be more detailed than a general statement that mitigation is being required, but not so detailed as to duplicate discussion of mitigation in the EIS. The Record of Decision should contain a concise summary identification of the mitigation measures which the agency has committed itself to adopt.

The Record of Decision must also state whether all practicable mitigation measures have been adopted, and if not, why not. Section 1505.2(c). The Record of Decision must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they are adopted as part of the agency's decision. If the proposed action is the issuance of a permit or other approval, the specific details of the mitigation measures shall then be included as appropriate conditions in whatever grants, permits, funding or other approvals are being made by the federal agency. Section 1505.3 (a), (b). If the proposal is to be carried out by the

federal agency itself, the Record of Decision should delineate the mitigation and monitoring measures in sufficient detail to constitute an enforceable commitment, or incorporate by reference the portions of the EIS that do so.

34d. Q. What is the enforceability of a Record of Decision?

A. Pursuant to generally recognized principles of federal administrative law, agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Records of Decision. This is based on the principle that an agency must comply with its own decisons and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein.

35. Q. How long should the NEPA process take to complete?

A. When an EIS is required, the process obviously will take longer than when an EA is the only document prepared. But the Council's NEPA regulations encourage streamlined review, adoption of deadlines, elimination of duplicative work, eliciting suggested alternatives and other comments early through scoping, cooperation among agencies, and consultation with applicants during project planning. The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from NEPA.

The time required for the preparation of program EISs may be greater. The Council also recognizes that some projects will entail difficult long-term planning and/or the acquisition of certain data which of necessity will require more time for the preparation of the EIS. Indeed, some proposals should be given more time for the thoughtful preparation of an EIS and development of a decision which fulfills NEPA's substantive goals.

For cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months, and in many cases substantially less, as part of the normal analysis and approval process for the action.

36a. Q. How long and detailed must an environmental assessment (EA) be?

A. The environmental assessment is a concise public document which has three defined functions. (1) It briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) it aids an agency's compliance with NEPA when no EIS is necessary, i.e., it helps to identify better alternatives and mitigation measures; and (3) it facilitates preparation of an EIS when one is necessary. Section 1508.9(a).

Since the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).

While the regulations do not contain page limits for EA's, the Council has generally advised agencies to keep the length of EAs to not more than approximately 10–15 pages. Some agencies expressly provide page guidelines (e.g., 10–15 pages in the case of the Army Corps). To avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues.

36b. Q. Under what circumstances is a lengthy EA appropriate?

A. Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 *and* where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

37a. Q. What is the level of detail of information that must be included in a finding of no significant impact (FONSI)?

A. The FONSI is a document in which the agency briefly explains the reasons why an action will not have a significant effect on the human environment and, therefore, why an EIS will not be prepared. Section 1508.13. The finding itself need not be detailed, but must succinctly state the reasons for deciding that the action will have no significant environmental effects, and, if relevant, must show which factors were weighted most heavily in the determination. In addition to this statement, the FONSI must include, summarize, or attach and incorporate by reference, the environmental assessment.

37b. Q. What are the criteria for deciding whether a FONSI should be made available for public review for 30 days before the agency's final determination whether to prepare an EIS?

A. Public review is necessary, for example, (a) if the proposal is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS. Sections 1501.4(e)(2), 1508.27. Agencies also must allow a period of public review of the FONSI if the proposed action would be located in a floodplain or wetland. E.O. 11988, Sec. 2(a)(4); E.O. 11990, Sec. 2(b).

38. Q. Must (EAs) and FONSIs be made public? If so, how should this be done?

A. Yes, they must be available to the public. Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSIs. These are public "environmental documents" under Section 1506.6(b), and, therefore, agencies must give public notice of their availability. A combination of methods may be used to give notice, and the methods should be tailored to the needs of particular cases. Thus, a Federal Register notice of availability of the documents, coupled with notices in national publications and mailed to interested national groups might be appropriate for proposals that are national in scope. Local newspaper notices may be more appropriate for regional or site-specific proposals.

The objective, however, is to notify all interested or affected parties. If this is not being achieved, then the methods should be reevaluated and changed. Repeated failure to reach the interested or affected public would be interpreted as a violation of the regulations.

39. Q. Can an EA and FONSI be used to impose enforceable mitigation measures, monitoring programs, or other requirements, even though there is no requirement in the regulations in such cases for a formal Record of Decision?

A. Yes. In cases where an environmental assessment is the appropriate environmental document, there still may be mitigation measures or alternatives that would be desirable to consider and adopt even though the impacts of the proposal will not be "significant." In such cases, the EA should include a discussion of these measures or alternatives to "assist

agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary." Section 1501.3(b), 1508.9(a)(2). The appropriate mitigation measures can be imposed as enforceable permit conditions, or adopted as part of the agency final decision in the same manner mitigation measures are adopted in the formal Record of Decision that is required in EIS cases.

40. Q. If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?

A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. Sections 1508.8, 1508.27.

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such *possible* mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

[FR Doc. 81-8734 Filed 3-20-81; 8:45 am]
BILLING CODE 3125-01-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 531

[Docket No. LVM 77-06; Notice 5]

Passenger Automobile Average Fuel Economy Standards; Exemption From Average Fuel Economy Standards

AGENCY: National Highway Traffic Safety Administration, Department of Transportation.

ACTION: Final decision to grant exemption from fuel economy standards.

SUMMARY: This notice exempts Excalibur Automobile Corporation (Excalibur) from the generally applicable average fuel economy standards of 19.0 miles per gallon (mpg) and 20.0 mpg for 1979 and 1980 model year passenger automobiles, respectively, and establishes alternative standards. The alternative standards are 11.5 mpg in the 1979 model year and 16.2 mpg in the 1980 model year.

DATES: The exemptions and alternative standards set forth in this notice apply in the 1979 and 1980 model years.

FOR FURTHER INFORMATION CONTACT: Robert Mercure, Office of Automotive Fuel Economy Standards, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, D.C. 20590 (202-755-6384).

SUPPLEMENTARY INFORMATION: The National Highway Traffic Safety Administration (NHTSA) is exempting Excalibur from the generally applicable average fuel economy standards for the 1979 and 1980 model year and establishing alternative standards applicable to that company in those model years. This exemption is issued under the authority of section 502(c) of the Motor Vehicle Information and Cost Savings Act, as amended (the Act) (15 U.S.C. 2002(c)). Section 502(c) provides that a manufacturer of passenger automobiles that manufactures fewer than 10,000 passenger automobiles annually may be exempted from the generally applicable average fuel economy standard for a particular model year if that standard is greater than the low volume manufacturer's maximum feasible average fuel economy and if the NHTSA establishes an alternative standard applicable to that manufacturer at the low volume manufacturer's maximum feasible average fuel economy. Section 502(e) of the Act (15 U.S.C. 2002(e)) requires the NHTSA to consider:

(1) Technological feasibility;

(2) Economic practicability;

(3) The effect of other Federal motor vehicle standards on fuel economy; and

(4) The need of the Nation to conserve energy.

This final rule was preceded by a notice announcing the NHTSA's proposed decision to grant an exemption to Excalibur for the 1979 and 1980 model years (45 FR 50840, July 31, 1980). No comments were received during the 45-day comment period.

Based on its conclusions that it is not technologically feasible and economically practicable for Excalibur to improve the fuel economy of its 1979 and 1980 model year automobiles above an average of 11.5 and 16.2 mpg, respectively, that other Federal automobile standards did not affect achievable fuel economy beyond the extent considered in this analysis, and that the national effort to conserve energy will be negligibly affected by the granting of the requested exemptions, this agency concludes that the maximum feasible average fuel economy for Excalibur in the 1979 and 1980 model years is 11.5 mpg and 16.2 mpg, respectively. Therefore, NHTSA is exempting Excalibur from the generally applicable standards and is establishing alternative standards of 11.5 mpg for the 1979 model year and 16.2 mpg for the 1980 model year.

In consideration of the foregoing, 49 CFR Part 531 is amended by revising § 531.5(b)(5) to read as follows:

§ 531.5 Fuel economy standards.

* * * * *

(b) The following manufacturers shall comply with the fuel economy standards indicated below for the specified model years:

* * * * *

(5) Excalibur Automobile Corporation.

APPENDIX D.

Memorandum on Statutory Defects in the Draft Environmental Assessment

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
450 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37219

MEMORANDUM

TO: FRANK J. SCANLON
Deputy Attorney General

FROM: R. TIM WURZ
Assistant Attorney General

DATE: November 15, 1985

RE: MRS Environmental Assessment

SUMMARY

The Environmental Assessment that is to accompany a DOE proposal to Congress for an MRS facility must adhere to certain strict guidelines. Those guidelines, found in the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10101 et seq., and in regulations promulgated by the Council on Environmental Quality (CEQ), 40 C.F.R. Part 1508.9, have not been adequately followed in this instance.

DISCUSSION OF THE LAW

The NWPA provides that the Environmental Assessment (EA) prepared for the MRS proposal "shall be based upon available information regarding alternative technologies for the storage of spent nuclear fuel and high-level radioactive waste." 42 U.S.C. § 10161(c)(1). In addition, 40 C.F.R. Part 1508.9(b) requires that an EA include, inter alia, discussions of alternatives to the proposed action and of the environmental impacts of these alternatives.

LEGAL AND STATUTORY DEFICIENCIES OF EA

My examination of the EA has revealed three (3) substantive deficiencies in the draft EA prepared by DOE. The most glaring and serious omission involves the failure of DOE to provide a meaningful discussion of the interim

---

storage facility concept and the relative advantages and disadvantages of such an alternative. Rather, the EA dismisses the concept with the cursory statement, "Federal Interim Storage would not significantly affect the comparison of system performance with and without an MRS facility in any case." Draft EA, Part I, p. 1.1.11. I believe that a more detailed discussion of interim storage should be included in the EA.

The interim storage program is specifically discussed in the NWPA in §§ 10151-10157. The existence of a potential alternative to an integrated MRS-repository system is therefore easily discoverable and could be subjected to quantifiable analysis. Contrary to DOE's conclusion, it appears to me that use of federal interim storage until a final repository is prepared to receive spent fuel would "significantly affect the comparison of system performance with and without an MRS facility." Such an alternative proposition should be discussed in detail in the EA since no further consideration of the need for an MRS will be considered after congressional review of the proposal. 42 U.S.C. § 10161(c)(2).

A second deficiency of the draft EA involves the inadequate discussion of the socio-economic impacts of the proposed MRS facility. The draft EA contains no serious mention of adverse demographic and socio-economic results flowing from location of an MRS within a given community. Rather, DOE's discussion focuses on various problems or concerns resulting from an influx of people and capital into the communities surrounding the MRS. DOE has failed to address issues that would be raised by emigration of a large percentage of citizens who do not view the MRS as a benevolent neighbor, by drastic decreases in land value in the area, and by other related problems. Such issues need to be addressed if the possible impacts of the construction and operation of an MRS are to be properly assessed.

Finally, the draft EA perfunctorily dismisses potential environmental conflicts of the three (3) Tennessee sites with protected areas. In discussing the air quality impacts of construction of the facilities on Class I areas, DOE concluded, "The Oak Ridge site is 30 miles from a

---

Class I area. Activities at the site are not expected to have measurable effects on this or any Class I area." Draft EA, Part 2, p. 2.3.73. Additionally, in discussing the Hartsville site, DOE states, "The Hartsville site is __ miles (__ km) from a Class I area. MRS facility construction is not expected to have measurable affects on this or any Class I area." Draft EA, Part 2, p. 2.3.92. No further analysis or study is mentioned.

By contrast, in its Monitored Retrievable Storage Program Briefing Package of July 9, 1985, the Office of Civilian Radioactive Waste Management (OCRWM) reported DOE's decision not to study placement of the MRS at a DOE-owned location in Paducah, Kentucky. The Paducah site was eliminated "because of potential land use and environmental considerations." Briefing Package, p. 119. The three (3) Tennessee sites are also extremely close to protected Class I land areas. DOE has failed, however, to explain why the concerns that resulted in elimination of the Kentucky site from consideration need not even be discussed in relation to the Tennessee sites.

OTHER COMMENTS AND QUESTIONS

Other statements and conclusions made by DOE in the draft EA have raised certain questions. On page 1.1.12 of Part I of the EA, DOE states that fuel from western reactors will be shipped directly to the final deep geologic repository. Since the facilities at the repository will have capabilities to process and/or consolidate spent nuclear fuel, wouldn't it be economically and environmentally feasible to perform all functions for storage at the repository? The EA does not adequately address this question.

On page 1.2.11 of Part I, DOE officials conclude that "[t]he estimated cost of spent fuel transportation would be relatively insensitive to whether an MRS facility is included in the waste management system." DOE has emphasized the transportation benefits of an integrated MRS-repository disposal system in its push for MRS authorization. If, however, the costs of the transportation of the spent fuel will remain relatively equal with or without an

---

MRS, would not the total environmental impact be lessened by performing MRS functions at either the reactor sites or at the permanent repository? Also, if the transportation benefits from an MRS are not as great as originally envisioned, is the MRS idea still a good one? The EA appears to ignore the significance of a lesser transportation benefit.

On page 1.2.39 of Part I of the draft EA, DOE reports, "The largest contribution to unit radiological dose would be from transporting fuel in trucks. Therefore, the largest potential for reducing dose would result from using larger truck or rail casks rather than legal-weight truck casks where possible." If the largest dose of radiation will result from truck transporting of fuel, it appears that choosing to truck spent fuel from the eastern United States to an MRS will have a relatively significant radiological effect. Would not that effect be mitigated by consolidating spent fuel rods at the reactor sites and transporting them by rail in large casks to the repository? The EA fails to provide significant analysis or consideration of this alternative to DOE's proposed plan.

Finally, on pages 2.3.127-2.3.130 of the draft EA, DOE discusses the "Relative Advantages and Disadvantages of the Six Site-Design Combinations." The document analyzes eight factors to emphasize the relative strengths or weaknesses of the prospective sites. In no instance did the DOE-preferred Clinch River Breeder Reactor site have a sole advantage over the other proposed sites. In fact, the Hartsville site seems, from the EA discussion, to have more advantages that the other locations. Why, then, has the Clinch River site been selected as the preferred location for an MRS? Was the lack of potential community opposition an overriding factor?

CONCLUSION

The draft EA prepared by DOE has examined some of the potential environmental impacts of an MRS. The document, however, is statutorily deficient in its discussions of possible alternative technologies for transportation and storage of nuclear waste. Such analysis should be mandated

---

because the environmental impact statement (EIS) prepared after MRS authorization need not consider any alternatives to the facility design approved by Congress. The EA, therefore, is the only document in which an extensive study and comparison of alternatives can be undertaken. DOE should be required to perform the in-depth analysis of alternative technologies that is required to insure that the nation's best interests are served by authorization of an MRS.

RTW:dmm

END

DATE
FILMED
6/3/92