NUCLEAR REGULATORY COMMISSION

Office of Nuclear Material Safety and Safeguards; In the Matter of Department of Energy, (Savannah River High-Level Waste Tanks); Response to NRDC Petition

I. Introduction

On July 28, 1998, the Natural Resources Defense Council (NRDC) submitted a petition to the U.S. Nuclear Regulatory Commission (NRC) requesting that NRC ''. . . assume and exercise immediate licensing authority over all high-level radioactive waste (HLW) that is stored in the 51 underground tanks located on the Department of Energy's (DOE) Savannah River Site (SRS).'' NRC published receipt of the petition in the **Federal Register** on September 4, 1998 (63 FR 47333). On September 30, 1998, DOE's General Counsel responded to NRDC's petition. On October 23, 1998, NRDC responded to DOE's reply.

On March 6, 2000, NRDC sent a letter to Chairman Richard A. Meserve asking for a public meeting to discuss the Savannah River tank closure program and to consider the points NRDC raised in its petition. The NRDC letter also stated that the NRC should initiate formal rulemaking if the Commission agreed with the NRC staff's position in SECY 99–284 (December 15, 1999).[1]

NRDC, in submitting this petition, expressly stated that it did not seek to have the petition addressed under the procedures of 10 CFR 2.206, ''Requests for Action under This Subpart.''[2] However, it requested the Commission to exercise its authority to take regulatory action. This petition was considered under the Commission's general authority to address issues associated with its jurisdiction.[3]

By letter dated August 27, 1998, the Director of the Office of Nuclear Material Safety and Safeguards (NMSS) informed the petitioner that immediate action was not warranted for a number of reasons, including: (1) NRC does not perceive any immediate threat to the public health and safety from DOE's management of the SRS tank farm; (2) DOE is actively monitoring the condition and safety of the tanks; and (3) DOE has agreed not to close any more tanks, pending the NRC staff's completion of its review of DOE's waste classification methodology. The Director, NMSS, informed NRDC that the NRC staff would not respond to the petition until it completed its review of DOE's classification methodology.[4]

II. Discussion

A. NRC's Jurisdiction

NRC has limited licensing authority over DOE activities. With the dissolution of the Atomic Energy Commission in 1975, NRC was given licensing and related regulatory responsibilities for only four types of facilities within the Energy Research and Development Administration (ERDA) (now DOE). Two types of facilities are relevant to HLW issues. Specifically, Section 202(3) of the Energy Reorganization Act (ERA) addresses facilities used primarily for the receipt and storage of HLW resulting from activities licensed under the Atomic Energy Act. Section 202(4) addresses *''. . . facilities authorized for the express purpose of subsequent long term storage of high-level radioactive waste* generated by the Administration [now DOE], which are not used for, or part of, research and development activities.'' (Emphasis added.)

Section 202(3) is not relevant here because Savannah River does not possess wastes from licensed activities. Section 202(4) would be relevant if: (1) the DOE facility at Savannah River was for storing high-level waste for the long term; and (2) such facility was ''authorized for the express purpose of subsequent storage of high-level radioactive waste.'' The HLW at Savannah River is from defense activities. DOE intends the tanks to be closed in place. It has no intent to recover the residual waste for future use, processing, or disposal. The burial of any residual material in the tanks on site is, in essence, disposal. However, for purposes of the ERA, the Commission has interpreted the term ''storage'' to include disposal.[5] Assuming the residual material is HLW, to resolve the question of NRC jurisdiction requires a determination as to whether the tanks have been expressly authorized for long-term storage of HLW.[6]

This issue was raised before the Commission in the late 1970s in a petition filed by NRDC. The NRDC petition requested that NRC license the tanks at Savannah River. The Commission, after reviewing the legislative history for Section 202(4)[7] and past authorization acts, could not find that these tanks were ''. . . authorized for the express purpose of subsequent long term storage.'' The Commission concluded that it had no jurisdiction because the tanks, at the time, were intended for interim storage and had not been authorized for long-term storage. [*In the Matter of NRDC, ''Request Concerning ERDA High-Level Waste Storage Facilities,*'' CLI 77–9, 5 NRC 550 (1977).] Based on the legislative history, the Commission also concluded that Congress ''had in mind'' that Section 202(4) would apply to facilities not in existence in 1974 when the ERA was enacted.[8] However, the Commission opined that Section 202(4) could apply to facilities constructed before 1974, if they were subsequently

[1] SECY 99–284, ''Classification of Savannah River Residual Tank Waste,'' December 15, 1999, addressed NRC staff views on DOE's methodology for classifying incidental waste at SRS.

[2] NRDC stated: ''This petition does *not* call for NRC to exercise an enforcement or other judicially un-reviewable discretionary action within the meaning of 10 CFR 2.206 or the holding in Hechler v. Chaney, 470 US 821 (1985).''

[3] In light of the specific request of the petitioner in the July 28, 1998 petition, this petition was not treated as a petition submitted under 10 CFR 2.206, notwithstanding the petitioner's March 6, 2000 letter referring to the petition as ''its 2.206 petition.''

[4] The staff has completed its review, and has transmitted the results to DOE. See letter from W.F. Kane/NRC to R. Schepens/DOE-SRS, dated June 30, 2000.

[5] The ERA does not define the term ''storage.'' The ERA does not explicitly give NRC jurisdiction over the disposal of HLW. However, the Commission, in 1981, when it promulgated 10 CFR part 60, ''Disposal of High-Level Wastes in Geologic Repositories,'' asserted that, ''[T]he Commission interprets 'storage' as used in the Energy Reorganization Act to include disposal.'' ''Disposal of High-Level Radioactive Wastes in Geologic Repositories: Licensing Procedures,'' 46 FR 13971, Footnote 1 (February 25, 1981). See also 10 CFR 60.102(b)(3). This is different from the Nuclear Waste Policy Act of 1982 (NWPA), Public Law 97–425, 96 Stat. 2201, 42 U.S.C. 10101, et seq., which, in Section 25, defines ''storage'' to mean retention of HLW with the intent to recover it for future use, processing, or disposal.

[6] See Footnote 2, ''Denial of Rulemaking Petition,'' 58 FR 12346, where the Commission said that the contents of the waste in the Hanford tanks are not dispositive of the question of whether the storage of the treated wastes is subject to NRC licensing.

[7] The Senate Committee on Government Operations explained that Section 202(4) provides NRC ''. . . with the authority and responsibility for licensing and related regulation of retrievable surface storage facilities and other facilities for high-level radioactive wastes which are or may be *authorized by the Congress*. . . for long-term storage. . . . It is not the intent of the Committee to require licensing of such storage facilities which are already in existence. . . .'' Committee on Government Operations, Senate Report 93–980, at 59 (June 27,1974) (emphasis added). The Conference Report explained that it retained the Senate language for Section 202(4) and also noted that facilities for long-term storage were not in existence. [Conference Report HR 93–1445 (October 8, 1974).]

[8] There are 51 underground storage tanks at Savannah River. Eighteen of these tanks were constructed after the passage of the ERA. DOE maintains that none of these tanks was expressly authorized for long-term storage of HLW. Letter from Mary Anne Sullivan, General Counsel, DOE, to John Greeves, Director, Division of Waste Management, NRC, ''NRDC Petition to Exercise Licensing Authority Over Savannah River Site High-Level Waste Tanks,'' September 30, 1998.

expressly authorized for long-term storage.[*Id.* at 554.] [9]

In seeking judicial review of the Commission's decision denying the NRDC's petition, the NRDC argued that the question of whether the tanks are expressly authorized for long-term storage turns on the likelihood that the tanks will be used for long-term storage rather than whether Congress or the ERDA actually authorized them. The Court rejected that view stating:

> Had Congress desired to base NRC licensing jurisdiction on a factual determination of the probability that particular ERDA waste storage facilities would for reasons of necessity or otherwise, be used for long-term storage, it would have enacted a statute significantly different from that before us. Instead, Congress chose to give NRC licensing jurisdiction when such facilities are ''authorized for the express purpose of subsequent long-term storage.'' 42 U.S.C. 5842(4). Although the parties suggest that some ambiguity exists concerning who must give the required authorization, Congress or ERDA, neither authorized the . . . tanks for long-term storage. [*NRDC* v. *USNRC*, 606 F2d 1261,1267 (D.C. Cir.1979).]

In light of its finding that neither the ERDA nor the Congress had expressly authorized the tanks for long-term storage, the Court did not resolve this suggested ambiguity. The purpose of Section 202 of the ERA was to give NRC new authority over ERDA. However, this was limited authority as the new authority only extended to certain ERDA activities. Senate Report 93–980 is clear that Congress was to make the authorization. Given that it was the Senate language that was adopted in the final bill, its views are instructive. Moreover, there is no evidence in the legislative history to suggest that Congress intended the ERDA to have the discretion to decide for itself which facilities would be authorized for long-term storage and, therefore, licensed by NRC. It does not seem reasonable that Congress would have intended that result given the purpose of Section 202 to establish licensing requirements for certain ERDA facilities. Following the logic of the Court of Appeals, if Congress intended that the ERDA could have provided the authorization, significantly different language would have been used.

Thus, absent express Congressional authorization, NRC does not have jurisdiction over defense HLW stored at Savannah River. Since the enactment of the ERA, there has not been an express authorization for long-term storage of HLW at Savannah River. Congress has repeatedly authorized funds for interim storage at Savannah River and funds for removal of HLW from filled waste tanks. With one exception, there has not been a reference to long-term storage at Savannah River. The exception—Section 3141 of the National Defense Authorization Act for Fiscal Year 1997 [Public Law 104–201, 110 Stat. 2422 (1996)]—directed that the Secretary of Energy accelerate the schedule for isolation of HLW in glass containers if the Secretary found, among other things, that it ''. . . could accelerate the removal and isolation of high-level waste from long-term storage tanks at the [Savannah River] site.'' Although this is a recognition that there is, and is likely to be, lengthy storage at Savannah River, this language is not an authorization for the ''. . . express purpose of subsequent long-term storage.'' If anything, it is an indication from Congress that it does not desire long-term storage of HLW at Savannah River. In sum, although Congress is aware that DOE is in the process of removing HLW from the storage tanks at Savannah River, it has not expressly authorized the long-term storage of any residual HLW in those tanks.

Apart from the ERA, NRC has authority to license DOE's repositories for disposal of HLW arising out of defense activities. Section 8(b)(3) of the NWPA provides that any repository for the disposal of HLW resulting from atomic energy defense activities is to be licensed under Section 202 of the ERA and is to be subject to the Commission's requirements. Section 2(18) of the NWPA defines a ''repository'' to mean ''permanent deep geologic disposal. . . .'' Although the HLW at Savannah River is defense waste, it is not stored nor disposed of, nor intended to be stored or disposed of in a repository as that term is used in the NWPA.[10] Therefore, the NWPA is not a source for NRC jurisdiction over the Savannah River tanks.

B. Incidental Waste

As to the issue of incidental waste raised by NRDC, NRC has in the past recognized the concept of incidental waste. For example, in a response to a rulemaking petition involving Hanford, the Commission concluded that the reprocessed wastes would be ''incidental waste'' and not HLW, based on DOE's assurances that the wastes:

> (1) have been processed (or will be further processed) to remove key radionuclides to the maximum extent that is technically and economically practical;
>
> (2) will be incorporated in a solid physical form at a concentration that does not exceed the applicable concentration limits for Class C low-level waste as set out in 10 CFR Part 61; and
>
> (3) are to be managed, pursuant to the Atomic Energy Act, so that safety requirements comparable to the performance objectives set out in 10 CFR part 61, subpart C, are satisfied.[11]

NRC recognizes that the residual waste at Savannah River is different from the waste at Hanford. The residual waste at Savannah River generally consists of waste that is left on the bottom of the tanks and that is embedded in pits in the tank walls; at Hanford, the waste consists of the low-activity fraction resulting from pre-treatment. Importantly, the waste at Hanford was not greater than Class C. At Savannah River some of the residual waste, if subject to 10 CFR part 61, would be classified, in accordance with 10 CFR 61.55, as greater than Class C. The Commission's regulations at 10 CFR 61.58 reserve the discretion to allow material to be treated as not greater than Class C if the requirements of 10 CFR part 61, Subpart C, are met. However, in light of the lack of NRC jurisdiction over the SRS tanks, NRC has not adopted a position as to whether the residual waste DOE seeks to classify as ''incidental waste'' in these tanks is considered HLW.

NRC has provided technical assistance, from a safety perspective, on DOE's methodology for classifying waste as ''incidental.'' In the June 30, 2000, letter, the NRC staff stated:

> Based on the information provided, the staff has concluded that the methodology for tank closure at SRS appears to reasonably analyze the relevant considerations for Criterion One and Criterion Three of the three incidental waste criteria. DOE would undertake cleanup to the maximum extent that is technically and economically practical, and would demonstrate it can meet performance objectives consistent with those required for disposal of low-level waste. These commitments, if satisfied, should serve to provide adequate protection of public health and safety. . . . The NRC staff, from a safety perspective, therefore does not disagree with DOE–SR's proposed methodology, contingent upon DOE reaching current goals for bulk waste removal, as well as water and chemical washing, such that the performance objectives stated in subpart C 10 CFR 61 are met. . . .

The staff's technical advice does not mean that NRC has decided that the material left in the tanks is incidental

[9] As noted below, there have not been any subsequent Congressional authorizations.

[10] Neither the NWPA nor 10 CFR Part 60 requires HLW to be disposed of in a geologic repository. Should future reprocessing of commercial fuel occur, 10 CFR Part 50, Appendix F, would require the resulting HLW to be transferred to a Federal repository. See also, the 1987 advance notice of proposed rulemaking to define HLW, 52 FR 5992, 5993 (February 27, 1987).

[11] *Id.* at 12345.

waste. The results of the NRC staff review were provided as input to the DOE decision. DOE is responsible for determining whether the residual tank waste can be classified as incidental.[12]

III. Conclusion

NRC has provided technical assistance, from a safety perspective, on DOE's methodology for classifying waste as ''incidental.'' NRC staff has concluded that DOE's commitments to (1) clean up to the maximum extent technically and economically practical, and (2) meet performance objectives consistent with those required for disposal of low-level waste, if satisfied, should serve to provide adequate protection of public health and safety.

NRC does not have licensing and related regulatory authority over the HLW or residual wastes in the tanks at Savannah River. The authority and responsibility for classifying the waste at Savannah River reside in DOE, not NRC. Therefore, the issues underlying the petition should be directed to DOE.

Dated at Rockville, Maryland, this 2nd day of October, 2000.

For the Nuclear Regulatory Commission.

William F. Kane,

Director, Office of Nuclear Material Safety and Safeguards.

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[12] DOE has promulgated an order, DOE 435.1, ''Radioactive Waste Management,'' (July 9, 1999), that addresses, among other things, the classification of waste as incidental and not HLW. NRDC has challenged DOE's use of incidental waste. [NRDC and Snake River v. DOE, No. 00–70015 (May 22, 2000).]

NUCLEAR REGULATORY COMMISSION

Reactor Oversight Process Initial Implementation Evaluation Panel Meeting Notice

Pursuant to the Federal Advisory Committee Act of October 6, 1972 (Pub. L., 94–463, Stat. 770–776) the U.S. Nuclear Regulatory Commission (NRC), on October 2, 2000, announced the establishment of the Reactor Oversight Process Initial Implementation Evaluation Panel (IIEP). The IIEP will function as a cross-disciplinary oversight group to independently monitor and evaluate the results of the first year of implementation of the Reactor Oversight Process (ROP). A Charter governing the IIEP functions as a Federal Advisory Committee is being filed on October 16, 2000, after consultation with the Committee Management Secretariat, General Services Administration. The IIEP will hold its first meeting on November 1–2, 2000, in Conference Room T–8A1, Nuclear Regulatory Commission, 11545 Rockville Pike, Rockville, Maryland.

The IIEP meeting participants are listed below along with their affiliation:

A. Randolph Blough—U.S. Nuclear Regulatory Commission
R. William Borchardt—U.S. Nuclear Regulatory Commission
Kenneth Brockman—U.S. Nuclear Regulatory Commission
Steve Floyd—Nuclear Energy Institute
David Garchow—PSEG Nuclear LLC
Richard Hill—Southern Nuclear Operating Company
Rod Krich—Commonwealth Edison Company
Robert Laurie—California Energy Commission
David Lochbaum—Union of Concerned Scientists
James Moorman, III—U.S. Nuclear Regulatory Commission
Loren Plisco—U.S. Nuclear Regulatory Commission
Steven Reynolds—U.S. Nuclear Regulatory Commission
A. Edward Scherer—Southern California Edison Company
James Setser—Georgia Department of Natural Resources
James Trapp—U.S. Nuclear Regulatory Commission

A tentative agenda of the meeting is outlined as follows:

November 1, 2000

1:00–1:20—Welcome & Opening Remarks —Introduction of Committee Members
1:20–1:40—Role of Independent Advisory Committees
1:40–2:00—Legal Requirements of FACA Committees
2:00–3:00—IIEP Charter —Discussion of Proposed Bylaws
3:00–3:15—Break
3:15–3:30—Administrative Support for FACA Committee
3:30–3:45—Lessons Learned and Best Practices from the Pilot Program Evaluation Panel
3:45–4:00—Current Status of the Reactor Oversight Process
4:00–5:00—Overview of Staff Performance Measures

Thursday, November 2, 2000

8:00–10:15—Detailed Discussion of Staff Performance Measures
10:15–10:30—Break
10:30–12:00—Detailed Discussion of Staff Performance Measures
12:00–12:45—Lunch
12:45–3:15—IIEP Discussion on Acceptability of Staff Performance Measures
3:15–3:30—Break
3:30–4:30—Agenda Planning

Meetings of the IIEP are open to the members of the public. Formal procedures for the conduct of the Panel meetings will be developed during the November 1–2, 2000 meeting. In the interim, at the November 1–2, 2000, meeting, oral or written views may be presented by the members of the public, including members of the nuclear industry. Persons desiring to make oral statements should notify Mr. Loren R. Plisco (Telephone 404/562–4501, e-mail LRP@nrc.gov) or Mr. John D. Monninger (Telephone 301/415–3495, e-mail JDM@nrc.gov) five days prior to the meeting date, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. Use of still, motion picture, and television cameras will be permitted during this meeting.

Further information regarding topics of discussion; whether the meeting has been canceled, rescheduled, or relocated; and the Panel Chairman's ruling regarding requests to present oral statements and time allotted, may be obtained by contacting Mr. Loren R. Plisco or Mr. John D. Monninger between 8:00 a.m. and 4:30 p.m. EDT.

IIEP meeting transcripts and meeting reports will be available from the Commission's Public Document Room. Transcripts will be placed on the agency's web page when a web site for the IIEP is established.

Dated: October 12, 2000.

Andrew Bates,

Advisory Committee Management Officer.

[FR Doc. 00–26760 Filed 10–17–00; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards

Subcommittee Meeting on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on October 31, 2000, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c) (2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows: *Tuesday, October 31, 2000—1:00 p.m. until the conclusion of business.*

The Subcommittee will discuss proposed ACRS activities and related matters. The purpose of this meeting is to gather information, analyze relevant issues and facts, and to formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Oral statements may be presented by members of the public with the