

**NYE COUNTY COMMENTS ON PROPOSED GUIDELINES FOR THE
RECOMMENDATION OF SITES FOR NUCLEAR WASTE REPOSITORIES;
YUCCA MOUNTAIN SITE SUITABILITY GUIDELINES**

DOCKET # RW-RM-99-963

Nye County has the same general concerns with this latest effort at revising the DOE repository guidelines that we expressed with respect to the aborted 1996 attempt (Docket # RW-RM-96-100). Nevertheless, we find this product to be more acceptable than the last, for several reasons.

Nye County, as the *situs* jurisdiction for the proposed Yucca Mountain repository has been very active in the exercise of its oversight authority, recognized by Congress in the Nuclear Waste Policy Act (NWPA). Among the many activities that the Nye Nuclear Waste Repository Project Office (NWRPO) has been engaged in is the sometimes fitful effort to determine whether, and if so how, to amend DOE's General Guidelines for the Recommendation of Site for Nuclear Waste Repositories (Siting Guidelines). That process has been lengthy, controversial, and contentious. This latest, and presumably last, proposal on which the department seeks public comment promises to continue that tradition.

Background

The Yucca Mountain Project has been repeatedly redirected, beginning with the single focus on Yucca Mountain in the Nuclear Waste Policy Amendments Act of 1987. Nye County has previously reviewed and commented on several attempts by the department to formulate a policy with respect to the Siting Guidelines, developed in response to these changing program directions. Our comments have been sometimes informal, offered at various interactions such as technical exchanges or meetings, and sometimes formally in writing in response to various DOE proposals. The latest of these was the Nye comments on the DOE attempt in 1996 to amend 10 CFR Part 960, submitted to the department on March 11, 1997.

In March of 1994, for example, in response to DOE's so-called "Scenario A", Nye declined to actively participate in developing any proposed changes to the Siting Guidelines, and took the position that its pre-decisional role should be limited to responding to DOE's proposed changes. Nye also, at that time, did not feel that sufficient justification for any changes had been shown, given that site characterization was still in its very early stages. Nye County also opposed developing site-specific guidelines, and felt that adopting the NRC's then Subpart E of 10 CFR 60 would mask the fundamental

distinction between site suitability and licensability. Finally, we have consistently spoken out against the potential that “institutional momentum” would ensure that Yucca Mountain is found suitable and licensed regardless of site conditions. An example of this latter concern was the decision by Congress to ratify the DOE Revised Program Plan to amend the Siting Guidelines “to make them specific to the Yucca Mountain site.” This was done, of course, at DOE’s request and despite Nye’s active opposition.

We expressed all of these concerns in our comments on Docket # RM-RM-96-100 in March of 1997. They remain the same in relation to this latest proposal. We do acknowledge, however, that the provisions of 10 CFR 960 contemplate periodic revision in response to new information and a refined understanding of the overall process of nuclear waste disposal developed in the course, and as a result, of site characterization. Much more is known and understood today about Yucca Mountain, and about appropriate design parameters for a nuclear waste repository, than was known when real site characterization began in 1994, or when the 1996 proposal to amend Part 960 was published for comment. Much new knowledge of the key natural processes operating at the site and the engineered barriers likely to be employed to enhance waste isolation, including the effects of ventilation on long-term waste isolation, has been developed. Nye County’s own Independent Scientific Investigations Program, including the Early Warning Drilling Program, continues to contribute data and analyses to the understanding of Yucca Mountain.

The Current Proposal

Legal Authority

This most recent proposal is accompanied (see 64 FR 67065 – 67071, 11/30/99) by a discussion entitled “Legal Authority and Necessity to Amend the Guidelines and Criteria”. That discussion amounts to what can only be described as a novel legal argument in support of the department’s action in proposing these amendments. Because of Nye’s views on this matter it is not necessary to offer any detailed analysis of DOE’s argument here, other than to say that in our view, regardless of whether they are considered “guidelines” under § 112(a) of the NWPA, or “criteria” under §113(b), the provisions of this proposal fall short of what is required.

Nye County has never questioned the authority of DOE to amend its own guidelines, but rather the substance and content of various proposed amendments. A reading of the department’s argument in support of its legal authority prompts no change in that view. While we feel that relying on §113(b)’s call to include “criteria” for site characterization is somewhat strained, it seems clear that even such “criteria” must include elements, similar to if not identical to those required by §112(a), which are missing from this proposal.

First, there remain in our view essential differences between suitability and licensability. Any suitability decision, whether under §112(a) guidelines or §113(b) criteria, must include consideration of such elements as transportation, socioeconomic impacts, impacts

to future uses of scarce natural resources such as water, etc. An NRC licensing decision that a proposed repository site and design is capable of isolating waste for a required period of time to a particular dose or release standard need not, and probably will not, include all of those considerations. And it is not enough to say that these issues will be treated in an environmental impact statement (so far, as Nye and many other commenters, including the NRC, have already made clear in Draft Yucca Mountain EIS comments, the department has not adequately done so), they must be an integral part of the regulatory regime governing the suitability decision. The factors specified in §112(a), (call them “criteria”, if you will) such as the ones mentioned above, are not only legal requirements, they are also commonsense elements of any thorough and comprehensive decision to site a facility such as a nuclear waste repository. Whether included during site screening to select a candidate site for characterization, or after characterization in deciding whether a site is suitable for development as a repository, factors such as local and national transportation impacts, impacts on the local economy and environment, use of water, etc., must be considered. How and when they are considered, and how they are weighed along with other more technical criteria, should be set out with specificity in whatever guidance governs the suitability decision, whatever that guidance is called and under whatever section of the NWPA it is adopted. The proposed 10 CFR Part 963 fails in that respect.

An Overall System Performance Approach vs. Site-Specific Yucca Mountain Criteria.

As noted above, Nye is aware that Congress can be said to have dictated guidelines specific to Yucca Mountain by directing the department to carry out the Yucca Mountain Project “in accordance with the revised Program Plan”. That plan itself called for the amendment of the Siting Guidelines “to make them specific to the Yucca Mountain site”. The department now proposes, as it did in 1996, that an overall system performance approach, based on a total system performance assessment, provide the basis for determining site suitability. This is proposed instead of the alternative of writing site specific guidelines, such as adapting the groundwater travel time disqualifying condition of 10 CFR 960.4-2-1 to what is the known or suspected actual groundwater travel time at the site.

While Nye would still prefer that DOE, as it indicated was its intent in 1994, first apply the Siting Guidelines in their present form, we find the current approach, as we did in our 1997 comments, far preferable to a site-specific revision of the guidelines. Evaluating the site’s suitability on the basis of an assessment of the overall system’s ability to meet the EPA standard and NRC licensing regulations for the required regulatory period provides a more meaningful test than artificial guidelines written to fit the specific conditions and processes the department feels can be demonstrated at Yucca Mountain. Nye County remains opposed to such a contrived approach, and is glad that DOE has discarded it.

Moreover, our analysis of the proposed 10 CFR Part 963, and the supplementary information accompanying it, leads to the conclusion that this proposal is improved over the 1996 version. These improvements come in the form of much more specificity, verifiability, and transparency in the total system performance assessment, as requested by several commenters, including Nye, in response to the 1996 proposal. We support

these improvements. But the department rejects a suggestion by the Nuclear Waste Technical Review Board (NWTRB) that the new guidelines (or criteria) specify a margin of safety, i.e. require performance in excess of applicable standards. That is unfortunate. The NWTRB suggestion was a good one, well grounded in scientific conservatism and sound policy. Nye supported that suggestion then and still does so now. While we note that DOE is committed to indicating, in its underlying technical documentation, by what margin (if any) the expected performance of the repository will exceed applicable EPA and NRC standards, we urge DOE to reconsider this, and include in the guidelines (or criteria) themselves a requirement for performance somewhat in excess of applicable standards.

Nye is particularly gratified to see the new definition of “closure” in the proposed Part 963. As noted in the supplementary information (64 FR 67075, 11/30/99), Nye strongly suggested such a change to allow, or at least not preclude, the possibility of some openings in the repository to accommodate natural ventilation. We are heartened by the department’s response to this, as well as other indications of its commitment to further explore to benefits of long-term ventilation of the repository. Naturally, Nye supports this change.

Regulatory Review Discussion

As we also noted in our 1997 comments, the reviews under both Executive Order 12612 and Executive Order 12866 are inadequate. Neither of those EO’s refer only to federal mandates in the sense of actual legal requirements enforceable against state or local governments under statutes or authorizing regulations. Both do, however, require the following of federal departments and agencies:

- In the case of EO 12612, consideration of the effect on states (including local governments), the relationship between the federal government and the states, or the distribution of power and responsibility among various levels of government;
- In the case of EO 12866 an assessment of the effects of federal regulations on state, local and tribal governments, including specifically the availability of resources to carry out any mandates, and reasonable efforts to minimize any burdens that uniquely or significantly affect such governmental entities.

EO 12866 further addresses “significant regulatory action” which is defined as any action which may adversely effect the economy, competition, jobs, productivity, the environment, public health or safety, or state, local or tribal governments. It is beyond argument that the Yucca Mountain program effects Nye County is a very significant way. The economy, jobs, the environment, and public health & safety are all effected, not only by the ultimate placement of nuclear waste in Yucca Mountain, but by the ongoing characterization and development of the site itself. Congress, in enacting the NWPA, clearly recognized those burdens by directing payments equivalent to taxes be made to

Nye as the situs jurisdiction, and authorizing and funding Nye to carry out direct oversight of the program.

The projects affects are clearly present already, and must be acknowledged and fully analyzed under the Executive Orders cited above. It might indeed have been possible to refer to and incorporate such an analysis from the draft Yucca Mountain EIS. Unfortunately, no such analysis has yet been done. The burden is therefore on the department, under these EO's, to provide one here, before these amendments and the new Part 963 are finally adopted.