

REQUEST REPLY BY: 6/23/06

COMNJD-06-0006



CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

June 9, 2006

MEMORANDUM TO: Commissioner McGaffigan
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons

FROM: Chairman Diaz *hidd*

SUBJECT: IMPLEMENTATION OF NRC RESPONSIBILITIES UNDER THE
RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION
ACT

Disapproved. See attached comments.
E. Mc Caffigan Jr.
6/14/06

The Ronald W. Reagan National Defense Authorization Act of Fiscal Year 2005 (NDAA or Act) assigned the Commission new responsibilities regarding waste determinations to be made by the Secretary of Energy in the course of DOE's cleanup of the Savannah River Site (SRS) and Idaho National Laboratory. Under Section 3116(a) of the NDAA, DOE must consult with the NRC on the Secretary's determinations that certain wastes are not high-level radioactive wastes in accordance with criteria specified in the Act. Among these criteria are that the wastes will be disposed of in compliance with the performance objectives set out in subpart C of 10 CFR Part 61.

In addition, Section 3116(b) of the NDAA assigned the NRC to monitor DOE's disposal actions to assess compliance with the Part 61 performance objectives. As part of our monitoring responsibilities, the NRC must notify DOE, the covered State, and certain Congressional committees if the Commission considers any disposal actions taken by DOE to be not in compliance with the Part 61 performance objectives. Any failure of the Commission to carry out its Section 3116(b) monitoring and reporting responsibilities is subject to judicial review, in accordance with Section 3116(f) of the Act. Since DOE has not yet taken disposal actions pursuant to a waste classification by the Secretary, the NRC's monitoring role has not commenced.

In the SRM for SECY-05-0073, the Commission directed the staff to ensure that the technical bases for our decisions are "transparent, traceable, complete, and as open to the public and interested stakeholders as possible." Further, the staff was directed to inform the Commission how it "intends to implement the unique monitoring activities to ensure compliance" with the 10 CFR Part 61 performance objectives. The staff has striven to fully conform to the Commission's direction in its consultations with DOE.

The first consultation under Section 3116(a) of the NDAA, for salt waste disposal at SRS, was completed earlier this year. Salt waste disposal activities are expected to begin this summer, and NRC's monitoring function will begin. Accordingly, this is an appropriate time to review the agency's experiences in implementing the consultation process and to consider ways to improve the efficiency and effectiveness of this process. The salt waste determination was

Commissioner McGaffigan's Comments on COMNJD-06-0006


I disapprove the Chairman's recommendation to make the Ronald W. Reagan National Defense Authorization Act of Fiscal Year 2005 (NDAA) consultation process more collaborative by providing additional guidance to the staff on the flexibility with which it can interpret the Commission's direction in the SRM for SECY-05-0073. I also disapprove the Chairman's proposal to clarify the Commission's direction in the SRM regarding our monitoring role to ensure DOE's compliance with 10 CFR Part 61 performance requirements.

I understand and am sympathetic to the September 1, 2005, joint concern expressed by the South Carolina Governor's Nuclear Advisory Council and the South Carolina Department of Health and Environmental Control that the process that DOE is using to implement Section 3116 of the NDAA is not meeting their expectation that DOE move forward in a timely manner on its Federal Facility Agreement. However, I believe that, for our part, the NRC staff has put forth a considerable effort to make the NDAA consultation process as efficient and as "transparent, traceable, complete, and as open to the public and interested stakeholders as possible." For example, the staff's ongoing efforts to identify and resolve generic technical issues will result in significant efficiencies in future waste determination reviews. Our Advisory Committee on Nuclear Waste, the State of Idaho and the Savannah River Site Citizens Advisory Board have also expressed general support for the NRC's involvement in waste determinations thus far.

I believe DOE must learn to get comfortable with NRC's openness policies. In future NDAA reviews, NRC staff will be able to consult with DOE much earlier in its process of developing its waste incidental to reprocessing (WIR) determinations. The staff should encourage DOE to be more proactive during these next consultations by engaging the NRC staff earlier in the determination process, in open meetings. In a related matter, I believe DOE will need to be comfortable with open interactions with NRC staff if they ever expect Congress to extend Section 3116 to cover the treatment of wastes at Hanford.

With regard to the Chairman's concern that the NRC could be interpreted as having exceeded its NDAA mandate in the SRM for SECY-05-0073, I believe that our role in assessing compliance and reporting non-compliance to the DOE, the covered States, and the congressional committees looks and feels like we're meant to "ensure compliance." In any case, it is plain and clear to the staff and all stakeholders that the NDAA does not grant NRC an enforcement role in the consultation process, just a reporting role, and no clarification of the meaning of the SRM is required.

I request that this COM, the voting record, and the SRM be made publicly available when the SRM is completed.


Edward McGaffigan, Jr. 6/14/06
(Date)



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CHAIRMAN

June 9, 2006

MEMORANDUM TO:

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Commissioner Merrifield
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Commissioner Lyons

*I approve in part and
disapprove in part. See
attached comments.*

FROM:

Chairman Diaz *[Signature]*

SUBJECT:

IMPLEMENTATION OF NRC RESPONSIBILITIES UNDER THE
RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION
ACT

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In addition, Section 3116(b) of the NDAA assigned the NRC to monitor DOE's disposal actions to assess compliance with the Part 61 performance objectives. As part of our monitoring responsibilities, the NRC must notify DOE, the covered State, and certain Congressional committees if the Commission considers any disposal actions taken by DOE to be not in compliance with the Part 61 performance objectives. Any failure of the Commission to carry out its Section 3116(b) monitoring and reporting responsibilities is subject to judicial review, in accordance with Section 3116(f) of the Act. Since DOE has not yet taken disposal actions pursuant to a waste classification by the Secretary, the NRC's monitoring role has not commenced.

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Comments from Commissioner Merrifield on COMNJD-06-0006:

I approve in part and disapprove in part, as described in the following paragraphs, the Chairman's proposal in COMNJD-06-0006, Implementation of NRC's Responsibilities Under the Ronald W. Reagan National Defense Authorization Act.

The Ronald W. Reagan National Defense Authorization Act of Fiscal Year 2005 addressed the issue of accelerated clean up at two defense sites, Savannah River and Idaho National Laboratory, and specifically the issue of waste incidental to reprocessing. Concerning waste classification, under the Act, DOE must consult with NRC on what waste does not require disposal in a high level waste repository and how the performance objectives specified in the Act will be achieved for any such material disposed on the site. In addition, NRC, in consultation with the covered states, shall monitor the disposal actions proposed by DOE for the purpose of assessing compliance with the performance objectives. This monitoring activity is equivalent to inspection with no enforcement authority.

This issue of whether the meetings with DOE shall be open or closed was first raised by the staff in SECY-05-0073, Implementation of the NRC Responsibilities under the National Defense Authorization Act of 2005 in reviewing Waste Determinations for the Department of Energy (DOE). In the Staff Requirements Memorandum (SRM) for this paper the Commission stated that "The staff, in making its determination on the Department of Energy's waste disposal plans, should ensure that the technical basis for our decisions are transparent, traceable, complete, and as open to the public and interested stakeholders as possible." This is a position which I strongly supported when the SRM was issued and still support today. However, it has been raised to the Commission that the NRC staff may be interpreting the words "as possible" to mean that no closed meetings can be held with DOE on this issue. I recognized at the time of the SRM, and still recognize today, that although a majority of the meetings with DOE should be open to the public, there may be logical and common sense justification for holding a limited number of closed meetings. For example, if the discussions were to involve security issues (and I have no information to indicate they would on this topic), I would expect the meetings to be closed to the public. But there may be other valid reasons for meeting with DOE on this topic in a closed session. Given the current staff actions, the Commission needs to provide additional direction to the staff on the meaning of the term "as possible".

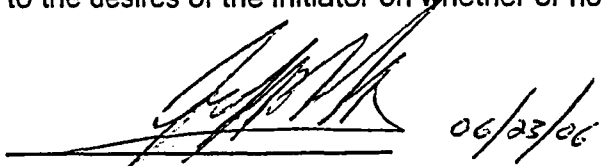
The word "consult" as used in the Act can have several meanings. Prior to this Act, NRC acted as a true consultant to DOE on waste incidental to reprocessing actions. Under a cost reimbursable agreement, DOE requested the NRC provide written opinions of proposals at various sites. Because we had no regulatory authority over these DOE sites, the NRC treated these actions as government to government interactions which could be closed to the public. The end result was not a regulatory decision but rather a technical opinion from NRC. DOE under its own regulatory authority is responsible for defending any regulatory decisions concerning its affected sites. However, the Act changed the consultation from a voluntary action initiated by DOE to a mandatory requirement. One of the reasons for requiring the consultation with NRC in the Act was a recognition that such consultation may improve public acceptance of the final DOE action. In order to achieve this objective, the consultation process requires a more open process instead of a government to government process. I recognize that DOE in this instance is not a NRC licensee. But if the goal is to increase public confidence in the final decision, the process to reach a decision should be more open to the public. Thus, I supported the statement in the SRM as discussed previously.

However, I also support Management Directive 3.5, "Attendance at NRC Staff Sponsored Meetings", which establish the criteria the staff uses for open and closed meetings with our licensees. This criteria is based on the principal that our regulatory actions should ensure that the technical basis for our decisions is transparent, traceable, complete, and as open to the public and interested stakeholders as possible. Therefore, I support the Chairman that staff should be informed that Management Directive 3.5 applies to these interactions with DOE. Where I differ from the Chairman is that I would not classify these meetings as government to government meetings. If they are classified as government to government meetings then Management Directive 3.5 does not apply. Application of Management Directive 3.5 would allow for closed meetings in certain circumstances. Principally, whether a meeting should or should not be open for public attendance is dependent primarily on the subject matter to be discussed. The meeting can be closed to the public if it is a general information exchange having no direct, substantive connection to a specific NRC decision or action. Another example of a meeting that may be closed to the public under Management Directive 3.5 is a reviewer visiting a corporate office to examine design calculations before writing the evaluation report or visiting a site to review site design implementation. If such meetings can be used to speed up the process, then logic and common sense indicates they should be held. Meetings which do not meet the criteria in Management Directive 3.5 should be open, public meetings. This action meets my criteria for holding open public meetings with DOE on this topic as much "as possible"¹.

As I have outlined above, this proposal will treat DOE with the same fairness of process that we have for those licensees we regulate. I believe this approach is appropriate as I have been unable to identify any basis for treating DOE more stringently in a consultation process than we do with our licensees in a regulatory process.

I support the second action proposed by the Chairman which is a technical correction to the SRM on SECY-05-0073 where the SRM reads "..., how the staff intends to implement the unique monitoring activities to ensure compliance, ...". The Chairman is correct in that the Ronald W. Reagan National Defense Authorization Act of Fiscal Year 2005 provides the NRC no authority to "ensure compliance". We are charged under the Act to assess compliance with the performance objectives and inform Congress, DOE, and the covered state of any non-compliance. Even though the SRM states that staff is to ensure compliance, the staff fully recognizes the limitations in this area. However, if we are going to provide further instructions to the staff in this area, we should correct this direction to the staff as well.

The last issue of consideration is should this COMNJD and associated voting record be made publically available. The papers which initiated this action, COMSECY-05-0073 and its voting record, are publically available. Under normal circumstances, I would have no objection to releasing this paper and my vote as well. Conversely, I have no objection to withholding the paper either. However, since this is an internal Commission initiative, out of professional courtesy to the initiator and to maintain collegiality within the Commission, I am willing to defer to the desires of the initiator on whether or not their COM should be released publically.

A handwritten signature in black ink, followed by the date "06/23/06" written in the same ink.

¹ Upon further reflection, I would have changed the words from "as possible" to "as practicable" as this wording more accurately reflects the "common sense" approach that I envisioned in my original vote.



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CHAIRMAN

June 9, 2006

Disapprove. See attached comments.

MEMORANDUM TO: Commissioner McGaffigan
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons



Gregory B. Jaczko Date 6/15/06

FROM: Chairman Diaz 

SUBJECT: IMPLEMENTATION OF NRC RESPONSIBILITIES UNDER THE
RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION
ACT

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In addition, Section 3116(b) of the NDAA assigned the NRC to monitor DOE's disposal actions to assess compliance with the Part 61 performance objectives. As part of our monitoring responsibilities, the NRC must notify DOE, the covered State, and certain Congressional committees if the Commission considers any disposal actions taken by DOE to be not in compliance with the Part 61 performance objectives. Any failure of the Commission to carry out its Section 3116(b) monitoring and reporting responsibilities is subject to judicial review, in accordance with Section 3116(f) of the Act. Since DOE has not yet taken disposal actions pursuant to a waste classification by the Secretary, the NRC's monitoring role has not commenced.

In the SRM for SECY-05-0073, the Commission directed the staff to ensure that the technical bases for our decisions are "transparent, traceable, complete, and as open to the public and interested stakeholders as possible." Further, the staff was directed to inform the Commission how it "intends to implement the unique monitoring activities to ensure compliance" with the 10 CFR Part 61 performance objectives. The staff has striven to fully conform to the Commission's direction in its consultations with DOE.

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**Commissioner Jaczko's Comments on COMNJD-06-0006
Implementation of NRC Responsibilities under the Ronald Reagan
National Defense Authorization Act**

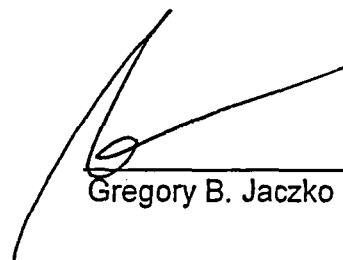
I disapprove the Chairman's recommendation to restrict public access to interagency communication related to the Ronald Reagan National Defense Authorization Act (NDAA) of 2005, Defense Site Acceleration Completion, consultation process with the Department of Energy (DOE). I also disapprove of the proposal in this COM to clarify the Staff Requirements Memorandum (SRM) for SECY-05-0073 concerning how the Nuclear Regulatory Commission (NRC) will conduct its monitoring responsibilities under the NDAA, because I believe that the direction the Commission provided staff is consistent with the NDAA.

The Commission in the SRM for SECY-05-0073 provided the staff with the flexibility needed to engage the DOE in making its waste determinations. I believe the staff, in keeping its discussions and dealings with the DOE as open as possible to the public, has improved the quality of the DOE's waste determinations. Even DOE's own staff have commented on how the process for making a waste determination has improved as a result of NRC involvement.

While I recognize that South Carolina may want the process to be more timely, I do not believe that any delays in making these waste determinations are a result of NRC's involvement. I believe that the inability to conduct these reviews in a timely manner is primarily a result of (1) the quality of the documents that the DOE has provided the staff for its review; (2) the Department's response time to staff request for additional information (RAI); and (3) the resistance the staff receives from the DOE to conduct discussions openly. Therefore, attempting to close this process of government-to-government meetings will not resolve the aforementioned issues. The solution is for DOE to be more receptive to conducting its business out in the open, to provide better quality documents, and to respond to RAIs in a more timely manner.

I also agree with Commissioner McGaffigan that it is understood the NDAA did not grant NRC an enforcement role in this process, only a monitoring role to ~~assess~~ (or ensure) DOE compliance with the performance objectives set out in subpart C of 10 CFR 61. Consequently, I do not believe clarification of the meaning of the previously issued SRM, on this point, is required.

I also agree with Commissioner McGaffigan that the memorandum, votes and associated documents should be made publically available.



Gregory B. Jaczko *6/15/06*
Date



CHAIRMAN

REQUEST REPLY BY: 6/23/06

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WASHINGTON, D.C. 20555-0001

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Approved, with attached comments.

MEMORANDUM TO: Commissioner McGaffigan
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons

FROM: Chairman Diaz *higdon*

Peter B. Lyons 6/23/06
Peter B. Lyons Date

SUBJECT: IMPLEMENTATION OF NRC RESPONSIBILITIES UNDER THE RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION ACT

The Ronald W. Reagan National Defense Authorization Act of Fiscal Year 2005 (NDAA or Act) assigned the Commission new responsibilities regarding waste determinations to be made by the Secretary of Energy in the course of DOE's cleanup of the Savannah River Site (SRS) and Idaho National Laboratory. Under Section 3116(a) of the NDAA, DOE must consult with the NRC on the Secretary's determinations that certain wastes are not high-level radioactive wastes in accordance with criteria specified in the Act. Among these criteria are that the wastes will be disposed of in compliance with the performance objectives set out in subpart C of 10 CFR Part 61.


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Commissioner Lyons' Comments on COMNJD-06-0006

I approve the Chairman's request to issue new/revised staff guidance regarding the Commission's expectation for implementing the Ronald Reagan National Defense Authorization Act (NDAA) with the modifications offered by Commissioner Merrifield regarding the use of Management Directive (MD) 3.5 as a guideline for these DOE interactions, while recognizing that MD 3.5 was written for regulation of licensees in contrast to the situation with DOE. I would note that the NAS final report on DOE's tank waste, which was issued in April 2006, has the following recommendation in the Executive Summary: NRC review is "improving the technical quality and public transparency of DOE's planning efforts. DOE should continue to seek transparent, independent peer review of critical data and analyses used to support decisions and tank waste retrieval, processing, and disposal even if review is not required by the NDAA." It is clearly in the best interest of the Commission and stakeholders to make as much of the waste determination process as open and transparent as possible.


Peter B. Lyons 6/23/06
Date