

In the final rule (66 FR 55732; November 2, 2001), the Commission clarified the intent of NWPA's multi-barrier provision:

Section 63.113(a) requires that the geologic repository include multiple barriers, both natural and engineered. Geologic disposal of HLW is predicated on the expectation that one or more aspects of the geologic setting will be capable of contributing to the isolation of radioactive waste and thus be a barrier important to waste isolation. \* \* \* The performance assessment provides an evaluation of the repository performance based on credible methods and parameters including the consideration of uncertainty in the behavior of the repository system. Thus the performance assessment results reflect the capability of each of the barriers to cope with a variety of challenges. \* \* \* A description of each barrier's capability \* \* \* as reflected in the performance assessment, provides an understanding of how the natural barriers and the engineered barrier system work in combination to enhance the resiliency of the geologic repository. The Commission believes that this understanding can increase confidence that the postclosure performance objectives specified at § 63.113(b) and (c) will be achieved and that DOE's design includes a system of multiple barriers.

10 CFR 63.102(h); see 66 FR 55758. The Commission placed the requirements for multiple barriers in § 63.115.

In sum, the NWPA as enacted in 1982 requires that NRC's regulations for a repository must specify the use of a system of multiple barriers. Neither Congress' amendment of NWPA in 1987 nor its enactment of EnPA in 1992 altered that direction. None of this legislation required that geologic considerations were to be the primary criteria for licensing a repository. NRC's technical criteria in Part 60, issued in 1983 in response to NWPA's direction, did not make geologic barriers the primary criteria but did, in implementing the multi-barrier requirement, set separate numerical criteria for both the engineered and the geologic barriers to meet. NRC reconsidered this approach in 2001 when it issued regulations governing DOE's license application for a repository at YM and decided not to include subsystem requirements. NRC provided a detailed explanation of its reasons for altering its approach for implementing NWPA's multi-barrier requirement. We have no doubt that Part 63 fully complies with Congress' statutory directions to NRC.

Petitioner ignores section 121 of NWPA—which speaks directly to NRC's duty with respect to issuing regulations for the repository—and, instead, locates

repository performance, and to address and quantify the corresponding uncertainty.” *Id.*

the asserted duty of the Commission to establish regulations requiring that geologic isolation be the primary form of containment for HLW in sections 112(a) and 113(b)(1) of the NWPA, 42 U.S.C. 10132(a) and 10133(b)(1).<sup>5</sup> Petition at 11–18. Because these provisions of NWPA place obligations on DOE, rather than NRC, they do not govern NRC's rulemakings for a geologic repository.

As relevant here, section 112(a) provides:

SEC. 112. (a) GUIDELINES.—Not later than 180 days after the date of enactment of this Act, the Secretary, following consultation with the Council on Environmental Quality, the Administrator of the Environmental Protection Agency, the Director of the Geological Survey, and interested Governors, and the concurrence of the Commission shall issue general guidelines for the recommendation of sites for repositories. Such guidelines shall specify detailed geologic considerations that shall be primary criteria for the selection of sites in various geologic media. Such guidelines shall specify factors that qualify or disqualify any site from development as a repository. \* \* \* Such guidelines shall require the Secretary to consider the various geologic media in which sites for repositories may be located and, to the extent practicable, to recommend sites in different geologic media. The Secretary shall use guidelines established under this subsection in considering candidate sites for recommendation under subsection (b). The Secretary may revise such guidelines from time to time, consistent with the provisions of this subsection.

42 U.S.C. 10132(a). Under section 112(b), the Secretary is to nominate at least 5 sites determined to be suitable for site characterization and, subsequent to such nomination, to recommend to the President 3 of the nominated sites for characterization as candidate sites. Each nomination of a site is to be accompanied by an environmental assessment which includes, *inter alia*, “an evaluation by the Secretary as to whether such site is suitable for site characterization under the guidelines established under subsection (a).” Section 112(b)(1)(D)(i).

The most obvious reason why these provisions of NWPA do not demand that NRC issue regulations requiring that geologic barriers be primary is that these provisions give direction to the Secretary of DOE, not to NRC. Petitioner assumes that the mandate given to DOE to formulate guidelines for the nomination, and then selection, of sites for characterization applies equally to NRC in promulgating its regulations.

<sup>5</sup> The 1987 amendments to NWPA did not revise section 112(a) but did revise section 113(b) to make its provisions applicable solely to the characterization of the YM site, rather than any candidate site.

But there is no statutory language to support this. Petitioner may believe that although the statute itself is silent on any NRC duty to make geologic barriers primary, this result must necessarily follow from the duty placed on DOE to issue guidelines specifying “detailed geologic considerations that shall be primary criteria for the selection of sites in various geologic media.” Section 112(a). It may be readily acknowledged that it would make little sense for Congress to establish a system for selecting a repository where DOE guidelines for selection of sites and NRC regulations for licensing a repository would contradict each other.<sup>6</sup> But there is no such contradiction. DOE's guidelines are for the purpose of comparing a multitude of alternate site possibilities, an inquiry for which it makes obvious good sense for geologic considerations to be paramount.<sup>7</sup> NRC's licensing regulations are for the purpose of examining DOE's application for a repository at an already-chosen site—*i.e.*, one that has gone through the section 112 screening process. Such a site would have already passed the section 112 tests for geologic considerations in the DOE guidelines. Congress thus had no need to require, and did not require, NRC to issue regulations making geologic considerations the “primary” criteria for approval of DOE's license application for the repository.

Petitioner seeks to bootstrap the section 112(a) site selection guidelines into the requirement in section 113 that DOE prepare a site characterization plan which shall include “criteria to be used to determine the suitability of such candidate site for the location of a repository, developed pursuant to section 112(a).” Section 113(b)(1)(A)(iv). See Petition at 11–12. If the criteria for site characterization for determination of suitability for a repository required by section 113 are the same as the guidelines required by section 112, then, petitioner assumes, DOE may not recommend a site to the President for approval under section 114 unless the site has been shown to meet the guidelines, including the guideline that geologic considerations be the primary criteria for selection. On the same theory, petitioner also claims the NRC

<sup>6</sup> In fact, DOE's need to seek NRC's concurrence on its guidelines assures that there will be no such conflict.

<sup>7</sup> As enacted in 1982, the section 112(a) guidelines were intended for use in the nomination and selection of candidate sites for a second repository as well as for the identification and study of further sites after the approval of candidate sites for characterization for two repositories. See sections 112(b)(1)(C) and 112(d) of the 1982 NWPA.