

must promulgate regulations requiring that geologic considerations be the primary criteria for approval of a license application.

Petitioner makes several unwarranted leaps in arriving at these conclusions. The first is that Congress intended that the criteria required under section 113 be the same as the guidelines required under section 112. DOE considered this question at considerable length when it issued its criteria for consideration of the YM site. (66 FR 57298, 57311–12; November 14, 2001). DOE concluded that Congress' directive in section 113(b)(1)(A)(iv) that the criteria to be used to determine the suitability of a candidate site for the location of a repository be "developed pursuant to section 112(a)" is best understood as "mandating observance of the special procedural requirements of section 112(a) in formulating or altering the section 113(b) 'criteria,'" *i.e.*, the requirements to consult with specific agencies and to get concurrence from NRC, and not as requiring that the "criteria" be the guidelines themselves. (66 FR 57312). Second, even assuming, *arguendo*, that the criteria were intended to be the guidelines—and we have no reason to quarrel with DOE's interpretation of its own statutory mandate—that still would not oblige NRC to craft its regulations under DOE's criteria. There would be no contradiction between DOE's recommending a site as suitable for a repository, based primarily on geologic considerations, and NRC's issuing regulations under which a repository would be approved, based upon the existence of multiple barriers, but not necessarily on geologic "primacy."

In sum, because sections 112 and 113 of NWSA place no obligations on NRC with respect to rulemakings for a geologic repository, and because part 63 is in full conformance with section 121 of NWSA which does spell out NRC's rulemaking obligations, we reject petitioner's claim that part 63 is not in full conformance with NWSA and deny the petition.

b. 10 CFR Part 63 is in Accord With AEA Requirements

Petitioner asserts that because part 63 does not demand that the applicant provide "an affirmative safety case" for the repository, "the rule is materially deficient." Petition at 4. In petitioner's view, a requirement that DOE conduct a total system performance assessment "to determine whether a primary radiological standard set by the EPA can be met by the overall repository system, and not by any particular subsystem or any particular isolation barrier" is not

adequate. Petition at 22. Rather, "under NRC's plenary safety jurisdiction (Atomic Energy Act Section 161b) * * * it would remain NRC's legal obligation to apply these basic scientific prerequisites [found in section 112(a) of NWSA] in providing for reasonable assurance of the safety of the repository. * * *⁸ *Id.*; see also petition at 32.

Section 161b. of the AEA provides, in relevant part:

Sec. 161. General Provisions.

In the performance of its functions the Commission is authorized to—

* * *

b. establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life and property. * * *

We agree with petitioner that "[t]his is clearly an extremely broad grant of authority." Petition at 6 n.2. The Commission is granted wide discretion to determine what standards are necessary or desirable to protect health and minimize danger to life and property. Through an extensive and open public process, the Commission set forth its post-closure public health and environmental standards in subpart L of part 63. Petitioner, however, is dissatisfied with these standards and would require inclusion of the DOE guidelines listed in section 112(a) of NWSA and/or the requirements preferred by the *Peer Review*. However, there is no statute requiring the Commission to make these choices rather than the standards the

⁸ Petitioner erroneously believes that DOE was exempt from regulation by NRC under section 161b. of the AEA until passage of NWSA in 1982. In fact, NRC's authority over DOE, with respect to an application for a license for a geologic repository, stems from section 202(3) of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5842(3), which provides that NRC shall have licensing and related regulatory authority pursuant to chapters 6, 7, 8, and 10 of the AEA with respect to DOE "facilities used primarily for the receipt and storage of [HLW] resulting from activities licensed under [the AEA]." Thus, in 1981, when NRC issued its original rule governing a DOE license application for a repository at 10 CFR Part 60, the Commission cited section 202 as the authority for the rule, noting that it interpreted "storage" as used in this section to include disposal. (46 FR 13971 n.1; February 25, 1981). Neither NWSA nor EnPA provided NRC with rulemaking authority; rather NWSA directed NRC, "pursuant to authority under other provisions of law," to promulgate the technical requirements and criteria it would employ to consider a DOE license application for a repository (sec. 121(b) of NWSA) and EnPA required NRC to modify its technical requirements to be consistent with standards to be promulgated by EPA. Section 801(b)(1) of EnPA. For these reasons, we agree with petitioner that part 63 must be consistent with section 161b. of the AEA.

Commission, in fact, deemed sufficient for a determination that the repository will not pose an unreasonable risk to the health and safety of the public. See 10 CFR 63.31(a)(2); 63.41(c). Petitioner has not presented any new information that causes the Commission to reconsider choices already made in an extensive and recent rulemaking proceeding. See *infra*. Thus, we remain satisfied that the part 63 rules fully comply with the Commission's duty, under section 161b. of the AEA to establish standards to protect health and minimize danger to life and property.

2. Reopening the Final 10 CFR Part 63 Rule Would Be an Unwise Expenditure of Resources Because the Petition Does Not Appear To Present Any Significant New Factual Information Not Previously Considered During the Rulemaking Proceeding

On February 22, 1999 (64 FR 8640), the Commission published its proposed rule to establish licensing criteria for the disposal of HLW in the proposed geologic repository at YM. The public comment period, originally ending on May 10, 1999, was extended to June 30, 1999, in response to many requests for extension. During the public comment period, the NRC staff held a series of public meetings in Nevada to discuss the proposed rule and solicit public comment. The final rule was published on November 2, 2001 (66 FR 55732). Petitioner had multiple opportunities to file, and did file, extensive comments on the proposed rule, all of which were carefully considered by the Commission before issuing the final rule. We do not find in the petition significant new factual or policy information not already considered in the rulemaking that established part 63. Given this, and our recent consideration (in the part 63 rulemaking) of essentially the same questions petitioner now raises, it would not be a wise expenditure of resources to reopen these issues.

We briefly recount below the concerns that petitioner now raises as "material deficiencies," but were in actuality resolved in the part 63 rulemaking.

Reasonable Expectation

Petitioner objects to the Commission's use of "reasonable expectation," rather than "reasonable assurance," to describe the degree of certainty to be obtained for the compliance of the repository with the post-closure performance standards. Petition at 3, n.1. The Commission has fully explained why it incorporated "reasonable expectation," rather than "reasonable assurance," into its implementing regulations for YM. See