



CHAIRMAN

UNITED STATES  
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D. C. 20555

November 25, 1981

MEMORANDUM FOR: Forrest J. Remick, Director  
Office of Policy Evaluation

Leonard Bickwit, Jr.  
General Counsel

FROM: Chairman Palladino *MP*

SUBJECT: WASTE CONFIDENCE PROCEEDING

In preparation for the oral presentations to the Commission in the Waste Confidence Proceeding, I request that OPE assemble key materials which will be useful to the Commissioners. I would expect to receive the briefing materials following (and including) receipt of the filings by the five consolidated groupings due December 21.

Following the oral presentations to the Commission by the participants, OPE and OGC should be prepared to provide support to the Commission as it prepares its decision. The Commission itself will resolve issues in controversy and provide guidance for your use in drafting a decision. If you believe it necessary, you also may ask the EDO for limited technical support from the NRC staff.

cc: Commissioner Gilinsky  
Commissioner Bradford  
Commissioner Ahearne  
Commissioner Roberts  
SECY  
EDO

8809210054 880916  
PDR WASTE PDC  
WM-1

## WASTE CONFIDENCE MATERIALS

### Procedural Matters

1. Notice of Denial of Petition for Rulemaking (NRDC Confidence petition) June 27, 1977
2. Decision in State of Minnesota v. NRC May 23, 1979
3. Notice of Proposed Rulemaking October 25, 1979
4. First Prehearing Conference Order February 4, 1980
5. Memorandum and Order (setting up Working Group) May 28, 1980
6. Memorandum and Order (concerning Working Group Report and use of outside contractors) January 16, 1981
7. Order Denying Motion to Require Detailed Consideration of Wastes Resulting from Three Mile Island February 20, 1981
8. Memo from Marshall Miller to the Commission "Recommendations Concerning Further Proceedings" June 17, 1981
9. Second Prehearing Memorandum and Order November 6, 1981

### Substantive Matters

1. ACRS Statement December 10, 1980
2. Major Issues in Waste Confidence Rulemaking and Abstracts of Principal Positions on these Issues (Part 3 of Working Group Report) January 29, 1981.
3. Report of the Working Group on the Proposed Rulemaking on the Storage and Disposal of Nuclear Wastes January 29, 1981
4. Letter from Omer F. Brown, II (DOE) to Marshall Miller (concerning changes in spent fuel storage policy) March 27, 1981

5. Memo from Commissioner Ahearne to Director, OPE  
Attachments:
    1. Memo from Chairman Ahearne to Director, OPE  
(consideration of reprocessing) September 3, 1981
    2. Memo from Edward J. Hanrahan to Commissioner  
Ahearne (consideration of reprocessing) February 9, 1981
    3. Statement of Kenneth Davis, Deputy Secretary  
of Energy before Subcommittee on Energy and  
Environment March 10, 1981
  6. Memo from Forrest Remick to Commission (tentative  
schedules and reply to Commissioner Ahearne's  
memo of September 3) July 9, 1981
- September 29, 1981

Jeanon, France, and Mc L. Lewis (Duke Power Company), United States of America developed this draft from an IAEA collation during a meeting on May 16-17, 1977, and we are soliciting public comment on it. Comments on this draft received by August 19, 1977 will be useful to the U.S. representatives to the Technical Review Committee and Senior Advisory Group in evaluating its adequacy prior to the next IAEA discussion.

Single copies of this draft may be obtained by a written request to the Director, Office of Standards Development, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

(5 U.S.C. 522(a))

Dated at Rockville, Md., this 16th day of June 1977.

For the Nuclear Regulatory Commission

ROBERT B. MURPHY, Director

Office of Standards Development

[FR Doc. 77-1811 Filed 7-1-77; 11:52 AM]

[Docket No. PRM-50418]

## NATURAL RESOURCES DEFENSE COUNCIL

### Denial of Petition for Rulemaking

Notice is hereby given that the Nuclear Regulatory Commission (hereinafter "NRC" or "Commission") has denied a petition for rulemaking submitted by letter dated November 8, 1976 by the Natural Resources Defense Council, Inc., 917 15th Street, NW, Washington, D.C. A notice of the filing of the petition, Docket No. PRM-50-18, was published in the FEDERAL REGISTER on January 13, 1977 (42 FR 2730) and interested persons were invited to comment on the petition by February 14, 1977. The comment period was subsequently extended to February 22, 1977 (42 FR 9735, February 17, 1977). Eighteen letters were received which recommended denial of the petition while two letters supported the petition. Copies of the comments are available for public inspection in the Commission's Public Document Room at 1717 H Street, NW, Washington, D.C.

Natural Resources Defense Council (hereinafter "NRDC") petitioned the Nuclear Regulatory Commission (1) to conduct a rulemaking proceeding to determine "whether radioactive wastes can be generated in nuclear power reactors and subsequently disposed of without undue risk to the public health and safety, and (2) to refrain from acting finally to grant pending or future requests for operating licenses until such time as this definitive finding of safety can be and is made." (NRDC Petition, at 15). NRDC argued that the Commission is required by the Atomic Energy Act (42 U.S.C. 2011 et seq. (1972)) and the Energy Reorganization Act (42 U.S.C. 5801(a) (1972)) to ensure that the public health and safety are protected. The petitioner cited the requirements found in the Commission's

regulations that the Commission must make a finding that "there is reasonable assurance that the activities authorized by the operating license can be conducted without endangering the health and safety of the public" and that "the issuance of the license will not be inimical to the health and safety of the public" (§ 50.57(a)(3) and (a)(6)) and from these requirements argued that the NRC must make a finding, prior to issuing an operating license for a reactor, that permanent disposal of high-level radioactive wastes generated by that reactor can be accomplished safely.

In contrast, those comments which favored denial of the petition argued that long-term storage or disposal of high-level wastes is beyond the scope of licenses for reactors and, therefore, that no finding need be made regarding safe disposal of high-level wastes until the NRC licenses an actual facility to handle such disposal. The two comments supporting the petition stated that such wastes could not be disposed of safely but gave no evidence to support this conclusion.

After thorough study of the petition and exhibits submitted therewith and analysis of the comments, the Commission has concluded that it is not obligated to make a "definitive" finding, nor is it appropriate to make the "definitive" finding requested by NRDC, the safe methods of high-level waste disposal are now available prior to the licensing of a reactor. Because the petition seeks a finding that safe waste disposal can be accomplished immediately, the Commission has determined that the rulemaking petition should be denied. The Commission notes that prior to any licensing of high-level waste disposal facilities, a detailed finding concerning the safety of the proposed facilities will be made. There is, we believe, a clear distinction between permanent disposal of wastes and their interim storage. The Commission must be assured that wastes generated by licensed power reactors can be safely handled and stored as they are generated. As part of the licensing process for an individual power reactor facility, the Commission does review the facility in question in order to assure that the design provides for safe methods for interim storage of spent nuclear fuel. But it is neither necessary nor reasonable for the Commission to insist on proof that a means of permanent waste disposal is on hand at the time reactor operation begins, so long as the Commission can be reasonably confident that permanent disposal (as distinguished from continued storage under surveillance) can be accomplished safely when it is likely to become necessary. Reasonable progress towards the development of permanent disposal facilities is

\* The Commission's definition of high-level wastes for purposes of this notice, is the same as petitioner's definition which includes high-level wastes as defined in 10 CFR Part 20, App. F, spent fuel rods, and transuranic-contaminated wastes. (Petition, at 3).

presently being accomplished. Under these circumstances a halt in licensing of nuclear power plants is not required to protect public health and safety.

### STATUTORY REQUIREMENTS

As petitioner states, the Atomic Energy Act clearly requires that some kind of safety finding be made prior to issuance of an operating license for a nuclear power reactor. (NRDC Petition, at 4-6). Section 103d of the Act provides that no license for a production or utilization facility may be issued if, in the opinion of the Commission, the issuance of the license would be inimical to the health and safety of the public. It seems clear, however, that the statutory findings required by section 103 apply specifically to the "proposed activities" and "activities under such licenses" (42 U.S.C. 2133). These activities include some interim storage activities for spent fuel. They do not include the permanent disposal of high-level wastes, though wastes are, in fact, generated by operation of the reactor.

That detailed questions regarding the safety of permanent disposal of these wastes are to be addressed in connection with the licensing of an actual high-level waste disposal facility, rather than in connection with licensing of reactor operation, is clear from the statutory treatment of radioactive wastes. Historically, the Atomic Energy Act has provided that nuclear materials licensing proceedings involving possession or use of nuclear materials off-site from the facility, which include high-level radioactive waste disposal proceedings, are to be treated as separate and distinct from the facility licensing proceeding itself. The Act provides for two-step facility licensing proceedings in sections 101-102, and 185 of the Act in sharp contrast to the one-step licensing provisions relating to byproduct, source, and special nuclear material covered by sections 53, 52, 57, 62, 63, 81, and 82. (42 U.S.C. 2131-2136; 2235; 2073-74; 2077; 2092-93; 2111-12)

Section 182 of the Atomic Energy Act which sets forth the information which must be supplied by an applicant for a facility license gives further support to the proposition that on safety finding regarding ultimate disposal of high-level wastes is required in a reactor operating license proceeding. (42 U.S.C. 2232). This section sets forth in some detail what an applicant for a license to operate

\* This point was raised in several of the comments. See comments of LaBoeuf, Lamb Leiby & MacRae, at 6-7; Shaw, Pittman Fotts & Trowbridge, at 4-6, and 22-23; and Westinghouse, at 3-3.

\* "Nuclear materials" include special nuclear materials defined in section 115a of the Act (42 U.S.C. 2011aa) and covered in sections 81-86 of the Act (42 U.S.C. 2071-2076), source material which is defined in 112 of the Act (42 U.S.C. 2011a) and covered in sections 61-69 of the Act (42 U.S.C. 2091-2099), and byproduct material which is defined in section 116 of the Act (42 U.S.C. 2011a) and covered in 81-82 of the Act (42 U.S.C. 2111-2112).

production or utilization facility must apply to enable the Commission to make the required safety finding. This information includes "the place of use (special nuclear material), (and) the specific characteristics of the facility" as well as information regarding the technical and financial qualifications of the applicant.

The emphasis on information pertaining to the facility and applicant to be licensed is especially significant. No such information is required regarding high-level waste disposal facilities. Such information would be necessary were the Commission to make the detailed safety finding regarding high-level waste disposal activities requested by petitioner. Indeed, an applicant for a reactor operating license will have no responsibility for permanent disposal of high-level waste. (Appendix F, 10 CFR Part 50). This responsibility has been assumed by the Federal government, which, through ERDA, will research, design, build and operate high-level waste disposal facilities.

The statutory provisions cited above make it clear that no statutory requirement exists that the Commission determine the safety of ultimate high-level waste disposal activities in connection with licensing of individual reactors.

#### REGULATORY REQUIREMENTS

With regard to the petitioner's contention that the Commission's regulations require a finding regarding the safety of ultimate disposal of high-level wastes, as the Commission's regulations deal with the handling of spent fuel and other high-level wastes, they do so only to the extent that such activities are related to on-site activities carried on by the licensee as an integral part of operation of the reactor. This scheme of regulations has been in effect for some time, and the Commission's findings have been limited to those findings required by the Act and the Commission's regulations—that there is reasonable assurance that the activities authorized by the operating license (the operation of the reactor) can be conducted without endangering the health and safety of the public" and "the issuance of the license will not be inimical . . . to the health and safety of the public." (10 CFR 50.37(a)(3) and (a)(6)). These findings have not included findings with regard to safe permanent disposal of high-level radioactive wastes and, as is pointed out below, have been implicitly approved by Congress.

#### CONGRESSIONAL RATIFICATION OF NRC ACTION

The scope of the Commission's safety findings is well known to Congress, as is the extent of the development of systems for high-level radioactive waste

disposal. Congress has permitted continued licensing of reactors and the Commission has been given broad discretion in developing criteria for licensees. Such conduct constitutes implicit ratification of the Commission's handling of the high-level waste disposal question.<sup>1</sup>

As early as 1959, Congress held hearings on waste disposal problems.<sup>2</sup> Six days of hearings were held and the printed hearing materials totaled over 3,000 pages. The hearings were followed by a detailed Joint Committee survey analysis. At that time, development of a permanent high-level waste repository was further from completion than it is today. Congress was made aware of the fact that the problem of permanent disposal of high-level waste had not been solved and that several years of research and testing would be required before engineering practicality could be demonstrated.

During the hearing, the AEC described generally its regulatory program for radioactive waste disposal.<sup>3</sup> Comments regarding regulatory aspects of the high-level radioactive waste disposal problem were confined to the brief statement that "for the foreseeable future, all high-level wastes resulting from processing of spent fuel elements from licensed reactors will be returned to the Commission for processing and handling."<sup>4</sup>

Witnesses who testified in 1959 commented upon the Commission's handling of waste disposal problems, and one witness was questioned about whether he felt that the Commission had been meeting its responsibilities in the area of high-level waste disposal. He stated in response that the Commission had handled the problem quite well, but pointed out that temporary containment and custody was the only presently available method of handling high-level wastes and that a final and permanent solution to the problem might not ever be devised.<sup>5</sup>

In later hearings, in 1973 and 74, some witnesses urged that a moratorium on licensing be imposed until a solution to the high-level waste disposal question was reached.<sup>6</sup> One witness cited the

<sup>1</sup>This point was made repeatedly in the comments. See comments by LeBoruf, Lamb, Leiby and MacEas, at 7-8; Shaw, Pittman, Fotts, and Trowbridge, 6-7, 18-22; and Troy B. Cooner, at 3-4.

<sup>2</sup>Industrial Radioactive Waste Disposal, "Hearings before the JCAE Special Subcommittee on Radiation, Jan. 29-30, Feb. 2-3, and July 29, 1959, 85th Cong., 1st Sess. (1959).

<sup>3</sup>Id. at 9-10.

<sup>4</sup>Id. at 2515.

<sup>5</sup>Id. at 11-13.

<sup>6</sup>Hearing on S. 2744 before the Senate Subcomm. on Reorg., Research and Int'l Org. of the Senate Comm. on Government Operations, 93rd Cong., 1st Sess., (1973), see particularly the prepared statement of Daniel F. Ford, Union of Concerned Scientists, at 210-215; Hearings on S. 2125 and S. 2744 before the Subcomm. on Reorg., Research, and Int'l Org. of the Senate Comm. on Government

high-level waste disposal problem as one of several problems which in his opinion warranted a moratorium on continued construction of nuclear power reactors,<sup>7</sup> and another witness stated that "many people have come to believe that present nuclear power plant construction plans which imply accumulations of more radioactive wastes, should be halted until a proven method for safely storing radioactive wastes is available."<sup>8</sup> The AEC in response described the existing proposals for long-term waste management and disposal, but made no claim that methods for permanent disposal had been developed.<sup>9</sup> Instead of ordering a moratorium on licensing, the Congress provided for NRC licensing of ERDA facilities for waste disposal in sections 202 (3) and (4) of the Energy Reorganization Act.

Thus, almost from the beginning of the reactor licensing program the basic issue presented by the NRDC petition—whether nuclear power reactors should be licensed in the absence of some "definitive" finding or conclusion that high-level wastes can be safely disposed of—was also presented to the Congress. Congress is and has been aware of the high-level waste disposal problem, aware of its connection to reactor operations, and aware that the Commission does not plan to defer licensing until the problem is resolved.

The question of continued licensing in the face of continued uncertainty respecting ultimate disposal technology is certainly a legitimate one to present to the Congress. It must make its judgments, as we do, with an eye to known prospects for the future, programs for implementing them, and current assessments of the risk that what is thought likely to succeed will in fact succeed. This Commission recognizes its responsibility to keep the Congress aware of its information and projections on these matters and has done so in the past. The Commission has confidence, given the on-going federal programs, that the problem of permanent disposal will be solved. This confidence was supported by the Congress when it passed major legislation dividing the Atomic Energy Commission into separate agencies and provided for NRC licensing of ERDA waste management facilities. At that time, it did not order a moratorium on reactor licensing and did not require that the Commission make specific findings with regard to high-level waste disposal in reactor licensing proceedings. As the Supreme Court said in *Power Reactor Development Corp. v. Electrical Union*

*Operations*, 93rd Cong., 2d Sess., (1974), testimony of Dr. Edward F. Redford, Johns Hopkins University, at 139, and prepared statements submitted by Sam Love, Environmental Action Foundation, at 141 and Anthony Rolzman, at 212.

<sup>7</sup>Id., testimony of Sam Love, at 141.

<sup>8</sup>Hearings on S. 2125 and 2744, supra note 7, testimony of Daniel F. Ford, at 213.

<sup>9</sup>Hearings on S. 2125 and S. 2744, supra note 7, at 336-47.

<sup>1</sup>See General Criteria for Nuclear Power Plants, Appendix A, 10 CFR Part 50. See also comments by LeBoruf, Lamb, Leiby, and MacEas, at 10-12; and Shaw, Pittman, Fotts, and Trowbridge, at 7-9.

with regard to Congress' failure to act regarding the Commission's safety findings at the construction permit and operating license stages:

"It may often be a shabby business to attribute significance to the inaction of Congress, but under these circumstances, and considering especially the peculiar responsibility and place of the Joint Committee on Atomic Energy in the Statutory scheme, we think it fair to read this history as a de facto acquiescence in and ratification of the Commission's licensing procedure by Congress."

In the instant case, Congress was clearly aware of the Commission's actions and the high-level waste disposal question, yet though major revisions of the legislation relating to the Commission's authority were made Congress neither amended the statutes to require such a finding nor did it direct the Commission to stop licensing reactors pending resolution of the waste disposal problem. Such a course of conduct reinforces the conclusion reached above, based on the clear language of the statute, that the Commission is not required to make a finding that radioactive wastes can be disposed of safely prior to the issuance of an operating license for a reactor. It presupposes, as well, a continuing dialogue between the Congress and the responsible federal agencies—a dialogue which has in fact been vigorous over the past months and promises to remain so. The Congress is entitled to the Commission's continuing assessment of this issue, and will have it.

#### CONCLUSION

NRDC cites several court cases in its petition in support of the proposition that the Commission must make a full safety finding prior to reactor licensing.<sup>14</sup> The Commission agrees with NRDC that these cases interpreting the statute indicate that a definitive safety finding regarding operation of the facility must be made prior to licensing a reactor. However, NRDC gives no support for its conclusion that this finding must extend to safe permanent disposal of high-level wastes, as actively not performed by the facility. To the contrary, the previous discussion demonstrates that there is no statutory requirement that the Commission determine that high-level radioactive wastes can be permanently disposed of safely prior to the issuance of an operating license for a reactor. The legislative materials cited above support the view that Congress did not and does not require that the Commission make the finding requested by NRDC. Accordingly, the Commission has decided to deny NRDC's petition for rulemaking.

#### POLICY CONSIDERATIONS—SCOPE OF A REASONABLE SAFETY FINDING

The Commission believes that the direction and progress of the present over-

all high-level waste management program is satisfactory and provides a reasonable basis for continued licensing of facilities whose operation will produce nuclear wastes. Even if, contrary to the Commission's view, some kind of prior finding on waste disposal safety were required under the statutory scheme, such a finding would not have to be a definitive conclusion that permanent disposal of high-level wastes can be accomplished safely at the present time. There is no question that prior to authorizing operation of a reactor the Commission must find pursuant to section 162 that hazards which become fully mature with start-up will be dealt with safely from the beginning. But the quality of this reactor safety finding can be readily distinguished from the quality of findings regarding impacts on public health and safety which will not mature until much later, if ever. The hazards associated with permanent disposal will become acute only at some relatively distant time when it might be no longer feasible to store radioactive wastes in facilities subject to surveillance. The Commission would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely. The accumulating evidence as discussed below continues to support the Commission's implicit finding of reasonable assurance that methods of safe permanent disposal of high-level wastes can be available when they are needed. Given this, and the fact that at present safe storage methods are presently available and highly likely to remain so until a permanent disposal system can be demonstrated and licensed, the Commission sees no reason to cease licensing reactors.

The technology for disposal is reasonably available, and the studies done to date, while not conclusive, are nevertheless promising for timely and safe implementation of the technology. Most importantly, ERDA has dramatically expanded the U.S. program for development of a permanent high-level waste repository. ERDA has issued a report on technology for high-level waste repositories (ERDA-76-43), and has a programmatic EIS on high-level waste management in preparation. ERDA has greatly expanded its program for selection of sites for geologic disposal and is expected to apply to the NRC for a license for such a facility in early 1980 or before. In addition, ERDA is involved in programs to consider the effects on disposal of emplacement of spent fuel rods in a repository. Furthermore, it is involved in extensive program to develop methods of stabilizing (e.g., solidifying) high-level wastes to provide for optimum safety during transportation, storage and disposal should reprocessing be commenced sometime in the future. Finally, ERDA is engaged in developing interim storage sites in case federal custody of wastes becomes necessary before a working repository is available. Thus, there is now a coordinated Federal program to develop an actual disposal facility. Similarly, the NRC is expanding

its own program to set the regulatory requirements for such an operation. The NRC is presently developing a set of regulations to govern licensing of federal repositories to insure that permanent disposal of high-level radioactive wastes will be accomplished safely.

The NRC is also involved in several waste management related programs. The Commission recently completed an "Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle", NUREG-0116, which was published in October 1976, and a companion document NUREG-0216, published in March 1977. In the survey the light water power reactor uranium fuel cycle was taken as including alternatively (1) no reprocessing of spent fuel and follow-on interim and/or long-term storage or disposal of spent fuel or (2) reprocessing spent fuel for purposes other than recycle of plutonium, with follow-on interim and/or long-term storage or disposal of plutonium and wastes from reprocessing, with plutonium either separated from or included with the wastes. This survey served as the basis for an interim rule (hereinafter "S-3"), promulgated on March 14, 1977 (42 FR 13803) which quantified the environmental impacts from the reprocessing and radioactive waste management portions of the nuclear fuel cycle alternatives described above. The survey generally concluded that these impacts were not significant. A final rulemaking proceeding will be held shortly.

In addition, the Commission has been involved in a rulemaking proceeding on its final Generic Environmental Statement on the Use of Recycle Plutonium in Mixed-Oxide Fuel in Light Water Coolers Reactors, NUREG-0002 (hereinafter "GESMO"). While the Commission has recognized that President Carter's statement of April 7, 1977 regarding reprocessing raises significant issues requiring reassessment of the course of the GESMO proceedings (42 FR 23964, May 5, 1977), these proceedings to date have furnished the Commission with information on waste management sufficient to convince the Commission that the technology for disposal does exist. More detailed information on NRC and ERDA programs available in Appendices B and C of the S-3 Survey (NUREG-0116). It suffices to state here that these programs are designed to permit the NRC to meet its regulatory responsibilities in the field of waste management to protect the health and safety of the public. Of course, if additional work that is underway will produce more information on the technology and risks of high-level waste disposal and the momentum of the Federal program may change.

Beyond this, the selection and demonstration of an actual disposal site will likely be highly controversial, and strong and continued national commitment to "get the job done" will likely be necessary. We see in the recent statements and actions of the Executive Branch regarding nuclear power and national energy policy, a firm commitment to carry through to completion a co-

<sup>14</sup> 357 U.S. 596, 409 (1961).  
*U.S. Power Reactor Development Corp. v. Electrical Union*, supra note 13; *Neder v. NRC*, 513 F.2d 1045 (D.C. Cir. 1975) and *Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975).

## NOTICES

prehensive high-level waste management program. Further, the Commission fully intends to press for vigorous pursuit of programs aimed at developing and implementing sound and timely arrangements for high-level waste disposal.

Dated at Washington, D.C., this 27th day of June, 1977.

For the Nuclear Regulatory Commission.

**SAMUEL J. CHELSE**  
Secretary of the Commission.

[FR Doc. 77-18815 Filed 7-1-77; 8:45 am]

## REGULATORY GUIDE

## Issuance and Availability

The Nuclear Regulatory Commission has issued a guide in its Regulatory Guide Series. This series has been developed to describe and make available to the public methods acceptable to the NRC staff of implementing specific parts of the Commission's regulations and, in some cases, to delineate techniques used by the staff in evaluating specific problems or postulated accidents and to provide guidance to applicants concerning certain of the information needed by the staff in its view of applications for permits and licenses.

Regulatory Guide 3.27, Revision 1, "Nondestructive Examination of Welds in the Liners of Concrete Barriers in Fuel Reprocessing Plants," describes methods acceptable to the NRC staff for nondestructive examination to establish the leaktight integrity of welds in the metal liners of concrete confinement barriers in fuel reprocessing plants. This guide was revised following public comment and additional staff review.

Comments and suggestions in connection with (1) items for inclusion in guides currently being developed or (2) improvements in all published guides are encouraged at any time. Comments should be sent to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20535, Attention: Docketing and Service Branch.

Regulatory guides are available for inspection at the Commission's Public Document Room, 1717 H Street NW, Washington, D.C. Requests for single copies of issued guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20535, Attention: Director, Division of Document Control. Telephone requests cannot be accommodated. Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

(3 F.S.C. 332(a))

Dated at Rockville, Md., this 23d day of June 1977.

For the Nuclear Regulatory Commission.

**PAT G. SMITH**  
Acting Director.

Office of Standards Development.

[FR Doc. 77-18815 Filed 7-1-77; 8:45 am]

[Docket No. 50-485]

**ROCHESTER GAS AND ELECTRIC CORP.**  
(STERLING POWER PROJECT, NUCLEAR UNIT NO. 1)

Order Regarding Evidentiary Hearing

The evidentiary hearing in this matter will resume on Saturday, July 16, 1977, at 9:00 a.m., at The Education Center, Room No. 19, 233 West Utica Street, Oswego, New York.

Dated at Bethesda, Md., this 27th day of June 1977.

So ordered:

**THE ATOMIC SAFETY AND LICENSING BOARD,**

**EDWARD LUTON,**

Chairman.

[FR Doc. 77-18815 Filed 7-1-77; 8:45 am]

[Docket No. 50-455]

**CONSUMERS POWER CO.**

Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment No. 13 to Facility Operating License No. DPR-6, issued to the Consumers Power Company (the licensee), which revised Technical Specifications for operation of the Big Rock Point Plant (the facility) located in Charlevoix County, Michigan. The amendment is effective as of its date of issuance.

The amendment authorized modification of the facility's liquid radioactive waste collection system in that it permits replacement of the presently installed liquid radwaste concentrator, feed pump, condenser, and associated piping and instrumentation with two cartridge filter units. The amendment also revised the Technical Specifications to delete reference to the components that will be removed during the modification of the waste collection system.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment. Prior public notice of this amendment was not required since the amendment does not involve a significant hazards consideration.

The Commission has determined that the issuance of this amendment will not result in any significant environmental

impact and that pursuant to 10 CFR 51.5 (d) (4) an environmental impact statement or negative declaration and environmental impact appraisal need not be prepared in connection with issuance of this amendment.

For further details with respect to this action, see (1) the application for amendment dated May 25, 1977, as supplemented by letter dated June 14, 1977 (2) Amendment No. 13 to License No. DPR-6, and (3) the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street NW, Washington, D.C., and at the Charlevoix Public Library, 107 Clinton Street, Charlevoix, Michigan 49720. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, D.C. 20535. Attention: Director, Division of Operating Reactors.

Dated at Bethesda, Md., this 22nd day of June 1977.

For the Nuclear Regulatory Commission.

**DOX E. DAVIS,**

Acting Chief, Operating Reactors Branch No. 2, Division of Operating Reactors.

[FR Doc. 77-19099 Filed 7-1-77; 8:45 am]

[Docket No. 50-326]

**NORTHEAST NUCLEAR ENERGY CO., ET AL.**

Issuance of Amendment to Facility Operating License

Notice is hereby given that the U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment No. 29 to Facility Operating License No. DPR-65 issued to Northeast Nuclear Energy Company, The Connecticut Light and Power Company, The Hartford Electric Light Company, and Western Massachusetts Electric Company, which revised Technical Specifications for operation of the Millstone Nuclear Power Station Unit No. 2, located in the Town of Waterford, Connecticut. The amendment is effective as of its date of issuance.

The amendment will provide (1) modification of the action required to be taken, as stated in Technical Specification 3.1.1.5, in the event that the Reactor Coolant System (RCS) temperature becomes less than 515° F, and (2) a change in the limits of RCS pressure as a function of temperature as given in Technical Specification 3.4.9.1.

The applications for the amendment comply with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license

STATE OF MINNESOTA, By the MINNESOTA POLLUTION CONTROL AGENCY, Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and United States of America, Respondents,

Northern States Power Company, Intervenor.

NEW ENGLAND COALITION ON NUCLEAR POLLUTION, Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and United States of America, Respondents,

Vermont Yankee Nuclear Power Corporation, Intervenor.

No. 78-1269, 78-2032.

United States Court of Appeals, District of Columbia Circuit.

Argued May 2, 1979.

Decided May 23, 1979.

Petitions were filed to obtain review of orders of the Atomic Safety and Licensing Appeal Board of the Nuclear Regulatory Commission which affirmed initial decisions granting two operators of nuclear power plants amendments to their operating licenses to permit expansion of on-site capacity for the storage of spent nuclear fuel assemblies. The United States Court of Appeals for the District of Columbia, Leventhal, Circuit Judge, held that: (1) the NRC could properly consider the complex issue of nuclear waste disposal in a generic proceeding such as rulemaking and then apply its determinations in subsequent adjudicatory proceedings, and (2) where the complex and vexing question of the disposal of nuclear wastes was a matter that was currently before the NRC in a related proceeding and where the disposition of that proceeding might have a bearing on the instant petitions, it was appropriate in the

interest of sound administration to remand to the NRC for further consideration in light of the pending proceeding.

Remanded.

Tamm, Circuit Judge, concurred and filed opinion.

#### 1. Health and Environment ==25.5(7)

The Nuclear Regulatory Commission could properly consider the complex issue of nuclear waste disposal in a generic proceeding such as rule-making and then apply its determinations in subsequent adjudicatory proceedings.

#### 2. Administrative Law and Procedure ==309

Where factual issues do not involve particularized situations, an agency may proceed by a comprehensive resolution of the questions rather than relitigating the question in each proceeding in which it is raised.

#### 3. Health and Environment ==25.5(7)

In view of fact that a related generic proceeding in which the issues of storage and disposal of commercial nuclear wastes were of central concern was pending before the Nuclear Regulatory Commission and where the disposition of that proceeding might have a bearing on the petitions for review, it was appropriate in the interest of sound administration to remand to the NRC for further consideration in light of the pending proceeding petitions for review of orders of the Atomic Safety and Licensing Appeal Board which granted two operators of nuclear power plants amendments to their operating licenses to permit expansion of on-site capacity for the storage of spent nuclear fuel assemblies.

#### 4. Health and Environment ==25.15(1)

Though it is for the Nuclear Regulatory Commission to decide the ultimate question of certainty implicit in health and safety judgments and to resolve technical



disagreements, these matters are not totally immune from judicial review.

**Petitions for Review of Orders of the Nuclear Regulatory Commission.**

Anthony Z. Boisman, Washington, D. C., with whom Karin P. Sheldon, Washington, D. C., was on brief, for petitioner in No. 78-2032.

Jocelyn Furtwangler Olson, Sp. Asst. Atty. Gen., Roseville, Minn., with whom Warren R. Spannaus, Atty. Gen., State of Minnesota, St. Paul, Minn., was on brief, for petitioner in No. 78-1269.

Stephen F. Elperin, Sol., U. S. Nuclear Regulatory Commission, Washington, D. C., with whom William M. Shields, Atty., U. S. Nuclear Regulatory Commission, Edward J. Shwaker and Michael A. McCord, Attys., Dept. of Justice, Washington, D. C., were on brief, for respondents.

Robert E. Zahler, Washington, D. C., with whom Wm. Bradford Reynolds, Washington, D. C., was on brief, for intervenor in No. 78-1269.

Thomas G. Dignan, Jr., Boston, Mass., with whom R. E. Gad III and Faith S. Hochberg, Boston, Mass., were on brief, for intervenor in No. 78-2032.

James W. Moorman, Asst. Atty. Gen., Dept. of Justice, Washington, D. C., for respondent, United States of America.

Before TAMM, LEVENTHAL and MacKINNON, Circuit Judges.

Opinion for the Court filed by LEVENTHAL, Circuit Judge.

Concurring statement filed by TAMM, Circuit Judge.

**LEVENTHAL, Circuit Judge:**

Petitioners challenge an order of the Atomic Safety and Licensing Appeal Board (Appeal Board), a unit of the Nuclear Regulatory Commission (NRC). The Appeal Board affirmed initial decisions of Atomic Safety and Licensing Boards (Licensing Boards) granting two operators of nuclear

power plants amendments to their operating licenses to permit expansion of on-site capacity for the storage of spent nuclear fuel assemblies.

The crux of the case is current uncertainty about the prospects for developing and implementing safe methods for the ultimate disposal—or even long-term storage—of the highly toxic radioactive wastes created in the process of nuclear power generation.

In this opinion, we do not set aside or stay the challenged license amendments. On certain aspects of the case, we issue rulings approving the agency's procedural position. However, we conclude by remanding these cases to the agency for clarification and consideration in the light of a related proceeding and other current developments.

**I. BACKGROUND AND DECISION UNDER REVIEW**

A nuclear reactor core contains a number of fuel assemblies, bundles of thin tubes (or "fuel rods") containing pellets of enriched uranium. The build-up of neutron-absorbing "poisons" during the chain reaction reduces the ability of the fuel to sustain an efficient chain reaction. "Spent" fuel assemblies must therefore be removed periodically from the reactor core and replaced with fresh fuel. When removed from the core, the assemblies generate enormous heat and contain highly radioactive uranium, actinides and plutonium. Under current practice, the assemblies are placed vertically on racks in a "spent fuel pool" adjacent to the reactor and within the containment vessel. The spent fuel pool is a large basin constructed of concrete, lined with stainless steel and filled with water to dissipate the heat generated by radioactive decay and to absorb radiation.

It was anticipated, when most of the nuclear power plants now in operation in the United States were licensed, that spent fuel would be stored at the reactor site only long enough to allow the fuel assemblies to cool sufficiently to permit safe shipment off-site for reprocessing (the extraction from the rods of usable uranium and plutonium) or

permanent disposal. Spent fuel storage capacity at these plants is therefore limited.

Plans for off-site reprocessing or storage have not materialized. No facility for reprocessing of commercial nuclear wastes is currently licensed; indeed, in 1977 President Carter suspended indefinitely all commercial reprocessing, because of security concerns about plutonium proliferation. The availability of off-site storage facilities, not involving reprocessing, is limited, and no additional capacity is currently projected.

Operators of nuclear plants have sought from the Nuclear Regulatory Commission license amendments permitting expansion of on-site spent fuel storage capacity. Otherwise, as is evident from the foregoing description, these nuclear plants, which were designed in contemplation of off-site shipment of spent fuel, would be forced to shut down when the limited on-site storage capacity was filled.

More specifically, these consolidated appeals involve two applications for license amendment. Vermont Yankee Nuclear Power Corporation, the intervenor in No. 78-2032, operates a nuclear generating facility at Vernon, Vermont. Its spent fuel pool had an original capacity of 600 fuel assemblies. Scheduled refuelings would have filled the pool by 1977, and forced Vermont Yankee to cease operation in August 1978. On November 5, 1976, Vermont Yankee applied to the NRC for an amendment to its operating license to permit expansion of the pool's capacity from 600 to 2000 assemblies, thereby permitting on-site storage through 1987. The application contemplated no increase in the physical dimensions of the pool, but rather the installation of new racks that would permit closer spacing of the fuel assemblies in the pool. The New England Coalition on Nuclear Pol-

lution (petitioner here) and others intervened.

Northern States Power Company, intervenor in No. 78-1269, operates the Prairie Island nuclear facility in Goodhue County, Minnesota. That facility has two reactors, which would have exhausted the 198-assembly capacity of their shared spent fuel pool by the spring of 1978, forcing the shutdown of both reactors by the spring of 1979. On November 24, 1976, Northern States requested that NRC grant an amendment to its operating license to permit expansion of the pool capacity to 637 assemblies, allowing storage through 1982.<sup>1</sup> Like Vermont Yankee, Northern States proposed to accomplish the expansion through closer spacing of racks within the pool. The Minnesota Pollution Control Agency intervened.

In separate proceedings on each application, the NRC Staff undertook evaluations of the safety of the proposed pool modifications and their environmental impact. The evaluations extended only to the safety and environmental effects of the proposed modifications themselves; the Staff did not consider any implications arising from the possibility that the unavailability of a permanent nuclear waste disposal solution might cause the plant sites to become permanent storage facilities, or even to continue on as storage beyond the expiration dates of the licensees' operating authority (for Vermont Yankee and Prairie Island, during the years 2007-2009).

Noting that the modification would entail no increase in the amount of wastes annually generated by the reactor, the Staff found "reasonable assurances" that the modifications would not endanger public health and safety, and hence satisfied the standards of the Atomic Energy Act and NRC regulations,<sup>2</sup> and concluded that the National En-

available storage capacity another two or three years.

1. The projected dates for Vermont Yankee and Prairie Island assume retention of sufficient capacity in the pool to permit the temporary removal of all fuel assemblies from the reactor core to facilitate core maintenance. Use of this "off-load" capacity for storage of spent fuel assemblies, while undesirable from an engineering perspective, would extend the period of

2. J.A. at 16 (Vermont Yankee); *Id.* at 216 (Northern States); see 42 U.S.C. § 2133(d) (1976) (no license may be issued, *if*, in the opinion of the Commission, issuance would be "inimical to the common defense and security

vironmental Policy Act (NEPA) did not require the preparation of environmental impact statements because the modifications would not "significantly affect the quality of the human environment."<sup>3</sup>

The initial decision of the Licensing Board in each proceeding essentially adopted the Staff's safety and environmental findings and approved the requested amendments. 6 N.R.C. 436 (1977) (Vermont Yankee); 6 N.R.C. 265 (1977) (Prairie Island). Each Board excluded from its determination any consideration of the safety and environmental effects of long-term storage of nuclear wastes on the site. 6 N.R.C. at 438 (Vermont Yankee); J.A. at 172 (Prairie Island) (order following pre-hearing conference).

Petitioners appealed. The Appeal Board consolidated the appeals and affirmed. 7 N.R.C. 41 (Jan. 30, 1978).

The Appeal Board first noted that there was no serious challenge to the evidence supporting the Staff's and Licensing Boards' safety and environmental conclusions. It then addressed the different issue raised by the intervenors (petitioners here). Those parties contended that the uncertainty as to the feasibility of ultimate solutions for the disposal of commercial nuclear wastes raised the possibility that the reactor sites might become long-term and possibly indefinite storage sites, persisting subsequent to the expiration of the plants' operating licenses. Before any expansion of on-site storage capacity could be approved, they argued, the Commission must consider the safety and environmental implications of indefinite storage on-site after decommissioning of the reactor.

In deciding to what extent it was bound to take into account these long-term impli-

or to the health and safety of the public"; 10 C.F.R. § 50.57(a)(3) (1978) (license may be issued upon finding that "[t]here is reasonable assurance (1) that the activities authorized by the license can be conducted without endangering the health and safety of the public"; see also 10 C.F.R. § 50.91 (1978) (Commission guided in granting amendments to license by considerations entering into initial approval).

cations, the Appeal Board began with NEPA's "rule of reason" as to the possible consequences of an action that must be considered. That doctrine was first enunciated in *NRDC v. Morton*, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972), quoted with approval, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976). The Board defined its inquiry not as whether it was "theoretically possible" that no off-site fuel repositories would be available at the expiration of the license; rather, it defined the question as whether that event was "reasonably probable." 7 N.R.C. at 49.

Although evincing uncertainty as to the conclusion it might reach on its own, the Board believed the question foreclosed by an earlier determination of the NRC.<sup>4</sup> The Board invoked an NRC decision denying a petition of the Natural Resources Defense Council that it initiate a rulemaking to determine "whether radioactive wastes can be generated in nuclear power reactors and subsequently disposed without undue risk to the public health and safety" and that it refrain from granting further operating licenses until such a "definite finding of safety" was made. 42 Fed.Reg. 84,891 (1977). The Commission premised its denial on its "reasonable confidence that wastes can and will in due course be disposed of safely." Pointing to what it called "a coordinated Federal program to develop an actual disposal facility," the Commission noted its "implicit finding of reasonable assurance that methods of safe permanent disposal of high-level wastes can be available when they are needed." *Id.* at 84,893. The Appeal Board recognized that the NRC's conclusion did not stem from a formal record

3. J.A. at 48 (Vermont Yankee); *Id.* at 243 (Prairie Island); see National Environmental Policy Act, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1976).

4. Had we been compelled to come to grips with that question unaided, it is not certain what result might have been reached. It has turned out, however, that the Commission has spoken on the subject.

7 N.R.C. at 49.

developed in a rulemaking or adjudicatory proceeding. But it nonetheless gave effect to the ruling as "a policy declaration that, for the purposes of licensing actions, it both can and should be presumed that there will be spent fuel repositories available 'when needed'—i. e., well before the termination of the Prairie Island or Vermont Yankee operating licenses." 7 N.R.C. at 51.

The NRC itself entered a simple order declining to review the Appeal Board's decision and providing no further reasoning or comment. In a separate statement, Commissioner Bradford attacked the Board's reasonable probability finding, because the conclusion of the NRC denial of rulemaking from which it was derived "was not based on or tested by any evidentiary hearing." J.A. at 121. Petitioners then sought review in this court.

## II. ANALYSIS

Petitioners renew the claims they advanced before the Appeal Board and the Commission.<sup>5</sup> They submit: Prior to the issuance of a license amendment permitting expansion of on-site storage capacity, the NRC must make a determination of probability that the wastes to be generated by the plants can be safely handled and disposed of. If no "off-site" solution (either an ultimate solution to the problem of waste disposal, or some interim solution involving storage facilities off the reactor site), is projected as probably available, the

5. The Minnesota Pollution Control Agency makes an additional argument. It contends that NRC violated NEPA by improperly "segmenting" its consideration of the environmental impact of expansion of onsite storage capacity at Prairie Island. The theory is that because the present expansion of the spent fuel pool will accommodate the spent fuel assemblies produced at Prairie Island only until 1982, a request for further expansion is inevitable. Citing *Kleppe v. Sierra Club*, 427 U.S. 390, 98 S.Ct. 2718, 49 L.Ed.2d 578 (1976), Minnesota argues that the NRC was required to take into account the environmental impact of this "unavoidable consequence" of the current expansion.

We find this argument without substance. Minnesota has not pointed to any consequence of future expansion that could not be adequately considered at the time of any request for

NRC must take into account the safety and environmental implications of maintaining the reactor site as a nuclear waste disposal site after the expiration of the license term.

Petitioners do not take issue with the Appeal Board's conclusion that all that is required is a reasonable probability that a solution will be available when needed. They claim the Appeal Board erred in making its determination of reasonable probability not on the basis of evidence adduced on the record in the adjudicatory proceedings, but on the basis of the NRC's "declaration of policy" in its denial of rulemaking on the NRDC petition.

[1,2] No one disputes that solutions to the commercial waste dilemma are not currently available. The critical issue is the likelihood (or probability) that solutions, either ultimate or interim, will be reached in time. Petitioners propound a number of theories for why the "fact" of this likelihood must be tested within the context of an adjudicatory proceeding and its evidentiary procedures. We do not consider these contentions in detail. We agree with the Commission's position that it could properly consider the complex issue of nuclear waste disposal in a "generic" proceeding such as rulemaking, and then apply its determinations in subsequent adjudicatory proceedings. Where factual issues do not involve particularized situations, an agency may proceed by a comprehensive resolution of

further expansion. Indeed, the NRC Staff in its environmental impact analysis of the proposed expansion expressly considered five factors articulated by the NRC for consideration of individual license amendment applications pending preparation of a generic EIS on the question of interim on-site storage of spent fuel assemblies. See 40 Fed.Reg. 42,802 (1975). The Staff specifically found that the licensing action here would not foreclose alternatives available with respect to other licensing actions designed to ameliorate a possible shortage of spent fuel capacity (noting that "taking this action would not necessarily commit the NRC to repeat this action or a related action") and that addressing the environmental impact associated with the proposed licensing action would not overlook any cumulative environmental impacts. J.A. at 239-42.

the questions rather than relitigating the question in each proceeding in which it is raised. *Ecology Action v. AEC*, 492 F.2d 998, 1002 (2d Cir. 1974) (Friendly, J.); see *American Airlines, Inc. v. CAB*, 123 U.S. App.D.C. 810, 359 F.2d 624 (en banc), cert. denied, 385 U.S. 843, 87 S.Ct. 73, 17 L.Ed.2d 75 (1966). Petitioners hypothesize the need for individualized determinations, but we think it clear that the central issue posed by petitioners—the feasibility of interim or ultimate nuclear waste disposal solutions—is one essentially common to all nuclear facilities.

Petitioners fear that determination of the question in a “generic” proceeding, which would proceed as a rulemaking rather than adjudication, will deprive them of procedures, such as cross examination, to test the evidence underlying the probability determination that would be afforded by an adjudication. We do not dictate the procedures of the “generic” proceeding. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). The breadth of the questions involved and the fact that the ultimate determination can never rise above a prediction suggest that the determination may be a kind of legislative judgment for which rulemaking would suffice.

In its decision, the Appeal Board relied on the NRC’s denial of NRDC’s rulemaking request. The NRC’s decision was one of statutory interpretation, concluding that Congress did not intend in enacting the Atomic Energy Act to require a demonstration that nuclear wastes could safely be disposed of before licensing of nuclear plants was permitted. The Second Circuit affirmed on this basis. *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978). Thus, the NRC in its denial of rulemaking chose not to under-

take the kind of comprehensive inquiry into the question of disposal solutions that would be required to give content to a “generic” determination. NRC did state its “reasonable confidence” that solutions would be available when needed. While based on a description of current federal efforts in the area, NRC’s “assurances” are not the product of a rulemaking record devoted expressly to considering the questions.<sup>6</sup> Further, that proceeding did not address the particular problem focused by petitioners—that even if ultimate disposal solutions will be found, they will not be available before the expiration of the plants’ operating licenses.

[3] We need not consider what course we would have followed if this were all that were before us. As is clear from the records of this court, and as confirmed by counsel, there is now pending before the Commission a related generic proceeding—the so-called “S-3” proceeding, in which the issues of the storage and disposal of commercial nuclear wastes are of central concern. That proceeding commenced in 1972 when the Commission’s predecessor (the Atomic Energy Commission) proposed rulemaking to reconsider whether the environmental effects of the uranium fuel cycle should be included in the cost/benefit analysis prepared in licensing each nuclear plant. Although concluding that the environmental effects of the fuel cycle were “relatively insignificant,” the Commission found it preferable to take them into account. It promulgated its rule as “Table S-3,”<sup>7</sup> which specified a series of numerical values intended to represent the incremental contribution of one nuclear reactor to the total environmental impact of the uranium fuel cycle. See *NRDC v. NRC*, 178

6. Cf. *NRDC v. NRC*, 178 U.S.App.D.C. 336, 361, 547 F.2d 633, 638 (1976) (Tamm, J., concurring in result) (“NEPA requires the Commission fully to assure itself that safe and adequate storage methods are technologically and economically feasible. It forbids reckless decisions to mortgage the future for the present, glibly assuring critics that technological advancement can be counted upon to save us from the consequences of our decisions”). As

appears below, the Supreme Court, in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), reversed the ruling of the majority opinion requiring further procedures but remanded for the kind of inquiry called for in Judge Tamm’s concurring opinion.

7. The current, “interim,” Table S-3 appears in 10 C.F.R. § 81.20(e) (1978).

U.S.App.D.C. 836, 845, 547 F.2d 633, 642 (1976), reversed *sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978).

In reaching its conclusion that the environmental impact was "relatively insignificant," the Commission relied substantially on testimony of agency personnel that the as-yet unsolved problems of ultimate disposal of nuclear wastes would be resolved. *Id.* at 849-56, 547 F.2d at 646-53. This reliance was challenged on judicial review. While the Supreme Court reversed this court's holding that NRC's procedures were inadequate, *Vermont Yankee, supra*, 435 U.S. at 539-48, 98 S.Ct. 1197, it did not disapprove the view expressed by Judge Tamm in his concurring opinion, *NRDC v. NRC, supra*, 178 U.S.App.D.C. at 861-64, 547 F.2d at 658-61, and remanded to this court to permit a determination whether the administrative record contained sufficient evidence to support the NRC's finding. 435 U.S. at 549, 98 S.Ct. 1197.

On remand, this court has held in abeyance its review of the original S-3 rulemaking, as well as that of an "interim" rule now before the court, pending completion of NRC proceedings to promulgate a new fuel cycle rule. At oral argument, NRC counsel informed the court that this new final fuel cycle rule is pending before the Commission. Counsel also told the court that the current feasibility and likelihood of implementation of nuclear waste disposal solutions was a matter contested in the hearings on the new final rule.

It would be inappropriate for this court to ignore the relevance of proceedings in which some of the basic questions raised

8. The on-going S-3 proceedings have focused only on the issue arising under NEPA, as to the environmental impact of nuclear waste disposal, and not on the effect of the uncertainty as to solutions under the public health and safety standard for licensing under the Atomic Energy Act, which NRC counsel acknowledged is more rigorous than NEPA standards in certain aspects. And the S-3 proceedings may not be concerned with the more limited issue identified in the pending cases of whether offsite storage solutions will be available prior to the expiration of the operating certificates.

now are the subject of current exploration. Since the disposition of the S-3 proceeding, though it has a somewhat different focus,<sup>8</sup> may have a bearing on the pending cases, and being advised of recent developments<sup>9</sup> that raise new issues about the feasibility of disposal solutions, we think it appropriate in the interest of sound administration to remand to the NRC for further consideration in the light of its S-3 proceeding and analysis. In particular, the court contemplates consideration on remand of the specific problem isolated by petitioners—determining whether there is reasonable assurance that an off-site storage solution will be available by the years 2007-09, the expiration of the plants' operating licenses, and if not, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates. We neither vacate nor stay the license amendments, which would effectively shut down the plants.

At oral argument intervenors Vermont Yankee and Northern States stressed the argument that the court has no legitimate basis for concerning itself with issues of ultimate waste disposal in the context of the public health and safety standard of the Atomic Energy Act. The Appeal Board did not deem these concerns irrelevant, but it held that an analysis was required only where it was "reasonably probable" that solutions would not be reached. The question is whether there has been an NRC disposition in generic proceedings that is adequate to dispose of the objections to the licensing amendments.

[4] Intervenors rely on *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978). The Second Circuit found that Congress was well in-

9. At oral argument counsel for petitioner New England Coalition told the court of a final Report to the President by the Interagency Review Group on Nuclear Waste Management, issued March 19, 1979, that casts some doubt on whether current proposed solutions to the permanent waste disposal problem are technologically feasible. *Id.* at 42. The Report also pointed to gathering institutional problems, e. g., the resistance of localities to storage of wastes within their jurisdictions, that "may well be more difficult than finding solutions to remaining technical problems." *Id.* at 87-88.

formed that disposal solutions were not currently feasible, yet it permitted continued licensing of nuclear plants. We do not read that opinion, however, to hold as a matter of law that storage and disposal concerns are never relevant to the licensing of nuclear plants. Rather, as the NRC itself recognized, Congress has chosen to rely on the NRC's (and its predecessor's) assurances of confidence that a solution will be reached. See 42 Fed.Reg. at 34,392. There is no implication that Congress intended that the NRC ignore new knowledge or analysis in its licensing decisions. As the Supreme Court implicitly recognized by remanding for a review of the sufficiency of the S-3 evidence in *Vermont Yankee*, supra, 435 U.S. at 549, 98 S.Ct. 1197, this court does not exceed its judicial province by inquiring into the basis of those assurances of confidence. As Commission counsel rightly notes, it is for the Commission to decide the ultimate question of certainty implicit in health and safety judgments and to resolve technical disagreements, but that is not to say that these matters are totally immune from judicial review.

### III. CONCLUSION

The court confines its action at this time to rejection of certain contentions by petitioners, notably the claim of need for an adjudicatory proceeding. We agree with the Commission that it may proceed in these matters by generic determinations. The complex and vexing question of the disposal of nuclear wastes is a matter that is currently before the Commission in a related proceeding, and is characterized by continuing evolution of the state of pertinent knowledge. Accordingly we remand the balance of these cases, and issues raised, for further consideration by the Commission with such procedure as it may deem appropriate.<sup>10</sup>

So ordered.

10. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44, 98 S.Ct. 1197 (1978). The Commission may integrate the issues with the pending S-3 proceeding, designate a follow-on generic proceeding, or follow such other courses as it deems appropriate.

TAMM; Circuit Judge, concurring:

The Nuclear Regulatory Commission<sup>1</sup> ruled that prior to approval of a license amendment permitting expansion of a nuclear plant's spent fuel pool capacity, there must be a determination concerning future spent fuel storage. Specifically, there must be a determination whether it is reasonably probable that an offsite fuel repository will be available when the operating license of the nuclear plant in question expires. We remand this case to the Commission for appropriate proceedings devoted to determining whether such a reasonable probability exists.

Although I concur in the court's opinion, I write separately to emphasize my belief that section 102(2)(C) of the National Environmental Policy Act of 1969<sup>2</sup> and section 103(d) of the Atomic Energy Act of 1954<sup>3</sup> mandate the determination that the Commission identified in this case. In addition, if the Commission determines it is not reasonably probable that an offsite waste disposal solution will be available when the licenses of the plants in question expire, it then must determine whether it is reasonably probable that the spent fuel can be stored safely onsite for an indefinite period. Answers to these inquiries are essential for adequate consideration of the safety and environmental standards of the relevant statutes. It is undisputed that questions involving storage and disposal of nuclear waste pose serious concerns for health and the environment. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 538-39, 98 S.Ct. 1197, 1208-09, 55 L.Ed.2d 460, 475-76 (1978).

This interpretation of the relevant statutes is consistent with the recent decision of the Second Circuit in *NRDC v. NRC*, 582 F.2d 166 (2d Cir. 1978). The court of ap-

1. The decision was rendered by the Commission's Atomic Safety and Licensing Appeal Board.

2. 42 U.S.C. § 4332(2)(C) (1975).

3. 42 U.S.C. § 2133(5) (1975).

peals in that case held that the Commission need not halt licensing of nuclear plants pending a determination that an approved method of permanent nuclear waste disposal exists. The Second Circuit decided that congressional intent is satisfied by a reasonable assurance that a safe method for permanent disposal of wastes will be available when needed. See *id.* at 171-75. Our opinion merely remands this case to the Commission for such proceedings as it deems appropriate to determine whether there is reasonable assurance that an offsite storage solution will be available when needed—in this case, by the years 2007-2009.





or breakdown of irrigation equipment or facilities shall not be considered as a failure of the water supply from an avoidable cause.

(c) Insurance shall not attach on an irrigated basis on acreage otherwise insurable on such basis unless it is so reported and designated by such practice at the time the acreage is reported.

**4. Annual Premium.** If there is no break in the continuity of participation, any premium adjustment applicable under section 5 of the policy shall be transferred to (1) the contract of the insured's estate or surviving spouse in case of death of the insured, (2) the contract of the person who succeeds the insured if such person had previously participated in the farming operation, or (3) the contract of the same insured who stops farming in one county and starts farming in another county.

(b) If there is a break in the continuity of participation, any reduction in premium earned under section 5 of the policy shall not thereafter apply; however, any previous unfavorable insurance experience shall be considered in premium computation following a break in continuity.

**5. Claim for and Payment of Indemnity.** (a) Any claim for indemnity on a unit shall be submitted to the Corporation on a form prescribed by the Corporation.

(b) In determining the total production to be counted for each unit, production from units on which the production has been commingled will be allocated to such units in proportion to the liability on each unit.

(c) There shall be no abandonment to the Corporation of any insured tobacco acreage.

(b) In the event that any claim for indemnity under the provisions of the contract is denied by the Corporation, an action on such claim may be brought against the Corporation under the provisions of 7 U.S.C. 1508(c); *Provided*, That the same is brought within one year after the date notice of denial of the claim is mailed to and received by the insured.

(e) Any indemnity will be payable within 30 days after a claim for indemnity is approved by the Corporation. However, in no event shall the Corporation be liable for interest or damages in connection with any claim for indemnity whether such claim be approved or disapproved by the Corporation.

(f) If the insured is an individual who dies, disappears, or is judicially declared incompetent, or the insured is an entity other than an individual and such entity is dissolved after the

tobacco is planted for any crop year, any indemnity will be paid to the person(s) the Corporation determines to be beneficially entitled thereto.

(g) The Corporation reserves the right to reject any claim for indemnity if any of the requirements of this section or section 6 of the policy are not met and the Corporation determines that the amount of loss cannot be satisfactorily determined.

**6. Subrogation.** The insured (including any assigned or transferee) assigns to the Corporation all rights of recovery against any person for loss or damage to the extent that payment hereunder is made by the Corporation. The Corporation thereafter shall execute all papers required and take appropriate action as may be necessary to secure such rights.

**7. Termination of the Contract.** (a) The contract shall terminate if no premium is earned for five consecutive years.

(b) If the insured is an individual who dies or is judicially declared incompetent, or the insured entity is other than an individual and such entity is dissolved, the contract shall terminate as of the date of death, judicial declaration, or dissolution; *However*, if such event occurs after insurance attaches for any crop year, the contract shall continue in force through such crop year and terminates at the end thereof. Death of a partner in a partnership shall dissolve the partnership unless the partnership agreement provides otherwise. If two or more persons having a joint interest are insured jointly, death of one of the persons shall dissolve the joint entity.

**8. Coverage Level and Price Election.**

(a) If the insured has not elected on the application a coverage level and price at which indemnities shall be computed from among those shown on the actuarial table, the coverage level and price election which shall be applicable under the contract, and which the insured shall be deemed to have elected, shall be as provided on the actuarial table for such purposes.

(b) The insured may, with the consent of the Corporation, change the coverage level and price election for any crop year on or before the closing date for submitting applications for that crop year.

**9. Assignment of Indemnity.** Upon approval of a form prescribed by the Corporation, the insured may assign to another party the right to an indemnity for the crop year and such assignee shall have the right to submit the loss notices and forms as required by the contract.

**10. Contract Changes.** The Corporation reserves the right to change

any terms and provisions of the contract from year to year. Any changes shall be mailed to the insured or placed on file and made available for public inspection in the office for the county at least 15 days prior to the cancellation date preceding the crop year for which the changes are to become effective, and such mailing or filing shall constitute notice to the insured. Acceptance of any changes will be conclusively presumed in the absence of any notice from the insured to cancel the contract as provided in section 13 of the policy.

This proposal has not been classified "significant" and is being published under emergency procedures, as authorized by Executive Order 12044 and Secretary's Memorandum No. 1955, without a full 60-day comment period. It has been determined by James D. Deal, Manager, Federal Crop Insurance Corporation, that an emergency situation exists which warrants less than a full 60-day comment period on this proposal because the final regulations and policies governing tobacco must be published and be available in the FCIC county offices not later than December 15, 1979, to afford the farmers an opportunity to examine them before the cancellation date of December 31, 1979. A Draft Impact Analysis has been prepared and is available from Peter F. Cole, Secretary, Federal Crop Insurance Corporation, Room 4088, South Building, U.S. Department of Agriculture, Washington, D.C. 20250.

*Note.*—The reporting requirements contained herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942 and OMB Circular A40.

Approved by the Board of Directors on September 8, 1979.

Peter F. Cole,

Secretary, Federal Crop Insurance Corporation.

[FR Doc. 79-2285 Filed 10-24-79; 9:03 am]  
BILLING CODE 3410-05-1

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Parts 50 and 51

#### Storage and Disposal of Nuclear Waste

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

**SUMMARY:** The United States Nuclear Regulatory Commission is conducting a generic proceeding to reassess its degree of confidence that radioactive wastes produced by nuclear facilities will be

safely disposed of, to determine when any such disposal will be available, and whether such wastes can be safely stored until they are safely disposed of. This rulemaking has been initiated in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *State of Minnesota v. NRC*, Nos. 78-1289 and 78-2032 (May 23, 1979), but it also is a continuation of previous proceedings conducted by the Commission in this area. 42 FR 34391 (July 5, 1977).

This notice describes the procedures the Commission will employ to conduct that proceeding and how members of the public can participate. If the Commission finds from this proceeding reasonable assurance that radioactive wastes from nuclear facilities will be safely stored or disposed of off-site prior to the expiration of the license for the facility, it will promulgate a rule providing that the safety and environmental implications of radioactive waste remaining on site after the anticipated expiration of the facility licenses involved need not be considered in individual facility licensing proceedings. In the event the Commission determines that on-site storage after license expiration may be necessary or appropriate, it will issue a proposed rule providing how that question will be addressed.

**DATES:** Notices of intent to participate must be filed by November 26, 1979. Other deadlines are described below.

**ADDRESS:** Send comments to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch. All filings will be available for public inspection in the Commission's Public Document Room at 1717 H-Street, N.W., Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** Stephen S. Ostrach, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. (202) 634-3224.

#### SUPPLEMENTARY INFORMATION:

##### Background

On May 23, 1979 the United States Court of Appeals for the District of Columbia Circuit remanded two licensing actions to the Commission to consider whether an off-site storage solution for nuclear wastes will be available by the years 2007-09, the expiration dates of the licenses of the Vermont Yankee and Prairie Island nuclear plants to which the Commission had granted permits to increase the on-site waste storage facilities, and, if not, whether that waste can be stored at the

sites past those dates and until an off-site solution is available. In response to the D.C. Circuit's decision the Commission has decided to undertake a generic reconsideration of the radioactive waste question so that it can: (1) reassess its confidence that safe off-site disposal of radioactive waste from licensed facilities will be available; (2) determine when any such disposal or off-site storage will be available; and (3) if disposal or off-site storage will not be available until after the expiration of the licenses of certain nuclear facilities, determine whether the wastes generated by those facilities can be safely stored on-site until such disposal is available. Previously, in connection with a petition for rulemaking filed by the Natural Resources Defense Council the Commission considered the related question of the likelihood that waste disposal will be accomplished safely, and at that time it found reasonable assurance that methods of safe permanent disposal of high-level waste would be available when they were needed. 42 FR 34391, 34393 (July 5, 1977), *pet. for rev. dismissed sub nom. NRDC v. NRC*, 582 F.2d 166 (2nd Cir. 1978). However, in denying the NRDC petition, the Commission announced its intent to reassess this finding periodically. This new proceeding will offer an opportunity for the Commission to reassess its earlier finding, to obtain wider public participation in its decision and also to take account of new data and recent developments in the federal waste management plan, most notably the Report to the President by the Interagency Review Group on Waste Management, TID-29442 (March, 1979) (the "IRG Report").

##### Purpose of Proceeding

The purpose of this proceeding is solely to assess generically the degree of assurance now available that radioactive waste can be safely disposed of, to determine when such disposal or off-site storage will be available, and to determine whether radioactive wastes can be safely stored on-site past the expiration of existing facility licenses until off-site disposal or storage is available. In addition to information submitted by public participants and government agencies, this proceeding will draw upon the record compiled in the Commission's recently concluded rulemaking on the environmental impacts of the nuclear fuel cycle (44 FR 45362-74 (August 2, 1979)), and the record compiled herein will be available for use in the general fuel cycle rule update discussed in that rulemaking. However, this proceeding is not designed to reach quantitative

conclusions about waste repository impacts or performance. The Commission will consider economic issues in this proceeding in the same fashion such issues were considered in the recent fuel cycle rulemaking: namely, a waste disposal model will not be considered realistically available if it would be prohibitively expensive to build and operate such a proposed facility. Cf. 44 FR at 45367.

During this proceeding the safety implications and environmental impacts of radioactive waste storage on-site for the duration of a license will continue to be subjects for adjudication in individual facility licensing proceedings. The Commission has decided, however, that during this proceeding the issues being considered in the rulemaking should not be addressed in individual licensing proceedings. These issues are most appropriately addressed in a generic proceeding of the character here envisaged. Furthermore, the court in the *State of Minnesota* case by remanding this matter to the Commission but not vacating or revoking the facility licenses involved, has supported the Commission's conclusion that licensing practices need not be altered during this proceeding. However, all licensing proceedings now underway will be subject to whatever final determinations are reached in this proceeding.

If the Commission finds reasonable assurance that safe, off-site disposal for radioactive wastes from licensed facilities will be available prior to expiration of the facilities' licenses, it will promulgate a final rule providing that the environmental and safety implications of continued on-site storage after the termination of licenses need not be considered in individual licensing proceedings. In the event the Commission determines that on-site storage after license expiration may be necessary or appropriate, it will issue a proposed rule providing how that question will be addressed.

##### Procedures

The Commission has chosen to employ hybrid rulemaking procedures for conducting this proceeding. Within thirty days after publication of this notice members of the public may file a notice of intent to participate as a "full participant" in the further stages of the proceeding discussed below. The notice of intent should set forth the person's or group's identity, technical or other qualifications to participate, tentative positions on the issues to be considered, and a discussion of any special matters or concerns sought to be raised. Furthermore, at that time those members of the public who do not wish to be full

participants but who wish to file comments on the issues addressed in a rulemaking should file their comments.

The individuals or groups who have chosen to participate as full participants shall be supervised by a "presiding officer" to be named by the Commission at a later date. That officer's principal responsibility will be to monitor the early stages of the proceeding for the Commission, and to assist the Commission in conducting the later portions. To those ends he or she will have authority to order consolidation of individuals or groups in the same fashion provided in 10 CFR 2.715a. The presiding officer may take appropriate action to avoid delay, including, if necessary, holding pre-hearing conferences or certifying matters to the Commission.

The Commission's staff will compile a full bibliography on the subjects relevant to the proceeding which will be made available to the public at an early stage of this proceeding. In addition to that bibliography the Commission will maintain a publicly available data bank which will include relevant information on waste storage and disposal. The data bank will include the IRG Report, the background material the IRG collected in preparing the report, the Generic Environmental Impact Statement on Waste Management being prepared by the Department of Energy, and a collection of other principal works that the Commission staff will compile on the subject of radioactive waste storage and disposal. Furthermore, the Commission will solicit the views of a number of federal agencies on the questions involved in this proceeding and on the conclusions of the IRG Report and make the responses of those agencies available in the data bank so that the participants can address them in their papers. The Commission expects that full participants will voluntarily make relevant documents in their possession available to other full participants to the extent practical and will reference and produce on request the documents on which they rely.

The Commission is considering whether additional procedures should be employed. One proposal is to strictly control inter-participant discovery and to provide that requests for interrogatories, depositions or other formal discovery will not be entertained unless the Commission finds compelling justification therefor. If this proposal were adopted, the Commission expects there would be at most only a few exceptional circumstances in which such justification could be

demonstrated. An alternative proposal which is also under consideration would be to apply to this proceeding the discovery procedures set forth in 10 CFR Part 2 and to have any discovery supervised by the presiding officer. Participants or other members of the public who wish to express views on this matter should file those views with their notices of intent or comments which are due November 28, 1979. In particular participants should discuss whether imposition of the discovery provisions of Part 2 or their absence would be likely to alter their willingness to participate in this rulemaking or to affect the quality of their contribution to the record. The presiding officer will then summarize the views expressed and present his or her recommendations to the Commission. The Commission will issue a prompt decision on this matter so that the participants' preparation of their statements will not be adversely affected by uncertainty as to the extent of data that may be available to them.

Approximately 80 days after the notices of intent are filed, the officer will issue a prehearing order resolving all preliminary issues including consolidation. Following the prehearing order the participants will have approximately 60 additional days (the exact time to be set in the prehearing order) to prepare and file their statements of position. The statements will be the participants' principal contribution to the waste confidence proceeding, and participants should focus their preparation on them. The statements should set forth the participants' views on the issues discussed above, and on the underlying assumptions and scenarios, both technical and institutional, upon which those views are based. After the statements are filed, the participants will be given approximately 60 days (to be set by the order) to prepare cross-statements discussing statements filed by other participants. The cross-statements should be limited to material discussed in the statements and should not be used to introduce new material.

After the statements and cross-statements have been received, the Commission with the assistance of the presiding officer will issue a second prehearing order. This order will set out the procedures to be followed for the remainder of the hearing and may provide for further written submissions from the full participants, or for the scheduling of an oral hearing. If the Commission desires oral presentations, the participants may be further consolidated to ensure that the oral

presentations will be efficient and useful. Unless different procedures are set out in the second prehearing order, the hearing will begin with delivery of prepared statements from the representatives, both technical and legal, of the groups into which the participants have been consolidated. These statements should succinctly summarize the participants' views previously set forth in their statements and cross-statements. Participants should ensure that their representatives will be able to address the merits of the legal, technical and institutional issues that have been raised in this proceeding. After the prepared remarks the speakers will be questioned by the members of the Commission. Furthermore, other participants will be given the opportunity to submit written questions to the Commission for it, in its discretion, to ask of participants.

The Commission reserves the option of providing a final stage at which representatives of the participants may be cross-examined by other participants. The Commission will defer deciding whether to permit any cross-examination until after the hearing is over. To obtain cross-examination a participant will be required to identify the issue or issues as to which cross-examination is sought, and the representative or participant involved, and to demonstrate that cross-examination is necessary to prepare a record adequate for a sound decision.

Based on the material received in this proceeding and on any other relevant information properly available to it, the Commission will publish a proposed or final rule in the Federal Register. Any such final rule will be effective thirty days after publication.

Comments, notices of intent to participate and any other documents filed in this proceeding should be filed by serving a copy on the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C., 20535, Attention: Docketing and Service Branch. All filings will be available for public inspection in the Commission's Public Document Room at 1717 H Street NW., Washington, D.C.

Dated: October 23, 1979.

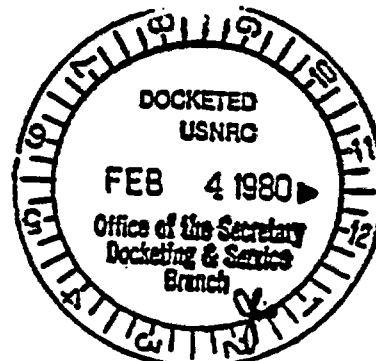
For the Commission.

Samuel J. Chilk.

Secretary of the Commission.

CALLING CODE 7900-01-01

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



In the Matter of

PROPOSED RULEMAKING ON THE STORAGE  
AND DISPOSAL OF NUCLEAR WASTE

(Waste Confidence Rulemaking)

FR-50, 51 (44 FR 61372)

FIRST PREHEARING CONFERENCE ORDER  
(February 1, 1980)

A prehearing conference was held in this waste management rulemaking proceeding on January 29, 1980 at 1717 H Street, N. W., Washington, D. C. This conference convened pursuant to notice duly published in the Federal Register on January 16, 1980 (45 FR 3056). The following Full Participants had representatives in attendance:

Department of Energy

American Nuclear Society

Atomic Industrial Forum

California Energy Commission

Capital Legal Foundation and Scientists and Engineers for Secure Energy

Christa-Maria

Commonwealth of Massachusetts

Commonwealth of Virginia

Consolidated Edison Company of New York, Inc.

Consumers Power Company

County of Ocean and Township of Lower Alloways Creek

Department of the Interior (U. S. Geological Survey)

Edison Electric Institute

8002130347  
18pp.

Environmental Coalition on Nuclear Power

General Electric Company

Natural Resources Defense Council, Inc.

Marvin Lewis

New England Coalition on Nuclear Pollution

Niagara Mohawk Power Corporation, Omaha Public Power District,  
Power Authority of the State of New York, and Public Service Company  
of Indiana, Inc. (Utilities)

Safe Haven, Ltd.

Scientists and Engineers for Secure Energy

State of California (Department of Conservation)

State of Delaware

State of Hawaii

State of Illinois

State of Louisiana

State of Maryland

State of Minnesota

State of Missouri

State of New Hampshire

State of New Jersey

State of New York

State of Ohio

State of Oklahoma

State of Oregon

State of South Carolina

State of Texas

State of Vermont

State of Wisconsin

Tennessee Valley Authority

Uranium Fuel Cycle Group

Utility Waste Management Group

Representatives of the NRC Office of General Counsel (OGC), Staff, and Public Document Room (PDR), as well as the U. S. Department of Energy (DOE), also participated.

Written prehearing statements were filed by: The NRC Staff, the Department of Energy, the American Nuclear Society, California Department of Conservation, the Environmental Policy Institute, New England Coalition, Neighbors for the Environment, the Utility Waste Management Group, the Edison Electric Institute, and the Environmental Coalition on Nuclear Power (Tr. 17). Motions were filed by California Energy Resources Commission, Consumer's Power Company, and the State of Wisconsin (Tr. 17).

The Commission has described these issues to be covered in its generic reconsideration of the radioactive waste question so that it can (1) reassess its confidence that safe off-site disposal of radioactive waste from licensed facilities will be available, (2) determine when any such disposal or off-site storage will be available, and (3) if disposal or off-site storage will not be available until after the expiration of the licenses of certain nuclear facilities determine whether the wastes generated by those facilities can be safely stored on-site until such disposal is available (44 FR 61372, 61373). Hybrid rulemaking procedures are to be followed, rather than adversarial adjudicatory procedures (Tr. 19-20).

By its Order dated January 28, 1980, the Commission decided to provide procedural assistance to Full Participants by serving without charge one copy of the transcript of this prehearing conference, and subsequent copies of statements of position and cross-statements filed with the Secretary (Tr. 15-16).

The Commission also entered an Order<sup>1/</sup> on January 29, 1980, determining that formal discovery under the procedures set forth in 10 CFR Part 2 will not be permitted in the stages of the proceeding prior to the second prehearing order. The availability of a comprehensive bibliography and data bank, as well as the opportunity to file cross-statements of position, submission of questions to be asked by the Commission if an oral hearing is held, and requests for information from federal agencies under the Freedom of Information Act (5 U.S.C. Sec. 552), were deemed sufficient to make necessary information reasonably available (Tr. 22).

The notice of proposed rulemaking provided that the "Commission's Staff will compile a full bibliography on the subjects relevant to the proceeding which will be made available to the public at an early stage of this proceeding."<sup>2/</sup> An information sheet was supplied at the prehearing conference which indicated that the following bibliographies are being made available:

"NRC is contributing an extensive bibliography on the subject of waste disposal, Radioactive Waste Processing and Disposal, which includes TID-3311 plus supplements published between 1958 and 1980. This multi-volume bibliography will contain 19,000 references from the Nuclear Science Abstracts and Energy Data Bases indexed at Oak Ridge National Laboratory, Technical Information Center (ORNL, TIC) from the late 1950's up to November 1979.

---

<sup>1/</sup> Commissioner Bradford dissenting.

<sup>2/</sup> 44 FR 61374.

"DOE's Bibliography on waste submitted under cover letter from Omer F. Brown, Office of the General Counsel, DOE, to Marshall E. Miller dated January 18, 1980. This bibliography contains 11,922 references from the Nuclear Science Abstracts, The Energy Data Base, and two of the Ecological Sciences Information Center's Data Bases indexed from 1967 to Later 1979."<sup>3/</sup>

In addition, the Commission stated that a data bank would be maintained and made publicly available, covering relevant information on waste storage and disposal. The data bank will include the IRG Report, the background material the IRG collected in preparing the report, the Generic Environmental Impact Statement on Waste Management being prepared by DOE, and a collection of other principal works to be compiled by the Staff. The information sheet described the following data bank documents, in addition to the extensive bibliographies:

"The NRC Databank of documents related to nuclear waste storage and disposal as referenced in 44 Fed. Reg. 61372 will be located in the Commission's Public Document Room (PDR) at 1717 H Street, N.W., Washington, D. C., and will include the following sets of documents:

1. Regular collection of orders, issuances, submissions, correspondence, etc., generated by or communicated to NRC and directly related to PR 50, 51 (44 Fed. Reg. 61372).
2. Collection of technical documents and reports containing 'relevant information on waste storage and disposal' compiled by the NRC staff (44 Fed. Reg. 61374), including:
  - a. The Report by the Interagency Review Group on Waste Management, TID-29442.
  - b. The Department of Energy's Draft GEIS on Waste Management.
  - c. 'Other principal works' -- estimated at 130 or more documents.
3. Collection of an estimated 300 technical documents and reports referenced in the DOE submission. There is expected to be overlap between this set of documents and the documents in Item #2."<sup>4/</sup>

---

<sup>3/</sup>Tr. 24-26.

<sup>4/</sup>Tr. 23-27.



A number of participants stated that it was a serious hardship to them to have data bank documents available only in the Washington, D. C. public document room (Tr. 28-43). The NRC Staff and DOE have identified approximately 130 core documents which are reasonably necessary to enable participants to make meaningful contributions to this proceeding (Tr. 38). DOE presently maintains 10 public document rooms in major cities regionally around the country (Tr. 37, 40-41, 43-45, 54-56). It was agreed that both DOE and NRC Staff will make available at the 10 regional offices of DOE both the core documents which they have identified, as well as additional documents which are relevant to the subject of waste management. A list of such principal documents and the location of the regional document rooms will be mailed to Full Participants by the Secretary of the Commission, after the lists have been filed by DOE and the Staff, respectively.

The California Energy Resources Conservation and Development Commission (CEC) filed a motion for reconsideration of the hearing schedule, requesting that the sixty-day period for preparing and filing position statements not commence until after the resolution of certain procedural questions which it had asserted. These procedural issues were described by CEC as (1) the Commission itself should preside over this rulemaking, or designate a committee of two or more Commissioners to conduct this proceeding, and (2) that the Commission should present as its own witnesses experts from a broad spectrum of disciplines, views and interests to mediate the technical issues presented by this rulemaking. An order was also sought certifying both issues to the Commission. This motion is denied.

The Commission carefully considered and described the procedure it wished to follow in its notice of proposed rulemaking (44 FR 61372). As there stated, "The Commission has chosen to employ hybrid rulemaking procedures for conducting this

proceeding." A presiding officer was named whose "principal responsibility will be to monitor the early stages of the proceeding for the Commission, and to assist the Commission in conducting the later portions." The Commission has thus clearly exercised its plenary power to establish the form and procedures to be followed in this rulemaking. The Participants are given an opportunity to take part in this rulemaking proceeding in compliance with its own established framework and procedures. Such participation does not extend to a challenge or attack upon the procedures themselves, whether in the guise of motions for reconsideration or requests for certification of issues.

As an outgrowth of the CEC motion described above, a number of Participants<sup>5/</sup> also requested that the NRC Staff be immediately and directly involved in the proceeding either by sponsoring a number of witnesses,<sup>6/</sup> presenting a base case,<sup>7/</sup> or stating a position.<sup>8/</sup> The Staff took the position that it would not be filing a position because it has been directed to consider all sides of the question, and it should not be frozen into taking a particular position.<sup>9/</sup> The Office of General Counsel also stated that it would not be appropriate for the Staff to take a position at this time before a complete record has been compiled and the various views have been presented.<sup>10/</sup>

---

<sup>5/</sup>CEC, States of Illinois, New Hampshire, Ohio, Vermont and Wisconsin, Safe Haven Ltd. and Marvin L. Lewis.

<sup>6/</sup>Tr. 65-67, 70, 90.

<sup>7/</sup>Tr. 69, 76, 83.

<sup>8/</sup>Tr. 80, 95-99.

<sup>9/</sup>Tr. 95, 100.

<sup>10/</sup>Tr. 100-101, 104-105.

The various requests made concerning the role of the Staff in this proceeding will be treated as motions stated in the course of the prehearing conference. Such motions will be denied. Here again some Participants are attempting to convert a hybrid, legislative type of rulemaking into a confrontational or adversarial type of adjudicatory proceeding. Several times the Staff was even referred to as a "party", which should be required to take a position the same as other Participants.<sup>11/</sup> This view is erroneous. The Staff is not a party, and cannot be compelled to become one, or to be treated as though it were. The Commission again has plenary power to determine the role of the Staff, and its assigned duties of preparing a comprehensive bibliography, or compiling a collection of principal works for inclusion in the data bank, do not convert the Staff into a party on a level with Participants. The Participants are offered an opportunity to state their views affirmatively on waste management, and to file cross-statements discussing statements filed by other Participants. This does not require the Staff to state a position, make a case, sustain a burden of proof, or otherwise be subjected to adversarial conduct.

The Participants will have the benefit of a statement of position by DOE at an early date, which should enable them to focus their statements on significant facts and conclusions. DOE is without question the lead federal agency on waste management, which has produced a substantial data base and extensive studies and analyses of these complex issues. DOE here has forthrightly stated that there is reasonable assurance that nuclear waste from licensed facilities (1) can be safely disposed of off-site, (2) either such disposal or alternatively off-site

---

<sup>11/</sup>Tr. 97, 101.

storage will be available before the expiration of certain operating licenses, and (3) nuclear waste can be stored safely until it is disposed of ultimately.<sup>12/</sup> DOE has further agreed to file its statement of position first in this proceeding, and it has stated that such a 400-500 page initial statement will be filed by April 15, 1980.<sup>13/</sup> Accordingly, the Participants will have everything they contend is needed from the Staff, in a more complete form from DOE.

The State of Wisconsin has filed a motion for clarification and bifurcation. Clarification of the Staff's role is requested, for reasons similar to those advanced by CEC. This motion is denied for the same reasons. Bifurcation of the proceeding to require either outside experts or the Staff to submit testimony first is also contrary to the procedure established by the Commission, and the motion is denied.

UWG-EEI raised two questions regarding the scope of issues. DOE has indicated that it intends to deal only with the disposal of spent fuel in this proceeding, and that waste from reprocessing should not be considered. UWG-EEI objected to this limitation. The position of DOE is sustained in this regard, in light of the Commission's suspension of its further consideration of reprocessing spent fuel from commercial reactors, In the Matter of Generic Environmental Statement on Mixed Oxide Fuel, Docket No. RM-50-5, 42 FR 65334 (1977). This followed the decision of the President on April 7, 1977, to defer indefinitely all civilian reprocessing of spent fuel. In addition, DOE could not have its statement of position ready for filing by April 15, 1980 if it were required to consider the disposal of waste from reprocessing.

---

<sup>12/</sup>Tr. 61. See also DOE's Notice of Intent to be a Full Participant, pp. 1-2.

<sup>13/</sup>Tr. 105, 107.

The second point raised by UMG-EEI deals with the position taken by the Staff that this proceeding is concerned solely with high-level waste, and low-level waste and uranium mill tailings are not within its scope (Tr. 114). We agree that this proceeding is concerned only with the management of high-level waste. That is the issue which the court focused on when these proceedings were remanded for NRC consideration.<sup>14/</sup> It is also the sole issue involved in the Commission's decision to reassess its 1977 findings (42 FR 34391), which dealt specifically with "permanent disposal of high-level radioactive wastes" generated by commercial reactors.<sup>15/</sup> There is no necessity to explore here other wastes which have been or are being considered by the Commission in other proceedings.

This rulemaking proceeding does not involve a major federal action having a significant impact on the environment, and consequently an environmental impact statement is not required by NEPA.<sup>16/</sup> The reracking of spent fuel pools in various nuclear reactors is also beyond the scope of this proceeding.<sup>17/</sup>

The Commission has determined by its Order dated January 29, 1980, that discovery will not be permitted during the first phase of this proceeding. However, if any Participant has questions regarding the DOE statement of position which genuinely require clarification, as opposed to covert discovery, such

---

<sup>14/</sup> State of Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979).

<sup>15/</sup> Tr. 114, 120-122.

<sup>16/</sup> Tr. 123-124.

<sup>17/</sup> Tr. 125.

questions may be addressed to the Presiding Officer for his further consideration.<sup>18/</sup>

The safety of transportation of spent nuclear fuel is beyond the scope of this proceeding, for the same reasons governing the exclusion of low-level waste and uranium mill tailings, supra. This transportation issue has been and is being extensively considered in other proceedings.<sup>19/</sup>

The following schedule shall govern the further conduct of the first phase of this proceeding:

The DOE in cooperation with the NRC Staff shall establish within a reasonable time regional data banks in the 10 federal regions of the country. All Participants shall forthwith commence the preparation of their statements of position, which will be their principal contribution to the waste confidence proceeding.

By April 15, 1980, DOE shall file and serve its statement of position.

By June 9, 1980, all Participants shall file their statements of position.

By August 11, 1980, all Participants shall file their cross-statements regarding statements of others.

---


<sup>18/</sup>Tr. 155.

<sup>19/</sup>Tr. 125-132.

By September 10, 1980, all Participants shall file their suggestions as to further proceedings, additional areas of inquiry or further data or studies.

Thereafter the Commission with the assistance of the Presiding Officer will issue a second prehearing order, setting out the procedures to be followed for the remainder of the hearing.

It is so ordered.

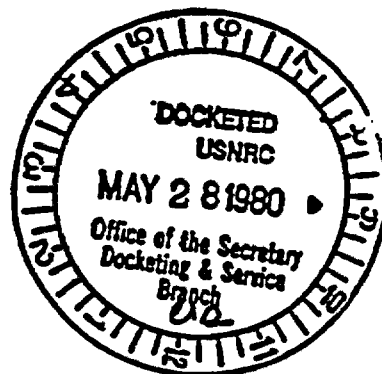
  
Marshall E. Miller  
Marshall E. Miller  
Presiding Officer

Dated at Bethesda, Maryland  
this 1st day of February 1980.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

John F. Ahearne, Chairman  
Victor Gilinsky  
Richard T. Kennedy  
Joseph M. Hendrie  
Peter A. Bradford



In the Matter of

PROPOSED RULEMAKING ON THE STORAGE AND  
DISPOSAL OF NUCLEAR WASTE

(Waste Confidence Rulemaking)

PR-50, -51  
(44 Fed. Reg. 61372)

MEMORANDUM AND ORDER

In the period following issuance of the Presiding Officer's Prehearing Conference Order on February 1, 1980, the Commission received two motions from participants requesting that the NRC staff be assigned an explicit role with regard to assuring the development of an adequate record in this proceeding. The Natural Resources Defense Council (NRDC) in a motion dated February 14, 1980, contended that the Commission cannot be assured of a complete record in this proceeding unless the staff solicits the views of technical experts. <sup>1/</sup> The California Energy Commission (CEC) in a motion dated February 20, 1980, suggested that the staff should actively seek out a broad spectrum of views by empaneling a body of

---

<sup>1/</sup> This motion was supported by the States of Wisconsin, Ohio, Illinois, and New Hampshire. It is opposed by the Utility Waste Management Group and the Edison Electric Institute.

8006020477  
4pp.



experts to mediate the technical issues presented by this rulemaking. 2/

The Commission has directed its Office of Policy Evaluation to form a working group to advise the Commission regarding the adequacy of the record to be compiled in this proceeding. The working group is composed of personnel from the Offices of Policy Evaluation, the General Counsel and the Executive Legal Director, and is provided with technical support by the program offices of Nuclear Materials Safety and Safeguards, Research, and Standards Development. 3/ The working group will review the participants' submissions and, after the cross-statements are filed, will identify issues in controversy and any areas in which additional information is needed. Depending upon the procedures adopted at that point, the working group will assist in obtaining this further information by: (1) preparing questions to be asked of participants by the Presiding Officer or the Commission; or (2) suggesting methods of obtaining this information by other means, including soliciting information from other sources.

---

2/ CEC also suggested that the Commission or a committee composed of at least two Commissioners should conduct this proceeding. As the Presiding Officer noted in his Order of February 1, 1980, the Commission carefully considered the procedure it wished to follow and decided to employ hybrid rulemaking procedures and to designate a Presiding Officer who will monitor the early stages of the proceeding and assist the Commission in conducting the later stages of the proceeding. We believe that it would be premature at this preliminary stage of the proceeding to determine what procedures would be appropriate for the later stages of this proceeding. Accordingly, after the cross-statements are filed, CEC may again present this suggestion if it believes that this procedure would be appropriate for conducting the next stage of this proceeding.

3/ The working group may also engage the services of outside experts if it determines that such consultation is needed.

Following the last phase of the hearing, the working group will prepare a summary of the record, identify the key issues and controversies, and indicate how their resolution could affect the Commission's decision. In addition, the Presiding Officer may at any time during the proceeding identify areas in which the working group could provide assistance. The Commission will consider the Presiding Officer's requests and may suitably modify the extent of the working group's participation.

The Commission believes that at the present stage of the proceeding the establishment of this working group adequately addresses the concerns expressed in the motions referred to above. Many issues may be resolved by the participants' position papers and cross-statements, thus obviating the need for additional expert opinions on those issues. Accordingly, the Commission believes it would be premature to solicit expert opinion at this time. After these documents have been filed, the working group will be able to identify the important and controversial issues and then to determine whether the special participation by experts as urged by NRDC and CEC would materially clarify particular issues or disputed evidence. 4/

Insofar as the NRDC and CEC motions request Commission action other than that described in this Memorandum and Order, those motions are denied.


Commissioner Bradford would have preferred that the staff views on the substantive issues be subject to public scrutiny. He also would have preferred that the Commission undertake the service of all filings in this case.

---

4/ To a large extent, the nature of participation by non-participant experts, should it be found necessary, will be determined by the issues they would address. Thus, CEC's suggestion for technical mediation is also premature at this time.

It is so ORDERED.

For the Commission



SAMUEL J. CHILK  
Secretary of the Commission

Dated at Washington, D.C.,  
this 28th day of May, 1980.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



COMMISSIONERS:

John F. Ahearne, Chairman  
Victor Gilinsky  
Joseph H. Hendrie  
Peter A. Bradford

SERVED

JAN 16 1981

In the Matter of

PROPOSED RULEMAKING ON THE STORAGE  
AND DISPOSAL OF NUCLEAR WASTE

(Waste Confidence Rulemaking)

PR-50, -51  
(44 Fed. Reg. 61372)

MEMORANDUM AND ORDER

Now that the participants' statements and cross-statements have been received, the opening stage of this proceeding as envisioned in our October 25, 1979 Notice of Proposed Rulemaking, 44 Fed. Reg. 61372, has been completed. Pursuant to the Presiding Officer's order of May 29, 1980 the participants have filed suggestions as to the nature and scope of further proceedings. Additional input to the decision on further proceedings will come from the Commission's working group, which in accordance with the Commission's Memorandum and Order of May 28, 1980 is expected to identify issues in controversy and areas in which additional information may be needed. The May 28, 1980 Memorandum and Order also indicated that the working group would submit a summary of the record "following the last phase of the hearing." The Commission has been informed, however, that to accompany its identification of issues the working group is preparing to submit a summary of the

8801220005  
6PP

record so far compiled. It appears that this early availability of the summary will be advantageous.

The content of the record so far compiled is of course a major consideration affecting the choice of further proceedings. Accordingly, the Commission finds well-taken those suggestions which urge that a firm decision on further proceedings should follow rather than precede the Commission's opportunity to review the working groups's summary of the record and identification of issues. A number of the suggestions for further proceedings have also urged that the Commission obtain participants' comments on the working group's report in order to provide further assurance that the summary and identification of issues accurately represent the present state of the record. The Commission believes that concise comments, limited to pointing out significant gaps or possible errors in the summary and identification of issues, can contribute to the usefulness of the working group's product.

Accordingly, the Commission has directed that the working group shall no later than January 29, 1981 file with the Commission and the Presiding Officer and have served on all participants a report which summarizes the record, identifies key issues and controversies, and indicates insofar as possible at this stage of the proceeding how their resolution could affect the Commission's decision. However, the working group shall not make recommendations or express views regarding the conclusions which the Commission should reach on the issues.

Within 35 days from the date the working group's report is filed, participants may submit to the Presiding Officer comments regarding the accuracy

of the working group's summary of the record. Participants may also comment on whether the working group's identification and description of the issues is accurate and complete. Participants may indicate their views on the relative importance of the issues identified. To be of greatest use to the Commission comments should be kept reasonably brief and to the point. Following the close of the comment period, the Presiding Officer shall promptly transmit these comments to the Commission, together with his recommendations concerning further proceedings.

Certain of the participants have filed motions objecting to the working group's use of outside consultants to assist in preparing its summary of the record and identification of issues.<sup>1/</sup> Some of the motions regarded as unduly "secret" the contract-awarding procedures followed by the staff. In response to these motions the Commission notes first of all that the May 28, 1980 Memorandum and Order put the participants explicitly on notice (note 3) that the working group was authorized "to engage the services of outside experts if it determines that such consultation is needed." By the nature of the working group's initial assignment the Commission would expect the group itself to be the best judge of the scope and type of outside assistance, if any, which might be needed to perform the summarizing and issue-identification

---

<sup>1/</sup> Objections were filed by the United Nuclear Waste Management Group -- Edison Electric Institute (UNWMI), the Natural Resources Defense Council--New England Coalition on Nuclear Pollution (NRDC-NECNP), the State of New York, the State of Ohio, the California Energy Commission and California Department of Conservation, the State of Minnesota, Environmental Coalition on Nuclear Power, Marvin Lewis, Safe Haven, Ltd., and John O'Neill II.

tasks set out by the Commission's order.<sup>2/</sup> The Commission notes that the working group's contracting activities have not been "secret" but have followed approved contracting procedures in full accord with applicable statutes and regulations.<sup>3/</sup> The only services engaged so far have been largely for the purpose of making the summaries more readable to the public. The scope of

---

<sup>2/</sup> The Working Group has been involved in three separate procurement actions during the course of this proceeding. First, the Working Group has obtained the services of Editorial Consultants, Inc. to provide technical editing and writing assistance. This contract was initiated on September 24, 1980 and terminated on December 10, 1980. A second contract was awarded to Teknekron, Inc. on October 27, 1980 and was completed on November 5, 1980. The purpose of this contract was for the contractor "to improve the quality of the working group's summaries" of the participants' statements of position. The Working Group explicitly stated that "the contractor will avoid interpreting, paraphrasing, or otherwise modifying the conclusions made by the participants on the issues." The final procurement action (Request for Quotation (RFQ) No. RS-NMS-81-032) is entitled "Technical Support for the Confidence Rule-making Proceeding." The purpose of this contract is for the contractor to review the participants' submittals and to assist the Working Group in its function of identifying issues and assuring completeness of the record by summarizing the record, describing issues identified by the participants, and identifying technical errors and omissions or issues where additional information is necessary. Sixty percent of effort under this contract would be reserved for any support required during the second phase of the proceeding. Proposals received on this RFQ have been evaluated by the Working Group, but no contract award has yet been made for this RFQ.

<sup>3/</sup> For major contractual actions (i.e., contract awards greater than \$10,000), the NRC routinely has published in the Commerce Business Daily a summary of the request for quotation. This is required by the Federal Procurement Regulations. In the instance involving RFQ No. RS-NMS-81-032, the notice was published in the Commerce Business Daily on October 22, 1980 and contained a partial list of offerors who were solicited. After a contract award is made, a full list of offerors in any procurement action is normally obtainable under the Freedom of Information Act (FOIA). Prior to awarding the contract, however, the Commission does not release the identity of firms who have submitted bids, since release of this information could interfere with the competitive process. The offerors are being evaluated in accordance with applicable law and procedures, including the NRC Organizational Conflict of Interest Rule, 42 CFR 20-1.54.

these two contracts was too small to require publication, but no attempt has been made to conceal them from the participants.

Some of these motions also objected to the working group's providing an "evaluation" of the record or in effect performing any task involving expressions of judgment on the content of the record. The working group's mission to identify "key" issues requires the group to exercise a degree of judgment in addition to performing "ministerial" duties. Even the preparation of a summary of the record clearly involves some selectivity and discretion. In managing a record of this size the Commission finds it both necessary and reasonable that evaluative functions at this level be performed by the working group rather than the Commissioners themselves. At the same time, the Commission has made clear that the working group's technical evaluation of the record to determine completeness is not to include a judgment on how the evidence should be weighted in resolving serious controversies. That judgment the Commission has reserved for itself.

The Commission recognizes the participants' concern that the summary and identification of issues should fairly represent the record. The Commission believes that the opportunity for participants to comment on the working group's report provides adequate assurance that any significant inaccuracies or biases, whatever their source, will not go unremarked. Accordingly, the Commission is not persuaded that the working group's use of outside consultants poses a threat to the fairness of this proceeding. The Commission

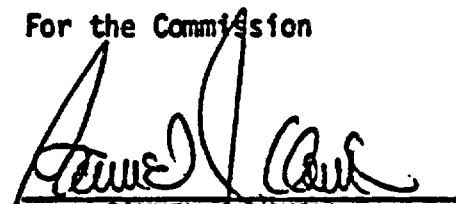


therefore denies motions to the effect that consulting contracts should be withdrawn.

It is so ORDERED.



For the Commission

  
SAMUEL J. CHILK  
Secretary of the Commission

Dated at Washington, DC,  
this 16<sup>th</sup> day of January, 1981.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE PRESIDING OFFICER

In the Matter of

PROPOSED RULEMAKING ON THE STORAGE  
AND DISPOSAL OF NUCLEAR WASTE

(Waste Confidence Rulemaking)

PR-50, 51 (44 Fed. Reg. 61372)

ORDER DENYING MOTION TO REQUIRE  
DETAILED CONSIDERATION OF WASTES RESULTING  
FROM THREE MILE ISLAND ACCIDENT  
(February 20, 1981)

On February 9, 1981, the Environmental Coalition on Nuclear Power (ECNP) and the individual participant Marvin I. Lewis filed a motion to include in this rulemaking proceeding a full consideration of the disposition and storage of high level radioactive wastes and damaged fuel generated by the TMI-2 accident, or generated in the course of cleanup of TMI-2.<sup>1/</sup> The Movants requested the Commission to direct the Presiding Officer and the NRC Staff to supplement the record with full information relating to such wastes, and to require the Department of Energy to supplement the record with full information and analysis pertaining to the storage and disposal of TMI accident-related radioactive wastes. It was also moved that all participants be given an extension of time to review this additional material, to amend their previous statements and cross-statements of position, and to respond to the comments of other participants. A response opposing this motion was filed by the United States Department of Energy (DOE) on February 17, 1981.

<sup>1/</sup> This refers to the accident of March 28, 1979, at the Three Mile Island Nuclear Station, Unit 2.

8102250068  
7PP

Although this motion purports to be filed before the Commission rather than the Presiding Officer, the initial response to the motion will be made by the latter. The procedure originally adopted by the Commission provided that "participants shall be supervised by" a Presiding Officer.<sup>2/</sup> It was further stated that "That officer's principal responsibility will be to monitor the early stages of the proceeding for the Commission, and to assist the Commission in conducting the later portions."<sup>3/</sup> In accordance with this responsibility to monitor the early stages of this proceeding, the Presiding Officer in the past has issued rulings on proposals by participants to alter the scope of the proceeding.<sup>4/</sup> That practice will be continued here, and the motion will be denied.

As Movants state, they have previously raised the issue of permanent disposal of severely damaged fuel caused by the accident at TMI-2.<sup>5/</sup> This identification by ECNP of a potential issue concerning the capability of the DOE waste management program to handle safely severely damaged fuel from major reactor accidents, was a useful contribution to this proceeding. That issue was subsequently considered by the Working Group, which in identifying areas where additional information might be needed, stated:

---

<sup>2/</sup> Notice of Proposed Rulemaking, 44 Fed. Reg. 61372 at 61374 (October 25, 1979).

<sup>3/</sup> Id.

<sup>4/</sup> First Prehearing Conference Order, dated February 1, 1980, pp. 6-11; Order Denying Motions to Strike Filings of SE<sub>2</sub>, dated February 4, 1981.

<sup>5/</sup> Statement of Position of ECNP, pp. 2, 4. See also Cross-Statement of ECNP, pp. 2, 8; Suggestions of ECNP as to the Nature and Scope of Further Proceedings, pp. 1-2.

"Another potential issue raised by participants and considered by the Working Group is the capability of the DOE waste program to safely store and dispose of damaged spent fuel including that which has been severely damaged in major reactor accidents (e.g., the core from TMI-type accidents). The spectrum of fuel damage analyzed in the DOE Position Statement stops short of considering severely damaged fuel. The Working Group recognizes that management and disposal of severely damaged fuel might present unique problems.

"Although it is assumed for purposes of this proceeding that the spent fuel to be stored and disposed of has not been severely damaged in the course of its use in power reactors, i.e., the condition of the spent fuel is essentially the same as all spent fuel presently being stored at reactor sites, DOE states that only spent fuel meeting predetermined acceptance criteria will be accepted in the repository. There is no description of the final disposition of spent fuel which does not meet the criteria."<sup>6/</sup>

This is a generic rulemaking proceeding for the Commission to reassess its degree of confidence that radioactive wastes produced by nuclear facilities will be safely disposed of.<sup>7/</sup> Hybrid rulemaking procedures are to be utilized rather than adversarial adjudicatory procedures. Accordingly, the nature of severely damaged fuel at TMI-2 is properly the subject of generic consideration in this proceeding.

The high specific activity wastes resulting from the cleanup operations at TMI-2, as well as spent fuel in the damaged core and other wastes having some characteristics very similar to high-level waste, help to establish the parameters of nuclear waste to be considered in this proceeding. It is anticipated that the Working Group and the Presiding Officer will take into consideration the comments of participants such as ECNP regarding identification

---

<sup>6/</sup>The Report of the Working Group on the Proposed Rulemaking on the Storage and Disposal of Nuclear Wastes, Part IV, Technical Issues for Spent Fuel Storage, p. 28 (January 29, 1981).

<sup>7/</sup>44 Fed. Reg. 61372-73.

and description of issues in making recommendations to the Commission concerning further proceedings.<sup>8/</sup> It is also expected that consideration will be given by the Commission to the best approach to obtain additional information where it deems additional information to be required.

It is apparent from the letter of Chairman Ahearne cited by Movants,<sup>9/</sup> that the question of handling and processing unusual nuclear wastes at the TMI site is receiving careful attention at the highest levels of NRC. It is also apparent that since ECNP and some of its principals are intervening parties to pending TMI proceedings,<sup>10/</sup> they thus have had access to such information as would be relevant to this rulemaking proceeding. Accordingly, the management and disposal of high specific activity wastes and of severely damaged fuel from major reactor accidents (such as TMI-2), have been and will continue to be given careful generic consideration in this waste confidence proceeding.

However, the pending motion seeks to compel the Commission to go further by now interjecting a specific and very detailed review of TMI proceedings into this proposed rulemaking. It would improperly expand the scope of this proceeding and unduly delay it. All participants have already had ample opportunity to address this and other issues if they wished, as the TMI-2 contentions have been repeatedly asserted here by ECNP, commencing with its

---

<sup>8/</sup> Commission's Memorandum and Order, entered January 16, 1981, pp. 1-3.

<sup>9/</sup> Letter of October 20, 1980, from Chairman John F. Ahearne to Secretary of the Department of Energy, Charles W. Duncan.

<sup>10/</sup> Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit 1, Restart Proceedings) Docket No. 50-289 (Restart); Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit 2, Operating License Amendments), Docket No. 50-320-OLA.

original statement of position and continuing through its cross-statement and suggestions for further proceedings. An additional, extensive and detailed consideration of TMI wastes is unnecessary for a generic rulemaking proceeding. The Movants can participate in a thorough review of TMI-generated waste problems by their interventions in those proceedings, without unnecessarily expanding the scope of the instant proceeding.

The relief requested by the instant motion reflects a continuing misunderstanding or misinterpretation of the nature of this waste confidence proceeding and of the proper role of participants therein. The Movants seek by motion to compel the Presiding Officer (and the NRC Staff) immediately to "reopen the record"; to "supplement the record fully" with a large volume of information and data regarding the ultimate disposal of TMI-related wastes and damaged fuel remaining in its pressure vessel; to permit all participants to file more comments, amended statements and cross-statements; and to extend the 35-day response period to the Working Group's summaries and identification of issues. These requests are unreasonable and will be denied.

In the first place, the record has not been closed, and hence need not be reopened for any proper purpose. This is an on-going proceeding which continues to generate information for ultimate decision-making by the Commission. Next, the Working Group's summaries, identification of issues and suggestions for the development of additional information are part of the record so far compiled. So are the responses thereto made by the participants within the established comment period. In addition, following the close of the comment period the Presiding Officer will "promptly transmit

those comments to the Commission, together with his recommendations concerning further proceeding.<sup>11/</sup> Thus, the nature of TMI nuclear wastes is now pending as a potential issue which will be resolved by the Commission itself, in accordance with the process described above.

However, ECNP seeks by this motion to short-circuit established procedures and to compel the Presiding Officer and others to decide immediately in its favor on these issues as a matter of law. No party has a right to foreclosure the deliberate and sequential consideration of important issues by those persons or bodies which are given that responsibility by the Commission's procedures. An attempt to accomplish this result by motion would constitute a distortion if not a misuse of motion practice, and will not be permitted.

An additional aspect of motion practice employed by ECNP will be considered at this time. Along with its cross-statement, ECNP included an undated paper entitled "Motion Filed Consequent Upon And As Part Of The Cross-Statement of ECNP." This paper asked for the immediate suspension of all further proceedings because the statements filed by numerous parties "have raised indisputable areas of deficiency, uncertainty, lack of necessary and sufficient information, and procedural voids." Although denominated a motion, this paper was considered to be merely ECNP's suggestions concerning procedures for the remainder of the proceeding. As such, these suggestions would be considered together with the differing suggestions of all other participants.<sup>12/</sup> Obviously, ECNP has no right to impose its conclusions upon

---

<sup>11/</sup> Commission's Memorandum and Order of January 16, 1981.

<sup>12/</sup> Order of Presiding Officer dated May 29, 1980.

everyone else simply by couching them in the form of a motion. However, if ECNP insists on having this filing treated as a motion, it is summarily denied.

ORDER

For all the foregoing reasons, it is, this 20th day of February, 1981

ORDERED

That the Motion of Environmental Coalition on Nuclear Power and Marvin I. Lewis to Commissioners to Include in This Proceeding a Consideration of High Level Radioactive Wastes Resultant From the Three Mile Island Accident, be and the same is hereby DENIED.

*Marshall E. Miller*  
Marshall E. Miller  
Presiding Officer