

UNITED STATES NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No. 52-016

Calvert Cliffs-3 Nuclear Power Plant
Combined Construction and License Application

**NEW CONTENTION BY JOINT PETITIONERS BASED ON INFORMATION
NOT PREVIOUSLY AVAILABLE**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(f)(2), joint petitioners hereby submit a new contention challenging the adequacy of the application by Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC to build and operate a new nuclear power plant on the Calvert Cliffs, Maryland site. This contention is based on comments that Nuclear Information and Resource Service, Beyond Nuclear and Public Citizen (NIRS, et al) submitted on February 6, 2009, regarding the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") proposed Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (October 9, 2008) ("Proposed Waste Confidence Decision"); and its proposed rule entitled: Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (October 9, 2008) ("Proposed Temporary Storage Rule"). *See* the attached Comments by Texans for a Sound Energy Policy et al. Regarding NRC's Proposed Waste Confidence Decision Update and Proposed Rule Regarding Consideration of

Environmental Impacts Of Temporary Storage Of Spent Fuel After Cessation Of Reactor Operations (February 6, 2009) (“Comments”).

Our contention seeks to enforce, in this specific proceeding, the NRC’s commitment that “it 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.” Proposed Waste Confidence Decision, 73 Fed. Reg. at 59,552 (citing 42 Fed. Reg. 34,391, 34,393 (July 5, 1977); *Natural Resources Defense Council v. NRC*, 582 F.2d 166 (2d Cir. 1978)).

The contention also seeks to enforce the requirement of the National Environmental Policy Act (“NEPA”) that generic determinations under NEPA must be applied to individual licensing decisions and must be adequate to justify those individual decisions.

As the Supreme Court held in *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983):

The key requirement of NEPA . . . is that the agency consider and disclose the actual environmental effects in a manner that will ensure that the overall process, including both the generic rulemaking *and the individual proceedings*, brings those effects to bear on the decisions to take *particular actions that significantly affect the environment*.

462 U.S. at 96 (emphasis added). *See also State of Minnesota v. U.S. Nuclear Regulatory Commission*, 602 F.2d 412, 416 (D.C. Cir. 1979) (agreeing with the Commission 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*”) (emphasis added). Indeed, the Commission itself has stated that it intends to use the Proposed Waste Confidence Decision to “enhance the efficiency of combined license proceedings for applications for nuclear power plants anticipated in the near future” and “assure that [the NRC’s] Waste Confidence findings are up to date.”

73 Fed. Reg. at 59,551. *See also* Proposed Temporary Storage Rule, 73 Fed. Reg. at 59,547 (“The proposed revision reflects findings that the Commission has reached in the ‘Waste Confidence’ decision update . . .”) By placing the exact same concerns raised in our Comments before the ASLB in this contention, we therefore seek to ensure, as required by NEPA and *Baltimore Gas and Electric Co.*, that whatever decisions the NRC reaches in response to our Comments on the Proposed Waste Confidence Decision and Proposed Temporary Storage Rule will be applied in a timely way to the licensing decision for the proposed Calvert Cliffs-3 nuclear power plant, *i.e.*, before that plant is licensed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (holding that environmental concerns must be considered *before* an action is taken).

Joint petitioners recognize that the issues raised by our Comments – and therefore by this contention -- are generic in nature. Therefore we do not seek to litigate them in this individual proceeding. Instead, the contention should be admitted and held in abeyance in order to avoid the necessity of a premature judicial appeal if this case should conclude before the NRC has completed the rulemaking proceeding.¹ If the ASLB does not consider that it has the authority to admit the contention because it presents a challenge to a generic rule, we request the ASLB to refer the contention to the Commission.

II. CONTENTION 8

A. Statement of the Issue

¹ Under the Hobbs Act, 28 U.S.C. § 2344, we may take a judicial appeal as of right only if we do so within 60 days of a decision ending our participation in this case. If we should be dismissed from this proceeding before the NRC has completed the Waste Confidence Decision and Temporary Spent Fuel Storage rulemaking proceedings, we will be required to appeal the substantive issues raised by our contention before the issues are ripe.

Neither the Proposed Waste Confidence Decision nor the Proposed Spent Fuel Storage Rule satisfies the requirements of NEPA or the Atomic Energy Act. Therefore they fail to provide adequate support for the Applicant's Environmental Report or for an Environmental Impact Statement in this particular licensing case. The deficiencies in the Waste Confidence Rule also fatally undermine the adequacy of the NRC's findings in Table S-3 of 10 C.F.R. § 51.51 to satisfy NEPA. Unless and until the NRC remedies the deficiencies in the Waste Confidence Rule, Table S-3, and the Proposed Spent Fuel Storage Rule, the NRC has no lawful basis to issue a license for the proposed Calvert Cliffs-3 nuclear power plant.

B. Statement of Issues of Law and Fact to Be Raised

This contention is intended to be identical to the Comments that NIRS, et al. and other groups filed with the NRC on February 6, 2009. The legal and factual issues raised contention can be summarized as follows:

The NRC has no technical basis for a finding of reasonable confidence that spent fuel can and will be safely disposed of at some time in the future. Therefore, under the Commission's own standard that "it 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 Commission must refuse to issue new licenses or renew existing licenses for nuclear power plants. 73 Fed. Reg. at 59,552 (citing 42 Fed. Reg. 34,391, 34,393 (July 5, 1977); *Natural Resources Defense Council v. NRC*, 582 F.2d 166 (2d Cir. 1978)).

The NRC's lack of a basis for any finding of confidence in the technical feasibility of a repository also fatally undermines Table S-3 of the NRC's Uranium Fuel Cycle Rule, which depends on the assumption that radioactive releases from a repository

will be zero. Final Rule, Licensing and Regulatory Policy and Procedures for Environmental Protection; Uranium Fuel Cycle Impacts From Spent Fuel Reprocessing and Radioactive Waste Management, 44 Fed. Reg. 45,362 (August 12, 1979). Based on its own statement in the 1990 Waste Confidence rulemaking proceeding, the NRC, having arrived at a stage where any basis that it may have had for confidence in the safe disposal of spent fuel has clearly evaporated, must revisit the basis for Table S-3. *See* Review and Final Revision of Waste Confidence Decision, 55 Fed. Reg. 38,474, 38,491 (September 18, 1990) (“Unless the Commission, in a future review of the Waste Confidence decision, finds that it no longer has confidence in the technical feasibility of disposal in a mined geologic repository, the Commission will not consider it necessary to review the S-3 rule when it reexamines its Waste Confidence findings in the future.”) Certainly, the Commission no longer has any basis whatsoever for the principal assumption underlying Table S-3, which is that spent fuel can be safely disposed of in a repository, having repudiated that assumption in the proposed Waste Confidence Decision. 73 Fed. Reg. at 59,555. *See also* IEER Comments.

In both the proposed Waste Confidence Decision and the Proposed Temporary Storage Rule, the NRC continues to deny that temporary spent fuel storage poses significant environmental risks, ignoring a wealth of government reports showing that high-density fuel storage pools are vulnerable to catastrophic fires that may be caused by accidents or intentional attacks. Instead of confronting this information in a detailed EIS, the NRC calls it a security matter and shrouds it in an unjustifiably broad mantle of security-related secrecy. But the NRC is not entitled to use security concerns as an

excuse for failing to comply with NEPA. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1034-35 (9th Cir. 2006).

In making a finding of no significant impact (“FONSI”) with respect to spent fuel storage, the NRC has not even attempted to comply with the NRC’s procedural requirements for a FONSI, such as preparing an environmental assessment (“EA”) that addresses the purpose of and need for the proposed action and evaluates alternatives to the proposed action. The NRC also violates NEPA by failing to identify the documents on which it relies for its decision, and by failing to disclose all portions of its decision-making documents that are non-exempt under the Freedom of Information Act (“FOIA”). *San Luis Obispo Mothers for Peace* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1, 15-17 (2008) (citing *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981)).

Perhaps most importantly, the NRC fails to explain why it is justified in continuing to allow licensees to use dangerous high-density fuel storage pools to store spent fuel under protective measures whose adequacy is suspect but cannot be publicly verified, when it would be possible to virtually eliminate the danger by using low-density pool storage and hardened dry storage of spent fuel. The NRC’s secrecy is unnecessary, corrosive to the NRC’s system of accountability through open decision-making, and potentially dangerous because the decision-making process was not only secret but was restricted to the NRC and a limited group of individuals with a vested interest in minimizing the cost of mitigative measures, *i.e.*, reactor licensees.

The Proposed Waste Confidence Rule and the Proposed Temporary Storage Rule are utterly inadequate to satisfy the requirements of the AEA and NEPA for a generic

licensing decision for new nuclear power plants. Any generic decision to allow the creation of additional spent reactor fuel and other radioactive waste associated with the uranium fuel cycle must be accompanied by thorough, supported, and well-documented safety findings; and it must also be accompanied by an environmental impact statement (“EIS”) that fully assesses the environmental impacts of the uranium cycle, including health and environmental impacts and costs, and that examines a reasonable array of alternatives, including the alternative of not producing any additional radioactive waste.

C. Brief Explanation of the Basis for the Contention

This contention is based on the legal and technical criticisms of the Proposed Waste Confidence Decision and the Proposed Temporary Storage Rule that are contained in the following documents which are attached to the contention:

- the Comments submitted by NIRS, et al. and other organizations on February 6, 2009;
- attached to the Comments, the expert declaration of Dr. Arjun Makhijani, President of the Institute for Energy and Environmental Research (“IEER”), to which in turn is attached his curriculum vitae and expert report entitled “Comments of the Institute for Energy and Environmental Research on the U.S. Nuclear Regulatory Commission’s Proposed Waste Confidence Rule Update and Proposed Rule Regarding Environmental Impacts of Temporary Spent Fuel Storage” (February 6, 2009) (“IEER Comments”);
- also attached to the Comments, the expert declaration of Dr. Gordon R. Thompson, Executive Director of the Institute for Resource and Security Studies (“IRSS”), to which in turn is attached his curriculum vitae and expert report

entitled “Environmental Impacts of Storing Spent Fuel and High-Level Waste from Commercial Nuclear Reactors: A Critique of NRC’s Waste Confidence Decision and Environmental Impact Determination” (February 6, 2009) (“Thompson Report”).

D. Demonstration That the Issue Raised by the Contention is Within the Scope of the Proceeding and Material to the Findings the NRC Must Make to Support its Licensing Decision.

Before licensing the proposed Calvert Cliffs-3 nuclear power plant, the NRC must make a determination under the Atomic Energy Act that it has a reasonable assurance that spent fuel can be safely stored and disposed of. *See* Comments at pages 7-8. Under NEPA, the NRC must also evaluate the environmental impacts of spent fuel storage and disposal. *Id.* While the NRC has chosen to make these determinations generically, in the Proposed Waste Confidence Decision and the Proposed Temporary Storage Rule, those generic determinations must be adequate to support any individual licensing decision. *Id.* Therefore the contention is within the scope of this proceeding and material to the findings the NRC must make to support the requested issuance of a license.

E. Concise Statement of Facts or Expert Opinion Relied on to Show the Existence of a Genuine Dispute with the Applicant and the NRC Regarding the Adequacy of the License Application

In support of this contention, joint petitioners rely on the facts, expert opinion, and documentary resources set forth in the attached IEER Comments and Thompson Report. The IEER Comments and Thompson Report contain sufficient information to show that joint petitioners have a genuine dispute with the Applicant and with the NRC regarding the safety and environmental impacts of spent fuel storage and disposal, and whether the NRC has complied with the requirements of the Atomic Energy Act and

NEPA in the Proposed Waste Confidence Decision and the Proposed Spent Fuel Storage Rule.

III. SATISFACTION OF 10 C.F.R. § 2.309(f)(2).

This contention satisfies the requirements of 10 C.F.R. § 2.309(f)(2) in the following respects:

First, the information on which the contention is based, *i.e.*, the legal and technical analyses of the Proposed Confidence Decision and the Proposed Temporary Storage Rule, were not available to joint petitioners until February 6, 2009, when the Comments were finalized, presented to NIRS, et al. for concurrence, and submitted to the NRC.

Second, the information upon which the new contention is based is materially different than information that was previously available. While some of the information presented in this contention may have been publicly available, it was not integrated into a single document that presented a comprehensive and integrated analysis of the Waste Confidence Rule and the related Table S-3 and Proposed Temporary Storage Rule. The reason for this is that the NRC has not offered an opportunity to comment on the Waste Confidence rule or its Finding of No Significant Impact regarding temporary spent fuel storage in approximately ten years.

Third, this contention has been submitted in a timely fashion based on the availability of the information contained in the Comments and supporting IEER Comments and Thompson Report. As discussed above, those documents were not available to joint petitioners in final form until the day they were submitted to the NRC, February 6, 2009.

III. CONCLUSION

For the foregoing reasons, the contention should be admitted.

Respectfully submitted,

_____/s/_____

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March 6, 2009

CERTIFICATE OF SERVICE

It is my understanding that all on the Calvert Cliffs-3 service list are receiving this motion through the submission I am making on March 6, 2009 via the EIE system.

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This 6th day of March 2009.

_____/s/_____

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