

RULEMAKING ISSUE MEETING

June 15, 2009

SECY-09-0090

FOR: The Commissioners

FROM: Stephen G. Burns
General Counsel

SUBJECT: FINAL UPDATE OF THE COMMISSION'S WASTE CONFIDENCE DECISION

PURPOSE:

To provide an update of the Commission's 1990 Waste Confidence findings and a draft final rule amending 10 C.F.R. § 51.23(a)

BACKGROUND:

On April 18, 2007, the Combined License Review Task Force (Task Force) published the "Report of the Combined License Review Task Force," COMDEK-07-0001/COMJSM-07-0001 (ML071090162), which recommended, *inter alia*, that the Commission consider rulemaking to resolve issues that are generic to combined license applications. Task Force Report at 4. On June 22, 2007, the Commission issued a Staff Requirements Memorandum (SRM) on the Report's recommendations that approved rulemaking to resolve generic issues associated with combined license applications. Staff Requirements – COMDEK-07-0001/COMJSM-07-0001 – Report of the Combined License Review Task Force (ML0717601161). The SRM directed the NRC staff to propose rulemakings that would provide the greatest efficiencies on subjects such as non-proliferation risks, the need for power, long term storage of spent fuel, reprocessing and waste confidence. On September 7, 2007, the Commission issued an additional SRM agreeing with the nuclear industry view that a near-term update to the NRC's Waste Confidence findings was appropriate and directed the staff to include waste confidence in its proposal to the Commission on potential rulemakings. Staff Requirements-Periodic Briefing on New Reactor Issues (ML0725301921).

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On December 17, 2007, the Executive Director for Operations (EDO) provided a memorandum to the Commission wherein the staff committed to evaluate possible updates to the Waste Confidence Decision. "Rulemakings that Will Provide the Greatest Efficiencies to Complete the Combined License Application Reviews in a Timely Manner" (ML073390094). On July 1, 2008, the Office of the General Counsel (OGC), with input from the Office of Nuclear Material Safety and Safeguards (NMSS), the Office of New Reactors (NRO), the Office of Nuclear Reactor Regulation (NRR), and the Office of Nuclear Regulatory Research (RES), provided the Commission an update of the Waste Confidence findings and options for amending the findings and associated rule, 10 C.F.R. § 51.23(a) (ML081830760). In an SRM issued on August 11, 2008, the Commission directed the staff to proceed with development of a proposed rulemaking package to revise Waste Confidence findings 2 and 4, as well as 10 C.F.R. § 51.23(a). Staff Requirements – SECY-08-0090 – Update of the Commission's Waste Confidence Decision (ML082240753). The SRM also directed that the proposed rule package include Finding 2 with a timeframe, as proposed in the SECY paper, but also "specifically request comments on the inclusion of the timeframe in Finding 2."

On October 9, 2008, the Commission published its proposed update, "Waste Confidence Decision Update," and proposed rule, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," in the *Federal Register* (73 FR 59551 and 73 FR 59547). The public was provided a 60-day comment period to December 8, 2008, to submit comments, but the comment period was later extended to February 6, 2009 (73 FR 72370; November 28, 2008). During the public comment period, the NRC received 3,088 comments, of which all but 157 were form letters. OGC, with the assistance of NMSS, NRO, NRR, and RES, has now prepared *Federal Register* notices for a draft update of the Waste Confidence Decision ("draft final update") (Enclosure 1) and a draft amendment to 10 C.F.R. § 51.23(a) ("draft final rule") (Enclosure 2) for the Commission's consideration.

DISCUSSION:

The draft final update follows the format used in the proposed update and restates the bases of the 1984 and 1990 Waste Confidence findings (49 FR 34658, August 31, 1984; 55 FR 38472, September 18, 1990) and then examines how events and documents since 1990 have affected those findings. The draft final update considers all the comments received on the proposed update, which are grouped into 8 main issues raised by the commenters: (1) compliance of the Waste Confidence Decision with the National Environmental Policy Act; (2) compliance of the Waste Confidence Decision with the Atomic Energy Act; (3) the meaning of "reasonable assurance" in the Waste Confidence findings; (4) whether the Commission has an adequate basis for reaffirming Finding 1; (5) whether the Commission has an adequate basis to expect that repository capacity for spent fuel generated in any reactor will be available within 50-60 years beyond the licensed life for operation of that reactor; (6) whether the Commission has an adequate basis to reaffirm Finding 3; (7) whether the Commission has an adequate basis for finding that spent nuclear fuel generated in any reactor can be stored safely and securely and without significant environmental impact for at least 60 years; and (8) miscellaneous comments. The draft final update and the draft final rule also take into account events that have transpired since the Commission's publication of its proposals in October 2008, notably the intent of the new Administration not to open a repository at the Yucca Mountain, Nevada, site even if it should receive a license. Since the Commission's proposals were premised on an assumption that the Yucca Mountain program would not go forward, there is no reason for that fact to

undermine the Commission's confidence in Finding 2 that a repository will become available. Finally, the draft final update assures the public that if significant and pertinent unexpected events occur, raising substantial doubt about the continued validity of the findings, the Commission would consider revisiting the findings.

The draft final update considers the many comments received on the specific question for public comment in the Commission's proposals; *i.e.*, whether Finding 2 should contain a timeframe, as proposed, or take a more general approach that a repository will be available when needed (the alternative approach). The State of Nevada, Clark and Eureka Counties in Nevada, and the Nuclear Energy Institute favor the alternative approach. They generally believe that a timeframe involves too much speculation about future events and that licensed storage of spent nuclear fuel will be safe no matter what the time needed. States, state organizations, Nye County, Nevada, environmental groups, and individuals want the Commission to retain a timeframe. In general, they believe that, in the absence of a timeframe, the Commission's confidence in the eventual safe disposal of spent fuel would rest on pure speculation; that it would ignore intergenerational ethical concerns of this generation reaping the benefits of nuclear energy while passing off the problem of waste disposal to future generations; and that a timeframe is necessary to provide an incentive for the Federal Government to meet its responsibilities for the disposal of spent fuel and high-level radioactive waste.

A number of commenters noted that while proposed Finding 2 was phrased in terms of reasonable assurance that sufficient mined geologic capacity can reasonably be expected to be available within 50-60 years beyond the licensed life for operation of any reactor, the generic determination in the proposed rule was phrased more generally as a determination that spent fuel can be stored safely and without significant environmental impacts until a disposal facility can reasonably be expected to be available. In response to these comments, and in acknowledgement of the fact that no matter how the rule is phrased, the basis for the rule is limited to the evidence supporting Finding 4 (that storage is safe and environmentally benign for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor), the draft final rule language is amended to be consistent with Finding 4. The draft final rule language is also amended to include Finding 2. This is to make clear that Finding 4 does not contemplate indefinite storage and underscores the Commission's expectation of repository availability within 50-60 years beyond licensed operation.

OTHER CONSIDERATIONS

Although the licensing proceeding for the Yucca Mountain repository is ongoing, DOE and the Administration have made it clear that they do not support construction of Yucca Mountain. The President's 2010 budget proposal states that the "Administration proposes to eliminate the Yucca Mountain repository program." *Terminations, Reductions, and Savings: Budget of the U.S. Government, Fiscal Year 2010*, p. 68. In response to these developments, the Senate is considering a bill to appoint a National Commission on High-Level Radioactive Waste and Spent Nuclear Fuel. National Commission on High-Level Radioactive Waste and Spent Nuclear Fuel Establishment Act of 2009, S. 591, 111th Congress (1st Sess. 2009). The Department of Energy is also considering the appointment of a similar panel. Thus, it appears likely that an expert panel will convene to assess the current options for dealing with the long-term disposal or storage of spent nuclear fuel and high-level radioactive waste (HLW).

While we believe that the draft final rule and the draft final update are adequately supported, without more precise information on near-term federal actions relevant to the development of the federal HLW disposal program, the Commission could choose to defer final action on the Waste Confidence rule and update while the proposed expert panel is established and sets its schedule and agenda. This could allow additional information and insights to be gathered and could make for a more informed Waste Confidence rule and update. A delay until we know with some certainty the likely schedule and decision path of any expert panel deliberations should have little effect on licensing proceedings for new reactors.

RECOMMENDATION:

OGC does not believe that the comments received warrant any changes to the revised Waste Confidence findings as proposed nor to the revision of 10 C.F.R. § 51.23(a), except to the extent necessary to be more consistent with Finding 4, as explained above. Thus, OGC recommends that the Commission approve the draft final update and the draft final rule for publication in the *Federal Register* but notes that the Commission may wish to defer action on the draft final update and draft final rule to incorporate additional information on direction of the federal HLW disposal program as it becomes available over the next few months.

RESOURCES:

No additional resources beyond those discussed in SECY 08-0090 are required for this rulemaking effort (associated resources are not HLW).

COORDINATION

NMSS, NRO, NRR, RES, the Office of Nuclear Security and Incident Response, and the Chief Financial Officer have reviewed the paper and the enclosures and their comments have been incorporated.

/RA/

Stephen G. Burns
General Counsel

Enclosures:

1. *Federal Register* Notice – Final Revision to the Waste Confidence Decision
2. *Federal Register* Notice – Final Rule: amendment to 10 C.F.R. § 51.23(a).

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Document Names:

- G:\RFC\Waste Confidence\Final Rule\SECY Paper.doc
- G:\RFC\Waste Confidence\Final Rule\Enclosure 1.doc
- G:\RFC\Waste Confidence\Final Rule\Enclosure 2.doc

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