NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER SVINICKI

SUBJECT: SECY-09-0090 – FINAL UPDATE OF THE COMMISSION'S WASTE CONFIDENCE DECISION

Approved XX in part Disapproved XX in part Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached XX None ___

SIGNATURE

09/24/09
DATE

Entered on "STARS" Yes ✓ No ___

Comments of Commissioner Svinicki on SECY-09-0090
Final Update of the Commission's Waste Confidence Decision

I do not support publication in the *Federal Register* of the draft final update of the Commission's waste confidence decision and final rule, as proposed by staff, at this time. The timeframe for public comment in this matter did not encompass the policy deliberations of recent months occurring between the Administration and the Congress, which may lead to a wholesale re-examination of the Nation's path forward on high-level radioactive waste disposal. This decision and rule should be re-noticed for limited comment by the public on the Administration's recent announcements, and how they may impact the timeframe of availability of a geologic repository. Additionally, I believe the Commission should solicit the views of the Administration. Such action is not without historical precedent.[1] Following that, the staff should consider any additional comments received and then either recommend to the Commission an update to the waste confidence findings and rule or offer its assessment that -- until the policy debate matures further -- the findings and rule are not ripe for the Commission's informed judgment to be updated at this time. This approach is consistent with the staff's acknowledgement that the Commission may wish to defer action on the draft final update and rule to incorporate additional information on direction of the federal disposal program.

The existence of the policy framework provided by the Nuclear Waste Policy Act has played a significant role in the action of prior Commissions on the issue of waste confidence. In announcing its position on waste confidence in 1984, the Commission at that time disclosed that the Nuclear Waste Policy Act "had a significant bearing on the Commission's decision." Although the legislation was "intrinsically incapable of resolving technical issues," it would "establish the necessary programs, milestones, and funding mechanisms to enable their resolution in the years ahead." Consequently, to the extent that entirely new approaches will be under consideration by any future Blue Ribbon Panel, the Commission's attempts to renew its confidence findings and to attach updated timeframes to the availability of disposal options might best be informed by further opportunity for public comment.

The counterargument against further public comment is, of course, that the Commission confronts incessant churn in the Nation's laws and policies and that the Commission's

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[1] In 1977, when President Carter issued a statement on nuclear policy announcing, "[w]e will defer indefinitely the commercial reprocessing and recycling of the plutonium produced in the U.S. nuclear power programs," the Commission had under active deliberation its generic environmental impact statement on the use of mixed oxide fuel in light-water reactors (or, GESMO). The President's statement cast a significant shadow over the Commission's deliberations. As an independent regulatory agency, NRC was not obligated to follow President Carter's policies, but the Commissioners decided to suspend GESMO proceedings and to solicit comments from the President and the public on how to proceed. To this end, on May 5, 1977, then-NRC Chairman Rowden sent a letter to President Carter asking for his "views on the relationship of your non-proliferation and national nuclear energy policies to the issues confronting the Commission." Stuart E. Eizenstat, Assistant to the President for domestic affairs and policy, ultimately replied on behalf of the President, advising the NRC that the "President believes that his nonproliferation initiatives would be assisted . . . if the Commission were to terminate the GESMO proceedings."

finding of waste confidence – or any decision -- must be rooted in the law as we find it now. This is unarguably true. Yet, while I agree that the framework for nuclear waste disposal as enshrined in the Nuclear Waste Policy Act must be accepted as a settled matter, until and unless it is changed, the challenge of shutting one's ears to the din of the current debate is felt most acutely in attempts to establish the estimated "timeframe" for repository availability contained in Finding 2. The timeframe, as structured, does not turn on the question of feasibility, or even necessity, but rather, as noted in the draft final Statements of Consideration, "Finding 2 is not a finding that sufficient repository capacity must be available within 50 – 60 years of the licensed life of a reactor for public health or safety reasons; *it is a prediction* that a repository will be available in this period of time." (p. 39, emphasis added)

Plainly put, this is a particularly difficult time to be in the prediction business. That said, however, the Court in State of Minnesota v. NRC (D.C. Cir. 1979) noted this approach and stated that "[t]he 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." As the Atomic Energy Commission's first Chief of the Environmental and Sanitary Engineering Branch, Mr. Joseph Lieberman, sagely cautioned in 1960, however, in voicing his confidence that the nuclear industry would grow "in a rational way without being hamstrung by its own wastes": "[O]ne has to be very careful to distinguish between aspiration, reality, and speculation in this field."

At this point in our rulemaking process, the Commission has already specifically solicited public comment on the necessity or merit of including a timeframe for repository availability in Finding 2. Some commenters, such as the State of Nevada and the Nuclear Energy Institute, favored a more general approach, i.e., that a repository will be available when needed; believing that a timeframe involves too much speculation about future events and that licensed storage of spent nuclear fuel will be safe no matter the duration of storage prior to disposal. Some commenters, however, objected strongly to such an approach; reasoning that a timeframe is necessary to provide an incentive for the Federal Government to meet its responsibilities under law to provide disposal. In my review of the history, the existence of a timeframe in Finding 2 – a date repeatedly extended by the Commission since its original decision in 1984 -- has produced no discernable effect thus far. The more compelling argument for inclusion of a timeframe appears to be the conundrum created in trying to envelope a National Environmental Policy Act (NEPA)-worthy environmental analysis of the impacts of the storage of spent nuclear fuel for an indefinite period. I am informed by the NRC staff that a bounding analysis of this type would be challenging, would take a number of years to conduct, and would confront many analytical uncertainties.

This dilemma is important because waste confidence is, at its heart, an exercise in compliance with NEPA. The issue has its origins in challenges to the NRC's reactor licensing process that came about in the late 1970s. In Natural Resources Defense Council v. NRC (2d Cir. 1978), the Court noted with approval the NRC's stated premise 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." Later decisions, such as J. Tamm's concurring opinion in Minnesota v. NRC opined that "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," the courts have also spoken to the role of other decisionmakers in this issue – namely, Congress.

As noted by the court in NRDC v. NRC (1978): "We are not without appreciation of the well-intentioned concerns of NRDC . . . NRDC urges that even if reasonable assurance of safe future disposal of waste could be demonstrated, 'the full incentive to develop such a facility on a timely basis will not be present unless the regulatory link is made now between reactor licensing and waste disposal.' This is the kind of argument that is properly made to the Congress . . . it is for the Congress rather than the courts to translate such concerns into law. NRDC makes the point that 'serious political and social resistance to the development of a geologic repository is mounting throughout the country.' . . . *Nevertheless, resolving the problem of such 'resistance' must come from the legislative branch of government.* . . ." (emphasis added) For my part, I labor in the hope that the Congress and the Administration will work with dispatch to empanel the Blue Ribbon Panel; evaluate options; act, if necessary; and, lift the current cloud of uncertainty over the road ahead.

My comments here should not be interpreted as casting doubt on the Commission's prior and existing findings of waste confidence. I am confident that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impact in either the reactor spent fuel storage basin, or in dry cask storage on an onsite or offsite independent spent fuel storage installation, or in some combination of these storage options, for many decades. Further, since the provision of permanent disposal capacity for high-level radioactive waste and spent fuel is, as a matter of law, the obligation of the federal government (a commitment affirmed to the Congress by the current Energy Secretary and which the current Administration has not sought to disturb), I believe that the existence of this obligation provides a basis for confidence that such disposal capacity will be provided by the federal government at a future time. I operate with the conviction that high-level radioactive waste and spent fuel will be managed in a safe manner until such disposal capacity is provided because there does now and will exist in the future a governmental authority to ensure that this is so.

As I consider these questions, I feel keenly the heavy burden of weighing the equities of future generations of Americans who will inherit these concerns. I share the commitment of my fellow Commissioners to preserving the credibility of this and future Commissions by remaining above the political froth of nuclear policy debates; these debates are not our domain. Our charge is that laid forth by Judge Tamm [Natural Resources Defense Council v. NRC, (D.C. Cir. 1976), concurring opinion] who wrote so powerfully:

> 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.

Kristine L. Svinicki 09/24/09