



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 8, 2011

The Honorable Fred Upton
Chairman, Committee on Energy
and Commerce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed for your information is a copy of a notice of a denial of a petition for rulemaking to be published in the *Federal Register*.

The U.S. Nuclear Regulatory Commission (NRC) has denied a petition for rulemaking from Dan Kane, who requested that the NRC rescind the 1990 Waste Confidence Rule, suspend all ongoing reactor-licensing proceedings, and phase-out all currently operating reactors. In his petition, Mr. Kane argues that the Department of Energy's (DOE) decision to withdraw the Yucca Mountain license application renders the Waste Confidence Rule invalid.

The NRC has denied the petition on the grounds that it misinterprets the Waste Confidence Decision and Rule as well as the consequences of rescinding the Waste Confidence Rule. Additionally, the issues raised by Mr. Kane were considered in a recently completed update to the Waste Confidence Rule. The Waste Confidence Decision and Rule, both the 1990 version and the recently completed update, assume that Yucca Mountain would not be available as a repository. Therefore, the status of DOE's application has no impact on the validity of the Waste Confidence Rule. Further, even if the Waste Confidence Rule were rescinded, reactor licensing and license renewal would not have to be discontinued, since such an action would only mean that the issues would be considered in individual licensing actions rather than generically through the rulemaking process.

Sincerely,

A handwritten signature in cursive script, reading "Rebecca L. Schmidt".

Rebecca L. Schmidt, Director
Office of Congressional Affairs

Enclosure:
Federal Register Notice

cc: Representative Henry A. Waxman



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 8, 2011

The Honorable Barbara Boxer
Chairman, Committee on Environment
and Public Works
United States Senate
Washington, DC 20510

Dear Madam Chairman:

Enclosed for your information is a copy of a notice of a denial of a petition for rulemaking to be published in the *Federal Register*.

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Rebecca L. Schmidt, Director
Office of Congressional Affairs

Enclosure:
Federal Register Notice

cc: Senator James M. Inhofe



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 8, 2011

The Honorable Ed Whitfield
Chairman, Subcommittee on Energy
and Power
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed for your information is a copy of a notice of a denial of a petition for rulemaking to be published in the *Federal Register*.

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Rebecca L. Schmidt, Director
Office of Congressional Affairs

Enclosure:
Federal Register Notice

cc: Representative Bobby L. Rush



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 8, 2011

The Honorable Thomas R. Carper
Chairman, Subcommittee on Clean Air
Nuclear Safety
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed for your information is a copy of a notice of a denial of a petition for rulemaking to be published in the *Federal Register*.

The U.S. Nuclear Regulatory Commission (NRC) has denied a petition for rulemaking from Dan Kane, who requested that the NRC rescind the 1990 Waste Confidence Rule, suspend all ongoing reactor-licensing proceedings, and phase-out all currently operating reactors. In his petition, Mr. Kane argues that the Department of Energy's (DOE) decision to withdraw the Yucca Mountain license application renders the Waste Confidence Rule invalid.

The NRC has denied the petition on the grounds that it misinterprets the Waste Confidence Decision and Rule as well as the consequences of rescinding the Waste Confidence Rule. Additionally, the issues raised by Mr. Kane were considered in a recently completed update to the Waste Confidence Rule. The Waste Confidence Decision and Rule, both the 1990 version and the recently completed update, assume that Yucca Mountain would not be available as a repository. Therefore, the status of DOE's application has no impact on the validity of the Waste Confidence Rule. Further, even if the Waste Confidence Rule were rescinded, reactor licensing and license renewal would not have to be discontinued, since such an action would only mean that the issues would be considered in individual licensing actions rather than generically through the rulemaking process.

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Rebecca L. Schmidt, Director
Office of Congressional Affairs

Enclosure:
Federal Register Notice

cc: Senator John Barrasso



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 8, 2011

The Honorable John Shimkus
Chairman, Subcommittee on Environment
and the Economy
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed for your information is a copy of a notice of a denial of a petition for rulemaking to be published in the *Federal Register*.

The U.S. Nuclear Regulatory Commission (NRC) has denied a petition for rulemaking from Dan Kane, who requested that the NRC rescind the 1990 Waste Confidence Rule, suspend all ongoing reactor-licensing proceedings, and phase-out all currently operating reactors. In his petition, Mr. Kane argues that the Department of Energy's (DOE) decision to withdraw the Yucca Mountain license application renders the Waste Confidence Rule invalid.

The NRC has denied the petition on the grounds that it misinterprets the Waste Confidence Decision and Rule as well as the consequences of rescinding the Waste Confidence Rule. Additionally, the issues raised by Mr. Kane were considered in a recently completed update to the Waste Confidence Rule. The Waste Confidence Decision and Rule, both the 1990 version and the recently completed update, assume that Yucca Mountain would not be available as a repository. Therefore, the status of DOE's application has no impact on the validity of the Waste Confidence Rule. Further, even if the Waste Confidence Rule were rescinded, reactor licensing and license renewal would not have to be discontinued, since such an action would only mean that the issues would be considered in individual licensing actions rather than generically through the rulemaking process.

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Rebecca L. Schmidt, Director
Office of Congressional Affairs

Enclosure:
Federal Register Notice

cc: Representative Gene Green

NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

Docket No. PRM-51-13

[NRC-2010-0088]

Dan Kane; Denial of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking; Denial.

SUMMARY: The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM) submitted by Dan Kane. Mr. Kane requested that the NRC rescind the Waste Confidence Rule, suspend all ongoing reactor licensing proceedings, and phase out operations at all operating nuclear power plants. The NRC is denying the petition because, contrary to the assertions made in the PRM, the Commission's Waste Confidence Decision and Rule consider the political uncertainty discussed in the petition and do not depend on the availability of a repository at Yucca Mountain, Nevada.

ADDRESSES: You can access publicly available documents related to this petition for rulemaking using the following methods:

- **NRC's Public Document Room (PDR):** The public may examine, and have copied for a fee, publicly available documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- **NRC's Agencywide Documents Access and Management System (ADAMS):** Publicly available documents created or received at the NRC are available electronically at the NRC's electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents.

If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

- **Federal rulemaking Web site:** Public comments and supporting materials related to this petition for rulemaking can be found at <http://www.regulations.gov> by searching on Docket ID: NRC-2010-0088. Address questions about NRC dockets to Carol Gallagher 301-492-3668; e-mail Carol.Gallagher@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Tison Campbell, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: 301-415-8579, e-mail: tison.campbell@nrc.gov; or Lisa London, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: 301-415-3233, e-mail: lisa.london@nrc.gov.

SUPPLEMENTARY INFORMATION:

The Petition

Title 10 of the *Code of Federal Regulations* (10 CFR), Section 2.802, Petition for rulemaking, provides an opportunity for any interested person to petition the Commission to issue, amend, or rescind any regulation. On February 2, 2010, Dan Kane submitted a PRM requesting that the NRC rescind 10 CFR 51.23, Temporary storage of spent fuel after cessation of reactor operation—generic determination of no significant environmental impact, also known as the Waste Confidence Rule. (ADAMS Accession No. ML100570095 (Petition)).

Mr. Kane believes that rescinding 10 CFR 51.23 would require the NRC to cease

licensing new nuclear power plants and to suspend the licenses of existing power plants. He argues that the Waste Confidence Rule is no longer valid because the Department of Energy has filed a motion to withdraw its application for a spent nuclear fuel (SNF) and high-level waste (HLW) disposal facility at Yucca Mountain and because he believes that the Commission must "adequately anticipate and address future political considerations with regard to waste disposal" as part of its Waste Confidence Decision and Rule.

(Petition at 3). The NRC reviewed Mr. Kane's petition and determined that the petition met the minimum sufficiency requirements of 10 CFR 2.802. Accordingly, the NRC docketed the request as PRM-51-13 on February 25, 2010; the NRC notified the public of the opportunity to submit comments on the petition in the *Federal Register* notice announcing the docketing of the petition. (75 FR 16360; April 1, 2010). The NRC received 10 comments on the PRM: five comments supported granting the petition, one asked the NRC to provide additional information on the basis for the Waste Confidence Decision and Rule, and four argued that the petition should be denied.

Background

In his February 2, 2010 PRM, Dan Kane requested that the NRC "[c]ease licensing of new nuclear power plants and begin an orderly phase out of existing operating nuclear power plants until the Commission can be assured not only of the technical and economic certainties of a waste disposition decision, but also of the political certainties associated with that disposition." (Petition at 3). Mr. Kane believes that the uncertainty regarding the licensing of a nuclear waste repository at Yucca Mountain undermines the basis for the NRC's regulations at 10 CFR 51.23, which he believes provide the basis for the continued operation and licensing of nuclear power plants. (*Id.*) He contends that the then proposed

revisions to Finding 2 (of the five findings in the Waste Confidence Decision), which provides part of the basis for 10 CFR 51.23, "was grounded in the belief that the Yucca Mountain repository would become available within the first quarter of the twenty-first century or perhaps a few years later." (*Id.* at 2). Mr. Kane also believes that the NRC has not complied with its obligations under the National Environmental Policy Act (NEPA) because "[t]he spirit of NEPA compliance cannot be satisfied by assuming some unknown future solution to an existing challenge." (*Id.*) As discussed above, Mr. Kane believes that this existing challenge is political. (*Id.* at 2–3). Further, Mr. Kane argues that the deficiency in the Waste Confidence Decision and Rule results from the inability of the Commission to "adequately anticipate and address future political considerations with regard to waste disposal." (*Id.* at 3).

NRC Evaluation

The NRC does not agree with Mr. Kane that 10 CFR 51.23 should be rescinded.

Whether the withdrawal of the Yucca Mountain Application necessitates the revocation of the Waste Confidence Decision and Rule

The basis for Mr. Kane's petition to revoke the Waste Confidence Rule is the Department of Energy's motion to withdraw the Yucca Mountain license application and the Obama Administration's decision not to seek further funding for the program. (Petition at 2). Despite Mr. Kane's assertions to the contrary, the Commission has stated on numerous occasions that the Waste Confidence Decision and Rule are not based on an assumption that Yucca Mountain will become available. In fact, the Waste Confidence Decision and Rule assume that Yucca Mountain will not be built. (See, e.g., 55 FR 38494;

September 18, 1990, 75 FR 81040; December 23, 2010). Therefore, Mr. Kane's argument that the Waste Confidence Decision and Rule should be revoked because they relied upon the eventual availability of Yucca Mountain must be rejected because it does not accurately consider the basis for the Decision and Rule.

Mr. Kane is correct that the Commission cannot speculate when the political and societal obstacles to the successful completion of a repository program will be overcome. The Commission has acknowledged these difficulties in the recently published update to its Waste Confidence Decision and Rule. (See, 75 FR 81048 and 81063). However, it does not follow from the Commission's acknowledgement of the societal and political obstacles to a successful repository program that the Commission cannot have reasonable assurance that disposal capacity will be available when needed as expressed in the Waste Confidence Decision and Rule. Although the Commission cannot specifically predict when a repository will become available, the Commission can have reasonable assurance that a repository will become available when necessary and that the SNF and HLW in on-site and off-site storage facilities can be stored safely and without significant environmental impacts for at least 60 years after the licensed life of operation for any reactor. (*Id.* at 81048, 81063, and 81069–81074). As discussed in the analysis of Finding 2 of the Waste Confidence Decision, the Commission continues to have reasonable assurance that a repository can be licensed, opened, and in operation within 25–35 years of a Federal decision to begin a repository program. (*Id.* at 81063).

Further, the political obstacles associated with the licensing of Yucca Mountain or any other repository are not fatal to the Commission's Waste Confidence Decision and

Rule. As stated above, the Commission assumed that Yucca Mountain would not be licensed in both the proposed and final updates to the Waste Confidence Decision and Rule. (See, e.g., 75 FR 81040). As also discussed above, the Commission's analysis in the Waste Confidence Decision—which serves as the Environmental Assessment (the NEPA analysis) for the Waste Confidence Rule—does consider and acknowledge the political difficulties associated with the successful completion of a project to license and operate a nuclear waste repository. These difficulties informed the Commission's decision to remove a target date from Finding 2 and 10 CFR 51.23, and to adopt the "when necessary" standard in the current Finding 2 and 10 CFR 51.23. The Commission also acknowledged that if a repository is not available as the end of the 60-years of post-licensed life storage nears, it will be necessary to revisit the Waste Confidence Decision and Rule (if a subsequent update has not occurred by that time). (75 FR 81035). Further, in its September 15, 2010 Staff Requirements Memorandum approving the final update to the Waste Confidence Decision and Rule, the Commission directed the NRC staff to begin a separate longer-term rulemaking (to be supported by an Environmental Impact Statement) to assess the long-term storage of SNF and HLW. (ADAMS Accession No. ML102580229).

Contrary to Mr. Kane's assertions that the NRC has neglected its responsibilities under NEPA "by assuming some unknown future solution to an existing challenge," the NRC has not assumed some unknown future solution. The Waste Confidence Decision and Rule demonstrate that a solution—deep geologic disposal—does exist and is technically feasible. (See, e.g., 75 FR 81058–81060). The unknown that prevents the Commission from providing a target date is the political and societal uncertainty

surrounding the nuclear waste disposal program; the Commission addressed this uncertainty in its update to the Waste Confidence Decision. (75 FR 81062–81067). Further, the U.S. government as a whole has demonstrated its continued commitment to finding a long-term solution to the nuclear waste disposal problem. The NRC continues to have confidence that SNF and HLW can be stored safely until a disposal solution becomes available. The United States is actively examining potential solutions. The Blue Ribbon Commission on America's Nuclear Future is assessing disposal options and is expected to publish a report with recommendations at the beginning of 2012. Just because the Obama Administration has expressed a desire to abandon one specific option for SNF and HLW disposal does not mean that progress is not being made toward an ultimate disposal solution.

Whether rescinding 10 CFR 51.23 would require the cessation of reactor licensing

Even if the Commission were to rescind 10 CFR 51.23, it does not follow that the operation and licensing of nuclear power plants would have to cease. The Waste Confidence Rule satisfies the Commission's NEPA responsibilities for the period of time after the expiration of a license. Without the generic determination in the Waste Confidence Rule, the NRC could satisfy its NEPA obligations by including the post-licensed-life storage of SNF in the NEPA analysis for each nuclear power plant or ISFSI licensing action.

Further, the Commission's Waste Confidence Decision and Rule are not dependent on the NRC's ability to predict when the political and societal obstacles that stand in the way of opening a disposal site will be resolved. Rather, as discussed by the

Court of Appeals for the D.C. Circuit in *Minnesota v. NRC*, 602 F.2d 412 (1979), the question that has to be considered by the NRC is "whether there is reasonable assurance that an off-site storage solution will be available by the years 2007-09¹, . . . and **if not**, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates." (*Id.* at 418 (emphasis added)). The Court further "agree[d] with the Commission that it may proceed in these matters by generic determinations." (*Id.* at 419). The first Waste Confidence Decision and Rule were issued in 1984, and updated in 1990 and 2010. The Commission continues to use the Decision and Rule to satisfy both the direction of the Court (to determine whether there is reasonable assurance that fuel can be stored safely beyond the expiration of the license) and to provide a generic determination of its obligations under NEPA to assess the environmental impacts of the storage of SNF and HLW waste after the expiration of a license.

Based upon its analysis of Mr. Kane's petition, the NRC has concluded that the petition should be denied. The petition does not provide sufficient justification to support the assertion that 10 CFR 51.23 should be rescinded because the Commission's analysis does not consider political issues and because the Yucca Mountain repository program is no longer being funded. As discussed above, the NRC has shown that the Commission's analysis supporting the Waste Confidence Update and Rule does not depend on the availability of Yucca Mountain and does consider the political issues associated with a repository program. The NRC has also demonstrated that both the 1990 and 2010 updates to the Waste Confidence Decision and Rule assumed that Yucca Mountain would

¹ The licenses of the two plants at issue in this case would have expired in 2007 and 2009.

not be built. The cessation of the Yucca Mountain program, whether for political, technical, or other reasons, is irrelevant to the continued viability of the Waste Confidence Decision and Rule because, for the purposes of the Waste Confidence Decision and Rule, the NRC has consistently assumed that Yucca Mountain would not be built. The NRC is therefore denying Mr. Kane's petition for rulemaking.

Public Comments on the Petition

The NRC received 10 comments on this petition for rulemaking.

Comment 1:

Neal Hunemuller submitted a comment asking that the NRC address the laws that provided the basis for the Waste Confidence Decisions (49 FR 34658; August 31, 1984, 55 FR 38474; September 18, 1990, and 75 FR 81037).

NRC Response:

The Commission developed the Waste Confidence Decision and Rule as a result of several cases that set out the NRC's obligations with respect to safe storage and disposal of SNF and HLW under the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 26 (codified as amended in scattered sections of 42 U.S.C.) (AEA) and NEPA. The AEA requires the NRC to establish standards to govern the civilian use of nuclear material and facilities, as the Commission may deem necessary to protect public health and safety and the common defense and security; and NEPA directs federal agencies to evaluate the environmental impacts of major federal actions that significantly affect the quality of the human environment. In 1978, the Court of Appeals for the Second Circuit held that the NRC was not required to withhold action on pending or future applications for nuclear power reactor operating licenses until it makes a determination that high-level radioactive

wastes can be permanently disposed of safely. (*NRDC v. NRC*, 582 F.2d 166, 175 (2d Cir. 1978)). In 1979, the Court of Appeals for the D.C. Circuit considered whether the 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” if no off-site interim storage facility or ultimate disposal solution is available. (*State of Minnesota v. NRC*, 602 F.2d 412, 416 (1979)). The Court remanded the issue to the NRC and instructed the agency to consider “whether there is reasonable assurance that an off-site storage solution will be available by the years 2007-09 . . . and if not, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates.” (*Id.* at 418). Further, the Court held that this finding could be made by a generic determination. (*Id.* at 419). This generic determination was promulgated as the NRC’s 1984 Waste Confidence Decision and Rule. (49 FR 34658 and 34688).

Comment 2:

Jason Hout submitted a comment opposing the petition. He argued that because operating nuclear power plants can safely store SNF, their operation should not be directly tied to the availability of SNF disposal.

NRC Response:

The NRC agrees that the petition should be denied. As noted above, recent developments regarding the development and licensing of the repository at Yucca Mountain, including the Department of Energy’s motion to withdraw its application, do not mean that the recent Waste Confidence Decision and Rule are invalid; the Waste Confidence Decision and Rule assume that the repository at Yucca Mountain will not be built.

Comment 3:

Paul M. Krishna submitted a comment supporting the petition, which stated that the Secretary of Energy's direction to the Blue Ribbon Commission (BRC) to not consider mined geologic disposal flies in the face of the Waste Confidence Rule. He argued that the DOE's motion to withdraw the Yucca Mountain licensing application potentially results in nuclear power plant licenses violating the Waste Confidence Rule and that this violation should affect the granting of any construction permits, operating licenses, or combined construction permit and operating licenses for any future nuclear power plants. Mr. Krishna stated that the NRC needs to either grant DOE's motion to withdraw the Yucca Mountain license application and stop licensing all future nuclear power plants, or deny the motion and continue the licensing process for Yucca Mountain. Finally, Mr. Krishna questioned whether the NRC was planning to "come up with another waste confidence rule which states that on-site storage of SNF and HLW is safe and secure for another 100 years, by which time we might have a repository," which he claims "will not work."

NRC Response:

The NRC believes that Mr. Krishna has misinterpreted the Secretary of Energy's direction to the BRC; the BRC was not directed to refrain from considering geologic disposal. Instead, the BRC charter specifically directs it to, "provide advice, evaluate alternatives, and make recommendations for a new plan to address these issues, including Options for permanent disposal of used fuel and/or high-level nuclear waste, *including deep geologic disposal*" (emphasis added) See, http://brc.gov/pdfFiles/BRC_Charter.pdf.

The NRC also disagrees with Mr. Krishna's assertion that the withdrawal of the

Yucca Mountain license application would result in current or future power plant licenses violating the Waste Confidence Rule. As discussed above, the Waste Confidence Rule is a generic determination of the environmental impacts of post-licensed life storage, which does not depend on a disposal site at Yucca Mountain. Further, both the Waste Confidence Decision and Rule assume that Yucca Mountain will not be built. For the purposes of the update to the Waste Confidence Decision and Rule, the Commission has consistently assumed, in both the proposed and final Rule and Decision, that Yucca Mountain would not be built. (73 FR 59556; October 9, 2008 and 75 FR 81040). The Waste Confidence Decision and Rule are based on technological developments, increased scientific understanding, and a review of international experience and progress with repositories, not the ultimate availability of the Yucca Mountain repository. (75 FR 81032 and 81037).

As noted previously, the Waste Confidence Decision and Rule are separate from the Yucca Mountain licensing decision—they assume that a repository is not constructed at the Yucca Mountain site. It does not follow from the NRC's pending decision on the DOE's motion to withdraw the Yucca Mountain application that the licensing of new nuclear power plants would have to cease if the DOE's motion is granted. Whatever decision the Commission eventually makes in the Yucca Mountain proceeding will have no direct effect on the Waste Confidence Decision and Rule.

Mr. Krishna also questioned whether the NRC plans to conduct another Waste Confidence rulemaking to look at storage for more than 60 years after the end of licensed life. In the Staff Requirements Memorandum for the recent update to the Waste Confidence Decision and Rule, the Commission instructed the staff to prepare a plan for a longer-term rulemaking that would update the Waste Confidence Decision and Rule to

address the impacts of storing SNF for more than the 120 years considered in the current Waste Confidence Rule. (ADAMS Accession No. ML102580229). Mr. Krishna's assertion that a longer-term Waste Confidence Rule would not work is speculative. NRC rulemakings are conducted in a manner to ensure that the agency's actions comply with applicable laws (e.g., the AEA, the Administrative Procedure Act, and NEPA). NRC rulemaking procedures will provide an opportunity for public comment when Mr. Krishna can comment on the actual substance of a proposed rule once it is developed.

Comment 4:

James Blaylock commented that continued nuclear power generation is based on a solution to nuclear waste disposal, and that without a defined program the Federal government has now invalidated that commitment. Mr. Blaylock stated that long-term storage is not an acceptable approach, and that he supports the petition.

NRC Response:

As noted in Finding 4 of the Commission's Waste Confidence Decision, the Commission finds reasonable assurance that SNF generated in any reactor can be stored safely without significant environmental impacts 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 in a combination of storage in its SNF storage basin and either onsite or offsite independent spent fuel storage installations.

The Commission does not agree that the Federal government has invalidated its commitment to provide for SNF disposal. The Federal government continues to evaluate options for the ultimate disposal of SNF and HLW; the Waste Confidence Decision does not consider the indefinite storage of SNF; disposal is still the ultimate goal (75 FR

81041); and the Nuclear Waste Policy Act is still the law. The Act continues to mandate disposal in a repository, the collection of funds for the Nuclear Waste Fund, and that the Federal Government "has the responsibility to provide for the permanent disposal of" HLW and SNF. (42 U.S.C. 10131 (2006)). Concurrent with its recent motion to withdraw the Yucca Mountain application, the Secretary of Energy created the Blue Ribbon Commission on America's Nuclear Future to evaluate, assess, and advise on possible alternatives for storage, management, and ultimate disposal of SNF and HLW (part of this evaluation will explore the need for additional or amended legislation). (http://brc.gov/pdfFiles/BRC_Charter.pdf). These measures demonstrate the Federal government's continued commitment to addressing the nuclear waste disposal problem even in the absence of the development of a repository at Yucca Mountain.

Comment 5:

David Hathcock submitted a comment, which stated in full: "I agree with this Proposed Rule change. I am a concerned individual."

NRC Response:

Although Mr. Hathcock expressed support for the petition, the NRC believes that its decision to deny the petition is correct. As stated above:

- (1) The Department of Energy's decision to withdraw its application for a repository at Yucca Mountain does not mean that the Waste Confidence Decision and Rule should be revoked. The Waste Confidence Decision and Rule assume that Yucca Mountain will not be built.
- (2) Revocation of 10 CFR 51.23 would not result in the end of reactor licensing or relicensing. Without the Waste Confidence Decision and Rule, the NEPA

evaluation of post-licensed life storage of SNF would be included in each individual licensing action.

Comment 6:

Winston Hamilton Jr., P.E. submitted a comment opposing the petition.

Mr. Hamilton argued that cutting the funding to the Yucca Mountain project is not directly related to the nuclear industry. He also stated that he was "surprised" to see such a notice published in the *Federal Register* by the NRC.

NRC Response:

The NRC agrees that the petition should be denied. As noted above, the Waste Confidence Decision and Rule assume that a repository is not built at Yucca Mountain.

The NRC also agrees that cutting the funding for the Yucca Mountain project does not immediately affect operating reactor performance. As noted in Finding 3 of the Waste Confidence Decision, the Commission finds reasonable assurance that HLW and SNF will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all HLW and SNF. (75 FR 81067).

With respect to publication of the PRM, the NRC published the PRM because, in accordance with 10 CFR 2.802(e), the NRC found that the petition satisfied the requirements of § 2.802(c).

Comment 7:

Noah Miska submitted a comment supporting the petition. Mr. Miska expressed support for the ultimate goal of the petition—the cessation of new reactor licensing and

the phasing out of existing plants—because he believes that granting the petition is “necessary to make up for the loss of the proposed Yucca Mountain nuclear waste storage facility.” Further, Mr. Miska argued that granting the petition would result in the end of the production of new SNF and HLW, which he believes represents “too great a risk to the public’s well being to justify their existence.” Mr. Miska also noted that the reduction in nuclear power capacity could be offset by “investments in wind and/or solar infrastructure, which could potentially create many thousands of new jobs.”

NRC Response:

As noted in the response to Mr. Kane’s petition, the revocation of the Waste Confidence Rule would not result in the end of nuclear reactor licensing or relicensing. Rather, the NEPA evaluation of post-licensed-life storage would shift from the generic determination in the Waste Confidence Rule to individual licensing proceedings.

Mr. Miska is correct that reaching the ultimate goal of the petition—the cessation of new reactor licensing and the phasing out of existing plants—would result in the end of the production of civilian SNF. But as discussed generically in the Waste Confidence Decision and specifically in each licensing decision, the NRC has evaluated the risks of licensing these facilities and has determined that the facilities can be licensed in accordance with its regulations. To the extent that Mr. Miska believes that no risk from nuclear power is acceptable, Congress has spoken otherwise: The NRC has been directed by Congress in the AEA to establish regulations that allow for the licensing of nuclear power plants and provide reasonable assurance of the protection of the public health and safety and common defense and security.

Finally, the NRC acknowledges that a reduction in nuclear power capacity could be offset by increased use of wind or solar power (although the amount to which the base-

load power provided by nuclear power could be offset by solar and wind power is still uncertain). These matters, however, are matters of national energy policy and are not within the NRC's jurisdiction to consider. The NRC does not promote the use of nuclear power or any other means of producing power. Rather, NRC is charged with making sure that as long as national energy policy includes nuclear power, nuclear power plants are operated safely and securely and in compliance with regulatory requirements.

Comment 8:

The Nuclear Energy Institute (NEI) submitted comments opposing the petition on several grounds. NEI first argued that any NRC consideration of the impacts of recent developments in the Yucca Mountain project should be considered within the then ongoing Waste Confidence proceeding. Second, NEI argued that as rulemakings consider issues generically, it is inappropriate to consider Mr. Kane's request for cessation of new plant licensing and the phase-out of currently operating plants.

NRC Response:

The NRC agrees that the petition should be denied. As noted previously, the Waste Confidence Decision and Rule do not depend upon the availability of the repository at Yucca Mountain. Although the NRC agrees with NEI that separate consideration of an ongoing rulemaking on individual dockets is inappropriate, *Entergy Nuclear Operations* (Indian Point, Units 2 and 3), CLI-10-19, 72 NRC __ (July 8, 2010) (slip op. at 2-3) ("Under longstanding NRC policy, licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission" (citation omitted)), Mr. Kane has not requested that his petition be considered in individual dockets, but has instead requested generic relief.

Thus, the NRC does not agree with NEI's suggestion that the petition should be denied because it seeks resolution of a generic issue on individual docket.

Comment 9:

The DOE submitted comments opposing the petition. The Department argued that the issues raised in the petition fall squarely within the Commission's recently concluded Waste Confidence rulemaking, and that the Waste Confidence rulemaking is not dependent upon the availability of Yucca Mountain for waste disposal. The DOE also noted that dry storage technology provides DOE with sufficient time to meet its obligations for a permanent waste disposal under the Nuclear Waste Policy Act.

NRC Response:

The NRC agrees that the petition should be denied. As noted previously, the Waste Confidence Decision and Rule do not depend upon the availability of the repository at Yucca Mountain. Further, both the Waste Confidence Decision and Rule assume that Yucca Mountain will not be built. In its recent Waste Confidence Decision and Rule, the Commission affirmed its position on the temporary storage of SNF pending the construction of a repository. Whether DOE has met its obligations under the Nuclear Waste Policy Act is outside the scope of the Commission's Waste Confidence Decision and Rule.

Comment 10:

J. Russell Dyer submitted a comment supporting the petition. He raised two concerns: intergenerational equity and the effect of social and political stability on the long-term storage and eventual disposal of SNF and HLW. Mr. Dyer argued that without a

“considered national policy to replace the Nuclear Waste Policy Act” the United States should cease generating the hazardous burden of SNF and HLW. Mr. Dyer urged the NRC to suspend existing reactor licenses, curtail license extension actions, and refrain from granting new construction or operating licenses.

NRC Response:

Mr. Dyer is correct that intergenerational equity was considered in the Nuclear Waste Policy Act and the Commission’s Waste Confidence Decision. (42 U.S.C. 10131 (2006) and 75 FR 81048). But intergenerational equity does not dictate that a disposal facility must be available when a nuclear power plant is licensed; as noted in the Waste Confidence Decision: “The Commission’s approach in Findings 2 and 4 acknowledges the need for permanent disposal, and for the generations that benefit from nuclear energy to bear the responsibility for providing an ultimate disposal for the resulting waste.” (75 FR 81048). Further, this concern was evaluated by the Court of Appeals for the Second Circuit in *NRDC v. NRC*. In that case, the Court held that the AEA did not require the NRC to make a finding that safe permanent disposal was available when a license is issued. (*NRDC v. NRC*, 582 F.2d 166, 175 (2d Cir. 1978)). Consistent with that decision, in the Waste Confidence Decision and Rule, the NRC found reasonable assurance of safe storage of SNF for at least 60 years beyond the licensed life for operation of any reactor and that repository capacity will be available when necessary. (75 FR 81067).

The Federal government continues to evaluate options for the ultimate disposal of SNF and HLW. Although the Waste Confidence Decision does not consider the indefinite storage of SNF, disposal in a geologic repository is still the ultimate goal (75 FR 81041). The Nuclear Waste Policy Act is still the law: The Act continues to mandate disposal in a repository, the collection of funds for the Nuclear Waste Fund, and that the Federal

Government "has the responsibility to provide for the permanent disposal of" HLW and SNF. 42 U.S.C. 1013 (2006). Concurrent with its recent motion to withdraw the Yucca Mountain application, the Department of Energy created the Blue Ribbon Commission on America's Nuclear Future to evaluate, assess, and advise on possible alternatives for storage, management, and ultimate disposal of SNF and HLW (part of this evaluation will explore the need for additional or amended legislation).

(http://brc.gov/pdfFiles/BRC_Charter.pdf). These measures demonstrate the Federal government's continued commitment to addressing the nuclear waste disposal problem in this generation.

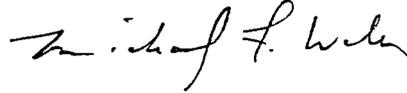
Mr. Dyer's comment links political and social stability with the ability to determine and implement a final disposal solution. As explained in the Waste Confidence Decision and Rule, the Commission has confidence that the political and institutional hurdles to determining a path forward can be overcome. (75 FR 81049). This conclusion is supported by a review of international progress on licensing a deep geologic repository. (See. 75 FR at 81065-81066). In addition to benefiting from international experience, any new repository program would benefit from the lessons learned through the preparation and review of the Yucca Mountain license application. Although the Commission recognizes the need for broad public support before a successful repository program can be achieved (75 FR 81066), the ongoing efforts of the NRC and other Federal entities provide reasonable assurance that this generation will deal with the ultimate disposal of SNF and HLW.

Determination of Petition

For reasons discussed above, the NRC denies PRM-51-13.

Dated at Rockville, Maryland, this 16th day of February, 2011.

For the Nuclear Regulatory Commission.

A handwritten signature in black ink, appearing to read "Michael F. Weber". The signature is written in a cursive style with a large initial "M".

Michael F. Weber,
Acting Executive Director for Operations.