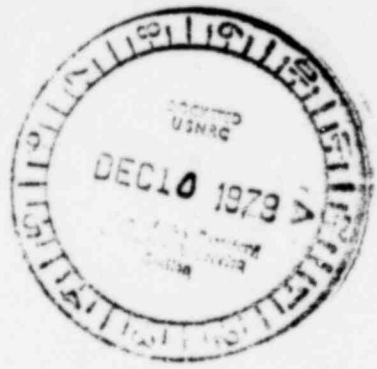

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Re: Federal Register Notice 44 Fed. Reg. 61372, October 25, 1979.
PROPOSED RULEMAKING:	)	
STORAGE AND DISPOSAL OF WASTE	)	

RESPONSE OF CONSUMERS POWER COMPANY TO MOTION OF CHRISTA-MARIA FOR RECONSIDERATION OF DECISION

Consumers Power Company, the licensee in the spent fuel pool license amendment proceeding in Matter of Consumers Power Company (Big Rock Nuclear Plant), Docket No. 50-155, opposes intervenor Christa-Maria's request for reconsideration of the Notice of Proposed Rulemaking issued by the Commission on October 25, 1979. 44 Fed. Reg. 61,372 (1979).

The Nuclear Regulatory Commission ("Commission" or "NRC") there gave notice of a generic proceeding to reassess its degree of confidence in the future availability of disposal facilities for radioactive wastes. The Commission acted in response to State of Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979), in which the court held that the Commission's

previous assurance that disposal facilities would be available when needed (42 Fed. Reg. 34,391 (July 5, 1977)) required further consideration because (i) that determination was not the product of a rulemaking record, and (ii) one question before the court had not been the focus of previous NRC consideration, i.e., whether the ultimate solution to radioactive waste disposal would be found before the expiration of the operating licenses for the concerned facilities. 602 F.2d at 417. The Commission also acted in furtherance of its previously announced intent to reassess periodically its finding of reasonable assurance.

The October 25, 1979 notice announced that during the generic proceeding the issues being considered for rulemaking would not be addressed in adjudication. The Commission also concluded that licensing could proceed during the rulemaking, noting that the court in State of Minnesota v. NRC, supra, had remanded the case but had refrained from vacating or staying the spent fuel pool license amendments there challenged. The notice provided, however, that all pending licensing would proceed subject to the final rule. 44 Fed. Reg. 61372, 61373 (October 25, 1979).

Intervenor Christa-Maria argues that the Commission must either require that the waste disposal issue be addressed in adjudications or suspend all licensing pending completion

of the generic proceeding. She contends that this result follows from State of Minnesota v. NRC, supra, from the requirements of NEPA, and from general principles of administrative law.

The opinion of the court in State of Minnesota v. NRC, supra, supports the position of the NRC to permit the continuation of licensing actions pending the conclusion of the rulemaking directed by the court. There intervenors challenged two spent fuel pool license amendments granted by the Commission. In each instance the cognizant Atomic Safety and Licensing Board declined to consider the safety and environmental effects of the storage of nuclear wastes at the reactor site beyond the expiration date of the operating licenses, 2007 for Vermont Yankee and 2009 for Prairie Island.[1/] The Atomic Safety and Licensing Appeal Board affirmed this result based on the denial by the Commission of a petition for rulemaking filed by Natural Resources Defense Council, Inc.[2/] The Commission's denial was premised on

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1/ Matter of Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), 6 NRC 426, 438 (1977); and Matter of Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), 6 NRC 265, 267 (1977). In the Prairie Island case, the Board denied contentions which raised the issues of safety and environmental effects beyond the expiration date of the facility license.

2/ 7 NRC 41, 49-51 (1978).

inter alia, the judgment that reasonable confidence presently existed to conclude that radioactive wastes can and will in due course be disposed of safely. 42 Fed. Reg. 34391 (July 5, 1977).

On appeal, the court in the Minnesota case held that the Commission's finding of reasonable assurance should be grounded in a rulemaking record and that further agency proceedings were needed to explore further the question raised by the petitioners and to establish the required rulemaking record. However, the court rejected petitioners' demand that this assurance be tested within the evidentiary procedures of an adjudication, saying:

> . . . 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. . . 602 F.2d at 416.

The court did not suggest that current and future adjudications be deferred until after the completion of the generic proceeding. Christa-Maria draws the contrary conclusion because the court remanded the case to the Commission, but the court expressly refrained from staying the challenged license amendments:

> . . . We neither vacate nor stay the license amendments, which would effectively shut down the plants. 602 F.2d at 418.

The court necessarily understood that licensing amendments for Vermont Yankee and Prairie Island would go into effect and remain in effect despite the remand and the generic proceeding. Consumers Power Company submits that the court equally contemplated that the NRC could also authorize other license amendments, such as that submitted in the Big Rock proceeding to which the results of the generic rulemaking would apply, without awaiting the completion of the rulemaking.

The court implicitly recognized that interruption of the orderly licensing process pending rulemaking, with the grave consequences that such an interruption would entail, is not a matter lightly to be decided by a court. Rather the matter rests within the sound discretion of the Commission, which alone can judge the adequacy of the bases for its previous finding of assurance pending full reassessment. Thus in declining to intrude on the NRC's authority to issue license amendments for expanding spent fuel pool capacity, the court, in our view, gave weight to the careful review -- albeit without the benefit of rulemaking -- given by the Commission and the court in NRDC v. NRC, 582 F.2d 166 (2d Cir. 1978) to the "reasonable confidence" question during the consideration by the NRC and the court of the NRDC petition for rulemaking, and to the opportunity for further review provided by a related and ongoing NRC rulemaking involving Table S-3. 602 F.2d at 417-419. The "S-3"

proceeding is presently under the court's jurisdiction thereby assuring a further review by the court of the remanded matters once the NRC has completed the "reasonable confidence" rulemaking.

Nor is Christa-Maria correct that the Commission's Notice of Proposed Rulemaking is at odds with NEPA. No environmental impact statements were prepared for the license amendments challenged in State of Minnesota v. NRC, supra, and the court did not hold that such statements were required. In each instance the cognizant Atomic Safety and Licensing Board, after full consideration in the crucible of the adversary process, adopted the NRC Staff's findings in its negative declaration that no environmental impact statement was needed because the increase in the pools' storage capacities was not an action significantly affecting the quality of the human environment. 602 F.2d at 415.

In the context of the NRC's negative declaration -- left undisturbed by the court, Christa-Maria's NEPA arguments are misplaced. For as the court recognized, all that is required is a further evaluation of the prior affirmative finding of the NRC of "reasonable confidence." 602 F.2d at 419.

Moreover, the main thrust of the reasonable assurance or reasonable confidence inquiry stems from the NRC's statutory mandate under the Atomic Energy Act of 1954, as amended ("Act") rather than NEPA. The NRC is charged with

the responsibility of protecting the public health and safety under the Act, and it is in this context that the court in NRDC v. NRC, 582 F.2d 166 affirmed the Commission's denial of the NRDC petition for rulemaking. The petition requested the NRC to (i) determine whether high-level radioactive wastes generated in nuclear power reactors can be permanently disposed of without undue risk to the public health and safety, and (ii) withhold action on pending and future applications for operating licenses for nuclear power reactors until an affirmative determination has been made. The court held that the petition was properly denied because the Act did not require the requested determination prior to the issuance of operating licenses for nuclear power reactors. 582 F.2d at 171-175. The further consideration of the "reasonable confidence" finding directed by the court in State of Minnesota v. NRC, supra serves to assure that the NRC will adequately discharge its public health and safety responsibilities under the Act. Thus while the related environmental concerns are pertinent, the dominant consideration on remand from the court is the proper discharge of the NRC's statutory mandate under the Act.

Finally, there is no basis for Christa-Maria's assertion that, as a matter of general administrative law, the Commission must suspend licensing pending the completion of a related generic proceeding unless it duplicates the generic inquiry in the individual licensing proceedings.

The orderly administrative process would be paralyzed if the Commission were forced to suspend all licensing every time it periodically reassessed an earlier finding in an area "characterized by continuing evolution of the state of pertinent knowledge," as the court in State of Minnesota v. NRC found this one to be. 602 F.2d at 419.

Christa-Maria cites two previous Commission actions that she maintains support her assertion. She cites the Commission's action in suspending licensing following the court's invalidation of a portion of the Commission's Table S-3 in NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976), as a recognition that NEPA requires such a suspension in a situation like the present one. The two situations, however, are distinguishable. Following NRDC v. NRC, supra, the Commission decided to suspend licensing pending conclusion of an expedited interim rulemaking on the environmental impacts of the tail end of the uranium fuel cycle. At issue there, however, were new licenses, for which environmental impact statements were concededly necessary, and the Commission recognized that without a valid substitute for Table S-3 "the basis for a complete environmental impact statement will not be in place." 41 Fed. Reg. 34,707, 34,708 (Aug. 16, 1976). Later, however, with the court's approval, the Commission decided to proceed with licensing before the interim rulemaking was completed on condition that such

licenses be subject to a final determination of a valid rule. 41 Fed. Reg. 49,898, 48,899 (Nov. 11, 1976).

In the second action, following the invalidation of Table S-3, the Commission deferred instituting rulemaking on radon releases from the fuel cycle and directed that in the interim the issue be a subject of adjudication. 43 Fed. Reg. 15,615 (April 14, 1978). This example provides no support for Christa-Maria's assertion because it involves an issue that concededly required inclusion in an environmental impact statement and because the notice itself indicated that the Commission was not instituting a rulemaking.

These two examples do not establish the existence of a uniform Commission practice such as Christa-Maria suggests, much less the alleged legal requirement of such a practice. On the contrary, a broader view of the Commission's past practice shows that the Commission has always considered suspension of licensing pending a generic proceeding to be within its discretion. In exercising this discretion the Commission weighs the economic, social, and environmental costs of a suspension in licensing and the likelihood that its present analysis of the issue is dramatically in error. See 41 Fed. Reg. 45,849, 49,851 (Oct. 18, 1976); 41 Fed. Reg. 48,989, 49,899 (Nov. 11, 1976); 44 Fed. Reg. 45,362, 45,365 (August 2, 1979).

In 1972, for example, the Atomic Energy Commission issued a Notice of Proposed Rulemaking concerning its previous policy statement establishing interim acceptance criteria for emergency core cooling systems for light water-cooled reactors. 37 Fed. Reg. 288 (Jan. 8, 1972). The Commission determined that the conduct of the rulemaking hearing should not interrupt the orderly licensing process under the existing regulations. 37 Fed. Reg. 288, 289 (Jan. 8, 1972). When this notice appeared, a licensing adjudication was pending before an Atomic Safety and Licensing Board in which the intervenor argued that the interim acceptance criteria were inadequate. The Board declined to consider this argument because the pending rulemaking "made it inappropriate to entertain duplicative challenges in an adjudicatory context." Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1080 (D.C. Cir. 1974). The license issued and the intervenor, like intervenor Christa-Maria here, argued to the District of Columbia Circuit on appeal that the AEC should either have considered intervenor's arguments in the adjudication or suspended licensing pending the outcome of the rulemaking. The court sustained the issuance of the license, holding that the AEC had not violated NEPA or abused its discretion. The court reasoned:

> . . . If the agency could not consolidate the challenges to its rules into rulemaking, and meanwhile proceed with adjudications, UCS and other intervenors in other cases would effectively be able to impose a moratorium on licensing, despite the Commission's judgment that it is prompt action that is called for. . . Union of Concerned Scientists v. AEC, 499 F.2d. 1069, 1081-82 (D.C. Cir. 1974).

In 1975, the NRC received requests to suspend licensing of air transport of radioactive materials; these came from public officials who maintained that existing regulations were inadequate to protect the public safety and security. The Commission issued a Notice of Proposed Rulemaking to re-evaluate the regulations. It refused, however, to suspend licensing pending the rulemaking because it believed that the risk involved in transport under the existing regulations was small. 40 Fed. Reg. 23,768, 23,770 (June 2, 1975). The State of New York then sought a preliminary injunction against further transport, which was denied. See 41 Fed. Reg. 5627, 5628 (Feb. 9, 1976).

These counterexamples are sufficient to demonstrate that the examples cited by Christa-Maria do not represent a uniform and binding Commission practice. The Commission has always considered the suspension of licensing during a related generic proceeding to be a matter within its sound discretion, not something required as a matter of law. As an agency interpretation of long standing, this position is entitled to great weight. Furthermore, the position has been endorsed

by the District of Columbia Circuit in Union of Concerned Scientists v. AEC, supra.

For the foregoing reasons, the Notice of Proposed Rulemaking challenged here by Christa-Maria is entirely proper and requires no reconsideration. The Motion of Christa-Maria should be denied.

Respectfully submitted,

Joseph Gallo

Joseph Gallo

One of the Attorneys for
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Dated: December 8, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of PROPOSED RULEMAKING: STORAGE AND DISPOSAL OF WASTE	)	Re: Federal Register Notice 44 Fed. Reg. 61372, October 25, 1979.

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 CFR § 2.713(a), the following information is provided:

Name:	Michael I. Miller
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Admissions:	Supreme Court of Illinois District Court for the District of Columbia District Court for the Northern District of Illinois
Name and Address of Party:	Consumers Power Company 212 West Michigan Avenue Jackson, Michigan 49201

Michael I. Miller/kar
Michael I. Miller

Dated: December 8, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 CFR § 2.713(a), the following information is provided:

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Joseph Gallo/kar
Joseph Gallo

Dated: December 8, 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 CFR § 2.713(a), the following information is provided:

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Peter Thornton/kas
Peter Thornton

Dated: December 8, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	Re: Federal Register Notice 44 Fed. Reg. 61372, October 25, 1979.
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CERTIFICATE OF SERVICE

I hereby certify that copies of the following: RESPONSE OF CONSUMERS POWER COMPANY TO MOTION OF CHRISTA-MARIA FOR RECONSIDERATION OF DECISION; and NOTICE OF APPEARANCES OF MICHAEL I. MILLER, JOSEPH GALLO and PETER THORNTON in the above-captioned proceeding were served upon the following persons by depositing copies thereof in the United States mail, first class postage prepaid, this 8th day of December, 1979.

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Washington, D.C. 20555

Commissioner Peter A. Bradford
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Commissioner Richard T. Kennedy
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Commissioner John F. Ahearne
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