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

OFFICE OF THE SECRETARY

January 2, 1980

DOCKET NUMBER
PROPOSED RULE PR - 50 51 (44FR 61372)

Karin P. Sheldon, Esq.
Sheldon, Harman & Weiss
1725 I Street, N.W.
Suite 506
Washington, D.C. 20006

Dear Ms. Sheldon:

On November 7, 1979, Christa-Maria, an intervenor in the Big Rock spent fuel expansion proceeding, moved the Commission to reconsider its decision that pending spent fuel pool expansion proceedings could continue during the waste confidence rulemaking subject, however, to retroactive application of whatever determinations are reached in the rulemaking. That decision was announced as part of the notice of proposed rulemaking in that confidence proceeding. 1/

Your motion argues that the decision in State of Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979) held that the NRC's consideration of the possibility of long-term on-site storage of spent fuel has been legally inadequate under NEPA and the Atomic Energy Act, and that adequate consideration is legally required prior to approval of any new spent fuel pool expansion. Since under the rulemaking notice long-term storage will not be considered in individual proceedings, you argue that the individual proceedings must be suspended until the rulemaking is completed.

The Commission believes that your position is based upon a misreading of the State of Minnesota decision. Judge Leventhal was quite careful not to "make law" in that case. His opinion for the court was consciously limited to a remand to the Commission for further consideration in light of new information and did not accept petitioners' contentions that the Commission had erred both procedurally and substantively in declining to consider the possibility of long-term on-site storage. Judge Leventhal concluded his opinion by writing "[t]he court confines its action at this time to rejection of certain contentions by petitioners, notably the claim of need for an adjudicatory proceeding." 2/ The court explicitly held that it would neither "vacate or stay the license amendments, which would effectively shut down the plants." 3/ The court's decision was based on its belief that before it decided the broader legal questions pressed on it by petitioners, "in the interest of sound administration" it should remand these proceedings to the NRC for further consideration in light of the S-3

1/ 44 FR 61373 (October 25, 1979).

2/ 602 F.2d at 419 (emphasis added).

3/ 602 F.2d at 418.

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rulemaking and the IRG report. 4/ Even Judge Tamm's concurring opinion which squarely decides that both NEPA and the Atomic Energy Act require the Commission to determine whether it is reasonably probable that an offsite fuel repository will be available when the plant operating licenses expire, does not call for a halt to spent fuel expansion. Indeed Judge Tamm takes pains to explain that his views are consistent with the Second Circuit which "held that the Commission need not halt licensing of nuclear plants pending a determination that an approved method of permanent nuclear waste disposal exists." Concurring opinion at 419-20.

Despite all this your motion simply asserts, that the court "rejected" NRC's position as set forth in ALAB-455, the Appeal Board decision under review 5/ and therefore that future spent fuel expansions cannot be approved. To the contrary, it should be emphasized that the position set forth in the notice of proposed rulemaking will put future spent fuel pool expansions in exactly the same position as the Vermont Yankee and Prairie Island spent fuel pool expansion approvals that were the subject of the court's decision. All of these expansion proceedings could be decided, but would remain subject to the results of the generic rulemaking.

Your motion seeks to draw an analogy to the Commission's actions following the Court of Appeal's decisions in the S-3 case 6/ and its actions in connection with the consideration of the environmental effects of radon. Neither avails here. The major and decisive distinction between those earlier cases and that presented now by spent fuel expansion proceedings is that in the earlier cases it had been determined that the Commission's method of evaluating environmental effects was either substantively in error or was insufficient as a matter of law. As noted above, the State of Minnesota case does not entail any such finding of error on the part of the Commission. That alone removes the usefulness of S-3 and radon as potential anologies. Secondly, as earlier noted the State of Minnesota court explicitly recognized that it was not imposing a licensing halt.

Furthermore, in connection with the S-3 analogy, it also might be noted that subsequent to the Commission's August 13, 1976 suspension of license issuance, the court of appeals stayed issuance of its mandate in Vermont Yankee and approved resumption of its license issuance on the sole condition that the Commission would "make any licenses granted between July 21, 1976 [the date of the court's original decision] and such time when the mandate is issued subject to the outcome of the proceedings herein." Order of October 8, 1976 quoted in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI 76-17, 4 NRC 451, 457 (1976). We think it not

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4/ "We need not consider what course we would have followed, if this were all that were before us." 602 F.2d 417.

5/ 5 NRC 41 (1978).

6/ NRDC v. NRC, 547 F.2d 633 (D.C. Cir. 1976), rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978).

unlikely that the court of appeals disposition of the State of Minnesota case was intended to avoid the uncertainties governing license issuances which had been engendered by the S-3 decision up until the time that the D.C. Circuit stayed its mandate. Accordingly, if it is relevant at all, the S-3 example you cited also suggests that conditioning licenses on the outcome of the remanded proceeding is permissible for spent fuel expansion approvals as well.

For the above reasons, the Commission has decided to deny Christa-Maria's November 7 petition for reconsideration.

Sincerely,

Samuel J. Chilk
Secretary of the Commission

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSIONERS

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

MOTION OF CHRISTA-MARIA
FOR RECONSIDERATION OF DECISION

Christa-Maria, intervenor in spent fuel pool expansion proceedings in the Matter of Consumers Power Company (Big Rock Nuclear Plant) Docket No. 50-155, requests the Commission immediately to reconsider the decision announced in the Notice of Proposed Rulemaking, 44 Fed. Reg. 61373, October 25, 1979, to allow the expansion of spent fuel storage pools at nuclear plants prior to a determination in generic rulemaking proceedings that indefinite on-site storage is safe or that off-site storage or disposal will be available before on-site storage becomes unsafe. The Commission has determined not to permit consideration of these generic issues in individual licensing proceedings, but has concluded that licensing practices fo[illegible] changed while the generic p[illegible]

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