

HEARTLAND OPERATION
TO
PROTECT THE ENVIRONMENT

30 January 1991

James Kennedy
Office of Nuclear Materials
Safety and Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: SECY 90-318

Dear Mr. Kennedy:

Attached please find comments in response to SECY 90-318, as noticed in the Federal Register, Vol. 55 No. 233, dated December 4, 1990. Please acknowledge receipt of the attached comments.

Please send me a copy of the Commission's determination as to any action(s) that will be taken as a result of recommendations and comments received regarding SECY 90-318.

Thank you for your consideration and attention.

Sincerely,



Diane A. Burton, Director
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COMMENTS REGARDING
RECOMMENDATIONS ON THE
TRANSFER OF TITLE PROVISIONS
OF THE
LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENTS ACT OF 1985
SECY 90-318

The notice for public comment published in the Federal Register, Vol. 55 No. 233, dated December 4, 1990, listed a number of questions of particular interest to the Commission. The questions posed therein will be addressed first, followed by general comments regarding the instant issue.

1. What factors should the Commission consider in deciding whether to authorize on-site storage of LLW (other than storage for a few months to accommodate operational needs such as consolidating shipments or holding for periodic treatment or decay) beyond January 1, 1996?

The primary factors to be considered by the Commission in determining whether to allow on-site storage of LLW in any instance should, of course, be the public's health and safety and the protection of the environment. These important considerations are in no way related to any set deadline or time frame.

Clearly, on-site storage of LLW, most especially at nuclear power plants, should have priority over any other option should permanent disposal capacity be unavailable for whatever reason. Such nuclear power plants are presumably secure and environmentally suitable for reactor operation and storage of spent fuel rods, so on-site storage of LLW should present no additional undue hazards. A deadline put in place by Congress is not written in stone, nor should it be viewed as an obligatory deadline regarding policy decisions by a regulatory agency when there is the slightest potential for adverse effects to the public or the environment. It can reasonably be assumed

that Congress did not intend to sacrifice the protection of public health and safety and the environment for in speed in the development of LLW disposal capacity.

The instant case is just such a situation. Notwithstanding the January 1, 1996, deadline of the LLRWPA, the clear indication, as shown by progress made-- or lack of progress--in a number of the compact regions and 'go-it-alone' states, is that the development of suitable disposal capacity is a more complicated and lengthy process than perhaps envisioned by Congress when it established the timetable for implementation of the LLRWPA.

Some of the complications various compact host states and non-compact states have experienced are: locating suitable sites for permanent LLW facilities; ascertaining which, if any, technology can be relied upon to ensure isolation of LLW from the environment for the time period necessary to adequately protect the public health and safety and the environment; and in some cases, constitutional questions arising from the LLRWPA itself. None of the aforementioned issues are delaying the process of implementing the LLRWPA for delay purposes only, but rather delay has occurred for good cause.

On-site storage of LLW, at currently licensed points of generation, should be the primary means of providing for the safe management of LLW if permanent disposal capacity is not otherwise available--irrespective of the arbitrary time tables of the LLRWPA.

2. What are the potential health and safety and environmental impacts of increased reliance on on-site storage of LLW?

If the on-site storage occurs at a duly licensed and operating nuclear power plant, most of which currently store high-level waste on-site, one should expect no more potential for negative public health and safety or

environmental impacts than the potential for such impacts under normal operating conditions of the plant. Nevertheless, if there is any concern whatever that there would be potential negative health and safety or environmental impacts, it is incumbent upon the commission to conduct site specific environment analysis and to issue Environmental Impact Statements citing exactly what such impacts would be.

On-site storage of LLW at other than nuclear power plants may pose health and safety and environmental problems. Many hospitals and medical research facilities currently store LLW for decay, as well as consolidation for shipment. A goodly portion of such LLW waste has half-lives measured in minutes, hours, days, or months. Storage areas, one assumes, have met regulatory requirement to ensure isolation of the LLW. For medical treatment and research facility which generate significant amounts of waste containing long-lived radionuclides, it may be necessary to develop a program which would allow such wastes to be stored at the nearest nuclear power plant.

3. Would LLW storage for other than operational needs beyond January 1, 1996, have an adverse impact on the incentive for timely development of permanent disposal capacity?

The major adverse impacts on the incentive for timely development of permanent LLW disposal capacity appear to be more related to: lack of adequate technology to provide for safe LLW management and disposal; lack of suitable locations for permanent LLW disposal facilities within some states and regions; incompetent siting plans resulting in designation of unsuitable sites--by private LLW management companies in some instance--for the location of permanent LLW disposal facilities; and issues of constitutionality intrinsic to the LLRWPA.

A number of important aspects key to accomplishing the development of any permanent LLW disposal program were unaddressed prior to Congress enacting the LLRWPA. Antecedent to being able to competently, much less timely, develop permanent LLW disposal capacity is the existence of adequate technology for the same. Accurate and detailed assessments of the waste stream (mixed waste, as well as LLW), is also a necessary consideration.

4. What specific administrative, technical, or legal issues are raised by the requirements for transfer of title?

The most serious issue is the legal question of constitutionality, and secondarily, the question of enforceability. As noted in SECY 90-318 "...the LLRWPA does not impose implementation responsibilities on the NRC regarding the 1996 deadline," nor for that matter the 1993 deadline. In fact, the LLRWPA not only does not specifically designate any entity to implement the 1993 or 1996 deadlines, it does not provide for court jurisdiction to address legal liabilities arising from states taking title to such wastes. It appears that the LLRWPA may impose no enforceable obligation on the states to accept title to or possession of any LLW.

Generally, in order to have title vested or possession transferred, a party needs to *accept* title and possession. The legal ramification of a state not being willing to accept title and possession is lengthy litigation--the silence of the LLRWPA as regards implementation and jurisdiction further complicates the issue.

5. What are the advantages and disadvantages of transfer of title and possession as separate steps?

Pragmatically, it may be far easier to secure a transfer of title, than a transfer of possession. If, in fact, a state has no disposal capacity available, how could

possession possibly be transferred to the state?

42 U.S.C. 2021e(d)(2)(E) appears to contain a classic 'Catch-22'--"...If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste...."

It would appear that the only reasonable approach to addressing the ultimate sanction of the LLRWPA, would be to ignore it. Any attempt to implement the above quoted sanction would clearly have to be done in separate steps--title transfer, and transfer of possession only when adequate disposal capacity is available.

The two step process, however, poses numerous, complex liability problems. This aspect of the issue is reminiscent of the "Who's on first" comedy routine.

6. Could any State or local laws interfere with or preclude transfer of title or possession?

Of course State laws, and perhaps local laws, could interfere with and attempt to preclude transfer of title or possession. Whether such laws could successfully preclude transfer of title or possession would be a matter for the courts to determine.

7. What assurances of the availability of safe and sufficient disposal capacity for LLW should the Commission require and when should it require them? What additional conditions, if any, should the Commission consider in reviewing such assurances?

As SECY 90-318 noted, the LLRWPA does not impose implementation responsibilities on the NRC, regarding enforcement of sanctions or adherence to the LLRWPA timetable. Consequently, the NRC should be primarily

concerned with the protection of the public health and safety and the environment. The timeframe to sensibly use would be that timeframe necessary to assure such protection.

It is difficult to assess what assurances could be required, since the radioactive waste problems have for so long been neglected or ignored. There is serious doubt within the scientific community as to whether there is available suitable technology for addressing the problems-- low-level or high-level. What has been conspicuously absent in the nuclear industry, as well as in the regulatory agencies, is emphasis on the development of adequate treatment, storage, or disposal technologies.

Of course, whatever assurances or conditions the NRC may consider should be tied only to a timeframe which assures a technology capable of achieving permanent isolation of the waste from the biosphere inhabited by human beings and their food chains.

8. Are there any other specific issues that would complicate the transfer of title and possession, as well as on-site storage of LLW and mixed (radioactive and chemical) waste?

Mixed waste is an especially troublesome topic. Currently, as noted by the Office of Technology Assessment and others, no treatment facilities are available, and in some cases no technology is available, for much of the mixed waste stream. Most likely, this waste is presently being stored on-site, which is contrary to the law and regulatory requirements. One can reasonably assume that just because treatment facilities are unavailable, the industry has not ceased to generate the waste.

GENERAL COMMENTS

There being no prohibition of storage of LLW, or HLW for that matter, on-site at nuclear power plants, it would appear that the most reasonable solution to the short-term storage/disposal needs can easily be met by on-site storage. Maintaining the timeframe currently outlined in NRC regulations--interim storage for five year, with renewal options--would be reasonable. Prior to renewal of interim storage licenses, each storage facility should be inspected to ensure compliance with necessary regulatory safety standards.

If there is any question as to the adequacy of the existing guidance or regulatory framework for licensing interim on-site storage, an evaluation of current framework and assessment of potential impacts should be undertaken immediately

The licensing of a State to possess LLW would pose numerous complicated problems. Foremost, is the 'take-title-to and possession-of' sanction of the LLRWPA. One can only pray that there will be no attempt to license a state to take title to or possess LLW if the state has no capacity to take possession of such LLW.

Further, it is important to note that the sanction is a two-step process, *if* a generator requests, *then* the state shall be obligated, to take title to, possession of, etc. States could develop other arrangements with the generators of LLW within their boundaries to address the disposal capacity issue, which would not involve taking title or possession of LLW. And, once again, it bears emphasizing that taking title to is not a necessary requirement of law, but rather a possible penalty.

The major flaws of the LLRWPA are becoming increasingly apparent. The fact that reasonable alternatives--long-term or indefinite-term storage--were not considered, much less provided for, is one of the glaring flaws. Rather than viewing the licensing of storage after 1996 as an action that would relieve States from the need to comply with the LLRWPA, such position should be viewed as assisting States in addressing the immediate need for safe storage, and relieving States of that concern as they attempt to provide for adequate disposal capacity.

The development of safety guidance for long-term storage should be undertaken at this time, to allow sufficient time for in-depth assessments and public participation. Prudence dictates that such program be developed and operational prior to the need for it. It

does not always follow that, criteria and guidance for a particular option being in place, such becomes the primary option for dealing with a given situation.

It is difficult for this reviewer to understand how, if conducted in a comprehensive manner, the development of a policy statement would limit or constrain future options. Any policy statement should consider all options and allow for any reasonable option under certain circumstances. The NRC's position of not looking favorably on extended long term storage of LLW need not, necessarily, be undermined by a comprehensive program addressing long term storage as an alternative, should the need arise.

One would certainly hope that the development of a policy statement would be more time intensive than the development of a letter. The implications of the statement under Policy Statement contained in Enclosure 2: "It may also be a more difficult mechanism in which to present positions that require *subtle* discussion and treatment such as the timeframe over which NRC will authorize storage after 1996." [Emphasis added], are offensive. Any *subtle* discussion regarding this issue should be conducted in full public view.