



CHAIRMAN

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

COMMISSION
CORRESPONDENCE

June 12, 1980

Mr. Emilio E. Varanini, III
Commissioner and Chairman
Nuclear Fuel Cycle Committee
California Energy Commission
1111 Howe Avenue
Sacramento, California 95825

Dear Mr. Varanini:

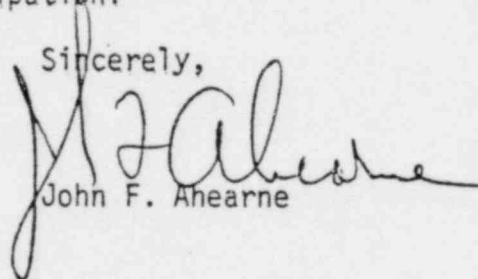
Thank you for your letters of February 20 and May 13, 1980 expressing your concerns about the procedures in the Commission's proposed rule-making on the storage and disposal of nuclear waste ("Waste Confidence Rulemaking"). Both of your letters have been placed in the official docket of the Waste Confidence Rulemaking proceeding.

I believe that you will find the Commission's Memorandum and Order of May 28, 1980 (copy enclosed) to be responsive to your suggestions concerning procedures to assure that the record compiled in the proposed rulemaking will be adequate for a sound assessment of the likelihood that safe waste disposal can and will be achieved.

The Order refers to a working group established by the Commission to monitor the development of the record. This group is composed of personnel from offices in close contact with the Commission itself and should provide a meaningful level of Commissioner involvement at this stage of the proceeding. As the Order notes, there will be opportunity later on, after the initial filings of the parties have been received and reviewed, to see how well the procedures are working and to adopt further measures that may appear necessary.

We appreciate the strong interest you have shown in this proceeding and look forward to your further participation.

Sincerely,



John F. Ahearne

Enclosure:
Memo and Order dated
May 28, 1980

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

John F. Ahearne, Chairman
Victor Gilinsky
Richard T. Kennedy
Joseph M. Hendrie
Peter A. Bradford



In the Matter of

PROPOSED RULEMAKING ON THE STORAGE AND
DISPOSAL OF NUCLEAR WASTE

(Waste Confidence Rulemaking)

PR-50, -51
(44 Fed. Reg. 61372)

MEMORANDUM AND ORDER

In the period following issuance of the Presiding Officer's Prehearing Conference Order on February 1, 1980, the Commission received two motions from participants requesting that the NRC staff be assigned an explicit role with regard to assuring the development of an adequate record in this proceeding. The Natural Resources Defense Council (NRDC) in a motion dated February 14, 1980, contended that the Commission cannot be assured of a complete record in this proceeding unless the staff solicits the views of technical experts. ^{1/} The California Energy Commission (CEC) in a motion dated February 20, 1980, suggested that the staff should actively seek out a broad spectrum of views by empaneling a body of

^{1/} This motion was supported by the States of Wisconsin, Ohio, Illinois, and New Hampshire. It is opposed by the Utility Waste Management Group and the Edison Electric Institute.

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experts to mediate the technical issues presented by this rulemaking. 2/

The Commission has directed its Office of Policy Evaluation to form a working group to advise the Commission regarding the adequacy of the record to be compiled in this proceeding. The working group is composed of personnel from the Offices of Policy Evaluation, the General Counsel and the Executive Legal Director, and is provided with technical support by the program offices of Nuclear Materials Safety and Safeguards, Research, and Standards Development. 3/

The working group will review the participants' submissions and, after the cross-statements are filed, will identify issues in controversy and any areas in which additional information is needed. Depending upon the procedures adopted at that point, the working group will assist in obtaining this further information by: (1) preparing questions to be asked of participants by the Presiding Officer or the Commission; or (2) suggesting methods of obtaining this information by other means, including soliciting information from other sources.

2/ CEC also suggested that the Commission or a committee composed of at least two Commissioners should conduct this proceeding. As the Presiding Officer noted in his Order of February 1, 1980, the Commission carefully considered the procedure it wished to follow and decided to employ hybrid rulemaking procedures and to designate a Presiding Officer who will monitor the early stages of the proceeding and assist the Commission in conducting the later stages of the proceeding. We believe that it would be premature at this preliminary stage of the proceeding to determine what procedures would be appropriate for the later stages of this proceeding. Accordingly, after the cross-statements are filed, CEC may again present this suggestion if it believes that this procedure would be appropriate for conducting the next stage of this proceeding.

3/—The working group may also engage the services of outside experts if it determines that such consultation is needed.

Following the last phase of the hearing, the working group will prepare a summary of the record, identify the key issues and controversies, and indicate how their resolution could affect the Commission's decision. In addition, the Presiding Officer may at any time during the proceeding identify areas in which the working group could provide assistance. The Commission will consider the Presiding Officer's requests and may suitably modify the extent of the working group's participation.

The Commission believes that at the present stage of the proceeding the establishment of this working group adequately addresses the concerns expressed in the motions referred to above. Many issues may be resolved by the participants' position papers and cross-statements, thus obviating the need for additional expert opinions on those issues. Accordingly, the Commission believes it would be premature to solicit expert opinion at this time. After these documents have been filed, the working group will be able to identify the important and controversial issues and then to determine whether the special participation by experts as urged by NRDC and CEC would materially clarify particular issues or disputed evidence. 4/

Insofar as the NRDC and CEC motions request Commission action other than that described in this Memorandum and Order, those motions are denied.

Commissioner Bradford would have preferred that the staff views on the substantive issues be subject to public scrutiny. He also would have preferred that the Commission undertake the service of all filings in this case.

4/ To a large extent, the nature of participation by non-participant experts, should it be found necessary, will be determined by the issues they would address. Thus, CEC's suggestion for technical mediation is also premature at this time.

It is so ORDERED.

For the Commission



SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.,

this 28th day of May, 1980.

CALIFORNIA ENERGY COMMISSION

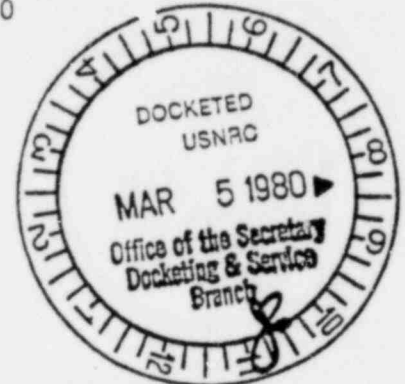
2221 HOWE AVENUE
SACRAMENTO, CALIFORNIA 95825

DOCKET NUMBER
PROPOSED RULE

PR-50,51(44FR 61372)
February 20, 1980



John F. Ahearne, Chairman
Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20055



Dear Chairman Ahearne:

As a member of the California Energy Commission (CEC), a participant in the nuclear waste confidence proceeding, and as presiding member of the CEC's Nuclear Fuel Cycle Committee, I am concerned that this important investigation be conducted in a manner permitting full public participation and a complete and coherent record. Recent developments in the proceeding appear to jeopardize achievement of these goals. Moreover, these developments seem to depart from the expressed intent of the Commission, and threaten to erode public confidence in this inquiry.

On October 25, 1979, the Commission issued its Notice of Proposed Rulemaking in this matter. (44 Fed.Reg. 61372.) There, recognizing the complexity of this proceeding, the Commission actively solicited the suggestions of all interested parties regarding a variety of questions, including procedural issues. (See 44 Fed.Reg. 61373, 61374.) In particular, the Commission specified that notices of intent to participate should include discussion "of any special matters or concerns sought to be raised." The Commission also stated it was "considering whether additional procedures should be employed" for the hearing.

In response to the notice, the CEC filed a notice of intent to participate which raised, among other matters, two procedural issues. First, we suggested that the NRC should conduct this rulemaking itself, or delegate it to a committee of two or more commissioners, rather than leaving it to some subordinate body.^{1/} Second, we urged the NRC to actively seek out a broad spectrum of views by empaneling a body of experts to "mediate" the complex technical issues presented by this rulemaking.^{2/}

1. The CEC conducts all its hearings in this manner, and has found that it promotes informed decisionmaking.

2. Scientific "mediation" is an issue identification technique. Technical experts on both sides of a controversy confer and then publish a statement describing where they agree and disagree. For issues where disagreement exists, the (cont.)

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These questions remained unresolved (indeed, unacknowledged) until a prehearing conference was held on January 29, 1980. At that time, we again raised our concerns in a prehearing conference statement and related motion. In addition, we asked the hearing officer to certify both issues to the NRC itself, where such fundamental matters should be resolved. Many states and other parties supported our motion.

Three days later, on February 1, 1980, the hearing officer issued a prehearing conference order that, among other things, summarily rejected our motion with respect to both these matters. Moreover, the order seemingly ignored our request for certification. Most disturbing of all, however, was the hearing officer's apparent refusal to even consider the merit of our suggestions. The order instead suggests that participants in this rulemaking are precluded from raising procedural objections or suggestions. In the words of the order, "participation does not extend to a challenge or attack upon the procedures themselves."

Such an order severely limits meaningful public participation and the ultimate credibility of this proceeding. The NRC cannot expect parties to keep silent when they perceive fundamental procedural issues related to this hearing. If parties are precluded from voicing such concerns precisely because they are significant, the integrity of the hearing process will suffer.

We firmly believe the hearing officer has misunderstood the directions of the Commission. The Commission's Notice of Proposed Rulemaking invited parties to make exactly the type of suggestions we have raised. This direction, as well as the importance of this rulemaking, suggests the Commission would consider these procedural issues.

It is regrettable that the hearing officer has refused to consider these particular suggestions. Many parties including ourselves believe the merit of these proposals is clear. We are convinced that the procedures we suggest would focus this

statement sets forth the respective positions of each side and any suggestions for resolving the dispute. This technique was used successfully in Sweden to define issues similar to those presented in this rulemaking. For a more detailed description of the technique, see Nancy E. Abrams and R. Stephen Berry, "Mediation: A Better Alternative to the Science Court," Bulletin of the Atomic Scientists, April 1977; and Nancy E. Abrams "Nuclear Politics in Sweden," Environment, May 1979.

John F. Ahearne, Chairman
Nuclear Regulatory Commission
February 20, 1980
Page 3

proceeding on the important issues while also ensuring a complete and impartial record.

In its Notice of Proposed Rulemaking, the Commission indicated its desire to actively participate in this proceeding. We believe that such active participation is essential; the hearing officer's prehearing conference order illustrates the problems that may result from lack of Commission participation. To date, over sixty parties have intervened in this proceeding. The precise issues that will be addressed in the proceeding remain totally amorphous. Direction from the Commissioners themselves at this stage is necessary to ensure that the parties will focus on those matters that the Commission believes are necessary for its decision.

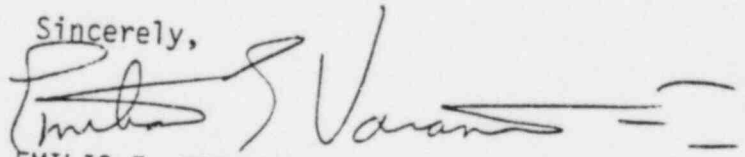
Moreover, unlike more common factual matters before the NRC, the central question in this proceeding is the NRC's confidence. This judgment must, of course, be made by the Commission itself and it cannot easily result from a review of a lengthy record developed by a subordinate officer. Rather, the Commission itself, or a committee of the commissioners, should direct the proceeding and the issues it addresses.

The second procedure suggested by the CEC, mediation of the issues by a balanced panel of technical experts, would also result in an expeditious focusing of issues. It would lead to elimination of many technical disputes not really material to the Commission's ultimate decision and at the same time would guarantee that the decision is based on a comprehensive record. This procedure has also been used elsewhere with considerable success, most notably by the Swedish government in its review of nuclear waste disposal issues.

It is my hope that the matters I have addressed in this letter are of concern to you also and that they can be resolved. If I can be of further assistance in explaining the CEC's suggestions in greater detail, please do not hesitate to contact me.

cc: Commissioner Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford

Sincerely,


EMILIO E. VARANINI, III
Commissioner and Chairman
Nuclear Fuel Cycle Committee

CALIFORNIA ENERGY COMMISSION

1111 HOWE AVENUE
SACRAMENTO, CALIFORNIA 95825



May 13, 1980

Mr. John F. Ahearne, Chairman
Nuclear Regulatory Commission
1717 H Street, N. W.
Washington, D. C.

Dear Chairman Ahearne:

On February 20, 1980, I wrote to you expressing my concern about the procedures being used in the nuclear waste confidence proceeding. As that letter states, the California Energy Commission (CEC) is primarily concerned with ensuring the active participation of the NRC commissioners in the proceeding rather than delegating the matter to a hearing officer. To date, I have not received any response to my letter.

The extraordinary nature of this proceeding necessitates the extraordinary procedure of having the Commission or a committee of commissioners directly hear this case. Uncertainty over the disposal of radioactive waste is one of the major impediments to increased use of nuclear energy. The central issue before the Commission is their confidence that this uncertainty will be resolved. Obviously, this determination is fraught with complex policy judgments involving the most fundamental and unprecedented questions of continuing societal risk. Furthermore, it is virtually impossible to separate the technical issues involving nuclear waste disposal from these difficult policy questions. Even now, however, the parties have received no guidance from NRC on what is their standard for confidence. Thus, for this proceeding to have any real focus, the commissioners themselves must preside and make the necessary policy decisions.

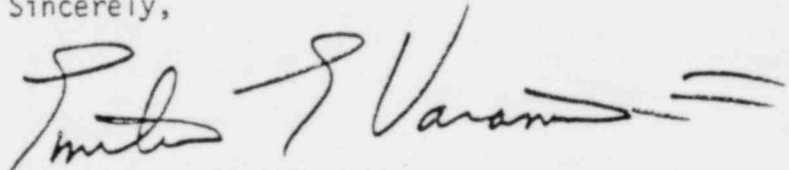
The recently issued United States Department of Energy (DOE) Statement of Position on the Waste Confidence Rulemaking underscores the need for direct Commission involvement. That statement shows that the national nuclear waste disposal program is at a crossroads. The future course of that program as proposed by DOE is based upon their assessment of what is sufficient confidence for waste disposal. The NRC commissioners through their assessment of confidence will never have a better opportunity to provide the needed direction to federal waste disposal plans.

I am frankly surprised at NRC's apparent reluctance to use this pro-

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ceeding for a meaningful evaluation of nuclear waste disposal activities. A comparatively small amount of Commission time invested now in this proceeding could forestall many more years of dispute over waste disposal. I trust that you will give this matter your personal attention. I hope to hear from you soon.

Sincerely,

A handwritten signature in dark ink, appearing to read "Emilio E. Varanini, III". The signature is fluid and cursive, with a long horizontal stroke at the end.

EMILIO E. VARANINI, III
COMMISSIONER AND CHAIRMAN
NUCLEAR FUEL CYCLE COMMITTEE

cc: Commissioner Joseph M. Hendrie
Commissioner Victor Gilinsky
Commissioner Richard T. Kennedy
Commissioner Peter A. Bradford
California Congressional Delegation
Editorial Board - Nucleonics Week
Editorial Board - Washington Post
Senator Gary Hart
Congressman Morris Udall