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January 31, 1991

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

Subj:       SECY-90-318 (Sept. 12, 1990)  
          LLRWPA Title Transfer and Possession Provisions  
          55 Fed. Reg. 50,064 (Dec. 4, 1990)

Dear Mr. Kennedy:

In accordance with the above-referenced notice and invitation to comment (the Notice), we hereby submit these comments on behalf of Gulf States Utilities Company, Maine Yankee Atomic Power Company, Northeast Utilities, Public Service Electric & Gas Company, and South Carolina Electric & Gas Company. We appreciate this opportunity to express our views on SECY-90-318, Low-Level Radioactive Waste Policy Amendments Act Title Transfer and Possession Provisions (Sept. 12, 1990), which briefs the Commission on issues related to the title transfer and possession provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA) and provides the Commission related NRC Staff recommendations. The Commission was briefed on SECY-90-318 by the Staff on October 29, 1990. At that time, the Commission decided to solicit the views of the public regarding the Staff's recommendations.

Our comments are limited to those aspects of SECY-90-318 which appear to ratify and even expand on attempts to impose requirements or remove authority granted by present licenses without rulemaking or opportunity for adjudication. Specifically, we are concerned with the Staff's recommendation in SECY-90-318 that the Commission "approve the staff plans to continue to utilize existing guidance to authorize storage for a single five-year period beginning in 1993." SECY 90-318 at 7 (emphasis added).

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The underscored phrase suggests a Staff position that NRC formal licensing actions, involving, for example, the issuance of license amendments or new licenses, are a prerequisite to LLW storage beyond 1993 by power reactor licensees. If this interpretation of the Staff's intent is accurate, SECY-90-318 would seemingly be in conflict with the requirements of the Atomic Energy Act, 42 U.S.C. § 2011 et seq., and the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

It is our view that power reactor licensees currently have the authority to store LLW at the facility at which it was generated for the duration of the operating license. The onsite storage of LLW produced as a result of the operation of a nuclear power plant is authorized in the Part 50 operating license. The typical license provision authorizing possession of LLW material does not restrict possession to a period of time. The concept of a limit, such as a "5 year limit," for LLW storage is solely rooted in NRC guidance documents, such as generic letters and information notices. It is well established that such guidance documents may not of themselves establish legally binding requirements. Indeed, the Staff acknowledges in SECY-90-318 that there is "no law or regulation [that] prohibits storage of wastes for periods of time in excess of five years . . . ." SECY-90-318 at 5.

Where facility modifications to permit increased storage are necessary, licensees currently are simply required to analyze the technical and safety implications of increased onsite LLW storage and, under appropriate circumstances, may proceed without the need for prior review and approval by the NRC. We are mindful of the NRC Staff's position regarding the need for licensees to perform appropriate technical and safety evaluations in conjunction with planned expansions of existing onsite LLW storage capacity. The Staff's position is primarily set forth in Generic Letter No. 81-38, Storage of Low-Level Radioactive Wastes at Power Reactor Sites (GL 81-38), issued November 10, 1981. The guidance outlined in GL 81-38 references the requirements of 10 C.F.R. § 50.59 which, inter alia, permit a licensee to make facility modifications without prior NRC authorization after making specific findings. GL 81-38 notes that pursuant to the requirements of Section 50.59, the licensee could increase its LLW storage capacity without prior NRC approval if the expansion is not prohibited by its operating license or its technical specifications, and if no unreviewed safety question as defined in Section 50.59 is raised. In accordance with Section 50.59, the licensee must document its Section 50.59 safety evaluation and file a summary thereof with the NRC.<sup>1</sup>

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1/ See 10 C.F.R. § 50.71(e).

In our view, GL 81-38 merely points to a change process already provided for in the regulations. Section 50.59 assures appropriate controls are in place to ensure licensee reviews of the technical and safety implications of increased LLW storage, including related facility modifications to provide for such storage. Under most circumstances involving LLW storage, the test of Section 50.59 can be met. Accordingly, no application for a Part 50 license amendment is required and<sup>2</sup> no opportunity for a hearing on the storage plans is required.

GL 81-38 also suggests that any proposed increased storage capacity may not exceed "the generated waste projected for five years." GL 81-38 at 1. The concept of a five year limit, however, is not supported by any provisions in the Atomic Energy Act or NRC's regulations (and GL 81-38 does not offer support for the limit).

In this regard, SECY-90-318 declares that the Staff intends to continue to use the existing regulatory guidance for LLW storage, such as that provided in GL 81-38. However, in suggesting the need for additional licensing "authorization" for licensees to store their own LLW for limited periods, SECY-90-318 can be viewed as an attempt to elevate the legal significance of the existing guidance. For the NRC to treat the "5 year limit" as a legally enforceable requirement at this juncture would have the effect of transforming a Staff position into the legal equivalent of a Commission rule, regulation or order. Moreover, were the NRC Staff to attempt to impose new requirements regarding LLW storage, for example, by virtue of the Commission's action on SECY-90-318, such requirements would have to be subject to the procedures<sup>3</sup> outlined under 10 C.F.R. § 50.109, the backfitting rule.

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2/ In this regard, we are aware of no instance in which the Staff has challenged a safety evaluation prepared by a plant licensee that concluded that its prior approval for an increase in LLW storage capacity was not required. Indeed, Chairman Carr observed at the October 29 presentation on SECY-90-318 that the onsite storage of LLW presented few technical or safety concerns.

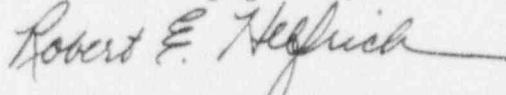
3/ The justification in SECY-90-318 to require additional licensing authorization for limited periods of storage appears to be linked to concern with the implementation of the title transfer and possession provisions of the LLRWPA. The Staff acknowledges, however, that "the LLRWPA does not impose implementation responsibilities on NRC regarding the 1996 deadline . . . ." SECY-90-318 at 4. The NRC's sole mission, therefore, remains the adequate protection of the public health and safety in the operation of commercial

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In summary, SECY-90-318 appears to suggest (mistakenly, in our view) that without alteration to the existing regulations or specific licenses, the NRC Staff could require formal licensing approvals and limit such approvals to a period of time (five years or less). It is our view that present operating licenses contain sufficient authority to store any LLW generated at the reactor. Thus, it now appears that the Staff intends to require its prior review and approval of onsite storage of LLW. To that extent, SECY-90-318 is irreconcilable with current regulations, e.g., 10 C.F.R. § 50.59, and existing operating licenses. The "5 year limit" concerning onsite LLW storage, as set forth in GL 81-38, is not a rule, regulation or order and has not undergone 10 C.F.R. § 50.109 procedures, and is therefore not an enforceable regulatory requirement.

Sincerely yours,



Mark J. Wetterhahn  
Robert E. Helfrich  
James W. Moeller

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nuclear power plants. It should not now go beyond this  
mission, in the pursuit of objectives for which other  
government entities are responsible.