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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE PRESIDING OFFICER



In the Matter of)
)
PROPOSED RULEMAKING ON THE) PR-50, 51 (44 Fed. Reg.
STORAGE AND DISPOSAL OF) 61372)
NUCLEAR WASTE)
)
(Waste Confidence Rulemaking))

COMMENTS OF CONSUMERS POWER COMPANY
REGARDING WORKING GROUP SUMMARY OF THE RECORD



Pursuant to the Nuclear Regulatory Commission's Notice of Proposed Rulemaking, 44 Fed. Reg. 61372 (October 25, 1979) (hereinafter referred to as "the Notice") and its own Notice of Intent to Participate of November 26, 1979, Consumers Power Company ("Consumers") is a full participant in the instant proceeding. Consumers hereby adopts the comments of the Utility Nuclear Waste Management Group-Edison Electric Institute ("UNWGM") regarding the Working Group Summary of the Record which was served on all parties to this proceeding on January 29, 1981. However, Consumers also wishes to supplement the UNWGM comments with the following additional material related to its particular interest in this proceeding.

As it has in past submissions in this proceeding, Consumers confines its comments to the subject of storage of spent fuel at the reactor site. The working group summary sets forth four issues, one procedural, and three technical, which are relevant to this interest. The three technical

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issues with respect to spent fuel are:

4.1 Do the properties of spent fuel allow it to be safely stored for extended periods without significant safety, health, and environmental effects?

4.2 Can the structure of spent fuel storage basins and associated basin components safely sustain extended periods of operation, perhaps for many decades?

4.3 How important are the risks imposed by accidents and acts of sabotage at spent fuel storage facilities?

Report of the Working Group on the Proposed Rulemaking on the Storage and Disposal of Nuclear Waste, Part 3, at 9-11.

Because of the overriding importance of one issue which the working group describes as procedural, however, Consumers believes that these issues have been misstated. Under procedural issues, the working group sets forth the question of what should be the appropriate legal standard for decision making, i.e., the standard for finding confidence, as follows:

1.2 Is the "reasonable assurance" standard appropriate for finding confidence in this proceeding or should some other standard such as "beyond a reasonable doubt," "more likely than not," "substantial evidence," "extraordinarily high degree of assurance" be applied?

Id. at 2. Consumers believes that the legal standard for decision making should not be open to question in this proceeding. Moreover, the correct legal standard does not require definitive answers to the three technical issues as stated above.*

* Although Consumers' specific interest is confined to the issues relating to spent fuel storage, the substance of the comments herein regarding the standard of decision applies equally to all technical issues in this proceeding.

Neither the Atomic Energy Act, the National Environmental Policy Act (NEPA), the Commission's regulations, the Notice, nor the judicial decisions giving rise to this proceeding suggest anything other than that a standard of "reasonable probability" should be applied to this proceeding. Moreover, the Commission does not have legal authority to apply a different standard.* In the Notice, the Commission stated:

If the Commission finds from this proceeding reasonable assurance that radioactive waste from nuclear facilities will be safely stored or disposed of off-site prior to the expiration of the license for the facility, it will promulgate a rule providing that the safety and environmental implications of radioactive waste remaining on site after the anticipated expiration of the facility licenses involved need not be considered in individual facility licensing proceedings. In the event the Commission determines that on-site storage after license expiration may be necessary or appropriate, it will issue a proposed rule providing how that question will be addressed.

44 Fed. Reg. at 61373 (emphasis added). In the Notice the Commission also stated that "this proceeding is not designed to reach quantitative conclusions about waste repository impacts or performance." Id.

* Section 103 of the Atomic Energy Act prohibits the Commission from issuing licenses for production or utilization facilities "if in the opinion of the Commission, the issuance of a license to such person would be inimical to . . . the health and safety of the public." 42 U.S.C. § 2133 (1976). The Commission's interpretation of this requirement has always been that it must find "reasonable assurance" that the facility can be constructed and operated without undue risk to the public. 10 C.F.R. §§ 50.35(a)(4), 50.57(a)(3). Since determination as to "confidence" arises in a licensing context, there is no justification from a safety standpoint for applying a basic standard other than "reasonable assurance." In addition, it is by now hornbook law that NEPA incorporates a "rule of reason." E.g., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978).

Indeed, the two court cases which prompted the Commission to institute this proceeding support very strongly the notion that the only proper standard is that of "reasonable probability." In Natural Resources Defense Counsel, Inc. v. NRC, 582 F.2d 166 (2d Cir. 1978), the court held that the Atomic Energy Act did not require the NRC to make a definitive determination on the disposability of nuclear waste. The Court there rejected NRDC's contentions that because means for dealing with nuclear waste were not completely proven, the Commission could not satisfy its statutory responsibility:

It is our conclusion that NRDC simply reads too much into the AEA. Indeed, if the AEC had interpreted the statute to require the affirmative determination regarding permanent disposal of high-level waste sought by NRDC, no commercial production or utilization facilities would be in operation today. We are satisfied that Congress did not intend such a condition.

582 F.2d at 171.

Moreover, in State of Minnesota v. NRC, 602 F.2d 412 (D.C. Cir. 1979), the Court stated the issue which prompted the instant proceeding as follows:

No one disputes that solutions to the commercial waste dilemma are not currently available. The critical issue is the likelihood (or probability) that solutions, either ultimate or interim, will be reached in time.

602 F.2d at 416. This case involved contentions that the Commission had satisfied neither its safety nor its NEPA responsibility with respect to determining the potential availability of solutions to the nuclear waste problem.

The Court indicated that a finding of "reasonable probability" would satisfy both statutory responsibilities. Indeed, the application of a more severe test was never at issue in that case: "Petitioners do not take issue with the Appeal Board's conclusion that all that is required is a reasonable probability that a solution will be available when needed." 602 F.2d at 416 (emphasis added).

Judge Tamm, although he concurred in the Court's opinion, felt compelled in his concurring opinion to restate for emphasis the key issues:

Specifically, there must be a determination whether it is reasonably probable that an off-site fuel repository will be available when the operating license of the nuclear plant in question expires. . . .

. . . .

. . . In addition, if the Commission determines it is not reasonably probable that an off-site waste disposal solution will be available when the licenses of the plants in question expire, it then must determine whether it is reasonably probable that the spent fuel can be stored safely on-site for an indefinite period.

602 F.2d at 419 (concurring opinion) (emphasis added).

With respect to the technical issues for spent fuel storage, DOE and others have cited ample evidence showing that (1) there have been decades of successful experience with spent fuel storage without any significant degradation of fuel, cladding, or associated hardware; (2) that there are no known mechanisms which would indicate either that the

experience cannot be extrapolated to five or ten decades or that the experience cannot be extrapolated to higher burn-up fuel; and (3) that the likelihood of catastrophic consequences from accident or sabotage is small because of preventive measures which have been taken and because of the ability to repair most components of spent fuel pools. In opposition, others urge that current data does not show long-term fuel storage to be conclusively safe because it has not yet been conducted, that there is a possibility that some unknown mechanism will be discovered which will undermine the extrapolation referred to above, that there is no assurance that the necessary research to resolve uncertainties will be conducted, that there is no assurance that the necessary human management to conduct spent fuel storage facilities adequately will continue to be available, and that the possibility of catastrophic accident or sabotage cannot be altogether precluded. Report of the Working Group on the Proposed Rulemaking on the Storage and Disposal of Nuclear Waste, Part 2, at 82-103. The courts have, however, definitively rejected the assertion that all uncertainties must be resolved in order for the NRC to make a finding of confidence. Moreover, the courts have indicated that the appropriate standard of decision is that there is a reasonable probability that the questioned events will take place. Given such a standard, given the evidence that spent fuel storage has been successfully

conducted for decades, and given the uncontroverted evidence that there are no identified mechanisms which would undermine the conclusion that today's experience with spent fuel storage can be extrapolated to many decades and to higher burnup fuel, it is hard to understand how the Commission could reach any conclusion other than that there is a reasonable probability that (1) the properties of spent fuel allow it to be safely stored for extended periods without significant safety, health, and environmental effect; (2) that the structure of spent fuel storage basins and associated basin components can safely sustain extended periods of operation, perhaps for many decades; and (3) that risks posed by improbable accidents and improbable acts of sabotage at spent fuel storage facilities do not undermine the basic conclusion that storage for many decades is likely to be safe.

CONCLUSION

In view of the foregoing, the Commission should find and indeed is required to find that it has confidence on all of the technical issues which it has stated with respect to spent fuel storage. However, it appears that the Working Group has actually misstated these issues so that the implied standard for decision making is too severe. Rather, the Working Group should restate issues 4.1 through 4.3 as follows:

4.1 Is there reasonable probability that the properties of spent fuel allow it to be safely stored for extended periods without significant safety, health, and environmental effects?

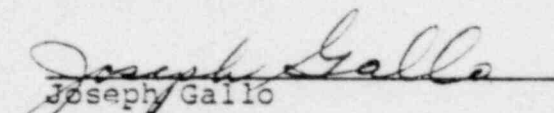
4.2 Is there reasonable probability that the structure of spent fuel storage basins and associated basin components can safely sustain extended periods of operation, perhaps for many decades?

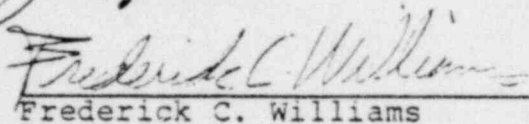
4.3 Is there reasonable probability that spent fuel storage facilities will withstand risks imposed by accidents and acts of sabotage?

Based on the evidence at hand, the Commission must find in the affirmative on these three issues. However, we believe that the process of decision will be facilitated in any event by restating these issues in accordance with the proper legal standard set forth by the courts which have considered this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Commission's Order of January 28, 1980 copies of the attached Comments of Consumers Power Company Regarding Working Group Summary of the Record have been served by first class mail, postage prepaid, 5th day of March, 1981, on the following persons:

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