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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



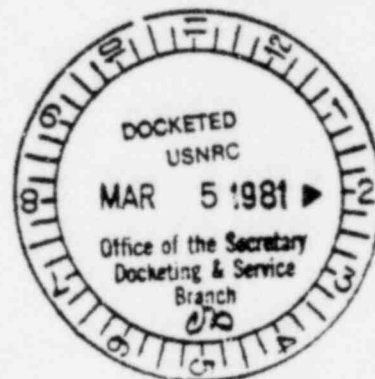
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In the Matter :

of : PR-50, 51 (44 F.R. 61372)

Proposed Rulemaking on Storage :  
and Disposal of Nuclear Waste, :  
10 CFR Parts 50 and 51 :  
(Waste Confidence Rulemaking) :

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COMMENTS OF ROBERT ABRAMS, ATTORNEY  
GENERAL OF THE STATE OF NEW YORK,  
WITH RESPECT TO THE WORKING GROUP'S  
IDENTIFICATION OF ISSUES, REPORT AND  
SUMMARY OF THE RECORD

Robert Abrams, Attorney General of the State of New York, objects to certain of the issues as phrased by the working group, certain statements in the group's report, and several omissions from the group's summary of our statements. We submit, among other things, that the working group erroneously failed to recognize that (i) confidence must be based on existing facts rather than hopes for the future, and (ii) the Commission must decide whether nuclear waste will be disposed of safely, not merely whether it can be. These and other objections are set forth concisely below.

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OBJECTIONS TO THE  
ISSUES IDENTIFIED

The working group says it has identified 26 different issues in this rulemaking. We object to the wording of many of these issues.

Issue 1.2: The issue identified, "Standard for Finding Confidence," is stated as how much assurance is necessary for confidence. While this issue is important, another issue relevant to the Standard -- but which is omitted -- is whether, as claimed in our Statement, assurance must be based on facts which exist today rather than on hope or speculation about facts which may or may not come into being some time in the future. Our position that assurance must be based solely on existing facts is mentioned in the Report, Part 2, p. 10, but no issue is identified to resolve that question. We submit that it must be faced and answered by the Commission.

Issue 2.1: The Commission should not assume a commitment by the Federal Government to provide the policy and budgetary support necessary to carry out whatever measures are required. For one thing, such an assumption would run counter to many statements in the record. For another, until the necessary technical measures and their cost are fully known there is no basis for even guessing how the Government, or its different components, would act. Moreover, campaign statements by President Reagan raise doubts about the continued existence of DOE itself, thus casting

further doubt about the continuity of its current activities. For the Commission to evade the institutional questions within the Federal Government by conjuring up an assumption out of thin air would undermine the credibility of this proceeding.

Issue 2.2: This issue is well stated so far as repositories are concerned, but it should be broadened to cover storage facilities as well as repositories. Nuclear waste will not be safely stored pending disposal unless storage sites are accepted by State and local governments.

Issue 3.1: This issue is not correctly stated. Since the ultimate issues are whether nuclear waste will be safely disposed of by a given date and will be safely stored until then, use of the word "can" tends to miss the issue. Moreover, with respect to the relevant date, the court in State of Minnesota v. NRC, 602 F. 2d 412 (D.C. Cir. 1979) selected the arbitrary date of 2007, while we and others have argued that an earlier date should be used. See our Statement, p. 24. The Commission should select a date, rather than avoid the issue through use of the "schedule consistent with" language created by the working group.

Therefore, Issue 3.1 should be restated to read:

- (a) Based on existing facts, is there assurance that DOE, by the necessary date, will complete construction of the necessary number of safe repositories at sites meeting all technical criteria, and obtain State, local and public approval for putting the repositories into operation?
- (b. What is the necessary date?

Issue 4.1: Instead of the vague term "extended periods," the term should be "many decades or substantially longer," because the time period is indefinite. There is no known date by which storage will no longer be needed.

Issue 4.2: This issue should begin with the word "Will," rather than "Can," and should end with "perhaps for many decades or substantially longer."

Issue 4.3: This issue should be restated to read as follows:

Is the Commission now confident that storage will be safe for an indefinite period lasting several decades or perhaps substantially longer despite the possibility of accidents, acts of sabotage and acts of terrorism?

Issue 5.1: This issue, as stated, uses the "can" instead of "will" form, and also uses the irrelevant word "potentially." Many sites may be potentially acceptable, but safe disposal requires sites that actually meet all the necessary criteria. The issue should be restated, as follows:

Have the necessary number of safe sites meeting all technical criteria been shown to exist, and if so, do we have assurance from existing facts that they will be developed by the necessary date?

Issue 5.2: This issue uses the word "can" instead of "will," and seeks a speculative answer on whether knowledge will come into being in the future -- something that neither the

Commission nor anyone else knows with any certainty. Unless the knowledge exists now, there is no way of knowing when, if ever, it will exist, or whether the substance of any knowledge subsequently received will be favorable or unfavorable to the DOE plan. Therefore, the issue should be restated as follows:

Is the state of knowledge of candidate geologic media and sites for a repository sufficient now for DOE to select a safe medium and a sufficient number of safe sites?

Issue 5.3: As phrased, this is a non-issue.

It is generally accepted that in situ testing of a specific site is necessary before it can be determined whether that site is suitable. As demonstrated at Lawrenceville, Kansas, such testing may prove that a site previously considered suitable is not suitable. Moreover, DOE has not even selected candidate sites yet for intensive in situ testing, and so the answer to the second question must be no. The issue, therefore, is not open to question, and must be answered as indicated above.

Issue 5.4: This issue is misstated because if the knowledge does not exist today the Commission cannot say when, if at all, it will come into existence. The issue should be restated in terms of facts known today.

Issue 5.5: This issue is misstated for the same reason as Issue 5.4.

Issue 5.6: The term "obstacle" tends to confuse the question. The issue should be restated, as follows:

Does the Commission have confidence that nuclear waste will be safely disposed of in a repository despite the possibility of accidental or deliberate human intrusion into any repository?

Issue 5.9: If DOE has not developed engineered barriers to date, the Commission cannot say when, if at all, DOE will develop them. The issue should be limited to whether DOE has developed the engineered barriers.

Issue 5.10: This issue is sheer speculation. It should be limited to whether DOE has already solved the borehole and shaft sealing problem.

Issue 5.11: The second sentence should be changed to whether a system for ensuring retrievability already has been devised. If it has not, the Commission has no basis for speculation about whether or when one will be devised.

Issue 5.13: The first sentence should begin with "Do," rather than "Can," because the concern is with the adequacy of existing models rather than the theoretical adequacy of non-existing models. For the same reason the second sentence should be: "To what extent have they been validated and verified?"

Issue 5.14: The second sentence should be "Will DOE meet these objectives?"

Issue 5.15: The two sentences included in this issue are good, but a third sentence should be added, as follows: "Will the necessary monitoring be performed?"

OBJECTIONS TO THE WORKING GROUP REPORT  
(Introductory Statement and Commentary)

1. On p. 3, line 10, the word "can" should be changed to "will." The Commission must decide if nuclear waste will be safely disposed of, not only whether it can be. See pp. 16-17-PS.\*

2. On p. 6, the IRG report is cited as supporting the scientific feasibility of waste isolation. This citation is misleading, however, because that report (p. 42) said, to the contrary, that "the scientific feasibility of the mined repository concept remains to be established."

3. On p. 7 the working group acknowledges that technical gaps exist in the waste disposal program, but says that the Commission may rely on the existence of DOE's research program as a basis for confidence, although it is unknown if DOE will find answers or if any answers found will be those hoped for by DOE. The working group also says that the Commission may have to exercise "intuitive judgment" to resolve the technical gap problem. See also p. 45.

We disagree with the above views. We contend that confidence would have to be based on facts which exist today, not on facts which DOE or others may hope will be discovered in the future (p. 24-PS). Wishful thinking in past years has

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\* PS refers to our Statement of Position; CS refers to our Cross-Statement.

led this nation to its present nuclear waste dilemma. For years the NRC and its predecessor have allowed nuclear plants to produce nuclear waste because of the hope that some day a solution would be found, yet the solution has not been achieved and large quantities of waste need to be disposed of. The time has come to say no to new nuclear plants until a solution has been developed and tested. For the Commission to find confidence based on the hope that a solution will be found would be irresponsible and dishonest. Facts, rather than intuition, hope, optimism or faith in technology must be the basis for the Commission's decision.

Moreover, the working group's suggestion that confidence can be based on the existence of the DOE program is incorrect. For decades the Government has had a program aimed at solving the waste problem, but success has not been achieved. It is true that the Commission's earlier policy statement expressing confidence in safe disposal was based on the program then being undertaken by a predecessor of DOE. 42 Fed. Reg. 34393. However, that policy statement was rejected by the court in State of Minnesota v. NRC, 602 F. 2d 412 (1979), precisely because it was not based on a factual record. (See pp. 25-26-PS). Now, at the court's direction, a factual record has been developed, and the Commission's decision must be based on existing facts rather than the ongoing activities and hopes of DOE. If the facts now in existence do not establish that nuclear waste will be safely disposed of,



if they establish instead that technical gaps still exist, the decision must be that there is no basis for confidence at this time.

We also object to the suggestion that the existence of substantial uncertainty should result in "framing the outcome of this proceeding directly in terms of changes in licensing and regulatory policy" (p. 12). In our view, the existence of such uncertainty should result in a finding of no confidence. The Commission's duty under the Atomic Energy Act to protect public health and safety requires an honest answer to whether there is confidence based on existing facts to warrant further licensing of nuclear plants. In addition, the court's ruling in State of Minnesota requires it. If the answer is no, the Commission should so state rather than issue a meaningless, contingent ruling.

4. We disagree with the working group's suggestion that the record should be supplemented with respect to DOE's expenditures of manpower and monetary commitments to the disposal program. This is irrelevant. No matter what the expenditures may be, there could be no assurance that all technical and institutional problems will be resolved. It would be sheer speculation to say that a given level of expenditure will assure a safe solution. Moreover, in light of Federal budgetary policies and procedures, future DOE expenditures in this area cannot be predicted with any certainty.

5. Deciding whether nuclear waste will be safely disposed of certainly requires consideration of institutional issues. To the extent that the working group equivocates on the Commission's need to face that issue (pp. 10,19), we object.

OBJECTIONS TO SUMMARY OF THE RECORD

We recognize that the summary of the record is a very abbreviated presentation of the parties' positions and omits the supporting argumentation. We therefore ask the Commission to review the actual statements filed to determine the basis for our positions. In light of our recognition that the summary could not set forth our arguments in full, we limit our objections to those areas where important parts of our position are omitted from the summary.

OBJECTIONS TO PART 1.B: SUMMARY OF PARTICIPANTS' STATEMENTS ORGANIZED ACCORDING TO THE DOE SUBJECT HEADINGS

1. With respect to Subject II.D.(3), we are quoted as saying that the site investigation work conducted to date affords no basis for confidence that satisfactory sites will be found (p. 54). This should be supplemented with a sentence adding that serious problems are already known to exist at all of the sites under consideration (pp. 65-67-PS; pp. 42-45-CS).

2. Under Subject II.F.(2), our response to the Oklo argument is mentioned. In fact, we set forth eight reasons why Oklo was irrelevant (pp. 19-21-CS), but the working group's summary mentions only one (p. 84). The summary should indicate briefly that other responses were raised as well.

3. At p. 106, with respect to Subject III, our point that the public perception of risk differs from that of the technical community is mentioned briefly, but the manner in which the public perceives risk was omitted. The statement should be supplemented to describe our quotation from Battelle that to the public "the outcomes of an event [are] more important than the probability."

4. On Subject III.B.(3), the summary fails to mention our discussion of possible conflict between DOE and the Interior Department over selection of repository sites (p. 75-PS).

5. With respect to Subject IV.B., the discussion of our position (pp. 160-161) should include a reference to the nuclear waste storage accident in the Soviet Union, which required the resettlement of the population from an area of between 38 and 380 square miles (pp. 107-108-PS).

OBJECTIONS TO PART 2: MAJOR ISSUES  
IN WASTE CONFIDENCE RULEMAKING

We have previously set forth our objections to the framing of issues. In this section we discuss objections to the summaries of our position in Part 2.

1. Under Issue 3.1, DOE's purported reliance on the Lyons, Kansas project and work being performed in Sweden is cited (p. 45). Our position on Issue 3.1 is set forth at pp. 62-63, but does not include the position we took on those two matters. That discussion should be supplemented with a summary of our position on Lyons (pp. 61-62-PS) and Sweden (pp. 21-23-CS), which contradicts the DOE view.

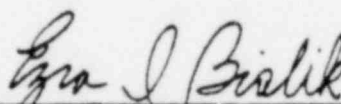
2. On Issue 4.1, the safety of storage, our position has been omitted. The summary should be supplemented to add our points that storage would have to be for an indefinite period, perhaps many decades or more; that it requires a large volume of shipments of waste; that many storage sites would be needed, and that public acceptance of such sites is uncertain (pp. 102-104, 108-110- PS).

3. On Issue 5.6, our position on human intrusion (p. 145) omits our citation to the statement by the NRC that "human intrusion cannot be prevented." See p. 50 of our Statement, quoting from 45 Fed. Reg. 31398 (May 13, 1980).

On p. 146 of Part 2, line 9, "the confident" should  
read "to be confident."

Dated: March 2, 1981

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By



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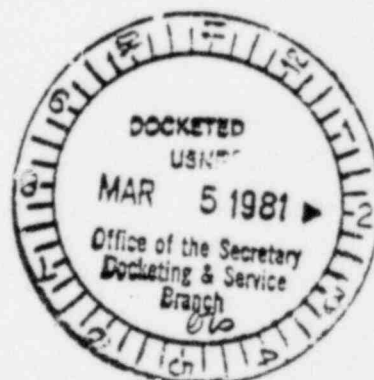
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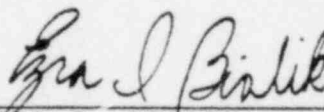
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