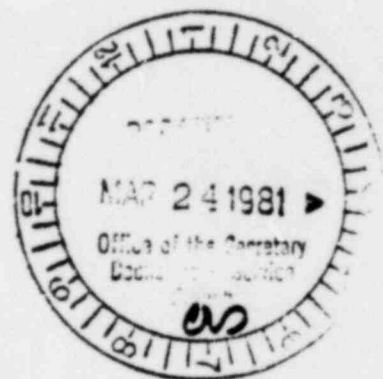




UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of

PROPOSED RULEMAKING ON THE STORAGE
AND DISPOSAL OF NUCLEAR WASTE

(Waste Confidence Rulemaking)

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

3/17/81

COMMENTS OF THE STATE OF WISCONSIN
ON THE REPORT OF THE WORKING GROUP
AND THE ACRS LETTER OF DECEMBER 10, 1980

By Memorandum and Order dated January 16, 1981, the Commission has solicited from all participants comments on the Report of the Working Group dated January 21, 1981. Specifically, the Commission has invited comments on 1) the accuracy and completeness of the Working Group's identification of the issues in the proceeding; 2) the accuracy of the Working Group's summary of the record in the above-captioned proceeding; and 3) the relative importance of the issues identified. Additionally, the Commission has invited comments on the letter of the Advisory Committee on Reactor Safeguards (ACRS), dated December 10, 1980.

The State of Wisconsin has reviewed both the Report of the Working Group and the ACRS letter and hereby submits its comments

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thereon. In submitting these comments, this participant recognizes that many of its positions are reflected in comments already submitted by other participants. In the interest of avoiding redundancy, these comments will limit discussion of issues already addressed. However, the brevity of treatment of a given issue should not be interpreted by the reader as a reflection of our concern in raising it.

I. THE WORKING GROUP REPORT

A. Identification of Issues

The State of Wisconsin is satisfied with the general categorization of the issues. However, we believe that their phraseology has serious deficiencies. The Working Group's identification of these issues exposes two pervasive themes, or biases: 1) the desire to phrase over-simplified questions which solicit "yes-no" responses, and 2) an attempt to structure the questions in a manner so qualified or generalized as to necessitate answers supporting a finding of confidence. As a result, the Working Group's identification of the issues tend to gloss over the true, underlying issues or miss them altogether.

The Attorney General for the State of New York has already detailed some linguistic problems in the issues as stated. To that extent, we support and concur in those comments. What follows is a list of other instances which illustrate these mischaracterizations.

Issue 1.2 The issue is not whether the "reasonable assurance" standard is applicable, for this has been decided affirmatively in State of Minn. v. NRC, 602 F.2d 412 (D.C. Cir. 1979). Rather, the issue is what "reasonable assurance" means. Moreover, as New York properly noted, the issue as stated misses a critical element of the standard: that an off-site storage solution will be available.

Issue 2.2 This identification illustrates the problem with a "yes-no" question. The issue is not whether state or local concerns will have adverse affects, but how and to what extent development and operation of a site will be impacted thereby. The question as phrased assumes that state and local interests are inherently adverse to DOE's efforts and will necessarily hinder rather than enhance the development of a safe repository. One can identify in this phraseology the Working Group's and DOE's resistance to local participation in site selection.

Issue 2.3 This issue as phrased suggests that the "public" is some special interest whose support should be solicited but is not necessary. The real issue which must be addressed is why DOE has such difficulty gaining public acceptance and what efforts are necessary to instill and secure public trust.

Issue 3.2 One can always evaluate a program: the issue is what value it has. The issue should be restated:

Would an evaluation of the DOE waste management program at this early stage of its implementation provide a meaningful basis for making a determination of confidence?

Issue 3.3 The real issue is whether the DOE program "adequately provides for assessment . . .," not whether it "provides for an adequate assessment . . ."

Issue 4.1 What do the terms "safely," "extended periods" and "significant" mean? Without such definitions, the issue as phrased has no meaning.

Issue 5.1 This issue, as identified, illustrates the improper use of qualifiers to foster a positive response. The true issue is not whether potentially available sites can be identified, but whether unqualifiedly available sites now exist and will be identified.

Issue 5.7 The issue is not whether spent fuel is an adequate waste form, but whether it is the best form or form of choice. This issue should be rephrased:

Is spent fuel, as discharged from the reactor, the most desirable waste form? Is the information currently available adequate to assess the performance of spent fuel as a waste form in the host media currently under consideration for permanent repositories?

B. Summary of the Record

The Working Group's summary of the position statements from Wisconsin is generally complete and accurate. However, the summary has failed to recognize or refer to our Supplemental

Statement. Moreover, there are certain institutional and technical concerns not reflected in the Report.

1. On October 10, 1980, the State of Wisconsin submitted a Supplemental Statement. The lateness of this filing was necessitated by DOE's resistance to transmitting a document of direct impact and critical importance to us, ONWI-50 (Dames and Moore Report). Our statement did not so much criticize or even evaluate that report (although we found considerable technical flaws). Rather, it criticized the DOE for its obstreperous behavior.

One of the key "institutional" questions before the Commission is whether DOE will in good faith pursue a policy of "consultation and concurrence," bringing the various state concerns into the decision-making process. Despite its express intention to pursue this policy, DOE's record has been dismal.

Our Supplemental Statement is a perfect example of DOE's consistent resistance to state involvement. ONWI-50 assesses granitic formations in the United States for possible repository siting. Since a portion of Wisconsin was given the number one ranking in that report, we are obviously directly affected by it. Nonetheless, the report was purposely withheld by DOE. The Supplemental Statement details the arduous steps taken by the state to obtain this document, which finally resulted in its release under the Freedom of Information Act.

The DOE has, in its position statements, professed a desire to involve states in the process. The history of DOE's

involvement with the State of Wisconsin demonstrates, to the contrary, that DOE will not even allow states to be informed, let alone involved. The Working Group failed to make note of this in its Report.

2. The Wisconsin position statements raised several technical and institutional questions which were not adequately addressed by DOE and which are not sufficiently reflected in the Report.

a. How are legitimate, critical comments by consultants and others incorporated into the DOE program?

b. What mechanism exists within DOE to insure that DOE will independently and critically review the nearly 12,000 documents in the record? What institutional structure within DOE insures that these documents are in fact defensible and technically flawless?

c. The State of Wisconsin raised a concern that DOE is not evaluating geophysical tools to understand their technical limitations prior to their use on a specific site investigation.

d. DOE has not adequately addressed how it will insure that abandoned or unused exploratory operations will be properly reclaimed.

e. The State of Wisconsin is concerned about the lack of data concerning the hydraulic conductivity of granite, as discussed in our initial position statement.

II. ACRS LETTER

As an initial observation, the ACRS letter does not address the issue before the Commission, as stated in State of Minn. v. NRC, supra. The ACRS letter only addresses the sub-issue of whether nuclear waste can be safely stored and whether permanent disposal facilities can be made available. The primary issue before the Commission is whether such facilities will be available. ACRS, at p. 2 of its letter, recognizes that this issue has two component parts: technical feasibility and institutional factors. However, it has expressly limited its conclusions to technical issues (ACRS letter at p. 4).

The technical conclusions of ACRS present serious questions which render them virtually valueless. The letter does not indicate what documentation, if any, it has relied on. Nor does it comment on or qualify the documents and testimony supporting a contrary conclusion. These issues have been addressed in the comments of NECNP and New York Attorney General Robert Abrams, and we concur in their evaluations.

While ACRS urges a finding of "confidence" on technical issues, it implicitly calls for a finding of "no confidence" on

equally critical institutional issues. At p. 3 of its letter, ACRS states:

Until the issue of consultation and concurrence among federal, state and local authorities is better resolved and the licensing/litigation process as well as standards setting by EPA and NRC is better defined, we believe that trying to forecast a firm availability date for a repository is futile in the absence of action by Congress. (Emphasis added.)

In view of ACRS's recognition of unresolved institutional issues, we submit that the letter must be interpreted by the Commission as a statement of "no confidence."

III. GENERAL OBSERVATIONS

The Working Group Report properly recognizes that at this stage of the proceedings, many significant questions remain unanswered. The comments received to date further demonstrate that basic definitional issues and criteria, as well as technical and institutional issues, are yet to be determined. The ACRS letter, which many have viewed as supporting a finding of confidence, is itself equivocal and unconvincing. The Working Group, while generally concluding that there is no reason to supplement the record (with certain exceptions), tacitly recognizes that many critical questions have not been and cannot be addressed at this time.

DOE and its proponents in the nuclear industry would rely on legal presumptions to buttress a positive finding that the current DOE program will result in a repository within applicable

time constraints. These presumptions only support a conclusion that the agency will act in good faith to carry out its tasks; one cannot presume that it will be successful. Moreover, the DOE's past actions, most notably its unilateral and arbitrary actions regarding WIPP, as well as its conduct referred to in sec. I.B.1., above, belie its promises to implement a system of consultation and concurrence. These types of actions, and the mistrust which they have spawned, are sufficient to rebut any presumption favoring the agency's actions. In reality, DOE's position relies on an embryonic, untested program that offers no assurances of success.

DOE and its proponents also hide behind the "substantial evidence" test as a basis for a finding of "confidence." This test is a standard of judicial review which limits the court's ability to pass judgment on the wisdom of an agency's actions. Commentors' suggestions that the Commission should rely on this test in exercising its wisdom is both perverse and ludicrous, and further demonstrates the weaknesses in the record.

The transition to the current administration, with its concurrent shifts in policies and priorities, illustrates some of the critical institutional concerns and the tenuous basis of DOE's case. We are now entering a period of severe fiscal constraint in which all programs will feel the budgetary ax. While DOE's budget is currently somewhat safe, there have been clear signals that DOE's very existence is in jeopardy. There is no guarantee that this program will continue to be funded at all, let alone at

the substantial levels that will be necessary to fully implement its goals. Moreover, one can never be certain that future administrations will be as sympathetic to this issue as was the former administration.

The State of Wisconsin believes that many technical as well as institutional issues have been inadequately addressed or ignored by DOE. The agency's position relies heavily on speculation and unwarranted optimism. These limitations have been recognized by both the Working Group and ACRS, and lead to the inevitable conclusion that at this time the Commission can only make a determination of "no confidence."

Dated this 17th day of March, 1981.

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