

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

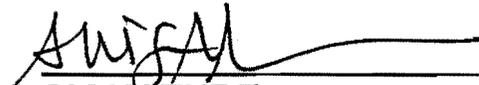
FROM: Chairman Allison Macfarlane

SUBJECT: COMSECY-12-0016 – APPROACH FOR ADDRESSING
POLICY ISSUES RESULTING FROM COURT
DECISION TO VACATE WASTE CONFIDENCE
DECISION AND RULE

Approved X Disapproved Abstain

Not Participating

COMMENTS: Below Attached X None



SIGNATURE

8/10/12

DATE

Entered on "STARS" Yes X No

**Chairman Macfarlane's Comments on COMSECY-12-0016,
"Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste
Confidence Decision and Rule"**

I approve the staff's recommendation to proceed with a parallel, two-track approach to support both (1) selected ongoing and near-term site-specific licensing actions, and (2) a generic analysis to address the U.S. Circuit Court of Appeals decision to vacate the 2010 waste confidence decision and temporary storage rule. While I am fully confident in the adequacy of the recommendations put forth by NRC's world-class staff, and I am certain that NRC's managers are highly capable of determining appropriate paths for implementation, I would like to emphasize a few points to serve as guidance as the staff moves forward with its work.

First, the court stated that the agency can resolve the matter through either an environmental impact statement (EIS) or an environmental assessment with a finding of no significant impact, I believe that we should proceed with an EIS. Experience has shown that on issues of particular controversy, an environmental assessment will not result in resource or time savings in the end, because of the likelihood of challenges to the finding of no significant impact.

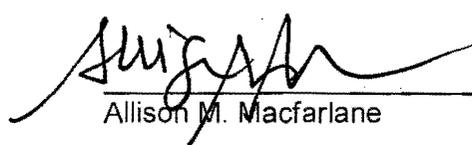
Second, I believe that resolving this issue successfully is a Commission priority. As the Commission affirmed, waste confidence plays a core role in many high-visibility licensing actions such as new reactors and license renewals. Issuing licenses is central to the NRC's mission. We also stated that we would not issue final licenses until we appropriately addressed the court's remand. We must act promptly. The staff should begin at once, and should set a goal of publishing a final rule and EIS within 24 months from the date of the Commission's staff requirements memorandum. With this in mind, if there is a site-specific licensing action that requires a final agency decision prior to the completion of the generic analysis and rule, the staff should begin on that licensing action immediately once it is recognized.

Third, given that dozens of licensing actions are not able to be completed until the court's remand is addressed, I believe that the NRC staff will be able to prioritize and redirect resources as needed to accomplish the objectives within 24 months. The staff should come to the Commission if additional resources are needed to meet this schedule.

Fourth, successfully resolving this issue can only be done with robust, meaningful, and effective public interaction, and with sufficient opportunities for public participation. Again, as affirmed by the Commission, we assured petitioners that they will be able to participate in future NRC proceedings on waste confidence, and that the public will be afforded an opportunity to comment in advance on any generic waste confidence document that the NRC issues on remand—be it a fresh rule, a policy statement, an EA, or an EIS. Moreover, I feel strongly that in difficult times, NRC should be particularly on guard against loosening its standards for openness and transparency. We value openness in part because we are accountable to the people we

serve. However, there is an additional reason: openness ensures that the NRC has the information it needs to make the best decisions. Effective regulation requires openness because it enables NRC to tap the deep reservoir of knowledge held by the members of the public.

Finally, the court's decision predates my appointment to the Commission, but since my arrival I have been impressed with the internal discussion that has resulted. The Commission has been presented a wide range of thoughtful opinions from program offices, the Office of General Counsel, the Office of Commission Appellate Adjudication, the perspectives from the senior executives who lead the NRC's environmental reviews, and the individual NRC staff who have added their thoughts to the discussion. This is a sign of a healthy organization that is up to the challenge of addressing this complex issue.

 8/10/12
Allison M. Macfarlane Date

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: COMSECY-12-0016 – APPROACH FOR ADDRESSING
POLICY ISSUES RESULTING FROM COURT
DECISION TO VACATE WASTE CONFIDENCE
DECISION AND RULE

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached XX None _____



SIGNATURE

08/15/12

DATE

Entered on "STARS" Yes No _____

Commissioner Svinicki's Comments on COMSECY-12-0016
Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule

I approve the staff's recommended Track 2 – development of a general National Environmental Policy Act (NEPA) analysis to support a revised waste confidence update that addresses the three deficiencies identified by the D.C. Circuit. I also join my colleagues in supporting the use of agency discretion to proceed directly to the development of an environmental impact statement (EIS).

I agree with all other members of the Commission that a schedule of 24 months for issuing a revised Waste Confidence Decision and Temporary Storage Rule is appropriate and achievable. The fullest possible use of existing information and analyses, as described by Commissioner Ostendorff in his vote, in conjunction with adherence to the Council on Environmental Quality Guiding Principles cited by Commissioner Magwood in his vote, will aid the NRC in meeting this timeframe.

To provide for the essential public engagement which must inform NRC's work on this important topic, I join my colleagues in supporting Commissioner Ostendorff's proposal that the staff conduct a series of public meetings during the public comment period on the draft EIS and proposed rule. I also support his proposal that the NRC establish an inter-office task force of the agency's most accomplished practitioners in environmental analysis to develop the NEPA analyses, the revised Waste Confidence Decision, the Temporary Storage Rule, and the plan for public meetings and outreach.

While I do not foreclose on the necessity of tailoring a general analysis for use in each NEPA document for affected NRC licensing actions that could be issued in advance of a final rule, I believe that pursuit of this option (Track 1) in parallel is not called for at this time. Instead, if the staff assesses, at some future time, that the achievement of the actions described above is substantially delayed, or that a specific licensing action presents an exceptional and compelling need to proceed otherwise, the staff should prepare a notion vote paper reviving its request to pursue Track 1, along with a description of what issues are delaying achievement of the 24 month schedule, and providing other possible remedies to address the delay.



Kristine L. Svinicki 08/15/12

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Commissioner Apostolakis
SUBJECT: COMSECY-12-0016 – APPROACH FOR ADDRESSING
POLICY ISSUES RESULTING FROM COURT
DECISION TO VACATE WASTE CONFIDENCE
DECISION AND RULE

Approved X Disapproved X Abstain

Not Participating

COMMENTS: Below Attached X None



SIGNATURE

8/13/12

DATE

Entered on "STARS" Yes x No

Commissioner Apostolakis' Comments on COMSECY-12-0016
"Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste
Confidence Decision and Rule"

I approve the staff's recommended Track 2, which will support issuance of an updated Waste Confidence Decision and Temporary Storage Rule with a revised basis that addresses the court's concerns. In particular, the staff should proceed to develop an Environmental Impact Statement (EIS).

I agree with Chairman Macfarlane and Commissioners Magwood and Ostendorff that an expedited schedule is needed. A goal of issuing a revised Waste Confidence Decision and Temporary Storage Rule within 24 months of the date of the Commission's Staff Requirements Memorandum is reasonable and appropriate.

The staff must also provide ample opportunity for public comment as it pursues a timely resolution of the court's remanded issues. The staff should find efficient means to advance these objectives. Thus, I support Commissioner Ostendorff's proposal that the staff conduct a series of public meetings during the public comment period on the draft EIS and proposed rule. I also agree with Commissioner Ostendorff that the timely accomplishment of these tasks would be enhanced by establishing an inter-office task force of experts in environmental analysis to develop the appropriate NEPA analyses, revised Waste Confidence Decision and Temporary Storage Rule.

I disapprove the simultaneous pursuit of a parallel effort in the form of Track 1, as proposed. Track 1 would have the staff devote additional resources to the tailoring of a general analysis for use in each NEPA document for affected NRC licensing actions that could be issued in advance of the final rule. This would not be as effective or as efficient as a clear focus on Track 2. However, if the staff determines that a licensing request involves an exceptional and compelling need for resolution before the final rule is completed, staff should notify the Commission. I would expect this to occur only under limited circumstances.



George Apostolakis
8/13/12

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MAGWOOD
SUBJECT: COMSECY-12-0016 – APPROACH FOR ADDRESSING
POLICY ISSUES RESULTING FROM COURT
DECISION TO VACATE WASTE CONFIDENCE
DECISION AND RULE

Approved Disapproved Abstain

Not Participating

COMMENTS: Below Attached None



SIGNATURE

10 August 2012

DATE

Entered on "STARS" Yes No

**Commissioner Magwood's Comments on COMSECY-12-0016:
"Approach for Addressing Policy Issues Resulting from
Court Decision to Vacate Waste Confidence Decision and Rule"**

As we have reviewed this matter in the aftermath of the decision by the U.S. Court of Appeals for the D.C. Circuit to vacate both the Waste Confidence Decision and Temporary Storage Rule, I find that my belief and confidence that the Commission's approach to this challenge was entirely appropriate and fully justified are unchanged. Most importantly, I reject the notion that it is necessary and appropriate for the NRC to analyze a scenario in which the United States Government utterly fails in its responsibility to safely dispose of high-level radioactive wastes. Whatever the short-term policy challenges this effort faces, the essential fact remains that deep geologic disposal is widely recognized as a technically appropriate and achievable strategy to deal with spent fuel and high-level wastes.

The Commission's confidence that a repository will be available "when necessary" is not based on a vague hope, but on a clear understanding that such a path can be achieved successfully, but only when the varied policy interests have sufficient motivation and urgency to converge upon a specific plan. The facts clearly demonstrate that no such urgency exists today. It is not the role of this agency to address these policy issues, but merely to assess whether there is sufficient cause to maintain confidence that the U.S. Government will properly dispose high-level radioactive wastes at an appropriate time in the future.

The Government's agent in this matter, the Department of Energy, maintains a legal commitment to accept and dispose of commercial high-level waste and has signed recent agreements with utilities to accept wastes from yet-to-be constructed nuclear power plants. Congress has continually implemented the Nuclear Waste Policy Act over the course of years. The technical facts point to the appropriateness of a deep geologic repository as a disposal strategy and the Administration's Blue Ribbon Commission on America's Nuclear Future has reaffirmed this approach. I believe these facts provide as much confidence as we have ever had that high-level waste will be disposed properly.

Nevertheless, the decision by the D.C. Circuit is binding. This agency must now move forward to address the three deficiencies cited by the court in a manner that responds fully to the court's remand, makes the most effective use of agency resources, provides for comprehensive stakeholder engagement, and is fully consistent with both the letter and intent of the National Environmental Policy Act (NEPA).

As the agency faces this challenge, I commend the staff for providing the Commission with a thorough discussion of the various options. Program offices, the Office of the General Counsel, and the Office of Commission Appellate Adjudication have all made valuable contributions to our consideration of this matter. The subject COMSECY as well as our many discussions with the staff have reflected a thoughtful approach to the present challenge. I therefore approve the staff's recommendation in COMSECY-12-0016 subject to the guidance outlined below.

In my view, the most appropriate approach to address the three deficiencies cited by the D.C. Circuit is for the NRC to develop an Environmental Impact Statement (EIS) that builds upon the existing Environmental Assessment that NRC developed for the 2010 Waste Confidence Update. Most of this work was not faulted by the court and should be used as a firm baseline upon which to address the issues raised by the court. This approach will allow the staff to focus both its internal resources and external outreach on the areas of greatest interest. Moreover, when addressing the three deficiencies, staff should be mindful of the Council on Environmental Quality Guiding Principles, which state that:

- NEPA encourages straightforward and concise reviews of documentation that are proportionate to potential impacts and effectively convey the relevant considerations to the public and decision-makers in a timely manner while rigorously addressing the issue presented;
- NEPA reviews shall be integrated into project planning to ensure planning and decisions reflect environmental considerations, avoid delays later in the process, and anticipate and attempt to resolve potential issues rather than become an after-the fact process that justifies a decision already made;
- NEPA reviews should be coordinated with and take appropriate advantage of existing documents and studies, including through adoption and incorporation by reference;
- NEPA reviews should encompass early and well-defined scoping which can assist in focusing environmental reviews on appropriate issues that would be meaningful to a decision; and
- Agencies should develop meaningful and expeditious timelines for environmental reviews and respond to comments in proportion to the scope and scale of the environmental issues raised.

Adhering to these guiding principles should allow the staff to complete the necessary EIS in 24 months by taking full advantage of existing analyses and documents such as DOE's "Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada," the various spent fuel transportation impact studies, and the documents and studies underlying the Environmental Assessment developed for the 2010 Update.

As we engage this process, it is absolutely vital that the public be provided a full and complete opportunity to participate in the development of the EIS. Therefore, as staff plans its 24 month schedule for this work, it must anticipate all the necessary public meetings that should be held during both the scoping process and the public comment period for the draft EIS. Staff should develop a plan to apply our staff resources in the manner most appropriate to this challenge.

I support staff's general approach to maintain the option to conduct some environmental analyses on a site-specific basis, but caution that such a step should be used only in rare or extreme circumstances. While I believe it would be a mistake to preclude any possibility of site-specific analysis, the staff's primary objective must remain the completion of the generic analysis within 24 months. Therefore, should the staff identify the need to conduct any site-specific analysis prior to the completion of the generic analysis, it should notify the Commission prior to beginning the site-specific review.

Finally, I recognize that this work will likely require the reallocation of agency resources. The staff should provide the Commission with full information about how it plans to fund and staff this vital task and how it will impact other work.


_____ 8/10/12
William D. Magwood, IV Date

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER OSTENDORFF
SUBJECT: COMSECY-12-0016 – APPROACH FOR ADDRESSING
POLICY ISSUES RESULTING FROM COURT
DECISION TO VACATE WASTE CONFIDENCE
DECISION AND RULE

Approved X Disapproved Abstain

Not Participating

COMMENTS: Below Attached X None

M. Ostendorff
SIGNATURE

8/9/12
DATE

Entered on "STARS" Yes X No

**Commissioner Ostendorff's Comments on COMSECY-12-0016,
"Approach for Addressing Policy Issues Resulting from Court Decision
to Vacate Waste Confidence Decision and Rule"¹**

Just over two months ago, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found that the NRC had violated the National Environmental Policy Act (NEPA) in issuing the 2010 update to the Waste Confidence Decision (WCD) and accompanying Temporary Storage Rule (TSR) (2010 Update). The D.C. Circuit vacated both the WCD and TSR and remanded the case to the NRC. Because the NRC's WCD and TSR supports a number of the agency's licensing decisions, particularly new reactor licensing and reactor license renewal, the Commission recently declared that although license reviews and proceedings will continue to move forward, the NRC will not issue final licenses dependent upon the WCD or the TSR until the remand is appropriately addressed. Since it is the NRC's mission to license, as well as to regulate, resolution of the waste confidence remand is one of the most important issues currently before the agency.

In 1979, in *Minnesota v. NRC*, this agency was told that it needed to assess whether there was reasonable assurance that fuel can be safely stored at reactor sites beyond the expiration of plants' operating licenses. This agency did just that when it issued its original WCD in 1984, which made five "Findings." Three of those Findings have remained unchanged since that time. Over the course of the past 25 plus years, this agency has seen fit to update two of those Findings, once in 1990 and again in the 2010 Update. Although the D.C. Circuit vacated the 2010 Update, my confidence in the basis for the 2010 Update has not wavered; I continue to believe that the Commission was justified in its approval of the WCD and TSR. This agency must, however, still address the three deficiencies identified by the D.C. Circuit. In doing so, it is neither necessary nor desirable to go back to the drawing board on waste confidence. This agency has a long, rich history with our waste confidence determinations that can and should be drawn upon in answering the D.C. Circuit's remand.

With that, I approve staff's proposed Track 2—development of a general NEPA analysis to support a revised waste confidence update that addresses the three deficiencies identified by the D.C. Circuit. Even though the court stated that the agency can resolve the matter through either an environmental impact statement (EIS) or an environmental assessment with a finding of no significant impact, I believe that we should, at our discretion, proceed with an EIS.

Although I approve the use of an EIS, I do not approve a wholesale revision to what has already been accomplished throughout the course of the past quarter century on waste confidence. Such a revision is not necessary since the court did not question whether the WCD and TSR satisfies the requirement from *Minnesota v. NRC* that high-level waste (HLW) and spent nuclear fuel can be stored safely on site after the expiration of a reactor's license; rather, the court found that our conclusion needed further NEPA analysis. As the Council of Environmental Quality (CEQ) said in March of this year, "agencies should keep EISs as concise as possible . . . and no longer than necessary to comply with NEPA and the other legal and regulatory requirements being addressed in the EIS . . ." The staff can, and therefore should, use existing knowledge to prepare the updated NEPA analysis for Findings 2 and 4, which would be focused on the three issues raised by the court. The staff should discuss only briefly those issues that are not significant and leverage the use of existing documents and studies through incorporating

¹ The Commission has been made aware that the staff intends to supplement COMSECY-12-0016 within the next week. I am cognizant of the proposed contents of the supplement and I am satisfied that I have all the information I need to cast this vote. If, for some reason, that should change upon receipt of that supplement, I will consider amending my vote as appropriate.

information by reference, as discussed in CEQ regulations and NRC and CEQ guidance. The NRC's other three WCD Findings were untouched by the court, and I would expect that these Findings would remain largely unchanged as the staff moves forward on an EIS.

Although addressing the remand on Finding 2—that the NRC had not analyzed the environmental consequences of no permanent HLW repository—will be more involved, under both CEQ and NRC regulations, the NRC may adopt or incorporate by reference all or part of another agency's EIS. DOE's "no action alternative" in the Yucca Mountain EIS, which the agency adopted in 2008 as part of its review of DOE's license application, contains a foundation that the NRC should build upon. There are also numerous other technical documents and reports on related issues, such as the impacts of transportation and consolidated storage, that can, and should, be used to support the necessary analyses. Further, although the court ruled that the probability of the failure to establish a repository is not so low that it could be dismissed, such a failure is at best uncertain. The staff's analysis need not be expansive as NRC guidance and CEQ regulations permit consideration of such uncertainties in discussing the significance of environmental impacts. Finally, despite recent setbacks, significant progress has been made over the past decades in the technical development of a HLW deep geologic repository. The report from the Blue Ribbon Commission on America's Nuclear Future further informs my belief. I continue to have confidence that such a repository, wherever located, will be developed as the permanent solution for disposing of HLW.

I fully expect the public to participate in the agency's work on the court's remand. However, because our normal NEPA and rulemaking timelines provide for a process that goes well above and beyond the minimum procedures required by NEPA and the Administrative Procedure Act, there are efficiencies that can, and should, be gained that would still allow for fulsome stakeholder engagement. In unique circumstances such as these, a more limited scoping process is called for since the court directed us to the specific deficiencies that need to be addressed. Also, the proposed TSR, draft WCD, and draft EIS could be issued for the required public comment period while still holding a series of public meetings, with those several meetings taking place within the span of a week or two at locations across the country. Because of the high priority that this matter demands, and the high interest this matter has engendered, new approaches within our existing process for EIS development, such as the use of an interoffice team consisting of the agency's most outstanding NEPA practitioners to develop the EIS and resolving comments in parallel with the comment period, must be applied to act with the urgency that this matter deserves. Both an expedited schedule and full engagement of our stakeholders are essential and reasonable.

I also approve staff's pursuit of Track 1, under limited circumstances. The staff should maintain the flexibility to use this option if a case presents itself that would not delay or create inconsistencies with the Track 2 approach and the staff determines that completion of the rulemaking is unacceptably delaying a certain licensing decision. If such a case presents itself, the staff should inform the Commission of the need to undertake a site-specific approach.

We all, the staff and the Commission, have an obligation to act on this, and to act quickly to produce a quality product. I pledge to do my part—whether that be by placing a very high priority on voting on proposed and final rules or by ensuring that NMSS, OGC, and other staff offices have the proper resources to complete this effort. I know that this vote calls for the staff to bring the Commission high quality products and to do so quickly, perhaps more quickly than they are used to under normal agency timelines. But, this situation does not allow for business as usual. The staff should use existing information to the fullest, adjust its processes to gain efficiencies while accommodating stakeholder involvement, and focus its review on the remanded issues so that the NRC can publish the updated WCD and TSR in the *Federal*

Register no later than 24 months from the date of the Commission's staff requirements memorandum. While aggressive, I believe that 24 months is an appropriate time period to complete our action on the D.C. Circuit's remand. Staff and OGC should come to the Commission at the earliest opportunity if more resources are needed to meet this schedule.

As the CEQ stated earlier this year, NEPA reviews should be sufficient and efficient, concise and timely—I wholeheartedly agree.