

September 20, 1999

COMMISSION VOTING RECORD

DECISION  
ITEM:           SECY-99-214

TITLE:           OPTIONS FOR PROCEEDING WITH NRC'S EFFORTS REGARDING THE RELEASE OF SOLID  
                  MATERIALS

The Commission (with Chairman Dicus, Commissioner Diaz, and Commissioner McGaffigan agreeing) approved Option 1 of the subject paper as recorded in the Staff Requirements Memorandum (SRM) of September 20, 1999. Commissioner Merrifield approved Option 2.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission, and the SRM of September 20, 1999.

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Annette Vietti-Cook  
Secretary of the Commission

Attachments:    1. Voting Summary  
                  2. Commissioner Vote Sheets  
                  3. Final SRM

cc:   Chairman Dicus  
      Commissioner Diaz  
      Commissioner McGaffigan  
      Commissioner Merrifield  
      OGC  
      EDO  
      PDR  
      DCS

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VOTING SUMMARY - SECY-99-214

RECORDED VOTES

	<b>APRVD</b>	<b>DISAPRVD</b>	<b>ABSTAIN</b>	<b>NOT PARTICIP</b>	<b>COMMENTS</b>	<b>DATE</b>
COMR. DICUS	X				X	8/27/99
COMR. DIAZ		X			X	8/27/99
COMR. McGAFFIGAN		X			X	9/2/99
COMR. MERRIFIELD	X				X	8/26/99

COMMENT RESOLUTION

In their vote sheets, Chairman Dicus, Commissioner Diaz, and Commissioner McGaffigan approved option 1 directing the staff to proceed with the enhanced participatory rulemaking plan and schedule already established, with modifications. Commissioner Merrifield approved option 2 with modifications. All Commissioners provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on September 20, 1999.

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#### Chairman Dicus

I approve Option 1 with modifications as described below to SECY 99-214. I would continue the process as described in the June 30, 1998, Staff Requirements Memorandum (SRM), which is to conduct workshops (currently scheduled from September through November 1999) that use the Issues paper as the starting point for discussions, but would request that the scoping process for the GEIS be delayed until these workshops are complete in order to determine if there is a sound basis for going forward with a rulemaking on the unrestricted release of solid materials.

Due to the impending issuance of an international recommendation by the European Community in July 2000 for recycled material, coupled with the recent headlines of the future unrestricted release of slightly contaminated recycled materials in Tennessee, I believe that this Commission has an obligation to address this issue on a Federal level, and to try to obtain as much input as possible from stakeholders, the public, and licensees. While I recognize that there appears to be the perception that the Commission has already decided on a path forward, our intent is to strive ahead to develop appropriate actions for a currently unregulated activity in order to protect the public's health and safety from recycled or cleared byproduct materials that enter or originate in this country. I agree with Commissioner Merrifield in stating that we cannot indefinitely delay addressing this problem because selected stakeholders will not attend workshops on this issue, and add that we must be pro-active in finding a solution to address the issues concerning recycled radioactive materials before they arrive at our doorstep.

As a final note, as described in the June 30, 1998, SRM on this subject, the staff was directed that, "if problems that would delay completing the rulemaking arise in certain categories of solid materials, then a decision can be made to narrow the scope of the rule." By sending SECY 99-214 to the Commission, the staff has indeed followed the intent of that SRM which was to provide the Commission with information in order for it to be able to confirm the continued direction of this initiative. If, in the future, other significant issues arise that the staff believes is of concern or interest to the Commission, they should again inform the Commission of these developments and request guidance when necessary.

#### Commissioner Diaz

The reason for, and goal of, this proposed rulemaking is to provide reasonable protection of public health and safety and the environment. There is not, and cannot be, any other reason. The staff knows this better than anyone. This point should have been clearly made in the discussion of Option 1 in the paper. The direction provided by the Commission in the June 30, 1998, SRM to initiate a rulemaking continues to be needed. Without such direction there will be no regulations for the continued control nor consideration for release of NRC regulated solid material (e.g., metals, equipment, soil). The lack of national standards and regulations has led, and will continue to lead, to radioactive material being introduced into the environment without any assurance that public health and safety and the environment are protected. We cannot put this off for the future because the future is now. I believe the Commission must act without delay on this important matter.

Radioactive materials, both naturally occurring and man-made, enter the public domain from myriad sources. Unlike the NRC regulations governing liquid and gaseous effluents from Atomic Energy Act materials, there are no standards or controlling rules governing release of solid radioactive materials. The regulatory control over solid materials is uneven. Increasingly, such materials appear in everyday commerce, generally unbeknownst to the people.<sup>(1)</sup> The Federal government has already recognized this as one of the unavoidable results of an increasingly open global economy. The EPA, working with the Department of State, has begun efforts to develop clearance levels for the importation of very slightly radioactive materials, consistent with international practice, as established in draft IAEA standards that are nearing completion. Indeed, other nations have recognized this issue and are ahead of the United States in addressing it.

I, therefore, disapprove the staff's recommendation, and approve Option 1. The staff should proceed with the enhanced participatory rulemaking plan and schedule already established. As part of implementing Option 1, I propose the following actions:

1. The staff should continue work on a generic environmental impact statement to provide the public with the necessary technical information to allow for meaningful public participation. In this regard, I propose that a series of public meetings to discuss the preliminary generic environmental impact statement be held.
2. Similar to our process for revising Part 35, periodic Commission meetings should be held at the completion of pertinent milestones. These meetings will provide additional public fora and will keep the Commission informed of public concerns and the progress in developing the rule.
3. Appoint an ombudsman for this sensitive rulemaking who will be responsible and accountable for all activities related to this endeavor. The Ombudsman should have direct access to the Commissioners while still working within the established staff organization. The Ombudsman should not be hindered by previous Agency experiences with this issue. I would expect the Ombudsman to keep the Commissioners fully and currently informed of the status and progress of the rulemaking, especially of interactions with the public.

In summary, the NRC rule dealing with clearance of solid materials must establish a holistic regulatory framework that is both protective and practical. It is in the National interest for the NRC to set a regulatory framework that would serve as a model for other governmental agencies, at the Federal, State, and local levels.

#### Commissioner McGaffigan

I strongly disapprove Option 3 for the reasons described below and approve Option 1 to continue with the process previously laid out in the June 30, 1998 staff requirements memorandum (SRM) on SECY-98-028.

I am committed to rulemaking in this area, as I said in my vote on SECY-98-028. The need for rulemaking has only been made more clear by recent events, such as the criticism directed in part at the Commission in Judge Gladys Kessler's June 29, 1999 ruling in OCAW v. Pena, in which she stated: "The Court is further concerned by the fact that no national standard exists governing the unrestricted release of volumetrically contaminated metals. Both EPA and NRC have attempted to develop Federal regulatory standards for volumetrically contaminated metals, but both agencies have tabled their

efforts in order to focus on other concerns." This agency has not tabled its effort, as our June 30, 1998 SRM and the actions taken since clearly demonstrate, but this was apparently not brought to the Judge's attention. Furthermore, next May, the nations of the European Union will put in place a 10 Sv/year (1 mrem/year) clearance standard.

We have known from the outset that this will be a difficult rulemaking. The reason for the SECY paper is that certain public interest groups are now threatening to boycott our rulemaking process. That is their right, although it is not something which I welcome. I hope that they will reconsider.

However, Option 3 is not the way to bring these public interest groups into the process. Option 3 would have the Commission walk away from its June 30, 1998 SRM, walk away from the issues paper in the June 30, 1999 Federal Register notice, and eliminate the Generic Environmental Impact Statement scoping component of the stakeholder meeting process. Surely, given our previously stated views, we could be accused of dissembling in the name of stakeholder facilitation.

An enhanced participating rulemaking is not a negotiated rulemaking. I note the public interest group criticism of the license termination rulemaking process reported in Attachment 4. I do not agree with their criticism that "their perspective was ignored by the staff and Commission when the decision on the final rule was reached." All comments were summarized in NUREG/CR-6353, which both staff and Commissioners reviewed. The Commission put the final rule SECY paper in the public domain for months as we deliberated on it. A public meeting was held with the Environmental Protection Agency in April 1997 to receive its comments on the paper and invite public comment. Finally, the rationale for the Commission's decision on the two most controversial issues -- the rejection of a separate groundwater standard and adoption of the 25 mrem/year (as opposed to 15 mrem/yr) all-pathways standard -- was clearly articulated in the regulatory analysis and accompanying generic environmental impact statement. If the initial stakeholder meetings in 1993 gave the impression that we were engaged in a negotiated rulemaking, then the disappointment of these stakeholders is more understandable. The Commission clearly did not adopt their point of view on these controversial issues. In this rulemaking on the release of solid materials, we need to avoid mis-communication about the nature of the participatory rulemaking process, from the outset, while properly considering all comments.

I believe that Commissioner Diaz's recommendations for periodic Commission meetings at important milestones and for appointment of an ombudsman to head up this rulemaking effort will help prevent mis-communication as this effort proceeds. I concur in them.

Commissioner Merrifield

I approve option 2 with modifications in SECY-99-214. I would remove both the options paper as a central focus of the meetings and the environmental impact scoping aspect from the workshops. The intent of these workshops is to discuss all concerns with the potential release of formally contaminated solid material in order for the Commission to determine if rulemaking is appropriate, and, if appropriate, what should be the scope of the rulemaking. The purpose of the options paper was to provide a starting point for and facilitate discussion. However, the options paper was not to limit the scope of the meeting. Environmentalist groups have stated that they believe the format of the proposed public workshops predetermines that rulemaking allowing release of material is necessary and the only question really is the scope of the effort. Therefore, they have refused to take part in the meetings. I do not believe it was the staff's intent to use the options paper in this manner; but if there is an incorrect public perception of the staff's intent, we should correct the situation. Option 2 would establish a meeting agenda somewhat independent of the options paper but, at the same time, recognize the existence of the options paper. I clearly support all options being discussed as input by all stakeholders, including the environmentalist groups, is important before the Commission makes a final decision.

I was initially inclined to support option 3 but now believe option 3 may cause an unacceptable delay. This is an issue of national significance which needs to be resolved one way or another in a timely manner. It would be best to resolve the issues with inputs from all stakeholders in open and frank discussions. We should make a good faith effort to get all stakeholders to participate and thoughtfully consider all input in reaching a final decision. However, we cannot indefinitely delay addressing the problem because selected stakeholders will not attend meetings. Therefore, I support option 2 because it will maintain the program on a reasonable schedule.

I commend the staff for bringing this issue to the Commission's attention. This particular staff effort is an important issue which is and will remain fairly controversial. Therefore, the staff should continue to keep the Commission informed of any significant development and request guidance when necessary.

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1. In the United States, the NRC and Agreement States have approved the release of contaminated materials using case-specific evaluations. An example is the current controversy in Tennessee over the State's granting permission to release some slightly contaminated materials resulting from the decommissioning of a facility at Oak Ridge. A consistent and coherent national standard would ameliorate these difficulties.