

September 5, 2002

COMMISSION VOTING RECORD

DECISION ITEM: SECY-02-0127

TITLE: PROPOSED RESPONSE TO STATE OF OHIO
 ON ITS ASSURED ISOLATION STORAGE
 FACILITY DRAFT RULES

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of September 5, 2002.

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

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

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

SECY NOTE: THIS VOTING RECORD WILL BE MADE PUBLICLY AVAILABLE 5 DAYS
 AFTER THE LETTER IS SENT TO THE STATE OF OHIO.

VOTING SUMMARY - SECY-02-0127

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	PARTICIP	NOT COMMENTS	DATE
CHRM. MESERVE	X				X	8/15/02
COMR. DICUS	X				X	8/13/02
COMR. DIAZ	X				X	8/22/02
COMR. McGAFFIGAN	X				X	8/27/02
COMR. MERRIFIELD	X				X	8/20/02

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and 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 5, 2002.

Commissioner Comments on SECY-02-0127

Chairman Meserve

I approve the staff's proposed response to the State of Ohio on the State's proposed rules for an Assured Isolation Facility (AIF), subject to the attached edits.

In responding to the State, the staff notes its intention to undertake a rulemaking effort for assured isolation in the fiscal year 2004-2005 time frame. Although I understand that the staff's efforts are designed to facilitate efforts to find safe alternatives to disposal of low-level waste (LLW) in light of the eventual closing of the Barnwell LLW facility to out-of-compact states, at this time it is unclear that the expenditure of significant resources on this rulemaking is worthwhile. Consequently, I join in Commissioner Dicus' comment that the staff should not initiate a rulemaking for an AIF without direction from the Commission. I also agree with her suggestion, however, that the staff should proceed with a rulemaking plan that would explore the interest in the assured isolation concept and that would provide a foundation for a Commission decision on whether to develop a rule.

Mr. Robert E. Owen
Manager of Technical Services
Bureau of Radiation Protection
Ohio Department of Health
246 North High Street
P. O. Box 118
Columbus, OH 43216-0118

Dear Mr. Owen:

I am responding to your letter of February 20, 2002, in which you requested our views on the proposed Ohio regulations for licensing of an assured isolation facility.¹ I want to stress that the Commission's policy has been, and continues to be, that **low-level radioactive waste (LLW)** should be disposed of safely in a permanent disposal facility as soon as possible after it is generated. Thus, the Commission strongly supports State and Compact efforts to develop new LLW disposal capacity in accordance with the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA). The Commission is also aware, **however**, that there are a variety of complex waste disposal issues, many of which are within the purview of the Atomic Energy Act, that continue to face the States and the Nation.

¹Assured isolation is a low-level radioactive waste (LLW) management concept, and the associated facility is not permanent nor near-surface disposal, as defined in 10 CFR Part 61.

~~In particular,~~ There are many challenges; in the area of site decommissioning; that depend; for their safe resolution; on the availability of safe and economic means of managing LLW. The Commission is open to serious consideration of feasible and safe **management** proposals and recognizes the need to assist the States in efforts that could include assured isolation facilities; which will help manage LLW. These facilities would permit relatively short-lived radioactive wastes to decay during isolation and then be recycled or disposed of at a future date, not to exceed a specified period of time. Although assured isolation is a LLW management tool; **In this connection,** concerns about ultimate disposal must be reviewed, since **because** storage for a period of 100 years raises additional complex issues, such as financial assurance **during the storage period and at for ultimate disposal,** **identification of** responsible parties and/or their successors, waste stability, and the LLRWPA requirement to establish additional permanent disposal capacity for LLW. **In addition, consideration must be given as to how current State and U.S. Nuclear Regulatory Commission (NRC) regulatory limits on the possession of special nuclear material apply to an assured isolation facility.**

~~In the past, several States expressed interest in the assured isolation concept. The questions that will need to be considered include, in part, a common definition for assured isolation, and what financial assurance mechanisms would be required during the storage period and for ultimate disposal. As a separate matter, other issues need to be considered, such as how current State and U.S. Nuclear Regulatory Commission (NRC) regulatory limits on the possession of special nuclear material apply to an assured isolation facility, or how other program elements under review and development, such as stewardship and financial assurance, impact the final outcome of a proposed regulation for assured isolation. We had anticipated a need for rulemaking on assured isolation as an interim measure to manage LLW, until permanent disposal facilities are developed. We currently anticipate initiation of this effort in the fiscal year 2004-2005 time frame. We also recognize that the Commission, in the past, noted it would provide assistance to a State or other organization that developed requirements for an assured isolation facility.~~

In the next decade, permanent LLW disposal capacity may not be available ~~and this would not be in the best interest of the public.~~ Therefore, it is timely to consider your proposal, as it could be a helpful foundation which other Agreement States could use in their development of similar ~~operable~~ rules. We **thus** are providing the enclosed general comments ~~as a technical consultation to you~~ for your consideration. These comments are not all-encompassing and are provided for assistance, should you continue to develop regulations separately for assured isolation. Please note that ~~should~~ **if the NRC should** proceed at a later date to develop assured isolation facility rules, ~~with extensive public and stakeholder involvement,~~ that might require Ohio **might be required** to amend its rule; to be compatible with NRC, depending on the compatibility category.

We would be pleased to discuss these issues and comments. Please contact me or Dr. Stephen Salomon of my staff at 301-415-3340.

Commissioner Dicus

I commend staff's efforts in addressing the State of Ohio's proposed rule language on the Assured Isolation concept and the siting, design, construction, and operation of an Assured Isolation Facility. Therefore, I approve staff's proposed response to the State of Ohio **(with edits - see attached)** and associated comments. With respect to staff's pursuit of a proposed rulemaking, I appreciate their proactive mind-set in addressing the establishment of implementing

regulations. However, if there is little or no additional State and/or licensee interest in pursuing the Assured Isolation concept, then I am not convinced that a rulemaking effort would be the best use of resources and funding. In light of this concern, I do believe that it would be beneficial for staff to stay the course in the future development of at least a rulemaking plan, which would provide the Commission with valuable resource, cost, and schedule information, as well as the availability of information on any future interest in the Assured Isolation concept. At that juncture, the Commission would then determine the appropriateness of a rulemaking effort.

Commissioner Diaz

I join the Commission majority in deferring the proposed rulemaking but would not object to the staff submitting a rulemaking plan

Commissioner McGaffigan

I approve the staff's letter, as edited by the Chairman, to the State of Ohio concerning the State's draft Assured Isolation Storage Facility rules. I also agree with the Chairman and my fellow Commissioners that the staff should not, at this point expend the effort to develop a rulemaking package in this area. NRC currently has a long list of priorities and spending significant time and FTE on this rulemaking is not the best use of NRC resources.

However, this is an important issue for several States and will most likely be an important issue for other States in the future. Therefore, I believe this would be an excellent subject for NRC and the Agreement States to use to develop a pilot program under the Alliance option of the National Material Program.

Commissioner Merrifield

I approve, with one modification, the staff's response to the State of Ohio concerning proposed State rules for licensing an Assured Isolation Facility for storage of low-level radioactive waste. As expressed by Commissioner Dicus and the Chairman, I am not ready to commit to NRC rulemaking in this area in the fiscal year 2004-2005 timeframe. I believe this would be a resource intensive rulemaking, which may eventually be applied only to licensees in Agreement States, similar to what is occurring in the low-level radioactive waste disposal program. However, I have no objection to the staff submitting a rulemaking plan, which would include significant Agreement State interaction and participation, for Commission consideration.

I fully support the concepts behind the current national low-level radioactive waste program that such waste should be properly and expeditiously disposed in a manner which protects public health and safety. I also support the concept that the generation which received the direct benefit from the use of the radioactive material should bear the cost of the ultimate disposal of the radioactive material. However, I recognize that there is insufficient public support for the concept of permanent disposal of low-level radioactive waste and there has been almost no progress in implementing the provisions of the Low-Level Radioactive Waste Policy Amendments Act, other than the formation of compacts and rejection of sites for a permanent repository. Therefore both the States and the NRC need to investigate alternatives. The concept of assured isolation storage appears to be gaining public support, although it does push the cost on final disposal on

future generations. But at least assured isolation facilities will provide for safe management of the low-level waste until a permanent solution can be developed.

As the letter states and I expect the staff to emphasize in discussions with the State, the NRC is open to serious consideration of reasonable and safe proposals to manage low-level radioactive waste. The staff letter raises some very serious concerns, which need to be carefully addressed in any regulatory effort in this area. I fully support all of the staff comments, but I particularly want to emphasize several of the comments. First, I am highly concerned about financial assurance issues raised by the staff. The State will need to look very seriously at plans for backup financial assurance provisions and may need to have provisions for the State to take title to and responsibility for the facility in case of bankruptcy of the original businesses associated with the waste in the facility. I also agree with the staff comments that there should be a reduced number of such facilities, vice allowing every contaminated site to develop its own assured isolation storage facility. Finally, security requirements for the facility will need to be evaluated, particularly in the post 9/11 environment.