

**AFFIRMATION ITEM**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER OSTENDORFF  
SUBJECT: SECY-14-0072 – FINAL RULE: CONTINUED  
STORAGE OF SPENT NUCLEAR FUEL (RIN 3150-  
AJ20)

Approved  X  Disapproved \_\_\_\_\_ Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_\_\_ Attached  X  None \_\_\_\_\_

W. Ostendorff  
SIGNATURE

7/29/14  
DATE

Entered on "STARS" Yes  X  No \_\_\_\_\_

**Commissioner Ostendorff's Comments on SECY-14-0072,  
"Final Rule: Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20)"**

My vote today is based on the documents before me as well as frequent and active engagement with the NRC staff over the course of two years. The journey to this endpoint began with the DC Circuit Court of Appeals' remand of the 2010 Waste Confidence rulemaking, followed by Commission direction to the staff in 2012. Since then, the staff has thoroughly and thoughtfully executed the Commission's direction, all the while keeping the Commission and the public informed of its steady progress. In response to the Commission's direction, the agency put together an interdisciplinary team that has truly exemplified teamwork. Scientists, engineers, and attorneys together developed a rule and generic environmental impact statement (GEIS) expeditiously. The quality of the staff's work is noteworthy—the staff used accurate and high-quality information to ensure that the GEIS contains a rigorous environmental impact analysis. Knowing the skill and effort that went into the staff's work product, and having been kept informed throughout its development, I do not hesitate to approve the staff's recommendation with only minor comments.

Specifically, I agree that the revised rule is the best means to preserve the efficiency of the NRC's licensing process by adopting generic determinations of the environmental impacts of the continued storage of spent nuclear fuel beyond the licensed life for operation of reactors. The statement of considerations carefully explains that the rule does not authorize any licensing action. Instead, the GEIS will contribute, along with numerous other evaluations, to future licensing actions. I further agree that what had been known as the "waste confidence decision" and a generic safety finding are no longer needed in 10 C.F.R. § 51.23, and that the new title of the rule is a helpful clarification. While I remain confident that a permanent repository is feasible, it is not the NRC's role to determine when a repository will be available, nor is it the NRC's role to develop a repository. With the analyses now contained in the GEIS, the rule does not need to predict when a repository will be available.

In addition, the GEIS thoroughly evaluates the impacts of storing spent nuclear fuel through an indefinite time period. The staff correctly points out that the NRC will continue to review health and environmental impacts of spent fuel storage as part of its ongoing licensing, oversight, and research activities. Any new information, such as the performance of spent fuel over extended periods, will be used to update and improve the NRC's regulatory requirements, as appropriate. NEPA also requires that EISs be supplemented to address new and significant information. I therefore agree that the NRC will consider updates to the rule and GEIS according to the plan outlined in the *Federal Register* notice.

Although I support the staff's recommendation overall, I have a few minor comments that should be addressed. Based on the first-rate quality of the staff's work, I view high-level comments as appropriate. The staff does not need to submit to the Commission for approval its changes in response to these comments.

### Rule language in 10 C.F.R. § 51.23(a)

I agree that 10 C.F.R. § 51.23(a) should codify the GEIS. But I disagree that the word “conclusively” should be used in the text. That is not to say that I don’t see the rule as a conclusive determination, but rather, I don’t see this rule as any more conclusive than other rules implemented after public notice and comment. I don’t want to imply that, for instance, the waiver provision in 10 C.F.R. § 2.335 doesn’t apply to 10 C.F.R. § 51.23, or that the GEIS won’t be revisited as required by NEPA. Despite the fact that the staff has explained the waiver provision and the staff’s criteria for reevaluation in the *Federal Register* notice, it is better to be clear in the regulatory text and save members of the public a trip to the statement of considerations. Therefore, the staff should remove the word “conclusively” from the text of 10 C.F.R. § 51.23(a).

### Federal Register Notice

First, the *Federal Register* notice and the GEIS should be consistent in all material aspects. For example, on page 3 of the Federal Register notice, the “Need for the Regulatory Action” should say, “The purpose of this final rule (rule) is to preserve the efficiency. . .”

Second, the staff should ensure that the dates and regulatory citations are correctly noted in the *Federal Register* notice. For instance, on page 52, “November 7, 2014” and “December 20, 2014” should each be “2013,” on page 3, the title of 10 C.F.R § 51.23 includes the word “operations” rather than “operation,” and on page 37, 51.75(b) is listed twice but 51.75(c) is not listed.

Finally, on page 57, the staff states, “Further, spent fuel is currently being stored safely at reactor and storage sites across the country, which supports the NRC’s belief that spent fuel can continue to be stored safely for the timeframes considered in the GEIS.” This sentence should be revised for consistency with Appendix B of the GEIS and to affirm the NRC’s confidence in the feasibility of continued safe storage. Therefore, the sentence should be revised to state, “Further, spent fuel is currently being stored safely at reactor and storage sites across the country, which supports the NRC’s conclusion that it is feasible for spent fuel to continue to be stored safely for the timeframes considered in the GEIS.”

### GEIS

First, in section 4.12.2, the second half of the first paragraph discusses license termination. This appears out of place and a relic of a previous version. It should be removed.

Second, the staff should remove the discussion in section 4.19.2 of improvised nuclear devices (INDs) and amend the corresponding comment response in Appendix D. The staff added the text in response to a comment about theft and diversion of spent nuclear fuel. But the text does not explain the multiple steps required for an adversary to successfully steal, move, chemically alter, and then detonate an IND. The GEIS implies that the NRC views an IND scenario as reasonably foreseeable, which it is not. Furthermore, its connection to the analysis for the Diablo Canyon ISFSI licensing is misplaced and implies that such a scenario was considered reasonably foreseeable there, which it was not.

Finally, in section 6.4.17.1, on page 6-57, the first sentence should be changed to “Potential cumulative impacts from an at-reactor ISFSI or an away-from-reactor ISFSI. . .”

#### Conclusion

Once again, I commend the staff for the thoughtful and rigorous review of this complex issue that is of great interest to the Commission and the public. I am confident that the agency has appropriately responded to the DC Circuit Court of Appeals’ remand and has fulfilled its NEPA obligation for continued storage of spent nuclear fuel.