

NOTATION VOTE

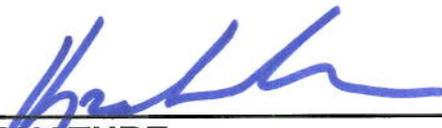
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: SECY-09-0090 – FINAL UPDATE OF THE
COMMISSION'S WASTE CONFIDENCE DECISION

Approved XX In Part Disapproved XX In Part Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached XX None ___



SIGNATURE

08/ 9 /10

DATE

Entered on "STARS" Yes No _____

Supplemental Comments of Commissioner Svinicki on SECY-09-0090
Final Update of the Commission's Waste Confidence Decision

On September 24, 2009, I cast my original vote on SECY-09-0090, the draft final update of the Commission's waste confidence findings and rule. In that vote, I disapproved the publication in the *Federal Register* of the draft final update of the waste confidence decision and final rule, as proposed by the staff. Rather, I proposed that the decision and rule be renoticed for limited comment regarding the Administration's announced policy decision to re-examine the Nation's path forward on high-level radioactive waste disposal.

In the intervening year since I originally deliberated on this issue and cast my vote, the Administration has acted on its announcements, commissioned a panel of experts to formulate policy recommendations, and filed a motion to withdraw the application for licensing of a deep geologic repository at Yucca Mountain. In response to these and other developments, many of those speaking on behalf of interested and impacted stakeholders have made their views known. I have followed this public discourse closely and have deliberated further on this matter. I now supplement my original vote on SECY-09-0090 to support the following outcome.

I approve a final rule revising the generic determination on the environmental impacts of storage of spent fuel at, or away from, reactor sites after the expiration of reactor licenses with the following revisions to 10 CFR § 51.23 and Waste Confidence Findings (2) and (4) to read as follows:

10 CFR § 51.23: Temporary storage of spent fuel after cessation of reactor operation – generic determination of no significant impact.

(a) The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that sufficient mined geologic repository capacity will be available when necessary.

Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level waste and spent nuclear fuel generated by any reactor when necessary.

Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life of operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.

The Office of the General Counsel (OGC) should adjust the language in the statements of consideration (SOC) to reflect these revisions. The final rule package should be submitted to the Commission for its information five business days prior to sending it to the Office of the Federal Register for publication. As the revisions to the SOC are likely to be extensive, this five business day period of "negative consent" review will allow the Commission the opportunity to

assess whether the staff's revisions have correctly interpreted and communicated the Commission's decision in this matter.

In addition, I believe the Commission should issue direction to the staff to undertake a longer-term initiative to prepare an update to the waste confidence findings and rule to account for storage at onsite storage facilities, offsite storage facilities, or both, for a period of at least 300 years from the end of licensed operation of any nuclear power reactor (which may include the term of a revised or renewed license), and up to 500 years (or longer, if staff's technical judgment recommends a longer period based on its analysis.) Given this approach and the breadth of the analysis, the Commission should exercise its discretionary authority under 10 CFR § 51.20(a)(2) to direct the staff to prepare a draft Environmental Impact Statement (EIS) to accompany the proposed rule developed as a result of the analysis.

The lead responsibility for this rulemaking effort should be assigned to the Office of the Executive Director for Operations, with support from OGC. The Commission should designate this activity as a high-priority rulemaking. The staff should identify the funding adjustments necessary to begin this effort as soon as possible, and should begin this effort no later than the beginning of Fiscal Year 2011. Any funding in Fiscal Year 2011 dedicated to examining extended storage of spent nuclear fuel should be significantly redundant with these efforts and should be realigned to support this purpose.

Staff has estimated that the development of this rule package and EIS – depending on resourcing – could take as long as five years. This effort is clearly discretionary on the agency's part and its outcome – whatever that might be – does not bear any relation to the revised findings and rule language that I support at the present time. I simply believe that this longer-term analysis and rulemaking is a prudent action on the NRC's part and it may root future technical and environmental deliberations in more expansive ground. In no way should my support for undertaking this longer-term evaluation be interpreted as an endorsement of prolonged onsite storage of spent nuclear fuel as the preferred policy course for the Nation.

As I stated in my original vote, and consistent with the revised findings I now support, I continue to be “confident that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impact in either the reactor spent fuel storage basin, or in dry cask storage on an onsite or offsite independent spent fuel storage installation, or in some combination of these storage options, for many decades.” I also reaffirm the statement from my original vote that “since the provision of permanent disposal capacity for high-level radioactive waste and spent fuel is, as a matter of law, the obligation of the federal government (a commitment affirmed to the Congress by the current Energy Secretary and which the current Administration has not sought to disturb), I believe that the existence of this obligation provides a basis for confidence that such disposal capacity will be provided by the federal government at a future time.”

My support now for the promulgation of a rule and findings expressing confidence in the availability of mined geologic disposal capacity “when necessary” is intended to express confidence that whenever the Nation should confront the natural limits of its ability to continue to store spent fuel (whatever form those limits should happen to take either technically or environmentally, or as a matter of policy), and it therefore becomes “necessary” to provide for disposal, such limits will have been discovered and understood as they approach, and mined geologic repository disposal will have been developed in advance of that time. In the meantime,

the NRC has all of the regulatory authority it needs to compel the continued safe and secure storage of spent fuel at reactor sites, and will continue to exercise that authority on behalf of the public interest.

In my original vote, I also reflected on the heavy burden the Commission faces in weighing the equities of future generations of Americans who inherit the problems we fail to address in the present day. I quoted from the concurring opinion of Judge Tamm in *Natural Resources Defense Council v. NRC* (D.C. Cir. 1976) that “NEPA requires the Commission to fully assure itself that safe and adequate storage methods are technologically and economically feasible.” I believe the path that I am supporting today – both in the near term and on an enduring basis – provides that assurance.

Finally, I benefited from the contributions to the Commission’s deliberations on the broad issue of waste confidence made by Dr. Dale Klein, former Chairman and Commissioner, with whom I served. The Commission did not complete action on this paper prior to his departure from service on the Commission, but I believe the initial vote he cast is a useful augmentation of the Commission’s voting record, for the consideration of future Commissioners and agency historians. So that it will be preserved, I insert Dr. Klein’s vote here, in its entirety, with my supplemental vote.


Kristine L. Svinicki 8/9/2010

The vote of Dr. Dale Klein follows:

DR. KLEIN'S COMMENTS ON SECY-09-0090:
FINAL UPDATE OF THE COMMISSION'S WASTE CONFIDENCE DECISION

I greatly appreciate the staff’s effort in providing a draft final update of the Commission’s Waste Confidence Decision and addressing the many public comments on the proposed update. However, I strongly believe that the Commission should give the public an opportunity to comment on whether and, if so, how the Administration’s recent announcements of changes in the Nation’s high-level waste (HLW) repository program should affect the proposed update. Thus, I do not support publication of the draft final update and final rule in the *Federal Register* at this time. Instead, I support continuation of this rulemaking through a limited re-noticing for the solicitation of comment on how the Commission should take account of these recent developments, as well as any recent developments in the HLW programs of other nations, and in particular how these developments may bear on the proposed draft final estimate of a target date for the availability of a geologic repository. As part of this re-noticing, I am also willing to explore and invite comment on whether the Commission could reasonably modify its draft final findings and draft final rule to reflect the potential consideration of a broader range of disposal options.

After the staff reviews any additional comments, the staff should resubmit a draft final update package that includes the staff's evaluation of the additional comments and any new or revised recommendations. I recommend that the Commission offer a 45-day comment period for this limited re-noticing and that the Commission direct the staff to resubmit a proposed final update within nine months of the receipt of this Commission direction.

The new Administration announced its intent to pursue alternatives to Yucca Mountain after the close of the comment period. The Commission published its proposed revision of the Waste Confidence Decision on October 9, 2008, and the comment period closed on February 6, 2009. Thus, stakeholders, when commenting, did not have the benefit of the Administration's announced intent to change course on the HLW disposal program and study long-term alternatives for HLW storage and disposal. Even without that news, many commenters argued that aspects of the proposed update were too speculative, particularly the Commission's proposed estimate of a target date for the availability of a geologic repository in proposed Finding 2.

The draft final update, which has been made public, acknowledges that the Administration's proposed budget plan to eliminate the Yucca Mountain project would likely have forced the Commission to consider an update to the Waste Confidence decision if the Commission had not already issued a proposed rule and update. The draft final update refers to proposals to initiate expert reviews of HLW and spent nuclear fuel (SNF) disposal options, goes on to take account of the recent developments, and provides an analysis of why these developments do not alter the staff's proposed draft final update. Thus, in my view a limited re-noticing that allows for public input on developments after the close of the comment period clearly would enhance openness, transparency, and public involvement in the Commission's decision-making process.

I am also concerned that the credibility of the Commission's decision-making process would be affected by proceeding to finalize the update at this time. Such an action might be perceived by many as a rush to judgment in the midst of a dynamic environment that promises to affect the Nation's approaches to storage and disposal of HLW and SNF.

In addition, a final decision at this time could lead unnecessarily to a variety of misinterpretations. Some may interpret the Commission's final decision, particularly one at this time, as reflecting a position for or against the Administration's recent actions or anticipated new approaches to HLW storage and disposal. I recognize, of course, that some misinterpretation is often unavoidable. I also recognize that the draft final update accurately explains that the Commission commenced this update for clearly articulated reasons in advance of the recent developments. It is also true that the Commission's proposed update has included the express assumption that the currently proposed HLW repository does not become a reality. Nonetheless, I think it is fair to conclude that a pause to obtain, consider, and respond with care to stakeholders' perspectives on the recent developments should diminish the potential for misinterpretation of the Commission's action.

Perhaps of most importance, a limited re-noticing should enrich the bases for the Commission's final analyses and decisions and strengthen the final conclusions. The Commission should benefit from the receipt and consideration of a wide variety of perspectives on the Administration's recent announcements, as well as recent developments in the HLW disposal programs in other countries. For instance, the Department of Energy (DOE) did not submit comments on our proposed update and rule change. Moreover, while Congress and the

Administration are considering the concept of establishing an expert commission to address options for HLW storage and disposal, no such plans are settled at this time. It could be helpful to know and take account of the expected schedule, charter and perhaps even the range of potential final products associated with an expert panel or commission.

It seems to me that DOE's submission of comments would be consistent with the spirit of Section 113(c)(3) of the Nuclear Waste Policy Act of 1982, as amended. That section provides that, if at any time the Secretary determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall, among other things, "report to Congress not later than 6 months after such determination the Secretary's recommendations for further action to assure the safe, permanent disposal of spent nuclear fuel and high-level radioactive waste, including the need for new legislative authority." It would also be useful to have a description of the current status of DOE's efforts to put into place contracts with current and potentially new commercial reactor licensees.

As noted above, I am also willing to support an invitation for comment on whether the Commission's waste confidence update can reasonably allow for consideration of a broader range of disposal options. A variety of potential technological solutions to ultimate disposal may be considered in the near future, even though the principal assessments, as well as the dominant policies in the U.S. and abroad, concern a mined geologic repository. For instance, I have heard the thoughtful suggestion that a deep borehole might be among the disposal paths for wastes remaining under some reprocessing and transmutation scenarios. Thus, I suggest that the Commission ask specifically whether the Commission's proposed Finding 2 and the related rule need reference a "mined" geologic repository when providing an estimate of the likely date of availability of a geologic repository. In addition, the Commission could inquire whether it would be reasonable to use the broader terminology, "sufficient disposal capacity," instead of the references to "sufficient mined geologic repository capacity" in the draft final updated Finding 2 and in the draft final rule, and whether it would be reasonable to make a similar change in Finding 3 (referring to "sufficient repository capacity").

The phrase, "sufficient disposal capacity" seems to encompass a geologic repository and the possibility of consideration of additional disposal paths. Yet, if such language were employed, it seems that the principal support for the pertinent findings would still be the statutory direction, technical data, and policy support for a mined geologic repository. I make no assumption about the likely outcome of this inquiry if the Commission pursues it to a resolution.

My proposal should not be read as intended to diminish the importance of the government's legal obligation to provide a permanent disposal capacity for HLW and SNF. At the same time, I also recognize that Secretary Chu has stated that the Administration does "remain committed to meeting our obligations for managing and ultimately disposing of spent nuclear fuel and high-level radioactive waste." Letter from Secretary Chu to Senator Inhofe, dated June 1, 2009. However, the Commission's Waste Confidence Decisions have always taken account of the nation's progress in meeting those obligations. Consistent with that history, I see potential benefit in gaining more perspective and information on recent developments as we proceed to finalize an update to the Waste Confidence Decision. I also believe that my proposal is consistent with the staff's statement in SECY-09-0090 that the

