UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
SECRETARY

September 15, 2010

COMMISSION VOTING RECORD

DECISION ITEM: SECY-09-0090

TITLE: FINAL UPDATE OF THE COMMISSION'S WASTE CONFIDENCE DECISION

The Commission (with Chairman Jaczko and Commissioners Apostolakis and Magwood approving and Commissioners Svinicki and Ostendorff approving in part and disapproving in part) acted on the subject paper as noted in an Affirmation Session and recorded in the Staff Requirements Memorandum (SRM) of September 15, 2009.

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 Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff
OGC
EDO
PDR

VOTING SUMMARY - SECY-09-0090

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO	X				X	7/22/10 9/17/09
COMR. SVINICKI	X	X			X	8/9/10 9/24/09
COMR. APOSTOLAKIS	X				X	8/13/10
COMR. MAGWOOD	X					8/13/10
COMR. OSTENDORFF	X	X				8/10/10

COMMENT RESOLUTION

In their vote sheets, Chairman Jaczko and Commissioners Apostolakis and Magwood approved and Commissioners Svinicki and Ostendorff approved in part and disapproved in part the staff's recommendation and provided some additional comments as noted in an Affirmation Session and reflected in the SRM issued on September 15, 2009.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: Chairman Gregory B. Jaczko

SUBJECT: SECY-09-0090 – FINAL UPDATE OF THE COMMISSION'S WASTE CONFIDENCE DECISION

Approved __X__ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached _X__ None ___

SIGNATURE

7/22/10

DATE

Entered on "STARS" Yes _x_ No ___

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

This update to our Waste Confidence Decision has been with the Commission for some time and understandably so given the complexity of the issues involved. Although Commissioner Svinicki and I have had the benefit of reviewing this rule for more than a year, our more recently confirmed colleagues have not. Thus, the Commission has taken the necessary additional time before moving forward with this proposal. I believe that time has proven very productive. Now that the full Commission has had the opportunity to become familiar with the lengthy history of our Waste Confidence Decision and fully consider the complexity of this matter, I propose the following path forward in hope of reaching a consensus on this important issue: The Commission (1) approve the Waste Confidence update, as revised below, and (2) direct the staff to conduct further analysis to support a future update to account for the possibility of additional, indefinite storage of spent nuclear fuel.

First, I propose approval of the issuance of a final rule revising our 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 C.F.R. § 51.23 and Waste Confidence Findings (2) and (4):

> § 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 in the foreseeable future.
>
> Finding 2: The Commission finds reasonable assurance that sufficient disposal capacity, including but not limited to mined geologic repository capacity, will be available to dispose of the commercial high level waste and special nuclear fuel generated by any reactor in the foreseeable future.
>
> Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safety 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.

Second, I propose directing the staff to also begin a longer-term rulemaking effort that would address impacts of storage beyond 100 years. While I remain confident that we will achieve a safe and environmentally sound means to permanently dispose of the nation's spent nuclear fuel, I believe that the prudent course of action is to direct the staff to conduct further analysis and update the Waste Confidence findings to account for the possibility of additional, indefinite

storage of spent nuclear fuel. While I believe that the staff's analysis showing that storage will be safe and will not result in environmental consequences for 100 years should be more than adequate to account for the time until permanent disposal becomes available, an understanding of the consequences of storage for longer periods of time will be helpful in informing future Commission policy decisions on this subject. I therefore propose that the staff be directed to prepare an update to the Waste Confidence Findings and Proposed Rule to account for storage at onsite storage facilities, offsite storage facilities, or both, for more than 100 years, but no longer than 300 years, from the end of licensed operations of any nuclear power plant, which may include the term of a revised or renewed license.

Given the breadth of the analysis necessary to support a Waste Confidence update, the Commission should exercise its discretionary authority under 10 C.F.R. § 51.20(a)(2) to direct the staff to prepare a draft Environmental Impact Statement. The proposed rule and draft environmental impact statement should be sent to the Commission in an Information Paper five days before they are sent to the office of Federal Register to be published for public comment.

In light of the extensive environmental review that will be necessary to support this proposed rule, the lead responsibility for this rulemaking effort should be shifted from the Office of the General Counsel to the EDO's office. The staff should provide the Commission with updated budget estimates and timelines for this rulemaking. The Office of the General Counsel will continue to provide support to the staff for this rulemaking.

This is a difficult and challenging issue of national significance. I appreciate the staff's continued hard work, as well as the other Commissioners' thoughtful deliberations.

Gregory B. Jaczko 7/22/10
Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: GREGORY B. JACZKO

SUBJECT: SECY-09-0090 – FINAL UPDATE OF THE COMMISSION'S WASTE CONFIDENCE DECISION

Approved _X_ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached _X_ None ___

Gregory B Jaczko

SIGNATURE

09/ 17 /2009

DATE

Entered on "STARS" Yes _X_ No ___

Chairman Jaczko's Comments on SECY-09-0090
Final Update of the Commission's Waste Confidence Decision

I support the staff's position and general findings for the Waste Confidence decision. The staff has worked hard to develop a good final product and I am comfortable with it as written.

That said, in the interest of trying to find a compromise and coming to resolution on this matter, I would also support a few changes to Findings 2 and 3. These changes would need to be re-noticed for a short, narrow, public comment period, and the staff should return to the Commission with a recommendation after the comments have been considered.

The staff paper makes it quite clear that the Commission's waste confidence decision is not based on the Yucca Mountain program, but rather that safe disposal for high-level waste (HLW) and spent fuel in a mined geologic repository is technically feasible. Given the current state of the Yucca Mountain program, as described by the staff in the SECY paper, I believe that the Commission should make it clear that we believe that these findings apply because we are confident that a disposal solution is technically feasible for HLW and spent fuel, whether it be a mined geologic repository or some other approach.

Therefore, Findings 2 and 3 could be revised as follows:

> Finding 2: The Commission has reasonable assurance that sufficient high-level radioactive waste and spent fuel disposal capacity will be available within 50-60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level radioactive waste and spent fuel originating in such reactor and generated up to that time.
>
> Finding 3: The Commission finds reasonable assurance that HLW and spent fuel will be managed in a safe manner until sufficient disposal capacity is available to assure the safe disposal of all HLW and spent fuel.

I commend the staff for their excellent work on this paper and on this issue.

Gregory B. Jaczko

09/17/2009

Gregory B. Jaczko

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

Commission may wish to defer action until it has additional information and insights that would provide a more informed decision. I look forward to deliberating with my fellow Commissioners on this proposal.

/RA/ 09/16/09

Dale E. Klein Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

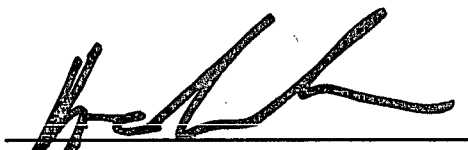
FROM: COMMISSIONER SVINICKI

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

09/24/09

DATE

Entered on "STARS" Yes √ No ___

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

I do not support publication in the *Federal Register* of the draft final update of the Commission's waste confidence decision and final rule, as proposed by staff, at this time. The timeframe for public comment in this matter did not encompass the policy deliberations of recent months occurring between the Administration and the Congress, which may lead to a wholesale re-examination of the Nation's path forward on high-level radioactive waste disposal. This decision and rule should be re-noticed for limited comment by the public on the Administration's recent announcements, and how they may impact the timeframe of availability of a geologic repository. Additionally, I believe the Commission should solicit the views of the Administration. Such action is not without historical precedent.[1] Following that, the staff should consider any additional comments received and then either recommend to the Commission an update to the waste confidence findings and rule or offer its assessment that -- until the policy debate matures further -- the findings and rule are not ripe for the Commission's informed judgment to be updated at this time. This approach is consistent with the staff's acknowledgement that the Commission may wish to defer action on the draft final update and rule to incorporate additional information on direction of the federal disposal program.

The existence of the policy framework provided by the Nuclear Waste Policy Act has played a significant role in the action of prior Commissions on the issue of waste confidence. In announcing its position on waste confidence in 1984, the Commission at that time disclosed that the Nuclear Waste Policy Act "had a significant bearing on the Commission's decision." Although the legislation was "intrinsically incapable of resolving technical issues," it would "establish the necessary programs, milestones, and funding mechanisms to enable their resolution in the years ahead." Consequently, to the extent that entirely new approaches will be under consideration by any future Blue Ribbon Panel, the Commission's attempts to renew its confidence findings and to attach updated timeframes to the availability of disposal options might best be informed by further opportunity for public comment.

The counterargument against further public comment is, of course, that the Commission confronts incessant churn in the Nation's laws and policies and that the Commission's

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[1] In 1977, when President Carter issued a statement on nuclear policy announcing, "[w]e will defer indefinitely the commercial reprocessing and recycling of the plutonium produced in the U.S. nuclear power programs," the Commission had under active deliberation its generic environmental impact statement on the use of mixed oxide fuel in light-water reactors (or, GESMO). The President's statement cast a significant shadow over the Commission's deliberations. As an independent regulatory agency, NRC was not obligated to follow President Carter's policies, but the Commissioners decided to suspend GESMO proceedings and to solicit comments from the President and the public on how to proceed. To this end, on May 5, 1977, then-NRC Chairman Rowden sent a letter to President Carter asking for his "views on the relationship of your non-proliferation and national nuclear energy policies to the issues confronting the Commission." Stuart E. Eizenstat, Assistant to the President for domestic affairs and policy, ultimately replied on behalf of the President, advising the NRC that the "President believes that his nonproliferation initiatives would be assisted . . . if the Commission were to terminate the GESMO proceedings."

finding of waste confidence – or any decision -- must be rooted in the law as we find it now. This is unarguably true. Yet, while I agree that the framework for nuclear waste disposal as enshrined in the Nuclear Waste Policy Act must be accepted as a settled matter, until and unless it is changed, the challenge of shutting one's ears to the din of the current debate is felt most acutely in attempts to establish the estimated "timeframe" for repository availability contained in Finding 2. The timeframe, as structured, does not turn on the question of feasibility, or even necessity, but rather, as noted in the draft final Statements of Consideration, "Finding 2 is not a finding that sufficient repository capacity must be available within 50 – 60 years of the licensed life of a reactor for public health or safety reasons; *it is a prediction* that a repository will be available in this period of time." (p. 39, emphasis added)

Plainly put, this is a particularly difficult time to be in the prediction business. That said, however, the Court in State of Minnesota v. NRC (D.C. Cir. 1979) noted this approach and stated that "[t]he breadth of the questions involved and the fact that the ultimate determination can never rise above a prediction suggest that the determination may be a kind of legislative judgment for which rulemaking would suffice." As the Atomic Energy Commission's first Chief of the Environmental and Sanitary Engineering Branch, Mr. Joseph Lieberman, sagely cautioned in 1960, however, in voicing his confidence that the nuclear industry would grow "in a rational way without being hamstrung by its own wastes": "[O]ne has to be very careful to distinguish between aspiration, reality, and speculation in this field."

At this point in our rulemaking process, the Commission has already specifically solicited public comment on the necessity or merit of including a timeframe for repository availability in Finding 2. Some commenters, such as the State of Nevada and the Nuclear Energy Institute, favored a more general approach, i.e., that a repository will be available when needed; believing that a timeframe involves too much speculation about future events and that licensed storage of spent nuclear fuel will be safe no matter the duration of storage prior to disposal. Some commenters, however, objected strongly to such an approach; reasoning that a timeframe is necessary to provide an incentive for the Federal Government to meet its responsibilities under law to provide disposal. In my review of the history, the existence of a timeframe in Finding 2 – a date repeatedly extended by the Commission since its original decision in 1984 -- has produced no discernable effect thus far. The more compelling argument for inclusion of a timeframe appears to be the conundrum created in trying to envelope a National Environmental Policy Act (NEPA)-worthy environmental analysis of the impacts of the storage of spent nuclear fuel for an indefinite period. I am informed by the NRC staff that a bounding analysis of this type would be challenging, would take a number of years to conduct, and would confront many analytical uncertainties.

This dilemma is important because waste confidence is, at its heart, an exercise in compliance with NEPA. The issue has its origins in challenges to the NRC's reactor licensing process that came about in the late 1970s. In Natural Resources Defense Council v. NRC (2d Cir. 1978), the Court noted with approval the NRC's stated premise that it "would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely." Later decisions, such as J. Tamm's concurring opinion in Minnesota v. NRC opined that "if the Commission determines it is not reasonably probable that an offsite waste disposal solution will be available when the licenses of the plants in question expire, it then must determine whether it is reasonably probable that the spent fuel can be stored safely onsite for an

indefinite period," the courts have also spoken to the role of other decisionmakers in this issue – namely, Congress.

As noted by the court in NRDC v. NRC (1978): "We are not without appreciation of the well-intentioned concerns of NRDC . . . NRDC urges that even if reasonable assurance of safe future disposal of waste could be demonstrated, 'the full incentive to develop such a facility on a timely basis will not be present unless the regulatory link is made now between reactor licensing and waste disposal.' This is the kind of argument that is properly made to the Congress . . . it is for the Congress rather than the courts to translate such concerns into law. NRDC makes the point that 'serious political and social resistance to the development of a geologic repository is mounting throughout the country.' . . . *Nevertheless, resolving the problem of such 'resistance' must come from the legislative branch of government.* . . ." (emphasis added) For my part, I labor in the hope that the Congress and the Administration will work with dispatch to empanel the Blue Ribbon Panel; evaluate options; act, if necessary; and, lift the current cloud of uncertainty over the road ahead.

My comments here should not be interpreted as casting doubt on the Commission's prior and existing findings of waste confidence. I am 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. Further, 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. I operate with the conviction that high-level radioactive waste and spent fuel will be managed in a safe manner until such disposal capacity is provided because there does now and will exist in the future a governmental authority to ensure that this is so.

As I consider these questions, I feel keenly the heavy burden of weighing the equities of future generations of Americans who will inherit these concerns. I share the commitment of my fellow Commissioners to preserving the credibility of this and future Commissions by remaining above the political froth of nuclear policy debates; these debates are not our domain. Our charge is that laid forth by Judge Tamm [Natural Resources Defense Council v. NRC, (D.C. Cir. 1976), concurring opinion] who wrote so powerfully:

> NEPA requires the Commission fully to assure itself that safe and adequate storage methods are technologically and economically feasible. It forbids reckless decisions to mortgage the future for the present, glibly assuring critics that technological advancement can be counted upon to save us from the consequences of our decisions.

Kristine L. Svinicki 09/24/09

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER APOSTOLAKIS

SUBJECT: SECY-09-0090 – FINAL UPDATE OF THE COMMISSION'S WASTE CONFIDENCE DECISION

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached XX None ___

SIGNATURE

8/13/10
DATE

Entered on "STARS" Yes X No ___

COMMISSIONER APOSTOLAKIS' COMMENTS ON SECY-09-0090:
FINAL UPDATE OF THE COMMISSION'S WASTE CONFIDENCE DECISION

I approve staff's recommendation to publish the revised Commission's Waste Confidence decision and to make a conforming change to 10 CFR 51.23(a), subject to the following comments. I appreciate the extensive staff analysis and well developed proposal that are before the Commission. I also have had the opportunity of reviewing the thoughtful analyses and recommendations in the votes of my fellow Commissioners and former Chairman Klein.

I concur in the assessment of Chairman Jaczko and my fellow Commissioners that the Commission should now proceed to make its determination on the draft final waste confidence update and final rule. It appears that the Commission is close to consensus on immediate and longer term action. I understand the desire of former Chairman Klein, as well as Commissioner Svinicki, to move cautiously in their initial votes last year, given the uncertainties regarding changes in national policy at that time. Although the draft final rule that the staff submitted in 2009 assumed that Yucca Mountain would not be built, I appreciate the prudence of pausing to become better informed about current developments in the national policy on disposal of high-level waste and spent nuclear fuel.

At this juncture, the Administration has moved forward and has established the Blue Ribbon Commission on America's Nuclear Future. The Blue Ribbon Commission is chartered to conduct and is engaged in a comprehensive review of policies for managing the back end of the nuclear fuel cycle, including all alternatives for the storage, processing, and disposal of civilian and defense used nuclear fuel, high-level waste, and materials derived from nuclear activities. It is also to make recommendations for a new plan to address these issues. In addition, the Administration has moved to terminate the Yucca Mountain project, submitted a motion to the NRC to withdraw the construction authorization application for Yucca Mountain, and is in litigation concerning these actions. Thus, it appears that it will be several years at least before the Commission would have the benefit of any additional information and recommendations that might be of significant interest to the Commission as it assesses its continuing confidence in the safe management and disposal of high level waste and spent nuclear fuel.

Until such time as a disposal site is made available by the federal government, I am confident that NRC's licensing and inspection programs will continue to ensure the safe and secure management of spent nuclear fuel by licensees in either a spent fuel pool or in dry cask storage systems. I am also confident that storage can be accomplished without significant environmental impacts for many decades. In particular, I join my fellow Commissioners in supporting the staff's proposed updated Finding 4.

I also support modification of Finding 2 and the final rule to provide that a mined geologic repository will be available "when necessary" rather than offering a target date for repository availability. The federal government remains obligated to provide permanent disposal capacity for high-level radioactive waste and spent fuel, an obligation accepted and affirmed by the current Secretary of Energy. The Commission has confidence (as expressed in Finding 1) that safe disposal of HLW and spent fuel in a mined geologic repository is technically feasible, and I believe the NRC has, and will continue to have, the ability to require safe and secure storage of spent nuclear fuel until disposal is necessary. A federal imperative to shift to disposal may be premised upon a variety of reasons, including increased development of social and political acceptance for disposal as outlined in the supplementary information or some ultimate

determination of when temporary storage should end for technical, environmental, or policy reasons.

In summary, I support issuance of the final rule and Waste Confidence update with the following revisions:

10 C. F. R. § 51.23, **Temporary storage of spent fuel after cessation of reactor operation—*generic determination of no significant environmental 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 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 to dispose of commercial high-level waste and spent fuel when necessary.

Waste Confidence Finding 2:

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

Waste Confidence 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 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 either onsite or offsite independent spent fuel storage installations.

Both Finding 4 and the final rule refer to storage of spent fuel for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license). I think it should be clear in the supplementary information that these statements are premised on and bounded in part by the existing licensing limit of 60 years of operation when a renewed license is obtained and that the current regulatory regime allows for initial licensing of reactor operation for 40 years and renewal of the license for an additional 20 years. Thus, the updated Finding 2 reflects confidence in safe storage (supported by technical studies), without significant environmental effects for at least 120 years. The intent of this clarification is to ensure that the literal language is not interpreted as reflecting an assessment of safe storage without environmental effects for 60 years beyond the licensed life for operation, *whatever* the licensed life for operation. In this regard, I also note that efforts have begun on research that could contribute to an assessment of feasibility of licensing reactors for an additional 20 year period beyond 60 years. Thus, I think it would be useful if the supplementary information also explained that the Commission may need to revisit this finding and its technical bases if the

Commission eventually were to establish a regulatory program for such an additional period of operation.

I also support my fellow Commissioners' desire to direct staff to reassess the waste confidence decision with consideration of a longer time frame for storage and potential disposal, such as from 100 to up to 300 years, and to direct preparation of an Environmental Impact Statement (EIS) as an exercise of the Commission's discretion as part of a future rulemaking effort. My support for this effort should not be considered in any sense an endorsement of extended long-term or permanent spent fuel storage. Rather, I believe that the additional technical studies and environmental review of longer term storage would enhance future decision-making. At the same time, it will bolster the Commission's ability to respond to the possibility of future modifications in national policy regarding spent fuel storage and disposal, such as a shift toward centralized interim storage. I also agree with my fellow Commissioners that the lead for this effort should be assigned to the Office of the Executive Director for Operations with support from the Office of General Counsel.

In addition, I suggest that staff be directed to propose a time frame, and a rulemaking plan, based in part on its planning for the extended storage and transportation and regulatory program review discussed in COMSECY-10-0007. Integrated planning should be beneficial in establishing the scope of the studies, EIS, and future rulemakings. This approach should include consideration of the schedule for the activities and recommendations of the Blue Ribbon Commission.

The federal government is charged with providing for permanent disposal of high-level radioactive waste such as spent fuel. In exercising this responsibility, it is conceivable that the future path for the disposal of high level waste such as spent fuel may not even involve a mined repository. It might include, for example, a deep borehole. This approach would not be, as I would define it, a "mined repository." However, it most certainly could be considered under some reprocessing and transmutation scenarios for the remaining amount of waste. Therefore, staff should continue to monitor closely the activities of the Department of Energy's Blue Ribbon Commission on America's Nuclear Future to ensure that we can respond to potential modifications of national policy.

George Apostolakis 8/13/10

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER MAGWOOD

SUBJECT: SECY-09-0090 – FINAL UPDATE OF THE COMMISSION'S WASTE CONFIDENCE DECISION

Approved __X__ Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached _X_ None ___

SIGNATURE

8/13/10
DATE

Entered on "STARS" Yes X No ___

Commissioner Magwood's Additional Comments on SECY–09–0090: Final Update to the Commission's Waste Confidence Decision

I approve publication of the final update and rule, with modifications I believe are necessary to reflect the current status of the high-level-waste-repository program.

Since 1984 the Commission's Waste Confidence Decision and Rule have comprised the NRC's generic environmental analyses of the storage of spent nuclear fuel at, or away from, reactor sites after the expiration of reactor operating licenses. This process has complied with the direction from the United States Court of Appeals for the District of Columbia Circuit that the Commission should determine whether there is reasonable assurance that an offsite disposal solution will be available by the expiration of the plants' operating licenses and, if not, whether there is reasonable assurance that commercial spent fuel can be stored safely at nuclear power plant sites after plant operations have ended. For more than twenty-five years, the Commission has consistently found that spent fuel can be stored safely for decades after the expiration of a reactor's operating license and that a deep geologic repository will be available at some point in the future. But the uncertainties generated by the significant political challenge of siting a high-level waste disposal facility make it difficult for the Commission to base its considerations on a specific schedule by which a repository would be available. Therefore, I join with my fellow Commissioners in finding that a specific "target date" should be removed from Waste Confidence Finding 2.

Technical analysis performed by the NRC staff, which benefits from practical experience with dry cask storage facilities that have been deployed at many nuclear power plant sites across the country, confirm the safety of storing spent nuclear fuel for at least 60 years beyond expiration of a plant's license. With this analysis, the staff proposes to extend the period of safe storage (found in Waste Confidence Finding 4) from at least 30 years beyond licensed life to at least 60 years. I support this proposal and believe that the analysis is more than adequate to support this extension. I also recognize that the removal of a specific target date from Waste Confidence Finding 2 may cause some to question whether the Commission is endorsing the indefinite storage of spent nuclear fuel—it is not. Rather, Finding 2 reflects the Commission's confidence that disposal capability will be available when necessary. The Commission's Waste Confidence decision is anchored in the knowledge that the technologies exist to respond in a timely fashion to any Federal imperative to shift from storage of spent fuel and high-level waste to disposal of spent fuel and high-level waste. However, the Waste Confidence decision remains bounded by the safe-storage period discussed in Finding 4. Finding 4 is still limited to at least 60 years of storage beyond licensed life for operation, which means that, as it has done before, the Commission may need to revisit its Waste Confidence Decision in the future to ensure that it continues to have reasonable assurance in continued safe and environmentally sound storage and the eventual availability of a facility that can accept U.S. commercial high-level wastes for final disposition.

As a result, I join with my colleagues in recommending that the agency publish a final rule that revises 10 CRF 51.23 and Waste Confidence Findings (2) and (4). I suggest the following modifications:

1) I recommend that § 51.23, "Temporary storage of spent fuel after cessation of reactor operation—generic determination of no significant environmental impact" be changed to read:

   (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 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 to dispose of commercial high-level waste and spent fuel when necessary.

2) I recommend that Waste Confidence Finding 2 be revised as follows:

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

3) I recommend that Waste Confidence Finding 4 be revised as follows:

   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 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 either onsite or offsite independent spent fuel storage installations.

I understand that, apart from the Waste Confidence Findings, some of my colleagues have proposed an additional long-term project to extend the scope of the Commission's confidence in the long-term storage of spent nuclear fuel to well beyond the 60 years after plant operation that is contemplated in the final rule and supported by the staff's current technical assessments. This project would take the form of a rulemaking supported by an Environmental Impact Statement (EIS) that would engage the public in the development of alternatives and consideration of impact and support the development of a potential update to the Commission's Waste Confidence Findings and Rule in the future. The proposed EIS would be initiated under the Commission's discretionary authority under 10 CFR 51.20(a)(2).

This long-term rulemaking and EIS would be separate from the final rule that I have discussed above. The final rule and update stand on their own and I support their publication (as modified in this vote) even if the Commission declines to approve a long-term rulemaking and EIS. The expanded scope of the long-term rulemaking and the additional public participation that accompany an EIS will allow the Commission to consider a more robust Decision and Rule that could support disposal options other than mined geologic disposal and that could expand the timeframe for safe storage of spent fuel and commercial high-level wastes well beyond the 60 years after licensed life contemplated in the current Decision and Rule.

It is important to stress that in launching a consideration of the storage of spent fuel and commercial high-level wastes over the very long-term future, the Commission is sailing boldly into *mare incognitum.* Current policies and technologies are unlikely to provide reliable paths with which the agency can confidently chart its course. It is, therefore, my view that the Commission should pursue this effort in a comprehensive manner.

In this light, I recommend that the staff develop a plan for the long-term rulemaking and EIS for Commission consideration that casts a wide net. The staff should consider not only the potential long-term storage of today's spent nuclear fuel and commercial high-level wastes, but also the potential ramifications of the future availability of advanced nuclear fuel cycle technologies and their concatenate waste management strategies. For example, some approaches would enable short-lived species to be separated from spent fuel and stored until they decay—thereby reducing the performance requirements of a future repository. Spent fuel treatment and recycling options such as this are being explored by researchers in many countries and consideration of the long-term storage of the products associated with these processes would help inform future Commission decisions.

Staff should assess how the proposed project to develop a long-term rulemaking and EIS might reflect the potential application of advanced spent fuel management technologies. Moreover, as part of developing a plan for this effort, staff should assess potential future strategies and, based on their assessment, recommend to the Commission the appropriate time period to be considered in the analysis.

I look forward to the staff's views on how best to design such an expansive project. I believe the Commission must receive a complete plan for its consideration in time to inform the development of FY 2013 performance budget.

William D. Magwood, IV 8/13/2010

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER OSTENDORFF

SUBJECT: SECY-09-0090 – FINAL UPDATE OF THE COMMISSION'S WASTE CONFIDENCE DECISION

Approved XX Disapproved XX Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached XX None ___

SIGNATURE

8/10/10
DATE

Entered on "STARS" Yes XX No ___

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

I approve publication of the Waste Confidence update and final rule in the Federal Register. Specifically, for reasons stated below, I approve Finding 2 and § 51.23 as revised in my vote, and I approve Finding 4 as recommended by the staff. The Commission's deliberations on this matter must be informed by the current state of events and most up-to-date technical knowledge. The Commission also has an obligation to meet its safety, security and environmental responsibilities in the context of being a consistent and reliable regulator. Keeping these considerations in mind, completion of this rulemaking at this time is critical. I believe we can issue the update and final rule based on the information we have on hand. I think it is also prudent to initiate the technical and environmental studies to evaluate longer-term storage of high-level radioactive waste and spent nuclear fuel.

In addition to the excellent work done by the staff, I appreciate the work that the Chairman and Commissioner Svinicki have done on this rule prior to the arrival of the three new Commissioners. I also acknowledge Dr. Klein's efforts on this rulemaking prior to his departure. It was invaluable to have had the benefit of their insights.

For the reasons set forth below, I support adoption of the following versions of § 51.23(a), Finding 2, and Finding 4:

> **§ 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 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 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.

With respect to the type of disposal capacity in which the Commission can have confidence, I believe that the term "mined geologic repository" is most appropriate. The nation's current understanding of the technical feasibility of the disposal of high-level waste and spent nuclear fuel is based nearly exclusively on information related to a mined geologic repository. For this reason, Finding 2 should refer narrowly to the assurance of the availability of a mined geologic repository.

I would also eliminate a target repository availability date in the final rule and Finding 2. I believe that predicting a target date for the availability of a geologic repository would be premature and does not provide any additional value for three reasons. First, I understand that the law does not require the NRC to determine or guess when a repository will be available. Throughout its history in dealing with the Waste Confidence Rule, the Commission has taken care to avoid relying on the success of a particular repository program. In both the 1984 and 1990 rulemakings, for instance, the determination of safe and secure storage was made without dependence on the timing of repository availability, and in fact assumed that the Yucca Mountain project would be abandoned. Rather than focusing on predicting repository availability, the appropriate inquiry is whether the Commission has reasonable assurance that the spent fuel can be safely stored onsite beyond the expiration of the operating licenses of nuclear power plants. The specific repository date used in past rules has never been associated with a health, safety, or environmental concern. This is still the case today.

Second, some stakeholders who commented on the proposed rule suggested that elimination of the target date would remove any incentive for the Federal Government to meet its responsibilities for the disposal of high-level waste. However, there is no evidence that keeping a target repository availability date as part of the rule has ever had the motivational effect on the development of a repository that these stakeholders desire.

Third, I think that asserting a prediction in the form of a repository availability date arguably undermines the validity of this rule. Notwithstanding the Commission's repeated explanation that the purpose of the target date is to establish a bounding time period for the environmental analysis, some stakeholders have viewed the target date as a binding prediction on the availability of the repository. Therefore, each time the Commission revises the target date, the Commission's credibility unnecessarily comes into question.

Instead of attempting to predict repository availability through the use of a target date, I join Commissioner Svinicki in recommending that Finding 2 and the rule apply the caveat "when necessary" to qualify when sufficient mined geologic repository capacity will be available. The term "when necessary" acknowledges our confidence that there will be no gap between the time when a repository will be necessary due to safety or other reasons and the availability of a repository. This is consistent with what the Commission proposed as an alternative approach in the proposed rule. Having reviewed the history of this rule, I do not see use of the phrase "when necessary" as a significant departure from the underlying rationale in past rules. In previous iterations of this rulemaking, the Commission has recognized the limitations of predicting a specific date of repository availability. Ultimately, the predictions were based on a belief that a repository would be available "when needed" or "in due course."

I believe that "when necessary" contemplates a wide array of situations that could ultimately trigger the need to dispose of high-level waste in a repository. Most importantly, a change in the political or societal elements necessary for acceptance of a national repository could mark this moment. Alternatively, although unlikely, a repository could become necessary because of some unforeseen safety, security, economic, legal, or capacity issue that could arise in the future. It is difficult to imagine a scenario which would necessitate disposal on the basis of safety or security, but I would not want to dismiss at least the possibility that some change of events would create a more urgent need for a repository.

I also approve the staff's recommendation to revise Finding 4 to reflect our 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. I believe that the basis provided by the staff in the draft Federal Register Notice for extending the time period in Finding 4 from 30 years to 60 years is sound. Spent fuel has been stored safely for decades, and the staff currently has a technical basis, as evidenced by the studies referenced in the draft final rule, that suggests that it could continue to be stored as such for more than 60 years. From a security perspective, spent fuel storage locations are secure, and better protected than ever.

While a strong technical basis exists to issue this rule, the NRC and its federal partners continue research in this area to evaluate the feasibility of storage of spent fuel for longer timeframes. Therefore, I agree with the Chairman and Commissioner Svinicki's proposal to engage in a longer-term rulemaking that would provide greater longevity to the Waste Confidence Rule. The Commission should direct an Environmental Impact Statement (EIS) be completed to supplement the rulemaking using its discretionary authority under 10 CFR 51.20(a)(2). To provide the staff with flexibility in determining the appropriate period of review, I would propose that the staff be directed to analyze the storage of spent nuclear fuel at onsite storage facilities, offsite storage facilities, or both, for up to or beyond 300 years from the end of license operation of any nuclear power reactor, with the ultimate timeframe determined by the staff's technical judgment during the course of the analysis. The staff should provide the Commission with the resources needed for such a rulemaking.

While I support the technical analysis to determine the feasibility of spent fuel storage for up to or beyond 300 years from licensed life of operation, I would emphasize two points. First, I have complete confidence in the Commission's justification for issuance of this rule at the present time. Second, my support for the timeframe associated with this analysis should not be interpreted as advocating long-term onsite storage of spent nuclear fuel as a solution. The intent of directing the staff to analyze the impacts of storage for extended periods is to provide flexibility, and ensure that the Commission is prepared to respond to any future changes in the technical or political environment.

Addressing our confidence in the safe and secure management of nuclear waste has forced us into the very challenging business of considering the effects of our actions over extremely long periods of time. Nevertheless, I am confident in the Commission's basis for issuing this final rule now. I commend the staff for their continued diligence and my fellow Commissioners for their thoughtful attention to this rule. I look forward to reviewing the staff's future recommendations in this area.

William C. Ostendorff

8/10/2010