

May 29, 2001

COMMISSION VOTING RECORD

DECISION ITEM:       SECY-01-0026

TITLE:                ALTERNATIVES FOR RULEMAKING: DOMESTIC  
                          LICENSING OF URANIUM AND THORIUM RECOVERY  
                          FACILITIES

The Commission (with all Commissioners agreeing) approved Alternative 3 of the subject paper as recorded in the Staff Requirements Memorandum (SRM) of May 29, 2001.

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

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Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

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

## VOTING SUMMARY - SECY-01-0026

### RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	PARTICIP	NOT COMMENTS	DATE
CHRM. MESERVE	X				X	5/7/01
COMR. DICUS	X				X	4/17/01
COMR. DIAZ	X				X	5/7/01
COMR. McGAFFIGAN	X				X	4/30/01
COMR. MERRIFIELD	X				X	5/2/01

### COMMENT RESOLUTION

In their vote sheets, all Commissioners approved Alternative 3, updating regulatory guidance in lieu of continuing the development of the proposed 10 CFR Part 41 rule, and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on May 29, 2001.

## Commissioner Comments on SECY-01-0026

### Chairman Meserve

SECY-01-0026 proposes various alternatives for the development of new requirements governing uranium and thorium recovery facilities. In a Commission meeting with the National Mining Association (NMA) on April 10, 2001, concerning the alternatives, NMA also raised certain additional matters: the fee structure for uranium and thorium recovery licensees; and the complications arising from past Commission decisions regarding the classification of certain effluents from *in situ* leach facilities as 11e.(2) byproduct material.

1. Rulemaking. In connection with SECY-99-011, the Commission approved the staff's draft rulemaking plan for the development of a new 10 CFR Part 41 devoted to uranium and thorium recovery facilities and the disposal of 11e.(2) byproduct material. Although both the staff and industry agree that the development of a new rule would be desirable, the NRC would be required to recover the costs of any such effort from the affected licensees. It is now clear that the recovery industry is unable to bear these costs in light of its precarious financial circumstances. Accordingly, the staff has presented various options in SECY-01-0026 to the Commission as to how to proceed.

It is apparent that proceeding with the rulemaking (Alternative 2) might have the perverse result of serving to jeopardize the very industry that is intended to be guided by the new rule. And Alternative 1, which would allow the National Materials Program Working Group to take the lead role in developing a rule based on consensus, is problematical because this would be a new approach that could be subject to delays or expenses beyond those identified by the staff. Consequently, I choose Alternative 3, which is to discontinue the current rulemaking, but to update guidance documents to implement the Commission directions. Although the absence of a new rule could increase the possibility of hearings on individual licensing actions, Alternative 3 will still ensure protection of public health and safety, seems to promise the least short-term financial consequences, and is supported by the industry. If economic circumstances were to change, the Commission could then launch a rulemaking.

2. Fees. I recognize the difficult economic situation in which the industry finds itself and the problems that our fee obligations present. I am committed to finding a solution to a situation in which our fees would contribute to putting a vital, but economically depressed, industry out of business. I believe a legislative solution that would provide public funds to cover fees in this situation is the fairest approach and I would support industry efforts to pursue such legislation. I do not agree that a shift of the fee burden from the uranium recovery industry to other licensees is a fair and equitable solution to the problem.

3. In situ Leach Facilities. The recent Commission decisions on matters related to NRC regulation of uranium and thorium recovery facilities were intended to provide a basis for regulating these facilities that is technically and legally sound.<sup>1</sup> In its presentation at the April 10

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<sup>1</sup> See Staff Requirements Memoranda for: SECY-00-227, "Concurrent Jurisdiction of Non-Radiological Hazards of Uranium Mill Tailing" (Dec. 2, 1999); SECY-00-012, "Use of Uranium Mill Tailings Impoundments for the Disposal of Waste Other than 11e.(2) Byproduct Material and

Commission meeting, NMA questioned the Commission's decision on SECY-99-013 concerning classification of effluents from *in-situ* leach (ISL) facilities. It is my expectation that staff will address and resolve many of the concerns raised by NMA in the course of developing guidance to implement the Commission's decisions.

For example, the NMA observed that the Commission's action might create a liability for past discharges that were lawfully released pursuant to National Pollutant Discharge Elimination Standards (NPDES) permits.<sup>2</sup> But any potential "liability" for past discharges under NPDES permits would arise, as explained by the NMA, only as a result of NRC staff actions.<sup>3</sup> Because NRC has sole jurisdiction over 11e.(2) byproduct material, this issue can be handled appropriately in the development of guidance to implement the Commission's decisions.<sup>4</sup>

It was apparent from the NMA presentation that more aggressive efforts should be made to harmonize the NRC approach to the regulation of *in situ* leach facilities with those of affected states (e.g., Wyoming, Nebraska). It appears that some states impose obligations that overlap substantially with NRC requirements. NRC staff should coordinate its activities with other affected regulators so as to reduce needless burdens imposed on these licensees.

#### Commissioner Dicus

After completing my review of SECY 01-0026 and participating in the April 10 Commission meeting on rulemaking and guidance development for the uranium recovery industry, I approve Option 3 from SECY 01-0026. This approach discontinues the proposed 10 CFR Part 41 rulemaking plan and supports modifying and updating existing NRC guidance documents per Commission direction set forth in the Staff Requirements Memorandums for SECYs 99-012, 99-013, and 99-277.

With full respect and appreciation for the declining price of  $U_3O_8$ , increased international competition, and the few remaining productive domestic *in-situ* leach facilities, I firmly support minimizing industry cost impacts to the extent practical and reasonable. However, I find the National Mining Association's and/or the uranium recovery industry's proposal to be considered a non-profit institution not to be a practical solution and their request for temporary discontinuance of NRC fees not to be equitable. Because the industry is a profit-making entity, and since fees are

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Reviews of Applications to Process Material Other than Natural Uranium Ores" (Apr. 8, 1999); and SECY-00-013, "Recommendations on Ways to Improve the Efficiency of NRC Regulation at *in Situ* Leach Uranium Recovery Facilities" (Mar. 12, 1999).

<sup>2</sup> Transcript "Public Meeting on Rulemaking and Guidance Development for Uranium Recovery Industry," 48 (Apr. 10, 2001).

<sup>3</sup> Id. at 49.

<sup>4</sup> It should also be recognized that prior to 1995, the NRC considered all effluents to be 11e.(2) byproduct material. It was only with the change to NRC guidance enacted in 1995 that certain wastes were determined not to be 11e.(2) byproduct material. See SECY-99-013, "Recommendations on Ways to Improve the Efficiency of NRC Regulation at *in Situ* Leach Uranium Recovery Facilities," at 4 (Mar. 12, 1999)

required by the NRC for services rendered, I am not comfortable supporting either proposal. As I mentioned at the April 10 meeting, the NRC would still have to recover costs, but at the expense of other licensees. Therefore, in order to minimize substantial near-term cost impacts, I stand supportive of not going forward with the 10 CFR Part 41 rulemaking at this time. Although costs will still be incurred for staff's guidance modification and update efforts, the overall impact will not be as time consuming or substantial as rulemaking.

#### Commissioner Diaz

I believe that a rulemaking that codifies the Commission's direction in the SRMs for SECY-99-0012, 99-0013, and 99-0277 could provide the public, licensees, and the agency with potential benefits, such as finality and stability of the public health and safety requirements. However, updating the existing guidance would provide a comparable level of protection of public health and safety, and, therefore, at this time, I approve Alternative 3.

#### Commissioner McGaffigan

Based on a review of the subject staff paper and discussions during the April 10, 2001 Commission briefing by NRC staff and representatives of the National Mining Association (NMA), I join Commissioner Dicus in approving Alternative 3, at this time, as described in SECY-01-0026. Clearly, Alternative 3 would not preclude development of a rule at a later date, and it would require fewer resources than the other two Alternatives and implement the Commission's decisions on the earlier related staff papers (SECY-99-012, 99-013, and 99-277). I offer the following comments on each Alternative.

Alternative 1 - Use of the National Materials Working Group to complete this rulemaking - This is the least attractive Alternative for several reasons. First, the NRC staff and Commission have spent considerable time and effort considering these important issues. Turning these issues over to a new group of individuals is not efficient and would be unnecessarily resource intensive for everyone involved. Second, the Commission has made sometimes difficult decisions on the earlier staff papers and provided specific guidance to the staff on these matters. It is unclear what status these decisions would be given in the context of a National Materials Working Group approach. Third, as a general matter, I have grave misgivings about the "alliance" approach to rulemaking which the National Materials Program Working Group may propose later this spring. Without prejudging that report, I doubt that this approach will be suitable for complex rulemakings.

Alternative 2 - Continue to Develop a Final Rulemaking Plan - In my opinion, now is not the time to continue the uranium recovery program rulemaking, with its attendant costs, since the price of uranium remains depressed as a result of large supplies becoming available at the end of the cold war and the costs of the rulemaking represent an unacceptably high percentage of the industry's direct costs. However, I would likely support a rulemaking at some time in the future either when the industry is more viable after prices for yellowcake recover or should the Congress grant fee relief to this category of licensees. In that regard, I support the NMA initiative discussed during the recent briefing to seek legislative relief from NRC's current fee structure while the average annual spot price per pound of yellowcake remains below a certain dollar amount. While not prejudging its outcome, I would also be willing to entertain a request from the industry to NRC to exempt uranium recovery licensees from our current fee structure. However, it must also be recognized that any fees not paid by a specific category of licensee must be borne by the remaining categories of licensees since, under the Omnibus Reconciliation Act of 1990, NRC's fee-based

budget must be recovered from its licensees. For this reason, a legislative solution is clearly preferable to a rulemaking solution.

Alternative 3 - Discontinue the Current Rulemaking and rely on guidance development -- Until the time that any "fee relief" occurs or uranium prices recover from their historic lows, I fully support the Alternative 3 guidance approach since it is the least resource intensive approach while still providing opportunities for stakeholder input during development of the guidance. To this end, I encourage the staff to work closely with the industry, States, Environmental Protection Agency and the Department of Energy to find efficient and effective means to reduce any unnecessary regulatory burden to licensees. In my opinion, this goal can be accomplished through tools other than State- or site-specific Memoranda of Understanding which are typically resource intensive to develop. Reducing regulatory burden is particularly important in the protection of groundwater where Federal and State regulatory programs, both of which are designed to protect public health and safety and the environment, tend to overlap to varying degrees.

Finally, in view of the State and industry comments discussed during the briefing and likely to be received during development of the guidance to implement the earlier Commission decisions, I do not consider my earlier decisions to be inalterable. Consistent with my vote on SECY-99-011, I continue to be open to reconsidering my position on these important issues in light of comments received during the guidance development process. The staff should keep the Commission periodically informed of the status of these efforts, and the final guidance should be submitted to the Commission for approval.

#### Commissioner Merrifield

I approve Alternative 3 as described in SECY-01-0026. Namely, I approve the staff discontinuing the development of the proposed Part 41 rule and devoting its resources on updating regulatory guidance documents to implement the previous Commission directions and to explore other approaches to achieve effectiveness and efficiency of uranium recovery regulations that could be less resource-intensive. Ultimately, I believe the ideal approach would be to finalize the proposed new Part 41. But due to the severe economic depression in the uranium recovery industry, issuance of regulatory guidance, at this time, would have the least financial impact for this particular industry but would continue to adequately protect the public health and safety and the environment. This current action would not preclude rule making at some future time to establish the guidance as legal requirements.

At the Commission briefing on April 10, 2001, the industry requested that the Commission reconsider certain aspects of its previous decisions before issuing the final guidance. The regulation of the uranium and thorium recovery facilities has proven to be a complex undertaking with decisions made in one area, for perfectly valid reasons, having unintended consequences in another area. Based on the information presented to date, I desire more detailed information on unintended consequences of the previous Commission decisions, and I look forward to reviewing the public comments on the proposed regulatory guidance. In many instances in the past, when the staff has been provided specific instructions by the Commission as it has in this case, the staff has been allowed to issue final regulatory guidelines with a copy provided to the Commission. However, due to the unique circumstances associated with this regulatory guidance, I want the proposed final regulatory guidance submitted to the Commission for approval. I will seriously consider all of the public and industry comments, particularly in the area of unintended consequences, in my vote on the final guidance.

Finally, I understand the severe economic conditions of the uranium recovery industry and would support their legislative request for relief from NRC fees for some short duration. However, any request for the NRC to grant fee relief to one segment of the nuclear industry without general fund relief provided by Congress would require a fairly careful review to clearly understand unintended circumstances and fee impacts to our other licensees.