

June 19, 2008

MEMORANDUM TO: R. W. Borchardt
Executive Director for Operations

FROM: Annette L. Vietti-Cook, Secretary **/RA/**

SUBJECT: STAFF REQUIREMENTS – SECY-08-0036 – DENIAL OF TWO
PETITIONS FOR RULEMAKING CONCERNING THE
ENVIRONMENTAL IMPACTS OF HIGH-DENSITY STORAGE OF
SPENT NUCLEAR FUEL IN SPENT FUEL POOLS (PRM-51-10
AND PRM-51-12)

The Commission has approved the staff's recommendation to deny both petitions for rulemaking, forward letters to the petitioners notifying them of this decision, and to publish the *Federal Register* notice of the denials.

Footnote 15 should be replaced with the following:

In the wake of the Ninth Circuit's *Mothers for Peace* decision, the Commission decided against applying that holding to all licensing proceedings nationwide. See, e.g., *Amergen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007), *pet. for judicial review pending*, No. 07-2271 (3d Cir.). The Commission will, of course, adhere to the Ninth Circuit decision when considering licensing actions for facilities subject to the jurisdiction of that Circuit. See *id.* Thus, on remand in the *Mothers for Peace* case itself, the Commission is currently adjudicating intervenors' claim that the NRC Staff has not adequately assessed the environmental consequences of a terrorist attack on the Diablo Canyon Power Plant's proposed facility for storing spent nuclear fuel in dry casks. See, *Pacific Gas & Elec. Co.*, CLI-07-11, 65 NRC 148 (2007). The Commission's ultimate decision in that case will rest on the record developed in the adjudication.

Commissioner Jaczko's dissenting view and the Commission's additional views (attached) should be included at the end of the *Federal Register* Notice.

Attachment: Dissenting view of Commissioner Jaczko and the Commission's additional views

SECY NOTE: THIS SRM TO MADE PUBLICLY AVAILABLE 5 WORKING DAYS
AFTER DISPATCH OF THE LETTERS TO THE PETITIONERS

cc: Chairman Klein
Commissioner Jaczko
Commissioner Lyons
Commissioner Svinicki
OGC
CFO
OCA
OPA
Office Directors, Regions, ACRS, ACNW, ASLBP (via E-Mail)
PDR

Commissioner Gregory B. Jaczko's dissenting view on the Commission's decision to deny two Petitions for Rulemaking concerning the environmental impacts of high-density storage of spent nuclear fuel in spent fuel pools

I disagree with the decision to deny the petition for rulemaking as included in this Federal Register notice. In general, I approve of the decision not to initiate a *new* rulemaking to resolve the petitioners' concerns, but because information in support of the petition will be considered when the staff undertakes the rulemaking to update the Generic Environmental Impact Statement for license renewal, I believe that the decision should have been to partially grant the petition rather than deny it.

The petitioners requested the agency review additional studies regarding spent fuel pool storage they believe would change the agency's current generic determination that the impacts of high-density pool storage are "small". I believe that the agency could commit to reviewing the information provided by the petitioners, along with any other new information, when the agency updates the Generic Environmental Impact Statement (GEIS) for License Renewal in the near future. Regardless of whether or not the information will change the GEIS' conclusions, at a minimum, the agency should be committing to ensure that this information is part of the analysis performed by the staff upon the next update of the GEIS. While we can not predict the outcome of the significance level that will ultimately be assigned to the spent fuel category in the GEIS, it seems an obvious commitment to ensure that the ultimate designation will be appropriately based upon all information available to the staff at the time. Thus, I believe this decision should be explained as a partial granting of the petition. It may not provide the petitioners with everything they want, but it would more clearly state the obvious – that this information, and any other new information, will be reviewed by the agency and appropriately considered when the staff begins its update of the license renewal GEIS.

This specific issue illustrates a larger concern about how the agency handles petitions for rulemaking in general. I find it unfortunate that the agency appears to limit its responses to petitions based upon the vocabulary that has been established surrounding this program. Currently, when the agency discusses these petitions, we discuss them in the context of "granting" or "denying" the rulemaking petitions. We then appear to be less inclined to "grant" unless we are committing to the precise actions requested in the petition. But these petitions are, by their very definition, requests for rulemakings; which means, even if we do "grant" a petition for rulemaking, we can not guarantee a particular outcome for the final rule. The final rulemaking is the result of staff's technical work regarding the rule, public comments on the rule, and resolution of those comments. Rulemaking petitions are opportunities for our stakeholders to provide us with new ideas and approaches for how we regulate. By limiting our responses, we limit our review of the request, and thus, we risk missing many potential opportunities to improve the way we regulate.

The additional views of the Commission follow:

The Commission does not share Commissioner Jaczko's dissenting view. We appreciate his statement of concern about the petition for rulemaking (PRM) process, but believe these matters are extraneous to the Commission's analyses of the petitioners' technical bases for this particular rulemaking request and, consequently, they had no bearing on the majority view. Specifically, the Commission does not agree that the petitions should be granted in part on the basis of the agency's plan to update the Generic Environmental Impact Statement (GEIS) for License Renewal and make attendant rule changes in the future. The Commission's detailed statement of reasons for denial of the petitions is the product of a careful review of the petitioners' assertions and other associated public comments, and is supported by the facts before us. In these circumstances, the Commission does not believe the petitioners' request can fairly, or reasonably, be "granted" in part based on a future undertaking which itself had no genesis in the petitioners' requests.

The Commission's timely and decisive action in response to the two petitions serves the interests of the Commission and other participants in an effective, disciplined, and efficient rulemaking petition process. In this instance, a decision now has particular value since it directly addresses the petitioners' statements of significant concern about certain, generic aspects of ongoing and future license renewal reviews. While the analyses performed to respond to these petitions will also undoubtedly inform NRC staff proposals regarding the next update of the GEIS, the Commission does not yet have such proposals before it. Any final Commission decisions on an updated GEIS would be preceded by proposed changes, solicitation of public comment, and evaluation of all pertinent information and public comments. Furthermore, a partial "granting" of the petition could imply that the Commission endorses the petitioners' requests and will give them greater weight than other points of view during the GEIS rulemaking.

As to the other matter raised in Commissioner Jaczko's dissent – that of agency review and disposition of petitions for rulemaking more generally – while petitions for rulemaking are indeed opportunities for stakeholders to suggest new considerations and approaches for regulation, Commissioner Jaczko's general concerns about the agency's process for handling rulemaking petitions go beyond the subject of the Commission's action on these petitions. However, this subject matter is being considered, as the Commission has instructed NRC staff [SRM dated August 6, 2007] to conduct a review of the agency's PRM process. At such time as staff may recommend, as an outgrowth of this review, specific proposals for Commission action which would strengthen the agency PRM process, the Commission will assess such recommendations and act on them, as appropriate.