

**Basis for NEI Position that NRC should Defer Its Decision to Develop an Environmental Impact Statement under the National Environmental Policy Act**

**NEI Comments on the Draft “Background and Preliminary Assumptions for an Environmental Impact Statement – Long-Term Waste Confidence Update” (U. S. Nuclear Regulatory Commission, December 2011)**

The NRC’s draft report was developed as a means to seek feedback on the agency’s *preliminary plans* to develop an Environmental Impact Statement (EIS) associated with the long-term storage of spent nuclear fuel. According to the draft report, at 1, the EIS is “intended to inform an update of certain aspects of the Waste Confidence decision and, possibly, the Waste Confidence rule in Title 10 of the *Code of Federal Regulations* (CFR) section 51.23.” However, the draft report also acknowledges (*id.*) that “the NRC has not yet formally announced its intent to develop this proposed EIS under the National Environmental Policy Act.”

The Commission, in the Staff Requirements Memorandum (SRM) on SECY-09-0090, dated September 15, 2010, addressed the recent final rule updating the NRC’s waste confidence findings and amending 10 C.F.R. 51.23. In that SRM, the Commission directed the staff to begin the longer-term rulemaking effort to update the waste confidence decision to address long-term storage of spent fuel beyond the 120-year timeframe considered in the revised waste confidence findings. The Commission also indicated that, to support a longer-term waste confidence update, the staff should prepare a draft EIS. While NEI agrees that the longer-term rulemaking effort is prudent, NEI believes that the NRC should reconsider the current plan to move forward with an EIS. Rather, the technical and regulatory evaluation of the terms for and impacts of long-term storage should proceed forward, and should become the basis for a *future* decision on the specific form and scope of the NEPA documentation.

NRC regulations and NEPA require only that the NRC determine whether an EIS or Environmental Assessment (EA) will be prepared *before taking a proposed action*. See 10 C.F.R. 51.25. An EIS is ordinarily required only if the proposed action is a major federal action significantly affecting the quality of the human environment or when the proposed action involves a matter that the Commission, in an exercise of its discretion, has determined should be covered by an EIS. 10 C.F.R. 51.20(a). As an alternative, an EA may be completed before concluding that a proposed action will require an EIS. 10 C.F.R. 51.31. An EA may also provide a basis for a finding of no significant environmental impact (FONSI). 10 C.F.R. § 51.32. While the NRC may have discretion to conduct an EIS rather than an EA, it does not appear to be prudent to exercise that discretion from the outset in this particular case.

In connection with the final rule updating the Waste Confidence findings in 2010, the NRC did not conduct an EIS. Commenters on the proposed rule specifically argued that the waste confidence decision should be supported by a generic EIS. 75 *Fed. Reg.* 81,032, 81,040 (Dec. 23, 2010). The Commission rejected that approach. The Commission explained that site-specific licensing proceedings are supported by generic and site-specific EISs covering the impacts related to storage of spent fuel during the licensed term. *Id.* at 81,041. However, the waste confidence findings themselves reflect that spent fuel storage for the defined period beyond the operating lifetime of a plant would not involve any significant environmental impacts from storage. The revisions in the findings also did not involve a significant impact. Given its

conclusions, the NRC made a FONSI and determined that an EIS was not required. *Id.* at 81,042. The NRC's decision to not prepare an EIS has been challenged in the United States Court of Appeals, and the NRC has maintained its position that the waste confidence decision does not require an EIS.<sup>1</sup>

With respect to extended or long-term storage now being analyzed, and a possible update to the waste confidence findings, it is neither prudent nor necessary for the NRC to pre-suppose that an EIS is required. The precise nature of the proposed federal action has not been determined. Moreover, the technical and environmental evaluations to be conducted by the NRC will define the conditions of long-term storage and determine the nature of any environmental impacts. The evaluations will undoubtedly be used to frame the scope of any future rulemaking. Likewise, there is no particular reason stated by the Commission or in the draft report for the agency to exercise discretion at the present time to prepare an EIS. The ongoing work can be conducted as an EA, with a decision to be made in accordance with 10 C.F.R. 51.31 based on the EA. This approach would have the added benefit of maintaining consistency with the approach that was taken (and is now being challenged) with respect to the revised waste confidence findings in 2010.

There are practical considerations as well that support deferral of the decision to prepare an EIS. The NRC's EIS process in 10 C.F.R. Part 51 dictates a scoping process (10 C.F.R. 51.28 – 51.29) and other procedural requirements (10 C.F.R. 51.70 – 51.74). However, these requirements raise difficulties at the present conceptual stage of the technical and regulatory evaluation of long-term spent fuel storage issues. The scope of any rulemaking is not yet defined; it will, in fact, be defined only upon completion of the evaluation. The NRC appears to be addressing the NEPA issue as the proverbial cart before the horse. One impact of this approach is reflected in the series of assumptions outlined in Section 8 of the draft report. The assumptions, in effect, define the scope of the proposed evaluation. It may be more appropriate to conduct an evaluation (perhaps in the form of a regulatory gap analysis similar to what is currently underway for the proposed reprocessing rulemaking – 10 C.F.R. 7X) that leads to findings of the type characterized in the draft report as assumptions. Those findings would inform or constrain further evaluations of environmental impacts. Then, depending upon the evaluation, the NRC can (1) determine the scope of its proposed action, and (2) the nature of the required NEPA review.

In sum, NEI suggests that the NRC defer the determination of the scope of the NEPA review. At most, at this time, the NRC should prepare an EA. Whether an EIS is necessary or desirable as a matter of discretion should be determined based on the results of NRC's evaluation and/or EA.

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<sup>1</sup> NEI is a party to the litigation in the Court of Appeals for the D.C. Circuit (Case No. 11-1045 (consolidated with Nos. 11-1051, 11-1056, 11-1057)). NEI concurs with the NRC's position.