

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

