

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

**Paul S. Ryerson, Chairman
Dr. James F. Jackson
Dr. Michael O. Garcia**

In the Matter of

GE-HITACHI GLOBAL LASER ENRICHMENT, LLC

(GLE Commercial Facility)

)
) Docket No. 70-7016-ML
)
) ASLB No. 10-901-03-ML-BD01
)
) July 10, 2012
)
)

**GE-HITACHI GLOBAL LASER ENRICHMENT, LLC'S BRIEF
ON THE APPLICABILITY TO THE ABOVE CAPTIONED PROCEEDING
OF THE D.C. CIRCUIT'S DECISION
IN *NEW YORK v. NRC*, No. 11 1045 (D.C. Cir. JUNE 8, 2012)**

I. Introduction

Historically, the U.S. Nuclear Regulatory Commission (NRC) has addressed, on a generic basis, the environmental impacts of the storage and disposal of high-level radioactive waste (HLW) and spent nuclear fuel (SNF) generated by nuclear power plants. In its Waste Confidence Decision, the NRC reached five findings regarding its degree of assurance that these wastes can be safely disposed of, when disposal or offsite storage would be available, and whether SNF can be safely stored onsite past the expiration of existing nuclear plant licenses until offsite disposal or storage is available.¹ The NRC codified certain determinations reached in the five findings in 10 C.F.R. § 51.23, the so-called Waste Confidence Rule.² Specifically, the

¹ See Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,038 (Dec. 23, 2010) ("2010 WCD Update").

² See Final Rule, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010) ("2010 Waste Confidence Rule").

Waste Confidence Rule sets forth the NRC's generic determination on the environmental impacts of spent fuel storage, and expresses the NRC's reasonable assurance that sufficient geologic repository capacity will be available "when necessary."³

The D.C. Circuit's recent decision in *New York v. NRC*, No. 11-1045 (D.C. Cir. June 8, 2012), vacated the Waste Confidence Decision and Rule.⁴ As a result, this Atomic Safety and Licensing Board (ASLB) asked that the parties in this proceeding provide their legal analyses of the implications of the D.C. Circuit decision on this proceeding.⁵ GE-Hitachi Global Laser Enrichment, LLC (GLE) herein provides its analysis.

II. Analysis

As explained below, the D.C. Circuit's decision to vacate the Waste Confidence Decision and Rule has no impact on the above captioned proceeding. Not only do the plain language and regulatory history of the Waste Confidence Decision and Rule expressly *not* apply to enrichment facilities, or the type of wastes generated by such a fuel cycle facility, but the environmental analyses for GLE's facility have not relied upon the Waste Confidence Decision or Rule. Furthermore, the situation that gave rise to the Waste Confidence Decision and Rule – namely, the lack of a permanent repository for certain radioactive wastes generated by reactors – is not at issue for GLE's proposed facility, the wastes from which can be disposed of at existing, operating facilities.

³ See 10 C.F.R. § 51.23(a); *see generally* 2010 Waste Confidence Rule.

⁴ See *New York v. NRC*, No. 11-1045, slip op. at 21 (D.C. Cir. June 8, 2012).

⁵ See Tr. 27-28 (Ryerson) (June 28, 2012).

A. The Waste Confidence Decision and Rule Do Not Apply to Fuel Cycle Facilities Like GLE’s Proposed Enrichment Facility

Background On the Waste Confidence Decision and Rule

The NRC initiated the Waste Confidence rulemaking in 1979, partially in response to a decision by the D.C. Circuit that reactor operating license amendment proceedings must consider long-term on-site storage of SNF, and the ultimate availability of permanent disposal facilities.⁶ The NRC chose to address the environmental impacts of SNF and HLW storage on a generic basis, instead of evaluating and litigating such issues on a case-by-case basis in reactor operating licensing proceedings.⁷ In 1984, the NRC concluded the initial Waste Confidence rulemaking and produced the Waste Confidence Decision, including five Waste Confidence Findings, and the accompanying Waste Confidence Rule.⁸ The Waste Confidence Decision and Rule found, on a generic basis, that there are no significant environmental impacts from storage of SNF during the period following permanent shut down of a nuclear power plant, until the federal government accepts the fuel.⁹ The Waste Confidence Rule thus relieves a nuclear power utility in a site-specific license renewal or combined operating license proceeding from having to address such issues under the National Environmental Policy Act (NEPA), for the post-operation period of a nuclear power facility.¹⁰

A subsequent update to the rulemaking in 1990 relied on the Commission’s finding that there was “reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be

⁶ See, e.g., Requirements for Licensee Actions Regarding the Disposition of [SNF] Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688 (Aug. 31, 1984) (“1984 WCD”).

⁷ See *id.* at 34,688; 2010 WCD Update, 75 Fed. Reg. at 81,038.

⁸ See 2010 WCD Update, 75 Fed. Reg. at 81,038-39.

⁹ See 2010 Waste Confidence Rule, 75 Fed. Reg. at 81,032.

¹⁰ See 10 C.F.R. § 51.23(b); 2010 WCD Update at 81,041.

available within 30 years beyond the licensed life for operation (which may include the terms of a revised or renewed license) of any reactor.”¹¹ The Commission also added an explicit reference to potential *renewed* reactor licenses.¹²

In 2008, the Commission again proposed to update the Waste Confidence rule to “confirm the Commission’s confidence that [SNF] storage [at nuclear reactor sites] is safe and secure over long periods of time.”¹³ This review led to the promulgation of final revisions in 2010 to the Waste Confidence Decision¹⁴ and Rule.¹⁵ The 2010 update to the Waste Confidence Decision and Rule eliminated any specific prediction of what year a permanent repository might be available (other than “when necessary”), and found that SNF could be safely stored on site for at least 60 years (rather than 30 years as previously held) after permanent cessation of plant operations.¹⁶

Notably, the genesis and evolution of the Waste Confidence Decision and Rule demonstrate that the Waste Confidence rulemaking pertains to SNF and HLW generated by nuclear reactors, and does *not* pertain to fuel cycle facilities that generate only low-level radioactive wastes, like GLE’s proposed facility.¹⁷

¹¹ 2010 WCD Update, 75 Fed. Reg. at 81,039 (*quoting* Waste Confidence Decision Review, 55 Fed. Reg. 38,474, 38,474 (Sept. 18, 1990) (“1990 WCD Update”)).

¹² *See* 2010 WCD Update, 75 Fed. Reg. at 81,039 (*citing* 1990 WCD Update, 55 Fed. Reg. at 38,474).

¹³ Proposed Rule, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547, 59,549 (Oct. 9, 2008); *see also* Waste Confidence Decision Update; Update and Proposed Revision of Waste Confidence Decision, 73 Fed. Reg. 59,551 (Oct. 9, 2008).

¹⁴ *See* 2010 WCD Update, 75 Fed. Reg. at 81,038.

¹⁵ *See* 2010 Waste Confidence Rule.

¹⁶ *See* 2010 WCD Update, 75 Fed. Reg. at 81,038-39.

¹⁷ *See* NUREG-1938, Environmental Impact Statement for the Proposed GE-Hitachi Global Laser Enrichment, LLC Facility in Wilmington, North Carolina, vol. 1, at § 4.2.12, tbl. 4-25 (Feb. 2012) (describing the wastes generated by the proposed GLE facility, which include low-level radioactive waste, but not HLW or SNF).

The Plain Language of the Waste Confidence Decision and Rule Demonstrates the Inapplicability of Both to GLE's Proposed Facility

The plain language of the five Findings reached in the Waste Confidence Decision, as revised in 2010, also evidences the limited scope of the Waste Confidence rulemaking to HLW and SNF generated by nuclear power reactors:

Finding 1: The Commission finds reasonable assurance that safe disposal of *HLW* and *SNF* in a mined geologic repository is technically feasible.¹⁸

Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial [*HLW*] and [*SNF*] generated in any reactor when necessary.¹⁹

Finding 3: The Commission finds reasonable assurance that *HLW* and *SNF* will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all *HLW* and *SNF*.²⁰

Finding 4: The Commission finds reasonable assurance that, if necessary, [*SNF*] generated in any reactor can be stored safely 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.²¹

Finding 5: The Commission finds reasonable assurance that safe, independent onsite [*SNF*] storage or offsite [*SNF*] storage will be made available if such storage capacity is needed.²²

GLE's proposed facility, of course, does not generate HLW *or* SNF; rather, it generates low-level radioactive waste,²³ which the five Waste Confidence Findings do not address. Nor

¹⁸ 2010 WCD Update, 75 Fed. Reg. at 81,058-60 (reaffirming the original first finding) (emphasis added).

¹⁹ *Id.* at 81,060-67 (updating the second finding) (emphasis added).

²⁰ *Id.* at 81,067-68 (reaffirming the original third finding) (emphasis added).

²¹ *Id.* at 81,069-74 (updating the fourth finding) (emphasis added).

²² *Id.* at 81,074-76 (reaffirming the original fifth finding) (emphasis added).

does the Waste Confidence Decision elsewhere address low-level radioactive waste, or wastes generated by enrichment facilities or fuel cycle facilities, generally.²⁴

Similarly, the plain language of the Waste Confidence Rule, set forth at 10 C.F.R. § 51.23, clearly applies only to HLW and SNF generated by nuclear power reactors, and not to the types of waste generated by GLE's proposed facility:

(a) The Commission has made a generic determination that, if necessary, *[SNF] 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 to dispose of the commercial *[HLW]* and *[SNF] generated in any reactor* when necessary.

(b) Accordingly, as provided in §§ 51.30(b), 51.53, 51.61, 51.80(b), 51.95, and 51.97(a), and within the scope of the generic determination in paragraph (a) of this section, no discussion of any environmental impact of *[SNF] storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI)* for the period following the term of the reactor operating license or amendment, reactor combined license or amendment, or initial ISFSI license or amendment for which application is made, is required in any environmental report, environmental impact statement, environmental assessment, or other analysis *prepared in connection with the issuance or amendment of an operating license for a nuclear power reactor under parts 50 and 54 of this chapter, or issuance or amendment of a combined license for a nuclear power reactor under parts 52 and 54 of this chapter, or the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto.*

(c) This section does not alter any requirements to consider the environmental impacts of *[SNF]* storage during the term of a

²³ See *supra* note 17.

²⁴ See generally 2010 WCD Update, 75 Fed. Reg. at 81,038.

reactor operating license or combined license, or a license for an ISFSI in a licensing proceeding.²⁵

Clearly, the scope of the Waste Confidence Decision and Rule does not extend beyond SNF and HLW generated by nuclear power plants, to the types of radioactive wastes generated by GLE's proposed enrichment facility. The analysis could end here.

The Regulatory History of the Waste Confidence Rulemaking Also Clearly Shows that the Rulemaking Does Not Pertain to GLE's Proposed Facility

In addition to the genesis of the Waste Confidence rulemaking and the plain language of the Waste Confidence Decision and Rule, the regulatory history further demonstrates that the Waste Confidence rulemaking has no bearing on licensing proceedings for fuel cycle facilities like GLE's proposed facility.

For example, in publishing the updated Waste Confidence Rule in 2010, the NRC described the rule narrowly as "its generic determination on the environmental impacts of storage of [SNF] at, or away from, reactor sites after the expiration of reactor operating licenses."²⁶ Likewise, the NRC characterized the final, updated Waste Confidence Decision as pertaining to "radioactive wastes generated by nuclear power plants."²⁷ The NRC made no reference in its 2010 rulemaking to low-level radioactive wastes or wastes generated at the front end of the fuel cycle.²⁸ In fact, the NRC expressly rejected comments that the Waste Confidence rulemaking should be accompanied by a Generic Environmental Impact Statement that considers the impacts of all aspects of the nuclear fuel cycle.²⁹ In response to those comments, the NRC emphasized the "limited scope" of the revisions to the Waste Confidence Decision and Rule,

²⁵ 10 C.F.R. § 51.23 (emphasis added).

²⁶ 2010 Waste Confidence Rule, 75 Fed. Reg. at 81,032.

²⁷ 2010 WCD Update, 75 Fed. Reg. at 81,038.

²⁸ See generally 2010 Waste Confidence Rule; 2010 WCD Update.

²⁹ See 2010 Waste Confidence Rule, 75 Fed. Reg. at 81,033; 2010 WCD Update, 75 Fed. Reg. at 81,040-42.

which it described as pertaining to the “temporary storage of [SNF] after cessation of reactor operation.”³⁰

Similarly, in publishing the revised Waste Confidence Decision and Rule in 1990, the NRC made clear that the rulemaking did *not* address low-level radioactive waste.³¹ Specifically, the NRC responded to comments that “the Proposed Waste Confidence Review does not address low-level waste concerns.”³² The NRC answered that Congress determined the disposition of low-level radioactive wastes in the Low-Level Radioactive Waste Policy Act, and that NRC did not have the regulatory jurisdiction to alter that determination.³³

The 1984, 1990, and 2010 rulemakings consistently demonstrate that the scope of the Waste Confidence Decision and Rule is, as described by the NRC in 1984, “to reassess [the NRC’s] degree of confidence that radioactive wastes produced by nuclear facilities will be safely disposed of, to determine when any such disposal will be available, and whether such wastes can be safely stored until they are safely disposed of”³⁴ – not to address more broadly, radioactive wastes associated with the fuel cycle, including low-level radioactive wastes.

³⁰ 2010 WCD Update, 75 Fed. Reg. at 81,041; *see also* 2010 Waste Confidence Rule, 75 Fed. Reg. at 81,033.

Although the NRC addressed comments about applicability of Table S-3 of 10 C.F.R. § 51.51, which summarizes the environmental effects of the uranium fuel cycle (including enrichment), *see* 2010 WCD Update, 75 Fed. Reg. at 81,043-44, Table S-3 applies to applicants for construction permits, early site permits, or combined operating licenses for light water cooled nuclear power reactors. *See* 10 C.F.R. § 51.51(a); *see also* 2010 WCD Update, 75 Fed. Reg. at 81,043 (“the Table S-3 proceeding was the outgrowth of efforts to generically address the NEPA requirement for an evaluation of the environmental impacts of operation of a light water reactor”). That is, Table S-3 does *not* apply to fuel cycle applicants, such as GLE. Moreover, the NRC concluded that there was no basis to revisit the environmental effects described in Table S-3, in light of any changes to the Waste Confidence Findings. *See* 2010 WCD Update, 75 Fed. Reg. at 81,043-44.

³¹ *See* 1990 WCD Update, 55 Fed. Reg. at 38,482.

³² *Id.*

³³ *See id.* at 38,482-83.

³⁴ 1984 WCD, 49 Fed. Reg. at 34,688 (*citing* Notice of Proposed Rulemaking, Storage and Disposal of Nuclear Waste, 44 Fed. Reg. 61,372 (Oct. 25, 1979); *see also* 1990 WCD Update, 55 Fed. Reg. at 38,472; 2010 WCD Update, 75 Fed. Reg. at 81,038).

B. GLE’s Proposed Enrichment Facility Does Not Rely on the Waste Confidence Decision or Rule

Not only do the Waste Confidence Decision and Rule not apply to enrichment facilities, but GLE’s proposed facility does not rely on the Waste Confidence Decision or Rule. At no point in GLE’s Environmental Report or the NRC Staff’s Environmental Impact Statement (EIS) is the Waste Confidence Decision or Rule referred to or relied upon for the proposed enrichment facility.³⁵ Furthermore, no EIS for any other enrichment facility – the United States Enrichment Corporation, Inc.’s American Centrifuge Plant,³⁶ Louisiana Energy Services’ URENCO USA facility,³⁷ or AREVA Enrichment Services, LLC’s Eagle Rock Enrichment Facility³⁸ – has relied upon or referred to the Waste Confidence Decision or Rule. The Waste Confidence rulemaking simply has no bearing on the GLE facility or this proceeding.

C. The Circumstances that Give Rise to the Waste Confidence Decision and Rule are Not at Issue for GLE

One ancillary point bears noting. The genesis of the Waste Confidence Decision and Rule, as discussed in Section II.A above, is the need for long-term storage of SNF and HLW generated by nuclear power reactors, and the current lack of availability of a permanent repository for such wastes. This issue does not exist for the proposed GLE facility. Rather, there exist three facilities in the U.S. that can receive low-level radioactive wastes for disposal. As indicated in GLE’s EIS, GLE would send most of its low-level radioactive waste to

³⁵ See Environmental Report for the Proposed GLE Uranium Facility (Dec. 31, 2008), *available at* ADAMS Accession No. ML090910573 (as supplemented on July 13, 2009, and November 13, 2009); NUREG-1938.

³⁶ See NUREG-1834, Environmental Impact Statement for the Proposed American Centrifuge Plant in Piketon, Ohio (Apr. 2006).

³⁷ See NUREG-1790, Environmental Impact Statement for the Proposed National Enrichment Facility in Lea County, New Mexico (June 2005).

³⁸ See NUREG-1945, Environmental Impact Statement for the Proposed Eagle Rock Enrichment Facility in Bonneville County, Idaho (Feb. 2011).

EnergySolutions' disposal facility in Clive, Utah.³⁹ GLE would send the remainder of the low-level waste—depleted UF₆ tails—to the U.S. Department of Energy's conversion facilities in Paducah, Kentucky, or Portsmouth, Ohio.⁴⁰ And although temporary storage of these wastes at GLE's facility may be necessary,⁴¹ such storage is not analogous to the long-term, on-site storage of SNF and HLW addressed by the Waste Confidence Decision and Rule.

III. Conclusion

For the aforementioned reasons, GLE concludes that the D.C. Circuit's decision in *New York v. NRC* to vacate the Waste Confidence Decision and Rule has no bearing on this proceeding.

Respectfully submitted,

Executed in accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.
this 10th day of July 2012

³⁹ See NUREG-1938, at 4-95.

⁴⁰ See *id.* at 4-95 – 4-97.

⁴¹ See *id.*

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, copies of “GE-Hitachi Global Laser Enrichment, LLC’s Brief on the Applicability to the Above Captioned Proceeding of the D.C. Circuit’s Decision in *New York v. NRC*, No. 11-1045 (D.C. Cir. June 8, 2012)” were filed via the Electronic Information Exchange (EIE) with the following recipients:

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