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NUCLEAR REGULATORY COMMISSION

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NRC Concurrence in High-Level Waste
Repository Siting Guidelines Under
the Nuclear Waste Policy Act of 1982

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Proposed 10 CFR 960

STATEMENT ON BEHALF OF THE YAKIMA INDIAN NATION

Mr. Chairman; Commissioners--

My name is Dean R. Tousley; I am an associate attorney for the Yakima Indian Nation, on whose behalf I am speaking today. The Yakimas appreciate this additional opportunity to comment on the results of the guidelines concurrence process to date.

As a result of the Commission's Preliminary Decision and the process of negotiation which followed it, DOE's May 14 submission represents a significant improvement over the November 18 version in terms of discerning how the guidelines will be applied. On the other hand, that increased knowledge is often not reassuring. Unfortunately, many of the embellishments to the guidelines merely codify and make explicit the subjectivity and relative lack of substantive standards which were implied by the vagueness of the November version. Before

HOC006

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75.04

- 2 -

we suspected that DOE's selection of sites would be based on its largely unfettered discretion. Now we know that is the case.

Specific Comments

There are many details of the May 18 version of the guidelines which contribute to our conclusion that they are still unacceptable. We will discuss just three of the most important ones.

1) Preliminary determination of suitability for development of a repository under section 114(f) of the NWPA -- The new version of the guidelines declares that at the time of the recommendation of three sites for characterization, DOE will also declare that those three sites are preliminarily determined to be suitable for development as repositories. Consequently, those three sites will constitute the alternatives considered in the NEPA environmental impact statement for the recommended repository site under section 114(f) of the NWPA. Thus, DOE has codified its intention to select NEPA alternatives before site characterization has even begun.

This provision must fall under two of the Commission's own concurrence criteria: that the guidelines "must not contain provisions that might lead DOE to select sites that would not be reasonable alternatives for an ... EIS" (emphasis added); and that the guidelines "should not contain provisions that are in conflict with NRC responsibilities embodied in the NWPA." On

HQC006

1172

its face, the selection of alternative sites on the basis of the very meager data which will be available prior to characterization "might" lead DOE to select sites that would not be reasonable alternatives" for an EIS. Indeed, the phrase "might lead" certainly understates the probability that this will occur.

The staff "believes that the revised siting guidelines provide a basis for DOE to select three sites that will be reasonable alternatives for the purposes of NEPA," and cites an earlier Commission decision to the effect that "the characterization of several sites '...will assure that DOE's preferred site will be chosen from a slate of candidate sites that are among the best that can reasonably be found.'"

This is a non-sequitur. The characterization of several sites does not ensure the quality of that slate of sites, particularly if those sites do not even have to be suitable at the end of characterization. Since the guidelines remain extremely non-selective, there is nothing in them to ensure that the slate of sites is among the best. Indeed, the present slate of potentially acceptable sites bodes ill for that possibility.

The NWPA does not alter the NEPA requirement that the Commission's EIS for a repository include consideration of reasonable alternatives. The Commission's NEPA and NWPA responsibilities in this program will not be satisfied by the mere possibility that the sites chosen by DOE for characterization will ultimately prove to be reasonable

HQC006

1133

alternatives for NEPA purposes. The alternatives must be reasonable, and it must be possible to demonstrate that they are reasonable.

If it accepts DOE's interpretation of section 114(f), NRC will be backing itself into a corner which drastically increases the probability that it will be required to deny DOE's license application. If DOE selects its alternatives without information from characterization, the reliability of that preliminary determination of suitability will be practically non-existent.

DOE argues that the Commission can prepare its own EIS if it is unsatisfied with DOE's. Even if that argument has any legal merit, as a practical matter that option does not exist. If the Commission cannot adopt the DOE EIS because one or more of the alternative sites is unreasonable, it will be precluded from remedying the situation in its own EIS by considering other sites as alternatives, since it will not even have the information needed to make the choice, nor will it have the time given the deadlines established in the NWPA.

High likelihood that the Commission will be able to adopt DOE's EIS can be obtained only if the determination of suitability takes place at, or very near, the end of site characterization. Only if DOE selects for characterization those three sites which are most likely to remain "suitable" after characterization will the Commission indeed be assured "that DOE's preferred site will be chosen from a slate of candidate sites that are among the best that can reasonably be found."

HQC006

1174

This provision also falls under the concurrence criterion that the guidelines "should not contain provisions that are in conflict with NRC responsibilities as embodied in the NWPA." The Commission's primary responsibilities in this program are to ensure public health and safety through the licensing process, to satisfy itself that NEPA is complied with, and to guarantee the promulgation of acceptable guidelines through its concurrence. Since application of the guidelines, together with DOE's intended timing of the preliminary determination of suitability, would satisfy the NRC's NEPA responsibilities concerning consideration of reasonable alternatives only by accident, the Commission must refuse to concur under its concurrence criterion number 3.

In conclusion, the NWPA in section 114(f) requires first, that characterization shall have been completed for the sites considered as alternatives, and second, that the Secretary has made the preliminary determination of suitability with respect to them. The least strained and most rational interpretation of the language and juxtaposition of these two requirements is that the first one should precede the second one in time. In light of the vital importance of the selection of NEPA alternatives in the process, that is also the interpretation which is dictated by programmatic and policy considerations, and which is likely to result in the most expeditious and successful accomplishment of the goals of the NWPA. Finally, as shown above, that is the interpretation which leads to the least conflict with NRC responsibilities under the NWPA.

HQC006

As the staff correctly intimates (p. 51), NRC concurrence in the guidelines before sites are selected for characterization should provide assurance that DOE will select three reasonable alternatives for an EIS. That promise will go unfulfilled if the Commission concurs in the guidelines in their present form.

2) Level of Findings at the Nomination and Recommendation Stage -- The table in DOE's proposed Appendix III is designed to comply with the NRC condition #5, concerning how the guidelines will be applied at each siting decision stage. The table shows that, at the Nomination and Recommendation for Characterization stage, low-confidence (type 1 and type 3) findings will be made for all of the guidelines. (In an earlier version, some of the pre-closure "1s" had been "2s", reflecting requirements for higher-confidence findings.)

At the last meeting between DOE and NRC staffs on concurrence, the NRC staff urged DOE to change the findings for non-geologic, pre-closure disqualifying conditions back to higher level, type 2 findings. The NRC staff argued, correctly, that it would be feasible to make the more conclusive findings at the recommendation stage for guidelines, such as those, which do not need to await the conclusion of time-consuming in situ geologic testing during characterization. At the conclusion of that meeting, several public observers, including the representative of the Yakima Indian Nation, expressed support for the NRC staff's position.

HQC006

DOE has declined to accept the suggestion, and the staff now proposes to concur in the guidelines nonetheless. We urge the Commission to insist on the change suggested by its staff at the May 3 meeting before concurring. The nomination and recommendation decisions should be based on the most conclusive findings possible at each stage. DOE's statement that it will make the higher level finding "if there is sufficient evidence to support it" is not an acceptable alternative, since it gives no incentive for DOE to develop the required evidence.

Also with respect to the Appendix III table, DOE should be required to make at least lower level ("1" and "3") findings with respect to additional guidelines at the potentially acceptable site stage. There is no reason DOE cannot make such findings at that stage with respect to such issues as site ownership and control, meteorology, socioeconomic impacts, and transportation. (The May 3 DOE submission to the Commission staff included a level 1 finding for all three population disqualifiers; they have eliminated one of the three without explanation in the May 18 version.)

3) Type and Level of Information Required for Siting Decisions -- The Commission's Preliminary Decision states: "For each category of technical criteria in the guidelines, DOE should describe the type and level of information needed to conclude whether the site meets that aspect of the guidelines." 49 Fed. Reg. at 9660 (emphasis added). DOE has responded to this concurrence condition with its proposed Appendix IV, which purports to specify the types of information that will "be

HQC006

11/9/77

included in the evidence used for evaluations and applications of the guidelines" at the nomination for characterization stage. Appendix IV does not specify the levels of information that will be needed for any siting decision. Section 960.3-1-4 of the proposed guidelines, "Evidence for Siting Decisions," says with respect to levels of information only that they will be site-specific, and that the levels will be lower at the potentially acceptable site stage than the nomination stage.

This does not satisfy the Commission's requirement that DOE describe the "type and level of information needed," and the Commission should not accept it as such. From the very start of the discussions between the DOE and NRC staffs concerning concurrence with the Preliminary Decision, DOE protested that they could not specify the "levels" of information required. Unfortunately, this is an issue on which the Commission staff did not persist.

In addition, the introductory section of Appendix IV states:

The types of information specified in this appendix will be used except where the findings set forth in Appendix III of this Part can be arrived at by reasonable alternative means or the information is not required for the particular site.

This is a loophole large enough to drive an exploratory shaft drilling rig through. If DOE is giving itself complete discretion to decide that at certain sites particular information is not required (for unspecified reasons), it is obvious that Appendix IV sets no meaningful standards for information requirements at all, and DOE has failed to comply with NRC's condition 6. If what DOE means to express here is

HQC006

that information will not be required if for a particular site such information is totally irrelevant, the Commission should require DOE to so state the concept.

In any event, the Commission must refuse to concur with the guidelines on the grounds that they fail to specify the level of information needed for application of the guidelines as required by the Preliminary Decision.

Conclusion

The above comments do not exhaust the Yakima Indian Nation's outstanding concerns with respect to the siting guidelines. They are only the most significant issues, for which we have been able to compile comments on the extremely short notice provided. The issues presented here constitute more than sufficient grounds for the Commission to withhold its concurrence in the guidelines. Particularly with respect to the "preliminary determination of suitability" issue, the Commission's continued refusal to concur would be in the best interest of expeditious accomplishment of the nuclear waste program's major goals and the Commission's legal responsibilities.

HQC006

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- 10 -

Respectfully submitted,

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HQC006