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November 27, 1985

WM Record File
101.4

WM Project 10
Docket No. _____
PDR
LPDR

Nunzio J. Palladino, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: Proposed Amendments to 10 CFR Part 50

Distribution:
REB MJB Joan-ticket
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Dear Chairman Palladino:

D. K. ...
This has been controlled on 11/29/85 of
without
enclosures.

On April 17, 1985, Yakima Tribal Council Vice Chairman Melvin R. Sampson wrote the Commission requesting that the Commission convene a public meeting to hear comments of interested parties on the proposed amendments to 10 CFR Part 60. Unfortunately, the Commission denied that request.

As it is our understanding that the proposed amendments are currently before you for a vote, we are writing again now to renew our earlier request. We understand that the Commission recently granted a similar request to the American Mining Congress in the Commission's mill tailings rulemaking. The equities are even stronger in favor of your grant of this request than was true in the case of the American Mining Congress, since we--and several state governments--have already made a timely request for this meeting.

Substantively, the deficiencies in the proposed amendments to Part 60 have only become more apparent since our initial request. DOE's interpretation of the timing of the preliminary determination of suitability, and the promulgation of weakened final EPA standards, have resulted in a virtual regulatory vacuum as far as scrutiny of DOE's site selection process is concerned. Consequently, the arguments for careful NRC review of that process are even stronger than before.

11/27..To OGC to Prepare Response for Comm Review and Signature of SECY...
Date due: Dec 9..Cpys to: RF, EDO..85-1020

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Nuzio J. Palladino
November 27, 1985
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For the reasons above, as well as those set forth in our April 17 letter, the Yakima Indian Nation urges the Commission to hold a public meeting to accept comments by interested parties before voting on amendments to 10 CFR Part 60. As we stated in our previous letter, both the process and your rule can only be strengthened by your grant of this opportunity.

Sincerely yours,

Dean R. Tousley

Dean R. Tousley

ASSOCIATE ATTORNEY FOR
THE YAKIMA INDIAN NATION

cc: Melvin Sampson
Russell Jim
Jim Hovis
Catherine Russell

ANALYSIS OF PROPOSED REVISIONS TO 10 CFR PART 60

Summary

The purpose of the proposed revisions to 10 CFR Part 60 is to revise the regulations that treat state and Indian tribal participation in the siting and licensing process to conform with the provisions of the Nuclear Waste Policy Act of 1982. The portions of 10 CFR Part 60 that are proposed for revision to make the regulations conform with the provisions of the Nuclear Waste Policy Act of 1982 include:

<u>Section</u>	<u>Existing Section Title</u>
60.2	Definitions
60.10	Site Characterization
60.11	Site Characterization Report
60.61	Site Review
60.62	Filing of Proposals for State Participation
60.63	Approval of Proposals
60.64	Participation by Indian Tribes
60.65	Coordination

The Nuclear Regulatory Commission (NRC) is required by law to cooperate with the states, and the NRC recognizes the value of state participation in siting and licensing decisions. However, the cooperation between the NRC and the states, as presently defined, consists mainly of issue definition and information exchange. The states are not granted a full advise-and-consent role in the decision process under current interpretations of the applicable statutes (The Atomic Energy Act of 1954, as amended; Reorganization Plan No. 3 of 1970; and the Nuclear Waste Policy Act of 1982) or regulations (10 CFR Part 60).

Another problem with the way that the 10 CFR Part 60 regulations are structured is that the NRC's role is basically only advisory until after site characterization is completed, as the Department of Energy (DOE) is not required to obtain any type of license or formal approval from the NRC until after site characterization is completed. The NRC does not become involved in the process for a particular site until after a site characterization plan is submitted by the DOE for that site. State involvement is tied to NRC involvement, as a State is not considered an interested party for purposes of these participation provisions until after the State is identified within a site characterization plan. This is well after the conclusion of the environmental assessment process.

It is not clear in the Act or in the regulations what role, if any, State comments prior to the site characterization phase have in influencing either NRC or DOE decision processes. As the Act and the regulations both define the commencement of the site characterization phase as the beginning of shaft sinking, there apparently is no regular mechanism available to the States to influence activities that occur prior to that time. Though many serious environmental consequences can result from these "preliminary"

activities, the only redress if the DOE or the NRC ignore State concerns about such activities appear to be through the courts under the provisions of Section 119 of the Nuclear Waste Policy Act.

Specific Changes Proposed for 10 CFR Part 60

Specific changes in 10 CFR Part 60 (and their implications for the State of Utah) are summarized below.

The changes proposed for Section 60.2 (Definitions) do not affect state participation in the siting and licensing process. In order to provide conforming definitions with the Nuclear Waste Policy Act, the definitions of "Indian tribe" and "tribal organization" have been dropped, and a definition of "affected Indian tribe" is added. The definition of "affected Indian tribe" is the same as that provided in the Nuclear Waste Policy Act.

The "preapplication review" portions of 10 CFR Part 60, which deal with site characterization activities, have been extensively revised. Substantively, these revisions define the contents of the site characterization plan that DOE must submit to the NRC prior to the commencement of the DOE's site characterization activities. In addition to information required under the old version of the "preapplication review" regulations (old 10 CFR 60.10 and 60.11), the DOE must submit plans for decontaminating and decommissioning the site characterization area, including plans for mitigation of any significant environmental effects, if the area is deemed to be unsuitable for development as a repository. The DOE must also submit its criteria, developed pursuant to section 112(a) of the Nuclear Waste Policy Act for repository activities covered by that section of the Act, or other siting criteria utilized by the DOE for other types of sites, utilized for determining the suitability of sites for location of a geologic repository. The level of information required for waste forms or waste packages has been upgraded from a description of the research and development efforts related to waste packaging to a requirement that the DOE provide a description of the waste form or package and its relationship to the natural barrier systems peculiar to an individual site. The conceptual design for the repository that the DOE must submit must take into account "likely site-specific requirements." (See proposed 10 CFR 60.15, 60.16, 60.17, and 60.18). The language for these additional regulatory requirements is quoted directly from Section 113 of the Nuclear Waste Policy Act.

Also, it is important to note that both the Act (Section 113(b)) and the regulations (new 10 CFR 60.16) require that the site characterization plan be submitted to the NRC "before proceeding to sink shafts at any candidate site." Previously, the NRC required the DOE to submit site characterization plans as early as possible in the DOE's planning process. This implies that certain preliminary activities, such as drilling and seismic exploration, as well as construction of access, could occur prior to DOE submission of the site characterization plan. Thus, the only effective opportunity available to the NRC or the states and tribes for review and comment on such activities (if it is available at all) is at the Environmental Assessment stage.

Once the NRC receives a copy of DOE's site characterization plan for a given site, the NRC must prepare a site characterization analysis and make this analysis available to the public for comment. This analysis must be transmitted to the host state and affected Indian tribes, along with an invitation to comment. In both the old and new versions of the rule, the NRC will publish a notice of opportunity for comment in the Federal Register, and will afford a reasonable comment period, "not less than 90 days," for comment by interested parties, including states.

The NRC must provide the site characterization analysis to the DOE, together with whatever comments the NRC feels are important, and the NRC must include a statement either that the Director of the NRC has no objection to the DOE's proposed site characterization program, or specific objections to and/or recommendations about the DOE's proposed program. These new provisions are similar to those in the old version of the rule.

Additional sections have been added requiring the DOE to include a description of and justification for any planned onsite testing with radioactive materials (NRC approval of such planned testing is required), and a requirement for semiannual progress reports by the DOE to the NRC during site characterization activities. The use of radioactive materials at the site characterization stage is governed by the Nuclear Waste Policy Act (see Section 113(c)(2)(A) and (B)). The requirement for a semiannual progress report appears to be an NRC requirement not explicitly covered in the Act, justified by the NRC's interest in expediting licensing decisions. The new sections of the rule make mandatory reporting of progress and issues by the DOE to the NRC. The NRC may, when it receives these reports or comments from other interested parties or on its own initiative, comment to the DOE at any time during the site characterization process, and the NRC may also raise objections to the DOE's conduct of the characterization process. In both the old and new versions of the rule, copies of any such correspondence are to be made available by the NRC in its Public Document Room.

The final portion of this section in both the old and new versions of the rule indicate that consultations between the NRC and the DOE are informal consultations and are not regarded as a part of a proceeding under the provisions of the Atomic Energy Act of 1954, as amended. The new version of the rule adds a disclaimer stating that the conduct of informal conferences does not imply that the NRC will issue a license or any other authorization, and that the authorities of the NRC, the Atomic Safety and Licensing Boards and Appeal Board, and the presiding officers or NRC Director are unaffected.

Subpart C of 10 CFR Part 60 defines and orders participation by States and Indian tribes in the site characterization and licensing process. The Nuclear Waste Policy Act contains several explicit sections treating State and Indian tribal participation at various points in the process. Unfortunately, except for the State "veto" provisions (Section 116(b)(2)), which can only be implemented after a site is formally recommended by the President to the Congress, this participation is mainly limited to information and communication. Neither the statute nor the regulations at 10 CFR Part 60 appear to offer the opportunity for true interactive cooperation, coordination, and decisionmaking between the NRC, the DOE, and the States and Indian tribes.

Old 10 CFR 60.61 will be retitled "Provision of Information", and the revised "Site Review" provisions have been moved to 10 CFR 60.62. The section on provision of information provides that States and affected tribes will be notified regarding NRC determinations or plans made with respect to site characterization or other geologic repository activities. However, these provisions are not triggered until a geologic repository "may be located" within a State. For the purposes of this section, a repository "may be located" within a State when such State is identified in a plan submitted to the NRC by the DOE.

The "Site Review" section has been moved to 10 CFR 60.62, and the old section 60.62, entitled "Filing of Proposals for State Participation," has been eliminated. The site review provisions are not triggered until an area has been approved by the President for characterization and a request for consultation is submitted in writing to the NRC by either the State or an affected Indian tribe. Consultation is defined as keeping the parties informed of the Director's views on the progress of site characterization; review of applicable NRC regulations, procedures, and schedules; and cooperation in developing State proposals for participation in licensing reviews.

Old section 60.63, entitled "Approval of Proposals," has been eliminated. A new section, entitled "Participation in License Reviews," has been substituted. Participation in licensing reviews is defined by the rules of practice before the NRC provided in 10 CFR Part 2 (Subpart G). States and affected Indian tribes may submit proposals to the Director of the NRC for participation in the review of site characterization plans or license applications. The State or tribe may also request meetings with the NRC regarding any such proposal. The NRC may then, subject to the availability of funds, approve all or part of the proposal. To be approved, proposed activities must be suitable in light of the type and magnitude of potential impacts, must enhance communications between the NRC and the state, must make a timely and effective contribution to the review, and must be authorized by law.

Old section 60.64, entitled "Participation by Indian Tribes," has been eliminated, as Indian participation has now been incorporated in the various sections dealing with State participation. A section entitled "Notice to States" has been substituted. This section provides that the Governor and legislature of a State may jointly designate a person or entity to receive information and notification from the NRC on their behalf.

Old section 60.65, entitled "Coordination," has also been eliminated. This section allowed the Director of the NRC to take into account the desirability of avoiding duplication of effort in acting upon multiple participation proposals. However, the Nuclear Waste Policy Act now specifically grants participation rights to the States and affected Indian tribes, and Indian participation, for example, cannot be foreclosed even though a proposal for State participation has been submitted. Thus, the old section is no longer applicable. Old section 60.65 is now titled "Representation," and it requires any person or entity acting in a representative capacity for a tribe or a State to submit a basis for such authority upon request by the NRC.

Recommendations

The currently proposed revisions to 10 CFR Part 60 for the most part include minor wording changes that conform the existing regulations to the provisions of the Nuclear Waste Policy Act. The NRC appears to be utilizing a restrictive interpretation of its authorities under the Act in order to avoid duplicating DOE authorities and responsibilities. The State of Utah would like to encourage the most liberal interpretation possible of the NRC and State participatory role in the DOE's siting and licensing activities.

Under both the Act and the proposed regulations, the opportunities for State participation with NRC in the siting portions of the process have been restricted. The States cannot formally propose participation in the process until after a site characterization plan is received by the NRC. This is in contrast to earlier versions of the regulations, which encouraged submission of site characterization plans to the NRC at the earliest possible point in the process. As plan submittal triggers State participation, State participation was thus potentially available at an earlier point in the process under the old regulations. As the language in the proposed rule dealing with this issue is quoted verbatim from the Act, it appears unlikely that this restrictive requirement can be relaxed in the proposed rule.

Under the proposed rule, the DOE is not obligated to submit plans to the NRC until the DOE plans to commence shaft sinking; "preliminary" activities are not covered by these plans. A clear definition should be added to the regulations of what, exactly, constitutes "preliminary" activities, as these pre-plan activities may be environmentally disruptive and may also trigger State regulation or require State permits. For example, is site preparation and construction of access prior to commencement of actual shaft sinking considered to be "preliminary," and thus exempt from the participation requirements, or is it considered to be a part of the shaft sinking? The latter interpretation is preferred, as the DOE would then have to submit plans for such activities to the NRC (and the NRC would have to solicit State participation) before large-scale disturbances (and consequent environmental damage) occur.

(17)

ESTABLISHED BY THE
TREATY OF JUNE 4, 1855
CENTENNIAL JUNE 8, 1955

CONFEDERATED TRIBES AND BANDS

Yakima Indian Nation

GENERAL COUNCIL
TRIBAL COUNCIL

POST OFFICE BOX 151
TOPPENISH, WASHINGTON 98948

DOCKET NUMBER
PROPOSED RULE PR-60
DOCKET (50 FR 2579)
USNRC

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April 17, 1985

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Honorable Samuel Chilk, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Re: 10 CFR Part 60 Amendments

Dear Secretary Chilk:

On January 17, 1985, the Commission issued for public comment proposed amendments to 10 CFR Part 60, Licensing Procedures for Disposal of High-level Radioactive Waste in Geologic Repositories, 50 Fed. Reg. 2579. Because of the coincident deadlines for submission of comments on these proposed amendments and on the draft environmental assessments for proposed repository sites, the Yakima Indian Nation filed its comments on these amendments late, on April 8, 1985.

As detailed in our comments (enclosed), the Yakima Indian Nation feels strongly that the proposed amendments, if adopted as proposed, would seriously undermine the Commission's ability to fulfill its statutory responsibilities in the nuclear waste program. Moreover, the proposed amendments would greatly increase the likelihood that the national nuclear waste disposal program would experience very significant unnecessary delays or outright failures in its implementation. In brief, we believe the Commission staff's reluctance to engage in a thorough review of the Department of Energy's site screening and selection process constitutes a fundamental abdication of the Commission's public health and safety and environmental protection responsibilities under the Atomic Energy Act, the National Environmental Policy Act, and the Energy Reorganization Act. Moreover, contrary to the Commission's position expressed in the proposed amendments, nothing in the Nuclear Waste Policy Act either requires or suggests such deference by the Commission concerning the selection of sites for characterization.

Because these issues have such profound implications for the Commission's responsibilities in this crucial national program and for the success of the program itself, the Yakima Nation feels that they deserve a higher degree of scrutiny than the Commission might ordinarily devote to such a rulemaking. For this reason, we

APR 18 1985

Acknowledged by card..... dp

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Honorable Samuel Chilk, Secretary
April 17, 1985
Page 2

request that the Commission schedule a public meeting before voting on promulgation of a final rule to receive oral comments on this proposed rule from the staff, affected states, Indian tribes, and representatives of the general public that have submitted comments on the proposal. Such a session, similar to the ones which the Commission held during its consideration of the concurrence in DOE's general siting guidelines, would serve to illuminate the issues in this vital rulemaking for the Commissioners' benefit, and, whether or not it changed the outcome, would result in a better-informed Commission decision.

The Yakima Nation urges your favorable consideration of this request.

Sincerely yours,


MELVIN R. SAMPSON,
Vice Chairman
Yakima Tribal Council

MRS:ls

Enclosure

FROM Harmon & Weiss		DATE OF DOCUMENT 11/27/85	DATE RECEIVED 1/85	NO NM-51067
TO NPalladino		LTR XX	MEMO	REPORT
CLASSIF		FILE CODE: 101.4		
DESCRIPTION (Must Be Unclassified) Proposed Amendments to 10 CFR 60		REFERRER TO HMiller	DATE 12/6	RECEIVED BY 12/5
ENCLOSURES		RBoyle		
REMARKS <i>12/9/85</i> <i>check w. OPE -</i> <i>OAC has lead for responding. They want answering</i> <i>RBoyle Please Cancel</i>				