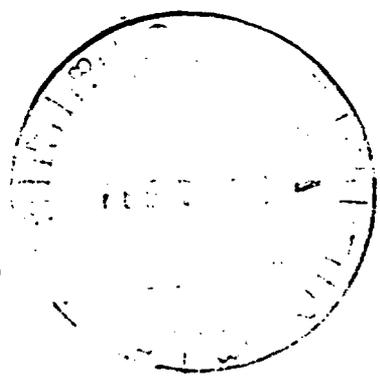


AGENCY NUMBER  
PROPOSED RULE **PR-60**  
**(50 FR 2579)**



TESTIMONY OF THE NEZ PERCE TRIBE  
SUBMITTED TO THE  
NUCLEAR REGULATORY COMMISSION  
CONCERNING PROPOSED AMENDMENTS TO  
10 C.F.R. Part 60  
January 24, 1986

The Nez Perce Tribe of Idaho submits these comments for the record of the Nuclear Regulatory Commission's public meeting on the proposed changes to 10 C.F.R. Part 60.

The Elimination of the Draft SCA and Formal Comment

Our primary objection to the proposed changes is that, under the amendments, NRC will be issuing a final Site Characterization Analysis ("SCA") without allowing public comment on a draft of the SCA. Why this amendment is deemed necessary or desirable by NRC staff is difficult to understand. The Nuclear Waste Policy Act ("NWPA") certainly does not require such a change in NRC procedures. Thus, it is most ironic that NRC would rely on the public participation provisions of the NWPA as to Department of Energy ("DOE") activities to curtail public participation in NRC activities.

It is not enough to say that potentially-affected Tribes and States will have input into the SCA through their participation in DOE's activities. DOE often is unresponsive to Tribal and State concerns, and we've no guarantee that those concerns will be addressed adequately in DOE's site characterizations. Although we certainly will strive to make these concerns known to NRC during the formulation of the SCA, we will have no means of assurance that our input was considered carefully or the reasons why our proposals were rejected (if they are rejected) without a

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formal comment process on a draft SCA. To present the SCA as a fait accompli and invite comment on a document which by definition is the final product is to mock those Tribes and States that value every opportunity to present their views.

As a final justification for its proposal, NRC staff notes the statutory schedule under NWPA and expresses the belief that a formal comment period will cause DOE to fall behind the statutory schedule. This argument borders on the laughable. Neither NRC in its licensing processes nor DOE in its NWPA activities are known for their strict adherence to schedule guidelines. Nonetheless, a disturbing trend seems to have developed by which both DOE and NRC unduly restrict or eliminate entirely public comment processes in the name of schedule, when neither institution has shown an ability to adhere to schedule in any event. Tribal and State governments and industry and environmental groups thus become the scapegoats and victims of federal inability to keep pace with the statutory schedule of NWPA. We suggest that any slippage in the NWPA schedule is more than justified by the benefits of public confidence in the process. Such confidence, of course, flows directly from opportunities to participate meaningfully in the formulation of key documents.

Finally, if, as NRC staff says, they will invite and respond to Tribal and State concerns in preparing the SCA, a formal comment process should present no unforeseen problems. If NRC in fact is aware of public concerns and addresses them in the SCA, it will be prepared to respond to public comments when a draft

SCA is completed and should be able to issue formal responses in short order.

The proposed change leaves the impression that NRC staff does not want to be bothered by public comment. This impression will come back to haunt NRC. To reduce public input now is to invite trouble later. If for no other reason, NRC should issue a draft SCA for formal comment simply to foster Tribal and State confidence in the meaningfulness of their participation in the NWPA process.

Affected Tribes and States as  
Parties in NRC Licensing Proceedings

We concur in NRC staff's analysis of the question of whether a host State and affected Indian Tribes would have standing to be parties to NRC licensing proceedings. The staff concludes that affected Tribes and States clearly would have standing. We are mystified somewhat by NRC's reluctance to state this conclusion in the amended regulations. We are satisfied, however, by the unambiguous statement to that effect in the proposed Federal Register notice. When the time comes, we will hold you to that statement.

Definition of Indian Tribe

We are quite disturbed at the proposal to define Indian Tribe the same way that "affected" Indian Tribe is defined in NWPA. Our concern is less directed at our own status, since the Nez Perce Tribe is an affected Indian Tribe with full rights of participation in NWPA processes. Rather, our concern goes to the gross ignorance of NRC staff of fundamental federal obligations

to all Indian tribes. Such obligations apply to all federal agencies, including NRC, and affects the implementation of all statutes, including NWPA.

A fundamental principle of federal Indian law is that the United States has a fiduciary obligation to Indian Tribes to act in the Tribes' best interests. Where Tribal interests are affected adversely by federal action, the federal action must be based upon unambiguous congressional authorization. This fiduciary responsibility is not limited to the Bureau of Indian Affairs or other agencies whose primary mission is to protect Tribal interests. The responsibility is pervasive and applies to every agency of the United States government, including this Commission.

A corollary of this principle is that federal statutes passed for the benefit of Indians are to be construed liberally and ambiguities resolved in their favor. NWPA, with its provisions for Tribal participation, is subject to this century-old rule of statutory interpretation.

The NRC staff's proposed amendment violate these principles. NWPA does not say that only "affected" Tribes may participate in NRC proceedings. It does not require NRC to disregard those Tribes that do not fall within the NWPA definition. The Commission, presumably, felt an obligation to hear from and respond to the concerns of Indian Tribal governments when it issued the existing regulations. Nothing in NWPA suggests even remotely that the obligation has changed. What NWPA does is to provide even greater participation and financial assistance to those Tribes whose off-reservation treaty rights may be affected adversely by a repository.

Congress apparently felt more solicitous of treaty rights than of other legal rights held by Indian Tribes.

Whether or not Congress' choice was appropriate is not at issue here. What is at issue is whether Congress, in affording greater protections to treaty Tribes, intended to exclude all other Tribes from NRC repository licensing proceedings. No evidence exists in the legislative history that Congress so intended. For NRC staff to construe the statute in the way it has indicates either gross ignorance of federal Indian law or profound disdain for the government-to-government relationship that exists between Indian Tribes and the federal government.\*/

That is the source of our concern as an affected Tribe. While the amendment itself does not harm us directly, it indicates that NRC knows little of Indian rights. Such ignorance does affect us directly. NRC staff, by excluding non-affected Tribes from NRC licensing processes, has acted cavalierly at best, illegally at worst. It would be most unfortunately for non-treaty Tribes to have to make the point in court when this Commission can so readily resolve the matter. We urge the Commission to reject the staff recommendation on the definition of Indian Tribe.

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\*/ In this regard, we note that NRC staff rather haughtily dismissed Indian comments regarding whether or not the word "Tribes" should be capitalized. The point seems trivial on its face. Our experience, however, is that federal agencies simply fail to accord Tribes the dignity their governmental status deserves. States, of course, suffer no such indignity, a matter NRC staff fails to acknowledge. The point of the capitalization comment is that under NWPA, Tribes and States are equal. This point escaped NRC staff, providing further evidence of its ignorance of the status of Tribal governments under federal law.