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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

COMMISSION MEETING

Presentations by
Participants on
Proposed Amendments
to Part 60

(Public Meeting)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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PRESENTATIONS BY PARTICIPANTS ON PROPOSED
AMENDMENTS TO PART 60

- - -

PUBLIC MEETING

- - -

Nuclear Regulatory Commission
Room 1130
1717 "H" Street, N.W.
Washington, D.C.

Friday, January 24, 1980

The Commission met in open session, pursuant to notice, at 9:50 o'clock a.m., NUNZIO J. PALLADINO, Chairman of the Commission, presiding.

COMMISSIONERS PRESENT:

- NUNZIO J. PALLADINO, Chairman of the Commission
- THOMAS M. ROBERTS, Member of the Commission
- JAMES K. ASSELSTINE, Member of the Commission
- FREDERICK M. BERNTHAL, Member of the Commission
- LANDO W. ZECH, JR., Member of the Commission

1 STAFF AND PRESENTERS SEATED AT COMMISSION TABLE:

2 J. HOYLE
3 M. MALSCH
4 M. MURPHY
5 S. FRISHMAN
6 P. SPURGIN
7 T. LEHMAN
8 D. PROVOST
9 D. TOUSLEY
10 S. HARJO
11 D. BERRICK
12 J. McGRANERY
13 R. STEIN
14 J. KNIGHT
15 L. MILLS
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P R O C E E D I N G S

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2 CHAIRMAN PALLADINO: Good morning, ladies and
3 gentlemen. This morning we are meeting with interested
4 states, Indian tribes, industry groups, public interest groups
5 and the Department of Energy to hear their comments on
6 proposed changes to NRC regulation 10 CFR Part 60.

7 This regulation deals with licensing procedures for
8 the disposal of high-level radioactive waste in geologic
9 repositories. Of particular interest are proposed procedural
10 amendments for dealing with site characterization and
11 participation of states and Indian tribes.

12 By way of background licensing procedures for
13 high-level radioactive waste geologic repositories were
14 promulgated in final form on February 25, 1981. In publishing
15 these procedures the Commission recognized that provisions of
16 Part 60 dealing where participation might have to be changed
17 in the future should the passage of pertinent legislation take
18 place.

19 This did, in fact, occur with passage of the Nuclear
20 Waste Policy Act of 1982 often referred to as the NWPA. The
21 NWPA sets forth in considerable detail the roles and
22 responsibilities of NRC, the Department of Energy, states and
23 Indian tribes and the general public during the process of
24 siting and development of geologic repositories.

25 The NWPA requires that DOE consult and cooperate

1 with states and Indian tribes at many specified points
2 throughout the regulatory siting and development process. DOE
3 is required to issue its site characterization plans for
4 public comment, hold meetings to obtain further public comment
5 and provide for funding of states and tribes to participate in
6 and inform their residents about the process.

7 One year ago NRC published the proposed amendments
8 for comment to conform to the NHPA and is currently
9 considering final rulemaking. Before the Commission makes its
10 final decision, we have agreed to listen to comments from
11 various groups speaking today.

12 The states will start the presentation and will be
13 allowed 25 minutes total. They will be followed by the Indian
14 tribes who are allowed ten minutes. After that, we will have
15 a ten minute break. After the break we will continue with the
16 public interest groups for 15 minutes followed by DOE and
17 Edison Electric Institute for five minutes each.

18 Before we start, let me ask are there any comments
19 from other Commissioners?

20 (No response.)

21 CHAIRMAN PALLADINO: Then let me turn the meeting
22 over to the state panel and I am not sure which one of you is
23 going to speak first.

24 MR. MURPHY: I will, Mr. Chairman.

25 CHAIRMAN PALLADINO: Fine. Would you each identify

1 yourselves as you speak so that we can keep the record
2 straight. We appreciate your being here.

3 MR. MURPHY: Thank you, Mr. Chairman. For the
4 record I am Malachy Murphy, a special deputy attorney general
5 for the State of Nevada. I first want to thank the Commission
6 for the opportunity to be here today.

7 As you know, Nevada was one of the states which
8 specifically requested this meeting and we appreciate the
9 opportunity to make some comments directly to the Commission
10 on these issues.

11 Even a cursory perusal of SECY-85-333 makes it clear
12 that your staff has done a great deal of work on these
13 proposed amendments and has given serious consideration to the
14 comments earlier submitted by the states and other interested
15 parties.

16 Indeed, in several instances as that document
17 discloses, the staff revised the proposed amendments to
18 reflect the concerns we identified. They have not fully
19 adopted the states' positions however and accordingly, some of
20 our concerns remain.

21 I will identify and discuss briefly four areas in
22 which Nevada retains certain reservations regarding the
23 proposed amendments, first, the so-called "decoupling" of
24 Parts 2, 51 and 60; two, the elimination of the draft site
25 characterization analysis; three, the host state's party

1 status in licensing; and four, the use of radioactive
2 materials in trace amounts during site characterization.

3 Nevada continues to feel that in order for the
4 Commission to correctly integrate the NWPAA into its regulatory
5 framework in a way which guarantees the states their full
6 rights and participation under that Act that it should
7 promulgate all new rules reflecting passage of the NWPAA, the
8 procedural rules of Part 2 as well as Parts 51 and 60 in one
9 rulemaking thereby guaranteeing a single integrated approach
10 and tending to avoid any potential whatsoever for
11 contradiction, inconsistency, misunderstanding or confusion.

12 Under proposed section 60.17(c), the Director is to
13 review the Department of Energy's site characterization plan
14 and prepare a site characterization analysis with respect to
15 that plan.

16 This, of course, reflects the requirements of
17 Section 113 of the Act. In the preparation of that site
18 characterization analysis, the Director is to provide an
19 opportunity with respect to any area to be characterized for
20 the state in which such area is located and for affected
21 Indian tribes to present their views on the site
22 characterization plan and their suggestions with respect to
23 comments thereon which may be made by NRC.

24 Nothing in the proposal, however, requires the
25 Director to give any consideration to the comments of the

1 potential host state or affected tribe.

2 He must merely provide an opportunity to comment.

3 Under subsection (c), however, the Director may invite and
4 consider the views of interested parties.

5 As the staff accurately points out the State of
6 Nevada possesses considerable expertise in this area. Indeed
7 in recent weeks literally because of the addition of full-time
8 staff and new subcontractors, Nevada possesses even more
9 expertise on site characterization, we think, than we did at
10 the time of our submittal of earlier written comments.

11 We believe that expertise should not only be made
12 available to the staff in preparing its site characterization
13 analysis, but that the consideration of the state's comments
14 should be required by rule.

15 Under the current proposal, there is no requirement
16 that comments received from states, affected Indian tribes or
17 other interested parties receive any substantive weight.
18 Unless such a provision is included the state cannot be
19 insured that its comments where appropriate will be heeded.

20 We feel confident that those comments will be
21 heeded. That confidence stems from the fact that historically
22 throughout this process the comments we have made and
23 submitted to the staff and to the Commission have been given
24 serious consideration. We are just asking, I guess, for a
25 little pepper to be added to the salad in that the substantive

1 comments we do make be required to be given considerable
2 weight by rule.

3 One further point in that regard, I am guessing in
4 that respect but it would appear that the reason for the
5 staff's position is the Congressional silence with respect to
6 a draft site characterization analysis. In the original 10
7 CFR 60 which you promulgated prior to the passage of the NWPA,
8 such a draft was required.

9 Congress, on the other hand, in passing the Act is
10 merely silent in that respect. I would submit to the
11 Commission that that silence should not be interpreted as any
12 indication on Congress' part that a draft SCA is not
13 appropriate and I think there is clearly discretion on the
14 part of the Commission in that respect and we urge you to
15 adhere to your earlier decision in the original 10 CFR 60 that
16 such a draft analysis with the state and affected tribes and
17 interested parties' ability to comment on that draft be
18 preserved.

19 On page 11 of enclosure A to SECY-85-333 the staff
20 makes the statement that under section 189(a) of the Atomic
21 Energy Act and I am quoting here, "there can be no question
22 that the host state has a legal right to be a party" in a
23 licensing proceeding. The staff also says that the tests of
24 standing and again I am quoting "are clearly met for host
25 state participation."

1 While this provides an added measure of comfort to
2 the states, it does not provide the states with the absolute
3 guarantee in the regulations themselves of complete party
4 status from the very outset which is what we are requesting.

5 While I can agree that it is probably and indeed I
6 think it is inconceivable to anybody in this room at this
7 time that a host state's petition to intervene as a party in
8 repository licensing would be denied, we are at least six and
9 perhaps as many as eight or ten years away from the
10 commencement of that proceeding.

11 The problem simply is that there will be different
12 people in this room at this time. There will be different
13 Commissioners and in many cases, there will be different
14 members of your staff.

15 All we are asking is that the Commission formalize
16 what I view to be the correct legal conclusion by the staff
17 that the host state has an unquestionable legal right to full
18 party status by merely placing appropriate language to that
19 effect in the rule at this time.

20 At page 25 of enclosure B to SECY-85-333 the staff
21 responds to comment number 20 which suggested that the rules
22 should provide that NRC will concur in the use of radioactive
23 tracers only if certain criteria are met.

24 In its response, the staff concludes that "it is not
25 apparent" that the NWFPA is intended to apply to tracer amounts

1 of radioactive materials. It is likewise I suggest not
2 apparent that it does not so apply. Both subsections (A) and
3 (B) of section 113(c)(2) refer to and I am quoting "any"
4 radioactive material.

5 While clearly that section was intended to prevent a
6 de facto unlicensed repository, we believe that it was also
7 intended to give the Commission some control by way of
8 concurrence over the use of any radioactive materials
9 whatsoever during the process of site characterization
10 including trace amounts.

11 We are informed, for example, that in one case a
12 contractor to the NNWSI plans to use trace amounts of cesium
13 and strontium 90 for experimental purposes to determine its
14 practicality simply because it has never been done before.

15 That should be viewed by the Commission as
16 unacceptable as it is by us. The Commission should review the
17 use of trace amounts of radioactive materials on a
18 case-by-case basis and should concur in such use only to the
19 extent absolutely necessary to provide data for the
20 preparation of the required environmental reports and license
21 application unless such material is clearly demonstrated to be
22 fully retrievable.

23 In conclusion, the Commission we feel should utilize
24 a total integrated approach in revising its rules to conform
25 to the requirements and provisions of the Act.

1 These rules should provide for full participation by
2 affected states, defining their party status in any
3 construction authorization at the outset. As part of the site
4 characterization and pre-licensing activity, a potential host
5 state should be entitled to comment on proposed NRC and DOE
6 action as we are now and as we have been in the past with the
7 expectation that comments will be heard and where meritorious,
8 will be heeded.

9 In that respect, the site characterization analysis
10 of the staff should be made available to the states and
11 affected tribes in draft form and finalized only after the
12 opportunity for state and tribal comment.

13 Finally, the Commission's rules should provide for
14 the concurrence in the use of radioactive materials in trace
15 amounts only when absolutely necessary.

16 Again, Mr. Chairman, we greatly appreciate the
17 opportunity to be heard today. Thank you.

18 CHAIRMAN PALLADINO: Thank you very much. I suggest
19 we go through all the speakers and then proceed with
20 questions.

21 COMMISSIONER ASSELSTINE: Sounds good, yes.

22 CHAIRMAN PALLADINO: All right.

23 MR. FRISHMAN: Thank you, Mr. Chairman. My name is
24 Steve Frishman and I am director of the Nuclear Waste Programs
25 Office for the State of Texas.

1 We, too, appreciate the opportunity for this
2 meeting. I think we have demonstrated in the past that these
3 meetings can be productive for all parties and I hope that in
4 the future we will be able to continue this format at times
5 when we all agree that it is necessary and has a potential to
6 be productive.

7 In order to avoid repetition and keep on our fast
8 track here, first of all I would like to associate myself and
9 the State of Texas with the comments made by Mr. Murphy for
10 the State of Nevada.

11 I would like to expand on that in one area and
12 mention another area that has been the subject of discussion
13 and review already but just add a couple points to it.

14 First of all, I think it is important that the
15 Commission recognize that the relations of the Commission in
16 this project because I will only be speaking about this, the
17 relations with the public by the Commission should not be
18 constrained by the Nuclear Waste Policy Act.

19 I think what we are seeing here in some case is an
20 effort to say that the Act really says all that is necessary
21 in the particular areas that we are discussing. The
22 Commission has the latitude to deal independently with the
23 public and with affected parties outside of the Waste Policy
24 Act.

25 I think that has been the source of our discussions

1 since back in 1983 regarding policy and procedural changes to
2 this rule.

3 At this point I think in the effort to conform with
4 the Waste Policy Act it may be that what we are seeing as a
5 final rule here is even a step backward. Regarding the area
6 of the draft site characterization analysis we proposed back
7 in September of 1983 a method that we felt could provide
8 essentially the equivalent to a draft SCA process.

9 We are happy to note that a portion of that is
10 proposed in this final rule. We are unhappy to note that the
11 operative portion of it is not adopted. Just as Mr. Murphy
12 pointed out, we are seeing the ability to comment and we are
13 pleased to see that that ability to comment is evolving and it
14 has finally gotten up to something very similar to in fact the
15 rule language that we proposed in September 1983.

16 What is missing once again is the response element
17 to that meaning the knowledge of how the Commission and the
18 staff view the comments that come in and what is to be done
19 with those comments.

20 We see no security for ourselves at the level of
21 comment that is invited. We are pleased to see that some of
22 the "mays" have been changed to "shalls" but at the same time
23 where does it go and that is what we are looking for.

24 We want the ability to demonstrate to our
25 constituents and demonstrate to the Department of Energy that

1 our comments have, in fact, been either integrated into the
2 process or a statement of why they are not integrated. I
3 think they are equally important.

4 So in the absence of a response mechanism and a sure
5 response mechanism, I think we, too, have to go back and
6 reiterate what we stated in September of 1983 and that is
7 that our preference is for a draft SCA.

8 Now a value of the response whether it be through a
9 draft SCA and an NRC response to comments and a draft SCA or
10 just response to comments without that draft, a real value
11 there that I see is that it will serve to broaden or even
12 bring to the forefront the regulatory and oversight
13 expectations of the public relative to how the NRC is viewing
14 the DOE's program at a stage in the program where what you say
15 is still not enforceable. It is really only recommendations.

16 It is important from our point of view that this
17 information of the expectations be clear and that there be
18 clear statements in response to those expectations in order
19 that all parties have a better sense of what the regulatory
20 atmosphere really is.

21 I don't believe that it is acceptable to have
22 topical meetings, have an exchange among even three sectors,
23 the NRC, the DOE and the affected states and tribes, I don't
24 believe that that is the place to air the expectations and get
25 considered responses. I think it must be done outside of that

1 context and it must be done in a way that has a much more
2 general view.

3 So if we are not to have a draft SCA, I am back to
4 where my last sets of comments I feel are still valid. We
5 must go into a comment response mode at some point.

6 Before I go on to this next one, anything that
7 affects the SCA we feel should be an effective process for the
8 SCA updates. We don't see any real difference in the SCA and
9 its updates just as we don't see any real difference in the
10 SCP and its updates. This is an evolutionary process and
11 there should be a responding evolutionary process that goes
12 with DOE continuing in its site characterization plan.

13 Now just very quickly on the relationship of the SCA
14 to shaft construction, again it is appearing to us that we are
15 going to be in a piece-mealing situation where although maybe
16 the shaft won't be started until the SCA is released, all the
17 understandings have been made before that in meetings between
18 the NRC and DOE staff whether states and tribes are present or
19 not.

20 The SCP under the Waste Policy Act is required to go
21 through a public review process. That process is compromised
22 if it is not a process that is entirely responsive to the
23 Waste Policy Act in the sense that the public also has a level
24 of responsibility to look at the entire issue of shaft
25 construction as well as the entire issue that incorporates

1 shaft construction which is site characterization.

2 So to come to early agreements and say that the
3 shaft constraints or recommendations in an SCA are pretty well
4 taken care of ahead of time so that a shaft can start the day
5 you may drop an SCA on the table does not serve anything other
6 than DOE's desire to fast track the schedule.

7 We have so far many examples of the failure of DOE's
8 fast tracking to in fact arrive at benefits for the program or
9 for anyone associated with the program. To how to saving a
10 little bit of time whether it be in the draft SCA or whether
11 it be relative to when you start digging a hole in the ground,
12 those benefits I don't think are going to be realized any more
13 than the hurry-up benefits up to this point have been
14 realized.

15 In each case it has resulted in a slow-down rather
16 than a hurry-up.

17 COMMISSIONER BERNTHAL: In fairness to DOE, they are
18 trying to meet a fast track schedule imposed by the Congress.
19 I think it not quite fair to call the schedule that Congress
20 laid down for them their schedule. They are trying to meet
21 it. I think many people realize that that may be a difficult
22 schedule to meet when Congress imposed it.

23 It is DOE's job to try to carry out that mandate.
24 Whether or not they end up meeting it is another question

25 MR. FRISHMAN: At this point the schedule has

1 disintegrated to a single milestone in DOE's mind. Everything
2 in that schedule has so far essentially not appeared on time.
3 All that is happening is 1998 is being held firm.

4 Our major concern through our discussions with you
5 and with DOE is that when you hold 1998 firm, everything else
6 gets compressed and from our view up until this point things
7 become compromised and when things become compromised, it is
8 to the detriment of the program.

9 So at this point and it is becoming more and more
10 evident to I think all of us anyway that holding to a schedule
11 most of which currently is of DOE's invention because they
12 didn't make the Congressional schedule, holding to that
13 schedule is artificial to the point of in fact compromising a
14 program.

15 I and some of your staff members were at a meeting
16 this week on quality assurance along with DOE. The theme of
17 that conference was you only get once chance. I firmly
18 believe that. I announced that approximately a year ago and I
19 am glad to see that other people are beginning to think that,
20 too.

21 If we don't come to some understanding of what is
22 reasonable in a technical program that one chance is going to
23 go by very, very quickly.

24 CHAIRMAN PALLADINO: Let me interrupt. You had over
25 ten minutes and I think you have basically concluded?

1 MR. FRISHMAN: I have concluded, yes, sir.

2 CHAIRMAN PALLADINO: Thank you. Let's go on to the
3 next speaker.

4 COMMISSIONER ASSELSTINE. Just before you do that,
5 Joe, just one comment on the schedule. Fred, you are right.
6 Congress established a schedule but I think the Congress also
7 said we are going to take a look at this as time progresses.
8 We want a mission plan that discusses how you are going to get
9 to the point where we have a successful repository constructed
10 and ready to operate.

11 I think the Congress also said if you see problems
12 with that schedule to the agencies, to DOE, you are to come
13 back and tell us what the problems are and what needs to be
14 done.

15 The clear message of the Act is that Congress wanted
16 this job done. They laid out a possible schedule on how to
17 get there but first and foremost, they said we want it done
18 right. I think all of us have acknowledged, DOE as well as
19 us, if there is any conflict at all between the doing the job
20 right and getting it done properly and meeting a schedule, you
21 always come down on the side of adjusting the schedule and
22 doing things properly.

23 I think we have said that repeatedly. DOE has said
24 that as well. You are right, there is a schedule. But I
25 don't think it is so hard and fast that if there were any

1 conflicts in doing things properly that the schedule ought to
2 prevail.

3 CHAIRMAN PALLADINO: Nevertheless, I think the
4 Congress set the tight schedule with the hope that it could be
5 met and efforts should be made to meet it. Nevertheless, we
6 can come back and pick that point up again. I wonder if we
7 could go to the next speaker.

8 MR. SPURGIN: Thank you, Mr. Chairman. My name is
9 Patrick Spurgin. I am the director of the Utah High Level
10 Nuclear Waste Office. I would also like to express our
11 appreciation for this opportunity to speak with the Commission
12 about this subject.

13 Utah's participation in the nuclear waste program is
14 directed toward two fundamental purposes. The first purpose
15 is in accordance with traditional state role to protect and
16 promote the health, safety and welfare of the citizens of the
17 state.

18 The second purpose is to provide a basis for public
19 confidence in the nuclear waste program through state
20 participation in and review of that program. The obligation
21 to pursue this goal is placed on the state by the terms of the
22 Nuclear Waste Policy Act.

23 Of course, the Atomic Energy Act places primary
24 authority for radiological health and safety with the
25 Commission. Thus, under the Nuclear Waste Policy Act the

1 state's efforts to protect public health and safety and to
2 participate in the program must be undertaken in a cooperative
3 fashion with the Commission for both the states and the
4 Commission to have legitimate duties and interests in this
5 for.

6 The states, however, can discharge their
7 responsibilities only if they have access to necessary
8 information and access to the nuclear waste program decision
9 making process.

10 Because the Commission will play an increasingly
11 greater role in the nuclear waste program and through its
12 licensing decisions will increasingly determine the program's
13 nature and direction the rigor of the Commission's review of
14 DOE activities is of great interest to the state.

15 The Commission's review of DOE activities can also
16 provide a significant opportunity for state input into
17 pre-decisional evaluations enhancing the state's legitimate
18 pursuit of the purposes of the Nuclear Waste Policy Act.

19 Doubt concerning the credibility of the federal
20 nuclear waste disposal effort is potentially a great
21 impediment to the program and to the nuclear power industry
22 generally.

23 Congress recognized in the Nuclear Waste Policy Act
24 that minimizing political and legal opposition to the waste
25 program by instilling public confidence in it would be

1 essential to the program's success.

2 Accordingly, the Act grants the states very broad
3 participatory powers in the program in an effort to promote
4 public confidence. This is promoted by enabling states to
5 focus technical resources on pre-licensing and licensing
6 activities in order to verify that actions have been taken on
7 the basis of best knowledge and analysis.

8 Public confidence will be promoted by state
9 opportunities to appropriately influence Commission and DOE
10 decisions before they are made.

11 The nuclear waste program will thus proceed most
12 rapidly and efficiently and most consistently with the spirit
13 of the Act when the states are provided three basic
14 opportunities.

15 These are, first, full access to the decision making
16 process of DOE and the Commission; two, is the reasonable
17 opportunity to voice state concerns within that process; and
18 three, the opportunity for full and fair responses to the
19 concerns that are raised in the process.

20 All of these considerations suggest that consistent
21 with the spirit of the Nuclear Waste Policy Act the Commission
22 should take a broad view of both its regulatory authority and
23 its responsibility to further the participatory rights of the
24 states.

25 Accordingly, we urge the Commission to re-evaluate

1 provisions of the proposed final 10 CFR Part 60 bearing upon
2 the Commission's site characterization analysis, the
3 Commission's review of site selection information, the
4 relationship of the completed site characterization analysis
5 to shaft sinking and the role of the states in licensing
6 proceedings after recommendation of a repository for
7 developing.

8 Each of these areas significantly affects the
9 state's ability to discharge their duties under the Nuclear
10 Waste Policy Act.

11 Steve and Mal have already discussed some of those
12 items that I mentioned earlier. With respect to the
13 Commission's review of site selection information, certain
14 activities which are part of the Commission's licensing
15 process under existing 10 CFR Part 60 have essentially been
16 removed by legislative fiat.

17 Those existing provisions of 10 CFR Part 60 which
18 require a discussion of site selection information in the site
19 characterization report were perceived presumably to be
20 related to health and safety issues when the existing rule was
21 promulgated.

22 Under the Nuclear Waste Policy Act, DOE is now
23 directed to provide general guidelines for site selection and
24 to describe the process by which sites were selected in
25 statutory environmental assessments.

1 Nonetheless while it may be that the format of the
2 Commission's regulations must be altered to be made consistent
3 with the Nuclear Waste Policy Act, the rationale for existing
4 provisions for Commission review of health and safety issues
5 associated with site selection still remains.

6 This suggests that the review of site selection
7 information through EA review should be more than aspirational
8 as is suggested in the supplementary information accompanying
9 the proposed final rule.

10 If the Commission review of site selection
11 information is important to health and safety issues, that
12 review should remain in a defined and articulated manner in
13 the Commission's licensing rules.

14 That concludes my statement but I do because of the
15 relationship between the NRC and the states, I truly
16 appreciate on behalf of the State of Utah this opportunity to
17 address the Commission.

18 CHAIRMAN PALLADINO: Thank you very much.
19 Mr. Lehman.

20 MR. LEHMAN: Mr. Chairman and members of the
21 Commission, I am Tom Lehman, Associate Director of the State
22 of Minnesota, Washington office. Gregg Larson who is the
23 director of Minnesota's High-Level Radioactive Waste Program
24 is unable to be here today and I would like to take this
25 opportunity to read his statement into the record.

1 Minnesota is grateful for this final opportunity to
2 testify today on the Commission's proposed procedural
3 amendments to 10 CFR 60. We hope that you will once again
4 consider our views and recognize the special importance of
5 your regulatory role in this repository siting process.

6 I wish to note for the record that the State of
7 Minnesota submitted comments in this rulemaking on March 17,
8 1985. Our comments and those of other states have not been
9 favorably addressed by the staff. Rather than restate those
10 comments, I want to highlight some fundamental issues that are
11 basic in this rulemaking.

12 The first issue concerns the authority of the
13 Commission to review DOE siting decisions. In examining the
14 staff position, it is clear to us that the staff continues to
15 interpret Congressional silence with regard to existing 10 CFR
16 60 site selection review responsibilities as Congressional
17 rejection of those responsibilities.

18 Although the Nuclear Waste Policy Act does not
19 specifically identify site selection criteria in the list of
20 items that constitute a site characterization plan, it does
21 provide the Commission with the authority to request other
22 information that it deems necessary.

23 Even if this were not the case, the NWPA does not in
24 itself define the breadth of Commission authority in
25 repository siting and licensing matters.

1 The staff has neglected other underlying statutory
2 authority, most notably the Atomic Energy Act of 1954 and the
3 Energy Reorganization Act of 1974. Both assign the Commission
4 broad health, safety, environmental and licensing
5 responsibilities sufficient to serve as a basis for formal
6 review of the DOE's site selection process prior to the final
7 choice of a site.

8 In addition, the Commission has site selection
9 review authority under the National Environmental Policy Act.

10 This narrow interpretation is neither persuasive nor
11 wise. The Commission must be willing to play a central role
12 in the comparative analysis of sites and must consider not
13 just the final site proposed for licensing, but also the range
14 of choices that were available at each of the decision points
15 in the site selection process.

16 By relegating the entire siting process to the DOE,
17 the Commission unnecessarily surrenders its basic oversight
18 authority, ignores its NEPA responsibility and risks the
19 consequences of a flawed process and Environmental Impact
20 Statement. Given the historical record of mismanaged and
21 inept siting efforts, that risk is substantial.

22 The second issue concerns the perception of the
23 staff that the states and tribes have the resources and
24 expertise sufficient for participation in the siting program
25 at a level equivalent with the Commission and the DOE.

1 The fact that the NWPA guarantees public
2 participation, that frequent technical meetings in Washington
3 are open to the public and interested parties, and a NRC/DOE
4 procedural agreement has been signed should not serve as a
5 convenient excuse for the elimination of formal mechanisms for
6 public involvement in the Commission's work.

7 These mechanisms are most often the focus of public
8 attention. There is a significant difference in the type of
9 notice, the information distribution and the response
10 requirements between informal NRC/DOE technical meetings in
11 Washington and the formal review that would accompany release
12 of an NRC site characterization analysis.

13 The Commission's expertise with concurrence on the
14 siting guidelines should have demonstrated that even when
15 opportunities for public participation are numerous, there is
16 no certainty that the responsible agency will be responsive.

17 The Commission's unique role as a regulator provides
18 a status different from that of the states and tribes. It was
19 only after the Commission actively sought change in the
20 guidelines that the DOE began to respond.

21 The repository siting schedule again appears to be
22 more important than procedural and institutional aspects of
23 the program. While the DOE abandons the schedule at will, the
24 Commission staff imply that a 90-day public comment period
25 could hinder DOE compliance with NWPA deadlines.

1 It is unfortunate that catch-up on the schedule must
2 come at the expense of state, tribal and interested public
3 involvement in the process.

4 We do not agree with the staff that the public
5 comment period is not needed because the Commission will b
6 fully aware of all the relevant issues and concerns. Not only
7 is this an arrogant assumption, but it ignores the importance
8 of public gain through access to Commission information,
9 expertise and conclusions.

10 Furthermore, the expectation that the states, tribes
11 and public would formally review the Commission's draft site
12 characterization analysis would contribute to a more rigorous
13 analysis by the Commission.

14 It also will lend some semblance of Commission
15 independence to what often looks like a cooperative venture
16 between a regulator and the future license applicant.

17 Rather than discourage such public interaction, the
18 Commission should welcome the mutually beneficial effects that
19 would accompany formal public review and comment on a draft
20 site characterization analysis as contemplated in the existing
21 rules.

22 The third issue concerns the timing of shaft
23 construction and the need for a prohibition on such
24 construction until after the Commission, states and tribes
25 have reviewed the SCP and DOE has considered the comments.

1 Because the staff endorses the view that
2 construction must await DOE consideration of the comments on
3 the SCP, we are puzzled by the reluctance to state this in the
4 proposed amendments.

5 Despite the DOE Mission Plan agreement that
6 sufficient time must elapse for review of the SCP, there are
7 numerous examples of DOE proposed short-cuts, such as limited
8 work authorization and premature determinations of site
9 suitability, some of which reversed previous DOE positions.

10 We do not share the commission's confidence that DOE
11 commitment will be adhered to in the face of schedule delays.
12 Our cynicism is reinforced by the Commission and the DOE
13 desire to avoid even a 90-day review period for the site
14 characterization analysis.

15 Finally, the staff questions the need for a
16 declaration of an absolute right to participate in the
17 licensing proceedings of the Commission. While we would like
18 to believe that our concern is unwarranted with respect to
19 this issue, the Commission's action on the question of
20 preliminary determination of site suitability, the recent
21 decision to hold unrecorded gatherings without soliciting
22 public comment and the staff proposal to alter the
23 Commission's rules of practice for licensing proceedings lead
24 us to the conclusion that such a declaration is necessary.

25 We understand that minor changes may be necessary

1 to ensure 10 CFR 60 conformance with the NWPA, but the
2 proposed procedural amendments go beyond what is required. We
3 urge that they be reconsidered.

4 Thank you.

5 CHAIRMAN PALLADINO: Thank you, Mr. Larsen. We will
6 now go on to the next speaker.

7 MR. PROVOST: Mr. Chairman and members of the
8 Commission, for the record I am Don Provost, technical
9 director of the State of Washington Office of High-Level
10 Nuclear Waste Management.

11 Thank you for inviting me to present the State of
12 Washington views on the proposed amendments to 10 CFR 60 which
13 deals with site characterization and participation of state
14 and Indian tribes.

15 Before I make specific comments, I will briefly
16 discuss our earlier participation with NRC. Our first major
17 involvement was with the 1982 site characterization report on
18 the Basalt Waste Isolation Project. State representatives
19 had routine discussions with NRC staff.

20 We were pleased by the excellent work from NRC
21 staff. The draft site characterization analysis together with
22 comparable reports from the State of Washington, affected
23 tribes and USGS influenced the U.S. Department of Energy to
24 significantly improve the BWIP project.

25 During the process of NRC concurrence in the USDOE

1 siting guidelines, the Commission listened to the states and
2 tribes, considered their comments and made an independent
3 determination. We appreciated NRC's fair and independent
4 role.

5 However, we were very concerned when NRC reversed
6 their position on the timing of the preliminary determination
7 of potential high-level waste repositories.

8 Recently, we were neither notified about this
9 meeting nor sent the relevant supporting material. This
10 apparent change in approach is a serious concern to us. The
11 opportunity and procedures for comment now appear to be
12 substantially reduced from those we experience earlier.

13 This brief discussion of our interactions with NEC
14 is intended to give a rationale for why we did not comment on
15 the proposed rule published on January 17, 1985 but asked to
16 testify at this hearing.

17 In general, we support the testimony presented by
18 the other states and affected tribes. However, we do have
19 several specific comments on high priority issues.

20 They are, number one, draft site characterization
21 analysis, there is a strong need for states and affected
22 tribes to have an opportunity to participate effectively in
23 the NRC review of the SCP.

24 More importantly, it is important that issues come
25 to closure between a draft and final site characterization

1 analysis. For example, several issues raised in the site
2 characterization are not yet resolved. Examples are quality
3 assurance management and performance allocation. These are
4 raised in the SCP but have as yet not been resolved. Major
5 technical and policy issues must be resolved as early as
6 possible.

7 Another issue is shaft sinking. The State of
8 Washington does not plan to fully staff its technical review
9 team unless and until the president selects Hanford for site
10 characterization. It is my understanding that other states
11 and tribes are taking a similar approach.

12 This means that we are not now budgeted and do not
13 have the technical staff to fully participate in the NRC/USDOE
14 meetings to resolve shaft related issues. The only
15 opportunity for thorough and meaningful state, tribal and
16 public discussion will take place during the SCP comment
17 period.

18 Under the Act, states and tribes have consultation
19 rights. To be meaningful, such consultation must be held
20 before federal decisions are locked in concrete.

21 In a related matter, we are concerned that the
22 surface site characterization activities continue at Hanford
23 even though the EA's are not in final form and the SCP is
24 delayed for at least a year. Again, the Nuclear Waste Policy
25 Act requires a thorough and meaningful review by the states,

1 tribes and the public. This has not occurred at the
2 federally-owned sites.

3 Standing of the states and tribes in a licensing
4 hearing, a host state and affected tribes are entitled to full
5 party status at the outset of the NRC proceedings and an
6 absolute right of participation in NRC licensing proceedings
7 should be declared by 10 CFR Part 60.

8 In summary, the State of Washington strongly
9 recommends that NRC not decrease current procedures relating
10 to the participation of states and Indian tribes.

11 CHAIRMAN PALLADINO: Thank you very much,
12 Mr. Provost. I guess we are ready for questions. I wanted to
13 ask you one question. You say you didn't receive notice of
14 this meeting? You must have received some notice, you are
15 here.

16 MR. PROVOST: We had a phone call from other
17 interested parties who indicated that the meeting was being
18 set and they had received information that we had not been
19 mailed. So it is our feeling that all the parties that are
20 involved should have had exactly the same notice and sent
21 information at the same time. We had to call and make our own
22 arrangements for the meeting and came in late.

23 CHAIRMAN PALLADINO: We will check into that.

24 MR. PROVOST: It takes at least five days for the
25 mail to get to us anyway so we are already at a disadvantage.

1 CHAIRMAN PALLADINO: Sometimes we make fast
2 decisions to hold meetings but we will try to be considerate
3 in the future or at least more considerate.

4 Let me ask one question and anyone of you is free to
5 answer. It is my understanding that the proposed amendments
6 provide for comments by the host state and affected Indian
7 tribes before the final site characterization analysis. I was
8 curious or interested in why you feel that is not enough
9 opportunity for comment.

10 MR. FRISHMAN: I think we do see that as a valid
11 opportunity for comment. The issue is the disposition of
12 those comments and our understanding of the extent to which
13 those comments receive considered attention to the extent of
14 being incorporated or knowing why they were not incorporated
15 so that we can all move forward with an understanding of what
16 the evolving view of site characterization is on the part of
17 the Commission as well as our own view, as well as DOE's view.

18 We could find a way and I have already figured out
19 the way to make it essentially a working process anyway and it
20 becomes rather chaotic and probably more consumptive of
21 resources than just a straight draft. We can do something
22 very simply by making those comments, with those comments
23 request a response and request a timely response under the
24 provisions of the Nuclear Waste Policy Act.

25 We get that timely response and then we forward it

1 to the DOE. That would work essentially the same way. But
2 what it does then is it casts an image of antagonism among
3 between affected parties and the Commission. . . . Image
4 that is projected, there becomes her image of some
5 fraternalism between for and the Department of
6 Energy.

7 is, I don't think is a very happy situation but it
8 is very easy to do.

9 MR. MURPHY. May I make a further comment,
10 Mr. Chairman?

11 CHAIRMAN PALLADINO. Surely

12 MR. MURPHY: It is our understanding that the states
13 under the staff proposal, that the states will be afforded the
14 opportunity to comment in the sense of making suggestions to
15 the director as to what should be contained in the site
16 characterization analysis while it is in draft form at the
17 staff level.

18 But the opportunity to comment on the substance of
19 the site characterization analysis does not arise under the
20 proposed amendments until the SCA is delivered to DOE and we
21 are just concerned that at that point in time the train is so
22 far out of the station that it will be virtually impossible to
23 get it back in and decouple any of the cars.

24 So what we are suggesting and we appreciate the
25 opportunity to suggest to the staff what should be contained

1 in the site characterization analysis. We just think we ought
2 to have the opportunity to comment upon what the staff finally
3 does come up with in draft form before it is delivered to DOE.

4 CHAIRMAN PALLADINO: Let me read one sentence or
5 maybe it is two sentences, I am not sure, "under a change that
6 is reflected in the final rule that is recommended here NRC
7 would provide opportunity before publication of the SCA for
8 the host state and affected Indian tribes to present their
9 views on the DOE SCP and their suggestions with respect to
10 comments thereon which may be made by NRC."

11 Maybe that isn't good enough in your view but I just
12 want to make sure I understood why.

13 MR. MURPHY: That is correct, Mr. Chairman. We are
14 entitled under that to comment on the Department of Energy's
15 site characterization plan. What we are asking for is the
16 opportunity to comment as well on the staff's response to the
17 site characterization plan which is the site characterization
18 analysis before it is delivered to DOE.

19 MR. SPURGIN: I would add to that that we would be
20 looking for the response which I think is probably the most
21 important, one of the more important aspects of it, I should
22 say.

23 The response is critical for the public confidence
24 purposes if you will that the state is supposed to serve under
25 the terms of the Act.

1 CHAIRMAN PALLADINO: Let me turn to my colleagues to
2 see if they have other questions. Jim, do you want to start?

3 COMMISSIONER ASSELSTINE: I have a few.

4 CHAIRMAN PALLADINO: Do you have some, Tom?

5 COMMISSIONER ROBERTS: No.

6 COMMISSIONER ASSELSTINE: Let me start with the
7 broader proposition that I think some of you mentioned. When
8 I read the staff's paper I get the flavor that the reason why
9 some of the modifications are being proposed, modifications to
10 the rule that the Commission had previously adopted, was
11 because when they looked at the Nuclear Waste Policy Act, the
12 Nuclear Waste Policy Act did not specifically require some of
13 these things. Therefore, the staff's view is that they should
14 take them out of the Commission's rule.

15 I think one of you made the point that the staff
16 seems to be under the impression that because Congress did not
17 mention it specifically or include it, therefore, the Congress
18 disapproved of those things.

19 I guess my recollection was somewhat different from
20 the time that the Congress considered the Act. In fact, I had
21 recalled that the Congress was quite aware of what the Agency
22 had done both on the technical side and on the procedural side
23 and if anything, there were some statements or comments
24 endorsing the kinds of approaches that the Commission had
25 adopted.

1 Is that your recollection? I know a lot of you all
2 were involved in the process as well, that far from
3 disapproving of some of those things the Congress had
4 recognized that this Agency had gone quite far in putting in
5 place both its technical requirements and the process by which
6 it would deal with both the Department of Energy and the
7 states in this early informal stage.

8 MR. FRISHMAN: Yes. I am not aware of any intent in
9 the writing of the Waste Policy Act to limit the ability of
10 the Commission. I don't think there are exclusionary
11 statements there. I don't think there was an exclusionary
12 intent.

13 As I stated in my opening comments the NRC is not
14 constrained by the Waste Policy Act. It is guided, yes and
15 the requirement to conform the rule to the Act is, I think, a
16 legitimate approach and not one that was meant to limit.

17 COMMISSIONER ASSELSTINE: Yes. Pat, you made the
18 point I think on the draft site characterization analysis that
19 we are better off if we try to talk to the states and here
20 from the states informally before the Agency takes its final
21 position on something.

22 MR. SPURGIN: Even if I didn't say it, I basically
23 agree with that.

24 (Laughter.)

25 COMMISSIONER ASSELSTINE: One of the things I wanted

1 to explore is we have have some experience with this process
2 and Don, I wonder if you could talk a little bit about the
3 process, the existing process, that we used in looking at the
4 original draft site characterization report from DOE on the
5 Hanford site.

6 My impression was that both in terms of an informal
7 discussion in advance of the Commission issuing its draft site
8 characterization analysis and the mere fact that the NRC would
9 put on the table a draft document that others would then have
10 to respond to worked fairly effectively, but I would be
11 interested in your perceptions of that as well.

12 MR. PROVOST: I think that was a very good process
13 and was a very meaningful process that raised the level of
14 understanding of the BWIP Project a great deal and got a lot
15 of technical and policy issues on the table and we had
16 informal discussions with NRC staff during the process of the
17 developing the SCA and had interchanges during that process.

18 Then it came out and it had a very good effect,
19 getting that out, getting comments and I think that there were
20 not a great deal of comments on the SCA itself but was a very
21 effective one of putting out there for everybody to comment
22 and then large things, many things were surfaced and many
23 things accomplished but yet, some very basic things were not.
24 They are still not resolved today.

25 COMMISSIONER ASSELSTINE: Yes. I appreciate that

1 but I guess the sense that I had had from basically all
2 parties was that the existing process that the staff is now
3 proposing to change had actually worked pretty well.

4 MR. PROVOST: Very well.

5 COMMISSIONER ASSELSTINE: It didn't delay things.
6 It didn't drag the process out but instead surfaced some
7 issues so that they could be resolved early on rather than
8 later on in the process. It may not have gotten all of them,
9 you may not have gotten all of them settled yet but at least
10 they started to get surfaced fairly early through the use of
11 informal discussions and the draft document.

12 MR. PROVOST: Yes, and very clearly in the record
13 they were identified so they are there. That is the thing we
14 appreciated.

15 COMMISSIONER ASSELSTINE: It almost seems to me that
16 that is going to advance the process rather than just relying
17 on a final document that may not elicit the kinds of reactions
18 and responses that are needed

19 MR. MURPHY: May I make a comment on this question
20 of delay and I realize that should be a concern both to the
21 Department and the Commission. The only delay involved in
22 site characterization which the site characterization plan
23 affects is the sinking of the exploratory shaft itself. The
24 Act says before proceeding to sink shafts, et cetera.

25 Any other activity associated with site

1 characterization can commence immediately upon the president's
2 approval of a site recommendation. Indeed in our case and in
3 Hanford's case they are characterizing our site already.
4 There is no question about it. The only thing that hasn't
5 been done on Yuucca Mountain is sink a shaft and so the only
6 thing that is going to be delayed by 90 days, in allowing the
7 states 90 days to comment or 60 or whatever appropriate
8 comment period is selected, is the sinking of a shaft and it
9 is probably going to take them that much time to get the
10 material and equipment at the site to get things ready to go
11 anyway.

12 CHAIRMAN PALLADINO: Let me make a comment without
13 taking sides or whether we should or should not do it. A
14 90-day comment period is not limited to 90 days. It takes
15 time to get it out and then there is the 90 days and then
16 reading them, assimilating, deciding what is going to be done
17 about them so the 90 days becomes more like six to seven
18 months.

19 I am not saying that may not be worthwhile. I am
20 just pointing out the comment period is not limited just to
21 the particular period in which we receive the comments.

22 Go ahead.

23 MR. MURPHY: I am finished. Thank you.

24 COMMISSIONER ASSELSTINE: I had a question on the
25 role of the host state as a party. What benefits or

1 advantages do you see to the states and also to the affected
2 Indian tribes I guess as well and we will hear from them later
3 of saying up front in the regulations that the host state and
4 affected tribes are recognized as parties to this proceeding
5 even before we get to the formal proceeding stage several
6 years from now? What benefit do you think that provides to
7 the states?

8 MR. MURPHY: It provides an assurance to the states
9 that they are going to be full participants in that licensing
10 process and it also as a party it gives the states standing
11 for want of a better word to participate and even though the
12 Act itself does, I think, to be considered a full party in all
13 of the informal pre-application kind of interchanges between
14 any applicant before the Commission and the Commission staff.

15 As I said, Commissioner Asselstine, it is
16 inconceivable to me and I am sure it is to everybody else in
17 the room that the State of Nevada would not be entitled to
18 full party status in the event that Yucca Mountain is
19 selected I just want to see another nail in the coffin.
20 That is all.

21 COMMISSIONER ASSELSTINE: All right.

22 MR. SPURGIN: I would add that even though you can't
23 conceive of a situation where that might happen not being able
24 to tell the future and potential changes in circumstances,
25 there is nonetheless an uncertainty and the removal of any

1 uncertainty which doesn't cost anybody anything I think you
2 have to look on favorably.

3 COMMISSIONER ASSELSTINE: All right. On the Part 51
4 changes, I am sympathetic to the view you expressed about
5 looking at this thing as a whole and in fact I think several
6 of us are. As I recall, I think, Commissioner Zech had
7 started an effort to get the staff to move that process
8 forward.

9 It would be useful at some point to hear where the
10 staff is. I think Lando, you proposed that they ought to get
11 that stuff done in March. If we could move that forward and
12 get a chance to look at how the whole package fits together, I
13 am sympathetic with that view. It seems to make sense to me.

14 CHAIRMAN PALLADINO: It is not clear though to me
15 why you think they should be handled together.

16 MR. MURPHY: Just to avoid any potential for any
17 inconsistency whatsoever between any of the three parts.

18 CHAIRMAN PALLADINO: Well, if handling them together
19 would guarantee that, maybe that would be an advantage. Often
20 we fall into traps. I was just interested in your thoughts on
21 that if you have any.

22 COMMISSIONER ASSELSTINE: I guess the final area
23 where I have a question is on the relationship of the shaft
24 sinking to the full understanding of the site characterization
25 plan.

1 Is it because the shaft sinking is a major
2 construction activity that has the potential to affect what is
3 done with the site and how characterization proceeds? Is that
4 your principal concern in terms of wanting to make sure that
5 there is a full understanding of what is proposed for site
6 characterization and how the shaft fits in, construction work
7 fits in with that that drives the linkage question?

8 MR. PROVOST: Maybe I can explain the Hanford. It
9 is a saturated site and sinking the shaft will in a technical
10 basis severely affect the hydrologic baseline and it also
11 affects -- well, once you do that it affects all of the tests.

12 So from a technical one, once you sink that shaft
13 you had better understand your baseline. You have to
14 understand a lot of things going all the way through it.
15 Especially in our case, we think it is a very major technical
16 one besides the issues that you raised.

17 It affects all the tests later on so you have to
18 know what is going on.

19 MR. FRISHMAN: I see it as potentially -- and I
20 agree with what Don says -- I see it potentially even going
21 farther than that and that is a choice of a location for a
22 shaft itself is very important in the integrity of the site
23 and relative to the question of whether the exploratory shaft
24 or shafts become ultimately even possible as repository shaft
25 or shafts.

1 I think there is a real possibility here of
2 compromising a site with a shaft. Now just because you don't
3 have the spectrum of thought and knowledge that everyone
4 collectively might be capable of providing, we have some
5 concerns about the potential shaft locations at the Deaf Smith
6 County Site.

7 One was suggested in the draft EA. What I hear is
8 that that is moving around or has been moved around in the
9 contractor's minds anyway and I have yet to see a rationale
10 for anyone of the possible locations for the shaft and here
11 it is, I have some real questions about it.

12 I don't have a mechanism right now to even raise
13 those questions other than in the informal conference and then
14 it becomes not really -- that is a small issue when you are
15 talking about shafts, where it is and the potential to
16 compromise.

17 When you get into the technical meeting on the
18 shafts, you are talking much more about the mechanics of the
19 shaft itself.

20 COMMISSIONER BERNTHAL: What are the nature of the
21 questions that you have right now about the current location?
22 Are you talking about surface questions or geophysical
23 questions?

24 MR. FRISHMAN: I am talking geologic questions
25 because the current proposed location is very close to a

1 boundary of the designated identified site, very close to a
2 boundary.

3 I have some questions about the logic of that given
4 the gradient of the deep aquifer as well as the gradient of
5 the near surface aquifers and whether, in fact, that shaft if
6 it becomes a working repository shaft may in fact increase or
7 require a necessity to increase the controlled area outside of
8 the current identified site. There are geotechnical questions
9 regarding where that shaft is best located.

10 There is another question that is still very much an
11 open question and I know that the architect engineer right now
12 has a milestone report due or it has already been submitted.
13 We have not been able to find it having to do with whether in
14 fact an exploratory shaft can be used as a repository shaft
15 and then if it is not used, how do you seal it. Can you get
16 the integrity of that to the point where it looks like the
17 host rock? The answer is no but you have to do a lot more
18 thinking than just say no.

19 It becomes a question of its ultimate use, its
20 ultimate license ability, whether it is used or not used. The
21 shaft itself to me has a very great potential to compromise a
22 site and I think it is worth all the scrutiny in front rather
23 than rushing to start digging.

24 CHAIRMAN PALLADINO: All right. Any more questions?

25 COMMISSIONER ASSELSTINE: Just one comment. The

1 sense I have is that both our staff and DOE are basically in
2 agreement with that, that there are a lot of sensitive issues
3 about shaft construction, that that really is a very
4 significant aspect of the overall plan for site
5 characterization, the only difference being what you all want
6 to see as a formal recognition that that has to be part of
7 this process and the process has to lead to the identification
8 of concerns and response to those comments before proceeding
9 with the construction of the shaft whereas DOE and the staff
10 are saying well, we will rely on an informal assurance that
11 they won't start on that. Is that basically right?

12 MR. FRISHMAN: Somewhere the plan has to be
13 integrated to the point where you can look at the whole thing
14 and say does one piece of it make sense relative to the
15 other. I am sure that it is intended to do that. It is just
16 that for purposes of time, once again there is a whole sector
17 that is getting the disadvantage of being in a hurry.

18 CHAIRMAN PALLADINO: Fred, do you have any
19 questions?

20 COMMISSIONER BERNTHAL: I don't really have many
21 questions beyond what have already been asked. I have to say
22 that the thought that you want to think very carefully that
23 you are sinking a shaft in the right place, that you are going
24 to gather the maximum amount of information, the maximum
25 amount of significant information, those seem like very valid

1 concerns..

2 It was not so clear to me at the outset of these
3 comments about great caution before you go ahead and sink a
4 shaft and I guess what you are saying is much like before you
5 start building a house, you want to make sure you are building
6 in the right spot.

7 I wasn't quite so sure though how to view this
8 business of sinking an exploratory shaft in the larger picture
9 of activities that generally are carried out for a variety of
10 other purposes. I am really getting back to the comment that
11 you made, Mr. Provost.

12 Is this by its nature a truly extraordinary
13 engineering event in the area in the State of Washington we
14 are talking about here? Has nothing comparable either as a
15 collection of other shaft sinkings for other purposes or
16 perhaps other activities ever been carried out?

17 It sounded like you were arguing that the very
18 sinking of the shaft would somehow disturb the science and
19 the ability to gather data and the nature of the aquifer or
20 whatever else might be. It is almost an uncertainty principle
21 of geology, I guess, that once you start observing you change
22 the picture. I didn't quite understand that.

23 MR. PROVOST: Again, the Hanford is probably the
24 most complex geology and hydrology of any of the sites and
25 everything from mounding the water from defense activities on

1 the site to understanding that whole area, for example, let me
2 give you an example.

3 In the site characterization report basically what
4 was done in the previous one and an awful lot of information
5 was provided there, a lot of comments came in, a lot of
6 suggestions but recently now based on the information they
7 have recently gathered, USDOE recently gathered, at least the
8 contractors like in Texas are looking at possibly moving the
9 shaft location because of stresses underground.

10 There are places where there are high stresses
11 underground and it would be very dangerous to workers and
12 others with less. Of course, we feel that they should be
13 taking the safest spot but yet we have heard nothing about it
14 officially. We know they are working on it and discussing it
15 and apparently we won't hear about it until if it shows either
16 probably in the site characterization plan.

17 This illustrates the difficulty since 1982 they have
18 been looking at this and they have had a drill rig on site for
19 several years so they have been pretty much chosen. They are
20 very comfortable with it but now they are looking at the data
21 and they are considering changing that.

22 It is something that takes time and we want them to
23 take the time to make sure that they pick the right spot. If
24 they choose to go there, they should take that time and have
25 others look at it. So it is not only the hydrology, the

1 geology, as you say it has never been done in our area at all.

2 COMMISSIONER BERNTHAL: In all of the activities
3 that have been carried in that area, there is nothing that
4 would remotely disturb, it sounded like you were saying
5 perhaps irreversibly, alter the system whatever that is with
6 the shaft sinking.

7 MR. PROVOST: Both staffs agree that your hydrologic
8 baseline will change considerably once you drop that and you
9 have to have time to do that. The delays have helped them get
10 a better baseline than you would have had originally but now
11 with this other information on stresses and everything else,
12 it just takes time to get it right.

13 COMMISSIONER BERNTHAL: That is all I have. Thank
14 you.

15 CHAIRMAN PALLADINO: Thank you. Commissioner Zech.

16 COMMISSIONER ZECH: Just a couple of comments.
17 First of all, I appreciate very much your comments here this
18 morning and I would encourage you to continue your close
19 working relationship with our staff and encourage you also to
20 continue your efforts with DOE.

21 I appreciate the fact that the states should clearly
22 be involved and your comments this morning I think is
23 something that we should listen to and take very seriously. I
24 think that our efforts are to conduct our business in the most
25 responsible manner we possibly can recognizing the very

1 serious and important effort this is for our country and we
2 should try to resolve our problems as early on as some of you
3 pointed out as we possibly can and continue working very
4 closely together.

5 Some of the earlier comments regarding making sure
6 that your comments are heard and are carefully reviewed and I
7 believe the term was used where meritorious heeded, certainly
8 I agree with that.

9 I think that is part of what we are all trying to
10 do. Naturally there is going to be differences of judgment as
11 regards to what is meritorious, what is necessary and so forth
12 but those are things that we ought to do in my view anyway as
13 openly and honestly as we possibly can recognizing that people
14 are going to differ.

15 But the exchange with the states and Indian tribes
16 and all involved in this important endeavor, I think is
17 extremely important recognizing that we are probably not going
18 to end up satisfying everyone or perhaps not as many people as
19 we would like, but we simply must do it as responsibly as we
20 can. I think that is what the Commission's effort is and I
21 think that is what DOE is trying to do also.

22 The states also should continue their efforts to be
23 involved and to influence the process to the degree they can
24 and recognizing that eventually the decisions will be made but
25 I appreciate very much your comments and I think the

1 Commission as well as our staff should take them aboard and
2 review them very carefully so I thank you very much for your
3 continuing efforts on the part of your fellow citizens of our
4 country and I think that we are making progress and we should
5 continue to work closely together.

6 CHAIRMAN PALLADINO: Thank you very much gentlemen.
7 We appreciate your being here and we will certainly consider
8 your comments.

9 (Panel excused.)

10 CHAIRMAN PALLADINO: Now I wonder if we might have
11 the representatives of the Yakima Indian Nation and the
12 National Congress of American Indians join us here at the
13 table.

14 Do you plan to go first, Mr. Tousley?

15 MR. TOUSLEY: It makes no difference.

16 CHAIRMAN PALLADINO: Well, you are listed first on
17 my sheet of paper so why don't we go ahead. That way I can
18 keep track of the times.

19 MR. TOUSLEY: Thank you, Mr. Chairman. I am Dean
20 Tousley, an attorney for the Yakima Indian Nation.

21 On behalf of the Yakima Nation, I thank you for
22 granting our request for this meeting. The Yakimas feel that
23 the amendments to 10 CFR Part 60 have profound implications
24 for the Commission's responsibilities in this important
25 national program and for the success of the program itself.

1 We continue to have two primary concerns about this
2 Act, the elimination of the draft site characterization
3 analysis and the Commission refusal to review DOE's site
4 selection process.

5 With with respect to the draft SCA's, the staff
6 argues that interactions between DOE and the states and tribes
7 and the ability of states and tribes to participate in
8 meetings between DCE and NRC among other things eliminates the
9 need for NRC circulation of draft SCA's for public comment.

10 Unfortunately, I have to report that the promise of
11 full participation in these meetings is not being realized.
12 At the outset of a recent BWIP hydrology coordination meeting,
13 DOE announced a policy limiting the participation of state and
14 tribal representations in such meetings to an opportunity to
15 make comments at the end of the meeting.

16 The NRC's chief representative protested this policy
17 but to no avail. One of our technical consultants made
18 extensive comments at the end of the meeting but our people
19 felt generally that they were unable to participate
20 effectively in the meeting because of their exclusion from the
21 give and take of the technical exchange.

22 In light of this and other manifestations of DOE's
23 attitude about state and tribal participation, it is improper
24 for the Commission to use the supposed ability to participate
25 as an excuse for curtailing its own interactions with states

1 and tribes, including the circulation of a draft SCA.

2 In the place of a draft SCA, the staff has added
3 language calling for the director to provide an opportunity
4 for the states and affected indian tribes to present their
5 views on the SCP and their suggestions with respect to NRC
6 comments.

7 It is unclear what kind of opportunity the director
8 is to provide, that is, whether written or oral comments at a
9 meeting. The timing of this opportunity is also unclear yet
10 quite important. If it is scheduled too early, we will not
11 yet be familiar with the SCP and if too late, the ability to
12 influence the SCA will be compromised.

13 Moreover, comments to the Commission staff would be
14 much more meaningful if commentors had a draft or at least an
15 outline of NRC's views to reflect upon. Preferably the
16 Yakima's would like to continue to see a draft SCA with a full
17 opportunity to comment. At a minimum, we urge you to further
18 amend this provision so that the stated opportunity to present
19 tribal and state views is held a reasonable time following the
20 staff's circulation of at least an annotated outline of its
21 SCA.

22 With respect to Commission review of the DOE site
23 selection process, this is even more important to the Yakima
24 Nation. The NWPA clearly provides that NRC authority to
25 promulgate technical requirements and criteria is pursuant to

1 other provisions of law such as the Atomic Energy Act and the
2 Energy Reorganization Act. Thus, Congress did not intend in
3 the NWPA to prescribe the scope of NRC review of DOE's
4 repository program.

5 Because of its crucial bearing on the adequacy of a
6 repository, the siting process goes to the essence of NRC's
7 mandated public health and safety and environmental protection
8 responsibilities under the relevant statutes.

9 For NRC to decline to fully review that process
10 would be a basic abdication of those responsibilities.

11 Moreover, the Commission's responsibilities under
12 NEPA require it to engage in evaluation of alternatives as a
13 part of its licensing process. Although NWPA section 114(f)
14 prescribes the choices from which the NEPA alternatives must
15 be selected, it does not prescribe that those alternatives
16 are automatically suitable for NEPA purposes.

17 It is the Commission's responsibility to analyze the
18 alternatives and to decide whether they are suitable as the
19 agency ultimately responsible for NEPA compliance. NEPA and
20 the NWPA certainly are not satisfied by DOE's approach to the
21 preliminary determination of suitability which is now to be
22 made prior to characterization when it is the merest of
23 unsubstantiated allegations.

24 Finally, the language of the Act itself provides
25 that NRC need not curtail its review of the site selection

1 process. Section 114(f) states that and this is a quote,
2 "Nothing in this Act shall be construed to amend or otherwise
3 detract from the licensing requirements of the nuclear
4 Regulatory commission as established in title II of the Energy
5 Reorganization Act of 1974."

6 Congress did not intend its failure to explicitly
7 incorporate all of the details of Part 60 in the Act to be
8 construed as implicit rejections of them. Where Congress was
9 silent on the subject already addressed by Part 60, Congress
10 intended that NRC licensing and regulatory requirements should
11 not be affected.

12 One of the regulatory requirements in place when
13 Congress passed the NWPA was the requirement for NRC review of
14 the site selection process. Now it is the Commission's
15 conclusion that the NWPA by omission somehow proscribes its
16 review of DOE site selection process is incorrect.

17 As discussed above, the Commission responsibilities
18 under its organic statutes and NEPA require such a review and
19 the NWPA is entirely consistent with those requirements.

20 A member of your staff told me in confidence that
21 the staff was very disappointed in the way DOE weighed all the
22 post-closure guidelines equally for all the sites but that the
23 staff felt constrained against forcefully stating this
24 objection because of the Commission's position.

25 DOE and the country have been done a great

1 disservice by this unnecessary reluctance to state valid
2 technical objections to the most critical aspect of the EA's,
3 an aspect which the Commission has compelling legal and policy
4 reasons to comment upon.

5 In conclusion, it is quite possible for the federal
6 government's efforts to dispose of high-level radioactive
7 wastes to fail yet again in spite of the NWPA. If that
8 happens, it will almost certainly be because of the
9 inadequacies of DOE's site selection process and the lack of
10 effective regulation of that process by NRC.

11 We urge you to help prevent another waste program
12 failure by retaining your proper active role in reviewing the
13 repository site selection process and by retaining the most
14 extensive possible interactions with states and affected
15 Indian tribes.

16 The Commission staff, most notably the Policy and
17 Program Control Branch, is doing a very commendable job at
18 those interactions, much better than DOE. If the Commission
19 declines to exercise its authority where it is needed,
20 however, the Commission's credibility will suffer just as
21 DOE's has and the waste program will be seriously threatened.
22 In the absence of credibility somewhere in the government,
23 this program cannot succeed.

24 Thank you very much.

25 CHAIRMAN PALLADINO: Thank you. We will next hear

1 from Suzan Harjo. You may proceed.

2 MS. HARJO: Thank you. I am Susan Harjo and I am
3 Cheyenne and Creek and I am a citizen of the Cheyenne and
4 Arapaho tribes in the State of Oklahoma. I am also the
5 director of the National Congress of American Indians and you
6 have our prepared statement before you, I understand, and we
7 are also submitting a prepared statement on behalf of the Nez
8 Perce tribe in Idaho for the record and I believe you have
9 both statements there.

10 We wish to join the previous witnesses, both
11 Mr. Tousley and the state witnesses, in urging that public
12 commenting on the draft site characterization analysis be
13 provided for in the final rule. Such commenting we agree with
14 the previous witnesses is not precluded by the Nuclear Waste
15 Policy Act and is permissible under the general NRC authority.

16 With specific regard to Indian nations, the NRC as
17 an instrumentality of the trustee, United States, is a partner
18 in the government-wide fiduciary responsibility to Indian
19 nations and that responsibility includes taking actions
20 regarding the beneficiary Indian tribes that would actually
21 benefit the Indian tribes.

22 All too often the actions of many U.S. agencies, the
23 old Indian agents up through modern times, have not benefited
24 the beneficiary Indian nations and that is the agreement that
25 has been made. That is the law of this land that there is

1 this trust relationship, there is a fiduciary obligation. NRC
2 shares in that.

3 Our requests here are so modest as to be really the
4 bare minimum I would think that NRC could do to carry out its
5 historic responsibility as part of the United States
6 government.

7 We are only asking for three things, that there be
8 allowed a comment period on the SCA draft, that you not change
9 the rule to limit Indian tribes and Indian organizations at
10 this point by saying that those designations should be changed
11 to affected Indian tribes and we have also included a symbolic
12 request that if the Commission staff is going to incorrectly
13 capitalize the "s" in state then it should capitalize the "t"
14 incorrectly in tribe.

15 (Laughter.)

16 MS. HARJO: It is just the sort of perceptual thing
17 that does make a difference in federal agencies because it
18 looks like great big states, little bitty tribes; great big
19 responsibility to the states and diminutive responsibility to
20 the tribes. I think we can do that and that is a real easy
21 one.

22 CHAIRMAN PALLADINO: We will do better.

23 MS HARJO: Mr. Tousley has expressed his concern
24 about the Department of Energy and I would like to make our
25 point about not changing the term to affected Indian tribe at

1 this point and discuss a bit what is happening in the
2 Department of the Interior where the Secretary of the Interior
3 has responsibility for determining affected tribe status.

4 There is no one in the whole of the Bureau of Indian
5 Affairs who is even assigned to this matter. You can't find
6 an individual who has responsibility, day-to-day
7 responsibility, even if it is only one day out of 30 for this
8 matter.

9 COMMISSIONER BERNTHAL: Why not?

10 MS. HARJO: Why not is an excellent question. There
11 was a very good fellow who was there handling a number of
12 issues that he wasn't being permitted to handle including
13 hazardous waste sites in the trust responsibility area, an
14 office of the Bureau of Indian Affairs, and he used to attend
15 meetings at the Department of Energy I know and was very up on
16 the issue. He has been shipped somewhere to the west of
17 D.C. and we don't know where. I don't mean banished. I
18 think he can be found but he is not a person now in charge and
19 there is a void

20 COMMISSIONER BERNTHAL: I think they let him out.

21 (Laughter.)

22 MS. HARJO: They permitted him to escape. Still, an
23 issue this important would it seem need at least one person at
24 one desk where the mail stops to be accountable in the agency
25 that is designated as determining affected tribe status.

1 One of the problems that has been created, the Coeur
2 d'Alene tribe, I understand you have received a separate
3 communication from them about having been denied affected
4 tribe status because they do not fit into the strict language
5 of the Act which defines affected Indian tribe to include one,
6 any tribe on whose reservation a nuclear waste site is
7 proposed or two, any tribe whose possessor or usage rights to
8 lands outside the reservation as defined by Congressionally
9 ratified treaties may be effected by such a site.

10 Now the Coeur d'Alene's do not have specific
11 Congressionally ratified treaties but their reservation is
12 designated as a reservation and they enjoy all the attributes
13 under law of Indian country. They are treated for all
14 practical purposes as a reservation. It is just that they
15 were established under a different mechanism, under an
16 executive order.

17 Our history spans, of course, the entire history of
18 the United States so we go through these many policy and
19 writing acts of Congress and we know that sometimes it is
20 really sloppy and here we have the Coeur d'Alene tribe which
21 is fully federally recognized for all other purposes being
22 excluded because of the treaty language.

23 On the other hand, we have the Passamaquoddy Tribe
24 and Penobscot Nation in the State of Maine being included in
25 for NWPA purposes by DOE even though the legislative history

1 is clear that the fad at the time in 1980 was to say in that
2 particular committee, the House Interior Committee, they
3 didn't want Indian territory referred to as reservations for
4 that period of time.

5 So three acts that I worked on were not called
6 reservations and so they are included but here we have all
7 references to reservations. So we have inappropriate
8 inclusions, unjust exclusions, sloppiness in the writing,
9 sloppiness and even perhaps inattention in the Department of
10 the Interior as to these designations.

11 Leaving the terms as they are, Indian tribe and
12 tribal organization is not going to create a real problem for
13 anyone in NRC or DOE and would allow for some of these
14 problems that I have mentioned to be sorted out and would not
15 close your option to changing this rule to specifically
16 affected Indian tribe as these things get sorted out.

17 Unless I am missing something really major, it seems
18 like this, too, is a very easy one.

19 CHAIRMAN PALLADINO: I am trying to understand --

20 MS. HARJO: I am, too.

21 CHAIRMAN PALLADINO: I am not quite sure that I got
22 what you would like us to do.

23 MS. HARJO: The proposal is to change at this point
24 the term, "Indian tribe" and "Indian tribal organization" to
25 "affected Indian tribe" or "affected Indian tribes." At this

1 point with so much confusion about who is an affected Indian
2 tribe and who is not and so much of that being sorted out now
3 and the tribes being so far behind the states in this process
4 and rushing to catch up, it is our feeling that if you change
5 to affected Indian tribe you would be unjustly excluding some
6 tribes from this process.

7 CHAIRMAN PALLADINO: That is where I am having
8 difficulty. I thought you were recommending that we change to
9 it.

10 MS. HARJO: No.

11 COMMISSIONER ASSELSTINE: I think you are saying
12 stick with the existing definitions in the regulations.

13 MS. HARJO: Right, for the moment.

14 COMMISSIONER ASSELSTINE: For the moment, until some
15 of these questions get sorted out.

16 MS. HARJO: That is right, and somewhere down the
17 road obviously it would be changed but at this point, that
18 might preclude some of the really valuable consultative
19 ability of these tribes and you might just be closing your own
20 doors to dealing with the tribes.

21 CHAIRMAN PALLADINO: All right. Did you say you had
22 one other point?

23 MS. HARJO: I probably did, but I don't. Thank you.

24 (Laughter.)

25 CHAIRMAN PALLADINO: Thank you. I guess we are open

1 for questions. One comment I might make and this applies to
2 all of us. We have a balance to make in trying to meet the
3 schedule that the Congress set forth and making sure that
4 everybody is properly heard and that is a balance we keep on
5 trying to achieve. So while we have a tendency to lean toward
6 giving everybody their say, I think there is a point at which
7 we have to make a decision that we ought to close ranks and
8 get on with the job.

9 I think one of the other areas that we are faced
10 with is the judgment that is needed in deciding what comment
11 should be reflected in the change in the regulation and which
12 ones don't and there is a feeling, I gather, and maybe it
13 doesn't come from your presentation as much as it did from the
14 states' presentations, that if we don't follow the suggested
15 comment, that we haven't given it attention.

16 So I guess I am saying, yes, we need to give
17 consideration to all the comments and we should allow time
18 for the comments but it isn't possible to agree to bring all
19 the comments in.

20 Let me see if others have comments? Commissioner
21 Roberts?

22 COMMISSIONER ROBERTS: No.

23 CHAIRMAN PALLADINO: Jim, do you have anything?

24 COMMISSIONER ASSELSTINE: One comment and one
25 question.

1 I would say the comment is you are going to need to
2 bear with us a bit. Dealing with Indian tribes is not
3 something this agency has had a lot of experience and practice
4 with and I think it is a learning experience for us as well as
5 for you all in this area.

6 I would also say that people who worked on the
7 legislation on the Hill also were people who in some instances
8 were not involved in detail in legislation affecting the
9 federal government's special relationship with the Indian
10 tribes and there may well be some things that we need to
11 surface, whether we do it or the Department of Energy goes it,
12 or the Congress on its own initiative takes a look at some of
13 these things like the definitions of which tribes were
14 included and weren't and was it a conscious decision that that
15 was the right balance to strike.

16 I think your comments are well taken on those kinds
17 of questions and they are things that we probably ought to
18 look at and the Department of Energy ought to look at as well
19 as the Department of Interior.

20 I agree with Fred that his question earlier sure
21 seems to make sense to have somebody at the Department of the
22 Interior that is following this and helping the tribes with
23 their special interest and concern in this area.

24 The question I had basically goes to your points,
25 Dean, on reviewing the DOE site selection process. If I

1 understood you right, your point was that basically the
2 Commission has to do that at some point in this process to
3 carry out our NEPA responsibilities. We are going to have to
4 look at the alternate sites that were considered in the
5 process that was used to identify and select the alternatives
6 that were considered even though the number may be fixed.

7 MR. TOUSLEY: That's right.

8 COMMISSIONER ASSELSTINE: If that is the case, are
9 you basically saying that the earlier the agency focuses on
10 that problem the better. If there are difficulties in the
11 site selection process, it is a lot better to know about those
12 in the early informal stage than later on in the more formal
13 hearing stage and that the site characterization plan
14 logically presents a useful time at which to make that kind of
15 a review. Is that basically the sense of what you were
16 saying?

17 MR. TOUSLEY: That's right. It is not just more
18 useful early. It is practically use less late. There is
19 really very little you can do if you get a license application
20 for a repository and the alternatives aren't suitable. You
21 are really in a bad situation at that point. Now is the time
22 when you can influence that decision.

23 COMMISSIONER ASSELSTINE: So on the delay side, we
24 may be a lot better off in terms of avoiding delay --

25 MR. TOUSLEY. Exactly.

1 COMMISSIONER ASSELSTINE: -- and we should focus on
2 that issue and get it resolved as much as we can early on in
3 the process.

4 MR. TOUSLEY: Exactly. I would just like to add in
5 response to the Chairman's comment a minute ago, I think the
6 history of federal efforts to dispose of nuclear waste
7 indicates that there is no place where it is better to take a
8 little bit of extra time to hear what everybody has to say
9 than in this program.

10 Past efforts have failed both because of the lack
11 of technical credibility and because of the lack of public
12 confidence and taking that time is what is going to help
13 create that confidence.

14 CHAIRMAN PALLADINO. I agree with you on that. I
15 think that has been the reason for failure and I hope it
16 isn't the reason for failure or I hope there is no failure in
17 the future and that we go forward. We all have to face where
18 and how do we close ranks.

19 COMMISSIONER ASSELSTINE: That is all I had, Joe.

20 CHAIRMAN PALLADINO: All right. Fred, do you have a
21 comment?

22 COMMISSIONER BERNTHAL: No.

23 CHAIRMAN PALLADINO. Lando.

24 COMMISSIONER ZECH: No. I would just like to thank
25 the panel members.

1 CHAIRMAN PALLADINO: Thank you. We appreciate your
2 giving us your comments and as I said before, we will give
3 them careful consideration.

4 (Panel excused.)

5 CHAIRMAN PALLADINO: I am going to declare a ten
6 minute recess at this point. Please be prompt in returning so
7 we can get on with the other speakers.

8 (Whereupon, a short recess was taken.)

9 CHAIRMAN PALLADINO: Ladies and gentlemen, I wonder
10 if we could begin to take our seats. I suggest we get
11 started. Commissioner Zech will be on his way here shortly.
12 This is a continuation of our discussion on Part 60 and we now
13 are going to have presentations by Mr. Berrick and
14 Mr. McGranery representing public interest groups.
15 Mr. Berrick, do you want to start?

16 MR. BERRICK: Thank you, Mr. Chairman. I am David
17 Berrick, Director of the Nuclear Waste and Safety Project of
18 the Environmental Policy Institute. I am here this morning
19 not only on behalf of my own organization but also on behalf
20 of the Natural Resources Defense Council. Mr. Dan Reicher of
21 the Council regrets that he cannot be here this morning. He
22 was called to Ohio to consult with state officials about some
23 of the more recent problems at the Fernald DOE Feed Materials
24 Facility

25 I want to thank you on behalf of both of our

1 organizations for the opportunity to testify this morning.
2 Let me begin briefly by stating that I think it is helpful
3 that the SECY paper in the package before the Commission was
4 distributed to participants this morning. It gives us an
5 idea of the kinds of issues that the Commission is focussing
6 in on and allows us to make more meaningful comments.

7 I think there are a number of questions raised by
8 portions of the package that are more detailed than we should
9 get into at the moment and let me just mention a couple of
10 examples.

11 On page nine of the proposed rule the package states
12 that Part 60 is exempt from NEPA under Section 121 of the
13 Nuclear Waste Policy Act. I think you will find that that
14 section only exempts the promulgation of technical
15 requirements specifically required by section 121 and doesn't
16 extent to all of Part 60 rulemakings including this one.

17 Another example is the statement in Enclosure B,
18 Comment two it is stated that the EPA assurance requirements
19 are not relevant to repositories licensed by the Commission.
20 I think you will find in going through the EPA rulemaking
21 package a presumption that NRC will in fact insure that the
22 objectives of all assurance requirements promulgated in their
23 final high-level waste regulations be accomplished by
24 amendment to 10 CFR Part 60 making those assurance
25 requirements very relevant.

1 With the expectation that we will be allowed to
2 submit a more detailed statement for the record, let me get to
3 some more general issues before the Commission today.

4 In particular, the central issue here really is the
5 degree to which the NRC will be involved in the repository
6 site selection process. I don't think you have heard very
7 much today that raises very many questions about the overall
8 licensing aspects of the Commission's rule.

9 But what we are really concerned with here this
10 morning is the early stages of the process, the site selection
11 aspects of the DOE program.

12 In some regard the shift of most concern to me and
13 to our organizations is this shift from a more formal
14 structured relationship between NRC and DOE as articulated in
15 the current version of Part 60 to a more informal ad hoc
16 relationship proposed in the rule.

17 In doing so, the NRC argues that Congress
18 deliberately excluded from the Nuclear Waste Policy Act the
19 site selection review role now contained in Part 60.

20 Perhaps a more accurate reading of the Nuclear Waste
21 Policy Act is that the statute is silent on some specific
22 issues such as the draft site characterization assessment.
23 Congress could have directed the NRC to conform Part 60 of the
24 Nuclear Waste Policy Act as it customarily does in legislation
25 and did not do so and as Mr. Tousley pointed out earlier this

1 morning Section 114 now specifically states that the Waste
2 Policy Act is not intended to detract or to limit other
3 authorities that the Nuclear Regulatory Commission has.

4 "To some extent we believe that NRC has over read, if
5 I may use that word, the Waste Policy Act in attempting to
6 fashion a rationale for the changes it is making in this
7 proposed rule and that has been a long standing complaint of
8 ours.

9 In general, the NRC has repeatedly attempted to
10 assure us that it is not abandoning its role in the
11 pre-licensing stage, the site selection stage. If I may quote
12 from the draft preamble, "In regard to the generalized concern
13 that NRC should be involved in the site selection process, it
14 is noted that the NRC has played an important role in this
15 process and will continue to do so."

16 Our concern inadequately conveyed I think in the
17 SECY paper is that while we are gratified by these assurances,
18 we are not satisfied by the entirely ad hoc nature of this new
19 relationship.

20 Similarly we recognize that the current proposal
21 revises references to the Procedural Agreement, but the fact
22 remains that the Procedural Agreement and other ad hoc
23 protocols will now govern much of the NRC's new role. Such
24 arrangements do not provide the assurances that the NRC's site
25 selection participation now articulated clearly in Part 60

1 will be fully and identifiably accountable.

2 The NRC staff has to a substantial extent attempted
3 to gloss over these fundamental concerns preferring to direct
4 the Commission's attention to more discrete tangential
5 alterations to Part 60.

6 For example, the NRC staff has construed our
7 insistence that the NRC explicitly specify NRC's role in Part
8 60 narrower issues such as what is in the site
9 characterization plan and whether we have this simultaneous
10 promulgation of Part 51 and Part 60.

11 The point I want to make here is that it is not the
12 form of the review. We are not raising the question as to
13 whether or not the site characterization plan or the SCA must
14 address all of the aspects of the site review.

15 If those aspects are now encompassed in the
16 Environmental Assessment as the staff contends, fine. That
17 does not negate the necessity in Part 60 for then spelling out
18 this new rule. One of the concerns has been that we are
19 getting into an area where specific functions for early site
20 review are going to be carried out that just simply are not
21 being codified.

22 It is not really a question of is it in the SCP. We
23 don't necessarily care if it is in the SCP as long as within
24 the rule itself, it is clear how these functions are going to
25 be carried out. It should be in the EA and that should be

1 handled as part of the Commission's comments on the EA and
2 let's put in a provision in Part 60 that spells out that that
3 is how it will be handled and outline the scope of how the NRC
4 will comment on the EA's.

5 CHAIRMAN PALLADINO: Do you think the old rule was
6 better in this regard?

7 MR. BERRICK: The old rule established principle and
8 a process for addressing this early site review. If that
9 needs to be changed to bring us into strict technical
10 conformance with the Waste Policy Act, fine, but we think that
11 the principle and the necessity for that early site review
12 needs to be retained.

13 If we are moving it around to a different specific
14 DOE function, that is understandable but that does not mean
15 that we should drop it from the codified regulations. We
16 think it is important that it be retained in the codified
17 regulations.

18 COMMISSIONER BERNTHAL: Let me be very candid and
19 straight forward about what the perception is on at least my
20 part for what Congress had in mind and meant to do and whether
21 or not that was a clear understanding at the time, it seems to
22 me that that is the clear understanding today on the part of
23 many members of the Congress or at least, I think, we have to
24 concede that there is this broad perception that the NRC
25 should confine its role to the role as reviewer and commenter

1 where we said review and comment and concurrence where we said
2 concurrence and that we do not intend and did not intend the
3 NRC to become the bottleneck in this process.

4 I am speaking very plainly. I think that is the
5 atmosphere that exists today. I am not saying it is right or
6 wrong or making a judgment. I am telling you that that is the
7 perception that one gathers sitting on this side of the table.

8 Why shouldn't we be responsive to that? There is
9 the very clear message, it seems to me that runs through this
10 when one goes to the Hill and hearings and generally what is
11 being said. Again without being judgmental or saying anybody
12 is right or wrong in the assessment of our role and the
13 perceptions that are being transmitted our role, how do you
14 respond to that?

15 MR. BERRICK: I guess I would respect by saying I
16 think at this juncture, the staff is recommending changes that
17 over react to that concern about being the bottleneck.

18 For example, dropping this draft site
19 characterization assessment. I think the staff and perhaps
20 the Commission itself believes that it would be a lightening
21 rod, that that type of process would be a bottleneck. We
22 don't see it that way in the sense that under the current
23 requirement, let's say if the Commission were to insist that
24 DOE wait, it is not even an insistence by the NRC that DOE
25 actually respond

1 I guess it is just a question of degree. I don't
2 think people are saying the NRC ought to start licensing
3 early. That was a presumption that the Commission itself
4 sought to avoid when it originally issued the current version
5 of Part 60 that you would not get into a limited work
6 authorization or early site review process, that the
7 Commission would review in some detail what the Department of
8 Energy's activities were going to be and that would be done on
9 this sort of formal basis with identifiable documents and
10 identifiable comment process.

11 It was not that the Commission was going to begin a
12 licensing proceeding and the licensing proceeding would not
13 start until DOE actually walked in the door with a licensing
14 document. I don't think we are suggesting that that needs to
15 be changed.

16 I think what we are suggesting is that the original
17 formulation of Part 60 which required specific issues to be
18 raised, such as the site characterization activities, to be
19 raised to a specific identifiable level requiring the
20 Commission at that time regardless of what informal
21 communications is going on, regardless of the schedule and
22 internal program that DOE was following, that there would be
23 an identifiable point at which the Commission would satisfy
24 itself with the assistance of outside comment that all the
25 issues were addressed before the step in the process would

1 proceed

2 I don't think we are talking about additional
3 bottlenecks. I think we are trying to preserve the informal
4 nature of NRC's role. We are not talking about getting into a
5 licensing process but I think there is a lot of scope short of
6 getting into the licensing process in terms of assuring that
7 the Commission's role is an identifiable one, not just for
8 this Commission but for future Commissions.

9 COMMISSIONER BERNTHAL: I appreciate your comment.
10 I am sorry to interrupt.

11 CHAIRMAN PALLADINO: That is all right. I did, too,
12 so I don't blame you. I blame myself. But nevertheless, I
13 think it is important when we get a point we want to discuss,
14 we do it. Did you have more?

15 MR. BERRICK: I had a few more comments if I may.

16 CHAIRMAN PALLADINO: All right.

17 MR. BERRICK: Just carrying on this point, to a
18 large extent the staff has insisted in this rulemaking of the
19 necessity for these informal relationships for a long and very
20 deeply involved relationship with the DOE and the NRC to make
21 sure these issues are aired.

22 I don't think there is a disagreement on our part or
23 on the staff's part about the importance of an involvement in
24 these early stages. I think the importance is whether or not
25 there are identifiable decision points or points in the

1 process where the informal process comes to some kind of an
2 identifiable review point

3 We would argue that the informal process so far has
4 been hampered by the lack of clear codified procedural To
5 some extent if you look at the environmental assessment
6 comments which is sort of the most recent embodiment of the
7 current Part 60 site review process, the NRC deliberately
8 restricted the scope of its comments on the EA's and therefore
9 its review of the DOE site selection process.

10 It did not get into some of the site ranking issues
11 and the comparative merits of one site versus the another, so
12 to some extent the Commission is limiting, in the absence of a
13 more clearly defined policy and I would say a policy at odds
14 with current regulations, the scope of its review.

15 That is at the heart of our concern about the sort
16 of the ad hoc nature of the Commission review of this area.
17 We think that really ought to be nailed down in Part 60.

18 Let me just make one final statement about the
19 draft site characterization assessment. One of the points I
20 really would like to impress upon you and it was not entirely
21 brought up this morning in your previous conversation is that
22 I think that the staff to some extent has sort of overly
23 embellished the site characterization assessment and this
24 ongoing process that is supposed to ensure from that.

25 The site characterization assessment and plan is not

1 really a living document. We are not really going to have
2 the opportunity to come back. I see in my personal view the
3 site characterization assessment as really being a definitive
4 statement by the NRC on the information necessary to obtain a
5 license and I think that it will restrict greatly the number of
6 requests, considerations, interventions, and the many challenges
7 on what information is necessary.
8
9 At DOE's time table for conducting
10 site characterization work, you see that in practice it
11 can't be otherwise. DOE now for the salt sites is only going
12 to have eight months or is only scheduling eight months of in
13 situ testing.

14 We are not really talking about a multi-year process
15 of evolution, re-examination, re-visiting these kinds of
16 issues. It is really going to be as somebody said earlier a
17 one shot deal and I think that the analysis is also going to
18 have broader legal implications for the kinds of questions
19 that can be raised without the adequacy of data.

20 People, I think, will come back and say, "The NRC
21 signed off on a site characterization analysis. This is what
22 they told us was required to get the license." You can't come
23 back in and say that it is inadequate and the NRC staff, I
24 believe, throughout this process will have trouble coming back
25 and raising a new issue or trying to get existing issues
revisited having the Commission once articulated, "This is

1 what the program was supposed to have done."

2 COMMISSIONER BERNTHAL. As a scientist I share your
3 chagrin on hearing numbers like that and all I can say is that
4 it seems to be the nature of the way we do business not only
5 in this agency but in the government generally that process
6 now takes precedence over substance and that is only
7 exemplified by comments like you made. It is going to be
8 eight months really to do the real science and the rest of the
9 time Lord knows what we will be doing. That troubles me as
10 well.

11 CHAIRMAN PALLADINO: Does that conclude your
12 comments?

13 MR. BERRICK: Yes. I would like the opportunity to
14 submit a more detailed statement if that would be agreeable.

15 CHAIRMAN PALLADINO: When might we get that?

16 MR. BERRICK: If you give me a week perhaps, I don't
17 know but there may be other members who are participating
18 today who would want to submit additional comments.

19 CHAIRMAN PALLADINO: All right. I will bring that
20 up later. I think we could certainly afford something like a
21 week. Thank you, Mr. Berrick. Mr. McGranery, please proceed.

22 MR. McGRANERY: Mr. Chairman and Commissioners, my
23 name is Jim McGranery. I am here today representing
24 Scientists and Engineers for Secure Energy. Today's
25 presentation was scheduled to be delivered by SE-2's Executive

1 Director, Miro Todorovich. Since he is unable to be here, I
2 wish to ask your permission to speak in his stead and present
3 a summary of SE-2's position. I would also appreciate your
4 consent for the written text of our remarks to be entered into
5 the record at this hearing.

6 CHAIRMAN PALLADINO: All right.

7 MR. McURANEY: There are two principles which form
8 the basis for our technical and legal comments.

9 First, in the pre-construction permit application
10 stage which I emphasize here, Congress gave primary
11 responsibility to the Department of Energy and limited the NRC
12 participation to review and comment except in two particular
13 cases where NRC concurrence is required.

14 This is a much different role than the NRC foresaw
15 for itself in the original version of 10 CFR Part 60.

16 Therefore, the adjustment to this diminished status
17 is understandably difficult. We compliment the NRC on its
18 efforts to pare the expansive role foreseen down to the role
19 actually assigned by Congress.

20 However, as we explain below, further restraint is
21 appropriate if not legally required.

22 The second principle which we have in mind is that
23 Congress legislated as the primary purpose of the Act a
24 schedule for the siting, construction and operation of
25 repositories which Congress determined was adequate to provide

1 reasonable assurance of adequate health, safety and
2 environmental protection to the public.

3 We suggest that the Commission is legally obligated
4 to restrain any tendency to an expansive interpretation of its
5 role in the site characterization process when such an
6 interpretation may tend to violate the
7 Congressionally-mandated schedule and especially now when we
8 are already behind that schedule.

9 Our principal area of concern is in proposed 10 CFR
10 Part 60.18 which defines the NRC's implementation of its
11 responsibility to review and comment on the DOE SCP. Congress
12 provided for NRC review and comment on the SCP without
13 indicating any public participation in that effort while
14 explicitly providing for public comments to the DOE on the
15 SCP.

16 Thus, the Commission has no responsibility to seek
17 public participation in the development of its comments and if
18 it decides it has the authority due to the lack of an explicit
19 prohibition, it should carefully limit that participation to
20 avoid further delay in the legislated schedule.

21 For that reason, we recommend that the invitation
22 for comment on the SCP in proposed 60.18(b) require comments
23 within 45 days after the close of the relevant DOE public
24 hearings.

25 This would allow for public participation concurrent

1 with the normal NRC review schedule. No time limit is
2 currently in the regulations. In this connection, we also
3 note that there is language in 60.18(c) that should be
4 transferred to subparagraph (b) so that the same invitation
5 goes out to the whole world at the same time.

6 Section 60.18(f) is a vestige of the pre-Act concept
7 of draft and final SCA's and should probably be deleted.
8 Interested persons have never before needed any regulatory
9 authority for writing to the NRC at any time on any subject
10 and certainly would not now suddenly feel constrained.

11 On the other hand, such a formal invitation may be
12 argued to confer some formal but undefined status on such post
13 hoc comments.

14 In short, we can see no good resulting from this
15 additional, formal procedure but we can imagine complaints
16 charging lack of good faith because the NRC fails to respond
17 to a real or spurious objection which is now reiterated for a
18 third or fourth or fifth time.

19 In this connection, we have reference to all of the
20 previous procedural opportunities which the various interested
21 parties have to make comments to the NRC and DOE.

22 In the last sentence of proposed section 60.18(g),
23 DOE is quote "required," closed quote, to address any topic,
24 quote, "Requested of the Director" closed quote, in the
25 semi-annual reports. There is simply no statutory authority

1 for the NRC to impose such a requirement at this stage
2 although DOE may and we are confident would cooperate with the
3 NRC in providing information on germane issues.

4 We also note that in the provision stating that the
5 SCP shall contain any other information required by the
6 Commission, the word "required" should not read as a license
7 for intellectual curiosity, but rather in the sense of "needed
8 for its responsibilities related to site characterization
9 under the Act.

10 In similar fashion, proposed section 60.18(h) is not
11 authorized by the Act but is the subject of the DOE/NRC
12 Procedural Agreement. For this reason, it may not be
13 appropriate to NRC regulations especially if the Procedural
14 Agreement is not cited as authority.

15 Probably the single most unnecessary burdensome and
16 perilous provisions in the proposed rules are in the last
17 sentence of proposed section 60.18(i) and the first sentence
18 of proposed section 60.18(j).

19 These provisions require the invitation of State,
20 Tribe and public comment on all comments which the Director
21 makes to DOE on site characterization. Such provisions are
22 administratively impossible to comply with unless we were to
23 require at least memoranda if not taped recordings of all
24 conversations between the DOE and NRC staffs at all levels.

25 Then the Federal Register would be overwhelmed with

1 notices of invitations for comment. Moreover, we believe
2 these provisions as well as others go well beyond if not
3 violate the DOE/NRC Procedural Agreement

4 We believe that the above-suggested revisions would
5 not hamper effective and more than adequate participation by
6 interested persons in the spirit of the Act, but would avoid a
7 procedural morass, avoid further frustration of the Act's
8 schedule and be more in keeping with the Commission's limited
9 role in the site characterization process.

10 Aside from some minor legal suggestions attached as
11 an addendum, we have only one further legal comment. We do
12 not believe that the final rule, its background, comments or
13 statement of consideration should express any opinion on DOE's
14 authority to sink a shaft before receiving and considering NRC
15 comments on the SCP.

16 It is DOE's responsibility, not NRC's, to interpret
17 the DOE statutory authority and defend that interpretation
18 during the site characterization process. On the other hand,
19 the NRC observation that it may be prudent for DOE to await
20 such comments to avoid difficulties in subsequent licensing
21 seems totally appropriate and helpful.

22 That concludes our oral presentation. I would be
23 happy to answer any questions or try to answer any questions
24 which the Commission may have.

25 CHAIRMAN PALLADINO: Thank you. You make a number

1 of interesting points that are different from some of those
2 that we heard up to the moment. I am trying to phrase the
3 question and maybe I will phrase it first for Mr. Berrick and
4 then I will come back to you, Mr. McGranery

5 If I understood your comments Mr. Berrick, we
6 should use the current Part 60 procedures unless the Act
7 really requires that we make a change. Is that a fair summary
8 of your statement?

9 MR. BERRICK I think that is correct. I would take
10 that one step further which is to say that we believe that
11 Part 60 as currently promulgated established the correct role
12 for the Commission in terms of the scope of the issues it
13 reviews at the site selection stage.

14 If strict conformance to the Waste Policy Act
15 requires that some of those activities that previously were
16 going to be part of the review of the site characterization
17 plan now become part of the review of some other statutorily
18 required document such as the Environmental Assessment, that
19 is okay as long as the basic scope of the review is retained.

20 Part of our basic concern is that when we go back
21 and see, for example, the scope of the Commission's comments
22 on the EA's which the staff in the proposed rule, the preamble
23 to the proposed rule of these changes, stated is now the
24 appropriate level to address some of these issues, we see the
25 scope being limited from what is now in the current

1 regulations

2 So the basic thrust is the principles, the scope of
3 the review articulated in the original rule is the appropriate
4 scope and the appropriate types of issues to be reviewed.
5 Those should be retained. If that means some fine tuning in
6 the process, that is certainly appropriate.

7 CHAIRMAN PALLADINO: Now Mr. McGranery, on the other
8 hand, you indicated that the Act does very severely restrict
9 and limit NRC's role and that keeping some of these
10 opportunities for additional comments in there would be
11 contrary to the Act. Is that a fair representation?

12 MR. McGRANERY: I think that it would not only be
13 contrary to the Act, but would exacerbate a problem that
14 Commissioner Bernthal and you have already addressed, namely
15 that this seems to be turning into a lawyer's game as opposed
16 to a scientific and engineering exercise.

17 We are getting a lot of formalism, a lot of
18 procedures, some of which as I point out I think are
19 impossible to actually comply with whether or not
20 legislatively authorized and we are ignoring the main focus,
21 namely, the development and construction and operation of the
22 repositories.

23 This is the same game which was played with the
24 Commission back in the early days of table S-3 and the
25 Commission stuck to its guns there as to limitations on the

1 procedural rights according to the statute and it took five
2 years but the Commission won in the Supreme Court.

3 These procedural tangles here that are being
4 developed is really a matter of giving up everything that was
5 won and frustrating the smooth operation of the Agency

6 CHAIRMAN PALLADINO: I understand your point. It is
7 trying to achieve that ripe balance that gives us the
8 problem. Did you want to make a comment?

9 MR. BERRICK: I just wanted to respond to that in
10 the sense that I think to some extent we are over exaggerating
11 the issue here on things like the draft site characterization
12 and we are basically talking about whether or not we are going
13 to send the manuscript out for peer review before we publish
14 it. I guess I am not sure to echo things that Mr. Provost
15 said earlier, I am not sure that what we are not striving for
16 here is quality in the process and to make sure that all of
17 the issues that need to be covered are covered before DOE goes
18 ahead with something as critical as sinking the site
19 characterization shaft.

20 I think the Commission from the earliest iterations
21 of Part 60 identifies that activity as being very critical. I
22 don't think to follow on my earlier conversation with
23 Commissioner Bernthal that we are trying to create new
24 issues. We are fighting about the same decision points,
25 whether or not prior to sinking the shaft the Commission bring

1 to a head its views of whether or not DOE is following a
2 program and going to sink a shaft according to certain kinds
3 of parameters that will insure one, that information necessary
4 for licensing can and will be obtained, and two, the integrity
5 of the site is preserved.

6 That was fundamental to the original iterations of
7 Part 60. I think it is just a question of how much of that we
8 are going to preserve. I don't think we are talking about
9 opening up new issues or raising new questions for the
10 Commission to consider. We are still talking about exactly
11 the same issues.

12 CHAIRMAN PALLADINO. Thank you. One more comment
13 and then I will go to questions.

14 MR. McGRANERY. If I may respond to that very
15 briefly. This is the question that the Commission always
16 faces, namely, how many bites of the apple. The Act spoke of
17 an EA. We have created a draft EA and an EA. The Act did not
18 require these technical meetings between NRC and DOE and
19 certainly did not address the public nature and chance for
20 participation therein.

21 You have created that also which will provide tens
22 if not hundreds of opportunities for comment. You will always
23 no matter what you give, no matter how fair you try to be, you
24 will always be asked for one more procedural step and whether
25 it is the chance to submit additional comments or

1 what-have-you, always one more and you will get more tied up
2 in the process rather than in your true engineering and
3 scientific responsibilities so that you can be a useful
4 advisor to DOE at this stage and later a judge.

5 CHAIRMAN PALLADINO: Let me turn to my colleagues.
6 Commissioner Roberts.

7 COMMISSIONER ROBERTS: No questions.

8 CHAIRMAN PALLADINO: Jim.

9 COMMISSIONER ASSELSTINE: Maybe just a brief
10 comment. I don't think given the hour I will go into a lot of
11 questions.

12 (Commissioner Bernthal exited the meeting.)

13 COMMISSIONER ASSELSTINE: I guess the comment is,
14 Jim, I think your principles that you cite from your reading
15 of the Act, with all due respect, I just think you are
16 mis-reading what the Congress had in mind and let me tell you
17 why

18 First, it seems to me that we are not trying to
19 overly legalize the process. What we are trying to do is
20 de-legalize it to the extent that we can. If there is one
21 thing that was clear of the position of this Agency before the
22 Congress it was that we have to go through a formal licensing
23 process for this repository.

24 We, the Agency, thought that the best way to make
25 that process work given the unique characteristics of

1 repository development was to have an effective informal
2 process before we got into hearings with lots of lawyers and
3 all of the trappings to try to iron out as many issues as we
4 could, surface the issues up, make sure that we had the
5 information that we needed to make a licensing decision and
6 make sure that as many issues as could be identified were
7 identified, surfaced and addressed.

8 What we told the Congress more than anything else, I
9 think, was that if that informal process works and at the time
10 we had basically laid out what that process was going to
11 contain, then we thought we could meet our obligation to make
12 a licensing decision on an expeditious basis and we were quite
13 clear to the Congress that the only way that process was going
14 to work once we got into the hearing phase was if this
15 informal process worked effectively.

16 I think the Congress bought that lock, stock and
17 barrel. They were aware of what was in our procedural
18 requirements. They were aware of what was in our technical
19 rules and I think that by in large what the Act has is an
20 endorsement of that pre-hearing informal process. I think the
21 Congress took the Commission at its word and said, you have
22 mapped out a process here and go do it.

23 What I read in the difference between review and
24 comment and concurrence was that there were a few places in
25 particular where the Congress was a bit uncomfortable in just

1 relying on the informal nature of that process and they said
2 at those points we really want the NRC to sign off formally on
3 a couple of these key elements.

4 By in large I think the debate here is I guess I
5 would agree with Dave is not over momentous issues, it is how
6 are we are going to make that informal process work and work
7 effectively to surface issues, get them identified and get
8 them addressed so that once we get into the formal process,
9 once the lawyers take over, there is a minimum potential for
10 disruption and delay and stretching out this whole process.

11 I would also say that I guess I disagree that the
12 setting of the schedule represented a Congressional judgment
13 on what was needed to provide adequate protection for the
14 health and safety of the public. I don't think the Congress
15 likes to substitute its judgment on that kind of question for
16 the judgment of this Agency and I see what the Congress doing
17 is basically saying, "We want an aggressive schedule. We want
18 to see a repository within this time frame. We think it is
19 do-able although we think it is also very ambitious, but the
20 burden ultimately is on the agencies that are involved both
21 DOE and the NRC as well as other agencies to make that process
22 work and what they think needs to be done in that process has
23 to be spelled out in a mission plan and then if there are
24 changes to that, the agencies have to come back to us and tell
25 us."

1 I really don't view that as substituting the health
2 and safety judgments that this Agency has to make as it goes
3 along.

4 So I guess on those two points, I have a different
5 view of what the Congress had in mind and what is embodied in
6 the Act. I think we would be in the worst possible situation
7 if we had this informal process go forward not function the
8 way we told the Congress we had in mind only to find out that
9 we have major problems that then have to be considered in a
10 formal licensing proceeding where it is much more difficult, I
11 think you will agree given our experience in the reactor area,
12 to try to settle some of those kinds of issues.

13 It is going to be a much tougher and more lengthy
14 process if we don't make this informal process work to
15 identify and address those concerns. So I guess that is more
16 of a comment than a question.

17 MR. McGRANERY: If I may respond very, very briefly,
18 first, as to my second principle as to the schedule and the
19 finding that it is consistent with the health, safety and
20 environmental protection of the public, that I am afraid is
21 unarguable. That is the precise language of Section 111(b)(1)
22 of the Act.

23 Getting to the more important issue, I think that
24 what the regulations are doing is squaring the circle. You
25 have mentioned several times and I would be totally in favor

1 of informal resolutions, informal contacts. That is the
2 nature of the development of scientific and engineering
3 answers.

4 Our problem is that this regulation formalizes these
5 things unlike anything else has ever been formalized before
6 creating an endless series of requirements for Federal
7 Register notices and responses and reviews never-ending.

8 To accomplish your purpose which I think is a very
9 good one, all the regulation needs to state here is that the
10 staff under the director shall consult with the states, tribes
11 and interested members of the public. That would do the job.

12 CHAIRMAN PALLADINO: All right. Thank you. Let me
13 see if Commission Zech has any questions?

14 COMMISSIONER ZECH: Just a brief comment, I think it
15 is important that we hear all the various view and I think
16 Mr. McGranery has given us a different perspective than we
17 have heard this morning.

18 I think it is important that we listen to all the
19 views and I don't want to prolong this any further except to
20 say that I appreciate his views and those of Mr. Berrick,
21 also. I think it is important that we listen to all of them
22 and I am inclined to say that I think your perception that we
23 are overly legalistic and procedurally oriented here is
24 certainly a concern of mine at this Agency, also.

25 We are involved in public health and safety and

1 substance and content are very, very important and something
2 we should be focussing our attention on so I think your
3 comments in that regard are very appropriate.

4 CHAIRMAN PALLADINO All right Thank you. Thank
5 you very much, gentlemen. We appreciate your coming and
6 giving us the benefit of your thoughts

7 (Panel excused)

8 CHAIRMAN PALLADINO Now I wonder if we could have
9 the representatives from the Department of Energy join us at
10 the table

11 COMMISSIONER ASSELSTINE. One of these guys looks
12 familiar!

13 (Laughter)

14 CHAIRMAN PALLADINO: Who is going to speak first?

15 MR. STEIN: I am, Mr. Chairman.

16 CHAIRMAN PALLADINO: All right. Would you identify
17 yourself for the record, please?

18 MR. STEIN. Yes. Mr. Chairman and Commissioners, I
19 am pleased to have the opportunity to participate on behalf of
20 the DOE in the NRC's consideration of the amendment to 10 CFR
21 Part 60 procedural rule.

22 I am Ralph Stein of the Department. I am the
23 director of the engineering and geotechnology division.
24 Accompanying me today is Mr. Jim Knight on my right who is the
25 director of the licensing and regulatory division.

1 On January 17, 1985 the NRC published in the Federal
2 Register a request for public comment on the proposed
3 amendments to the procedural rule, 10 CFR 60. These proposed
4 amendments were intended to bring the regulations in line with
5 the Nuclear Waste Policy Act of 1982.

6 On March 21, 1985 the DOE provided NRC with comments
7 on the proposed amendments along with some recommended
8 changes.

9 (Commissioner Bernthal re-enters the meeting.)

10 MR. STEIN: Basically the Department agrees with the
11 proposed amendment and believes that it is an appropriate
12 modification of the rule to reflect the provisions of the
13 Act. As I noted the Department did however have some comments
14 and recommended changes for the proposed amendment.

15 We continue to recommend that the Commission adopt
16 these changes. In particular, we urge the Commission to adopt
17 the suggested change which would commit the Commission to
18 provide comments on exploratory shaft and shaft sinking within
19 90 days after receipt of the site characterization plan for
20 public comment.

21 This schedule is consistent with our mission plan
22 schedule and our ability to meet the requirements of the Act.
23 We do recognize, of course, that these earlier comments by the
24 Commission on the exploratory shaft would be contingent on the
25 Department providing early and complete information on

1 exploratory shaft to the Commission and receiving their
2 comments on our exploratory shaft plans and programs.

3 We would intend to adopt these comments as
4 appropriate in the site characterization plan. At this point
5 I would like to note that DOE has work in progress on the site
6 characterization plans.

7 This work is based on the annotated outline for the
8 site characterization plans which was agreed to by the NRC
9 staff in meetings with the staff. However, the annotated
10 outline is based on the assumption that the site
11 characterization process will occur essentially as presented
12 in the rule now before the Commission.

13 Until the final rule is promulgated, there will be
14 uncertainty as to the applicability of the work being done to
15 prepare the site characterization plans. Should there be
16 significant changes to the amendment, portions of the
17 annotated outline and the work being done according to the
18 annotated outline may need revision.

19 A delay in issuance of the site characterization
20 plans would likely result.

21 Should the final rule not be promulgated at the time
22 the site characterization plan is issued, the site
23 characterization plan or plans may be in non-compliance with
24 the existing regulations.

25 Thus, from the Department's point of view it is

1 essential to the DOE program that the final rule be issued as
2 promptly as possible.

3 Basically, those are the comments that I wanted to
4 make here this morning. In summary, we do agree generally
5 with the modified rule, the amendments to the rule. We do
6 appreciate the opportunity of being able to appear before you
7 today and thank you for that opportunity

8 CHAIRMAN PALLADINO: Thank you. Was Mr. Knight
9 going to make any comments?

10 MR. KNIGHT: No, thank you.

11 CHAIRMAN PALLADINO: Let me ask you one question.
12 The thread of many of the comments that we received so far
13 today has been that we are reducing the amount of opportunity
14 that we had provided in the earlier version of Part 60 for
15 people to comment for example on the site characterization
16 analysis by no longer offering opportunity to comment on the
17 draft.

18 Do you think we have gone overboard either in the
19 old one or in the new one with regard to opportunities for
20 comment and I meant going overboard either in denying it or in
21 providing for it?

22 MR. STEIN: I think that the old rule was structured
23 in a different approach. The old rule was structured in a way
24 at least the way we handled it in our interactions with NRC
25 where we would create as in the case in Richland, Washington,

1 a site characterization report which in effect was a final
2 document given to NRC which would then be reviewed and a
3 site characterization or a draft site characterization
4 analysis would be put forward.

5 Basically this was the first opportunity that NRC
6 and the public had to look at that document. Since then
7 there have been a number of changes in the way we interact
8 with the Commission, the states and the tribes. We have
9 frequent open public meetings with the Commission on early
10 activities associated with the preparation of the plan. We
11 have had at least four different meetings, open public
12 meetings, with the Commission staff.

13 We invite the states and the tribes to participate
14 in those meetings and we look for and seek comments in the
15 early stages of the development of the site characterization
16 plan as well as other parts of our program.

17 As we modify the input, we then come back and talk
18 about it some more with the Commission, the states and the
19 Indian tribes. These are open meetings and so there is lots
20 of opportunity for participation in the development of the
21 site characterization plan.

22 So when that document finally reaches the public for
23 review and comment, it ought not be much of a surprise because
24 it will have lots of discussion that will take place prior to
25 the time that it is finally issued. I think that the present

1 rule is entirely appropriate.

2 CHAIRMAN PALLADINO: One of the points that I heard
3 several times was that "OH, yes, they may have an opportunity
4 to make comments in public comments but they don't get the
5 feeling that they are seriously considered" and thereby,
6 there is credibility lost on the part of DOE and when DOE is
7 involved and sometimes I guess even NRC. Do you feel that
8 there is ample opportunity for the states and Indian tribes
9 and other groups to interact effectively on some of these
10 documents that are being prepared?

11 MR. STEIN: I believe there are ample opportunities
12 for that and I would like to say to you that we consider the
13 comments very seriously, not only, of course, the comments of
14 the staff but the comments of the other participating parties.

15 MR. KNIGHT: I might add if I may, there was
16 reference earlier perhaps to some inhibition in the ability of
17 the parties at the meetings to fully interact and I think I
18 can state without equivocation that it is our intent that
19 there be full and active participation.

20 MR. STEIN: Yes, that is quite correct. In the
21 meetings that we have had with the Commission staff, I make it
22 a point to ask for full participation in the technical reviews
23 that are ongoing.

24 CHAIRMAN PALLADINO: For example, a situation was
25 described where they weren't allowed to speak until the end of

1 the meeting and then it was just almost as though it were just
2 giving them an opportunity for some perfunctory comments. I
3 know they didn't use that word. I am being a little bit more
4 graphic to focus on the issue because we do have a credibility
5 problem and I think DOE may have it greater than we do at
6 least on this issue

7 MR STEIN I certainly noted the comment and so did
8 Jim and we will look into it. But we are stating policy that
9 we have these open meetings and the states and tribes are
10 welcome to participate. The fact is we encourage them to
11 participate.

12 CHAIRMAN PALLADINO: All right. Let me see if my
13 colleagues have other comments? Tom?

14 COMMISSIONER ROBERTS: No

15 CHAIRMAN PALLADINO: Jim.

16 COMMISSIONER ASSELSTINE: Just a couple of quick
17 comments, first on that point, I think it would be useful for
18 us to know though it in fact quite a part from what your
19 statement of policy is, if in fact that is the way the
20 meetings are being conducted. So if you could give us some
21 feedback on that, I think that would be useful if that concern
22 is, in fact, valid. They have gone to these meetings and they
23 have been told that you can't participate in the give-and-take
24 of the technical exchange, you have to sit quietly and wait
25 until the end of the meeting and then provide your comments.

1 That would be useful to know if that is going on

2 MR STEIN. Mr Asselstine, I would like to mention
3 that we do have that specifically covered in the DOE/NRC
4 Procedural Agreement for these meetings and they do call for
5 open participation. But I will give you a specific response
6 to your question.

7 COMMISSIONER ASSELSTINE. Good. I agree also with
8 your comment that we ought to get on with it and finalize the
9 regulations. I suspect that most of the issues that we have
10 been talking about today may not directly affect the content
11 of your site characterization plans since they tend to deal
12 with what happens to them after they get here or some of these
13 other aspects. I am inclined to agree with you that we ought
14 to get on with it and finalize the regulation.

15 One question I wanted to ask though and that is on
16 the draft site characterization analysis, I noticed at one
17 point the Department of Interior was going to come to the
18 meeting today and for some reason decided not to, but they
19 said that that is something that we ought to retain, we ought
20 to retain the draft site characterization analysis and not
21 just have the final one.

22 It strikes me that it might well be of value to you
23 as well as to the states and the Department of the Interior to
24 have a draft site characterization analysis. For example, if
25 there are things in our draft that you disagree with, it is

1 very easy for you then to come back and say, "Here are our
2 problems with it as well as the parts that we agree with" and
3 then the NRC could issue its final one and lay to rest at
4 least any areas where there were differences between us rather
5 than having a final document on the table much like the
6 concern the states expressed

7 It is easier to work things out when you are talking
8 about a draft document before you have something final on the
9 table and say that this is our position period. I wonder why
10 you don't see having a draft as something that is in your
11 interest as well as the states and Interior have expressed.

12 MR. STEIN. Again, I would like to comment that we
13 have lots of opportunity to get input from the states, tribes,
14 NRC and others during the time up to the time that we prepare
15 the document. So we should have a pretty good understanding
16 about what the comments are and we ought to also at the same
17 time have an opportunity to reflect those comments in the
18 document that we have put out.

19 Someone earlier today noted that there is just sort
20 of one crack at it with the SCP. I look at the SCP not as a
21 snap shot in time. When it is issued, it is certainly a snap
22 shot in time. It will describe the overall program that we
23 are going to implement on the site characterization plan but
24 every six months thereafter, we have to provide progress
25 reports on the work that we do and it also provides ample

1 opportunity to have if you will mid-course corrections on the
2 program that we have.

3 I look at the SCP as being the final document when
4 we are ready to go forward with the license application so the
5 SCP exists initially, tells you what it is that we are going
6 to do, but we do have an opportunity and will correct
7 mid-course corrections, if you will, every six months
8 thereafter

9 CHAIRMAN PALLADINO: Thank you, Fred.

10 COMMISSIONER BERNTHAL: No comments.

11 CHAIRMAN PALLADINO: Lando.

12 COMMISSIONER ZECH: Just a quick comment, I would
13 just encourage you to continue your efforts to have an open
14 dialogue with the states and tribes. I think that is
15 important that you do that and I think everyone appreciates
16 the fact that decisions are difficult and will be made in a
17 responsible manner but the fact that dialogue is necessary and
18 candid and open is important and I just urge you to continue
19 to try even harder in that regard. Thank you, Mr. Chairman.

20 CHAIRMAN PALLADINO: Thank you very much, gentlemen.

21 (Panel excused.)

22 CHAIRMAN PALLADINO: We now have a representative
23 from Edison Electric Institute, Mr. Mills. Please join us at
24 the table. We are pleased to have you join us.

25 MR. MILLS: Thank you, Mr. Chairman and

1 Commissioners, I am pleased to appear today to participate in
2 your consideration of Part 60. My name is Loring Mills and I
3 am vice president of Edison Electric Institute and I appear
4 here on behalf of both the Institute and the Utility and
5 Nuclear Waste Management Group. The utilities do have a vital
6 interest in all aspects of the Nuclear Waste Program.

7 Mr. Chairman, I request that my prepared statement
8 be made a part of the record and I will present only a brief
9 oral statement.

10 CHAIRMAN PALLADINO. All right.

11 MR. MILLS: As we indicated in our written comments
12 last March, we basically support the proposed amendments which
13 will bring the Commission procedures to the licensing of the
14 high-level waste repositories in conformance with the Nuclear
15 Waste Policy Act.

16 It is a comfortable position to agree with the NRC
17 staff. The Act, of course, is the outcome of lengthy debate
18 and bargaining extending over a period of many years and
19 several Congresses, among various groups with numerous
20 interests.

21 No one party received all it wanted in the process
22 that Congress finally prescribed. However, the process does
23 embody a reasonable balance between the need for public input
24 and the practical project demands associated with efficient
25 program implementation.

1 We support the program, the process and the schedule
2 the Act mandates for site selection and the development of
3 repositories. We believe the Commission's proposed amendments
4 to the repository licensing regulations reflect an appropriate
5 sensitivity to the importance of maintaining the balance
6 between competing demands as struck in the Nuclear Waste
7 Policy Act.

8 We are concerned about the desire of some commenters
9 that have suggested that the proposed regulations be modified
10 to require that DOE not to proceed to sink exploratory shafts
11 at recommended sites until after the review of DOE site
12 characterization plans have been completed.

13 The requirement of the NWPA on site characterization
14 specifically addressed in considerable detail in section 113
15 including a designation that actions under 113 are preliminary
16 decision making activities as it relates to the NWPA.

17 There is no requirement in the Act that DOE await
18 completion of site characterization plan review by NRC, the
19 states or otherwise prior to the sinking of shafts and the NRC
20 should not impose one.

21 Timely feedback to DOE for such reviews is
22 appropriate as DOE proceeds with characterization. The
23 exchange of information during site characterization on a
24 cooperative basis is essential.

25 To this end, close communication between the host

1 states, the Indian tribes, the NRC and DOE during site
2 characterization must be achieved to assure that the necessary
3 information and data are available for the construction
4 application

5 As we understand it, this process of close
6 communication and coordination of all parties is envisioned as
7 part of the living site characterization plan concept as it is
8 embodied in the mission plan and discussed there and as it was
9 just indicated by DOE

10 We wish to emphasize again that approval of the
11 SCP's is not required under the Act although close
12 coordination and cooperation between NRC and DOE is needed for
13 the desired result to be achieved.

14 The Commission should not restrict the flexibility
15 provided in the Act with respect to site work by requiring DOE
16 to await completion of any SCP review prior to starting the
17 exploratory shafts.

18 Thank you, gentlemen I will try to answer any
19 questions

20 CHAIRMAN PALLADINO Thank you very much. I am sure
21 the staff welcomes your support especially when most of the
22 comments were critical of the staff report. One aspect of
23 your statement that reminded me of a point that came up
24 earlier, how do you feel about identifying host states and
25 affected Indian tribes as parties in the proposed rule?

1 MR MILLS. There are several opportunities for
2 these parties to participate and they are a specifically
3 designated party to work with DOE on a cooperative basis. I
4 believe the opportunities are there. I believe that they will
5 not be bashful in coming forward. I don't believe it is
6 essential that it be included as a specific requirement in the
7 rule.

8 COMMISSIONER ASSELSTINE. You would expect them to
9 be named as parties, would you not?

10 MR MILLS. Absolutely.

11 COMMISSIONER ASSELSTINE. All right.

12 MR. MILLS. I don't believe they will be bashful in
13 requesting it.

14 COMMISSIONER ROBERTS: I think they will not be
15 bashful.

16 (Laughter.)

17 CHAIRMAN PALLADINO: But they somehow seem worried
18 and I was having trouble understanding why they are worried
19 but I will leave it at that. Do you have any comments or
20 questions?

21 COMMISSIONER ASSELSTINE: No.

22 CHAIRMAN PALLADINO. Fred?

23 COMMISSIONER BERNTHAL: No.

24 COMMISSIONER ROBERTS: You see, being last you just
25 wore us down. No one is going to ask you anything.

1 COMMISSIONER ASSELSTINE: That's right.

2 MR. MILLS. Thank you.

3 CHAIRMAN PALLADINO: Thank you very much.

4 (Witness excused.)

5 CHAIRMAN PALLADINO: Let me express appreciation to
6 all the participants of today's meeting. I find I always
7 learn a great deal from having presenters come before us. I
8 did have a request earlier at least by one individual and
9 maybe there were more than one to be able to submit additional
10 information. Let me suggest that any information we are going
11 to get and which you want to make sure that we consider in our
12 decisions ought to come in by a week from today.

13 COMMISSIONER ASSELSTINE. That sounds good.

14 COMMISSIONER ZECH: Fine.

15 CHAIRMAN PALLADINO: Let me so request it because we
16 do want to act as promptly as we can on this matter. Anything
17 more to come before us?

18 (No response.)

19 CHAIRMAN PALLADINO: Thank you very much. We will
20 stand adjourned

21 [Whereupon, the hearing in the above-entitled matter
22 was adjourned at 12:40 o'clock p.m., to reconvene at the call
23 of the Chair.]

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Name of Proceeding: Presentation by Participants on Proposed Amendments to Part 60 (Public Meeting)

Docket No

Place: Washington, D. C.

Date: Friday, January 24, 1986

were held as herein appears and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission.

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PART 60

SCHEDULED: 9:30 A.M., FRIDAY, JANUARY 24, 1986 (OPEN)

DURATION: APPROX 3 HRS

SPEAKERS: * STATE PANEL 25 MIN
(TENTATIVE) NEVADA - MALACHAI MURPHY
TEXAS - STEVE FRISHMAN
UTAH - PATRICK SPURGIN
MINNESOTA - GREGG LARSON
WASHINGTON - DON FEGMOST

* TRIBAL PANEL 10 MIN
YAKIMA INDIAN NATION - DEAN TOUSLEY
NATIONAL CONGRESS OF AMERICAN INDIANS -
SUEAN SHOWA HARRIS

10 MINUTE INTERMISSION

* PUBLIC INTEREST GROUPS 15 MIN
ENVIRONMENTAL POLICY INSTITUTE -
DAVID BERRICK
NATURAL RESOURCES DEFENSE COUNCIL -
DAVID BERRICK
SCIENTISTS AND ENGINEERS FOR SECURE ENERGY -
JAMES MCGRANEY, JR.

* FEDERAL AGENCY PANEL 5 MIN
DEPARTMENT OF ENERGY -
RALPH STEIN
JIM KNIGHT

* INDUSTRY 5 MIN
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