PR-60 (6)
(50 FR 2579)

NATIONAL CONGRESS OF AMERICAN INDIANS

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March 18, 1985

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

RE: Comment on Proposed Change to 10 CFR 60, Part 60

By Hand

Dear Mr. Secretary:

This responds to the request for comment on rule changes to 10 CFR 60, Part 60, proposed by the Nuclear Regulatory Commission (NRC) (*Federal Register*, Vol. 50, No. 12, January 17, 1985). This comment is offered by the National Congress of American Indians (NCAI). The NCAI, established in 1944 to promote Indian treaty, traditional, cultural and property rights, is the oldest and largest national membership organization of American Indian and Alaska Native governments and people.

Although the NCAI is concerned about other proposals for change to 10 CFR 60, our foremost objection regards the proposal to change Subpart A, Section 60.2, Definitions, wherein the terms "Indian Tribe" and "Tribal organization" would be replaced by the term "affected Indian tribe," as defined in the Nuclear Waste Policy Act of 1982 (NWPA).

We strongly object to this proposed change because it would serve to limit participation by an already narrow category of Indian Tribes in the NRC high-level waste geologic repository licensing procedures. The proposed change would preclude participation by tribally-sanctioned organizations which may be requested by more than one tribal government in the interest of cost-saving and information-sharing and technical assistance.

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Most importantly, the proposed change would preclude the participation of Tribes that are not at this time "affected tribes" under the NWPA. There are only three Tribes at present that have petitioned for and received "affected" status. Most Tribes in the first and second repository States have not petitioned for "affected" status, and some may not be aware that they are potentially affected. To correct this information gap, our organization has a contract with the Department of Energy to develop and disseminate information on the NWPA and related issues to Tribes that could be affected by the siting and transportation issues. Since the federal government does not know where the sites, including the MRS site, or the transportation routes will be, the NRC should not preclude participation by Tribes that may be affected by these issues prospectively, but are not designated as "affected" now.

We are concerned that the NRC, by adopting the poor draftsmanship of the NWPA, may further limit participation by Tribes that have land and usage rights that are not the subject of congressionally-ratified treaties. Section 2(2) of the NWPA mentions both federally defined possessory or usage rights and congressionally-ratified treaties, the latter being one method of establishing reservation boundaries and Indian country. Indian country is defined in Section 1151(a) of 18 U.S.C. and the Court has interpreted it to mean include all reservation lands, with the term reservation being a term of art meaning all Indian lands which are subject to restrictions against alienation, notwithstanding the issuance of any patent. In 1871, in an appropriations act, Congress restricted its future treaty-making with Indian Nations and Tribes. Since that time, nearly 30 million acres have been federally defined as reservations or Indian country, through congressional settlements, Executive Orders, administrative procedures and court decisions. Also since that time, Congress has passed numerous acts recognizing the property and usage rights of Tribes,

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including the National Environmental Policy Act, the American Indian Religious Freedom Act and the Archaeological Resources Protection Act, all of which recognize Tribes, their rights and property, irrespective of their establishment method. Since the NRC rule and the NWPA address, in the first instance, property that would be affected by nuclear waste, the focus here should be on the character of that property and related jurisdictional systems, rather than on the precise manner in which they were federally defined or recognized.

For the present, we urge that the NRC leave the definitions as they are, considering future changes as the siting and transportation issues are more focused and as Tribes are at least as informed as are the States today.

As an overall comment, we would appreciate changes in 10 CFR 60, and all NRC materials, to write "Tribe(s)" with a capital "T," as "State(s)" is written with a capital "S." Our guide for this is the initial governing document of the United States, which provides in the Commerce Clause that Congress is authorized to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes" (U.S. Constitution, Article 1, Section 8, Clause 3).

Thank you for your serious consideration of our comment.

Sincerely,

Suzan Shown Harjo
Executive Director

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March 19, 1985

DOCKET NUMBER
PROPOSED RULE PR-60 (8)
(50 FR 2579)

Samuel J. Chilk
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

Dear Mr. Chilk:

The Natural Resources Defense Council, Inc. (NRDC) submits the following comments on the Nuclear Regulatory Commission's proposed rule regarding "Disposal of High-Level Radioactive Waste in Geologic Repositories; Amendments to Licensing Procedures" (50 Fed. Reg. 2579, January 17, 1985).

NRDC welcomes this opportunity to respond to the Commission's proposed revisions of 10 C.F.R. Part 60. It is our view, however, that by eliminating the requirements in § 60.11 for the Commission review of the Department of Energy's (DOE) site selection process and the issuance for public comment of a draft site characterization analysis, the Commission misapprehends the appropriate role it is to play in the selection and eventual construction and operation of a repository. Furthermore, many of the reasons given by the Commission for these revisions are based on its interpretation of various sections of the Nuclear Waste Policy Act which are inapplicable to a defense-only repository. Our comments focus primarily on the need for Commission review of DOE's site selection process and for issuance of a draft site characterization analysis. We wish to underscore, however, the particular need for these two procedural steps in connection with the licensing of a defense-only repository.

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I. The Commission Should and Must Review the DOE Site Selection Process

The proposed rule sets forth two justifications for eliminating the Commission's review of site selection information now required by § 60.11 -- that there is no statutory authority for such a review, and that such a review would come too late in the process to be useful. Concerning the first justification, the Commission reasons that the site selection information does not belong in the site characterization report (renamed in these revisions and hereafter referred to as the site characterization plan), since the Nuclear Waste Policy Act (NWPA) specifically includes a discussion of these items in the environmental assessments (EAs). The Commission, however, apparently does not plan to review this information in the draft or final environmental assessments. According to the Commission, there is simply a lack of authority for it to engage in any form of review of DOE's site selection process.

The second justification for the proposed revision is that, with the passage of the NWPA, the site characterization plan is not required until after the sites under consideration have already been subject to extensive scrutiny. The proposal concludes, although the point is not self-evident, that Commission review of the site selection process would be superfluous in light of the information already gathered about each site.

These comments will address each of these justifications in turn. As a preliminary matter, however, it is our basic position that the Commission should undertake a continuing comparative review of the sites throughout the site selection process. In this way the Commission can most effectively exercise its oversight and decisionmaking responsibilities concerning the siting of a repository. Although it would be preferable for the Commission to review site selection information in the site

characterization plan rather than in the EAs, the form of the review is not as important as the fact that such review takes place. These comments, which focus on the necessity for Commission review of site selection information contained in the site characterization plan, can also be applied in large part to the review of site selection information contained in the EAs.

A. The Commission Has the Statutory Authority and Responsibility to Review Site Selection Information

In our view, a comparison and evaluation by the Commission of the sites to be characterized is not discretionary. Rather, the Commission has the authority and responsibility to conduct such a review under the Nuclear Waste Policy Act, the Energy Reorganization Act, the Atomic Energy Act, and the National Environmental Policy Act. Other portions of the Commission's Part 60 regulations, which are not the subject of the current proposed revision, also make site selection review advisable.

1. Nuclear Waste Policy Act

The Commission is clearly reluctant to engage in the comparative evaluation of sites at any stage in the site selection process. In explaining this reluctance, the Commission sets out some of its responsibilities under the Nuclear Waste Policy Act to emphasize that no specific provision provides for Commission review of site selection information. In our view, although the NWPA does not specifically require Commission site selection review, or for that matter environmental assessment review, the structure of the Act and the Commission's extensive participation at all other stages of the process logically require the Commission to oversee DOE's site selection decisions. The process the Nuclear Waste Policy Act establishes, from the identification of potential sites, to nomination, to characterization, and to eventual site selection, is a single site selection process. This continued selection from among

alternatives is the core of the repository siting process. Consequently, NRDC believes it is essential for the Commission to be involved in the decisionmaking as site alternatives are eliminated.

Moreover, contrary to assertions in the proposed rule, nothing in the Nuclear Waste Policy Act "calls for" site selection information to be excluded from the site characterization plan. 50 Fed. Reg. 2582, January 17, 1985. To the contrary, while the NWPA specifically requires inclusion of such information in the EAs and does not require its inclusion in the site characterization plan, the Act also provides that the Commission may require DOE to include in the site characterization plan, "any other information" it deems necessary. § 113(b)(1)(A)(v). Clearly, in light of this broad discretion given the Commission to require the inclusion of any information it deems necessary, the fact that site selection information is not specifically named in § 113(b) does not mean that it is excluded, as the Commission implies. Furthermore, the Commission's failure to review similar information in the draft environmental assessments, demands continued inclusion of this information in the site characterization plan so as not to compound the error.

As a separate matter, Section 121 of the Nuclear Waste Policy Act requires the Environmental Protection Agency (EPA) to develop general requirements needed to assure protection of public health and the environment from management and disposal of high-level wastes. Once the EPA issues final standards, Section 121 of the NWPA requires the Commission to revise its Part 60 regulations to become consistent with those standards.

The most recent working draft of EPA's standards (to be codified in 40 C.F.R. Part 191) establishes seven "assurance requirements" that are designed to provide confidence that a repository will meet the long-term containment requirements. One

of these "assurance requirements" provides that the Commission undertake a comparative evaluation of the three sites in order to determine which of the three sites' natural properties provides better isolation of the wastes. EPA intends that this evaluation play a significant role in choosing a site; consequently, the Commission's refusal to comment "upon the relative merits of one site against another" (50 Fed. Reg. at 2583) conflicts with this requirement.

It is true that, as more detailed information is gathered during site characterization activities, the determination called for in § 191.14(e) can be made with greater and greater accuracy. However, since the Commission claims that submission of the site characterization plan begins its formal, substantive review, the time to make preliminary determinations, based on the extensive information the Commission admits is already known about a site, is in its comment on the site characterization plan. Such determinations would assist DOE in carrying out its site characterization activities, and enable the Commission to identify areas of special concern within any one site, as well as alert it to issues affecting repository safety common to all three sites.

2. The Energy Reorganization Act

Even if the Nuclear Waste Policy Act does not require the Commission to review DOE's site selection process, this does not mean, as the Commission seems to conclude, that it is necessarily precluded from such review. Section 202(3) & (4) of the Energy Reorganization Act establishes the Commission's licensing and regulatory authority over all high-level nuclear waste repositories. The NWPA reconfirms this in § 114(e). This authority enables the Commission to regulate DOE activities prior to construction since, in the words of the Commission, "DOE activities that take place before an application is filed and may

affect the long-term safety of the repository obviously may preclude receipt of a construction authorization." 46 Fed. Reg. at 13971.

This earlier Commission interpretation of the scope of § 202, in the preamble to the 1981 final rule, contrasts markedly with the present view of the Commission that there are some areas in the siting process in which it cannot participate. In our view, Section 202 evinces an active Commission involvement in all aspects of repository development, including final site selection. By not reviewing site selection information wherever it may be found, the Commission is impermissibily limiting the scope of its duties.

3. The Atomic Energy Act

In addition to preserving the Commission's authority to license repositories under the Energy Reorganization Act, Section 114(e) of the NWPA also recognizes the Commission's independent authority to protect public health and safety under the Atomic Energy Act. NRDC believes that the refusal of the Commission to compare sites by reviewing site selection information compromises this responsibility. As noted earlier, the NWPA establishes a process by which potential sites are eliminated from consideration in stages. The methodology used to eliminate these alternatives, whether the number of sites is being reduced from 9 to 5, or from 5 to 3, or from 3 to 1, is obviously the essence of the Act. The proposed revision denies the Commission the ability to influence, in the most direct, basic way, DOE's site selection decisions. As recognized by all concerned, the geological features of a repository are by far the most important factor in ensuring safe isolation of high-level wastes. In our view, therefore, the refusal of the Commission to play a central role in a comparative analysis of sites is an abdication of its public health and safety responsibilities.

4. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) also mandates direct Commission input into DOE's site selection process. In fact, the Commission's original justification for the Part 60 rule was compliance with NEPA. 46 Fed. Reg. at 13922. The Commission has offered no explanation for why this essential ingredient of the Commission's NEPA compliance, namely the evaluation of alternatives, is no longer valid; it states merely that a Part 51 rulemaking will come later. NRDC believes that, because Part 60 rests in part on NEPA authority, NRDC and other interested parties should be allowed to see and comment on those Part 51 revisions while considering the revisions of Part 60.

In the meantime, NRDC can draw only one conclusion from the Commission's refusal to avail itself of opportunities to review DOE site selection and to engage in comparative analysis of sites in both the EAs and site characterization plans -- that the Commission has decided that such review is not its appropriate role. However, the Commission cannot escape its responsibilities by refusing to recognize them. Consideration of alternatives is necessary for the simple reason that adverse environmental impacts of site activities can be avoided or reduced through proper site selection. Thus, the Commission's required role in the siting process of a repository is not only merely to ascertain whether the repository meets the technical criteria, guidelines, and standards established by DOE, NRC, and EPA, but also to use its expertise to continually evaluate and compare the range of choices as the list of sites is winnowed down.

5. Existing 10 C.F.R. Part 60 Regulations

It should be noted that an ongoing evaluation of DOE's site selection decisions will better enable the Commission to make reasoned decisions regarding construction authorization and license applications. Eventually the Commission will have to

evaluate alternatives in determining whether to issue a construction authorization (§ 60.31(c)) and whether to issue a license (§ 60.41(d)). Although the relationships between the sites will change as more information is received about each site, the Commission should not wait until site characterization is complete before beginning such a review.

Failure to engage in a comparative analysis based on current knowledge will result in the amount and complexity of the information simply overwhelming the Commission when it finally has to evaluate alternatives as required in § 60.31 and § 60.41. Issues should instead be addressed at the earliest possible time. This would allow the Commission to make tentative judgments, and would alert it to any change in circumstances. Consequently, it is not only appropriate but highly desirable for the Commission to keep itself, DOE and the public informed regarding its current views on the comparative evaluation of sites.

B. Commission Review of Site Selection Information is Appropriate at the Site Characterization Plan Stage

The second justification the Commission offers for refusing to review site selection information is that such a review would come too late in the process. In making this claim, the Commission fails to recognize the purpose of review of site selection information, which is to provide Commission input into DOE site selection decisions made at various stages of the process. By not reviewing site selection information in the draft environmental assessments, the Commission has missed a critical opportunity to make a comparative evaluation of the potential sites. Thus, DOE's determination of which sites to nominate, and which sites to recommend to the President, will be made without the Commission's independent evaluation of DOE's tentative decisions. The Commission's next formal opportunity to comment on site selection decisions is in its site

characterization analysis. The Comission should direct this analysis toward the critical step of choosing one site.

II. The Commission Should Retain the Part 60 Provision Requiring the Issuance of a Draft Site Chacterization Analysis for Public Comment

NRDC strongly supports the retention of the provision in Part 60 that requires issuance of a draft site characterization analysis for public comment. Issuance of a draft site characterization analysis will involve the public in the decisionmaking process and assist the Commission in preparing its required analysis. 44 Fed. Reg. at 70409. NRDC believes that formal public input into the Commission's analysis will force the Commission to scrutinize more carefully DOE's site characterization plan, which will result in a more reasoned analysis by the Commission. In contrast, removing the public comment requirement will emasculate the Commission's role as an independent regulator of DOE's site characterization plan.

The Commission argues that a public comment period is not appropriate because the Commission will already be aware of all the relevant issues and public concerns. Issue identification, however, is not as important as an opportunity for the public to comment upon the adequacy of the Commission's analysis, and its characerization of the issues. The process would force the Commission to take into account concerns of the public, examine more closely its own assertions, and, perhaps most important, act as an intermediary between DOE and the public. These will occur only if a draft site characterization analysis is issued for public comment.

The Commission claims that effective opportunities exist for States, Indian tribes and the public to influence the site characterization process through formal and informal comment during the siting process, the DOE/NRC Procedural Agreement, and

the Section 60.18(f) process. First, although these methods are used to communicate to the Commission and to some extent to inform interested parties of the Commission's activities, none provide that the Commission must actually address issues expressed to it. As the Commission knows, it is one thing to be "aware" of public concerns, it is another to have to respond to them. There is also no assurance that the concerns of States, Indian tribes or the public will be the concerns of the Commission, thus expressing these concerns to the Commission does not provide any reasonable assurance that they will have any influence on DOE's site characterization activities. Secondly, neither the comments to DOE on its site characterization plan nor the informal comments to the Commission will be specifically directed at the Commission's analysis of the site characterization plan.

As for the Procedural Agreement, although the Commission may view it as the principal mechanism for evaluating site characterization, the Agreement is less concerned with providing for public input and more concerned with NRC/DOE interactions. While NRDC is in favor of the purposes underlying the Agreement, and believes it can be used effectively to ensure better communication between the the Commission and DOE, the Procedural Agreement simply does not provide any means for ensuring Commission consideration of State, Indian tribes, or public concerns. There is no comparison between a Procedural Agreement that provides for notification to States and Indian tribes of technical meetings, which the public may attend as observers, and an open public comment period on a draft site characterization analysis. If the Commission is actually going to rely on the Agreement's procedures as providing an efficacious means for DOE and the Commission to obtain input on site characterization, then the least the Commission can do is to make the public participation provisions less inadequate by providing for

notification to the public of the meetings and responding to public discussion and comment in a formal manner.

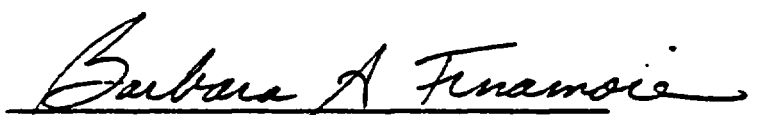
Finally, Section 60.18(f) requires the Director merely to invite comments on the site characterization plan. Not only is the Director not required to respond to the comments, but in all likelihood site characterization will have begun before the comments are even read.

NRDC does not agree with the Commission's contention that comment and review on a draft site characerization would be at odds with the ongoing dynamic review process it envisions. The Commission implies that comment on a draft site characterization analysis would "freeze" the entire review process. Though NRDC supports the Commission's notion of an ongoing evaluative process, NRDC also supports establishing a window through which all the accumulated knowledge can be viewed at once and the interrelatedness of the issues involved in site characterization examined. If the Commission is suggesting that any analysis will have to deal with only the information available at the time, NRDC agrees. There is no reason, however, why this analysis cannot be meaningful. Site characterization is not an "arbitrary point in time," but a critical stage in the process, which is why the NWPA requires DOE to issue its site characterization plans for comment and to hold hearings near the site, and why the Commission must comment on DOE's plan. Any freeze of the analysis process would in fact be difficult, since during the period of comment and review the Commission and DOE would presumably be exchanging information under the terms of the Procedural Agreement, and during site characterization DOE is required by both the NWPA and the Commission to submit periodic updates on its characterization activities.

NRDC strongly disagrees with any notion that the scheduling provisions of the Nuclear Waste Policy Act require that the draft site characterization analysis not be issued for public

comment. Considering the infrequency with which actions have up to now met the deadlines established in the NWPA, we find very curious the Commission's emphasis on the 3 to 4 month period it would take to receive comments and respond to them. Also, as the Commission is aware, the original proposed rule specifically found that a public comment period could be met "without undue schedule delays." 44 Fed. Reg. at 70409. If there were no reason to receive comments on a draft site characterization analysis, NRDC agrees that it would be desirable for the Commission to "complete its review and provide comments to DOE...in a prompt fashion." As discussed above, however, there are very important reasons that comments should be received and the Commission should not neglect them.

Respectfully submitted,



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DOCKET NUMBER
PROPOSED RULE PR-60 (9)
(50 FR 2579)

Mar 14 -85

DOCKETED
USNRC

Sec'y - NRC
Wash, DC 20555

'85 MAR 22 P2:35

Re: Proposed rule - High level waste disposal
Fed Reg - Jan 17-85, p 2579

ATT: DOCKETING & SERVICE BRANCH

Gentlemen =

We commend your statement (page 2583, col 1) that ever though the "Waste Policy Act makes no provision for the Commission to comment to DOE on its environmental assessments...it is nevertheless the intention of the Commission to review and comment on the environmental assessments, as well as other technical documents..."

This is too important an issue to be impairedby legal hair-splitting over who does what, and to which.

Better to have many controls, and reviews by the public at every step of the way, than not enough.

After all, DOE and NRC will be preparing designs for repositories interded to last for thousands of years. So, additional months, or even years, spent in planning and review should not be considered time wasted.

We also suggest this is too important an issue to be entrusted exclusively to state or local officials. Beyond having vote-getting personalities, too many of these folks have the IQ of a groundhog.

RE: COMMISSIONER ASSELSTINE'S ADDITIONAL VIEWS:

1 - We concur.

2 - We also suggest that 60.18(c) be re-worded to read: "...the Director shall invite and consider the views of interested persons on DOE's site characterization plans and shall review ...etc# (By the way, who is this Director?)

3 - We commend your decision in 60.18(f) to allow a period of "not less than 90 days" for public comment.

4 - We suggest a public document room automatically be established in the court house or other public building in the town nearest the site - in which all documents, correspondence etc re: the project shall be available for public inspection.

5 - Finally, though public comment may be tedious, repetitious or even divisive, we feel the people who will live near the site should be given a respectful hearing. You may find the common-sense views of some old farmer may just enlighten the "experts".

E. Nemethy

Acknowledged by card MAR 22 1985