(50 FR 2579)

Governor's Task Force on High-Level Radioactive Waste

'85 MAR 25 P4:31

March 17, 1985

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing and Service Branch

Dear Mr. Secretary:

Attached are the State of Minnesota's comments on the proposed revisions to 10 CFR 60, as published in the Federal Register on January 17, 1985.

Sincerely,

Tom Kalitowski

Tom Kalitowski, Chairman
Governor's Task Force on High-Level
Radioactive Waste

Enclosure

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Acknowledged by card. MAR 25 1985

Room 100 • Capitol Square Bldg • 550 Cedar St • St Paul, MN 55101 • (612) 296-2603

STATE OF MINNESOTA

COMMENTS ON THE PROPOSED AMENDMENTS TO 10 C.F.R. PART 60

The State of Minnesota has reviewed the proposed amendments to 10 C.F.R. Part 60, "Disposal of High-Level Radioactive Waste in Geologic Repositories." Minnesota wishes to comment on aspects of the proposed amendments relating to the participation of states and affected Indian tribes in site characterization analysis and licensing reviews.

1. Minnesota strongly disagrees with the proposed rules regarding the contents of the site characterization plan. Because the guidelines lack any provisions requiring DOE to set forth its method for selection of sites for characterization or describe its decision process, we believe that the NRC should request that such information be provided in the site characterization plan.

   Requiring such information by the NRC does not conflict with the Nuclear Waste Policy Act (NWPA) or duplicate information already provided by DOE. The Waste Policy Act specifies that DOE will prepare an environmental assessment for each site nominated for characterization. The content of these environmental assessments is specified and includes the type of site selection information previously required by 10 CFR 60 in the site characterization report. However, the site selection information pertains only to the selection of the <u>five</u> nominated sites, and not to the selection of the <u>three</u> candidate sites; it is <u>not</u> duplicative of information previously required.

   There is no provision of the NWPA that precludes the NRC from considering site selection information; instead, Section 13(b)(1)(A)(v) of NWPA authorizes the NRC to request "Any other information required" for its review of a general plan for site characterization. Because the site selection information for the <u>three candidates sites</u> is not available elsewhere, and because the NRC does have the authority to request such information, we believe it should be included in the site characterization plan.

   We are troubled by the reluctance of DOE to provide the method and decision process used in the selection of the three candidate sites and the reluctance of the NRC staff to review and comment on such information. While we would like to believe that the selection would be based on technical considerations and the desire to produce three viable alternatives, this reluctance leads us to the conclusion that other considerations will enter into the decision. This should not be a concern of the states alone, but also should be shared by the NRC and the staff. The willingness to look at the quality of the data available but not its application, compartmentalizes review activities to an unreasonable and unnecessary extent. Taking this "blind" position is also inconsistent with the NRC's past efforts to develop a participatory role in the process as early as possible.

It is difficult to understand why the NRC finds it inappropriate to comment on site selection information, particularly if sites are selected that will raise potential licensing issues. There is no way to avoid the politically sensitive aspects of site selection; they are present at each stage of the process. Rather than be a party to procedures that promote an aura of secrecy, the Commission, in the interest of ensuring that sites selected for characterization are the best among the five nominated, should be pursuing a course more characteristic of an independent regulator than a DOE facilitator.

We wish we could share the NRC's confidence that these DOE decisions will lead to a licensible site; however, the general nature of the guidelines and DOE's position on past issues, such as the preliminary determination of suitability, have not been reassuring. We hope the NRC will retain the methodology and decision process in the contents required for the site characterization plan, thereby providing other parties, if not the NRC, with the opportunity to review and comment on those issues.

2. Minnesota favors the current language in 10 CFR 60.11 that provides for public comment on a draft site characterization analysis prepared by NRC staff. The NRC assumes that ongoing consultation and contact between the NRC, DOE and the states and affected parties eliminates the need for any formal public interaction with the NRC. The NRC, however, should not assume that the states or other interested parties will have the resources to participate in a manner similar to that of NRC and DOE. This was apparent when similar assumptions were made about the DOE/NRC staff concurrence meetings. Even if states and interested parties are to participate at that level, they lack some of the technical expertise needed to carefully and fully follow and understand the progress of this program in all its complexity.

   The states and affected parties would find it extremely helpful to have a document, prepared by technical experts, that analyzes and identifies key issues associated with various aspects of the site characterization program. Many of the states and parties involved would depend on the NRC to provide this analysis before they submitted their comments to DOE. This is a critical point in the repository siting program and every effort should be made by NRC staff to enhance, rather than restrict, public comment and participation.

   The desire to maintain an ongoing DOE/NRC interagency process is commendable and should be encouraged; however, it should not be considered a substitute for formal public review of the site characterization analysis. If scheduling mandates are to be emphasized, then we suggest that this interaction be depended on to reduce the amount of time needed by staff to prepare the analysis and compensate for the time required for public review of that analysis.

3. The proposed amendments, if adopted, would change 10 CFR Part 60.63(a) to read as follows:

> State and local governments and affected Indian tribes may participate in license reviews as provided in Subpart G of Part 2 of this chapter. (Emphasis added.)

This proposed rule is nothing more than a reminder to states, local governments, and affected Indian tribes of the existence of 10 CFR Part 2, which governs procedure in NRC adjudications and which does not provide a state, local government or affected Indian tribes an absolute right to participation in NRC licensing proceedings even though the licensing proceeding will have a direct impact on the state, local government or affected Indian tribe.

Minnesota believes that the proposed rule amendment should be changed to provide an absolute right of participation in NRC hearings on licensing a high-level radioactive waste repository to those state, local and tribal governments which are affected by the proposed repository. The decision being made in such a proceeding will profoundly affect those entities. The possibility that these entities could be excluded from participation should be remedied.

Minnesota's position on this matter is prompted not only by the importance on the repository licensing matter, but also by the recent efforts of the NRC staff to "reform" the NRC's rules of practice so that states, local governments, and affected Indian tribes could be prevented from effectively participating in NRC licensing hearings of any kind. The staff's suggestions for "improving" the licensing process were published on April 12, 1984 (49 Fed. Reg. 14698). In a letter dated May 25, 1984, Minnesota strongly objected to those suggestions. A copy of that letter is attached. Minnesota continues to believe that those suggestions would adversely affect all future intervenors and would reduce the public's confidence in the NRC as a licensing body.

Minnesota urges the NRC to change the proposed language of 10 CFR Section 60.63(a) to read as follows:

> Upon request, the government of any state, county, municipality or Indian tribe affected by the location of the proposed repository shall be granted party status in any hearing conducted by the Commission on the license application held pursuant to Subpart G of Part 2 of this chapter.

4. The existing 10 CFR Section 60.63 sets forth criteria for approval of state proposals to facilitate state participation. The proposed amendments would renumber Section 60.63(b)(2) to be Section 60.63(d)(2) and amend it to read as follows:

> The proposed activities (i) will enhance communciations between NRC and the state or affected Indian tribes, (ii) will make a productive and timely contribution to the review, and (iii) are authorized by law. (Emphasis added.)

The addition of the word "timely" in describing the type of contribution of a state or Indian tribe that would be looked upon favorably by the NRC could be used to further limit the participatuion of a state or Indian tribe in the review of a site characterization plan and/or a license application. While Minnesota recognizes the need to conduct the proposed activities in a manner that does not unduly delay license reviews, we also recognize that the states do not always have the expertise and personnel immediately available to address complex issues that will be considered by the NRC.

Based on our experience to date with the repository program, as well as our expectations regarding the pressures exerted on decision makers as the program progresses, we are concerned that the word "timely" will become the focal point of this qualification, despite the benefits that might accompany state participation. The key word is "productive" and, if a state can make a productive contribution to the review, the NRC should be willing to accommodate reasonable needs of states in providing that contribution.

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

ST. PAUL 55155

ADDRESS REPLY TO
ATTORNEY GENERAL'S OFFICE
POLLUTION CONTROL DIVISION
[illegible] WEST COUNTY ROAD B2
ROSEVILLE, MN [illegible]
TELEPHONE [illegible]

May 25, 1984

Secretary
U. S. Nuclear Regulatory Commission
Washington D.C. 20555

Re: Request for public comments on suggestions for procedural changes in nuclear power plant licensing process, 40 Fed. Reg. 14698 (April 12, 1984)

Dear Sir:

On April 12, 1984, the Commission published a request for public comments on suggestions for procedural changes in the nuclear power plant licensing process. (49 Fed. Reg. 14698.)

The State of Minnesota, by its Attorney General and its Minnesota Pollution Control Agency, (hereinafter "Minnesota") has reviewed the suggestions published in the Federal Register and wishes to comment on five aspects of the suggestions, as discussed below.

1. Creation of a Screening Atomic Safety and Licensing Board. It has been suggested that 10 C.F.R. Section 2.721 be revised to authorize the establishment of one or more Screening Atomic Safety and Licensing Boards. The screening boards would rule on requests for hearing, petitions for leave to intervene, and admissibility of contentions in all initial licensing proceedings.

Minnesota supports the adoption of this suggestion. The creation of screening boards should result in more consistency and predictability with respect to the rulings made by the Boards. Under the present system, an individual Atomic Safety and Licensing Board is appointed each time a request for hearing is received, and that individual Board makes its own determinations on requests for hearing, petitions for leave to intervene, and the admissibility of contentions. Because each Board is not necessarily aware of what is being done by other Boards or what other Boards have done in the past, there is potential for conflicting rulings on similar requests, petitions, and contentions. Minnesota believes that improving consistency and predictability as to these rulings by creating screening boards would benefit all parties.

2. Applying Judicial Standards of Standing. It has been suggested that 10 C.F.R. Section 2.714 be amended so that no person would be able to initiate a hearing on a nuclear power plant or intervene in a hearing on a nuclear power plant unless that person can meet judicial standards of standing. Specifically, 10 C.F.R. Section 2.714(f) is proposed to be amended as follows:

> (f) Ruling on request for hearing or petition to intervene. The Commission or the presiding officer designated to rule on the intervention petition or request for hearing shall, in ruling on the request or petition shall [sic] consider the following factors, among other things:
>
> (1) The nature of the requestor's or petitioner's right under the Act to be made a party to the proceeding.
>
> (2) The nature and extent of the requestor's or petitioner's property, financial, or other interest in the proceeding.
>
> (3) The possible effect of any order which may be entered in the proceeding on the requestor's or petitioner's interest. No request for hearing or petition to intervene may be granted unless the Commission or the presiding officer designated to rule on the request or petition determines that the requestor or the petitioner meets judicial standards for standing.

Minnesota strongly objects to the suggestion because it is contrary to express provisions of the Atomic Energy Act (Act). Section 189 of the Act provides, in relevant part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

(Emphasis supplied.) Under the Act, any person "whose interest may be affected" has standing to request a hearing or to intervene in a hearing and the Commission is required by the Act to grant such a hearing request or admit any such person as a party. The suggested amendment would require a person's request

or petition to be denied if the person could not meet the more stringent test that must be met to establish judicial standards for standing.

Judicial standards for standing are discussed in the leading case of Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). In that case the United States Supreme Court announced a two-part test for standing. Standing exists if "the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise," and if "the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 152-153, 90 S.Ct. at 829-830.

The suggested amendment goes beyond the requirements of the Act and is thus beyond the Commission's statutory authority. Therefore the Commission cannot adopt the suggested amendment.

3. Changing the Requirements Relating to Contentions. It has been suggested that 10 C.F.R. Section 2.714 be amended to change the requirements relating to contentions. These changes, as discussed below, are significant, and Minnesota objects to these changes.

First, the suggested amendments would change the time for filing of contentions. The existing 10 C.F.R. Section 2.714(b) allows the person who requests a hearing or petitions to intervene to file his or her contentions "not later than fifteen (15) days prior to the holding of the special prehearing conference." The suggested amended 10 C.F.R. Section 2.714(g) requires the contentions and supporting information to be submitted "at the time the petition or request is filed." Second, the suggested amendments would greatly increase the burden on the person who requests a hearing or petitions to intervene to provide information supporting the contentions. The present regulation, 10 C.F.R. Section 2.714(b) only requires the "bases for each contention set forth with reasonable specificity." The suggested amended regulation 10 C.F.R. §2.714(g)(1) would require submission of the following:

> (i) A brief explanation of the bases of the contention.
>
> (ii) A concise statement of the alleged facts or expert opinion which support the contention and which at the time of the filing the requestor or petitioner intends to rely upon in proving its contentions at the hearing,

together with references to the specific sources and documents which will be relied upon to establish such facts or expert opinion.

(iii) Sufficient information (which may included information pursuant to §2.714(g)(1)(i) and (ii)) to show that a genuine dispute exists with the applicant 1/ on an issue of law, fact or policy. This showing must include references to the specific portions of the application (including the applicant's environmental and safety report) which the requestor or petitioner disputes and the supporting reasons for each such dispute, or, if the requestor or petitioner believes that the application fails to contain certain information on a relevant matter as required by law, the identification each such failure and the supporting reasons for the requestor's or petitioner's belief. On issues arising under NEPA, a petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement or appraisal that differ significantly from the data or conclusions in the applicant's document. Amended or new contentions based on NRC environmental documents shall be filed and ruled upon in initial licensing proceedings in accordance with paragraph (j) of this section. (Emphasis supplied.)

The suggested amendments relating to contentions create an impossible situation for intervenors. Ordinarily, in accordance with the provisions of 10 C.F.R. §2.105(d), the Commission informs the public, in the Federal Register, about a proposed license or license amendment thirty days before the due date for the filing of requests for hearing or petitions to intervene. This has, in most cases, been just barely enough time for a potential intervenor to make a decision that it is interested in filing a request for hearing or a petition to intervene and to file the request or petition. Additional time is essential to allow for the drafting of contentions. Under the suggested amendments, potential intervenors will have a maximum of thirty

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1/ History has shown that intervenors in Commission licensing proceedings are just as likely to have a genuine dispute with the Commission staff on issues of law, fact, or policy as with the applicant. If this suggested amendment is intended to limit litigation of disputes only to those between the applicant and the intervenor, this suggested amendment is not reasonable.

days to obtain a copy of the license application and supporting information, review that information, note all problems, develop a case-in-chief, put it in writing, and submit it within the deadline.

The requirement that intervenors must submit, along with their contentions, all of the information set forth in the suggested amendments to 10 C.F.R. Section 2.714(g)(1) amounts to a requirement that intervenors have ready their case-in-chief at the time of filing the request for hearing or petition to intervene, prior to the opportunity to conduct discovery. This requirement is much too onerous at the point in the proceeding where the only decision to be made is whether a particular contention is admissible. It is more onerous than the requirements in any judicial proceeding. Minnesota recognizes that this information must eventually be developed in order to have a meaningful presentation of the issues. However, this information should not be required at such a preliminary stage.

Under the suggested amendments, the only persons who have a hope of submitting an admissible contention are those who have been privileged to have received a copy of the license amendment as the same time as the Commission staff received it, who have followed the Commission staff review and the drafting of the proposed license or license amendment, and who have been preparing their case in chief prior to the publication of notice in the Federal Register of the existence of the license application. In a state such as Minnesota, which is a non-agreement state, it is doubtful that anyone, including the State and its agencies, could submit a successful request for hearing or petition to intervene.

In Minnesota's experience, the present rule allowing contentions to be filed just prior to the special prehearing conference has allowed sufficient time to prepare meaningful contentions and the statement of bases required by the present rule has provided sufficient information to allow the Licensing Boards to rule on their admissibility. Therefore the present rule should be retained. The suggested amendments are unreasonable and should be rejected by the Commission.

4. Requiring a Demonstration of Special Need for Cross Examination. It has been suggested that 10 C.F.R. Section 3.733 and 2.743 be revised to permit cross examination only upon the request of a party filed within 10 days after service of the written testimony concerning a particular issue and limiting cross examination only to those parties who have submitted an admissible contention on the issue. A motion to cross examine

must include a detailed cross examination plan and a statement as to why written testimony could not establish the same points.

Minnesota regards this suggestion as entirely unacceptable. The major purpose of a Commission licensing hearing is to adjudicate disputed facts. Trial-type procedures are not only appropriate but essential to develop a full and complete hearing record. The right of parties to cross examine witnesses in an adversarial proceeding is a fundamental characteristic of the adversarial process arising from basic constitutional principles of due process. There would have to be an extraordinarily good reason to remove that constitutional right entirely from persons who did not happen to file a contention on a given issue. Such a good reason is not demonstrated by the discussion of this suggestion. In fact, no reason is offered by the discussion of this issue.

There are perfectly legitimate reasons why an intervenor may wish to, and should have a right to, cross examine witnesses on issues raised by another party. Many intervenors, including states, have limited resources to devote to Commission licensing proceedings. They be forced by this fact to coordinate their efforts with other intervenors and to divide up the work with respect to issue in which they have a common interest. Thus two intervenors may, to avoid duplication of effort, agree between themselves to assert different contentions but to support each other with respect to the presentation of evidence and the cross examination of adverse witnesses concerning these contentions. In addition, given the complexity of the subject matter, an intervenor may discover that it is vitally interested in an issue which it did not initially identify. The Commission has no valid reason to cut off the rights of parties to fully participate in all issues which are the subject of the hearings.

Even where the suggested amendment allows a party an opportunity to make a motion for the right to cross examine witnesses, the terms of the suggested amendment is a de facto removal of the right to cross examination. It is totally unreasonable and unrealistic to expect a party who has been served with potentially voluminous testimony and exhibits to accomplish, within ten days, the tasks of reading and digesting the material, preparing a detailed cross examination plan, and preparing and submitting a written motion to the presiding officer. No person who has ever been a party to a Commission licensing proceeding could seriously suggest that ten days would be sufficient to accomplish all of this.

The time schedule established by this suggested amendment

contains serious potential for abuse by parties with substantial financial resources. For example, an applicant who wishes to ensure that its witnesses will not be cross examined has the opportunity to present the intervenors with thousands of pages of testimony and exhibits which would be clearly beyond the capability of the intervenor to review in time to file a motion for cross examination.

Minnesota emphatically objects to the suggested amendments regarding cross examination and urges the Commission not to consider them any further.

5. Limitations on Filing Proposed Findings of Fact, Conclusions of Law, and Exceptions. It has been suggested that 10 C.F.R. Sections 2.754 and 2.762 be amended to limit the filing of proposed findings of fact, conclusions of law, and exceptions on a given issue only to those parties who raised the issue in a contention. Applicants and Commission staff, however, would not be subject to this limitation.

Minnesota strenuously objects to this suggestion, as it will not further the Commission's interest in better decision-making and it will severely limit the full participation by intervenors. As discussed above, intervenors may have a significant interest in contentions raised by other parties. There is nothing inherently unfair about a party submitting its views as to the state of the record on an issue which has been duly raised in an adversarial proceeding. The filing of proposed findings of fact and conclusions of law does no harm; on the contrary, it could be of help to the decision-makers. The filing of valid exceptions by persons other than those who put an issue in controversy is likewise no threat to sound decision-making. This suggestion is not supported by any valid rationale and should not be adopted by the Commission.

Minnesota appreciates the opportunity to comment on the suggested amendments, which, if adopted, would have a profound impact on the ability of Minnesota to participate in any future Commission licensing proceedings. In general, the suggestions are inimical to intervenors and to the public. The suggestion that these amendments would "improve" the hearing process is

ironic. The "improvement" would consist of the elimination of all hearings other than those requested by applicants.

Very truly yours,

HUBERT H. HUMPHREY, III
Attorney General

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MARK WHITE
GOVERNOR

September 9, 1983

Mr. Robert Browning
Nuclear Regulatory Commission
Washington, D.C. 20555

RE: Procedural Amendments to Nuclear Regulatory Commission 10 CFR 60, Disposal of High-Level Radioactive Wastes in Geologic Repositories

Dear Mr. Browning:

We have reviewed the draft materials distributed to state representatives at the meeting on August 19, 1983, at Dallas, and evaluated the various proposals relative to our interests in participating in Nuclear Regulatory Commission activities and decisions as they relate to disposal of high-level nuclear wastes in geologic repositories. We have also reviewed the existing appropriate sections of 10 CFR 60 to determine whether amendments are needed to have the rule conform to provisions of the Nuclear Waste Policy Act of 1982. We have determined that, while some minimal level of amendment to procedure is needed to achieve conformity with the Act, further amendment may be appropriate to enhance the efficiency and maintain the substance of an assured opportunity for interaction between an interested state and NRC.

We have chosen as a format for a response to your request for comment, a revision, in rule form, of the appropriate sections of 10 CFR 60. You will find this draft revision attached. Much of it will be familiar to you, as we have drawn heavily from sections of the existing 10 CFR 60, as well as from the two draft proposals presented in the Dallas meeting. Our focus was largely on Section 60.11 and Subpart C of the rule, as was yours, but you will note some major conceptual variation from your 8/17/83 Draft. I think you will find the proposal, overall, to be supportive of my statement in the Dallas meeting to the effect that we and other states are seeking an assured access to NRC activities and decisions that affect us as potential host states for a high-level nuclear waste repository. We also want that access to be one that does not result in an unnecessary burden on the NRC or the states, yet will result in a full and constructive relationship between the parties.

You will note in the attached proposed rule amendments that we have developed a procedure that removes the existing requirement for NRC to write and submit for public review a Draft Site Characterization Analysis. While we prefer the draft SCA process now standing in 10 CFR 60, we also recognize the advisory nature of the SCA and the need to expedite its transmittal to DOE. Thus we view our proposal to contain an acceptable alternative process by which substantially the same results can be achieved by NRC and the states, but in a manner that is less consumptive of time and resources on the part of all parties.

Our proposed changes to Subpart C, we think, preserve the opportunity for formal interaction between parties, while establishing a more permissive means of achieving that interaction. In addition, we have attempted to include only those provisions of the existing Subpart C that seem appropriate in light of the provisions of the Nuclear Waste Policy Act.

We appreciate the opportunity to respond to your draft proposals regarding NRC Rule 10 CFR 60. If you have questions or comments regarding our proposal please do not hesitate to contact me. I will be happy to discuss this matter further with you and your staff, at your convenience.

Sincerely,

Steve Frishman, Director
Nuclear Waste Programs Office

SF:sz

Enclosure

cc: Mr. Holmes Brown, National Governor's Association

10 CFR PART 60 - DISPOSAL OF HIGH-LEVEL WASTES IN GEOLOGIC REPOSITORIES

1. The Authority citation for Part 60 continues to read as follows:

AUTHORITY: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95-601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); sec. 121, Pub. L. 97-425, 96 Stat. 2228 (42 U.S.C. 10141).

2. Section 60.2 is revised by inserting, in the appropriate alphabetical location, a definition of the term "affected Indian tribe." As revised, §60.2 reads:

60.2 Definitions.

As used in this part --

* * * * * *

"Affected Indian tribe" means an affected Indian tribe as defined in the Nuclear Waste Policy Act of 1982.

* * * * * *

3. Section 60.2 is further amended by deleting the definitions of "Indian tribe" and "Tribal organization."

4. Section 60.10 is redesignated as §60.15.

(v) Plans to apply quality assurance to data collection, recording, and retention.

(3) Plans for the permanent closure, decontamination, and dismantlement of surface facilities and for the mitigation of any significant adverse environmental impacts caused by site characterization activities, if such area is determined unsuitable for application for a construction authorization for a geologic repository operations area;

(4) Criteria, developed pursuant to section 112(a) of the Nuclear Waste Policy Act of 1982, to be used to determine the suitability of such area for the location of a geologic repository; and

(5) Any other information which the Commission, by rule or order, requires.

(b) A description of the possible waste form or waste package for the high-level radioactive waste to be emplaced in such geologic repository, a description (to the extent practicable) of the relationship between such waste form or waste package and the host rock at such area, and a description of the activities being conducted by DOE with respect to such possible waste form or waste package or such relationship; and

(c) A conceptual design for the geologic repository operations area that takes into account likely site-specific requirements.

§60.19 Review of site characterization activities

(a) The Director shall cause to be published in the Federal Register a notice that a site characterization plan has been received from DOE and that a staff review of such plan has begun. The notice

shall identify the area to be characterized and the NRC staff members to be consulted for further information.

(b) The Director shall make a copy of the site characterization plan available at the Public Document Room. The Director shall also transmit copies of the published notice of receipt to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian tribe.

(c) (1) The Director shall review the site characterization plan and prepare a site characterization analysis with respect to such plan.

(2) The Director shall, in the Federal Register notice provided for in Section 60.18(a), request comment from affected states, Indian tribes, and interested persons which he will review and consider in preparing the site characterization analysis and additional comments and recommendations.

(3) The Director shall also review and consider comments and questions submitted in the DOE public hearings held according to Section 113(b)(2)(B) of the Nuclear Waste Policy Act of 1982, and the Director shall review and consider DOE responses to such questions and comments in his preparation of the site characterization analysis and additional comments and recommendations.

(d) The Director shall provide to DOE his site characterization analysis, together with a summary of comments received under Section 60.18(c)(2 and his response to those comments, and such additional comments as may be warranted. Such comments shall include either a site -

that the Director has no objection to the DOE's site characterization program, if such a statement is appropriate, or specific objections with respect to DOE's program for characterization of the area concerned. In addition, the Director may make specific recommendations pertinent to DOE's site characterization program.

(e) If DOE's planned site characterization activities include onsite testing with radioactive material, the Director's comments shall include a determination, if appropriate, that the Commission concurs that the proposed use of such radioactive material is necessary to provide data for the preparation of the environmental reports required by law and for an application to be submitted under §60.22 of this part.
(NOTE: 60.22 appears to need revision to support Subsection (e))

(f) The comments of the Director under this section shall not constitute a commitment to issue any authorization or license or in any way affect the authority of the Commission, the Atomic Safety and Licensing Appeal Board, Atomic Safety and Licensing Boards, other presiding officers, or the Director, in any proceeding under Subpart G of Part 2 of this chapter.

(g) During the conduct of site characterization activities, DOE shall report not less than once every six months to the Commission on the nature and extent of such activities and the information that has been developed and on the progress of waste form and waste package research and development. The semiannual reports shall include the results of site characterization studies, the identification of new issues, plans for additional studies to resolve

new issues, elimination of planned studies no longer necessary, identification of decision points reached and modifications to schedules where appropriate. DOE shall also report its progress in developing the design of a geologic repository operations area appropriate for the area being characterized, noting when key design parameters or features which depend upon the results of site characterization will be established. Other topics related to site characterization shall also be covered if requested by the Director.

(h) During the conduct of site characterization activities, NRC staff shall be permitted to visit and inspect the locations at which such activities are carried out and to observe excavations, borings, and in situ tests as they are done.

(i) The Director may comment at any time in writing to DOE, expressing current views on any aspect of site characterization. Comments received in accordance with this Section and Section 60.64 shall be considered by the Director in formulating his views.

(j) The Director shall transmit copies of the site characterization analysis including the comment summary and response required under Section 60.18(d), all comments to DOE made by him under this section to the Governor and legislature of the State in which the area to be characterized is located and to the governing body of any affected Indian tribe.

(k) All correspondence between DOE and the NRC under this section, including the reports described in paragraph (g), shall be placed in the Public Document Room.

(l) The activities described in paragraphs (a) through (k) above constitute informal conference between a prospective applicant and the staff, as described in §2.101(a)(1) of this chapter, and are not part of a proceeding under the Atomic Energy Act of 1954, as amended.

Section 60.61 Provision of Information

(a) The Director shall provide to the Governor and Legislature of any State containing a site which has been approved for site characterization, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made by the commission wit respect to the site characterization, siting, development, design, licen ing construction, operation, regulation, permanent closure, decontamina and dismantlement of surface facilities of any proposed repository at such site.

(b) Notwithstanding paragraph (a), the Director is not required to distribute any document to any entity if, with respect to such document, that enti or its counsel is included on a service list prepared pursuant to part 2 of this chapter.

(c) Copies of all communications by the Director under this section shall be placed in the Public Document Room and copies thereof shall be furnished to DOE.

Section 60.62 Site Review

(a) Upon approval of a site for site characterization and upon request of a state, or Indian tribe, the Director shall make available NRC staff to consult with representatives of states and Indian tribes to keep them informed of the Director's view on the progress of site characterization

and to notify them of any subsequent meetings or further consultations with the Department of Energy.

(b) Requests for consultation shall be made in writing to the Director.

(c) Should the State, Indian tribe, or other interested person direct questions or comments in accordance with section 60.18(c)(2) to NRC concerning the preparation of the site characterization analysis, the Director shall review and consider such comments and questions in the preparation of the site characterization analysis. In addition, he shall summarize and respond to such comments and questions and provide such summary and response to DOE in accordance with Section 60.18(d).

(d) Consultation under this section may include, among other things, a review of applicable NRC regulations, licensing procedures, protential schedules, and the type and scope of State activities in the license review and site characterization plan review. In addition, staff shall be made available to cooperate with the State in developing proposals for participation by the State.

Section 60.62 Filing of Proposals for State Participation

(a) State and local governments and affected Indian tribes may participate in license reviews as provided in Subpart G of Part 2 of this chapter.

(b) States in which sites have been approved for site characterization may submit to the Director a proposal for State participation in the review of the site characterization activity reports and/or license application.

A state's proposal to participate may be submitted at any time prior to docketing of an application or up to 120 days thereafter.

(c) Proposals for participation under this Subpart shall be made in writing and signed by the Governor of the State or the official designated by State law or by joint designation of the governor and legislature.

(d) Items which may be presented for consideration, in whole or in part, subject to revision by the State, in a proposal for State participation include but are not limited to:

(1) A general description of how the State wishes to participate in the review and a preliminary identification of issues which it wishes to review.

(2) A preliminary description of material and information which the State plans to submit to the NRC staff for consideration in the review.

(3) Services or actions which the State may request such as seminars, public meetings, additional Public Document Rooms, or employment or exchange of State personnel under the Intergovernmental Personnel Act.

Section 50.64 - Approval of Proposals

(a) The Director and a representative of the State shall jointly arrange for meetings between the representatives of the State and the NRC staff to

discuss any proposal submitted under Section 60.63(b), with the primary goal of identifying any modifications that may contribute to the effective participation by the State.

(b) The Director shall approve all or any part of a proposal as it may be modified through the meetings described above if it is determined that the proposed activities:

(1) will enhance communications between NRC and the State,

(2) will contribute productively to the license review and/or site characterization activity report reviews, and

(3) are not prohibited by law.

(c) The decision of the Director shall be transmitted in writing to the Governor or designated official of the originating State. A copy of the decision shall be made available at the Public Document Room. If all or any part of a proposal is rejected, the decision shall state the reason for the rejection.

(d) The State originating the proposal may appeal the rejection of all or any part of a proposal to the Commission.

(e) A copy of all proposals received shall be made available at the Public Document Room.

Section 60.55 Participation by Indian Tribes

(NO CHANGES SUGGESTED IN THIS SECTION)

Section 60.56 Notice to States. If the Governor and Legislature of a State ha jointly designated on their behalf a single person or entity to receive notice and information from the Commission under this part, the Commission will provi such notice and information to the jointly designated person or entity instead of the Governor and Legislature separately.

Section 60.67 Coordination

The Director may take into account the desirability of avoiding duplication of effort in taking action on multiple proposals submitted pursuant to the provis of this Subpart to the extent this can be accomplished without substantial prejudice to the parties concerned.

OFFICE OF THE GOVERNOR
STATE CAPITOL
AUSTIN, TEXAS 78711

MARK WHITE
GOVERNOR

September 19, 1984

Mr. Robert Browning, Director
Division of Waste Management
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Browning:

We appreciate the opportunity for continued consultation with you and your staff on the draft revision of 10 CFR 60 -- "Disposal of High-Level Radioactive Wastes in Geologic Repositories". While we find no objection to most of the proposed modifications, there are several key points on which we are compelled to comment: (1) opportunity for state comment on the NRC site characterization analysis prior to its submission to the Department of Energy, (2) irrevocable commitment by NRC to explicitly respond to the affected state comment on site characterization analyses, and (3) a defined mechanism for appeal to the Commission of state participation decisions by the Director of the NRC Office of Nuclear Material Safety and Safeguards (NMSS). Section references below apply to the July, 1984 draft revision to 10 CFR 60 (Document 7590-01).

Items (1) and (2) above concerns subpart B, sections 60.15 through 60.18 addressing site characterization. In order to offer explicit comments on these sections, knowledge of the mechanics and schedule of interactions between NRC and DOE in the site characterization process is necessary. The Nuclear Waste Policy Act provides broad guidance on this portion of the high-level waste disposal program. The Act also provides in section 117 that the Commission shall provide timely and complete information for, among other things, site characterization plans. Consistent with these provisions of the Act, we recommend that one or more meetings be held for DOE, NRC, potential host states, and affected Indian tribes to develop the mechanics of the interactions surrounding the site characterization plan, site characterization analysis, comments of the affected states and Indian tribes, and the initiation of site characterization activities. Until this process is adequately defined we cannot prepare comprehensive comments on the portions of 10 CFR 60 addressing participation in the site characterization planning process.

In spite of the uncertainty presented by the lack of detail for the site characterization planning process, we have prepared comments on the current draft revision of 10 CFR 60 based on assumptions regarding details of that process. The three key assumptions are: (a) the DOE will not commence site

characterization until the final site characterization analysis has been submitted to them and addressed, (b) the NRC will be allocated sufficient time to complete a comprehensive process for assessment of the DOE site characterization plan, and (c) the DOE site characterization plan will be modified to address the issues presented in the site characterization analysis before site characterization begins. As noted above, final comments on 10 CFR 60 cannot be prepared until these key issues are definitively addressed.

With respect to the opportunity for state input, the revised rule contains two relevant provisions. At subsection 60.18(c) the Director of NMSS is permitted (but not required) to "invite and consider the views of interested persons on DOE's site characterization plan". This mechanism could allow some affected state input but only at the discretion of the Director, and the comments would not be based on a draft site characterization analysis, in view of the removal of this provision in the draft revision. The other relevant provision (subsection 60.18(f)) of the draft revision instructs the Director of NMSS to request public comment on the site characterization analysis, but it is our understanding that the opportunity for comment will occur after the site characterization analysis is submitted to the DOE and further that the comments will then simply be filed in the NRC Public Document Room.

We submit that offices and agencies of each potential host state are uniquely qualified, because of extensive familiarity with geotechnical and other factors regarding the potential sites and vicinities, to identify relevant issues to be addressed in the site characterization plans and the analyses of those plans. For example, in Texas, we have obtained data from the Texas Department of Water Resources on quality and availability of water from a water-bearing unit that had not been considered by DOE. This recognition of unique state perspective was, in fact, noted by the NRC in NUREG-0539, "Means for Improving State Participation in the Siting, Licensing, and Development of Federal Nuclear Waste Facilities."

The need for greater state input in the licensing process was clearly articulated in one of the key waste management studies of recent years, the "Report to the President by the Interagency Review Group on Nuclear Waste Management" (TID-29442, pp. 95-96). Although, the Nuclear Waste Policy Act requires that hearings be held in the vicinity of sites to be characterized, our experience suggests that DOE responses to these comments will not be adequate. The critical licensing role played by NRC should enhance the likelihood of DOE attention to concerns identified by the states if the NRC finds merit in those concerns and passes them on to DOE in the site characterization analysis.

With respect to our concern that the NRC respond directly to comments of affected states, the key role of these states in the high-level waste management issue is clearly articulated in the Nuclear Waste Policy Act. State leadership of the affected states is identified as the focal point for interaction between the federal government and affected parties. Because of that

responsibility, it is essential that the state receive direct responses to concerns submitted to federal authorities on key program documents -- such as the site characterization analysis. We, therefore, recommend alteration of 10 CFR 60 to include an irrevocable commitment for direct NRC response to state comments on that document. Congress recognized the states' critical need for full information and, furthermore, grants specific authority to obtain that information in section 117 of the Nuclear Waste Policy Act.

Finally, item (3) above concerns the provision in subpart C, subsection 60.63(e) which states that the Director of NMSS will accept or deny state participation proposals. In view of the relatively subjective determination required to make such a decision based on the specified criteria (subsection 60.63(d)), we are concerned that a mechanism be defined for appeal of unfavorable decisions to the Commission. Based on discussions with you and your staff on July 27, 1984 and August 9, 1984, we understand that staff decisions can always be appealed to the Commission itself and explicit statement of that option in 10 CFR 60 is not required. This understanding, if correct, sufficiently addresses our concern about this provisions. We strongly support your suggestion that language noting this opportunity for appeal to the Commission be included in the Statement of Consideration for this rule.

We appreciate your providing a copy of your draft revision of 10 CFR 60 for review. I hope these comments are helpful in this revision of the high-level radioactive waste disposal regulations.

Yours truly,

Dan Smith

Dan Smith, Assistant Director
Nuclear Waste Programs Office

bcc:

cc: Steve Frishman, Director, Nuclear Waste Programs Office

Division of Planning and Natural Resources
COEUR d'ALENE TRIBE OF IDAHO
Coeur d'Alene Tribal Headquarters
PLUMMER, IDAHO 83851

16 March 1985

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Sir:

This is to comment on the proposed rulemaking of Jan. 17, 1985 (Federal Register, Vol. 50, No. 12, p. 2579), limiting notification, funding, and participation by Indian Tribes to those having "affected status" as defined under the Nuclear Waste Policy Act of 1982. Thus Section 60.2 would change "Indian Tribe" and "Tribal Organization" to "affected Indian Tribe" as defined in the NWPA, which requires that "affected status" be determined by the Secretary of the Interior. I would bring to your attention that the Secretary has found the Coeur d'Alene Tribe not entitled to "affected status" even though Lake Coeur d'Alene (one-third of which lies within the Coeur d'Alene Indian Reservation) and the Coeur d'Alene River and its tributaries are crossed, recrossed, and skirted through much of their length by Interstate 90, a primary transportation route to the proposed Hanford repository, and even though the Tribe's Reservation lies downwind from Hanford in an area where the soil has been transported from as far away as Oregon by the prevailing winds, which blow from Hanford for the major part of the year. The definition is in any case rather peculiar, giving more importance to areas outside reservations, where Tribes have no more than fishing hunting, and gathering rights, than to Reservation lands themselves, where Tribal members live.

In conjunction with Section 60.63, which now is to read " . . . State and local governments and affected Indian Tribes may participate in license reviews . . . ." the Coeur d'Alene Tribe is thus entirely excluded from the process, even though the potential damage to its lands certainly exceeds that to any local government's lands. The NRC should provide a means by which Tribes which do not meet the peculiar definition of "affected Tribe" even though subject to transportation and windborne effects, can receive funding for effective participation in the process.

Respectfully,

James C. Albrecht

James C. Albrecht
Natural Resources Planner

PROPOSED RULE PR-60
(50 FR 2579)

(14)

Department of Energy
Washington, D.C. 20585

MAR 2 1 1985

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

Dear Mr. Chilk:

The Department of Energy is pleased to respond to the request of the Nuclear Regulatory Commission (NRC) for comments on the proposed procedural amendments to 10 CFR 60, published on January 17, 1985 (50 Federal Register 2579). The proposed amendments should bring the regulation in line with the Nuclear Waste Policy Act of 1982. Attached are our comments with recommended alternative language where appropriate. Most of our recommended changes to the proposed or existing rules are in the line-in/line-out form. Recommended additions are underlined and recommended deletions are in brackets. For each recommended change, we have added a brief rationale. We are available to meet with NRC concerning the enclosed comments.

Sincerely,

Ben C. Rusche, Director
Office of Civilian Radioactive
Waste Management

Enclosure:
DOE Comments on NRC Proposed Revisions to 10 CFR Part 60

Acknowledged by card... MAR 2 8 1985

1.0 COMMENTS ON SUPPLEMENTARY INFORMATION

DOE notes that the first footnote to page 2580 of the proposed rule identifies that the Content of Application Section (60.21) will be reviewed after issuance of the DOE Siting Guidelines. We would encourage the NRC to propose any necessary revisions to this section as soon as practicable in order to ensure that any additional data deemed necessary by the NRC staff to make a finding can be factored into the site characterization activities and to minimize any unnecessary delay in the license application preparation activities which DOE has already begun.

In addition, Commissioner Asselstine requested comments on two matters set forth at page 2588 of the Proposed Rule. With regard to the first point raised by Commissioner Asselstine, DOE agrees with NRC that discussion of the site screening and selection process in the site characterization plans is neither necessary nor appropriate. This information will have already received extensive and sufficient public review, including a review by the NRC staff, during preparation of the site specific environmental assessments. Therefore, DOE agrees with the deletion of the requirement in the existing 10 CFR 60.11 as proposed by NRC. The second point raised by Commissioner Asselstine deals with the timing of public review of NRC's site characterization analyses. DOE agrees with NRC that circulation of a draft site characterization analysis for public comment is not necessary and that the rule should be promulgated as now proposed. Under the proposed rule, the public will have a sufficient opportunity to comment on the site characterization analyses and to make the NRC aware of its concerns at any time during the site characterization process. Also, DOE will be interacting extensively with NRC and the States and Indian tribes prior to the release of the site characterization plans. This will allow all parties ample opportunity to comment on DOE's planned activities during site characterization.

2.0 SECTION-BY-SECTION ANALYSIS

(The underlined wording should be inserted for the reasons specified in the rationale.)

Subpart B

60.15(c) (presently 60.10(c))	NRC has stated that it will be revising 10 CFR Part 51 to make it consistent with the NWPA. Pending this revision, NRC should footnote the cross reference to Part 51.40 in Section 60.15(c) to indicate that NWPA has superseded the current Section 51.40(d). This footnote should identify Section 114(f) of the NWPA as containing the environmental review provisions applicable to high-level nuclear waste repositories.

60.15 (d) (2) The number of exploratory boreholes and shafts shall be limited to the extent practical, consistent with obtaining the information needed for site characterization, and with mine safety considerations.

Rationale: Safety considerations might require more shafts than are strictly necessary for site characterization.

60.16, 60.17 In the proposed revisions to these sections, the word "area" is used synonymously with the term "candidate site", as defined in the NWPA and the Siting Guidelines. Although NRC has expressed a preference not to adopt the statutory term in this case, DOE strongly believes that both agencies should adhere to the statutory terminology to the greatest extent possible, in order to avoid the confusion that would result from the two agencies having different names for identical concepts. Accordingly, DOE urges that NRC adopt the term "candidate site", and make any additional changes necessary to give its regulations the maximum congruence with statutory terminology.

60.18(d) Within 150 days of receipt of a site characterization plan from DOE, the director shall provide to DOE the site characterization analysis together with such additional comments as may be warrented. These comments shall include either a statement that the Director has no objection to the DOE's site characterization program, if such a statement is appropriate, or specific objections with respect to DOE's program for characterization of the area concerned. In addition, the Director may make specific recommendations pertinent to DOE's site characterization program. Within 90 days of receipt of a site characterization plan from DOE, the Director shall provide to DOE specific comments that, in the Director's view, should be considered by DOE prior to the sinking of exploratory shafts.

Rationale: The sinking of exploratory shafts at a candidate site is a critical path activity in each site characterization program. The site characterization programs themselves are critical path activities in the overall waste management program. Accordingly, it is essential that a specified time be established for significant events that could affect those critical path activities. The comments of NRC on a site characterization plan is one of those significant events. The suggested modification to Section 60.18(d) provides for two such specified time intervals: first, a ninty (90) day period within which NRC will provide to DOE those specific comments

considered by DOE prior to sinking exploratory shafts; the second, a 150-day period for issuing the overall site characterization analysis. The ninty (90) day period is consistent with the time being planned for public review and comment on the SCP's. This will ensure timely consideration of all comments prior to sinking of exploratory shafts and minimize the potential for delays.

60.18(e) If DOE's planned site characterization activities include on-site testing with radioactive material, the Director's comments shall include a determination, if appropriate, that the Commission concurs that the proposed use of such radioactive material is necessary to provide data for the preparation of the environmental reports required by law and for an application to be submitted under 60.22 of this part.
The Commission will concur in the use of radioactive tracers if, at the end of site characterization, they will be present in the geologic repository operations area in concentrations less than those allowed by Table II, 10 CFR 20. The removal of these trace amounts at the end of site characterization shall not be required.

Rationale: The regulation does not differentiate between "10 metric tons of spent fuel" (the maximum amount permissible under Section 13(c)(2)(B)(i)) and small amounts of radioactive tracers. The proposed change is necessary to allow DOE the flexibility to use radioactive tracers if necessary in conducting site characterization activities.

60.18(h) During the conduct of site characterization activities, NRC staff shall be permitted ... as they are done in accordance with the Procedural Agreement and implementing project specific agreement between NRC and DOE in effect at that time.

Rationale: DOE suggests that the regulation specifically reference the existing DOE/NRC Procedure Agreement and the project specific implementing agreement to preclude any questions concerning their future applicability.

New Section 60.__ Timely Commission Action

The Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than --

1. January 1, 1989, for the first such application and January 1, 1992, for the second such apolication; or

2. The expiration of three years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established by law;

whichever is later.

Rationale: This recommended new section would recognize the NRC's responsibility under Section 114(d) of the NWPA to reach a decision on construction authorization within the timetable set forth therein. DOE believes this timetable to be stringent, and therefore also believes that a specific regulatory provision to the effect of this recommendation is desirable, in order to emphasize the NRC's dual obligations to conduct its licensing proceedings in a full, fair and open manner, but also to reach its decisions in a timely manner.

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April 8, 1985

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

Dear Mr. Chilk:

Enclosed are the Comments of the Confederated Tribes and Bands of the Yakima Indian Nation on the Proposed Amendments to 10 CFR Part 60, 50 Fed. Reg. 2579.

Sincerely yours,

Dean R. Tousley

Dean R. Tousley

ASSOCIATE ATTORNEY FOR
THE YAKIMA INDIAN NATION

Enclosure

cc: Mr. Melvin R. Sampson
Mr. Russell Jim
Mr. James B. Hovis

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Disposal of High-Level Radioactive Waste in Geologic Repositories; Amendments to Licensing Procedures	10 CFR Part 60 50 Fed. Reg. 2579

COMMENTS OF THE YAKIMA INDIAN NATION

Pursuant to Nuclear Regulatory Commission notice published January 17, 1985, 50 Fed. Reg. 2579, the Confederated Tribes and Bands of the Yakima Indian Nation submit the following comments on NRC's proposed amendments to licensing procedures for disposal of high-level radioactive waste in geologic repositories, 10 CFR Part 60. Except for the two matters discussed below, the Yakima Indian Nation has no objections to the other proposed amendments to Part 60.

I. THE COMMISSION INCORRECTLY CONCLUDES THAT IT LACKS AUTHORITY TO REVIEW DOE'S SITE SELECTION PROCESS.

The proposed amendments to 10 CFR Part 60 would eliminate the provision in 10 CFR § 60.11 that the NRC review DOE's repository site selection process. The Commission concludes that, since the Nuclear Waste Policy Act ("NWPA") does not explicitly provide for NRC review of the site screening and selection processes of the Department of Energy, "[s]uch a review by NRC is not necessary to fulfill any of its statutory responsibilities." 50 Fed. Reg. 2583, col. 2. The Yakima Indian Nation strongly disagrees.

Apart from ignoring clear statutory authority to engage in a review of DOE's site selection process, NRC's failure to do so would be a policy mistake with profound implications for the likelihood of success of the national radioactive waste disposal program.

A. NRC review of DOE's site selection process is not only authorized, but is required by the Atomic Energy Act of 1954, the Energy Reorganization Act of 1974, the National Environmental Policy Act of 1969, and the Nuclear Waste Policy Act of 1982.

The lack of explicit NWPA provisions for NRC review of DOE's site selection process--other than the Commission's concurrence in the general siting guidelines--does not dispose of the possible sources of statutory authority for the Commission to do so. On the contrary, the NWPA quite clearly provides that NRC authority to promulgate technical requirements and criteria (i.e., Part 60) is pursuant to "other provisions of law." NWPA § 121(b)(1)(A). The NWPA specifically mentions as such authority the Atomic Energy Act of 1954 (42 U.S.C. § 2011 *et seq.*) and the Energy Reorganization Act of 1974 (42 U.S.C. § 5801 *et seq.*). Thus, Congress did not intend in the NWPA to prescribe the scope of NRC review of DOE's repository program. Rather, the authority for NRC requirements and their appropriate scope are derived from those "other provisions of law."

The Atomic Energy Act, as amended by the Energy Reorganization Act, is the NRC's organic statute. It assigns to the NRC the primary responsibility for assuring that the public health and safety and the environment are adequately protected

from the hazards associated with activities involving radioactive materials, including disposal. Section 202 of the Energy Reorganization Act explictly establishes NRC authority to license and regulate high-level waste repositories, 42 U.S.C. § 5842.

In sharp contrast to questions of nuclear power plant safety, the primary determinant of the adequacy of a high-level radioactive waste repository over the very long periods of concern will be not engineered features, but rather the natural, geologic characteristics of the site chosen. Congress emphasized this point when it required in the NWPA that detailed geologic considerations should be the primary criteria for the selection of sites for repositories, NWPA § 112(a), and when it established elaborate procedures for the selection of sites. *See* NWPA §§ 112-118. This primacy of natural site conditions in determining the adequacy of a proposed repository means that siting is the absolute essence of the NRC's mandated public health and safety and environmental protection responsibilities under the above-cited statutes.

The repository site selection process is by far the most important aspect of the adequacy of the repository program. Thus, for NRC to decline to review that process in the crucial early stages of selecting sites for characterization would be a basic abdication of its public health and safety and environmental protection responsibilities under the Atomic Energy Act and Energy Reorganization Act. NRC cannot hope to adequately discharge its responsibilities by deferring its review of the sites until the stage of repository construction authorization.

Moreover, the Commission's responsibilities under the National Environmental Protection Act ("NEPA") require it to engage in evaluation of alternatives as a part of its licensing process. Under NWPA § 114(f), the Commission must, to the extent practicable, adopt the environmental impact statement submitted by DOE with its application for construction authorization as its own. Under the same section, the alternatives considered in that EIS for purposes of NEPA compliance are those

> 3 candidate sites with respect to which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination, that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 112(a).

Thus, the sites which DOE selects for characterization now will be the only effective alternatives that the Commission will have to consider in fulfilling its NEPA responsibilities. It was precisely in recognition of this fact that the Commission required, as a condition of its concurrence in DOE's siting guidelines, that DOE agree to make the "preliminary determination of suitability" at the end of site characterization instead of before it, as DOE had proposed. The Commission recognized at that time that if DOE did not have strong incentives to select the most suitable sites for characterization, the Department might later come to the Commission with an EIS which considers unacceptable alternatives.

For the same reason of satisfactory NEPA compliance, the Commission must play an active role in reviewing DOE's comparison and selection of sites for characterization. Indeed, NEPA was cited by the Commission as its primary authority for the original

promulgation of Part 60. 46 Fed. Reg. 13922. The same NEPA responsibilities which prompted the original promulgation of Part 60, including its requirement for NRC review of DOE's site selection process, remains unaltered by the NWPA.

In the most important court case interpreting the Commission's role in NEPA implementation, the U.S. Court of Appeals for the D.C. Circuit wrote:

> NEPA requires that an agency must--to the *fullest* extent possible under its other statutory obligations--consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a *pro forma* ritual.
> ...
> Such a full exercise of substantive discretion is required at every important, appropriate and nonduplicative stage of an agency's proceedings.

Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1128 (D.C. Cir. 1971) (Emphasis in the original). The only alternatives which the Commission need consider under the NEPA modifications included in the NWPA are the three sites which are selected for characterization by DOE. NWPA § 114(f). If DOE selects for characterization sites which are unlikely to prove to be suitable alternatives for NEPA purposes, NRC will not have an acceptable EIS which it can adopt.

Since ultimate NRC satisfaction of its NEPA responsibility is being profoundly affected by present DOE actions in selecting sites for characterization, there can be no question but that this is an "important, appropriate and nonduplicative stage of [the] proceeding" which requires NRC's "full exercise of its substantive discretion". Only aggressive NRC review and oversight of the DOE

selection of sites for characterization can ensure the Commission's ability to adopt the DOE EIS.

Finally, the NWPA explicitly does not compel the Commission to amend or narrow the scope of its licensing requirements. NWPA § 114(f) states, in part:

> nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act .... *Nothing in this Act shall be construed to amend or otherwise detract from the licensing requirements of the Nucler [sic] Regulatory Commission as established in title II of the Energy Reorganization Act of 1974....*

(Emphasis added.) Congress was well aware of the existing provisions of Part 60 when it passed the NWPA, and incorporated many of them in the Act. However, in light of the above language, it could not be more clear that Congress did not intend its failure to incorporate all of the details of Part 60 in the Act to be deemed as implicit rejections of them. Inconsistent provisions, such as the Commission properly addresses in other aspects of the instant proposal, obviously warrant amendments by the NRC. On the other hand, where Congress was silent on a subject already addressed by the Commission in Part 60--such as NRC review of DOE's site selection process--Congress made plain its intent that NRC licensing and regulatory requirements not be deemed implicitly curtailed by any provision in the NWPA.

Thus, the Commission's conclusion that the NWPA *by omission* somehow proscribes its review of DOE's site selection process is patently incorrect. As discussed above, Commission responsibilities under its organic statutes and NEPA require such

a review, and the NWPA is entirely consistent with those requirements.

Recommendation

The Commission should amend Part 60 to explicitly mandate thorough NRC review of the draft EAs, including the methodology used by DOE in the comparison of sites. Provision for only a partial NRC EA review in the NRC/DOE Procedural Agreement is not sufficient, since the NRC's failure to review DOE's comparison methodology is a basic abdication of its statutory responsibilities, and the Procedural Agreement is too easily amended without the benefit of public participation.

B. NRC failure to review DOE's site selection process and comparison methodology would be a policy mistake which significantly increases the chance for another major failure in the nation's nuclear waste disposal program.

Policy considerations apart from any statutory requirements argue even more strongly for NRC review of DOE's site comparison and selection process. If DOE makes serious missteps in its site selection process (as virtually all of the affected parties believe they are doing now), the Commission's only recourse at the time a final site is selected will be to reject DOE's application for a construction authorization. Certainly the adverse implications of such a development for the successful and timely implementation of a repository would far outweigh any possible costs associated with a less deferential Commission stance on site selection for characterization now.

Serious federal efforts to locate a repository have been thwarted at least twice in the past by the technical and political siting blunders of DOE's predecessor agencies. The extensive

state and tribal participation prescribed by the NWPA for the siting process ought to do much to improve the political atmosphere, but it does not substitute for thorough technical oversight by the agency responsible for protecting public health and safety and the environment--the NRC.

In sum, the Yakima Indian Nation strongly supports the position expressed by Commissioner Asselstine, 50 Fed. Reg. 2588, that NRC should retain the 10 CFR § 60.11 requirement for NRC review of the site screening and selection process which is now to be documented in the environmental assessments. Alternatively (but less desireably), the Commission should require a thorough site selection discussion in the site characterization plans pursuant to its authority under NWPA § 113(b)(1)(A)(v), and the Commission should thoroughly review that discussion in its site characterization analysis.

II. THE COMMISSION SHOULD RETAIN THE PRESENT REQUIREMENT FOR ISSUANCE OF A DRAFT SITE CHARACTERIZATION ANALYSIS FOR PUBLIC COMMENT.

The Commission contends that the 10 CFR § 60.11 requirement for issuance of a draft site characterization analysis ("SCA") for public comment is no longer needed because of the new timing for a site characterization plan ("SCP") and the prior opportunities for interactions among DOE and other program participants. While the NWPA does provide for additional opportunities for DOE interaction with states and Indian tribes prior to issuance of the SCP, that does not obviate the utility of Commission issuance of its SCA in draft form.

In addition to providing a vehicle to involve the public in the decision-making process, the issuance for public comment of a draft SCA also serves as a means of assisting the Commission in preparing its own analysis. That function, which the Yakima Indian Nation believes is very important, is unaffected by any changes imposed by the NWPA.

Experience to date in this program has shown that the views of affect states and Indian tribes and public interest groups can be very important in the development of the Commission's positions on important issues in the waste disposal program. For example, the Commission's stance on DOE's proposed general siting guidelines was obviously quite materially affected by the arguments presented to the Commission by affected parties on that issue. The guidelines were significantly improved as a result of that influence. Since affected states and tribes have the benefit of NWPA funding for their participation in this program, their resources are better than usual to provide well-considered comments.

The ability of the affected parties to present their own comments to DOE on the SCPs is very important, but those comments do not have the impact of the comments of the regulator. Once again, the experience with the siting guidelines is an excellent example of this point. Most of the revisions which the Commission sought in DOE's proposed siting guidelines were basically the same as revisions which were sought by the states and Indian tribes for a year prior to their submission to the Commission for concurrence. DOE (and the NRC Staff) largely ignored our comments

until they were pressed by the Commission itself in its conditional concurrence decision.

The Commission's SCAs can in a like manner be beneficially affected by an opportunity for comments by affected parties prior to finalization. It is no slight to the competence of the Commission Staff to state that NWPA-funded affected states and tribes might identify important issues and arguments which the Staff overlooked, but would want to include. Neither comments to DOE on the SCP nor informal opportunities to comment to NRC under the Procedural Agreement will substitute for an opportunity to comment on NRC's analysis of the SCPs.

As far as the scheduling mandates of the NWPA are concerned, the YIN feels strongly that the benefits to the Commission and the program to be derived from comments on draft SCAs far outweigh the costs in terms of delay. In addition, the Commission can specify a relatively short comment period (e.g., 30 days) and refuse to grant extensions. While this would be less than ideal from the viewpoint of prospective commenters, it would be far better than no opportunity to comment at all.

To conclude, the Yakima Indian Nation strongly supports the view of Commissioner Asselstine that the present requirement in 10 CFR § 60.11 for NRC issuance of draft site characterization analyses for public comment should be retained. Nothing in the NWPA requires or even suggests the deletion of this procedural step, and the potential benefits of it far outweigh the potential costs.

Respectfully submitted,

Dean R. Tousley

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ASSOCIATE ATTORNEY FOR
THE YAKIMA INDIAN NATION

April 8, 1985

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

ER 85/134

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Sir:

The Department of the Interior has reviewed the proposed Amendments to Licensing Procedures for Disposal of High-Level Radioactive Waste in Geologic Repositories as noted in the Federal Register on January 17, 1985, and has the following comments.

General

The revisions as proposed would no longer require the preparation of draft Site Characterization Analyses (SCAs) by the Nuclear Regulatory Commission (NRC) for the Department of Energy (DOE) Site Characterization Plans (SCPs) for candidate repository sites. As proposed, only final SCAs would be required. No public comment would be invited until the SCAs have been completed by NRC. This revision decreases the opportunities for this Department to alleviate potential conflicts or issues concerning natural resources under our jurisdiction. Likewise issues within our areas of expertise might not surface until well into the SCA process. An explanation for this revision is given on page 2584 of the Notice. The stated reasons for this change include (1) the extensive opportunities for interaction between NRC, DOE, the States, affected Indian tribes, and the public regarding the sites recommended for characterization, and (2) scheduling mandates for the Nuclear Waste Policy Act of 1982 (NWPA). Given that the review opportunities afforded the general public are also our only opportunities, we are concerned that NRC's proposed changes will limit this Department's participation in the licensing of repositories until very late in the decision process.

We agree that numerous opportunities are available to interact with DOE during pre-licensing activities (e.g., opportunities to comment on draft Environmental Assessments and SCPs and to present testimony at related hearings). However, during this same period of time, specific opportunities to interact directly with NRC, the ultimate licensing authority, are relatively limited. The review of draft SCAs would provide such a specific opportunity. In addition, it is unclear that the scheduling mandates of NWPA will not accommodate draft and final SCAs prepared by NRC [see page 26 (Figure 9) and page 55 (Table 3), Preliminary Draft, Project Decision Schedule, Radioactive Waste Management System, DOE/RW-0018, January 1985]. We recommend retaining the present requirement for the preparation of a draft SCA because it allows for early conflict resolution.

We would also urge that the final rulemaking provide a mechanism to involve any Federal land management agency in site screening and selection whose management responsibilities may be affected by a geologic repository. Otherwise, the affected agency might have to cope with schedules developed independently by DOE and other entities.

A procedural agreement similar to that between DOE and the NRC should be executed between DOE and any affected Federal land management agency to assure that information flow is maintained to facilitate each organization's mission with regard to site investigation and characterization, and to ensure that affected land management agencies are informed of and invited to all technical meetings.

An additional concern is that NRC's future plans include revisions to 10 CFR 51, which governs its procedures for NEPA compliance under the NWPA. With such revisions, NRC could lessen the level and effectiveness of the Department of the Interior's role, in reviewing license applications and the development of disposal activities. We urge the Department of the Interior be allowed to review any proposed revisions to NRC's NEPA compliance procedures.

Specific Comments to 10 CFR 60, Subpart B Proposed Revisions

§60.17 - This section specifies the contents of the SCP that DOE must submit to NRC as part of the licensing process for a repository. We recognize that there are several changes to this section that are necessitated by the provisions of the NWPA; however, there are other revisions to this section that we believe should not be made and are not necessitated by the NWPA. Foremost, we recommend that NRC retain the requirement for DOE to identify in a SCP the criteria used to arrive at the candidate area and to describe the process by which the site was selected for characterization. Although the preamble states that NRC anticipates that such information would be provided by DOE in the environmental assessment to accompany the SCP we do not believe such information should be deleted from DOE's plan, which serves as the "record of decision" document for the proposed site. The decision process for site selection should require DOE to identify, address, and describe the means by which issues of concern raised by the public were then considered by DOE. Further, our review of the assessments for the nine sites issued for consideration in December 1984 by DOE indicated many conclusions reached in these EA's were based upon erroneous reasonings. However, such information will be fully addressed in the environmental documents accompanying this plan, nothing more than an executive summary of the issues and an iteration of DOE's analysis and decision need be presented in the SCP.

We recommend that NRC spell out precisely what type of information and the level of analysis that must be reflected in DOE's SCP and its overall licensing application to NRC, because the information required in this proposed rulemaking is vague. We believe the NRC should qualify the information needed for adequate review of applications. To merely state that the DOE will understand and provide information to the level of detail required by the NRC and other statutory reviewers (e.g., Department of the Interior) is not adequate. Considering the fact that the NRC and DOE appear to be attempting to lessen opportunities for the general public and other Federal agencies to participate throughout the decision process, it is difficult to know how reviewers, other than the NRC, may be able to request further information or analysis from DOE.

We recommend that NRC's requirement for DOE to plan for not only mitigating significant adverse impacts but also reclaiming the site be retained within the proposed rules. Under paragraph (a)(3) of this section, NRC does not require DOE to plan for reclaiming the site, but merely to plan for mitigating any significant adverse environmental impacts that occur as a result of site characterization. We believe

regulatory revision is a serious omission by NRC in light of the fact that reclamation planning is required by the NWPA [42 U.S.C. 10133(c)(4)].

§60.18 - This section considers the review procedures for site characterization activities. We recommend that NRC retain the provisions for public participation rather than adopt the changes as proposed in this document. As stated above, it appears that NRC/DOE proposes to limit general public involvement to compliance with NEPA only and to minimize State, Indian tribe, and other Federal agency involvement on decision documents. NRC will continue to publish a notice in the Federal Register that a SCP has been received from DOE and that NRC staff review has begun. However, according to paragraph (a) of this section, NRC is proposing to no longer afford the public an opportunity to consult with staff and discuss issues of concern during staff review, but merely allow the public to contact the NRC staff for information on the proposal. Also, along the same vein, paragraph (c) of this section proposes that NRC may invite and may consider the views of interested persons. We believe the proposal is a much less responsive policy than presently exercised by NRC under its existing regulations. These regulations state: "The Director shall publish a notice of availability of the draft... analysis and... request comment.... The Director shall then prepare a final... analysis which shall take into account comments received and any additional information acquired during the comment period." [10 CFR 60, 11(d)-(e)].

We hope these comments will be helpful to you.

Sincerely,

Bruce Blanchard, Director
Environmental Project Review

CONFEDERATED TRIBES AND BANDS
Yakima Indian Nation
POST OFFICE BOX 151
TOPPENISH WASHINGTON 98948

April 17, 1985

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

Re: 10 CFR Part 60 Amendments

Dear Secretary Chilk:

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

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

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

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

The Yakima Nation urges your favorable consideration of this request.

Sincerely yours,

MELVIN R. SAMPSON,
Vice Chairman
Yakima Tribal Council

MRS:ls

Enclosure

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Disposal of High-Level Radioactive Waste in Geologic Repositories; Amendments to Licensing Procedures	)	10 CFR Part 60 50 Fed. Reg. 2579

COMMENTS OF THE YAKIMA INDIAN NATION

Pursuant to Nuclear Regulatory Commission notice published January 17, 1985, 50 Fed. Reg. 2579, the Confederated Tribes and Bands of the Yakima Indian Nation submit the following comments on NRC's proposed amendments to licensing procedures for disposal of high-level radioactive waste in geologic repositories, 10 CFR Part 60. Except for the two matters discussed below, the Yakima Indian Nation has no objections to the other proposed amendments to Part 60.

I. THE COMMISSION INCORRECTLY CONCLUDES THAT IT LACKS AUTHORITY TO REVIEW DOE'S SITE SELECTION PROCESS.

The proposed amendments to 10 CFR Part 60 would eliminate the provision in 10 CFR § 60.11 that the NRC review DOE's repository site selection process. The Commission concludes that, since the Nuclear Waste Policy Act ("NWPA") does not explicitly provide for NRC review of the site screening and selection processes of the Department of Energy, "[s]uch a review by NRC is not necessary to fulfill any of its statutory responsibilities." 50 Fed. Reg.

2583, col. 2. The Yakima Indian Nation strongly disagrees. Apart from ignoring clear statutory authority to engage in a review of DOE's site selection process, NRC's failure to do so would be a policy mistake with profound implications for the likelihood of success of the national radioactive waste disposal program.

A. NRC review of DOE's site selection process is not only authorized, but is required by the Atomic Energy Act of 1954, the Energy Reorganization Act of 1974, the National Environmental Policy Act of 1969, and the Nuclear Waste Policy Act of 1982.

The lack of explicit NWPA provisions for NRC review of DOE's site selection process--other than the Commission's concurrence in the general siting guidelines--does not dispose of the possible sources of statutory authority for the Commission to do so. On the contrary, the NWPA quite clearly provides that NRC authority to promulgate technical requirements and criteria (i.e., Part 60) is pursuant to "other provisions of law." NWPA § 121(b)(1)(A). The NWPA specifically mentions as such authority the Atomic Energy Act of 1954 (42 U.S.C. § 2011 *et seq.*) and the Energy Reorganization Act of 1974 (42 U.S.C. § 5801 *et seq.*). Thus, Congress did not intend in the NWPA to prescribe the scope of NRC review of DOE's repository program. Rather, the authority for NRC requirements and their appropriate scope are derived from those "other provisions of law."

The Atomic Energy Act, as amended by the Energy Reorganization Act, is the NRC's organic statute. It assigns to the NRC the primary responsibility for assuring that the public

health and safety and the environment are adequately protected from the hazards associated with activities involving radioactive materials, including disposal. Section 202 of the Energy Reorganization Act explictly establishes NRC authority to license and regulate high-level waste repositories, 42 U.S.C. § 5842.

In sharp contrast to questions of nuclear power plant safety, the primary determinant of the adequacy of a high-level radioactive waste repository over the very long periods of concern will be not engineered features, but rather the natural, geologic characteristics of the site chosen. Congress emphasized this point when it required in the NWPA that detailed geologic considerations should be the primary criteria for the selection of sites for repositories, NWPA § 112(a), and when it established elaborate procedures for the selection of sites. *See* NWPA §§ 112-118. This primacy of natural site conditions in determining the adequacy of a proposed repository means that siting is the absolute essence of the NRC's mandated public health and safety and environmental protection responsibilities under the above-cited statutes.

The repository site selection process is by far the most important aspect of the adequacy of the repository program. Thus, for NRC to decline to review that process in the crucial early stages of selecting sites for characterization would be a basic abdication of its public health and safety and environmental protection responsibilities under the Atomic Energy Act and Energy Reorganization Act. NRC cannot hope to adequately discharge its responsibilities by deferring its review of the sites until the

stage of repository construction authorization.

Moreover, the Commission's responsibilities under the National Environmental Protection Act ("NEPA") require it to engage in evaluation of alternatives as a part of its licensing process. Under NWPA § 114(f), the Commission must, to the extent practicable, adopt the environmental impact statement submitted by DOE with its application for construction authorization as its own. Under the same section, the alternatives considered in that EIS for purposes of NEPA compliance are those

> 3 candidate sites with respect to which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination, that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 112(a).

Thus, the sites which DOE selects for characterization now will be the only effective alternatives that the Commission will have to consider in fulfilling its NEPA responsibilities. It was precisely in recognition of this fact that the Commission required, as a condition of its concurrence in DOE's siting guidelines, that DOE agree to make the "preliminary determination of suitability" at the end of site characterization instead of before it, as DOE had proposed. The Commission recognized at that time that if DOE did not have strong incentives to select the most suitable sites for characterization, the Department might later come to the Commission with an EIS which considers unacceptable alternatives.

For the same reason of satisfactory NEPA compliance, the Commission must play an active role in reviewing DOE's comparison and selection of sites for characterization. Indeed, NEPA was

cited by the Commission as its primary authority for the original promulgation of Part 60. 46 Fed. Reg. 13922. The same NEPA responsibilities which prompted the original promulgation of Part 60, including its requirement for NRC review of DOE's site selection process, remains unaltered by the NWPA.

In the most important court case interpreting the Commission's role in NEPA implementation, the U.S. Court of Appeals for the D.C. Circuit wrote:

> NEPA requires that an agency must--to the *fullest* extent possible under its other statutory obligations--consider alternatives to its actions which would reduce environmental damage. That principle establishes that consideration of environmental matters must be more than a *pro forma* ritual.
> ...
> Such a full exercise of substantive discretion is required at every important, appropriate and nonduplicative stage of an agency's proceedings.

Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1128 (D.C. Cir. 1971) (Emphasis in the original). The only alternatives which the Commission need consider under the NEPA modifications included in the NWPA are the three sites which are selected for characterization by DOE. NWPA § 114(f). If DOE selects for characterization sites which are unlikely to prove to be suitable alternatives for NEPA purposes, NRC will not have an acceptable EIS which it can adopt.

Since ultimate NRC satisfaction of its NEPA responsibility is being profoundly affected by present DOE actions in selecting sites for characterization, there can be no question but that this is an "important, appropriate and nonduplicative stage of [the] proceeding" which requires NRC's "full exercise of its substantive

discretion". Only aggressive NRC review and oversight of the DOE selection of sites for characterization can ensure the Commission's ability to adopt the DOE EIS.

Finally, the NWPA explicitly does not compel the Commission to amend or narrow the scope of its licensing requirements. NWPA § 114(f) states, in part:

> nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act .... *Nothing in this Act shall be construed to amend or otherwise detract from the licensing requirements of the Nucler [sic] Regulatory Commission as established in title II of the Energy Reorganization Act of 1974....*

(Emphasis added.) Congress was well aware of the existing provisions of Part 60 when it passed the NWPA, and incorporated many of them in the Act. However, in light of the above language, it could not be more clear that Congress did not intend its failure to incorporate all of the details of Part 60 in the Act to be deemed as implicit rejections of them. Inconsistent provisions, such as the Commission properly addresses in other aspects of the instant proposal, obviously warrant amendments by the NRC. On the other hand, where Congress was silent on a subject already addressed by the Commission in Part 60--such as NRC review of DOE's site selection process--Congress made plain its intent that NRC licensing and regulatory requirements not be deemed implicitly curtailed by any provision in the NWPA.

Thus, the Commission's conclusion that the NWPA *by omission* somehow proscribes its review of DOE's site selection process is patently incorrect. As discussed above, Commission responsibilities under its organic statutes and NEPA require such

a review, and the NWPA is entirely consistent with those requirements.

Recommendation

The Commission should amend Part 60 to explicitly mandate thorough NRC review of the draft EAs, including the methodology used by DOE in the comparison of sites. Provision for only a partial NRC EA review in the NRC/DOE Procedural Agreement is not sufficient, since the NRC's failure to review DOE's comparison methodology is a basic abdication of its statutory responsibilities, and the Procedural Agreement is too easily amended without the benefit of public participation.

B. NRC failure to review DOE's site selection process and comparison methodology would be a policy mistake which significantly increases the chance for another major failure in the nation's nuclear waste disposal program.

Policy considerations apart from any statutory requirements argue even more strongly for NRC review of DOE's site comparison and selection process. If DOE makes serious missteps in its site selection process (as virtually all of the affected parties believe they are doing now), the Commission's only recourse at the time a final site is selected will be to reject DOE's application for a construction authorization. Certainly the adverse implications of such a development for the successful and timely implementation of a repository would far outweigh any possible costs associated with a less deferential Commission stance on site selection for characterization now.

Serious federal efforts to locate a repository have been thwarted at least twice in the past by the technical and political siting blunders of DOE's predecessor agencies. The extensive

state and tribal participation prescribed by the NWPA for the siting process ought to do much to improve the political atmosphere, but it does not substitute for thorough technical oversight by the agency responsible for protecting public health and safety and the environment--the NRC.

In sum, the Yakima Indian Nation strongly supports the position expressed by Commissioner Asselstine, 50 Fed. Reg. 2588, that NRC should retain the 10 CFR § 60.11 requirement for NRC review of the site screening and selection process which is now to be documented in the environmental assessments. Alternatively (but less desireably), the Commission should require a thorough site selection discussion in the site characterization plans pursuant to its authority under NWPA § 113(b)(1)(A)(v), and the Commission should thoroughly review that discussion in its site characterization analysis.

II. THE COMMISSION SHOULD RETAIN THE PRESENT REQUIREMENT FOR ISSUANCE OF A DRAFT SITE CHARACTERIZATION ANALYSIS FOR PUBLIC COMMENT.

The Commission contends that the 10 CFR § 60.11 requirement for issuance of a draft site characterization analysis ("SCA") for public comment is no longer needed because of the new timing for a site characterization plan ("SCP") and the prior opportunities for interactions among DOE and other program participants. While the NWPA does provide for additional opportunities for DOE interaction with states and Indian tribes prior to issuance of the SCP, that does not obviate the utility of Commission issuance of its SCA in draft form.

In addition to providing a vehicle to involve the public in the decision-making process, the issuance for public comment of a draft SCA also serves as a means of assisting the Commission in preparing its own analysis. That function, which the Yakima Indian Nation believes is very important, is unaffected by any changes imposed by the NWPA.

Experience to date in this program has shown that the views of affect states and Indian tribes and public interest groups can be very important in the development of the Commission's positions on important issues in the waste disposal program. For example, the Commission's stance on DOE's proposed general siting guidelines was obviously quite materially affected by the arguments presented to the Commission by affected parties on that issue. The guidelines were significantly improved as a result of that influence. Since affected states and tribes have the benefit of NWPA funding for their participation in this program, their resources are better than usual to provide well-considered comments.

The ability of the affected parties to present their own comments to DOE on the SCPs is very important, but those comments do not have the impact of the comments of the regulator. Once again, the experience with the siting guidelines is an excellent example of this point. Most of the revisions which the Commission sought in DOE's proposed siting guidelines were basically the same as revisions which were sought by the states and Indian tribes for a year prior to their submission to the Commission for concurrence. DOE (and the NRC Staff) largely ignored our comments

until they were pressed by the Commission itself in its conditional concurrence decision.

The Commission's SCAs can in a like manner be beneficially affected by an opportunity for comments by affected parties prior to finalization. It is no slight to the competence of the Commission Staff to state that NWPA-funded affected states and tribes might identify important issues and arguments which the Staff overlooked, but would want to include. Neither comments to DOE on the SCP nor informal opportunities to comment to NRC under the Procedural Agreement will substitute for an opportunity to comment on NRC's analysis of the SCPs.

As far as the scheduling mandates of the NWPA are concerned, the YIN feels strongly that the benefits to the Commission and the program to be derived from comments on draft SCAs far outweigh the costs in terms of delay. In addition, the Commission can specify a relatively short comment period (e.g., 30 days) and refuse to grant extensions. While this would be less than ideal from the viewpoint of prospective commenters, it would be far better than no opportunity to comment at all.

To conclude, the Yakima Indian Nation strongly supports the view of Commissioner Asselstine that the present requirement in 10 CFR § 60.11 for NRC issuance of draft site characterization analyses for public comment should be retained. Nothing in the NWPA requires or even suggests the deletion of this procedural step, and the potential benefits of it far outweigh the potential costs.

Respectfully submitted,

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ASSOCIATE ATTORNEY FOR
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April 4, 1985

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(18)

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

high level nuclear waste office

Norman H. Bangerter, Governor

Patrick D. Spurgin, Director
Jack Wittman, Associate Director

DOCKETED
USNRC

April 17, 1985

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Dear Sirs:

On January 17, 1985, the Nuclear Regulatory Commission published a notice of proposed rule-making addressing modifications to 10 CFR Part 60 necessitated by provisions of the Nuclear Waste Policy Act of 1982. This letter serves as the comments of the State of Utah High-Level Nuclear Waste Office on the proposed rule.

As a general comment, it is noted that the Nuclear Waste Policy Act contains unique provisions for state participation in nuclear waste repository siting, construction, operation and decomissioning procedures. This special role of the states reflects a recognition that state participation is necessary for an appropriate level of public confidence in the safety of the disposal strategies called for in the Act.

Clearly, the NRC also plays a unique role in the repository program. Provisions of the Nuclear Waste Policy Act call for NRC involvement in the program from the drafting of site selection guidelines, through site characterization plan review and comment, to the end point of repository decomissioning. NRC involvement throughout the program is necessary for its ultimate acceptability to the public. The states' participation in licensing is tied directly to NRC involvement. These considerations suggest that the NRC should interpret its authority under federal law in a manner that provides most liberally for NRC and state participation in DOE siting and licensing activities.

On a more specific note, a clearer definition should be added to the regulations for "preliminary activities". The DOE is not obligated to submit the site characterization plan to the NRC until the DOE plans to commence shaft sinking. As preliminary activities may be environmentally disruptive, it may also trigger state regulation required state permits.

APR 25 1985 dp

Acknowledged by card.....

Therefore, the definition of preliminary activities is of great importance. It is urged that activities performed in preparation of sinking a shaft, including design boreholes and surface preparation be considered part of the shaft sinking process so that such activities can be effectively evaluated along with the site characterization plan.

As is noted in the section-by-section analysis of the proposed changes, under the heading of "provision of information", the Nuclear Waste Policy Act requires the Commission to furnish timely and complete information to host states and affected indian tribes regarding its determinations or plans.

The DOE and NRC have undertaken, through procedural agreements, a series of meetings wherein the two agencies exchange views on the adequacy of certain activities undertaken by DOE in view of NRC's interpretations of the requirements for licensing. The Commission is urged to assure that the states and affected tribes are given notice of such meetings, of the subjects to be discussed, and of the opportunity to attend and participate at an appropriate level in the meetings in accordance with the spirit of section 117(a) of the Nuclear Waste Policy Act.

Finally, in regard to Commissioner Asselstine's request for comments on retention of requirements for issuance of draft site characterization analyses for public comment, we would urge in this and in all other cases, that the NRC only retreat from the provisions of present 10 CFR Part 60 to the extent mandated by the law and no more, and that the Commission otherwise maintain the current level of involvement by all parties in site characterization planning and review. The Commission is again referred to our general commentary at the beginning of this letter.

In addition to these comments, please see the attached analysis of changes to the regulation developed by other state reviewers.

We hope that these comments will be of assistance in the preparation of the final modification to 10 CFR Part 60.

Sincerely,

Patrick D. Spurgin
Director

PDS/hud

cc: Toni Ristau

enclosure

ANALYSIS OF PROPOSED REVISIONS TO 10 CFR PART 60

Summary

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

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

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

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

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

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

Specific Changes Proposed for 10 CFR Part 60

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

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

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

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

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

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

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

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

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

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

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

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

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

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