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PRAIRIE ISLAND INDIAN COMMUNITY
LEGAL DEPARTMENT

February 6, 2009

Secretary
US Nuclear Regulatory Commission
Attn: Rulemaking and Adjudications Staff
Washington, DC 20555-0001

VIA EMAIL
Rulemaking.Comments@nrc.gov

Re: Comments Regarding Proposed Revisions of the Waste Confidence Rule (Docket ID NRC-2008-0404) and the Waste Confidence Decision (Docket ID-2008-0482)

Dear Rulemaking and Adjudications Staff:

The Prairie Island Indian Community would like to offer the following comments regarding the Nuclear Regulatory Commission's (NRC) proposed revision of the Waste Confidence Rule (10 CFR 51.23(a)), pursuant to the notice in the Federal Register on October 9, 2008 (73 FR 59547), and a related update and proposed revision of its 1990 Waste Confidence Decision (73 FR 59551).

Community Background

The Prairie Island Indian Community is a federally-recognized Indian tribe organized under the Indian Reorganization Act of 1934. The tribe is governed under the terms and conditions of the Prairie Island Indian Community's Constitution and By-Laws adopted by tribal members on May 23, 1936, and approved by the Secretary of the Interior on June 20, 1936. The Constitution and By-laws provide that the Community Council (sometimes referred to as the "Tribal Council") shall be the governing body for the Community. The five-member Tribal Council consists of a President, Vice-President, Secretary, Treasurer, and Assistant Secretary/Treasurer, each of whom serves a two-year term.

Our homeland is located on Prairie Island, which is formed at the confluence of the Vermillion and Mississippi Rivers in southeastern Minnesota (approximately 35 miles southeast of the Twin Cities of Minneapolis and St. Paul, Minnesota). The Mdewakanton, "those who were born of the waters," have lived on Prairie Island for countless generations. The size of the Prairie Island Indian Community land base (including both trust and fee lands) has grown through several federal acts and direct purchases by the Tribal Council, and now totals over 3,000 acres (including both land and water). Approximately 1,986 acres of trust land are located in the immediate vicinity of the Prairie Island Nuclear Generating Plant (PINGP). (Figure 1).

Template = SECY-067

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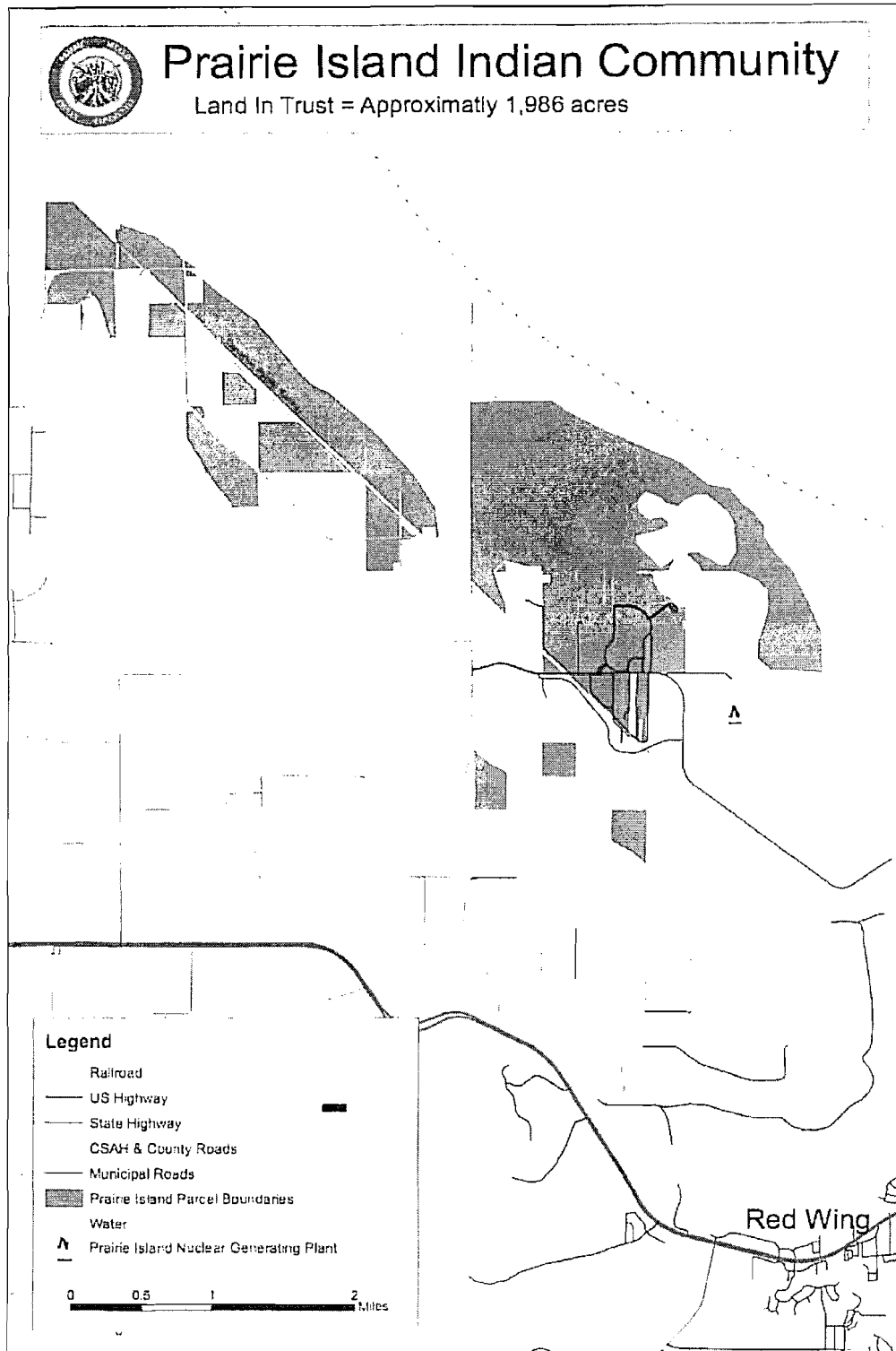


Figure 1

Nuclear Waste on Prairie Island

The PINGP, which is located less than 600 yards away from our homeland (see Figure 1), is currently licensed by the NRC to store spent fuel in up to 48 dry casks at an Independent Spent Fuel Storage Installation (ISFSI) on plant property. The owner of the PINGP and ISFSI, Northern States Power (NSP), anticipates needing to expand the ISFSI to accommodate 98 casks over the plant's lifetime to support license extension and decommissioning.

It is important to note from the outset how the waste confidence issue has evolved. As noted in the NRC's discussion of the current proposed revision, "[p]rior to NRC's original Waste Confidence proceeding, the Commission had stated that, as a matter of policy, it '*would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.*'" 73 FR 59547, 59548 and 73 FR 59551, 59552 (quoting *Natural Resources Defense Council; Denial of Petition for Rulemaking*, 42 FR 34391, 34393 (July 5, 1977) (emphasis added)). More than 30 years later, with no operational federal repository, no other plan to dispose of nuclear wastes, and no reasonable estimate for when such a repository or other disposal method will be available, there's little reason to have any confidence in the Commission's Waste Confidence Rule as it currently reads or as the Commission proposes to amend it.

During the initial licensing processes in the early 1990s, we expressed our concerns regarding the long-term storage of spent fuel in dry casks and the possibility that the waste would never leave Prairie Island. We were assured at that time that the ISFSI was to be an *interim* or *temporary* solution until the national repository, Yucca Mountain, could begin accepting waste. The proposed revision of the Waste Confidence Rule validates the concerns we expressed during the initial licensing process and exposes the false assurances that the ISFSI is an interim or temporary solution. Unfortunately, it's becoming increasingly clear that the waste will not be removed from Prairie Island during the lifetime of those Tribal members and leaders who initially fought against interim or temporary storage.

According to the proposed revisions to Finding 2 of the Waste Confidence Decision, waste could conceivably be stored at on-site for 60 years beyond the licensed life of the reactor. In the case of the PINGP ISFSI, this would mean that 98 casks will be on-site until 2094, a date that is completely unacceptable to our people. Given that the first cask was loaded and stored in early 1995, according to Finding 2, this waste will remain on Prairie Island for 100 years, hardly the *interim* or *temporary* solution promised in the 1990s.

As we are painfully aware, the deadline for receiving spent fuel at the Yucca Mountain Repository has been slipping away and continues to be extended with each successive revision of the Waste Confidence Rule. There appears also to be some expectation (on the part of the NRC) that Yucca Mountain may possibly be abandoned all together and that the process will begin anew for a new disposal facility. Yucca Mountain won't be scrapped because of technical infeasibility but because of a lack of political will and societal support. Until the political and societal objections are addressed, no waste will be moved from its current, at-plant location. What possible confidence can the Commission have that all of the political issues or societal

objections can ever be satisfactorily resolved, much less within the estimated time? Considering that the original estimates for completion of a disposal facility have not and will not be realized, on what basis can the Commission possibly find “reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50-60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor”?

The Proposed Waste Confidence Rule Amendments

The Commission proposes to amend 10 CFR 51.23(a) as follows:

The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts ~~for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations until a disposal facility can reasonably be expected to be available. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial highlevel waste and spent fuel originating in such reactor and generated up to that time.~~

The lack of progress to date on the Yucca Mountain Repository calls into question what confidence, if any, one can have in the current Waste Confidence Rule. The Commission’s proposed response to this reality, however, is to simply eliminate any reference to a specific time that the spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or a renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite ISFSIs. Indeed, despite the fact that no one can predict if, much less when, the Yucca Mountain Repository or any other disposal facility will be available, the proposed amendment states that the waste can be stored safely and without significant environmental impacts “until a disposal facility can reasonably be expected to be available.” In effect, the Waste Confidence Rule would be premised on the pure *speculation* that a disposal facility will be available at some unknown point in the future.

The costs of proposed rule changes

The cost of the proposed rule change is only briefly and minimally discussed. The significant cost (to the taxpayers) of stranding this waste for an additional 50 to 60 years at over 100 sites across the country cannot be overlooked. The Department of Energy (DOE) has a statutory and contractual obligation to remove spent fuel from commercial nuclear power plants to a national repository. Indeed, the nation’s ratepayers have paid more than \$31 Billion into the Nuclear Waste Fund (NWF) for the development of a safe and secure national storage facility (Yucca Mountain).

In recent years, the utilities have had to turn to the courts to recover costs associated with developing, licensing, and maintaining on-site spent fuel storage facilities. The Government's on-going liability associated with the DOE's delay in opening a national repository is estimated to be \$11 Billion (the so-called Judgment Fund), assuming that Yucca Mountain will be open by 2020. Stranding the waste for an additional 50 to 60 years will only increase that liability.

The Federal Register notice contains no discussion about the implications of this rule to the ratepayers, who are getting short-changed. First, they have paid into the NWF to develop the repository (\$31 Billion paid in this far) and have seen nothing for the money they have paid into the fund. Second, ratepayers are also assessed fees to cover the costs of on-site interim storage. Third, ratepayers are responsible for decommissioning costs (Decommissioning Fund). Finally, the taxpayers (which includes the ratepayers) will be responsible for the Government's breach of contract liability (the Judgment Fund).

We recommend that the full cost of implementing this rule be completely evaluated by the NRC under the NRC Regulatory Analysis Guidelines and the legislative requirements for assessing the impacts of proposed rules which have a certain threshold cost.

Stranding spent nuclear fuel indefinitely at over one hundred sites across the nation, as this rule proposes, does not provide a safe, secure and long-term solution to the waste disposal problem; it merely keeps moving the target date to future generations.

Proposed Finding 2

The Commission finds reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50-60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial HLW and spent fuel originating in such reactor and generated up to that time.

The Prairie Island Indian Community has deep concerns regarding the bases for this finding. First, as the Federal Register notice discusses, the Nuclear Waste Policy Act (NWPA) sets a 70,000 metric tons heavy metal (MTHL) statutory capacity limit for the national geologic repository. This issue has been recently evaluated by the DOE in the agency's "Report to the President and the Congress by the Secretary of Energy on the Need for a Second Repository," released December 2008. The report points out that Yucca Mountain would, in fact, be able to accommodate all the spent nuclear fuel from the existing fleet of reactors, even if their licenses were to be extended. This capacity does not include spent fuel that will be generated at new reactors. The statutory capacity, however, must be lifted by Congressional action. Increased capacity at Yucca Mountain through legislative action is not guaranteed. In recent years, we have seen consistent efforts to block legislation continuing funding for the Yucca Mountain project, slowly killing the project for which the ratepayers have already paid billions of dollars.

How can the NRC be assured that increased sufficient capacity will be available (either through a legislative increase or a second repository) when the first geologic repository (Yucca Mountain) is now 11 years overdue and has an uncertain future?

It is not clear how the proposed rule change helps decommissioned plants. The proposed language change states “mined geologic repository capacity can reasonably be expected to be available within 50-60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor....” According to the recent DOE “Report to Congress on the Demonstration of the Interim Storage of Spent Nuclear Fuel from Decommissioned Nuclear Power Plants,” there are nine decommissioned nuclear power plants in the United States. The earliest decommissioning took place in 1976 at Humbolt Bay (NRC Information Digest 2007). If one were to add an optimistic 50 years (instead of the more conservative estimate of 60 years) to 1976, the date would be 2026, just one year beyond the current language in the current Waste Confidence Rule (10 CFR 51.23(a)). Would that mean that waste would be leaving Humbolt Bay by then? Would waste from other plants be leaving by that date as well? If that is possibly the case, why the rule change?

Our intention in mentioning this is that when it comes to the storage of spent fuel at a national repository, there are no certainties or assurances. We cannot be sure that the Yucca Mountain license application will even move forward, that the program will receive adequate funding, or that storage capacity beyond 70,000 MTHM will be available.

Proposed Finding 4

The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.

This proposed revision seems to provide for the possibility that Yucca Mountain will not receive a license from the NRC. When the ISFSI at Prairie Island was first licensed in the 1990s, it was to be temporary measure, only for a period of years, to keep the plant running and people working until Yucca Mountain was open. As you may be aware, Minnesota law requires approval from the Public Utilities Commission (PUC) and the State Legislature before a utility can use on-site dry cask storage. The legislative hearings for the Prairie Island ISFSI were highly contentious and divisive. It is highly doubtful that NSP would have received state approval then if legislators believed that the waste would be on-site for 100 years.

We would like to point out to the Commission that these ISFSIs are not located in remote parts of the country. Many are located near population centers. In our case, the ISFSI is located right next to us, 600 yards away from our homes, community center and business. As we mentioned earlier, Prairie Island is our only homeland, the land promised to us by the United States government. We cannot simply relocate to another place away from a nuclear waste dump.

Finding 5

In regard to Finding 5, the Commission should convene a national dialogue on the alternative to on-site storage or a geologic repository. Regional away-from-reactor storage is an alternative that would avoid the singular problems of a repository at Yucca Mountain and also remove the waste from the reactor sites around the country. The science for regional storage may provide more certainty that a geologic repository, and even though still difficult, presents less of a political challenge than siting a repository. Even though the initiation of such a solution may rest with others, it is the Commission's responsibility to provide leadership in this area because of Finding 5.

We are members of the Nuclear waste Strategy Coalition (NWSC), which is an ad hoc groups of state utility regulators, state attorneys general, electric utilities and associate members representing 47 member/affiliate organizations in 31 states. The NWSC also recommends that spent fuel and high-level radioactive waste be moved to a centralized interim storage facility.

New Reactors

We understand that nuclear utilities have expressed intention to file license applications for up to 34 new reactors by 2010. The waste from the future plants has not been calculated into the storage problem. In our view, as the closest neighbor to a nuclear power plant, it is completely irresponsible to develop new plants when there is no available national repository for the spent fuel from the first generation of nuclear power plants. We cannot hope that some future generation will find a solution to this decades old problem. Writing a rule that simply allows the waste to remain on-site indefinitely is not the answer.

We appreciate this opportunity to provide comments to the Commission on this important issue.

Respectfully,



Philip R. Mahowald
General Counsel

cc: The Honorable Amy Klobuchar
The Honorable John Kline
The Honorable Timothy Walz
The Honorable Erik Paulsen
The Honorable Betty McCollum
The Honorable Keith Ellison
The Honorable Michele Bachman
The Honorable Collin Peterson
The Honorable James Oberstar

The Honorable Tim Pawlenty
The Honorable Margaret Anderson Kelliher
The Honorable Marty Seifert
The Honorable Lawrence Pogemiller
The Honorable David Senjem
The Honorable John Howe

Rulemaking Comments

From: Phil Mahowald [pmahowald@piic.org]
Sent: Friday, February 06, 2009 6:43 PM
To: Rulemaking Comments
Subject: Comments on Docket Nos. 2008-0404 and 2008-0482
Attachments: SKMBT_C35109020616560.pdf

Dear Secretary and Rulemakings and Adjudication Staff:

Attached please find the comments of the Prairie Island Indian Community on the NRC's Proposed Revisions of the Waste Confidence Rule (Docket No. 2008-0404) and the NRC's Proposed Revisions of the Waste Confidence Decision (Docket No. 2008-0482).

Hard copies will follow by mail.

Sincerely,

Philip Mahowald

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