

December 12, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
Northern States Power Company)	
)	
Prairie Island Nuclear Generating Plant)	Docket No. 72-10-ISFSI-2
)	ASLBP No. 12-922-ISFSI-MLRBD01
(Independent Spent Fuel Storage))	
)	

PRAIRIE ISLAND INDIAN COMMUNITY MOTION TO ADMIT NEW AND AMENDED
CONTENTIONS AFTER ISSUANCE OF NRC'S DRAFT ENVIRONMENTAL
ASSESSMENT

The Prairie Island Indian Community in the State of Minnesota (“PIIC”) hereby moves the Atomic Safety and Licensing Board (“ASLB”) for leave to file new and amended contentions based on the U.S. Nuclear Regulatory Commission’s (“NRC” or “Commission”) draft Environmental Assessment (“EA”) ¹ on Northern States Power Company, a Minnesota Corporation’s (“Applicant” or “NSPM”) application for renewal of its license to operate the Prairie Island Nuclear Generating Plant’s Independent Spent Fuel Storage Installation (“PI ISFSI”). The Community timely files this motion under 10 C.F.R. § 2.309(c)(1) and the Licensing Board’s Amended Initial Scheduling Order of February 1, 2013.²

The Board’s December 20, 2012 Order granted the PIIC’s petition to intervene, admitted three of its contentions, and held one additional contention in abeyance.³ On November 19, 2013,

¹ Draft Environmental Assessment for the Proposed Renewal of U.S. Nuclear Regulatory Commission License No. SNM-2506 for Prairie Island Independent Spent Fuel Storage Installation, Docket No. 72-0010, Accession No. ML13205A120 (November 2013).

² Licensing Board Order (Amended Initial Scheduling Order) (February 1, 2013) at 3 (unpublished).

³ *In the Matter of Northern States Power Company* (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP 12-24, 76 N.R.C. 503, 2012 WL 9245459 (December 20, 2012).

the NRC published notice of the draft EA and finding of no significant impact.⁴

Each of the proffered new or amended contentions arises under the draft EA. For each of the proffered new or amended contentions, PIIC addresses in the introduction to the contention the criteria in 10 CFR 2.309(c)(1) for new or amended contentions. For all of the contentions, the information was not previously available in the applicant's Environmental Report ("ER"). The information was either first presented in the draft EA and not adequately addressed or not addressed at all.

EA Contention 1. The Draft Environmental Assessment Improperly Minimizes Waste Storage Impacts.⁵

The Board had declined to admit PIIC's initial Contention 1 on the failure of the applicant to address the environmental impacts of long-term waste storage in its Environmental Report, but instead held it in abeyance pending the Commission's further order.⁶ The Board held:

In light of the vacatur of the WCD and TSR in *New York v. NRC*, NRC's rules require the ER to consider the reasonably foreseeable impacts of permanent storage, which Northern States' ER clearly fails to do. We agree with the Staff, however, that Contention 1 must be held in abeyance pursuant to the Commission's direction in CLI-12-16.⁷

The draft EA is similarly deficient. The draft EA states, among other things:

In addition, the Commission directed the NRC staff to proceed with a rulemaking that includes the development of an EIS to support an updated WC Decision and Rule within 24 months (by September 2014) (NRC, 2012i). The Commission indicated that the EIS used to support the revised rule should build on the information already documented in various NRC studies and reports on the impacts associated with the storage of spent nuclear fuel that were developed as part of the 2010 WC Decision and Rule Update, and should primarily focus additional analyses on the deficiencies identified in the D.C. Circuit's decision.

⁴ 78 F.R. 69460 (November 19, 2013).

⁵ PIIC has styled this EA Contention 1 as an amendment of its original Contention 1 rather than a new, stand-alone contention. PIIC respectfully defers to the Board on whether it would prefer to have separate contentions for the ER and EA, respectively.

⁶ See 76 N.R.C. at 509-11.

⁷ *Id.* 510-11.

The updated rule and supporting GEIS will provide the necessary NEPA analyses of waste-confidence-related environmental issues. As directed by the Commission, NRC will not issue a renewed license for the PI ISFSI before waste-confidence-related issues are resolved. This will ensure that there would be no irretrievable or irreversible resource commitments or potential harm to the environment before WC Decision (WCD) impacts have been addressed. If the results of the WC GEIS identify information that requires a supplement to this draft EA, the NRC staff will perform any appropriate additional NEPA review for those issues before NRC makes a final licensing decision.⁸

For the same reasons set forth in the PIIC's original Contention 1 and the Board's ruling on it, the PIIC seeks to amend its original Contention 1 to include this deficiency in the draft EA.

EA Contention 2. The Draft Environmental Assessment Does Not Adequately Address Cumulative Impacts of Related Projects on the PIIC, Its Members and Its Land.

The Board had previously admitted PIIC's initial contention on the failure of the applicant to address cumulative impacts in its ER.⁹ The PIIC is now amending the contention to include the failure of the draft EA to adequately address cumulative impacts in three areas: 1) the failure to address the cumulative impacts of long-term waste storage; 2) the failure to adequately address the potential impacts of the reasonably foreseeable expansion of the PI ISFSI on cultural and historic resources; and 3) the failure to address the potential inability to transport high burnup (HBU) fuel off site.

First, the Board has already determined that portions of PIIC's original Contentions 2 that implicate the Waste Confidence Decision and Temporary Storage Rule be held in abeyance. For the same reasons set forth in the PIIC's original Contention 2 and the Board's ruling on it, the

⁸ Draft EA at 4-1 to 4-2.

⁹ See 76 N.R.C. at 511-18.

PIIC seeks to amend its original Contention 2 to include the WCD/TSR deficiency in the draft EA.

Second, the draft EA fails to adequately address the potential impacts of the reasonably foreseeable expansion of the PI ISFSI on cultural and historic resources. The PI ISFSI will have to be expanded to accommodate the total of 98 casks needed if the PINGP is decommissioned after the end of its licensed life (2034). PIIC contends that the reasonably foreseeable expansion of the PI ISFSI would have a high and adverse impact on cultural and historic resources.

PIIC believes that the NRC staff must require the license applicant to perform additional field investigations before the license is renewed and/or impose a license condition on the applicant to ensure that any potential impacts are mitigated. There was no information previously available on this issue in the applicant's ER. Therefore, PIIC believes that the criteria for new or amended contentions in 10 CFR 2.309(c)(1) have been met.

To fulfill its responsibilities under the National Environmental Policy Act¹⁰ and to affirm its general commitment to the implementation of the Executive Order on environmental justice,¹¹ the Commission has adopted a Policy Statement on environmental justice ("Policy Statement").¹² The Commission's Policy Statement recognizes that the impacts, for the purposes of NEPA, of its regulatory or licensing actions on certain populations may be different from the impacts on the general population. Disproportionately high and adverse impacts of a proposed action call

¹⁰ 42 U.S.C. Section 4321 *et. seq.*

¹¹ Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 59 Fed. Reg. 7629 (February 16, 1994).

¹² Policy Statement on the Treatment of Environmental Justice Matters in Regulatory and Licensing Actions, U.S. Nuclear Regulatory Commission, 69 Fed. Reg. 52040 (August 24, 2004).

for “close scrutiny – a hard look – under NEPA.”¹³ The NRC’s goal is to identify and adequately weigh or mitigate effects on low-income or minority communities that become apparent only by considering factors peculiar to those communities.¹⁴

The NRC staff did conduct an environmental justice review in the draft EA and identified the PIIC as a “low-income or minority” community. The staff also conducted an “environmental justice cumulative impact analysis.” However, this review did not identify the potential impacts on historic and cultural resources from the expansion of the ISFSI to 98 casks as a high and adverse impact. The PIIC believes that it is a high and adverse impact – potential destruction of tribal historic and cultural resources is a serious matter – and that the NRC is required to take action now to mitigate the potential impacts of the expansion.

The Commission, in characterizing the legal nature of the Policy Statement, noted “it does not de-emphasize the importance of adequately weighing or **mitigating** the effects of a proposed action on low income and minority communities by assessing impacts peculiar to those communities.”¹⁵ Furthermore, in the licensing context, the NRC’s focus is supposed to be on full disclosure, as required by NEPA, of environmental impacts associated with a proposed action “...and [t]o take care to **mitigate** or avoid special impacts attributable to the special character of the community.”¹⁶ For example, this responsibility to mitigate was characterized by the NRC in an Environmental Impact Statement as follows:

In its environmental reviews, the NRC considers demographic and economic circumstances of local communities where nuclear facilities are to be sited and takes care

¹³ *Id.* at 52040.

¹⁴ Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998).

¹⁵ Note at 52042 (emphasis added).

¹⁶ *Id.* at 52044, citing as authority, Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, at 156 (2002 (emphasis added) and citing with authority

to ensure that the license applicant mitigates or avoids special impacts attributable to the special character of these communities.¹⁷

The NRC staff repeatedly states in the draft EA that there is a high probability that additional unrecorded cultural resources may exist within the PINGP property.¹⁸ In its cumulative impact analysis, the NRC staff finds that it is reasonably foreseeable that the ISFSI may be expanded to accommodate 98 casks.¹⁹ However, the NRC staff does not believe that any action needs to be taken now, in considering this application for license renewal, to ensure that these historic and cultural resources will be protected. The NRC staff bases this conclusion on the fact that the NRC would require that an application and an ER be submitted to the NRC for review and approval of the proposed expansion. The NRC would then conduct a thorough assessment of the impacts to the environment, including presumably an assessment of the impact on historic and cultural resources.²⁰ This provides little assurance that any unrecorded historic and cultural resources would be protected. In addition, the PIIC does not have much faith that the conclusion in that future environmental review would be any different than the conclusion in the instant draft EA.

Potential destruction of historic and cultural resources of importance to the PIIC would constitute a disproportionately high and adverse impact on the PIIC. The responsibility to mitigate disproportionately high and adverse impacts on low income and minority communities requires NRC to take action now in ascertaining whether unrecorded cultural resources are present in the expansion area for the 98 casks. The license for the ISFSI should not be renewed

¹⁷ Final Environmental Impact Statement for an Early Site Permit (ESP) at the North Anna ESP Site, U.S. Nuclear Regulatory Commission, NUREG-1811, Vol. 2 at 225 (December 2006) (emphasis added).

¹⁸ See draft EA at 3-19, 4-10, 4-11.

¹⁹ See draft EA at 4-26.

²⁰ See draft EA at 4-26.

until an archeological survey sufficient to identify unrecorded cultural resources is performed by the applicant and/or by imposing a license condition on the any renewed license that no expansion can be considered as a subject of an amended license until such a survey is performed.

Third, the draft EA fails to analyze the cumulative environmental impacts of the potential difficulties of transporting the high burnup spent (HBU) fuel that will increase in volume over the life of PINGP. It is reasonably foreseeable that the HBU fuel might have to remain on site in the ISFSI indefinitely, regardless of what the eventual waste confidence rulemaking provides about the future availability of storage and disposal options, and regardless of whether there is a storage or disposal facility available.

PIIC does not believe that this issue is one of the contentions that should be held in abeyance until the NRC Waste Confidence proceeding is completed. The proposed rule on waste confidence is focused on the availability of future storage and disposal options and not on the practical difficulties of getting fuel off of the reactor site. Therefore, the potential site-specific environmental impacts of HBU fuel having to remain on site indefinitely must be analyzed now in order for those potential impacts to be factored in to the NRC decision making on the alternatives in the EA. In addition, the EA should evaluate other methods to ultimately transport HBU fuel offsite. No information was previously available on these types of impacts in the applicant's ER and PIIC believes that the criteria in 10 CFR 2.309(c)(1) for the admission of new or amended contentions are met. There is no coverage of this type of impact in the draft EA or any previous material in this proceeding. The very real possibility of HBU fuel remaining on site due to the transport difficulties, and hence the need to look at the environmental implications, is provided below.

DOE, NRC and industry have recognized the lack of data for HBU fuel benchmark predicative model and empirical conclusions.²¹ The DOE demonstration program is intended to build confidence in the ability to predict performance of these systems. TN-32 is the selected cask for the demonstration on HBU fuel. The first internal inspection will not occur for at least 10 years. There is no plan for internal inspection or a designated place where it would be opened. Funding is only provided for five years. DOE has recognized concerns about HBU cladding embrittlement after 20 years of storage. DOE has recognized concerns about transporting HBU fuel below cladding ductile-to-brittle transition temperature. Loads on fuel cladding during transportation include vibration and shock.

Given the absence of approved transportation for the TN-40HT storage cask and the lack of data needed to benchmark models for HBU fuel, the EA cannot reasonable rely on promises to provide data for transportation of the PI ISFSI's HBU fuel. The EA must evaluate other methods to ultimately transport HBU fuel offsite. Reasonable alternatives must be based on current technology, not long term research and development that are not adequately funded. It must also be supported by an NRC approved certificate of compliance for transportation of HBU fuel. The EA must also analyze the potential environmental impact of the HBU fuel remaining on site indefinitely.

²¹ For example, see Billone and Yiu, "Ductile-to-Brittle Transition Temperatures for High-Burnup PWR Cladding Alloys (and cited references), U.S. Nuclear Waste Technical Review Board Winter Meeting (November 20, 2013); Boyle, "High Burnup Cask Demonstration Project" U.S. Nuclear Waste Technical Review Board Winter Meeting (November 20, 2013); Draft Interim Staff Guidance-24, U.S. Nuclear Regulatory Commission (2013).

EA Contention 3. THE DRAFT ENVIRONMENTAL ASSESSMENT FAILS TO SATISFY THE NRC'S FEDERAL TRUST RESPONSIBILITY TO ASSESS AND MITIGATE THE POTENTIAL IMPACTS ON THE PIIC, ITS PEOPLE, AND ITS LAND.

PIIC seeks to renew Contention 3, as amended, challenging the NRC's failure to comply with its trust responsibilities to the PIIC. This contention was first raised in PIIC's original Petition. The Board denied the contention on the basis that the applicant has no duty to discharge the trust responsibility or to discuss the trust responsibility in its ER.²² However, the Board concluded that PIIC was free to raise a contention challenging the NRC Staff's compliance with the trust responsibility once the Staff issued its EA or draft EIS. We do so now.²³

The Federal responsibility requires that the Federal Government (and its agencies) protect Indian trust lands from alienation, confiscation, environmental degradation, or the risk of environmental degradation. The NRC's breach of trust stems from its failure to comply with the NWPA and the AEA with respect to establishing a permanent repository, resulting in the indefinite storage of spent nuclear fuel immediately adjacent to the PIIC's reservation homeland. In addition, the NRC cannot fulfill its trust responsibility to PIIC with reliance on the non-existent Waste Confidence Decision and Temporary Storage Rule.

In addition, there are two significant deficiencies in the draft EA that require additional NRC action. The first deficiency concerns the inadequacy of the analysis and conclusion on the cumulative impacts of the ISFSI on cultural and historic resources. The second deficiency concerns the absence of any analysis of the likelihood of a terrorist attack on the ISFSI, and the

²² See 76 N.R.C. at 519-20.

²³ Note that we raise this same failure to ensure the mitigation of impacts in EA Contention 2 based on the duty of the agency to mitigate high and disproportionate adverse impacts under the law and policy on environmental justice.

potentially devastating physical and economic impacts on the PIIC homeland from such an attack. In neither of these two cases was there any information previously available in the applicant's ER. Therefore, the PIIC believes that the criteria for new or amended contentions in 10 CFR 2.309(c)(1) have been met. The legal basis for this contention is the fiduciary responsibility ("trust responsibility") of the federal government to Indian tribes.

The "trust responsibility" that the federal government owes to Indian tribes imposes both substantive and procedural duties on the federal government. This doctrine has its origin in *Cherokee Nation v. Georgia*, where Chief Justice John Marshall described Indian tribes as being "in a state of pupillage," with "[t]heir relation to the United States resembl[ing] that of a ward to his guardian."²⁴ The trust responsibility is a common law doctrine, although Congress has supplemented the doctrine from time-to-time via legislation. It imposes certain substantive duties on the federal government, including the duty to provide services to tribal members (e.g., health care, education), the duty to protect tribal sovereignty, and the duty to protect tribal resources.²⁵ The trust responsibility also includes a procedural component – the duty to consult with Indian tribes – which is necessary to effectuate these substantive components.²⁶

When it comes to tribal resources, the trust responsibility is at its apex. The Supreme Court has noted that the conduct of federal officials must "be judged by the most exacting fiduciary standards."²⁷ General principles of trust law are frequently incorporated by courts into the federal trust responsibility. Consequently, just as private trust law is about serving the best

²⁴ 30 U.S. 1, 17 (1831).

²⁵ Reid Peyton Chamber, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 *Stan. L. Rev.* 1213 (1975).

²⁶ Gabriel S. Galanda, "The Federal Indian Consultation Right: A Frontline Defense Against Tribal Sovereignty Incursion," *Federal Lawyer* (Fall 2010).

²⁷ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

interests of the beneficiary, “[a]t the core of the Indian trust doctrine is the federal government's duty to serve the 'best interests' of the tribe and its members.”²⁸ Through the trust responsibility, the federal government has a general mandate to ensure the preservation of a usable land base for future generations of tribal members.²⁹ Thus, the federal government is obligated to protect Indian trust lands from alienation, confiscation, environmental degradation, or the risk of environmental degradation.³⁰

It has been argued that as long as the federal agency complies with its statutory duties, it fulfills its trust responsibilities. While there are some federal decisions that make this claim, other federal decisions have left open the question of whether the United States is required to take special consideration of tribal interests when complying with applicable statutes and regulations.³¹ PIIC believes that the trust responsibility must mean more than solely complying

²⁸ Mary Christina Wood, “Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources,” 1995 Utah L. Rev. 109, 112 (1995).

²⁹ 1995 Utah L. Rev. at 138.

³⁰ *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919) (enjoining the Secretary of the Interior from disposing of tribal lands under general public land laws because it would be a violation of the trust responsibility); *Cramer v. United States*, 261 U.S. 219 (1923) (placing heavy emphasis on the trust responsibility while voiding a federal land patent that had conveyed lands occupied by Indians to a railroad nearly 20 years earlier); *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256 (D.D.C. 1972) (holding that the trust responsibility required enjoining diversions of water by a federal reclamation project which reduced the level of Pyramid Lake on a downstream Indian reservation and otherwise impaired the lake's fishery). See also *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 426 (1991) (where the trust relationship exists, the trustee "has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust").

³¹ See e.g., *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006) (claiming that the trust responsibility “does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations,” while still stating that the Court was “leaving open the questions of whether the United States is required to take special consideration of tribal interests when complying with applicable statutes and regulations”).

with existing statutes and regulations. Compliance of this type is no different than what is owed to the general public. In order for the trust responsibility to have any vitality, Federal agencies must exercise a higher responsibility when taking action which may affect a tribe. This is especially true when the issues concern lands held in trust by the United States for a tribe and the tribal cultural and historic resources and a tribe's ancestral homeland. The federal agency, here the NRC, must make every reasonable effort to ensure that these resources are protected in order to fulfill its fiduciary duty to the Tribe.

The PIIC does not believe that the NRC has fulfilled the trust responsibility in its analysis and conclusions in the EA in two respects. The first concerns the analysis and conclusion of the cumulative impacts on historic and cultural resources from the reasonably foreseeable expansion of the ISFSI. The second is the absence of any analysis of a possible terrorist attack on the ISFSI.

The NRC staff repeatedly states in the draft EA that there is a high probability that additional unrecorded cultural resources may exist within the PINGP property.³² In its cumulative impact analysis, the NRC staff finds that it is reasonably foreseeable that the ISFSI may be expanded to accommodate 98 casks.³³ However, the NRC staff does not believe that any action needs to be taken now, in considering this application for license renewal, to ensure that these historic and cultural resources will be protected. The NRC staff bases this conclusion on the fact that the NRC would require that an application and an ER be submitted to the NRC for review and approval of the proposed expansion. The NRC would then conduct a thorough assessment of the impacts to the environment, including presumably an assessment of the impact

³² See draft EA at 3-19, 4-10, 4-11.

³³ See draft EA at 4-26.

on historic and cultural resources.³⁴ This provides little assurance that any unrecorded historic and cultural resources would be protected. In addition, PIIC does not have much faith that the conclusion in that future environmental review would be any different than the conclusion in the instant draft EA.

The fiduciary duty contained in the trust responsibility requires NRC to take action now to ascertain whether unrecorded cultural resources are present in the expansion area for the 98 casks. The license for the ISFSI should not be renewed until an archeological survey sufficient to identify unrecorded cultural resources is performed by the applicant and/or by imposing a license condition on the any renewed license that no expansion could be considered as a subject of an amended license until such a survey is performed. The higher duty imposed by the trust responsibility requires such action.

The second trust responsibility deficiency in the EA is the failure to analyze potential terrorist attacks. In order to fulfill its trust responsibility, the NRC must assess the likelihood of a terrorist attack on the ISFSI and its potential impacts. As noted above, under the trust responsibility, the federal government has a general mandate to ensure the preservation of a usable land base for future generations of tribal members. The failure of the NRC staff to analyze the physical and economic impacts of a terrorist attack on the ISFSI, and the potential consequences on the PIIC tribal homeland and the viability of its economic base falls squarely within this mandate. The NRC routinely performs this type of analysis in EAs and EISs for facilities located within the confines of the Federal Circuit Court of Appeals for the 9th Circuit based on the seminal decision in *San Luis Obispo Mothers for Peace v. NRC*.³⁵ However, the

³⁴ See draft EA at 4-26.

³⁵ 449 F.3d 1016.

NRC has limited the application of this decision to facilities within the geographic scope of the 9th Circuit. The location of the PI ISFSI is outside of the scope of this Circuit Court decision. The higher duty imposed by the trust responsibility requires the NRC to extend the analysis required by the 9th Circuit to the PI ISFSI.

In the case of a catastrophic accident at the PI ISFSI, one that can be envisaged by a terrorist attack, there could be substantial physical harm to tribal members and to visitors to the PIIC resort, the devastation of the tribal land and the possibility that the Tribe would need to abandon its homeland and its economic base. There should be an analysis of these possible impacts, including the cost of relocating the Tribe. The need for such an analysis is only underlined by the distinct possibility that the fuel will never be moved offsite because of the failure of the Federal government's policy on the storage and disposal of spent fuel. It is impossible for the NRC to make an informed decision on the alternatives contained in the draft EA without this type of economic and health information.

II. CONCLUSION

For the foregoing reasons, the PIIC's motion for leave to file new and amended contentions should be granted and its new and amended contentions should either be admitted or held in abeyance.

Respectfully submitted,

Signed (electronically) by Philip R. Mahowald

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Prairie Island Indian Community's Motion for Leave to File New and Amended Contentions**, dated December 12, 2013, was provided to the Electronic Information Exchange for service on the individuals listed below, this 12th day of December, 2013.

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