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Samuel Chilk
Secretary of the Commission
U.S. Nuclear Regulatory Commission
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11555 Rockville Pike
Rockville, MD 20850

ATTN: Docketing and Service Branch

VIA COURIER

Dear Mr. Chilk:

Enclosed please find the comments of the National Congress of American Indians on the Commission's proposed rule, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-level Radioactive Waste at a Geologic Repository, 54 Fed. Reg. 39387.

Sincerely yours,

Dean R. Tousley

Dean R. Tousley

ATTORNEY FOR THE
NATIONAL CONGRESS OF
AMERICAN INDIANS

Enclosure

cc: Members of the LSS Advisory Committee



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**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

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| Procedures Applicable to Proceedings for the Issuance of Licenses for High-Level Radioactive Waste Repositories | 10 CFR Part 2<br>54 Fed. Reg. 39387 |

# COMMENTS OF THE NATIONAL CONGRESS OF AMERICAN INDIANS

> "The Great White Father promises that if you agree to stay on this reservation, it will be yours for as long as the sun shines and the river flows."

Statements such as this were made time after time by United States agents while "negotiating" treaties with Indian tribes during the nineteenth century. More often than not, such promises were broken within a very short time, as minerals were discovered or simply because white settlers demanded more land.

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On September 26, 1989, the Commission published in the Federal Register a proposed rule on Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-level Radioactive Waste at a Geologic Repository, 54 Fed. Reg. 39387. Following are the comments of the National Congress of American Indians ("NCAI") on that proposed rule, which harkens back to the specter of broken treaties alluded to above. For the reasons stated below, NCAI urges the Commission to withdraw this proposed rule.

**The Pillaging of Regulatory Negotiations**

The Nuclear Waste Policy Act, 42 U.S.C. § 10101 *et seq.*, requires the NRC to decide on a construction authorization for a high-level waste repository within 36 months of the docketing of an application, with a possible 12 month extension for good

cause. In an attempt to be able to meet that excessively ambitious schedule, the Commission staff decided there was a need for a more expeditious means of accessing information and conducting discovery before and during the licensing proceeding. It decided to seek to establish a computerized "licensing support system" ("LSS").

From September 1987 until July 1988, NCAI participated as a party in the Commission's negotiated rulemaking proceeding to establish procedures for submission and management of records related to the repository licensing in connection with the LSS system. NCAI supported the LSS as a means to facilitate more timely and meaningful access to repository licensing information by interested and affected Indian tribes or other potential intervenors in the licensing process. However, NCAI has never felt that the statutorily prescribed three-year licensing period was achievable consistent with the Commission's responsibility to ensure that this crucial program is implemented so as to protect future generations for thousands of years.

Thus, while the use of the LSS to facilitate a timely and meaningful repository licensing process is something which NCAI supports wholeheartedly, it was always a primary objective of NCAI in participating in the negotiated rulemaking to ensure that the LSS and the NWPA were not used as a pretext for unwarranted curtailment of public participation rights in the licensing process. Indeed, NCAI was most concerned about, and fought hardest in the negotiations to prevent, enactment of provisions which would make intervention in the licensing process unduly difficult to sustain.

The seven parties to the negotiations came from two different fundamental perspectives. DOE and the nuclear industry, and to some extent the NRC Staff, were most interested in streamlining the licensing process, and made it clear that they would like to maximize the rule's limitations on intervention. NCAI, the State of Nevada, the

local government coalition, and the environmental coalition--all prospective intervenors in the licensing process--were most interested in enhancing the effectiveness of the licensing review and their participation in it. They worked to minimize limitations on intervention.

After nearly a year of negotiations, six of the seven parties to the negotiated rulemaking--including the NRC Staff and the license applicant, DOE--agreed on carefully negotiated proposed rule language including new requirements and limitations on intervention rights. As in any negotiated result, no party was entirely satisfied with every aspect of the compromise that was reached. Only the nuclear industry representatives refused to concur in the final language--primarily based on what they considered the excessive cost of the LSS, not the intervention language. Even the industry had conditionally assented to the language on interventions, which was heavily influenced by their forcefully expressed views on the subject. This was surely an unprecedented level of agreement among parties with widely disparate viewpoints and interests.

It bears emphasizing that the license applicant and five other parties carefully negotiated and agreed to the language of the rule and the Commission promulgated that language as its own in April 1989. Yet, less than six months later, the Commission is proposing amendments to the rule which curtail public participation rights to a degree beyond anything that was proposed even by the nuclear industry in the negotiated rulemaking process.

This proposal is profoundly shocking and disappointing. It is incomprehensible that the Commission would engage in the time-consuming and costly effort entailed by negotiated rulemaking only to negate some of the most important aspects of that effort

just six months later. The purpose of negotiated rulemaking is to engage all the relevant interests in a dialogue which balances the opposing interests of the parties and results in a higher quality proposed rule--one with broad appeal and acceptability. That purpose was served to a remarkable extent in this negotiated rulemaking process, notwithstanding the nuclear industry's last-minute non-concurrence. It seemed, to some of us who have had much less pleasant experiences in agency/public interactions, a refreshingly productive endeavor. In short, the negotiated rulemaking won the Commission some much-needed public good will and credibility. It is now apparent that public good will is not something the Commission values highly.

NCAI would never have concurred in the negotiated rulemaking process to provisions like those proposed here, because nothing about the LSS or the NWPA justifies such extreme curtailment in public participation. This proposed rule, if promulgated, would render the negotiated rulemaking a nullity--a complete waste of time and effort--as far as NCAI is concerned. Since even DOE agreed to the rule as promulgated, it is very difficult to comprehend why the Commission is acting so aggressively now to promulgate these draconian and unjustifiable restrictions on public participations rights--issues that were absolutely key to the concurrence of NCAI and several other parties in the negotiated rulemaking process. Parties make concessions in negotiations in reliance on the fact that the concessions of other parties will be observed and respected. Promulgation of this rule would be an egregious violation of that reliance. Why, we wonder, did the Commission bother with negotiated rulemaking in the first place, if it was prepared to jettison the result with no apparent cause?

Promulgation of this proposed rule would severely tarnish the image of regulatory negotiations in general, but particularly that of the NRC as a sponsor of

such proceedings. As NCAI testified before the Commission before it promulgated the proposed rule last year, the negotiated rulemaking process was one we would have recommended for numerous other regulatory purposes. If this proposal is promulgated, NCAI will have no choice but to recommend that negotiated rulemaking be avoided at all costs. Why should NCAI, or anybody else, participate in a negotiating process if it is apparent that the agency can turn around and turn acceptable results into completely unacceptable results just a few months after the process ends?

**Substance**

In their substance, these proposed amendments--like their recently promulgated counterparts in Subpart G of Part 2--are completely unjustifiable. The Commission tried for a decade to get Congress to enact Atomic Energy Act amendments that would have gutted citizen participation, but Congress repeatedly declined those undemocratic overtures. Now, between the new combined license/standard design certification rule (Part 52), the Subpart G changes, and this proposal, the Commission is acting administratively to accomplish everything which Congress has declined to do statutorily.

A large part of the Commission's apparent justification for these proposed amendments is that they make Subpart J consistent with recently finalized revisions to Subpart G of the Commission's licensing proceedings. That is no justification, however, as the Subpart G revisions are also completely unwarranted and violative of the Atomic Energy Act section 189(a) hearing right and due process.[1] The right to a hearing in the abstract is useless if the barriers to actually getting one's concerns litigated are set too high, as is the case here and in Subpart G.

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[1] NCAI references the October 17, 1986 comments of the Yakima Indian Nation on the proposed Subpart G amendments.

In the context of the repository licensing proceeding, this proposal seems to be based on the assumption that all potential intervenors will be well-financed, large entities with many years of in-depth experience reviewing the waste program. That assumption is incorrect. In the case of Indian tribes, it is quite possible that tribes which would be affected by a proposed repository, and likely candidates for intervenor status, may *not* be officially deemed "affected Indian tribes" within the narrow compass of the NWPA definition.[2] Thus, such tribes would not enjoy the benefits of NWPA consultation and cooperation funding for meaningful, early participation in the waste program. They will be unable to attend the scores of meetings that DOE, NRC, and state representatives hold to discuss technical and institutional issues in the repository program, or to hire knowledgeable consultants to assist them in their review of the program. They would get little practical benefit from the early availability of the LSS system, because they would be largely unable to afford its use.

Thus, Indian tribes that intervene in the repository licensing proceeding may be in essentially the same position as citizens' groups or individuals. They will be required to submit to the LSS and the requirements of the pre-license application licensing board if they wish to intervene; they will be required to be computerized so they can submit their filings as ASCII files for inclusion in the LSS; but they will be hard pressed to enjoy the putative benefits of the LSS because they will be unable to afford on-line

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[2] This is, in fact, precisely the situation which currently prevails in Nevada. Because of the NWPA's very restrictive definition of "affected Indian tribe," it is possible that none of the Nevada tribes that are closest to the Yucca Mountain site will be deemed to satisfy it. The Duckwater Shoshone Tribe, for instance, has petitioned the Secretary of Interior for affected tribe status, but there has as yet been no response.

and search charges and unable to afford competent technical consultants who can make use of the information the LSS contains.

NCAI was conscious of this potentially unfair effect of the LSS rule on meagerly-financed or non-computerized intervenors during the negotiated rulemaking. Nonetheless, we begrudgingly accepted these provisions as part of the compromise of the negotiations, in large part because excessive additional restrictions on intervention were *not* part of the package. With the package that was negotiated and promulgated by the Commission, even intervenors that lacked the wherewithal to make very effective use of the LSS would have had the chance to sustain a modest intervention effort.

Under the current proposal, only the well-off or large institutional intervenor will be able to even get any contentions admitted. The Commission's protestations that it is not requiring prospective intervenors to prove their cases to get in the door do not make it any less the case. Proposed section 2.1014(a)(2)(iii) would require potential intervenors to present evidence and satisfy a summary disposition standard in order to get a contention admitted. It is not sufficient to say that the information needed to satisfy such a standard will be available in the LSS. As noted above, the LSS will not be that helpful to parties who lack the wherewithal to use it effectively or to interpret its data meaningfully. Even granting that intervention is generally a dubious undertaking for those on a severely limited budget, it should not be effectively impossible for a small tribe or organization to carry on a limited intervention if it is so inclined. This proposal's extremely high threshold for getting contentions admitted will have precisely that effect.

The Commission's own General Counsel has recognized the adverse effect of requiring satisfaction of a summary disposition standard at such an early stage:

> NRC rules providing for summary disposition on pleadings (10 C[illegible].749) recognize the general principle that an adjudicatory hearing is not required for matters as to which there is no genuine dispute. The draft rule seeks to integrate that general principle into the contention stage of the proceeding. *In practice, however, would be intervenors will be less prepared to fend off summary disposition at this early stage; thus, the rule change could significantly affect public participation in licensing proceedings.*[3]

Even utility executives who are license applicants before the Commission have acknowledged the unfairness of provisions such as the Commission here proposes. The following are comments submitted by the Public Service Company of Oklahoma on a similar proposal:

> Licensing boards would be permitted, at the time contentions were first offered, "to judge the merits of the contentions as to whether genuine issues of material fact exist." Any contention that failed to measure up would be rejected, and it would not be the subject of a hearing. This proposal undoubtedly would exclude frivolous contentions from a licensing proceeding. *Unfortunately, it is not legally supportable. It simply requires too much evidence too soon in the proceeding and, if adopted, would contravene the administrative due process tenets of the Administrative Procedure Act of 1949 and the attendant case law.*[4]

Potentially even more damaging for the prospects of intervention by a small entity are the proposed new section 2.1024, which would require any party who sponsors a contention to present direct testimony in support of that contention, and section 2.1025, which would require responses to summary disposition motions to be accompanied by affidavits if the motions themselves were accompanied by affidavits.

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[3] Memorandum from Leonard Bickwit, Jr., General Counsel, to the Commissioners (February 17, 1981) (Re: Intervention in NRC Adjudicatory Proceedings). (Emphasis added.) Mr. Bickwit's memo refers to an earlier, similar proposal to raise the threshold for admission of contentions.

[4] Comments of the Public Service Company of Oklahoma on Rulemaking Proposal -- 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings; Modifications to the NRC Hearing Process," (46 Fed. Reg. 30349), July 8, 1981, at 5 (Emphasis added).

These provisions drastically raise the minimum costs of intervention by compelling intervenors to hire experts for both testimony and affidavits. It is difficult to see what purpose these provisions serve other than to facilitate getting rid of intervenors. Intervenors who cannot afford to do more should continue to have the opportunity to make their cases on the basis of cross-examination only.

The attempt to make the hearing schedule mandatory in proposed section 2.1026 simply defies reality. The Commission cannot anticipate now all the developments that might occur or need to occur during the licensing proceeding. And finally, the proposed withdrawal of the licensing and appeal boards' *sua sponte* review authority, § 2.1027, represents a needless constraint on their ability to conduct hearings and reach valid findings. It also reveals that the Commission seems to value the timing of the repository licensing proceeding above its scientific validity.

**Conclusion**

In sum, these proposed amendments bely a profound distaste for public participation and accountability. The theme that ties them together is the desire to get rid of and otherwise unduly constrain intervenors as quickly and effortlessly as possible. The three-year licensing time limit in the NWPA was never a good idea for a program whose implications may be felt for thousands of years. The licensing of a high-level waste repository *should not* be easy. DOE's application should be subjected to every possible iota of scrutiny before it is approved by the Commission.

The Commission now proposes to elevate the deadline to the position of prime directive, and to use it as a pretext for making intervention in the Commission's repository licensing the exclusive domain of large institutions and the well-heeled. The nuclear industry and DOE have advanced the premise that there is no real technical

impediment to a successful repository program, but rather only public relations problems. NCAI does not accept that premise, but if it is correct, this proposed rule will only hurt the cause. If this proposal becomes law, the public will correctly conclude that the avoidance of scrutiny is the paramount concern of the NRC. The damage to the credibility of the high-level waste program and the Commission's oversight of that program, and to the institution of regulatory negotiations, will be incalculable.

Section 189(a) of the Atomic Energy Act does *not* say, "[T]he Commission shall grant a hearing upon the request of any person *with unlimited resources* whose interest may be affected by the proceeding...." The Commission should not attempt to achieve that result by rulemaking. NCAI strongly urges the Commission to withdraw this proposed rule.

Respectfully submitted,

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Dated: November 27, 1989