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NOTE FOR: John G. Davis, Director
Office of Nuclear Material
Safety and Safeguards

FROM: Robert E. Browning, Director
Division of Waste Management

SUBJECT: RESPONSE TO YAKIMA TRIBAL, WASHINGTON GOVERNOR'S
REQUESTS FOR PARTICIPATION IN NRC REVIEWS
UNDER 10 CFR 60

On April 5, 1983, I forwarded to you proposed responses to the Yakima Tribal and Washington Governor's requests for participation in NRC reviews under our present procedural rule, 10 CFR 60. I also enclosed ELD's recommended responses, which I considered to be unresponsive. I recommended a meeting between you, the Office of the Executive Legal Director (ELD), and the Office of State Programs (SP), and said I would provide a point paper on the subject. Attached is the promised point paper, which was prepared by the Licensing Process and Integration Branch (WMPI) staff.

I have scheduled the meeting between you, ELD, and SP on Friday, April 8, but would like to meet with you to discuss this prior to that time.

Original Signed by
Robert E. Browning
Robert E. Browning, Director
Division of Waste Management

Enclosure: WMPI
Staff Point Paper

*See previous concurrence

CRussell has all backup on this issue

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Point Paper
On State and Tribal Participation

I. Issue: Is it in the best interests of NRC to change the state/tribal participation provisions of 10 CFR 60 at this time?

A. Urgency of resolving this issue: . letters to NRC from Governor of Washington State, Tribal Chairman of Yakima Tribe requesting to enter into written agreements to participate in NRC reviews under Subpart C of 10 CFR 60.

II. What are the changes in 10 CFR 60 specifically required by the Act?

A. None

1. "The Secretary, the Commission, and other agencies involved in the construction, operation, or regulation of any aspect of a repository in a State shall provide to the Governor and legislature of such State, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made with respect to the site characterization siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository." (Section 117(a)(1), Nuclear Waste Policy Act of 1982.)

2. "Any such written agreement [between DOE and a State or tribe to carry out requirements for DOE provision of information and consultation and cooperation] shall not affect the authority of the Commission under existing law." (Section 117(c) of Act.)

3. "It was our view that existing law makes it very clear that recognized rights of State or Indian tribes to participate in either an MRS facility or a geologic repository would not be affected by this bill. Stated differently, the substitute amendment should not be interpreted to preclude the right of a State or Indian tribe to exercise any right recognized under existing law with respect to a MRS facility or a geologic repository." (Senator Alan Simpson, in colloquy with Senator Robert Stafford during Senate floor debate on passage of

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Nuclear Waste Policy Act of 1982. Congressional Record,
December 20, 1982, p. S15668)

II. What provisions of 10 CFR 60 related to State/tribal participation have been rendered potentially awkward or duplicative by NWPAA? For which of these provisions is a remedy urgent for timely response to the Washington State and Yakima Tribal requests?

A. Section 60.11(c) requirement for NRC to provide copies of SCR

1. DOE required to submit SCP to states, tribes, and NRC under Section 113 of Act

2. Not urgent for timely response

B. "Potentially affected" States eligible to participate in NRC reviews under Subpart C include States adjacent to potential repository host States.

1. Sections 116, 117 of NWPAA limit eligibility for funding, consultation and cooperation with DOE to only those States in which a potentially acceptable repository site is located.

2. Not urgent for timely response

C. Section 60.64 provides for participation of "potentially affected" Indian tribes in NRC reviews.

1. Section 117 limits tribal eligibility for DOE consultation and cooperation to "affected tribes" as determined by the Secretary of Interior.

2. Not urgent for timely response (Secretary has already determined Yakimas to be "affected tribe.")

III. Options for Resolving Issues for Responses to Washington State Governor's, Yakima Tribal Council Chairman's Requests

A. Delay actions to accommodate Washington, Yakima requests to participate under existing NRC rules (e.g., negotiation of written understanding under Subpart C) pending appropriate rulemaking on 10 CFR 60 consistent with law. (Essentials of OELD staff draft.)

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1. Pros:

- a. preserves flexibility for later amendments to 10 CFR 60

2. Cons:

- a. not responsive to Washington State, Yakima requests
- b. inconsistent with existing NRC rules for State, tribal participation
- c. Rulemaking for substantive changes in NRC procedures may take up to two years. (Since Act does not specifically require changes in procedures, abbreviated rulemaking options may be problematic for substantive amendments.) Holding NRC rules in abeyance for an extended period may promote confusion among interested States, tribes at other sites on how to proceed toward participation in NRC reviews
- d. potential negative impact on State, tribal confidence in NRC good faith, given no explicit statutory requirement for amending NRC rules on State, tribal participation
- e. delay in establishing effective relationships for State/tribal participation inconsistent with Commission intent that 10 CFR 60 promote early identification of potential licensing issues.
- f. potentially inconsistent with Commission Policy and Planning Guidance (PPG) that NRC reviews not delay national waste management program

B. Respond affirmatively to Washington/Yakima requests without notice of possibility of amendments to participation procedures under Part 60.

1. Pros:

- a. responsive to State, Yakima requests
- b. minimizes grounds for State/tribal doubts about NRC consistency and/or good faith

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c. minimizes grounds for State/tribal confusion on how to proceed

d. consistent with PPG, Commission desire for early identification of potential licensing issues

2. Cons:

a. may foreclose opportunity to cite Nuclear Waste Policy Act as basis for subsequent changes in Part 60 participation

C. Respond to Washington/Yakima requests pursuant to substantive requirements of Part 60, making only administrative amendments to State/tribal participation provisions (e.g., eliminating duplication). Use written memoranda of agreement to clarify limits of NRC responsibilities (e.g., provision of DOE documents).

1. Pros:

a. affirmative response to State/tribal requests

b. consistent with existing NRC rules

c. minimizes grounds for State/tribal confusion about NRC procedures, or doubts about NRC consistency and/or good faith

d. consistent with PPG, does not impair early identification of potential licensing issues

e. eliminates duplication of NRC efforts

2. Cons:

a. may foreclose opportunity to cite Nuclear Waste Policy Act as basis for subsequent changes in Part 60 participation

D. Notify Washington Governor/Yakima Tribal Chairman that Part 60 participation procedures may be changed in light of NWPA, but until such changes are in place, NRC will proceed under existing rules

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using written memoranda of understanding to clarify NRC.
(Essentials of WMPI approach)

1. Pros:

- a. responds affirmatively to incoming requests
- b. consistent with existing NRC rules
- c. proceeding under existing rules pending revisions is consistent with approach to public review and comment on BWIP Draft Site Characterization Analysis in recent letter to Robert Morgan, DOE
- d. minimizes grounds for State/tribal confusion about NRC procedures
- e. consistent with PPG, does not impair early identification of potential licensing issues
- f. retains flexibility for any subsequent amendments to NRC rules

2. Cons

- a. option to amend rule may provide basis for doubts about NRC good faith
- b. does not provide quickest way to eliminate duplication

WMPI Staff Recommendation: Option D., because it promotes or permits the greatest number of positive outcomes, and because it is consistent with approach in recent letter to Morgan.

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