

## WCO outreach CEm Resource

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**From:** Mary Jo Brenden [mjbrenden@piic.org]  
**Sent:** Friday, February 17, 2012 11:50 AM  
**To:** WCO outreach Resource  
**Cc:** Phil Mahowald  
**Subject:** Prairie Island Indian Community Comments  
**Attachments:** Christine Pineda letter 2.17.12.pdf

Greetings:

Attached please find the Comments of the Prairie Island Indian Community on the draft report "Background and Preliminary Assumptions for an Environmental Impact Statement—Long-Term Waste Confidence Update."

Please feel free to contact Phil Mahowald, the General Counsel for the Prairie Island Indian Community, if you have any questions or need any further assistance.

Regards,

Mary Jo Brenden  
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PRAIRIE ISLAND INDIAN COMMUNITY  
LEGAL DEPARTMENT

February 17, 2012

Ms. Christine Pineda, Project Manager  
Mailstop EBB-2B2  
Office of Nuclear Material Safety and Safeguards  
US Nuclear Regulatory Commission  
Washington, DC 2102

Dear Ms. Pineda:

The Prairie Island Indian Community (PIIC or Community or Tribe) would like to offer the following comments and recommendations to the Nuclear Regulatory Commission (NRC) on the draft report "Background and Preliminary Assumptions for an Environmental Impact Statement—Long-Term Waste Confidence Update," issued on January 3, 2012. In summary, the Waste Confidence EIS would evaluate the generic impacts of extended on-site storage and associated transportation impacts for a period of 200 years, beginning in 2050 (or until 2250).

The Prairie Island Nuclear Generating Plant (PINGP), owned by Northern States Power Company d/b/a Xcel Energy (Xcel), is located on our Tribe's ancestral homeland and immediately adjacent to the PIIC reservation. See Figure 1. The PINGP has been online since the early 1970s and will operate at least until 2034 (both operating licenses were renewed in June 2011 for an additional 20 years). Like many utilities, Xcel also operates a site-specific Independent Spent Fuel Storage Installation (ISFSI), which is licensed by the NRC. The ISFSI is approximately 600 yards from the nearest Community residences, and is located on the west bank of the Mississippi River in an area that is quite popular for recreational boating and heavily used by barges. If the PINGP is decommissioned in 2034, the spent fuel is estimated to require a total of 98 casks – approximately 2500 tons of spent nuclear fuel. Most recently, Xcel has applied for a 40-year license extension for the ISFSI because its initial 20-year license is set to expire in 2013. In addition, Xcel will have to apply for a license amendment for the ISFSI to increase its storage capacity to 98 casks, to provide enough on-site storage during the period of extended operation and for decommissioning.



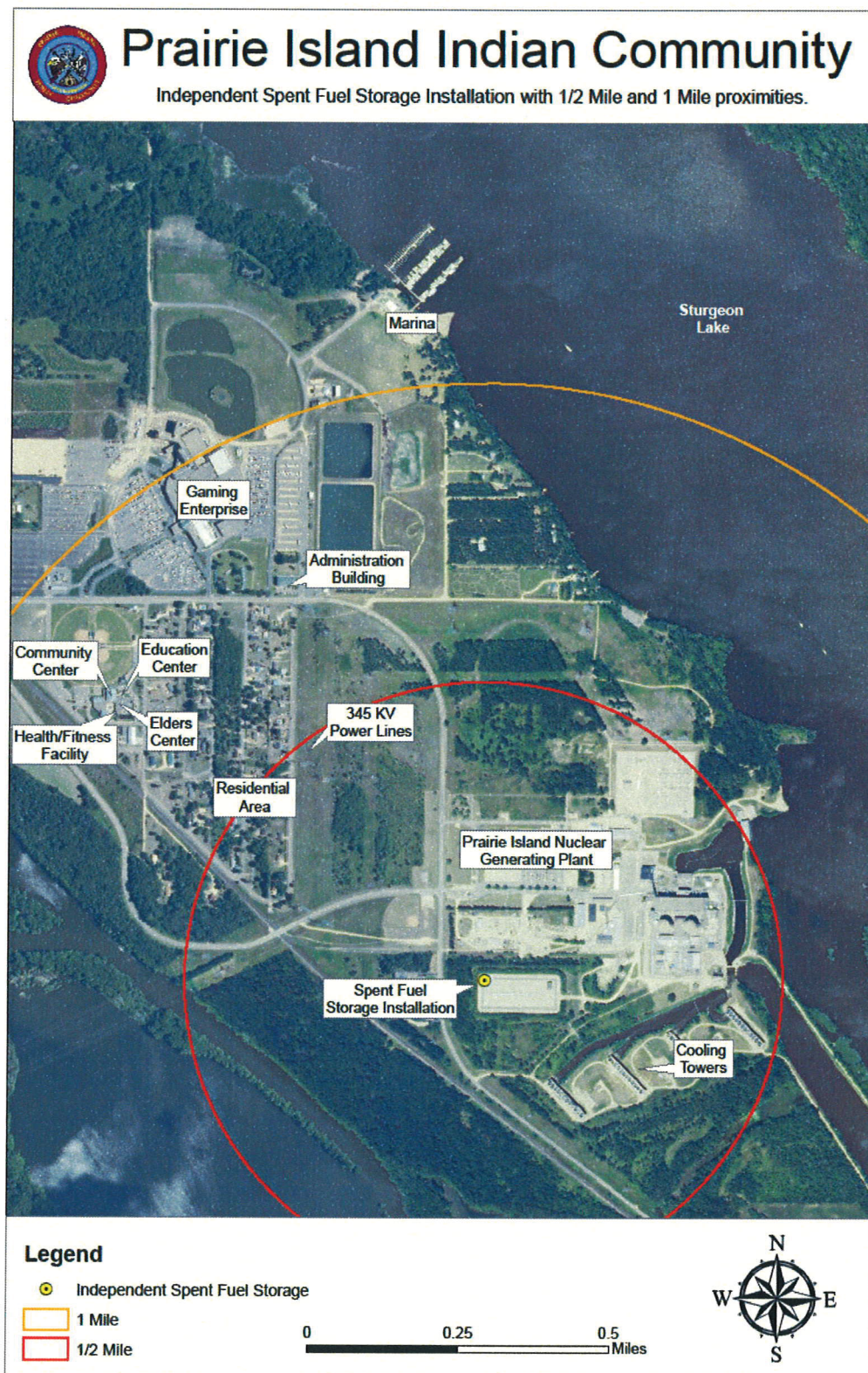


Figure 1



When the ISFSI at Prairie Island was initially proposed, in the early 1990s, it was to be *temporary* measure, only for a few years, to keep the plant running and plant personnel working until Yucca Mountain could be opened. PIIC, along with countless others, expressed concerns regarding the *long-term* storage of spent fuel in dry casks and the possibility that the waste would never leave Prairie Island. We understood then that the ISFSI was to be an interim or temporary solution until the national repository at Yucca Mountain could begin accepting waste. The probability that the waste will leave during the lifetime of those Tribal members and leaders who fought against interim or temporary storage is close to zero.

Minnesota law requires approval from the Public Utilities Commission (PUC) and the State Legislature before a utility can use on-site dry cask storage. During the process to evaluate NSP's application for a Certificate of Need (CON) for the Prairie Island dry cask storage facility (by the PUC), hearings were held before Administrative Law Judge Allan Klein in November and December 1991. In April 1992, Judge Klein recommended that the PUC deny the CON, stating:

The likelihood that the dry cask storage would become permanent is so great that it is appropriate to require legislative authorization if the project must go forward immediately.

Despite these recommendations, the Public Utilities Commission ruled that NSP could store the waste, though the MN Legislature reduced the number of casks allowed from 48 to 17 (NSP initially sought a CON for 48 dry casks). Subsequent Legislative action in 2003 increased the cask limit to 29 casks.

The 1992 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 200+ years, as the NRC is now preparing for through its extended storage initiative (to be discussed further in this letter).

As the NRC is well aware, 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 seen in Figure 1. 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. The process to acquire additional lands, apply to transfer them into trust, and have them placed into trust and designated at PIIC's reservation is a long, complex, and expensive endeavor, and there are no guarantees that the fee-to-trust application would be approved.

## Tribal Consultation

The report does not discuss how the NRC plans to consult with any impacted federally recognized tribes to inform them of plans to allow for extended on-site storage of up to 200 years. The NRC should bear in mind that the transportation aspects have the potential to impact a great number of Indian tribes and tribal lands. Federally recognized Indian tribes have an expectation that they will be consulted on a government-to-government basis. Tribes are not the public and should not be treated as such. Please do not publish a notice in the Federal Register and expect tribes to respond.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, states: the United States has a unique legal relationship with Indian Tribal governments; the United States recognizes the right of Indian Tribes to self-government and tribal sovereignty; each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies which affect the Tribe.

Furthermore, the Executive Order states "Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights."

Particularly relevant to the EIS for extended on-site storage of spent nuclear fuel, is Section 5. Consultation.

- b. To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:
  - 1. funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or
  - 2. The agency, prior to the formal promulgation of the regulation, consulted with tribal officials early in the process of developing the proposed regulation;

The extended storage EIS proposal does have tribal implications. (i.e., 200+ years on on-site dry casks storage immediately adjacent to a federally recognized Indian tribe). While the Prairie Island Indian Community will incur no costs to "comply" with the proposed action (i.e., the generic EIS), the Tribe will incur substantial costs in participating in this proceeding, participating in the generic EIS process, participating in every ISFSI license

renewal and monitoring the activities at the ISFSI for the next 250 years. The Tribe receives no federal funding to enable its participation in NRC proceedings. Over the last twenty years the Tribe has expended considerable resources to participate in NRC proceedings. These are tribal funds that could be used for other community purposes.

Executive Order 13175, signed by Presidents Clinton, Bush, and Obama, applies to all federal agencies, including the NRC. It is our view that the NRC must consult with us regarding the proposal to allow for 200+ years of on-site storage. We expect a meeting with the Tribal Council and not just an invitation to attend a public meeting.

#### Community consultation

Though not required by any Executive Order or policy, it would be to NRC's advantage to meet with affected communities to explain why spent nuclear fuel will be stored in their backyards for 200+ years after the nuclear power plants cease operations. Many communities initially supported on-site dry cask storage as a means to keep the local nuclear power plants operational until the national repository at Yucca Mountain could be licensed and opened. No one ever imagined that a short-term solution would turn into a 200+ year endeavor.

As stated in the report, "the staff plans to develop the EIS to analyze impacts of storage from approximately the middle of this century for a period of 200 years." In the case of Prairie Island, this would represent a total on-site storage term of close to 300 years. This is preposterous!

#### National Context (Proposal is Premature)

According to Section 1 of the report (Purpose of This Report), "the NRC is anticipating that spent nuclear fuel will be stored longer than originally intended because of the uncertainties in the national strategies for disposing of spent nuclear fuel." It seems to us that this action, along with previous NRC actions, is partially responsible for the status quo (i.e., indefinite on-site storage). Furthermore, the report goes on to state "the NRC is developing this EIS potential update to accommodate potential (emphasis added) changes in the national program concerning spent fuel management." While this proposal is being framed as a proactive regulatory action, it is our view that the proposed action will serve to *delay* the Government's legal obligation to accept spent nuclear fuel and dispose of it in a national repository. In effect, this proposed action would allow the federal governmental an additional 200+ years to meet its legal obligation to the utilities.



We believe that the NRC's proposal for extended on-site storage is premature for the following reasons:

Appeal of the 2010 Waste Confidence Decision/ On-site Storage Rule

Litigation challenging the Waste Confidence and On-Site Storage Rules is pending. This appeal should be allowed to continue through final resolution before any related rulemaking is proposed or finalized.

US Court of Appeals Review of Yucca Mountain License Application

While the report discusses the DOE's request to withdraw the license application for Yucca Mountain and subsequent actions by the NRC to terminate review activities, it fails to mention that the DOE's actions are being challenged in the US Court of Appeals and that oral arguments are scheduled for May 2012. The Court may very well rule that the NRC must continue its review of the Yucca Mountain license application.

It is also significant that the Nuclear Waste Policy Act is still the law of the land and absent a change in the law, Yucca Mountain is still the site of the National repository.

Technical evaluation of dry casks

To our knowledge, there have been very few technical studies regarding the long-term performance of dry casks. Considering that these casks could potentially be used for decades, if not longer, it is crucial that the NRC complete the technical work before it moves forward with the extended storage EIS. How can the NRC evaluate potential environmental, health and safety risks if we do not know how the casks will perform for the extended time period?

According to the NRC's Environmental Assessment (EA) for the Prairie Island ISFSI, "The TN-40 dry storage cask is designed to provide storage of spent fuel for at least 25 years" (ADAMS ML090260415, July 1992). We object to any effort twenty years after the fact to redefine the "design life" of a cask to mean 200 years, particularly without detailed, site-specific analysis and rigorous testing of casks.

As we discuss further in our comment letter, when the ISFSI at Prairie Island was originally proposed, there was an underlying assumption that that dry cask storage would be a short-term solution. It is unrealistic to ask the public to accept 200+ years of on-site dry cask storage without robust testing of casks and technical data to support the long-term use of such casks.

No one envisioned that more than 25 years would be needed, because at that time, the DOE was completing many of its technical studies for Yucca Mountain and the NRC's Waste Confidence Rule assured us that a repository would be available with the first quarter of

the 21<sup>st</sup> century. Now it appears that the NRC is telling us that these casks, with a design life of 25 years, can be used for 200+ years? There are several lifetimes of difference between 25 years and 250 years.

What if the NRC did nothing? Licensees would continue to apply for ISFSI license renewals every forty years. There are no regulations that prohibit license extensions for ISFSI's. It is not the job of the NRC to be proactive and anticipate having to accommodate the federal government's failure to accept spent nuclear fuel. For the reasons articulated above, we believe that the proposed action is premature and should be suspended until the questions raised above have been answered (either by the courts or through exhaustive testing/research of dry cask performance).

### Waste Confidence Decision and Rule

The report states "The Waste Confidence Decision expresses the Commission's confidence in the safe management and ultimate disposal of spent nuclear fuel." How can the public be assured/confident that anything will ever happen if the deadline/goal is a moving target? The only thing we are confident of is the fact that waste will continue to be stored at Prairie Island long after we are gone.

The first Waste Confidence and Decision and Rule were adopted in 1984 in response to a 1979 lawsuit regarding spent nuclear fuel storage and disposition. The decision, by the US Court of Appeals for the District of Columbia, directed the NRC to determine whether a disposal solution for spent nuclear fuel would be available by the time a reactor ceased operations (i.e., end of its license) and if not, determine whether the spent fuel could be safely stored after that date (the end of license).

The 1984 Waste Confidence Rule and Decision expressed the Commission's views that one or more mined geologic repositories will be available by the years 2007 – 2009 (Finding 2) and if necessary, spent fuel can be safely stored on-site (or in the reactor pool) for at least 30 years beyond the expiration of the reactors operating license, (or a minimum of 70 years) (Finding 4).

In 1990, the Waste Confidence Rule and Decision were updated to state that there was reasonable assurance that at least one mined geologic repository would be available by the first quarter of the 21<sup>st</sup> century (Finding 2) and if necessary, spent fuel can be safely stored for at least 30 years beyond the licensed life of the plant (which now includes license extension, or for a minimum of 90 years) (Finding 4).

The most recent update to the Waste Confidence Decision and Rule (2010) now assures us that at least one mined geologic repository will be available *when needed* (emphasis added) (Finding 2) and spent nuclear fuel can now be safely stored for 60 years beyond the licensed life of the reactor (regardless of when the plant ceases operations) (Finding 4).

Although the Waste Confidence Rule does not, in and of itself, approve extended on-site storage (as each plant goes through a licensing process), the rule does prevent legal challenges to license renewal applications (for both reactors and site-specific ISFSI's) with respect to waste removal. In effect, this is tacit NRC approval for long-term storage of spent nuclear fuel.

When one looks at the history of the Waste Confidence Rule and Decision, it appears that dates keep changing in response to political pressures and realities. That waste can be managed safely in the short-term appears may be true, but this proposal is taking interim storage beyond the short-term. Back in 1993 and 1994, people in Minnesota were willing to accept on-site storage because there was a date on the horizon—1998 (according to the Nuclear Waste Policy Act) or by 2025 (the Waste Confidence Rule)—by which the waste would be moved from reactors sites. Now, we are looking at a date that is so far into the future as to be absurd. We are neither assured nor confident that the waste generated and stored at the Prairie Island ISFSI will ever move.

#### Blue Ribbon Commission

The report discusses the then expected report from the Blue Ribbon Commission (BRC) on America's Nuclear Future. BRC report contains eight recommendations for future action. Among other things, the BRC recommends developing one or more consolidated storage sites and a deep geological disposal site. It should be noted that there is no guarantee that any of the eight recommendations made by the BRC will ever be implemented.

While the NRC is contemplating extended on-site storage (i.e., 200 years beyond licensed life of plant), the BRC is recommending a consent-based approach to identify communities willing to host a consolidated interim storage facility and a geologic repository. The BRC's premise is that a willing host community will be found if such a facility provides economic and other benefits to the community. The communities around operating or decommissioned plants must be considered in the same light: they are host communities that should receive some benefit for hosting such a facility. What economic benefits does abandoned spent nuclear fuel bring to communities? How will socioeconomic benefits be calculated in the extended storage EIS, as many, if not all, current reactors would have ceased operations and ceased generating tax revenue, employment opportunities, and other benefits for the host community?

#### Section 6. Alternatives

NEPA requires that alternatives to the proposed action, including the No Action Alternative, be evaluated as part of an EIS. As discussed in the report, the no-action alternative would be to continue reviewing the Waste Confidence decision and rules every 5 to 10 years.

As we stated above, the Waste "Confidence" decision and rules has evolved over the last thirty years: dates keep moving and assumptions (regarding the repository) change or



disappear altogether. A 200+ year waste confidence decision and rule will only serve to grant the federal government an additional 200+ years to delay licensing a repository. In our view, the “No-action” alternative is preferable in that revising the waste confidence decision and rule every 5 to 10 years would reflect current (for that time) legal, technical, and political realities. It is unrealistic to ask the public to accept 200 years of on-site dry cask storage.

## Section 7. General EIS Methodology and Scope of Impacts

According to the report, “the staff plans to develop the EIS to analyze impacts of storage from the approximately the middle of this century for a period of 200 years.” This would represent a storage term of close to 300 years. This is preposterous!

The NRC should clarify how the proposed extended storage EIS would interplay with ISFSI license renewal applications. The NRC developed the regulatory framework for licensing dry casks and ISFSIs and meeting the requirements of the National Environmental Policy Act (NEPA), by conducting an environmental assessment for each site-specific license application. As well, each ISFSI must apply for a license extension, which triggers an environmental (EA) and safety review by the NRC. The license renewal process does allow for some public participation. It is not known whether the generic EIS would eliminate or limit future public participation in the license renewal process.

### Generic sites

How can generic sites possibly capture unique site-specific features, such as geology, soil conditions, water features, elevation, population densities around the site, and economic costs and benefits? Site elevation may be particularly important as the NRC evaluates a 200+ year storage period and the Nation evaluates climate change and sea level rises. There are a few plants (and ISFSIs) located on our coasts, at very low elevations. We cannot overlook the possibility that these sites could possibly be flooded, within the 200+ year time frame, as a result of climate change.

Most important to the Prairie Island Indian Community would be historic, cultural, and social impacts that are unique to Prairie Island and would not be captured in a generic EIS for long-term storage. As we discussed earlier in this letter, all federal agencies, including the NRC must consult with federally recognized Indian Tribes before they take actions that impact tribal people, lands, and resources.

Given the recent events in Japan, we, as a Nation, have been acutely aware that site-specific natural features and hazards play an important role in assessing potential environmental and safety risks and consequences from the nuclear power plant and dry cask storage operations. This is especially vital when one considers that not all of the spent fuel is or will be in dry casks (i.e., in storage pools, that are especially vulnerable to natural hazards).

## Section 8.1 Preliminary Assumptions

Sub-section 4 discusses long-term transportation impacts and states that the assessment of impacts will be based on current package technologies, existing transportation infrastructure and regulatory requirements. With respect to transportation impacts (and assessment of impacts from accidents, Subsection 8), it is not clear how or whether the NRC will consider impacts to lands around transportation routes or just the impacts from repackaging fuel for transportation. If the NRC plans to assess impacts to the former (i.e., transportation of fuel) then impacts to Tribal lands, along and within transportation corridors must be considered. This will require consultation with many potentially impacted Indian tribes.

With respect to repackaging impacts, specifically at Prairie Island, the casks currently in use are storage only (not dual purpose); they are not licensed for transportation. It is not clear whether they could be licensed for transport, given their size and weight. Although we have no way of knowing with any certainty, we assume that when the PINGP is eventually decommissioned, the spent fuel pool will be decommissioned as well. How will fuel from the storage-only casks be repackaged into a transportation cask? How will the unique impacts from transferring fuel (without a pool) at Prairie Island impacts be assessed in a generic EIS?

Sub-section 6 of the report discusses the underlying assumption that current and future licensees are responsible for the financial resources needed to support long-term storage operations. Further, the section states: "However, in the event licensees cannot fulfill their legal financial obligations, the US Government will provide sufficient resources and protection to ensure continued safe and secure storage." This statement seems to be at odds with the statement in the last paragraph of Sub-section 6, that states, "the Waste Confidence EIS will also assume that the current structure of financial assurance for spent fuel storage will continue to exist." Furthermore, the EIS will assume that the loss of institutional control and oversight is not seen as a credible scenario.

How can we possibly know whether a utility (or any entity as we know them today) will be in business in 250 years? If we assume continued financial assurance and no loss of institutional control, why, then, include the statement that the Federal government will provide sufficient resources and protection to ensure continued safe and secure storage? Who will bear these costs? Will these sites become federal sites?

Sub-section 9 discusses that the NRC plans to consider the environmental impacts of terrorism related to storage and transportation, at the generic level. As we mentioned previously and repeatedly, it is our belief that potential impacts to our lands, health, safety, and culture cannot be assessed "generically." How can a generic EIS possibly capture impacts from terrorism on our only homeland, the land promised to us by the federal government, which cannot be easily replaced?

## Section 8.2 Preliminary Scenarios for Analysis

The report identifies potential 4 scenarios for review in the EIS: Scenario 1—Extended onsite storage at reactor sites and off-site independent spent fuel storage sites; Scenario 2—Interim storage and shipment to one centralized storage facility; Scenario 3—Interim onsite storage and shipment to one centralized storage facility; and Scenario 4—Interim onsite storage and shipment to at least one reprocessing facility.

Scenario 1 is the most likely of all scenarios; the others are wishful thinking. With respect to Scenario 1, we found that one of the most important statements in the BRC report is the following: “finding sites where all affected units of government, including the host state or tribe, regional and local authorities, and host community, are willing to support or at least accept a facility has proved exceptionally difficult.” We have no reason to think that the result of any new efforts to site a regional storage facility or repository will be any different. We question whether the waste generated and stored at Prairie Island will ever leave.

It is highly doubtful that centralized storage facilities will be developed, given the above statement. The fact is, no one really wants these facilities. If they do, it is for the short term. In addition, because of the economics of uranium mining (i.e., cheaper to use virgin uranium than reprocessed uranium), it is unlikely that a reprocessing facility will become a reality anytime soon.

## Section 9—Impacts Analysis

We can't see how it is possible to assess impacts from extended storage if the NRC doesn't know how dry casks will perform for 200+ years. To understand and articulate environmental, health and safety impacts, don't we need to understand the risks first?

How will unique cultural, historical, and social impacts to the Prairie Island Indian Community be assessed?

What are the assumptions regarding cask performance? Does the NRC expect that the original casks can be or will be used for 200+ years? This is why the technical work regarding long-term cask performance needs to be done first.

What if fuel has to be transferred to a second cask? What if there is no pool in which to transfer fuel to a different cask? What about the health risks to people living near by? In the case of the Prairie Island ISFSI, our people are 600 yards from the ISFSI. Once the plant is decommissioned, there will be no pool. How will these factors be included in the generic EIS?

We support the comments provided to you by the Nuclear Waste Strategy Coalition, of which we are members.



PIIC Comments on Long Term Waste Confidence Update

February 17, 2012

Page 12

We appreciate the opportunity to provide comments on this important issue. If our comments appear overly pessimistic it is because we have no reason to be optimistic. The proposal for an extended storage EIS reinforces our fear that the spent nuclear fuel on Prairie Island will ever leave.

Sincerely,

A handwritten signature in blue ink that reads "Philip R. Mahowald" followed by a stylized monogram "mjr".

Philip R. Mahowald  
General Counsel for the  
Prairie Island Indian Community