

TRANSMITTAL TO: ☒

Document Control Desk, 016 Phillips

9/85

ADVANCED COPY TO: ☐

The Public Document Room

DATE: 9/12/85

FROM: SECY OPS BRANCH

cc: C&R
w/attachs.
(w/o SECY
papers)

Attached are copies of a Commission meeting transcript(s) and related meeting document(s). They are being forwarded for entry on the Daily Accession List and placement in the Public Document Room. No other distribution is requested or required. Existing DCS identification numbers are listed on the individual documents wherever known.

Meeting Title: Oral Pres. on Timing of DOE's Publ. letter on Suitability of Site for Development as Repository

Meeting Date: 9/6/85 Open ☒ Closed ☐

Item Description:

DCS Copies
(1 of each checked)

Item Description:	Copies Advanced To PDR	*	Original Document	May be Dup*	Duplicate Copy*
1. TRANSCRIPT	1	*	1	—	—
When checked, DCS should send a copy of this transcript to the LPDR for: <u>w/scheduling notes</u>		*			
2. <u>See attached</u>	1	*	1	—	—
		*			
		*			
3.		*			
		*			
		*			
4.		*			
		*			
		*			

(PDR is advanced one copy of each document, two of each SECY paper.)

*Verify if in DCS, and
* Change to "PDR Available."

8509180504 850906
PDR 10CFR
PT9.7 PDR

9/6/85 - Oral Presentations on Timing of DOE's Preliminary
Determination on Suitability of Sites for Development
as Repositories (PUBLIC MEETING)

Attachments

1. Testimony of Del White and Ron Halfmoon
2. Views of the Yakima Indian Nation
3. Testimony of Gregg S. Larson
State of Minnesota
4. Statement of Booth Gardner, Governor
State of Washington
5. Comments by STAND AND POWER
6. Statement of Edison Electric Institute

ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

COMMISSION MEETING

Oral Presentation on Timing of
DOE's Preliminary Determination
on Suitability of Sites for
Development of Repositories

(Public Meeting)

Docket No.

Location: Washington, D. C.

Date: Friday, September 6, 1985

Pages: 1 - 126

ANN RILEY & ASSOCIATES
Court Reporters
1625 I St., N.W.
Suite 921
Washington, D.C. 20006
(202) 293-3950

DISCLAIMER

This is an unofficial transcript of a meeting of the United States Nuclear Regulatory Commission held on Friday, September 6, 1985 in the Commission's office at 1717 H Street, N.W., Washington, D.C. The meeting was open to public attendance and observation. This transcript has not been reviewed, corrected, or edited, and it may contain inaccuracies.

The transcript is intended solely for general informational purposes. As provided by 10 CFR 9.103, it is not part of the formal or informal record of decision of the matters discussed. Expressions of opinion in this transcript do not necessarily reflect final determination or beliefs. No pleading or other paper may be filed with the Commission in any proceeding as the result of or addressed to any statement or argument contained herein, except as the Commission may authorize.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

- - -

ORAL PRESENTATION ON TIMING OF DOE'S PRELIMINARY
DETERMINATION ON SUITABILITY OF SITES FOR DEVELOPMENT
OF REPOSITORIES

- - -

PUBLIC MEETING

Room 1130
1717 H Street, N.W.
Washington, D.C.

Friday, September 6, 1985

The Commission met, pursuant to notice, at
9:40 a.m.

COMMISSIONERS PRESENT:

NUNZIO PALLADINO, Chairman of the Commission
THOMAS ROBERTS, Commissioner
JAMES ASSELSTINE, Commissioner
FREDERICK BERNTHAL, Commissioner
LANDO ZECH, Commissioner

STAFF AND PRESENTERS SEATED AT COMMISSION TABLE:

J. HOYLE
M. MALSCH
B. RUSCHE
R. HALF MOON
D. TOUSLEY
K. GOVER
T. LEHMAN
M. MURPHY
S. FRISCHMAN
P. SPURGIN
D. PROVOST
C. SINDERBRAND
D. BERRICK
L. MILLS
J. SILBERG
B. OLMSTEAD
H. MILLER
R. BROWNING

P R O C E E D I N G S

CHAIRMAN PALLADINO: Good morning, ladies and gentlemen. The purpose of this meeting is to have the Commission hear the views of representative of state, Indian tribes, environmental groups, industry, other interested segments of the public, and the Department of Energy, on the proposed timing of DOE's preliminary determination of site suitability for a high-level radioactive waste repository.

This meeting, which was requested by Commissioner Roberts, will help the Commission to decide on the course of action for dealing with the change in DOE's position on the earlier agreement between NRC and DOE regarding this timing.

As most of you will recall, last year, on June 22, 1984, the Commission met with DOE to discuss and approve DOE's repository siting guidelines. At that meeting, the Commission also listened to representatives from many of the same groups we have with us today. Among other things, the matter of timing from the preliminary determination was discussed.

Subsequently, on July 10, 1984, the Federal Register Notice was published on NRC's final decision regarding DOE's siting guidelines. The notice stated that at the June 22 meeting the Commission and DOE agreed that

1 the preliminary determination should be made after
2 completion of site characterization and not at the time of
3 site nomination and recommendation.

4 Since that time, DOE has taken the position that
5 the preliminary determination should be made before
6 completion of site characterization. This position is
7 reflected in DOE's mission plan which is before Congress
8 for approval.

9 As noted earlier, the Commission is considering
10 the course of action it will take in dealing with the
11 change in DOE's position on the preliminary determination
12 timing.

13 Before coming to a final decision, it will be
14 helpful to obtain the views of our various speakers this
15 morning. Each representative will be allowed five minutes
16 to present his or her views, and in advance I would like to
17 express the Commission's appreciation for your willingness
18 to come here and be with us today.

19 Are there any additional remarks by other
20 Commissioners?

21 COMMISSIONER ZECH: No.

22 COMMISSIONER ASSELSTINE: No.

23 CHAIRMAN PALLADINO: If not, then let me turn to
24 our first speaker, Mr. Ben Rusche from DOE. If you would
25 join us at the table, Ben, we would appreciate it.

1 MR. RUSCHE: Mr. Chairman, members of the
2 Commission, I appreciate the opportunity of meeting with
3 you this morning to discuss the timing of the preliminary
4 determination that is required by the Nuclear Waste Policy
5 Act.

6 I recall our discussion on July 28 in which this
7 subject was discussed at some length. I think it necessary
8 this morning for me to only briefly reiterate that
9 discussion, and that is my purpose.

10 It appears to me that most people will agree that
11 the act does not specify the time when this determination
12 should be made. I think there is no better evidence of
13 that fact than that we are having the meeting this
14 morning. If it was clear when the determination should be
15 made, we all would be in complete agreement and would be
16 following that provision of the act.

17 We would hold the view that lacking that precise
18 specification in the act, the act in effect leaves that
19 determination, timing, to the discretion of the Secretary
20 and it is in that mode that we have continued to operate.

21 Again, I think most people who have looked at the
22 issue would agree that the matter is not specifically
23 related to safety, and that you and we are charged under
24 the act to assure the safety and health of the public and
25 the environment by complying with all of the rules and

1 regulations of the NRC; by complying with the standards and
2 regulations of the EPA, and any other Federal and state
3 bodies that have applicable regulations.

4 In that sense, we are a fully-regulated activity,
5 just as if we were a private entity, and the preliminary
6 determination is not a factor in whether or not and to what
7 extent we meet that consideration.

8 It seems to me that that leaves us with the view
9 that the preliminary determination is a management or
10 programmatic decision and is related to how we conduct the
11 program and manage the resources, therefore.

12 Thirdly, I would try to raise the question for
13 your consideration as well as ours as to what the purpose
14 of the preliminary determination is. Again it is unclear
15 in the act as we read it.

16 We have read your words. We have had
17 correspondence from both Houses of Congress. We have read
18 the assessment, the recent staff assessment of the Office
19 of Technology Assessment. We have heard many views from
20 the industry. We had many comments in the 20,000 or so
21 separate sets of comments that were received concerning the
22 environmental assessments.

23 In short, we come to the conclusion that the
24 purpose of the preliminary determination is to assure
25 reasonableness in our selection of alternative sites for

1 characterization and consideration eventually in the
2 environmental impact statement and in our application to
3 the Commission for a construction authorization.

4 We believe its purpose is to add assurance that
5 the three sites that we select for characterization, for
6 which we are going to expend a sizeable sum of money, have
7 a high probability of being found acceptable.

8 You and your staff and many members of the public
9 have seen the evaluation that we have done thus far as
10 depicted in our draft environmental assessment, and we have
11 all come to the conclusion -- I say "all," at least your
12 staff and our staff have -- that none of the nine sites
13 that are being considered for the first repository do we
14 find a basis to disqualify. That is, all nine of the sites
15 remain not disqualified in our consideration.

16 So our objective, then -- for this discussion --
17 is to look at the reasonableness argument. It obviously
18 could be made -- that is the determination could be made --
19 before we select sites for characterization, during the
20 time we are characterizing at some intermediate,
21 indeterminate point, or after site characterization -- and
22 I would only notice that after site characterization is a
23 very imprecise point -- and that we will continue gaining
24 information on the sites perhaps long after we have filed
25 an environmental impact statement and construction

1 authorization with you.

2 Whatever point in the process is selected, it
3 should be reasonable, we believe, from the standpoint first
4 of the reading of the act and, second, from overall program
5 implementation.

6 In terms of reading of the act, we believe the act
7 requires the Secretary to find that the sites nominated are
8 suitable for site characterization, and I think that is
9 straight-forward.

10 The act does not specify any finding to accompany
11 the recommendation of sites to the President for
12 characterization. A preliminary determination that sites
13 recommended to the President for selection for
14 characterization are suitable for development as
15 repositories on a preliminary basis would provide a basis
16 for the recommendation decision that would otherwise be
17 missing. And that is the course that we have indicated we
18 plan to take.

19 The requirement in Section 112(b)(1)(e)2) to
20 include an evaluation in the environmental assessments of
21 whether the sites are suitable for development as
22 repositories provides a basis upon which to make that
23 preliminary determination. It is on that basis that we
24 expect to make it, and you recall, that is the provision
25 that requires us to judge the sites in terms of the then

1 available data.

2 For NEPA purposes, a preliminary determination at
3 the time of recommendation will add confidence that the
4 alternative sites considered in the EIS later on or,
5 indeed, reasonable alternatives.

6 In the second place, reasonableness in terms of
7 overall program implementation suggests:

8 First, that the preliminary determination must be
9 made on a site, that is at the time determination, "Not
10 unsuitable." All nine of the sites fit that category as of
11 the present time, that is based on our data and the draft
12 environmental assessments.

13 The preliminary determination must be made on
14 three sites, and the act itself requires us to select three
15 sites for characterization.

16 We have taken the view that that specification in
17 the act provides a considered balance between the need to
18 assure technical quality and safety, and at the limit that
19 is absolutely assured to the extent that human beings can
20 do it by compliance with your regulations and EPA's
21 regulations. The balance between technical quality and
22 safety and the need to proceed expeditiously in a cost-
23 effective manner.

24 Therefore, in the mission plan we have indicated
25 in response to your objection -- that is Objection 5 shown

1 on the Federal statements -- that we intend on the basis of
2 these facts or these views, that we intend to make the
3 preliminary determination at the time we make the
4 recommendation to the President for selection of sites and
5 characterization.

6 I believe this is consistent with the Act; with
7 NEPA; with the CEQ guidelines on EIS; your rules,
8 particularly Part 50 -- Part 51, excuse me -- and Part 60,
9 and it certainly is consistent with the guidelines, which
10 was the subject of our discussion first about a year and-a-
11 half ago.

12 Mr. Chairman, that concludes my comments. I will
13 be glad to take questions now or, if you would prefer, even
14 later on in the discussion, however you would prefer to
15 handle it.

16 CHAIRMAN PALLADINO: Well, I think it might be
17 appropriate to have questions now, unless Commissioners
18 feel otherwise.

19 COMMISSIONER ASSELSTINE: That's fine with me.

20 CHAIRMAN PALLADINO: All right.

21 Well, Ben, let me ask you a question. There have
22 been identified for us several alternatives, one of which
23 is, we might not take any action. Another one is, wait
24 until the Congress decides on the mission plan before
25 taking a course of action. The third one would be, this is

1 a major revision that ought to come back for Commission
2 review in view of the fact that there was an important
3 consideration in our concurring in deciding guidelines.

4 Would you comment on what the impact of each of
5 these might be?

6 MR. RUSCHE: Would you mind providing me the order
7 so that I can be sure of commenting?

8 CHAIRMAN PALLADINO: First, suppose we took no
9 action. What would that imply or impact?

10 MR. RUSCHE: Well, my interpretation of your
11 taking no action would be that based on the conversations
12 we have had, that the uncertainty and perhaps confusion --
13 if that's the right word -- of our discussion a year ago
14 has been clarified and you understand that what at least
15 some readings of those discussions would have led us to did
16 not, and you understand why we have taken this course of
17 action and we would proceed.

18 I think the down-side, if any, is that there may
19 still be some who would care to refer to that word in the
20 record that would appear to be a failure to fully comply
21 with every one of those details, even in spite of this
22 discussion, and therefore would perhaps leave some cloud on
23 the guidelines.

24 I am not in a position from a legal standpoint to
25 say whether that is serious or not. From a practical

1 standpoint it doesn't seem serious to me, but it might be
2 otherwise.

3 The second one was?

4 CHAIRMAN PALLADINO: Waiting for Congress to act.

5 MR. RUSCHE: We have several sets of hearing
6 before Congress. I am sure this is going to be a subject
7 that will be discussed in each of those hearings.

8 I rather doubt that the Congress will take an
9 action which will have the effect of law. That is, that
10 Congress would adopt amendments to the NWPA. Now, I may be
11 wrong but I would be surprised if that is the case, and I
12 suspect that what will come out of those discussions will
13 be a recognition that the issue is unclear in the act and
14 that in the limit it is the discretion of the Secretary to
15 make the determination at a particular time and for a
16 purpose, and that is where the matter will reside.

17 So that will not, in effect, resolve anything in
18 your mind if there is a question remaining.

19 CHAIRMAN PALLADINO: The third one that the
20 Commission is considering is whether or not we should ask
21 for the deciding guidelines to come back so we could review
22 the situation and determine whether or not we concur in the
23 change.

24 MR. RUSCHE: I think we agreed last year that any
25 time you thought anything we did deserved that

1 consideration, we were going to make it with you. As to
2 whether that is an appropriate course is obviously
3 something you have to make.

4 My own opinion would be that the discussion of
5 last summer when the guidelines were adopted was a fairly
6 clear recognition that this was not a safety issue. We
7 agreed to delete from the guidelines provisions that would
8 have dealt specifically with this subject, and it was on
9 that point of discussion in which there were conditions
10 attached -- at least as some of us read it -- that seemed
11 to be perhaps not fully met.

12 The conditions were not attached, though, from a
13 safety standpoint, I don't believe. Therefore, I would say
14 if you elected to reconsider the guidelines, it would be on
15 a procedural basis or an administrative basis, and not on a
16 safety basis.

17 If you were to elect that course, we would
18 obviously submit a request for modification. But it's
19 interesting that the modification would not have anything
20 to do with the guidelines because there is nothing in the
21 guidelines that we would modify.

22 CHAIRMAN PALLADINO: Ben if we took no action,
23 you implied that there might be a problem on an
24 uncertainty. If the "No action" were accompanied by a
25 statement that said this is a minor issue with regard to

1 approval of the siting guidelines, would that help?

2 MR. RUSCHE: Yes.

3 CHAIRMAN PALLADINO: I'm not indicating which way
4 we are going. I don't think we know.

5 MR. RUSCHE: Well, I'm sure we don't know.

6 CHAIRMAN PALLADINO: Okay, other questions? Tom?
7 Jim?

8 COMMISSIONER ASSELSTINE: Just one quick one.

9 Ben, you said the act does not specify when the
10 preliminary determination is to be made, in your view.
11 Accepting that view just for the moment for the sake of
12 argument, is there anything in the act that would prevent
13 an agreement that the determination should be made after
14 rather than before site characterization, or at least after
15 site characterization is substantially complete if the
16 Commission were to determine that that is what is necessary
17 in order to assure an effective site screening and site
18 selection process?

19 Assuming for the moment that the Commission makes
20 that judgment, is there anything in the act that precludes
21 that kind of an agreement?

22 MR. RUSCHE: I think only logic. That is, I do
23 not believe there is anything written in the act that would
24 preclude that. In fact, if the statement I made with
25 respect to the exercise of discretion by the Secretary is

1 true, then that discretion is discretion and I think we
2 could make it when we conclude it is appropriate, and that
3 is what we have tried to do.

4 COMMISSIONER ASSELSTINE: I don't have any other
5 questions.

6 CHAIRMAN PALLADINO: Fred?

7 COMMISSIONER BERNTHAL: I have a question simply
8 of background here, and I believe I thought at least at one
9 time I knew the answer. But I would like somebody here,
10 perhaps Ben if you can, to review it for me.

11 What did Congress say, or what did they not say,
12 in the conference report on this matter? Was there
13 anything contained in the conference report or did they
14 agree to accept the Senate interpretation? Or was there
15 nothing said about that?

16 I should recall, but I don't.

17 COMMISSIONER ASSELSTINE: There is no conference
18 report.

19 MR. RUSCHE: The Commissioner is correct. To the
20 best of my knowledge, there is no conference report. That
21 is one of the things that many of us have yearned for so
22 that we had a clearer picture of what the intent was.

23 As I understand what happened -- and maybe
24 Commissioner Asselstine will be as close to it or closer
25 than I was -- that at the time when the act was literally

1 being born, in the last moments, a House version that had
2 been adopted by the House, cam to the Senate and after a
3 good bit of discussion essentially a substitute for the
4 House version -- suggested by Senator McClure -- was placed
5 under discussion, and there remained several unclear issues
6 of which this was one.

7 I believe there is some dialog that we have record
8 of, and much of that is referred to in both the letters
9 from Senator McClure and from Congressman Udall and others,
10 and there are various interpretations of what was meant,
11 what was said. I guess there is, not very much question
12 about what was said but there is perhaps a little bit more
13 question about what was intended.

14 COMMISSIONER BERNTHAL: Okay. So the point is,
15 and I didn't recall, that there is nothing on the record
16 that would assist the court or this Commission in
17 interpreting -- as a matter of law -- beyond what is
18 actually written.

19 MR. RUSCHE: Oh, I believe some of the exchanges --

20 COMMISSIONER ASSELSTINE: No, that's not right.

21 MR. RUSCHE: -- some of the exchanges are on the
22 record.

23 COMMISSIONER ASSELSTINE: That's right.

24 MR. RUSCHE: There just was no conference report,
25 so to speak.

1 COMMISSIONER ASSELSTINE: That's right, yes. This
2 bill did not go through the normal process of having a
3 Senate-passed version, a House-passed version, going to
4 conference, having the conferees meet, issue a conference
5 report, and then have the conference version going back to
6 the House and the Senate.

7 It was at the last end of the session. There was
8 an effort to simply impose a substitute. But there is a
9 legislative history. The legislative history consists of
10 statements by the floor managers and other participants in
11 both the House and the Senate discussing the provisions.

12 MR. RUSCHE: Yes, that's correct to the best of my
13 knowledge.

14 COMMISSIONER BERNTHAL: So it consists of floor
15 colloquy, essentially.

16 MR. RUSCHE: Yes, that's correct. And subsequent
17 comments on colloquy and so forth.

18 CHAIRMAN PALLADINO: Lando, do you have any
19 questions?

20 COMMISSIONER ZECH: No, just a comment.

21 As you know, Mr. Chairman, I was not a
22 Commissioner during the June 1984 meeting. So I was not
23 involved in that particular meeting nor the discussions
24 that took place there.

25 I have tried to review that and review the issue --

1 a very important issue -- that we are discussing. I have
2 not really made up my mind completely as to my position,
3 but it does seem to me that the issue we are talking about
4 is a matter of timing. It does seem to me that this is an
5 issue that the Congress and Department of Energy have to
6 sort out.

7 Our involvement, of course, is concerning public
8 health and safety and licensing, and we certainly intend to
9 carefully and thoughtfully review our regulatory
10 responsibilities as we proceed.

11 But it does seem to me at the moment that our
12 participation should be focused on the public health and
13 safety aspects of it. I think, however, that since there
14 has been some confusion in the guidelines and at least I
15 think we would be acting more responsibly to at least try
16 to review what has taken place and perhaps make a more
17 definitive position from the regulatory standpoint, that
18 might at least be helpful in this matter.

19 I think that is probably the position that we
20 should take.

21 CHAIRMAN PALLADINO: All right, any other comments
22 or questions?

23 COMMISSIONER ASSELSTINE: No.

24 CHAIRMAN PALLADINO: Thank you, Ben.

25 MR. RUSCHE: Thank you, Mr. Chairman.

1 CHAIRMAN PALLADINO: We have two representatives
2 from Indian tribes, and I was wondering if they would join
3 us at the table at this time. Ron Half Moon and Dean
4 Tousley.

5 Each of you, Mr. Half Moon and Mr. Tousley, would
6 have five minutes. I suggest we proceed with Mr. Half
7 Moon's presentation.

8 MR. HALF MOON: Thank you. My name is Ron Half
9 Moon. I am the program manager for the Nez Perce Nuclear
10 Waste Policy Act program.

11 I am accompanied by Kevin Gover who is the counsel
12 to the tribe on the nuclear waste policy issues.

13 It was intended for the chairman of the Nez Perce
14 tribe to be here to present the testimony but he was not
15 able to. So, the staff or I will be presenting this. If
16 there is no objection, then I will read from our prepared
17 remarks.

18 Mr. Chairman, members of the Commission, we are
19 pleased to have this opportunity to present the views of
20 the Nez Perce tribe which has been designated as an
21 affected Indian tribe under the Nuclear Waste Policy Act
22 with regard to the Hanford site on the matter of whether
23 Section 114(f) of the act requires the Department of Energy
24 to conduct characterization activities at potential
25 repository sites before making a preliminary determination

1 of the suitability of such sites.

2 The legal issue presented by Section 114(f) is
3 complex and interesting but does not lend itself to a
4 definite answer. The Commission has available on its own
5 legal experts to dissect that issue. However, it
6 undoubtedly will be presented with a larger amount of legal
7 research on the matter.

8 In our view, the section is ambiguous at best. We
9 wish to focus, therefore, on considerations other than the
10 precise statutory construction of 114(f).

11 We would note first that the Department of Energy
12 seems to be reneging on a commitment made to this
13 Commission and to the public that characterization would
14 occur prior to any preliminary determination of
15 suitability.

16 As you well know, the Commission's concurrence --
17 not advice but concurrence -- in the siting guidelines is
18 required by the act. Our reading of the Commission's
19 concurrence decision of July 10 is that characterization
20 must occur before any preliminary determination of
21 suitability. In fact, the concurrence decision cannot be
22 read any other way.

23 If DOE did not agree with the Commission's
24 explanation of the agreement reached in June of 1984, it
25 should have said so.

1 DOE's current position creates at least two
2 significant problems:

3 First, it called into the question the validity of
4 DOE's siting guidelines. Because the Commission must
5 concur in the siting guidelines and because DOE now intends
6 to violate a specific term of the Commission's written
7 concurrence, the validity of DOE's plan of operation is
8 open to question.

9 In fact, DOE has practically asked to be sued on
10 the matter and certainly will be sued.

11 Second, when NRC announced that DOE has agreed to
12 something and DOE much later denies that agreement, public
13 confidence in the process -- including the confidence of
14 the Nez Perce tribe -- is shaken.

15 The only way to minimize the inevitable
16 controversy is to show the public that when DOE and NRC say
17 a certain procedure will be followed, it will be followed.
18 Shifting and contradictory interpretations and agreements
19 undermine the credibility of those agencies and therefore
20 diminish public confidence in the process.

21 From a policy perspective, we believe that
22 characterization prior to preliminary determination is the
23 more sound procedure.

24 Congress must have wanted the preliminary
25 determination to be a decision of some significance, and if

1 the decision is a significant one, it obviously should be
2 made only on the basis of the greatest possible amount of
3 information.

4 The process of characterization yields information
5 and therefore should proceed significant decisions whenever
6 possible, including the preliminary determination. In this
7 way, the protection of public health and safety is better
8 served.

9 Finally, as a practical matter, the Commission and
10 DOE will spare themselves a number of problems by agreeing
11 that characterization will proceed the preliminary
12 determination.

13 As we have noted, the existing situation invites
14 litigation and is a demerit on the record of the program.
15 Unlike many problems, however, these are capable of
16 correction. If DOE and the Commission simply agree that
17 characterization will precede the preliminary
18 determination, the problem we have discussed will disappear
19 and no new problems from such a decision are readily
20 foreseeable.

21 We would be happy to respond to any questions you
22 may have.

23 CHAIRMAN PALLADINO: All right. Thank you, Mr.
24 Half Moon.

25 I am going to suggest we hear from Mr. Tousley and

1 then, if you don't mind, we can have questions of both of
2 you.

3 COMMISSIONER ASSELSTINE: Good idea.

4 * MR. TOUSLEY: Mr. Chairman, members of the
5 Commission, I am Dean Tousley. I am an attorney for the
6 Yakima Indian nation and the tribe has asked me to make a
7 presentation on their behalf this morning.

8 To begin with, I would like to state that we
9 viewed the Commission's final concurrence decision with
10 respect to this matter as absolutely unequivocal. The two
11 sentences which are of greatest interest here are, "At the
12 June 22 Commission meeting, the Commission and DOE agreed
13 that the preliminary determination required by Section
14 114(f) of the NWPA should be made after the completion of
15 site characterization and not at the time of site
16 nomination and recommendation."

17 The Commission and DOE therefore agreed that the
18 last sentence containing the statement to the contrary
19 should be deleted from the guidelines.

20 DOE is now taking the position that the first
21 sentence I just read has no effect. Mr. Rusche has told us
22 on July 29 and again this morning that it has no effect
23 apparently because it is not based on safety
24 considerations.

25 He seems to feel that that fact alone dismisses

1 any interest the Commission might have in that subject.
2 However, the Calvert Cliffs case 15 years ago established
3 quite clearly that it is the Commission's ultimate
4 responsibility to comply with the National Environmental
5 Policy Act when it engages in licensing actions.

6 The implication of DOE's position with respect to
7 this provision is that the Commission could get an EIS in
8 1991 or '92, or whatever, which considers as alternatives
9 sites which are known at the time of EIS submission to be
10 unsuitable for development as a repository.

11 I would like to use a "hypo" to explore this
12 situation a little bit with you. In the reactor licensing
13 situation, if your staff came to you with an EIS for a
14 reactor which stated that, "Four or five years ago when we
15 started to consider this matter, we believed that Sites B
16 and C were suitable alternatives to the proposed Site A for
17 this reactor.

18 "Today, however, we know that Sites B and C are
19 not suitable. Nevertheless, we bring you this EIS with
20 those three sites as the alternatives considered."

21 I submit to you that you would have a very
22 difficult time accepting that EIS as satisfying your NEPA
23 obligations. And that is precisely what will happen if you
24 accept DOE's view of this provision. You will be in a
25 position of having to accept as alternatives sites which

1 are known at the time that the EIS is submitted to be
2 unsuitable. I say that will not satisfy your NEPA
3 obligations.

4 Then other major point I would like to make about
5 the merits of this decision is that if the meaning is given
6 to this provision which the plain reading of the statute
7 gives, that is that characterization comes first and then a
8 determination of suitability, that provides DOE with a much
9 needed incentive to choose for characterization the best
10 sites it can find.

11 That kind of incentive is sorely missing anywhere
12 else in the regulatory framework of this program at this
13 time. Previously, there was a provision in the EPA's
14 standards, an assurance requirement, which would have
15 implemented an ALARA-type requirement to keep releases from
16 a repository as low as reasonably achievable, thus
17 providing incentive to select the best possible sites.

18 This interpretation which we urge on you today of
19 the preliminary determination provision also provides such
20 an incentive. Without it, there is no such incentive. The
21 only standard which DOE seems inclined to comply with is
22 one of suitability.

23 We submit that determinations of absolute
24 suitability made today in light of the unprecedented
25 uncertainties involved in this program are simply not

1 reliable enough to provide the adequate assurance that we
2 can end up with a repository site which is sufficient in
3 its isolation capabilities.

4 The additional comparative incentive to pick the
5 best sites possible as well as suitable sites adds
6 considerably to our confidence in that respect.

7 The Yakima Indian nation believes that the clear
8 understanding which was apparent at the end of the June 22,
9 1984 Commission meeting and also in the Commission's final
10 concurrence decision was a very significant matter. It
11 contributed substantially to our feeling that our heavy
12 participation in the Commission's concurrence process was
13 well spent and that it yielded important improvements in
14 the siting guidelines.

15 If the Commission reneges on this understanding at
16 this time, that will greatly degrade our sense of
17 accomplishment in this regard.

18 We urge the Commission, consistent with the plain
19 meaning of the language of Section 114(f) and its NEPA
20 obligations, to retain the current language of its
21 concurrence decision and make it perfectly clear to DOE
22 that it will require an EIS with suitable alternatives in
23 order to license a repository.

24 I thank you for this opportunity to amplify our
25 position on this matter.

1 CHAIRMAN PALLADINO: Thank you.

2 Well, let me ask one question either or both of
3 you can comment on.

4 If I understand DOE's position, it is that the
5 purpose of the preliminary determination was to assure all
6 parties that they were going after sites that really had
7 the potential for being suitable, based on the availability
8 of information.

9 Now, if one waits until after characterization,
10 then is this a preliminary decision? I admit it is a more
11 firm decision, but do you think that is in keeping with the
12 intent as DOE expresses it or interprets it?

13 MR. TOUSLEY: I would say that a determination
14 following characterization would certainly still be
15 preliminary. It would be certainly preliminary to the
16 ultimate decisions by the Commission on licensing as to the
17 suitability of the site.

18 Even the Commission's licensing decisions are
19 going to be preliminary in this program because we won't
20 know for a long time whether these sites are really
21 suitable.

22 Making the determination prior to characterization
23 is so preliminary as to be meaningless. They are making
24 that determination in selecting the sites to characterize.
25 It doesn't add anything to that to say, "We preliminarily

1 determine that these sites are suitable." They are
2 selecting those sites to characterize. At the end of the
3 characterization period is the time when it's reasonable to
4 make a preliminary determination that they are suitable.

5 CHAIRMAN PALLADINO: Do you have any other
6 comments?

7 MR. GOVER: Yes. We would pretty much agree with
8 that. As Dean points out, the preliminary determination
9 would appear to be meaningless if it simply means that the
10 three sites that are selected for characterization also are
11 preliminarily determined to be suitable.

12 Because the phrase is undefined in the act and
13 seems to have emerged at the last minute during the
14 congressional debate, we have to try to find a way to give
15 it some meaning.

16 It seems to me if it is to be a meaningful
17 decision -- and we have to assume that Congress didn't
18 intend for it to be unmeaningful -- if it's going to be a
19 meaningful decision, it ought to be made on the basis of
20 the greatest amount of information possible.

21 Characterization yields the greatest amount of
22 information and therefore it should occur either after or
23 at least late in the process of characterization. For that
24 proposition, there is some very direct legislative history,
25 whereas it is very difficult to find any legislative

1 history that would support DOE's interpretation of the
2 statute.

3 CHAIRMAN PALLADINO: Okay, let me stop there for a
4 moment. Tom, do you have questions?

5 COMMISSIONER ASSELSTINE: Just a couple of
6 questions.

7 Ron, let me ask you. The sense I get from your
8 statement was that this agreement was part of the
9 Commission's concurrence decision, and if that concurrence
10 and the Commission's concurrence role is to be meaningful,
11 if the Department wants to change its view now, then that
12 has to be done as part of the formal review process for the
13 guidelines. The Department has to request that the
14 Commission re-open the guidelines, at least on this aspect,
15 and make a new decision on whether it still concurs.

16 Is that a fair characterization of the view that
17 you were trying to express? If we don't do that, we are
18 basically undermining our concurrence role and the validity
19 of our concurrence decision, and also calling into question
20 the validity of the guidelines themselves.

21 MR. HALF MOON: The feeling that we've got
22 generally is that we feel that the concurrence decision is
23 of some consequence, and that a reneging by the DOE of that
24 apparent agreement is of some concern to us just as a
25 matter of some confidence in the process.

1 I think by and large that we are not totally
2 familiar with the procedural aspects of what that means.
3 So from the public image standpoint as we see this obvious
4 disagreement, it is of some concern to us.

5 COMMISSIONER ASSELSTINE: Dean, I want to explore
6 the NEPA question a little more with you. Ben placed a
7 great deal of emphasis on the fact that in his view the
8 preliminary determination was not a factor in the safety
9 decisions, and Commissioner Zech, I think, was trying to
10 make the same point, that what he was concerned about was
11 with safety decisions here.

12 Isn't that an unduly narrow reading of the
13 Commission's responsibilities? Isn't what we are really
14 talking about here the Commission's licensing
15 responsibilities which include not only the health and
16 safety responsibilities under the Atomic Energy Act and
17 under some of the authority in the Nuclear Waste Policy
18 Act, but also the environmental review responsibilities
19 that are under NEPA and under the -- as interpreted and
20 modified by the Nuclear Waste Policy Act?

21 Don't we really have to look at the full range of
22 the Commission's licensing responsibilities?

23 MR. TOUSLEY: Yes.

24 (Laughter)

25 MR. TOUSLEY: I would amplify that a little bit.

1 COMMISSIONER ASSELSTINE: Yes.

2 (Laughter)

3 COMMISSIONER BERNTHAL: Is this called "Leading
4 the witness?"

5 MR. TOUSLEY: As I hope I made clear in my
6 statement, I do think it goes very deeply to the
7 Commission's NEPA responsibilities. But it really goes to
8 the safety responsibility as well.

9 COMMISSIONER ASSELSTINE: Yes.

10 MR. TOUSLEY: By having the incentive I talked
11 about on the quality of sites that are characterized, you
12 are much more likely to end up with a safe site, a
13 licensable site, at the end. That's totally apart from the
14 environmental obligations.

15 COMMISSIONER ASSELSTINE: Yes. In fact, let me
16 ask you on the technical side as opposed just to the
17 environmental side, I had a question in my own mind about
18 whether what DOE was proposing here was consistent with the
19 Commission's own technical regulations.

20 When I look at Part 60 and the way Part 60 is
21 defined, defined site characterization, site
22 characterization is defined as the activities that will
23 generate the information needed to determine the
24 suitability of the site for geological repository.

25 It sounds like to me the Commission's already made

1 the technical judgment in its regulations that the kind of
2 information from characterization is the information that
3 is really needed to make a determination on site
4 suitability.

5 Do you see an inconsistency with what DOE has
6 proposed and what the Commission has already said in its
7 regulations is a technical requirement in order to make a
8 judgment on suitability?

9 MR. TOUSLEY: I think that's exactly right. The
10 determination at this time is simply that three sites are
11 suitable for characterization, not suitable for development
12 as repositories.

13 COMMISSIONER ASSELSTINE: Right. And that's the
14 distinction that's made in our own regulations, I think; is
15 it not?

16 MR. TOUSLEY: I agree, yes.

17 CHAIRMAN PALLADINO: But it doesn't say
18 preliminary determination.

19 COMMISSIONER ASSELSTINE: It says any
20 determination. It says "a" determination.

21 CHAIRMAN PALLADINO: Well, a determination --

22 COMMISSIONER ASSELSTINE: And it draws a
23 distinction --

24 CHAIRMAN PALLADINO: Read it again, Jim.

25 COMMISSIONER ASSELSTINE: I can read you the whole

1 definition of site characterization.

2 "Site characterization means the program of
3 exploration and research, both in the laboratory and in the
4 field, undertaken to establish the geologic conditions and
5 the ranges of those parameters of a particular site
6 relevant to the procedures under this part. Site
7 characterization includes borings, surface excavations,
8 excavation of exploratory shafts, limited sub-surface
9 lateral excavations and borings, and in situ testing in
10 depth needed to determine the suitability of the site for a
11 geologic repository" --

12 CHAIRMAN PALLADINO: Suitability.

13 COMMISSIONER ASSELSTINE: -- "but does not include
14 preliminary borings and geophysical testing needed to
15 decide whether site characterization should be undertaken."

16 So the regulations seem to draw a clear
17 distinction between the kind of limited information that is
18 available now to decide whether to undertake site
19 characterization and the more detailed information you get
20 out of site characterization to decide whether the site is
21 suitable for development.

22 COMMISSIONER BERNTHAL: It sounds like the use of
23 the word "preliminary" --

24 CHAIRMAN PALLADINO: Excuse me. All right, go
25 ahead.

1 COMMISSIONER BERNTHAL: Well, I was just going to
2 say, it's not sure that you buttressed your case much. I
3 mean, it refers to "preliminary."

4 COMMISSIONER ASSELSTINE: No --

5 COMMISSIONER BERNTHAL: Wait a minute, preliminary
6 borings and if you are carrying out --

7 COMMISSIONER ASSELSTINE: And geophysical testing.

8 COMMISSIONER BERNTHAL: -- preliminary studies --

9 COMMISSIONER ASSELSTINE: Needed to decide --

10 COMMISSIONER ASSELSTINE: -- whether the site
11 characterization would be applicable to a preliminary
12 determination.

13 COMMISSIONER ASSELSTINE: No, I don't think so.
14 Not a determination of site suitability.

15 COMMISSIONER BERNTHAL: If I can interject a
16 related question, though. What would be left to do,
17 technically and scientifically, after site
18 characterization? That's a question that I wanted to ask
19 broadly here. What else is there to do?

20 I mean, we have a statement from our legal counsel
21 here, Mr. Cunningham, that indicates -- and I'm trusting
22 his interpretation of the law here, it should be better
23 than mine -- that Section 113 indicates that site
24 characterization is complete when the Secretary considers
25 that enough data is available to evaluate the suitability

1 for the site for a construction authorization application.

2 That defines, at least according to our legal
3 counsel's definition and a reading of the law, the
4 completion of characterization as being the point at which
5 the Secretary should believe that a construction
6 authorization is in order.

7 What else is there to do?

8 COMMISSIONER ASSELSTINE: Well, I think my own
9 answer would be, what is left to do is then proceed with
10 the licensing proceeding to make a final determination on
11 whether the site is suitable for building a repository.

12 MR. TOUSLEY: I think Mr. Rusche just said that
13 gathering of information and learning more about the sites
14 does not end even at the time that a license application is
15 submitted.

16 COMMISSIONER ASSELSTINE: That's right.

17 MR. TOUSLEY: That will be an on-going process.
18 Even constructing the repository will continue to be a
19 learning period in this program.

20 COMMISSIONER ASSELSTINE: Yes.

21 MR. TOUSLEY: There really is no way to adequately
22 characterize certain sites because they are so locally
23 heterogeneous that they are really going to have to mine
24 the site to know what's there.

25 COMMISSIONER BERNTHAL: Well, it just sounds to me

1 that the section that Commissioner Asselstine just read
2 refers to preliminary data gathering.

3 This is not an issue, a reading of the law,
4 incidentally, that I think this Commission is going to
5 settle. We have been advised by our legal counsel that we
6 should not feel compelled to settle a legal reading of the
7 law on this matter.

8 But I have to say that logic, to me at least,
9 seems to indicate that when you have done preliminary
10 technical work -- as the section that you just read, Jim,
11 seems to suggest -- that at least the use of the word
12 "preliminary" would seem to indicate that that implies a
13 preliminary determination can be made from such preliminary
14 boring data.

15 COMMISSIONER ASSELSTINE: I guess I don't read it
16 that way. Just because the word "preliminary" is used in
17 relation to boring doesn't mean that that applies to a
18 determination on suitability.

19 COMMISSIONER BERNTHAL: Well, there is another
20 section where the word "preliminary" is absent, though, and
21 only "determination" is used.

22 That is the problem here. I think we all agree
23 that the law is less than lucid on this point.

24 CHAIRMAN PALLADINO: Okay, I suggest we try to
25 draw out the people that make presentations to us as much

1 as possible, rather than try to express our own views --
2 although I'm sure we can't go without expressing our own
3 views.

4 Lando, do you have a question?

5 COMMISSIONER ZECH: No, thank you.

6 COMMISSIONER ASSELSTINE: Well, I had one other
7 question --

8 CHAIRMAN PALLADINO: Oh, go ahead, Jim.

9 COMMISSIONER ASSELSTINE: -- for Dean. I want to
10 go back to Ben's third basic statement. He said that the
11 purpose in his view of the preliminary determination was to
12 assure the reasonableness in the selection of sites to
13 assure that the three sites which are selected for
14 characterization have a high probability for success.

15 Are you saying you don't necessarily disagree with
16 that in terms of the purpose of the preliminary
17 determination, but in your view that purpose is best
18 fulfilled and achieved by requiring that the determination
19 be made after characterization because that's the real way
20 to make sure that the site selection process will function
21 to select good sites that have a high probability for
22 making it through the process?

23 MR. TOUSLEY: That's correct. I don't understand
24 what the statement that the sites are preliminarily
25 suitable adds before characterization. It's simply a

1 statement, it's out there. We have the information in the
2 EAs which are the basis for selecting sites to
3 characterize. They simply add the statement that they are
4 preliminarily suitable.

5 That doesn't add anything that adds any confidence
6 of reasonableness to me.

7 COMMISSIONER ASSELSTINE: And that's because we
8 don't have --

9 MR. TOUSLEY: We don't have the information yet.
10 That's correct.

11 CHAIRMAN PALLADINO: All right. Anything more?

12 MR. GOVER: Mr. Chairman, just one other things.
13 We have been in touch with the Umatilla Indian tribe, which
14 is the third of the affected tribes, and they asked us to
15 seek your leave for them to submit their own views in
16 writing, assuming the Commission doesn't resolve the issue
17 today.

18 CHAIRMAN PALLADINO: All right, we will be pleased
19 to receive them.

20 COMMISSIONER ASSELSTINE: Sure.

21 COMMISSIONER BERNTHAL: Let me ask one further
22 question here. That really is a legal question which
23 doesn't particularly apply to your comments and testimony.

24 If I could ask OGC to comment. I'm curious to
25 know whether the Commission itself, as a matter of law, has

1 before it potential difficulty in the concurrence process.

2 It is clear, and I agree with your comments, it is
3 clear that the concurrence statement says something other
4 than what DOE now proposes to do.

5 What legal implications does that have for the
6 process, Marty? Is that cast out on the process? Should
7 the Commission -- whatever its views on interpreting the
8 law might be -- should the Commission feel compelled,
9 should it feel it necessary, then, that we reiterate this
10 process of concurrence to clear up that discrepancy?

11 MR. MALSCH: I can't give you a definite answer,
12 but let me suggest this: That if at some future date the
13 Commission should be called upon to make an independent
14 determination as to whether the process has been consistent
15 with the Commission's own guidelines, it will then have to
16 confront the question definitively.

17 Now, it may be later, but it will be later. At
18 that point in time, the issue will arise as to whether in
19 fact the process has been consistent with the Commission's
20 guidelines, and that will in turn raise the question as to
21 exactly what the Commission's guidelines entail.

22 CHAIRMAN PALLADINO: Marty, I think it would be
23 worth doing some research on it and giving us the benefit
24 of that additional research.

25 MR. MALSCH: Sure. We have not researched these

1 questions independently.

2 COMMISSIONER BERNTHAL: I think we need to know
3 that because independently even of what the Congress does,
4 we may have a monkey wrench here in the procedure that
5 could come back --

6 COMMISSIONER ASSELSTINE: Yes.

7 COMMISSIONER BERNTHAL: -- to haunt everybody
8 later on. I think we need a paper on that.

9 CHAIRMAN PALLADINO: Very good question.

10 Okay. Well, thank you very much, gentlemen. We
11 have representatives, of six states here this morning, and I
12 think it would be in our common best interest if all of you
13 joined us at the table, and then we'll go down the list and
14 have each one of you make a presentation.

15 Mr. Tom Lehman, Malachai Murphy, Steve Frischman,
16 Patrick Spurgin, Don Provost, Carl Sinderbrand.

17
18
19
20
21
22
23
24
25

1 CHAIRMAN PALLADINO: We will next hear from the
2 States, and I propose to have you make presentations in the
3 order listed on my sheet, and I presume it is the same as
4 you all have, with Mr. Tom Lehman going first.

5 MR. LEHMAN: I am Tom Lehman, Associate Director of
6 the State of Minnesota, Washington Office.

7 I am here today on behalf of Gregg S. Larson,
8 Director of Minnesota's High-Level Radioactive Waste
9 Program, and I would like to take this opportunity to read
10 his statement into the record.

11 Mr. Chairman and members of the Commission, I want
12 to thank you for your invitation to testify here today. I am
13 confident that it reflects the Commission's sincere desire
14 to solicit and fully consider the views of the affected
15 States and tribes on the provisions of Section 114(f) of the
16 Nuclear Waste Policy Act and on the Commission's final
17 concurrence with the Department of Energy's siting
18 guidelines.

19 On the one hand, it is a surprise that the issue
20 of the timing of the preliminary determination of site
21 suitability is again before the Commission because the
22 parties that participated in the concurrence proceedings,
23 and apparently Commission members and staff, had considered
24 the issue resolved. On the other hand, it is not surprising
25 giving DOE's propensity for policy reversal.

1 The State of Minnesota urges that the Commission
2 reaffirm the agreement that was reached with DOE during the
3 June 22nd, 1984 meeting on final concurrence with the siting
4 guidelines. We do so for the following two reasons:

5 First, it is clear from the record of the
6 proceedings, the decision notice in the Federal Register and
7 the subsequent Commission comments on DOE's draft mission
8 plan that the Commission had concluded that DOE agreed to
9 delete language from Section 960.3-2-3 of the guidelines
10 requiring a preliminary determination of suitability at the
11 time sites are recommended for characterization.

12 It is also clear that the Commission expected the
13 final mission plan to reflect the agreement that the
14 preliminary determination would be made after completion of
15 site characterization.

16 It is difficult to escape the fact that even if
17 the record was determined to be ambiguous, which it is not,
18 the Commission acted on the belief that there was an
19 agreement with DOE.

20 Our second reason for urging reaffirmation of the
21 agreement is based on the view that the Commission's
22 position on this issue is logical, justifiable and based on
23 common sense. In the long run it will benefit the nuclear
24 waste program and the Commission's licensing process.

25 The question of whether or not alternative sites

1 are a necessary component of final site selection should not
2 be a difficult one to resolve. Minnesota supports the
3 Commission's concurrence position because a determination at
4 the end of characterization is the best way to guarantee
5 that there will be backup sites.

6 Not only will this ensure that the Commission is
7 not presented with a fait accompli at the time of licensing,
8 if only one site survives characterization, but it also will
9 contribute to schedule certainty by providing back-ups in
10 the event that sites being characterized are judged
11 unsuitable.

12 The latter advantage is emphasized in the recent
13 report on the nuclear waste program that was prepared by the
14 Office of Technology Assessment.

15 Furthermore, as a second repository state, we want
16 to stress the importance of maintaining geologic media
17 options. In limiting the current second repository program
18 to granite, DOE has put all its eggs in one basket. DOE has
19 argued that consideration of a variety of geologic media for
20 a second repository, as required in Section 112(a) of the
21 Act, could occur through nomination of sites that were
22 characterized but not selected for the final first
23 repository site as provided for in Section 112(b)(1)(C).
24 There was no certainty, however, that such sites would be
25 available if the preliminary determination is made at the

1 start of characterization.

2 Commission staff concern over the environmental
3 impact statement implications of the DOE position is also
4 warranted. If the EIS lacks reasonable alternatives, it
5 would fail to meet the requirements of the National
6 Environmental Policy Act and the Nuclear Waste Policy Act,
7 and adoption by the Commission would be precluded.

8 The EIS implications have a public as well as
9 legal dimension because of the importance that the
10 interested public normally ascribes to full and rigorous EIS
11 analysis of alternatives.

12 Finally, the preliminary determination of
13 suitability is a tail that wags the dog in the siting
14 program. Recognition that the determination must be made at
15 the end of characterization is a compelling incentive for
16 DOE to recommend the best possible sites for
17 characterization.

18 It would be a very visible demonstration of DOE's
19 often repeated intention to eliminate flawed sites as early
20 as possible in order to focus on sites that hold the
21 greatest promise of suitability.

22 As a licensing agency, it is particularly
23 important that the Commission continue to be viewed as an
24 independent entity that does not vacillate under pressure
25 on key policy issues.

1 Commission failure to reaffirm this agreement and
2 condition of concurrence will set a precedent for disregard
3 of other concurrence conditions, damage the credibility of
4 the Commission and contribute to the perception that the
5 Commission will readily bend and cede authority to DOE when
6 conflicts arise. That perception reduces public confidence
7 in the nuclear waste program and the important role of the
8 Commission in this undertaking.

9 Thank you.

10 CHAIRMAN PALLADINO: Thank you very much.

11 I suggest again that we have all the
12 representatives speak and then we will raise questions.

13 Mr. Murphy from the State of Nevada.

14 MR. MURPHY: Thank you, Mr. Chairman.

15 My name is Malachai Murphy. I am a Special Deputy
16 Attorney General for the State of Nevada.

17 I have prepared some written remarks which I will
18 submit, Mr. Chairman, rather than read them.

19 And also in the interest of brevity, because
20 things could get repetitive here pretty quickly, I think I
21 would just like to associate myself with the remarks of my
22 state and tribal colleagues, with one exception, and that is
23 that we do not feel there is any ambiguity in the Act.

24 CHAIRMAN PALLADINO: That you do not what?

25 MR. MURPHY: We do not feel there is any ambiguity

1 in the Act. We feel it is perfectly clear that the Act
2 requires the timing of the preliminary determination to
3 follow characterization rather than precede it.

4 And with that one small point, I think what I have
5 to say has already been clearly said by others, and I think
6 I will just wait for questions.

7 CHAIRMAN PALLADINO: All right. I am sure we will
8 have questions on your position.

9 Mr. Frischman I think is next.

10 MR. FRISCHMAN: Yes. Thank you.

11 In the interest of brevity, I will follow Mr.
12 Murphy's example, but I would like to take the same
13 exception that he did.

14 I do want to go into maybe a slightly different
15 approach in the view of this issue.

16 First of all, as I have said, we feel that it is
17 important that the preliminary determination of suitability
18 be made after site characterization. If in the alternative
19 you chose to accept the position of Mr. Rusche and the
20 Department of Energy, I think it is compelling that you
21 return to a concurrence proceeding.

22 And the reason I say this is because the
23 guidelines themselves are very much tied up in the
24 evaluation of the sites that may lead to any determination
25 of suitability.

1 If you look at what happens in the guidelines and
2 in the Act relative to the nomination and recommendation of
3 sites, first, I take exception with Mr. Rusche's comment
4 that the purpose for the preliminary determination is to
5 support or be a basis for a recommendation.

6 The Act itself provides some basis for that
7 recommendation, and the guidelines in which you concurred
8 provide a further basis for that recommendation. And if you
9 look at the requirements for the environmental assessment
10 leading to a nomination, one of the six elements is to
11 evaluate the suitability for development of a repository,
12 under each guideline that does not require site
13 characterization.

14 So you already have a basis for nomination and
15 recommendation. You don't need the preliminary determination
16 of suitability to do that.

17 CHAIRMAN PALLADINO: Could you read that again. I
18 am sorry, I didn't pick it all up.

19 MR. FRISCHMAN: Yes. One of the required six
20 elements in the environmental assessment, which is to
21 support a nomination and, according to the guidelines, a
22 recommendation as well, is an evaluation of the suitability
23 for development as a repository under each guideline that
24 does not require site characterization for its application.

25 So you are dealing here with an obvious

1 understanding that you do not have a full spectrum of
2 understanding on the site itself.

3 Now we could go into many of the problems that we
4 have discussed before about the guidelines and the fact that
5 they are vague, they are not definitive and they are
6 applicable to almost any site in the country if you accept
7 those that don't meet the population density standards.

8 So we are dealing with a whole series of sites
9 that right now really are not different in knowledge before
10 and after a recommendation.

11 I would think if Mr. Rusche really wants to carry
12 this to the proper extreme in his own mind, he ought to say
13 that all nine sites are determined to be preliminarily
14 suitable, because the judgment is no different and the
15 environmental assessment does not change that judgment
16 because the information is no different.

17 So we are in a position now where if the
18 determination is made, and if you look at the guidelines,
19 the guidelines incorporate in the system guidelines, among
20 other rules, your 10 CFR 60 and the as yet to be published
21 40 CFR 191, those are definitive requirements.

22 Now if you going to say that the site is suitable
23 to begin with, then what you are doing is assuming the
24 compliance with your requirements at this point because you
25 have already sort of ignored that there are guidelines that

1 can't be applied. You are just saying that everything is
2 being applied.

3 So the assumption then is made that the sites that
4 are determined to be preliminarily suitable are in fact in
5 compliance and meet the requirements of your 10 CFR 60 and
6 other rules.

7 Now let's go back to the 1980 programmatic EIS
8 that the Department of Energy submitted and has been
9 finalized and is supposedly the guiding NEPA document for
10 this program, because I have heard of nothing that removes
11 that document.

12 In that, whether we like it or not, sites are in a
13 position where you can assume the acceptability of the site,
14 unless you find that it is disqualified, up to the point and
15 through the point of recommending that site for site
16 characterization or beginning site characterization.

17 At the point that the decision is made to begin
18 site characterization, according to that environmental
19 impact statement and other documents subsequent to that, you
20 can no longer assume the acceptability of that site. You
21 must then determine through facts that the site is
22 acceptable. There is a flop-over.

23 I have always had a problem with the assumption
24 early, but now what is happening is the assumption by the
25 change recommended or taken by Mr. Rusche, that assumption

1 is being carried further into the characterization of sites,
2 and I submit in violation of that 1980 EIS.

3 So I think you have a process here that I would
4 not like to right now get into the argument of whether it is
5 safety related because I agree with the fact that your
6 responsibilities as a Commission are much greater than just
7 safety.

8 So I think you are facing an issue of overall
9 compliance of this program, not only with the Waste Policy
10 Act, but with previous approved policy and a very dangerous
11 assumption that a site at this point meets your requirements
12 when the facts are not on the table.

13 CHAIRMAN PALLADINO: All right. Thank you.

14 Let's see, we go next to Mr. Spurgin.

15 MR. SPURGIN: Yes. My name is Pat Spurgin, and I am
16 from the State of Utah.

17 I have to follow along with my colleagues and say
18 that most of what I would say is redundant to what you have
19 already heard.

20 I would just like to make the point that we
21 believe that the Commission's responsibilities also extend
22 to consideration of environmental impacts, and we believe
23 that that responsibility extends to the early stages of the
24 site selection process as well.

25 And we feel that the guidelines in their present

1 form and the Commission's concurrence in them at least in
2 part compromises the ability of the Commission to fulfill
3 its responsibility for consideration of environmental
4 impacts.

5 I would note that Utah doesn't believe that the
6 Department of Energy has to date gathered sufficient
7 information nor done sufficient analysis to make any kind of
8 determination of suitability, whether it be the preliminary
9 determination on a discussion or the simple determination of
10 the suitability of a site for further consideration.

11 By the same token, if the Section 114(f)
12 determination of suitability is deferred, all of the things
13 considered would still be an inadequate substitute for the
14 careful consideration of the safety, health and
15 environmental impacts arising from the earlier DOE
16 decisions, and that is the basic message.

17 Thank you for the opportunity.

18 CHAIRMAN PALLADINO: All right. Thank you.

19 Next Mr. Don Provost.

20 MR. PROVOST: Thank you, Mr. Chairman.

21 I am Don Provost, Acting Program Director of the
22 State of Washington Office of High-Level Nuclear Waste
23 Management.

24 I have a statement here from Governor Gardner, and
25 so I will just read his statement to you.

1 Mr. Chairman and members of the Commission, thank
2 you for inviting me to present my views on the importance
3 and timing of the preliminary determination of suitability
4 of potential high-level waste repository sites.

5 The State of Washington at every opportunity has
6 clearly and forcefully stated its opinion concerning Section
7 114(f) of the Nuclear Waste Policy Act. Our position is
8 faithful to both the spirit and the letter of the Act and
9 the intent of Congress. We emphatically believe the Act
10 requires a preliminary determination of suitability to be
11 made after characterization is substantially complete.

12 Others have already testified about the legal
13 justification for our position. So I will discuss the
14 implications of our position.

15 This is a very significant issue for both the
16 State of Washington and the Nuclear Regulatory Commission.
17 It is important to remember that USDOE makes a preliminary
18 determination and NRC makes a final determination of
19 suitability during the licensing process. Our citizens need
20 to be convinced that both determinations guarantee safe
21 permanent disposal of high-level wastes.

22 Before I discuss the specific concerns about the
23 timing, I want to give three conditions which must be met
24 before Washington State would consider accepting a
25 repository site. These conditions are:

1 -- USDOE must demonstrate to our satisfaction
2 that the repository will be safe.

3 -- USDOE must demonstrate that Hanford is better
4 and safer than any other site.

5 -- The proposed repository must be acceptable to
6 Washington State citizens.

7 Let me briefly explain how the decision on
8 determination of suitability relates to the three
9 conditions.

10 USDOE must use performance assessment techniques
11 to demonstrate that the repository will be safe. As you
12 know, Hanford is the most complex site under consideration.
13 Extensive studies will have to be completed before USDOE can
14 reliably conclude that groundwater travel times will meet
15 EPA and NRC requirements.

16 In its draft environmental assessment comments,
17 NRC states that it believes limitations of the available
18 data do not allow high confidence to be assigned to any
19 travel time estimates at this time. Independent experts
20 engaged by the State of Washington agree with this
21 statement.

22 At this time with this limited information, USDOE
23 cannot demonstrate that a repository at Hanford will be
24 safe. A preliminary determination of suitability should not
25 be made until USDOE can demonstrate the site is a safe site.

1 The Nuclear Waste Policy Act establishes a
2 procedure which allows the preliminary determination to be
3 made when relevant and necessary information is available.
4 This is not the time.

5 Condition two implies a comparison among
6 acceptable sites. If Hanford is chosen, it is very possible
7 that a disqualifying fatal flaw will be discovered during
8 site characterization. Even if site characterization is
9 completed at Hanford, we are convinced that USDOE will be
10 unable to assign high confidence to groundwater travel
11 times.

12 If one or more sites are disqualified, USDOE and
13 NRC would have a very difficult time proving the chosen site
14 is better and safer. If only one site would remain on the
15 list, comparison among alternatives would be impossible and
16 USDOE would be unable to demonstrate that the chosen site is
17 safer and better.

18 This leads me to condition three, citizen
19 acceptability. Having three suitable sites after
20 characterization is a fundamental requirement for citizen
21 acceptance. Having fewer than three sites available after
22 characterization will ensure a political failure. Such a
23 political failure would most likely occur during a
24 repository licensing process.

25 On August 1st I testified before the House

1 Subcommittee on Energy, Conservation and Power of the House
2 Committee on Energy and Commerce. I testified that the
3 effort to site a high-level repository is on the wrong
4 track. Public confidence is already at a low point. I
5 recommended a pause in the headlong rush to site a
6 repository and that non-USDOE experts be asked to review the
7 ranking methodology.

8 That procedure should set aside political
9 considerations and focus on a single issue, the issue of
10 safety. I hope that the quality and scope of this review is
11 sufficient to put the siting effort back on the right track.

12 Before I end my testimony, I wish to compliment
13 the Nuclear Regulatory Commission and staff for the quality
14 and objective nature of the result waste isolation project
15 work. This most important work requires a high standard of
16 excellence.

17 We have received top-level technical performance
18 from NRC. As a result, we now have high confidence in the
19 NRC. We are concerned that an incorrect decision on the
20 timing of a preliminary determination of suitability will
21 not only affect NRC's performance, but also place NRC in an
22 untenable position when the licensing decision is before it.

23 In summary, the Nuclear Waste Policy Act requires
24 that preliminary determinations of suitability for three
25 potential repository sites follow site characterization. If

1 USDOE makes a premature preliminary determination, legal
2 challenges certainly will delay the repository program.

3 It runs counter to the Nuclear Waste Policy Act's
4 intent of siting a safe repository with a supportable
5 procedure. A determination after characterization will
6 protect the public health and safety, ensure public
7 confidence and comply with the Nuclear Waste Policy Act.

8 COMMISSIONER PALLADINO: All right. Thank you very
9 much, Mr. Provost.

10 Let's see, we have Mr. Carl Sinderbrand from the
11 State of Wisconsin next.

12 MR. SINDERBRAND: Thank you, Mr. Chairman and
13 members of the Commission.

14 My name is Carl Sinderbrand from the Wisconsin
15 Department of Justice representing the State of Wisconsin in
16 this matter.

17 I appear here today with two hats. One as the
18 representative of a state being considered for a second
19 repository, but also as a representative of a state with a
20 substantial investment in nuclear power, which is very
21 concerned that the DOE program result in a timely conclusion
22 at selection of a repository which will meet NRC standards.

23 I would like to make several points, one legal and
24 the rest practical.

25 From a legal perspective, I believe that a

1 thorough reading of the Act of both in its structure and by
2 any accepted rules of statutory construction can only lead
3 to the determination that the preliminary determination must
4 be made after characterization for at least two reasons.

5 One is that the DOE's current interpretation would
6 result in the preliminary determination requirement being
7 superfluous and, secondly, because its interpretation could
8 lead to an environmental impact statement which presents no
9 alternatives to the selected site which conflicts with NEPA.
10 I believe it is clear that the intent of Congress was that
11 NEPA be complied with in the selection of a site for
12 development of a repository.

13 I would also like to agree with Mr. Provost's
14 comment with respect to a public acceptability and the
15 political consequences of the Department of Energy's
16 decision.

17 The States have an important role in the ultimate
18 selection of a repository. In order for a State to be
19 willing to accept a repository, recognizing that the States
20 have both geographically and politically a much more
21 immediate and close relationship with a repository than DOE
22 does, it must not only meet the minimum technical standards
23 before the NRC in 10 CFR 60, but it must also be considered
24 to be the best available site.

25 This reflects, I believe, a philosophical

1 dispute between the States, which may host a repository, and
2 the DOE. The States are concerned that the application of
3 the guidelines leads to the selection of a politically
4 acceptable and the best available site.

5 DOE in its position today and in its program
6 generally is clearly focusing on the selection of perhaps
7 only one technically acceptable site. I think this is a
8 distinction worth consideration because, as the NRC has
9 reflected before, a public acceptability and acceptability
10 by the States is a very important consideration.

11 The other point I would like to raise is relevant
12 to the second repository States, one that Mr. Lehman has
13 alluded to. DOE is in essence putting all its eggs in one
14 basket with respect to the second repository, and that is
15 that it is only considering crystalline rocks. The Nuclear
16 Waste Policy Act in the guidelines reflects the need to
17 consider alternative media both within the first and second
18 repository process.

19 If DOE under its interpretation goes through
20 characterization and has only one acceptable site, there
21 will be no alternatives to grant it for consideration for a
22 second repository.

23 Thank you.

24 COMMISSIONER PALLADINO: Thank you.

25 Well, let me start the questioning with two

1 questions.

2 Several of you, and I guess, Mr. Murphy, you were
3 the first one who said that the Act clearly requires that
4 the preliminary determination be made after site
5 characterization. Could you elucidate on that and why you
6 think it is so?

7 MR. MURPHY: Well, I think it is so because of the
8 application of fundamental principles of English grammar,
9 Mr. Chairman.

10 (Laughter.)

11 COMMISSIONER PALLADINO: Well, there aren't that
12 many of us that understand the grammar. So would you help
13 us.

14 MR. MURPHY: Congress said that the Secretary must
15 do two things. He must first characterize sites and he must
16 secondly make a preliminary determination that such sites
17 are suitable for development as repositories. Not a
18 preliminary determination that they are suitable for further
19 investigation, but a preliminary determination that they are
20 suitable for development as repositories after or following
21 characterizing three sites.

22 We see absolutely no ambiguity whatsoever. Resort
23 to the legislative history, to the floor colloquy simply
24 confirms what the language of the statute itself says, in
25 our view.

1 COMMISSIONER BERNTHAL: Isn't it true that the
2 floor colloquy though confirms it in one House and not the
3 other House of Congress pretty much? I mean I agree with
4 you. I think the floor colloquy on the House side seems to
5 confirm that, and the floor colloquy on the Senate side
6 seems to say the opposite.

7 MR. MURPHY: No, I don't agree with that,
8 Commissioner Bernthal. I think the floor colloquy in the
9 House confirms it more clearly than the floor colloquy in
10 the Senate in our view of the Act. But I don't think that
11 the remarks on the Senate floor support the Department of
12 Energy's position at all.

13 MR. FRISCHMAN: May I add something to that, and
14 that is the full statement in 114(f) goes to the extent that
15 such sites are suitable for development as repositories
16 consistent with the guidelines promulgated under Section
17 112(a).

18 Now let me reiterate one of my points, and that is
19 that it is known and understood in this Act and in its
20 application to date that all of those guidelines cannot be
21 applied until site characterization is underway.

22 So consistent with those guidelines, and it does
23 not say consistent with those guidelines which can be
24 applied prior to site characterization. It says consistent
25 with the guidelines of 112(a).

1 COMMISSIONER PALLADINO: But one of the
2 difficulties that I have is I may not read things the same
3 way as the various legal people might, and the various legal
4 people don't seem to be reading it all the same way. So I
5 guess it leads me to wonder whether it is all that clear.

6 MR. FRISCHMAN: I prefer to apply the rule of
7 logic, just as Mr. Rusche, and we just happen to disagree
8 once again.

9 (Laughter.)

10 MR. MURPHY: God forbid if the Congress should ever
11 pass a statute that doesn't require interpretation.

12 (Laughter.)

13 COMMISSIONER PALLADINO: I appreciate that, but
14 even Congress is interpreting it differently on both sides
15 of the House.

16 Well, maybe other questions will bring out further
17 clarification.

18 Let me just ask one other question. I guess Mr.
19 Provost first introduced the statement that it must be the
20 best available site, if I recall correctly.

21 And then I guess it was Mr. Sinderbrand who said,
22 or maybe you both said, that it must be politically
23 acceptable. Are these necessarily consistent requirements?
24 You may have the best available site on a technical basis,
25 and if that is what you meant, then I am not sure I

1 understand whether the next one excludes that one, and that
2 is that it must be acceptable to the citizens.

3 MR. PROVOST: Well, I don't think you will ever
4 prove acceptability to our citizens unless you have
5 something to compare them against and acceptable sites to
6 compare at the end. If you get through a process, and if you
7 make your preliminary determination early and one or two
8 sites drop out and you are left with one, you can be sure
9 you are not going to get one through. It is going to be a
10 political disaster. The only way it will ever be acceptable
11 is if there are three acceptable sites at the time of the
12 preliminary determination.

13 COMMISSIONER PALLADINO: No, I was trying to
14 understand, and I thought I had the paper before me, but I
15 must have mislaid it, you said we want the best available
16 site, and then I think you said the requirement that it must
17 be acceptable to people.

18 MR. PROVOST: That is Governor Gardner's position.

19 MR. MURPHY: Let me expand on that thought for one
20 moment, if I could, Mr. Chairman.

21 From Nevada's point of view at least, it is not
22 only a question of the site being acceptable, but the
23 process has to be acceptable to the public. The process of
24 selecting that site must be politically acceptable to the
25 public or there is no chance in the world that a notice of

1 disapproval will not be filed.

2 The only way that there is any hope of achieving
3 that kind of acceptability is for the public to be genuinely
4 satisfied that the Department has considered genuine
5 alternatives, and genuine alternatives we think are sites
6 for which the determinations are made as late in the process
7 as possible after securing as much confirmed scientific data
8 as is possible to achieve consistent with a reasonable
9 application of the deadlines which Congress has imposed on
10 the Department.

11 COMMISSIONER BERNTHAL: I have to say I agree with
12 the point you made that there is an obvious flaw here in
13 what appears to have been agreed to by the Commission and
14 the Department of Energy. That is unfortunate and that may
15 well require that the Commission take some steps to make
16 sure that public acceptability is guaranteed.

17 COMMISSIONER ROBERTS: I don't see how you are ever
18 going to guarantee that.

19 COMMISSIONER BERNTHAL: But on the point that I
20 said earlier, I do not propose, at least as one member of
21 the Commission, to get into interpreting a law that Congress
22 is surely free to interpret far better than we can. And if
23 they choose not to, then I would suggest that is the job of
24 the Court.

25 This law is just plain ambiguous, and I am not

1 sure the reading of English is quite as simple as you might
2 suggest. It is a mess, quite frankly.

3 MR. FRISCHMAN: I would like to expand on the
4 confidence thing just to add that in Texas confidence in a
5 preliminary determination of suitability at this point would
6 be absolutely zero because not one scientific investigator
7 working for the DOE program has ever set foot on either site
8 in Texas.

9 COMMISSIONER PALLADINO: That is interesting.

10 MR. MURPHY: That speaks to a point you made
11 earlier, too, Commissioner Bernthal, the colloquy between
12 you and Commissioner Asselstine on preliminary borings. They
13 haven't done any preliminary borings in Texas. They are
14 going to make that preliminary determination of suitability
15 in Texas without any preliminary borings.

16 MR. FRISCHMAN: It will be made on the basis of
17 extrapolation of data from borings around a 25,000 square
18 mile area.

19 COMMISSIONER BERNTHAL: But let me, if I can ---

20 COMMISSIONER PALLADINO: Yes, go ahead.

21 COMMISSIONER BERNTHAL: --- just for the public
22 record here, because I think it is important to the public,
23 share our understanding or lack thereof on the confusion in
24 the law on this particular point, and I don't intend to
25 imply the law is a mess on every point, but on this timing

1 question it is.

2 Our legal office again sifted through the
3 legislative record on this, and I find it interesting that
4 Congressman Ottinger, who I suspect shared your view at
5 least to some extent in this matter of timing, and if you
6 don't like DOE's position and you don't like the position
7 that DOE and NRC apparently agreed to, then you can find
8 something in between in Congressman Ottinger's comment,
9 because he says, and I am quoting now, "It is envisioned
10 that this preliminary determination would occur late in the
11 site characterization program."

12 So now you have got all three. It is before or is
13 it after or is it during. Now I submit to you that is
14 ambiguous.

15 MR. FRISCHMAN: Well, I would like to put that into
16 the context of my comments on the guidelines, and that is
17 that you can reach a point sometime during site
18 characterization when the Department is going to have to
19 make some kind of a determination for itself regarding the
20 suitability for a repository. And I think the point was made
21 already that the determination of suitability is reserved to
22 you folks, the Commission.

23 The Department can only make a preliminary
24 determination in the context of whether a site is in fact
25 suitable for a repository or not. When they make that

1 preliminary determination, they then have a basis for
2 handing you an application.

3 MR. MURPHY: Nevada agrees with that position,
4 Commissioner Bernthal to the extent that characterization
5 needs to be substantially completed before the preliminary
6 determination can be made, and by that we think Congress
7 meant that you have to have completed characterization to
8 the extent that you can apply those guidelines which require
9 characterization for their application.

10 Now at what point in time in the characterization
11 process that occurs, I am willing to concede at least is
12 within the programmatic discretion of Mr. Rusche and his
13 staff. But they can't make it before they even begin the
14 process of characterizing the site to apply those guidelines
15 which require characterization, and that is what they are
16 suggesting to you that they are going to do.

17 COMMISSIONER PALLADINO: Well, that would imply,
18 and I got this also from Mr. Provost's prepared comments,
19 that would imply that they had better be starting with more
20 than three to be characterized or somewhere along the line
21 if one falls out for some reason then you have to go back
22 and start another one.

23 MR. PROVOST: Or they had better go in with three
24 good sites and not go in with risky sites. Hanford is an
25 example of where there has been a lot of work done, but the

1 certitude of the results to date, and I think the NRC, EA
2 comments, ourselves and everybody agrees that they are
3 nowhere near being able to have any confidence in results.

4 COMMISSIONER PALLADINO: But you are saying they
5 must make a preliminary determination that they have three
6 good sites. That supports the other position.

7 MR. PROVOST: No, no.

8 COMMISSIONER PALLADINO: You have the problem that
9 you either make a preliminary determination that you have
10 three real good sites or you say I can't make it because I
11 don't have enough data and therefore I have to start more
12 sites.

13 MR. PROVOST: Of you could have a situation, as in
14 the current first three, where you have two sites that are
15 on government land, which went through a site selection
16 process that was completely different than any other site.
17 So it isn't like the second round where you go through a
18 very organized site selection process.

19 MR. MURPHY: Let me present a worst case scenario,
20 Mr. Chairman, which I think does point out that this
21 question indeed implicates public health and safety issues
22 and not just environmental or timing issues.

23 Assume through the application of guidelines,
24 which we think even after the Commission's concurrence are
25 imperfectly subjective, but assume through the application

1 of those subjective guidelines in a subject manner based on
2 what we feel to be in some cases inadequate and questionable
3 data in the environmental assessments that preliminary
4 determinations are made early in the process before
5 confirmed scientific data sufficient to make those decisions
6 is even begun to be gathered.

7 And assume further that the end result of that
8 process is one marginally acceptable site and two sites that
9 are determined to be unsuitable.

10 The Department then comes to this Commission with
11 an application for a construction authorization and puts you
12 folks in the very uncomfortable position, because of all of
13 the years of effort and hundreds of millions of dollars
14 expended on the program, of taking a look at only one site
15 out of three which is perhaps suitable, but only marginally
16 so based on then known data, and you would then be in the
17 position of asking yourselves whether to abort this entire
18 10, 15 or 20-year process or to authorize the construction
19 of a site which may later turn out to be bad.

20 That is really the critical question we are
21 talking about here today is how much confidence are you
22 going to require in the earliest siting decisions and,
23 consequently, how much hard, confirmed and defensible
24 scientific data must the Department generate before they
25 begin to make those decisions.

1 MR. FRISCHMAN: This comes back to the question of
2 what does it mean to reopen concurrence on the guidelines.
3 Mr. Rusche said it means nothing other than to deal with the
4 issue of preliminary determination.

5 Well, I submit if you deal with it and say that it
6 is later, that it is at the end of later in site
7 characterization, then that is all you have to do. But if it
8 goes the way the Department of Energy wants it to go, the
9 purpose for reopening concurrence is to determine if the
10 guidelines are sufficiently definitive and rigorous to
11 handle the question of are there facts that support this
12 determination or is it assumptions that support this
13 determination, and your own rules require facts.

14 COMMISSIONER PALLADINO: Let me see, Commissioner
15 Roberts, do you have questions?

16 COMMISSIONER ROBERTS: No.

17 COMMISSIONER PALLADINO: Jim?

18 COMMISSIONER ASSELSTINE: A couple of points, and
19 let me pick up on the one that you were just talking about,
20 Mal. I think you have to recognize that the argument that
21 Mr. Rusche has made has to be tempting or appealing to the
22 Commission in one respect, and that is that, gee, you guys
23 don't have to worry so much about this legal issue. You can
24 duck the legal issue.

25 And I think Commissioner Bernthal was talking

1 about well, maybe the Commission shouldn't get involved.
2 Let's leave this to the Department of Energy and the
3 Congress and say it is a matter of their discretion.

4 I guess I would like to address that head on and
5 see, you know, can the Commission duck it, can the
6 Commission afford to duck it and what kind of a situation is
7 the Commission likely to find itself in if it does that. If
8 things go ahead the way that DOE has proposed them and DOE
9 picks three sites, and I won't speculate on which three, and
10 for some reason or another one of those sites drops out
11 because there are difficulties in doing the characterization
12 work, and a second drops out because some flaw is identified
13 during characterization.

14 Then DOE comes back to the Commission with one
15 site, and then the Commission has to fulfill its
16 environmental impact responsibilities that still exist under
17 the law. Are we on the spot then and are we the ones then
18 that get left holding the bag. And if that is the case, can
19 the Commission really afford to duck the legal question now
20 and aren't we really going to pay for it later on?

21 MR. FRISCHMAN: I think you will pay for it in real
22 dollars because you will get an environmental impact
23 statement that you must accept to the extent practicable and
24 it will be very low on the scale of accepting to the extent
25 practicable when you interpret NEPA as it applies to your

1 decisions.

2 COMMISSIONER ASSELSTINE: And I take it that we
3 would be in the position of having to defend in Court an
4 environmental impact statement that says, gee, if we have
5 got one site here and the alternatives that we considered
6 washed out a couple of years ago in the process ---

7 MR. FRISCHMAN: Well, the question is whether you
8 want to spent the dollars defending yourselves in Court, or
9 you send your staff out to develop two more sites.

10 COMMISSIONER ASSELSTINE: That is true at that
11 point in time.

12 COMMISSIONER PALLADINO: But I suggest that you
13 ought to start with more sites if you are not sure.

14 COMMISSIONER ASSELSTINE: Well, I personally happen
15 to feel that is right, that we probably ought to start with
16 four sites rather than just three, and also make sure ---

17 COMMISSIONER PALLADINO: Well, I said "more." I
18 didn't say four. I don't know how many. I said more.

19 MR. MURPHY: There is some logic to that, but I
20 have to live with my colleagues from Mississippi and Utah as
21 well, Mr. Chairman.

22 (Laughter.)

23 I don't think they want to hear us suggest that
24 four or five sites should be characterized.

25 MR. FRISCHMAN: And I am not really suggesting that

1 you have to fully develop a lot of sites. What you would
2 have to do is investigate to the point where you had at
3 least viable alternatives, and you could probably do that
4 for an EIS without breaking ground.

5 COMMISSIONER ASSELSTINE: That is true, and I think
6 you also get to the point that Mr. Provost mentioned, too,
7 which is making sure that the sites you go forward with
8 really are ones that you are likely to be able to work with.

9 COMMISSIONER PALLADINO: But it sounds like double
10 talk to me. It sounds like you are saying we don't want a
11 lot more sites, we want the three that we have a pretty good
12 assurance are going to go through, and that to me sounds
13 like a preliminary determination.

14 Now if it goes through ---

15 MR. PROVOST: I think the history of the Hanford
16 site would ---

17 COMMISSIONER PALLADINO: Well, just let me finish.

18 MR. PROVOST: Okay.

19 COMMISSIONER PALLADINO: If you go beyond that
20 preliminary determination and one of these falls out, then
21 that is proof that you didn't make a good determination.
22 Well, I say yes, that is proof, but assuming that a
23 determination as made on honest and as good a set of grounds
24 as we could develop, then I think the time was when you had
25 decided that there should be three sites, which three sites

1 should be characterized.

2 MR. MURPHY: But remember what the significance to
3 the end result of the process is that we are talking about
4 here. If the Secretary is allowed to make his preliminary
5 determination of suitability before characterization begins
6 rather than substantially completed, then the process can
7 continue to go forward through licensing and through the
8 application for a construction authorization even if only
9 one or two sites are ultimately found to be suitable for the
10 application of such a license.

11 If, on the other hand, he has to make the
12 preliminary determination of suitability substantially into
13 characterization for the purpose we submit of having three
14 genuine alternatives for the Commission to consider in
15 adopting to the extent practicable the Department's EIS,
16 then it is an entirely different kettle of fish.

17 I suggest that at that point in time, if we get to
18 the end of this process with only one suitable site,
19 preliminarily determined to be suitable, and I don't even
20 think it is a question of practicality, I would suggest the
21 Commission would be legally prohibited from adopting such an
22 environmental impact statement.

23 COMMISSIONER PALLADINO: But you departed from my
24 point. My only point that I was bringing up is there seemed
25 to be some reluctance to go to more sites. If you really

1 think that the preliminary determination is made after the
2 site characterization is done and you want three to end up
3 with, it sounds to me like you have to start with more, and
4 that is all I was trying to clear up.

5 MR. SINDERBRAND: That is not necessarily true, Mr.
6 Chairman.

7 COMMISSIONER PALLADINO: Or you must be prepared to
8 stop along the way and add one.

9 MR. SINDERBRAND: If I may add, the preliminary
10 determination of suitability is not the only analysis of
11 suitability that occurs in the process. In preparing the
12 environmental analysis to support the characterization
13 decision, suitability must be determined.

14 The real issue isn't when the initial
15 determinations of suitability occur, but when the last
16 determination of suitability occurs, and we submit that
17 can't be made until after the data supporting guideline
18 determinations are made, and that is well into site
19 characterization.

20 MR. MURPHY: The point that has been made many
21 times earlier, and I think Commissioner Asselstine made it
22 at the July 29th meeting, the final determination of
23 suitability is made at this table. Everything the Secretary
24 does is preliminary in that respect. The final decision is
25 made right here in this room.

1 COMMISSIONER PALLADINO: I agree that everything is
2 preliminary until you get a final repository, but I don't
3 think that is the context in which the Congress developed
4 their concept of preliminary determination, or otherwise
5 they would have said so.

6 Jim, go ahead.

7 COMMISSIONER ASSELSTINE: I was going to say I
8 think that is what they did have in mind myself.

9 (Laughter.)

10 And I think that if ever there is going to be an
11 issue in the licensing proceeding, it is going to be the
12 suitability of that site for development as a repository.
13 That is going to be, no matter what site is selected, a
14 central issue in any licensing proceeding, and ultimately
15 the judgment is going to have to be made here.

16 The other question I guess I wanted to raise is
17 sort of a broader one, and that is what does this all do to
18 the process.

19 When I think back to a year or so ago when we were
20 last at this table on this subject, the sense I had, and I
21 think many of us expressed it at the time and, Fred, I think
22 you expressed it and, Joe, I think you did as well, was that
23 we were concerned and troubled when we had the guidelines
24 before us that after a number of iterations, reviews and
25 drafts by DOE that what we had before us was a set of

1 guidelines where the States and Indian tribes were almost
2 unanimous in saying there are some fundamental weaknesses in
3 these guidelines.

4 They don't provide an effective and an adequate
5 method for screening and selecting sites that are going to
6 provide a high degree of assurance that there are going to
7 be good sites chosen for characterization, and that at the
8 end of the road you will have good sites to make a selection
9 from to develop the repository. And there were a variety of
10 examples that I think all of you gave about that.

11 I know a number of us expressed the concern at the
12 time that we thought this whole process was getting off on
13 the wrong foot if what we had at this very early stage in
14 the process was a fundamental disagreement among all of the
15 States on one side and the Department of Energy on the other
16 about this program as going and whether we had an effective
17 site screening process or we had one that was fatally
18 flawed.

19 I think in many respects the Commission's
20 concurrence decision represented a good faith effort on our
21 part to try and deal with that. We made some changes that
22 our staff recommended to us, and we made some more that we
23 came up with, and I think one of those, one key one, in my
24 view, was the agreement with DOE on the timing of the
25 preliminary determination.

1 I guess what I am wondering is it strikes me that
2 this whole exercise now reopens those old wounds and I am
3 interested in your reaction of what this does to the
4 process, what it does to where we are now and what it does
5 to the kind of cooperation and agreement that I think is
6 absolutely essential to the success of this program.

7 Mal, I agreed very much with the comments that you
8 said about the States' role as this gets down the road,
9 particularly when the President selects a site and what it
10 does to our regulatory program, to the States' ability to
11 have confidence in us and to the working relationship with
12 DOE and to the whole success of the program.

13 MR. FRISCHMAN: I agree with me. It not only
14 reopens old wounds, but it opens existing wounds.

15 I think the place where that happened and I think
16 the place that you need to consider very carefully is
17 Appendix 3 and 4 are a result of the Commission's
18 determination that some more things needed to be done for
19 concurrence.

20 Now Appendix 3 and 4 have never been part of DOE's
21 public rulemaking process. Appendix 3 and 4 were subject to
22 our discussion, which was by invitation to a meeting with
23 the Commission.

24 So Appendix 3 and 4 we saw at the time as being
25 weak and inadequate, especially in the face of the vagueness

1 of the technical guidelines themselves.

2 And I think the only reason that we probably
3 didn't become extremely disturbed about the weakness of
4 Appendix 3 and 4, weak to the point where you have three or
5 so pages of information necessary for nomination and for
6 sites for characterization, and then a line that says the
7 types of information will be used except where findings set
8 forth in Appendix 3 of this part can be arrived at by a
9 reasonable alternative, whatever that is.

10 So we had little faith, and about the only thing
11 that kept us together in figuring well, we will try these
12 guidelines and we will do what Mike Lawrence asked us to do,
13 the proof of the guidelines is in their application, when we
14 left the room that day, the only thing that left us any
15 faith at all was that the process of determining suitability
16 of sites was not going to be nailed down at the same time
17 that these guidelines were used to say these are the world's
18 best sites out there that we can deal with right now.

19 So we have totally lost confidence if we lose the
20 ability to say that at the end of the process there are
21 going to be some further determinations, rather than just
22 stacking more and more and more concrete determinations on
23 the front end based on assumptions.

24 MR. SINDERBRAND: If I may add to that ---

25 COMMISSIONER PALLADINO: Let me make a point.

1 We have only one issue that we are talking about, the
2 timing. You may say that that destroys or undermines all the
3 confidence in everything that has been done up to now, but I
4 am not sure that that is the right thing to be talking about
5 here because one thing doesn't completely undermine the
6 confidence.

7 I think we should make sure that we recognize that
8 there is only one item under discussion, and that is the
9 timing of the preliminary determination. Now to the extent
10 that might undermine your confidence, it would be
11 appropriate, but I wouldn't get into all the other items.

12 MR. SINDERBRAND: If I may say, Mr. Chairman, that
13 I agree with Mr. Frischman that the States left the June
14 22nd, 1984 concurrence meeting with the reflection that the
15 preliminary determination being made after characterization
16 would provide the necessary incentive lacking in Appendix 3
17 for DOE to avail itself of the best information available
18 prior to making characterization decisions, and that the
19 absence of that assurance definitely does undermine our
20 confidence.

21 One must question at least rhetorically why the
22 Department of Energy is so intent in retracting from this
23 agreement that it made in the June 22nd meeting, and I would
24 suggest that is a reflection of a low level of confidence on
25 behalf of DOE that application of Appendix 3 will lead to

1 the selection of sites for characterization that can be
2 determined to be suitable after characterization.

3 MR. MURPHY: Let me add something to that point in
4 using the Department's own language, Mr. Chairman, and this
5 is what they are asking you and the public to accept at this
6 point in time, "To make a preliminary determination of
7 suitability when," and I am reading from page 189 of Volume
8 I of the Mission Plan, "when all of the issue identified in
9 Chapter 1 remained unresolved to some degree at this stage
10 of repository site investigations and development."

11 All of their technical issues remain unresolved to
12 some degree, and yet they still insist that they can, and
13 they are not going to resolve them between now and December,
14 and yet they still insist that they can preliminarily
15 determine that three sites are suitable for development as
16 repositories, not for further investigation, but for
17 development as repositories.

18 That does not instill a great deal of confidence
19 in the process either among members of State governments or
20 the public or Indian tribes.

21 COMMISSIONER ASSELSTINE: You know, Joe, you are
22 right that this meeting is to discuss the timing of the
23 preliminary determination question, but it does appear to me
24 that the two elements are linked because ---

25 COMMISSIONER PALLADINO: I was suggesting that we

1 only link them to the extent that it ties to this question.

2 COMMISSIONER ASSELSTINE: That is right, but as I
3 recall, many of the comments from the States were quite
4 focused on these guidelines don't spell out with a great
5 deal of precision what the criteria are going to be,
6 particularly disqualifying criteria, criteria that will bump
7 a site out.

8 COMMISSIONER PALLADINO: I agree that we got a lot
9 of very valuable contributions last time and we made changes
10 based on those.

11 COMMISSIONER ASSELSTINE: Nor do the guidelines
12 spell out with a great deal of specificity what information
13 is needed in order to make those kinds of judgments. And we
14 did not in the changes we made really go back and change
15 that fundamental approach of the DOE guidelines. We let DOE
16 take that flexible approach. We said all right, we won't go
17 back and try and rewrite the guidelines, and I think we all
18 recognized at the time that, first, there was a lot of
19 pressure on us to get the concurrence decision done and,
20 second, it might have been fairly impractical for us to try
21 and rewrite the guidelines ourselves.

22 Rather than bump them back to DOE, I think what we
23 tried to do is provide some added assurance that this
24 process, this site selection process would work. And the way
25 we did that is to say that we want this determination made

1 after characterization rather than before when we are
2 confidence that you will have the information.

3 Now whether it is after or whether it is after
4 characterization has been largely completed in my mind
5 doesn't make a whole lot of difference. But I think the big
6 difference is before you even start to gather that
7 information.

8 I guess those are the couple of questions that I
9 had.

10 COMMISSIONER PALLADINO: Okay.

11 Fred, do you have more?

12 COMMISSIONER BERNTHAL: I just have a comment. My
13 recollection of that very useful last meeting we had with
14 the States and Indian tribes was that at least some of the
15 difficulties were based on lack of communication and the
16 language not being clear and DOE and at least some members
17 of the Commission reading things one way when they didn't
18 say that so clearly.

19 That in fact I thought was cleared up in what I
20 thought was a very useful meeting. I don't recall this
21 question of timing being the sine qua non of the whole
22 process though. Now it may be that that is what you all have
23 in the backs of your minds. I would have to go back and
24 check the transcript, but I don't recall that being raised
25 as the central issue that made these guidelines acceptable

1 to the States.

2 MR. FRISCHMAN: Once that position developed, we
3 were afraid to touch it.

4 COMMISSIONER BERNTHAL: That may well be.

5 (Laughter.)

6 That is all sort of history, and I think again I
7 have to say at this point the Commission at least has to
8 have concern that this process not be jeopardized because of
9 what could be a serious legal difficulty raised later on.
10 Again, I need to see an opinion on that.

11 MR. MURPHY: Let me suggest another concern the
12 Commission ought to have had, and that is whether or not it
13 was the sine qua none in the minds of all five voting
14 members of the Commission, that language did find its way
15 into your order and you should now be concerned with whether
16 or not you are going to allow the Department of Energy to
17 turn its back on and walk away from that order or whether or
18 not you are going to start a process to reconsider or
19 whether or not you are going to insist upon your order being
20 adhered to.

21 COMMISSIONER PALLADINO: That is our dilemma, yes.

22 Any more, Fred?

23 COMMISSIONER BERNTHAL: No.

24 COMMISSIONER PALLADINO: Lando?

25 COMMISSIONER ZECH: No, thank you.

1 COMMISSIONER PALLADINO: Well, thank you very much,
2 gentlemen. We appreciate your input. As usual, it is very
3 valuable and will be carefully considered.

4 MR. FRISCHMAN: I would like to say for all of us
5 that we very much appreciate your being willing to hear us
6 and those others who are listed on the agenda today. I think
7 it goes a long way in our appreciation of how seriously you
8 take this issue and the whole repository issue.

9 Thank you.

10 COMMISSIONER PALLADINO: All right. Thank you.

11 I am going to suggest a short break.

12 COMMISSIONER ASSELSTINE: Good idea.

13 COMMISSIONER PALLADINO: Would we all try to be
14 back here by 11:30.)

15 (Recess taken from 11:22 to 11:34.)
16
17
18
19
20
21
22
23
24
25

1 CHAIRMAN PALLADINO: Please take your seats.

2 Ladies and gentlemen, we are going to resume the
3 presentation scheduled for this topic on preliminary
4 determination.

5 At this time, I'd like to have Mr. Dave Berrick
6 from Environmental Policy Institute join us at the table.

7 MR. BERRICK: Thank you, Mr. Chairman.

8 COMMISSIONER ASSELSTINE: Joe, do you want to try
9 and do -- well, I don't know if they object, but we might
10 do the last two together?

11 CHAIRMAN PALLADINO: It was suggested by SECY that
12 they be separate, so I'll follow --

13 COMMISSIONER ASSELSTINE: Fine.

14 (Laughter)

15 CHAIRMAN PALLADINO: And they have discussed it
16 with the individuals.

17 COMMISSIONER ASSELSTINE: Great. Fine.

18 MR. BERRICK: We wouldn't care, Mr. Chairman.

19 (Laughter)

20 MR. BERRICK: Mr. Chairman, I am David Berrick,
21 representing Environmental Policy Institute this morning,
22 and also two Texas citizen groups, Stand and Power, which
23 you have allowed to make a presentation this morning. I
24 will make an oral presentation on behalf of all three
25 organizations. We will submit separate written submissions

1 to you.

2 First, Mr. Chairman, members of the Commission, we
3 do thank you for the opportunity to appear this morning.

4 I think it's important that we reiterate, as has
5 been said before, that there was an agreement. That the
6 Commission clearly in its concurrence order said that there
7 was an agreement that the Department of Energy would make a
8 preliminary determination of suitability at the close of
9 site characterization.

10 DOE acknowledges in the mission plan itself that
11 discussions at that meeting indicated a further agreement
12 on this question. We believe that for policy reasons the
13 Department of Energy does not want to pursue that
14 agreement.

15 The basic question, we feel, before the Commission
16 is, was that original agreement signed; should the
17 Commission hold to that original decision? We believe that
18 it should.

19 As the Commission discussed on June 22, 1984
20 making the preliminary determination of suitability at the
21 time of recommendation will mean that it will be made on
22 the most general of criteria and the flimsiest of data.

23 We agree with observations made by the NRC staff
24 in Attachment 3 to SECY paper 85-258 -- which I believe was
25 presented to the Commission concerning the last meeting on

1 July 29 -- where the staff noted -- and this is again
2 amplified in DOE's comments this morning and in DOE's
3 mission plan -- that they will make this preliminary
4 determination primarily on the basis of those site
5 selection guidelines that do not require site
6 characterization.

7 As the staff pointed out, those are the most
8 general kind, they are things like site ownership, for
9 example. And we would further point out that when you look
10 at Appendix 3, as was just discussed by the previous panel,
11 even those guidelines are not carried to a final
12 determinative Level 2 or Level 4 finding.

13 The Texas groups want to stress at this point that
14 there are no site-specific data on the Texas site. Mr.
15 Frischman alluded to that earlier. And that the draft
16 Environmental Assessment specifically says that no site-
17 specific data have been collected. And the Texas groups
18 contend that no site-specific data will be collected prior
19 to the decision to make a preliminary determination
20 involving the Texas sites.

21 As the Commission, we believe, found in 1984,
22 making a preliminary determination of suitability before
23 characterization reduces it to a meaningless requirement.

24 As for the legal interpretation, let me just make
25 three basic points:

1 We believe that the conclusion reached by the
2 Commission in 1984 that the decision should be made after
3 characterization is the best interpretation of Section
4 113(f).

5 Looking at the plain meaning of the section, we
6 believe it's clear that the decision should follow
7 characterization. DOE alleges that there is no timing
8 requirement in the act for when this decision should be
9 made, and we suggest that 114(f) and, as Mr. Udall and Mr.
10 Dingell in their letters to DOE and the Commission have
11 pointed out, does specifically set a time for that
12 decision, which is after completion of site
13 characterization.

14 Next, DOE and other people, including the speakers
15 this morning, talked about the question of preliminary,
16 whether or not this is a preliminary determination and
17 whether or not there is significance that should be
18 attached to the word "preliminary."

19 We would just simply suggest that looking at
20 Section 114(f) and putting it in the context of the Nuclear
21 Waste Policy Act is preliminary to a great many things,
22 including preliminary to the onset of the NEPA review
23 process itself. We cannot prepare a draft environmental
24 impact statement. We can certainly not obtain adequate
25 public comment unless we have alternatives.

1 And when we look at the structure of 113(f), it is
2 the purpose of these provisions that we are debating to
3 come up with those alternatives to run through the NEPA
4 process.

5 So it's preliminary to the onset and completion of
6 the NEPA process itself. It's preliminary to the
7 recommendation by the Secretary to the President of a final
8 site, and so on. There is a great number of following
9 decision points well before the question of even submitting
10 an application to the Department of Energy.

11 Similarly, we do not believe that this preliminary
12 determination is an independent determination. That it
13 must be taken within the context of 114(f). It's sole
14 purpose in the act is to provide those alternative sites
15 for the preparation of the EIS. It is completely redundant
16 to insert it at the point where the Department of Energy is
17 already making a recommendation decision.

18 Finally, I think it's important to address this
19 whole question of three suitable sites. I realize that
20 that's not the issue on point here as to whether or not
21 three suitable sites need to be done. But it's important
22 because DOE has raised, as has a letter you have, I think,
23 received from the Senate, raises this specter of
24 catastrophic events occurring to the repository program if
25 three suitable sites must be found after characterization.

1 First, I think it's important, again, to
2 understand that the idea that these sites have to be
3 perfect sites or that these sites have to be qualified for
4 application, for construction authorization, have no basis
5 in the statute themselves or in the legislative history to
6 our understanding.

7 They can only be -- the section can only be read
8 in the context of developing sites that are suitable for
9 the purpose of implementing NEPA. As DOE points out in the
10 mission plan, there are many additional pieces of
11 information analysis, such as a preliminary safety
12 analysis, that must be prepared before the DOE can apply
13 for a construction authorization.

14 DOE has contended, and the issue has come up
15 before, that it might have to characterize a fourth site,
16 and this has raised a number of questions for a number of
17 people.

18 Without addressing the merits, I think it's
19 important to make the argument that Mr. Rusche himself made
20 on July 29 before the Commission, that characterization of
21 a fourth site or a fifth site, or a fiftieth site, would
22 not reduce the probability of having an inadequate site to
23 zero. That that probability is certainly going to exist
24 under anyone's scenario.

25 The only way to reduce that probability is through

1 a technically conservative program, which we believe that
2 the Waste Policy Act and the NRC regulations call for. The
3 NRC itself in proposing revisions to Part 60 has suggested
4 that because of the extensive interactions in developing
5 site characterization plans, site characterization
6 activities, that there will be timely identification of
7 licensing problems. We will not find ourselves at the end
8 of the road suddenly beset by an inadequate site and
9 finding ourselves with a multi-year delay.

10 Finally, I think, it's just important to point out
11 that a fourth site will be characterized, as will a fifth
12 site probably, and that will occur in the second repository
13 program. It's not an obligation on the part of the
14 Department that can be avoided in any case.

15 Finally, just on the point of the Commission
16 action. Again, we believe that the order that the
17 Commission issued in 1984 is the best interpretation of
18 114(f) and has sound policy reasons.

19 It's not clear, however, that this issue as DOE
20 has interpreted really affects the letter of the guidelines
21 because -- and Mr. Rusche said earlier today -- the changes
22 that were made at that time struck any reference to this
23 determination in the guidelines. So, as DOE is now
24 interpreting this doesn't cast any specific alteration on
25 the guidelines themselves.

1 At this point we would suggest that the Commission
2 reaffirm, for the reasons I have discussed, its original
3 order and to continue to pursue resolution of this conflict
4 through the Nuclear Waste Policy Act procedures such as
5 comments on the mission plan, comments by the staff on the
6 project decision schedule which the Commission has already
7 forwarded and, I assume, will continue to forward.

8 Thank you.

9 CHAIRMAN PALLADINO: Thank you.

10 COMMISSIONER BERNTHAL: I will try to answer any
11 questions at this point.

12 CHAIRMAN PALLADINO: You might help me clarify
13 something with regard to the requirements of the
14 Environmental Policy Act.

15 When it says that we must address alternatives, if
16 one had addressed alternatives and the alternatives didn't
17 pan out or it may turn out that you thought they were
18 alternatives but you did examine them, does it mean you
19 must always have -- come up with alternatives? Providing
20 you have explored alternatives.

21 For example, there may be things that the nation
22 may do for which it examines alternatives and finds none of
23 them viable. Does that mean then it can't go ahead and
24 make its decision on the remaining viable one?

25 MR. BERRICK: The act goes a long way towards

1 limiting the scope of the NEPA alternatives requirement.
2 It limits the alternative sites, but it also limits issues
3 such as the timing of the repository and the technology.

4 So the act itself in 114(f) goes a long way
5 towards limiting exactly that issue. The only alternatives
6 that are left for consideration are essentially the
7 alternatives that we are trying to identify here, which are
8 those three sites which in our opinion have been
9 characterized and have been found to be preliminarily
10 suitable.

11 But we believe -- I'm sorry. But we believe that
12 is still a requirement under NEPA that those must be
13 reasonable alternatives. An unsuitable site, we doubt,
14 would suffice as a reasonable alternative.

15 CHAIRMAN PALLADINO: Yes. I was only addressing
16 the very limited question. If there are three sites that
17 are evaluated -- whenever it is done -- and it turns out
18 that one or two are not suitable but one is, is not the
19 NEPA requirement satisfied so far as evaluating
20 alternatives?

21 MR. BERRICK: We don't believe that it would be.
22 And I think that we would also point to the legislative
23 history and the scope of which Congress restricted those
24 alternatives. It clearly specified which alternatives
25 would be considered in the preparation of this EIS.

1 So, it has narrowed the issue of alternatives and
2 has defined what constitutes the alternatives. But they
3 would still have to be reasonable in terms of implementing
4 the National Environmental Policy Act.

5 CHAIRMAN PALLADINO: Let's assume they are
6 reasonable, that it was evaluated on the best information
7 available and some real effort was made to get the
8 information, and the information was gotten, and it was
9 determined that one or two of these sites is not suitable.

10 Has not NEPA's requirement be satisfied because
11 the three sites were evaluated?

12 MR. BERRICK: We would argue, no. But that would
13 not mean that a court, looking at the reasonableness test,
14 wouldn't come to an alternative conclusion.

15 CHAIRMAN PALLADINO: Well, the reason I asked the
16 question, you seemed to imply that it was very clear in
17 114(f), and I've got to admit I went over it hurriedly
18 here. I didn't find all that clarity.

19 COMMISSIONER BERNTHAL: I think the impression
20 that it's clear is created by something that in itself is
21 unclear, and that's the numbering. It happens that there
22 is a number one and a number two in this process.

23 And it is true that in 114(f) number one is
24 indicated to be the characterization, and number two
25 preliminary determination. Whether there is any meaning to

1 that in the law once again, I guess, is up to Congress or
2 the courts to decide.

3 MR. BERRICK: We would point out again to the
4 Commission that in crafting the Waste Policy Act it's very
5 clear that the Congress spent a lot of time looking at the
6 NEPA issue. The whole question about restricting NEPA in
7 the early stages; of limiting the EIS to just a single
8 point in the process indicates to us that Congress did
9 spend a lot of time looking at exactly this issue.

10 We would just have to disagree with the general
11 conclusion that the Department has that Congress just
12 somehow didn't identify more clearly what it was that was
13 intended at the only point in time where a full
14 environmental impact statement is actually required.

15 I think that you have to look at 114(f) in the
16 context of the legislation, and what was called at that time
17 the NEPA road map, to use the expression that was used in
18 the committee reports.

19 This is the only place in which the EIS was done.
20 Congress very deliberately crafted the application of NEPA
21 to this statute. I think 114(f) needs to be read carefully
22 and this subsection involving alternative sites needs to be
23 taken within that context.

24 CHAIRMAN PALLADINO: Commissioner Roberts, any
25 questions?

1 Commissioner Asselstine?

2 COMMISSIONER ASSELSTINE: Just a question nor two
3 on that point that you raised, Joe.

4 Dave, if you looked at another example, not
5 nuclear waste repositories and outside of the confines of
6 this act, isn't what Joe described basically right, what
7 NEPA requires is a good-faith look for alternatives.

8 It could well be that the conclusion would be,
9 "Well, we looked. We looked at a number of different
10 sites, for example, for nuclear power plants within the
11 service area of this particular company and we just didn't
12 find any other acceptable ones. And this is the one that
13 we are going to go forward with because when we looked,
14 various sites had different problems."

15 So, if you look just at NEPA outside of the
16 confines of the waste repository proceeding, I think he's
17 basically right; isn't he?

18 MR. BERRICK: We would concede that a court,
19 looking at that reasonableness test, may conclude --

20 COMMISSIONER ASSELSTINE: But wasn't one of the
21 key concerns of the Congress -- and I think in both the
22 House and the Senate -- that this process was very
23 complicated and very complex, and you had at least two
24 agencies, Federal agencies, involved in various aspects of
25 the decision -- DOE and NRC -- at various decision points

1 throughout the process, selecting sites, characterizing
2 sites, recommending a site or nominating a site, or
3 selecting a site to be developed for licensing process.

4 Wasn't there a lot of concern on the part of the
5 members about, "Well, how does NEPA, how is NEPA going to
6 apply this process and are we going to get ourselves into
7 endless court battles about when you have to have
8 environmental impact statements; how many environmental
9 impact statements do you have to have; which points are
10 actions that trigger EISs and which aren't?"

11 So that what the Congress was trying to do is
12 spell out how NEPA applied in this particular case to bring
13 some rationality to the process and minimize the potential
14 for endless litigation on this. Wasn't that part of what
15 the Congress was trying to do?

16 MR. BERRICK: I think that's exactly what it was
17 intended to do, and there was in every draft of the bill,
18 virtually, an effort to limit this whole question of
19 alternatives as well.

20 COMMISSIONER ASSELSTINE: Is the crux of your
21 point in terms of the clarity of the statute the fact that
22 it does require the determination either in the latter
23 stages or after characterization?

24 Does that really turn on the fact that this whole
25 discussion came about in the context of limiting and

1 defining the environmental impact statement
2 responsibilities for the repository, how the issue came
3 about and where this requirement is found in the act, and
4 the context that it's found in terms of spelling out what
5 has to be done to meet it?

6 MR. BERRICK: Essentially, that's correct. We
7 don't believe you can take that preliminary determination
8 and make it this rather independent, stand-alone
9 determination.

10 COMMISSIONER ASSELSTINE: Pull it out of the
11 context and then just shift it around wherever you want.

12 Okay, that's all I have.

13 CHAIRMAN PALLADINO: Fred?

14 COMMISSIONER BERNTHAL: Let me just ask you the
15 question that I raised a while back. It really goes to the
16 question of what remains to be done as a technical matter.
17 Let's stand aside, for a moment, from the procedural
18 questions and the legal questions.

19 What, in your judgment, would have been intended
20 technically if the preliminary determination were to wait
21 until all characterization had been done and therefore, at
22 least I think as this part of the law reads plainly, the
23 President is prepared to make application for a
24 construction authorization.

25 What else would remain to be done technically?

1 MR. BERRICK: Well, I am going to just refer you
2 to a statement made by the Department of Energy in the
3 mission plan in response to comments on this specific
4 point, page 140 of Volume 2, where they say, "The data
5 collected during site characterization will be those needed
6 to demonstrate compliance with those siting guidelines that
7 according to the act require site characterization for
8 their application.

9 "Among them are both technical guidelines as well
10 as site and system guidelines for the entire waste disposal
11 system. Compliance with each guideline is the minimum
12 requirement for site recommendation.

13 "In order to receive a construction authorization
14 from the NRC, however, DOE will need to demonstrate more
15 than compliance with the siting guidelines. It will need
16 to prepare a preliminary safety analysis report; it will
17 need to demonstrate compliance with NRC performance
18 objectives for various subsystems of the waste disposal
19 system, and submit a more detailed repository design.

20 "In order to meet those requirements, DOE will
21 need to collect some data beyond those required of the
22 demonstration of site suitability."

23 So, I am just suggesting that after
24 characterization there are additional analyses and
25 additional technical data, perhaps, on things like waste

1 forms and repository logistical systems, and other kinds of
2 things, which will have to be completed -- safety analysis -
3 - before we get to the point of going to the Commission and
4 applying for a construction authorization.

5 Furthermore, in the statute itself 114(a) -- I
6 don't have it in front of me -- but 114(a) has a list of
7 documentation and support material that the Secretary is
8 supposed to forward, I believe, to the President or the
9 President to the Congress, in making the recommendation on
10 the final site.

11 The environmental impact statement is obviously
12 one. But there is a significant, lengthy list of
13 materials. I just don't have that section in front of me.
14 It's 114(a)(1), which we would believe would require
15 additional analysis.

16 COMMISSIONER BERNTHAL: Well, it's interesting
17 that DOE itself makes that interpretation because -- I
18 don't know whether you agree or not, but to me it would
19 almost look like a plain reading of the language of the law
20 would indicate a fairly high degree of certainty at the end
21 of the characterization process before that would then lead
22 rather quickly into an application for construction
23 authorization.

24 But I think I have heard what I need to know. I
25 appreciate your opinion on that.

1 CHAIRMAN PALLADINO: Okay, Commissioner Zech?

2 COMMISSIONER ZECH: No, thank you.

3 CHAIRMAN PALLADINO: Well, thank you very much.

4 MR. BERRICK: Thank you, Mr. Chairman, and thank
5 you again on behalf of all three organizations for the
6 opportunity to make a presentation this morning.

7 CHAIRMAN PALLADINO: Well, you're welcome.
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 We will now hear from Loring Mills and Jay
2 Silberg.

3 MR. MILLS: Mr. Chairman and Commissioners, I am
4 Loring Mills, and with me this morning is Jay Silberg, our
5 legal consultant on this issue.

6 My comments will not be redundant of the prior
7 nine presenters. It has been a lengthy meeting and I will
8 try to make them brief.

9 We were intimately involved in providing utility
10 industry input during the Congressional development of the
11 Nuclear Waste Policy Act, and the Policy Act does entail
12 many compromises. Implementation of that act is of vital
13 concern to our members and the electricity ratepayers.

14 We are pleased to have this opportunity to present
15 our views on the timing of DOE's preliminary determination
16 of suitability. Making the preliminary determination is
17 quite separate from meeting the site selection guidelines.

18 We fully concur with the position of the
19 Department of Energy as set forth in the mission plan. The
20 preliminary determination should be made before DOE makes
21 its recommendation to the President of the United States, a
22 very, very insignificant step that the President needs to
23 have supported for the three sites to be selected for site
24 characterization.

25 We did submit detailed views on this when we

1
2 commended on the DOE draft mission plan, and we would like
3 to provide to you for your consideration our more recent
4 detailed written views on that.

5 we note that DOE's interpretation is consistent
6 with that of the principal Senate sponsors, the floor
7 managers of the Nuclear Waste Policy Act.

8 The final language of the Act was a McClure
9 substitute to the House-passed version. Section 114-F was
10 modified to be consistent with the Senate amendments
11 clarifying that the preliminary determination is to be based
12 on site selection guidelines, and there is no reference to
13 the results from site characterization in that regard.

14 Unfortunately, there is little formal legislative
15 history on the final version of the Nuclear Waste Policy
16 Act. Principal supporters did meet informally to agree on
17 certain amendments to the McClure substitute, a Senate
18 version of the House-passed bill.

19 Our understanding of the timing of the timing of
20 the preliminary determination when the bill was passed was
21 identical to that of Senator McClure as indicated in his
22 letter in June to the Secretary.

23 More importantly, we believe that statutorily
24 construction of the language, when placed in context of the
25 entire site selection process and the deadline mandated for
accomplishing the requirements of the Act, really leaves no

1
2 other interpretation.

3 The use of the word "preliminary" itself suggests
4 that the determination will be made at some time before the
5 completion of site characterization, and you have discussed
6 that a great deal this morning.

7 After that time, DOE is in a position to make its
8 final determination and then apply for the NRC license.
9 There are more than one final determination by any
10 particular group of bodies. There will not be someone making
11 a preliminary determination and someone else making the
12 final determination necessarily. There will be more than
13 one.

14 If the preliminary determination were to be
15 required after site characterization, the entire process of
16 site selection becomes subject to an unacceptable risk, and
17 the schedules, and the schedules are an important part of
18 the Act laid out in the Act, will not be met.

19 DOE would be required either to characterize more
20 than three sites, something inconsistent with the explicit
21 language of the Act, or face the unacceptable risk of large
22 schedule delays and high cost uncertainties should one of
23 the initial three sites be found unsuitable.

24 DOE's interpretation is the only one consistent
25 with the overall, the overall purpose, structure and mandate
of the Act. Also, DOE's interpretation of its obligation

1
2 under the statute is to be given great weight.

3 The Court of Appeals for the District of Columbia
4 recently reinforced this view in its decision affirming
5 DOE's interpretation of the one-time fee structure pursuant
6 to the Act. Here we believe the Commission should accede to
7 the interpretation of DOE, which is the principal agent
8 responsible for implementation of the Act.

9 Certainly the Commission's foremost obligation is
10 to ensure the safe isolation of nuclear waste. Yet the Act
11 also provides deadlines to all federal agencies for
12 accomplishing their responsibilities.

13 The Commission must view its responsibilities as
14 well as those of the Department of Energy in light of the
15 program objectives of the Act, including the schedules
16 mandated by Congress.

17 As to the issue before us today, we believe NRC's
18 position on the timing of the preliminary determination as
19 reflected in the comments on the draft mission plan becomes
20 untenable when all program objectives are considered.

21 Thank you.

22 Mr. Silberg and I will be pleased to answer your
23 questions.

24 COMMISSIONER PALLADINO: All right. Thank you.

25 One question. I don't think there is any dispute
about the fact that there was an agreement reached between

1
2 the Commission and DOE on the preliminary decision being
3 made after site characterization. Is there any dispute about
4 that?

5 COMMISSIONER ASSELSTINE: Well, I think between us
6 and Mr. Rusche there is a dispute.

7 COMMISSIONER PALLADINO: About whether or not ---

8 COMMISSIONER ASSELSTINE: He says there wasn't an
9 agreement, that he did not agree that the determination
10 would be made after rather than before. Our decision is
11 clear, but he has told us both today and before, whenever we
12 met a few weeks ago, that that is not what he agreed to.

13 COMMISSIONER PALLADINO: Well, okay.

14 COMMISSIONER ASSELSTINE: I agree with you. I think
15 it is clear.

16 (Laughter.)

17 COMMISSIONER PALLADINO: I think it is clear. Even
18 though my position at the time was I would rather be silent
19 on the issue, I feel that there was an agreement.

20 COMMISSIONER ASSELSTINE: That is correct.

21 COMMISSIONER ROBERTS: I think you and I were
22 silent.

23 COMMISSIONER PALLADINO: Yes. We said we wanted to
24 be silent on that issue, and that was we didn't want to take
25 a stand on that.

COMMISSIONER ASSELSTINE: I think you are

1
2 absolutely right, there was an agreement.

3 COMMISSIONER PALLADINO: But I do think there was
4 an agreement. Well, let's assume there was an agreement, or
5 at least I must say the Commission feels there was an
6 agreement. Now what is your view about having that come
7 back, since it was a part of the siting guideline review?
8 What is your view about that coming back, or having to come
9 back to the Commission for further consideration?

10 MR. MILLS: I would like to comment on that, and
11 then I would like to have Mr. Silberg kind of indicate what
12 might be an appropriate direction to proceed on to resolve
13 that question before you.

14 I was here at that hearing on June 22nd of '84
15 from a different perspective in the audience. I also read
16 the order as issued. I believe that there were different
17 interpretations of what was said at the time. Typically
18 there was more than one lawyer in the crowd.

19 (Laughter.)

20 COMMISSIONER PALLADINO: There were a few of us
21 that aren't lawyers.

22 (Laughter.)

23 MR. MILLS: And that there was some confusion. I
24 believe it was also unbalanced in the sense of some people
25 understood quite directly what was trying to be accomplished
with that decision while others did not fully understand the

1
2 significance of it at the time partly because of the amount
3 of time that they had had being involved with it. Others
4 understood it completely of what they were trying to
5 achieve.

6 Thus, do you really have any agreement when in
7 fact there was a difference of understanding of the two
8 parties that were involved?

9 COMMISSIONER BERNTHAL: I agree with you. That
10 issue simply was not front and center, and the reason it was
11 not front and center, very easy to understand, was that
12 there wasn't any argument over it. There was an agreement
13 that DOE, and Jim felt I think rather strongly at the time,
14 and since DOE acceded, and that is why it says that in our
15 concurrence, there was no argument. It simply wasn't the
16 major issue of the meeting.

17 COMMISSIONER ASSELSTINE: I think there were two
18 issues. I think there was confusion on one and there was not
19 confusion on the other.

20 One issue being, when should the preliminary
21 determination be made, I think there was an agreement on
22 that and there wasn't any confusion.

23 There was a difference of view on what the
24 significance of that was in terms of whether you had to have
25 three valid sites at the end of the process, and there I
think it was pretty clear in the discussion that we agreed

1
2 we would simply disagree and not deal with that aspect of
3 the issue.

4 But I think you may be right that there was a
5 difference in terms of background and understanding on the
6 significance.

7 COMMISSIONER PALLADINO: I didn't think there was
8 any difference with regard to the timing.

9 COMMISSIONER ASSELSTINE: That is right, there
10 wasn't.

11 COMMISSIONER PALLADINO: Even though I didn't think
12 I wanted to interject ourselves into the timing, I thought
13 there was agreement with the majority.

14 COMMISSIONER ASSELSTINE: Yes.

15 COMMISSIONER PALLADINO: Well, assuming there was,
16 then I guess I am still interested in the degree to which,
17 or at least the requirement of the Commission to draw this
18 back and re-examine its position.

19 MR. SILBERG: The guidelines themselves, as I
20 understand them, are silent on this matter at the present
21 time. We think it would be appropriate for the Commission to
22 clarify its views as expressed in its decision, the decision
23 itself not being subject to any disagreement, and to
24 indicate what the current understanding is, what DOE's
25 current position is and what NRC's current position is.

We don't think that involves a reopening of the

1
2 guidelines themselves. I think, as most people would agree,
3 this was just not a central issue in the guideline process.
4 So we don't think it is necessary that we have a wholesale
5 re-examination of everything that has been discussed.

6 I think it would be useful to clarify the record
7 and to clear the air to remove the cloud that was mentioned
8 earlier and make sure that it is clear as of today, it is
9 not a matter in the guidelines and here are the positions of
10 the parties. We think that can be done based on the record
11 developed at this meeting without a lot of additional
12 lawyering.

13 COMMISSIONER PALLADINO: Okay. Let me see if
14 Commissioner Roberts has any questions?

15 (No response.)

16 COMMISSIONER PALLADINO: Jim?

17 COMMISSIONER ASSELSTINE: Two, and I will try and
18 keep them pretty much to quick ones.

19 One is a related issue and has to do with the
20 Commission's decision in the waste confidence proceeding,
21 and I know that is something that is of vital interest to
22 you all because that is the basis for the Commission's
23 ability to continue to license plants and for our judgment
24 that plants that now have licenses can continue to generate
25 spent fuel.

I think, as you will recall, a very important

1
2 basis or element in the Commission's waste confidence
3 decision was our reliance upon the enactment of the Nuclear
4 Waste Policy Act and that this provided a framework that
5 would really move us towards a successful solution to the
6 waste problem and on a timely basis within the confines of
7 the time periods that were defined by the Court in the waste
8 confidence proceeding.

9 One of the comments that we received back when we
10 put the proposed waste confidence decision out for comment
11 was wait a minute, you can't put such heavy reliance on the
12 Nuclear Waste Policy Act. There are ambiguities and
13 questions of interpretation about what the Act means and how
14 this process is all going to work.

15 And the Commission in its waste confidence
16 decision says well, you know, we have looked at this and we
17 don't see a big problem here. For example, the only area
18 where people had suggested perhaps that there might be an
19 ambiguity was on the timing of this preliminary
20 determination.

21 We have worked out this agreement with DOE where
22 we have resolved that issue and we don't see any
23 ambiguities, and that is the basis for our conclusion that
24 our judgment is right in the waste confidence proceeding
25 that the Act really does move us forward substantially in
resolving this problem and solving it on a timely basis.

1
2 I guess what I am concerned about is doesn't the
3 mere fact that now we have this ambiguity and now we have an
4 open dispute over the timing of the preliminary
5 determination, doesn't that call into question the validity
6 of the Commission's waste confidence decision and reopen
7 that whole matter that I think is probably of vital interest
8 to your member companies? It seems to me it does, but I
9 would be interested in your reaction to it, and I am going
10 to ask our staff the same question.

11 MR. SILBERG: Without going back, and I don't have
12 the text of the decision in front of me, again it would not
13 appear to me that the timing of the preliminary decision is
14 of such central interest to the viability of the nuclear
15 waste program and the Nuclear Waste Policy Act as a basis
16 for your waste confidence decision that a change on that
17 issue would necessarily reopen the waste confidence
18 decision.

19 There are indeed going to be lots of matters which
20 will come up for challenge as people go down the road
21 implementing the Nuclear Waste Policy Act. There have
22 already been a number of lawsuits and there will be more, I
23 can assure you.

24 The fact that people may dispute on issue
25 involving implementation of the Act doesn't mean that the
process isn't moving along. Indeed, I think everyone would

1 agree that the process is moving along. It may not be at the
2 speed that some people would like, it may be too fast for
3 some and not fast enough for others, but I don't see any
4 wholesale change in the nature of the program that would
5 such that would undercut the underlying basis for the waste
6 confidence decision.

7 MR. MILLS: I would like to add a comment. I do not
8 recall when the Commission finally made its waste confidence
9 rulemaking determination.

10 COMMISSIONER ASSELSTINE: August 31st, 1984.

11 MR. MILLS: It was almost a year ago at this point.
12 I thought that the elaboration that you made and putting as
13 much emphasis on the preliminary determination may have been
14 a small element of that consideration. But I suggest that
15 there were a great many other considerations and that was
16 not a preemptive sort of element.

17 COMMISSIONER ASSELSTINE: I think that the emphasis
18 on the Act and the benefits that the Act provides in terms
19 of providing greater assurance that in fact there will be a
20 solution available within the time specified by the Courts
21 is something that was a fairly central element of the
22 decision.

23 This is one of the two items that the Commission
24 chose to address specifically in answering the charge that
25 wait a minute, you can't put that heavy a reliance on the

1
2 Act. The Act itself creates questions and uncertainties and
3 ambiguities. So how strong a one this is, I don't know, but
4 this is only one of only two examples that the Commission
5 specifically referred to in saying that is not a problem.
6 But you might want to take a look specifically at that
7 reference because it is something that is I guess of concern
8 to me.

9 The other question I had is a somewhat broader
10 one, and maybe you have addressed it to the extent of your
11 answer, but when I go back to the situation a year or so ago
12 and I look at where we are now in terms of the concerns that
13 the States have about the site selection process and how the
14 guidelines are being applied and interpreted, I recall a
15 statement that somebody made to me shortly after the Waste
16 Policy Act was enacted.

17 They said to me, well now we have got the
18 framework and the challenge is to make it work, and to a
19 certain extent that is tied into the waste confidence
20 decision.

21 I wonder whether you are at all concerned or
22 troubled by the fact that at this early stage in the process
23 we seem to have, particularly with reopening this question,
24 such fundamental disagreements between the States and it
25 seems to be virtually all of the States, on the one hand,
and the Indian tribes and the Department of Energy on the

1
2 other, on how the site selection process is moving forward
3 to the extent of the number of lawsuits that have already
4 been filed in the process?

5 I guess to what extent are you concerned that the
6 way this process is being implemented and the way the
7 framework is being implemented, particularly on the site
8 selection part of things that we are losing the kind of
9 consensus that seems to me so important to making that
10 framework work and achieve a successful result at the end,
11 the successful result that we all want, which is a good,
12 safe repository located in an adequate area?

13 MR. MILLS: Commissioner, there is no question that
14 we have some concern about the process and we also have
15 concern about the schedule, both of which were defined in
16 the Act as it was passed. It was debated a significant
17 amount at the time of the development of the Act that the
18 prolonged effort could go on for an indeterminate period
19 unless Congress established some time periods under which
20 things should be achieved.

21 In the earlier drafts of the legislation there
22 were much shorter times than there are in the final draft of
23 the Act, and that was debated and of great concern. We are
24 comfortable that there are deadlines or at least scheduled
25 components provided. We are uncomfortable that they are not
all being met.

1
2 We see these many challenges that are taking place
3 as almost more in line with how can I impact the schedule
4 rather than how can I achieve a solution, and that is
5 disturbing to us.

6 We view some of these lawsuits in that category.
7 We want the process to go forward, and we believe it is very
8 significant to get this one behind us. We believe that an
9 understanding between the Nuclear Regulatory Commission and
10 the Department of Energy on this would be appropriate. We
11 also recognize that it is really the Department of Energy's
12 responsibility to make the preliminary determination and to
13 make their recommendation to the President for selecting the
14 three sites.

15 There will be a number of decision points through
16 the process which will be challenged. I expect that if this
17 were not one, there might be another. We are concerned about
18 the schedule and are concerned about the site selection
19 process. We do believe the site selection guidelines, which
20 were concurred in by the NRC a year ago, are appropriate,
21 and we believe there should be all effort to implement them.

22 MR. SILBERG: I think while we would all like to
23 see a process that works smoothly without litigation, I
24 don't think any of us assumed that that would happen, and
25 indeed the Nuclear Waste Policy Act as Congress enacted it
was based on the assumption that there would be disputes and

1
2 there would be litigation.

3 So the fact that people are in disagreement, and
4 the fact that people are in Court doesn't mean that the
5 process isn't working. Congress in fact put in judicial
6 review provisions and put in the expedited judicial review
7 provisions and put in a NEPA road map recognizing that there
8 were to be these disputes and providing a mechanism to
9 resolve them.

10 I wouldn't give up hope certainly. Indeed, one
11 could argue that the process is working now exactly the way
12 the Congress thought it was going to work. We all hope that
13 it will work smoothly, but that doesn't mean that the
14 process isn't working.

15 COMMISSIONER PALLADINO: May I make a comment with
16 regard to waste confidence. I would urge us not to abandon
17 the waste confidence document as problems are uncovered
18 unless they are so great that the basis for the waste
19 confidence document is completely destroyed. I haven't
20 reached such a point and I think it is something we ought to
21 think about carefully. Maybe I will stop there.

22 MR. MILLS: I concur with that, Mr. Chairman. I
23 would also comment on a dialogue that went on a few minutes
24 ago about the environmental impact statement requirements.

25 I believe early on in the drafting of the
legislation before it was passed there was one list put

1
2 together of perhaps 27 different EIS's that would have had
3 to have been made in order to achieve the process as
4 originally conceived.

5 A great deal of work went on in this area to
6 assure that that was not the roadblock in getting on with
7 the Act, and I think the Act is fairly clear in that regard
8 on how to proceed without running through an impossible
9 maze.

10 COMMISSIONER PALLADINO: Do you have more?

11 COMMISSIONER ASSELSTINE: No.

12 COMMISSIONER PALLADINO: Fred.

13 COMMISSIONER BERNTHAL: No.

14 COMMISSIONER PALLADINO: Lando?

15 COMMISSIONER ZECH: No. I would just like to thank
16 all the participants for a very useful discussion on a very,
17 very important matter, and I thank them very much, all of
18 them.

19 COMMISSIONER PALLADINO: I think we all share your
20 view on that.

21 Well, we thank you, Mr. Mills and Mr. Silberg.

22 MR. MILLS: Thank you.

23 COMMISSIONER PALLADINO: Now, let's see, we did not
24 plan a presentation by the staff, but if there are
25 Commissioner questions, we do have at least two
representatives from the staff and perhaps more who would be

1
2 willing to try to respond.

3 I gather you had some.

4 COMMISSIONER ASSELSTINE: I have a couple, yes.

5 COMMISSIONER PALLADINO: Did you have any questions
6 also for the staff?

7 COMMISSIONER ZECH: No.

8 COMMISSIONER PALLADINO: Did you?

9 COMMISSIONER ROBERTS: No.

10 COMMISSIONER PALLADINO: Fred?

11 COMMISSIONER BERNTHAL: I may. I have a comment or
12 two, or a request.

13 COMMISSIONER PALLADINO: Okay. Go ahead.

14 Welcome, gentlemen.

15 COMMISSIONER ASSELSTINE: I guess I had one sort of
16 technical question and a couple of sort of legal questions.

17 On the technical side, one of the things that we
18 heard from the States is the amount of information that is
19 available now, particularly on some of these sites, is
20 really quite limited and there are a good deal of
21 uncertainties about that information. The States were saying
22 they just didn't see how you could make a determination,
23 whether you call it preliminary or final or whatever, a
24 determination of site suitability.

25 I guess I would be interested in the staff's view
of how comfortable they are from a technical standpoint with

1
2 the level of information on some of these sites and the
3 ability to make a determination, whether you want to call it
4 preliminary or final, a determination on site suitability?

5 And I guess I would raise with you the same
6 question I raised early on in the morning, and that is when
7 I look at our regulations and the definition of site
8 characterization, it seems to be saying that the kind of
9 detailed activities that will go on during site
10 characterization are to develop the information needed to
11 make a determination on site suitability.

12 I guess I would ask for your comments both on that
13 and on the level of uncertainties and the limited
14 information that is now available on the various sites since
15 you all have gone through the draft environmental
16 assessments.

17 MR. BROWNING: Well, clearly, the amount of
18 information and the data available today is nowhere near
19 necessary to make a licensing decision. In fact, in most of
20 the cases, except for the case of Hanford where a draft site
21 characterization report had been prepared early in the
22 process, we have not yet seen the DOE's detailed plans for
23 characterizing the sites. Each one will probably be
24 different to some extent.

25 So clearly there is a level of uncertainty
inherent in the amount of information you have for making

1
2 any kind of a decision, even a decision to pick which site
3 to make the investment decision to continue characterizing
4 the sites which, as Mr. Rusche point out, is a very expensive
5 proposition and it requires a lot of consideration. But that
6 is their decision at this stage of the game.

7 I might defer to Hub Miller, whose people have
8 done the detailed technical evaluations of each of the nine
9 sites represented by the nine draft environmental
10 assessments to get any more detail with regard to the
11 technical data that is available for specific sites.

12 It varies from site to site. The sites that are
13 currently under federal control clearly have the major
14 amount of data. From our technical standpoint, we would like
15 to see the process continue where the data is generated
16 necessary to make the decisions. So anything that could be
17 done to keep the process going so DOE can continue to
18 collect the data necessary to make these key decisions is
19 going to be very important.

20 MR. MILLER: I wouldn't say anything other than
21 that, as Bob said, at each of the sites there is significant
22 uncertainty about key site parameters, and it won't be until
23 site characterization is conducted that we will resolve
24 issues relating to the geologic related site suitability
25 questions. I don't know how else to say it. The only
benchmark to use really is relative to what is needed for

1
2 licensing and, as Bob said, we have got far less than what
3 we will need for that certainly.

4 COMMISSIONER ASSELSTINE: Bill, my second question
5 I think really goes to you, and that is DOE has this
6 approach, and they want to make the preliminary
7 determination early at the time that they recommend the
8 three sites for characterization.

9 Particularly given the potential that what we
10 could end up with is a license application where only one or
11 perhaps two of the three sites, but potentially only one of
12 the three sites is still valid at the time that they come in
13 with the license application and that the other two
14 alternatives wash out, do you think that approach is
15 consistent with the Nuclear Waste Policy Act as a whole, and
16 what potential difficulties do you see for our NEPA
17 responsibilities under the Act?

18 MR. OLMSTEAD: You hand me a loaded question that
19 is hypothetically phrased so that I have to say that I don't
20 think that we could forward at that point.

21 I have to say that the one place I disagree with
22 the DOE in this process is in equating the preliminary
23 determination for purposes of 114-F with the nomination of
24 three sites for characterization in the Act. I do not think
25 that those are the same activities.

I think they have a lot of discretion as to where

1 for the preparation of an environmental impact statement,
2 which is what the 114-F finding is.

3 I have a lot of trouble with the after-the-fact
4 legislative history we have been getting because in the 10th
5 Circuit, which is not exactly a liberal bastion, they just
6 threw out the in the mill tailings case all of the
7 after-the-fact letters that were written by Congress as
8 inappropriate for consideration in interpreting the statute.

9 So we have to look to the Congressional record. It
10 is not really clear. It was on two days, one day in the
11 House and one day in the Senate in the closing days of the
12 session. And on the Senate side you don't find much, but you
13 do find an interesting statement by Senator Simpson to the
14 effect that out of the five sites, two that weren't selected
15 as three to go forward with the characterization, couldn't
16 be used for the second repository in the selection of five
17 sites. But the two that were characterized but not
18 recommended for the application for the repository could be
19 used as one of the three sites for characterization for the
20 second repository.

21 COMMISSIONER ASSELSTINE: So that supports the
22 House interpretation, doesn't it?

23 MR. OLMSTEAD: That clearly supports the view that
24 they need to be suitable for development as repositories
25 after characterization.

1 COMMISSIONER ASSELSTINE: That is interesting. I
2 take it your criticism of after-the-fact attempts to provide
3 after-the-fact legislative history, that is, here is what we
4 intended the law to do, that criticism goes primarily to the
5 Senate letter, does it not, as opposed to the House letter?

6 MR. OLMSTEAD: Right.

7 (Laughter.)

8 I have to say that what I think they intended was
9 they understood that the Nuclear Regulatory Commission had
10 had a lot of litigation of alternative sites, and that there
11 was going to be a huge problem with alternative sites if
12 they didn't do something.

13 COMMISSIONER ASSELSTINE: Right.

14 MR. OLMSTEAD: And so they wanted to define the
15 process by which those alternatives were going to be weaned
16 out and deemed acceptable for purposes of the environmental
17 impact statement.

18 They didn't have a very good idea about how all
19 that process worked. I don't think any of them did, except
20 that they knew that at some point the Secretary had to
21 prepare a draft impact statement and he had to have a final
22 impact statement and something could happen between those
23 two points.

24 So they didn't want something that came in as a
25 part of the comment process in the final impact statement

1 and going forward with the licensing application to impact
2 the schedule.

3 So I think the reason they said preliminary
4 determination, they were referring to the decision of the
5 Secretary at the time he decided to prepare the impact
6 statement in the three sites, because that impact statement
7 is going to start pointing at one, and he didn't want Courts
8 getting in there and telling him he couldn't do that.

9 So that is why I have always viewed him to have a
10 great deal of discretion during site characterization about
11 when he makes the determination of which site is going to be
12 the site under 113 that he submits as an application to us.
13 And the information developed subsequent to that I don't
14 think affects our ability to adopt the impact statement.

15 But if he takes a risk and does it at the time he
16 nominates three sites, and two weeks into nomination one of
17 the sites falls out, I think that we have problems. But I am
18 just trying to give it a reasonable reading. I am not trying
19 to tell you it is absolutely clear.

20 COMMISSIONER ASSELSTINE: Right. The last question
21 I have I guess is the waste confidence decision question.
22 You heard my question to Loring Mills and Jay Silberg. To
23 what extent do you think that this raises or at least calls
24 into question that aspect of the waste confidence decision
25 where we specifically say, hey, we don't see ambiguities,

1 and to the extent that people pointed out any, we resolved
2 that one. We worked it out.

3 MR. OLMSTEAD: Well, I have to admit, I don't have
4 a lot of insight into why that language got into the waste
5 confidence proceeding because OPE and OGC and the five
6 Commissioners were the ones ---

7 COMMISSIONER ASSELSTINE: But it is there.

8 (Laughter.)

9 MR. OLMSTEAD: I assumed at the time it was an
10 effort in recognition of the agreement that was reached or
11 that the Commission had put in the concurrence decision to
12 say to the public, hey, we don't have to worry about this.
13 We have real confidence that we are going to have good
14 sites. But beyond that, I haven't looked at that for a lot
15 of months, and I don't want to speculate.

16 COMMISSIONER ASSELSTINE: I hadn't either, quite
17 frankly, until very recently. I thought that whole issue was
18 settled, but these issues have a way of unsettling
19 themselves.

20 I guess that is all I have.

21 COMMISSIONER PALLADINO: Okay.

22 Fred, do you have any questions?

23 COMMISSIONER BERNTHAL: No, I have a comment or
24 two, but let's finish the questions here.

25 COMMISSIONER PALLADINO: All right. Are you through

1 with the staff?

2 COMMISSIONER ASSELSTINE: Yes.

3 COMMISSIONER PALLADINO: Well, thank you very much.

4 Let me express the Commission's gratitude to all
5 of the participants in this morning's session. I know I got
6 a lot of insight that I didn't have when I came in, and I am
7 sure all of us have benefitted.

8 We do thank you all.

9 Now there is a question as to when the submittals
10 that people said they were going to send in should come in.
11 I haven't thought about a specific date, but it certainly
12 should be as soon as possible so that we can make our
13 decision. If it could be done by the middle of next week, it
14 would be very beneficial to us.

15 Now are there other comments?

16 COMMISSIONER BERNTHAL: I had one question
17 actually, if we can take a minute, for DOE, and that is an
18 inquiry as to the status of the site characterization work
19 as of today. How would you characterize the status of that
20 site characterization work?

21 MR. RUSCHE: There is considerable work that has
22 been done at the two federally owned sites and no literal
23 onsite work at other sites, although there has been some
24 limited investigation.

25 I would say that as of the moment there is no site

1 characterization work going on. The site characterization
2 effort is the next step in the process after selection of
3 sites, and the development of site characterization plans,
4 which is an intensive activity involving your staff, States
5 and others.

6 It will be only when we reach that threshold that
7 we would begin actual site characterization work under the
8 Act.

9 COMMISSIONER BERNTHAL: So right now you are still
10 waiting for this preliminary step to be completed then?

11 MR. RUSCHE: We are waiting for the completion of
12 the environmental assessments and the nomination by the
13 Secretary of five sites and the recommendation of three
14 sites which should occur next year unless we find ourselves
15 in some other environment.

16 COMMISSIONER BERNTHAL: Okay. That is all I have.

17 COMMISSIONER PALLADINO: Thank you very much, Ben.

18 Well, we again express our appreciation to all
19 participants, and we will stand adjourned.

20 (Whereupon, at 12:30 p.m., the meeting adjourned.)

21 * * * * *

1 CERTIFICATE OF OFFICIAL REPORTER

2
3
4
5 This is to certify that the attached proceedings
6 before the United States Nuclear Regulatory Commission in the
7 matter of Commission Meeting
8

9 Name of Proceeding: Oral Presentation on Timing of DOE's
10 Preliminary Determination on Suitability
of Sites for Development of Repositories
(Public Meeting)

11 Docket No.:

12 Place: Washington, D. C.

13 Date: Friday, September 6, 1985
14

15 were held as herein appears and that this is the original
16 transcript thereof for the file of the United States Nuclear
17 Regulatory Commission.
18

19 (Signature)

(Typed Name of Reporter) Mary C. Simons

20
21
22
23 Ann Riley & Associates, Ltd.
24
25

9/6/85

SCHEDULING NOTES

TITLE: ORAL PRESENTATIONS ON TIMING OF DOE'S PRELIMINARY DETERMINATION
ON SUITABILITY OF SITES FOR DEVELOPMENT AS REPOSITORIES

SCHEDULED: 9:30 A.M., FRIDAY, SEPTEMBER 6, 1985 (OPEN)

DURATION: APPROX 2-1/2 HRS

PARTICIPANTS: ° BEN RUSCHE
(5 MIN EACH) DOE

° RON HALF MOON
NEZ PERCE INDIANS (IDAHO)

° DEAN TOUSLEY
YAKIMA INDIANS (WASHINGTON)

° TOM LEHMAN
STATE OF MINNESOTA

° MALACHAI MURPHY
STATE OF NEVADA

° STEVE FRISCHMAN

TESTIMONY OF DEL WHITE AND RON HALFMOON,
NEZ PERCE TRIBE OF IDAHO, BEFORE THE
UNITED STATES NUCLEAR REGULATORY COMMISSION

SEPTEMBER 6, 1985

Mr. Chairman, members of the Commission, we are pleased to have this opportunity to present the views of the Nez Perce Tribe, which has been designated an affected Indian tribe under the Nuclear Waste Policy Act with regard to the Hanford site, on the matter of whether section 114(f) of the Act requires the Department of Energy to conduct characterization activities at potential repository sites before making a preliminary determination of the suitability of such sites.

The legal issue presented by section 114(f) is complex and interesting, but does not lend itself to a definite answer. The Commission has available its own legal experts to dissect that issue, however, and undoubtedly will be presented with a large amount of legal research on the matter. In our view, the section is ambiguous at best. We wish to focus, therefore, on considerations other than the precise statutory construction of section 114(f).

We would note first that DOE seems to be reneging on a commitment made to this Commission and to the public that characterization would occur prior to any preliminary determination of suitability. As you well know, the Commission's concurrence - not advice, but concurrence - in the siting guidelines is required by the Act. Our reading of the Commission's Concurrence Decision of July 10 is that

characterization must occur before any preliminary determination of suitability. In fact, the Concurrence Decision cannot be read any other way. If DOE did not agree with the Commission's explanation of the agreement reached in June of 1984, it should have said so. DOE's current position creates at least two significant problems.

First, it calls into question the validity of DOE's siting guidelines. Because the Commission must concur in the siting guidelines, and because DOE now intends to violate a specific term of the Commission's written concurrence, the validity of DOE's plan of operation is open to question. In fact, DOE has practically asked to be sued on the matter, and almost certainly will be sued.

Second, when NRC announces that DOE has agreed to something, and DOE much later denies that agreement, public confidence in the process - including the confidence of the Nez Perce Tribe - is shaken. The only way to minimize the inevitable controversy is to show the public that when DOE and NRC say a certain procedure will be followed, it will be followed. Shifting and contradictory interpretations and agreements undermine the credibility of both agencies and, therefore, diminish public confidence in the process.

From a policy perspective, we believe that characterization prior to preliminary determination is the more sound procedure. Congress must have wanted the preliminary determination to be a decision of some significance. And if the decision is a

significant one, it obviously should be made only on the basis of the greatest possible amount of information. The process of characterization yields information and, therefore, should precede significant decisions whenever possible, including the preliminary determination. In this way, the protection of public health and safety is better served.

Finally, as a practical matter, the Commission and DOE will spare themselves a number of problems by agreeing that characterization will precede the preliminary determination. As we have noted, the existing situation invites litigation and is a demerit on the record of the program. Unlike many problems, however, these are capable of correction. If DOE and the Commission simply agree that characterization will precede the preliminary determination, the problems we have discussed will disappear and no new problems from such a decision are readily foreseeable.

We would be happy to respond to any questions you may have.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

NRC's Posture Concerning the
Department of Energy's Timing of
the Preliminary Determination of
Suitability for Development of a
Site as a Repository Under Section
114(f) of the Nuclear Waste Policy
Act of 1982

42 U.S.C. § 10134(f)
49 Fed. Reg. 28130

VIEWS OF THE YAKIMA INDIAN NATION

On July 10, 1984, following an extensive process, the NRC published in the Federal Register its final concurrence (49 Fed. Reg. 28130) in the Department of Energy's general guidelines for the selection of high-level radioactive waste repository sites (10 CFR Part 960) pursuant to section 112(a) of the Nuclear Waste Policy Act of 1982 ("NWPA"), 42 U.S.C. § 10132(a). Before giving its final concurrence, the Commission had requested DOE to make several substantial changes to the guidelines as they had been submitted to the Commission.

Among the issues for which the Commission ultimately sought improvements in the siting guidelines was the timing of DOE's preliminary determination of suitability of a prospective site for development as a repository pursuant to section 114(f) of the NWPA. That section of the Act states, in part:

For purposes of complying with the requirements of the National Environmental Policy Act of 1969 ... and this section, the Secretary shall consider as alternate sites for the first repository to be developed under this subtitle 3 candidate sites with respect to which (1) site characteri-

zation has been completed under section 113; and (2) the Secretary has made a preliminary determination, that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 112(a).

In the revised guidelines which DOE submitted to NRC following the Commission's preliminary concurrence decision and extensive interactions between the two agencies, DOE had on its own initiative inserted language in the guidelines to the effect that the preliminary determination of suitability would be made prior to site characterization, at the time that three sites are recommended for characterization. Numerous interested parties objected to DOE's interpretation, as it goes against the natural meaning of the statutory language, which requires first characterization of at least three sites, then a preliminary determination of suitability, in that order. Moreover, because of another provision in section 114(f), DOE's position has serious adverse implications for the Commission's ability to comply with its obligations under the National Environmental Policy Act of 1969 ("NEPA").

At its June 22, 1984 public meeting concerning final concurrence in the guidelines, the timing of the preliminary determination of suitability was a major, if not the major, topic of discussion. Most of the representatives of affected States and Indian Tribes that addressed the Commissioners that day, including the Yakima Indian Nation, expressed strong support for the position that the preliminary determination of suitability should be made after site characterization was completed, and a host of reasons was offered in support of that position. Commissioner Asselstine, with the apparent support of Commissioners Gilinsky and Bernthal and the abstention of Chairman Palladino and Commissioner Roberts, urged DOE Office of Civilian Radioactive Waste Management Director Benard Rusche to accede to the view that the preliminary determination of suitability should come after characterization, and there should still be three apparently suitable sites at that time.

At that June 22 meeting, Mr. Rusche quite clearly agreed to the first request, concerning the timing of the determination, and declined to accede to the second, concerning the number of suitable sites that must be found at that time. As to the latter issue, Commissioner Asselstine and Mr. Rusche agreed to disagree, leaving resolution for a later time. But as to the timing, Mr. Rusche's concession was unmistakable. The Commission's final concurrence decision agrees completely with this version of the events at that June 22 meeting, stating:

At the June 22, 1984 Commission meeting, the Commission and DOE agreed that the preliminary determination required by section 114(f) of the NWPA should be made after the

completion of site characterization and not at the time of site nomination and recommendation. The Commission and DOE therefore agree that the last sentence of the first full paragraph in § 960.3-2-3 of Subpart B should be deleted.

49 Fed. Reg. at 28139, col. 3. DOE now takes the following incredible position, explicated by Mr. Rusche at his July 29, 1985 briefing for the Commissioners, concerning the meaning of this passage:

- 1) The first sentence quoted above has no effect.
- 2) The effect of the second sentence is that, while DOE must take the statement of its preferred interpretation out of the guidelines, it is perfectly acceptable to put the very same provision in the Mission Plan. (The Commission, coincidentally, has no concurrence authority over the latter.)
- 3) DOE did not bring to the Commission's attention its disagreement with the obviously inconsistent language of the concurrence decision because the Department supposedly did not see any inconsistency.

In sum, DOE takes the position that the only thing agreed to at the June 22, 1984 meeting with respect to this subject was that its resolution should be deferred to a later time. We submit that this conclusion cannot be reached from a reading of the transcript of that meeting, or from the concurrence decision.

The Merits

The Yakima Indian Nation presented its arguments in support of Commissioner Asselstine's view of this provision at the June 22, 1984 meeting, but they bear reviewing here. The first and controlling reason for interpreting section 114(f) to require the preliminary determination of suitability after site characterization is that the plain meaning rule of statutory construction requires this interpretation. The NWPA essentially curtails the effect of NEPA until the stage when DOE applies to NRC for authorization to construct a repository. Only at that stage must DOE prepare a NEPA environmental impact statement, which must, to the extent practicable, be adopted by the Commission as part of its licensing. The consideration of alternatives in the EIS, which has been repeatedly held to be the very heart of NEPA compliance, is to be limited to those three sites which have been characterized and preliminarily determined to be suitable, in that order.

While Congress limited the general environmental law of the land by delaying NEPA implementation, Congress retained the driving force of NEPA by requiring that viable alternatives be

considered by the decision-makers. The seminal consideration of alternatives must still be a serious undertaking in the EIS for a repository. DOE's interpretation would mean that the EIS alternatives could consist of DOE's preferred site plus two sites which characterization has shown to be unsuitable. That clearly would not satisfy the NEPA requirement for a meaningful consideration of alternatives. Moreover, it would prevent the NRC from adopting DOE's EIS, thus causing a major delay in the waste disposal program.

A meaningful consideration of alternatives requires that the alternatives be viable ones at the time when the EIS is being drafted, which is at the end of site characterization. It is inconceivable that an EIS could be found acceptable if the alternatives it considers were deemed suitable five years earlier, but are known at the time of EIS preparation, on the basis of characterization, to be unsuitable. Yet this is precisely the implication of DOE's interpretation of this passage.

Finally, the Yakima Indian Nation feels very strongly that the post-characterization timing of the preliminary determination of suitability is called for in order to provide an incentive for DOE to select the best possible sites for characterization. If DOE knows that it must have three suitable sites at the end of characterization in order to submit a suitable EIS, it will have a strong incentive to choose the best sites it can for characterization. It is apparent from the draft environmental assessments and the sites proposed to be recommended for characterization therein that the current lack of such an incentive poses a serious threat to the prospects for successful accomplishment of this program's objectives.

Since the Environmental Protection Agency has eliminated from its environmental standards in 40 CFR Part 191 any assurance requirement calling on DOE to select sites so as to keep radioactive releases as low as reasonably achievable, there is no remaining provision in the implementing regulations of any of the three involved agencies which call for excellence in site selection. Mere "suitability" is the only standard that DOE feels compelled to satisfy.

We submit that in light of the enormous uncertainties and unprecedented time frames of concern in this program, our twentieth century subjective findings of absolute suitability of a site do not provide sufficient assurance that any site will in fact isolate wastes from the environment for a long enough time. The additional comparative finding that the chosen site is among the best that can be found substantially improves confidence that isolation will be successful. DOE must have three suitable sites at the end of characterization, as required by the language of the statute, in order to satisfy its and the Commission's NEPA

obligations. This requirement supplies a strong incentive for DOE to choose for characterization sites that are among the best that can be found.

Conclusion

The clear understanding which was apparent at the end of the June 22, 1984 meeting and in the Commission's final concurrence decision with respect to this matter was very significant to the Yakima Nation. It contributed substantially to a conclusion by us that our extensive participation in the Commission's concurrence process had been a worthwhile pursuit and that the process had yielded important improvements in the siting guidelines and the likelihood of a successful waste program generally. If the Commission reneges on this understanding now, it will greatly degrade that sense of accomplishment on our part.

The Yakima Indian Nation urges the Commission, consistent with the plain meaning of the language in section 114(f) of the NWPA and its NEPA obligations as modified by the Act, to retain the current language of its concurrence decision and require DOE to accede to the position it already agreed to at the June 22, 1984 Commission meeting; i.e., that the timing of the preliminary determination of suitability should be after site characterization.

We thank you for this opportunity to restate and amplify our views concerning this important issue.

TESTIMONY OF
GREGG S. LARSON
DIRECTOR
HIGH-LEVEL RADIOACTIVE WASTE PROGRAM
STATE OF MINNESOTA

BEFORE
U.S. NUCLEAR REGULATORY COMMISSION

SEPTEMBER 6, 1985

Mr. Chairman and Members of the Commission:

I am Gregg Larson, Director of the High-Level Radioactive Waste Program for the State of Minnesota. I want to thank you for your invitation to testify here today. I am confident that it reflects the Commission's sincere desire to solicit and fully consider the views of the affected states and tribes on the provisions of Section 114(f) of the Nuclear Waste Policy Act (42 U.S.C 10134) and on the Commission's final concurrence with the Department of Energy's (DOE) siting guidelines.

On one hand, it is a surprise that the issue of the timing of the preliminary determination of site suitability is again before the Commission because the parties that participated in the concurrence proceedings, and apparently Commission members and staff, had considered the issue resolved. On the other hand, it is not surprising given DOE's propensity for policy reversal.

The State of Minnesota urges that the Commission reaffirm the agreement that was reached with DOE during the June 22, 1984, meeting on final concurrence with the siting guidelines. We do so for the following two reasons:

First, it is clear from the record of the proceedings, the decision notice in the Federal Register, and the subsequent Commission comments on DOE's draft Mission Plan, that the Commission had concluded that DOE agreed to delete language from Section 960.3-2-3 of the guidelines requiring a preliminary determination of suitability at the time sites are recommended for characterization. It also is clear that the Commission expected the final Mission Plan to reflect the agreement that the preliminary determination would be made after completion of site characterization. It is difficult to escape the fact that, even if the record was determined to be ambiguous, which it is not, the Commission acted on the belief that there was an agreement with DOE.

Our second reason for urging reaffirmation of the agreement is based on the view that the Commission position on this issue is logical, justifiable, and based on common sense. In the long run, it will benefit the nuclear waste program and the Commission's licensing process.

The question of whether or not alternative sites are a necessary component of final site selection should not be a difficult one to resolve. Minnesota supports the Commission's concurrence position because a determination at the end of characterization is the best way to guarantee that there will be

back-up sites. Not only will this ensure that the Commission is not presented with a fait accompli at the time of licensing, if only one site survives characterization, but it also will contribute to schedule certainty by providing back-ups in the event that sites being characterized are judged unsuitable. The latter advantage is emphasized in the recent report on the nuclear waste program that was prepared by the Office of Technology Assessment.

Furthermore, as a second repository state, we want to stress the importance of maintaining geologic media options. In limiting the current second repository program to granite, DOE has put all its eggs in one basket. DOE has argued that consideration of a variety of geologic media for a second repository, as required in Section 112(a) of the Act, could occur through nomination of sites that were characterized, but not selected for the final first repository site, as provided for in Section 112(b)(1)(C). There is no certainty, however, that such sites would be available if the preliminary determination is made at the start of characterization.

Commission staff concern over the Environmental Impact Statement (EIS) implications of the DOE position is also warranted. If the EIS lacks reasonable alternatives, it would fail to meet the requirements of the National Environmental Policy Act and the Nuclear Waste Policy Act, and adoption by the Commission would be

precluded. The EIS implications have a public, as well as legal, dimension because of the importance that the interested public normally ascribes to full and rigorous EIS analysis of alternatives.

Finally, the preliminary determination of suitability is "the tail that wags the dog" in the siting program. Recognition that the determination must be made at the end of characterization is a compelling incentive for DOE to recommend the best possible sites for characterization. It would be a very visible demonstration of DOE's often repeated intention to eliminate flawed sites as early as possible in order to focus on sites that hold the greatest promise of suitability.

As the licensing agency, it is particularly important that the Commission continue to be viewed as an independent entity that does not vacillate under pressure on key policy issues. Commission failure to reaffirm this agreement and condition of concurrence will set a precedent for disregard of other concurrence conditions, damage the credibility of the Commission, and contribute to the perception that the Commission will readily bend and cede authority to DOE when conflicts arise. That perception reduces public confidence in the nuclear waste program and the important role of the Commission in this undertaking.

Thank you.

STATEMENT OF BOOTH GARDNER, GOVERNOR
STATE OF WASHINGTON
TO THE
NUCLEAR REGULATORY COMMISSION
SEPTEMBER 6, 1985

MR. CHAIRMAN AND MEMBERS OF THE COMMISSION:

THANK YOU FOR INVITING ME TO PRESENT MY VIEWS ON THE IMPORTANCE AND TIMING OF THE PRELIMINARY DETERMINATION OF SUITABILITY OF POTENTIAL HIGH-LEVEL WASTE REPOSITORY SITES. THE STATE OF WASHINGTON, AT EVERY OPPORTUNITY, HAS CLEARLY AND FORCEFULLY STATED ITS OPINION CONCERNING SECTION 114(F) OF THE NUCLEAR WASTE POLICY ACT (NWP). OUR POSITION IS FAITHFUL TO BOTH THE SPIRIT AND THE LETTER OF NWP, AND THE INTENT OF CONGRESS. WE EMPHATICALLY BELIEVE THE ACT REQUIRES A PRELIMINARY DETERMINATION OF SUITABILITY TO BE MADE AFTER CHARACTERIZATION IS SUBSTANTIALLY COMPLETE.

OTHERS HAVE ALREADY TESTIFIED ABOUT THE LEGAL JUSTIFICATION FOR OUR POSITION, SO I WILL DISCUSS THE IMPLICATIONS OF OUR POSITION. THIS IS A VERY SIGNIFICANT ISSUE FOR BOTH THE STATE OF WASHINGTON AND THE NUCLEAR REGULATORY COMMISSION. IT IS IMPORTANT TO REMEMBER THAT USDOE MAKES THE PRELIMINARY DETERMINATION, AND NRC MAKES THE FINAL DETERMINATION OF SUITABILITY DURING THE LICENSING PROCESS. OUR CITIZENS NEED TO BE CONVINCED THAT BOTH DETERMINATIONS GUARANTEE SAFE PERMANENT DISPOSAL OF HIGH-LEVEL WASTES.

BEFORE I DISCUSS MY SPECIFIC CONCERNS ABOUT THE TIMING OF THE PRELIMINARY DETERMINATION, I WANT TO GIVE THE THREE CONDITIONS WHICH MUST BE MET BEFORE WASHINGTON STATE WOULD CONSIDER ACCEPTING A REPOSITORY SITE. THESE CONDITIONS ARE:

1. USDOE MUST DEMONSTRATE TO OUR SATISFACTION THAT THE REPOSITORY WILL BE SAFE.
2. USDOE MUST DEMONSTRATE THAT HANFORD IS BETTER AND SAFER THAN ANY OTHER SITE.
3. THE PROPOSED REPOSITORY MUST BE ACCEPTABLE TO WASHINGTON STATE CITIZENS.

LET ME BRIEFLY EXPLAIN HOW THE DECISION ON DETERMINATION OF SUITABILITY RELATES TO THE THREE CONDITIONS. USDOE MUST USE PERFORMANCE ASSESSMENT TECHNIQUES TO DEMONSTRATE THAT THE REPOSITORY WILL BE SAFE. AS YOU KNOW, HANFORD IS THE MOST COMPLEX SITE UNDER CONSIDERATION. EXTENSIVE STUDIES WILL HAVE TO BE COMPLETED BEFORE USDOE CAN RELIABLY CONCLUDE THAT GROUNDWATER TRAVEL TIMES WILL MEET EPA AND NRC REQUIREMENTS. IN ITS DRAFT ENVIRONMENTAL ASSESSMENT COMMENTS, NRC STATES THAT IT BELIEVES "LIMITATIONS OF THE AVAILABLE DATA DO NOT ALLOW HIGH CONFIDENCE TO BE ASSIGNED TO ANY TRAVEL TIME ESTIMATES AT THIS TIME". INDEPENDENT EXPERTS ENGAGED BY THE STATE OF WASHINGTON AGREE WITH THIS STATEMENT. AT THIS TIME, WITH THIS LIMITED INFORMATION, USDOE CANNOT DEMONSTRATE THAT A REPOSITORY AT HANFORD WILL BE SAFE. A PRELIMINARY DETERMINATION OF SUITABILITY SHOULD NOT BE MADE UNTIL USDOE CAN DEMONSTRATE THE SITE IS A SAFE SITE. NWPA ESTABLISHES A

PROCEDURE WHICH ALLOWS THE PRELIMINARY DETERMINATION TO BE MADE WHEN RELEVANT AND NECESSARY INFORMATION IS AVAILABLE. THIS IS NOT THE TIME.

CONDITION TWO IMPLIES A COMPARISON AMONG ACCEPTABLE SITES. IF HANFORD IS CHOSEN, IT IS VERY POSSIBLE THAT A DISQUALIFYING FATAL FLAW WILL BE DISCOVERED DURING SITE CHARACTERIZATION. EVEN IF SITE CHARACTERIZATION IS COMPLETED AT HANFORD, WE ARE CONVINCED THAT USDOE WILL BE UNABLE TO ASSIGN HIGH CONFIDENCE TO GROUNDWATER TRAVEL TIMES. IF ONE OR MORE SITES ARE DISQUALIFIED, USDOE AND NRC WOULD HAVE A VERY DIFFICULT TIME PROVING THE CHOSEN SITE IS BETTER AND SAFER. IF ONLY ONE SITE WOULD REMAIN ON THE LIST, COMPARISON AMONG ALTERNATIVES WOULD BE IMPOSSIBLE AND USDOE WOULD BE UNABLE TO DEMONSTRATE THAT THE CHOSEN SITE IS SAFER AND BETTER.

THIS LEADS ME TO CONDITION THREE, CITIZEN ACCEPTABILITY. HAVING THREE SUITABLE SITES AFTER CHARACTERIZATION IS THE FUNDAMENTAL REQUIREMENT FOR CITIZEN ACCEPTANCE. HAVING FEWER THAN THREE SUITABLE SITES AFTER CHARACTERIZATION WILL ENSURE A POLITICAL FAILURE. SUCH A POLITICAL FAILURE WOULD MOST LIKELY OCCUR DURING THE REPOSITORY LICENSING PROCESS.

ON AUGUST 1, I TESTIFIED BEFORE THE HOUSE SUBCOMMITTEE ON ENERGY CONSERVATION AND POWER OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE. I TESTIFIED THAT THE EFFORT TO SITE A HIGH-LEVEL REPOSITORY IS ON THE WRONG TRACK. PUBLIC CONFIDENCE IS ALREADY AT A LOW POINT. I RECOMMENDED A PAUSE IN THE HEADLONG RUSH TO SITE A REPOSITORY AND THAT NON-USDOE EXPERTS BE ASKED TO REVIEW THE RANKING METHODOLOGY. THAT PROCEDURE SHOULD SET ASIDE POLITICAL

CONSIDERATIONS AND FOCUS ON A SINGLE ISSUE--THE ISSUE OF SAFETY. I HOPE THAT THE QUALITY AND SCOPE OF THIS REVIEW IS SUFFICIENT TO PUT THE SITING EFFORT BACK ON THE RIGHT TRACK.

BEFORE I END MY TESTIMONY, I WISH TO COMPLIMENT THE NUCLEAR REGULATORY COMMISSION AND ITS STAFF FOR THE QUALITY AND OBJECTIVE NATURE OF THEIR BASALT ISOLATION PROJECT WORK. THIS MOST IMPORTANT WORK REQUIRES A STANDARD OF EXCELLENCE. WE HAVE RECEIVED TOP LEVEL TECHNICAL PERFORMANCE FROM NRC. AS A RESULT WE NOW HAVE HIGH CONFIDENCE IN NRC. WE ARE CONCERNED THAT AN INCORRECT DECISION ON THE TIMING OF A PRELIMINARY DETERMINATION OF SUITABILITY WILL NOT ONLY AFFECT NRC'S PERFORMANCE, BUT ALSO PLACE NRC IN AN UNTENABLE POSITION WHEN THE LICENSING DECISION IS BEFORE IT.

IN SUMMARY, THE NUCLEAR WASTE POLICY ACT REQUIRES THAT PRELIMINARY DETERMINATIONS OF SUITABILITY FOR THREE POTENTIAL REPOSITORY SITES FOLLOW SITE CHARACTERIZATIONS. IF USDOE MAKES A PREMATURE PRELIMINARY DETERMINATION, LEGAL CHALLENGES WILL CERTAINLY DELAY THE REPOSITORY PROGRAM. IT RUNS COUNTER TO NWPA'S INTENT OF SITING A SAFE REPOSITORY WITH A SUPPORTABLE PROCEDURE. A DETERMINATION AFTER CHARACTERIZATION WILL PROTECT PUBLIC HEALTH AND SAFETY, ENSURE PUBLIC CONFIDENCE AND COMPLY WITH THE NUCLEAR WASTE POLICY ACT.

COMMENTS BY STAND AND POWER
REGARDING THE TIMING OF THE PRELIMINARY DETERMINATION
OF SITE SUITABILITY AS A NUCLEAR WASTE REPOSITORY

SUBMITTED TO
THE NUCLEAR REGULATORY COMMISSION

PREPARED BY
ALICE G. HECTOR, Attorney
DON HANCOCK, Technical Advisor

September 6, 1985

ALICE G HECTOR
HOLLIS A WHITSON

STAND and POWER, citizens' organizations in Swisher and Deaf Smith counties, Texas respectively, thank the Commission for the opportunity to present their views on the timing of the Secretary of Energy's preliminary determination that sites are suitable for development as repositories, required by Section 114(f) of the Nuclear Waste Policy Act (NWPA).

STAND and POWER strongly believe that it is appropriate and necessary for the Commission to have this meeting and that interested citizens should be able to participate in this and other similar meetings, along with state and tribal representatives and other affected parties. As we pointed out in our letter of August 27 to Secretary Chilk, our participation is particularly appropriate given our substantial interest in and comment on this issue. We would hope that in future public meetings related to the NWPA, the Commission would provide timely notification to affected parties and invite their participation.

We also believe that when a large number of parties are interested in a particular issue, consolidation of comments from parties with similar interests can legitimately be requested by the Commission. In the case of this meeting on the timing of the preliminary determination, we have asked the Environmental Policy Institute (EPI) to summarize some of our views for the Commission in its oral presentation. This request is made in the interests of consolidating comments and, given the extremely short notice provided and the short amount of time allotted for our presentation, to make best use of the limited resources available to STAND and POWER.

To briefly summarize our comments, STAND and POWER continue to believe that the Secretary's preliminary determination of site suitability must take place after site characterization. Thus, we concur with the Commission's position on the timing of the determination. Since DOE's Mission Plan continues to state the preliminary determination will be made before site characterization, we believe that the Commission should again affirm its position that such timing is inappropriate and to so inform the congressional committees which will have oversight responsibility for the Mission Plan.

NWPA requirements regarding the preliminary determination

Section 114(f), in part, states:

For the purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), compliance with the procedures and requirements of this Act shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent fuel in a repository. For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 1321 et seq.) and this section, the Secretary shall consider as alternate sites for the first repository to be developed under this subtitle 3 candidate sites with respect to which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 112(a). The Secretary shall consider as alternative sites for subsequent repositories at least three of the remaining sites recommended by the Secretary by January 1, 1985, and by July 1, 1989, pursuant to section 112(b) and approved by the President for site characterization pursuant to section 112(c) for which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 112(a).

The literal reading of the section indicates that the timing of the preliminary determination is after site characterization has been completed and before release of the required environmental impact statement. Such

timing of the determination logically follows from the steps specified in the Act:

- (1) The Secretary promulgates guidelines (section 112(a)).
- (2) The Secretary nominates at least 5 sites "he determines suitable for site characterization for selection of the first repository site" (section 112(b)(1)(A)).
- (3) The Secretary recommends 3 of the nominated sites to the President for characterization (Section 112(b)(1)(B)).
- (4) Following presidential approval, DOE characterizes the sites (Section 113)).
- (5) Following site characterization, the Secretary makes his preliminary determination of suitability for a repository and issues an EIS (Section 114(f)).
- (6) The president recommends to Congress one site to be developed as a repository (Section 116(b)(2)).

Additionally, making the preliminary determination after site characterization makes eminent sense legally. Under the Act, it is not the Secretary who decides that a site is suitable for a repository, rather it is the NRC which makes the determination of site suitability in its licensing process. The Secretary's preliminary determination should certify his belief that the sites are suitable for repository development, as the basis for an EIS and for the president's decision as to which site should be recommended as the repository.

This logical, legal reading of the Act, consistently held by STAND and POWER, is the same as the Commission's interpretation. Thus, the Commission's comments on the draft Mission Plan properly pointed out that making the

preliminary determination before site characterization was inappropriate. The DOE, however, did not change the timing of the preliminary determination in the final Mission Plan. Rather, DOE's response was to maintain its position that the preliminary determination can be made before site characterization (50 Federal Register 28450).

In its Federal Register response, DOE seems to interpret the term "preliminary" to mean "early" because "the Act recognized the possibility of a site's subsequently being found by the Secretary to be unsuitable." On the contrary, Section 114(f) refers to "preliminary" as opposed to the "final" determination of suitability—a decision that rests with the NRC following a rigorous licensing process. Section 114(f) specifically stated that the Commission's independent responsibilities and licensing requirements were not affected by the Act or this section.

Making the preliminary determination before site characterization is also inconsistent with the requirements of Section 112(b)(1)(E)(ii) of the NWPA. That subsection requires that the Environmental Assessments evaluate sites as to whether they are suitable for repository development for each guideline that does not require site characterization. Clearly Congress intended that some guidelines required under Section 112(a) could be applied to site evaluation before site characterization and that some guidelines could be applied only after site characterization. Thus, Section 114, which applies to site approval and construction authorization after site characterization, requires that the preliminary determination "consistent with the guidelines promulgated under section 112(a)" be based on evaluation of the sites against all guidelines, not just those that are applied before site characterization.

Furthermore, in the case of Texas where DOE's draft EA admits "[s]ite-specific data have not been collected" (page 3-1 of the Deaf Smith and Swisher County Draft EAs), DOE would have to make its preliminary determination of suitability with no site specific data! Clearly, Congress could not have intended for the preliminary determination to be made with so little factual information.

As an additional justification for its interpretation of the section 114(f) requirement, "DOE has concluded that a preliminary determination made after site characterization, as suggested in the Commission's objection, would have the effect of requiring that three sites be found suitable at the end of site characterization.... Requiring three suitable sites at the end of site characterization would necessitate the DOE's characterizing more than three sites or accepting the risk of large schedule and cost uncertainties should one of the initial three sites be found unsuitable." (50 Federal Register 28450) Such an argument is at best a "red herring" and only shows DOE's lack of confidence in its own program. The DOE's logic seems to be that characterizing 5 unsuitable sites would somehow result in having 3 suitable sites. Rather, what the law and the Commission's interpretation require is that DOE must make its recommendation to the president of 3 sites to characterize (Section 112(b)(1)(B)) based on a rigorous scientific approach to ensure that the sites characterized are likely to be suitable for repository development and that the preliminary determination be made after site characterization based on substantial site-specific data. The determination is preliminary because the President, the affected state or Indian tribe, and the Congress are involved in the final determination of what site is selected for the repository and because the final determination of site suitability is

made by the Commission through its licensing authority.

Finally, to read section 114(f) as allowing the preliminary determination to be made before site selection means that unsuitable sites could be considered "reasonable alternatives" in the EIS. Such an interpretation is ludicrous and not consistent with NEPA.

Conclusion

STAND and POWER reiterate their view that the Secretary's preliminary determination of site suitability must be made after site characterization. The organizations urge the Commission to continue to uphold that position and to convey its continuing disagreement with DOE's interpretation of NWPA to the appropriate congressional committees.

Thank you for your consideration of these views.

STATEMENT ON BEHALF OF
EDISON ELECTRIC INSTITUTE
THE UTILITY NUCLEAR WASTE MANAGEMENT GROUP

BEFORE THE
NUCLEAR REGULATORY COMMISSION
PUBLIC MEETING
SEPTEMBER 6, 1985

REGARDING
THE NUCLEAR WASTE POLICY ACT, SECTION 114(f):
TIMING OF THE PRELIMINARY DETERMINATION OF
SUITABILITY OF ALTERNATE REPOSITORY SITES

PRESENTATION BY
LORING E. MILLS
JAY E. SILBERG, ESQUIRE

The Edison Electric Institute (EEI) and the Utility Nuclear Waste Management Group (UNWWMG) were intimately involved in providing utility industry input during the Congressional development and at the time of enactment of the Nuclear Waste Policy Act. Implementation of that Act is of vital concern to our member utilities and their electricity customers. We are pleased to have this opportunity to present our views on Section 114(f) of the Act, regarding the timing of DOE's "preliminary determination" of suitability of those sites considered for the first repository.

We fully concur with the position of the Department of Energy as set forth in the Mission Plan. The preliminary determination should be made before DOE makes its recommendation to the President of the United States for the three sites to be characterized. EEI and UNWWMG submitted detailed views to DOE on this issue in our July 1984 comments on the draft Mission Plan. We submit for your consideration, as well, our more recent detailed written views.

We note that DOE's interpretation is consistent with that of the principal Senate sponsors and floor managers of the Nuclear Waste Policy Act -- Senators McClure, Domenici, Simpson and Johnston -- as expressed in their June 25, 1985 letter to Secretary Herrington. The final language of the Act was a McClure substitute to the House-passed version (H.R. 3809), as amended in the Senate. One of the principal amendments involved the site selection process. Section 114(f) was also modified to

be consistent with the Senate amendments clarifying that the preliminary determination is to be based on the Site Selection Guidelines.

Unfortunately, there is little formal legislative history on the final version of the Nuclear Waste Policy Act. Principal supporters of the bills in both Houses of Congress met informally to agree on certain amendments to the McClure substitute -- a Senate version -- to the House-passed bill. The conflicting interpretations offered recently by the principal sponsors in the Senate and the House help create some confusion.

Our understanding of the timing of the Section 114(f) preliminary determination, at the time the bill was passed, was identical to that of Senator McClure. More importantly, we believe that statutory construction of the language of Section 114(f) -- in the context of the entire site selection process and the deadlines mandated for accomplishing the requirements of the Act -- leave room for no other interpretation. The use of the word "preliminary" itself suggests that the determination will be made at some time before the completion of site characterization. After that time, DOE is in a position to make its final determination of suitability prior to applying to the NRC for a license. If the preliminary determination were to be required after site characterization, the entire process of site selection becomes subject to an unacceptable risk that the schedules laid out in the Act will not be met. DOE would be required either to characterize more than three sites, something inconsistent with the

explicit language of the Act, or face the unacceptable risk of large schedule delays and huge cost uncertainties should one of the initial three sites be found unsuitable. DOE's interpretation is the only one consistent with the overall purpose, structure and mandate of the Act.

Also, DOE's interpretation of its obligations under the statute is to be given great weight. The Court of Appeals for the District of Columbia recently reinforced this view in its decision affirming DOE's interpretation of the one-time fee structure pursuant to the Nuclear Waste Policy Act. Here we believe that the Commission should accede to the interpretation of DOE, which is the principal agency responsible for implementation of the Act.

Certainly, the Commission's foremost obligation is to ensure the safe isolation of nuclear wastes. Yet the Act also provides deadlines to all federal agencies for accomplishing their responsibilities. The Commission must view its responsibilities, as well as those of the Department of Energy, in light of the program objectives of the Act including the schedules mandated by Congress. As to the issue before us today, we believe NRC's position on the timing of the preliminary determination, as reflected in its comments on the draft Mission Plan, becomes untenable when all program objectives are considered.

Mr. Silberg and I will be pleased to answer any questions you may have.

Attachment A to EEI/UNWMO Statement Before the Nuclear
Regulatory Commission, September 6, 1985

INTERPRETATION OF SECTION 114(f) OF THE NUCLEAR WASTE POLICY ACT

Section 114(f) of the Nuclear Waste Policy Act ("NWPA") details compliance with the National Environmental Policy Act of 1969 ("NEPA") in selecting the first geologic repository for waste disposal, and provides in pertinent part:

For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 1321 et seq.) and this section, the Secretary [of Energy] shall consider as alternate sites for the first repository to be developed under this subtitle 3 candidate sites with respect to which (1) site characterization has been completed under Section 113; and (2) the Secretary has made a preliminary determination that such sites are suitable for development as repositories consistent with the guidelines promulgated under Section 112(a).

Comments on the Mission Plan elicited conflicting views on the timing of the "preliminary determination" of site suitability. DOE has interpreted the NWPA to allow the "preliminary determination" to be made at the time the Secretary recommends three sites to the President for site characterization. See Mission Plan, Volume II, § 5.4.1 at 138-40.

In their comments on the Mission Plan, the NRC, certain States and environmental groups argue that three sites must receive a "preliminary determination" of suitability after site characterization activities are completed. While the language of this section and the legislative history surrounding the

inclusion of the language at issue in the Act are not without some ambiguity, DOE's interpretation is the only one consistent with the purpose, structure and mandate of the Act.

The position taken by the NRC, et al., would require a finding of site suitability at the end of the site characterization process. Such an interpretation would be an odd time for a preliminary determination (since DOE will then have all of the information available to make its final determination) and it would necessarily require that three sites survive characterization. DOE notes that such an interpretation means either characterizing more than three sites or accepting the risk of large schedule and cost uncertainties should one of the initial three sites be found unsuitable. For this reason it is inconsistent with the Act.

Section 112(b)(1) of the Act directs the Secretary to "nominate at least 5 sites" and "recommend to the President 3 of the nominated sites" for site characterization. The Act does not permit characterization of more than three sites (otherwise the Act would have directed the Secretary to recommend at least three sites for characterization). The NWPA does not contemplate, nor would the mandated schedule for repository initial operations permit, the possibility of delay while characterizing a fourth or fifth site, should one or more of the three sites be found unsuitable after characterization was completed.

One of the principal amendments in the Senate version of the House-passed bill was in changing the site selection process. The House bill was to have the Secretary recommend to the President at least five sites by July, 1984 and one additional site by February 1, 1985 for site characterization. From these six (or more) sites at least three would be characterized. The Senate bill provided that at least five sites would be nominated, but only three would be recommended for characterization and one would be selected for the first repository.^{1/}

While the language of the Act is complex and not without some ambiguity, the answer to this important question of interpretation, in the context of the site selection process, is compellingly clear. Senator Simpson asked for clarification of the repository site selection procedure during final Senate debate as reflected in the following brief excerpt from a colloquy with Senator Johnston.^{2/}

MR. SIMPSON.

Of the five sites nominated in the first round, three will be recommended for characterization, and one of these three will be selected as the first repository.

.

MR. JOHNSTON. The Senator is correct.

^{1/} See 128 Cong. Rec. S 15641 (daily ed. Dec. 20, 1982).

^{2/} 128 Cong. Rec. S 15660-61 (daily ed. Dec. 20, 1982).

Senator Johnston, one of the floor managers of the NWPA, did not in any way qualify his answer. He did not say that one of the three would be selected only if all three sites recommended for characterization were subsequently found "suitable". It was without doubt, the intent of Congress that one of the three initially characterized sites "will be selected as the first repository".

DOE's interpretation is the only one consistent with the Congressional mandate to implement the NWPA on the schedule established by law. An essential and virtually unprecedented aspect of the NWPA was the detailed schedules or deadlines mandated by the Congress for accomplishment of the requirements of the Act by the federal agencies, including a "roadmap" interpreting the requirements of NEPA compliance. The Senate Committees carefully considered the testimony of witnesses from DOE, NRC, other federal agencies and interested parties before reporting S. 1662. Based on such testimony, the schedules originally established in draft bills were adjusted to provide three additional years to be allocated to site identification, site characterization and selection, and to NRC's review and approval of the application to build the first repository. The Senate Committees determined the schedule to be "realistic and workable" and expected "the involved agencies to do everything possible to assure that [the] schedule is met."^{3/} Indeed the

^{3/} S. Rep. No. 282, 97th Cong., 1st Sess. 21 (1981).

deadlines were extended even further after careful consideration by the House Committees and reconsideration by the Senate. The schedule could not accommodate the potential delay of characterizing a fourth or fifth site, if one or more of the three sites initially characterized were found unsuitable.

Unfortunately, there is little formal legislative history on the final version of the NWPA. Differences in the Senate-passed version of the NWPA (S. 1662) and in the House-passed version (H.R. 3809) were not resolved in a Conference Committee. Instead, the principal supporters of the bills in both Houses of Congress met informally to agree on certain amendments to a McClure substitute to the House-passed bill. The Senate then passed the McClure substitute to H.R. 3809, as amended, by voice vote. On the same day, the House agreed to the Senate's version of H.R. 3809.

As it turns out, Section 114(f) was the subject of two of seventeen negotiated amendments to the McClure substitute. The language which appears in the enacted version of the NWPA was drafted by the ad hoc Senate-House negotiators. Senator McClure described the Amendments to Section 114(f) during the final Senate debate as follows:^{4/}

Mr. President, these two amendments are of a clarifying nature, to make it clear that the Secretary's preliminary determination that sites are suitable for development as repositories is to be made consistent with the Secretary's guidelines promulgated

^{4/} 128 Cong. Rec. at S 15642 (daily ed. Dec. 20, 1982).

under Section 112(a). Without reference to the 112(a) guidelines, it was not clear what criteria the Secretary was to use in making this preliminary determination, and this amendment is intended to clarify that oversight.

The amendment to Section 114(f) reflected compromise. Senator McClure wanted to avoid any possibility that the EIS to accompany the recommendation of the site for the first repository might be embroiled in litigation regarding the adequacy of the "preliminary determination" of suitability of alternate sites. The Senators and Representatives were also mindful of the need to avoid major amendments to the House-passed version in the sensitive area of NEPA compliance, to avoid last minute controversy that could result in adjournment without final passage of the Act. The compromise was to clarify the criteria for making the "preliminary determination" of the suitability of the alternate sites by reference to the guidelines promulgated under Section 112(a) for recommendation of candidate sites for site characterization in the first place. Senator McClure notes that this amendment was also meant "to clarify that the Secretary's 'preliminary determination' is to be made at that point in time when the guidelines are applied 'in considering candidate sites for recommendation'." This occurs "when the Secretary recommends three of the candidate sites to the President for characterization (i.e., prior to site characterization."^{5/}

^{5/} Letter to Honorable John Herrington from Senators McClure, Domenici, Simpson and Johnston dated June 25, 1985.

In a letter from Congressmen Dingell, Markey, Swift and Wyden providing their understanding of the legislative history of Section 114(f), a statement by Representative Ottinger is cited, which offers his opinion that the preliminary determination would occur late in the site characterization program.^{6/} This statement occurred December 2, 1982, prior to the Senate amendments to the site selection process. The concern addressed by Representative Ottinger was one expressed by the States that the site selection process would "be a stacked deck for or against a particular site."^{7/} This concern was addressed in part by the Senate amendment which required that the preliminary determination be made on the basis of the Site Selection Guidelines to preclude consideration of a bogus site. In any event, what was "envisioned" by Representative Ottinger is not a binding interpretation of the bill -- even in the form as passed by the House.

Congressman Udall points to his statement in the December 20, 1982 Congressional Record (H. 10523) for support of his interpretation of when a preliminary determination of suitability must be made.^{8/} It appears that Mr. Udall's understanding of the changes to the bill as a result of amendments in the Senate

^{6/} Letter from Congressmen Dingell, Markey, Swift and Wyden to Mr. Ben Rusche dated July 26, 1985.

^{7/} 128 Cong. Rec. H. 8797 (daily ed. Dec. 2, 1982).

^{8/} Letter from Congressman Udall to Mr. Benard Rusche dated July 26, 1985.

differs from Senator McClure's understanding. Senator McClure was, of course, the author and proponent of the amendments and the McClure substitute to H.R. 3809 that was passed by the Senate and the House on December 20, 1985. This difference of opinion by two of the principal sponsors of waste legislation underscores the complexity of the statute, the uncertainty of legislative history and the need to analyze the Act in the context of the overall program enacted by Congress. As noted above, such an analysis leads inexorably to the interpretation given by DOE in the Mission Plan.

The language of the NWPA and the legislative history as reflected in the floor statements on the day of its passage, support DOE's position that the President's recommendation to the Congress of the site for the first repository will be selected from the initial three sites characterized, and the EIS need only consider such sites as alternates. Thus, the preliminary determination of site suitability can logically be made only prior to site characterization. Furthermore, an interpretation to the contrary could not be sustained because it could (if one of the characterized sites were found "unsuitable" after three years of characterization activities) needlessly abort the deadlines established by the NWPA. The federal agencies tasked with implementation of the NWPA cannot ignore that statutory mandate.

Finally, DOE's interpretation of its obligations under the NWPA is to be given great weight. General Electric Uranium

Management Corporation v. DOE, 764 F.2d. 896 (D.C. Cir. 1985);
Chevron, U.S.A., Inc. v. Natural Resources Defense Council,
Inc., 104 S.Ct. 2778 (1984).